THE NORMATIVE RESILIENCE OF PROPERTY

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I

When property rights are in turmoil — as they have been in New Zealand over the last decade or two, as a result of the application of Waitangi principles to disputed land-holdings — it is good to reflect on the basis of the legitimacy of existing structures of ownership. Such reflection may not be politically conclusive. But it is important nevertheless to be able to articulate in legal and moral terms the discomfort that many feel about disrupting existing property arrangements in the name of abstract justice.

Consider this example. X farms a piece of land in the Taranaki, under a long-term lease from the Crown. He and his family and their predecessors in title have been treated for generations as the lawful tenants of the land. But now the legitimacy of the whole arrangement is called in question on the basis of grave irregularities in the original transactions purporting to transfer the land to the Crown from the original inhabitants of the Taranaki. How now should we think about the rights and wrongs of X's position? Or take another example, a little less close to home. The arable land of an agricultural community has been held for generations among a very small group of families, representing (say) less than fifteen percent of the population. The rest either work as farm labourers or in service industries in market towns. Eventually the landless eighty-five percent gain political rights, and their representatives begin to question the justification of the existing division of land and to call for land reform. And let's say that their critique seems unanswerable on moral grounds. How should we think about the rights and wrongs of the existing land-owners in this apparently unjust situation?

In both examples, we are naturally sympathetic to the disruption that any redress of injustice will cause to lives of the farming families (though we temper that of course with equal sympathy for the distress of those whose dispossession constituted the injustice in question). The farmers themselves are likely to be outraged by any demand that they should give up 'their' land — even if that demand is made in the name of justice, and even if they are offered some form of compensation. But is there any substance to this outrage and this sympathy? Does it tell us anything about how we should think about property and justice in society? Or should we — who believe in strong justice — simply treat it as the squeak of the pips when the lemon is squeezed or, to switch metaphors, the sound of the eggs breaking as a better omelette is concocted. Are the sentiments of those who stand to be dispossessed anything that should give us pause in our enthusiasm for social justice?

These questions raise a whole host of issues in the theory of property, the theory of justice, and the theory of practical politics. In the theory of property,

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they remind us of the claims of possession and occupancy, the importance of stability and respect for existing expectations, and the role of prescription and similar concepts in the establishment and legitimation of rights. In the theory of justice, they remind us of the notorious difficulties associated with corrective or rectificatory justice, difficulties that surface not only in property, but also in tort law, and to a lesser extent in any body of law where the punishment of wrongs, the compensation of injury, and the vindication of righteous anger are involved. And in the theory of politics, they bring to mind the warnings that political philosophers have often sounded against tearing apart the social fabric in the name of utopian abstractions. One recalls Edmund Burke's advice about the wisdom of preferring tradition, settlement and establishment over our own puny and fragile individual speculations about justice.[1]

Some of these issues I have addressed in the past. I considered some general features of right-based justifications of property in my book, *The Right to Private Property* and I focused there particularly on the Lockean claims of labor and desert and Hegelian claims about the importance of property rights to the integrity of individual personhood.[2] In an article on David Hume, I examined the possibility of a more conservative approach to property that would respect existing equilibria of *de facto* possession and eschew any speculation about the moral basis of property rights.[3] In an article on Immanuel Kant's jurisprudence, I attempted to bring out the importance of the positive law of property, as something that could stand fast in society, in the midst of disagreements about justice.[4] Finally, in a couple of pieces on rectification, I tried to point out some of the more important practical and moral difficulties that confront any attempt to correct historical injustice.[5]

The present paper will by no means complete the picture: but I want to take this opportunity to add one more piece to the puzzle of how seriously we should take the claims of pure possession, in situations like those laid out in our examples. In this paper, I want to ask about the relation between existing patterns of property-holdings and the virtues and sentiments that property rights often involve: the sentiment of *belonging*, the condemnation of *theft* and *trespass*, the vice of *dishonesty*, as well as the general sense of *mine and thine*. These are undoubtedly moral sentiments, and they involve powerful thoughts about right and wrong; but it is intriguing that even when the overall morality of some existing set of property rights is called in question, these sentiments tend to associate themselves with the *status quo* rather than with the moral basis on

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1 Edmund Burke, *Reflections on the Revolution in France*, edited by Conor Cruise O'Brien (Harmondsworth: Penguin Books, 1969).

2 Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), esp. 137-252 (Lockean theory) and 343-89 (Hegelian theory).

3 Jeremy Waldron, 'The Advantages and Difficulties of the Humean Theory of Property' (1994) 11 Social Philosophy and Policy 85-123.

4 Jeremy Waldron, 'Kant's Legal Positivism,' (1996) 109 Harvard Law Review, 1535-1566.

5 Jeremy Waldron, 'Superseding Historic Injustice,' 103 Ethics (October 1992), 4-28, and 'Historic Injustice: Its Remembrance and Supersession,' in Graeme Oddie and Roy Perrett (eds.) *Justice, Ethics and New Zealand Society* (Auckland: Oxford University Press, 1992), 139-70.

which the *status quo* is being criticized. I want to ask why this is, and I want to consider what, if anything, it tells us about the broader enterprise of abstract moral justification and criticism in the area of property rights.

II

Let me begin with an idea that is deeply embedded in our respect for property — the idea of *honesty*. What exactly is the relation between property and honesty? In times past, 'honesty' was used as a general term for virtue or honour, encompassing chastity, generosity, and decorum. But according to the *Oxford English Dictionary* its prevailing modern meaning is '[u]prightness of disposition and conduct; integrity, truthfulness, straightforwardness: the quality opposed to lying, cheating, or stealing.'[6] Now, if stealing is one of the things to which the quality denoted by 'honesty' is characteristically opposed, then to that extent 'property' and 'honesty' are correlative terms. To steal is to take somebody's property — that is, an object which, under the rules of property, he has the right to possess — with the intention of permanently depriving him of it (what lawyers call the *animus furandi*). To be disposed not to steal means that one is disposed not to violate the rules of property in this way. To be honest — in this sense of honesty — is to respect the rules of property.

But respect *which* rules of property? The *existing* rules in society, currently in force, however unjust or oppressive? Or the rules of property in so far as they are regarded as fair? 'Honesty' also has the meaning of 'fairness and straightforwardness of conduct.'[7] Does it pull us in two directions here? Is the man who violates an unjust property right with the intention of permanently depriving an undeserving 'proprietor' of some goods he 'owns' dishonest? Is this even a marginal case for the concept of dishonesty? Or do 'honest' and 'dishonest' go unequivocally with the positive law of property (leaving it perhaps a further question whether dishonesty is always a vice or always wrong, all things considered)?

If it *is* a marginal case, then what tends to make the difference at the margin? Is a taking[8] less dishonest depending on its manner, depending on the motive, depending on the extent of the background injustice, or depending on whether there is an appeal to some alternative set of existing property rights (say, from the past)? Some might say, for example, that there is necessarily something *furtive* or *deceitful* about dishonesty, so that an open taking of something when property rules are contested is to that extent less dishonest. Or they may say that even if the existing allocation of property is unfair, it matters whether or not the taker is motivated by personal greed: though he took from the rich, Robin Hood was not dishonest inasmuch as he gave what he took to the poor. Or, if one 'steals'

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6 'Honesty,' I.3.d., *Oxford English Dictionary* (Internet Edition).

7 'Honesty,' 2.a., *Webster's Ninth New Collegiate Dictionary* (Springfield: Merriam Webster, 1991), 579.

8 I use 'taking' as an entirely neutral term; it refers to any appropriation or occupation of a resource by a person other than the officially designated owner, accompanied by the intention permanently to deprive the officially designated owner of the resource, whether that appropriation or occupation is morally justified or thought to be morally justified or not.

for personal use, it may make a difference whether it is personal use to satisfy a mere want or personal use to satisfy desperate need, particularly if a case can be made that society's neglect of such need is itself the ground of the injustice. Finally, it may make a difference whether the taker is attacking existing property rights purely on the basis of his own utopian theory of justice, or whether he is attacking them in the name of some alternative set of property rights that was established and existed in the society in the recent past. In his famous study *Whigs and Hunters*, E.P. Thompson notes that a lot of what was condemned in eighteenth century England as poaching, stealing and trespass was regarded by the perpetrators as the vindication of traditional property:

> What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights: for the landowner, enclosure — for the cottager, common rights; for the forest officialdom, 'preserved grounds' for the deer; for the foresters the right to take turf.[9]

In this context, and equally in the context of some occupations of contested land in New Zealand, the defenders of traditional or aboriginal rights would not necessarily regard themselves as thieves or trespassers nor their takings as dishonest, however much their opponents tried to stigmatize them in those terms.

III

We are imagining that something which is officially regarded as X's private property is taken by another individual Y, without X's consent, in circumstances where there is reason to question the justice of the official distribution.

In each of the aspects I have mentioned — manner, motive, need, extent of the background injustice, reference to an alternative set of aboriginal or traditional rights — one can imagine a sort of scale. For example, one might locate a given taking on a scale that runs from completely deceitful takings through various degrees of furtiveness in the direction of takings that are unabashedly open and public. Although there may be a point on this open-ness scale at which a taking ceases to be regarded as dishonest (or ceases even to be regarded as theft), there is also likely to be a range of points on the scale at which the action *would* be regarded as dishonest, notwithstanding the question about injustice. In some circumstances, it *is* dishonest to openly take property that is unjustly held. Or, to put it more carefully, there is a range of cases in which the condemnation of an open taking as dishonest does not depend on any judgment about the justification of the property right in question. One may withhold judgment on the latter issue, but still unequivocally condemn the taking as dishonest, in the cases within this range. The existence of such a range of cases, I shall call, '*the normative resilience of property*.'[10]

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[9] See E P Thompson, *Whigs and Hunters: the Origin of the Black Act* (Harmondsworth: Penguin Books, 1977), 261.

[10] I used the phrase 'institutional resilience' to refer to something similar in Jeremy Waldron, 'Property, Justification and Need,' (1993) 6 Canadian Journal of Law and Jurisprudence, 185, at 186-9 and 205-6.

Normative resilience refers here to the way in which certain normative judgments (such as judgments about honesty and dishonesty) by which property rights are upheld are insulated from other normative judgments about the property rights (such as judgments about their justice or injustice, their justification or lack of justification). The concept of normative resilience points to a discontinuity between two types of normative judgment associated with an institution: (1) judgments concerning the justification of the institution, and (2) judgments concerning individual conduct in relation to the institution. Resilience is the phenomenon whereby judgments of type 2, although they are predicated upon the institution, nevertheless remain unaffected by judgments of type 1 that are adverse to the institution. A resilient institution continues to exert itself normatively through its type 2 judgments, notwithstanding the fact that it is discredited at the type 1 level.

Let me make a few general points to clarify the concept of normative resilience. First, the phenomenon does not depend on there being different communities making the judgments of type 1 and type 2, respectively. Of course that is very common: the people who condemn the taking as dishonest are not the same as those who condemn the property system as unjust. But I am interested, under the heading of 'resilience,' in cases where judgments of both types are made by the same people. Moreover, I'm interested in cases where this is arguably not a simple logical mistake, i.e. not a failure of inference. A person may believe that all theft is dishonorable but fail to draw the conclusion that burglary is dishonorable (because they forget that burglary is a form of theft.) Now maybe in the end that is the proper explanation of normative resilience — too many people are failing to draw appropriate conclusions from the judgments of type 1 that they make. But it may not be the best explanation: it is possible or arguable that there is really is a logical gap between judgments of type 1 and judgments of type 2. An exploration of normative resilience is an exploration of that hypothesis (and of what would follow from it if it were true).

Secondly, the judgments of type 1 that interest us here may be either general judgments or particular judgments. (Depending on which they are, the relevant set of type 2 judgments will vary accordingly.) In his book *Punishment and Responsibility*, H.L.A. Hart distinguished between the general justifying aim of an institution and the particular distributive rules by which it operates. He thought for example that an institution of punishment might be utilitarian in its general justifying aim but still operate by retributive principles. And he offered a similar analysis of property:

> [I]n the case of property we should distinguish between ... the question why and in what circumstances it is a *good* institution to maintain, and the question in what ways individuals may become *entitled* to acquire property, and *how much* they should be allowed to acquire.[11]

[11] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 4.

Hart criticized John Locke — unfairly in my view[12] — for thinking that the same considerations ('the labor theory') could be used to answer both questions. The interdependence or otherwise of these two questions in the case of property is an interesting issue (as it is also in the case of punishment),[13] but it is not this that interests me under the heading of 'normative resilience.' For these purposes I am classifying both of Hart's questions under type 1. That is I am interested in the way in which judgments of honesty and dishonesty are insulated not only from a general judgment that a whole system of property is unjustified (a communist argument, for example, against private property) or from a general judgment that the distribution of private property in a particular society is inequitable, but also from a particular judgment that the distribution of some specific object or resource is unjust.

This explains why a famous passage from David Hume should not be regarded as an illustration of normative resilience. Hume asked us to consider that:

> A single act of justice is frequently contrary to public interest; and were it to stand alone, without being follow'd by other acts, may, in itself, be very prejudicial to society. When a man of merit, of a beneficent disposition, restores a great fortune to a miser, or a seditious bigot, he has acted justly and laudably, but the public is the real sufferer. ... But however single acts of justice may be contrary, either to public or private interest, 'tis certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual. 'Tis impossible to separate the good from the ill.[14]

Certainly Hume will figure in the account I want to offer (in section V). But this passage concerns the sort of looseness between general and particular justificatory judgments that Hart was talking about, not the sort of looseness between justificatory judgments, on the one hand, and judgments (like honesty and dishonesty) pertaining to individual conduct on the other. Hume's case would be a case of normative resilience if one were to conclude that there is in fact *no* justification for returning the fortune to the miser, but *still* felt dishonest about keeping it.

Third, although I have concentrated so far on the relation between justificatory judgments directed towards an institution (what I call type 1 judgments) and judgments that relate to the conduct or character of those who are constrained by the institution (what I call type 2 judgments), the latter class is broader than I have so far indicated. Under the type 2 heading, I am interested in any judgments that pertain to individual conduct, character or condition which appear to be derived (in some sense) from an institutional arrangement like property, but which exhibit a certain looseness in that derivation which enables them to survive despite the discrediting of the institutional arrangement from which they are supposedly derived. 'Honest' and 'dishonest' have been our paradigms of type 2 judgments in relation to the institution of private property. Terms like 'theft,' thief,' 'stealing,' 'pilfering,' etc. fall into the same class: like

[12] See Waldron, *The Right to Private Property*, op. cit., 331-2.

[13] See ibid., 323-42.

[14] David Hume, *A Treatise of Human Nature*, ed. L.A. Selby-Bigge (Oxford: Clarendon Press, 1888), 497.

'dishonest' they seem appropriately to characterize actions which violate property rules even when those property rules are thought to lack moral justification. But it is not only terms of condemnation that have this resilience. Also some of the terms connoting ownership seem to work this way as well. I may think of a piece of land as 'mine' or as 'belonging to me,' and think of myself as its 'owner,' without thinking that the rules which designate me as the owner have any moral justification.

The general characteristic of type 2 judgments is that they apply to individuals (or their actions, relations or circumstances) what are sometimes referred to as 'thick' moral predicates — in this case predicates whose descriptive meaning is related to certain institutional arrangements.[15] We have been working with such predicates associated with property. But we can list other such predicates related to other institutions. For example:

	TYPE 1	*TYPE 2*
I.	***Private Property* is morally justified.**	**Y is a *thief, dishonest,* etc** **Object O *belongs* to X.**
II.	**There is a moral justification for *the state.***	**Y is a *traitor,* or a *terrorist.*** **X has *authority.***
III.	**C is the *true religion.***	**Y is a *heretic.***
IV.	***Traditional marriage* is a good institution.**	**S is a *fornicator.*** **H is an *adulterer.*** **H *deserted* W.**
V.	**There is a justification for *aristocracy.***	**X is of *noble birth.*** **That man is not X; he is *Sir* X.** **Y does not know *his place.***
VI.	**There is a justification for *military discipline.***	**X *orders* Y to do A.** **Y is *insubordinate.***
VII.	**The *criminal justice* system works fairly.**	**Y is a *crook*** **Y is *innocent.***

Table [i]

[15] Not all thick moral predicates have these institutional connections. In some, the descriptive element refers to types of actions and responses to situations that are being commended or condemned (e.g. virtue words like 'courage'). For doubts about the ability to isolate the descriptive meaning of a thick term from its normative force, see John McDowell, 'Non-cognitivism and Rule-Following,' in S. Holtzman and C. Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge, 1981), 144 ff., and the response in the same volume by Simon Blackburn.

In each case the type 2 predicates cannot be understood without reference to the institution denoted in the type 1 judgments. Yet in each case it is an open question how resilient the type 2 judgments are, i.e. the extent to which their proper use does not depend upon the speaker's acceptance of (something like) the corresponding type 1 judgment. In group III, for example, the judgment that someone is a heretic does *not* seem to be normatively resilient. It is not a judgment that would be made except by someone who accepted the truth of the orthodoxy relative to which the alleged 'heresy' was defined. Sometimes one term associated with a given institution may figure in resilient judgments while others do not. In group V, for example, a person who rejected the legitimacy of the aristocratic class system, might well refuse to talk of someone's 'not knowing his place'; but he might continue nevertheless to refer to a person who has been knighted as 'Sir John' or whatever.

The other point I want to stress at this stage is that the type 2 predicates that interest us are normative or evaluative predicates used in a way that carries their ordinary normative or evaluative force. I am not interested in ironic or what are sometimes referred to as 'inverted-commas' uses of type 2 predicates:[16] as when Martin Luther talks of 'we heretics' or a social rebel acknowledges with bitter irony that he has forgotten 'his place.' The resilience of ironic or inverted commas uses of type 2 predicates is definitional and uninteresting. What *is* challenging, however, is a type 2 judgment retaining its ordinary evaluative force in circumstances where the corresponding type 1 judgment has been repudiated or discredited.

Notice I say '*ordinary*' evaluative force; I don't say that the evaluation implicit in the type 2 judgment must be conclusory. One could judge some action 'dishonest' without concluding that it was the wrong thing to do, all things considered. Maybe there are circumstances in which one *ought* to be a thief. There is some complication here depending on how one analyzes prima facie judgments and moral conflict. For example, consider the four judgments in Table [ii]:

(1) The private property system around here is just.
(2) Taking that food would be stealing.
(3) Y's baby needs that food or it will die.
(4) All things considered, Y ought to take the food.

Table [ii]

Normative resilience concerns the relation between 1 and 2. Somebody who rejects 1 might nevertheless accept 2; but such a person may also accept 4. There are two ways to understand the relation between 2 and 4. First, one might say

[16] See R.M. Hare, *The Language of Morals* (Oxford: Oxford University Press, 1952), 124 and 167 f.

that the evaluative force of 2 is merely provisional, pending the final judgment 4; once 4 is adopted, one abandons the condemnation implicit in 2. Alternatively, one might say that even if 4 is adopted, still 2 retains some of its evaluative force. Moral conflicts such as those between 2 and 4 are not always neatly resolved, without moral remainder, so to speak.[17] One may appropriately feel bad about doing A, even while acknowledging that A is, all things considered, the appropriate thing to do. On this second analysis, there is no particular problem in specifying 'ordinary evaluative force' so far as normative resilience is concerned. The ordinary moral force of 'stealing' includes *inter alia* its propensity to hang-over as a moral remainder in conflicts such as that in our example. But suppose one adopts the first pattern of analysis, giving evaluative force to 2 only provisionally, pending the final judgment 4. Then whether 2 should be regarded as normatively resilient in our sense depends on whether the rejection of 1 is decisive in yielding 4. If one says 'On the one hand this would be stealing, but on the other hand, the system of property is unjust; therefore 4,' then 2 is not normatively resilient. But if 4 is based on something like 3, understood as a moral consideration of independent force, then what I have called the resilience of 2 is undefeated. Its resilience consists , on this analysis, not in its always having evaluative force, but in its evaluative force being liable, so to speak, to be canceled only by independent considerations of a certain weight.

Also, resilience and normative force may be matters of degree. I have talked about the *independence* of type 1 and type 2 judgments. But remember that in the first paragraph of section III, I stressed the existence of a *range* of cases in which the force of a type 2 judgment might vary, dwindle and finally peter out, depending on factors like motivation, open-ness, etc. Some of these scalar considerations are independent of the relevant type 1 judgment. (They concern, for example, the manner in which the conduct in question is performed.) Others may *not* be independent of the type 1 judgment: we might say for example that if the injustice of the institution is really egregious, then the corresponding type 2 judgment must eventually be withdrawn. Thus it is possible that the evaluative force of the type 2 judgment does vary in a way that depends on variations in the type 1 judgment. But the type 2 judgment may *still* be regarded as resilient if the two scales fail to line up perfectly, as, for example, in Figure 1:

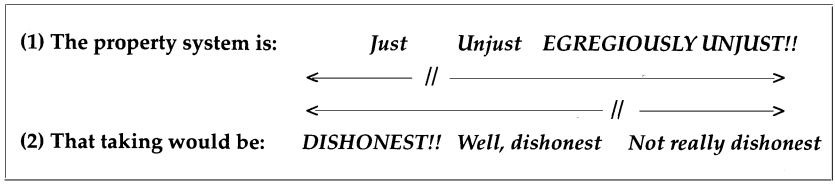

Fig. 1

[17] See Bernard Williams, 'Ethical Consistency,' in *Problems of the Self* (Cambridge: Cambridge University Press, 1973), 166-86.

In Figure 1, the judgment about dishonesty is somewhat resilient, because although it fades depending on how unjust the property system is, it is not simply abandoned as soon as the property system is condemned.

IV

The examples given in Table [i] included many in which the type 1 institution is a legal institution. And the analysis we are giving raises certain issues in regard to our understanding of the normative ramifications of positive law. Consider, for example, the judgments in Table [iii]:

TYPE 1	*TYPE 2*
VII. A: Our *laws* are in general just.	**This case is a *binding precedent.***
VII. B: It is good to have a *legal system.*	**That act would be *illegal.***
	This is a *valid* will.
	***Properly interpreted*, the statute means ...**
	Y is a *criminal.*

Table [iii]

Clearly the type 2 judgments in Table [iii] are in *some* sense resilient, relative to judgments like VII.A. Even in a legal system most of whose provisions are unjust, we can still distinguish (by the system's own lights) between valid and invalid wills, binding and non-binding precedents, lawful and unlawful acts, and proper and improper interpretations of legal sources.[18]

In a rather crude sense of legal positivism, normative resilience is simply a consequence of positivism. Legal positivism is often caricatured as the thesis that human laws have a claim to our respect simply because of their existence as social phenomena. Existing positive law is to be obeyed, whether we judge it morally right or wrong, according to this (caricatural) version. To discover that something is *the law*, on this account, is to discover something that has immediate normative consequences for action, whatever independent judgment we might make about it from a moral point of view. Most modern positivists do not hold this version. They know that it is a theory attributed to them by some of their opponents, but they think that in general their opponents err (both in the opponents' own jurisprudence and in the theories they attribute to the positivists) by investing concepts like 'law' and 'legal validity' with too much moral weight. Critiques of positivism, said H.L.A. Hart, are often based on 'an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law.'[19] The implication of a positivist jurisprudence, on Hart's view,

[18] Cf. Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 101-8.

[19] See H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' reprinted in his collection Essays in Jurisprudence and Philosophy (Oxford: Clarendon Press, 1983),

is not that propositions are to be *respected* or *deferred to* as law by virtue of their social existence, but that they are to be *identified* as law on that basis, leaving it a further question — an independent moral question — what respect, if any, is due to them on that ground or any other.

It follows that although sophisticated legal positivists in the Hart camp might accept the resilience of the type 2 judgments in Table [iii], some of them might want to deny that this is to be understood as *normative* resilience. They might say that the type 2 judgments have no normative force whatsoever. They tell us about the law, or they express legal conclusions, but they are not used to commend, condemn, evaluate, or prescribe. The positivist's judgment that some action is illegal, for example, tells us nothing about whether he thinks that, from the moral point of view, it ought to be done. Moreover, to use it in this purely descriptive way — to say what the law is — is not to use the term 'illegal' ironically or in inverted commas or in any other way that varies from its ordinary use. The claim of these positivists is that terms like this are not ordinarily used to express moral judgments at all.

Four issues need to be untangled here. First, it is arguable that some of the judgments that I have listed on the right-hand-side of Table [iii] as type 2 judgments in fact belong on left (with the type 1 judgments). They may stand in the same relation to VII.A or VII.B as principles of property distribution (or particular distributions) stand to the general justifying aim of property.[20]

Secondly, although it is true that terms like 'illegal' are not normally used to express moral judgments, that does not mean that their use has no normative aspect at all. Participants in a legal system usually deploy type 2 judgments in a conduct-guiding way, by which I mean that there is characteristically what H.L.A. Hart called an *internal aspect* associated with the use of terms like 'illegal,' 'valid,' etc. And that aspect is certainly normative.[21] An outsider — an anthropologist or a comparative lawyer, for example — may not use these terms normatively. But they could not function in legal judgments unless they were used normatively by a community of participants in the legal system;[22] and the anthropologist and comparative lawyer could not infer that they were legal terms unless they noticed them being used normatively in such a community.

Thirdly, some modern legal positivists hold a view that is called '*normative* positivism.' They believe that it is (morally) a good thing that judgments of legal validity and invalidity and lawful and unlawful conduct should be able to be made without using moral judgment.[23] (Jeremy Bentham certainly fell into this category, and so I think did Thomas Hobbes.) That belief is presumably dependent upon a type 1 judgment such as VII.B in Table [iii]. The normative

75 (criticizing Lon Fuller's jurisprudence). See also H.L.A. Hart, The Concept of Law, Second Edition (Oxford: Clarendon Press, 1994), 203-7.

20 Compare the discussion in the text accompanying notes 11-14, above.

21 See Hart, *The Concept of Law*, op. cit., 88 ff.

22 Ibid., 110-117. But as Hart emphasizes, they need not be used normatively by *all* participants in the legal system. Their normative use among a corps of officials may be sufficient. (Ibid., 116-7).

23 For 'normative positivism,' see Gerald J. Postema, *Bentham and the Common law Tradition* (Oxford: Clarendon Press, 1986), 328-36. (This is not the cariçatural view referred to in the last paragraph on the previous page.)

positivist view is roughly this: it is (morally speaking) a good thing that we have a system of positive law, for that enables us to judge statutes, wills etc. as valid or invalid without making moral judgments. Now it is unlikely that type 2 judgments grounded in *this* way would be very resilient. If one were to abandon VII.B, one would also be likely to divest the type 2 judgments in Table 3 of any specifically moral content. If they had any normative content left at all, it would be that discussed in the previous paragraph (i.e. their ordinary internal aspect).

Fourthly, whether we are talking about the normativity associated with the internal aspect of law, or the moral normativity that is associated with legal judgments in a jurisprudence of normative positivism, it is unlikely to be an all-things-considered normativity. There will be a further question of how much respect, ultimately, is owed to the law as such.[24] In other words, the issues that arose with regard to the judgments set out in Table [ii] will also arise with regard to those set out in Table [iii]. Consider for example the following variation on Table [ii]:

(1) Our laws are just and it is a good thing that we have a legal system.
(2) Action A is illegal.
(3) Action A is required by my religion.
(4) All things considered, I ought to perform action A

Table [iv]

Someone may accept 1 and 2, and yet follow 4 because of 3. Or someone may accept 2 but not 1, and yet still follow 4 because of 3. The hypothesis of normative resilience with regard to positive law would require that, in this sort of case, there must be a looseness between 1 and 2 which is quite independent of whatever looseness there is between 2 and 4. For someone who accepts 4, 2 can have a normative force independent of 1 only if 4 is based on 3 and 3 is not the reason for rejecting 1.

This tangle of considerations — particularly the third consideration (about normative positivism etc.)[25] has convinced me that it would be unwise to attempt to establish any *general* hypothesis of the normative resilience of legal judgments. It seems that some legal or legally-based judgments are normatively more resilient than others. In Table [i], for instance, the difference we noted between example I ('justified property'/'honesty') and example III ('true religion'/'heresy') would seem to work whether or not law is involved. Even in countries with a legally established religious orthodoxy, religious dissenters did not regard themselves as heretics, and probably not even as 'guilty of heresy.' Similarly with example II: in countries with anti-terrorist legislation, those whom legal officials designate as terrorists usually regard themselves as 'freedom fighters,' not terrorists, once they reject the legitimacy of the existing state and legal system.

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24 See Dworkin, op. cit., 96-8 and 108-113.

25 See note 23, above, and accompanying text.

In the present paper I want to concentrate particularly on the normative resilience of judgments associated with property. Although private property is a legal institution and has a legal existence, and although the resilience (such as it is) of positive law no doubt contributes something to the resilience of judgments about 'stealing,' 'dishonesty,' and 'belonging,' there seems to be something particular about property that lends it extra resilience in a way that is not associated with all legal institutions or all the normative judgments that they generate. Still, it is in the end an issue about positive law: for what I am exploring is the ethical significance not of the justification but of the *positive presence* in a society of a legal institution such as property.

V

In this section, I shall explore a possible line of justification for the normative resilience of property, a line of justification that may also help explain the distinction noted above between property and some of the other legal examples we have been considering. In the final section — section VI — I shall consider what (justified) normative resilience would imply in regard to the overall enterprise of type 1 justification in legal and political philosophy.

First, a preliminary point about justification, explanation, and ideology. An explanation of the normative resilience of property may or may not justify it. The explanation may be purely psychological, in which case what appears to be normative resilience will still seem like a sort of mistake unless some other, justifying explanation is forthcoming. A purely psychological account may tell us something about the way an ideology works; but it will tell us nothing in itself about the rights and wrongs of property. However, it is also possible that a psychological explanation — though in itself incomplete as a justification — is nevertheless part of an account which justifies normative resilience. Alternatively it is possible that a psychological account of what appears to be normative resilience tells us something about the tasks of justificatory theory in political philosophy. It may tell us that those tasks are impossible and fatuous, perhaps because almost everything that we think of as 'justification' turns out to be the psychological residue of ideology. It may tell us that social justification proceeds not institution by institution but *via* a general obligation to respect positive law, in a way that is not dependent on the justice of its content. Or (as I shall argue at the very end of the paper) it may tell us that the burden of justification is actually heavier than we thought and the task of justifying such an institution against its critics harder than that of justifying an institution that lacks this apparent resilience. That is, the more resilient an institution, the more harm it may do if it is unjust; so the heavier the burden that must be discharged in its initial justification. That will be my thesis.

It is not hard to think of a psychological explanation for the resilience of a judgment like 'This farm belongs to me.' Someone who has been designated officially as the owner of a given piece of land is likely to have actual control of the land: he will know it intimately, he may inhabit it with his family, cultivate it, earn his living from it, care about it, and regard it as part of the wealth that he relies on for his own security and that of his descendants. He will be able to point to features of the land where his work and his initiative have made a

difference, so that the land will not only seem like his; it may even look like his (in the way that a work of art looks like the artist's). These effects are likely to accrue to him by virtue of the operation of the system of property as positive law quite independently of whether it is just or unjust, or whether he or anyone else regards it as just or unjust.[26]

There is some interesting discussion of this phenomenon in David Hume's *Treatise of Human Nature*. We tend to think that the resilience of 'mine and thine' is motivated simply by a greedy desire to hang on to what one actually possesses. In Book III of the *Treatise*, Hume noted that greed cannot be the whole story. The effects we have just been discussing, he says, are likely to produce something like a sense of 'mine' and 'thine' which is not simply a cloak for mere utility or advantage.

> Such is the effect of custom, that it not only reconciles us to anything we have long enjoy'd, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to us. What has long lain under our eye, and has often been employ'd to our advantage, that we are always the most unwilling to part with; but can easily live without possessions, which we never have enjoy'd, and are not accustom'd to.[27]

This phenomenon is, as one would expect Hume to say, a matter of constant conjunction and its effect on the imagination:

> When two objects appear in a close relation to each other, the mind is apt to ascribe to them any additional relation, in order to compleat the union; and this inclination is so strong, as often to make us run into errors (such as that of the conjunction of thought and matter) if we find that they can serve to that purpose. ... Since, therefore, we can feign a new relation, and even an absurd one, in order to compleat any union, 'twill easily be imagined, that if there be any relations which depend on the mind, 'twill readily conjoin them to any preceding relation, and unite, by a new bond, such objects as have already an union in the fancy.[28]

Hume uses this in the *Treatise* to explain why it is natural to associate the artificial relation of property to the relation between a person and thing established by mere possession and occupancy in a state of nature.[29] But it may also be used to

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[26] These effects are probably less likely to accrue, however, or likely to accrue to a lesser extent, if the property system seems precarious on account of its (perceived) injustice – that is, if its (perceived) injustice means that some officials are beginning not to treat the provisions of positive law, in this regard, as normative for them in any sense at all. This may happen in an advanced revolutionary situation, where crucial players are beginning to defect from the established legal system.

[27] Hume, op. cit., 503.

[28] Ibid., 504 n.

[29] Ibid., 504-5: 'And as property forms a relation betwixt a person and an object, 'tis natural to found it on some preceding relation; and as property is nothing but a constant possession, secur'd by the laws of society, 'tis natural to add it to the present possession, which is a relation that resembles it.' (See also Jeremy Waldron, 'The Advantages and Difficulties of the Humean Theory of Property,' (1994) 11 Social Philosophy and Policy 85-123.)

explain why a relation of affection established by law (without regard to the law's moral content) may also be associated with — or, in Hume's terms, be completed by — a sense of righteous possession (a sense which more appropriately goes together with property systems when they *are* morally justified).[30]

Jeremy Bentham noticed something similar, which he thought was very important for public policy. He used it, for example, to ground certain proposals to reform the law of succession and inheritance. To explain why a system of escheat (which he favored) was better, psychologically, for those who suffered under it than a system of estate duties, Bentham argued as follows:

> Under a tax on successions, a man is led in the first place to look upon the whole in a general view as his own: He is then called upon to give up a part. ... His imagination thus begins with embracing the whole: then comes the law putting in for its part, and forcing him to quit his hold. This he cannot do without pain....[31]

If, on the other hand, we 'keep from him the whole, so keeping it from him that there shall never have been a time when he expected to receive it,' then there is no disappointment and no hardship.[32] 'Try the experiment upon a hungry child,' Bentham says (though he does not say where we are supposed to find a hungry child, or how we are to ensure that the poor little wretch is properly starved to begin with):

> Try the experiment upon a hungry child: give him a small cake, telling him after he has got it, or even before, that he is to give back part of it. Another time give him a whole cake, equal to what was left to him of the other and no more, and let him enjoy it undiminished — will there be a doubt which cake afforded him the purest pleasure?[33]

In Bentham's discussion, we begin to edge the psychological account in the direction of justification. For Bentham, it is not just a matter of the imagination embracing what positive law guarantees; it is also a matter of pleasure and pain, which of course are the currency of moral justification in Bentham's utilitarianism. The child with the smaller cake gets more pleasure than the child with a larger cake that is vulnerable to confiscation. The person who has to give up what he expected to hold cannot do so, Bentham says, without pain. And that pain accrues

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30 See also Hume's observation in Book II: 'If justice ... be a virtue, which has a natural and original influence upon the human mind, property may be look'd upon as a particular species of *causation*; whether we consider the liberty it gives the proprietor to operate as he please upon the object, or the advantages, which he reaps from it. 'Tis the same case, if justice, according to the system of certain philosophers, should be esteem'd an artificial and not a natural virtue. For then honour, and custom and civil laws supply the place of natural conscience, and produce, in some degree, the same effects.' (Hume, op. cit., 310.)

31 Jeremy Bentham, 'Supply without Burthen' in Volume I of *Jeremy Bentham's Economic Writings*, edited by W. Stark (London: George Allen and Unwin, 1952), 291.

32 Idem.

33 Ibid., at 292n.

whether or not the giving-up is morally required. What matters is that he expected to be able to hold it; that is what hurts when property is overturned. We are dealing here, in other words, with expectations — utilities projected into the future:

> [W]e must consider that man is not like the animals, limited to the present, whether as respects suffering or enjoyment; but that he is susceptible of pains and pleasures by anticipation; and that it is not enough to secure him from actual loss, but it is necessary also to guarantee him, as far as possible, against future loss.[34]

> Property, says Bentham, is entirely a matter of expectations: 'In matters of property in general, ... *hardship* depends upon *disappointment; disappointment* upon *expectation; expectation* upon the dispensations, meaning the *known* dispensations of the law.'[35]

Thus the justificatory edge of Bentham's argument works as follows. The pains of disappointment that are likely to ensue when something a person has regarded as his property is taken away are much greater than the corresponding pleasures that someone receives when the property is redistributed fairly. Sure, the new owner gets some enjoyment from the resource; but then the old owner lost his enjoyment. Sure, the new owner's enjoyment may be greater than that of the old owner, if we have moved in the direction of a more equal distribution: the law of diminishing marginal utility shows that that is probable.[36] But that extra utility has to be balanced against the specific pains of disappointment, coupled with the impact of the redistribution on others' enjoyment of other resources, which is rendered correspondingly less secure:

> To regret for what we have lost is joined inquietude as to what we possess, and even as to what we may acquire. ... When insecurity reaches a certain point, the fear of losing prevents us from enjoying what we possess already. The care of preserving condemns us to a thousand sad and painful precautions, which yet are always liable to fail of their end. Treasures are hidden or conveyed away. Enjoyment becomes sombre, furtive, and solitary. It fears to show itself, lest cupidity should be informed of a chance to plunder.[37]

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34 Jeremy Bentham, 'Security and Equality of Property,' an extract from Jeremy Bentham, *Principles of the Civil Code*, excerpted in C.B. Macpherson (ed.) *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978), 50. See also Stephen R. Munzer, *A Theory of Property (Cambridge*: Cambridge University Press, 1990), 194-5 and Ryan, *Property and Political Theory*, op. cit., 98.

35 Bentham, 'Supply without Burthen,' op. cit., 291. Bentham also ventures this observation in 'Security and Equality of Property,' op. cit., 51: 'It is proof of great confusion in the ideas of lawyers, that they have never given any particular attention to a sentiment which exercises so powerful an influence upon human life. The word *expectation* is scarcely found in their vocabulary.'

36 For Bentham's discussion of the utilitarian case for equality, see Bentham, 'Security and Equality of Property,' op. cit., 46-7.

37 Ibid., 54.

As a result, industry is deadened, incentives collapse, and long-term schemes of production become psychologically impossible. It follows, says Bentham, that from a utilitarian point of view, existing property rights must be respected no matter how unjust or unequal they appear.

> When security and equality are in conflict, it will not do to hesitate a moment. Equality must yield. The first is the foundation of life; subsistence, abundance, happiness, everything depends upon it. Equality produces only a certain portion of good. ... [If property should be overturned with the direct intention of establishing an equality of possessions, the evil would be irreparable. No more security, no more industry, no more abundance! Society would return to the savage state whence it emerged.[38]

So we get a dissonance of the sort we are looking for — between type 2 judgments that are dependent on existing property arrangements, and type 1 judgments which hold that those arrangements are unjust. A system of property may be unjust in the sense that it was an outrage to justice when it was set up, unjust in the sense that it ought to have been set up on a different basis. But once established, the rights and relations it generates take on a moral life of their own. Now it becomes morally wrong to interfere with them, even though it would not have been morally wrong to set up the system of property on a different basis altogether.

Someone might object that Bentham's argument goes further than driving this wedge between type 1 and type 2 judgments about property. It not only gives type 2 judgments independent support; it establishes in fact a different sort of type 1 argument in favor of existing arrangements, namely a conservative argument. For surely conservative arguments are one class of type 1 argument. Some theories of property are inherently conservative. They argue that private property holdings ought to be respected, not because this is the most efficient way of dealing with material resource, nor because it is an appropriate way of rewarding moral desert, nor because it is required by respect for Lockean entitlements, but because any attempt to change the existing system would be profoundly disruptive. There is something to this. Certainly, the propositions supported by Bentham's principle of respecting established expectations are propositions that apply to governments, legislators, and would-be reformers, and not just to the ordinary beneficiaries of the property system or other private individuals constrained by its rules.

> [W]hat ought the legislator to decree respecting the great mass of property already existing? He ought to maintain the distribution as it is actually established. It is this which, under the name of justice, is regarded as his first duty. This is a general and simple rule which applies itself to all states; and which adapts itself to all places, even those of the most opposite character. There is nothing more different than the state of property in America, in England, in Hungary, and in Russia. Generally, in the first of these countries, the cultivator is a proprietor; in the second, a tenant; in the third, attached to the glebe; in the fourth, a slave. However, the supreme principle of security commands the preservation of all these distributions,

[38] Ibid., 57.

> though their nature is so different, and though they do not produce the same sum of happiness. How make another distribution without taking away from each that which he has? And how despoil any without attacking the security of all?[39]

Still there is a significant difference between Bentham's position and a purely conservative position. When the opportunity arises to vary property arrangements in a way that does not produce pains of disappointment, Bentham is in favor of doing so, and doing so on the basis of principles of justice that are not conservative at all. His proposal to abolish collateral inheritance is a clear example of this;[40] and Bentham was infuriated by any suggestion that his plan would be opposed on the grounds of a more pervasive conservatism.

The account we have given is purely utilitarian. But one could imagine developing a similar account using non-utilitarian ideas. In a number of influential essays, Margaret Radin has argued that respect for existing property rights is bound up with respect for persons:

> Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.[41]

Radin uses the idea to distinguish between claims to property of different kinds — the claims of landlords and tenants, for example, in disputes about residential rent control.[42] But clearly it can be used also as an account of normative resilience: in Radin's example, even if a system of residential rent control is unjust, particular persons may be so bound up with the tenancies which they have established on this basis that it would be disrespectful now to them as persons to expose that identification (of them with their homes) to the vicissitudes of market pricing. And Radin's argument would have the additional interesting feature that, if the link between property and personhood is established by something long-lived and intimate like residential occupation, landlords cannot claim the benefit of similar resilience for the property rights that they have at stake in the matter.[43]

Radin seems to think that this personhood argument is Hegelian in provenance:[44] it's an application, she says, of Hegel's argument in the *Philosophy*

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39 Ibid., 57.

40 See Bentham, 'Supply Without Burthen,' op. cit. For a discussion of this proposal, see also Jeremy Waldron, 'Supply Without Burthen Revisited,' (1997) 82 Iowa Law Review 1467-85.

41 Margaret Jane Radin, 'Property and Personhood,' reprinted in her collection *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), 36. Note that Radin's account also includes a discussion of the fetishistic implications of this: ibid., 43-4.

42 Margaret Jane Radin, 'Residential Rent Control,' in Radin, *Reinterpreting Property*, op. cit.

43 Ibid., 79.

44 Radin, 'Property and Personhood,' op. cit., 44-8.

of Right about the importance of embodying one's freedom in the external world.[45] I am not so sure about that. I have argued elsewhere that Hegel's discussion is more like a type 1 argument about property.[46] But clearly there is enough of a conservative edge to Hegel's political philosophy in general (and enough doubt expressed in his work about the whole business of mounting type 1 arguments), that it would be wrong to neglect this connection.[47] (We will return to Hegel in section VI.)

Intriguingly, there is room for a similar argument about personhood in the utilitarian tradition. David Hume pointed out in Book II of the *Treatise*, that 'the mention of property naturally carries our thought to the proprietor,'[48] and the constant conjunction account of possession that we considered earlier[49] can easily be associated with Hume's account of personal identity.[50] The connection is made explicit in Bentham's discussion. Expectation, for Bentham, is not just a matter of pleasure or pain projected forward into the future. It is crucial to our being, as selves extended in time:

> It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a whole. Expectation is a chain which unites our present existence to our future existence...[51]

And he continues, in language worthy of Radin's account or that of Radin's Hegel:

> Everything which I possess, or to which I have a title, I consider in my own mind as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me; and I form my plan of life accordingly. Every part of my property may have, in my estimation, besides its intrinsic value, a value of affection — as an inheritance from my ancestors, as the reward of my own labor, or as the future dependence of my children. Everything about it represents to my eye that part of myself which I have put into it — those cares, that industry, that economy which denied itself present pleasures to make provision for the future. Thus our property becomes a part of our being, and cannot be torn from us without rending us to the quick.[52]

Once again, property arrangements will tend to have this effect in constituting people's sense of themselves, whether or not they are justified. It is enough that the rights in question are established and officially supported. Once that is the case, people will tend to think of the things assigned to them (even the things

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45 G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood (Cambridge: Cambridge University Press, 1991), 73 ff. (esp. paras. 41-64).

46 See Waldron, *The Right to Private Property*, op. cit., ch. 10, esp. 344-51.

47 See Hegel, *Elements of the Philosophy of Right*, op. cit., Preface, 9-23.

48 Hume, op. cit., 310.

49 See, above, note 28 and accompanying text.

50 See Hume, op. cit., 251 ff. and 277 ff.

51 Bentham, 'Security and Equality of Property,' op. cit., 51.

52 Ibid., 54.

assigned unjustly to them) as *theirs* and as *belonging to them*. And those claims will seem to the people concerned not just echoes of the positive law, but claims with independent moral force inasmuch as positive property rights have become connected with the basis of their personhood.

So far in this section we have concentrated on a particular kind of type 2 judgment about property — namely, possessors' judgments of things *belonging* to them. What about the other end of the stick — people's sense of the distinction between honesty and dishonesty, and the wrongness of stealing? How do we explain and justify the resilience of these judgments in relation to a set of perhaps unjustified property rights?

David Hume offered an account of sorts. Considerations like the ones outlined earlier in this section will explain why those who benefit from existing property rights will develop various terms and modes of vehement condemnation of acts that tend to interfere with those rights. Others will join them in that, to the extent that they foresee what they have to lose from any general deadening of industry consequent upon such violations (along the lines that Bentham indicated). That will happen whether or not the system of property was initially justified. Beyond that, Hume reckoned, even when the violation and its effects are quite remote, 'it still displeases us; because we consider it as prejudicial to human society, and pernicious to every one that approaches the person guilty of it. We partake of their uneasiness by *sympathy*.'[53] Together interest and sympathy will explain the development of virtue- and vice-concepts whose role it is to sustain the existing order of property.

Hume considers the extent to which this may be supplemented by purely political indoctrination. He doubts that that does much work on is own:

> Any artifice of politicians may assist nature in the producing of those sentiments, which she suggests to us, and may even on some occasions, produce alone an approbation or esteem for any particular action; but 'tis impossible it should be the sole cause of the distinction we make betwixt vice and virtue. For if nature did not aid us in this particular, 'twou'd be in vain for politicians to talk of honourable or dishonorable, praiseworthy or blameable. ... The utmost politicians can perform, is, to extend the natural sentiments beyond their original bounds; but still nature must furnish the materials, and give us some notion of moral distinctions.[54]

The connection between particular property rights and our natural sympathies is for Hume the best explanation of our tendency to mould our own sentiments and those of our children into dispositions of probity and honesty.

Of course we need not accept Hume's particular psychological account of the origin of moral distinctions. Maybe they are developed not merely by interest and sympathy, but by all sorts of methods of social construction, according to the direct power of the moral considerations at stake. So, for example, if Bentham is right, one might expect moral concepts like those used in type 2 judgments condemning theft, dishonesty, and expropriation to be forthcoming in society, just as one expects that in general moral ideals will follow considerations of

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[53] Hume, op. cit., 499.
[54] Ibid., 500.

social utility. And the same sort of case may be made on Radin's account. Any sensibility that values respect for persons will tend to develop modes of evaluation appropriate to the specific vulnerability of personhood in relation to existing property rights and — this is the important point — to develop them in a way that does not connect them too tightly to the modes of evaluation used for the overall assessment of the property regime.

One further point. At the very beginning of this paper, I noted that 'honest' tends to be a quite general term of moral appropriation. It used to mean virtue and honour of all sorts, encompassing chastity, generosity, and decorum; and even now it includes 'uprightness of disposition and conduct; integrity, truthfulness, straightforwardness' as well as 'the quality opposed to lying, cheating, or stealing.'[55] More than almost any other virtue word, 'honesty' connotes a thesis about the unity of the virtues in social life; it connects refraining from others' property with a general willingness to act truthfully, rightfully, and straightforwardly. It connects with virtues like industriousness, as when we talk of 'an honest day's work.' It connotes incorruptibility ('honest politicians'), neutrality ('honest broker'), sexual respectability ('make an honest woman of her'), and genuineness ('honest-to-God goodness'). These are not just ambiguities. There is a real tendency to think that someone who is honest in any of these regards is more likely to be honest in the others as well. The fact that honesty has all these ramifications is interesting, for it echoes what we might think of as *the social pervasiveness of property*. An established system of property is not simply one aspect, among others, of the social structure. It is quite all-encompassing, for it establishes much of the context in which we deal with others, relate to them, trade with them, work for them, and compete with them. Whether we like it or not, we all have to learn how to get by in the prevailing system of property.[56] We have to learn which things are 'ours' and which not; how to acquire something we don't already possess; under what circumstances we will gain the benefit of others' work with the resources *they* possess; and in general how industry, commerce, and social intercourse are carried on in a world composed of objects and places designated as items of property. One who shows himself incompetent in this regard, even in one instance, is liable to be suspected as a kind of *general* menace: if he doesn't take property seriously *here*, we may say, he may not take it seriously anywhere. (After all, we do rely to an enormous extent on people's voluntary willingness not to just run off with things they covet or break into whatever places they like.) And if this person doesn't take this part of the social fabric seriously — why, he may not take any of it seriously. If we can't trust him not to steal a towel from a hotel, can we trust him with our accounts or with our children? Can we trust him to tell the truth or keep his engagements or do the work that he promises to do?

Once again, all this holds whether or not the established system of property is itself morally justifiable. If it is *the established system*, then it is the pervasive basis of social context in the way I have been describing. It is not surprising, then, we would develop concepts like 'honesty' and 'dishonesty' whose purpose it is to

[55] See note 2, above.

[56] Cf. the account of 'Layman's Property' in Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977), 116 ff. See also Waldron, *The Right to Private Property*, op. cit., 42-3.

convey this holistic point, that someone who violates existing property rules in one regard is *in general* not to be trusted. It is not surprising, either, that these concepts would develop rather independently of any thoughts about overall justification. There may be innumerable just alternatives to the existing system of property, many of them much more just than the one that presently exists. But there is room for only one of them to be established, and it is within the framework of the one that *is* established that we all have to make our lives, for better or for worse.

Incidentally I think this also explains a couple of the connections that were explored in section II. There I said there is a connection between honesty and actions done in the open (and that therefore an open infringement of a property rule is less likely to be stigmatized as dishonest than a covert or furtive one). An action done in the open is one that can stand scrutiny in the sight of others with whom we share a social framework: one puts oneself on display, as it were, as one who has no reason to expect that he will not be trusted in general on account of the current infringement. (The logic is similar to that of the general law-abidingness which is displayed — paradoxically — in open acts of civil disobedience.) Similarly, someone whose challenge to contemporary property is grounded in some set of traditional property rights may seem less threatening to the social fabric, insofar as his deference to a tradition of property rights shows that he does at least take seriously the idea of social fabric.

If I am right in this hunch that the normative resilience of terms like 'honesty' and 'dishonesty' is explained in part by the social pervasiveness of property, then we might have a way of explaining some of the distinctions we found when we scrutinized Table [i]. Remember I said that some of the examples there exhibited normative resilience while others did not. For example, there does not seem to be the same normative resilience among the following pairs —

INSTITUTION	*TYPE 2 PREDICATE*
The state	**terrorist**
True religion	**heretic**
Traditional marriage	**fornicator**
Aristocracy	**lack of noble birth**

Table [v]

— as there is between private property and honesty. The explanation may be that those to whom the type 2 epithets in Table [v] are likely to be applied share, for the most part, a social world with those who agree with them that the institutions on the left of the table are unjustified. For example, those whom proponents of traditional marriage would condemn as fornicators tend to share a social world with people who deny that sex outside marriage is always wrong; and those whom defenders of the state label terrorists often have no choice but to confine their social relations to a small corps of trusted fellow insurgents, who of course agree with them in repudiating current state arrangements. In

the case of property, by contrast, one has to be a very fortunate opponent of current property arrangements to live surrounded only by like-minded individuals. Maybe the members of extreme socialist sects can do this (though even Karl Marx paid his rent in London, and Engels inherited industrial wealth from his family); or maybe the members of utopian communities can (like the Robert Owen community in Edinburgh). But most opponents of existing property arrangements, no matter how deeply they feel about the issue, have to make a living and share a world with others who support those arrangements in the framework that they constitute.

VI

So there may be something to the normative resilience of property. It may not be inappropriate to condemn theft, commend honesty, and respond sympathetically to claims of 'belonging' in the context of an unjust system of property rights. What follows from this? What does it tell us about the enterprise of justificatory argument in political philosophy?

It may be thought that the normative resilience of property argues for a rather gloomy prospect for grand theorizing in political philosophy. By indicating the enduring importance of judgments based on existing property rights whether the property system in general is justified or not, it may be thought to weaken the case for the more general inquiry. Since we are morally bound by existing property rights anyway, what is the point of asking whether the property system is just or unjust? Perhaps normative resilience hooks up with a more general Hegelianism, which maintains that (in some suitably nuanced sense) everything is alright as it is, and philosophers should stop going around indicting existing institutions for failing to conform to their theories and, as Hegel puts it scathingly, 'issuing instructions on how the world ought to be.'[57] Philosophers should stop worrying that legal reality lacks a moral justification; instead they should concentrate their energies on uncovering the rationality and justification which the normative resilience of existing arrangements shows is undoubtedly present already.

A somewhat different argument, though to a similar effect, may be made by a Marxist. The resilience of type 2 judgments — the Marxist may say — is to be explained ultimately in terms of social psychology. It is an instance of ideological power — that is, an indication of the ability, which prevailing institutions have, to infect not just the lives, but the consciousness of those who suffer under them. It is not enough that the system of capitalist property expropriates and exploits the proletariat. It also inoculates them against any form of rebellion or resistance by stigmatizing any infringement of prevailing property rules with the shame and dishonor of 'dishonesty.' Ideologically, an established system of property may have the effect that the proprietorial sentiments of the advantaged actually evoke an empathy and respect from the disadvantaged which is quite isolated from the latter's opinion about the justice or injustice of the property-holding in question. This, if you like, gives an ideological spin to the Bentham / Radin thesis about the connection between property and personality. We make it *as though*

[57] Hegel, op. cit., 21.

attacking P's property is attacking P herself; and since clearly it would be wrong to attack P herself (whatever the distributive situation), that sense of wrongness is projected onto any encroachment on P's property even though such encroachment considered on its own merits, might be quite justifiable. In its ideological aspect, the normative resilience of property may also be connected with with myths of equal opportunity and the equality or reciprocity of rights. We bring our children up to believe that in respecting P's property, they are according no greater respect to her than she is required to accord to them, and that if P has property (and they have none), this has to do with the way she succeeded (while they failed) in consummating opportunities that were available equally to everyone. We know all too well that such sentiments may persist, and surface in the phenomena of shame and the sense of dishonesty I have mentioned, long after the economic conditions of opportunity, equality, and reciprocal respect have evaporated. On this account, the quest for a general justification (or critique of property) is not so much pre-empted (as it is on the Hegelian approach) as hopeless. Since the ideology of property is already firmly in possession of all the space in moral consciousness that an effective justificatory theory could possibly occupy, we should abandon the futile business of challenging that ideology on moral grounds. The normative resilience of property — as an ideological product — shows that we are bound to lose that battle. If we oppose property, we should devote ourselves to the direct task of overthrowing it, rather than waste effort in a futile endeavor to discredit it first.

I find neither of these lines of argument convincing, however, and I don't believe we should use the normative resilience of property as a basis for inferring pessimistic conclusions so for as the justificatory enterprise is concerned. There are a number of responses that I want to make.

First, and most obviously, any Hegelian account of the social and legal world would be inadequate if it did not mention *our existing practice of engaging in general justificatory discourse* — for that's part of reality too! — and if it did not give that a place in the overall system of social practice that is 'alright as it is.' Secondly — so far as the Marxist argument is concerned — unless we adopt a very deterministic understanding of ideology, we should understand that something is in fact being fought out at the level of moral argument which is not simply foreordained by the victory of capitalist property at a more material 'level.' Ideological structures have a certain autonomy from material forms that mean they are not the mere reflex of existing arrangements. Since, as we have seen, the normative resilience of property is neither perfect nor comprehensive but varies in several dimensions (e.g. according to the extent to which the system as a whole is condemned), the mere fact of resilience does not show that broader justificatory inquiry is completely futile.

Third, even if we acknowledge that the normative resilience of existing private property arrangements is a sign of their ability to survive moral or philosophical critique, it doesn't follow that critique has no effect in the world or that it is morally insignificant. For it is important not only what we bring about in the world but also *how we inhabit the world*. Even if we are pessimistic about the likely effects on institutions of our justificatory discourse, still we need to consider justificatory arguments to ascertain whether we are entitled to live comfortably with the institutions that surround us. From this point of view, we are not entitled

to assume in advance (on e.g. Hegelian grounds) that everything is alright in the sense that we may live at our ease in modern society. Surely the upshot of a justificatory enquiry may be sadness and shame, concerning the institutions of our society, rather than the reconciliation that Hegel was looking for. That the resilience of certain institutions is *lamentable*, rather than something to which reason can be reconciled, is a familiar and perfectly respectable position for philosophers to adopt: it is the attitude of Plato to democratic politics in books Six and Seven of *The Republic*, of de Tocqueville to banal egalitarianism in volume II of *Democracy in America*, of Max Weber to the 'iron cage' of bureaucratic rationality, and of Hannah Arendt to the modern state's preoccupation with life and labour. Though these theorists do not think there is much to be done about what they lament, and though they may accept (and even explain) the fact of resilience, that does not diminish the importance of their evaluative arguments.

A smaller-scale example may help here. Many people believe that the abolition of capital punishment is a political impossibility in the United States for the foreseeable future at least so long as fear of crime is bound up with racial antipathy. But they nevertheless regard the debate about its justification as a live and important one, inasmuch as it determines whether, as moral beings, we may live *comfortably* in a society of which popular enthusiasm for judicial killing is an ineradicable feature. Moreover, that question — reconciliation or discomfort — is not seen as an indulgent matter of posture, but as an issue of authenticity and understanding. So long as this is recognized, the strictures of justificatory debate lose none of their importance in view of the resilience of the institutions we are evaluating.

The fourth point I want to make is the most important; it is the point I intimated earlier (at the beginning of section V). It seems to me that if an institution has the sort of resilience that we have been talking about, if it has or is likely to have this sort of presence in any society in which it is established, if it carries this kind of psychological baggage, if the mere fact of its positive existence is going to generate and sustain resilient type 2 judgments, then that does not diminish the burden of justification so far as an institution of this kind is concerned: instead it increases it. It means that if we do have any opportunity to make our justificatory discourse effective — if we are poised, for example, to introduce a new system of property (as governments have been over the last decade in Eastern Europe) — then we should think very carefully, because the likely resilience of what we are instituting means that it is liable to do much more damage and be much harder to eradicate if we make wrong choice at this stage than would be the case with a non-resilient institution.

Again an analogy may help. Consider the choices faced by a religious teacher who wants to address the question of sex with his pupils. Clearly it is important for him to tell them the truth, to get it right, and to communicate that truth in a way that will do the most good. If he makes a mistake (or, worse, tells his pupils lies), he does them a grave disservice — depriving them of harmless pleasures, leaving them ill-equipped to deal with the dangers of pregnancy or sexually-transmitted diseases, making them ashamed of things they needn't be ashamed of. To some extent, this damage may be reversible in later life, as they discover what they were taught was untrue. But if his sex education teaching is resilient in the consciousness of his pupils, in the way that religious sex education often

is, it will not be enough for the pupils to later become aware of his errors. Even if they are rightly convinced that he misled them (say about homosexuality or masturbation) the stigmatization of these activities as 'wrong' or 'dirty' might remain, resiliently, long after the underlying theories have been discredited. If this is a possibility — and I take it that one can figure out in advance that it is — then that is a reason for the teacher to approach his task more carefully, rather than less carefully. He should think to himself, 'I had better be very sure that I have got this right, because to a certain extent my teachings will be resilient and uncorrectable if I am wrong.' He certainly should not think (though no doubt many sex educators do), 'It doesn't matter whether I am right or wrong, for even if my lies are uncovered, they will still have the psychological effect that I desire.' And that would be the analogue of inferring a diminution of the justificatory burden from the normative resilience of property. In other words, the normative resilience of property may properly be said to diminish our sense of when justificatory discourse can have any effect in the real world; but just because of that, it increases the burden of justification we are under for those occasions when justificatory discourse *can* have some effect.

The same, finally, may be said not just about the institution of a new set of property arrangements, but also about occasions of injustice that are likely to become entrenched or established. Part of what was wrong about (say) the expropriation of aboriginal lands in New Zealand, Australia and the United States in the nineteenth century, was of course the immediate injustice, loss, and suffering endured by those who were the victims of expropriation. But part of the cost also is that that injustice is now not easily correctible, and that it persists, resiliently, both in the consciousness of the victims' descendants that they are somehow cheating or being dishonest in demanding the land back, and in the real pain and sense of deprivation that would be suffered by those who have become (perhaps through no fault of their own) the modern-day beneficiaries of that injustice. To that extent, the fact of resilience means that an injustice of this sort — in property arrangements — is a much worse thing to inflict on a people than an injustice in some area of life where resilience is not an issue. Resilience muddies the water; it makes the injustice that much more difficult to clear up; it lays a kind of curse on a land so that even good-hearted members of later generations may be genuinely at a loss as to how to make things better. That means, historically, that the original expropriation is all the more regrettable. But it also indicates a lesson for us so far as current issues of justice and injustice are concerned. For if we act unjustly now, in an area of life or law which exhibits this resilience, we should be aware that we are not just injuring the immediate victims, but we are poisoning the ground for any future attempt to make things better, and leaving for our children and grand-children to sort out a more hideous tangle of shame and loss and disorientation.