

ARTICLE

AFTER THE FLOOD: EQUALITY & HUMANITY IN PROPERTY REGIMES

*Joseph William Singer**

TABLE OF CONTENTS

I. CONTESTED TERRAIN	245
A. WHAT WE LEARNED FROM HURRICANE KATRINA	245
B. WHY WE HAVE ALREADY BEGUN TO FORGET (AND WHY IT IS SO HARD TO REMEMBER)	247
C. POVERTY & PUBLIC PHILOSOPHY	252
II. TWO VIEWS OF GOVERNMENT	254
A. SMALL GOVERNMENT	254
1. LIBERTARIAN INSTITUTIONALISM	254
2. THE LIBERTARIAN FANTASY	256
B. DEMOCRACY & SOCIAL JUSTICE.....	259
1. DEMOCRATIC PRAGMATISM.....	259
2. POVERTY & HUMAN FREEDOM	261

* Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Dan Kanstroom, Rabbi Jonathan Kraus, John Lovett, Martha McCluskey, Lila Singer, Mira Singer, Robert Singer, Laura Underkuffler, Johan van der Walt, and Keith Vetter. I also thank Alec Karakatsanis for extraordinarily helpful research assistance as well as helpful conversations. I would also like to thank the students in my 1L reading group at Harvard Law School on the Ownership Society and my seminar on the Ownership Society at the University of Hawaii William S. Richardson School of Law for their insightful comments and thoughts on the nature of ownership, including Lori Baker, Tim Cahill, Sarah Carter, Stanley Chang, Jesse Gabriel, Roman Goldstein, Chris Goodin, Rebekah Lacey, Scott Linton, Jason Liss, Marshall Mattera, Anderson Meyer, Binford Parker, Blaine Rogers, Joe Shear, David Squeri, Erin Suzuki, Tina Wakayama, and Natalie Wilson. Finally, I would also like to thank Joseph Miller and David Stein for their extraordinary work in reviewing the manuscript of this article, researching the footnotes, and ensuring the accuracy of the factual material presented in it.

C.	REFRAMING THE DEBATE	264
III.	RESOURCES FOR RECONSTRUCTION.....	267
A.	PROPERTY LAW: THE INSTITUTIONAL FRAMEWORK OF A FREE & DEMOCRATIC SOCIETY	267
1.	PROPERTY & SOCIAL RELATIONS.....	267
2.	PROPERTY, THE FREE MARKET, & REGULATION	270
3.	PROPERTY AS A REGIME	273
4.	REGULATORY TAKINGS, JUSTIFIED EXPECTATIONS & HURRICANE KATRINA	282
B.	PHILOSOPHY & POLITICAL THEORY: REASON, RESPONSIBILITY, & THE SOCIAL CONTRACT	288
1.	MORAL REASONING.....	289
2.	SOCIAL CONTRACT THEORY	292
3.	TAKING EQUAL OPPORTUNITY SERIOUSLY.....	296
4.	DECONSTRUCTION, CRITICAL LEGAL THEORY & RESPONSIBILITY	297
C.	RELIGION: HUMAN DIGNITY & THE GOLDEN RULE.....	300
1.	THE ROLE OF RELIGION IN PUBLIC JUSTIFICATION	300
2.	AFTER THE FLOOD: WHAT THE TORAH TEACHES US	307
a.	Human Dignity: Infinite Importance of Each Person.....	307
b.	Equality: Each Person Matters	311
c.	Responsibility: The Parable of the Marked Money	314
3.	BENEFICENCE AND JUSTICE	324
IV.	A NEW BOTTOM LINE: SECURING THE BLESSINGS OF LIBERTY	329
A.	GOVERNMENT AS INFRASTRUCTURE	329
B.	RECONSTRUCTION & HUMAN VALUES	332
C.	HUMANITY	338

If a poor person came to Sodom, every resident pretended to give charity by handing the traveler a coin. But they wrote their names on those coins and when the coins were offered to the store owners for bread, the shop keepers would see the names and refuse to accept the marked money. Because the residents would not give or sell bread to the poor, the poor would die in the street, and then the residents would come to

2006] **Equality and Humanity in Property Regimes** 245

take back their money.**

— Babylonian Talmud, Sanhedrin 109a

Property rights serve human values. They are recognized to that end, and are limited by it.***

— Justice Joseph Weintraub
Supreme Court of New Jersey (1971)

The compassionate imagination provides information essential for economic planning, by showing the human meaning of the sufferings and deprivations different groups of people encounter.****

— Martha Nussbaum

I. CONTESTED TERRAIN

A. WHAT WE LEARNED FROM HURRICANE KATRINA

Like September 11th, Hurricane Katrina changed our national conversation—at least for a while. For the first time in many years, both politicians and the media paid attention to poverty. We saw first hand what it means to be poor. We saw people out of options; we saw people who were desperate; we saw people left behind; we saw people begging for help. We saw people who lost their lives. We saw the human beings behind the abstractions. We saw what happens when we push poor people off the national agenda.

We learned, in short, that poverty is still a problem in the United States. The poor do not have what they need; nor do they have what they deserve. But the problem is deeper than this. There appears to be little room for the poor to use self-help to escape from poverty. Our economy has not seemed capable recently of generating such an escape route; nor has public policy

** This is my interpretation of the original Talmudic text filling in the blanks to make the story comprehensible and to flesh out the way the original text has been interpreted by subsequent generations of rabbis. The original is roughly “If a poor man happened to come there, every resident gave him a denar [a coin], upon which he wrote his name, but no bread was given. When he died, each came and took back his (denar).” Robert Kaiser, *What was the Sin of Sodom?*, <http://www.iwgonline.org/docs/sodom.html> (last visited May 23, 2006).

*** State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

**** Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* 438 (2001).

been able to open such a path for all who need it. One reason for this lacuna is the growing inequality of both income and wealth.¹ It was, after all, the huge and increasing gap between those who are well off, and those who are not, that allowed the haves to believe that things were going all right for the have-nots. Those of us who are doing all right have failed to pay adequate attention to the plight of those who are not doing all right. And those who struggle have an even harder time focusing on those who are desperate. Hurricane Katrina demonstrated that continuing racial divisions in access to the benefits of economic life may be one reason for this lack of attention.

This was a problem then, not only of material resources, but of human dignity. We, as a country, have failed in our obligation to treat every person with equal concern and respect; we acted humanely by raising millions of dollars to help the victims of the hurricanes and seeking to help them in other ways as well. But we did it after the fact when the harm was already done. As a nation, we were indifferent to what needed to be done to prevent the disaster from occurring at all, or to alleviate the poverty that Katrina made so painfully evident.² Somewhere along the way, we compromised our humanity.

We learned something else as well. Again, as in the case of September 11th, we learned why we need government. The rich, as well as the poor, suffered from the broken levees. Everyone in New Orleans needed government services to protect their lives and their homes. We heard loud demands for government action; we heard condemnations of the slow, incompetent response; we decried the appointment of marginally qualified political allies to positions of national trust. After years of hearing government employees derided as meddling bureaucrats, we remembered that they are public servants; we remembered why we need their services; we remembered that we ask many of them to risk their lives on our behalf. We remembered that some of them give their lives for us; we remembered how easy it is to forget to thank them or to value their service in the way we should. And now, ten months after the flood, the need for government services in

1. See BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 12-13 (2005) (asserting that there is a "monstrous" inequality of incomes that leave the bottom half of the population sharing 13 percent of the total income).

2. See MICHAEL LERNER, THE LEFT HAND OF GOD 222-223 (2006) (arguing that we as a country did not take adequate steps to avoid the New Orleans tragedy).

2006] Equality and Humanity in Property Regimes 247

rebuilding New Orleans is undisputed. The rebuilding process involves many contentious issues, but the need for government involvement in that process is not one of them.

B. WHY WE HAVE ALREADY BEGUN TO FORGET (AND WHY IT IS SO HARD TO REMEMBER)

But there were also things we did not hear; there were also things we did not remember. We did not hear reasons why the American public should be taxed to pay for the government response that Americans demanded. We heard righteous indignation at incompetent government action, but we did not hear loud demands for better land use planning to avoid such disasters in the future. With some exceptions, we did not hear an outcry for greater government regulation designed to protect the public from environmental disasters. Indeed, some argued that the incompetent government response to Hurricane Katrina proved, once again, that government could not be trusted to solve our problems and that we should rely more heavily on the private sector. We heard an outcry about the extent and effects of poverty in America, but we did not hear a call for new government regulation designed to eliminate poverty. We have been told for so long that government is the problem, that it was not clear whether there was anything useful for government to do other than to get out of the way. Yet people wanted something done; they demanded an effective governmental response to the destruction of much of New Orleans and the scattering of its people. But they seemed not to be able to bring themselves to accept the fact that answering their demands of necessity involved both taxation and regulation.

Upon being sworn in to his second term of office as President of the United States, President George W. Bush announced his hope that we could create an “ownership society” that would spread the benefits of ownership, giving people greater freedom, security, independence, and dignity.³ Upon being criticized for

3. On January 20, 2005, President Bush said:

In America’s ideal of freedom, citizens find the dignity and security of economic independence, instead of laboring on the edge of subsistence. This is the broader definition of liberty that motivated the Homestead Act, the Social Security Act, and the G.I. Bill of Rights. And now we will extend this vision by reforming great institutions to serve the needs of our time. To give every American a stake in the promise and future of our country, we will bring the highest standards to our schools, and build an ownership society. We will widen the ownership of homes and businesses, retirement savings and health insurance—preparing our people for the challenges of life in a free society. By making every citizen an agent of

not responding adequately to the devastation in New Orleans and the Gulf Coast after Hurricane Katrina, President Bush announced that “[i]n America, we do not abandon our fellow citizens in their hour of need[; rather, we] have a responsibility to our brothers and sisters” who are “suffering,” “angry and desperate for help.”⁴ The image of an ownership society suggests that the goal is to increase independence and self-reliance while the image of the responsive community suggests that we depend on each other and have obligations to respond collectively to those who are in need or are suffering. Promoting ownership appears to mean decreasing government regulation, but responding to need seems to suggest a role for government in coordinating those efforts and ensuring that they happen. Can these views be reconciled?

Hurricane Katrina reminded us that we need government, that we have not paid sufficient attention to the poor, and that the policies we have pursued as a nation have fallen short in spreading the benefits of economic opportunity and personal security. But ten months later, we have already begun to forget these things. Decades of Republican success have shaped our national conversation about the economy by framing public policy issues in a manner that has made both taxation and regulation into fighting words. We want to respond to human need and we want government to be involved in this effort, but if all government action is suspect, it is hard even to begin thinking about this task.

President Bush’s proposal to create an ownership society sought to fill this void. In so doing, he suggested making every

his or her own destiny, we will give our fellow Americans greater freedom from want and fear, and make our society more prosperous and just and equal.

White House Press Release, President George W. Bush, Inaugural Speech, Jan. 20, 2005, <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html> (last visited May 23, 2006).

4. The full quote is:

I know that those of you who have been hit hard by Katrina are suffering. Many are angry and desperate for help. The tasks before us are enormous, but so is the heart of America. In America, we do not abandon our fellow citizens in their hour of need. And the federal government will do its part. Where our response is not working, we’ll make it right. Where our response is working, we will duplicate it. We have a responsibility to our brothers and sisters all along the Gulf Coast, and we will not rest until we get this right and the job is done.

White House Press Release, President George W. Bush, Address to the Nation Discussing Hurricane Katrina Relief Efforts, Sept. 3, 2005, <http://www.whitehouse.gov/news/releases/2005/09/20050903.html> (last visited May 23, 2006).

2006] **Equality and Humanity in Property Regimes** 249

person an owner, thus promoting both equality and liberty. He evoked an image—a society of owners secure in their control of their property, free from government interference or coercion. The key terms in this libertarian picture are liberty and property. In this framework, regulation deprives us of liberty, and taxation deprives us of property. But the framework unravels. Expanding ownership suggests increased liberty and smaller government but if experience is any guide, the normal operation of the free market produces both poverty and inequality. We have a paradox: we want government to promote economic opportunity but we don't seem to want the government either to tax or to regulate; but these are the ways that government responds to social problems. What really do we want out of government? And are we serious about helping the poor?

This turn in public rhetoric has affected liberals as much as conservatives. Liberals want to curtail the excesses of the marketplace and create appropriate mechanisms to promote equality and security so that every person has access to the resources necessary to lead a fulfilling life. Liberals have sometimes attempted to use conservative rhetoric to defend liberal values, and while this approach has something to commend it, conservative rhetoric will not be sufficient to articulate liberal values. Liberals seem to have lost the ability to defend their core values in the face of the conservative onslaught on taxes and regulation. One looks in vain for a successful progressive alternative to the reigning libertarian framework. George Lakoff has emerged as a public intellectual for pointing out how conservative rhetoric has eclipsed liberal rhetoric and for his efforts to construct a liberal alternative.⁵ This alternative is needed now more than ever. Moreover, liberals need not just an alternative rhetoric but an alternative worldview—a new way to conceptualize the role of government in social life and the relations between the public and private spheres.

Paradoxically, conservatives need a new paradigm as much as liberals do. We sometimes forget that conservatives value government as much as liberals do; they are, after all, not

5. GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES* xvi (2004) (explaining that Americans need a clear moral vision, "one that lies behind everything Americans are proud of"). For further discussion of this topic see generally GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2002).

anarchists. Their world view contains a libertarian core and a liberal margin; President Bush proposed partial privatization of Social Security not abolition of it. Despite the push for deregulation and privatization, we have a host of regulatory laws that remain very popular and in no danger of being scrapped, including consumer protection laws, insurance regulations, zoning laws, antidiscrimination laws, marriage regulations, parental support obligations, health and safety laws, workers compensation laws, and banking and securities regulations. We do not have national health insurance but when uninsured people come to the hospital seeking emergency care, we want hospitals to provide it; doctors and nurses do not sit back and watch uninsured people die in the streets in front of the hospital. In fact, federal law requires most hospitals to provide such care.⁶ That care, of course, is costly and it is spread around to the rest of us.

Conservatives may wish to change the nature of the regulations that do exist but few are arguing to erase them entirely; conservatives are loath to recognize the liberal margin surrounding their libertarian core but neither do they seem ready to abandon it. Conservatives are in favor of limits on liberty to protect the rights of the individual; they are in favor of government action to establish and protect a regime of private property. They simply want government to do different things than liberals want government to do. But conservative rhetoric, like liberal rhetoric, does not have the tools to support the types of taxation and regulation that conservatives themselves seek.

The task of rebuilding New Orleans brings these issues to the forefront. Some, like Dennis Hastert, suggested that there was no reason to rebuild New Orleans.⁷ Others have echoed his

6. See The Emergency Medical Treatment and Active Labor Act, or EMTALA, 42 U.S.C. § 1395d(d) (2000) (requiring hospitals receiving Medicare funds to provide appropriate emergency treatment); see also 42 U.S.C. § 1395c(c) (2000) (defining participating hospitals); 42 C.F.R. § 489.24 (2005) (delineating regulations enforcing EMTALA).

7. Patrick Waldron, *Hastert Says Rebuilding Isn't Sensible*, CHICAGO DAILY HERALD (ARLINGTON HEIGHTS, IL), Sept. 1, 2005, at 12. But see John Patterson, *Hastert Backs Off New Orleans Comments*, DAILY HERALD (ARLINGTON HEIGHTS, IL), Sept. 2, 2005, at 9 (describing Hastert's attempts to clarify his comments following public criticism). See also Joseph B. Treaster & Deborah Sontag, *Despair and Lawlessness Grip New Orleans as Thousands Remain Stranded in Squalor*, N.Y. TIMES, Sept. 2, 2005, at 1 (discussing Hastert's comments regarding his reservations about rebuilding and his later attempt to clarify the meaning of those comments); *In*

2006] **Equality and Humanity in Property Regimes** 251

words—and those others have included liberals as well as conservatives; they have asked whether it makes sense to even have a city, much of which is located below sea level.⁸ Yet Hastert's comment was immediately shot down by politicians across the political spectrum, from President Bush to the Democrats. What stands out is that, even in this age of conservative triumph and enthusiasm for market solutions to all problems, the call for government action in response to Hurricane Katrina was overwhelming.

Yet the contours of that response are still emerging, and already we see old battle lines being drawn. On the environmental front, it is apparent that development in New Orleans has altered the natural state of things in a way that may have exacerbated the human consequences of the hurricane. The importance of wetlands and fragile coastal areas is more obvious than ever. A sensible response requires some form of governmental regulation of land use that may be different from what we have done in the past; rebuilding marshes and wetlands may be crucial to protect New Orleans in the future. The rebuilding effort itself, supported by Republicans and Democrats alike, will require billions of dollars of government expenditures, yet no one has proposed to tax the American people to generate the funds to pay for these expenditures. The public has reacted with compassion and concern for the hurricane's human victims and has sought some answer to the conditions of poverty that were so painfully revealed by this disaster. Yet if we view both regulation and taxation as our mortal enemies, it is unclear how government can act to combat poverty without involving itself in activities we claim to abhor.

Americans have always been of two minds about government. We are a nation that prizes liberty and views government as a threat to our freedom. But we are also a nation that teaches our children that "all [people] are created equal" and that it is precisely because we sought to "secure the blessings of

Brief, WASH. POST, Sept. 2, 2005, at A15 ("It makes no sense to spend billions of dollars to rebuild a city that is seven feet below sea level, House Speaker Dennis Hastert (R-Ill.) said of federal assistance for hurricane-devastated New Orleans.").

8. Melissa Harris Lacewell, *Beyond Repair*, THE AMERICAN PROSPECT, March 2006, at 9, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=1169> (last visited May 23, 2006) (wrestling with the question of whether rebuilding in place is the best thing for African American residents of New Orleans).

liberty to ourselves and our posterity” that we did “ordain and establish [the] Constitution for the United States of America.”⁹ Let me repeat that because you may have missed it. Although we fear that government impinges on our freedom, we established government to promote freedom. It seems that we need government if we want to “secure the blessings of liberty.”¹⁰ We need it but we fear it. Government can promote liberty but it can also oppress. How can we tell the difference?

C. POVERTY & PUBLIC PHILOSOPHY

Our ambivalence about government makes it hard to figure out whether and how to think about the poverty we observed in the wake of Hurricane Katrina. We have immediately reverted to old debates. The first thing the Bush administration sought to do was to protect contractors rebuilding New Orleans from having to comply with bothersome environmental laws, and to attempt to relieve them from the burden of paying the local prevailing wage.¹¹ Lowering the costs of doing business is supposed to give incentives for the market to step into the fray and efficiently clean up the mess and rebuild the city. Liberals respond by pointing out that it was precisely the lack of adequate attention to environmental impacts of development that got us into this mess in the first place, and it is more than a little ironic that the first thing we do to help poor people is to allow businesses to pay them wages that are too low to live on. How do we get beyond these old debates?

9. U.S. CONST. pmbl.

10. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ¶57, at 32-33 (Thomas P. Peardon ed. 1952) (1690).

[T]he end of law is not to abolish or restrain but to preserve and enlarge freedom; for in all the states of created beings capable of laws, where there is no law, there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is not law; but freedom is not, as we are told: a liberty for every man to do what he lists—for who could be free, when every other man’s humor might domineer over him?—but a liberty to dispose and order as he lists his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.

Id.

11. Thomas B. Edsall, *Bush Suspends Pay Act in Areas Hit by Storm*, WASH. POST, Sept. 9, 2005, at D03. Congress rejected the attempt to relieve government contractors of the burden of complying with the Davis-Bacon Act, causing President Bush to rescind his unilateral decision to suspend the Davis-Bacon wage protections in areas affected by Hurricane Katrina. Press Release, Committee on Education & the Workforce, Democratic Staff, U.S. House of Representatives, <http://edworkforce.house.gov/democrats/katrinainlocalwages.html> (last visited May 23, 2006).

2006] **Equality and Humanity in Property Regimes** 253

Nor do we have consensus on how to respond to the problem of poverty that was so visible on our television sets. John Edwards has begun a national campaign to abolish poverty.¹² That would seem to be a goal we could all get behind; if that is true, the only question would be how to identify the right means to accomplish this end. But even if we agree that poverty is a problem, it is not in fact clear that we agree that government should be involved in solving that problem; why not promote personal responsibility and charitable aid instead? To answer this question, we need a realistic sense of the relation between government and society – one that recognizes the essential role of government, including the benefits of taxation and regulation, but which also acknowledges the ways in which government action can interfere with both liberty and property, and even exacerbate the problems of the poor. However, our current way of thinking about the relation between government and liberty cuts off reasoned debate on this issue.

We need a new way to talk about government, taxation, and regulation. The dispute between liberals and conservatives is usually framed as a contest between regulation and deregulation, between big government and the private sector, between a coercive, command-and-control economy and the free market. The legal realists taught us long ago that this way of conceptualizing the relations between the public and private sectors is misleading; this is a false set of dichotomies. As I have said, conservatives want regulation as much as liberals do; they simply want it to have a different shape. Liberals value the free market as much as conservatives do; they simply want it to have a different shape.

The legal realists suggested that we think about human interests and the ways in which law adjudicates conflicts between conflicting interests to promote public policy goals.¹³ This proposal has been remarkably successful in the law schools and

12. See One America for All of Us, John Edwards Campaign Website, <http://www.oneamericacommitee.com> (last visited May 23, 2006) (outlining Edwards' campaign goals including eradication of American poverty). See also LERNER, *supra* note 2, at 222 (arguing for the "permanent elimination of poverty in the United States").

13. See generally AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (discussing legal realism); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467 (1988) (discussing the legacy and impact of the legal realism movement).

the courts; interest balancing became, for a while, the central paradigm in law. But it did not really challenge the old picture of government as a threat to private interests. That image remained and has been strengthened in recent years. If we want to think clearly about the choices available to us, we must recapture the sense that government does positive things for us. How can we move forward in recapturing a positive role for government while retaining our sensitivity to the ways in which concentrated power may lead to oppression?

II. TWO VIEWS OF GOVERNMENT

A. SMALL GOVERNMENT

1. LIBERTARIAN INSTITUTIONALISM

We can begin by reframing the debate. Let's start with the prevailing conservative view that the best government is a small government. This worldview is articulated by modern understandings of John Locke¹⁴ captured most successfully in the work of philosopher Robert Nozick.¹⁵ This view suggests that the most important value is liberty and it conceptualizes liberty as the freedom to live one's life according to one's own design, subject only to reasonable limits that are necessary to protect the similar liberty of others.¹⁶ Government regulation sets those limits on our liberty, with the goal of providing us with the maximum liberty possible. Those limits shape the contours of our basic institutions, including the free market, private property, and the family. To promote liberty, we therefore should create the right institutions and let individuals then be free to make their way in a world that is organized by that institutional framework.

The institutions we need are a limited government and laws that set the background rules for operation of a market economy, including laws defining the allocation and definition of property rights, laws providing for efficient enforcement of contracts, laws

14. See generally LOCKE, *supra* note 10 (outlining Locke's philosophy concerning individual liberty).

15. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

16. See CHARLES LARMORE, THE MORALS OF MODERNITY 124 (1996) ("Liberalism does not really equate liberty with license and law with burden. Against such an equation stands, for example, Locke's insistence that 'the end of law is not to abolish or restrain, but to preserve and enlarge freedom . . . where there is no law, there is no freedom.'").

2006] **Equality and Humanity in Property Regimes** 255

regulating actions that cause unreasonable harm to others, and laws regulating family relationships—in short, the rules of property, contracts, torts, and family law that set the basic ground rules for a market economy. If we create the proper institutions and both minimize government intrusion and maximize the sphere of individual liberty, while ensuring equal access to the market economy, then anyone can participate in social and economic life and act to bring herself out of poverty.

This worldview leads to an inexorable conclusion: Once the right institutions are created, whatever amounts of poverty exist are amounts with which we have to live. Once we have defined the right institutions, there is nothing more for government to do. If we have created the right institutions, then the poor should be able to accept personal responsibility to pull themselves up by their own bootstraps. We have created the environment that allows them to do this. Those who remain poor once we have created the right institutions have only themselves to blame. Moreover, anything we do collectively to respond to poverty through governmental action only makes the situation worse. Governmental action to respond to poverty harms the institutions that generate wealth and creates perverse incentives for poor people and thus only hurts the people we are trying to help. If poverty remains after the right institutions are in place, then that is the best we can do; the poverty that remains is the price we pay for living in a civilized society. If individuals still have a desire to help those who are poor, they are free to do so through private charity and religious organizations.

This worldview is often called *laissez-faire*, but that characterization is misleading. While the small government vision is designed to maximize liberty, it does not eschew government regulation; indeed it is premised on the idea that liberty cannot exist without law. A small government is nonetheless a government. A free market is nonetheless governed by rules. Governments, property, markets, and families are institutions, and the small government worldview wants them to exist and to have a certain character. The law imposes the rules that define the institutions. The libertarian conception of a free society is a form of *institutionalism*. The major feature of an institutionalist conception is that it presumes that we can identify the best institutions, including governmental structure, market mechanisms, and family structure, by reference either to an *a priori* view about the contours of a free society or by

reference to the predictable results of different institutional frameworks. Once we have identified those best institutions and set them up, then there is nothing further for government to do. Any poverty we observe is either inevitable or the fault of those who failed to take advantage of the opportunities the institutions provided them.¹⁷ If the institutions are the right ones, then there should be no poverty. If there is poverty, it is not the fault of the institutions, or of the government, or of society as a whole. The institutions can be defined, in some sense, independent of the consequences. Some who hold this view are comfortable living in a society with a fair amount of poverty. Others are worried about it but are resigned to the fact that government can do nothing to help; the only remedy is private charity.

2. THE LIBERTARIAN FANTASY

There are two major flaws in this paradigm. The first flaw in the libertarian framework is that it is premised on the fiction that equal opportunity can exist despite the presence of wide scale inequalities of income, wealth, and social circumstance. Brian Barry, a philosopher at Columbia University, has recently explained the myriad of ways in which unequal starting points in wealth, health, education, and family and social circumstances severely undermine the notion that every child has a fair and equal starting point.¹⁸ Creating equal opportunity in fact would require a great deal more government regulation than libertarians are willing to admit.

The second flaw in the libertarian paradigm is that it presumes that not much government is needed to make the system work. All I can say is that if this were so my property casebook would be a few dozen pages long instead of 1300 pages long. When Czechoslovakia broke from the Soviet Union in 1989, the foreign minister of Czechoslovakia commented that “[i]t was easier to make a revolution than to write 600 to 800 laws to create a market economy.”¹⁹ The libertarian notion of small government suppresses the number and complexity of choices

17. See MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 414 (2001) (“A compassionate society might still be an unjust society It might blame the poor for their plight and fail to blame those who exploit them.”).

18. BARRY, *supra* note 1, at 40-42 (explaining that all children do not enter the race to success with equal opportunities to win).

19. Jiri Dienstbier, *quoted in* William Echikson, *Euphoria Dies Down in Czechoslovakia*, WALL ST. J., Sept. 18, 1990, at A26.

2006] **Equality and Humanity in Property Regimes** 257

that must be made to define the basic framework of a market economy. These choices are embodied in law and public policy, and the *laissez-faire* ideology has always been associated with a lot more government regulation than its adherents are willing to admit.²⁰

Take this example: libertarians are ordinarily strong advocates of property rights, and they do not sufficiently appreciate the dilemma this puts them in. Consider Donald Lamp, the father-in-law of Justice Clarence Thomas. After September 11, he put an American flag outside the balcony of his condominium in a retirement community.²¹ But his condominium association told him to take it down; they had a rule against exterior hangings—no banners, no flags, no wind chimes. When he refused to take down his flag, the national press got wind of the story, and the condominium association backed down, making an exception to the policy for American flags. Every year when I teach this case, I am interested to know what my libertarian students will say about it because I never know what position they will take.

This year I had two such students – both brilliant and articulate. They both favor small government and a maximum range for individual liberty. One argued that we should promote freedom of contract and that when Lamp bought his condominium, he had implicitly promised to abide by the condominium rules promulgated by the condominium association; therefore, he simply did not own the right to put the American flag outside his condominium balcony. It would be paternalistic government regulation, she argued, to refuse to enforce a clear contractual provision that he had voluntarily agreed to when he bought the place. The government should defer to the will of the parties and enforce the contract; no flag on the balcony. But my other libertarian student argued just as forcefully that it would be an oppressive interference with individual liberty and with property rights not to allow a property owner to fly the American flag outside his own home after an attack on the United States. Use of state power to prevent him from doing so at the behest of his neighbors denied his liberty to express his views and to

20. *Seegenerally* RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1997) (arguing for increased autonomy).

21. Tony Mauro, *An Unwelcome Mat for Free Speech*, USA TODAY, Aug. 18, 2004, at 13A.

control his own property. Just as slavery contracts are unenforceable because they attempt to alienate inalienable rights, the condominium declaration could not be legally enforced if it submitted the owner to the tyrannical control of his neighbors. We have no titles of nobility in the United States and no law can give our neighbors the right to act like feudal lords.

The point is not to take a position on this dispute but to emphasize that a society that has strong protection for property has rules of property law that grant owners of property autonomy within the borders of their land, protecting them from being controlled by others, whether those others are prior owners, busybody neighbors, or government bureaucrats. To achieve this degree of autonomy, control, and liberty for owners, we must refuse to enforce contracts that limit what owners can do with their land; one must regulate contracts to ensure that owners are free to act like independent citizens rather than like feudal serfs.

It is possible, in other words, to conceptualize government regulation as liberty-promoting; after all, the prohibition on assault and battery increases our liberty to walk around. Similarly, prohibitions on pollution can be defended as protection for the health and property of others. Regulations can be conceptualized as protections for life, liberty, and property.²² It is perhaps not an exaggeration to say that when libertarians want regulation, they call it “protecting property rights.” But this verbal trick does not change the fact that protection for liberty and property is effected by laws that limit both liberty and property, and, as I have noted, the libertarian view severely underestimates both the number and complexity of those necessary laws. Small government is an idea that has intuitive appeal, but it fails to recognize that regulations are generally designed to limit one person’s freedom to protect another’s freedom. In such cases, the question is not whether government should intervene but on whose behalf it should do so.²³

22. See LARMORE, *supra* note 16, at 124 (“[L]aw does not simply limit freedom, but rather makes it possible.”).

23. See Martha T. McCluskey, *Changing, Not Balancing, the Market: “Economic” Politics and “Social” Programs*, PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY (Clare Dalton ed., forthcoming 2006) (manuscript in possession of author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829264 (last visited May 23, 2006) (explaining the political slant to discussions about efficiency and suggesting alternative ways of conceptualizing who is subsidizing whom and who is externalizing costs on others).

B. DEMOCRACY & SOCIAL JUSTICE

1. DEMOCRATIC PRAGMATISM

What is the alternative to the libertarian, institutionalist view? The competing framework is a form of *democratic pragmatism*.²⁴ This view focuses less on *a priori* assumptions about the best institutions and more on the democratic (small “d”) goal of spreading the benefits of liberty to everyone and focusing on the ability of institutions to achieve that end. The democratic alternative to the libertarian view assumes that no one would choose to be poor. If poverty exists, then by definition, our institutions have failed to promote social justice and more work needs to be done.²⁵ This does not mean social justice advocates assume that a democratic society would be devoid of inequality; rather, they assume that the right institutions would not leave people in situations of desperation or undue want and that a society that treated each person with equal concern and respect would be likely to mitigate vast inequalities of wealth and income to ensure that life circumstances are such that all persons can feel that they matter as much as the next person. This view is associated with John Rawls, who argued that the basic institutions of society cannot be just if they do not protect the interests of those at the bottom of the economic ladder.²⁶

The conflict between these views should not be overstated. Small government advocates generally believe that small government protects the interests of the poor better than do big government intrusive regulation and welfare programs. But what would a libertarian say if it turned out that small

when entitlement claims conflict). See also generally Martha T. McCluskey, *Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657 (1998); Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency,* 8 AM. U.J. GENDER SOC. POL'Y & L. 115 (2000) (both showing that distinctions between efficiency and equity are grounded in political rhetoric not fact or logic).

24. For current interpretations of pragmatism as applied to political theory, see generally LARMORE, *supra* note 16 and ERIC MACGILVRAY, *RECONSTRUCTING PUBLIC REASON* (2004).

25. See IAN SHAPIRO, *THE MORAL FOUNDATIONS OF POLITICS* 108 (2003) (“[I]f the legitimacy of states is tied to the degree that they preserve or undermine freedom, structural as well as transactional freedom should figure in our analyses.”).

26. For detailed discussion of the argument that justice requires equality for all segments of society see generally JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). See also LARMORE, *supra* note 16, at 146 (“I am convinced that the norm of equal respect lies at the basis of Rawls’s own theory of justice.”).

government did not do a good job of protecting the interests of the poor?

In an article in the *New Republic*, Jonathan Chait argued that many conservatives would favor what they see as small government even if it did not promote the best interests of the poor. They would do so, he argued, because promoting liberty and decreasing government regulation is more important to them than promoting the well-being of poor people. Pragmatists, on the other hand, are willing to try market solutions to the problems of the poor; they are more concerned with achieving results and less concerned with prejudging the best institutions to achieve those results.²⁷ I have some sympathy with this way of depicting the current political landscape, but I also think that this way of framing the dispute is somewhat tendentious. I prefer to hold conservatives to their word; I assume they really believe that small government produces better results, at least in the long run. At the same time, Chait is correct that, if conservatives believe that “small government” helps the poor better than “big government,” they should explain why getting rid of Social Security, Medicaid, and Medicare would improve the situation of poor families and children. They should explain why decreasing regulation of mining would better serve the interests of miners and their families. They should explain why Herbert Hoover’s response to the Great Depression was better for people than that of Franklin Delano Roosevelt. If they cannot make such arguments, and back them up with evidence, then we do face the possibility that they are more concerned with promoting a certain picture of “liberty” and “small government” than they are with promoting the well-being of the poor.

Conversely, it is not necessarily true that liberals are always more pragmatic about achieving their ends. Many liberals are loath to use market mechanisms to solve social problems even when evidence indicates that they may play a useful part in achieving liberal goals. The liberals who complained bitterly when President Clinton moved to “end welfare as we know it” had legitimate complaints about the loss of protection for poor families; at the same time, it was not exactly obvious that the prior system was actually serving the best interests of poor families and children, and there was no reason to conclude that

27. Jonathan Chait, *Fact Finders: The Anti-Dogma Dogma*, NEW REPUBLIC, Feb. 28, 2005, at 14.

2006] **Equality and Humanity in Property Regimes** 261

the welfare system as it then existed was the best way to respond to the needs of poor families. Liberals need to face facts as much as conservatives do.²⁸

2. POVERTY & HUMAN FREEDOM

The real debate comes down to this: does the persistence of poverty constitute a serious challenge to the legitimacy of our laws and institutions? Libertarians favor what they call “small government” both because it promotes liberty and because they believe in the long run this is the best way to help the poor. Pragmatists observe the persistence of poverty over time. They either conclude that experience has already disproved the idea that small government will eradicate poverty or they are unwilling to wait for the long run to see that idea through; they view the failure to help the poor right now as a fundamental institutional failure. They do so because they see poverty as deprivation of freedom and a denial of equal concern and respect for persons. Libertarians, on the other hand, view the government regulations designed to alleviate poverty as fundamental assaults on liberty and for that reason as deprivations of freedom and as a denial of equal concern and respect for persons.

This is a contest of values and it is a fundamental contest. Social justice advocates believe that we, as a society, have obligations to spread opportunity and to make it realistically possible for every person to live a decent and comfortable life, even if this means regulating economic life to achieve this goal. They argue for positive liberty, or the ability to achieve one’s goals.²⁹ Libertarians, on the other hand, believe that society has

28. See, e.g., Christopher Jencks, Joseph Swingle & Scott Winship, *Welfare Redux: Back in 1996, We Were Pessimistic About Reform. We Were Wrong. But New Rules Just Pushed Through May Confirm Our Worst Fears*, THE AMERICAN PROSPECT, March 10, 2006, at 36, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=11187> (last visited May 23, 2006) (arguing that the 1996 welfare reform law turned out to hurt poor people much less than liberals feared).

29. See NUSSBAUM, *supra* note 17, at 416.

My own view is that a liberal political society is best advised to describe its basic entitlements as a set of *capabilities*, or opportunities for functioning, in a number of particularly important areas. In other words, such a society should guarantee to all citizens a basic set of opportunities for functioning, in some central areas of human life that are likely to prove important for whatever else the person pursues.

Id. See also LARMORE, *supra* note 16, at 123 (distinguishing between positive and

no such obligation; indeed, they focus on negative liberty, or the right to be free from government regulation. They view government action designed to promote equality as an assault on liberty.

Our political traditions, as they have been interpreted over time, favor the libertarians.³⁰ From the earliest theorists of classical liberalism, we start our analysis from the assumption that the focus should be on the rights of the individual. We assume that individuals are important and that they are equally important. We then ask, in the social contract tradition of Hobbes and Locke, whether individuals acting to further their own well-being would agree to be bound by a common government.³¹ The argument is that they would, but only to the extent that it promotes their self-interest. Hobbes says we agree to obey the Leviathan to save us from violent death and to promote “commodious living.”³² Locke similarly argues that we agree to a social contract to increase our security and to promote industry.³³

The classical strategy is to convince people to obey government and to give up some of their liberty and property (through regulation or taxation) by arguing that this is in their self-interest. This strategy works some of the time. Most people favor zoning law, for example, even though it limits what they can do with their own land because they understand that they

negative liberty); RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, §52.1, at 177 (arguing for positive liberty).

30. But note that the antecedents of current libertarian theory had significant limits to their libertarian instincts. *See, e.g.*, ADAM SMITH, 1 *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 80 (Edwin Cannan ed. 6th ed., Methuen & Co. 1950) (“No society can surely be flourishing . . . of which the far greater part of the members are poor and miserable.”).

31. *See generally* THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed. 1968) (1651) (exploring the origins of human society); LOCKE, *supra* note 10, at (describing the possible reasons why people give up some liberty to form social institutions).

32. HOBBS, *supra* note 31, at 227 (government is instituted “to defend them . . . from the injuries of one another . . . and to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and lived contentedly . . .”). *See also Id.* at 254 (“preservation of life being the end, for which one man becomes subject to another”); *id.* at 188 (“The Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their industry to obtain them.”).

33. LOCKE, *supra* note 10, at 70-73 (explaining that although man is inherently the absolute lord of his own person and things, he remains willing to join a united society “for the mutual preservation of their lives, liberties, and estates.”)

2006] **Equality and Humanity in Property Regimes** 263

benefit more from restrictions on neighboring land than they lose by restrictions on their own land. Some are willing to pay for public schools even though they have no children because they can imagine the consequences to society if we did not have an educated population. Others may be willing to pay taxes to support job training programs that are not provided by the private sector because they can observe the increased crime and insecurity that emerges if many people are locked out of the ability to earn a decent living.

The problem is that recent changes in our economy, our tax system, and our culture have increased inequality in the distribution of both wealth and income in such a way as to undermine the willingness of those with property to share it with the have-nots.³⁴ The rich have enough property to pay for private schools, and if they are not altruistic, they may vote against tax increases to improve the public schools because their own children will not benefit from those expenditures. They can choose to live in gated communities with private police and private roads. They can, in effect, afford a separate peace. Moreover, the triumph of the small government ideology has convinced many people that government regulation and taxation only hurt the poor anyway. This ideology is comforting; it allows people to act in a self-interested manner and remain convinced that they are doing what is best for others at the same time. In addition, the collapse of manufacturing jobs and the increased squeeze on the middle class has put added pressure on the majority of the population, decreasing even further the willingness to respond to the poor.

That is the current state of things. More and more, the haves may be unwilling to do what is necessary to enable the have-nots to obtain the tools necessary to become haves.³⁵ For us to improve the situation of the poor, we need to convince those who have property to be willing to act, not out of self-interest alone, but out of a sense of obligation to those who are locked out of the current system or who are relegated to its outer fringes. We must be able to convince people to suffer short-run costs to

34. See JAMES K. GALBRAITH, *CREATED UNEQUAL: THE CRISIS IN AMERICAN PAY* 3 (1998) ("A high degree of inequality causes the comfortable to disavow the needy.").

35. See SHAPIRO, *supra* note 25, at 34 ("There is, however, no reason to suppose self-interested individual maximizers, of the kind Bentham insists we all are, will ever eschew private benefit in the interests of the general interest.").

obtain long-run benefits. But more than this: the democratic pragmatists are asking those of us who have property to give some of it up when this may not be in our self interest, either in the short or the long run. President John F. Kennedy asked us to consider, not what our country could do for us, but what we could do for our country.³⁶ It has been a long time since we have heard such rhetoric and it is not at all clear that it would fall on receptive ears today. Yet it also appears that an appeal to self-interest is not a strong enough engine to drive allegiance to what we used to call the public interest. It is certainly not sufficient to counter conservative rhetoric that demonizes both government and taxes. The question is how to get out of this conundrum. Why should the rich care about the poor anyway?

C. REFRAMING THE DEBATE

Everyone approaches the world from his or her own perspective. I come at this problem as a scholar of property law. I have the same tendency other scholars do to view all things through the lens of my specialty. I do not think that I am wrong, however, to contend that property lies at the center of the rhetorical dilemma that confronts both conservatives and liberals. Property, after all, is the contested terrain between liberty and regulation. Conservatives think of property as resting on the private side of the equation; the protection of property is the protection of the liberty of owners who seek relief from oppressive government regulation. Yet the protection of property only comes from government; it is the state that enforces trespass laws, that enforces the expectations that arise out of lawful contracts, and that imposes damages when one person takes another person's personal security by negligently harming her body or her property. I have argued that, when libertarians seek government regulation, they call it "protecting property rights." Liberals have the opposite problem; in their desire to promote government regulation, they have no cogent answer to the conservative claim that both regulations and taxation take property rights and interfere with liberty. For both liberals and conservatives, the contested terrain between the realm of liberty and the realm of regulation is taken up by property.

36. PRESIDENT JOHN F. KENNEDY, INAUGURAL ADDRESS, Jan. 20, 1961, *available at* <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/Inaugural+Address+January+20+1961.htm> (last visited May 23, 2006).

2006] **Equality and Humanity in Property Regimes** 265

Hurricane Katrina brought the problem of property to center stage. While the flood devastated properties in areas of the city inhabited by all segments of the population, from the very rich to the very poor, it is the poor who could not leave New Orleans in time because they did not own cars; nor did they have money in their bank accounts that would have allowed them to fly elsewhere and stay in a hotel. The hurricane also brought the connection between property and government regulation into sharper focus. In the conservative mindset we have inherited, we generally think of property rights as limiting government power. Thus, the more government, the less property. But here we saw that government action made property possible—indeed, brought it into existence. It did this by building the canals and the levees that encouraged development in areas in which it would otherwise have been too dangerous to live. Government constructed and paid for the infrastructure that allowed a city to be built and businesses and homes to be placed.

Both liberals and conservatives have raised the issue of whether to rebuild in the same places or to move homes and businesses to safer ground. Environmentalists have asked whether the changes we have made in the area have caused the very problems we now seek to fix. The wisdom of past government actions is now at issue. What is not at issue, however, is the impossibility of responding to the situation without substantial government involvement. The demand for government involvement is widespread and powerful but the rhetoric to support it is absent—killed off by the conservative rhetoric. Yet Katrina reminds us that it is part of the core business of government to make it both possible and safe for people to acquire and benefit from private property. Property is at the center of disputes about rebuilding efforts. Importantly, in my view, the relation between property and poverty is at the center of the center.

We can now define the problem I am interested in more precisely. First, I have argued that our inherited traditions and our reigning ideology teach us to be suspicious of government and to be especially suspicious of government efforts to redistribute property and to aid the poor. At the same time, support for government is deeper and more widespread than we are willing to admit. Libertarians favor a good deal of government regulation and the American public strongly supports many particular regulatory programs. Just recall the public demand for greater

government regulation after the mining disasters in West Virginia; recall the demand for an effective government response to Hurricane Katrina. We like the idea of small government in the abstract but when social problems arise we insist on effective and extensive government institutions designed to solve them.³⁷

Second, in addition to this underlying, perhaps surprising, support for government, it also appears that the American people care about the plight of the poor; they believe that those “who work hard and play by the rules” should have a decent life. They are worried about the loss of good-paying jobs and they want more time with their families. The American people understood that poverty prevented many people from leaving New Orleans and left them vulnerable to the flood waters. They understand that poverty is still a problem, and that a system which does not make it realistically possible for every person to escape from poverty denies that person’s human dignity. In short, they seem to want something to be done about economic hardship but they cannot see a positive role for government in attaining that end.

Here in a nutshell is the problem. We need a better way to think about the positive role of government in social life. We need a better way to think about the relations between government and society, between regulation and liberty, between taxation and property. I also believe we need conceptions of both property and liberty that allow us to see the ways in which poverty denies liberty, and thus the persistence of poverty constitutes a fundamental institutional failure and the eradication of poverty a core governmental concern. These better ways of thinking may then open the door to rational discussion about alternative ways to restore balance to the distribution of income and wealth in our country.

What resources do we have to help us in thinking about the positive role of government in social life and the importance of alleviating poverty? It turns out that we have strong, traditional resources for helping us think through this question. Those resources include law, political theory, philosophy, and religion.

37. This contrast is similar to the contrast between the *idea* of property as absolute and the actual *institution* of property which embodies widespread limitation and regulation. See generally LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003) (discussing this contrast).

III. RESOURCES FOR RECONSTRUCTION

A. PROPERTY LAW: THE INSTITUTIONAL FRAMEWORK OF A FREE & DEMOCRATIC SOCIETY

1. PROPERTY & SOCIAL RELATIONS

Long ago, the legal realists taught us to look at legal rights in terms of relations between persons. They applied this lesson to property, redefining it as a bundle of rights regulating relations among persons regarding control of things.³⁸ This is an easy lesson to forget.

Fifteen years ago, my brother came home to find his house on fire. Luckily, no one was inside. His children were with him and he knew his wife was safe. It was a major fire and a third of the house was completely destroyed. He told me later that, as he stood there, he felt an incredible sense of failure. He felt as if he had not been able to keep his family safe, that he had let them down. Yet in his heart of hearts, he knew, as he was thinking these thoughts, that they were not true. The fire was not his fault; he had not let his family down. He later found out that the fire had been caused by faulty electrical wiring placed in the house by the prior owner many years earlier—a fact of which he could not have been aware.

The fire centered in the back of the house on the second floor just outside the bedroom used by my niece. Her room was completely destroyed. She lost everything she owned—all her clothing, all her stuffed animals, all her books, all her toys, everything that was hers. The rest of the house was severely damaged and many items were unrecoverable.

It took only a few days for my brother and his wife to secure

38. RESTATEMENT OF PROPERTY, introductory note (1936), *reprinted in* A CONCISE RESTATEMENT OF PROPERTY (2001) (“The word ‘property’ is used in this Restatement to denote legal relations between persons with respect to a thing.”). *See also generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (defining legal rights as relations among persons); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (exploring the historical significance of Hohfeld’s view). *See also generally* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000) (defining property as social relations). *But see* Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed. 2001) (criticizing this view).

a trailer safely tucked away in their backyard. That trailer was to be their home for the next year as their house was rebuilt. And then came the fights with the insurance company. His insurance contract guaranteed him replacement cost. Within a short time, the company offered to pay a fixed amount to repair the damage—an amount that my brother believed was only about two-thirds what it would cost to repair the place. Even after he hired an insurance adjuster to help him negotiate with the company, it took many months to reach agreement on the amount the company would pay. The figure they eventually agreed upon was very close to my brother's initial estimate. During that time of negotiation, the insurance company refused to pay anything. My brother tried to get them to pay at least the amount they both agreed was due him; he wanted to use the money to pay the contractor to begin the work of rebuilding. The company refused to pay anything until they had reached agreement on the total amount. Luckily, he had a contractor who was willing to begin work right away without being paid up front. The fight with the insurance company was as painful as the fire in the home.

Yet when my brother tells the story now, he does not talk about the pain. He remembers something else. Before the fire, he thought his security came from the property he had accumulated. And to some extent he was right. He had a job as a family practice doctor in a poor community, he had a house, he had insurance. But the fire put all this in doubt. He still had a job and that was crucial. But his house was gone. His things were gone. And the insurance did not come. He felt as if he were starting from scratch.

But what he says is that something did come; the thing that came was all the people. As he tells the story now, what my brother remembers is the outpouring of support and love that he and his wife and his children received from their family, their friends, the children's school, their synagogue, their neighbors, his patients. When his daughter's classmates found out that she had lost all her stuffed animals, every child in the class brought a new stuffed animal to give her to take home. Her bed in the new trailer was literally covered and piled high with her new animal friends. Family and friends brought furniture, clothing, blankets, food, books, a record player and a television. And they visited. They visited and they kept in touch. My brother thought his security came from things but what he learned is that things can go away; what remained were his relationships with other people.

2006] **Equality and Humanity in Property Regimes** 269

His real security, what really and truly made him safe and protected, were those relationships.

Of course, that's not the end of the story either. It is not as if property was irrelevant to his ability to form those relationships. After all, it was his job that gave him the income to buy the house in the neighborhood that allowed him to form those relationships with his neighbors. It was the property owned by friends and family that enabled us to share what we had with him. It was the insurance that eventually enabled him to rebuild and his job that kept them all going. It was their backyard that allowed them to stay in the same community and the children to continue attending the same school. It was a combination of property rights and social infrastructure that brought his family through this. But most importantly, it was the fact that he was not alone and that others felt moved and even obligated to step forward and share what they had. They did this out of affection, but they also did it because they could easily imagine it happening to them. They did what they would want others to do for them. It turns out that property and social relationships cannot be so easily disentangled.

Consider the fact that the residents of New Orleans who left the city in the wake of the hurricane's devastation all had to go somewhere else. Some had the resources to leave and go to hotels and even to rent or buy property elsewhere. Others moved in with family or friends until their welcome wore out. Still others relied on housing provided by charitable and religious organizations. And those who were served in none of these ways had to depend on governments—local, state, and federal. Indeed, there was widespread agreement that government should step in and be the responder of last resort for those who had no other options. There appeared to be agreement that other cities had to make room for the displaced residents of the Gulf area and New Orleans in particular. This meant that property had to be made available elsewhere, in some way, shape, or form, to provide shelter, food, clothing, medical attention, and other basic services to those who were suddenly bereft of their homes and their communities.³⁹ The ultimate security, in other words, came from

39. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992) (holding that Miami could not arrest homeless people for urinating and sleeping in public when it did not have enough beds in city shelters for the resident homeless population).

government, and government is not an alien presence, an occupying power; in our democratic system, the government is us. The ultimate security for the victims of Hurricane Katrina was other people, acting collectively, through government channels.

Now perhaps one can argue that the tendency of government to step in at the last minute provides poor incentives. It decreases the sense that one needs to plan for oneself and take care of one's own family. In the abstract, it may be that this is true; it is not necessarily the case, however, that the best way to provide appropriate incentives is to withdraw from the emergency management business. Moreover, given the observable suffering that came to those who were not able to leave, it is difficult to believe that those left behind were there only because they had planned badly. It is abundantly evident that the great bulk of those who were left behind stayed because they could not leave; they had no transportation, no resources to buy transportation, and inadequate resources to pay for housing elsewhere. Deregulation would not have solved their problems.

More importantly, even those with resources generally obtained some kind of help from others, especially friends, family, and charitable organizations, as well as government agencies. The help provided by these various social institutions was provided because other people wanted to help, because they believed it was the right thing to do, because they would have wished for such help if they had been in the place of the evacuees. At rock bottom, their security came from a combination of their own efforts and the compassion of others. It was the willingness and the desire of other people to help that provided the ultimate safety net. Suppose they had not been there? Suppose they had not responded? Suppose my brother had just lost his job or his job was wiped out along with his home? Suppose he was alone and not connected with friends and family willing and able to help him? What then? And where does government fit in this picture?

2. PROPERTY, THE FREE MARKET, & REGULATION

The traditional understanding of the relation between property and regulation is that they are in mortal tension with each other. Every regulation appears to be a limitation on property rights and every increase in property rights appears to limit the intrusive power of the state. But this traditional

2006] **Equality and Humanity in Property Regimes** 271

understanding is fatally flawed.⁴⁰ Long ago, one of the great legal realists, Morris Cohen, taught us that all property rights are in fact delegations of sovereign power.⁴¹ After all, the state defines the rules by which property is acquired and the state enforces the rights of owners to exclude non-owners from their land. When an owner wishes to exclude a non-owner from her land, the law of property gives her the power to call on the police to remove the trespasser forcibly from the owner's land. The conferral of a property right simply means that the owner has the right to call on state officials to enforce her state-granted monopoly over the land which is designated her property. The protection of property is therefore by no means merely an act of individual freedom; it is a claim on state power—a claim which is redeemable to limit the liberty of others.

Consider the owner of a Woolworth's department store in the South before 1960. The owner has the power to exclude non-owners from the land and chooses to do so by denying African Americans the privilege of sitting at the lunch counter in the store. A customer enters the store and sits at the counter. The attendant sees the customer's face and asks her to leave; she politely declines. Eventually, the police are called and they come to haul the trespasser off to jail. Now it is clear that this set of property rights gives the owner of the land the freedom to determine who will and who will not enter the store and be served. But it is not fair to say that the situation merely involves protection of the owner's liberty. The owner's liberty to choose whom he will serve is backed up in this instance by the common law of property and the criminal law of trespass that entitle the owner to conscript state officials to forcibly limit the freedom of others. The owner's liberty to exclude is associated with a right to call on state power to control the behavior, and thereby limit the liberty, of others.⁴² Protection of the owner's property rights obviously entails the use of state regulatory power to control the behavior of customers. In other words, property and regulation go together.

Now look at what happened in 1964 with passage of the

40. See generally SINGER, ENTITLEMENT, *supra* note 48 (developing this idea).

41. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927), reprinted in AMERICAN LEGAL REALISM 109 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds. 1993).

42. On the distinction between liberties and rights, see generally Hohfeld, *supra* note 38; Singer, *The Legal Rights Debate*, *supra* note 38.

federal public accommodations law.⁴³ All of a sudden, it became lawful for individuals to enter the Woolworth's department store and demand services regardless of their race. If the owner sought to exclude unwanted patrons, state officials would forcibly protect their right to be there. A store owner who sought the help of the police to remove the unwanted patron would not find a sympathetic ear; rather, an owner who refused to serve customers because of their race could find herself subject to a court order to serve those customers—an order potentially enforceable by contempt of court with penalties that could include fines and incarceration. This new situation may seem to be a regulation of the owner's property rights, depriving her of the power to control access to her land. But of course, from the standpoint of the previously excluded customers, the change is a *deregulatory* one; they are now free to enter the store and seek service without fear of being hauled off to jail.

What does this teach us about the relation between property and regulation? First, ownership of property includes a bundle of rights and it is often the case that some of those rights are limited to protect the legitimate interests of others. In effect, this means that some of those sticks in the bundle are in fact owned by others and not the person we conventionally think of as the owner of the property. Such allocations of the sticks in the bundle are necessary for a property system to function at all, given the fact that many exercises of property rights interfere with or even harm the property and personal rights of others. Second, we can deduce from this observation that property rights are not absolute. They never were and never could be unless one gives all the property rights to a single person who then is free to rule in the way a king or queen rules her domain.

Third, in most disputes about property, there are property claims on both sides. The owner claims a right to exclude, but the customer claims a right to enter the property to acquire personal property in the form of lunch or a sweater or a pair of pants. If the owner has the right to exclude anyone she wishes, then those on the outside cannot come in to purchase property. A property system includes the right of owners to exclude others from their property, but it must include rules that protect the liberty of persons to acquire property and thereby become owners. If the

43. See 42 U.S.C. §§ 2000(a)-2000(a)(6) (2000) (defining prohibitions against discrimination and various remedies).

2006] Equality and Humanity in Property Regimes 273

right to exclude is not subject to judicious limitations, then the ability of non-owners to become owners will be correspondingly limited. The right to become an owner conflicts with the right to exclude. We have here a choice of property rights; either there is a right to exclude or a right to enter for the purpose of purchasing property. Either the owner has the absolute right to exclude or the public has an easement of access to public accommodations without regard to race. Protection of one property right can only exist at the expense of the other.

Now it does not help to step back and call for deregulation. What would that mean in this context? The situation calls for an allocative decision; does the entitlement belong to the store owner or to the patron?⁴⁴ The property right must be allocated in one direction or the other. There is no way for the state to remain uninvolved unless the state disbands itself and reverts to anarchy. A system of private property, by definition, entails state power and governmental regulation to determine to whom property rights are allocated when conflicting claims are made to a particular resource. Indeed, most issues that are described as contests between property and regulation can be redescribed as conflicts among competing property owners.⁴⁵ In such cases, regulation is inevitable. The only question is in whose interest that regulatory power shall be exercised.

3. PROPERTY AS A REGIME

We have seen that property and property law involve both social relations and regulation. We can now complete the picture by focusing on the global effects of individual rules of property law. Under current jurisprudence, property law involves the rules governing the allocation and scope of control over valued resources. When we speak about property, we generally talk about it as an individual right. However, when we do this, we forget that it is a system and not just an individual entitlement.⁴⁶

44. See generally UNDERKUFFLER, *supra* note 37 for a discussion of the distinction between property as a system of rights and property as an institution which involves regulation.

45. See generally SINGER, ENTITLEMENT, *supra* note 38 (analyzing the role of property rights among different segments of society).

46. SINGER, ENTITLEMENT, *supra* note 38, at 146 (emphasizing that "property rights are exercised by individuals who live not in isolation but in society, among other people"). See also LARMORE, *supra* note 16, at 63 ("[T]o the question why we should conduct our lives in this fashion, we can answer in the end only that this is the way of life we hold to, this is where our conscience feels at home.").

I am not just talking about the choice between communism and private property. I am talking about different private property systems; those systems comprise different “social and economic regime[s].”⁴⁷ Consider the systems of private property with which we are familiar. England had a feudal system with lords, vassals, and serfs. The United States once had slavery and company towns. In my childhood, the South was still bound by legally mandated racial segregation. Until very recently South Africa had a system of *apartheid*. What is our system?

The term most generally used for our system is the “free market.” This term, however, has an ideological bent to it. It suggests to even a casual observer that the basic ground rules of our system leave most people free from government regulation most of the time. Limitations on property rights appear as intrusions on both liberty and property. But if we recall our public accommodations example, the picture looks very different. A case involving the question of whether a retail store is a public accommodation seems to be a simple question about one particular property entitlement; do stores have the same obligations that common carriers and innkeepers have to serve the public without unjust discrimination or do they have the power to choose their customers at will?⁴⁸ But the issue involves much more than that. Consider that a society beset by racial prejudice would experience the cumulative effect of many individual decisions not to serve customers because of their race to be functionally identical to a society that mandated racial segregation. This is why the removal of the apartheid laws in South Africa was not sufficient to move that society to a post-apartheid regime.⁴⁹ The removal of regulatory laws that require segregation, like apartheid or Jim Crow laws, does not lead to integration or equal opportunity. Only competing regulatory laws, like the 1964 Civil Rights Act and the 1968 Fair Housing Act, can make it possible for people to acquire property without regard to their race. In a society characterized by racial prejudice, the opportunity to acquire property will not be

47. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, § 16.2, at 56 (discussing the structure of such a regime).

48. For a history of public accommodations law, see generally Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

49. Joseph William Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States*, 12 S. AFR. J. PUB L. 53 (1997).

2006] **Equality and Humanity in Property Regimes** 275

available in the absence of government regulation. These new regulatory laws prohibit owners from refusing to sell property because of the race of the buyer. This means that the individual rules of property law, as well as the choices being made about the rebuilding of New Orleans, are choices not only about property entitlements but about the kind of society we want to create.

Consider the anti-feudal theme in American property law. A little noticed provision of the U.S. Constitution prohibits creating titles of nobility. This clause is little discussed in constitutional law courses but is a fundamental background tenet in property law. The basic rules of property law in the United States are based on a fundamental opposition to feudalism as a property regime and a way of life. Recall that William the Conqueror claimed ownership of all of England and gave out much of the land to his lords who both governed and owned their feudal domains. They in turn subinfeudated, creating a vast social ladder, tying individuals to a certain place in the land and creating a vast network of personal obligations. Such a system severely limited the freedom of individuals to move around, to change jobs, to alter land use patterns, or to develop a national market economy. Over time, a complicated process of law reform pushed power downwards from the lords to those who lived on the land, creating the modern idea of ownership based on the idea of treating each person as an equal with inherent rights to liberty and the freedom to become an owner with the power to determine the use of one's own land.⁵⁰ This modern idea is based on the assumption that there will be many owners and not a few, that the free transfer of land is a basic rule of the system, and that ownership of land is not attached to personal obligations to a particular lord or members of an aristocratic ruling class. We see this modern idea in the Jeffersonian conception of a world of family farms, with independent owners not beholden to lords who would be able to control their lives and their votes.⁵¹ We see it in the homestead laws that sought to transfer public lands to millions of Americans rather than leaving the land in the hands of a few landlords who would rent it out to the masses.⁵²

50. See, e.g., A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* (2d ed. 1986) (detailing the historical development of property law).

51. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* 26-42 (1997) (describing Jefferson's views).

52. See ALAN BRINKLEY, *THE UNFINISHED NATION: A CONCISE HISTORY OF THE*

The “free market” is thus related to the idea of democracy.⁵³ It assumes that there will be many owners and not just a few. This idea of a “property-owning democracy”⁵⁴ was one that had to be invented and it was born only in struggle. Brendan McConville has written an incredibly interesting history of my home state of New Jersey.⁵⁵ He describes a violent hundred year struggle over land and sovereignty in New Jersey. Two sets of land claimants settled in New Jersey on the basis of land grants given by the military governor serving the Duke of York. Those settlers were opposed by two lords named Carteret and Berkeley who were subsequently given all of New Jersey by the Duke of York and who sought to establish two feudal domains by which they would control all the land and receive services (feudal quitrents) from their tenants. A third group of claimants emigrated from Pennsylvania and staked claims around Camden in west New Jersey. And of course, there were the Lenni Lenape Indians who were in the process of being displaced. In effect, there was a long struggle, not only over who would own property in the state, but over what kind of property regime would be established. None of the colonists seemed interested in protecting the rights of the Indians; nor did it occur to them to abolish or fail to establish slavery. However, they did quarrel among themselves not only about the legitimate source of title but whether to establish a property system characterized by widespread ownership and equal status among owners or one characterized by limited ownership and unequal status of lords and tenants. A similar struggle was evident in the nineteenth century in New York as the tenants of the Van Rensselaer family rebelled against the quitrent system.⁵⁶

The attempt to establish feudalism ultimately failed and this

AMERICAN PEOPLE 367 (1993) (describing the homestead laws of 1862).

53. See Jedediah Purdy, *A Freedom-Promoting Approach to Property*, 72 U. CHI. L. REV. 1237, 1243 (2005) (conceptualizing property as a device to promote human freedom). See also generally ROSS ZUCKER, *DEMOCRATIC DISTRIBUTIVE JUSTICE* (2001) (arguing that democracy requires fair distribution of resources).

54. See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 42.3, at 139 (discussing the notion of a “property-owning democracy” in relation to the principles of justice).

55. See generally BRENDAN MCCONVILLE, *THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY* (2003) (outlining the evolution of New Jersey property law).

56. See generally CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS 1839-1865* (2001) (detailing the impact of such rebellions on New York property laws).

2006] **Equality and Humanity in Property Regimes** 277

had a crucial effect on the development of the common law of property in the United States. For example, in the case of *State v. Shack*,⁵⁷ the New Jersey Supreme Court ruled that a farm owner could not prevent a doctor and a legal services lawyer from visiting migrant farmers housed on his land. Those workers had the right to receive visitors in their homes. In defending this result, Chief Justice Joseph Weintraub quoted a report that argued that “no trespass” signs designed to exclude service providers from helping migrant farm workers “represent the last dying remnants of paternalistic behavior.”⁵⁸

Today, we generally use the label “paternalism” to attack regulations of contracts that impose mandatory contract terms; in this derogatory use of the term, paternalism represents an intrusive regulation by the state into the system of free contract that wrongfully presumes that the state knows better than the parties what agreements are in their best interest. In *State v. Shack*, the contract between the farm owner and the workers contained no clause giving them a right to receive visitors in their barracks on his land. Mandating such a term might increase the owner’s costs and decrease the workers’ compensation. A libertarian view of free contract would suggest enforcing the contract the parties made, despite their unequal bargaining power, because it is paternalistic to prevent the workers from entering such a contract if they believe it is in their best interest.⁵⁹

But Chief Justice Weintraub argued that *failing to regulate the contract* (by requiring the farmer to open his farm to such visitors) was a form of paternalism.⁶⁰ How can that be? How can a law freeing the farmer from government regulation be “paternalistic”? The answer is that the court was referring to an older form of paternalism—a form associated with feudalism and plantation slavery. This older form treated the owner of the land as the lord and master of those he allowed to live on his land; the lord ruled his land as he ruled his family and such an owner

57. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

58. *Id.* at 373 (quoting THE REPORT OF THE GOVERNOR’S TASK FORCE ON MIGRANT FARM LABOR 63 (1968)).

59. See Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL’Y 107, 107 (1986) (arguing that “just outcomes” in contract law arise when people are allowed to do what they feel is in their own best interest).

60. *Shack*, 277 A.2d at 373.

claimed the power to determine the rules under which others lived, so to speak, under his roof.⁶¹ The farmer in *State v. Shack* claimed a right to act like a feudal lord, controlling the personal lives of his workers, isolating them from the outside world and determining the conditions of their existence. The failure to regulate the owner in this situation would have delegated state power to the owner in a manner that would have created a type of property regime—a regime that granted owners the power to rule over those who entered their households. I am overstating the case, of course; the workers always had the choice to leave, unlike serfs in feudal England. But the claim nonetheless holds. The ruling in *Shack* was premised on the view that a property regime that allowed farmers to exclude social service providers from their land, isolating their workers, and depriving them of the right to have visitors, would effectively treat those workers as less than equal persons, depriving them of what the court termed “associations customary among our citizens.”⁶² It would, in effect, look too much like feudalism or even slavery.

Lest we think that such considerations only apply to disempowered groups like migrant farm workers, consider the duty to mitigate damages in landlord/tenant law. Until recently, it was the law almost everywhere that landlords have no duty to mitigate damages when a tenant breaches the lease. Consider a law student in Cambridge, Massachusetts who signs a one year lease beginning on September 1 and then gets a summer job in New York City for the following summer. The student asks the landlord for permission to sublet, as the lease requires, but the landlord denies permission, as the lease allows her to do. The tenant then announces that she intends to breach the lease and finds a replacement tenant who is ready, willing and able to rent the apartment for the summer. The landlord refuses to accept the replacement tenant. The student breaches, stops paying rent on May 31, and moves to New York. Under the older law, the landlord could wait until September 1 and then sue the tenant for the back rent for the summer; the landlord had no duty to mitigate damages by looking for a replacement tenant or

61. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 193-221 (2d ed. 1979) (discussing real property in relation to feudal tenure); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 506-21 (5th ed., Little, Brown & Co. 1956) (1929) (discussing feudalism); SIMPSON, *supra* note 50, at 1-24 (describing feudal tenure).

62. *Shack*, 277 A.2d at 374.

2006] **Equality and Humanity in Property Regimes** 279

accepting a subtenant found by the tenant herself. If the landlord is entitled to collect the back rent from the breaching tenant at the end of the summer, then the tenant who wants to accept the job in New York is going to have to pay two rents for the summer if she wishes to accept the job. A tenant who cannot afford to do that would be induced to turn down the job. The reason most states have abolished the old rule is because they believe that tenants should not be tied to the land. Rather, they should have the freedom and autonomy to move to another place, accept a job there, and relinquish old ties, as long as they pay their debts at the place they are leaving. Because the landlord's major legitimate interest is in payment of the rent by a creditworthy tenant, the landlord has no reasonable ground for insisting that the money come from one person rather than another. As long as the landlord can still go after the initial tenant if the replacement tenant does not pay the rent, the landlord should not be able to insist that the tenant choose between leaving the apartment vacant and paying two rents versus giving up the summer job. To constrict the tenant's choices in this way is to exert too much control over the personal life of the tenant without sufficient reason; it is to act in the fashion of a feudal lord rather than a modern landlord. In determining what the rules of property law should be, we must therefore accept the fact that those choices will have systemic effects, and our goal should be to define our property institutions and our property law in a manner that is compatible with our considered judgments about what it means to live in a *free and democratic society that treats each person with equal concern and respect*.⁶³

63. This formulation differs from that used by John Rawls who talks about creating a "democratic society as a fair system of social cooperation between citizens regarded as free and equal." RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 12, at 39. My formulation puts the word "free" as modifier of "democracy," rather than as a modifier of "citizen," not because I am not interested in ensuring that individual citizens have freedom but because freedom is not just a characteristic of individuals but of social relations in general. A "free and democratic society" is one that is composed of free persons but their freedom is understood as relational in character; they obtain freedom from a system of legitimate institutions and law regulating human relationships which result in a social and economic regime that can be characterized as both free and democratic. In this sense, I am using the word "democracy" to characterize social and economic life and not just the political regime.

Ronald Dworkin originated the concept of "equal concern and respect." See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 17 (1996) (stating that "collective decisions [should] be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect"). See also generally

The concept of a property regime is at the center of debate about the future of New Orleans. Government will be intimately involved in this process if for no other reason than the involvement of government in creating the infrastructure that protects the area from flooding. It will be involved in more fundamental ways as well. Governmental choices will have a huge impact on the very shape of the city, the character of its neighborhoods, and the identity of its inhabitants. A consensus seems to be emerging in public discussions that displaced residents should have a right to come home, as well as a right to decide to place down roots elsewhere.⁶⁴ A more complicated issue is whether to rebuild all the previous neighborhoods in the same locations and what form that rebuilding should take. On one hand, it has been argued that rebuilding the most vulnerable neighborhoods will only make the mistakes of the past again, leaving the low-income segments of the population especially vulnerable to flooding.⁶⁵ On the other hand, the failure to rebuild such neighborhoods has the awful cost of losing longstanding communities and social relationships; it may even have a disparate impact based on race and class, leading to the rebuilding of areas of the city dominated by upper class whites. In addition, the normal operation of the market may cause land owners to evict their tenants and sell their property and then seek rezoning of formerly residential land for commercial purposes.

The value choices implicated in all these questions are obvious. Like it or not, government at many levels is intimately involved in setting the ground rules for the reconstruction of the city. While it is true that market forces may determine the ultimate uses of most specific pieces of property, land use regulations and government choices about investment in

RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (analyzing the meaning of liberty and equality in relation to basic human rights). *See also* RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 19.5, at 71 (“The question is: how to express the concern that is most appropriate to the freedom and equality of democratic citizenship?”).

64. *See New Orleans Mayor Asks Residents to Return*, NewsMax.com Wires, Dec. 4, 2005, <http://www.newsmax.com/archives/articles/2005/12/4/105304.shtml> (last visited May 25, 2006) (“Nagin encouraged residents to begin the rebuilding process on their properties and to voice their concerns to legislators.”).

65. Laceywell, *supra* note 8, at 9 (suggesting that we may better respond to the displaced population of New Orleans by “restoring” the city rather than “rebuilding” in place; if the levees are not rebuilt so as to make the most vulnerable areas safe again, residents would be better off being aided in moving to other parts of the city).

2006] **Equality and Humanity in Property Regimes** 281

infrastructure will substantially channel the overall shape of development, as well as the chances that the poor, as well as the rich, will benefit from these redevelopment activities. It appears that substantial governmental assistance will be needed if the poor, as well as the rich, are to return to the city and rebuild communities. Government decisions will help determine whether the racial and class segregation that characterized some of the New Orleans neighborhoods before the flood will reemerge.⁶⁶

The institutionalist view is that we need government to help us with basic infrastructure investment and perhaps minimal zoning law to separate residential and industrial uses. At that point, however, we let the free market take over and see what happens. If poor people move back to the city, fine; if they don't move back, that's fine too. If the city resegregates by race, then that is the natural operation of market forces and choices by individual housing consumers; the government is not to blame and any governmental action to counter this natural pattern of affairs will only deprive individuals of liberty and unnecessarily limit their property rights. The pragmatic view claims that we should worry intensely if the institutions we create to frame social relations deprive the poor of the opportunity to go home and to live in an improved environment where jobs are available to lift oneself out of poverty, neighborhoods are both various and safe, and schools are of high quality. The pragmatic view, in other words, rests on the notion that society (acting through governmental, as well as nongovernmental, institutions) has obligations to act to improve things for the least fortunate and not to rest until that is done.

This view is not alien to American history, institutions, philosophy, or law. The common law itself has long subjected property to intricate rules designed to ensure that one owner does not acquire too much power over others. The homestead laws were designed to spread land ownership widely. The public accommodation and fair housing and employment laws are designed to ensure that individuals are not excluded from

66. Alan Berube & Bruce Katz, *Katrina's Window: Confronting Concentrated Poverty Across America*, BROOKINGS INST. METROPOLITAN POL'Y PROGRAM (Oct. 2005), http://www.brookings.edu/metro/pubs/20051012_concentratedpoverty.htm (last visited May 25, 2006); *New Orleans after the Storm: Lessons from the Past, a Plan for the Future*, BROOKINGS INST. METROPOLITAN POL'Y PROGRAM (Oct. 2005), http://www.brookings.edu/metro/pubs/20051012_neworleans.htm (last visited May 25, 2006).

obtaining access to economic life for invidious reasons. If property is a regime, as well as an individual right, then it must be structured by law to enable the have-nots to become haves.⁶⁷

4. REGULATORY TAKINGS, JUSTIFIED EXPECTATIONS & HURRICANE KATRINA

The interrelation of government regulation and property is so intimate because regulations create the framework of expectations that owners are entitled to have, as much or more so than the private choices made by property owners. Consider what would happen if the federal government decided not to rebuild the levees in New Orleans, or decided that it could only rebuild them to withstand a Category 3 hurricane and then refused to issue flood insurance because the area is subject to more serious hurricanes. What rights would owners of real property in New Orleans have?

We ordinarily imagine property rights to be negative rights, i.e., that owners have the right to be left alone by the government but that they have no right to affirmative action by the government to promote their interests. However, as our trespass examples showed in the context of public accommodations law, even the most basic property rights (such as the right to exclude others) entail enforcement by public officials. This means that owners have the right to public action to protect their right to exclude non-owners from their land; this, in turn, requires that there be public employees to do the protecting (such as local police), and this, in turn, entails the need for taxes to pay their salaries.

In the context of zoning law, an owner who gets a building permit and builds a structure in reliance on applicable land use regulations acquires a *vested right* to maintain the structure at that location.⁶⁸ If a city chose to downzone the property where a business is located, allowing only residential uses on the land, the

67. For a discussion of this issue see generally JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000); SINGER, *ENTITLEMENT*, *supra* note 38, at 143 (explaining that “[p]rivate property is not just an entitlement, it is a regime”).

68. *Stone v. City of Wilton*, 331 N.W.2d 398, 404-05 (Iowa 1983) (holding that a change in zoning cannot be imposed retroactively on a developer who has received a building permit and already spent substantial amounts of money on architectural and construction work for a particular project in reliance on existing zoning regulations and the permit itself).

2006] Equality and Humanity in Property Regimes 283

law requires the prior nonconforming use to be grandfathered in, allowing it to persist despite its incompatibility with the new zoning law. Requiring an owner to tear down an existing structure built in reliance on prior land use regulations would certainly constitute a taking of property requiring just compensation under existing law.⁶⁹ The only possible exception would be if the property is dangerous and the governmental demand to demolish the property is based on a desire to protect the public or residents of the building. Would this exception apply if the federal government refused to allow New Orleans residents to rebuild in low-lying areas of the city?

On one hand, it could be argued that no one has the right to build in a flood plain and that government is well within its rights to regulate or even prohibit construction of property in areas where it is dangerous to live.⁷⁰ This argument, however, falls woefully short in the New Orleans case. The federal government built the levees and issued flood insurance for homes in the New Orleans area.⁷¹ The city zoned the land for residential and business use. In all these ways, the government created reliance interests on the part of those who invested in real estate

69. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (stating that when an owner “invested substantial amounts of money in making improvements” to connect a private lagoon to navigable waters, it would constitute a taking of property to require the owner to allow the public to use the lagoon).

70. Although the Supreme Court remanded in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987), to determine whether a prohibition on rebuilding a church in a flood plain constituted an unconstitutional taking of property, the lower court ultimately found this not to be a taking on the ground that the state was justified in prohibiting construction in an area where it was dangerous to live. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 258 Cal. Rptr. 893 (Ct. App. 1989) (“[I]t is abundantly clear . . . that the avowed purpose of this ordinance was to protect lives and health.”). See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (noting that it would not be a taking to order the destruction of a nuclear power plant after it was constructed once it was discovered that the plant sat atop an earthquake fault).

71. Michelle Delio, *Taming the Wild River*, WIRED, Nov. 8, 2004, <http://www.wired.com/news/roadtrip/riverroad/0,2704,65183,00.html> (last visited May 25, 2006); see also generally ALBERT E. COWDREY, *LAND’S END: A HISTORY OF THE NEW ORLEANS DISTRICT, U.S. ARMY CORPS OF ENGINEERS, AND ITS LIFE LONG BATTLE WITH THE LOWER MISSISSIPPI AND OTHER RIVERS WENDING THEIR WAY TO THE SEA* (1977) (detailing the initiation of the Army Corps of Engineer’s hurricane protection efforts involving the 17th Street and London Avenue Canals). In fact, the Army Corps of Engineers took control of the protection efforts of the 17th Street, London Avenue, and Orleans Avenue Canals after a federal court in the Eastern District of Louisiana enjoined the Army Corps of Engineers from implementing its so called “barrier plan” for Hurricane Protection. *Id.*

in the city. All this governmental expenditure and regulation gave implicit and perhaps even explicit representations that the area was safe to build and live in and that the government would maintain the levees to secure that safety. Even the issuance of flood insurance gave these assurances; if the area was too dangerous for habitation, the government would have refused to insure homes in the area at all. It is true that flood insurance gives a mixed message. On one hand, it suggests the land is subject to damage from flooding and that owners take the risk of flooding by buying property in that area. On the other hand, the insurance serves to induce investment in the area; the presence of insurance protection means that individuals will be more willing to buy and own homes in the area since their financial equity is protected by the insurance. In all these ways (building the levees, issuing the flood insurance, zoning the land for residential purposes), the government induced owners to invest in the low-lying areas of New Orleans. Moreover, government had at least a moral duty to act reasonably to maintain the levees in a non-negligent manner; owners would have expected that the federal government would undertake its work in providing flood control in a reasonable manner.

It also appears that, with enough investment, it would be possible to invest to make the levees stronger and most if not all of the area again safe to live in. Assuming this is the case, would a government choice not to spend that money violate the property rights of the owners? The government might argue that decisions about levels of public funding are political questions and no one has a property right to a certain level of spending. Landowners, however, have a strong case that they acquired vested property rights by investing in reliance on existing regulatory laws and that the government should be estopped from denying that the area is safe for habitation especially when the lack of safety results from the government's decision not to spend enough money to rebuild and maintain the levees that made the land safe and available for development in the first place.

The levees broke because they were built defectively, and the harm to the residents' real estate was caused, not by the hurricane, but by the Army Corps of Engineers.⁷² If owners were

72. See Bill Walsh, *Corps Chief Admits to Design Failure*, TIMES-PICAYUNE, Apr. 6, 2006 at A1 (reporting that the head of the Army Corps of Engineers acknowledged that a design failure resulted in the 17th Street Canal levee failure). Unfortunately,

2006] **Equality and Humanity in Property Regimes** 285

led to believe the area was safe for human habitation, and they relied on these representations, and if it is technologically feasible to rebuild the levees and render the area safe for rebuilding, then a political decision not to rebuild the levees so as to make the area safe for habitation would effectively render the property worthless. In such a case, it would be the government, not nature, that caused the loss of economically viable use of the land.⁷³

Although some cases hold that no taking arises from government negligence, even when that negligence destroys property,⁷⁴ as in the case of New Orleans, other cases have held that government actions that destroy property may constitute takings even if the government did not intend to produce the harm.⁷⁵ The Supreme Court ruled in the 1872 case of *Pumpelly v. Green Bay Co.*,⁷⁶ that permanent flooding of land caused by dam construction constitutes a taking of the affected property which requires compensation. The Court explained that “where real estate is actually invaded by superinduced additions of water,

the evidence continues to grow stronger and stronger that the Corps failed in its responsibility to protect New Orleans from flooding. John Schwartz, *Army Builders Accept Blame Over Flooding*, N.Y. TIMES, June 2, 2006, at A1, A16. See also Cain Burdeau, *Army Corps Takes Blame in Levee’s Failure: Concedes Design Flaws Played Role as Katrina Flooded New Orleans*, BOSTON GLOBE, June 2, 2006, at A2. These new admissions come shortly after a study released by the National Science Foundation (conducted Geotechnical Engineers at the University of California-Berkeley) detailing the specific design defects in both the storm protection canals and levees. For the complete report, see National Science Foundation, Independent Levee Investigation Team Draft Report (2006), available at http://www.ce.berkeley.edu/~new_orleans.

73. See *Lucas*, 505 U.S. at 1009 (examining plaintiff’s claim that South Carolina’s restriction on his right to build on his beachfront property was an unconstitutional taking).

74. See *Thune v. United States*, 41 Fed. Cl. 49, 52 (1998) (holding no taking where fire set by Forest Service that grew out of control and destroyed the plaintiff’s hunting camp after an unexpected change in wind conditions).

75. See *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (a taking may be found when “the effects experienced were the predictable result of the government’s action, and whether the government’s actions were sufficiently substantial to justify a takings remedy”); *Boling v. United States*, 41 Fed. Cl. 674, 680 (1998) (holding that erosion of the plaintiff’s land due to dredging by the Army Corps of Engineers was such a complete invasion of the property “that labeling it anything less than a taking would be nonsensical”); *Berenholz v. United States*, 1 Cl. Ct. 620, 627 (1982) (government’s weakening of a dam which eventually gave way and flooded plaintiff’s property was a taking because “the invasion of property rights was the result of acts the natural and probable consequences of which were to effect such an enduring invasion”).

76. *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1872).

earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”⁷⁷ The most recent authority on this question is the 2005 decision in *Hansen v. United States*,⁷⁸ in which the Federal Claims Court reviewed and attempted to rationalize the test for distinguishing between a noncompensable government “tort” and a compensable “taking” of property. *Hansen* held that a taking may be found by establishing “an unreasonable interference of a property interest by the government that is both substantial and continuous, a showing of legal (or ‘proximate’) causation, and the existence of at least broad authorization for the governmental acts involved.”⁷⁹ While some cases have suggested that the harm must be “foreseeable,” *Hansen* holds (citing *Pumpelly*) that “impos[ing] an absolute requirement of a showing of specific intent foreseeability would not only contravene the plain meaning of the *Takings Clause* which contains no state of mind requirement—but would also permit government to escape its constitutional duty to compensate its citizens for destruction of their property.”⁸⁰

We now have Chief Justice Roberts and Justice Alito on the Supreme Court. They are likely to be strong advocates for the rights of property owners. Ordinarily, one would not think that this would mean that they would support finding constitutional obligations on the state to spend money, even if those

77. *Pumpelly*, 80 U.S. at 181. In *Jackson v. United States*, 230 U.S. 1 (1913), the Supreme Court denied a takings claim against the federal government when levee construction by the United States flooded neighboring lands. The Court held that the federal government’s power over navigable waters gave the United States plenary power to construct any projects it deemed necessary to that purpose and immunized the U.S. from liability for “remote or consequential damages” such as the flooding of neighboring land. *Id.* at 23. *But see* *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (finding a taking when “the [government’s] imposition of the navigational servitude . . . will result in an actual physical invasion of [private property]”). It is unclear, however, how *Jackson* survives *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which held that a total deprivation of all economic value is a per se taking of property unless the owner never had the right to be free from the regulation in the first place. While it is true that the U.S. has the power to regulate navigable waters, it does not follow that there are no limits on any actions the U.S. may take to improve those waters; actions that directly cause flooding on neighboring lands would seem to exceed the scope of any regulatory powers encompassed by the navigational servitude.

78. *Hansen v. United States*, 65 Fed. Cl. 76, 80-81 (2005).

79. *Id.* at 81.

80. *Id.*

2006] **Equality and Humanity in Property Regimes** 287

expenditures are intended to support private property. The claim for government dollars looks like a claim for welfare, and we know that we have no constitutional right to welfare in the United States. But the owners can argue that they are not asking for a gift or a handout; they are asking for the government not to act so as to undermine their reasonable, investment-backed expectations that the city of New Orleans would be habitable.⁸¹ When owners have been induced to invest in reliance on a particular regulatory scheme, it is conventional reasoning that the regulatory permission cannot be rescinded retroactively without paying just compensation. It is also conventional reasoning that an owner who removes lateral support for land and builds a retaining wall to protect neighboring property has a continuing obligation to maintain the wall to protect the neighbor's property.⁸² While there may be no duty to aid a stranger in distress, in the absence of an immunizing statute, a good Samaritan has the duty to act reasonably once she begins to provide assistance. Here the city of New Orleans built the canals, zoned the land for development and granted building permits; then half a century ago, Congress mandated that the federal government, through the Army Corps of Engineers, take over the task of maintaining the levees to ensure against flood damage. In all these ways, the local, state, and federal governments made explicit or implicit representations that those levees were adequate to protect the homes and that they would be maintained. The government might want to imitate Gilda Radner's colorful comic character Emily Litella and say "never mind!" but the constitution may well protect the owners from such a governmental change of mind.

If the federal government could have avoided much (or all) of the harm caused by Hurricane Katrina if it had built the levees and other flood control mechanisms in a non-defective manner, then the harm may be attributable to the government and constitute a taking of property without just compensation. Moreover, a decision not to rebuild public infrastructure to make it safe for people to rebuild their homes in New Orleans might

81. I am indebted to Binford Parker for this idea.

82. *Noone v. Price*, 298 S.E.2d 218, 222 (W. Va. 1982) ("[W]hen an actor who removes natural lateral support substitutes artificial support to replace it, such as a retaining wall, the wall then becomes an incident to and a burden on the land upon which it is constructed, and subsequent owners and possessors have an obligation to maintain it.").

constitute a second unconstitutional taking of their property by depriving the property of any economically viable use. Of course, the courts might very well not interpret the law in this manner and reject one or both of these conclusions. The protection of property rights imposes obligations on government, but this leaves open the task of defining the scope of those obligations. However, it is not a stretch to argue that both the state and federal governments have acted in such a way as to assume obligations to the people of New Orleans that are not merely moral in nature but rooted in positive law.

New Orleans provides a visible, dramatic example of the fact that property and property rights come into existence because of government action that provides the *infrastructure* that makes that property available and secure. Regulations do not necessarily “take” or infringe on property rights; rather, property requires regulation for its very existence and regulations often enhance, rather than diminish the rights and interests of owners.

At the same time, I must acknowledge that there is no positive source of law in our constitutions or our statute books that imposes direct, legally enforceable obligations on us as a society to aid the poor or to mitigate inequality. We can see the impetus there in our legal and political history and we can see how such efforts are consistent with our historical traditions. We also, however, see much in our legal tradition that supports inequality and self-reliance. The question is why we should re-emphasize democratic values whose goal is to spread opportunity and universalize the availability of a decent life. For that, we must turn to our resources that aid us in thinking about fundamental moral and political questions. Philosophy and religion may help us step back to consider what obligations we have to others, especially those who are most vulnerable to being excluded from a comfortable life.

B. PHILOSOPHY & POLITICAL THEORY: REASON, RESPONSIBILITY, & THE SOCIAL CONTRACT

Our philosophic traditions are rich and various. My goal here is simply to help us remember some of the most basic insights we have learned from philosophers and the ways in which those insights support the notion of using government power to spread opportunity and alleviate suffering. I will briefly refer to our traditions of moral reasoning, social contract theory,

2006] **Equality and Humanity in Property Regimes** 289

the conception of equal opportunity, and modern notions of deconstruction and critical legal theory.

1. MORAL REASONING

Where can we find a basis for a sense of obligation? Philosophers have wrestled with this question for a long time. They have conflicting schools of thought, just as legal scholars do; there are utilitarians and consequentialists, Kantian moral duty theorists, Aristotelian virtue ethicists, communitarians, existentialists, and deconstructionists. Without addressing these multiple views in detail, I want simply to emphasize what I see as the most basic foundational insight of moral theory: the idea that we must give reasons for our actions that affect other people.

Philosophers start from the notion that persons have interests and the question is why they should do anything other than look out for themselves. Why do we have any duties to look out for the interests of others? This is obviously an old question. It is the gnawing doubt that Cain must have faced when God asked him, “Where is your brother Abel? אֵי הַבֵּל אַחֶיךָ?”⁸³ Cain, of course, answered by lying: “I do not know, לֹא יָדַעְתִּי” he said. And then in the usual translation, “Am I my brother’s keeper? אֲנֹכִי הֲשֹׁמֵר אֶחָי” The word “keeper” is from the noun form of the Hebrew verb which means “to guard” or to “watch over.” So the question really was: am I obligated to guard my brother, to watch over him? The evasion in the question is obvious. What is striking is the fear at the heart of the question. God knows that Cain has killed Abel; whether Cain knows that God knows is another story. If we assume Cain does know, then what is the meaning of the question? One obligation we might have is not to do harm to others; it seems a greater obligation to attend to their needs and interests beyond not harming them. Cain suggests that if he is obligated to look out for the interests of others, it is a small step from being required not to harm to being required to help, and a small step from that to being required to give himself up entirely to devote himself to the needs of others, thereby neglecting his own needs. What Cain is really asking is this: How can I attend to my own needs if I am constantly being pulled by the needs of others?

The history of moral theory is an attempt to answer this

83. *Genesis [Bereishit]* 4:9, JPS HEBREW-ENGLISH TANAKH (Jewish Publication Society 1999-5759).

question. The starting place is given in the Bible itself. God answers Cain by saying that his brother's blood cries out to God from the ground. But before God says this, God asks Cain a question. "What have you done? מה אשית" Morality starts with a call to justify yourself, to give reasons to others that they would find satisfying—in this case, reasons that would be satisfying to God. This is a pretty exacting standard.

The secular philosophers translate this call by appealing to human reason. Philosophers Christine Korsgaard and T.M. Scanlon have recently published works building on insights developed by Kant;⁸⁴ they define the foundations of morality as the call to give reasons for our actions that could be acceptable to others; they ask if we would accept those reasons if we were in their place.⁸⁵ Charles Larmore similarly argues that individual interests can be defended as legal rights – and moral obligations can become legal ones – only when we can present reasons that others can be expected to accept.⁸⁶

Long ago, Kant suggested the two most important kinds of reasons. He argued that we should treat human beings as ends not means, thereby affirming in secular language the insight that each human being is created in the image of God and is of infinite importance.⁸⁷ He argued that we should adopt principles we could make into maxims or universal laws, thereby affirming a

84. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor trans., ed., Cambridge Univ., 1997) (1785). For a discussion of Kant's philosophy see generally CHRISTINE M. KORSGAARD, ET AL., *THE SOURCES OF NORMATIVITY* (1996); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 4 (1998).

85. See also RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 9.2 at 27-28 (noting the public justifications are "addressed to others who disagree with us" and "appeal[] to beliefs, grounds, and political values it is reasonable for others also to acknowledge"); *id.* § 9.2, at 28 ("For justice as fairness to succeed, it must be acceptable, not only to our own considered convictions, but also to those of others . . .").

86. See LARMORE, *MORALS OF MODERNITY*, *supra* note 16, at 8, 12 (locating moral justification in the human practice of "reflection upon reasons for belief and action" and arguing that "[i]n modern ethics, the expectation of disagreement [on the nature of the good life] has turned attention toward a core morality on which reasonable people . . . can nonetheless agree."). See also *id.* at 96 ("Moral knowledge is . . . best understood as one species of the reflective knowledge of reasons rather than as a kind of perceptual knowledge."). See also generally KORSGAARD, *supra* note 84,; SCANLON, *supra* note 84, at 4. See also RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 6.5, at 17 (arguing that the "principles of justice the parties [in the original position] would agree to . . . would specify the terms of cooperation that we regard—here and now—as fair and supported by the best reasons.") (italics added).

87. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, *supra* note 75, at 41.

2006] **Equality and Humanity in Property Regimes** 291

version of the golden rule that requires us to avoid actions that harm others in ways we would not like if we were in their shoes.⁸⁸

What does the institutionalist, small government advocate say to the poor? She says that we live in a free country that makes it possible to participate in economic life so as to make a living. If you are poor, it is therefore your own choice, your own fault. Now this argument makes sense if it is in fact possible to use self-help to emerge from poverty. If, on the other hand, someone who works hard and plays by the rules may still wind up poor, then this answer is inadequate; it is not an answer one could be expected to accept. I will argue later that it is not always possible for everyone to use self-help to escape poverty and if that is the case, then our institutions are structured in a manner that denies, rather than spreads, opportunity. If this is so, then it is not clear what the libertarian says to those who are locked out of the economic system.

If the libertarian argument is that any government regulation or taxation designed to help the poor is *per se* illegitimate because it infringes on both liberty and property rights, then one must believe that a rational person would rather live destitute in a society with a “small government” than have a minimally decent life in a society that regulates economic life so as to insure against poverty. Given the fact that the libertarian world is not one devoid of government, it is hard to see a categorical objection to using governmental power to ensure that every person can become an owner. The libertarian appeal to liberty rings somewhat hollow. It is reminiscent of the ironic aphorism of Anatole France who wrote that “[t]he law, in its majestic equality, forbids rich and poor alike to sleep under

88. See KORSGAARD, *supra* note 84, at 143, commenting on the reaction one would get from being tormented by a stranger:

I invite you to consider how you would like it if someone did that to you. You realize that you would not merely dislike, it, you would resent it. You would think that the other has a reason to stop, more, that he has an obligation to stop. And that obligation would spring from your own objection to what he does to you. You make yourself an end for others; you make yourself a law to them. But if you are a law to others in so far as you are just human, just *someone*, then the humanity of others is also a law to you. *By making you think these thoughts*, I force you to acknowledge the value of *my* humanity, and I obligate you to act in a way that respects it.

There is an appeal to consistency in this argument; it is meant to remind you of what the value of humanity requires. . . . Of course it's true that . . . the argument would not go through if you failed to see yourself, to identify yourself, as just someone, a person, one person among others who are equally real.

Id.

bridges, beg in the streets, or steal bread.”⁸⁹ Indeed, philosopher Jeremy Waldron has argued that, if we support the institution of private property because it promotes independence and liberty, and if each person is entitled to equal concern and respect in the eyes of the law, then the basic institutions of society must be organized so that every one can become an owner—not just in theory but in reality.⁹⁰

2. SOCIAL CONTRACT THEORY

If we move from moral theory to political theory, the most salient method we find is the idea of the social contract. The most important sources for the American tradition are Thomas Hobbes, John Locke, and John Rawls. Hobbes and Locke start from the premise that individuals are self-interested. They then ask why they might nonetheless agree to obey government. They do so to protect themselves from each other and to create rules of the game that ensure the ability to live together in peace and harmony. By sacrificing some of their liberty, they obtain greater liberty than they could have ever known in the state of nature.⁹¹

John Rawls updates this view by introducing the idea of an ideal setting for the social contract. Instead of imagining individuals bargaining in a state of nature where they are at each others' throats, he imagines a fantastical world in which each person knows enough about human beings and society to be able to imagine the rules they would want to adopt as the basic structure of society but in which they are under a veil of ignorance as to their own personal characteristics and place in that society.⁹² The veil of ignorance is intended to aid in creating

89. ANATOLE FRANCE, *THE RED LILY*, ch. 7 (1894), in *COLUMBIA WORLD OF QUOTATIONS* (1996), available at <http://www.bartleby.com/66/37/22937.html> (last visited May 25, 2006).

90. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 329 (1988) (stating that “people need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person’s private property away from him, and . . . why it is wrong that some individuals should have no private property at all”). See also SINGER, *ENTITLEMENT*, *supra* note 38, at 167-71 (asserting that everyone deserves the right to private property).

91. For further discussion of the idea that humans are willing to give up liberty to achieve more stable social institutions see generally HOBBS, *supra* note 31; LOCKE, *supra* note 10.

92. See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 6, at 14-18 (discussing the social contract and the idea of the “original position”).

2006] **Equality and Humanity in Property Regimes** 293

an impartial point of view.⁹³ What rules would you adopt if you did not know whether you would be rich or poor, male or female, strong or weak, etc.? Rawls concludes that no one would adopt a basic structure of society that would not protect the interests of those at the bottom of the economic ladder.⁹⁴ This view has been criticized in various ways.

One suggestion of the utilitarians is that rational persons would choose to maximize social welfare so that the institutions could then be in a position to redistribute wealth in whatever way was deemed fair. This might benefit those at the bottom who would be worse off in a system that attempted to maximize the well-being of those at the bottom rather than maximizing the wealth of society as a whole. This view depends on the assumption that a society that maximized the total sum of wealth would in fact engage in enough redistribution to ensure the comfort of those at the bottom. But our own society shows that a society can be quite wealthy and be devoid of political support for redistribution. This can occur, as we can readily observe in our own society, because those who are well off believe that anyone can use self-help to escape from poverty. The only way to guarantee that a society that maximizes social welfare distributes its wealth fairly is to ensure that the institutions are obligated to engage in redistribution to aid those at the bottom whose interests are otherwise sacrificed for the benefits of the public. But if this requirement to redistribute property to aid those at the bottom is necessary to make the system acceptable, then Rawls's basic insight still obtains. In an original decision setting under a veil of ignorance, individuals seeking to create "a fair system of cooperation between free and equal persons"⁹⁵ would not be likely to adopt a framework of association that would leave them destitute.⁹⁶

93. SHAPIRO, *supra* note 25, at 83 ("[I]n the social contract tradition . . . a particular type of social arrangement is deemed legitimate on the grounds that freely choosing people would choose it if they were thinking clearly about their interests . . .").

94. For further discussion of Rawls' theories regarding the connection between justice and equality see generally RAWLS, *THEORY OF JUSTICE*, *supra* note 26; RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26.

95. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, at 14.

96. See SHAPIRO, *MORAL FOUNDATIONS*, *supra* note 25, at 126 (arguing that in a wealthy society, "the condition of the poorest segment may be dire. It therefore makes sense to assume that there are 'grave risks' to being the least advantaged, even if the probability of one's ending up in this position is low. Hence the risk-

The pragmatic Rawlsian view is criticized by the institutionalists in a second manner, however. They characterize it as a “patterned” or “substantive” view of justice. Nozick, for example, suggests that Rawls’s view is that the system must result in a certain end result distribution of wealth and income (a “pattern”) and that achieving this result requires taking property from individuals who justly acquired it and hold it, thereby violating their rights.⁹⁷ The institutionalist view, on the other hand, focuses on the process by which individuals acquire property; if that process is just, then the outcomes of the system are just, whatever they happen to be. In a famous example, Nozick argues that when a world class basketball player becomes wealthy because many people will voluntarily pay money to see him play, then he deserves to keep whatever he makes since his property was justly acquired through voluntary transfers.⁹⁸ Any government regulation of market exchanges or taxation of income or wealth to redistribute it to the needy interferes with individual rights by preventing individuals from making choices within the constraints they face and takes property rights from those who justly acquired them. Thus, any government action designed to alleviate poverty is, by its very nature, a violation of individual rights and an interference with both liberty and property.⁹⁹

The pragmatic answer to this argument is to focus on the question of defining what just institutions are in the first place. For one thing, Nozick assumes a just initial distribution of property at the beginning. This is a bit of a problem in American history; one need only recall the displacement of Indian nations, the institution of slavery, the subjugation of the rights of women, and longstanding racial segregation and discrimination, among other things, to question the justice of the origins of property rights in the United States.

Second, voluntariness is a relative proposition. If employers

aversion that is built into [Rawls’s] identification of the standpoint of justice with the standpoint of least advantaged.”).

97. NOZICK, *supra* note 15, at 169-72. See also SHAPIRO, MORAL FOUNDATIONS, *supra* note 25, at 127 (“Nozick’s justice syllogism is thus that if initial conditions are just and subsequent transactions are voluntary, the outcome must be accepted as just.”).

98. NOZICK, *supra* note 15, at 160-64.

99. See SHAPIRO, MORAL FOUNDATIONS, *supra* note 25, at 127-28 (discussing Nozick’s criticism of redistributing marked outcomes when “the initial conditions are just and subsequent transactions are voluntary”).

2006] **Equality and Humanity in Property Regimes** 295

are willing to pay employees wages that are too low to live on, then employees could try to demand higher wages but they have no guarantee they will succeed. Competition may force employers to be stingy, and that impetus will be helped enormously if employers feel entitled to pay as little as possible; if they feel no moral obligation to pay a living wage, then wages will be forced down by competition. Without labor unions to exert a countervailing force and without a legal requirement of an adequate minimum wage, it is perfectly possible for people to work hard and still be poor. Such people either get second jobs at night or on the weekend or supplement their income with help from family members and government grants, or they do without basic necessities, sacrificing their health and the basic comforts of life. As I argued earlier in my exploration of the rules governing property regimes in the United States, protecting the right of employers to pay wages too low to live on comes at the expense of the employees. Although Nozick is correct that government regulation may force a redistribution of property from some to others, he is not right to conclude that such governmentally imposed obligations are wrongful takings of property. We cannot assume that market transactions are voluntary merely because they were entered into without threats of violence.

Ownership of property gives individuals power over others and the normal operations of the marketplace do not always effectively counter that power; indeed, the market may effect the systematic use of power.¹⁰⁰ Remember the power of the farm owner who sought to prevent the migrant farm workers housed on his farm from receiving medical care and legal assistance and entertaining visitors in their homes. Remember the instance of the company town that uses the company's ownership of all the property in town to control the town's government and the private lives of all its citizens. The question is whether an owner can claim to be entitled to exercise that much power over other human beings. Even if one thinks the process by which someone acquired property was just because it followed from a series of voluntary transactions, a resulting imbalance in the distribution of property may create a form of social life that gives some people the power to rule over others.¹⁰¹ This is why the basic institutions

100. See SHAPIRO, MORAL FOUNDATIONS, *supra* note 25, at 129-30 (explaining the change in the power context that comes from an individual accumulating great wealth).

101. See SHAPIRO, MORAL FOUNDATIONS, *supra* note 25, at 109 ("We can recast the

of society must take into account changes over time. A series of voluntary transactions may lead to the concentration of ownership and hence power, thereby undermining our confidence that future transactions can be deemed both voluntary and fair.¹⁰² A just social system requires, in Rawls's formulation, "regulations required to maintain background justice over time for all persons equally."¹⁰³

3. TAKING EQUAL OPPORTUNITY SERIOUSLY

Another way to think about these issues is to take the idea of equal opportunity seriously. Philosopher Brian Barry has recently played out the implications of the unequal circumstances in which people find themselves.¹⁰⁴ Vast inequalities in social circumstances, including access to education, health services, family circumstance, social setting, and inherited wealth have

structural critique of transactional views of freedom by saying that they are myopic: procedural conceptions that lack attention to the contexts within which transactions, such as the exchange of labor-power for a wage, occur.”).

102. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, §13.2, at 44 (“A free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination.”). Rawls explains:

Suppose we begin, as it seems [Locke] does, with the attractive idea that persons' social circumstances and their relations with one another should develop over time in accordance with fair agreements fairly arrived at Now suppose we start with a just initial state in which everyone's possessions are justly held. We then say that when everyone respects persons' rights and duties, as well as the principles for acquiring and transferring property, the succeeding states are also just, no matter how distant in time. Call this an ideal historical process view.

To work out this idea we need an account not only of the just initial state and of fair agreements, but also of just social conditions under which fair agreements are to be reached. Even though the initial state may have been just, and subsequent social conditions may also have been just for some time, the accumulated results of many separate and seemingly fair agreements entered into by individuals and associations are likely over an extended period to undermine the background conditions required for free and fair agreements. Very considerable wealth and property may accumulate in a few hands, and these concentrations are likely to undermine fair equality of opportunity, the fair value of the political liberties, and so on.

. . . .

Unless the basic structure is regulated over time, earlier just distributions of assets of all kinds do not ensure the justice of later distributions, however free and fair particular transactions between individuals and associations may look when viewed locally and apart from background institutions.

Id. §15.1, at 52-53.

103. RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, §15.3, at 54.

104. See generally BARRY, SOCIAL JUSTICE, *supra* note 1 (discussing the impact of inequality on society).

2006] Equality and Humanity in Property Regimes 297

enormous impacts on the ability of individuals to compete in the marketplace.¹⁰⁵ It is becoming more and more the case that social status and wealth are being inherited. This does not mean that poor choices cannot explain some instances of poverty. It does mean that the opportunity to escape from poverty is not equally distributed; it does mean that many people face enormous obstacles to bettering their circumstances; it does mean that the advantages enjoyed by certain segments of the population deprive them of the ability to say that their resulting economic status is wholly the result of their individual efforts. If we recognize the effects on individual opportunity created by the unequal distribution of social and personal circumstances, it is no longer possible to complacently assume that anyone who works hard and plays by the rules can avoid poverty in the United States.

Barry further argues that if our goal is to create real equality of opportunity, then we would need vast changes in our institutions, both public and private. To create equal access to opportunity, we would have to ensure that children had adequate family and social settings in which to grow, as well as adequate healthcare and education. This in turn requires parents who are able to spend time with them and to give them the basic things that middle and upper-income families take for granted. We would go a long way to alleviating poverty if we only took the idea of equal opportunity seriously.¹⁰⁶

4. DECONSTRUCTION, CRITICAL LEGAL THEORY & RESPONSIBILITY

Brian Barry's argument, in effect, uses the institutionalist argument against itself. It takes the institutionalists at their word and then shows how their argument leads to conclusions that are the precise opposite of those they derive from their own assumptions. This argument is a kind of deconstruction; it brings to our awareness an ambiguity in the meaning of the word

105. Barry further argues that poverty must be defined in a relative, not an absolute manner. *See id.* at 173 ("I want to insist . . . that the whole idea of a standard of poverty unrelated to the incomes of others is nonsense.")

106. *See* RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, §13.6, at 47-48 (endorsing the idea that the basic institutions of society must make it possible to ensure "a social minimum providing for the basic needs of all citizens" as a "constitutional essential"). *See also id.*, §13.7, at 49-50 (explaining that the ideal of reciprocity, as well as the conception of persons as free and equal, requires institutions that maximize the well-being of the least advantaged persons).

“opportunity” and an ambiguity in the meaning of the word “equal.” On one reading, equal opportunity means, not merely absence of legal constraint but the ability to take advantage of the opportunities open to individuals in the society. On another reading, Barry argues that it is not the case the individuals are free from constraint merely because they are free to maneuver within existing market frameworks; they are constrained by the unequal distribution of access to property in the first place, including such things as education, health, wealth, and social capital. “Freeing” individuals to take advantage of equal opportunity would therefore require redistributing power; just as liberty must be constrained to promote liberty, property must be regulated to ensure equal opportunity to acquire it.

An alternative insight of deconstruction focuses on the impossibility of achieving the professed goals of promoting justice. Johan van der Walt argues in his recent book, *Law and Sacrifice*, that justice requires that we refuse to accept rationalizations that blind us to the inevitable harms imposed by law.¹⁰⁷ Only if the law maker faces the costs, as well as the benefits, of every law, can justice be done and be seen to be done. The ultimate goal of what van der Walt calls “post-apartheid law” is to remain vigilant and attentive to the effects of law on human beings, especially those on the losing side. Justice, paradoxically, requires recognizing and making visible the inevitable injustices resulting from attempting to create a just legal system. We must acknowledge the “injustice of the justified curtailment of a right.”¹⁰⁸ This, in turn, requires us to be able to justify the effects of law to those on the losing side; this may be an impossible task, but that does not relieve us of the obligation.¹⁰⁹

These insights emerge as well from critical legal theory. If we approach law and justification both systematically and skeptically, we observe that many concepts are both ambiguous and contested, that they may imply conflicting norms, that the norms justifying our existing institutions are both various and contradictory, and that it is difficult to identify clear and noncontradictory decision procedures to reconcile all the conflicting values we care about and principles to which we are

107. See generally JOHAN VAN DER WALT, *LAW AND SACRIFICE* (2005) (exploring the danger stemming from laws made without regard to justice).

108. *Id.* at 15.

109. *Id.*

2006] **Equality and Humanity in Property Regimes** 299

committed.¹¹⁰ As Rawls notes, “we are of divided mind”¹¹¹ In addition, critical legal theory has developed techniques of analysis of law and legal argument that emphasizes that the usual lawyers’ tasks of reconciling and distinguishing cases often generates a field of rules and exceptions, cases that “go both ways,” principles and counter-principles. These techniques allow us to see the ways in which the construction and application of the law governing the market economy requires multiple restrictions on negative liberty to create property and contract rights and requires choices that define the limits of those rights when they conflict with the rights of others.¹¹²

The indeterminacy we observe in our laws and moral and political philosophies does not mean that we are left speechless and unanchored when it comes to making decisions and justifying social and legal choices or in applying existing law. It does mean that we must take responsibility for the inevitable choices we must make and we must be attentive to the results of those choices.¹¹³ We can do this by critical analysis that clarifies the nature of the choices we are making among alternative legal rules and institutions as well as the implications of those rules and institutions in the real world. We can do this as well by telling the story in a different way, using narrative devices to describe social reality in a manner that elucidates moral lessons and enables decision makers to see things that had been obscured by their frameworks of analysis and thereby to empathize with the

110. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997) (discussing conflicting laws and societal norms and the process of resolving those conflicts). See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, §10.2, at 30 for a discussion of similar issues. Rawls points out:

Not only do our considered judgments often differ from those of other persons, but our own judgments are sometimes in conflict with one another. The implications of the judgments we render on one question may be inconsistent or incongruent with those we render on other questions. This point deserves emphasis. Many of our most serious conflicts are conflicts within ourselves. Those who suppose their judgments are always consistent are unreflective or dogmatic; not uncommonly they are ideologues and zealots.

RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, §10.2, at 30.

111. See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, §10.2, at 30. See also *id.* §11.4, at 35 (“To some degree all our concepts, and not only our moral and political concepts, are vague and subject to hard cases. This indeterminacy means that we must rely on judgment and interpretation (and on judgments about interpretations) within some range (not sharply specifiable) where reasonable persons may differ.”).

112. See SINGER, *ENTITLEMENT*, *supra* note 38, at 68 (negative liberty is the concept that “individuals are free to do what they want unless the state regulates their conduct to protect the rights of others”).

113. *Id.*

persons affected by the law. We can do this as well by giving reasons for our proposed solutions to social problems that demonstrate real concern for those who lose as well as those who gain from the institutions we collectively create.¹¹⁴

C. RELIGION: HUMAN DIGNITY & THE GOLDEN RULE

1. THE ROLE OF RELIGION IN PUBLIC JUSTIFICATION

I believe the evidence is overwhelming that it is not universally possible for every person to escape poverty without help. Our economic and social institutions deny equal opportunity by our vast inequalities of wealth, access to health care and adequate education, and social supports necessary to give each child a fair start in life. But even if one believed that this was so, we still face the problem of convincing a skeptic that she has an obligation to submit to taxation and regulation to aid others.

Our social contract tradition tries to suggest that self-interested individuals would accept government regulation because, if they thought about it clearly, they would understand that some amount of government regulation is in their own interest. John Rawls, for example, argues that individuals behind a veil of ignorance as to their personal characteristics would adopt a social and governmental system that protected the interests of the least well off persons.¹¹⁵ They would do so, not out of altruism or saintliness, but because they would recognize that such a system would be the best way to protect their own interests, broadly conceived as the desire to generate “a fair system of cooperation between free and equal persons.”¹¹⁶ And our moral philosophers similarly ask us to imagine what we

114. See generally SINGER, *EDGES OF THE FIELD*, *supra* note 67 for a detailed examination of the intended and actual consequences of social institutions today; see also VAN DER WALT, *LAW AND SACRIFICE*, *supra* note 107, (stating that a post-apartheid theory of law “insists on always keeping the losers alongside the winners”). See also RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, §10.4, at 31 (“The most reasonable political conception for us is the one that best fits all our considered convictions on reflection and organizes them into a coherent view. At any given time, we cannot do better than that.”).

115. For explanation of this idea see generally RAWLS, *THEORY OF JUSTICE*, *supra* note 26. See also SHAPIRO, *MORAL FOUNDATIONS*, *supra* note 25, § 5.3.1, at 125 (discussing Rawls’ argument that “social goods should always be distributed so as to work to everyone’s advantage” and this means that “they should be distributed so as to work to the greatest benefit of the least advantaged in society”).

116. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, § 6.1 at 14.

2006] **Equality and Humanity in Property Regimes** 301

would want if we were in the position of the poor.

But there is something missing in this strategy. Our moral and political theorists ask us to imagine a different world in which we could be suffering the fate of others. The problem is that we live in this world.¹¹⁷ In this world, it is not the case that government regulation and taxation can be accomplished in a manner that is Pareto superior — that improves everyone's lot while harming no one. Political decisions and legal changes almost inevitably hurt some to benefit others. That is why it is not irrational for good people to worry about both regulation and taxation; we want the burdens of government action to be fairly shared but it is inevitable that some will be called on to sacrifice their self-interest for the benefit of others. It may be that moral and political theory could convince them that this is the right thing to do. But it appears to me that more immediate and more powerful motivation is required.¹¹⁸ That motivation has to come from some source that reminds people of what it means to be a human being and that causes us to think about what is most important in life, what matters the most. This brings me to the topic of religion.

Our traditions in law, political theory, and philosophy all counsel us to come up with reasons acceptable to others, especially those who will suffer the consequences of any set of rules and institutions we create. The core question is: what would you want if you were in the other's place? Where have we heard this before? You will recall God's response to Cain's

117.

In the classic case of compassion, one is asked to imagine that the lot of the beggar might become one's own; but frequently that appeal fails . . . because one simply knows (or believes) that it cannot. Knowledge of one's own place makes the judgment of similar possibilities insufficient, unless one adds a robust concern for the well-being of others.

NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 17, at 341.

118. See LERNER, *supra* note 2, at 147 ("Social change requires trampling on the self-perceived interests of the wealthy, most of whom want to keep as much of their money as they can and do with it as they like. Raising their taxes, regulating their corporations, preventing them from outsourcing their factories—these are acts that we would not normally undertake unless we were convinced we had a moral obligation to do so."). See also RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, §7, at 18-19 (noting that a fair scheme of cooperation among free and equal persons could only be created by agreement in the parties making the agreement have "the capacity for a sense of justice" and the "capacity for a conception of the good" or "what is of value in human life" such that they would have "the requisite capacit[y] not only to engage in mutually beneficial social cooperation over a complete life but also to be moved to honor its fair terms for their own sake.").

question about the scope of his duty to his brother. "Where is your brother?" From the beginning, the moral sense prevents us from resting comfortably in the notion that we are entitled to consider our own interests alone. This way of thinking is based on the golden rule: treat others as you would wish to be treated. Where does the golden rule come from?

If we ask this question, we remember that there is another obvious and powerful source for a human sense of obligation to others: religion. Every major religion imposes obligations on individuals "to do justice and love goodness."¹¹⁹ It is the Bible that tells us: "The stranger who resides with you shall be as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I am the Lord your God."¹²⁰ The Bible that is held sacred by most religious persons in the United States contains a commandment from God in Deuteronomy 15:11 to "open your hand to the poor."¹²¹

How can religion be appropriately used to debate legal and political issues? The first amendment's protection for the free exercise of religion and the prohibition on the establishment of religion appear to create a barrier to using religious arguments as a basis for political rhetoric, public obligations, and legal argument. This barrier is welcome because it protects religious freedom and prevents the government from imposing a particular religious faith or practice on individuals. But this barrier may be unwelcome if it prevents religious persons from freely expressing their understanding of right and wrong and the basis for their sense of the obligations that human beings have toward each other. This raises a question: Could religion be a source of obligation in the laws of a free and democratic society?

There has been much discussion recently about the place of religion in the public sphere. Supreme Court appointments hang in the balance, as do presidential elections. Every day in the newspapers we see discussion of abortion, the Ten Commandments in courthouses, the Pledge of Allegiance, the theory of evolution, and the theory of intelligent design. Some wish for a greater place at the table for religious expression in public life while others fear this will lead to the establishment of

119. Micah 6:8, TANAKH: THE HOLY SCRIPTURES: THE NEW JPS TRANSLATION ACCORDING TO THE TRADITIONAL HEBREW TEXT (Jewish Publication Society 1988).

120. *D'varim* [Deuteronomy] 14:27.

121. *D'varim* [Deuteronomy] 15:11.

2006] **Equality and Humanity in Property Regimes** 303

a particular religious tradition in our public laws. Religion, moreover, can be a divisive force or it can be a unifying force; there are religions of exclusion and religions of inclusion; there are religions of blame and religions of love. And what does talk about religion mean for atheists or agnostics or those who are religious but believe that public obligations must rest on public reasons?

I agree with those who want public rhetoric to rest on public justifications.¹²² But this does not necessarily mean that religious and spiritual rhetoric must be banished from public discussion.¹²³ Indeed, I have come to the conclusion, after reviewing our traditions of law, moral theory, and political philosophy, that the only way to make a strong argument that we have obligations to abolish poverty is remind people why we should respond to the

122. See generally MACGILVRAY, RECONSTRUCTING PUBLIC REASON, *supra* note 24; JOHN RAWLS, POLITICAL LIBERALISM (1993) for discussion of pragmatic theories of justification. See also RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, §9, at 26-27 (discussing justification).

123. In recent years, a rich literature has emerged debating the appropriate role of religious arguments in the public sphere. For examples of this debate, see generally ROBERT AUDI, RELIGION IN THE PUBLIC SPHERE (1996); ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS (2000); CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); LERNER, *supra* note 2; RAWLS, POLITICAL LIBERALISM, *supra* note 122, at 240-254; LUCAS SWAINE, THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM (2005); JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT (2005); David S. Caudill, *Pluralism and the Quality of Religious Discourse in Law and Politics*, 6 U. FLA. J.L. & PUB. POL'Y 135 (1994); Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083 (1990).

Without wading into the complicated jurisprudential and political issues in this debate, I accept the idea that arguments in the public sphere designed to persuade those who do not share one's religious views should be framed in ways that reflect public justifications while also accepting the view that religious expression should not be banned entirely from political discourse. The question of the role of religious convictions in law is more complicated, especially when the judicial role is at issue; while I strongly accept the need to separate church and state to avoid establishment of religion, I also agree with those like David Caudill who argue that it is impossible to separate legal reasoning from various forms of faith and fundamental moral commitments. In this article, I use religious discourse to remind people of values they may already hold (which may be based on religious commitments, beliefs or ways of life), while translating those values into arguments that could support reasons for political and legal action that could be acceptable to individuals regardless of their religious identity or commitment.

needs of others. To do this, we must appeal to our most fundamental values. For many people, those values come from religion. Those who do not see themselves as religious, or who reject religion altogether, still have strong intuitions about right and wrong, about what it means to live a good life, about what is true and right about some version of the golden rule. They too have fundamental moral lessons they teach their children. It is those bedrock beliefs, those heartfelt intuitions, that we need to remember.

I believe that the question is not whether religion has a place in public life. Like Jim Wallis and Michael Lerner, I believe the real issue is what kinds of religious arguments have a legitimate place in a free and democratic society that treats each person with equal concern and respect.¹²⁴ This means that certain religious arguments may have a place in public discourse about law while other religious arguments are appropriately made only in settings of conversation and worship among adherents of that religion itself.¹²⁵ Of course, drawing the line is quite problematic; belief in the magic of the free market could be viewed as a faith-based tradition. But the need to translate religious arguments to secular ones is a logical deduction from the premise that our constitution adopts a political regime dedicated to freedom of religion and that this means that more than one religious tradition can exist, that individuals are free to choose what religious tradition they will follow, that they are free to participate in no religious tradition at all. The premise of individual liberty and the prohibition against establishment of religion mean that appeals to principle in the public sphere should be phrased in a manner that speaks to all persons regardless of their religious faith.¹²⁶ This does not mean that religious traditions and principles cannot serve as a source of inspiration for those public principles. It does not mean that

124. See generally LERNER, *LEFT HAND OF GOD*, *supra* note 2 (discussing the role of religion in the law); WALLIS, *supra* note 123 (exploring the connection between law, religion, and social justice).

125. This does not mean that religious persons should be free to state their own beliefs in public. It does mean that there is a difference between efforts to “announce” one’s own view of the good life and efforts to seek “common ground” with others who have different visions of the good life. LARMORE, *MORALS OF MODERNITY*, *supra* note 16, at 134-36.

126. See LARMORE, *MORALS OF MODERNITY*, *supra* note 16, at 135 (“[P]eople should respond to points of disagreement by retreating to neutral ground, to the beliefs they still share”).

2006] **Equality and Humanity in Property Regimes** 305

religious persons must refuse to use religious imagery in developing public reasons. It does mean, in Jim Wallis's words, that religious appeals in the public sphere must be "welcoming, inclusive, and inviting to all who care[] about moral, spiritual, or religious values."¹²⁷ They must be phrased in a manner that speaks to anyone, including those who do not share that religious tradition. In Wallis's felicitous phrase, they must "persuade" and not merely "pronounce."¹²⁸ As John Rawls explains, "we try to appeal only to principles and values each citizen can endorse."¹²⁹

For example, it is unacceptably sectarian for a public official to argue for a particular legal rule on the ground that those who ignore this rule violate the word of God. On the other hand, it should be perfectly acceptable for citizens to explain the sources of their beliefs in a particular tradition and then use that tradition to generate principles that could be adopted by a legislature or courts in a society that does not adhere to that particular religious tradition.¹³⁰ Based on sincere religious beliefs, some people have asserted that Hurricane Katrina represented God's punishment of the inhabitants of New Orleans for the same sins exhibited by the inhabitants of Sodom and Gomorrah.¹³¹ One church in Tyler, Texas put up a sign after Hurricane Katrina that read: "The big easy is the modern day Sodom and Gomorrah."¹³²

127. WALLIS, *supra* note 123, at xiv (explaining Martin Luther King, Jr.'s use of religious insights in the public sphere). *Accord*, LARMORE, *MORALS OF MODERNITY*, *supra* note 16, at 13 (arguing that the ideal of equal respect requires acceptance of the fact that "reasonable people tend naturally to disagree about the good life" and that this insight "impelled the liberal tradition to seek the rules of political life within a core morality all may affirm").

128. WALLIS, *supra* note 123 at xiv (explaining Martin Luther King, Jr.'s use of religious insights in the public sphere).

129. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 26, §12.3, at 41.

130. *See id.* at §26.2, at 90 (arguing that people can discuss their "reasonable comprehensive doctrines" in public to share the source of their views but that "the duty of civility requires us in due course to make our case for the legislation and public policies we support in terms of public reasons").

131. *See Katrina: God's Warning Against Decadence*, Kingdom Baptist Church Web Posting, <http://www.kingdombaptist.org/katrina3.cfm> (last visited May 30, 2006) (describing the Bible passages that purportedly warned of hurricanes such as Katrina and theorizing that New Orleans was hit because of the lifestyle of its inhabitants).

132. Cathleen Falsani, *Pastor's Sign Rubs Salt in Wounds of Downtrodden*, CHICAGO SUN-TIMES, Sept. 16, 2005, at 44. Dr. Wiley Bennett, pastor of Woodland Hills Baptist Church, explained that New Orleans was a "wicked city" and explained the sign to a newspaper reporter in the following way:

What I was trying to do was point out that the wickedness of the city of New Orleans brought a hand of judgment on that city. It was never put up there with

The sins often associated with Sodom and Gomorrah are homosexuality and fornication.¹³³ This kind of argument is appropriate for a religious leader to make in the context of elaborating the views of the religion. But it is not the kind of argument that speaks to those who are not already adherents of the particular religion. The argument that God opposes certain practices invites religious dispute about the existence of God and what God wants. It is difficult to translate such views into the kind of religious argument that is appropriate to debate about politics in the public sphere. As Jim Wallis explained, “pronouncing” certain activity as against the word of God or prohibited in the Bible does not give a sufficient reason for those who do not believe in God or so interpret the Bible or adhere to the same foundational book or any book at all. It also invites religious debate about which Bible is sacred and what parts of it to enforce literally and which should be interpreted only metaphorically.

Religious traditions contain precepts, laws, parables, stories, and world views. The sharing of the particulars of a religious tradition may be appropriate to support secular obligations when those traditions can lead to principles that are acceptable from a public point of view¹³⁴ and can provide the emotional and moral context for considering what obligations we have. Parables are especially translatable across religions and to nonreligious persons because they are stories that carry a moral message. In that light, I want now to tell some stories that might help us think about the obligations that we have in responding to the flood in New Orleans. I will do this by discussing a few of the teachings of the Jewish tradition on the meaning of the Flood in the Bible and the destruction of Sodom and Gomorrah. This analysis will reveal some of the central moral lessons that

the intention of saying there are no good people in the city of New Orleans. That was a misunderstanding. People took it wrong.

Cathleen Falsani, *Pastor's Sign Rubs Salt in Wounds of Downtrodden*, CHICAGO SUN-TIMES, Sept. 16, 2005, at 44.

133.

Without the intervention of Katrina, the weekend would have seen the summit, or nadir, of the annual 'Southern Decadence', a six-day festival of fetishism, sadism, promiscuity, indecency, obscenity and all the other tawdry aspects of homosexual life, which was down to run from Wednesday through to Monday.

Purity Comes to New Orleans, Christian Voice Web Posting, Sept. 13, 2005, <http://www.christianvoice.org.uk/Press/press010.html> (last visited May 30, 2006).

134. For a discussion of these issues see generally MACGILVRAY, RECONSTRUCTING PUBLIC REASON, *supra* note 24; RAWLS, POLITICAL LIBERALISM, *supra* note 122.

2006] **Equality and Humanity in Property Regimes** 307

traditional Jewish teachers have gleaned from these stories.

2. AFTER THE FLOOD: WHAT THE TORAH TEACHES US

a. Human Dignity: Infinite Importance of Each Person

It is a bedrock principle of Judaism that human beings are “created in the image of God” (*b'tzelem elohim* בְּצֶלֶם אֱלֹהִים) (Genesis [*Bereishit*] 1:27).¹³⁵ This means that each individual is of infinite importance. It means that we are capable of creation as God created the world. It means that we have free will to choose between good and evil. It means that we each have unique insights, capabilities, experiences, joys and sorrows. What happens to each person matters; how each person lives matters. The rabbis have taught us that if one kills a human being, it is as if one has destroyed an entire universe.¹³⁶ Laurie Anderson captured this understanding of the individual when she sang: “when my father died, it was like a whole library burned down.”¹³⁷ The idea that each person is created in the image of God is one of the major sources of the Western liberal tradition that counts the individual to be of supreme importance. The closest secular language to capture this insight is the recognition of *human dignity* or the *humanity* of each person.

As I noted earlier, some Christian commentators have seen the New Orleans flood as divine punishment for homosexuality and fornication. The Jewish tradition reads the Sodom story very differently.¹³⁸ To understand this, we have to go back to the first Biblical destruction of the world in the Flood.¹³⁹

The *Torah* says at Genesis (*Bereishit*) 6:11 that God destroyed the world because it was “corrupt” (*vatishakhet* וַתִּשְׁחָךְ) and filled with *khamas* חַמָּס. The word *khamas* is variously

135. RABBI JONATHAN SACKS, *TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY* 10 (2005).

136. MISHNAH, SANHEDRIN 4: 5.

137. Laurie Anderson, *World Without End*, on BRIGHT RED (Warner Brothers Records 1994).

138. See LERNER, *supra* note 2, at 218 (“The Talmudic rabbis tell us that the sin of Sodom was not sexual licentiousness but the failure to welcome strangers and provide the homeless with safety and security.”).

139. The following discussion is largely taken from my book, JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000), and is more fully developed there.

translated as “violence,”¹⁴⁰ “lawlessness,”¹⁴¹ “wrongdoing,”¹⁴² or “outrage.”¹⁴³ This wrongdoing was so horrible that God “was sorry/that he had made humankind on earth,/and it pained his heart.”¹⁴⁴ With all the evil doings one can observe in human history, what evil could be so terrible that it would make God regret having created human beings in the first place? What was so terrible that it “pain[ed] the heart of God”?

Rashi,¹⁴⁵ the great medieval commentator on the *Torah*, interprets the first reason for the destruction of the world—“corruption”—as “lewdness and idolatry.”¹⁴⁶ Sexual sin and idolatry led to “indiscriminate punishment [which] kills innocent and guilty alike.”¹⁴⁷ Rashi interprets these sins as having such drastic consequences as to bring a flood—a form of punishment that ignores justice, that punishes “good and bad” alike.¹⁴⁸ Avivah Gottlieb Zornberg suggests that “both sexual sins and idolatry may seem to be ‘generous’ sins. In them, human beings often experience and express a yearning to transcend the self, to relate to the other.”¹⁴⁹ Why would sexual sin and idolatry justify destroying everyone in the world?

The answer may lie in the second reason for the destruction of humanity: *khamas* חמס. Rashi interprets *khamas*—violence—

140. *Genesis (Bereishit) 6:11*, in CHUMASH, WITH TARGUM ONKELOS, HAPHTAROTH AND RASHI’S COMMENTARY (Silbermann Family, Rabbi A.M. Silberman ed. 1934/5745); THE TORAH: THE FIVE BOOKS OF MOSES (Jewish Publication Society, 3d ed. 1992).

141. *Genesis (Bereishit) 6:11*, THE TORAH: A MODERN COMMENTARY (Union of American Hebrew Congregations, W. Gunther Plaut ed., 1981).

142. *Genesis (Bereishit) 6:11*, THE FIVE BOOKS OF MOSES (Schocken Books, Everett Fox, trans., 1995).

143. *Genesis (Bereishit) 6:11*, GENESIS: TRANSLATION AND COMMENTARY (W. W. Norton & Co., Robert Alter trans., 1996).

144. *Genesis (Bereishit) 6:6*, in THE FIVE BOOKS OF MOSES (Schocken Books, Everett Fox, trans., 1995).

145. Rashi is Rabbi Schlomo Yitzkhaki (1040–1105), generally understood as the greatest commentator on the *Torah*.

146. Rashi, *Commentary to Genesis 6:11*, in CHUMASH, WITH TARGUM ONKELOS, HAPHTAROTH AND RASHI’S COMMENTARY 28 (Silbermann Family, Rabbi A.M. Silberman ed. 1934/5745).

147. CHUMASH, WITH TARGUM ONKELOS, HAPHTAROTH AND RASHI’S COMMENTARY 28 (Silbermann Family, Rabbi A.M. Silberman ed. 1934/5745); AVIVAH GOTTLIEB ZORNBERG, GENESIS: THE BEGINNING OF DESIRE 51 (Philadelphia, Jewish Pub. Society, 5755/1995) (quoting Rashi).

148. *Id.*

149. ZORNBERG, GENESIS, *supra* note 146, at 51.

2006] **Equality and Humanity in Property Regimes** 309

as meaning the sin of “robbery.”¹⁵⁰ Other rabbis agree with him.¹⁵¹ Tradition has it that sexual sin and idolatry were not enough to result in the Flood. Rashi writes that the “divine decree was sealed against them *only because of robbery*.”¹⁵² Although sexual sin and idolatry brought “total indiscriminate destruction” to the world, “it is only because of robbery, disrespect for private property, that the edicts are signed and sealed.”¹⁵³ Why would Rashi identify robbery—the violent seizure of property—as the straw that broke the camel’s back, the mark of a world that could not be redeemed?

The midrashic commentary (the commentary of the rabbis) on the sexuality of the generation of the Flood emphasizes its “rapacious self-assertion.”¹⁵⁴ “The divine beings saw how beautiful the daughters of men were and took wives from among those that pleased them.” (Genesis/*Bereishit* 6:2). They “took.” Here is a clue to the relation between sexual sin and robbery; putting these two phenomena together suggests rape. This kind of sexuality is “not an act of love, but an act of robbery.”¹⁵⁵ Zornberg explains:

The essential paradigmatic act of sexual sin is thus an act of rapacious self-assertion, which sweeps away all other ‘worlds,’ all other selves. When Rashi says that the verdict against the Flood generation was sealed only because of the sin of *robbery*, we can understand him to be describing the *nature* of the prevailing sexual fantasy (and idolatrous fantasy) of the period. This is a fantasy in which self swells to fill all worlds, a colonial expansionism that radically denies the existence of other worlds of self and culture. ‘Either me or you . . .’ Essentially, this is a sexuality of cruelty, not of erotic relationship. It is a ‘pursuit of ecstasy which necessarily excludes attention to other people.’ At base it is, to use [Richard] Rorty’s term, ‘a lack of curiosity.’¹⁵⁶

Robbery is used here as the mark of a lack of curiosity about

150. Rashi, *Commentary to Genesis* 6:13, *supra* note 145, at 28.

151. MEIR TAMARI, *THE CHALLENGE OF WEALTH: A JEWISH PERSPECTIVE ON EARNING AND SPENDING MONEY* 36 (1995).

152. ZORNBERG, *GENESIS*, *supra* note 146, at 51 (emphasis added); CHUMASH, *supra* note 146, at 28.

153. ZORNBERG, *GENESIS*, *supra* note 146, at 51.

154. *Id.* at 52.

155. *Id.*

156. ZORNBERG, *GENESIS*, *supra* note 146, at 52–53.

the needs of the other. It is a willingness to take, and to take violently. It ignores the other as a human being, as a person created in the image of God. It aligns with idolatry in the sense that the robber assumes that he can act without being observed by the sleepless eyes of God and that the person who is being violated is not due the respect, the care, the dignity one would give a being through whose eyes the divine spark shines. It is idolatrous in the sense that the perpetrator worships himself and thereby violates the boundaries of others.

Zornberg notes that after the Flood, Noah spends more than seven months shut up inside the Ark. Why? Why does God make him spend this time shut up with his family and the animals? What is he doing? The rabbis say that Noah was learning the feeding schedules of the animals.¹⁵⁷ The feeding schedules of the animals? Why is this the important thing he must learn? What is going on?

Zornberg notes that when God tells Noah everyone will be swept away but him and his family, Noah does not question, he does not protest, he does not speak up for the innocents who will be destroyed along with the guilty. Some interpretations assume that Noah was the only righteous man in his generation, but Rashi, and other scholars, presume the opposite. The flood sweeps away everything indiscriminately in its path—good and bad alike. When God tells Abraham the plan to destroy Sodom (*Sedom*) and Gomorrah (*Amorah*), Abraham protests and speaks up for the innocent who may suffer. Abraham represents a more developed state of moral consciousness, demonstrating concern for the other, while Noah is content if his family is saved. He does not speak up for others.

The experience in the Ark, the long confinement, according to the rabbis, is a seminar in the moral consciousness that the generation of the Flood lacked—an ability to attend to the needs and realities of others. The “righteous” person is defined by the “capacity to nurture the needy.”¹⁵⁸ Learning to feed the animals what they need when they need it “becomes a year-long workshop in the kindness that [Richard] Rorty defined as ‘curiosity.’”¹⁵⁹ The “knowing of need is the highest measure of that curious, tender

157. ZORNBERG, GENESIS, *supra* note 146, at 41, 59–64.

158. *Id.* at 60–61.

159. *Id.* at 61.

2006] **Equality and Humanity in Property Regimes** 311

concern that characterizes God and God-like man.”¹⁶⁰

We have come full circle from robbery—protection for property—to kindness—attention to the needs of others. What is the message of the Flood story? Is it about protection of the rights of the owner or protection of the needy? The rabbinic interpretation unites these principles; it does not see them as contradictory. In the Jewish tradition, the poor have claims on the property of the rich. A law that requires the rich to share what they have with the needy is not a taking of the property of the rich; rather, it is the failure of the rich to ensure basic necessities for the poor that robs them of what they own. Robbery, in the rabbinic interpretation is the failure to treat others as beings created in the image of God. The sin of the generation of the Flood was the inability to see other people *as people*, as *human beings* with innate and indeed infinite worth, to see them, in Kant’s words, as ends rather than means.¹⁶¹

b. Equality: Each Person Matters

It turns out that this sin of the Flood generation was the same as the sin of Sodom. Zornberg notes that the destruction of Sodom similarly revolved around the sins of rape and robbery. Two travelers come to Sodom, and Lot takes them in and gives them food and shelter.¹⁶² The men of Sodom come and threaten them with rape in an act of aggression against both the travelers and against Lot himself for giving them shelter and food. The sexual sin in Sodom is not sodomy, as is commonly believed, but rape, and it is seen by the rabbis as a particularly evil form of rape: it is the rape of strangers, travelers, visitors to Sodom, far from home, far from family, with no place to sleep except in the homes of strangers, people who are peculiarly vulnerable. The robbery in Sodom involved cruelty to the vulnerable—both a failure of hospitality to strangers and a lack of concern for the poor. The prophet Ezekiel identifies the sin of Sodom as

160. ZORNBERG, GENESIS, *supra* note 146, at 61.

161. KANT, GROUNDWORK, *supra* note 84, at 41 (“For all rational beings stand under the *law* that each of them is to treat himself and all others *never merely as means* but always *at the same time as ends in themselves*.”). See also LARMORE, MORALS OF MODERNITY, *supra* note 16, at 136 (stating that “we should never treat other persons solely as means, as mere instruments of our will; on the contrary, people should always be treated also as ends, as persons in their own right”).

162. Genesis (*Bereishit*) 19:1-3, THE FIVE BOOKS OF MOSES (Schocken Books, Everett Fox, trans., 1995).

“arrogance.” “She and her daughters had plenty of bread and untroubled tranquility; yet she did not support [literally, hold the hand] of the poor and the needy.” (Ezekiel 16:49). The men of Sodom were furious with Lot for sharing what he had with the strangers and inviting them into the community and into his home.

As Rashi explains, the men of Sodom did not see the poor or strangers as human beings at all. Lot asks the men of Sodom to “do nothing with these men, since after all, they came under the shelter of my roof (Leviticus [*Vayikra*] 19:8). But the men replied “Step back out of the way!” (Leviticus [*Vayikra*] 19:9). Rashi interprets this statement as meaning that Lot should distance himself from the men of Sodom. Rashi explains: “It is a contemptuous way of saying, ‘We are not considering you at all.’”¹⁶³

Sodom had the same blindness as the generation of the Flood. The rabbis were confused, however, by God’s decision to destroy the cities. Recall that God brought the rainbow after the Flood to represent God’s promise not to destroy the world again because of the sins of human beings; in the future God would give people the chance to redeem themselves. Destroying two cities seemed to contradict this promise. To explain the discrepancy – to reconcile the two cases, as we lawyers say – the rabbis believed that the people of Sodom had to have been really, really bad, to have committed wrongs that simply could not be forgiven. What sins might those be? Here is one story the midrash tells us about the people of Sodom:

For it once happened that two [young women] went down to draw water from a well. Said one to the other, ‘Why are you so pale?’ ‘We have no more food left and are ready to die,’ [she replied.] What did she do? She filled her pitcher with flour and they exchanged [their pitchers], each taking the other’s. When they [the Sodomites] discovered this, they took and burnt her.¹⁶⁴

Not only did Sodom fail to share what it had with the poor but it affirmatively prohibited the haves from sharing with the

163. BEREISHIS: THE METSUDAH CHUMASH/RASHI, *Vayikra* 19:9, at 195 (Rabbi Avrohom Davis ed. 1998).

164. GENESIS I, MIDRASH RABAH, *Vayera* 49:6, at 424-25 (Soncino ed., Rabbi Dr. H. Freedman trans. 1983).

2006] **Equality and Humanity in Property Regimes** 313

have-nots. Lot's sin, according to the men of Sodom, was to be hospitable. The sin of the Sodomites, according to Jewish tradition, was the failure to treat the most vulnerable persons as human beings of equal and infinite importance.

When the people of Sodom saw the travelers in Lot's home, they saw them as strangers, as outsiders to the community, as leeches who would take the wealth of Sodom from them by begging for charity. They did not see them as brothers or even as human beings. They did not realize the true nature of these visitors. They were not men, as they appeared, but angels. In Hebrew, the word for angel is *mal'ach* (מלאך) and it means "messenger of God." The two messengers of God who visited Lot were two of the angels who had previously visited Abraham in his tent; both Abraham and Sarah and Lot all showed them the proper hospitality. The moral of these stories—one that is familiar to Christians—is that, when one sees a human being, one is supposed to recognize a person created in the image of God. Sodom did not understand the infinite importance of human beings and it did not understand that *each* person has that importance. The Bible teaches us an important lesson about equality. It teaches us that when we see a person, we should see a human being and when we see a human being we should see a messenger of God.¹⁶⁵ The Bible teaches that we should see everyone this way—especially strangers, the homeless, and the poor. This is just what the people of Sodom did not do.

The word "stranger" alone appears at least one hundred times in the *Torah* as we are repeatedly commanded to care for the stranger (the sojourner, the homeless one). "The stranger who resides with you shall be as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I am the Lord your God."¹⁶⁶ This insight was carried over by Jesus when he preached that each person is precious in the eyes of God; "just as you did not do it to one of the least of these, you did not do it to me."¹⁶⁷ Jim Wallis notes: "Jesus is here asking, 'How much do you love me? I'll know how much you love me by how you love those who are the most vulnerable.'"¹⁶⁸

165. The "men" who appeared to both Abraham and Lot turned out to be angels.

166. *Deuteronomy (D'varim)* 14:27.

167. *Matthew* 25:45 (quoted in JIM WALLIS, *THE SOUL OF POLITICS: BEYOND "RELIGIOUS RIGHT" AND "SECULAR LEFT"* 83 (1995)).

168. WALLIS, *supra* note 167, at 83.

c. Responsibility: The Parable of the Marked Money

What does this learning about humanity and equality teach us about property? We have obligations to ensure that each person (especially those who are the most vulnerable) has sufficient means for a decent life, and we must avoid cruelty to those who are in dire straits by withholding necessities, making them feel guilty or humiliated by the need to rely on others, or pretending to make a decent life available to them when our institutions have not in fact made that possible.

Those who have property have fundamental obligations to those who have nothing. The Jewish tradition bases this obligation, not only on a series of commandments from God, but on the insight that each person is created in God's image and entitled to be treated with dignity. It is also based on the fundamental moral principle that we should not treat others as we would wish not to be treated. Philosophers have generalized this principle and related it to human reason; if you were setting up a society based on a set of institutions and rules, would you adopt a framework that would allow poverty to exist, not knowing whether you would be in the position of the rich or the poor?¹⁶⁹ The Rawlsian question suggests its own answer. No one chooses to be poor, and if this is true, no one would choose an institutional framework that would result in avoidable poverty.¹⁷⁰ Of course, the social goal of avoiding poverty must be matched with the goal of providing individual liberty. The question is whether liberty, as an ideal, includes the liberty to ignore the existence of poverty. It would do so only if one could imagine that it is moral to remain indifferent to human suffering or to treat others who suffer as not worthy of human dignity. Neither our religious traditions, nor our philosophical traditions, nor our political traditions allow us to view others as undeserving of equal concern and respect.¹⁷¹

If this is so, it means that we must adopt and construct

169. See NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 17, at 412-13 (“[M]iddle-class parents typically reveal in their own lives the belief that young children should not be hungry or neglected, that they should have the basic necessities of life provided to them so that they can develop their agency richly and fully.”).

170. See *id.* at 405 (“Compassion requires the judgment that there are serious bad things that happen to others through no fault of their own.”).

171. See generally RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17 (1996); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) for a discussion of the importance of the concept of equality in society.

2006] **Equality and Humanity in Property Regimes** 315

institutional frameworks that make it *realistically* possible for the have-nots to become haves. This, in turn, may require sharing what we have with those who have unmet fundamental needs. It may require laws that define and limit property rights to ensure equal opportunity to acquire property rights. The religious traditions associated with the Bible view property as a gift from God that is not wholly the result of individual efforts. Even if one imagines what property means with God out of the picture to secularize this moral message, the Biblical tradition focuses our attention on the extent to which we owe others for what we have. We are able to accumulate property because of the love and training we received from family and school and religious institutions. We depended on the environment established by law and government that made our homes safe and secure. We benefited from the taxes paid by others that made this infrastructure possible. When it is our turn to enter the marketplace, we become responsible for ensuring that that infrastructure persists and is strengthened, so that others may prosper in the ways we have prospered.

This is why the ancient Jewish sages teach us that it was a “mark of the people of Sodom” to rigidly adhere to the rules governing ownership of private property, believing that “what is mine is mine and what is yours is yours.”¹⁷² Those who insist on each one keeping her own property refuse to understand the extent to which others contributed to their own accumulation of that property. They refuse to see other people as human beings who are of equal and infinite importance and who deserve the minimum conditions necessary for a human life. They put property over people. The reason this is a mark of the people of Sodom is that, if every person in the community acted this way, no one would have property and the community would not be able to function. In one sense, this message is not so different from the message of the social contract theorists like Hobbes and Locke who argued that it was in the interest of each person to sacrifice some liberty to obtain the security that comes from institutions and rules of law that allow individuals to pursue happiness. In another sense, it goes further, by asking us not to think of ourselves and our self-interest alone when we reflect on the

172. *Pirkei Avot* perek 5 mishnah 13. The Hebrew Source for this quotation is AVOT: A COMPREHENSIVE COMMENTARY ON THE ETHICS OF THE FATHERS 312 (Shlomo P. Toperoff, ed., Jason Aronson, Inc., 1997). The English translation provided here is by the author.

obligations we have to others.

Traditional Jewish sources teach that the people of Sodom exhibited uncommon cruelty to the poor. Not only did they withhold sustenance from the poor but they would taunt them. We have already heard about the practice of attacking and raping strangers and travelers. But the people of Sodom would also torture the poor by pretending to be generous. As the *midrash* at the very beginning of this article explains,¹⁷³ they would appear to give charity by giving coins to travelers; but their charitable acts were mere pretense. They would mark the coins with their names. When the shopkeepers saw the marked money, they would not accept it, and the poor persons would die; then the men would come to take back their money. This parable describes extraordinary cruelty, not only in denying the support needed to sustain human life but in taunting the poor by making it appear as if they had been the recipients of aid when in fact they had received nothing.

On one interpretation, the parable of the marked money teaches that it is especially cruel to pretend to be kind. If one believes that it is possible for the poor to bring themselves out of poverty by personal responsibility and self-help, then this better be true; if it is not, then we have just given the poor marked money. On a different interpretation of the parable, the people of Sodom may have convinced themselves that they were acting appropriately. They even gave charity. Of course, they did it in a way that made it devoid of substance but they may have convinced themselves that it was not their fault that the shopkeepers would refuse to accept the coins. The shopkeepers themselves may have thought they were being neighborly by protecting the interests of their neighbors in refusing to accept the coins. This suggests that it is painfully easy to convince yourself that the best way to help others is not to help them; it is comforting to think that the pursuit of self-interest helps others through an invisible hand. We are likely to be convinced by such arguments, partly because of the comfort they provide, and partly because we have a widely shared consensus that everyone benefits from economic competition in the marketplace. The problem arises when we extend this argument to situations in which it no longer holds water.

173. BABYLONIAN TALMUD, *Sanhedrin* 109a.

2006] **Equality and Humanity in Property Regimes** 317

A final interpretation of the parable is that the people of Sodom colluded in refusing to see the stranger as a person worthy of equal concern and respect; they did not see the poor as human. We are responsible for the institutions we create and we are responsible for attending to the consequences of those institutions to human beings. If human beings are infinitely important and each person is equally human then indifference to those who remain in poverty after we have set in place what we thought were the best institutions treats those persons as less than human.

The institutionalists believe that their job is done once they have set up the appropriate institutions. They use reason and experience to define the proper institutions of a free and democratic society and then sit back and watch what happens. Anyone who is poor after we set up the government and market institutions and the rule of law has only herself to blame; by definition, we have set things up so that they are the best they can be for you, and any failures are attributable to individuals alone and not social institutions or other people. Indeed, once we are convinced we have the right institutions, then changing anything to respond to observed poverty will only make things worse, either by trampling on crucial liberties or by interfering with the market mechanisms that create wealth in the first place. The only remedy for poverty in such a case is private charity.

The pragmatic response to this paradigm is to focus our attention on those who are left behind in such a scheme. We are responsible for the institutions we create and we are responsible for attending to the consequences of those institutions to human beings. If human beings are infinitely important (the principle of *human dignity*) and each person is equally human (the principle of *equality*) then indifference to those who remain in poverty after we have set in place *what we thought were the best institutions* treats those persons as less than human. The pragmatic view is that the presence of persisting poverty is an indication of failure. Telling a poor person who cannot make it that it is her fault because we have set up everything so that she can succeed is cruel if it turns out *not in fact to be true* that there were no obstacles to her bringing herself out of poverty. The pretense that opportunity exists when it does not adds insult to injury; it is a mark of the people of Sodom who merely pretended to act justly by giving the poor marked money.

This pragmatic claim requires us to be extraordinarily attentive to facts in the world. If it is in fact possible for any person to lift herself out of poverty by acting rightly, then our concern for the poor may require us to aid individuals to see what opportunities they have and to help change habits that prevent them from attaining the life they seek. If, however, it is *not* possible for each and every person who works hard and plays by the rules to lift herself and her children out of poverty, then it is cruel and oppressive to pretend that our market and governmental institutions are the best of all possible institutions in the best of all possible worlds, and that the poor have only themselves to blame for their plight in our Panglossian world.

There are obviously empirical disputes about these questions. Libertarians genuinely believe that, all other things being equal, smaller government, lower taxes, and less regulation is better than more government and higher taxes and regulations. They believe that public actions merely get in the way and make things worse and they believe that individual initiative can allow any person to succeed in America. But even libertarians have limits to these beliefs. Hurricane Katrina brought to the fore the place of governmental investment in infrastructure, although of course the question of whether the government did a better job than the private sector would have done is necessarily on the table. However, it is apparent to me that we have sufficient evidence that the private sector alone could not be solely responsible for responding to natural disasters of the type and magnitude seen in 9/11 and Katrina. Few Americans seem to think that it was oppressive and wrongheaded for the government to be involved in responding to those disasters.

The question is whether government bears any responsibility for shaping and improving economic life outside the realm of national defense and natural disasters. The Panglossian view is that any person in America who works hard can make a good living. The facts suggest otherwise. We now have several detailed scholarly depictions of what life is like for the working and nonworking poor. Lisa Dodson's book *Don't Call Us Out of Name* explains in great detail the day to day lives of women and girls in poor America.¹⁷⁴ Barbara Ehrenreich went on an odyssey in which she tried to live on minimum wage jobs for several

174. LISA DODSON, *DON'T CALL US OUT OF NAME: THE UNTOLD LIVES OF WOMEN AND GIRLS IN POOR AMERICA* (1998).

2006] **Equality and Humanity in Property Regimes** 319

months. She explains in her book *Nickel and Dimed* why she failed at this effort. She worked hard—incredibly hard—and she was diligent at her work, cooperative with her surly supervisors, and thrifty in her spending, but the cost of housing and health care and transportation (along with other needs) made it virtually impossible for her to make ends meet.¹⁷⁵ John Schwarz and James K. Galbraith back up these observations with sociological and economic data that show shifting patterns of income and wealth distribution in America over the last 25 years.¹⁷⁶

We need to understand our fundamental connection to other human beings. At the end of her book explaining how it was impossible for her to live on the minimum wage, Barbara Ehrenreich explains:

[We should feel] shame at our *own* dependence . . . on the underpaid labor of others. When someone works for less pay than she can live on—when, for example, she goes hungry so that you can eat more cheaply and conveniently—then she has made a great sacrifice for you, she has made you a gift of some part of her abilities, her health, and her life. The “working poor,” as they are approvingly termed, are in fact the major philanthropists of our society. They neglect their own children so that the children of others will be cared for; they live in substandard housing so that other homes will be shiny and perfect; they endure privation so that inflation will be low and stock prices high. To be a member of the working poor is to be an anonymous donor, a nameless benefactor, to everyone else.¹⁷⁷

The haves often find it difficult to see how they became haves partly because of the kindness of strangers. They imagine themselves to be “self-made” and independent. If one adopts this

175. BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001). See also generally DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2005) for a discussion of the problems faced by America’s working poor.

176. JAMES K. GALBRAITH, *CREATED UNEQUAL: THE CRISIS IN AMERICAN PAY* (1998). For further discussion of income inequality see generally JOHN E. SCHWARZ, *ILLUSIONS OF OPPORTUNITY: THE AMERICAN DREAM IN QUESTION* (1997); PAUL RYSCAVAGE, *INCOME INEQUALITY IN AMERICA: AN ANALYSIS OF TRENDS* (1999); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE URBAN POOR* (1996); EDWARD N. WOLFF, *TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT* (1995).

177. EHRENREICH, *NICKEL AND DIMED*, *supra* note 175, at 221.

view, one may fail to see other people and the ways in which they have contributed to one's own success.

The belief that the market works perfectly is the base assumption behind the claim that those who work at low wages get paid precisely what they are worth. Impersonal market forces of supply and demand determine wages as well as prices and those who are worth it can earn enough for a comfortable life. But this perspective fails to see that it is human beings who set wages and who often have choices; they determine, for example, the relative wages of managers and employees. More importantly, they depend on the work of their employees to create the value and profit that the business generates. If the business is paying the worker less than is needed to live on, this is a form of exploitation because the business is extracting the value of the worker's labor without paying the amount needed to sustain the worker's life. This in effect externalizes that cost onto others.¹⁷⁸ The worker never gets to see her children because she is forced to work two jobs to support them. Her children are ill because they cannot afford health care. They suffer from asthma because they live in decrepit housing filled with mold and pests. And it is the law that determines who is allowed to externalize costs such as these onto others.

The pragmatists ask us to face facts and it is apparent that it is not true that anyone at any time can pull themselves out of poverty under current conditions. The institutionalists may be optimists and ask us to wait; the right institutions will allow things to get better over time. The pragmatists focus our attention on the suffering we can observe right now and the

178. Justice Hughes states:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.

West Coast Hotel v. Parrish, 300 U.S. 379, 399-400 (1937).

2006] **Equality and Humanity in Property Regimes** 321

individual stories of struggling people who cannot make it in today's world without some change in social policy and in our legal system. Of course, I want to emphasize that the pragmatic view challenges liberals as much as conservatives. It is not true that one can raise the minimum wage indefinitely without having some negative effect on employment. But the view of libertarian economists that any minimum wage must, by definition, inhibit employment is also wrong. This is why our current policy includes both a minimum wage and an earned income tax credit (EITC) designed to ensure that employers are not exploiting workers by paying them pitifully low wages while designing the regulatory scheme so as to maximize gainful employment. Liberals need to face the pragmatic challenge in another way as well: we must face the fact that political power in Washington is held by those who do not view regulation and taxation kindly. Achieving liberal goals may require compromising and adopting a mixed strategy that may not be the preferred methods for attaining liberal ends.¹⁷⁹ We cannot allow the perfect to get in the way of the good.¹⁸⁰

The parable of the marked money should remind us that we need to attend to the systemic consequences of rules governing the behavior of individuals. Two widely publicized events underscore this obligation. In the wake of Hurricane Katrina, many people generously opened their homes to evacuees. After a minister in Ocala, Florida, traveled to New Orleans and planned to take in three New Orleans families, the Majestic Oaks Homeowners Association notified all the residents of the homeowners association that existing deed restrictions limited occupancy of each home to a single family, thereby precluding the minister and all other owners in the association from extending hospitality to homeless evacuees.¹⁸¹ After extensive publicity and severe public criticism,¹⁸² that decision was rescinded. In an

179. See generally MATHEW MILLER, *THE 2% SOLUTION: FIXING AMERICA'S PROBLEMS IN WAYS LIBERALS AND CONSERVATIVES CAN LOVE* (2003) (discussing the role of compromise in politics).

180. "The best is the enemy of the good." VOLTAIRE, *Art Dramatique*, *DICTIONNAIRE PHILOSOPHIQUE* (1764) ("Le mieux est l'ennemi du bien."), in *COLUMBIA WORLD OF QUOTATIONS* (1996), available at <http://www.bartleby.com/66/2/63002.html> (last visited May 30, 2006).

181. *Two Ocala Home Association Board Members Resign Over Katrina Housing Issue*, NBC ONLINE NEWS, Sept. 12, 2005, <http://www.nbc6.net./news/4960068/detail.html> (last visited May 30, 2006).

182. *Subdivision Backtracks on Evacuee Ban*, ST. PETERSBURG TIMES (FLORIDA),

eerie, public echo of that dispute, the town of Gretna, “across the Mississippi from New Orleans and part of Jefferson Parish, stationed officers on the bridge leading out of New Orleans blocking the main escape route for the tens of thousands suffering in the Superdome, Convention Center, and throughout the city.”¹⁸³

While these decisions can be criticized on their own grounds from a moral point of view, it is important to note what the consequences would be if all towns and all property owners adopted the approach of the town of Gretna and the Majestic Oaks Homeowners Association: the residents of New Orleans who could not escape using conventional means of transport would have been locked into a devastated city with nowhere to go. The rules of property law must take into account the cumulative effect of individual land use decisions by property owners.

For example, a federal judge blocked the city of Miami from arresting homeless persons who were sleeping and urinating in public when there were only 700 shelter beds in the city and a homeless population of 6,000.¹⁸⁴ Judge C. Clyde Atkins explained that homeless persons almost never choose to be homeless and that those who have no home have no choice but to engage in “harmless, involuntary, life-sustaining acts such as sleeping,

Sept. 14, 2005, at 6A; see also *Nothing Majestic About It: From the Get-Go, There Simply Was No Defending the Majestic Oaks HOA Board's Decision*, Ocala Star-Banner, Sept. 13, 2005 (discussing the evacuee ban).

183. See Jordan Flaherty, *Crime and Corruption in New Orleans*, Oct. 17, 2005, <http://www.alternet.org/katrina/26871/> (last visited May 30, 2006) (discussing police corruption and misconduct in New Orleans following the storm). See also Ann M. Simmons, *Protesters Make A Stand on Bridge That Was Blocked*, Los Angeles Times, Nov. 8, 2005, at A-10 (describing an incident in which Gretna police refused evacuees from nearby New Orleans). See also Ellen Barry, *Katrina's Aftermath: After Blocking the Bridge, Gretna Circles the Wagons: Long Wary of Next-Door New Orleans, the Town Stands by Its Decision to Bar the City's Evacuees*, LOS ANGELES TIMES, Sept. 16, 2005, at A-1 (discussing the decision to exclude evacuees); Scott Gold, *Katrina's Aftermath: On the Edge Without an Exit: A Gretna, La. Social Worker Tries to Treat and Evacuate the Remaining Residents in His Housing Project, as Local Officials Say They Can't Do Much*, LOS ANGELES TIMES, Sept. 11, 2005, at A-17 (same); Gardiner Harris, *Storm and Crisis: Battling the Storm; Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES, Sept. 10, 2005 (same).

184. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992). See also *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (Eight Amendment right to be free from cruel and unusual punishment prohibits enforcement of ordinance that regulates use of public streets as applied to homeless individuals involuntarily sitting, lying, or sleeping on the streets due to the unavailability of shelter in Los Angeles).

2006] **Equality and Humanity in Property Regimes** 323

sitting, or eating in public.”¹⁸⁵ In so ruling Judge Atkins adopted the theory proposed by Professor Jeremy Waldron who had earlier explained: “Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it.”¹⁸⁶ While property law is not intended to make it impossible for homeless people to sleep or urinate, the cumulative impact of the rights of each other to exclude others from their property can have this effect unless there is some public property where homeless people “are allowed to be”¹⁸⁷ and to “perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around.”¹⁸⁸

Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless. If urinating is prohibited in public places (and if there are no public lavatories) then the homeless are simply unfree to urinate. These are not altogether comfortable conclusions, and they are certainly not comfortable for those who have to live with them.¹⁸⁹

While the individual rules of property law do not, in themselves, constitute cruelty to homeless people, their cumulative effect can indeed amount to “cruel and unusual punishment.”¹⁹⁰ It is this attentiveness to the actual circumstances of real people in the face of the institutions we have created and the options those people realistically face that is required if we are to acknowledge both the humanity and the equality of each person.

This brings me back to the contest between institutionalism and pragmatism. The institutionalists are correct that we should

185. *Pottinger*, 810 F. Supp. at 1564.

186. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

187. *Id.* at 300.

188. *Id.* at 301.

189. *Id.* at 315.

190. *Pottinger*, 810 F. Supp. at 1564-65.

focus attention, not only on particular legal rules concerning property, but on the institutional frameworks within which those rights will be exercised. They are also correct that values are a core element in determining what institutions we want and how to shape their contours. They are also correct that piecemeal reform of institutions that does not look at the big picture may cause more harm than good. The pragmatists are correct, however, that we should approach our institutional choices with a fair amount of humility; we should not assume that it is obvious which arrangements best cohere with the norms underlying a free and democratic society. Institutions that work in the United States may fail spectacularly in Russia, for example, because of its different history, culture, and values. Constitutional frameworks that do not fit the values of a particular culture are likely to have unintended consequences and to work badly.¹⁹¹

If poverty is a fundamental problem, as I have argued it is, then an institutional framework that does not make the eradication of poverty a central feature is an inadequate, unjust and inefficient framework. If we seek to treat each person with equal concern and respect, and if poverty is incompatible with the most basic norms of equality and humanity, then it is incumbent upon us to take seriously the idea of abolishing poverty and to turn to considering what it would actually take to make that come to pass. Nor are we concerned only with material well-being: given the American work ethic and deep-seated American values, receipt of a welfare check is not the same thing as earning the money through paid work. For these reasons, among others, we cannot rest on abstract principles to define the right institutions for our society; attention to the actual consequences of different frameworks for real people is absolutely essential.

3. BENEFICENCE AND JUSTICE

I have argued that certain fundamental religious, spiritual or moral values support the notion that government has an obligation to do what it can to eradicate poverty. But several further objections to this line of argument might be made. First, both political philosophers and religious leaders have often

191. See generally STEVEN CORNELL & JOSEPH P. KALT, WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (1992) (arguing that Indian nations saddled with constitutions that do not fit their culture do much worse economically than those with constitutions that have a good fit with their culture).

2006] **Equality and Humanity in Property Regimes** 325

distinguished between duties that should be enforced by law (matters of *justice*) and those that should be left to individual conscience (matters of *beneficence*).¹⁹² Philosophers like John Stuart Mill have argued that one of the primary goals of government (if not the primary goal) is to enable individuals to make up their own minds about right and wrong and to make autonomous choices within the bounds of the law.¹⁹³ Because we know that people disagree about the role of government in alleviating poverty, one might argue that the choice to help the poor is a moral or religious decision best left to individual conscience. Those who want to help the poor can choose to do so—by giving charity, by tithing their income, by donating it to charitable and religious organizations whose goal is to help the poor. Those who believe that the poor should engage in self-help and exercise “personal responsibility” can then follow their consciences and deny aid while those who favor such aid are free to follow their consciences as well.

There are two problems with this argument. First, it assumes that there are no barriers to collective action that might inhibit the ability of individuals to band with like-minded others to achieve the ends dictated by their consciences. It is true that individuals can make their own choices whether to help the poor and that they are free to band together to make their help more meaningful by pooling it through charitable or religious institutions that have both the wherewithal and the institutional know-how to do this job properly. But there are transaction costs that may both interfere with this happening and in achieving the professed aims of rendering adequate help to the poor. Freeloaders may fail to help the poor on the mistaken belief that others are doing so; in other words, they may have imperfect information and act on that false information. If there are freeloaders, this may inhibit the giving of charity. Some otherwise charitable souls may wish not to be chumps—carrying more weight than they should. If people suspect there may be freeloaders who expect others to do the job of helping the poor, and they feel they are being taken advantage of by those freeloaders, they may donate less than they otherwise would. This is especially true if their aid will only have the desired effects if enough other people act in a similarly charitable

192. SAMUEL FLEISCHACKER, *A SHORT HISTORY OF DISTRIBUTIVE JUSTICE* 17-28 (2004).

193. JOHN STEWART MILL, *ON LIBERTY* 75-161 (1869).

manner. In addition, many people may have imperfect information or even false beliefs about the ability of the poor to use self-help; if the prevailing ideology induces belief in the American dream, then many people may fail to give charity to aid the poor because they mistakenly believe it is not needed. They may assume that poverty is wholly the fault of the poor and that they are fully capable of using self-help to escape their fate. All these barriers to action may induce an inefficiently low level of individual and collective charitable giving. Finally, if it is true that the barriers to emerging from poverty are many and interwoven, then neither individuals nor religious organizations may be able to act so as to attack all the causes of poverty.¹⁹⁴ If such is the case, lack of government involvement may doom private efforts to eradicate poverty.

My second objection to the argument that we should leave charitable giving to individual conscience is that this argument assumes that the failure to aid the poor is a self-regarding act. But this argument is either circular or wrong. It is wrong in the sense that it rests on a false assumption, i.e., that choosing not to share one's property with the poor is a self-regarding act. It is obvious that the granting of charitable aid would help the poor, as would governmental action to alleviate poverty; in other words, the act of withholding property from those who need it is a direct and proximate cause of their suffering.¹⁹⁵ The only way to avoid this conclusion is to assume that owners of property have a right to withhold it from those who need it. But this is the very question we are asking: is it true that property owners have a legal and moral right to withhold their property from the poor?

It is circular to argue that that one does not harm the poor by withholding aid because this argument rests on the assumption that owners have no legal or moral obligation to share their property with the poor and this assumption is the very one that we are questioning. We are asking whether a just society would recognize an obligation to eradicate poverty that might require explicit government action to attain this end. To assume that governmental inaction has no bearing on the amount

194. See generally SHIPLER, *WORKING POOR*, *supra* note 174 (making this argument).

195. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 37, at 141 ("The very nature of these resources, and of individual property claims to them, means that the extension of property protection in such resources to one person *necessarily and inevitably* denies the same rights to others.").

2006] **Equality and Humanity in Property Regimes** 327

of poverty is to assume what needs to be decided. One might think that ownership necessarily entails the right to choose when (and whether) to sell or give away one's property. This is ordinarily true, but the political philosophers long ago conceded that it might not be true in situations of desperate need. Locke, for example, famously made a "proviso" that labor gives legitimate grounds to assert property rights in the product of one's labor "at least where there is enough and as good left in common for others."¹⁹⁶ The exact contours of this proviso are subject to debate, but one thing is clear: property rights are justified if they are part of a political and economic system that enables every person to become an owner, and if it is not possible for every person to use self-help to enter the property-owning class, then it follows that refusing to share one's property with the poor deprives them of resources needed for human life; this is therefore an other-regarding act that affects the poor and hence requires justification.

Religious persons may have a different objection to legalizing the obligation to give charity. They may believe that beneficent acts require beneficent intent; if they are coerced by government, they are, by definition, coerced tax payments, not charitable giving. As such, they lose their character as moral actions. If government forces individuals to give charity and if government is successful in adopting policies that eradicate poverty, it will have the untoward effect of making private charity impossible, thereby depriving individuals of the ability to do good for others.¹⁹⁷

I have several responses to this argument. First, human life being what it is, there will always be occasion for kind and generous acts no matter how successful government is in alleviating misery and eradicating poverty. There will inevitably be shortfalls and no governmental policy is going to prevent suffering entirely or eradicate the occasions for generosity. After all, people are generous when they give gifts to family and friends. They engage in acts of lovingkindness when they comfort someone after the death of a loved one or a disappointment in one's family or work life. They engage in beneficence when they celebrate happy occasions with others or give them compliments

196. LOCKE, *supra* note 10, at 17.

197. On the version of this argument that appeared in political philosophy, see FLEISCHACKER, *supra* note 191, at 19-28.

or visit them when they are sick. One thing is certain: we will never lack opportunities for sharing and other acts of lovingkindness.

Second, if it is true that governmental action allows certain kinds of aid to be provided that could not be provided by the private sector, then it is the failure of government to act (rather than the choice to act) that deprives individuals of the ability to engage in the kinds of charitable acts that are likely to be successful in alleviating poverty and suffering. Of course, the argument in favor of self-help may rest on the notion that getting government out of the picture will induce both self-help and private charitable giving sufficient to solve the problems of the poor; it is the presence of governmental involvement that induces complacency by those who assume that government is taking care of the problem so they do not have to do so. My response is simply to look at history. I think we have sufficient evidence over thousands of years that governmental inaction does not lead to a private response that is sufficient to get rid of poverty. The evidence, in other words, is entirely to the contrary. If government action can get around the transaction costs mentioned earlier and allow certain forms of coordinated action that would otherwise be impossible, and if those coordinated actions are necessary to alleviate poverty, then the failure to use governmental institutions to combat poverty has the effect of perpetuating it.

Third, it is important to recall that we are talking about religious arguments in the context of determining what our public policy should be. As I noted earlier, to become public justifications, religious arguments must be made in such a way as to be acceptable to those who do not share the proponent's religious outlook. If the argument is that suffering is inevitable, or that the poor will be rewarded in heaven, or that human suffering has the noble purpose and effect of teaching us to be compassionate, or that governmental involvement in helping the poor deprives individuals of the opportunity to do good, then I would suggest that these arguments are exactly the kinds of arguments that John Stuart Mill suggested be left to individual conscience; they depend on particular conceptions of the meaning of human life, the mechanisms of salvation, and the will of God. More importantly, they do so in a manner that justifies inaction in the face of suffering. An individual who did not share the theological premises behind these arguments would be unlikely to

2006] **Equality and Humanity in Property Regimes** 329

adopt them behind Rawls's veil of ignorance. Rather, one who did not know what religious views she would have would be more likely to choose a basic governmental framework that sought to alleviate or prevent suffering, so far as this is possible to accomplish. More generally, the idea of responding to human need is one that can be found in (almost?) all religious and moral traditions, and it is the responsibility to respond to suffering that is the basis of my argument.

IV. A NEW BOTTOM LINE: SECURING THE BLESSINGS OF LIBERTY

A. GOVERNMENT AS INFRASTRUCTURE

I have argued that conservatives, as well as liberals, need a new way to talk about government, regulation, and taxation. I have noted that the legal realists taught us to see the public and private sectors as implicated in each other, as interrelated and mutually reinforcing, rather than relentlessly antagonistic. Hurricane Katrina dramatically brings out the implications of these scholarly insights in ways that conservatives, as well as liberals, should be able to appreciate. Developing a new way to talk about fundamental governmental institutions is a daunting task. I can only sketch some possible ideas based on our discussion so far.

First, government *provides the infrastructure* that allows the free market to operate. In some sense, all law and all government action (including regulation and taxation) *are* the infrastructure that enable private property to exist and the market to operate fairly and efficiently. Government creates the environment within which we function as free and equal persons.

Second, government regulation, if done properly, *promotes both liberty and property*, rather than undermining them. Government "secures the blessings of liberty to ourselves and our posterity."¹⁹⁸ When we talk about liberty and when we talk about property, we are assuming the existence of both government and regulation. Government regulation cannot be the mortal enemy of liberty and property; rather, it is necessary for both liberty and property to exist. Of course, we are well aware that government can oppress and stifle both liberty and property, but this insight cannot allow us to forget Locke's suggestion that without law, there is no liberty or secure

198. U.S. CONST. pmbl.

property.¹⁹⁹

Third, government is the mechanism by which we create a *free and democratic society that treats each person with equal concern and respect*. It is both the way we create government of the people, by the people and for the people, and the manner in which we demonstrate collective responsibility for the conditions of our existence. It is in which we undertake our collective responsibility to treat each person as a human being entitled to freedom, dignity, and humanity.

How should liberals, in particular, talk about property, taxation, regulation, and government? First, we progressives should be brave enough to say what we want to say. If government and taxation do good things for us, we should say so. We should defend the institutions that are necessary to protect our liberties. We should remember why we created government in the first place: “to secure the blessings of liberty to ourselves and our posterity.” Of course, liberty means different things to different people. That document I just quoted that talks about the “blessings of liberty” protected the liberty to own slaves. This, if nothing else, should remind us that we need to define what we mean by liberty and that one person’s definition of liberty is another person’s definition of oppression. So we must imagine what the world would look like if we actually had the kind of liberty we imagine. One way to do this is to focus on the outcomes we expect our institutions to make possible. This requires us to focus on what it means to create a free and democratic society that treats each person with equal concern and respect. To make these points concrete, it is not amiss to make value statements that explain how things ought to be. We can use the words “should,” or “ought,” or “right and wrong.” We may sometimes be aided by evocative aphorisms. Those who work hard and play by the rules shouldn’t be poor. Each person has the right to a fair shot at a decent life. No child deserves to live in poverty or want.

Second, we may be able to use the insight that many regulations can be interpreted as protections of property rights. Regulations that seem to a libertarian to take property rights may actually be needed to protect the property rights of others

199. LOCKE, *supra* note 10, ¶57, at 32-33 (“[W]here there is no law, there is no freedom”).

2006] **Equality and Humanity in Property Regimes** 331

and to prevent some owners from using their property to harm others and their property. For example, one can argue that companies shouldn't be able to take our pensions away by false promises they don't intend to keep, and that no one has a right to destroy the environment and undermine the safety or destroy the property of others.²⁰⁰

Finally, we need to appeal to the human sense of responsibility, obligation and service that is most salient in the sphere of religious life but which also had significant expression in ideals of public service, especially evident these days by those in the military. We have obligations to protect our nation, to promote the welfare of its inhabitants, and to leave things as good or better for our children as our parents left things for us. Nor is this appeal to a sense of obligation a fearsome burden; in fact, much of what makes life meaningful to people comes from the sense that they are doing good, that they are being helpful, that they are contributing to others, that they have made things better rather than worse.²⁰¹ When people get up to speak at a funeral, they do not say: "What a great guy! He made a lot of money and even laid off 40,000 people in a single day—very impressive." They talk about a person's character, love of his family, contribution to the community, sense of humor, the difference the person made to others.²⁰² Government has a role to play in making it more possible for people, in their day-to-day lives, to act in ways that they can view as worthwhile, as praiseworthy. It should be possible to be a good businessperson and a good person at the same time; it should be possible to be a good lawyer and a good person at the same time; it should be possible to be a politician and a good person at the same time. And it is the government promulgation of programs and law that sets the framework within which people live their lives. The boundaries shaped by the law should allow us the opportunity to live lives of meaning, in ways that we can appreciate as valuable, and in which we can see ourselves as serving others, as well as ourselves.²⁰³

200. See generally McCluskey, *Changing, Not Balancing*, *supra* note 23 for a further discussion of these arguments.

201. For further discussion of the ways that individuals define what is meaningful and fulfilling see generally LERNER, *LEFT HAND OF GOD*, *supra* note 2; SACKS, *TO HEAL A FRACTURED WORLD*, *supra* note 134, at 6.

202. *Id.*

203. LERNER, *LEFT HAND OF GOD*, *supra* note 2, at 41 ("What we have discovered,

B. RECONSTRUCTION & HUMAN VALUES

How should we think about the role of government in responding to the devastation wrought by the hurricanes? One approach, I suppose, would be to do nothing: let the private sector take care of it. The inadequacy of this response seems to be universally understood. After all, the government altered natural drainage patterns by building the 17th Street and London Avenue canals, and later the levee system to solidify the flood control purpose of these canals, to make land accessible for development and safe for habitation that would not otherwise have been so. Government induced development in the area by implied or express representations that the area was safe for habitation. As I noted earlier, there is a possible claim under the takings clause if the government fails to rebuild the levees; thus if nothing is done, taxes would still have to be assessed to compensate owners for the loss of their property. Moreover, it is hard to see how government could abandon New Orleans, pull out now and refuse to fix the levees at all. Even if private contractors get involved in fixing the levees, it is hard to see why private enterprise would have adequate incentives to do this when the benefits of the levees are spread among so many people; when the positive externalities are enormous and the cost of repair is privately born by only one party, there will be underinvestment in infrastructure. The usual way to get private actors involved in such projects is for public authorities to hire them to do such work, paying them out of taxes or fees or tolls. Whether government compensates for the loss of the right to build on the land, rebuilds the levees itself, or hires private enterprise to do this, government will be involved in some manner.

There has therefore been a general consensus that we cannot do without government involvement here in some way. The libertarian proposals have been of a different character. Economist Edward Glaeser, for example, has suggested that the government not make a commitment to rebuild New Orleans. Instead, he argued that it might be better for the government to give every resident of New Orleans a big fat check rather than rebuilding the infrastructure of the city.²⁰⁴ This would allow each

fundamentally, is that many people need what anthropologist Clifford Geertz once termed a 'politics of meaning' and what I now call a spiritual politics—a spiritual framework that can lend meaning to their lives.”).

204. Edward L. Glaeser, *Should the Government Rebuild New Orleans, Or Just Give Residents Checks?* THE ECONOMISTS' VOICE, vol. 2, article 4, (2005), available at

2006] Equality and Humanity in Property Regimes 333

person to choose to rebuild or to move elsewhere or to use the money to invest in their children's education or other purposes. He noted that the population of New Orleans has been declining and that the industries that sustained New Orleans at its heyday were now employing fewer people. He argued that we should invest in the people not the place. Some of the people displaced by the hurricane may prefer using money to settle elsewhere rather than to rebuild their homes.

Professor Glaeser was criticized for suggesting that New Orleans not be rebuilt; his academic, long range approach suggested that it was inevitable that New Orleans would decline further and that the government should go with the flow rather than try to halt the tide of history. I want to point out a different aspect of his proposal. Paying individuals money and letting them choose to invest it in New Orleans or elsewhere is appealing to some because it appears both to give individuals more choice and to reduce the role of government in planning where investment occurs. It thus seems to reduce government regulation and increase individual freedom. But the reality is that this approach denies as much freedom as it enables. A governmental choice not to rebuild the infrastructure and to give individuals checks to spend as they please is not a neutral solution; it leaves the infrastructure absent or weakened. After all, if residents of New Orleans want to move back to the city and to rebuild their old neighborhoods, the government choice not to rebuild the infrastructure prevents them from doing this. Thus, although this solution may seem to involve less government regulation and more individual choice, it actually closes off one set of choices and pushes people to leave New Orleans. It is not, in other words, a neutral policy; further, it is neither a government withdrawal from regulation nor an unambiguous victory for individual autonomy. In addition, the decline of New Orleans' population and its economic infrastructure is not merely a fact that must be confronted; it is a fact that is partly the result of government policy and it is possible that it could be turned around by changes in government policy.

More problematic, however, are costs that cannot be monetized. The perspective that focuses on individual choice or easily identified monetary costs and benefits fails to count adequately intangible harms and benefits. The responses that

government makes in this situation will affect the contours of New Orleans, as well as the social make-up of its population. What dollar amount would one place on the loss of communities made up of friends and neighbors? How does one put a number on the emotional harm of not being able to go home again? How would one monetize the loss associated with government policy that enables well-off families to return to New Orleans but denies that right to poor families? How does one measure the harm to the social fabric if government policy is directed in such a manner as to change fundamentally the racial make-up of the city?²⁰⁵

A community is more than the fair market value of the real property located in it; the loss is to a way of life, to social relationships, to a piece of American history, and—given the place of New Orleans in the American landscape—a loss to the national cultural heritage. The social landscape of reconstruction efforts should be a central concern in thinking about the shape of those efforts. This does not mean that individual choice should not be part of the picture; it may treat the affected individuals with more respect than assuming government knows what is best for them. But no government response will be neutral in this respect. Public choices about investment in infrastructure, as well as the contours of zoning and environmental regulation will inevitably shape the environment in which individual choices are made.²⁰⁶ Nor should government be indifferent to racially disparate impacts of alternative government policies.²⁰⁷ Because infrastructure will channel private choices in particular directions, the government response will inevitably shape social life. The question is therefore what form government regulation should take. Deregulation is simply not an option.

What values should guide us in reconstruction? What method should we use to adjudicate conflicts among those values? I have argued that Hurricane Katrina placed the issue of poverty on the national agenda. It also forced us to confront the

205. Bill Quigley, *Who Was Left Behind Then? Who is Being Left Behind Now? Six Months After Katrina*, COUNTERPUNCH, Feb. 21, 2006, <http://www.counterpunch.org/quigley02212006.html> (last visited May 30, 2006).

206. Professor Glaeser is well aware of the ways in which government impacts private investment decisions and he does not argue that the payment of checks to persons constitutes a “small government” solution to the problem. *See, e.g.*, Jon Gertner, *Home Economics*, N.Y. TIMES MAGAZINE, March 5, 2005, at 94 (explaining Glaeser’s approach to real estate and urban economics).

207. Quigley, *supra* note 204.

2006] **Equality and Humanity in Property Regimes** 335

continuing existence of racial inequality in the United States. It is no longer possible to pretend that poverty is not a problem or to think that economic inequalities among racial groups are inevitably going to decline. Hurricane Katrina also forced us to see how government provides the glue that holds us together, the infrastructure that makes our property available and safe, the environment that determines how valuable our property will be, as well as its character. It is also clear that choices are relative to one's situation. We value freedom to make our own choices but those who were poor had fewer choices when faced with the hurricane. Poverty denied them the freedom that all of us want.

How much should we worry about poverty? My answer is that we should worry about poverty a lot. It should, indeed, be a topic of the utmost importance for public discourse about public policy and law. This is so for a number of reasons.

First, the infinite importance of each person means that we must treat all people with dignity; we must recognize them as human. No one would choose to be poor and if we set up our institutions so that it is not possible for each person to have the minimum necessary for a decent human life, then we have failed to treat that person as a human being. We deprive the poor of choices if we do not make it possible for them to escape from poverty. Our obligations to recognize other people as human does not mean that we have personal obligations to care for every other person in our society; that would not be possible. It does, however, mean that our society as a whole has an obligation to create institutions that make it possible to eliminate poverty.

Second, the *equal* importance of each person means that we cannot conclude that each is counted equally merely because each person's interests are added into a grand utilitarian calculus; rather, we must be attentive to the *actual possibilities for each person* within the institutions we have created.

Third, our concern to avoid cruelty means that we must be careful that a decent life is *in fact possible* from the institutions we create, and, fourth, our commitment to our own humanity and the humanity of others means that *our obligations may not be merely negative but positive as well*.

Fifth, we should recognize the *role of government and law in creating, defining, and allocating property rights*. Many people assume that we as a society are not responsible for the plight of

the poor; our country is one of opportunity and poverty is the result of poor individual choices. I beg to differ. It is not true that anyone can make it in America without government help. It is not true that we do not need government or get anything from it. It is not true that property rights have an objective definition that does not require making value judgments. It is not true that there is no contradiction between wanting to regulate other owners but be free from regulation oneself. The truth of the matter is that property and sovereignty are interconnected and that property cannot exist without government, which both delegates coercive power to owners to exercise their property rights and determines the shape of property institutions and the kinds of property regimes we establish through law. The truth is that the value of property is directly related to background political institutions and public policies, including what economists would characterize as subsidies to property owners. The truth is that the value of the property we accumulate within the system is the joint result of our own efforts, luck, and the good will of others. The truth is that we need to define property rights consciously if we want to make it realistically possible for individuals to make a life for themselves and if we want our property regime to be consistent with the values of a free and democratic society that treats each person with equal concern and respect. The truth is that social circumstances substantially constrain and enable economic success and that it would require a massive government effort to make equality of opportunity a reality rather than a fantasy.²⁰⁸

What now does all this mean for New Orleans? First, it means that no one should be put in the position suffered by the poor in New Orleans in the face of the hurricane. We need better planning in the future, including figuring out what led to the suffering and how to avoid it in the future. I should not have to say this but planning means government action, which means hiring public servants (even if much work is outsourced to the private sector), which means paying them, which means raising taxes to pay for those protections.

Second, we need to attend not merely to land use planning and rebuilding but to poverty itself. This is, of course, not merely a local matter in Louisiana; poverty should be an urgent matter of national concern. This requires government action. It may

208. See generally BARRY, *supra* note 1 (developing this argument in detail).

2006] **Equality and Humanity in Property Regimes** 337

require increased expenditures on education and training and child care. It may require subsidizing incomes through programs like the Earned Income Tax Credit (EITC). I should not have to say this but these things require public expenditures and that means taxation.

Third, we should attend to the character of the neighborhoods that will result from rebuilding efforts; it matters if our policies recreate the involuntary hypersegregation by race and class that characterized New Orleans before the flood.²⁰⁹ The racial and class composition of the city following rebuilding matters. Will people be able to live in New Orleans regardless of their race, background, or income? This does not mean that government officials should make all the decisions. Private choice about development should be central. But private development takes place within public frameworks, including infrastructure, zoning, environmental regulation and land use planning designed to ensure housing that is safe and affordable by all segments of the population in neighborhoods that are desirable.

Fourth, in considering what should be done now, after the flood, we should think sensibly about the best way to respond. Professor Glaeser's suggestion to think broadly about available alternatives and the inevitability of scarce resources is well taken. Responding to the disaster partly entails judgments about how to minimize the costs of our response and the trade-offs that may be necessary if we don't have infinite resources. For example, most people believe that, all other things being equal, everyone in New Orleans should have the right to come home or to move elsewhere and start over. The problem, of course, is that all other things are not equal. The cost of rebuilding matters, as does the wisdom of decisions on where to locate housing to rebuild safe and thriving communities. The effects of rebuilding efforts, including the cost of such efforts, on the national economy and other priorities similarly matters. At the same time, it is important not to forget the costs of *not* rebuilding; these costs are often ignored in considering appropriate government policy. We would lose a great deal – and much of it unmeasurable in dollar terms – if those who want to return to New Orleans were not able to do so or if vibrant communities were left to the dustbin of

209. See generally Berube & Bruce Katz, *Katrina's Window*, *supra* note 66 (discussing the impact of the decision-making process involved in the decision whether or not to rebuild New Orleans neighborhoods).

history.

C. HUMANITY

In his essay on the origin of inequality, Jean Jacques Rousseau argued that human beings are instilled by both God and nature with an inherent instinct to be sympathetic to the suffering of others. But we are corrupted, he said, by civilization; we are taught that the suffering we observe is inevitable or the fault of those we see suffering. We are taught by fancy arguments that actions we take to aid the vulnerable only wind up hurting them or are incompatible with our duty to respect their liberty. Rousseau wrote:

Nothing but such general evils as threaten the whole community can disturb the tranquil sleep of the philosopher, or tear him from his bed. A murder may with impunity be committed under his window; he has only to put his hands to his ears and argue a little with himself, to prevent nature, which is shocked within him, from identifying itself with the unfortunate sufferer.²¹⁰

He then added ironically: “Uncivilized man has not this admirable talent; and for want of reason and wisdom, is always foolishly ready to obey the first promptings of humanity.”

We need not accept Rousseau’s view that human beings are innately good to learn from his point that we are conditioned by frames of analysis to see the world in a certain way and that it is a common experience to hear that actions designed to help people can wind up hurting them. This observation is true, but it also can lead us astray. The idea that government is bad and regulation pernicious cannot withstand scrutiny. Nor can the idea that the rational way to make public choices is to place monetary values on everything and then just do the math and see how it comes out. While we need to subject our intuitions to critical analysis and to test our assumptions through experience, it is also true, as Rousseau taught us, that one can act irrationally if one ignores what he called “the first promptings of humanity.” Martha Nussbaum makes a similar point:

If economic policy-making does not acknowledge the complexities of the inner moral life of each human being, its

210. JEAN JACQUES ROUSSEAU, *A Discourse on the Origin of Inequality*, in *THE SOCIAL CONTRACT AND DISCOURSES* 226 (G. D. H. Cole trans. 1950) (1755).

2006] **Equality and Humanity in Property Regimes** 339

strivings and perplexities, its complicated emotions, its efforts at understanding and its terror, if it does not distinguish in its description between a human life and a machine, then we should regard with suspicion its claim to govern a nation of human beings; and we should ask ourselves whether, having seen us as little different from inanimate objects, it might not be capable of treating us with a certain obtuseness.²¹¹

It is irrational to analyze law and public policy in a manner that does not recognize the relevance of the full range of human concerns.²¹² Those concerns include attention to the human consequences of public policy. This does not mean that we do not subject our compassionate instincts and intuitions to reasoned scrutiny and considered judgment; it is true that some policies designed to help people may wind up hurting them.²¹³ It does mean, however, that forms of analysis that insulate the analyst or decision maker from the human consequences of law lead us far astray.

Here is the bottom line: we need a “new bottom line.”²¹⁴ We should act with humanity, and whatever we do, we should be able to defend that course of action to every person affected by the decision.²¹⁵ This means not only that individuals should act with compassion but that our basic institutions should be structured to incorporate this basic principle.²¹⁶ This *humanity* test is based on the core insight of political liberalism²¹⁷ and Enlightenment moral theory. It is also good lawyering. When I advise my first year law

211. MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 25 (1995).

212. See generally Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002) for a discussion of the importance humanity.

213. See NUSSBAUM, *UPHEAVALS OF THOUGHT*, *supra* note 17, at 403 (acknowledging that “even appropriate compassion is unreliable and partial” and must be subjected to critical analysis).

214. LERNER, *LEFT HAND OF GOD*, *supra* note 2, at 228.

215. NUSSBAUM, *UPHEAVALS OF THOUGHT*, *supra* note 17, at 404 (“Political systems are human, and they are only good if they are alive in a human way.”).

216. See NUSSBAUM, *UPHEAVALS OF THOUGHT*, *supra* note 17, at 405 (“The relationship between compassion and social institutions is and should be a two-way street: compassionate individuals construct institutions that embody what they imagine; and institutions, in turn, influence the development of compassion in individuals.”).

217. RAWLS, *POLITICAL LIBERALISM*, *supra* note 122, at 227-30; see also generally MACGILVRAY, *RECONSTRUCTING PUBLIC REASON*, *supra* note 24 (interpreting pragmatism as applied to political theory).

students on how to structure a persuasive argument for a client's interpretation of the law, I tell them that they have to avoid making a "one-sided" argument. They have to not only note the interests of their client and explain their importance, but they must note the legitimate interests on the other side and explain how those interests can be protected even if the court rules against the other side; if, however, the interests directly conflict and it is not possible to protect both sets of interests, the lawyer must generate an argument that either explains why the losing side's interests are not legitimate in this particular context (although legitimate in other situations) or why the law should choose to protect the interests on one side despite their interference with the legitimate interests of the party on the losing side.²¹⁸ As T.M. Scanlon argues, it is crucial to come up with reasons that the losing side can be expected to accept as legitimate, even if we cannot get the losing side to agree.²¹⁹

The New York Times got this point in an editorial published on December 11, 2005, when it criticized the Congress for having failed, up until that time, to appropriate enough money to rebuild the levees and allow for the rebuilding of New Orleans. "If the rest of the nation has decided it is too expensive to give the people of New Orleans a chance at renewal, we have to tell them so We must tell them America is too broke and too weak to rebuild one of its great cities."²²⁰ If it is too embarrassing to say this directly to a person displaced from her home in New Orleans, then that is a sign that it would be wrong not to make it possible for every person to go home.

I am not saying anything that is not obvious. Indeed many of my comments may be viewed as self-evident. But let us recall how we got here. First, poverty has not been on the national agenda for many years. Second, the Republican onslaught has eclipsed the rhetoric of liberals for so long that it is almost impossible for progressives to voice their concerns with current social policy, much less defend using regulation and taxation to

218. See generally VAN DER WALT, LAW AND SACRIFICE, *supra* note 107 (arguing that justice requires the rejection of rationalizations that ignore the inevitabilities of harms imposed by law).

219. See SCANLON, WHAT WE OWE EACH OTHER, *supra* note 84, at 4 ("When I ask myself what reason that fact that an action would be wrong provides me with not to do it, my answer is that such an action would be one that I could not justify to others on grounds I could expect them to accept.")

220. *Death of an American City*, N.Y. TIMES, Dec. 11, 2005, at section 4, p. 11.

2006] **Equality and Humanity in Property Regimes** 341

achieve liberal goals. We should recall that our commitment to the ideals of humanity and equality is as crucial as our commitment to the ideals of liberty and the institution of private property. Libertarians are, of course concerned with human beings, but the core value they espouse is *liberty*. Progressives are in favor of liberty as well but our conception of it is very different from the libertarian conception. We progressives need to recapture that conception and express it in ways that clarify the liberties that would exist in a liberal political regime. My central message is to suggest to progressives that the core liberal value is *humanity*. This includes strong protection for liberty but it also suggests a particular version of what liberty means. Liberty includes the freedom to live one's life on one's own terms and to create meaning in connection with others. But liberty also entails the recognition that one does not live alone and that, if one wants others to respect one's autonomy, then the limits one wants others to respect must be ones that we accept for ourselves. Further, real liberty is not possible without economic security. A homeless person is not a free person. Freedom requires a material base – a setting in which one can make choices. The poor residents of New Orleans were free to escape the hurricane; yet they were not able to exercise that freedom. Poverty denies liberty.²²¹

I believe the ultimate test of any public policy or law is how it appears to those on the losing end.²²² As I explain to my law students, the best way to persuade a judge is to propose and defend a solution that appears fair to both sides. The good judge wants to be able to explain to the losing party why she is losing by reference to reasons that anyone could or should accept as a member of a free society that values each person equally but

221.

There are many sorts of vulnerability and need that do nobody any good, and some things, therefore, for which any good society should not ask its members to forage. Society expresses concern for the active development of citizens' higher capacities when it does support their health, nutrition, and education, when it does not force them to fight for their political freedom — when, in general, it focuses on the provision of the basic goods that are the most common objects of compassion in central cases.

NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 17, at 377-78. *See also* RAWLS, JUSTICE AS FAIRNESS, *supra* note 26, §31.2, at 106 (“to secure for those citizens the basic rights, liberties, and fair opportunities, [everyone needs] at least an adequate share of all-purpose material means . . . so that the citizens represented will be able to exercise those rights and liberties and to take advantage of those opportunities”).

222. *See generally* VAN DER WALT, LAW AND SACRIFICE, *supra* note 122 (arguing that harms imposed by law must be considered in the administration of justice).

which does not have consensus on fundamentals of religious belief or moral obligation. And all these arguments depend on the most fundamental requirements of respecting equality and human dignity. "Property rights serve human values," wrote Chief Justice Joseph Weintraub of the Supreme Court of New Jersey in his opinion in *State v. Shack*. "They are recognized to that end, and are limited by it."²²³

Our core concern should be our own humanity and the humanity of those affected by our actions and by our failures to act.²²⁴ We should be able to feel that we have acted in a humane way. This means both that we ourselves can feel that we have acted humanely and that those we touch could say the same. In short, the ultimate test is whether we have treated other people as human beings. Far from being wishy-washy, this test is actually rigorous. Try applying it to actual cases; it does not tell us precisely what to do but it does rule many things out.

Of course, it is inevitable that any legal rule and any governmental policy will curtail the interests and rights of some in order to protect the interests and rights of others. In such moments, it is especially important to speak to the loser, to justify the legal response to the crisis in ways the victims of that law could accept, even if we do not expect them to accept those reasons.²²⁵ And sometimes, even this is not possible. In such cases, acknowledgment of the tragic choice and the impact of the decision on those negatively affected by it is of central importance. You will note that I have not identified a decision procedure that ensures that we will reach the right result; nor have I lifted the burden of judgment from the shoulders of decision makers. My goal is precisely the opposite: to press upon legal decision makers the recognition that they are exercising power and that every law creates victims; in making such decisions, we expect them to act wisely and humanely, and this

223. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

224. KORSGAARD, SOURCES OF NORMATIVITY, *supra* note 84, at 125 ("We must value ourselves as human.").

225. See LARMORE, MORALS OF MODERNITY, *supra* note 16, at 137 ("To respect another person as an end is to insist that coercive or political principles be as justifiable to that person as they are to us."); *see also id.* at 141 ("If the principles of political association are to be rooted in a commitment to equal respect, they must be justifiable to everyone whom they are to bind."); SHAPIRO, MORAL FOUNDATIONS, *supra* note 25, at 132 (arguing that assumptions about welfare should "be as friendly as possible to the disadvantaged in every conceivable regime").

2006] Equality and Humanity in Property Regimes 343

means that they must not hide from the effects of their actions on those who are the most vulnerable.

The Biblical tradition of concern for the orphan, the widow, and the stranger has something to teach those of us who deal in secular law. When you see another person, you should see an angel, a messenger of God. You may understand this literally or figuratively. Either way, it means that you should feel a sense of awe; it means that respect for human dignity is at the heart of the matter in creating a free and democratic society that treats each person with equal concern and respect. It means that the effects of the law on individual persons must be acknowledged and justified, especially when the legal framework leaves them poor and vulnerable to the flood waters.