

# The Property Equilibrium in a Liberal Social Order (or How to Correct Our Moral Vision)

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## I. THE IDEOLOGICAL DIN OF CONTEMPORARY LIBERAL THEORY

For a few brief moments it appeared to some that we inhabited a post-ideological age.<sup>1</sup> We have witnessed a widespread convergence on fundamental rights of the person, democratic governance, and the ineliminable role of markets and private enterprise in securing economic prosperity. The great ideological wars of the nineteenth and twentieth centuries between liberal capitalism, communism, and fascism—a worldwide clash of diametrically opposed forms of social, economic, and political life—was resolved by the victory of some broad, though thin, consensus on liberal-capitalism.<sup>2</sup> Ideology, however, was not destroyed though it is, mercifully, generally now much less deadly. Our chief ideological battleground today is “social” or “distributive” justice—which Bertrand de Jouvenel described as the “obsession of our time.”<sup>3</sup> Certainly it is the obsession of contemporary liberal political philosophy. The “welcome return” to “substantive political philosophy” that Rawls’s *A Theory of Justice* was said to herald<sup>4</sup> has resulted in forty years of proposals seeking to show that philosophical reflection leads to the demonstrable truth of almost every and any conceivable view of the justice of markets and the distribution of resources (or welfare, or opportunities). Select any view—from the justice of unregulated capitalist markets to the most extreme forms of egalitarianism—and one will find that some philosophers have proclaimed that rational reflection uniquely leads to its justice,<sup>5</sup> though few convince many of their colleagues, much less what used to be called “the educated public.” This is not merely a case of theoretical disorder, as one might expect during a Kuhnian revolutionary epoch in science, in which the dominant paradigm has broken down and no new one has replaced it.<sup>6</sup> It is, I believe, a sort of ideological (or, at

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<sup>1</sup> Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties*, revised edn. (New York: The Free Press, 1962); Francis Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 1992).

<sup>2</sup> As I have argued, given the prognoses for liberalism at the beginning of the twentieth century, and even near mid-way through it, this was indeed remarkable. See my “Liberalism at the End of the Century,” *Journal of Political Ideologies*, vol. 5 (2000): 179-199.

<sup>3</sup> Bertrand de Jouvenel, *Sovereignty* (Cambridge: Cambridge University Press, 1957), 139.

<sup>4</sup> Norman Daniels, “Introduction” to *Reading Rawls: Critical Studies of A Theory of Justice* (New York: Basic Books 1974), ix.

<sup>5</sup> For a litany of these incompatible truths about distributive justice, see my “On Justifying the Liberties of the Moderns: A Case of Old Wine in New Bottles,” *Social Philosophy & Policy*, vol. 25 (2007): 86ff.

<sup>6</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions*, third edn. (Chicago: University of Chicago Press, 1996).

best utopian) thinking masquerading as philosophizing. Captivated by their personal moral visions of a better world, political philosophers construct elaborate arguments and frameworks to demonstrate that their own highly disputable convictions are the dictates of impartial reason (and that their colleagues down the hall advocate radical injustice).

If addressing our topic—the relation between liberalism and capitalism—is not simply to add to this ideological din, we must pause and think about political philosophy’s range of competency. Political philosophers have their own moral and political convictions; the question is to what extent these are properly expressed in their political philosophy—their view of the just state, or the grounds and limits of the authority of the state. If a political philosopher is convinced by the moral case for Robert Nozick’s historical entitlement theory, Joseph Raz’s perfectionist morality, or Ronald Dworkin’s egalitarianism,<sup>7</sup> does this mean that she must demand that a just or authoritative state be libertarian, or perfectionist, or egalitarian? If she is a committed libertarian, must she hold that a non-libertarian state is unjust and nonauthoritative (or perhaps unjust and yet still authoritative)?<sup>8</sup> We might ask: is the private conscience of the philosopher (or anyone else) authoritative over what public morality and the law must be?

My concerns in this essay are both to better understand the task of the political philosopher while analyzing the place of property rules in a liberal order. I begin by arguing that two dominant approaches to political philosophy (examined in sections II and III) obscure the fundamental questions about the justification of property; if we succumb to their moral visions, the result will almost inevitably be a contribution to the ideological din surrounding property and justice. Sections IV and V then explore a third view, which is central to the thought of philosophers as diverse as T.H. Green, Kurt Baier and F.A. Hayek. With this view, which stresses the social reality of moral rules, we finally begin to understand the moral status of private property in a liberal order—when it is part of the “true” moral order, and when it is subject to philosophical criticism and proposals for revision.

## II. THE PUBLIC AUTHORITY OF PRIVATE CONSCIENCE

### A. *The social authority of private conscience thesis*

Let us begin by exploring a view that, though I think ultimately mistaken, is nevertheless attractive. It commences with a real insight: when a person’s action falls under social morality—that part of morality which concerns claims on others about what they must

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<sup>7</sup> Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974); Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000).

<sup>8</sup> Another possibility, often advocated today, is that such a state would be unjust and without authority, but still could be “legitimate,” in the sense that its use of coercive power may be non-wrongful. See Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008), 240ff.

and must not do—it no longer is simply her business what she does, it becomes everyone’s business.<sup>9</sup> We do not say that a person who violates the rules of morality is simply foolish or self-destructive: we accuse, reproof, and blame, we are indignant, and we may well punish.<sup>10</sup> We not only insist that what she does is our business, we insist that she must do as we demand. In a way we claim authority over her, a standing to direct her action according to *our understanding* of the rules, and we hold her accountable for failing to obey.<sup>11</sup> Suppose you make a moral demand of another and she replies “Well, that is what *you* think morality requires, but who are you to tell *me* what is morally required of *me*?” You are not apt to back down. When another denies your claim, at least sometimes you must reply that, having employed your reasoning as well as you can, your interpretation must not only hold for you, but for *her*: she must do as you demand of her. If you always refuse to uphold your moral demand in the face of disagreement, you are not advancing a moral *demand* at all, but simply offering an interpretation of morality for the consideration by others (as one might offer a philosophical view at a philosophy conference). We thus seem to be committed to a rather startling thesis: your own deliberations about the requirements of social morality justify you in claiming an authority to direct the lives of others as your interpretation dictates.

*B. The priority of the moral to the political*

Given the social authority of private conscience thesis, suppose we take the reasonable view that the state should conform to moral demands and requirements. You have reasoned as well as you can about the demands of social morality, and you have concluded, say, that resources should be distributed equally (or that only libertarian property rights are morally justified). Other reasonable moral agents disagree with you, but it seems that you cannot allow that to be a decisive objection. As Steven Wall says, “The model citizen believes that political justification should proceed from premises that are sound. Sound premises are not always uncontroversial.”<sup>12</sup> Suppose that you have thought as hard as you can about the demands of morality, and have provided others with the best arguments you can devise upholding your interpretation. But, just as one need not—indeed cannot always—withdraw a moral demand just because someone dissents, so you need not withdraw a demand for political action just because other, quite reasonable, people cannot grasp your moral justification. “[I]f people have sound political

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<sup>9</sup> See Kurt Baier, *The Moral Point of View*, abridged edn. (New York: Random House, 1965), xviii-xix.

<sup>10</sup> See Kurt Baier, *The Moral Point of View* (Ithaca, NY: Cornell University Press, 1958), 1.

<sup>11</sup> See further Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Cambridge, MA: Harvard University Press, 2006).

<sup>12</sup> Steven Wall, *Liberalism, Perfectionism, and Restraint* (Cambridge: Cambridge University Press, 1998), 35.

views and if they have good reasons for believing that they are sound, then they do not necessarily act wrongly if they impose them on others. The fact that some may reasonably reject their views does not in itself show that they should not enforce them.”<sup>13</sup>

Thus we appear to move seamlessly from the moral authority of private conscience over others to its public or political authority. You demand that the state institute the egalitarian (or libertarian) regime because you are convinced of its justice. At least this follows if we accept the *thesis of the priority of the moral to political*. Once one has determined that one is justified in believing a conclusion about morality, this grounds a justified demand that political action accords with one’s moral demands. We might distinguish weaker and stronger versions of this thesis:

*The Weak Version* (conscience is not to be violated by political authority): An act of a political authority is morally acceptable to Alf only if it conforms to Alf’s private conscience about the requirements of morality.

*The Strong Version* (political authority must track the demands of conscience): The conformity of an act of political authority to Alf’s private conscience is sufficient for Alf to conclude it is morally acceptable.

The Weak Version of the thesis claims that no act of political authority can be morally acceptable to Alf if it violates his private conscience—his own understanding of the requirements of morality. Should the law seek an egalitarian redistribution, but Alf believes that only strong libertarian property rights are morally justified, he must deny the moral authority of such a law. The Strong Version of the thesis claims that moral conscience not simply exercises a veto over the moral acceptability of laws, but that Alf’s view of the moral acceptability of the law is determined by how well it tracks his moral conscience. Someone might deny the Strong Version of the thesis by maintaining that even if he holds that a law conforms to the substantive requirements of morality, Alf still may hold that the law is not morally acceptable if it has not been enacted by the legitimate procedures of the state (e.g., Alf may be a good democrat). Call this “the procedural requirement.” In reply, though, the advocate the Strong Version of the thesis is apt to press a dilemma. Either (1) Alf believes that the procedural requirement is also a moral requirement or (2) he does not. If (1), then Alf’s commitment to the procedural requirement is simply part of his moral view (he is a good democrat because it is the moral thing), and so his stance is after all consistent with the Strong Version. His commitment to the procedural requirement only poses a challenge to the Strong Version if (2) is the case, but then we may wonder why Alf allows a non-moral procedural requirement to lead him to a the conclusion that a law that conforms to the requirements of morality is not morally acceptable.

### C. *The sectarian nature of the view*

I have tried to convey how compelling, at least on first inspection, is the private conscience’s claim to public authority. Given two apparently compelling theses—the

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<sup>13</sup> Ibid., 101.

social authority of private conscience and the priority of the moral to political—it looks as if we are forced to admit that a “model citizen” must insist that the enactments of political authority conform to his private conscience. Liberalism, however was founded precisely on the denial of the claim of sectarian belief to authority over authors.<sup>14</sup> Liberalism can be understood as a rejection of the pre-modern supposition that each, looking to his private conscience about the nature and will of God, properly insisted that the state’s enactments conform to his interpretation of His demands. As religious pluralism took hold, sharply conflicting demands, based on different interpretations of God’s will and nature, were pressed. Liberals such as Locke insisted that such private conscience had no public standing. The private judgment of each should rule his own life in religious matters. In controversies between churches about whose doctrine is true “both sides [are] equal; nor is there any judge... upon earth, by whose sentence it can be determined.”<sup>15</sup>

It will immediately be replied that this tale is about religious conviction, not moral belief. In fundamental respects, however, moral and religious beliefs are remarkably similar. The libertarian holds that it is obvious that we are self-owners, the left-libertarian that the world is owned by mankind in common, while the “liberal egalitarian” has a “single political vision” uniting liberty, equality, and community.<sup>16</sup> Each bases his political claims on a “seeming” or an “intuition”—what manifestly seems true to the proponent of the view. As Christopher Eberle has stressed, these seemings or controversial intuitions are epistemically very similar to “God Manifestation Beliefs”—beliefs about the world formed on the basis of perceptions of God’s will and characteristics.<sup>17</sup> The proponents of the various seemings—both religious and moralistic—can seek to show how they make sense of other features of our world, how important they are to us, and how they are consistent with the rest of our experience. Yet to others who do not have this “moral vision” the conclusions are not justified, and the rejected principles do not help them make sense of their own world. As David Gauthier rightly stressed, claims to insight into non-natural moral properties and claims to religious insight are in many ways the same type of claim.<sup>18</sup>

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<sup>14</sup> I consider these matters in more detail in “Hobbes’ Challenge to Public Reason Liberalism” in *Hobbes Today*, edited by S.A. Lloyd (Cambridge: Cambridge University Press, forthcoming).

<sup>15</sup> Locke, “A Letter Concerning Toleration,” in the *Works of John Locke in Nine Volumes*, 12th edn. (London: Rivington, 1824), vol. 5, 19.

<sup>16</sup> On the last see Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), 236.

<sup>17</sup> See Christopher J. Eberle, *Religious Conviction of Liberal Politics* (Cambridge: Cambridge University Press, 2002), especially chap. 8.

<sup>18</sup> David Gauthier, “Why Contractarianism?” in *Contractarianism and Rational Choice*, edited by Peter Vallentyne (Cambridge: Cambridge University Press, 1991), 21ff. But, it will be pressed, we argue for our moral beliefs and political positions; moral argument is part of a public, shared, discourse. Religious beliefs, though, also are supported by argument (that is why there are schools of theology), and some hold that sustained rational reflection is itself sufficient to arrive at truth about God—that is the very point of natural theology. And much moral argument is, contrary to the proclamations of some philosophers, itself not fully public and shared. Arguments for

## III. THE POLITICALIZATION OF MORALITY

*A. Moral judgment, private reason, and disagreement in the social contract tradition*

The social contract tradition always recognized that moral judgment is an exercise of private reason and, consequently, widespread and intractable dispute about the claims of morality are inevitable. All laws, written and unwritten," Hobbes tells us,

have need of interpretation. The unwritten law of nature, though it be easy to such as without partiality and passion make use of their natural reason, and therefore leaves the violators thereof without excuse; yet considering there be very few, perhaps none, that in some cases are not blinded by self-love, or some other passion, it is now become of all laws the most obscure, and has consequently the greatest need of able interpreters."<sup>19</sup>

Locke agrees: "though the Law of Nature be plain and intelligible to all rational Creatures; yet men being biassed by their Interest, as well as ignorant for want of studying it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases."<sup>20</sup> And to Kant, the root of conflict in the state of nature is that "individual men, nations and states can never be certain they are secure against violence from one another because each will have the right to do what seems just and good to him, entirely independently of the opinion of others." Kant goes on to insist that justice is absent in the state of nature because each relies on his own judgment, and thus "when there is a controversy concerning rights (*jus controversum*), no competent judge can be found to render a decision having the force of law."<sup>21</sup> For Hobbes, Locke and Kant a social order in which real justice obtains necessitates that individuals abandon reliance on their private judgments of equity and justice.

It is instructive to contrast the solutions of Hobbes and Locke to the conflict of private, sectarian, reasoning about morality. To Hobbes the problem is endemic to all reasoning. The exercise of our rationality is fallible: "no one man's reason, nor the reason of any one number of men, makes the certainty."<sup>22</sup> Rational people aim at what Hobbes calls "right reason"—true rationality, which reveals the truth. However, because everyone's exercise of rationality is fallible, we often disagree about what is right reason; the private use of reason leads to disagreement and, thought Hobbes, conflict. Although in such controversies each person claims that the use of his own private reason is "right reason," these claims only exasperate the conflict: "when men that think themselves

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controversial moral conclusions invoke as premises seemings or intuitions that are quite rationally not shared by others, or propose interpretations of very abstract moral platitudes (e.g., "don't harm others") that are not shared by others. There seems as little hope for progress once these controversial seemings and interpretations are in play in moral argument as there is in religious argument once the participants invoke different perceptions of the nature of God. To claim authority over the lives of others on the grounds of such seemings is quintessentially sectarian.

<sup>19</sup> Hobbes, *Leviathan*, edited by Edwin Curley (Indianapolis, IN: Hackett, 1994), 180 (chap. 26, ¶20).

<sup>20</sup> Locke, *Second Treatise of Government in Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1960), §124.

<sup>21</sup> Kant, *Metaphysical Elements of Justice*, 2nd edn., edited and translated by John Ladd. (Indianapolis: Hackett, 1999), 116-119, 146.

<sup>22</sup> Hobbes, *Leviathan*, 23 (chap. 5, ¶3).

wiser than all others clamour and demand right reason for judge, yet seek no more but that things should be determined by no other men's reason but their own, it is...intolerable in the society of men." Indeed, Hobbes insists that those who claim that their reason is obviously correct reason betray "their want of right reason by the claim they lay to it."<sup>23</sup> Someone who insists that *his* reason is right reason, and so *his* reason should determine the resolution of disputes, is not only a danger to society, but because he sees "every passion" of his as an expression of "right reason," he is *irrational*: he demonstrates the lack of right reason by virtue of the claim he lays to it. On Hobbes' view, then, a stable and prosperous social life is only possible among individuals who acknowledge that their private judgment of the demands of reason cannot hold sway in their controversies with others; our very interest in a secure and peaceful social life instructs us to abandon reliance on our private judgment. Hobbes thus proposes that *all* disagreements in private reason—including disputes about religious doctrine and practice, as well as about equity and justice—are to be resolved by the sovereign, who is to serve as the sole voice of public reason.

Locke, in contrast, proposes to separate private disagreement about morality from private disagreement about religion. "I esteem it above all things," Locke continues, "necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth."<sup>24</sup> As we have seen, Locke argues that private judgment should rule in religious matters. For the magistrate to seek to regulate such matters would be simply an exercise of private, not public, reason: "as the private judgment of any particular person, if erroneous, does not exempt him from the obligation of law, so the private judgment ... of the magistrate, does not give him any new right of imposing laws upon his subjects, which neither was in the constitution of the government granted him, nor ever was in the power of the people to grant."<sup>25</sup> However—and here Locke largely concurs with Hobbes—except in the most extreme cases, "all private judgment of every particular Member" must be excluded in determining the demands of morality.<sup>26</sup> It is the task of government to serve as the Umpire and the voice of public reason about what morality requires. Once again the political order becomes the interpreter of the moral order regulating interpersonal actions.

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<sup>23</sup> *Ibid.*, 23 (chap. 5, ¶3). See further David Gauthier, "Public Reason" in *Public Reason*, edited by Fred D'Agostino and Gerald F. Gaus (Brookville, VT: Ashgate, 1988): 50ff; E.W. Ewin, *Virtues and Rights: The Moral Philosophy of Thomas Hobbes* (Boulder, CO: Westview, 1991), chap. 2.

<sup>24</sup> Locke, "Letter on Toleration," 9-10.

<sup>25</sup> *Ibid.*, 43.

<sup>26</sup> Locke, *Second Treatise*, §88.

*B. The over-politicalization of moral authority and validation of ideological politics*

The social contract tradition thus represents a wide-ranging rejection of all sectarian claims to public authority. For Locke, private judgment concerning religion is stripped of all public authority over others, being confined to voluntary religious associations. Claims based on private judgment about morality also are without authority (at least over those who disagree): private judgment is “excluded” from public authority, and the state becomes the judge of social morality. Because Hobbes sees no stable way to insulate religious disputes from moral and political ones, he puts everything within the ambit of public authority.

Hobbes, Locke, and Kant trace the problem of social disorder to conflicting claims of private conscience about morality, and all see the solution to be establishing the state as the final umpire as to the demands of justice.<sup>27</sup> When applied to democracy, the social contract solution would seem to confirm the characterization of the democratic state as the battleground of competing ideologies (or, perhaps more charitably, sectarian views about social and political morality). To be sure, no private advocate of an ideology (or controversial moral vision) has any claim to social authority unless and until her vision is ratified by the democratic umpire, but we can suppose that each citizen (or citizen-philosopher) presses her own controversial, private judgment, about the demands of justice, hoping that it is selected by the Umpire, and so may emerge as the view with *bona fide* social authority.

Note that the social contract tradition ends up denying, or at least severely weakening, both of the intuitive claims we examined in section II, and which seemed to make the private moral conscience authoritative over the political. The *social authority of private conscience thesis* is straightforwardly rejected: such claims to authority are the source of social disorder. We should not suppose that the social contract tradition is restricted to solving the disorder resulting from differing distinctively political views: the root of the problem is conflicting private judgment about all authoritative claims on others, including moral ones. The thesis *that morality is prior to the political is*, if not abandoned, seriously compromised. Although for Hobbes, Locke, and Kant the principles of natural law, equity, or justice obtain prior to the advent of political association, the state’s role as definitive interpreter implies that, except (in the case of Locke) for extreme violations of morality,<sup>28</sup> a “model citizen” must deny both the Weak

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<sup>27</sup> This is not to say that citizens must believe that the state is always correct about these matters. While Hobbes perhaps flirts with this view (and in some ways Rousseau did so as well), Locke and Kant are clear that the state can be wrong, and the citizen may conclude that it is. The core question is about the social authority of one’s claims on others, not the truth of one’s moral judgments.

<sup>28</sup> For Locke, if the majority becomes convinced “in their consciences, that their laws, and with them their estates, liberties, and lives are in danger, and perhaps their religion too,” they may employ their private conscience and its authoritative claims to reject the government’s claim to authority. See Locke, *Second Treatise*, §§208, 209, 225, 230.

and Strong versions of the thesis.<sup>29</sup> That is, the model citizen will not first form a judgment about the demands of authoritative social morality and then employ this judgment to determine the state's authority: it is not until the judge or umpire has ruled that a claim with public authority arises.

Surely this cannot be the correct solution to the problem of sectarian claims to moral authority—at least not for a society of free individuals. Admittedly, in some cases moral disputes end up in the political arena; but the state is not generally the arbiter of social morality. In some version or other, our initial two theses must be sound. Individuals quite properly employ their own judgment to make demands on their fellows, and very often there is no supposition that the state need confirm the demand. If I believe that it is wrong to employ child labor, I will demand that those who do so cease (the social authority of private conscience) and I am apt to condemn the state if it fails to halt the practice, and I shall almost certainly deny the authority of any law that requires me to participate in the practice (the priority of morality to the political is invoked here). This, though, seems to drive us right back to the first view, the sectarian claims of private conscience claiming public authority. We appear to confront a dilemma: sectarian authority or the effective moral superiority of political authority. In the next section, focusing on property rights, I explore a conception of social morality that is neither resolutely individualistic nor statist; in section V I show how this conception resolves our dilemma.

#### IV PUTTING THE SOCIAL BACK INTO SOCIAL MORALITY (AND PROPERTY)

##### *A. Moral rules as social norms*

The problem for the two views we have examined is essentially the same: they see nothing between the individual conscience and the authority of the state. Caught in this simple dichotomy, the first view grants authority to the private conscience; the social contract tradition sees this as a threat to order, so when the demands of private conscience conflict, the state's decision is definitive. After his review of the classical social contract theories of Hobbes, Locke, and Rousseau, T.H. Green concluded that “they look only to the supreme coercive power on the one side and to individuals, to whom natural rights are ascribed, on the other” and so “they leave out of sight the process by which men are clothed with rights and duties, and with senses of rights and duties, which are neither natural nor derived from the sovereign power.”<sup>30</sup>

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<sup>29</sup> To remind readers, *The Weak Version* holds that an act of a political authority is morally acceptable to Alf only if it conforms to Alf's private conscience about the requirements of morality, while the *Strong Version* maintains that the conformity of an act of political authority to Alf's private conscience is sufficient for Alf to conclude it is morally acceptable.

<sup>30</sup> Green, *Lectures on the Principles of Political Obligation* in *Lectures on the Principles of Political Obligation and Other Writings*, edited by Paul Harris and John Morrow (Cambridge: Cambridge University Press, 1986), §113.

It is a mistake, then, to think of the state as an aggregation of individuals under a sovereign—equally so whether we suppose the individuals as such, or apart from what they derive from society, to possess natural rights [Locke], or suppose them to depend on the sovereign for the possession of rights [Hobbes]. A state presupposes other forms of community, with the rights that arise out of them, and only exists as sustaining, securing, and completing them. In order to make a state there must have been families of which the members recognized rights in each other (recognized in each other powers capable of direction by reference to a common good); there must further have been intercourse between families, or between tribes that have grown out of families, of which each in the same sense recognized rights in the other....<sup>31</sup>

Green's insight is that between the individual's private conscience and the public authority of the state lies the authority of social practices, including the rules of social morality. In recent moral and political philosophy, the importance of social norms and rules in ordering the moral life of a society has been most consistently stressed by Kurt Baier and F.A. Hayek. Throughout his long career, Baier insisted that the morality of a society is a social fact or, as he sometimes put it, a sort of social order constituted by systems of mores or rules.<sup>32</sup> Hayek too consistently stressed that it is the evolved moral rules of a society that order the actions of its members by aligning their expectations.<sup>33</sup> Two of Hayek's claims are especially important for our purposes: (1) moral rules arise through an evolutionary process and (2) they raise "endogenously."

This matching of the intentions and expectations that determine the actions of different individuals is the form which order manifests itself in social life....[The]...authoritarian connotation of the concept of order derives ... from the belief that order can only be created by forces outside the systems (or 'exogenously'). It does not apply to an equilibrium set up from within (or 'endogenously')....<sup>34</sup>

In their analyses of interpretive disagreements, Hobbes, Locke and Kant all paid insufficient attention to our evolved ability to coordinate our actions on common interpretation of norms. The tendency of our natural reason to produce divergent interpretations is countered by our tendency to converge on a common understanding of the norms that structure social life.

#### *B. Primitive property rights as correlated strategies*

To see how such convergence may evolve, let us start with a simple model of the development of property rights. Basic property rights can be modeled as conventions in correlated equilibrium about the mutual recognition of individual jurisdictions. In the most primitive case of all, the jurisdictions can be understood simply as territorial, as in the classic Hawk-Dove game given in Display 1:<sup>35</sup>

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<sup>31</sup> Ibid., §134.

<sup>32</sup> See Kurt Baier, *The Rational and the Moral Order: The Social Roots of Reason and Morality* (Lasalle, IL: Open Court, 1995), 199ff.

<sup>33</sup> See my "The Evolution of Society and Mind: Hayek's System of Ideas" in *The Cambridge Companion to Hayek*, edited by Ed Feser (Cambridge: Cambridge University Press, 2006).

<sup>34</sup> F.A. Hayek, *Rules and Order* (Chicago: University of Chicago Press, 1973), 36. Compare Baier, *The Rational and the Moral Order*, 218.

<sup>35</sup> I am drawing here on Herbert Gintis' analysis in *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (Princeton: Princeton University Press, 2009), 39-40, 201ff and my presentation in *On Philosophy, Politics, and Economics* (Belmont, CA: Thomson-Wadsworth,

	Hawk	Dove
Hawk	$z$	0
Dove	$v$	$v/2$

Display 1: Generalized Hawk-Dove Game<sup>36</sup>

Suppose Hawks and Doves are types of individuals in the population. A Hawk always battles for a territory until either it is injured or its opponent retreats. A Dove engages in display battle: if it meets a Hawk it quickly retreats without injury; if it meets another Dove, there is a .5 probability that it will retreat—in no case does it sustain injury. Let  $v$  be the value of the territory (and suppose it is positive); and  $w$  be the cost of injury from fighting over a territory (and suppose that  $w > v$ ); then let  $z = (v-w)/2$ . Display 2 provides a specific set of payoffs.

	Hawk	Dove
Hawk	-5	0
Dove	10	5

Display 2: A Specific Hawk-Dove Game

Let us view this as an evolutionary game. Players do not change strategies, but play their strategy against whomever they meet. Display 3 gives the expected payoffs of three different strategies when they meet each other.

<i>Plays against →</i>		Hawk	Dove	Lockean
<i>Player</i>	↓			
Hawk		-5	10	2½
Dove		0	5	2½
Lockean		-2½	7½	5

Display 3: Expected Payoffs

The expected payoff of a Hawk playing another Hawk is -5; the expected payoff of a Hawk meeting a Dove is 10; the expected payoff of a Dove meeting a Hawk is 0; and the expected payoff of a Dove meeting a Dove is 5. Though the players do not vary their strategies (and so they cannot make “moves” in the sense of traditional game theory), we can understand the population as “moving” in the sense that, if being a Hawk has a higher expected payoff than being a Dove, the population will move towards more Hawks and less Doves. In evolutionary terms we can think of this as a *replicator dynamic*

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2008), 136-42. For the classic analysis, see John Maynard Smith, “The Evolution of Behavior,” *Scientific American*, vol. 239 (1978): 176-192.

<sup>36</sup> Column player’s payoff is in the top right of each cell, row bottom left.

in which those strategies that tend to have higher average payoffs increase in the population and so displace lower payoff strategies.<sup>37</sup> So as the Hawks and Doves play each other repeatedly over long periods of time, the percentage of Hawks and Doves in the population from generation to generation will vary with how many points they gather in our Hawk/Doves game (points, let us say, indicate relative fitness). An *evolutionary stable strategy* is one that cannot be invaded by a mutant strategy.<sup>38</sup> It is immediately obvious that neither all-Hawk nor all-Dove is an evolutionary stable strategy. For a population of all Hawks the average expected payoff of the population is 5; since a mutant Dove would have a payoff of 0 it would outperform the population average and increase. For a population of all Doves, the average population payoff is 5; a mutant Hawk would receive a payoff of 10, thus again outperforming the average of the Dove population. In the case of Display 2 an evolutionary stable equilibrium would be a mixed population evenly split between Doves and Hawks. At that mix the average Hawk and average Dove payoffs are the same ( $2\frac{1}{2}$ ), and so neither population can grow at the expense of the other.<sup>39</sup>

As Herbert Gintis points out, while this population mix is stable, it is an inefficient way to allocate property rights: our Hawks and Doves have arrived at a stable equilibrium, but this includes the cost of injury to warring Hawks.<sup>40</sup> (And remember that a population of peaceful Doves can always be invaded by Hawks). Now suppose a new type of person arises, the Lockean. The Lockean acts aggressively to protect its territory, but is easily deterred from taking that of others. In short, the Lockean acts like a Hawk on its own territory and a Dove on that of others. Suppose that our Lockean has half its encounters on its own territory, and half on that of others; the expected payoff of

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<sup>37</sup> See here Brian Skyrms, *Evolution of the Social Contract* (Cambridge: Cambridge University Press, 1996).

<sup>38</sup> According to one way of formalizing this idea, S is an evolutionary stable strategy if and only if, with respect to a mutant strategy S\* that might arise, either (1) the expected payoff of S against itself is higher than the expected payoff of the mutant S\* against S or (2) while the expected payoff of S against itself is equal to the expected payoff of S\* against S, the expected payoff of S against S\* is higher than the expected payoff of S\* against itself. The idea is this. Suppose that we have an S population in which one or a few S\* types are introduced. Because of the predominance of S types, both S and S\* will play most of their games against S. According to the first rule, if S does better against itself than S\* does against S, S\* will not get a foothold in the population. Suppose instead that S\* does just as well against S as S does against itself. Then S\* will begin to grow in the population, until there are enough S\* so that both S and S\* play against S\* reasonably often. According to the second rule, once this happens, if S does better against S\* than S\* does against itself, S will again grow at a more rapid rate. To say, then, that S is an ESS is to say that an invading strategy will, over time, do less well than will S. There are other ways of formulating the basic idea of an evolutionary stable strategy, but that need not detain us here.

<sup>39</sup> In an evenly split Dove/Hawk population, a Dove will play half its games against other Doves, and in each game it receives 5 (so  $\frac{1}{2} \times 5 = 2\frac{1}{2}$ ), while it plays the other half of the time against Hawks, for an average payoff of 0 ( $\frac{1}{2} \times 0 = 0$ ); thus a Dove's overall expected payoff against the entire population is  $2\frac{1}{2}$ . Hawks play Doves half the time, and in each game receive 10 (so  $\frac{1}{2} \times 10 = 5$ ); the other half the time a Hawk plays against other Hawks, with an expected payoff each time of -5 (so  $\frac{1}{2} \times -5 = -2\frac{1}{2}$ ) — thus  $(5) + (-2\frac{1}{2}) = 2\frac{1}{2}$ .

<sup>40</sup> Gintis, *The Bounds of Reason*, 135.

Lockeans interacting is 5; half the time a Lockean playing another Lockean will get 10, and half the time 0. Our Lockeans can invade pure Hawk or pure Dove populations, as well as our mixed population in equilibrium. Recall (Display 3) that the average payoff of a Dove against a Dove is 5; but a Lockean playing a Dove will get 10 the half the time it is on its own territory ( $10 \times \frac{1}{2} = 5$ ) and will receive the Dove payoff the half the time it is on another's territory ( $5 \times \frac{1}{2} = 2\frac{1}{2}$ ), for a total expected payoff of  $7\frac{1}{2}$ , thus outperforming the Dove. In a population of all Hawks, the average payoff is -5; the Lockean will also receive the -5 payoff the 50% of the time it is on its own territory, but will receive the 0 payoff when it is off its territory, giving it a total expected payoff against Hawks of  $-2\frac{1}{2}$ , again outperforming the Hawk population. And neither can the Lockean population be invaded by either Hawks or Doves.<sup>41</sup> Lockeanism is an evolutionary stable strategy, and an efficient equilibrium.<sup>42</sup>

Of course the advantage of Lockeans depends on the costs and benefits of predation and defense; if preying on others is very easy and beneficial, Hawks may have an advantage. If preying is exceptionally difficult or yields little returns, Lockeans may have relatively little advantage over pure Doves. But societies filled with Hawks and Doves (without enough Doves to prey on, a society of predators does badly indeed), tend to reach inefficient equilibria over a wide range of values (concerning the variables in Display 1). If we add to our analysis competition between groups, societies of Lockeans overall have a distinct advantage. As Peter J. Richerson and Robert Boyd have demonstrated in an impressive body of work, cultural variation shows strong group selection processes.<sup>43</sup> Groups with fundamentally more efficient forms of organization tend to expand, and to be copied by others. Within broad parameters what Gintis calls the "property equilibrium"<sup>44</sup> is fundamental to social life, and over the long term we can expect social convergence on some "Lockean" (in our broad sense) conception of property rights.

All this is fairly standard evolutionary game theory. Note, however, that we can redescribe "Hawks" as those who are assertive in their private judgments about the bounds of property rights, "Doves" as those who are deferential to the private judgments of others, and Lockeans as those who have achieved a common conception of the

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<sup>41</sup>As Display 3 shows, the expected payoff of Doves against Lockeans is  $2\frac{1}{2}$  (half the time a Dove gets nothing, half the time 5); the expected payoff of Hawks against Lockeans is also  $2\frac{1}{2}$  (-5 half the time for  $-2\frac{1}{2}$ , and 10 half the time for an average of 5, so  $-2\frac{1}{2} + 5 = 2\frac{1}{2}$ ). Recall that the expected payoffs of Lockeans against themselves is 5, so they cannot be invaded. Lockeans can also invade the mixed population in equilibrium.

<sup>42</sup> It constitutes what Robert Aumann called a "correlated equilibrium," which is more efficient here than the Nash equilibrium characterizing our Hawk-Dove mixed population. See Skyrms, *Evolution of the Social Contract*, chap. 4; my *On Philosophy, Politics, and Economics*, 140-41, and Gintis, *The Bounds of Reason*, 135. For a sophisticated treatment see Peter Vanderschraaf, *Learning and Coordination: Inductive Deliberation, Learning, and Convention* (New York: Routledge, 2001).

<sup>43</sup> See, for example, Peter J. Richerson and Robert Boyd, "The Evolution of Free Enterprise Values," in *Moral Markets: The Critical Role of Values in the Economy*, edited by Paul Zak (Princeton: Princeton University Press, 2008), 114.

<sup>44</sup> Gintis, *The Bounds of Reason*, 210ff.

boundaries of property rights. Locke himself, perhaps, thought the state of nature would be populated by Hawkish interpreters of the property convention: each asserts, and employs force to defend, her own view of property rights with a strong bias towards self-interest.<sup>45</sup> If Locke was right about this—if the state of nature would be a world of interpretive Hawks—then indeed they would be apt to abandon all private judgment and abide by the umpire (the state) to avoid destructive war (-5). The first view we considered (section II), upholding the sovereign public authority of private conscience, also seems Hawkish, though these Hawks seem more peaceful (perhaps it is supposed that they live among Dove-like deferential interpreters who will do as they are told!). Over the long term, however, successful and efficient social orders would heavily favor our correlated Lockean interpreters, who are often able to converge on a common understanding of the bounds of property norms. The ability to think like others—or, following Cristina Bicchieri’s analysis, the tendency to share “scripts” about the detailed actions called for by rules—would be favored over Hawkish interpreters, and there is good reason to think this ability has indeed evolved in all human cultures.<sup>46</sup>

### *C. Territory, resources, and jurisdictions*

In the most primitive case the property equilibrium divides territory.<sup>47</sup> We get closer to an adequate notion of property if we think of it as involving resources. Many of the fundamental conflicts among humans concern how those things we can use to fulfill our needs, and are required for production, are to be divided. However, while a focus on the division of resources rather than mere territoriality is a step to a more adequate—a more human—conception of property, it is easy to also take a misstep here. Much current political philosophy, inspired by economic analysis, makes two claims about property rights:

1. Property is about the division of resources.
2. The property rights equilibrium is mutually beneficial.

From (1) and (2) it seems easy to infer:

- (3) A property right in equilibrium over some resource must benefit others, and certainly must not be an overall cost.

In his original and insightful book on *The Right to Exploit*, Gijs van Donselaar implicitly invokes this trinity of claims to argue against “parasitism” and, so, fixed property rights

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<sup>45</sup> Recall that according to Locke “though the Law of Nature be plain and intelligible to all rational Creatures; yet men being biassed by their Interest, as well as ignorant for want of studying it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases.” *Second Treatise of Government*, §124.

<sup>46</sup> Cristina Bicchieri, *The Grammar of Society: The Nature and Dynamics of Norms* (Cambridge: Cambridge University Press, 2006). I explore the development of such norms in some depth in *The Order of Public Reason* (Cambridge: Cambridge University Press, forthcoming), chaps. III and VII. See also Daniel Friedman, *Morals and Markets: An Evolutionary Account of the Modern World* (New York: Palgrave Macmillan, 2008), 18.

<sup>47</sup> Gintis, *The Bounds of Reason*, 204-207.

in resources. Natural resources, van Donselaar argues, are scarce, and so we compete for them; property rights divide these resources, and if the property system is to be mutually beneficial this division must work to the maximal advantage of society. Consequently, if someone appropriates a natural resource but does not employ it in a way that improves the lot of others (and of course, more strongly, if he employs it in a way that worsens their lot), his claim to the scarce resource cannot be justified through appeal to a mutually beneficial property equilibrium. Compared to the world in which the unproductive appropriator did not exist, others are worse off: he denies the use of the scarce resource to others by claiming property over it, but does nothing with it. It turns out that doing *something* useful with it is not enough to avoid the charge of being an exploiter: one must use it in the most efficient manner. The entrepreneur's

duty is not just to produce as efficiently as he can, but to produce at least as efficiently as any of his competitors would have done in his position (as far as that position is defined by control over resources). That implies that he may be required to produce more efficiently than he can. Where he fails to do so, he has no right to be in his position. Where he fails, his factor endowments ought to be adjusted.<sup>48</sup>

As interpreted by van Donselaar, our trinity of claims makes each the steward of external resources over which he has property rights, a stewardship that requires the most efficient use for its continuance. Fixed rights in resources license parasitism.<sup>49</sup>

Van Donselaar's case is grounded on efficiency: if the justification of property rights is a mutual benefit (qua efficiency), then only efficient users possess *bona fide* rights. As do most economists, van Donselaar equates two senses of efficiency or mutual benefit: (1) Pareto-superior changes that move us from distribution  $S_1$  to a new distribution  $S_2$ , where in  $S_2$  some have a higher level of preference satisfaction than in  $S_1$ , and no one has a lower level (no one is on a lower indifference curve in  $S_2$  than in  $S_1$  and at least one person is on a higher one); (2) improvements in human welfare—at least one person's welfare is increased in the move from  $S_1$  to  $S_2$  and no one's is decreased. These, though, are quite distinct ideas, despite the unfortunate tendency of philosophers and economists alike to conflate them under the label "utility."<sup>50</sup> The notion of *welfare* concerns whether, according to some standard, the life of humans is bettered or worsened. Now certainly in some basic cases there is wide convergence on judgments about welfare—it is generally agreed that bodily harms as well as severe lack of food and health diminish one's welfare, and are of crucial importance to life. However, for "increase in welfare" to serve as a general standard for judging social improvements and property rights, we need not simply identify this and that element of welfare (absence of physical harm, security of person, financial and workplace security, intellectual life and enlightenment, job skills,

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<sup>48</sup> Gijs van Donselaar, *The Right to Exploit: Parasitism, Scarcity, Basic Income* (Oxford: Oxford University Press, 2009), 54.

<sup>49</sup> A claim with which Gauthier appears to concur in his endorsement on the back of van Donselaar's book. In *Morals by Agreement* (p. 293) Gauthier advocated a weak requirement of efficient use as necessary for rightful possession.

<sup>50</sup> See John Broome, *Ethics out of Economics* (Oxford: Oxford University Press, 1991), chap. 2. See also my *Philosophy, Politics, and Economics*, 81-82.

pleasure, riches, sex, religiosity, excitement, contentment, and so on and on), but we must be able to rank these elements or, more adequately, construct a trade-off rate such that  $x$  amount of intellectual activity is equivalent to, say,  $y$  amount of financial security. There are always those who believe they have constructed such interpersonally valid metrics, but a characteristic of modern societies is that such metrics are highly controversial among competent and good will inquirers.

Given the dispute about the welfare interpretation of “utility,” we can appreciate the attraction of the other conception of “utility,” qua a mathematical representation of the degree to which a preference ordering is satisfied. This conception is often employed in modern welfare economics.<sup>51</sup> It seems enticing: letting people “prefer” whatever they wish and order their preferences in any way they like, the aim of social policy should be the efficient satisfaction of these preferences (or, if it thought there is some interpersonal metric, their overall maximization). Now in some domains of analyses, in which we make simplifying assumptions about the types of preferences held by individuals, this may lead to enlightening results, but it is markedly unsuitable as a general criterion of acceptable rules and norms. A person’s preferences can range over a just about anything, from preferences for food, to doing one’s Kantian duty, to having a world free of Catholics.<sup>52</sup> Since at least the late Middle Ages Western European society has been characterized not only by great diversity of preferences, but of preferences that some hold dearly that others decry. Imagine the preference orderings of Ayn Rand and G.A. Cohen. If we accept the crux of van Donselaar’s argument in the above quotation,<sup>53</sup> G.A. Cohen’s holding of property in resources would be contingent upon his use raising, or certainly not lowering, the preference satisfaction of Ayn Rand.<sup>54</sup>

Once we understand preferences to be simply a ranking of options or states of affairs on the basis of one’s values, ends, aims, and so on, the attraction requiring that all uses of resources advance the preferences of all, or least do not set them back, evaporates. The use of my property is often important to me *because* it allows me to set back the satisfaction your preferences. By opening my land to a Marxist summer camp, I set back the libertarian’s key preferences: that is not simply a side-effect of my use of the land, it is the *point* of it. By using the pulpit in a Catholic Church to denounce atheism, the point of the use of property is to set back atheistic preferences. The sense in which property rights are an efficient response to the problem of social life is much more general than that van Donselaar (and, I think, Gauthier) have in mind. By dividing social life into different

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<sup>51</sup> For its application to social policy, see Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002).

<sup>52</sup> See further my *Philosophy, Politics, and Economics*, chap. 2.

<sup>53</sup> Van Donselaar’s analysis is subtle; the possible counterfactuals he explores as to whether Alf would be better off if Betty did not exist, or did not claim a resource, are complex. See *The Right to Exploit*, 88ff.

<sup>54</sup> It would at least have to be the case that she would be better off given G.A. Cohen’s existence and his appropriation than she would have been in a world without him. van Donselaar, *The Right to Exploit*, chap. 2.

jurisdictions, in which each person's values, ends, and goals hold sway, the mutual respect of these jurisdictions allows us to live together in partly cooperative, partly competitive, arrangements with a minimum of conflict about whose values are to hold sway where. This, indeed, is the quintessential liberal response to the fact that our aims and values so often differ, and indeed conflict: the social recognition of jurisdictions in which one's ends hold sway, and one may act on the basis of one's own values and interests.<sup>55</sup> This is the sense in which property rights are the foundation of a social order among people who fundamentally disagree in their aims and values, as opposed to a social order premised on the devotion of all to a collective project, be it the glory of Calvin's God, the spirit of the nation, or an fully egalitarian society. In a liberal order each has a sphere in which her personal interests, religious convictions, or personal moral visions hold sway, and others respect those spheres and so do not seek to impose their interests, convictions and visions within them. A property rights equilibrium is a socially efficient solution to the problem of individuals living together in that mix of competition and cooperation that we call modern society—which helps explain why all contemporary social orders have tended to gravitate to the liberal solution.

*D. From convention to a moral equilibrium*

I have argued thus far that a "Lockean" property rights equilibrium in the sense of a set of shared or joint individual strategies dividing society into various jurisdictions is a critical part of an efficient solution to the problem of social order given differences in aims and interests. However, as David Schwab and Elinor Ostrom argue, there are compelling reasons to conclude that mere shared strategies are insufficient to sustain free market transactions.<sup>56</sup> If we suppose that individuals are solely devoted to their own private ends, the development of market exchange—which depends on trust—is difficult to explain. As Hobbes so effectively showed, individuals who are solely devoted to their private ends will be sorely tempted to renege on "covenants": if the other party performs first and so gives the second party what she wants, there seems to be no incentive for the second party to perform her part of the bargain.<sup>57</sup> Rather than exchanging, she will be tempted to snatch the goods and flee.<sup>58</sup> Given sufficiently narrow, self-interested, utility functions, she may often do better by snatching: she gets the good without paying for it.

To some extent reputational knowledge can mitigate this problem: if the person is known as a snatcher rather than an exchanger, exchangers will boycott her, thus giving her an incentive not to snatch in order to avoid future boycotts. However, the ability of

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<sup>55</sup> I have developed this case in some detail in "Recognized Rights as Devices of Public Reason," *Philosophical Perspectives: Ethics*, 2009: 111-36.

<sup>56</sup> David Schwab and Elinor Ostrom, "The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies" in *Moral Markets*, 204-227.

<sup>57</sup> Hobbes actually thinks a person has some reason to perform second, but this is usually too weak to outweigh her selfish passions. See Hobbes, *Leviathan*, chap. 14.

<sup>58</sup> On the game of snatch, see Schwab and Ostrom, "The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies," 205ff.

reputational knowledge to constrain snatching behavior is surprisingly limited. Peter Vanderschraaf, employing dynamic game analysis, has shown how sensitive this reputational solution is to accurate common knowledge. In his model Vanderschraaf takes account of the effects of false as well as true gossip: once we model information as gossip (true and false) and allow snatchers to adopt slightly more sophisticated strategies (such as only snatching half the time rather than always), Vanderschraaf shows that the snatchers can fare better than the exchangers “in a community that must rely upon private information or ‘gossip’ only to spread information.”<sup>59</sup> In a world of such imperfect information Vanderschraaf concludes that “Rationality alone does not explain reciprocal cooperation.”<sup>60</sup>

Natalie Henrich’s ethnographic research among the Chaldeans also supports the limits of cooperation through reputation. The Chaldeans are a non-Arabic, Christian, ethnic group that has emigrated from Iraq to the Detroit metropolitan area. They are a fairly large group—about 100,000 Chaldeans live in the Detroit area. Henrich’s research indicates that intra-group cooperation is to a large extent sustained though reputational knowledge. As one subject reported:

Everyone knows which families are good or bad, and you just do business with people who come from good families—I go by family name. If I don’t know someone, I call people and ask about his family. People just mention who they are and [if they have a good reputation], they get credit.<sup>61</sup>

Because the Chaldeans have social networks in which almost everyone is heavily enmeshed (family businesses, clubs, organizations, and churches), and because they have “a fondness for gossip,” only a few calls are required to get information about the reputation of any potential participant in a business deal.<sup>62</sup> The costs of a bad reputation are quite severe. “Among Chaldeans, a person with a bad reputation is less likely to be given credit, to be hired, to be desired as a business partner, or be lent money. People will also not want to date or marry a person with a bad reputation and if they do so people will gossip about them.”<sup>63</sup> The Chaldeans, then, are a case of a reasonably large group in which cooperation is to a large extent sustained by knowledge of reputations. Henrich and Henrich’s analysis however, also displays a number of pathologies and inefficiencies of social cooperation sustained through reputational knowledge. For example, individuals spend a great deal of time establishing reputations; because it is important that a person establish a generalized reputation as a cooperator, there is a significant incentive to ratchet up one’s reputation in public arenas with a show of cooperative behavior even with non-cooperators; conflict arises because of competition among individuals within groups, and between groups, to claim credit for accomplishments to

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<sup>59</sup> Peter Vanderschraaf, “Covenants and Reputations.” *Synthese*, vol. 157 (2007), 184.

<sup>60</sup> *Ibid.*, 185.

<sup>61</sup> Natalie Henrich and Joseph Henrich. *Why Humans Cooperate: A Cultural and Evolutionary Explanation* (Oxford: Oxford University Press, 2007), 123.

<sup>62</sup> *Ibid.*, 123.

<sup>63</sup> *Ibid.*, 124.

bolster reputations; individuals exploit opportunities to gain reputations without contributing; to have a reputation as a cooperator is not simply about one's past tendencies to engage in certain well-defined cooperator behavior, but is closer to a reputation as being a good group member, who conforms to the group's customs and norms; those who are members of families with good reputations are treated as having good reputations while those in families with historically bad reputations are treated as having bad reputations, even if they have no such individual history. Chaldean cooperation is focused on other Chaldeans: there is considerable distrust of out-group members. Chaldeans prefer to do business with co-ethnics, even at significant costs to themselves.<sup>64</sup> All these are significant costs to social cooperation through reputational knowledge. Overall it is unclear to what extent such reputational knowledge actually can sustain cooperation within large groups without intense social networks conveying reliable information.<sup>65</sup>

A large body of work indicates that extended market societies are only possible when the property equilibrium evolves into a moral equilibrium: individuals come to conceive of property and exchange rules as morally authoritative.<sup>66</sup> Participants largely refrain from cheating and exploiting others, not primarily because they are worried about their reputations, but because they believe it to be wrong to violate rules that *are generally followed by others*. This last phrase is important: people tend to follow rules that are generally followed—they tend to ignore normative exhortations to follow rules when this is not backed up by actual general conformity.<sup>67</sup> A striking feature of market economies is a strong acceptance of a norm that requires that strangers be treated fairly. In a now-classic cross-cultural study, Henrich and Smith found that participants in market societies (the United States, Indonesia, Israel) were much more likely to treat anonymous strangers fairly than were those in two small-scale societies—the Machiguenga of the Peruvian Amazon and the Mapuche of Southern Chile.<sup>68</sup> Henrich and Smith conclude:

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<sup>64</sup> Ibid., 193-196.

<sup>65</sup> See Robert Boyd and Peter J. Richerson, "The Evolution of Indirect Reciprocity," *Social Networks*, vol. 11 (1989): 213-236.

<sup>66</sup> See, for example: Richerson and Boyd, "The Evolution of Free Enterprise Values;" Schwab and Ostrom, "The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies;" Friedman, *Morals and Markets*, especially chap. 3.

<sup>67</sup> See here Cristina Bicchieri and Erte Xiao, "Do the Right Thing: But Only if Others Do So," *Journal of Behavioral Decision Making* (2008), published online in Wiley InterScience [(www.interscience.wiley.com) DOI: 10.1002/bdm.621]. In their experimental work on public goods games among the Machiguenga and the Mapuche, Joseph Henrich and Natalie Smith also found that "the primary indicator of what a subject will do is what the subject thinks the rest of the group will do." "Comparative Evidence from Machiguenga, Mapuche, and American Populations." In *Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-scale Societies*, edited by J. Henrich, R. Boyd, S. Bowles, et al. (Oxford: Oxford University Press, 2004), 125-67. See also Richerson and Boyd, "The Evolution of Free Enterprise Values," 114-15.

<sup>68</sup> These results are partly based on the "ultimatum game," which involves two subjects, Proposer and Responder, who have X amount of some good (say, money) to distribute between them. In the simplest version of the game, Proposer makes the first move, and gives an offer of the form: "I will

In order to exist, modern, industrial, urban centers must have developed norms (behaviors and expectations) to deal effectively with anonymous transactions, and allow people to cooperate in a wide variety of contexts. Market societies are filled with opportunities to “cheat,” such that, if most people took advantage of these loopholes, our systems would rapidly crumble. We think that these systems persist because people share sets of re-enforcing norms about how to behave in different contexts, what is “fair” in different contexts, and what to punish.... The point is, large-scale, market-based societies could not function without well-coordinated norms for dealing with anonymous, one-shot, monetary interactions. However, there is no reason to expect other societies, where anonymous monetary transactions are recent and rare, to share such norms.<sup>69</sup>

The Machiguenga, for example, “have little or no expectation of favorable treatment from anonymous persons, no sense of group fairness, and thus no reason to punish.”<sup>70</sup> Thus the Machiguenga have not developed norms about cutting into waiting lines, a basic rule of fairness that unites market societies such as Chile, the United States and India.<sup>71</sup> As the market order expands, groups adopt its norms of fairness.<sup>72</sup>

#### V. THE BASIC CONDITIONS FOR A MORAL EQUILIBRIUM

##### *A The optimal eligible set*

If the property equilibrium is to be a genuine moral equilibrium, it must be the case that the population can endorse the property norms as authoritative, and so an individual does not defect on them whenever he can “snatch rather than exchange” without being observed. As with almost all equilibrium solutions, this certainly does not mean that the norm must be judged “the best” by everyone. An equilibrium describes a set of actions that satisfies everyone’s utility function—now understood in an extended sense to include devotion to norms as well as private ends<sup>73</sup>—to the extent that each ranks acting on the equilibrium as better than unilateral defection. When the property rights equilibrium is also a moral equilibrium, each, drawing on her set of values and ends,

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take  $n$  percent of  $X$ , leaving you with  $100-n$  percent,” where  $n$  is not greater than 100%. If the Responder accepts, each gets what Proposer offers; if Responder rejects, each receives nothing. If both parties were narrowly self-interested, the Proposer would suggest, say 90:10 splits, and the Responder would accept. In fact, in market societies 60:40 splits tend to be the norm, though Henrich and Smith did find some differences among market societies: the outcomes of the experiments in the market societies of Israel and Indonesia show more low offers, and the Israeli data shows a lower mean offer. Henrich and Smith question the importance of mean and modes in analyzing the results of ultimatum games. “Comparative Experimental Evidence from Machiguenga, Mapuche, and American Populations,” 133-34.

<sup>69</sup> Henrich and Smith, “Comparative Evidence from Machiguenga, Mapuche, and American Populations,” 162-63.

<sup>70</sup> *Ibid.*, p. 159.

<sup>71</sup> *Ibid.*, pp. 163-64; Shweder, M. Mahapatra and J. Miller, “Culture in Moral Development,” in *The Emergence of Morality in Young Children*, edited by Jerome Kagan and Sharon Lamb (Chicago: University of Chicago Press, 1987), 47ff.

<sup>72</sup> This may be happening with the Machiguenga. Henrich and Smith, “Comparative Evidence from Machiguenga, Mapuche, and American Populations,” 141.

<sup>73</sup> See Schwab and Ostrom, “The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies,” 126ff. I analyze these sorts of extended utility function in some depth in *Philosophy, Politics, and Economics*, chap. 2.

affirms that the property norm is authoritative for her: that the norm requires exchange rather than snatch, or requires that one treat strangers fairly in market transactions, is itself a strong reason to do so, and one would normally see oneself as having done wrong, and so be properly liable to blame and rebuke, for failing to conform to it.

To help make the point more precise, suppose that each person has a well-informed and coherent “extended utility function,” which includes not only her private ends, but her values, normative intuitions, and so on.<sup>74</sup> For a property norm to be in universal moral equilibrium in a society it must be such that each, consulting her extended utility function, endorses the property norm as authoritative—a moral norm that she has reason to follow if others do so as well. Now suppose, consulting her own extended utility function, each person  $i$  proposes a property right rule  $p_i$ , which she believes is the rule that best satisfies her extended utility function. (This is basically what philosophers do when they argue for their preferred theory of property rights and distributive justice). Assume further that each individual has made a proposal, and so we have a set of all proposals  $\{p_1 \dots p_n\}$ . If there is any proposal in  $\{p_1 \dots p_n\}$  that some well-informed person cannot accept as authoritative—if *that* was the property right convention she would defect rather than comply when she could do so unobserved—it must be excluded from the set of acceptable property right norms. It could not serve as a possible moral equilibrium. Let us also exclude any norm that is Pareto dominated by another in the set: if for everyone  $p_x$  is ranked better than  $p_y$ , then we exclude  $p_y$  from the final set. The set of remaining norms is *the optimal eligible set of property norms*: any norm in the set is preferred to the absence of a moral equilibrium, and none is dominated by any other.

### B. Testing our moral property rights

As Baier stressed, the place to begin our moral thinking is with our existing social rules. Moral philosophy does not construct a system of morality *de novo*; a society’s morality is a social fact that structures the actual interactions of its members. As we have seen, it is only when social norms are a social fact—when others are generally conforming to them—that a person tends to act of them. Mere moral exhortation is seldom effective in generating moral behavior. Given this, when we are confronted by existing social norms the primary question for moral philosophy must be whether that norm is within the optimal eligible set. If our current property rights are within the optimal eligible set, they provide a *bona fide* moral equilibrium, and they can perform the social tasks that a property rights regime must perform because they are seen by all as morally authoritative. The existence of an actual social rule that is generally followed by a society is entirely different than a fanciful construction of what rules would be fairer, or nicer, or better: only an existing rule can provide a moral structure for human society. If our existing property rules are within the optimal eligible set, we are fortunate enough to live in a moral order.

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<sup>74</sup> I am simplifying here, of course. The set of persons must be further constrained, at least to those who are capable of forming extended utility functions, and so internalizing moral norms.

If we understand a rule of a true morality as one that is within the optimal eligible set, then we must agree with Baier that “[t]here is no a priori reason to assume that there is only one true morality. There are many moralities, and of these a large number may happen to pass the test which moralities must pass in order to be called true. It would, therefore, be better to speak of ‘a true morality’ or of ‘true moralities’ than ‘true morality’.”<sup>75</sup> If our existing property practice is within the optimal eligible set, each has sufficient reason to affirm it as an authoritative moral norm: consulting only her own reasons (“extended utility function”), she sees that given that others are complying, she too has sufficient reason not only to comply, but to endorse the rule as authoritative. In that sense each freely complies: she freely accepts the norm as authoritative over her.

Reconsider now one of our troublesome theses (section II above). According to the *social authority of private conscience thesis*, each person consults her own private conscience and makes authoritative moral claims on others. This seems to be precisely the type of sectarian claim to authority that the liberal tradition has decried (section II.C). Now when a moral rule is within the optimal eligible set, each person has reason both to demand that others comply (it is, say, essential to the practice of property) and each has reason to affirm this demand, because the moral rule is in equilibrium. It might seem to some that if all endorse the moral equilibrium, there would be no reason why one must *demand* that others comply—all would freely do so. As Richerson and Boyd observe, though, “we are imperfect and often reluctant, though often very effective cooperators.”<sup>76</sup> We need authoritative moral rules because we are a complex combination of selfish and moral creatures: the moral system, we might say, has developed on top of an earlier selfish set of motivations.<sup>77</sup> In less psychological terms, we are often tempted to put aside our normative commitments and cheat, even when we accept that this violates a norm we have good reason to endorse and internalize. Thus others must have authority to insist that we live up to our normative commitments, but if the norms are really in moral equilibrium, they are not making mere sectarian demands on us.

### C. *The priority of morality to politics*

Recall our other troublesome thesis, *the priority of morality to politics*; consider for now the weak version: i.e., an act of a political authority is morally acceptable to Alf only if it conforms to Alf’s private conscience about the requirements of morality. The thesis allows Alf to deny authority to any political act that violates his understanding of a moral norm. As we saw in section III, the social contract tradition can be interpreted as something close to renunciation of this thesis. I hope it is now clear that, insofar as the

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<sup>75</sup> Baier, *The Moral Point of View* (unabridged), p. 181. See also Baier, *The Rational and the Moral Order*, 199. Peter Strawson agrees: “There is no reason why a system of moral demands characteristic of one community should, or even could, be found in every other. “Social Morality and Individual Ideal,” *Philosophy*, vol. 36 (2001), 11.

<sup>76</sup> Richerson and Boyd, “The Evolution of Free Enterprise Values,” 114.

<sup>77</sup> See *ibid.* See also Freidman, *Morals and Markets*, chap. 1.

moral claim is based on a moral equilibrium, it is not problematic, and indeed is essential to a liberal social order. That the political must be constrained by the moral is fundamental to any free society: the political must operate within the area of the morally acceptable. When citizens conclude that the state has legislated, or enacted policy, that violates our *bona fide* moral equilibrium, citizens are right to deny its authority. States are useful but precarious devices: unless those who operate them are constrained by moral norms, their use of coercion allows them to make almost any outcome a social (though not a moral) equilibrium.<sup>78</sup>

Hobbes and Kant, and to a lesser degree Locke, thought that this was a recipe for social chaos; individuals would always use their private reason to interpret rules differently, and so morality itself would become the source of conflict. Now to be sure, sometimes we do disagree about morality (see below), but the driving force of social life is our ability to share very similar understandings of what is required of us. Just how we share these similar “scripts” is fundamental to understanding normative behavior,<sup>79</sup> but we certainly do; we are generally excellent at knowing what the moral rules require and detecting cheaters.<sup>80</sup> The phenomenon of moral disagreement is real, and must be dealt with: but it occurs around the periphery of great agreement. When the rules are in moral equilibrium our private consciences have strong tendencies to convergence.

#### *D. Moral disequilibrium and disagreement: the role of the state*

Of course our moral rules may not be in equilibrium. That is, we may be outside the optimal eligible set, in which case aspects of our current social morality may be oppressive: we demand of some that they comply with rules they do not have sufficient reasons to endorse as normatively authoritative. Because the property equilibrium is so essential to social life, rules in moral disequilibrium may nevertheless exhibit considerable social stability. It is generally in our interests to comply with an unjust property system—especially one that is coercively enforced—rather than have no property system at all. Here concern with distributional issues is certainly appropriate: if some receive little private benefit from the system of property, we may well be skeptical

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<sup>78</sup> On this important point see Schwab and Ostrom, “The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies;” Boyd and Richerson, *The Origin and Evolution of Culture*, chap. 9.

<sup>79</sup> For a sophisticated account, see Bicchieri, *The Grammar of Society*, chap. 2.

<sup>80</sup> For an overview of the psychological findings about these competencies, see K.I. Manktelow and D. Over, “Deontic Reasoning” in *Perspectives on Thinking and Reasoning: Essays in Honor of Peter Wason*, edited by Stephen E. Newstead, and Jonathan St. B. T. Evans (East Sussex, UK: Lawrence Erlbaum Associates, 1995), 91-114. See also Schwab and Ostrom, “The Vital Role of Norms and Rules in Maintaining Open Public and Private Economies,” 217; Denise Dellarosa Cummins, “Evidence for the Innateness of Deontic Reasoning,” *Mind & Language*, vol. 11 (June 1996): 160-90; Paul L. Harris and María Núñez, “Children’s Understanding of Permission Rules,” *Child Development*, vol. 67 (August 1996):, 1572-1591. For an accessible overview, see Friedman, *Morals and Markets*, 19ff.

that it can serve as a possible moral equilibrium. Fairness is crucial to our understanding of market and property relations. We must ask: what types of property rules are such that all individuals have normative reason to grant their authority? In our eagerness to give a definitive answer to this question, though, we must not forget that authoritative property rules are a tremendous social good, and well-informed individuals would certainly not reject the authority of all rules except that which gives them their preferred outcome. The range of possible moral equilibria is almost surely to be extensive, and our own social rules of property, imperfect as they are to philosophers, may well be within it.

Certainly a critical role of politics is to address oppression and deep unfairness when they occur. The great power of the political order is that it can move us from moral disequilibrium to a moral equilibrium (a property rule within the optimal eligible set). The great danger, as I said, is that it can effectively move us to *any* social equilibrium: it can move us from moral equilibrium into moral *disequilibrium* using its coercive power to impose norms that some have no good reason to endorse (or, we may say, is not endorsed by their “expanded utility function”). Just how we can use the state to move us toward, rather than away from, moral equilibrium, is the core question of liberal constitutionalism.

And, of course, the social contract theorists were right that sometimes we disagree about the moral rules. Often too—perhaps especially with the case of property rights, which often must adjust to rapid technological and social changes—our moral equilibrium only provides a core understanding, which must be developed and expanded via the state. Patent protections, copyright laws, and property rights in financial instruments are obvious examples; we cannot wait for the evolution of social conventions. We come back to T.H. Green, who properly conceived of the state as primarily the protector, sustainer, *and* developer of the social system of rights.<sup>81</sup>

#### VI. CONCLUSION: TOWARD A NON-IDEOLOGICAL POLITICAL PHILOSOPHY

It may seem that, after all, this analysis does not really restrict the scope of ideological political philosophy—or, we might say, the political philosophy of utopian vision. On the account I have offered the task of political philosophy is, first and foremost, to reflect on whether our moral rules (say, of property) are within the optimal eligible set: is our society oppressive, or do the normative reasons of all converge on endorsing on rules? Here, of course, there is great room for disagreement. But non-ideological political philosophy is not to be confused with a bland political philosophy in which we all agree. The crucial point is that the proper perspective is not the sectarian perspective of a philosopher with elite access to the moral truth, but an analysis of what rules are objects of moral convergence by well-informed and good willed individuals. If we do conclude that our rules are outside the optimal eligible set, then the philosopher may again don his

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<sup>81</sup> By far the most sophisticated contemporary statement of this view is Rex Martin’s *A System of Rights* (Oxford: Clarendon Press, 1993).

beloved legislative hat, proposing rules that he believes would pass the justificatory test. There is, though, no supposition that the rule endorsed by the philosopher's personal vision is even in the optimal eligible set, and should it be, it is almost certainly simply one of many.

The scope of political philosophy, and even applied public policy advice, remains wide. But I believe it will be both a more modest, and a less ideologically strident, political philosophy. We will not insist that justice demands that our own, often rather idiosyncratic, theories be adopted. And we will not make a profession of criticizing pervasive "everyday" attitudes such as the supposedly silly conviction of people that they have claims to their pretax incomes.<sup>82</sup> Many philosophers chafe under the actual moral rules of their society and are convinced that they can do better, and so construct complex and controversial "theories of justice" that, amazingly, they see as uniquely correct. Only by appreciating that morality is a social device and not simply a report of their private intuitions and elaborate constructions, can philosophers become part of the solution, rather than the ideological pollution.

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<sup>82</sup> This "everyday libertarian" view of ownership—that when the government taxes me it takes away *my* property—is criticized by Liam Murphy and Thomas Nagel as a "myth." *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002), 32-33.