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COMMUNITY AND PROPERTY

Overlooking Needs and Disparities — Comment on Jeremy Waldron, Community and Property for Those Who Have Neither A Comment on: "Community and Property — For Those Who Have Neither" by Jeremy Waldron.

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Overlooking Needs and Disparities — Comment on Jeremy Waldron, Community and Property for Those Who Have Neither

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In my Comment I want to address two points in Waldron's Community and Property for Those Who Have Neither. The first relates to the justification of the current private property regime, which is exclusionary in nature, when it interacts with segregative community practices that prohibit homeless people from performing certain activities in public places. Waldron considers restrictive public space regulation problematic in a reality in which some people have no property at all. Under this view, since the property-less are the most likely to become disadvantaged from the existing definition of private property, in a way that fundamentally restricts their liberty and freedom, we should focus on the regulation of public property, ensuring that it does not violate these individual rights. My point is that an analysis from a liberty/freedom viewpoint overlooks some important societal interests, such as equality or need, values which seem of importance to Waldron himself, but which he chooses to put aside in the present essay. The second point centers on the community, and on how the way we understand and value community stands to harm the property-less. In this context I would like to underscore the way law perpetuates community exclusion, in the name of freedom, but this time in the name of the freedom of the excluding community members. Throughout my Comment, I refer to human rights discourse as a point of reference for my thoughts. But I consider human

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Jeremy Waldron, Community and Property — For Those Who Have Neither, 10 THEORETICAL INQUIRIES L. 161 (2009).

rights not only in the "negative" liberty/freedom form, but also as rights based on the concept of human need and equality.

I. PROPERTY JUSTIFICATIONS AND THOSE WHO HAVE NO PROPERTY

Waldron asks us to evaluate the justification of private property through the interests and rights of those who have none. In this sense, he changes the point of reference from which we usually assess and justify the existing "array of . . . fundamental rules, rights, duties . . . that actually define private property." As a general strategy, he suggests that instead of evaluating institutions — such as property — from the perspective of the individual proprietor, or of the aggregate of such individuals, or of society as a whole, we ought to put first those whose interests are most directly constrained by the rules of the institution. This is so, among other reasons, because their interests are often "sold short" in traditional cost-benefit analysis, at least in comparison to the benefits that accrue to others.

As a general matter, I agree completely with this suggestion. I think that a shift of this sort enables us to see what we often don't see, and it ensures that we do not overlook individuals and groups whose interests we often compromise too easily. Since we are talking about justifications of property, Waldron does not commit — in this essay — to an alternative meaning to the "sole and despotic dominion" definition of private property; thus he is willing to assume, for the sake of argument, that private property-holders may be allowed to exclude others from their assets. He does not articulate, for example, that the right to private property embodies a form of social responsibility from within the doctrine.³ What follows from this is an assumption about the preferable loci of intervention to correct the faults he identifies.

Under this analytical approach, solutions to the problems of the propertyless need not necessarily come from the redefinition or the reallocation of private property. Nor does Waldron tell us what he thinks about public provision (through the welfare state) as a means of ensuring that everyone receives enough social assistance (by way of benefits or publicly allocated resources such as shelters and public toilets) for them not to need public places to perform basic life functions.

² *Id.* at 162.

³ See, e.g., Hanoch Dagan, The Social Responsibility of Ownership, 92 CORNELL L. REV. 1255 (2007); Gregory S. Alexander & Eduardo M. Peñalver, Properties of Community, 10 THEORETICAL INQUIRIES L. 127 (2009).

To be sure, Waldron believes that the extent of public provision and the regulatory scheme of public spaces are non-severable; he claims that "the less society provides in the way of public assistance, the more unfair is its enforcement of norms for public places." Nevertheless, he chooses to discuss the problem of homelessness through the question of public space regulation, which he claims is too often unjustifiably restrictive. Hence his proposal "to rethink the regulation of public spaces in a community where there are homeless persons." In other words, the main fault from a rights-based viewpoint is the existence of a regime under which public places are not available to those who have no private property.

I too share Waldron's objection to restrictive regulation of public places and find the "complementary thesis" problematic and unjust. Nevertheless, my view is that we pay too high a price if we look at the interaction of homelessness and the regulation of public spaces solely from this perspective.

The type of exercise Waldron asks us to perform — to think about property by putting first those who are most likely to suffer from a property rule — resembles one of the rationales underlying the idea of human rights. As Waldron rightfully explains, we are troubled by the consequences of the current property regime because of its detrimental impact on people *in those spheres of human life which we consider the most basic to our existence*. These are areas of life — sleeping, eating, cooking, and relieving oneself — which are existential to human survival in a physical and dignified manner. Indeed, human rights appear and make a claim on our polity not all the time, but in those same life spheres identified in the essay: liberty, privacy, and other basic human functions like sleeping, washing, urinating, etc.⁶ On this line of thought, these property-less individuals or groups may be considered a minority — a group that human rights theory and doctrine is geared to protect.⁷

⁴ Waldron, *supra* note 1, at 183.

⁵ *Id.* at 182.

⁶ A good and contemporary example is Lucie White's story of the use of "rights talk" during her work in Africa on health campaigns. Lucie White, *If You Don't pay, You Die: On Death and Desire in the Postcolony, in* EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 57 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

I do not aim to enter the debate about the basis for the idea of human rights, which is not unified and rests upon various theoretical grounds. See, e.g., Martha C. Nussbaum, Capabilities as Fundamental Entitlements: Sen and Social Justice, 9 FEMINIST ECON. 33 (2003). My assumption is that human rights are the incarnation of those negotiated salient values of human social life. Cf. Upendra Baxi, Failed Decolonization and the Future of Social Rights, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE, supra note 6, at 42.

Waldron, however, does not try to persuade us that the existing property regime cannot be justified through the ordinary justifications of human rights, or social rights. These justifications are often based on one of two rationales. The first is "need": under this rationale a person is entitled to a resource (basic subsistence, healthcare services, education and housing) because these resources are — as we define them in a certain place and time — the basic needs of any person (the normative justification). The second rationale is egalitarian — the claim being that people are entitled to something because others in their relevant vicinity (or maybe community) have it, and we are worried about a gap in the actual access to that resource by others (this is the equitable justification). But in Waldron's essay the problem of the property-less minority (or the poor or the destitute or the homeless) is analyzed through neither the needs nor the equitable framework.

Under Waldron's explanation, the problem arises due to a combination of three factors: 1. Some people have no property at all. 2. Many others do have private property. 3. Those who have property move (either directly or through some form of agency) to exclude those who have nothing from physical public places, by making them non-public or restricted in some manner.

In other words, Waldron does not argue with the problem of lack of property as an issue of existential need per se. Under his analysis, in one of the following instances — if *everybody* had some property (a minimum, and I will address this point below), or if *no one* had any property, or if there was *no exclusion* of those who have nothing from the public places by way of exclusionary regulation, then the problem of justification as presented here would not arise. It is only because some have property, others don't have any at all, and non-private property ("public spaces") is restricted through exclusionary rules and practices — that the poor have a serious problem and thus the need for justification arises.

I think this analysis is a good way to illustrate the injustice of the current

⁸ See, e.g., B.B. Pande, The Constitutionality of Basic Human Needs: An Ignored Idea of Legal Discourse, 4 S. Ct. Cases J. 1 (1989).

⁹ On the theoretical framework for protecting social rights as human rights, see DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS (2007).

¹⁰ Following the initial review of this comment Waldron revisits this notion. *See* Waldron, *supra* note 1, at 165, 179-81. However, he repeats his preference of the freedom/liberty paradigm, despite his acknowledgement of the existence of real need, for reasons explained in the sections referred to above.

property regime, but I want to raise some questions about its underlying assumptions and consequences.

I think it is important to note that Waldron's argument about justification appears in its most acute form when the kind of property we are talking about is both physical and scarce ("a place on earth"). When we think of other areas of need which may be as essential but less tangible, such as welfare, health, education, it is harder to imagine a situation in which one of these spheres is by and large "taken over" by some people through a regime recognized as "private property."

One might argue that monetary allowances (welfare), educational resources or professional time and services (doctors' hours and healthcare services) are not like land; that there can never be a situation in which poor people have no welfare or no healthcare because all such services are "taken" and held in private hands, like physical space or land.

But on second thought, similar problems can occur in these contexts: for example, there is only a limited number of doctors in a certain place, and if we have a regime under which most people acquire healthcare privately by "buying a doctor" or buying a doctor's services, and there are enough people of this kind to enable doctors to make a good living, there will not be enough "public healthcare/public doctors" to serve the destitute. 11

To avoid this outcome, we can decide to adopt a regime in which every person is entitled to a minimum bundle of healthcare services to keep him alive. In current International Human Rights Law this is known as the "minimum core" doctrine. The UN Committee on Economic, Social and Cultural Rights has adopted this view:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it . . . the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the

¹¹ This, in fact, has been at the center of the debate on healthcare in Canada, following the *Chaoulli* decision, in which the Canadian Supreme Court struck down a statute which prohibited acquisition of private health insurance. The worry has been that opening private healthcare would break up Canada's universalistic health-care system. *See, e.g.*, Colleen M. Flood, *Chaoulli's Legacy for the Future of Canadian Health Care Policy*, 44 OSGOODE HALL L.J. 273 (2006).

most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.¹²

Under this analytical framework and in the context of land, the "minimal core" resources can be equated with physical public places that are kept open for public usage.

My point until now has been only to suggest that the same logic relating to spatial resources can be applied to other, non-geographical social allocations of essential assets and services. ¹³ However, I believe this kind of arrangement raises additional concerns, to which I will now turn.

I return to Waldron's basic assumptions: the problem of justification arises because some people have property, others have no property at all, and those who possess it regulate the public spaces — in the name of "community interests" — in a way that excludes the property-less. Obviously, posing the issue in these terms brings up issues of distribution (who has and who has not). But it seems that these concerns can be discharged if everybody has *some* property — a minimum to satisfy their basic needs — or if they can have access to public property. Under this approach, we are less interested in *how much* each person has in relation to others, or in the *discrepancies or gaps* between them, as long as the minimum is secured.

But what about such gaps? Do we have no interest at all in a justification for probable differences between property holders? Some have a lot, but not only better homes, but also — according to the rationale mentioned above — much better healthcare, education. Given the importance of these resources, we might ask why it is right for some to have only a minimum of healthcare, education or other fundamental resources, while others hold so much more of these.¹⁴

¹² Comm. on Econ., Soc. and Cultural Rts., *The Nature of States Parties Obligations* (Art. 2, par. 1): 14/12/90. CESCR General Comment 3 (General Comments), ¶10.

¹³ Land has received special treatment in a number of Constitutional documents. See, for example, S. AFR. CONST. 1996 § 25, relating to the right of property. Inasmuch as the right to property, in general, is secured in a way that attempts to balance correcting past injustices and securing public order, see § 25(1)-(4), (6)-(9), section 25(6) obligates the state to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

¹⁴ The possible answer, that the poor have *equal opportunities* to gain or access such resources in a way that would reduce gaps — is not good enough, for the same reason that it is not a good answer regarding the opportunity to gain the "core minimum." As Waldron rightly claims: inasmuch as you can't sleep in an opportunity, you also don't stop being sick or get a good education from an opportunity to get better healthcare or an opportunity to go to a better school.

In this context, I would like to address a theory articulated by Stephen Munzer in his article *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers.* This article was a response to Ellickson's well-known proposal to regulate public spaces through the creation of differentiated zones: "red zones" in which the homeless would be allowed to stay and wander unrestrictedly, "green zones" which they would be prohibited from entering, and "yellow zones" in which they would be allowed to be, but under some manner of restriction. ¹⁶

As part of his response to Ellickson, Munzer articulates a pluralistic theory of property. This theory rests on a principle of *justice and equality* (in addition to other principles, including utility and efficiency, and a principle of desert and labor). Under the principle of justice and equality, justification for *property inequalities* includes two clauses: the first is concerned with the provision of a minimum for each person, the second, with *narrowing inequalities* once a minimum is satisfied.

The first clause — a requirement that each person have some minimal resources to fulfill his or her needs — is similar to the concern raised by Waldron, although, as mentioned above, Waldron does not rest it on "needs." The second clause is a relative one and claims that inequalities can be justified only if they do not result in undermining a *fully human life in society*.

What counts as "a fully human life in society"? We can debate the exact scope of this term, but the important point is that it cannot be satisfied by referring only to a minimum, with no regard for particular social and economic stratification and gaps. In order for one to live a dignified "fully human" life, this life must correlate in some manner with the general living conditions in one's society.

Significant economic and social gaps inevitably lead to a weakened sense of self-realization for the less advantaged, to lesser self-respect and inferior power, and to fewer opportunities to take part in shaping a common agenda or life-plan for all. Inequalities in economic resources inevitably lead to inequalities in economic power; thus, despite improvement in absolute material situation of those worse off (due to a guarantee of a certain minimum, as Waldron implies), this allotment does not alter the poor's

¹⁵ Stephen R. Munzer, Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers, 32 HARV. C.R.-C.L. L. REV. 1 (1997).

¹⁶ Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 YALE L.J. 1165 (1996).

social situation in relation to those who are much better off.¹⁷ Our culture is constantly occupied with economic relativism and with one's place on the scale of economic possessions. In this culture "our conception of an adequate standard of living will get relativized and will require a constant upgrading." Talking about a minimum, therefore, may not satisfy the principle of justice and equality, and may not guarantee a fully human life in a (particular) society in a (particular) time and place.

In fact, a minimum approach would accept the establishment of differentiated geographical "green zones" from which the homeless could be restricted, as proposed by Ellickson, because the homeless are allotted some (minimal) place to be, in the "red zone."

Waldron seems to acknowledge this is a problem, and he attempts to clarify his position regarding Ellickson's "green zones" in a way that would correlate with his sense of minimal allocation. Ellickson's proposal, admits Waldron, could satisfy his concerns, at least in a literal sense. He acknowledges that similar to the "provision of public shelters or public lavatories, the provision of Red-Zone public spaces breaks up the accumulative logic of prohibition that I have described." Indeed, they both satisfy a minimum, as required by his thesis.

There is, however, a problem in an arrangement under which certain areas remain closed off for the homeless, public spaces in which they would not be allowed to perform their essential life tasks. Although such exclusion is said to be warranted to preserve the interests of the community that wishes to enjoy public spaces without the presence of the homeless, Waldron agrees this is unwanted because it creates a sense of "us" and "them."

However, he claims that this type of segregative arrangement is faulty not because it deprives the homeless of a "place on earth" in which they can fulfill their basic human needs, as analyzed beforehand. Rather, the problem lies with another aspect of citizenship, which Waldron describes as "opportunities for communal interaction." These interactive opportunities for socialization would be severely diminished if we segregated the homeless into the red zones.

Now it seems to me that what Waldron is essentially talking about, when he puts forth the right to be part of a community and the right not to be involuntarily excluded from a communal setting, is very close to what we

¹⁷ On the critique of the (Rawlsian) principle of justice due to its disregard of economic inequalities, see Kai Nielsen, *Some Left Critiques of Rawls Principle of Justice*, 2 ANALYZE & KRITIK 74 (1980).

¹⁸ *Id.* at 87.

¹⁹ Waldron, supra note 1, at 184.

term "equality." Inequality, as we know it, can take many forms. One form is invidious discrimination; another is severe disparities and gaps in economic resources; another is segregation.

For minorities and excluded groups, segregation has long been a synonym for discrimination and inequality. Racial and religious minorities, gays and lesbians, new immigrants, people with disabilities, women — have all struggled with the consequences of exclusion from various social settings. ²⁰ Very often they have dealt with this problem through the paradigm of equality, drawing a direct line between exclusionary practices and "equal rights discourse." However, for reasons which I will not explore in this Comment, the same line of thought — segregation (or at least intentional segregation) = inequality — has not been similarly applied to "non-identity groups," such as poor people. Nevertheless, I believe the core issues are very much the same: the perceived inferiority of these groups lies at the root of exclusionary practices.

Therefore, when Waldron, rightly in my view, finds fault with the "green zone" regime due to its exclusionary and segregative consequences, what bothers him is not a violation of the liberty or freedom of the homeless people, but the infringement of their right to equality. And to connect this point to the one discussed before — segregation and exclusion, in my view, do resemble economic disparities more than restrictions on liberty.

In sum, when we discuss the problem of homelessness in the context of public space regulation, it is important not to restrict ourselves to the "minimal core" paradigm. The problem lies not only in the fact that some people have no property, others have some, and public spaces are restricted. If we do not address questions of disparities in private property, limiting ourselves only to maintaining some public property accessible to those who have none of their own, the dignity of homeless people will not be fully addressed. Only if we are willing to consider *how much* private property others have in comparison to those who have none can we truly talk about a "fully human life in society."

²⁰ In the context of education, see, for example, Martha Minow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL'Y 11 (2004).

II. THE COMMUNITY

As Waldron shows, the community stands in the way of the property-less by regulating public spaces according to some "community interests." This community, we are told, is a deluding and tricky concept. On the one hand, it purports to offer an alternative to the individualistic, selfish, alienating "every person to himself" ethos, which has drawn much criticism. The community seems to further a different life-model based on relations, connections, informalities, mutuality, and familiarity — a rather "cozy" and romantic notion that is supposed to ameliorate the fallacies of market-individualism.

However, as Waldron points out, the problem is that not all people have communities, and that, like property, communities in fact operate through exclusionary dynamics. I completely agree, and would like to illustrate how law plays into this equilibrium.

Communities are often portrayed as extralegal, or "softly" regulated by law. The relationships between members of the community are not highly legalized; on the contrary — the alleged advantage of communities is the informality and relational aspects of the interactions between their members. These relations are not organized through an individualist rights discourse. Community members are left to develop alternative modes of dispute resolution, governance and resource allocation through some form of self-regulation. The community usually relies on claims of "self-governance" when external law wishes to impose upon it certain standards and norms (such as human rights, privacy rights or gender rights) which contradict internal practices. In these cases, law is asked to stay away and not intervene, and the community wishes to define and situate itself as an extralegal entity.²¹

However, law is not really external to these communities. It plays a crucial role in providing them with the basic conditions and resources to form themselves.

First, as Waldron asserts, it is the existing regime of property that constitutes a precondition for the existence of every type of community of this sort. If the members of the community did not have property, they would not be able to exclude others from private or communal places.

²¹ These types of community claims feed into the growing discourse on "the new civil society" and "new governance theories." On this point, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

But this is almost obvious. Second, private law very often recognizes these communities as non-person (or juridical) valid legal entities, through the law of corporations (associations, limited-liability companies, etc.); in fact, law does provide them with the powers to exclude others. Third, public law gives these communities powers of regulation through rules of local government. Very often they are recognized as cities, neighborhoods, communal settlements, kibbutzim, etc.²²

In other words, although they benefit significantly from the state legal system that allows them to exclude, these communities then resort to a non-legal ethos of non-legal relations and informal soft law, which only reinforces the exclusionary dynamics of the property-less and community-less.

This dual nature of law must be exposed. Like private property, which ought to be seen only as a state-sponsored construction designed to serve certain interests and functions, the exclusionary powers of a community too are creatures of law (rather then a pre-law, pre-state form of praxis). Thus, the law that has afforded these powers can also remove them. Waldron's article provides a sound ground for why this move may be justified.

²² Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQUIRIES L. 43 (2009).