

CAROL M. ROSE\*

## Left Brain, Right Brain and History in the New Law and Economics of Property

These two excellent papers reflect a kind of yin and yang of property: Michael Heller is in a quest to unlock the “left-brain” rational categories by which we organize our thinking about property; Peter Huang searches for the grounds of our deep “right-brain” emotional responses to property. Both papers are written in an analytic mode, and I have very little quarrel with either on that count. Following a few comments on the major points in each, however, I will argue that in the case of both left and right brain—rational categories and emotional response—the analytic power of the argument borrows from particular historical instantiations of property, and that these two excellent analyses might be deepened diachronically, taking into account the narrative context into which the analytic elements are embedded.

### I

#### LEFT-BRAINED PROPERTY: MICHAEL HELLER AND THE STANDARD CATEGORIES OF PROPERTY

Michael Heller argues very powerfully that our categories for reasoning about property are outdated, if indeed these categories were ever very useful. In his view, an unholy categorical trinity of “private property, public property, and commons” hinders our understanding of the real functions and characteristics of property. He proposes to change this dismal picture by constructing new categories, by reintegrating parts of others, and by redefin-

---

\* Gordon Bradford Tweedy Professor of Law and Organization, Yale University Law School. A.B. Antioch College 1962, Ph.D. Cornell Univ. 1970, J.D. Univ. of Chicago 1977.

ing still others, and he gives us a new chart showing the ways in which these various tactics might play out.

Now, creating charts is a game that many can play, and while Heller's chart has considerable force, I am going to propose a somewhat different one, but one that I think better captures the point that Heller is making about property.

First, my chart has a horizontal axis that looks like this:

FIGURE 1



This horizontal axis represents a continuum from “anticommons” on the far left, a state of *unlimited exclusion, no access*, to “open access” on the far right, a state of *unlimited access, no exclusion*. Though Heller is modest about it, he is the chief publicist for the term “anticommons,” a situation in which so many people have the right to exclude that a resource winds up not being used at all, because all of the rights-holders have the power to prevent all others from gaining access.<sup>1</sup> Heller himself has very creatively taken the “constructive” approach (to use his terminology) in taking up this hitherto little-used term; the numerous citations to his new conception show how right he is that the world is ready for this new term.<sup>2</sup>

On the other end of this horizontal axis I place the term “open access,” or what Garrett Hardin called the “tragedy of the commons.”<sup>3</sup> Here I need to take up a slight quibble with Heller’s language. Heller uses the term “commons” ambiguously, as Hardin did, sometimes mixing up the concept of a commonly-held group property with the concept of open access. For several years, however, the political scientist Elinor Ostrom has led a charge against this mix-up, arguing very forcefully that these are very different matters indeed.<sup>4</sup> The commonly held group prop-

<sup>1</sup> Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

<sup>2</sup> As of November 8, 2000, Lexis lists 66 articles (excluding Heller’s original article) citing “anticommons” since the publication of Heller’s 1998 study, as opposed to one mention previously, in Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322 n.22 (1993). Heller credits Frank Michelman for the original usage in 1983; see Heller, *supra* note 1, at 623 n.7.

<sup>3</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

<sup>4</sup> ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITU-

erty (or CPR, for “common pool resource”), she says, is not necessarily tragic at all; indeed institutions to manage CPRs in fisheries, forestry, grazing and agriculture have in fact persisted and thrived over very, very long periods of time—even the very common field system that Hardin tried to use as a bad example.<sup>5</sup> Such CPRs are, after all, *property*, even though owned by a group, and a group may be entirely capable of managing its property in a sustainable way. Ostrom argues that Hardin’s “tragedy” occurs not in these CPRs, but rather in what she calls open access resources, in which all comers are free to use the resource but no one can exclude anyone else.<sup>6</sup> Hence I place Ostrom’s “open access” at the far right of my spectrum. In Heller’s terminology, Ostrom has helped us to understand property by the strategy of “redefining” and “reintegrating” our categories. The large number of legal citations to her work shows how ready the world has been for her creative changes to the canonical categories as well.<sup>7</sup>

But somewhere between these tragic extremes—unlimited exclusion/no access, unlimited access/no exclusion—there lies the category of usable property, where use is compatible with exclusion. It is at that point that I place my vertical line:

---

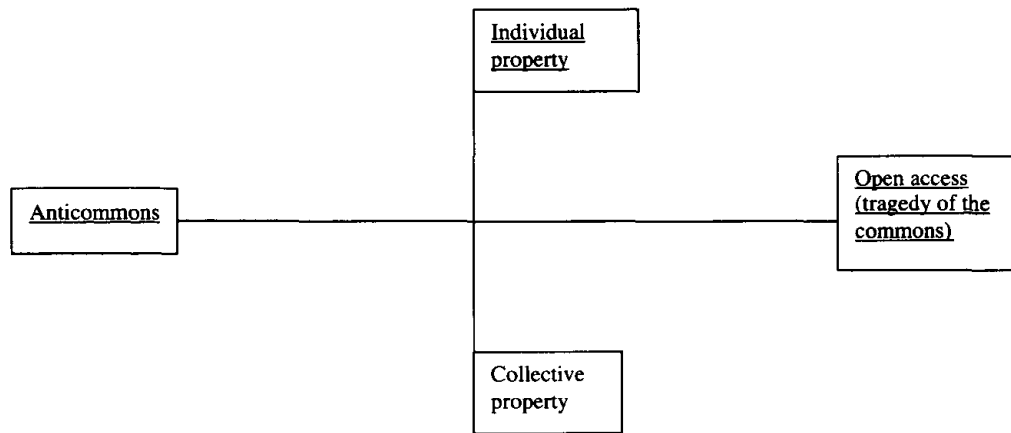
TIONS FOR COLLECTIVE ACTION 23 (1990) (describing “disastrous” effects of thinking that limited commons is the same as open access); *see also* Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENVTL. L. REV. 393, 399-400 (1999) (reviewing critiques by Ostrom and others of the “tragedy of the commons”).

<sup>5</sup> *See generally* Ostrom, *supra* note 4; Susan Jane Buck Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49 (1985); CARL J. DAHLMAN, *THE OPEN FIELD SYSTEM AND BEYOND: A PROPERTY RIGHTS ANALYSIS OF AN ECONOMIC INSTITUTION* (1980).

<sup>6</sup> Ostrom, *supra* note 4, at 23.

<sup>7</sup> For law reviews alone, Lexis lists 124 articles citing this work as of November 8, 2000.

FIGURE 2



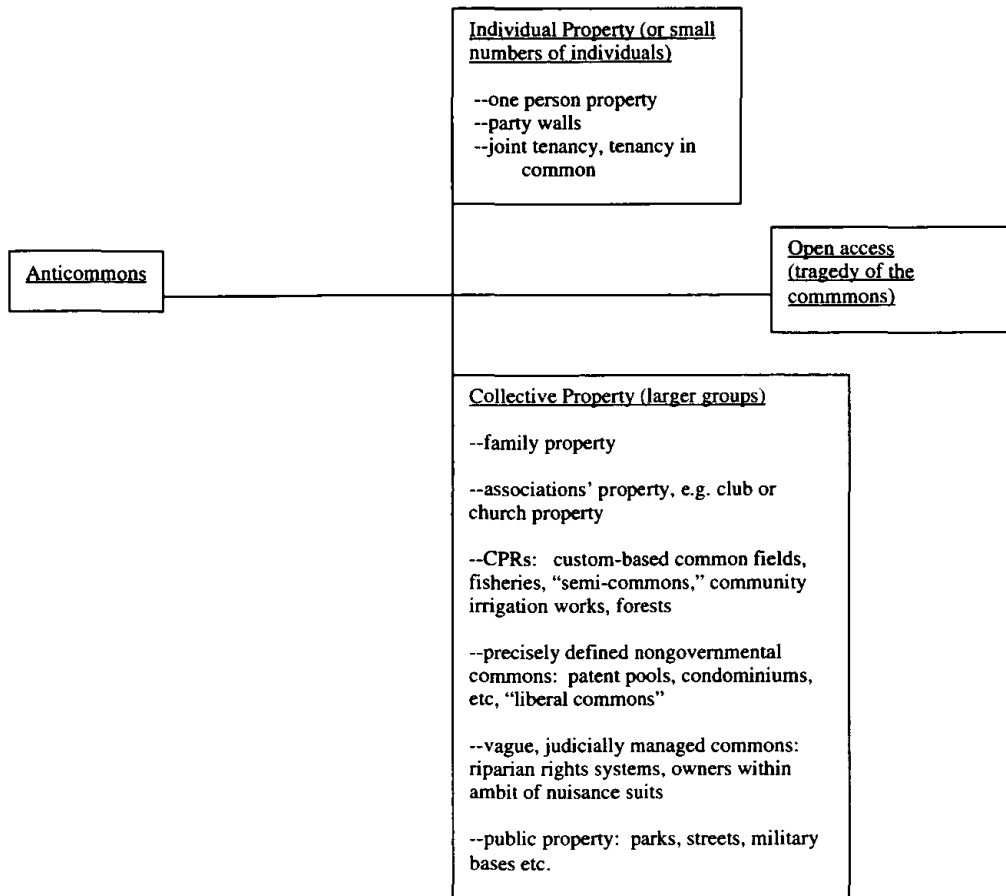
My vertical line intersects with the horizontal at a midpoint that we generally consider “property.” At this midpoint a resource can be subject to effective ownership because the owner can *both* exclude outsiders *and* use the resource. But along this vertical line lie different kinds of *owners*: the owner of the resource may be an individual (the upper extreme), or some collectivity (the lower extreme).

There is an enormous rhetoric about the uppermost category on the vertical, that is, individual property—so much, in fact, that individually-owned property seems to some to be synonymous with “property” itself. That, in fact, was Hardin’s mistake when he suggested that “property” could only be individual whereas “common” resources were tantamount to being up for grabs. But even Hardin paid attention to—and criticized—one form of collective property, namely property of the state, or *public* property, i.e. property such as parks, streets, squares, and sewage treatment plants, all owned and managed by organized governmental institutions.<sup>8</sup>

Between these extremes along the vertical, however, there are many other forms of collective property, and here I will fill in the chart a bit more:

<sup>8</sup> Hardin, *supra* note 3, at 1245.

FIGURE 3



As this chart suggests, between the property of individuals (or small numbers of individuals like joint tenancy) and public property, there are a lot of collective but non-public forms of property. This intermediate range represents an area of property that has been only recently explored in much depth; perhaps for that reason, the terminology is a mess. For customary, community-based property, Ostrom uses the term "CPR" as a shortcut for "common pool resource," but others have used this shortcut to mean "common property regime."<sup>9</sup> Still others designate this kind of common property as "community-based management,"<sup>10</sup> and Henry Smith has added the term "semicommons" in a recent

<sup>9</sup> See Paul Seabright, *Managing Local Commons: Theoretical Issues in Incentive Design*, J. ECON. PERSPECTIVES, Fall 1993, at 113, 114 n.1 (discussing terminology).

<sup>10</sup> See, e.g., Martin S. Weinstein, *Pieces of the Puzzle: Solutions for Community-Based Fisheries Management from Native Canadians, Japanese Cooperatives, and Common Property Researchers*, 12 GEO. INT'L ENVTL. L. REV. 375, 380-83 (2000); Gregory F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 UCLA J. ENVTL. L. & POL'Y 179, 195-96 (1997/1998); Alison Rieser, *Property Rights and Ecosystem Man-*

article about medieval scattered fields.<sup>11</sup> Heller tells us that he and Hanoch Dagan are adding a new category, the “liberal commons,”<sup>12</sup> and I have added to the mess by talking about “limited common properties” (LCPs), encompassing both the customary and the “liberal” versions of common properties.<sup>13</sup> One might be depressed about this welter of names, but I am not; it suggests the enormous dynamism in current scholarship of non-governmental common property ownership.

What is particularly interesting about this intermediate area of collective but non-public property is the relatively recent interest property scholars have taken in it. It is odd that this phenomenon is so new; certainly collective but non-public property is all around us. Family property is a pervasive form of property ownership, but even beyond that, many of us live in co-ops and condominiums, and most of us belong to institutions that collectively own property—clubs, churches, and the like. Why then have these intermediate collective property forms been so relatively little noticed? Why, aside from governmental public property, is “property” so often equated with individual property?

One reason surely must be the powerful libertarian appeal of individual property—property seen as that realm in which the individual has ultimate control, free from any intrusion except by those that she invites, and in which she is free to express herself exactly as she wishes.

A second reason comes from economics. Economists, assisted by game-theoretic thinking, have been skeptical of the ability of groups of persons to cooperate; if transaction costs do not kill collective action, then strategic bargaining and prisoners’ dilemmas will.<sup>14</sup> This anti-collective attitude among economists is now eroding somewhat, as economically-informed scholars are jumping on board a veritable bandwagon of subjects relating to “norms.”<sup>15</sup> The new norms literature dovetails nicely with the work of Ostrom and her colleagues on CPRs, since all of these

---

agement in *U.S. Fisheries: Contracting for the Commons?*, 24 *ECOLOGY L.Q.* 813, 816 (1997).

<sup>11</sup> Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 *J. LEGAL STUD.* 131, 131 (2000).

<sup>12</sup> Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* (forthcoming Jan. 2001).

<sup>13</sup> Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 *MINN. L. REV.* 129, 132 (1998).

<sup>14</sup> Robert Cooter, *The Cost of Coase*, 11 *J. LEGAL STUD.* 1, 14-20 (1982).

<sup>15</sup> ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DIS-*

scholars are interested in the ways that customary practices can serve as the glue that makes group cooperation possible.

A third reason that accounts for the myopia about the intermediate forms of property ownership may be particularly American. Our law has been particularly hostile to most forms of collective property, particularly those in Ostrom's CPR range. This too is an interesting puzzle. My own view is that some of this hostility is a historically self-serving myopia. Our leading case about Native American property claims is *Johnson v. M'Intosh*,<sup>16</sup> where it might have been possible to recognize property in native tribes; but the Marshall Court, while not completely dismissive of all Native American claims, ignored the possibility of collective tribal ownership.<sup>17</sup> The logic seems to have been that the tribes were not cognizable sovereign governments (hence public property was not possible), nor did individual persons in the tribes have recognizable common-law claims to property.<sup>18</sup> Those two possibilities, individual property and governmental public property, appeared to exhaust the Court's idea of what counted as "property," illustrating Heller's point that our categories have seriously—and unjustly—limited our property imagination. While probably not so intended by Marshall himself, any excuse to ignore native property proved to be highly convenient for settlers.

But aside from self-justifying motivations with respect to tribal peoples, American courts did have serious and important arguments against custom-based collective property. There is a very attractive quality about the modern CPR literature's depiction of community-owned resources and their management systems for irrigation, forestry, fishing and the like. This is particularly the case when this literature focuses—as it often does—on traditional groups, and when it shows how these picturesque and often-ignored peoples have managed to carve out sustainable lives for themselves. These groups govern themselves and their collective

---

PUTES (1991); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977); Symposium, *Law, Economics and Norms*, 144 U. PA. L. REV. 1643 (1996).

<sup>16</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>17</sup> The case recognized an undefined claim of "occupancy" in the Indian tribes, but not full property; the "occupancy" right was not alienable, since it could be extinguished (by purchase or conquest) only by the United States. *Johnson*, 21 U.S. at 584-88.

<sup>18</sup> The denial of Indian property was an explicit part of the brief for the defendants, *Johnson*, 21 U.S. at 567-70; and while Marshall verbally brushed it aside in the Court's opinion, *Johnson*, 21 U.S. at 588, he could not come up with any category of property for tribal peoples, aside from the incoherent "occupancy."

properties through customary norms and adherence to traditional practices, rather than through formal government. It was precisely this informal, customary governance, however, that made nineteenth-century American courts cast a jaundiced eye on this kind of collective property. The judges saw these community practices as mired in the swamps of medieval feudalism, hierarchy, and rigidity; in particular, they thought that customary law was incompatible with democratic forms of government, in which communities pass laws for themselves not by looking to the past, but rather by looking to the open actions of democratically-elected representatives.<sup>19</sup>

These concerns are not trivial, even today. One much-cited example of a modern CPR is the lobster-fishing community on Monhegan Island, described with great relish by James Acheson.<sup>20</sup> The Monhegan lobstermen police the “perimeter” of their lobstering grounds, using low-level violence against interloping outsiders, and they allocate fishing spots among themselves on the basis of community norms, closely reflecting the individual standings that come from kinship, residence, and recognized skill.<sup>21</sup> As affectionate and appealing as this portrait may be, however, it has a downside: from a more skeptical perspective the Monhegan fishermen look xenophobic, misogynistic,<sup>22</sup> and bullying—characteristics rather reminiscent of the historic American legal concerns about customary law. Indeed, one cannot help but notice that the international feminist community voices similar concerns about efforts to devolve governing authority on fundamentalist religious communities.<sup>23</sup> These communities hardly seem paragons of democratic rule and equal opportunity either, at least with respect to their internal governance.

On the other hand, American legal institutions have generally been quite friendly to the category of collective property that Heller and Dagan call “liberal common property.” These are

---

<sup>19</sup> See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 741-42 (1986).

<sup>20</sup> JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988).

<sup>21</sup> *Id.* at 44-50 (describing the role of residence), 52-53 (same for skill), 73-77 (describing policing of outsiders, locations of most prestigious fishermen’s spots).

<sup>22</sup> *Id.* at 74 (describing pejorative use of representation of female genitalia as warning to encroaching outsiders).

<sup>23</sup> See, e.g., Ayelet Shachar, *Group Identity and Women’s Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POLIT. PHILOS. 285 (1998) (describing how accommodation to minority cultures may lead to repression of women members within the group).



non-public common properties in which the members may participate in somewhat formalized “private government,” and in which they always retain the ultimate protection of “exit.” Unlike the more custom-driven CPRs, where both new entry and exit may be quite constrained, in the “liberal common property” participants can sell their shares and get out. To accommodate the liberal common property that Heller and Dagan describe, American legislatures have passed statutes permitting the creation of such organizations as corporations, condominiums and cooperatives, and the courts have supplied a body of common law for their governance.<sup>24</sup>

Why this difference? My best guess is that the possibility of *exit* is the key to the positive response of our legal institutions to “liberal common property.” We are, after all, a nation of immigrants, for whom the idea of “exit” has profoundly liberationist connotations. Add to that attitude the American dream of the Wild West, the open frontier, the wide open spaces, and one can easily see how our law might easily smile upon institutions that enable people to work with others, but to cut and run when necessary.

All this is to say that there is a *story* behind the categories in which we see property. Our collective myopia about certain forms of common property—our insistence until recently that those forms of property were either tragic or non-existent—is a part of a larger narrative about who we are as a nation. There are some forms of property that we just did not *want* to notice until quite recently. Just as interesting is the fact that we are waking up to them now. Why the burst of interest in traditionalist communities and their norms? Are we in the grasp of a fundamentally reactionary nostalgia? Or has the Libertarian distaste for governmental regulation made customary regimes seem more attractive? Or might the new interest in CPRs and norms stem from a growing internationalism, including the extremely belated recognition that tribal and traditionalist peoples the world over have been the subjects of vicious expropriation, in part because their holdings and products never counted as “property?”<sup>25</sup> Those are the narratives in which our categories of

---

<sup>24</sup> See, e.g., UNIF. CONDOMINIUM ACT (amended 1980), 7 U.L.A. 199 (1997); *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975) (interpreting condominium rules for community governance); *Justice Court Mut. Hous. Coop. v. Sandow*, 270 N.Y.S.2d 829 (1966) (same for co-op rules).

<sup>25</sup> See Rose, *supra* note 13, at 139-43, 160-61 (noting past failure to treat tribal

property are embedded, and they need to be explored. Heller's illuminating article points out the time-bound character of the traditional categories. We should turn to history, along with self-reflection, to understand the stories that we once used to tell ourselves about property, as well as the ones we are telling ourselves now.

## II

### RIGHT-BRAINED PROPERTY: PETER HUANG AND THE ROLE OF EMOTIONS IN PROPERTY

If Michael Heller's property categories are all about rational understanding—left-brain thinking, so to speak—Peter Huang's contribution concerns the right side of the brain, as he builds a systematic picture of the powerful role of the emotions in property bargains. He argues that expectations about property give rise to emotions, and in turn our emotions give rise to actions that police our bargaining partners and keep them from violating our expectations. Here too, I have little to add to a quite fascinating analysis, except to stress that emotional responses to property, like our categories of thinking about property, need to be considered within a narrative or historical framework.

One of the points that Huang makes is that our emotional responses to property derive from our expectations of entitlement, and thus expectations of entitlement also lie behind the so-called "endowment effect," the phenomenon in which owners of property value the things that they already have more than they value the prospect of getting things that they do not have.<sup>26</sup> This point, however, raises a persistent question about the literature on the endowment effect: just when is it that someone thinks a thing is within his or her "endowment"?

A classic article on the endowment effect concerned some experiments with people who had been given either coffee cups or candy bars: the holders of coffee cups valued coffee cups more highly, while the holders of candy bars valued their candy bars more highly.<sup>27</sup> But this study made the matter far too easy, be-

---

peoples' products and locations as property, but modern change toward some recognition).

<sup>26</sup> See Peter H. Huang, *Reasons within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000).

<sup>27</sup> Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AMER. ECON. REV. 1277 (1989).

cause with the much-cited coffee cups and candy bars, all the indicia of endowment went in the same direction; possession and title were united. Unfortunately, the indicators of endowment diverge all too often in property. Take adverse possession: here, possession and title go in opposing directions. The would-be adverse possessor is legally a trespasser until a magical statutory date passes, after which the true owner is barred from asserting his or her ownership. Oliver Wendell Holmes famously described adverse possession as the legal recognition that extended possession makes you think of a thing as in some way “tak[ing] root in your being.”<sup>28</sup> But when does the thing become so rooted? And does the thing ever really take root in this way if you *know* that someone else is the true owner? Judges and juries don’t think so. They evidently think that if the trespasser knows his or her legal status and trespasses anyway, title should not be awarded to the trespasser even after the magical date passes; as Richard Helmholz showed, trial courts are forgiving to good faith trespassers, but they do not take kindly to people who knowingly barge in on other people’s property.<sup>29</sup> Similar questions arise with constitutional “takings” claims: one might think that endowment effects explain an owner’s emotional response to a regulatory cutback on some land use. Unfortunately, this begs the question. Does an owner really think that it is a part of her landed endowment to be able to burn old tires in the back yard? And if she really thought so at one time, does she now, many years after the passage of clean air legislation that forbids this activity? That is, does the passage of time now un-root her earlier expectations? In short, what makes anyone classify some right as a part of his or her “endowment”?

Coming back to Huang’s main thesis, one might ask the same question about expectations in bargaining. What kind of treatment does a person *expect* in the bargaining process, such that a violation of expectations leads her to become angry and to act on her anger in the course of bargaining? Huang’s primary answer appears to be an analytical one rather than a historical one: one expects equal treatment, though the expectation of equality may

---

<sup>28</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897).

<sup>29</sup> R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 356-58 (1983) (noting that judges and juries do not find for knowing trespassers in adverse possession, whatever the formal law).

be modified by another factor, namely deservingness.<sup>30</sup>

This description of expectations seems to me to be at least open to question. Several years ago I wrote an article called "Women and Property," and in that article I tried to work through some of the ways that women would typically bargain if they were more inclined to be cooperative than men—or even if they were simply *thought* to be more cooperative than men.<sup>31</sup> It is the latter point that is more important: culture and beliefs can dislodge peoples' expectations from a norm of equality, even when that norm might be modified by deservingness.<sup>32</sup> Indeed, there is nothing particularly "normal" about the norm of equal treatment. To use the example that Huang uses, if women are more cooperative, or if they are simply thought to be more cooperative about taking care of children or doing the housework, then everyone will expect them to do so, even though this means that they take on an unequal share of the household tasks. Because of the community norms about who takes care of the kids and the house, women expect a bad deal, and they get it.<sup>33</sup>

This fact, however, suggests a somewhat more nuanced relationship between expectations, emotions, and actions based on emotions. Consider this same dynamic of inequality in another context, namely employment relations. In the days before Title VII, women were routinely paid less for the same work as men, or they were routinely segregated to positions that paid less than the pay levels in all-male occupations. Suppose, under those circumstances, that Allen offers Barbara a job as a waitress, and in particular he offers her, say, only two-thirds of the amount a waiter would receive. Barbara may get angry at this, but Barbara has another cognitive process overlaying her emotional reaction: if she refuses the job at this pay, will it teach Allen a lesson? The answer is almost certainly "no." Because of the norm of unequal pay for women, he will simply think that she is at best weird, or at worst overreaching in her demands. Moreover, because of the

---

<sup>30</sup> See Huang, *supra* note 26.

<sup>31</sup> Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992).

<sup>32</sup> See Robert Sugden, *Contractarianism and Norms*, 100 ETHICS 768, 779-82 (1990) (disputing constancy of norms of equality, using gender as an example of the ways culture creates persistent norms of inequality).

<sup>33</sup> See also Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2414-15 (1994) (arguing that if divorce is a "bad deal" for women, it is because marriage itself is a bad deal, in which women have lesser claims on family assets).

same norm, he can offer the job to some other woman, say Charlotte, and Charlotte will accept because she knows that no one is going to offer her more. Thinking about all of this, Barbara gives up and accepts, reconfirming Allen's view that he is acting on the basis of a norm acceptable to all.<sup>34</sup>

Let me repeat that Barbara may be angry at this treatment, even though she expects it; I can attest from my own experience that I certainly was. The situation undoubtedly resembles people's reactions to racial slights: these slights still rankle, no matter how expected they may be.<sup>35</sup> But Barbara's anger does not mean that she will act on her anger. She shares a collective action problem with other women; since it does no individual woman any good to protest, all women give in.<sup>36</sup> In turn, their giving in fortifies the very norm that disadvantages them, as well as their expectation of disadvantage. My point here is that Barbara does act on her *expectations*, but not necessarily on her *emotions*. Her expectations are formed by surrounding norms, no matter how unjust she may find them.

The most interesting question here is this: what changes norms? One matter that is surely not the whole explanation, but nevertheless an important element, is Barbara's outrage, an outrage divorced from her realistic expectations about how she will be treated. A second element is surely the sympathy that she gets from others—others who, like Barbara, have every expectation that she will be treated badly but nevertheless lend their voices to her cause. But her rage and their sympathy are not based on expectations in any real-world sense. They are based on a sense of justice.

Where does this sense of justice come from? This is also a matter with a story. Huang is surely right that in our day and age, people do expect equal treatment, but this is a historically contingent expectation. Robert Darnton, an eminent historian of eighteenth-century France, has pointed out that we have only relatively recently come to think that social relations should be equal and not hierarchical; until the age of the great revolutions, the normal view was that human society was by nature ordered in

---

<sup>34</sup> Rose, *supra* note 31, at 439.

<sup>35</sup> See Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 971, 986 (1997) (describing literature in which black middle class authors discuss the constant aggravation of racial insults).

<sup>36</sup> Sudgen, *supra* note 32, at 779-82 (describing gender inequality in part as a collective action problem about defying norms).

a hierarchy, and that things would surely fall apart if superiors failed to rule inferiors.<sup>37</sup> Under those circumstances, unequal treatment might be accepted with dignity, as a part of the just order of things; as Tocqueville remarked, the man with the soul of the lackey is only the one who accepts unequal treatment, thinking he deserves better.<sup>38</sup> As to feminist history specifically, Linda Kerber has argued that women's unequal status came to seem problematic only when hierarchy fell away for everyone *but* women.<sup>39</sup>

In short, in the yang as well as the yin of property, the emotions as well as the rational categories, our attitudes and beliefs have a history, and they take their place within a historical narrative. As these two excellent papers make clear, one need not always take a historicizing view in order to say many interesting things about property; an analytic approach can be very illuminating in its own right. But a narrative often sets a backdrop for the analytic categories, reaching out behind them into the past. When we pay attention to that narrative, we can give our analytic categories some perspective, along with a salutary understanding of their contingent nature.

---

<sup>37</sup> Robert Darnton, *What Was Revolutionary About the French Revolution?*, N.Y. REV. BOOKS, Jan. 19, 1989, at 3, 4; *see also* CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994) (noting the wide permeation of the idea of hierarchy in pre-French Revolutionary European thought).

<sup>38</sup> ALEXIS DE TOCQUEVILLE, *2 DEMOCRACY IN AMERICA 188-89* (Phillips Bradley ed., 1945) (distinguishing servants with own sense of honor in aristocratic societies from servants said to have the "soul of a lackey").

<sup>39</sup> LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 9-10* (1998).