

Note to participants in Coleman's seminar: this is very much a rough draft, so please excuse some of the copy-editing and footnote errors. I ask for no excuses when it comes to the bad arguments, though. I look forward to our discussion very much. -mns

*Property Institutions and Regulative Ideals*

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**DRAFT FOR JULES COLEMAN'S PHILOSOPHY OF THE  
COMMON LAW SEMINAR  
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*Introduction*

What is the relationship between property rights and property institutions? A natural answer to this question is the following: what property rights there are depends upon the property institution. But what kind of dependence is there? And what is a property institution in the first place? This paper is a first stab at sketching out answers to these two questions.

Let me set up this inquiry by situating this discussion within a broader project of trying to understand the relationship between our distinctively structured, historically situated institutions and norms and value. We generally recognize that we have institutions, like the institution of tort law, and then individual rights and duties that are somehow related to this institution. On some views, these rights and duties cannot be understood except in light of our grasp of the overall structure and point of the institution. Jules Coleman, for example, has argued

that the institution of tort law is best understood as an institution “embodying” the principle of corrective justice.<sup>1</sup> Coleman writes:

The relations among the central concepts of tort law – wrong, duty, responsibility, and repair – are best understood as expressing the fundamental normative significance of the victim-injurer relationship as it is expressed in the principle of corrective justice. To understand tort law is precisely to understand the way in which the principle of corrective justice is embodied in it.<sup>2</sup>

This might appear to be merely an epistemological point but Coleman argues that it is not. Coleman notes that “the conceptual is already implicated in the phenomenon we seek to describe,”<sup>3</sup> including the normative phenomena such as the responsibilities and rights that parties have in virtue of some of the features of their relationships to one another. So, Coleman should be understood as being at least partially committed to the view that many of the most important normative phenomena associated with tort law depend for their existence on the highly structured and primarily legal institution of tort law. We might say that a necessary condition for the existence of these normative phenomena is the institution of tort law.

Is this the case with property rights and property institutions: Do property rights depend for their existence on property institutions? And what are property institutions anyway? Do property institutions embody principles of justice (or principles of efficiency) in the way that Coleman (or law and economics theorists) believe that the institution of tort law

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<sup>1</sup> See, e.g., Jules Coleman, *The Practice of Principle* (NYC: Oxford University Press, 2001), chapters 2 – 5.

<sup>2</sup> *Ibid.*, p. 23.

<sup>3</sup> *Ibid.*, p. 24.

embodies these principles? In this paper, I seek to provide a sketch of some answers to these questions. It is, in many ways, just part of the initial stages of a research project.

The paper proceeds as follows. I begin with a summary and criticism of an account of property and property institutions that is very prominent in Anglo-American jurisprudence and political philosophy, namely the account put forward by Jeremy Waldron in his *The Right to Private Property*<sup>4</sup> and “Property, Honesty and Normative Resilience.”<sup>5</sup> I then turn to constructing an alternative analytic framework for an analysis of property rights and property institutions. This proceeds in two steps. First, I discuss the Hohfeld-Honoré account of property rights relations. Then, building on both the strengths of Waldron’s view and my criticisms of his view, I develop a new framework for an account of property rights and property institutions.

Before beginning, though, it is worth noting that my discussion in this paper is meant to be maximally agnostic with respect to metaethical questions about both property rights discourse and realism about property rights. The best account of the relationship between property rights and property institutions should, as much as possible, be consistent with both realism and anti-realism about property rights and be consistent with both a cognitivist and a non-cognitivist account of property rights discourse.

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<sup>4</sup> Jeremy Waldron, *The Right to Private Property* (NYC: Oxford University Press, 1988), hereafter referred to as *RPP*.

<sup>5</sup> Jeremy Waldron, “Property, Honesty and Normative Resilience” in Stephen Munzer, ed. *New Essays in the Legal and Political Theory of Property* (NYC: Cambridge University Press, 2001), pp. 10 – 35, hereafter referred to as *PHNR*.

### *Waldron on Property*

Jeremy Waldron begins his account of the relationship between property rights and property institutions by giving an important definition:

The concept of property is the concept of a system of rules governing access to and control of material resources.<sup>6</sup>

For our purposes, the relevant features of this definition is that Waldron identifies property as a *system* of rules. So, Waldron begins by immediately focusing on systems of rules and not single rules (I put aside the objection that a single rule could be considered a very simple system). The difference is important. There are many instances of single rule with respect to a single object. For example, a couple might have the rule that the left side of the bed is one person's side while the right side of the bed is the other's. Or, a parent might establish a rule stipulating that two children must share equally some toy. A system of rules, on the other hand, includes many rules usually regarding many objects and many persons.

Waldron quickly leaves behind the very abstract concept of property and turns to concepts of more specific forms of property systems. He identifies three: the concept of private property, the concept of collective property and the concept of common property.<sup>7</sup> Systems of property are often – although not necessarily<sup>8</sup> – organized around a concept of some form of property. When a concept of some form of property plays such a role, the concept plays the role of what Waldron calls the “the

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<sup>6</sup> RPP, p. 31.

<sup>7</sup> RPP, pp. 37 – 42.

<sup>8</sup> RPP, p. 42.

organizing idea of a property system.” The organizing idea of a property system is “an idea whose gist is expressible in terms of [some] image” that “serves as an essential point of reference by which the operation of these systems of very detailed and complicated rules is to be understood.”<sup>9</sup> Importantly, the organizing idea of a property system is something to which those governed by the system appeal in order to have a simple heuristic for understanding the many and complex rules of the property system. So, the organizing idea of a property system is an idea that is supposed to capture, in some sense, the core features of the system in a way that makes that system easy for all those governed by that system to understand. For example, the organizing idea of a private property, or ownership, system is “the abstract idea of an object being correlated with the name of some individual.”<sup>10</sup> This provides for all those governed by the system a “rough and ready” characterization of how one ought to act: if some object is not correlated with one’s own name, then one should minimize as much as possible one’s interactions with that object unless one has received permission from the person whose name is correlated with that object.<sup>11</sup> The organizing idea of a property system facilitates *guidance* of those governed by that system.

Despite initial appearances, this does not suggest that the concept of property that also serves as the organizing idea of a property system plays a central role in the determining the property rights that exist under that system. All we have seen is that the organizing idea facilitates guidance; but it does not determine what property rights there are. In fact, since Waldron characterizes the organizing idea as a rough and ready

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<sup>9</sup> RPP, p. 38.

<sup>10</sup> RPP, p. 47.

<sup>11</sup> RPP, p. 43.

characterization, we are likely safe in taking it to be the case that the direction of fit of the organizing idea is belief-like and not intention-like. That is, the organizing idea is more representation of how things are and not a rule for how things ought to be.

What, then, is the relationship a property system and the individual rules of a property system?<sup>12</sup> Waldron begins the process of answering this idea by introducing a distinction that is Rawlsian in provenance (although Rawls himself credits H.L.A. Hart). The distinction is between the concept of some F and different conceptions of F. A concept of an F is an abstract characterization of F – a general account of what F is. A conception of F is a more concrete, particular account of F that operates at a more practical level. For example, Rawls distinguished between the concept of justice – the concept of rules governing the distribution of benefits and burdens within a cooperative social venture – and different conceptions of justice – concepts of sets of particular rules governing this distribution.<sup>13</sup> So, competing conceptions of justice are understood only against a background univocality about the concept of justice.

Waldron applies this distinction – incorrectly, I shall argue – to private property (and the other two forms of property, although I shall, following Waldron, discuss on private property for the remainder of this section), arguing that we can distinguish a concept of private property from different conceptions of private property. Waldron draws the distinction as follows:

The *concept* of ownership is... a correlation between individual names and particular objects... the rules of real or

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<sup>12</sup> Waldron poses this question in RPP at p. 47.

<sup>13</sup> John Rawls, *A Theory of Justice*, 2<sup>nd</sup> ed. (Cambridge, MA: Harvard University Press, 1999), p. 7. I discuss this at much greater length below.

postulated legal systems assigning rights, liberties, powers, immunities and liabilities to people in regard to particular resources amount to *conceptions* of that abstract concept.<sup>14</sup>

Rules of private property, then, are just rules composing the conception of a concept of private property. This, then, takes us some way towards understanding one important feature of Waldron's view. It looks like conceptions of private property are a lot like what Coleman and others take to be institutions of tort law, namely rules of a legal system that assign rights, duties, liberties, powers, immunities and liabilities to people. So, we have *prima facie* reason to think, at least at this stage, that some conception of private property is nothing other than a particular (real or postulated) institution of private property. But, it is not clear what the relationship is between individual property rights and conceptions of property. For, a conception of property is just the conception of a system of rules. We have not gotten any closer to understanding how these systems of rules are related to individual cases of property rights.

On the other hand, we can tease out more about Waldron's view of property institutions by looking at how he uses his concept-conception distinction to address two worries about property. The first was expressed forcefully by Thomas Grey in his "The Disintegration of Property."<sup>15</sup> Grey lists six different concepts, each of which has the name 'property,' but each of which is, according to Grey, so distinct from the other five concepts that all six together cannot consistently be accounts of the

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<sup>14</sup> RPP, p. 52 (emphasis added). Waldron also describes the conception of private property as "the detailed legal rules conferring particular rights, powers, liberties, on particular subjects." RPP, p. 47.

<sup>15</sup> Thomas C. Grey, "The Disintegration of Property," in *Nomos XXII: Property*, J. Roland Pennock and John W. Chapman, eds. (New York: New York University Press, 1980), pp. 69 – 81.

same concept.<sup>16</sup> The six concepts Grey lists are the concept of real estate, the concept of all rights *in rem*, the concept of entitlements that advance allocative efficiency, the concept of public law entitlements to social minima, the concept of thing-like stuff recognized by takings jurisprudence and Calabresian property rules.<sup>17</sup> Each of these is supposed to be a concept of property employed by legal and political theorists. Grey gives no argument for why these six concepts of property are inconsistent with each other. So, he simply presents it as obvious that they in fact share only a name – they are merely homonymous. On the basis of this, Grey concludes that

...discourse about property has fragmented into a set of discontinuous usages... It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all.<sup>18</sup>

The second worry involves disagreements about what the core rights of ownership are.<sup>19</sup> For example, one might believe that the power to transfer one's wealth to one's children is an essential feature of private property.<sup>20</sup> Someone else may believe that this is not a core right and therefore may endorse some form of limited

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<sup>16</sup> Grey equivocates between property and ownership or private property. I assume, as does Waldron, that Grey throughout his article is expressing worries about discourse about private property and not property *tout court*. This renders Grey's argument, which is obscure and confused to begin with, even less convincing. But, since Waldron takes the challenge seriously (and, to a certain degree, positions his analysis as a response to Grey), I am also considering it.

<sup>17</sup> Grey, *op. cit.*, pp. 69 – 85.

<sup>18</sup> *Ibid.*, pp. 72 – 3.

<sup>19</sup> See, e.g., J.E. Penner, "The 'Bundle of Rights' Picture of Property," 1996 *UCLA Law Review* 43:711.

<sup>20</sup> See Waldron, *op. cit.*, pp. 50 – 51. See also Jeremy Waldron, "'Supply Without Burthen' Revisited" 82 *Iowa Law Review* 1997, pp. 1467 – 85.

escheat when it comes to intestate wealth. Such disputes are common both in the popular political realm and among political and legal theorists. This suggests that there may be massive conceptual confusion about private property. But, if discourse about private property admits of this sort of endless contestability, what use is the concept? Why not just focus on the individual issues, e.g., whether certain forms of escheat are justifiable, and leave the matter of private property entirely to the side?<sup>21</sup>

Waldron responds to these concerns by pointing out that there can be disagreement within a community about which system of rules best realizes the concept of private property in practice while all in that community remain committed to realizing the concept of private in some manner. To understand this, consider the concept of basketball. There is, for the most part a univocal concept of basketball shared by all. But, there can be many competing views about what actual rules are best for playing basketball. Should there be a 24-second clock rule? A 3-second in the paint rule? A 3-point line rule (and if so, how far back should the line be)? Should pick-up players call their own fouls (and if so, can they be contested by the accused fouler)? These rules are all debated and have changed over time. There is flexibility in what the actual rules of basketball, as it is realized in everyday life, can be. This flexibility is not grounds for junking the concept of basketball. Rather, it is simply a feature of how concepts of different features of human society are related to the nuts and bolts – the daily practices – of human society itself.

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<sup>21</sup> Waldron puts the question this way:

One possibility is that we conclude the term is simply ambiguous... covering a variety of quite distinct legal phenomena from usage to usage. If we take this approach, we should probably abandon 'ownership' altogether... replacing it in every context by a less ambiguous statement of the legal relations to which we want to refer. (RPP, pp. 47 – 8)

Which individual rules are essential parts of a system of rules realizing a concept of private property, then, is a contingent matter: it is always open to challenge. This is what Waldron, borrowing from W.B. Gallie, calls the ‘essential contestability’ of property.<sup>22</sup> This allows us to make sense of the phenomena Grey identifies. The different forms of ‘property discourse’ reflect *either* different conceptions of private property *or* technical disagreements about the nuts and bolts of a particular conception of property. They therefore all remain well within the bounds of discourse about private property. Disagreements about which rights are essential to private property are also simply disagreements at the level of conceptions of private property.

Institutions of private property are fluid. They are sites for regular contestation about their very structure. This is not conceptually problematic because the contestation occurs against a background univocality about the concept of private property. (There may be practical problems if the contestation results in constant change in the system of rules that compose the property institution.) The contestation always takes a form of challenges to the conception of private property, in particular challenges to which rules best realize the concept of private property. This suggests that the concept of private property does a great deal of work since it is what holds the entire system together. But, how does it do that work – in particular, what mechanism facilitates this? And, is the concept of private property something like the concept of corrective justice or is it something even more abstract that would allow for contestation between those who believe tort law should reflect principles of corrective justice and those who believe tort law should reflect principles of efficiency?

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<sup>22</sup> RPP, pp. 51 – 52. The Gallie article is W.B. Gallie, “Essentially Contested Concepts”...

We have, so far, a rough idea of Waldron's view of property institutions. But, what is the relationship between property institutions and individual property rights? To get at Waldron's view on this, we must turn to "Property, Honesty and Normative Resilience," in which he distinguishes two kinds of judgments:

- (1) judgments concerning the justification of the institution;
- (2) judgments concerning individual conduct in relation to the institution<sup>23</sup>

The purpose of introducing these two types of judgments is to argue for something Waldron calls 'normative resilience.' Normative resilience exists when the content of judgments about the justification of an institution (a 'Type-1' judgment) does not affect evaluations of individual conduct in relation to that institution ('Type-2' judgments). The most natural way in which to understand resilience is the following: if an institution is resilient, then (up to a point) even if it is unjustifiable, its rules are still binding with respect to our own and each other's behavior (and so still ought to guide our evaluations of that behavior). Institutions that are not resilient, then, are institutions whose rules' bindingness stand and fall with the institution's justification.

We should consider what Waldron takes to be the canonical Type-1 judgment when it comes to property, namely the following: "Private property is morally justified."<sup>24</sup> It is not clear how Waldron understands these judgments. For, his other examples are split evenly between judgments about the very

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<sup>23</sup> PHNR, p. 12.

<sup>24</sup> *Ibid.*, p. 15. He also gives the following as a Type-1 judgment about property: "The private property system around here is just." (p. 16).

*possibility* of a just institution of a certain sort (the state, aristocracy and military discipline) and judgments about whether an existing institution is just (a particular religion, the criminal justice system and traditional marriage). This suggests that, with respect to property, Waldron accepts the possibility of two kinds of Type-1 judgment: one about private property *tout court* and one about specific institutions of private property.<sup>25</sup> So, throughout his discussion of the institution of private property, Waldron equivocates between private property *tout court* and some specific institution of private property. For the time being, though, I will put this concern aside.

We can now have an answer to the question about the relationship between the individual case of someone having property rights in some object and a property institution. The relationship is characterized by normative resilience. Waldron takes it to be the case that, up to a certain point, if a particular property institution is judged to be unjust, the individual property rights people have ‘within’ that institution may be judged to be still binding. Suppose, for example, that the modern institution of private property is judged to be unjust. This would not affect judgments about whether I have ownership rights in my truck or whether my landlord has property rights in the apartment I lease from her or whether Bill Gates has the right to bequeath his fortune to whomever he wishes (limited inheritance regulations

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<sup>25</sup> This suggests that that the two kinds of Type-1 judgments might map onto the distinction Waldron makes between the concept of private property and conceptions of private property. But, this is mere suggestion since Waldron never explicitly uses the analytical machinery of *The Right to Private Property* in “Property, Honesty and Normative Resilience.” It is not clear how such a mapping would proceed. In the next section, I will discuss this at some length. It is enough here simply to flag this issue, with a special note that there seems to be a discontinuity between Waldron’s analytic account of property and his account of the normative resilience of property.

notwithstanding). Because property is normatively resilient, someone could not justify stealing my truck, I could not justify destroying my leased apartment and the state could not justify taking possession of Gates' fortune upon his death by appealing to the (*ex hypothesi*) fact that the private property institution is unjust.

What does this tell us about the relationship between property institutions and property rights? What it tells us is that there is a justificatory gap between property institutions and individual property rights: the justification of individual property rights does not depend upon the justification of the overarching institution. If there is no justificatory traction between property institutions and individual property rights, is there any traction at all? That is: are individual property rights dependent in any way on the overarching institution? Waldron must think it must at least *appear* that there is such a dependency relationship, or else normative resilience would not be a significant phenomenon. What makes normative resilience significant is that it has to do with cases in which explanatory dependence pulls away from justificatory dependence. Normative resilience characterizes the situation in which the existence and/or content of certain norms and values depends upon an institution but the justification of these norms and values does not depend upon the justification of the institution.<sup>26</sup>

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<sup>26</sup> A clarificatory note is in order. If a property right exists, then it is (defeasibly) binding because it is a right. That is, the very existence of the property right provides a *pro tanto* reason for taking the property right to be binding. This is just the nature of rights: their existence and their (defeasible) bindingness go hand-in-hand. So, the mystery of normative resilience can be summed up in this ham-fisted way: why is it that the justificatory status of what makes a property right exist just doesn't matter?

So, if property is normatively resilient, then the existence of individual property rights must depend upon the overarching property institution. But what is the nature of this dependency relationship? Here are some reasonable candidates (I focus only on existence and not content here):<sup>27</sup>

- (i) An individual property right exists if and only if it is explicitly recognized somehow by the property institution.
- (ii) An individual property right exists if and only if property rights of its sort are explicitly recognized somehow by the property institution.
- (iii) An individual property right exists if and only if the property institution facilitates protection of property rights of that kind (but this need not involve explicit recognition of that right).
- (iv) An individual property right exists if and only if, by the lights of the governing property institution, that property right is justifiable (but this need involve neither explicit recognition nor protection of that right).

In these four cases, we explain the existence of some property right by appealing to a fact about some property institution but one fact that we do not cite is the justificatory status of the property institution. In (i) – (iv), citing some fact about the governing property institution (e.g., citing a statute, citing binding precedent, citing an administrative rule, etc.) is supposed to go a long way towards explaining the existence of the property right. We might

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<sup>27</sup> I put all of these in terms of biconditionals. That in itself may be too strong. But, if the dependence were only conditional, then we would be dealing with only sufficient conditions. I think that, when it comes to dependency relations, the most interesting questions are questions of necessary conditions.

have to throw in certain other factors, e.g., the history of certain transactions. But, these would not do the explanatory heavy-lifting. The unification of diverse phenomena that explanation provides would be accomplished by citing one of the factors identified on the right hand side of one of the biconditionals above.

Of course, the four options listed above are mere speculation since it is hard to tell when the explanatory dependence of some A on B suggests justificatory dependence of A on B. And therefore it is unclear what the explanatory (i.e., non-justificatory) relationship is between property institutions and property rights. In fact, it's not even clear why and what kind of explanatory dependence suggests justificatory dependence. Is it reductive explanation? Is it some form of causal explanation (e.g., appealing to some form of counterfactual dependence of property rights on property institutions)? These questions must be answered if there is to be a thorough account of normative resilience. In fact, these questions need to be answered to defend the very plausibility of normative resilience in the first place. Normative resilience exists only when explanatory dependence pulls away from justificatory dependence. But, if in every case there is not justificatory dependence, there is also no significant explanatory dependence, then normative resilience is at best a sterile concept.

Of course, we don't need normative resilience to be plausible in order to get a grasp on Waldron's view of the justificatory relationship between the property institutions and property rights. As has been stressed repeatedly, Waldron takes it to be the case that the justification of individual property rights does not depend upon the justification of a property institution. The upshot of this is the rather conservative view that, *ceteris paribus*, all individual property rights that currently exist are

binding.<sup>28</sup> The *ceteris paribus* clause is meant to account for cases in which independent moral considerations override or outweigh the moral significance of the bare fact that there is a property right.<sup>29</sup> Of course, this leaves it an utter mystery how we come to change what property rights exist. Does it depend upon the operation of the property institution? If so, what role does the property institution play?

This completes the summary of Waldron's view of property institutions and their relationship to individual property rights. Property institutions are systems of rules that realize abstract concepts of private, common or collective property. These institutions are loci for political contestation and can be in continual flux without ceasing to be institutions of a particular form of property. Individual property rights that exist within any given society are in some way explanatorily dependent upon the overarching property institution. But, there is only very limited justificatory dependence.

### *Problems With Waldron's View*

Waldron has given us a good start. But, his account suffers from a few infelicities that are serious enough to warrant revisions. In this section, I will briefly highlight these infelicities.

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<sup>28</sup> See PHNR, pp. 31 – 35 for Waldron's reflections on the significance of this conservatism.

<sup>29</sup> See PHNR, pp. 15 – 21. One example Waldron uses is the case in which someone's baby needs food lest it die. In such a case, the food-owner's property rights would still be binding but considerations about the baby's need would outweigh or override those rights. This is different from the case in which an institution is not normatively resilient and is judged to be unjust. In such a case, the fact of the institution's unjustifiability renders chimerical the purported rights (and other moral relations) that are somehow dependent upon that institution.

First, the most obvious infelicity is an inattention to the problem of the explanatory dependence of individual property rights on property institutions. This has already been discussed above, so I will not belabor the point here other than to point out that, even by the lights of the argument in *PHNR*, this lacuna is significant.

Second, the argument in *PHNR* comes close to equivocating between evaluation of conduct and evaluation of rules. Insofar as we conceive of property rights as rules, then we can raise two distinct questions: first, is the rule justified, and second, is it justifiable not to obey the rule. Is Waldron claiming that because property is normatively resilient, individual property rules may be justified even if the overarching property institution is not? Or, is he claiming that if an overarching property institution is unjust, so are the subordinate property rules, but we are nonetheless still required to follow its rules? If the latter, then Waldron is tying property institutions and property rules far more tightly together than I suggested in the previous section. On this view, the justification of property rights and the justification of the overarching property institution do not pull apart from one another at all. Instead, the justification of conduct governed by the rules of the institution pulls apart from the justification of both the rules and the institution itself. While we have reasons to abandon both the property institution and the property rules because neither of these is justified, the balance of reasons is in favor of obeying the unjustified rules.

It seems to me that this second reading is not felicitous. For, it is unclear why, if the balance of reasons is, usually and for the most part, in favor of obeying a rule then that rule is in some sense justified. Note that Waldron is not saying that there are rare

cases in which the prudent thing to do is to obey an unjustified rule. He is making the more robust claim that, *ceteris paribus*, we have conclusive reasons to obey a property rule *because it is the standing property rule* (and not because of strictly instrumental reasons such as failure to obey would result in punishment or it would be imprudent to call attention to one's revolutionary leanings by breaking the property rule, or something like that). But, this just suggests that the rule itself is justified and that is why the balance of reasons is in favor of obeying the rule. This is why it seems odd to read Waldron as arguing that the discontinuity in justification was between conduct on the one hand and property institutions and property rules on the other. Nonetheless, this is precisely the reading Waldron invites when he writes that the discontinuity is between judgments regarding the justice of an institution and "judgments concerning individual conduct in relation to the institution."<sup>30</sup> So, we have another unresolved problem facing Waldron's account.

Third, Waldron's account of the relationship between the concept of private property and the conception of private property contains within it an equivocation. On the one hand, the conception of a particular form of property is something like a particular legal system's paradigm of a particular form of property: "[The conception of private property] may be defined as the particular bundles of rights, liberties, powers, duties, etc., associated with full ownership in particular legal systems."<sup>31</sup> On the other hand, Waldron tells us that the conception of a particular form of property is more like the wide panoply of legal rules that shape property rights in a particular society: "The rules of real or postulated legal systems assigning rights, liberties, powers, immunities, and liabilities to people in regard to particular

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<sup>30</sup> PHNR, p. 12.

<sup>31</sup> RPP, p. 60.

resources amount to conceptions of that abstract concept.”<sup>32</sup>

These two ways of understanding the conception of some form of property are rather different: a collection of actual legal rules is not the same thing as a paradigm of some particular form of property. So the equivocation between the two is not entirely unremarkable and should be resolved lest Waldron be faced with a glaring incoherence in his account of property.

But, we might resolve this equivocation by looking more closely at the formal character of the concept-conception distinction to which Waldron appeals. John Rawls in *A Theory of Justice*, introduced us to the distinction between concept of justice and competing conceptions of justice.<sup>33</sup> This distinction has become standard for almost all Anglo-American philosophers, including (or especially) critics of Rawls.<sup>34</sup> Without going into the rather tricky exegesis that is required to defend or criticize the specifics of Rawls’ particular distinction, we can still consider how he presents it to get a sense of how it is to be used. Rawls writes:

Men disagree about which principles should define the basic terms of their association. Yet we may still say, despite this disagreement, that they each have a conception of justice. That is, they understand the need for, and they are prepared to affirm, a characteristic set of principles for assigning basic duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation. Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of

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<sup>32</sup> RPP, p. 52.

<sup>33</sup> John Rawls, *op. cit.*, pp. 5 – 11.

<sup>34</sup> Waldron, RPP, p. 52, cites Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard, 1978), p. 103, in which we find a discussion of a single concept of fairness and competing conceptions of fairness.

principles, these different conceptions, have in common.<sup>35</sup>

Rawls here is distinguishing between a determinate set of principles and, roughly speaking, the role that those principles, once settled, are to play. Certain facts about the human condition – “the normal conditions under which human cooperation is both possible and necessary”<sup>36</sup> – force us into situations in which we must establish principles according to which we can organize a well-functioning society. In particular, these principles cannot dictate an organization that assigns *arbitrarily* roles, duties, burdens, benefits, etc., to any one person or class of people. So, the concept of justice just is the concept of principles that can do the work just described. Particular conceptions of justice are collections of determinate principles that one can take to be the best candidates to do the work of organizing society. When we are deciding how to design the basic institutions of a society, we are guided by a particular conception of justice as the best of all possible conceptions.<sup>37</sup> But, the concept of justice cannot guide us in this task. The concept of justice guides our thinking about what the best possible conception of justice is.<sup>38</sup> So, conceptions of justice

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<sup>35</sup> Rawls, *op. cit.*, p. 5.

<sup>36</sup> Rawls, *ibid.*, p. 109. Rawls notes that he is of course referring to Hume’s famous circumstances of justice as found in David Hume, *A Treatise of Human Nature*, David Faye Norton and Mary Norton, eds. (NYC: Oxford, 2000), §2.2.2 and the *Enquiry Concerning the Principles of Morals*, Tom Beauchamp, ed. (NYC: Oxford, 1998), §3.1. Rawls also points out that he is following Hart, *op. cit.*, pp. 189 – 195.

<sup>37</sup> Indeed, this is what we find in Rawls, *op. cit.*, in which once the conception of justice is defended in Part One, Rawls turns in Part Two to a general discussion about the sorts of institutions that such a conception requires.

<sup>38</sup> There are alternative concepts of justice from the one we find in Rawls, *ibid.* By defining the concept of justice as he does, Rawls shows that he takes as his initial datum that needs to be explained (or, alternatively and perhaps more accurately, the initial problem that needs to be addressed) the fact of unmerited inequalities that exist in any system of social institutions that facilitate social

play very concrete roles in our political lives whereas a concept of justice is far removed.

The relationship picked out by the concept-conception distinction, then, is a relationship between different *ideas* or *principles*. It is not the relationship between an idea or a principle and its practical realization. This speaks against reading Waldron's notion of a conception of a particular form of property as being the practical realization of a concept of a particular form of property. But, this runs counter to the text in which Waldron urges that the conception of property should be understood as "the rules of real or postulated legal systems assigning rights, liberties, powers, immunities, and liabilities to people in regard to particular resources..."<sup>39</sup> Waldron here is describing the ways in which a particular concept of property could be practically realized at some specific historical moment.

What is at stake is not only the coherence of Waldron's view. For, if Waldron is using the Rawlsian concept-conception distinction (and he explicitly claims that he is), he cannot mean by the conception of private property something like the actual laws, administrative rules, judicial opinions, etc., that are the realization of some concept of a form of property. Instead, he must mean something more like the canonical shape that a particular form of property takes in a society. But, this means that we can no longer take Waldron's conception of private property, for example, to be the same thing as an institution of private property, since an institution is a (real or imagined) social practice and not a concept

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cooperation. But, if this is not one's major concern, i.e., if one is not struck by the problem of unmerited inequalities, as e.g., libertarians and robust desert theorists are not, then one would take a different view of what the concept of justice is. Consider, for example, the concept of justice at work in Robert Nozick, *Anarchy, State and Utopia* (NYC: Basic Books, 1974).

<sup>39</sup> RPP, p. 52.

or principle. But, if Waldron wants the conception of private property to be taken to be something like a historically situated social-political institution, then he is not correctly employing the Rawlsian concept-conception distinction and is instead employing something more like the well-known function-realizer distinction developed primarily by philosophers of mind during the last half of the Twentieth Century.<sup>40</sup>

The function-realizer distinction is fairly well understood when it comes to computation and biological organisms but it is poorly understood, if it is at all applicable, when it comes to the relationship between concepts and human institutions. The best account we have is Coleman's partial constitution embodiment relationship.<sup>41</sup> In the fourth section of this paper, I shall offer a friendly amendment to Coleman's account by applying the Kantian concept of a regulative ideal to the property institutions.

These reflections should raise concerns about the strength of Waldron's view. It suffers from conceptual confusion at several key points and significant silence at other key points in the account. I do not take this to be evidence that Waldron's view should be junked, though. Instead, I believe he has provided invaluable groundwork that, coupled with Coleman's work on the embodiment relationship, can facilitate important development in the analysis of property. In what follows, I shall attempt to begin that process.

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<sup>40</sup> For two classic statements, see David Armstrong, *A Materialistic Theory of the Mind* (London: RKP, 1968) and Hilary Putnam "Minds and Machines" reprinted in Hilary Putnam, *Mind, Language, and Reality* (NYC: Cambridge University Press, 1975).

<sup>41</sup> See Coleman, *op. cit.*, esp. Lectures 3 – 5. John Gardner has challenged parts of Coleman's account of the embodiment relation to what I take to be good effect. See Gardner, "What is Tort Law For?", unpublished manuscript.

### *The Hohfeld-Honoré Account of Property*

I begin with a very brief discussion of the classical analytic jurisprudence on property.<sup>42</sup> Here, we are concerned with cases such as ownership of one's car, one's property rights in one's leased apartment, one's landlord's property rights in that same leased apartment, a musician's property rights in her songs, state ownership of the subway and common ownership of the air we breath, to name a wide range of examples. Although the objects of property are all quite distinct and the relationships between the property rights holder and the objects of property are distinct, these are all nonetheless instances of property. So, what do they have in common? This will give us a clear grasp of the core features of the most basic kind of property: the property rights relation.

Early on in the Twentieth Century, Wesley Hohfeld, in the process of developing a systematic conceptual vocabulary of legal discourse, laid the groundwork for our contemporary understanding of property.<sup>43</sup> By applying the Hohfeldian vocabulary and Hohfeldian insights about relations between legal rights, we can characterize the formal structure of a property as a rights relation between:

- (i) The holder of property rights;

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<sup>42</sup> This is also how RPP, Stephen Munzer, *A Theory of Property* (NYC: Cambridge University Press, 1990) and Lawrence Becker, *Property Rights: Philosophic Foundations* (Boston: Routledge and Kegan Paul, 1977) begin.

<sup>43</sup> See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, W.W. Cook, ed. (New Haven: Yale University Press, 1919).

- (ii) Objects of property rights;<sup>44</sup>
- (iii) Everyone else.<sup>45</sup>

Property rights are held by (i) in (ii) against (iii).<sup>46</sup> Once we spell out each relatum and the specific property rights that structure their relationship to one another, this description will be filled out into something recognizable as a property rights relation. But, in order to fully understand the general form of a property rights relation, we need not spell out all possible property rights, all possible holders of property rights, all possible objects of property rights and all others who might violate property rights. Rather, we need only recognize first that this cannot be an empty relation (i.e., each ‘part’ of the relation must be filled) and second that there must be some property rights that fix the structure of the relation. Finally, this relation need not be a relation mediated by *legal* rights. There is nothing about Hohfeld’s analysis that suggests that it cannot be transposed to the non-legal ethical theorizing.<sup>47</sup>

A property rights relation, then, is a normative relationship that exists between three relata – a property rights holder, an object of property rights and others that might violate those property rights. There is a range of types of property rights relations.

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<sup>44</sup> In what follows, I shall avoid referring to objects of property rights as ‘property.’

<sup>45</sup> Viz. David Hume, *A Treatise of Human Nature*, p. 310 (§3.2.1.16): “A man’s property is suppos’d to be fenc’d against every mortal, in every possible case.”

<sup>46</sup> That property is a *three*-part relation is naturally suggested by Hohfeld’s observation that rights *in rem* are rights held by one person against another and *not* rights held by one person in an object. See Hohfeld, *op. cit.* Hohfeld was wrong not to include the object of property rights in his analysis of property rights relations. It makes little sense to give an account of property rights that leaves out the object of property rights. On the other hand, Hohfeld was right to insist over and over again that property rights are always held *against someone*.

<sup>47</sup> And, indeed, many have done so. See...

Private property is the most widespread type of property rights relation in our society. But, many other kinds of property rights relations can also exist: tenancy, communal ownership, trust, usufruct, etc.

#### *a. Hohfeld and Property Rights*

We can now turn to a brief discussion about property rights. Property rights, recall, are what fill out the structure of property rights relations. There is often confusion when people talk about property rights. Hohfeld showed us that there is not just one master property right. Rather, there are many different kinds of property rights: claim-rights, liberties (liberty-rights or privileges), powers and immunities. Hohfeld pointed out that by ‘rights,’ people usually are referring to *claim-rights*, or rights that rights-bearers have against bearers of correlative duties. In what follows, I shall describe the many different kinds of rights one can possess from the oft-discussed claim-rights to the other, more esoteric sorts of rights.<sup>48</sup>

##### *Claim-Rights*

When someone says that they have a right to a certain good, e.g., a right to medical care, or a right to act in a certain manner, e.g., a right to free speech, they usually mean that they have a claim-right. The unique feature of claim-rights is that they are always accompanied by correlative duties. For example, suppose A has a claim-right to medical care. Necessarily, some B has the correlative duty to provide medical care to A.<sup>49</sup> *Ipsa facto*, if there is no A

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<sup>48</sup> Very useful discussions of the ‘incidents’ of property can be found in Becker, *op. cit.*, pp. 11-15. My discussion here owes much to Becker’s discussion of property rights in the cited pages.

<sup>49</sup> At least for Hohfeld, this is a conceptual necessity: it is part of the ‘logic’ of claim-rights that for all claim-right holders, there are others who bear the burden of the correlative duty.

who has a duty to provide B medical care, then B hasn't a claim-right to medical care. Or suppose that A has the claim-right to speak her mind. This requires it to be the case that there is some B who has a duty not to interfere with A speaking her mind. Citizens of the United States, for example, have a claim-right against the state to allow them to speak their mind. The state, on the other hand, has the duty to allow all citizens to speak freely. No one else has this duty. For example, the owner of a shopping mall does not have the duty to allow individuals to speak their mind in the shopping mall.<sup>50</sup> If the duty-bearer fails to perform (or not to perform) the particular action, the existence of the claim-right is supposed to justify coercing the duty-bearer to act in accordance with their duty. If it is too late, the existence of that claim-right is supposed to justify seeking some kind of remedy to cure the damage caused.

### *Liberties*

Liberty-rights (or privileges) are rights to perform certain actions. The characteristic feature of A having liberty-right to  $\phi$ , where  $\phi$ -ing is acting in some manner, is that A is in a situation in which no one rights against A and thus A has no duties towards others. A is therefore free to do as one pleases with respect to the content of the particular liberty right. For example, if A has the liberty-right to speak as she wishes, then there is no B to whom A owes a duty not to speak in a particular manner. A, then, can speak as she wishes without abrogating any of her duties.

### *Powers*

When someone has a power, one can alter the rights-relationships of others. In order for this to occur, another person must be liable to the power-holder changing their moral and/or legal

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<sup>50</sup> For a limited exception, see *Pruneyard Shopping Center et al. v. Robins et al.*, 447 U.S. 74 (1980).

status with respect to an object and all others. For example, in the United States, a county clerk has the power to marry two people: by signing a marriage license involving the two people, the clerk changes the rights-relationships of the couple. Importantly, for the clerk to exercise her power to marry, there must be individuals who together are liable to have their rights-relationships changed in the appropriate manner. But being unable to exercise a power due to the absence of those who have the correlative liabilities does not divest one of the power.

### *Immunities*

If someone has an immunity, they are not subject to others altering their rights-relationship with respect to that thing. If one is immune from certain changes in one's rights-relationships with respect to certain things, then someone (or everyone) bears a correlative disability. Although the other party (or parties) have a disability, they need not have any duties towards the holder of the immunity. Immunities, like powers, also vary in scope. If A has an immunity from being made owner of some O owned by B, then the rights relation is rather limited. It is not necessarily the case that if C came to own O then A would continue to be immune from being subject to O's transfer.

### *b. Honoré and Property Rights*

In 1961, A.M. Honoré published a seminal article in which he employed Hohfeldian rights vocabulary to formulate a list of the rights associated with full ownership.<sup>51</sup> Honoré was clear that the list of these 'incidents' of ownership is not a list of jointly sufficient and individually necessary conditions for the existence of private property. Rather, the list was meant to suggest the range

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<sup>51</sup> A.M. Honoré, "Ownership" in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (NYC: Oxford University Press, 1961), pp. 112 – 128.

of property rights that can be involved in *any* property rights relation. There can be quite a bit of variation in the incidents without the rights relation ceasing to be a property rights relation. While not every property rights relation involves all (or even any) of these incidents, every property rights relation involves *at least one* incident that is substantially like one of these rights. The list of rights recognized by Honoré includes the following.<sup>52</sup>

1. The claim-rights to
  - a. Possess
  - b. Use
  - c. Manage
  - d. Receive income
2. The powers to
  - a. Transfer
  - b. Waive
  - c. Exclude
  - d. Abandon
3. The liberties to
  - a. Consume
  - b. Destroy
4. The immunity from
  - a. Expropriation
5. The liability for
  - a. Execution to satisfy a court order

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<sup>52</sup> I am not including Honoré's prohibition of harmful use (i.e., one's duty to forbear from using the thing in certain ways harmful to others) in the list of incidents. Surely, this prohibition is more a matter of respecting other people's non-property related rights than it is a matter of a property rights relation. One has this duty with respect to things in which they have no property rights at all. For example, I most surely have a duty not to use a rock I come upon in the street as a weapon.

If A has one or more of these property rights in some thing, O, against all others who might violate those rights, then A is in a property rights relation in which s/he stands as relatum (i), i.e., a property rights holder, and O stands as relatum (ii), i.e., an object of property rights and everyone else who might violate those rights stands as relatum (iii). Thus, for O to be owned by A, A must have enough of the above property rights in O against all others who might violate those rights.

The common way of referring to the Hohfeld-Honoré account of property is as the ‘bundle of rights’ account of property. A property rights holder possesses a bundle of rights that is composed of individual and separable ‘sticks’ of incidents of property, or more generally property rights. Thus, one property rights holder may have a bundle of rights in some object, the bundle being composed of the claim-right to possess, the power to abandon and the liability for execution to satisfy a court order. Another property rights holder may have a bundle of rights in the same object but the bundle is composed of different rights such as the claim right to manage, the claim-rights to use and to receive income and the power to exclude. The two parties therefore have different bundles of rights in the same object.

To sum up, property rights structure a tripartite relation between an agent, an object and all others. We can call such relations ‘property rights relations’. So, my relationship to my truck is a property rights relation structured by almost all of the property rights listed above. When most think about property, then, they think about individual property rights relations – one’s ownership of a car, a musician’s ownership of her song, state ownership of a park, common ownership of the sea.

This analytic clarity allows us to formulate two issues more clearly than they have yet been stated. We can restate the driving question of this paper: what is the relationship between a property institution (whatever that may be) and individual property rights relations? In the next section, I turn to a preliminary answer to this question.

### *Regulative Ideals and Embodiment*

Property rights relations are wildly heterogeneous. Each relatum of the property rights relation can be different and so can the property rights that structure the relation. So, at its most formal level, this analysis of property rights relations give us the resources to make distinctions between individual property rights relations but it does not allow us to identify classes of property rights relations. Of course, this analysis is based upon Honoré's discussion of ownership and so there are, imminent in the analysis, tools for distinguishing property rights relations that are cases of ownership from other property rights relations. But, this would be a bit too blunt of an instrument since we know that there are more than just two kinds of property rights relations.

This is where the Rawlsian concept-conception distinction can be helpful. The concept of justice, recall, is the concept of any set of principles that will enable us to justify the different assignments of benefits, burdens and roles in a cooperative social venture. And a conception of justice is a particular set of principles that allows us to justify the distribution of benefits, burdens and roles in a cooperative social venture. Such principles are needed because Rawls takes as his initial datum the fact that unmerited inequalities will exist in any cooperative social venture. These inequalities, Rawls believes, must be justified to the

participants of the system and the principles that compose the conception of justice are supposed to do this. Thus, we can understand Rawls' concept of justice as picking out a problem area – the problem area of justifying inequalities due to unmerited difference. And, a conception of justice, then, is just a conception of principles that in some way can be used to address the problems identified by the concept of justice.

Can we transpose Rawls' concept-conception distinction with respect to justice to the case of property? We can. There are certain conditions in which we must establish rules that govern our interactions with each other as mediated by certain objects.<sup>53</sup> Let us call these conditions 'property cooperation problems'.<sup>54</sup> The concept of property, then, just is the concept of rules resolving property cooperation problems. A conception of property, then, is just a conception of *certain* rules that resolve property cooperation problems, rules such as rules of private property, common property, collective property, etc.

So, the concept of property I put forward is more or less identical to Waldron's account of the concept of property. But I have abandoned Waldron's concepts of particular forms of property, such as the concept of private property, in favor of *conceptions* of certain forms of property. The conception of a form of property stands in relation to the concept of property in exactly the same formal manner that Rawlsian conceptions of

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<sup>53</sup> It doesn't matter what those conditions are. Many have argued that scarcity is one of those conditions but I have doubts about whether that claim is the conceptual truth that some, e.g., Hume, *op. cit.*, and Waldron, *op. cit.*, take it to be.

<sup>54</sup> For more on the game theoretic concept of cooperation problems and the relationship of cooperation problems to property rights, see Matthew Smith, *Property Rights, Social Norms and the Law*, Ph.D. Dissertation, UNC-Chapel Hill, chapters 4 and 7.

justice stand in relation to the Rawlsian concept of justice. We therefore move from the identification of a well-defined domain of problems by an abstract concept (e.g., the concept of justice, the concept of property) to the identification of a range of possible strategies for resolving the problems in that domain (e.g., conceptions of justice such as Rawls' two principles of justice, conceptions of property such as private property).

Rawls' two principles of justice should not be understood as collections of rules enshrined in a political community's constitution. Rather, they are moral principles to which those constructing the basic structure of society are committed. These principles make themselves felt in society because commitment to these principles plays a major role in shaping the actual rules that will give a determinate form to the institutions of the basic structure of society.<sup>55</sup> But, Rawls nowhere claims that the two principles of justice should be taken to be, in some sense, articles of a political community's constitution. Similarly, different conceptions of property should not be understood as referring to collections of determinate property rules or as carefully articulated models for legal statutes. Rather, conceptions of property should be understood as something more like principles to which certain relevant parties are committed and commitment to which shapes a society's property institution. I shall call the role that conceptions of property play with respect to an institution of property the *regulative ideal* of a property institution.<sup>56</sup>

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<sup>55</sup> Many have challenged Rawls on the coherence of the distinction between the institutions of the basic structure and less basic institutions. See esp. G.A. Cohen, "Where the Action Is: On the Site of Distributive Justice" and Liam Murphy "Institutions and the Demands of Justice."

<sup>56</sup> The concept of a regulative ideal is taken from Immanuel Kant. In particular, see the Appendix to the Ideal in Immanuel Kant, *Critique of Pure Reason*, Paul Guyer and Allen Wood, trans. & eds. (NYC: Cambridge University Press, 1998), p. 590 – 604. All translations are from this text.

This should be contrasted with Waldron’s account of the organizing idea of a property system, which is an idea that plays a role in guiding laypeople in their efforts to comply with actually existing complex and heterogeneous property statutes and regulations, among other legal rules. The regulative ideal plays its important role primarily in the practices of the institution’s officials and not in the practices of those who are governed by individual property rights relations.

I take the concept of the regulative ideal from Immanuel Kant’s Appendix to the Dialectic in his *Critique of Pure Reason*. The Appendix is obscure and I do not wish to engage in lengthy exegesis of Kant’s work here. At best then, I shall cite a passage here more for its suggestive value and then move on from there, taking my reflections to be inspired by Kant and not as faithful analyses of Kant’s writings.<sup>57</sup> As will be clear, I owe as much to Coleman’s account of the embodiment as partial constitution, as well.

Kant argued that the seeking an explanation of the world by seeking knowledge of the world presupposes an ultimate goal of knowledge of something self-explanatory, that is knowledge based upon an unconditioned ground of metaphysically necessary substance – something that would provide “the greatest unity alongside the greatest extension.”<sup>58</sup> (A644/B672) But, Kant

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<sup>57</sup> Insofar as my exegesis is correct, I owe a great debt both to Philip Kitcher, “Projecting the Order of Nature” in R.E. Butts, ed., *Kant’s Philosophy of Physical Sciences* (NYC: D. Reidel Publishing, 1986), pp. 201 – 235, and to Jim Kreines who talked me through the text. Any infelicities in interpretation are entirely my responsibility.

<sup>58</sup> Kant writes:

For the law of reason to seek unity is necessary, since without it we would have no reason, and without that, no coherent use of the

believed that because of the internal limitations of sensible intuition, we could not have knowledge of such a thing (it is “only an idea – i.e., a point from which the concepts of the understanding do not really proceed, since it lies entirely outside the bounds of possible experience” (A644/B672)). Therefore, the very logic of explanation through knowing the world generates an illusory end that hovers before our eyes but that can never be achieved. This illusion provides an idea of a perfect ground for knowledge but is not itself a real object of knowledge (since it is an illusion). This idea therefore is not constitutive of knowledge (because it is not something we can know). Instead, it is only *regulative*. This is the regulative ideal – the idea of a unified, maximally simplistic single system that explains the heterogeneous phenomenon of the world. This elegant goal shapes our scientific endeavors and provides an ideal for systematization.

Kant therefore writes that this idea of pure reason has “an excellent, and indispensably necessary regulative use.” (A644/B672) What exactly is the regulative function of this idea of pure reason? Kant writes:

If we survey the cognitions of our understanding in their entire range, then we find that what reason quite uniquely prescribes and seeks to bring about concerning it is the systematic cognition, i.e., its interconnection based on one principle. This unity of reason always presupposes an idea, namely that of the form of a whole of cognition, which precedes the determinate cognition of the parts and contains the conditions for determining *a priori* the place of each part and its relation to others. (A645/B673)

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understanding, and, lacking that, no sufficient mark of empirical truth; thus in regard to the latter we simply have to presuppose the systematic unity of nature as objectively valid and necessary . (A651/B679)

The regulative ideal helps to transform our knowledge from “merely a contingent aggregate” to a “system interconnected in accordance with necessary laws.” (A645/B673) The multiplicity of propositions we take to be true is ordered into an ordered unity that has an internal logic to it – a systematicity. The regulative ideal for Kant helps to unify and integrate our knowledge into a maximally simple, explanatorily powerful and coherent whole.

I seek to transpose this concept of the regulative ideal to the case of the human political-legal institution of property. Before doing so, it is necessary to give a brief account of what property institutions are. Property institutions are systems of rules, enforcement mechanisms and other legal and policing apparatuses that regulate property rights relations.<sup>59</sup> Notably, I am

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<sup>59</sup> This characterization of property institutions has some features in common with the characterization of institutionalized normative systems in Raz (1990), pp. 123 – 148. (See also Raz (1979) and Raz (1980)) For example, both Raz and I agree that institutions systems of norms should be analyzed in terms of the regulation of norm application. Raz writes:

Norm-applying institutions and not norm-creating institutions provide the key to our notion of an institutionalized system. Institutionalized systems are sets of norms which either set up certain norm-applying institutions or which are internally related in a certain way to these. (Raz (1990), p. 132)

But, our two views are also quite distinct. I have laid down more permissive conditions for counting as an institutionalized system of norms than does Raz. Additionally, Raz assumes that institutionalized norms, e.g., property norms covered by a property institution, are applied (and sometimes created) by the officials of that institution (see esp. Raz (1990), p. 128) and that both the systemic validity of the norms (i.e., their being norms of the property institution) and the judging of the effectiveness of the institution depend upon the behavior of norm-applying officials and *not* on the behavior of the norm-governed agents (or as Raz puts it, the ‘norm subjects’). Raz in particular argues for the primacy of sanctions over practice. Raz writes:

denying that property institutions are not composed of collections of individual property rights relations. Rather, they are composed of norms that, for the most part, *regulate* property rights relations. So, property institutions are composed largely of rules for rule application and rules for adjudication in the case of disputes<sup>60</sup> Such regulation need not involve the full panoply of ‘official’ bodies like law courts or police forces (although it frequently does). Furthermore, the system of rules, the enforcement mechanisms and the other related apparatuses can be fairly unincorporated with respect to each other and themselves. That is, they need not exist as property institutions *per se*, but can be more or less informal

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If [the norm-applying officials] regularly enforce the norms on those of their norm subjects who have not conformed with them then we can regard the system as practised even if the bulk of the population does not practise its norms. The reason why this is a plausible step is that even if not practised by the norm subjects the norms are applied to them by the norm-applying organs. (Raz, 1990, p. 131)

But this seems incorrect. The meta-norm of norm-enforcement exists and so the institution exists. But, why believe that mere norm-enforcement generates norms? It generates reasons to act in conformity with the norm, but a particularly stiff-necked population may not find that reason to have much weight. Raz must think that the norms are generated and sustained by the institution so that the absence of the institution leads to the absence of the norms. That may be the case some of the time, but I shall argue that it is certainly not the case when it comes to property rights.

<sup>60</sup> This drives another wedge between my account of property institutions and Razian normative systems, in which the normative system is constituted by the norm-regulating meta-norms, the primary organs applying these regulatory norms and the primary norms themselves. All that has been said so far is consistent with taking my account of property institutions not to be a model of a broader account of normative systems that, if fleshed out, would be presented as a competitor to Razian normative systems. For the purposes of this paper, I remain agnostic on this question. But, if there are strong independent reasons for endorsing my account of property institutions (as I think that there are) then eventually something will need to be said either to square my account of property institutions with Raz’s account of institutionalized normative systems or to defend it against his account as a competing view.

arrangements. This is meant to leave open the possibility for a property institution being shared by several nations that are bound by treaties or a great deal of trade interdependence. It is also meant to leave open the possibility that property institutions existed in pre-modern societies such as the Ancient Greek world or Imperial Rome.<sup>61</sup>

By distinguishing property institutions from collections of property rights relations, I allow for both an important distinction and an important historical phenomenon. First, it allows us to distinguish between property norms and meta-norms regulating property norms. Second, it is consistent with the possibility of property institutions being overthrown or changing without changes in property rights relations. For example, the American Revolution resulted in the abandonment of the English institution of property and the emergence of a new institution.<sup>62</sup> But, it is an open question whether most property rights relations remained unchanged – there was neither a mass redistribution nor significant changes in the sorts of property rights of the newly liberated American citizens. What did change, though, were many of the rights, powers, liabilities, etc., that citizens had with respect to the state and each other when there were breaches of property and when transfers were undertaken, to name two key cases. But, these are changes in meta-norms – rules regulating the property rights relations and not changes in the property rights relations themselves. Of course, massive changes in property institutions can cause massive changes in property rights relations, but since

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<sup>61</sup> See G.E.M. de Ste. Croix (1954) and Moses I. Finley, *The Ancient Economy* (1985).

<sup>62</sup> It also allows for the phenomenon of pre-institution property norms becoming regulated by newly formed institutions without the norms being destroyed and reconstituted in some strange legal transubstantiation. For a striking example of effectively pre-institutional property norms, see R.H. Lowie, “Incorporeal Property in Primitive Society,” 37 *Yale Law Journal* (1928).

there are no clear analytical grounds for taking it to be the case that property rights relations are transformed *every* time a property institutions changes, it would be too strong a claim to insist *a priori* that property institutions are actually *composed* of property rights relations.<sup>63</sup>

Now that we have a rough sketch of property institutions, we can turn to regulative ideals and institutions. In order to understand how regulative ideals work, we must first get a grasp on the Coleman's embodiment relation.<sup>64</sup> For, I see the internal requirements of Coleman's embodiment relation – in fact, the internal requirements of any highly reflective social practice – to be similar in form to the requirements Kant takes to be internal to the logic of scientific explanation. For, a reflective practice, if it is to be a *reflective* practice, involves the participants seeking to make sense of the practice and then regulate themselves within the practice by the lights of their understanding of the practice. A non-reflective practice or a reflective practice shot through with some form of false consciousness lacks this two-stroke engine of reflection and subsequent guidance in light of reflection. As I understand it, one of Coleman's objections to the law and economics account of tort law is just that such an account explains tort law in terms that are radically inconsistent with the reflective understanding of practitioners of tort law. Therefore, those who promote a law and economics explanation of tort law are forced either to deny that tort law is a reflective practice or to posit false consciousness (and therefore are yoked with the further responsibility of having to explain the mechanism by which the

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<sup>63</sup> A nice example suggestive of the independence of property norms from property institutions can be found in Yochai Benkler, "Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production" 114 *Yale L. J.* (2004).

<sup>64</sup> See Coleman, *op. cit.*

false consciousness is produced and sustained). I take Coleman to hold that *neither* of these consequences is acceptable, especially given the fact that his account of tort law embodying a principle of corrective justice suffers from neither of these faults. Regardless, both Coleman and proponents of the law and economics account of tort law presume that there is a single concept – corrective justice or efficiency, respectively – provides a systematic unity to the institution of tort law. What they disagree about is whether tort law is a reflective practice or whether it is a reflective practice shot through with false consciousness. Neither reject the view that it is a practice structured by a regulative ideal.

To see in more detail why I take Coleman and law and economics theorists of tort law to be claiming that tort law is a practice is structured by a regulative ideal, we must look more closely at the embodiment relation Coleman posits and that law and economics theorists presume (but I shall focus on Coleman's account since he is the one who developed the embodiment relation as a concept). On Coleman's view, tort law embodies a moral norm, namely a principle of corrective justice. This embodiment relation is such that the larger more abstract principle – the principle of corrective justice – constrains what is an instance of a legal norm of corrective justice. But, once the legal norms have been spelled out in light of the moral norm, the legal norms give determinate shape to the moral norm. Thus, it's a two-way street such that the legal norms are constrained by the moral norm but also partially constitute the moral norm. We therefore *explain* the practice of tort law – e.g., the reasons and concepts employed by the practitioners – by appeal to the moral principle of corrective justice, but we also explain the determinate content of the principle of corrective justice by appeal to the legal norms that were constructed in light of the commitment of officials to the moral norm of corrective justice. Thus, principles of corrective justice are

unifying principles that, when considered as we survey the heterogeneous practice of tort law and as practitioners themselves reflectively engage in the wide range of practices composing tort law, yield a projected unity of practice.

How is this supposed to work? Note first that the sorts of human social practices that concern us – e.g., the practices associated with our making different kinds of claims on one another – are not natural kinds.<sup>65</sup> They appear at first to be a merely contingent aggregate of practices.<sup>66</sup> While I do not share Kant’s view that a transcendental feature of reason includes a drive to order our social practices in a way that makes them maximally unified under a single concept, we nonetheless do seek to order our practices into intelligible classes that have certain concepts and structures associated with them. But, we do not seek merely a rational reconstruction that lies sterile on the page or in our discourse (although we may seek that). Rather, insofar as we seek *coordination* with each other, we seek a *practical unity* that embodies the principles guiding a rational reconstruction of the practices. This is what institutions do: they unify these practices into a structured system of practices. This is why the embodiment relationship is not merely a matter of rational reconstruction – a sort of anthropologist’s trick in order to make sense of a confusing mess of ultimately foreign practices – but is in fact *practiced* by the relevant parties. That is just to say that the practical unity is practiced from the Hartian internal point of view as much as it may be understood from the Hartian external point of view.

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<sup>65</sup> Pace John Locke, *Two Treatises on Government*, Peter Laslett, ed. (NYC: Cambridge University Press, 1960), chapter 5 of the *Second Treatise*. In general, I presume a methodological naturalism here that rules out consideration of pre-Humean natural law accounts of property rights.

<sup>66</sup> This is especially the case when it comes to modern property. See, e.g., Charles Reich, “The New Property” 73 *Yale Law Journal* 733-787.

Institutions facilitate the projection of a unity onto a heterogeneous collection of practices. The regulative ideal is at the core of this process of imposition of order: institutions integrate a wide range of practices according to some blueprint and that blueprint is provided by the regulative ideal. This means that regulative ideals function as *standards* in virtue of which self-maintaining systems regulate themselves. Regulative ideals should be understood as idealized and cleaned up variants of practices and reasoning within an institution. Because practices and reasoning are normative themselves, regulative ideals pick out idealized normative arrangements and therefore require a certain idealization of discourse achieved through the introduction of abstract and formal concepts. These variants in turn serve as standards for the practical reasoning, discourse and intentional actions of those who participate in the institution and the concepts facilitate expression of the standards.<sup>67</sup>

For example, if an institution is structured around the regulative ideal of private property, then an ideal exemplar of private property – some ideal collection of property rights from the Hohfeld-Honoré list – becomes the standard against which all actual property rights relations are measured. In such an institution, there would be a meta-norm requiring that as many property rights relations as possible were private property rights relations. Along with this would come formal concepts – *private property, ownership, theft, trespass*, etc. - whose contents are fixed at least partially by the regulative ideal itself. These concepts would be used by officials in the institution in their discourse about property rights relations. Another property institution might be

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<sup>67</sup> For more on the role of formalism in property, see Henry Smith, “The Language of Property: Form, Context and Audience” 55 *Stanford L. Rev.* (2002). This focuses partially on the importance of formalism for non-officials, but it also nicely explains the importance of formalism to officials’ efforts at establishing and maintaining a unified set of practices related to property.

structured around the regulative ideal of private property but one that employed a different exemplar – i.e., different incidents of ownership were taken to be core incidents of private property. The concepts of *private property*, *ownership*, *theft*, *trespass*, etc. – would be different within this institution from the former one. Translation would surely be possible but it would also be necessary.<sup>68</sup>

This suggests at least three roles for a regulative ideal. First, the regulative ideal provides a standard for auto-correction within the institution. In this way a regulative ideal can serve as grounds for criticism of the practices, discourse or reasoning in which participants in an institution engage. Second, the regulative ideal can serve as grounds for explanation. We can explain what participants in an institution do by appeal to the regulative ideal. For example, we can explain or participants themselves can justify the concepts used or the actions taken within an institution by appealing to the regulative ideal. Third, the regulative ideal can serve as grounds for predictions about the practices, discourse and reasoning of participants of an institution. Thus, the regulative ideal provides structure from both Hartian points of view, namely the internal point of view or the view of the participants and the external point of view or the point of view of observers of the institution. From the internal point of view, the regulative ideal is a source of justification and from the external point of view, the regulative ideal is a source of explanation.

But, there is a wrinkle in this story. As John Gardner has pointed out, there is an unavoidable instrumental dimension to such

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<sup>68</sup> I also take it to be the case that, e.g., there would be two homonymous concepts of *private property* within a single society: one employed by officials of the institution and one employed by citizens governed by the institution.

an explanation.<sup>69</sup> For, there is built into the embodiment relation a general commitment to realizing the moral principle of corrective justice in the practice. There is a meta-norm at work, a norm that says that the best state of affairs is one in which the most number of people are maximally guided (other moral principles considered) by the principle of corrective justice.<sup>70</sup> In short, if we have practices that aim to embody moral principles, then part of the practice involves commitment to this moral meta-norm. So, not only is there the regulative ideal of the practice, but there is a universal meta-norm that requires maximal conformity with the regulative ideal. But, the meta-norm is not distinctive to any one practice: all practices that embody a regulative ideal are governed by the same formal meta-norm. What makes one practice distinct from another at the formal level is therefore still the regulative ideal that the practice is to embody.

So, what I have tried to do here is to combine the Kantian idea of the regulative ideal with Coleman's idea of the embodiment relation. My claim has been that the moral norm that an institution embodies should be thought of in terms of a Kantian regulative ideal. In regards to property institutions, the crucial claim I wish to put forward here is that the prescriptive power of property institutions – the power to shape property rights relations – is itself guided by a regulative ideal of some conception of property. The task of an institution, then, is to introduce both practical and conceptual systematic unity into human practices. The systematicity is defined by the regulative ideal, which is a conception of property. The regulative ideal therefore amounts to something like a formal account of the ideal property rights relation.

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<sup>69</sup> See Gardner, *op. cit.*

<sup>70</sup> This is perhaps not how Gardner would put it, although I take this to be the upshot of his position.

When some conception of property serves as a regulative ideal of a property institution, that fact need not function as a reason *for which* some agent within the institution takes some action or makes some judgment. That is, the proposition that some conception of property is a regulative ideal for an institution need not play a psychological role in the cognitive lives of most of the participants of the institution (although, if Hart is correct, it must when it comes to judges and legislators). But, that some conception of property is a regulative ideal for an institution can be a reason to which some participant appeals in order to justify some action she has taken or some premise she has employed in argument (even if the reason for which she acted or introduced the premise had nothing to do with the regulative ideal and was instead something perverse, say that taking the action or introducing the premise would annoy the people she manages).<sup>71</sup>

When a property institution is structured according to a regulative ideal – a conception of property – the rules, enforcement mechanisms and other apparatuses of that institution promote certain kinds of property rights relations and discourage others.<sup>72</sup>

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<sup>71</sup> See, e.g., the way Jules Coleman in *The Practice of Principle* (NYC: Oxford University Press, 2001), p. 98, describes the role of the rule of recognition:

The framework [provided by the rule of recognition]... creates the parameters of reason[s] that are recognized as appropriate or good ones...

<sup>72</sup> An institution of property can promote certain kinds of property rights relations and discourages others by picking out certain contingencies as relevant in determining when something becomes owned, by whom it is owned and how it is owned. So, these would be contingencies in the world that are picked out by the property institution as relevant. These are contingencies affecting the formation of property rights relations. On the other hand, there can be, over time, contingent changes to the actual rules of a property institution that render it a different sort of property institution (it can switch from a private property based system to a socialist system – more on this below). So, these are

This is not to say that many different kinds of property rights relations cannot exist within a single property institution that is structured according to a single conception of property. Even in a libertarian society, common ownership would likely be unavoidable in at least some cases.<sup>73</sup> It is certainly the case that in socialist societies, for example, there are many cases of private property: people privately own their underwear. Furthermore, commitments to other values may limit the predominance of the preferred form of property. For example, within an institution based on private property, commitments to certain liberties might require publicly owned spaces and commitments to efficiency might require the socialization of certain resources. A property institution's rules and other apparatuses, although geared toward encouraging and protecting a particular conception of property, would therefore make space for these different forms of property.

The crucial question at this stage is therefore not at the site of individual holdings but at the site of the meta-norm identified by

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contingencies directly relevant to property *institutions*. The reader should be sensitive to the difference between these two kinds of contingent change. But, despite the difference, both contingencies are covered by the necessity claim that I am making.

<sup>73</sup> Even Robert Nozick, who in *Anarchy, State and Utopia* urges a maximally private property-based property institution, argues for limited public ownership of certain resources. In the actual world, nowhere comes even close to Nozick's libertarian dream (or is it a nightmare?) and private ownership is always mixed with other forms of ownership. As an aside, it is a conceptual truth that a fully private property-based property institution must make possible the creation of common ownership. In fact, it is a conceptual truth that within such a system, it must be possible that there is no private ownership at all. For, all those who have full liberal ownership rights in their objects of property rights may decide to transfer those objects to all (or even just more than one person) in the society. This is a power-right of all private owners and all others have a liability correlative to that power-right. Of course, upon transfer, there would no longer be any private owners. This would not change the character of the property institution since the rules and regulations of the institution would remain the same and would still favor (or perhaps even encourage) private property.

Gardner, namely the norm requiring as many people as possible maximally conforming to the normative arrangement picked out in the regulative ideal. Clearly, the question here is not a matter of what the regulative ideal is but instead what other principles provide reasons that weigh *against* maximal conformity with the normative arrangement picked out in the regulative ideal. That is, the question is about the *scope* of the meta-norm. Robert Nozick, for example, defended a property institution with a regulative ideal of private property and he allowed for only very few considerations limiting the scope of the meta-norm requiring maximal realization of the regulative ideal (these were Nozick's few so-called side-constraints). Others might be committed to the same kind of property institution – one with a regulative ideal of robust private ownership – but also committed to other moral principles that limit somewhat more than Nozick does the scope of the meta-norm.

In addition to limitations on the scope of the meta-norm, the emodiment relation allows for regulative ideals to be multiply realized in practices. As mentioned above, insofar as tort law realizes the regulative ideal of a principle of corrective justice, the particular statutes themselves give determinate form to the principle of corrective justice. Similarly, the particular ways in which a regulative ideal of some conception of property is realized gives determinate form to that conception. Thus, both Coleman and I do not simply recognize multiple realizability of a regulative ideal but also a process of feedback from the particular legal norms that articulates and determinately structures the regulative ideal itself.

There is therefore yet another location of divergence between property institutions with the same regulative ideal. Not only will parties recognize different independent moral

considerations for restricting the scope of the embodiment meta-norm but also different independent moral considerations for realizing the regulative ideal in certain ways. For example, consider several different property institutions that share the regulative ideal of private property. The legislative and judicial officials of each of property institution will do their best to realize the regulative ideal in the property rights relations that are governed by the rules of the institution. But, each property institution will back off this regulative ideal in different places for different reasons (e.g., in some property institutions exceptions will be made to ensure *some* common property in land while in other property institutions there will be no common property in land but exceptions will be made to ensure common ownership of factories). In short, entirely different mechanisms can achieve the same (less-than-perfect) level of success with respect to realizing a regulative ideal.<sup>74</sup> There will be reasonable differences about what kind of institutional mechanisms will allow for the closest approximation of the regulative ideal; there will be disagreements about what counts as fidelity to the regulative ideal.

If I am correct about this, then this suggests that appeal to a regulative ideal of some institution is not sufficient to explain the concepts employed by the officials in that institution or the practices of the participants of that institution. We must also attend to the independent considerations that broaden and limit the scope of the embodiment meta-norm and the independent

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<sup>74</sup> Just to see how this could work, consider artificial hearts. A regulative ideal guides the construction of all artificial hearts (roughly: to pump blood through a person's circulatory system with the same effectiveness, reliability and ease as a natural, non-diseased heart). We can easily imagine there being different kinds of artificial hearts that all achieve the same relative level of success with respect to this regulative ideal but in different ways. One requires a bulky battery, the other is easily portable but is prone to breaking down, the other won't break down ever but also won't pump blood at a consistent rate, etc.).

considerations that determine how a regulative ideal is realized in the actual legal rules of an institution. All these together contribute to determining the semantic content of the concepts employed by the practitioners as well as the inferences that are allowed in their reasoning. In a property institution structured by the regulative ideal of private property, the semantic content of a term such as “ownership” is determined only partially by the regulative ideal (whose content is fixed by independent processes although we must allow for the feedback from the determinate rules of the institution). It is also determined by the independent considerations that determine which property rights will be taken as core rights of private property (e.g., does limited escheat run afoul of private property?). The independent moral considerations that determine the scope of the meta-norm will determine some of the allowable theoretical and practical inferences. For example, if there is a strong commitment to egalitarianism, then it is likely that the meta-norm will be very limited in scope. We will therefore be unable to infer more or less globally from a failure to realize the regulative ideal to the practical requirement that we take steps to ensure that the regulative ideal is better realized. For, it might be the case that the value of an egalitarian society generates conclusive reasons to prevent the realization of the regulative ideal in several locations in order to ensure equality.

This concludes my discussion of regulative ideals and embodiment. In the final section, I will return to the question of the relationship between property rights relations and property institutions.

*Explanatory Slippage and Normative Resilience*

I argued above that property rights relations do not depend for their existence on any particular property institution. In fact, I claimed that property rights relations can subsist across changes in institutions. None of this is meant to suggest that property institutions are not necessary conditions for the existence of property rights relations, although I doubt this claim very much. Nonetheless, we have seen that property institutions bear a contingent relationship to property rights relations. They regulate these relations, although certainly imperfectly. Thus, it is entirely possible that a property institution could formally outlaw a certain kind of property rights relation (e.g., private ownership of the land) without such property rights relations disappearing. There would have to be further effort to realize this meta-norm in practice. For example, imagine an inefficient property institution in which there is a lag of ten years from passage of statutes to implementation of the statute. During these ten years, it seems perverse to say that a statute outlawing private ownership of the land has made it the case that no one privately owns the land even though *nothing has changed in anyone's practices* with respect to the land. What has changed are the meta-norms governing the property rights relations having to do with land. These meta-norms may take time to implement and therefore the changes in what is governed by the norms may not come about for some time after the passage of the statute.

Thus, there is substantial slippage between the formal requirements articulated in property institutions and what property rights relations exist in a community. Another kind of slippage is the following. Kant pointed out that our epistemological limitations prevent us from ever achieving the scientific regulative ideal. In the practical realm – the realm of human institutions – it is also the case that we never fully realize the regulative ideal. We never realize the ownership relation or

perfect relation of common ownership. There are always people who are intransigent and violate others' rights and our own human errors that cause imperfect steps to be taken to realize an ideal.<sup>75</sup> (This distinction between the regulative ideal and the imperfect realization of that ideal is a familiar one – it is the distinction between ideal and non-ideal theory in political philosophy.<sup>76</sup>)

The additional slippage, then, is the slippage between the regulative ideal and the practices that realize that ideal. Thus, there are two major locations at which there is no strong explanatory dependence: first, there is limited explanatory dependence between the meta-norms of a property institution and the property rights relations governed by that institution; second, there is limited explanatory dependence between the regulative ideal of a property institution and the practices of the practitioners within that institution. This second location of slippage can further exacerbate the slippage at the first location. All this suggests that it is an utterly contingent matter how tight the dependency relation is between the conception of property that is a regulative ideal of an institution and the property rights relations governed by that institution. That is, the fact that some conception of property is a regulative ideal of a property institution may provide only the most limited explanation of the property rights relations that exist in a community. Since the normative resilience of property is a matter of explanatory dependence without justificatory

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<sup>75</sup> This marks an important distinction between Bratmanian intentions and plans and regulative ideals – nowhere does Bratman suggest that plans and intentions are in some sense unrealizable ideals. They are realizable and that's why we form plans and intentions. See Michael Bratman, "Two Faces of Intention" 93 *Philosophical Review* 3 (July 1984), pp. 375 – 405 and "Joint Intentional Action" and "Shared Cooperative Activity" reprinted in Michael Bratman, *Faces of Intention* (NYC: Cambridge University Press, 1999).

<sup>76</sup> See Rawls, *op. cit.*, p. 8. See also John Rawls, *Law of Peoples* (Cambridge, MA: Harvard University Press, 2001), esp. §§13 – 16. See also Liam Murphy, *Moral Demands in Nonideal Theory* (NYC: Oxford University Press, 2003).

dependence, my claim that there is an absence of explanatory dependence (or a contingency of explanatory dependence), if correct, stands as a direct challenge to the significance of Waldron's claim that property is normatively resilient. It may, after all, be true that it is unjustifiable to have a property institution structured by a regulative ideal of private property, but so what? That the property institution is structured by this regulative ideal may have little explanatory significance with respect to the existence of any particular property rights relation. We therefore get both a failure of explanatory dependence and justificatory dependence (since, *ex hypothesi*, there is justificatory independence).

Instead of the mystery of normative resilience, though, we get the more understandable phenomenon of justificatory dependence following explanatory dependence: the lack of robust dependence of the existence of individual property rights on the overarching property institution may actually explain why it is that there is a justificatory discontinuity between property institutions and property rights relations. The mystery of normative resilience emerges only in cases in which there is robust dependence. But, even then, the problem may not be that the institution is unjustifiable *tout court*, but that the meta-norm has improper scope or that the regulative ideal is being improperly realized in the actual legal rules. So, in these cases, normative resilience would not characterize the phenomenon. Instead, we would have a globally justifiable property institution with locally unjustifiable features.

So, normative resilience exists only in cases where there is robust explanatory dependence of property rights relations on a property institution *and* the property institution is globally unjustifiable. Does that ever happen? It is not obvious to me that

it does and so it is not obvious to me that normative resilience is significant political phenomenon.

### *Conclusion*

In this paper, I've tried to show that Jeremy Waldron's account of property and property institutions suffers from a few significant flaws. I have, employing both unproblematic features of Waldron's view and resources drawn from Kant's philosophy of science and Jules Coleman's theory of tort law, tried to articulate a new account of property institutions and their relationship to property rights relations. This account draws a bright line between property rights relations and property institutions allowing for both explanatory and justificatory discontinuity. This all has been admittedly quite sketchy. But, I hope that it has steered us, however roughly, onto a new and fruitful path in our reflections about property rights and property institutions.