

THE MASS CULTURE OF PROPERTY

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The purpose of this essay is to initiate a critique of ways in which access to civil justice in the United States, especially in relation to values and institutions of private property, is shaped by mass communications and the popular arts—what are sometimes grouped together under the heading of the culture industries.

I. JUSTICE

It is here, as always, too easy to begin without treating the notion of justice as itself problematic. United States Supreme Court Justice Antonin Scalia, in a PBS documentary on the Court and its personalities, makes light of this notion by referring to the inscription carved in stone above the entrance to the Court building: Equal Justice Under Law.¹ How could justice be other than equal, Scalia asks, how could there be justice *not* under law?² But that is just the point. Language and literature provide memorable illustrations—for example, “poetic justice.”³ Aristotle, in his *Poetics*, advocated a literature aspiring to show the virtuous rewarded and Philip Sidney, in his *Defense of Poetry*, similarly argued that poetic justice was, in fact, “the reason that fiction should be allowed in a civilized nation.”⁴ That is literature, not law, which must find its own justification. And it was Shelley, of course, who claimed, “Poets are the unacknowledged legislators of the world.”⁵

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1. See THIS HONORABLE COURT: INSIDE THE SUPREME COURT (Greater Wash. Telecomm. Ass’n 1988).

2. *Id.*

3. Wikipedia, Poetic Justice, http://en.wikipedia.org/wiki/Poetic_justice (last visited Jan. 14, 2007).

4. *Id.*

5. See PERCY BYSSHE SHELLEY, A DEFENCE OF POETRY 80 (John E. Jordan ed., Bobbs-Merrill 1965) (1821).

Jerold Auerbach, one of only a handful of scholars to brave a history of the American legal profession, has written a short but interesting book, entitled *Justice Without Law?*, in which he surveys experiments in non-judicial and non-legal dispute resolution at different periods in American history.⁶ While anthropologists tend to define law much more broadly than lawyers and are thus able to incorporate much presumptively non-legal social activity within the category of law and legal process, it is clear that the social sciences have long been familiar with justice outside of an adversary legal system.⁷

Even if we consider examples of the most profound injustice during the past century, just deserts were not always apportioned according to law. Not only did the Armenian genocide of 1914–1918 go unpunished, but the fact that it even occurred is today formally denied by the Turkish state.⁸ In a world perhaps more sensitive to issues of racism and genocide than that of the First World War, the French National Assembly, in October 2006, adopted a bill criminalizing denial of the Armenian genocide.⁹ While the bill has yet to be adopted by the French Senate, a number of Turkish politicians have responded by threatening to pass a law making it a crime to deny that France used torture and committed genocidal acts against the Algerian people during the period of Algeria's struggle for independence.¹⁰ Turkish writer Orhan Pamuk, most recently the author of a remarkable personal memoir, *Istanbul: Memories and the City*,¹¹ won the 2006 Nobel Prize in Literature.¹² Although Pamuk regards himself as a writer rather than a political

6. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 4 (1983) (“In many and varied communities, over the entire sweep of American history, the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals.”).

7. *See id.* at 14, 119–20.

8. Wikipedia, Armenian Genocide, http://en.wikipedia.org/wiki/Armenian_genocide (last visited Jan. 14, 2007).

9. *French in Armenia ‘Genocide’ Row*, BBC NEWS, Oct. 12, 2006, <http://news.bbc.co.uk/2/hi/europe/6043730.stm>.

10. Scott Peterson, *French Bill Complicates Turkey’s EU Bid*, CHRISTIAN SCI. MONITOR, Oct. 13, 2006, at 7.

11. ORHAN PAMUK, *ISTANBUL: MEMORIES AND THE CITY* (Maureen Freely trans., Vintage Books 2006).

12. *See All Nobel Laureates in Literature*, http://nobelprize.org/nobel_prizes/literature/laureates (last visited Mar. 19, 2007).

activist, he was the first intellectual in the Muslim world to take a stand against the Iranian death sentence, or *fatwa*, directed against Salman Rushdie.¹³ Moreover, Pamuk himself was placed on trial in Turkey for comments he made in an interview, during which he acknowledged the Armenian genocide.¹⁴ Partly because of pressure from the European Union, the criminal charge of insulting or offending Turkishness was dropped early in 2006.¹⁵

Thus we have a complicated historical example of appalling injustice first condoned by law, then belated efforts to use legislation, not to punish perpetrators but rather to criminalize denial of the reality of injustice, coupled with competing efforts to use law to intimidate critics and retaliate for historical record correction. It is easy to characterize the award of the Nobel Prize to Orhan Pamuk as itself a form of poetic, rather than legal, justice. On the day of his international award, however, Pamuk refused to discuss legal battles and wished only to talk about his city and the vocation of being a writer.¹⁶

A premiere example of twentieth century subordination of historical evil to legality was the justice meted out at Nuremberg.¹⁷ Surely this illustrates the natural relationship between law and justice, but questions have been raised about the Nazi war crimes trials in subsequent decades. In spite of the fact that the prohibition on ex post facto laws is most deeply imbedded in the U.S. Constitution, it was the Americans who had the least difficulty at Nuremberg dispensing with concerns about whether the Nazi prosecutions were fair.¹⁸ If international law did not formally recognize the concept of genocide in 1939, or have a widely accepted definition of aggressive war, it would after the world learned of the

13. Can V. Yeginsu, *The Trials of Orhan Pamuk and Turkey*, TIMES ONLINE, Feb. 1, 2006, <http://tls.timesonline.co.uk/article/0,,25338-2020182,00.html>.

14. *Id.*

15. Ian Traynor, *Turkey Draws Back from Prosecuting Outspoken Novelist*, THE GUARDIAN UNLIMITED, Jan. 23, 2006, <http://www.guardian.co.uk/turkey/story/0,,1692856,00.html>.

16. See Orhan Pamuk, Nobel Lecture: My Father's Suitcase (Dec. 7, 2006), available at http://nobelprize.org/nobel_prizes/literature/laureates/2006/pamuk-lecture_en.pdf.

17. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 551-52 (2006).

18. See Thane Rosenbaum, *The Romance of Nuremberg and the Tease of Moral Justice*, 27 CARDOZO L. REV. 1731, 1735 (2006).

case made at Nuremberg against the Hitler regime.¹⁹ If all law has to begin somewhere, believed the Americans, this was as good a place as any.²⁰ Much less discussed have been the limitations placed upon German defense lawyers in their efforts to implicate the Russians (on the Eastern Front) and the British and Americans (the fire bombings of Dresden and Hamburg) in crimes against humanity akin to those of which the surviving Nazi leaders were accused.²¹ Finally, partly inescapably, there is the question of who was and was not placed in the dock at Nuremberg.

On the one hand, it was no accident that Nazi Germany's captains of industry, the architects of an authoritarian capitalist economic and industrial system, were not tried for war crimes—at least not until the cold war had overtaken events and punishing good German businessmen hardly seemed worth the effort in the face of the growing Soviet menace to freedom—and to global free enterprise as well.²² On the other hand, there is also the simple fact that by the fall of 1945, some of the most important German political leaders (Adolf Hitler, Joseph Goebbels, Heinrich Himmler) were dead, Martin Bormann was dead or had escaped, Wilhelm Canaris had been executed, Erwin Rommel suffered a forced suicide, and Hermann Goering, although tried and convicted at Nuremberg, nevertheless managed to “cheat the hangman.”²³ What justice could there be when so many of those responsible went, in a sense, unpunished? This question becomes even more imperative once we recognize the extent to which the Nazi state was able to function successfully only because of the direct participation of millions of German citizens.²⁴

Still, perhaps the most interesting case is that of SS Obergruppenführer Reinhard Heydrich.²⁵ Except for Hitler, did

19. See Meron, *supra* note 17, at 565. See generally Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957 (2004).

20. See Meron, *supra* note 17, at 551–52.

21. Jonathan Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 LOY. L.A. L. REV. 655, 666–68 (2000).

22. See JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* 135–56 (1978).

23. Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (in International Law)*, 49 LOY. L. REV. 471, 489–90 (2003). See generally Turley, *supra* note 21, at 672 n.74.

24. See generally LAURENCE REES, *THE NAZIS: A WARNING FROM HISTORY* (1999) (discussing the rise and fall of the Nazi party through the perspectives of eyewitnesses).

25. Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT'L L. 199, 204 (1996).

anyone deserve to be prosecuted at Nuremberg more than Heydrich? Recall that at the Wannsee Conference at the beginning of 1942, where a final organizational scheme for the extermination of Europe's Jews was agreed upon, Adolph Eichmann may have been the secretary, busily taking notes, but it was Heydrich's meeting.²⁶ He was the one who made it clear to all those in attendance that the Final Solution was a priority of the Nazi regime.²⁷ And it was Heydrich who many believed to be Hitler's chosen successor.²⁸ But only four months after the Wannsee Conference, Czech patriots attempted to assassinate Heydrich as he rode through Prague in an open vehicle.²⁹ Although shots fired at Heydrich missed their target, a bomb tossed into the car did not.³⁰ Reinhard Heydrich died a week later from blood poisoning, a consequence of bomb and auto fragments lodged in his body by the explosion.³¹

Was Heydrich murdered or, as Charles Laughton put it in a different context in Billy Wilder's film, *Witness for the Prosecution*, "executed"?³² Within weeks of placing his imprimatur on the blueprint for the Holocaust, the man directly responsible for its planning was killed by resistance fighters trained by British intelligence.³³ Perhaps this would not qualify as an example of Antonin Scalia's "justice under law" but justice it was nonetheless, swiftly delivered. Compare it, as well, with the "justice under law" aimed at by conventional war crimes prosecutions of more recent vintage: those of Saddam Hussein and Slobodan Milosevic. Instead of being tried for a genocidal chemical attack on Kurdish civilians or the characteristic acts of aggression committed by his regime (like those in Kuwait), Hussein was prosecuted merely for a single act of

26. *Id.*; WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 965 (1959).

27. Lippman, *supra* note 25.

28. Historyplace.com, SS Leader Reinhard Heydrich, <http://www.historyplace.com/worldwar2/biographies/heydrich.htm> (last visited Jan. 14, 2007); see Timothy K. Gilman, *Search, Sentence and (Don't) Sell: Combating the Threat of Biological Weapons Through Inspections, Criminalization, and Restrictions on Equipment*, 12 J. TRANSNAT'L L. & POL'Y 217, 225 n.39 (2003).

29. SHIRER, *supra* note 26, at 991.

30. Historyplace.com, *supra* note 28; see SHIRER, *supra* note 26, at 991.

31. Historyplace.com, *supra* note 28; see SHIRER, *supra* note 26, at 991.

32. WITNESS FOR THE PROSECUTION (United Artists 1957).

33. Historyplace.com, *supra* note 28; see SHIRER, *supra* note 26, at 991, 1019.

vengeance,³⁴ before a jerry-built and jury-rigged court,³⁵ in a trial which made that of the Chicago Seven in 1969–1970 look almost solemn by comparison. In contrast to the Allied policy toward Nazi defendants at Nuremberg, Milosevic was extended a broad range of rights and, at times, it seemed as if his trial might last longer than had the years' of ethnic cleansing visited upon the population of Kosovo for which he was being prosecuted.³⁶ No argument Milosevic wished to make was denied to him.³⁷ And he was still arguing when he died of a heart attack, probably months away from any foreseeable verdict in his trial.³⁸ In all these instances, any automatic assumption of a direct relationship between formal legal process and real justice deserves to be questioned.³⁹

II. ACCESS

So it would be an error to assume that justice can emerge only from within the context of law. Nevertheless, setting that important observation to one side, narrow the focus to a particular kind of justice and how it is achieved: access to civil justice. Civil justice implies not only a legal form of justice but one centered on civil rather than criminal law.⁴⁰ While virtually every field of civil law presents its own debates about ethics and morality, right and wrong, just desert and normative policy, when we think of civil justice we are most likely to think of the kind of fairness—compensation, restoration, repair, setting an example—which the tort system is

34. Hussein was charged with the murder of 148 men in Dujail, after he ordered the men to be executed in response to a failed assassination attempt. *Defiant Saddam Pleads Not Guilty*, BBC NEWS, Oct. 19, 2005, http://news.bbc.co.uk/2/hi/middle_east/4355992.stm.

35. “‘Jury-rigged,’ which means ‘assembled in a make shift manner’, is attested since 1788. It comes from ‘jury mast’, a nautical term attested since 1616 for a temporary mast made from any available spar when the mast has broken or been lost overboard . . . ‘Jerry-built’, which the OED defines as ‘built unsubstantially of bad materials; built to sell but not last’ is attested since 1869, and is said to have arisen in Liverpool.” Yaelf.com, [“Jerry-built”/“Jury-rigged”], <http://www.yaelf.com/aeFAQ/mifjrybltjryrggd.shtml> (last visited Jan. 14, 2007).

36. See Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT’L L.J. 823, 830–33 (2005).

37. See *id.*

38. See Colin Nickerson, *Autopsy Cites Milosevic Heart Attack*, THE BOSTON GLOBE, Mar. 13, 2006, at A8.

39. See G. Shikin, *The Legendary Sloba Has Gone*, 52 INT’L AFFAIRS 87, 87–94 (2006).

40. BLACK’S LAW DICTIONARY 263 (8th ed. 2004) (defining civil justice as “methods by which a society redresses civil wrongs”).

designed to deliver. And while lawyers most often regard the fairness or justice sought by tort law to be an appropriate and proportionate response to negligence or carelessness, the intentional infliction of emotional distress or other non-criminal wrongs, the mass psychology of torts likely turns upon how “the little guy”⁴¹ is viewed as a victim of the system, David versus Goliath, the wronged individual trying somehow to take on those large, faceless, private institutions that run the show, like banks, corporations, hospitals and insurance companies.

After identifying four Hollywood movies that establish “the master discourse of tort cinema” (*The Verdict*, *Class Action*, *Philadelphia*, *The Rainmaker*) I elsewhere argue that the “targets on which these four films train their sights are, respectively, negligent physicians and the medical-malpractice defense bar, the automobile industry, employers who discriminate against minorities and the disabled in their hiring practices, and the insurance industry.”⁴² The battle over civil justice can thus be seen, and clearly in American motion pictures has routinely been seen, as a struggle between the average citizen and the wealthiest, most powerful, and often least responsible social institutions in the private economy.

The history of American tort law can be, and has been, written in terms of this particular story or narrative. Tort lawyer Stuart Speiser’s book, *Lawsuit*, provides a perfect illustration.⁴³ Speiser tells a harrowing tale, beginning more or less with the Triangle Shirtwaist Factory fire of 1911, of how millions of American workers and consumers were virtually without legal protection from tort law until the rise, during the Progressive and New Deal eras, of an American personal injury and plaintiffs bar, the contingent fee system, new and stricter standards of liability, and a new psychology among lawyers, courts, and the public regarding the duty of care owed to society by corporate America.⁴⁴ This story is only a longer, smarter, more detailed and more sophisticated version of the master discourse of tort cinema.

41. See generally WILHELM REICH, LISTEN, LITTLE MAN! (Ralph Manheim trans., Farrar, Straus and Giroux 1984) (describing “the little guy” and “little men” in modern society).

42. ANTHONY CHASE, MOVIES ON TRIAL 108 (2002).

43. STUART M. SPEISER, LAWSUIT (1980).

44. See *id.* at 134–38.

Law professor Deborah Rhode, expanding the purview of her assessment of access to civil justice beyond that of the tort system, points out that “[m]illions of Americans, including those of moderate income, suffer untold misery because legal protections that are available in principle are inaccessible in practice.”⁴⁵ She adds that domestic violence victims, for example, “cannot obtain protective orders, elderly medical patients cannot collect health benefits, disabled children are denied educational services, defrauded consumers lack affordable remedies The list is long and the costs incalculable.”⁴⁶ What presents itself first as a problem of the tort system quickly envelopes the whole of civil society: What starts out as a problem of access to lawyers is transformed into a crisis of inadequate legal representation and a concerted effort to rollback or abolish hard-won legal rights—all in the name of “tort reform.” The creation and preservation of creative solutions like contingent fee systems, legal services agencies, class action suits, punitive damages or damages for pain and suffering runs up against the resistance of the rich and powerful and is subject to an organized, well-financed counterattack designed to repeal the legal side of the welfare state. Wherever one looks, it is increasingly a confrontation between access to civil justice and the foundations of a regime of unbounded private accumulation.

III. PROPERTY

Here is where property comes in. On the one hand, “property law,” like tort law, commercial law and a host of others, represents a discrete subdivision of the law school curriculum. One category of civil justice to which access is limited by the social forces identified above is the part regulated by the law of real and personal property. Yet property is simultaneously a social and economic category which is inextricably bound up with the historical development of free market societies, and is at the heart of what seems threatened by lawyers and clients; law schools and bar associations; and government agencies and social movements, vigorously calling for a deepening of access to civil justice in times of prosperity and the protection of civil rights in times of economic retrenchment. An

45. DEBORAH L. RHODE, ACCESS TO JUSTICE 4–5 (2004).

46. *Id.* at 5.

investigation of property law, including its mass psychology and popular culture, promises further insight into the process by which civil justice can be obtained as well as denied.

In assessing popular psychological structures, cultural contexts, master discourses and the basic elements of how a world view or big picture gets communicated, it is frequently valuable to try to identify and describe a basic dichotomy or metaphor around which thinking is organized and debate is conducted. This is the project at which Herbert Packer was working in laying out the basic framework of his battle model of criminal justice: crime control versus due process.⁴⁷ Packer was careful to observe this was a polar dichotomy, one which at the extremes did not and could not exist.⁴⁸ Yet thinking about criminal violence and criminal justice in the United States in terms of a prosecutorial position whose primary goal was the creation and maintenance of social order, and a defense orientation committed to preserving due process and individual rights, just made sense. And it made sense at many different levels. It rang true in terms of the rhetoric of political campaigns, of contentious editorials devoted to the “law and order” issue, as well as the socialization of prosecutors and defense lawyers in law schools and law offices.⁴⁹ And it is one good way of organizing the narrative structures and psychological tensions animating movies about gangsters and cops, crime and the law.⁵⁰

Are property and property law susceptible to such dichotomization, to the simplification of complex strategies and intellectual propositions, and their distillation into a basic metaphor or contradiction? Consider the views of several historians who, though not lawyers, have shown keen interest in the interaction of legal rules, economic regulation, and ideologies of property during the emergence of Western capitalism. In his classic work on the origins of the English working class, Edward Thompson describes how eighteenth-century bread and food riots in the British countryside often betrayed a rather clear and orderly conception of

47. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 2 (1964).

48. *Id.* at 6.

49. *Cf.* CHASE, *supra* note 42, at 68–70 (describing the crime control/due process dichotomy as resonating in various contexts).

50. *See id.* at 67–87.

the moral economy.⁵¹ “In Honiton in 1766” records Thompson, “lace-workers seized corn on the premises of the farmers, took it to market themselves, sold it, and returned the money and even the sacks back to the farmers.”⁵² In the Thames Valley, Thompson says that villages and towns “were visited by large parties of labourers, who styled themselves ‘the Regulators’, enforcing a popular price on all provisions.”⁵³ While such riots and illegal direct action can easily be portrayed by men of property (as was frequently the case, then and later) as sheer anarchy—the crowd turned mob—the people, by contrast, regarded such riots “as acts of justice, and their leaders . . . as heroes.”⁵⁴ “In most cases they culminated in the enforced sale of provisions at the customary or popular price, analogous to the French ‘*taxation populaire*’, the proceeds being given to the owners.”⁵⁵

After surveying mountains of often fascinating historical anecdote and other evidence, Thompson concludes with the observation that “the final years of the [eighteenth] century saw a last desperate effort by the people to reimpose the older moral economy as against the economy of the free market.”⁵⁶ So we have a rough dichotomy to work with, an older moral economy versus the rising free market system. There are other elements of importance, for example the fact that the older economy was understood to be a moral economy.⁵⁷ In other words, though it was not governed by legal rules, it was still a form of regulation, containing a structure of standards, values, and rules. Indeed, it can be argued that only when the law, the inheritance of every freeborn Englishman, fell into the hands of new commercial classes and was used to impose the free market that the people found themselves in opposition to the law. The law could either reflect the old or new economy, a system of moral values or of free markets, and therein rested a sharp and historic opposition of property ideologies.

51. See E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING-CLASS* 63 (1963).

52. *Id.* at 64 (citing R.B. Rose, *18th Century Price-Riots, the French Revolution, and the Jacobin Maximum*, 4 INT’L REV. SOC. HIST. 432, 435 (1959)).

53. *Id.*

54. *Id.* at 65.

55. *Id.* (footnote omitted).

56. *Id.* at 67.

57. See *id.* at 63.

The final point is brought out most clearly in a commentary provided by European social historian Harvey Goldberg, who asserts that “over long ages from antiquity through the seventeenth century, in one successive society after another, even the governing classes and their ideologues treated private property as a social convention.”⁵⁸ What this meant, points out Goldberg, is that property was treated “as an institution which society itself had created and . . . which it could control, which it could limit, which it could even abrogate in the interest of some transcendent good . . .” But all that changed, asserts Goldberg, following Thompson’s line of reasoning, in the eighteenth century. The “bourgeoisie and its liberal ideologues in the emergent capitalist societies,” he claims, “did not treat private property as an artificial convention. Instead, they came to treat it as what they called a natural and inviolable right.”⁵⁹ Thus we have Locke, liberalism, the U.S. Constitution, and Charles Beard’s famous thesis regarding the economic origins of America’s founding legal document⁶⁰ which, to be sure, was right for the wrong reasons (it was the founding principles or philosophy of property, not the founding fathers themselves, that were driven by economic interests and forces).

Just as there are those today who regard property as an artificial convention-lent ideological credibility by law and transformed into a sacred right by America’s civic religion, an irrational worship of property and freedom as somehow inseparable, there are others who remain strongly committed to the idea that significant interference with private property ownership constitutes the road to serfdom. Just as John Maynard Keynes and Friedrich Hayek are contrasted as philosophical icons—and polar opposites—dominating modern economic discourse and theory,⁶¹ the views of left-wing or socialist historians like Thompson and Goldberg can be juxtaposed to those of right-wing or conservative adversaries, like Richard Pipes and Tom

58. Audio tape: Lecture on the Ideology of Private Property, given by Harvey Goldberg at the University of Wisconsin, Madison (Jan. 24, 1977) (on file with the Harvey Goldberg Center for the Study of Contemporary History), *quoted in* ANTHONY CHASE, *LAW AND HISTORY* 119–20 n.219.

59. *Id.*

60. *Cf.* CHASE, *supra* note 58.

61. DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* 123–38 (2002).

Bethell. Whether one regards it as a “starting hypothesis” (like Pipes) or, more prosaically, as American conventional wisdom, Pipes believes that “there is an intimate connection between public guarantees of ownership and individual liberty: that while property in some form is possible without liberty, the contrary is inconceivable.”⁶² And, after about three hundred pages of historical argument, Pipes predictably concludes that “government[al] interference in the life of the citizenry[,]” and especially with the right to life, liberty, and property, “even for benevolent purposes endangers liberty: it posits a consensus which does not exist and hence requires coercion.”⁶³ A prime target is the modern welfare state which “indeed coerces in a variety of ways to attain its unattainable ends. But well-meaning patriarchalism also enervates people by robbing them of the entrepreneurial spirit implicit in freedom.”⁶⁴

While Tom Bethell, citing Richard Epstein’s *On the Optimal Mix of Private and Common Property*,⁶⁵ allows for the social legitimacy of communal and state property, as well as private property, he is quite skeptical of communal property.⁶⁶ “When the Pilgrims arrived in Massachusetts in 1620,” observes Bethell, “they established a society with communal property—Plymouth Colony. But within three years they privatized their property.”⁶⁷ What happened? “Between those two events,” says Bethell, “the Pilgrims fully experienced communalism’s great problem: it sets up a system of rewards and punishments that puts the welfare of the community on a collision course with human nature.”⁶⁸ The communal ideal, argues Bethell, contradicts our natural instinct in favor of personal possession,⁶⁹ and the community interest which justifies

62. RICHARD PIPES, PROPERTY AND FREEDOM at xiii (1999).

63. *Id.* at 291.

64. *Id.*

65. Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, in PROPERTY RIGHTS 17 (Ellen F. Paul, Fred D. Miller Jr. & Jeffrey Paul eds., 1994).

66. See TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 25 (1998).

67. *Id.* at 31.

68. *Id.* Bethell subsequently discusses the “free-rider” problem and the “tragedy of the commons” in recent history, specifically in the context of early colonial America. See *id.* at 31–55.

69. See *id.* at 31.

governmental interference with private property, according to Pipes, “posits a consensus which does not exist.”⁷⁰

IV. CULTURE

This sort of contrast, between advocacy of communal and private property, sets the stage for our selective survey of popular culture’s positions on property law and values. In what is sometimes described as the first bestseller of the twentieth century, Arthur Conan Doyle introduces an ancillary issue, however briefly or obscurely. In *The Hound of the Baskervilles*,⁷¹ Mr. Frankland of Lafter Hall, “an elderly man, red-faced, white-haired, and choleric” seems to be a perpetual litigant in local courts.⁷² On the one hand, he tells Dr. Watson that:

I mean to teach them in these parts that law is law, and that there is a man here who does not fear to invoke it. I have established a right of way through the centre of old Middleton’s park, slap across it, sir, within a hundred yards of his own front door. What do you think of that? We’ll teach these magnates that they cannot ride rough-shod over the rights of the commoners, confound them!⁷³

So here is a commoner using a traditional right of property law to impose limits on the private property of a “magnate,” presumably a member of the town elite, old Middleton.

On the other hand, Watson says that Frankland’s “passion is for the British law” and that he “fights for the mere pleasure of fighting,” adding that he is “equally ready to take up either side of a question”⁷⁴ So Frankland does seem to appreciate the fact that “property” is a mere legal convention and far from respecting the sanctity of property rights, he is “learned in old manorial and communal rights”⁷⁵ and, as a kind of self-made legal realist, he recognizes there are two sides to any legal question.⁷⁶ Without any

70. See PIPES, *supra* note 62, at 291.

71. ARTHUR CONAN DOYLE, *THE HOUND OF THE BASKERVILLES*, in *THE NEW ANNOTATED SHERLOCK HOLMES: THE NOVELS* 383 (Leslie S. Klinger ed., 2006).

72. *Id.* at 494.

73. *Id.* at 541.

74. *Id.* at 494.

75. *Id.*

76. See *id.*

reason for our questioning Watson's characterization, however, Frankland seems less the communal rights champion than a law case addled refugee from the pages of Dickens. Like the old woman seemingly made daft by her obsession with the case of Jarndyce and Jarndyce in *Bleak House*,⁷⁷ which to death's door snares her in its traces, the litigious Frankland, in at least one motion picture adaptation of Conan Doyle's tale, has read up on the law of "body-snatching" and informs dinner guests: "I'll be glad to tell you a thing or two about everybody here"⁷⁸ Mr. Frankland becomes a kind of paranoid busybody spying on weird neighbors who "dabble a bit in the occult."⁷⁹

The politics of property rights gets a sharper, more focused treatment from a bestselling author at the other end of the century: Stephen King, writing under the pseudonym Richard Bachman, in his novel, *Thinner*.⁸⁰ Attorney Billy Halleck, his wife Heidi, and their daughter Linda are enjoying "a picnic lunch and waiting for the first band concert of the spring to begin. Most of the others abroad on the common that day," writes King, "had been there for the same reason, a fact the Gypsies undoubtedly knew."⁸¹ A band of Gypsies had set up camp outside of town and when little Linda draws near, thinking they must be staging a carnival or something, her mother pulls her back, warning that they are Gypsies and she should keep her distance.⁸² When Heidi adds that Gypsies are "all crooks," Linda looks at her mother, then her father, the lawyer, who shrugs.⁸³ So we have the commons, the same commons historically protected by the British law of property about which Conan Doyle's Mr. Frankland is so passionate, the quiet enjoyment of the commons by picnicking townfolk, and then the Gypsies—outsiders, shady characters, the 'other'—those outside the commons, outside the community, and apparently outside the law.⁸⁴

77. CHARLES DICKENS, *BLEAK HOUSE* 19 (Signet 1964) (1853).

78. *THE HOUND OF THE BASKERVILLES* (Twentieth Century Fox Film Corp. 1939).

79. *Id.*

80. STEPHEN KING, *THINNER* (Signet 1985).

81. *Id.* at 46.

82. *Id.*

83. *Id.*

84. *See id.*

Officer Hopley pulls up in a squad car, gets out, and begins “discussing the facts of life with the Gypsy who had been doing the juggling act”⁸⁵ The reader learns that the facts of life, in this case, have to do with a long list of potential violations of city ordinances which the Gypsies will be cited for by the police if they do not move on pronto.⁸⁶ Billy’s shrug in response to his daughter’s questioning gaze is the other side of the same coin: the commons turns out not to be common after all. At first the Gypsies resist by dragging their feet but when cops begin writing up tickets and slipping them under the windshield wipers of vans, roadsters, and assorted remodeled vehicles the traveling band has ringed around their camp, they get the message loud and clear.⁸⁷ “A second Fairview police cruiser pulled up” writes King, “its flashers turning lazily,” and “that was it.”⁸⁸ The confrontation is over.⁸⁹

That night, when Billy is putting Linda to bed, she asks him, “Were the police running those guys out of town, Dad?”⁹⁰ What follows is two pages of Billy responding to a series of shrewd questions from his daughter in good lawyerly fashion—trying to give moderately truthful if highly selective answers that will carefully avoid dealing with his daughter’s suspicion that something is rotten in Denmark.⁹¹ King skillfully juxtaposes what Billy says to Linda with what he says to himself, like “*Bang!* A little flag went up inside his head. Lie #1.”⁹² Linda persists: “I thought the common was public property . . . That’s what we learned in school.”⁹³ Billy responds: “Well, in a way it is . . . ‘Common’ means commonly owned by the townspeople. The taxpayers.”⁹⁴ Then King interjects what amounts to a legal annotation to Billy’s weasel-word explanation: “*Bong!* Lie #2. Taxation had nothing at all to do with common land in New England, ownership of or use of. See *Richards*

85. *Id.* at 47–48.

86. *See id.* at 48–50.

87. *See id.* at 49.

88. *Id.* at 50.

89. *Id.*

90. *Id.* at 51.

91. *Id.* at 51–54.

92. *Id.* at 52.

93. *Id.* at 53.

94. *Id.*

vs. *Jerram, New Hampshire* or *Baker vs. Olins* (that one went back to 1835)⁹⁵ Now it is true that there is an actual legal case quoted by Walter Matthau in the Billy Wilder/I.A.L. Diamond movie, *The Fortune Cookie*.⁹⁶ And, yes, Robert Traver includes an actual case citation from Michigan law in his novel, *Anatomy of a Murder*,⁹⁷ which Otto Preminger keeps in the film of the same title.⁹⁸ But it is peculiarly satisfying to find a popular storyteller like Stephen King unleashing the hard legal history in a thriller that, in a real sense, turns on questions about access to civil justice.⁹⁹

And King does not stop there. He talks about potato farmers in Lewiston, Maine, in 1931, the Roosevelt era Supreme Court, police permits, and he keeps going until Linda falls asleep.¹⁰⁰ The dream of equal justice remains just that—not something the police are likely to enforce on a spring afternoon on the Fairview common, not “when you see the common from Lantern Drive and the country club,” concludes King, “not when that view is part of what you paid for”¹⁰¹ Communalism, claims Tom Bethell, put the good folk of Plymouth colony “on a collision course with human nature.”¹⁰² But in Stephen King’s *Thinner*, human nature, not yet shaped (contaminated?) by the “facts of life,” asks some pretty tough questions on a little girl’s way to bed about hypocritical double standards, legal double talk and a father’s hapless shrug. Maybe Bethell’s one-dimensional theory of human nature and Richard Pipes’ reverence for private property are just sophisticated new versions of an old point of view—the view of the commons from Lantern Drive.

The juxtaposition of these two property notions—that private ownership should remain unrestrained in the name of individualism and liberty versus the conviction that society will always retain a legitimate claim upon private property, an enduring and legitimate

95. *Id.*

96. THE FORTUNE COOKIE (United Artists 1966).

97. ROBERT TRAVER, ANATOMY OF A MURDER 201 (1958). Traver cites an actual Michigan state law murder case, *People v. Durfee*, 29 N.W. 109 (Mich. 1886), during the fictional trial. *Id.* at 418.

98. ANATOMY OF A MURDER (Columbia Pictures 1959).

99. KING, *supra* note 80, at 51–53.

100. *Id.* at 53–54.

101. *Id.* at 54.

102. BETHELL, *supra* note 66, at 31.

capacity to publicly regulate private wealth and power—may not come any sharper in popular culture than it does in Stephen King’s morality tale, *Thinner*. But the same juxtaposition is there, in a wide range of popular movies and genre films, if we are only willing to look.

V. FILM

Joe Dante’s movie, *The ‘Burbs*,¹⁰³ is structurally organized around the basic dichotomy between property notions outlined above. Ray Peterson (Tom Hanks) is initially somewhat curious about his new suburban neighbors, the Klopeks, and he gradually becomes obsessed with why they never seem to show themselves and what, exactly, they are doing in the basement after dark that generates so much noise and rumbling.¹⁰⁴ The clash of classic property values in *The ‘Burbs* is writ small as well as large. Mark Rumsfield (Bruce Dern), a camo-wearing Vietnam vet, stands in his front yard and yells in the general direction of next door that if his neighbor’s poodle comes onto Rumsfield’s lawn one more time to defecate, Rumsfield will “staple his ass shut.”¹⁰⁵ Rumsfield’s lawn, not to mention his house, is his castle (or fort), above which he (or his bimbo wife) ceremoniously raises the American flag each morning.¹⁰⁶ The instinct for individual property rights, which may have driven some refugees from the urban jungle out into the suburbs in the first place, is strongly felt by many of Peterson’s friends and neighbors.¹⁰⁷ They are living the American dream and they are living it just the way they want. But does that include the Klopeks, the weird and creepy new residents who seem to be putting something strange into the garbage can on the street in the middle of the night? Is the nightmare they represent really compatible with a bland existence revolving around backyard barbecues, little league games and station wagon living?¹⁰⁸

103. *THE ‘BURBS* (Universal Pictures 1989).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

Eventually, Peterson plucks up his courage and decides the Klopeks have got to go.¹⁰⁹ There is a gradual ascendance of the community over individual privacy ideology among Peterson's tiny cabal of Klopek-inquisitors who, to the horror of their quite civilized (and still mentally-hinged) wives, become convinced that the foulest of deeds take place right next door night after night.¹¹⁰ The Klopeks are murdering people and then incinerating the corpses in a giant basement furnace; skulls and bones are stuffed into garbage bags and left on the street for public sanitation crews to unknowingly remove the evidence of appalling crimes.¹¹¹ Unless of course a neighborhood pooch happens to drag home a bone that is just a little . . . big. The bungling series of steps Peterson & Co. take in trying to unveil the conspiracy and thus protect the public weal from a pack of demented householders (and their vicious dog) are sufficiently amusing that we hope against hope they do not discover too soon that it is all a perfectly explicable series of harmless events and coincidences.¹¹² Things spiral out of control and Peterson is furiously digging away in the Klopeks' basement, searching for something to implicate them, when he hits a gas main and blows up his neighbor's home.¹¹³ He emerges from the inferno covered with soot and ash, stunned to think of how terrible the consequences of his arrogance have become—the unprecedented results of his failure to simply respect his neighbor's humble property rights.¹¹⁴

The wildly unexpected conclusion to the film with the Klopeks' car trunk springing open accidentally to reveal a cemetery's worth of human remains, completely validating the worst fears of the vigilante neighborhood watch,¹¹⁵ takes everyone by surprise. Having just admitted to his wife and to himself that his concern for the community had become psychotically disproportionate to actual circumstances, Peterson is spectacularly vindicated.¹¹⁶ He is not sure what to make of it. His partners in what looked like crime until just

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

moments before continue with their wild theorizing without even missing a beat.¹¹⁷ They were, after all, right. Leaning heavily on his wife's shoulder as they head for home, Peterson says he needs a vacation but asks a teen neighbor (Corey Feldman) to "keep an eye on the neighborhood for me."¹¹⁸ *The 'Burbs* represents a powerful endorsement of the philosophy of privacy, private property, and the notion that good walls make good neighbors—right up to the end, that is, when it suddenly turns the tables, thematically as well as in terms of plot development. The neighborhood (what's left of it) would seem to have become common property once again in the bone chilling conclusion to *The 'Burbs*.¹¹⁹

Oscillation of audience identification between different forces—and property credos—in *The 'Burbs* treats viewers to a real roller coaster ride. New York Film School graduate Barry Sonnenfeld's *The Addams Family* is, if anything, even more sophisticated in its handling of the basic juxtaposition of—or opposition between—property philosophies.¹²⁰ It represents, in a sense, the Bethell/Pipes, Friedrich Hayek/Milton Friedman devotion to property rights as a kind of manic disorder or burlesque psychosis flowering at midnight in the form of vampire capitalism. It starts off harmlessly enough, with the Addams pouring hot tar from a vat on their roof onto utterly unsuspecting Christmas carolers below.¹²¹ Then Gomez Addams (Raul Julia) slashes golf balls with a potent driver from his balcony—the first of which crashes through his neighbor's window and splashes into a bowl of breakfast cereal.¹²² When the milk-soaked homeowner runs out his front door crying, "Damn you Addams!" Gomez replies merrily: "Sorry about the window Judge! Keep the ball! I have a whole bucketful."¹²³

Begin with one of the most fundamental of common law property principles, familiar to every first-year law student: "use your property in such a way as not to harm that of your neighbor."¹²⁴

117. *Id.*

118. *Id.*

119. *Id.*; see also FRANK FIELD, NEIGHBOURS FROM HELL: THE POLITICS OF BEHAVIOUR (2003).

120. THE ADDAMS FAMILY (Paramount Pictures 1991).

121. *Id.*

122. *Id.*

123. *Id.*

124. *E.g.*, Chapman v. Barnett, 169 N.E.2d 212, 214 (Ind. App. 1960).

Blackstone argued that this specific maxim demonstrated how closely the common law followed the rule of gospel morality according to which one should do unto others as one would wish to be treated oneself.¹²⁵ Yet the Gomez clan uses their roof in such a way as to scald with hot oil the most neighborly of neighbors—a band of Yuletide carolers generously sharing with the Addams family the reason for the season.¹²⁶ Then the patron of the family uses his porch to launch missiles through his neighbor's glass windows—and not only is the neighbor a judge, learned in law, but Gomez promises there is more where that came from.¹²⁷ His idea of compensation for the harm caused: *a golf ball!*¹²⁸

The Addams Family is the story of how family values get turned on their head by a loveable bunch of monsters. Wednesday (Christina Ricci) is about to severely shock her brother, strapped into an electric chair, when mother, Morticia (Angelica Huston), tells her it is time to go to the charity auction.¹²⁹ Wednesday demurely requests for a few more minutes of high voltage fun, but her mom, just like any other mom, sternly informs her daughter she is not kidding.¹³⁰ But Wednesday begs and Morticia relents: the straight-laced young woman then throws the lever and the camera remains fixed on Wednesday's maniacal grin as her eyes light up: her brother is toast.¹³¹

Just as *The Addams Family* turns family values upside down, it turns traditional property values inside out. Instead of using one's own property in such a way that shows regard for a neighbor's equivalent right to quiet enjoyment, the Addams seem bent on using their property in the most savage way possible: do unto others before they do unto you. Taking the apparently fake Fester on a tour of the family gravesite, Morticia acknowledges (or, rather, brags) that the row of statues includes monuments to fallen "psychopaths, fiends, mad dog killers . . . roots, Fester."¹³² She gestures toward two figures

125. See WILLIAM BLACKSTONE, COMMENTARIES *216–21.

126. THE ADDAMS FAMILY, *supra* note 120.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

on a stone horse: “Mother and Father Addams . . . How I wish the children could have known them better. Tell that to an angry mob.”¹³³ On the soundtrack, we hear precisely the sounds of an angry mob, like the lynch party that swarms through the woods at the end of every Frankenstein film.¹³⁴ She then reads from the statue the family motto in Latin and translates it for Fester: “We gladly feast on those who would subdue us . . . not just pretty words.”¹³⁵ Presented first in Latin, this maxim might just as well be one of Blackstone’s legal principles, only again, turned on its head. It is also a pretty fair shorthand history of how the common law was transformed in the U.S. during the nineteenth century, as the free market held so dear by conservative economists today first grew and flourished on American soil.¹³⁶ Traditional common law values and thus doctrines, enshrined in Blackstone’s famous commentaries, were turned inside out.¹³⁷ Possibly, perhaps especially, by judges—maybe even the one living (unfortunately) so close to the Addams family mansion and exasperated by Gomez Addams’ reckless golf swing.

A lot of Hollywood movies delve into the basic dichotomies of American property and many of them, such as *The ‘Burbs*, *The Addams Family*, *Beetlejuice*,¹³⁸ *Nothing But Trouble*,¹³⁹ *Batman Returns*¹⁴⁰ and *Mousehunt*,¹⁴¹ are comedies. Far from popular culture constituting a mindless diversion from the big issues, you only have to scratch the surface to find, just beneath the top layer of plot, character and movie star glamour, pervasive questions of law and society, lawyers and morality, individualism and altruism, private ownership and public responsibility. The commons is not only still there in our law but in the images we project onto a silver screen during our leisure time as well. Perhaps our national divisions and disagreements over property rights are sufficiently contentious that

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* CHASE, *supra* note 58, at 111–12.

137. *See id.*

138. *BETLEJUICE* (Warner Bros. Pictures 1988).

139. *NOTHING BUT TROUBLE* (Warner Bros. Pictures 1991).

140. *BATMAN RETURNS* (Warner Bros. Pictures 1992).

141. *MOUSEHUNT* (DreamWorks SKG 1997).

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movies are relied upon to give us a safe place to laugh at the unresolved issues, and at ourselves, for awhile.