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## PROPERTY, UTILITY, AND FAIRNESS: COMMENTS ON THE ETHICAL FOUNDATIONS OF "JUST COMPENSATION" LAW

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*The courts have developed a bewildering array of rules for determining when the government must compensate people for economic losses its programs have caused them. Professor Michelman investigates our practice of compensating for some but not all losses by asking what general grounds justify programs interfering with the marketplace's apportionment of goods and services and why, if intervention is proper, compensation need ever be considered. He concludes that the line now drawn between compensable and noncompensable harms diverges from what considerations of utility or fairness would suggest but that it may be about as perfect as a system relying mainly on court decisions can achieve. One moral is that legislatures and administrative agencies have been shirking their role in the compensation process.*

WE shall be dealing here with matters which, were they to find their way into a treatise on the law of eminent domain, would appear in the chapter on "What Constitutes a Taking: General Principles."

"Taking" is, of course, constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation. Whether a particular injurious result of governmental activity is to be classed as a "taking" is a question which usually arises where the nature of the activity and its causation of private loss are not themselves disputed; and so a court assigned to differentiate among impacts which are and are not "takings" is essentially engaged in deciding when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons.

It might be thought remarkable that we tolerate even the raising

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of such a question. There is, after all, strong appeal in Hobhouse's insistence that a rational social order does not rest "the essential indispensable condition of the happiness of one man on the unavoidable misery of another, the happiness of forty millions of men on the misery of one"; and it is not easy to disagree with his statement that, however temporarily expedient, "it is eternally unjust that one man should die [he means, should be compelled to die] for the people."<sup>1</sup> If deliberate governmental activity foreseeably entails some injurious impact on an established private interest, how can we, without violating Hobhouse's strictures, avoid concluding at once that compensation is in order? Where is the occasion for further classifying such impacts into those which are and those which are not "takings"?

The issues become more distinct if we compare with the uncompromising platform of Hobhouse the worldly wise, tolerant pragmatism of Holmes. Without adverting to questions of "rationality," Holmes is content to lay it down that a government ought not to be called "civilized" if it "sacrifices the citizen more than it can help."<sup>2</sup> He leaves it to us to imagine what he has in mind when he speaks of deliberate public sacrifice of an individual which the government "cannot help." Could we convince Hobhouse that such a case is possible? Would he make exceptions for it if we could? Or would he be bound to conclude that the society which admits to the possibility of "unavoidable" sacrifice must be irrationally organized or motivated?

I believe that the "taking" problem can be reduced to terms which allow us to say that Holmes and Hobhouse are telling different versions of the same truth.

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It is debatable whether what follows is an essay in constitutional law. There is no doubt that the problem to be canvassed — what will be called the compensation problem — has received a generous share of attention from courts called upon to interpret and enforce constitutional strictures on public action and from scholars drawn to analysis, appraisal, and rationalization of constitutional doctrine as it materializes from the decisions.<sup>3</sup> More

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<sup>1</sup> L. HOBHOUSE, *LIBERALISM* 41 (1964).

<sup>2</sup> O.W. HOLMES, *THE COMMON LAW* 37 (M. Howe ed. 1963).

<sup>3</sup> See, e.g., E. FREUND, *THE POLICE POWER* §§ 504-602 (1904); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Kratovil & Harrison, *Eminent*

analysis and more criticism will be found in the following pages. Missing, perhaps conspicuously, will be efforts to arrive at a systematic restatement of legal doctrine, or to reformulate doctrine, redirect it, or overhaul it; for what is counselled here is, more than anything else, a deemphasis of reliance on judicial action as a method of dealing with the problem of compensation.

The compensation problem is, of course, familiar to constitutional lawyers who have faced the difficulty of distinguishing between valid exercises of the "police power," valid even though, in the course of "regulating" a person's activities, they cause him to be less well off than he was before the regulation; and governmental "takings" of "property," not permitted unless monetary "just compensation" is paid. The problem commonly finds a second legal formulation in the question whether material harm wrought by public enterprise to some private interest should be treated as a "taking" of property in which that interest is anchored even though no formal expropriation occurs; and a third formulation is the issue of how many dollars compose the "just compensation" which must be paid when "property" is, admittedly, being "taken."

Let us attempt to state the problem more generally and without using legal language. In a given period, a person enjoys a certain liberty to do as he wills with certain things which he "owns," and a certain flow of income (utility, welfare, good). The practical boundaries of his liberty, and the practical relationships between it and the sum of goods currently flowing to him, are in significant part determined by existing conditions of economic resource employment within his social universe — call it society, community, state. He may, for example, own land currently in use as a foundry. He may own other land which serves for his private residence. That land may abut land employed as a neighborhood street. All these land uses are productive of certain goods which are a part of society's sum total of goods: the foundry manufactures are, of course, such goods; so is household shelter; so is the use of a transportation artery or of a neighborhood gathering or play place; so is the serenity which emanates from a quiet, shaded street.

It is clear that this person's current flow of welfare is significantly affected by his being allowed to extract certain kinds of benefits from the foundry land, the house lot, and (as a kind

of appurtenance to the house lot) the land comprising the street. If any of these resources should be diverted by society into different uses, his personal welfare situation will be altered. Should society, for example, enforce a decision that the foundry land should be converted to other, less obtrusive uses, that land may become far less productive of good to the owner than it was before. Should society enforce a decision that the residence lot should be employed as a public playground, the lot surely will lose most of the value potential it formerly held for its owner. Should society enforce a decision to convert the neighborhood lane into a crosstown thoroughfare, a drastic loss of goods may be sustained by the owner of an abutting tract.

In each of these cases we may assume that society is acting rationally in the sense that the new conditions of resource employment will produce a greater amount of welfare in society than the old one did. (We shall shortly consider the meaning of such rationality in more detail.) Even so, the fact will remain that some members of society will be less well off after than they were before the reallocation.<sup>4</sup> One effect of the decision to reallocate resources will have been to redistribute welfare among the members of society. This redistributive effect can be partly cancelled, insofar as the values involved are convertible into dollars, by paying monetary compensation out of the social treasury. The effect of such payments will be to spread the loss immediately occasioned by the reallocation — its painfully obvious “opportunity cost” — among all the members of the society whose collective benefit, somehow understood, supposedly justifies the change. These costs will then be distributed in accordance with that pattern for the assessment of social expenses which we call the “tax structure,” unless special means are used to spread them according to a different pattern.

Such questions as those of distinguishing the “police power” from the “power of eminent domain” and of calculating “just compensation” thus seem to derive from a broader question:

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<sup>4</sup> Usage in this essay will correspond with the economists’ convenient distinction between “allocation” and “distribution.” “Allocation” refers to inputs of resources and effort: it connotes decision about what goods to produce. “Distribution” refers to the output of goods, and connotes decision about who shall enjoy them and in what proportions. Successful or “good” allocation is called “efficient.” Successful or “good” distribution is called “just” or “fair.” For the concepts and a discussion of the interactions between allocation and distribution decision-making, see R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 5-22, 28-41 (1959).

When a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society? Shall they be permitted to remain where they fall initially or shall the government, by paying compensation, make explicit attempts to distribute them in accordance with decisions made by whatever process fashions the tax structure, or perhaps according to some other principle? Shall the losses be left with the individuals on whom they happen first to fall, or shall they be "socialized"? <sup>5</sup>

For the most part, we have been content to assume that the answer is to be found in the recesses of constitutional law. Given the combination of an ingrained attachment to judicial review with a specifically relevant constitutional injunction against takings without compensation, it has been natural for us to rely heavily on the courts for decisions about when compensation should and should not be paid. It is no insult to the judicial performance, which in the sum of its results has certainly not been disastrous, to remark that it has sometimes yielded answers surprising to the uninitiated. Government, it appears, may not cause military jet aircraft to fly at a low altitude over my land, severely detracting from my enjoyment of the surface, unless it compensates me for my losses; <sup>6</sup> but respectable authority has it

<sup>5</sup> This essay does not explore the question of compensation out of the social treasury to offset redistributions not the proximate results of deliberate social (legislative or administrative) decisions. One can, of course, argue that people should be compensated for *all* abnormal harms, relying on the dual grounds of efficient resource allocation and fair distribution of the costs of social existence. Pursuit of these two objectives may suggest imposing duties of compensation on those enterprises or activities which, in the interest of efficient allocation, should be regarded as having caused particular harms and, where no such enterprise or activity can be identified, on the social treasury. See generally Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

The issues considered by Professor Calabresi are closely akin to many addressed here. See Comment, *Airport Approach Zoning: Ad Coelum Rejuvenated*, 12 U.C.L.A.L. REV. 1451 (1965), for an able demonstration that Professor Calabresi's analysis can be made to shed light on "just compensation" problems. There is, however, an important difference, warranting separate treatment, between compensating for individualized losses which are the foreseeable results of deliberate collective choices, and compensating for losses which are, from society's collective vantage point, pure accidents. The former practices, but not the latter, may imply a distinctive policy of forestalling exploitation, or the suggestion thereof, by the many of the selected or identified few. It could be said to be a subsidiary purpose of this article to clarify and elaborate upon this distinction.

<sup>6</sup> *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

that government may cause the same aircraft to fly, on the same mission, in a path which, although it does not invade "my" sector of sky, causes precisely the same kind of harm to my enjoyment of the surface and need not compensate me.<sup>7</sup> If government builds a dam across a navigable stream, impeding the flow of waters away from my lawfully placed mill and reducing its value, it must compensate me if my mill empties into nonnavigable waters,<sup>8</sup> but not if my mill empties into navigable waters.<sup>9</sup> If government, renovating a highway, encroaches on a foot or two of my frontage which I do not use or contemplate using, causing me negligible harm, it very likely will have to pay me something called the "fair market value" of the easement or fee which corresponds with its use;<sup>10</sup> but if, renovating the same highway, it causes a change in the traffic flow which devalues my business site drastically, compensation may not be required.<sup>11</sup> Government may perhaps not, in the interest of my neighbors' safety, forbid me (without compensation) to remove coal from my mine;<sup>12</sup> but it plainly may, in the interest of my neighbors' amenity, forbid me (without compensation) to make productive use of my clay quarry and brickyard.<sup>13</sup>

Immersion in the decisions suggests that such jarring outcomes can be traced sometimes to a deceptive simplicity in the constitutional text, but more generally to the felt need of courts for doctrinal principles which can be stated generally and yet incisively enough to conform visibly with the ideal of an impersonal justice identical for all. The results, if thus explainable, are nonetheless liberally salted with paradox. It is understandable, therefore, that the energies of legal scholars should have focused on analysis and rationalization of the judicial product, and that scholars trying to rescue courts from their immediate doctrinal embarrassments should have left for future clarification some

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<sup>7</sup> *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *Leavell v. United States*, 234 F. Supp. 734 (E.D.S.C. 1964). *But see* *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. 1964) (*semble*); *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962).

<sup>8</sup> *United States v. Cress*, 243 U.S. 316 (1917).

<sup>9</sup> *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

<sup>10</sup> *See* *City of Los Angeles v. Allen*, 1 Cal. 2d 572, 36 P.2d 611 (1934); *First Nat'l Stores, Inc. v. Town Plan & Zoning Comm'n*, 26 Conn. Supp. 302, 222 A.2d 228 (C.P. 1966) (*semble*).

<sup>11</sup> *See, e.g.,* *Stipe v. United States*, 337 F.2d 818 (10th Cir. 1964); *Brock v. State Highway Comm'n*, 195 Kan. 361, 404 P.2d 934 (1965).

<sup>12</sup> *See* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>13</sup> *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

more fundamental issues of fairness and policy which a compensation practice involves.

Most writing by legal scholars in this field has, then, been concerned to find a rationalizing principle or set of principles which will "explain" in the sense of imposing an intelligible order upon judicial decisions in compensability cases, or otherwise to suggest a principle to govern judicial decision of such cases.<sup>14</sup> Where either preoccupation prevails, thought is bounded by the premises implicit in the idea of judging as a way of making decisions.<sup>15</sup> Effort is trained on the articulation of a "rule of decision" — a principle to which one playing the role of judge can properly and fruitfully appeal.

This essay differs from what has gone before in its provisional abandonment of the assumption that case-by-case adjudication should or must be the prime method for refining society's compensation practices. This departure is in no way meant to deny that compensability, insofar as the question is thrust upon courts by the duties of judicial review, is a legal as well as an ethical problem; or that one must approach the problem, in its legal aspect, determined to arrive at some sort of solution which finds expression in decisional rules. It is intended, rather, to give due recognition to the circumstance — herein documented — that the attempt to formulate rules of decision for compensability cases has, with suggestive consistency, yielded rules which are ethically unsatisfying. This observation seems to justify the hypothesis that decisional rules simply cannot be formulated which will yield other than a partial, imperfect, unsatisfactory solution and still be consonant with judicial action.

Examination of that hypothesis requires willingness to return as far as may be necessary to first principles in order to form a clear understanding of just what purposes society might be pursuing when it decrees that compensation payments shall sometimes be made. A substantial part of this essay will be devoted to such an inquiry. Through it, I shall argue that the only "test" for compensability which is "correct" in the sense of being directly

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<sup>14</sup> These two aims — rationalization of existing decisions and advocacy of a "sound" principle — of course tend to spill into one another. An excellent example is Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). Having arrived at the articulation of his principle, Professor Sax successively explains why it is sound, tests it against past decisions and finds it largely successful in that regard, and "disapproves" a line of prior holdings which do not accord with it. *Id.* at 64-70.

<sup>15</sup> See pp. 1248-56 *infra*.

responsive to society's purpose in engaging in a compensation practice is the test of fairness: is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted? I hope to show that the test of fairness, while no doubt obvious, is not a truism; that departures from it in practice are common and can often be identified with confidence; that it can and to some extent always has served, and increasingly is serving, as a guide to public policy; and that its most important immediate implication for public policy pertains to the assignment of responsibility for ensuring that compensation is paid whenever it ought to be.

Full elaboration of the problem requires both some detailing of the failure of the rule-of-decision approach, and a tour over the route which leads to formation and specification of the idea of fairness as the key to compensability. The principal parts of the discussion will, however, be greatly eased by a preliminary attempt to establish agreement on certain premises which both underlie the governmental activities giving rise to compensation problems and establish one's basic orientation to such problems.

### I. THE PURPOSES OF COLLECTIVE ACTION<sup>16</sup>

The problem of defining the social purposes which justify governmental action arises both when government imposes a tax to finance public development and when government exercises its eminent domain or regulatory powers to override the market-expressed preferences of owners about the use of resources and thereby (through retrospective impact on investments already made and expectations already formed) gives rise to claims for compensation.

Assuming that there exists a social consensus, even a dim one, about such matters, the question of grounds for collective action becomes pivotal for a study of compensation practices. For if the only purpose which seems able, in the general understanding, to justify governmental "intervention" in the first place is a purpose which would obviously be disserved by payment of compensation (or by nonpayment) little more need be said. To intervene and yet to pay (or not to pay) would evidently be irrational. Further discussion will be required only if it develops

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<sup>16</sup> What follows is not intended to set out a complete theory of government, but only to establish certain premises and viewpoints which course through the remainder of the article.



that the decision about compensation is independent of, or at least not wholly determined by, the decision about collective intervention in the market.

What social purposes, then, are we looking for?

A prominent one, certainly, is "efficiency": augmentation of the gross social product where it has been determined that a change in the use of certain resources will increase the net pay-off of goods (however defined or perceived) to society "as a whole." To agree on a concept of efficiency adequate for present purposes requires brief examination of three questions pertaining to it: first, precisely what do we mean by the term; second, why is collective action through government ever necessary to its attainment; and third, in precisely what sense is social pursuit of efficiency to be taken as a good and a just thing?

The concept of efficiency is, to begin with, a concept of ethical maximizing, implying the goodness of increasing some quantity to the limits of possibility — at least as long as no sacrifices are required in other spheres. But it is most important to note that, as used here, the concept does not focus narrowly on the total social output of tangible economic goods, or imply that this output is the quantity to be maximized. Rather, an "efficient" process is one which maximizes the total amount of welfare, of personal satisfaction, in society, and not all satisfaction is material.

Such a conception does, of course, immediately introduce the vexing question of whether it is possible to speak intelligibly of maximizing aggregate social welfare; the difficulty being that of comparing one person's level or quantum of satisfaction with another's so that the several individual welfare situations — which together compose the social welfare situation — can be summed or netted to produce a meaningful aggregate quantity.<sup>17</sup> But there is at least one refined, theoretical sense in which efficiency is an intelligible notion as applied to proposed changes in the employment of resources. A proposed change is efficient if, after negotiated compensations have been promised by those who stand to gain from the proposal to those who stand to lose by it, the proposal can win unanimous approval. For the "losers,"

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<sup>17</sup> This is, at any rate, a difficulty for one who begins, as most readers probably will, with an essentially individualistic and egalitarian ethic, an ethic which perceives no good independent of the satisfactions experienced by individual human beings, and which lacks a means to rank individuals, regarded as sources of claims to satisfaction, as superior or inferior to one another. For a good, basic, philosophical treatment see S. BENN & R. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* chs. 2, 5, 6, 15 (1965).

by expressing their willingness to accept the change as long as they receive a certain amount of compensation, testify that they will, under such conditions, be conscious of no net loss in welfare; while the gainers, by expressing their willingness to pay the same amount of compensation, testify that the change will yield benefits to them which are worth more to them (in dollars) than the losers' losses are worth to them (in dollars).<sup>18</sup>

Note, please, that nothing has yet been asserted about the ethical rightness of social measures which are thus "efficient."<sup>19</sup> Before proceeding to the ethical question it will be useful to dwell briefly on the reasons why collective action should ever be necessary to the attainment of efficiency as above defined. For if an efficient change in the use of resources benefits gainers more than it costs losers, it might seem that gainers could be relied upon to make offers (directly to losers or indirectly through third-party enterprisers) which would suffice to induce losers to quit their objections to the change and, if they are in the way, to step aside. Conversely, if an inefficient change is one which costs losers more than it benefits gainers, it might seem that losers could be relied upon to make offers to induce gainers to abandon their proposal even if the losers could not directly block it.

This reasoning overlooks the extreme difficulty of arranging human affairs in such a way that each person is both enabled and required to take account of all the costs, or all the missed opportunities for mutual benefit, entailed by his proposed course of action before he decides whether he will embark on it. In addition, it overlooks the extreme difficulty of concluding voluntary arrangements to take account of such costs, or to exploit such opportunities, even after they become evident — a difficulty which stems from inertia, the expense (in time and effort) of bargaining, and strategic concealment.

That such circumstances justify the collectively coerced reallocations embodied in typical measures involving public invest-

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<sup>18</sup> See Kaldor, *Welfare Propositions of Economics and Inter-Personal Comparisons of Utility*, 49 *ECON. J.* 549 (1939): cf. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696, 706 (1939).

<sup>19</sup> In addition to inviting the questions raised below, the Kaldor criterion has been effectively criticized for failing to recognize that equivalent amounts of dollars, in the hands of different persons, do not necessarily represent equivalent amounts of welfare. See W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* 164-70 (2d ed. 1965); Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 *S. CAL. L. REV.* 548, 558-60 (1965). The cited Comment, at 548-63, contains an extended discussion and exhaustive citation of the writings of welfare economists relating to the matters discussed briefly in these pages.

ment — for examples, the construction of highways, dams, and airports — seems obvious. Many individual “losers” — including those whose land would be required and those who would suffer from nuisance effects — will be so situated, legally and otherwise, as to be able to demand from any private enterpriser full compensation for their losses as the price of getting out of the way; but the enterpriser will not have any practical means of collecting payments for benefits received by every beneficiary of the project (a class which includes many people in addition to those whose direct or indirect use of the facility would expose them to exaction of a toll). There are likely at any time to be countless possible projects which would return benefits to society exceeding the total costs which members would have to bear in the forms of monetary exactions and other detriments such as devaluations of privately owned land, but which profit-motivated investors cannot be expected to provide because of the difficulty of making people pay for benefits received without resorting to taxation.<sup>20</sup>

Similar considerations show that a government's regulatory activity may claim an efficiency justification. Consider an enactment requiring *A* to desist from operating a brickyard on land surrounded by other people's homes. The proposition implicit in the law (if we take efficiency to be its goal) is that *A*'s neighbors stand to gain more from *A*'s moving or altering his technology so as to reduce the nuisance than *A* or his customers would lose. It might, then, be argued that the measure is unnecessary because, if its premises are sound, we should expect the neighbors to offer *A* an acceptable sum in return for his agreement to cooperate. Conversely, the very fact that no such transaction has spontaneously evolved may be said to prove that *A*'s operation, granting that the neighbors are sustaining some of its costs, is efficient. Apparently, it is worth more to *A* to continue than it would be worth to the neighbors collectively to have him stop. The argument, however, is imperfect. A sufficient criticism, for present purposes, is that the failure of the neighbors to make an offer may indicate, not that it would not

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<sup>20</sup> The foregoing statement, while adequate for present purposes, will seem to economists a grossly inadequate and obtuse expression of the factors dictating public provision of a good, facility, or service. For more refined statements see Bator, *Government and the Sovereign Consumer*, in *PRIVATE WANTS AND PUBLIC NEEDS* 118 (E. Phelps rev. ed. 1965); Musgrave, *Provision for Social Goods*, in *PUBLIC ECONOMICS* (papers presented at a 1966 conference of Int'l Econ. Ass'n; J. Margolis ed.) (to appear).

be worthwhile for each of them to contribute some sum to a fund whose total would be acceptable to *A* in exchange for his moving, but only that they are unable to arrive (except by the expenditure of more time and effort than it would be worth) at a settlement with *A*, and among themselves, about what the total price should be and how the burden should be distributed.<sup>21</sup> The situation will be complicated by the impulse of each neighbor to be secretive about his true preferences because he hopes that others will take up the whole burden, thereby yielding him a free benefit.<sup>22</sup> And *A*, dealing with a group instead of with an individual, may turn more than usually cagey himself. There will, in addition, be side costs of drafting agreements, checking on their legality, and so forth.<sup>23</sup>

Now, even if we are agreed that efficiency is an intelligible goal and one which may necessitate some governmental allocating, it remains to establish that efficiency is a "good thing." The possible objections to efficiency as a goal for government are not only that one cannot intelligibly compare the levels of satisfaction of different persons, but that even if one could, there is no ethical justification for enriching *A* at *B*'s expense, no matter if *A* does (we think) gain more than *B* loses.

It will be clear at this point that the ethical question is closely tied up with, though it is not the same as, the question of who is competent to decide that some change in resource use would benefit some people more than it harms others. But critical as this question about decisional competency is, there is a more basic problem. Implicit in the notion of efficiency is an ethical premise which few would care to dispute: that a change in resource use which can improve the situations of some people without damaging the situations of any is desirable.<sup>24</sup> This outcome — improvement for some accompanied by no damage to others — describes the effect after actual payment of those compensations which beneficiaries must be willing to pay, and losers must be willing to accept, if the measure is efficient under our

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<sup>21</sup> For another defect of market allocation in this situation see Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 730 n.28 (1965).

<sup>22</sup> See A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 173-74 (1957); W. BAUMOL, *supra* note 19, at 173-75.

<sup>23</sup> See generally Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

<sup>24</sup> See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 92 (1962). This principle is known to the initiated as the Pareto Rule and changes which conform to it are called Pareto-optimal.

definition. But the definition requires only hypothetical willingness to pay and accept; it does not require actual payment. Thus the result of an "efficient" change may be benefit to some at the expense of others, a result not so obviously appealing to ethical sensibilities. If, indeed, this result is ethically unacceptable, then the compensation issue is settled with respect to any measure claiming efficiency as its sole justification. Improvement is unambiguously present only when gross benefits are shared to the point where no net losses have been sustained; and compensation must, therefore, be paid.

It may well be asked, therefore, why a measure not actually accompanied by compensation should ever be deemed justified by a purely hypothetical capacity to produce benefits to some without damage to any. True, we might choose to view majoritarian collective action not as a succession of unrelated particular measures, each having an independently calculable distributional impact, but — more faithfully to the facts of political life — as an ongoing process of accommodation leaving in its wake a deposit of varied distributional impacts which significantly offset each other.<sup>25</sup> On this view the benefit-sharing requirement would be converted into an insistence that collective activity be conducted in such a way that it can reasonably be expected that, when the effects of all measures are summed from time to time, no one will have been hurt while some will have benefited through the overall collective enterprise.<sup>26</sup>

Yet such a shift in perspective may perhaps carry us too far, not only revealing why actual benefit-sharing need not be demanded with respect to any particular measure, but also causing us to doubt whether even efficiency — an excess of aggregate gains over aggregate losses — should be deemed a virtue in any particular measure, inasmuch as we would now be professing an interest only in how the continuing collective process distributes its benefits and burdens over the long run. We might say that no one should be required to accept a loss inflicted by any measure which will not, at the least, contribute a net positive quantity

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<sup>25</sup> This way of looking at things is searchingly explored by Buchanan and Tullock. *See id.* Its necessity may be suggested to the casual observer by the difficulty of marking the boundary between one "measure" and the next. If Congress enacts an omnibus public works bill, authorizing construction of fifty projects all functionally unrelated to one another, how many "measures" is that?

<sup>26</sup> Buchanan and Tullock show how a constitution can be understood as the means of implementing such insistence, and argue that on such an understanding the majoritarian principle lacks any firm, logical foundations. *Id.* at 63–84.

to the periodic social summing process — which will not, that is, increase rather than decrease the total amount of aggregate longrun gains, thus improving, rather than impairing, the chances that no one will have been made poorer over the long run.<sup>27</sup> We would thus have found a rational, if perhaps weak, justification for insisting that aggregate gains derived from a social measure exceed aggregate losses inflicted by it, even while we fail to insist on a *sharing* of the net gains which, as we insist, the measure must yield. But we would still lack any satisfactory explanation for the failure to insist on such sharing. It cannot, after all, be denied that if our scruples about collective action which enriches *A* at *B*'s expense are honestly held, insistence on a sharing of every crop of benefits would be a far more certain route to vindication than would reliance on the supposition that logrolling among shifting interest alignments will produce an even distribution of benefits over the long run — a reliance which, given Madison's instruction in the workings of faction<sup>28</sup> plus some unmistakable lessons from the civil rights encounters of our own day, would have its heroic side.

This situation is full of meaning for the general "compensability" problem. Lacking a satisfactory explanation for selective nonenforcement of the rule that the benefits of social measures must be partially shared through compensation payments, we would be faced with a choice between living with our ethical uneasiness about social action which makes *A* richer and concomitantly makes *B* poorer, and strict enforcement of a full compensation requirement. That dilemma would, for many, make a strong case for a very demanding compensation practice.

It is of course true that the dilemma does not exist in just this form. There is a better explanation for selective nonenforcement of a benefit-sharing requirement than we have yet considered. For we have not yet taken account of what is doubtless the most obvious and influential circumstance of all: that to insist on full compensation to every interest which is disproportionately burdened by a social measure dictated by efficiency would be to call a halt to the collective pursuit of efficiency. It would require a tracing of all impacts, no matter how remote, speculative, or arguable, and a valuation of all burdens, no matter how idiosyn-

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<sup>27</sup> See Hicks, *The Rehabilitation of Consumers' Surplus*, 8 REV. OF ECON. STUDIES 108, 111-12 (1940). But see Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 S. CAL. L. REV. 548, 556-58 (1965).

<sup>28</sup> See THE FEDERALIST NOS. 10, 51.

cratic or imponderable. If satisfactory performance of such an obligation is not absolutely impossible, at least it is clear that in many situations its costs would be prohibitive. The expense of maintaining and operating whatever settlement machinery was deemed adequate would more than eat up the gains which seemed to make the measure efficient. A related problem is that it may be quite impracticable to identify in advance all the losses which may flow from a measure, or to predict the values which a compensation settlement would assign to them. If it were the accepted practice to entertain all plausible claims to be compensated for losses disproportionately imposed by public measures, public decision-makers probably would reject some proposals for no better reason than that they could not be sure of net gain after all the compensation returns were in.<sup>29</sup> Finally, the possibility should be noted that the outlay which the social treasury would have to make to cover compensation claims occasioned by an obviously net-positive measure might be prohibitive simply because the amount could not be raised by taxation without destabilizing the economy.

These realities are, apparently, enough to lend conviction to the otherwise weak case for omitting compensation and relying instead on logrolling to make individual accounts come out even. They impel us to believe that, even though particular measures cannot be shorn of capriciously redistributive consequences, we can arrive somehow at an acceptable level of assurance that over the life of a society (and within the expectable lives of any of its members) burdens and benefits will cancel out leaving something over for everyone, and that society ought, therefore, to proceed to economize its resources, using governmental coercion where necessary and not agonizing too much over compensation.

This resolution leaves the compensation practice (for we continue to have one, even though it is selectively nonenforced) somewhat unhinged from the functional role to which we earlier tentatively assigned it. If a sharing of the costs of each social measure dictated by efficiency is not a regularly sought objective of society, then the compensation practice cannot be explained as a means to that end. Perhaps it is enough for now to suggest that compensation payments have something to do with maintaining at an acceptable level the assurance that benefits and burdens will be evenly distributed over the long run. But aside

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<sup>29</sup> See Dodge, *Acquisition of Land by Eminent Domain*, in J. BEUSCHER, *LAND USE CONTROLS — CASES AND MATERIALS* 525, 534 (3d ed. 1964); cf. *id.* at 539, 546.

from that possibility, which will be explored at length below, there are other, powerful reasons supporting at least a distinct presumption in favor of compensating to the limits of feasibility, even where efficiency without cost-sharing is accepted unequivocally as a good thing.

To appreciate these reasons, it is only necessary to remember that no legislator or social planner is fully qualified by himself to assay the efficiency of proposed measures. Such judgments require insight (which legislators and planners possess in no greater quantity than the rest of us) into the idiosyncratic sources and capacities for well-being of the several members of society. It would seem, then, that the only valid test of the efficiency of any proposal is to put it to collective decision by everyone to be affected. Unanimous approval will establish the efficiency of the proposal. So also will unanimous approval achieved after a round of negotiations leading to a decision on the part of those favoring the measure to make payments in some form to those initially opposed, in return for which the opponents abandon their opposition. For such an outcome establishes, as convincingly as can be hoped, that the total gains from the measure will be great enough to offset all associated losses and leave something over. But only in a system requiring unanimity can efficiency be demonstrated by this method.<sup>30</sup>

The inability of outside observers to appraise the efficiency of proposed social measures has a clear bearing on the attitudes we should bring to the compensation problem. For if no justification is claimed for a collective measure except a resulting increase in aggregate welfare, then the measure is not demonstrably justifiable unless either (a) it has received unanimous approval or else (b) a bona fide hearing has been afforded to all claims of resultant loss, and a genuine effort made to compensate whenever

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<sup>30</sup> See Buchanan, *Positive Economics, Welfare Economics, and Political Theory*, 2 J. LAW & ECON. 124, 126-29 (1959); J. BUCHANAN & G. TULLOCK, *supra* note 24, at 90-92. But it is, as will later be seen, important to note that there will be situations in which majority rule resembles unanimous consent because we can be confident that persons burdened by a measure have extracted concessions in other spheres as a price of having permitted the measure's enactment. This will be true if the burdened class composes a majority of the decision-making group, or a substantial enough minority to possess a practical threat of veto. Thus, a statute saddling railroads with the burden of building grade crossings necessitated by expanding highway traffic, which seemingly has little to recommend it by way of fairness (see *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935)), may be tolerable if it appears that railroads and rail shippers' associations maintain influential lobbies at the statehouse and exercise real sway over a substantial minority of legislators. Compare Sax, *supra* note 14, at 70.



a claim is intrinsically convincing or apparently honest. If neither of these conditions is satisfied, nothing assures us that we are not witnessing an act of pure spoliation by the majority.

The foregoing analysis will, it is to be hoped, indicate the need for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements.<sup>31</sup> What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain "unsocialized," exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.<sup>32</sup>

In sum, if efficiency were the only generally accepted criterion for judging governmental action which has the effect of reallocating resources, and if the proposition were generally accepted that it is essentially no business of government to introduce a change in resource use for the sole purpose of benefiting one person at the expense of another, we would have a strong case for a compensation rule admitting of no exceptions except, perhaps, "impossibility" (meaning extreme impracticability).

But we cannot stand on the assumption that efficiency is the only goal. Few people any longer doubt that governments are properly engaged in controlling the distribution of wealth and income among members of society, as well as in controlling resource use so as to maximize the aggregate social product. It is, no doubt, intellectually most satisfying and productive to isolate the government's distribution function from its allocation function. One can then analyze public budgetary problems as if distributional decisions were always embodied in a "pure" form, such as a payment of "welfare" benefits, which both makes clear their distributional purposes and impacts and prevents distributional considerations from impairing the efficiency judgments which alone ought to govern decisions about resource use.<sup>33</sup> But

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<sup>31</sup> E.g., *Southern Pac. Co. v. City of Los Angeles*, 51 Cal. Rptr. 197, 203 (Dist. Ct. App. 1966), *appeal dismissed per curiam*, 87 S. Ct. 767 (1967); cf. J. BEUSCHER, *supra* note 29, at 539.

<sup>32</sup> See Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238, 1254 (1960). This point is made forcefully by F. HAYEK, *THE CONSTITUTION OF LIBERTY* 351 (1960). Professor Hayek does not go on to consider that "the planners," in decrying the heavy cost of compensating, may have had in mind the costs of arriving at settlements, or the costs associated with the destabilizing effects on the economy of raising the wherewithal through taxation.

<sup>33</sup> See R. MUSGRAVE, *supra* note 4, at 17-18.

no one contends that such rigid compartmentalization is followed in practice or that most people would prefer to see it instituted. It is widely felt that redistribution "in kind," through a government program ostensibly concerned with decisions about what to produce rather than with how products should be distributed, is sometimes preferable because redistribution in this form puts less strain on the sensibilities of the parties affected and also, perhaps, because in this form redistribution can be combined with a little disguised paternalism.<sup>34</sup> A public housing program, for example, surely makes its main appeal to the electorate through its redistributive and protective effects rather than through the idea that conversion of resources to this use is efficient.

Does recognition that redistribution may be a direct aim of measures that generate compensation claims, and not a mere consequence of the pursuit of efficiency, make the compensation problem go away? Of course, if there were no widely accepted limits to the kinds of redistribution which governments may undertake, we could end the discussion right here. It is clear that no discussion of any "compensation problem" can go forward (and, indeed, that no such problem can even be detected) unless there are standards which enable us to differentiate between intrinsically acceptable redistributive effects and those which seem, *prima facie*, to call for either compensation or special justification.

For the purposes of this essay I propose to rely on a proposition which will, I believe, command general and intuitive agreement. The proposition is that a designed redistribution by government action will surely be regarded as arbitrary unless it has a general and apparent "equalizing" tendency — unless its evident purpose is to redistribute from the better off to the worse off. Progressive income taxes and social welfare programs are, of course, excellent examples of such measures.

Whatever the explanation for the special tolerance for "equalizing" redistributions,<sup>35</sup> I shall take it that it is clear why a claim

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<sup>34</sup> See Heller, *Economics and the Applied Theory of Public Expenditure*, in JOINT ECON. COMM., 85TH CONG., 1ST SESS., FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH AND STABILITY 98, 99-102 (Comm. Print 1957); Maass, *Benefit-Cost Analysis: Its Relevance to Public Investment Decisions*, 80 Q.J. ECON. 208, 209, 214-15 (1966).

<sup>35</sup> It might, conceivably, stem from general agreement that an extra dollar is likely to embody more utility in the hands of a person who now has less, or very few of them, than in those of one who now has more, or very many. The utilitarian, concerned to maximize aggregate welfare as his ultimate goal, may accept this explanation. See J. BENTHAM, *THEORY OF LEGISLATION* 102-09 (7th ed.

to compensation, to offset a redistributive change in resource use, cannot usually be dismissed simply by asserting that the particular redistribution, having been determined upon by the legislature, must be deemed just. For most of the measures in question will very likely seem arbitrary if examined from the distributional point of view. Reverting to our earlier illustrations, we may say that there is no widely shared ethical precept which seems to warrant a redistribution from a member of the class of foundry owners to members of the class of residence owners; or from one, in his capacity as residence owner, to others, in their capacities as playground users; or from some who are residence owners to others who use crosstown streets. There is nothing about membership in any of these classes which seems to have any bearing on the fairness of a redistribution, for the redistribution is most unlikely to promote "equalization." The collective decisions we are talking about will not usually have been taken with any view to the preexisting incomes or accumulations of the persons incurring special losses and gains as a result; and so the measures will not, except by accident most unlikely to occur, be sustainable on the basis of what would be revealed by an investigation into those circumstances.

Yet measures such as the restriction on foundry operations in residential areas and the conversion of a neighborhood street into an arterial highway may be accompanied by accidental losses which, while not justified by any recognized distributional precept, are universally admitted to be noncompensable. It appears, then, that a redistribution which would have been unacceptable if undertaken for its own sake may be tolerated if it is the accidental consequence of a measure claiming the independent justification of efficiency. To ask why this should be so is one of the most fruitful approaches to the general compensation problem.

## II. SOME RULES OF DECISION

Examination of judicial decisions and of legal commentary focused on them indicates that one of four factors has usually

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1891). *But see id.* at 119-22. A better explanation might be that "equalizing" redistributions are accepted — within limits — because of a widespread conviction that the spectacle of extreme distributional inequalities, unalleviated by any visible social counteraction, presents an intolerable threat to social stability and cohesion. *See Deutsch, The Price of Integration*, in *THE INTEGRATION OF POLITICAL COMMUNITIES* 143, 153-54 (P. Jacob & J. Toscano ed. 1964). Or it might simply be that "equalization" seems consistent with the basic ethical postulate that one man's claims are the equivalent of any other man's.

been deemed critical in classifying an occasion as compensable or not: (1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.

There follow some brief comments on each of these four "tests." The discussions are, at this point, tentative and incomplete. Their purpose is the limited one of showing that none of the standard criteria yields a sound and self-sufficient rule of decision — that each of them, when attempts are made to erect it into a general principle, is either seriously misguided, ruinously incomplete, or uselessly overbroad. The discussions tend to overlook certain redeeming qualities in the criteria — their cores of valid insight and their embodiment (and concealment) of quite relevant, even if not necessarily conclusive, inquiries. These aspects are developed at a later point.

### A. *Physical Invasion*

At one time it was commonly held that, in the absence of explicit expropriation, a compensable "taking" could occur *only* through physical encroachment and occupation.<sup>36</sup> The modern significance of physical occupation is that courts, while they sometimes do hold nontrespasory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.<sup>37</sup> This may be true although

<sup>36</sup> See, e.g., *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

<sup>37</sup> Let us here stipulate that the word "thing" signifies any discrete, identifiable (even if incorporeal) vehicle of economic value which one can conceive of as being owned. Patents, easements, and contract rights are all examples of "things" as I am here using the term. Such things can be affirmatively expropriated by public authority in a manner analogous to its "taking" of a corporeal thing. Government, for example, might expropriate and continue to operate a going business, exploiting all its appurtenant incorporeal things. Likewise, government may destroy the value of incorporeal things just as it may destroy the value of corporeal things which it does not affirmatively exploit. By replacing next door's residence with a town incinerator it may deprive me not only of part of the

the invasion is practically trifling from the owner's point of view:<sup>38</sup> a marginally encroaching sidewalk, for example, or the installation of utility lines underneath a road where the public already owns an easement of way across the surface.<sup>39</sup> Moreover, compensation may be due although the actual harm to the complainant is indistinguishable from noncompensable harm to him which results from activity on the part of the government identical in every respect save that it apparently does not invade "his" sector of space.<sup>40</sup>

At first blush, it might seem that the magic of physical invasion is rooted in wordplay. Tutored by our constitutions, we are accustomed to thinking of compensation as being a requirement coupled with "takings" of "property." "Property" suggests a thing owned,<sup>41</sup> and "taking" suggests physical appropriation.

value of my land but also of the value of a building restriction, of which I was a beneficiary, supposed to prevent nonresidential uses of the land next door; and just as public authority can reduce the value of my land by forbidding me to use it for purposes of manufacturing, so can it, by introducing prohibition, destroy the value of my patent on a distilling process.

<sup>38</sup> See *Lovett v. West Virginia Cent. Gas Co.*, 65 W. Va. 739, 65 S.E. 196 (1909); 2 P. NICHOLS, *EMINENT DOMAIN* 396 (1963).

<sup>39</sup> See *Calor Oil & Gas Co. v. Withers' Adm'r*, 141 Ky. 489, 133 S.W. 210 (1911); 3 P. NICHOLS, *EMINENT DOMAIN* § 10.7 [1] (1965). But see *Cleveland v. City of Detroit*, 324 Mich. 527, 37 N.W.2d 625 (1949). In the case of the marginally encroaching public way, "just compensation" will probably be calculated, illogically, by multiplying the fair market value of the whole parcel by a fraction corresponding to the ratio between the number of square feet taken, and the number of square feet composing the parcel. See 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* 248-49 (2d ed. 1953). The result may well be an award of substantial compensation for nominal harm.

Perhaps some erosion of the strict rule requiring compensation for all physical occupation may be detected in decisions sustaining "subdivision exactions," whereby owners proposing certain changes in the use of their land are denied permits unless they dedicate specified portions of their holdings to street, park, or other public uses. E.g., *Southern Pac. Co. v. City of Los Angeles*, 51 Cal. Rptr. 197 (Dist. Ct. App. 1966), *appeal dismissed per curiam*, 87 S. Ct. 767 (1967). While it is of course true that these measures in form involve only *regulation*, and not *eviction* (see *Zayas Pizarro v. Puerto Rico Planning, Urbanizing & Zoning Bd.*, 69 P.R.R. 27 (1948)) economic necessity may be such as to make the distinction seem practically illusory.

<sup>40</sup> The reference, of course, is to the "flight nuisance" cases. See pp. 1169-70 *supra*.

<sup>41</sup> Such usage is not fashionable in academic circles, where there is a preference for a more sophisticated use of "property" to denote legal relations among persons with respect to things, rather than the things themselves which are the "subjects of property." See, e.g., *RESTATEMENT OF PROPERTY* ch. 1, Introductory Note (1936). In strictest *Restatement* parlance, "property" is not available even to describe the aggregations of rights, powers, privileges, and immunities (all having reference to the use or disposition of a specified thing) which inure to "owners." Those aggregations are called "interests in" a thing. "Property" is reserved for the

These connotations are reinforced by a basic form-over-substance argument. Since it is axiomatic that when government formally asserts a transfer of title to itself it must pay "just compensation," it should follow that when government in fact makes regular or permanent use of a thing which would be wrongful unless it had acquired title, it must pay that amount of compensation which acquisition of a title commensurate with its use would have cost it. The obligation to pay compensation is not to be escaped by simply declining to acquire title.<sup>42</sup>

Even when taken on its own strictly verbal terms, this line of argument does not hold up. It begins to fail as soon as we press on to a modest level of lingual sophistication.

Government may desire a benefit from private land which is obtained by affirmative, physical governmental or public use. But government may as well desire a benefit from that land — say scenic value — which requires only the owner's forbearance to make a certain use of it. We have conventionally recognized such "negative" benefits as "property" denominating them "negative easements," "covenants" running at law or in equity, or "servitudes." Just as government is free to purchase an "easement of way" from me (and to force me to sell) in case it wishes to drive its trucks over my land, so may government coercively purchase from me a "scenic easement" — a right to prevent me (doubtless through the use of an equitable remedy exactly corresponding to that available to a private person to whom I might sell such a right) from erecting any structure on my land.<sup>43</sup> Just as we say, when government behaves as though it owns an easement of way over my land (by regularly passing through), that it has "taken" the "property" consisting of such an easement and therefore must pay for it, we may say that when government behaves as though it owns a servitude burdening my land (by threatening to invoke a judicial remedy to prevent my making a certain use of it) it has "taken" the "property" consisting of the servitude and therefore must pay for it.<sup>44</sup> Wordplay — in short

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institution, or the system of legal relations, within which "ownership" occurs. See *id.* at § 5, comment *c*.

<sup>42</sup> Compare Sax, *supra* note 14, at 46-48.

<sup>43</sup> See, e.g., Highway Beautification Act of 1965, 23 U.S.C. §§ 131(g), 136(j) (Supp. I, 1965); N.J. STAT. ANN. § 13:8A-12(b) (Supp. 1966).

<sup>44</sup> See *Bydlon v. United States*, 175 F. Supp. 891, 900 (Ct. Cl. 1959); *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (Dist. Ct. App. 1963); Comment, *Airport Approach Zoning: Ad Coelum Rejuvenated*, 12 U.C.L.A.L. REV. 1451, 1454 n.17 (1965); cf. *Chappell v. United States*, 34 F. 673 (C.C.D. Md. 1888); *Chili Plaza, Inc. v. State*, 42 Misc. 2d 861, 248 N.Y.S.2d

dogged adherence to the constitutional formulas of "taking" and "property" — cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint.<sup>45</sup>

919 (Ct. Cl. 1964). The statement in the text should not be taken to reflect any opinion about whether an "inverse condemnation" action (for money damages) should ever lie in such a case. It means merely that regulatory impositions can be explained semantically as "takings of property" so that courts can, by issuing injunctions, require governments to choose between payment and nonenforcement. Whether a money judgment should ever be recoverable involves additional considerations. See generally J. BEUSCHER, *supra* note 29, at 538-50.

<sup>45</sup> The text glosses over an analytical distinction, which might be deemed relevant, between condemnation of an affirmative easement ("easement") and condemnation of a negative easement ("servitude"). In Hohfeldian terms, the condemnor of an "easement" invests himself with (i) a *privilege* to engage in activity which otherwise would have violated a duty he owed to the condemnee, and (ii) an appurtenant new *right* (implying a correlative new duty on the part of the condemnee) that the condemnee shall not interfere with the condemnor's exploitation of his new privilege. Establishment of a new easement thus entails the cancellation of a preexisting right-duty relationship, and also the creation of a new right-duty relationship running in the opposite direction. See Cook, *Legal Analysis in the Law of Prescriptive Easements*, 15 S. CAL. L. REV. 44 (1941). By contrast the condemnor of a "servitude," while destroying a liberty which the condemnee formerly enjoyed, gains no privilege for himself. A new right-duty relationship is created, but no preexisting one is ended. In language less exotic, it might be said that the condemnor of an easement becomes entitled to do acts which formerly only the condemnee could lawfully do or permit to be done; while the condemnor of a servitude, by contrast, does not become entitled to "do" anything. Thus it might be said that only where an easement is acquired has there been a transfer from the condemnee to the condemnor of any exploitative prerogative.

Now it might seem that only where some entitlement perceptibly shifts from one person to another should we think of "property" as having been "taken." If that were accepted, then the coercive acquisition by government of a servitude might be excluded, semantically, from the scope of the constitutional "taking" provisions. But, on further reflection, it appears equally true of the easement and servitude cases that the condemnee is deprived of the protection of law for a claim which has conventionally been regarded as a twig in his fee simple bundle—in the easement case, a right to exclude, and in the servitude case, a liberty to exploit. Moreover, it is equally true in both cases that the condemnor acquires an interest which is analytically distinguishable from the interest the condemnee loses. In the easement case, a right is lost and a converse privilege gained, appurtenant to which there may emerge a new right (to prevent interference with the newly privileged activity), which is a right quite different from the one (to exclude from the territory) which was lost; and in the servitude case, a liberty is lost and a right gained.

The analytical distinction between acquisition of an affirmative easement and acquisition of a servitude is, in any event, easily overlooked. Confusion of these two grounds of liability courses through the opinion in *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (Dist. Ct. App. 1963). And consider the widely noted decision in *Indiana Toll Road Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963). An airport operator sought damages from a neighboring landowner, basing his claim on the landowner's having built in viola-

Now there may be some kinds of resource-allocating government action which it seems hard to analyze as acquisitions of conventionally recognized "interests in property." If low-level flights of military aircraft, which do not invade "my" airspace, practically destroy the value of my surface to me, words cannot easily be manipulated to show that the government has, thereby, "taken" my "property." Government demands nothing of my land, makes no use of it, and derives no benefit from it. It is, moreover, indifferent to the use which is made of my property. Its conduct does not seem to characterize it as the owner of an easement or servitude, but simply as one maintaining what probably (though not necessarily) would be held a nuisance if privately instigated.<sup>46</sup> That suggests that we may treat the government as having acquired a "privilege" or "license" to maintain such a nuisance but received usage might seem too strained if we tried to call this a part of what used to be my "property."<sup>47</sup>

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tion of an "airport zoning" ordinance which limited the height of structures near the airport. The landowner, in defense, claimed that the ordinance was unconstitutional because it worked a taking of his property without just compensation. At issue, clearly, was the imposition of a servitude and not the exaction of a privilege. Yet the court, holding for the landowner, explained that the government, in enacting the ordinance, had attempted "to take and appropriate to its own use the ordinarily usable air space of the property" without paying compensation. Within the context of the case before it, the court's statement can mean only that the city "used" the air space when it forbade the owner of the underlying surface to use it. Under such a conception, any analytical distinction between easement and servitude simply disappears.

<sup>46</sup> See generally *Brandes v. Mitterling*, 67 Ariz. 349, 196 P.2d 464 (1948). An action of nuisance does not, of course, lie against the government unless there has been a waiver of sovereign immunity to tort liability. It is where there has been no such waiver (or the waiver does not extend to "nuisance" liability) that the conceptual distinction between "quasicontractual," constitutionally premised liability for a "taking" and "tort" liability in respect of a "nuisance" becomes critical. See, e.g., *Wenderoth v. Baker*, 382 S.W.2d 578, 580 (Ark. 1964); *Stoe-buck, Condemnation By Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. — (1967) (to appear).

Of course, government-generated "nuisances" are frequently held to be "takings" despite their nontrespassory character, and this circumstance has sometimes led to judicial recognition of "nuisance" as a distinct ground of government liability, even where there has been no statutory waiver of immunity. See A. VAN ALSTYNE, A STUDY RELATING TO SOVEREIGN IMMUNITY 225-26 (5 CALIFORNIA LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES) (1963); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 15-16 & n.27.

<sup>47</sup> It should be noted, however, that an "easement for a nuisance" (i.e., an irrevocable privilege to conduct an activity which would be enjoined by a neighbor under ordinary "private nuisance" standards) is both known to the common law, see RESTATEMENT OF PROPERTY § 451, comment a (1944), and acquirable by prescription, see *Sturges v. Bridgman*, 11 Ch. D. 853 (1879) (by implication).



By resort to such verbal gyrations one might, perhaps, explain the distinctions in treatment in the flight nuisance cases. But the explanation, even if linguistically sound, would be deficient in other respects. Its essence would appear to be that government must "pay for" any "property" which it "takes" but not for "merely" maintaining a "nuisance." Government may not, that is, acquire "something" without rendering full value therefor. That would seem to imply that government must pay a sum, for what it takes, approximating what a straightforward purchase would have cost it. In the case of a consensual easement of flight across private airspace, a price would probably be reached which somewhat exceeded the market devaluation of the underlying land thought to result from the contemplated overflights.<sup>48</sup> Yet when such an easement is unilaterally created by government activity, "just compensation" is figured at the amount of market devaluation, not at any projected, hypothetical "selling price" for the easement.<sup>49</sup> The point is not that so to figure the compensation is in any way unjust. Rather it is that the method of calculation indicates that government is being required to make good a loss which it caused — to cancel a redistribution — and not to "pay for" the "property" it received.<sup>50</sup> If, indeed, compen-

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See also *Snively v. City of Goldensale*, 10 Wash. 2d 453, 117 P.2d 221 (1941) (implying that city can condemn a privilege to pollute a stream); *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 65, 87. Use of this concept would open the semantic door to a "taking" argument even in flight nuisance cases not involving trespasses.

<sup>48</sup> The figure which the government uses to express the net benefits expected to accrue to society from the proposed use (the maximum price it should be willing to pay) probably exceeds the amount of market devaluation to be sustained by the underlying land. The underlying owner is in a position to levy a monopoly toll, because the commodity the government desires (a lawful flight path congruent with airport runways) cannot be purchased elsewhere. If this is the situation, strategic bargaining can be expected to arrive at a price somewhere in excess of the amount of the underlying owner's contemplated loss due to overflights. See J. VON NEUMANN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 556-57 (3d ed. 1953).

<sup>49</sup> See, e.g., *United States v. Causby*, 328 U.S. 256, 261-63 (1946). But cf. *Smith v. Potomac Elec. Power Co.*, 236 Md. 51, 202 A.2d 604 (1964) (by implication) (when condemnor takes fee but grants back limited use privileges to condemnee, value of privileges granted back may not be offset against value of fee interest taken in calculating just compensation).

<sup>50</sup> Compare the situation in which a landowner has sold his neighbor a motor vehicle right-of-way for \$5,000 — a figure which approaches both the seller's appraisal of his capital loss and the buyer's of his capitalized benefits — and the government later "takes" a privilege to drive its trucks over the same way. Even if the government's concurrent use neither aggravates the burden on the fee owner nor impedes the activity of the prior easement holder, it probably would

sation were strictly a concomitant of a constructive shifting of title, then it is not easy to see why any should be required in the flight nuisance cases, since the airplanes in question will almost certainly lie within the "navigable airspace" which Congress has already legislated into the public domain.<sup>51</sup> If compensation is required in respect of overflights through the public domain, then surely what is occurring is cancellation of a redistribution, and not payment for transferred property. And, on that basis, we are not only still shy of a distinction in the flight nuisance cases which will justify different treatment depending on whether or not "direct" overflights are occurring, but we also remain unenlightened as to why compensation should be so uncompromisingly required for physical takeovers which inflict no substantial economic harm.

### *B. Diminution of Value*

The mystery of the harmless physical takeover deepens when we turn to another common "test": compensability is often said to depend on the amount or degree of harm inflicted on the claimant. This is no assertion that an empirical line of distinction can be traced through the generality of "compensability" cases, dividing them into cases of "large" harms held compensable and "small" harms held noncompensable. The point, rather, is that in a considerable number of cases the amount or degree of harm *is stated* to be the discriminant of compensability;<sup>52</sup> and the statement sometimes comes from high authority.<sup>53</sup> But the

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have had to pay some more-than-nominal amount for its privilege had it been a private person. Yet it is held that a compensation award under such circumstances need be nominal only. See McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 471-72 (1933).

<sup>51</sup> 49 U.S.C. §§ 1301(24), 1304 (1964). This argument against compensation does, of course, suggest a question about the constitutionality of the "navigable airspace" legislation which changed the old "hell to heaven" rule. See Dunham, *supra* note 47, at 85-86.

<sup>52</sup> See, e.g., *Stevens v. City of Salisbury*, 240 Md. 556, 567-68, 571-73, 214 A.2d 775, 781, 784 (1965). Decisions disposing of constitutional challenges to zoning ordinances are full of such statements. Regulations are invalidated on the ground that they destroy too much value, e.g., *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964), or are sustained inasmuch as they destroy only a tolerable amount of value, e.g., *Neubauer v. Town of Surfside*, 181 So. 2d 707 (Fla. App. 1966).

<sup>53</sup> Most often cited as representative of the "diminution of value" test is the opinion of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See, e.g., Sax, *supra* note 14, at 41-42. The opinion contains two statements which strongly suggest adherence to such a test: (1) "One fact for consideration in determining such limits [of the principle that values are enjoyed subject to the police power] is the extent of the diminution. When it reaches a

"magnitude of the harm" test is intriguingly selective. It does not show up in cases involving physical takeover.<sup>54</sup> More striking, perhaps, is the absence of "magnitude" considerations from decisions sustaining curbs on "noxious" or "nuisance-like" uses of property; for these may, it seems, be quelled by public authority without any compensation for huge losses representing near-total devaluation of holdings.<sup>55</sup> Thus, the "magnitude" test holds sway only in cases involving neither a physical takeover nor a restriction on activity savoring of "nuisance." Its main targets are regulations directed against "innocent" property uses, and nontrespasory devaluations consequent on public development.<sup>56</sup>

No one will question that the size of the imposition must be a relevant factor in determining whether compensation should be paid. Even if there may be situations in which disproportionate social cost distribution may justly be tolerated, the claim to compensation must grow more compelling as the disproportionate harm increases towards immensity. But it is one thing to admit the relevance of the size factor, and quite another to convert that factor into the conclusive litmus. The attempt to formulate a "test" in terms of magnitude leads one into some puzzling questions, quite apart from the obvious one of where to draw the line.

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certain magnitude, in most if not in all cases there must be an exercise of [the power of] eminent domain and compensation to sustain the act." (2) "The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 413, 415. A reading of the entire opinion, however, leaves doubts about just what theory Justice Holmes was espousing. The first of the quoted statements may, in context, be part of a statement that, as the private loss increases, a larger public need or gain is required to justify the uncompensated imposition. Thus some kind of a "balancing" test may be intended. The second quoted statement occurs in a passage which is carefully restricted in applicability to cases resembling the one before the Court, where the prohibited use had been deliberately carved out and reserved when the balance of the fee simple was transferred.

<sup>54</sup> See *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809-11 & n.8 (1950). Subdivision exaction cases might be said to require a qualification of this statement. See note 39 *supra*; *Southern Pac. Co. v. City of Los Angeles*, 51 Cal. Rptr. 197, 198, 203 (Dist. Ct. App. 1966), *appeal dismissed per curiam*, 87 S. Ct. 767 (1967).

<sup>55</sup> *E.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); see *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962), an amazing case in which a zoning restriction making no provision for compensation was sustained despite an unimpugned finding that the restriction left the complainant's land utterly unusable for any productive purposes.

<sup>56</sup> *E.g.*, *Bellamy v. United States*, 235 F. Supp. 139 (E.D.S.C. 1964); *Friendship Cemetery v. City of Baltimore*, 197 Md. 610, 81 A.2d 57 (1951).

Is the supposedly critical factor the size of the private loss absolutely, or rather the size of that loss compared with some other quantity? And if, as seems clear, a comparison of magnitudes is intended — a comparison in which, were it fractionally expressed, the loss in value of the affected property would compose the numerator — what value supplies the denominator? Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?

The latter sort of comparison may seem more relevant to a decision whether or not to compensate; for it would forge a link between compensability and one's ability to sustain uncompensated burdens. But it seems plain that the former sort of comparison is intended; the decisions contain many statements that compensation is required in all cases where government action has destroyed all or nearly all the value of some *piece of property*. Thus if government — without physically moving in — effectively prevents all use of an isolated parcel of land worth a few thousand dollars, compensation will probably be required (unless, perhaps, the restriction is couched so as explicitly to prohibit only "noxious" uses);<sup>57</sup> whereas an owner may have to put up with six-figure losses inflicted by a zoning regulation, as long as the regulated land retains some use and some market value.<sup>58</sup> In other words, to determine compensability one is expected to focus on the particular "thing" injuriously affected and to inquire *what proportion of its value* is destroyed by the measure in question. If this proportion is so large as to approach totality, compensation is due; otherwise, not. It is not easy to see the relevance of this particular inquiry to just decision.

The difficulty is aggravated when the question is raised of how to define the "particular thing" whose value is to furnish the denominator of the fraction.<sup>59</sup> Let us suppose that I own a tract of unimproved land. Is the land necessarily one "thing" for this purpose, or might it be several? Can it, for example, ever be regarded as geographically divided into more than one thing? Evidently, it can be; for, if we imagine government's practically forbidding me any use of a geographically determined quarter of my farm, it is not likely that the obligation to com-

<sup>57</sup> See *Mackie v. United States*, 194 F. Supp. 306, 308 (D. Minn. 1961) (dictum).

<sup>58</sup> See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>59</sup> This problem has escaped neither Justice Brandeis, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419-20 (1922) (dissenting opinion), nor Professor Sax, see Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964).

pensate can be escaped by the argument that only a quarter of the value of the "thing" has been destroyed.<sup>60</sup>

It might thus appear that the scope of the "thing" subject to devaluation is to be defined by the incidence of the measure itself. But if that is so, will it not begin to seem as though *all* use restrictions are totally destructive of value? Suppose I am forbidden to remove gravel from my land, or to use my land for a foundry. Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as "rights" to particular surface uses have come to be recognized as species of "property" under the label of "easement" or "servitude," why not say that my land consists of two "things" — mining rights and surface rights, or foundry rights and residue — and that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of *those* rights — which the regulation totally destroys? <sup>61</sup> Why, in other words, should a regulation's own scope sometimes define the geographical, but not the functional, extent of the "thing" said to be regulated?

### *C. Balancing Social Gains Against Private Losses*

A popular — one may say a commonplace — test of the legitimacy of a police-power measure is to compare the need of society for the measure, or the contemplated gain of society from it, with the harm it will cause to the individual or class of individuals complaining. If individual losses are found to be "outweighed by" social gains, the measure is deemed legitimate.

This "balancing test" is sometimes advanced as a way to distinguish regulations requiring compensation from those not requiring it.<sup>62</sup> But use of the balancing test for such a purpose

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<sup>60</sup> See *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951).

<sup>61</sup> Courts have occasionally intimated their appreciation of the constitutional havoc which might be wrought in such cases by treating property as functionally divisible. See *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 532 (9th Cir. 1931); *Town of Seekonk v. John J. McHale Sons*, 324 Mass. 271, 90 N.E.2d 325, 327 (1950); *Township of Bloomfield v. Beardslee*, 349 Mich. 296, 303, 84 N.W.2d 537, 540 (1957).

<sup>62</sup> The most significant commentary to endorse such a use of the balancing test is probably Kratovil & Harrison, *Eminent Domain — Policy and Concept*, 42 CALIF. L. REV. 596, 609 (1954). Judicial decisions professing reliance on the balancing test frequently do not make clear (because there is no occasion) whether that test is regarded as determining only whether the object of a measure is within the competence of government to pursue by any means whatsoever, or as determining also the distinct question of compensability. See, e.g., *Malman v. Village of Lincolnwood*, 61 Ill. App. 2d 55, 208 N.E.2d 884 (1965). Some opinions do explicitly apply a balancing test to the compensability issue. See, e.g.,

seems to be a mistake, at best reflecting a careless confusion of two quite distinct questions. These are, first, whether a given measure would be in order assuming it were accompanied by compensation payments; and, second, whether the same measure, conceding that it would be proper under conditions of full compensation, ought to be enforced without payment of any compensation. The balancing test may have something to do with the first question, but cannot have anything to do with the second.

A danger which seems to be common to balancing tests is that they traduce us into imagining that there are persons in society whose interests can somehow be excluded from, and counterpoised against, "society's interests." The figure of the balance leads us momentarily to suppose that "society" has interests not shared by everyone, and that there are people who have interests which are not relevant to a calculation of what "society's interests" are.<sup>63</sup> But what, after all, can it mean, in a society professing the respect for persons which seems centrally implicit in liberal democratic institutions, to "weigh individual losses against social gains"? Must this not be but a casual way of asking whether there will be a greater or lesser sum of good (utility, welfare, happiness, pleasure) throughout society — as determined by examining the altered situations of *all* society's members — as a result of the measure in controversy? How can the "individual loss" be extracted from the calculation of the "social gain" so as to be "weighed against" it?

The balancing test can be rendered intelligible — on individualistic assumptions — only by supposing it to inquire whether, considering that some people will suffer losses from a proposed measure, the measure is yet efficient in the sense that *other people's* (not "society's") gains in some sense exceed or overshadow the admitted losses. To embark on that inquiry is, of course, to reveal an unstated ethical premise to which we have already directed

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Rochester Business Institute, Inc. v. City of Rochester, 25 App. Div. 2d 97, 267 N.Y.S.2d 274 (1966). And compare decisions implying that measures impelled by "public necessity" may be enforced under the police power without compensation, while infliction of identical private losses in pursuit of "mere convenience" requires exercise of eminent domain powers. *E.g.*, Gerlach Livestock Co. v. United States, 76 F. Supp. 87 (Ct. Cl. 1948), *aff'd on other grounds*, 339 U.S. 725 (1950); City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930). See also Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

<sup>63</sup> See generally Fried, *Two Concepts of Interest: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

some discussion — namely, that even if deliberate, collective impositions of individual harm must sometimes (or oft-times) be tolerated, they will not be tolerated unless they bring a net gain in aggregate welfare.

We might restate the balancing test by asking whether a distribution could be arrived at, under the regime to be established by the proposed measure, whereby everyone will be at least as well off as he was before, while at least some people will be better off. We would, by adopting that formulation, be implying that collective action having such a potentiality is right, or at least acceptable. We would also be implying that collective action lacking such a potentiality is wrong — or, at least, that there is no solid ethical foundation for nonequalizing social action which impoverishes some while enriching others, but without enriching "society" taken in the aggregate. The balancing test, on such a view, would merely inquire whether that supposed minimal condition of legitimacy exists, with respect to any measure not openly claiming justification as an equalizing redistribution.

Whether the balancing test, so interpreted, is of any interest to courts depends on whether courts will assume a role of appraising the efficiency of legislative measures. A case can, of course, be made for such a judicial role under some circumstances. That a majority (or a majority of representatives, or the representatives of a majority) have assented to a measure plainly gives no assurance that the measure is efficient. The approving majority may gain less from the measure than the resistant minority lose. In such a case, the imposition cannot appeal even to the weak justification that it contributes a positive sum to the long-run social accounting. It would be impossible to justify the measure within any system which insists that no one may be imposed on for the sake of another, but only for the sake of general gains in which he has a fair or equal chance to participate over the long run. If, then, a measure rather plainly violates this rule, or if the conditions surrounding or events leading up to its enactment show that it would be foolhardy to hope for its conformity to the rule, a court may intervene and nullify the measure on the ground that it is "arbitrary," "capricious," "unreasonable," "discriminatory," not in pursuit of a "public purpose," or the result of a process in some way "corrupted" by "improper" motivations.<sup>64</sup>

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<sup>64</sup> See generally Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965).

Judicial action of this sort must be rather rare for obvious reasons. Indeed, it is possible to make a strong argument that judicial nay-saying on such "inefficiency" grounds is quite unacceptable. But it is not necessary to arrive at confident conclusions about a proper attitude for the judiciary to assume towards the efficiency judgments of the legislature in order to agree that judgments about efficiency exhaust the significance of any comparison of gains flowing from a measure with the losses occasioned by it. In particular, although a weighing of *A*'s losses against the gains of *B*, *C*, and *D* may tell us whether a measure is efficient, that weighing cannot tell us whether the measure may be justly enforced against *A* without compensating him. Attempts to make the weighing yield that further insight seem to lead to absurdity. Such attempts imply that, where the general gains to the many only marginally exceed special losses to the few, those gains must be practically exhausted making good the individual losses; while gains to the many which vastly exceed individual losses may be retained intact even though the losses might be repaired leaving substantial gains for all.<sup>65</sup>

#### *D. Private Fault and Public Benefit*

Some of the most thoughtful commentators on our problem have suggested that the way to distinguish between compensable and noncompensable impositions is to ask whether the imposition simply restrains conduct which is harmful to others or whether, on the other hand, it aims at positive enrichment of the public through the extraction of public good from private property. The idea is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself.<sup>66</sup>

<sup>65</sup> At least one court seems to have sensed the fallaciousness of the balancing test as applied to compensability issues. See *Bacich v. Board of Control*, 23 Cal. 2d 343, 351, 144 P.2d 818, 823-24 (1944).

<sup>66</sup> See Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958); E. FREUND, *THE POLICE POWER* 546 (1904). The "noxious use" theory, which would validate any "regulation" no matter how thoroughly destructive of value, as long as the use prohibited is harmful to others, was apparently embraced by Justice Brandeis dissenting in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922). But cf. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935). (The theory may extend by analogy to the point of permitting physical occupation by the public. See *Ayres v. City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).) And the converse idea of Professor Dunham, that regulations which effectively force "innocent" owners to dedicate their hold-



For illustration of this approach, let us compare a regulation forbidding continued operation of a brick works which has been annoying residential neighbors with one forbidding an owner of rare meadowland to develop it so as to deprive the public of the benefits of drainage and wildlife conservation. According to the theories we are now to consider, a person affected by the second regulation would have the stronger claim to compensation. But even as to him, the matter is not free of ambiguity. To see this clearly, we can take as a third example a regulation forbidding the erection of billboards along the highway. Shall we construe this regulation as one which prevents the "harms" of roadside blight and distraction, or as one securing the "benefits" of safety and amenity? Shall we say that it prevents the highway abutter from inflicting injury on passing motorists, or that it enhances the value of the public's highway facility? This third example serves to expose one basic difficulty with the method of classifying regulations as compensable or not according to whether they prevent harms or extract benefits. Such a method will not work unless we can establish a benchmark of "neutral" conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation). Later it will be shown how this difficulty can be resolved so as to yield an inquiry which disposes of many, but not all, compensability controversies.<sup>67</sup> For the moment, while we are still in a critical rather than a constructive frame of mind, discussion will be limited to showing that there is no basis for a general rule dispensing with compensation in respect of all regulations apparently of the "nuisance-prevention" type,<sup>68</sup> and that broad generali-

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ings to public purposes are compensable as "takings," has gained something of a following in modern decisions. See *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 529, 215 A.2d 597, 610-11 (1966); *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 555-56, 193 A.2d 332, 241-42 (1963).

<sup>67</sup> See pp. 1243-44 *infra*.

<sup>68</sup> These include not only laws restricting or forbidding certain "noxious" activities, but also "Euclidean" zoning which tries to quarantine activities normally regarded as "innocent" but capable of diminishing the benefits from certain "higher" uses of land if the uses get too close together: "the law of nuisances . . . may be consulted . . . for the helpful aid of its analogies in the process of ascertaining the scope of [the power to enact zoning ordinances] . . . . A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365,

zations in terms of harm-prevention as opposed to benefit-extraction will, therefore, have a dangerous tendency to misbehave.

The annals of our law supply us with a classic example of the fallacy which such generalizations too readily induce.<sup>69</sup> The case is a factual variation on the economist's familiar illustration of the "smoke nuisance."<sup>70</sup> *A* acquires an isolated tract of clay-rich land, believing that it could be profitably used for a brick works. *A*'s reading of the market turns out to be sound, and the value of his brickmaking establishment — what he could sell it for from time to time — increases. Meanwhile the city, which once was distant, spreads and eventually *A* finds his brick works engulfed by residences. There is now a serious incompatibility between *A*'s use of his land, and his neighbors' use of theirs. It happens that the bias of inertia favors *A*; the presence of residential neighbors does him no harm, but the neighbors would be better off if he would desist. The incompatibility, however, is surely as much the neighbors' doing as it is *A*'s. What excuse can society possibly have if it should now intervene on the neighbors' behalf, save that they are sustaining greater losses from *A*'s activities than *A* and his customers will sustain if *A* is forced to abandon brickmaking at that location so that forcing *A*'s hand will enrich society "as a whole"? If that is not the basis on which society acts, then it is simply making a naked distributional decision, preferring *A*'s neighbors' welfare to *A*'s. Yet unless such a redistribution is an equalizing one, which it could be only by sheer accident, it will simply be arbitrary.

For another illustration of the frequently illusory quality of the "antinuisance" perception, consider the celebrated cedar rust case, *Miller v. Schoene*.<sup>71</sup> In that case the Supreme Court upheld a Virginia statute requiring destruction, without compensation, of cedar trees infested with a pest deadly to nearby apple orchards (a basic factor in the local economy) but harmless to the host cedars themselves. Now one may, if one pleases, say that a "nuisance" existed, there being obvious incompatibility between apple-life and cedar-life. Can we, however, find any basis for saying that the cedars, and not the apples, were "the" nuisance? To rely on the fortuity that the pest spawns in the

387-88 (1926). Justice Sutherland's famous aphorism does, of course, strongly suggest a purpose for zoning quite distinct from that of maximizing aggregate welfare in the community.

<sup>69</sup> *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>70</sup> See, e.g., A. PIGOU, *THE ECONOMICS OF WELFARE* 183-84 (4th ed. 1952).

<sup>71</sup> 276 U.S. 272 (1928).

cedars would be to find comfort in an illusion; for the case is not essentially different from one in which the apple pest spent its whole life in the apple trees but could be exterminated only by some arcane component of cedar ash, to furnish which the cedar stands were condemned without compensation. The Court, at any rate, seemed to acknowledge that the immolation of the cedars could be justified only by the benefit which would result to the general economy, and not by any attribution of responsibility to the cedar owners. But why, then, was no compensation required?<sup>72</sup>

The foregoing paragraphs suggest a useful way of stating the reason why compensability cannot depend on a rule couched in terms of harms and benefits. As long as efficiency is the only justification advanced for a measure, it is impossible to classify that measure as one which prevents harms rather than extracts benefits, or vice versa. If the justification for a ban on the brick works must be that the brickmaker and his customers will lose less from the ban than the residential neighbors will gain, and if it cannot be that the residential neighbors have a "better" claim to well-being than have the brickmaker and his customers, the uncompensated brickmaker is as surely sacrificed in the interest

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<sup>72</sup> That the "fault" rationale, which often accompanies the harm-benefit approach, is itself an attractive nuisance may perhaps be detected also from the well-known manifesto in *Mugler v. Kansas*, 123 U.S. 623, 669 (1887):

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by . . . [the prohibition of a nuisance, whereby the value of property is depreciated] is very different from taking property for public use . . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

In answer to our burning question about why some particular individual, and not the whole public, is to pay the cost of a public good (the achievement of more health, morality, and safety for all), the Court explains that individuals cannot complain if they are simply told to stop behaving obnoxiously and inflicting injury on their fellows. The "noxious use" here rebuked was the manufacture of beer. It is easy, when it is convenient, to discover moral delinquency in any conduct which a legislature later finds it expedient to prohibit. But the accuracy, and the ingenuousness, of the Court's gratuitous moral judgment were probably questionable then, and surely have been ridiculed by history. There were better reasons for sustaining the uncompensated imposition (a prohibition law), but the Court, beguiled by the notion of "fault," failed to discover them.

of social amelioration as is the owner of meadowland in a flood plain or wildlife conservation area who is forbidden to build on it. Or, taking the converse view, if we can say of the brick-maker that he inflicts intolerable harm on others by insisting on the operation of a brickyard at a particular location, we can say with equal force of the meadow owner that he will inflict intolerable harm on his fellows by insisting on building at *his* particular location — as, indeed, we might, if we found it convenient, say of one whose land is about to be converted by coercive social action into a public playground that *he* inflicts intolerable harm on society by refusing to dedicate his land to that use.<sup>73</sup>

In all these cases, our speaking of “intolerable harm” would mean nothing except that it is society’s best judgment (as duly expressed through its legislative or administrative organs) that an existing or proposed allocation is inefficient. In all these cases, it can be admitted that society is competent to override such inefficient private decisions by directing a reallocation, without making it apparent why a demand for compensation should be deemed any less compelling in one situation than in another.

Recognition of these difficulties has recently led to a proposal to recast the harm/benefit distinction into one which would discriminate between actions by the government in its role of public enterpriser (compensable) and actions in its role of arbitrator in the ongoing, kaleidoscopic shifting of values which characterizes private property (noncompensable).<sup>74</sup> This approach — let us label it the “enterprise/arbitration” approach — deliberately forswears reliance on illusory connotations of “fault,” or illusory distinctions between harm-prevention and benefit-extraction, and thereby successfully skirts some of the intractable ambiguities of the harm/benefit method. In the case of the ban on highway advertising, for example, it would evidently be enough to substantiate a claim for compensation that the regulation has the effect of making more valuable the public’s property.<sup>75</sup> But if the ordinance were one calling for removal of billboards from areas in which the beneficiaries were all private land owners, so that no significant benefit would accrue to the public at large, no compensation would be required.

We are left with a fundamental question to ask of the enter-

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<sup>73</sup> See Sax, *supra* note 59, at 48-49; Heymann & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1128 (1964).

<sup>74</sup> See Sax, *supra* note 59, at 62-63.

<sup>75</sup> See *id.* at 67.

prise/arbitration test. If there is something "wrong" with deliberate collective action which diminishes a few people's welfare in the course of augmenting the welfare of "the public" at large, why is that something not as virulently present when those who stand to benefit at the expense of these same few people are "private" property owners rather than a "public" one? <sup>76</sup> The question is not essentially different from our basic challenge to the harm-prevention/benefit-extraction test: why should it be thought less odious for society to force a landowner to contribute without compensation to the welfare of his neighbors (those who suffer from his nuisance-like activities) than to the welfare of all of us (who suffer from his refusal to dedicate his land to public uses)?

The preceding discussion, it should be clearly understood, has been limited in both scope and ambition. The main points can be reduced to two: first, that the distinction between a restriction aimed at preventing *A* from harming *B*, and one aimed at overcoming *A*'s unwillingness to bestow benefits on *B*, makes no sense *as long as no justification save efficiency is or can be claimed for either restriction*; and, second, that even where efficiency is the only justification to be found for a measure, arguments and decisions about compensability often seem to be rested on the illusory distinction. This is, then, a limited indictment of the harm-prevention/benefit-extraction test. We are not denying its strong intuitive appeal, nor even that it contains an important core of truth. At this point we assert only that — no doubt because it is so captivating intuitively — the test invites improper application.<sup>77</sup>

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<sup>76</sup> The normal judicial instinct, in fact, is to deal *less* leniently with uncompensated impositions to the extent that they seem designed to serve "private" rather than "public" interests. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1966).

<sup>77</sup> It is appropriate to point out that Professor Dunham seems to recognize that the harm-benefit distinction is illusory as a matter of economic logic, see Dunham, *supra* note 66, at 664; and that he has suggested reasons for the distinction which lie in a quite different sphere, see *id.* at 664-65; Dunham, *Property, City Planning, and Liberty*, in *LAW AND LAND* 28, 38-43 (C. Haar ed. 1964). His point, in essence, is that an antinuisance measure tends to enjoin negatively, forbidding some uses but leaving a substantial range for private choice; while a public benefit measure tends to enjoin positively, "planning on" a designated use and leaving no room for private choice. This difference can, of course, only be one of degree. If one public benefit measure zones a downtown parcel for parking lot purposes only, another may permit a variety of uses as long as they do not interfere with aircraft using the nearby public airport. If an antinuisance

III. SOME THEORIES OF PROPERTY<sup>78</sup>

Our survey of the general "tests" most commonly discussed in connection with judicial judgments of compensability has yielded no conclusions save that none of the tests is adequately discriminating and reliable. Even without a clear concept of the precise purposes of compensation, to which an "adequate" test ought to answer, we have been able to reject various proposed rules on account of more or less obvious flaws.

We turn now from deck clearing to theory building or, more

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measure does not in terms forbid all uses, it may forbid the only use which makes economic sense. The difference in tendency, nevertheless, exists and is important. For if, after restrictions are imposed, the owner retains a significant latitude for choice about his property's destiny—"significant" in the sense that he can feel himself imprinting his will or personality on that property's future—then it may be said that critical value has been preserved which disappears if his residuary choices are too far narrowed. This value—let us call it the "liberty" value—is not, strictly speaking, economic. The market devaluation which strategically situated property suffers from being restricted, say, to parking lot uses may be negligible compared to losses to other property resulting from "negative" zoning against heavy industry. And so it might appear that a case is made for prejudice against public benefit measures regardless of whether or how greatly they redistribute, justifying a rather sharp distinction between them and antinuisance measures.

A difficulty here is that the seeming unrelatedness of the "liberty" value to the question of distributional (economic) fairness may disqualify that value from consideration *when the issue is whether or not to compensate*. If zoning for "parking lot purposes only" is intolerably destructive of *liberty*, why should a compensation payment be relied on to cure the damage? If a compensation payment can be said to cure the damage because it enables the victim to replace his lost vehicle for liberty—his overly restricted property—with a different, unrestricted vehicle, then we are again talking about economic redistribution: if the overly restrictive measure has not occasioned much market loss, the owner *can* exchange his overly restricted property if he chooses to. Indeed, this very fact demonstrates that his liberty has not been significantly impaired. The degree of impairment of liberty will, then, depend on the amount of market devaluation. And if there is no market devaluation, then there will be no impairment of liberty.

Still, the "liberty" analysis, if accepted, is important because it reminds us that sometimes there will be values other than economic values at stake. The measure complained of may, at one and the same time, destroy a quantum of liberty which had been conferred by ownership of the affected property, and devalue that property to the point where the liberty cannot be rescued by exchange. In such a case, it would seem correct, when appraising the harm suffered by the complainant in the course of deciding whether it would be fair or tolerable not to compensate him, to take into account not only his lost dollars, but also his lost liberty.

<sup>78</sup> The ensuing discussion can be regarded as an elaboration of Morris R. Cohen's provocative statement that "[a]n adequate theory of private property . . . should enable us to draw the line between justifiable and unjustifiable cases of confiscation." Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 26 (1927).

accurately, to theory hunting. We are looking for a clear and convincing statement of the *purposes* of the compensation practice, in a form which shows us how to state with precision the variables which ought to determine compensability. In one respect, we take our cue from some of the literature we are rejecting. We shall conduct our search by probing the nature of "property." We shall try, however, to avoid the method of simply converting conclusions otherwise derived into forms of statement in which they are rested on a conveniently selected definition of "property."<sup>79</sup>

The persistent temptation to hunt for the key to the compensation puzzle in the nature or essence of "property" may in part be traced to familiar constitutional verbiage. More fundamental, perhaps, is the circumstance that questions of compensation seem to presuppose the idea that an existing distribution should normally have a degree of permanence — an idea which seems bound up with the existence of "property." It does, at any rate, seem as though exploration of the idea of property should promote a clearer understanding of the compensation problem, *if by "the idea of property" is meant the pattern of behavioral assumptions and ethical values which have come to be associated with institutions dictating some degree of permanence of distribution.* If one can grasp the relationships which supposedly exist between institutions, behavioral assumptions, and values, then one ought to be able to arrive at some defensible conclusions about the contours, leeways, and qualifications one's own assumptions and values would impose on institutions.

#### A. "Desert" and "Personality" Theories

A "desert" theory, as the expression is used here, is one which justifies property by appeal to an ethical postulate about individual merit, asserting that property is desirable because under its regime individuals are able to get and keep what is due them. Such a theory makes no assertion that property is desirable be-

<sup>79</sup> An example of this method is the "argument" that "property" is not affected unless there is a physical touching or encroachment; or that since "property" rights are held subject to the public good, "property" is not "taken" by a measure originating in public necessity. This definitional form of argument even enters into Professor Sax's sophisticated conception of property as "the end result of a process of competition among inconsistent and contending economic values," generating his conclusion that compensation is never required in respect of government action which can be regarded as merely influencing the outcome of this competition as it occurs between private owners. Sax, *supra* note 59, at 61, 62-64.

cause it leads to consequences which can be regarded as good for society "as a whole."

It is possible to interpret Locke's celebrated "labor theory" as a theory of desert.<sup>80</sup> Locke's axiom, on such an interpretation, would be that whenever one mingles his effort with the raw stuff of the world, any resulting product ought — simply ought — to be his.<sup>81</sup> There will be no going behind that intuitive proposition.

It is not necessary, in order to show that the Lockean thesis is not serviceable in the solution of compensation problems under our extant property system, to detail the ambiguities and inconsistencies which emerge when attempts are made to elaborate that thesis into a system of ownership which is relevant to the conditions of a postindustrial society.<sup>82</sup> The labor-desert thesis, if we allow it to have any significance at all where accumulations and family successions are permitted, then has an unmistakably absolutist implication.<sup>83</sup> It thus stands in marked contrast to our own notably contingent and relative doctrines of ownership.<sup>84</sup> Without denying that widespread, intuitive acknowledgment of a producer's special claims on his product must have played some role in the development of our property institutions, we can easily agree that this role has not been nearly so preemptive as to render the labor-desert thesis a significant aid in the solution of compensation questions which arise at the margins of ownership as we know it. Once one admits that compensation need not be

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<sup>80</sup> J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ("Of Civil Government") ch. 5 (Peardon ed. 1952) [hereinafter cited as LOCKE, *SECOND TREATISE*]. We shall see that Locke's theory may, with at least equal plausibility, be understood as a social utility theory. See, e.g., W. KENDALL, *JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE* 70-74 (Illini paperback ed. 1965). Present purposes do not demand any expression of preference for either interpretation.

<sup>81</sup> See LOCKE, *SECOND TREATISE* ch. 5, §§ 27-30. A qualification is that no one may appropriate more than he can consume before it spoils. See *id.* at § 31. But this restraint ceases to be of practical importance once the device of a nonperishable medium for accumulation, i.e., money, is introduced. See *id.* at §§ 46-48.

<sup>82</sup> See, e.g., R. TAWNEY, *THE ACQUISITIVE SOCIETY* 52-83 (Harvest paperback ed. 1962); Rashdall, *The Philosophical Theory of Property*, in *PROPERTY: ITS DUTIES AND RIGHTS* 33, 44-47 (Bishop of Oxford ed. 1913). See generally, for a thorough analysis of Locke's property theory, C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 197-221 (1962).

<sup>83</sup> No amount of debate over how radical or extreme Locke's "individualism" really was can obscure from readers of the *Second Treatise* his conviction that government, as a general rule, should not indulge in measures which directly and seriously impair private wealth, whether derived from labor, investment, or inheritance. See LOCKE, *SECOND TREATISE* ch. 11, §§ 138-40.

<sup>84</sup> See, e.g., Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B.U.L. REV. 435 (1964); Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963).



paid *every* time the fruits of a man's (or an ancestor's) labor are devalued by collective action, Lockean labor-desert theory is of no further use as such. Direct consultation of it simply cannot yield answers to compensation questions.

The same may be said of "personality" theories. These have in common with "desert" theories that they do not look to an end of maximizing social consumption. In their more philosophic mode, they assert that production — or the philosopher may prefer, achievement, or expression — should be regarded as an end in itself, and property as an arrangement indispensable to this end. A representative argument of this sort is Bosanquet's to the effect that property furnishes the external matrix which makes possible the achievement of an integrated, purposive internal life, a unified as distinguished from an episodic life experience.<sup>85</sup> Related arguments proceed from psychological perceptions, whether intuitively or empirically based, of a human proclivity to identify the self with its possessions and thus to experience from a loss of possession the anguish of intimate, personal loss.<sup>86</sup>

Such theories of property, while important and illuminating, seem not to furnish any special key to the compensation problem. It is not clear that the notion of property as an extension of the self has any relevance at all to compensation claims not generated by governmental trespasses. As for the "expression" variants, it can be said that they do demand that a man be able to establish some durable claim to control some of the external things of the world, and some assurance of consistency in his relationships with them. The values prized by these theories would therefore be offended by a system in which capricious interruptions were so much the order of the day as to inhibit the evolution within individual minds of ideas of permanence, predictability, and security. But, short of that, the "personality" theories cannot tell us which redistributions — out of all which may occur within a system in which permanency and security remain the underlying assumptions — are particularly to be deprecated.<sup>87</sup>

<sup>85</sup> Bosanquet, *The Principle of Private Property*, in *ASPECTS OF THE SOCIAL PROBLEM* 308, 309-11 (B. Bosanquet ed. 1895); cf. Bienenfeld, *Prolegomena to a Psychoanalysis of Law and Justice*, 53 CALIF. L. REV. 957, 1001, 1254, 1292-97 (1965). See also Rashdall, *supra* note 82, at 60-64; T. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* 216-20 (1895).

<sup>86</sup> See O. BROWDER, R. CUNNINGHAM & J. JULIN, *BASIC PROPERTY LAW* 1196-99 (1966).

<sup>87</sup> Professor Reich, a leading contemporary exponent of the view that property functions to nourish and protect personality, argues for recognition of a "vested" right, irrevocable except upon payment of compensation, to all forms of wealth or

*B. Social Functionary Theories*

We turn now to property theories which depend chiefly on ultimate values associated with consumption. Agreement is universal on subsistence as an important value for human beings, and the conviction is probably no less widespread that comfort and leisure are self-evident goods. Thus production — the calling into existence of the immediate means to subsistence, comfort, and leisure — is recognized as an instrumental value of great importance.

There is a class of property theories maintaining that private ownership is desirable simply because production cannot be expected to go forward, or consumption to be enjoyed, unless resources and product are first distributed into the separate, authoritative governance of determinate persons. In their simpler forms, these "social functionary" theories depend on an assumption of human depravity. In the Aristotelian vision, the vice which ownership chiefly counteracts seems to be sloth; it is thought that only an owner — an identified person with a clear power and responsibility — will be moved, whether by obligation or pride, to bestow on resources the attention they require in the interest of fruitful production.<sup>88</sup> In the view of the Christian fathers and their scholastic followers, the problem is not so much sloth as it is covetousness and contentiousness; private ownership is seen as a device to curb eternal dissension over who may use what, and

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claims to income upon which depend a person's essential independence, or his accustomed station in life. See Reich, *The New Property*, 73 YALE L.J. 733, 771-74, 785-86 (1964). Through such an approach one could, perhaps, arrive at manageable standards for judging compensability. Current just compensation practice, however, ranges so far beyond what could conceivably be dictated by Professor Reich's concerns as to make clear its pursuit of goals other than the safeguarding of personality. For similar reasons we can dispense with trying to clarify, criticize, or refine existing compensation practices by measuring them against Professor Calabresi's trenchant reminders that society might choose to compensate people for serious injuries simply to forestall the socially undesirable "secondary economic effects" which may flow from the heavy concentration of loss on an individual. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-19, 527-28 (1961). Avoidance of secondary effects might conceivably be the informing principle of a rule requiring compensation for losses caused by public measures. But the actual elaboration of the rule in our society indicates different preoccupations. So, for that matter, does the very locution: "just compensation."

<sup>88</sup> See ARISTOTLE, *POLITICS* bk. II, chs. 3, 5, at 58, 62-64 (Sinclair ed. 1962). This theme is only one of several which pervade Aristotle's rather unsystematic defense of private property. See, e.g., R. SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 13-20 (1951); Rashdall, *supra* note 82, at 36-37.

when.<sup>89</sup> The point of agreement between Aristotle and the Christian writers is that property is necessitated by human inability to sustain in its absence an acceptable milieu for production and consumption.

A more sophisticated and less unflattering variant of the social functionary theory of ownership may be found in Locke's account, if that be taken as a consumption-oriented explanation of property in terms of social utility rather than as a theory of individual desert. The argument is that production at any level sufficient to advance consumption beyond what will support the crudest kind of subsistence requires planning, foresight, and organization in the employment of resources; requires, that is to say, saving, capital formation, investment, and management, all of which it is supposed could not occur without ownership.<sup>90</sup>

Now an owner viewed as a social functionary seems to have no moral claim — no more than would a Russian commissar or a Platonic guardian — to the preservation of any given state of distribution of wealth or income. The justification for his ownership is his functional, not his personal merit. His province is to husband, cultivate, and manage in the interest of all. He has no moral title to reserve for himself any greater portion of the product than is required for prudent saving and investment, and he is obliged to share the excess either through charity or through payment of a wage large enough to support an existence superior to the bare subsistence which individual labor, in the absence of capital, would support.<sup>91</sup>

Social functionary theories, then, while they do demand a certain durability in the distribution of managerial prerogatives over particular resources, do not at all demand any continuity in men's comparative welfare positions, in the relative sizes of their existing incomes or accumulations. Their proponents can be expected to tell us that "owners" need be given no more of a vested interest in their property than government or business officials hold in their jobs. The theories remain wholly rational and self-contained when the possibility is introduced that men will from

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<sup>89</sup> See, e.g., Carlyle, *The Theory of Property in Medieval Theology*, in *PROPERTY: ITS DUTIES AND RIGHTS* 119 (Bishop of Oxford ed. 1913); R. SCHLATTER, *supra* note 88, at 33-46.

<sup>90</sup> The basis for such an interpretation of Locke is ably and carefully reconstructed in MACPHERSON, *supra* note 82, at 197-238.

<sup>91</sup> Cf. TAWNEY, *supra* note 82, at 84-90.

time to time arbitrarily be made relatively richer or poorer. All they seem to require is that stewardships over identifiable resources be accorded sufficient continuity so that the beneficial effects of order, pride, responsibility, and management may be felt. Thus — to take modern examples — government flight nuisances and regulatory abolitions of existing businesses would seem to be neutral occurrences.<sup>92</sup> Such impositions would become suspect only if the theories were understood as meaning that order and responsibility in resource management require society's complete abstinence from embroilment in collective decision making; so that what is required is not merely that, as a normal practice, the physical means of production and their fruits be clearly under the control of one person rather than up for grabs, but that additionally, all allocational decisions be left to private owner-managers. As to that possible interpretation, it is enough to say that modern society simply does not subscribe to such a self-effacing view, and that the compensation problem is acute precisely insofar as it does not.

The compensation problem is, as has already been observed, a backwash of collective allocational decision making. At the core of the problem — inasmuch as monetary payments are regarded as removing it — is a redistribution of income or wealth. The social functionary theories of property we have just been describing are not offended by redistributions as such. Nor can they be deemed offended by the practice of collective allocating and still have any modern relevance at all, unless it be simply to remind us that property institutions may be thought desirable because they enhance production by forestalling contentiousness and evoking the stimulus of an owner's pride and sense of responsibility. It is not immediately apparent how or why a refusal to make compensation payments might raise peculiar risks of dissension or of undermining pride of ownership. To see how that might come about, one needs the assistance of an insight not directly or necessarily entailed in the social functionary theories.

### *C. Utilitarian Theories*<sup>93</sup>

A new (and, I believe, critical) element enters the picture when

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<sup>92</sup> Cf. J. MECKLIN, AN INTRODUCTION TO SOCIAL ETHICS 302-22 (1921).

<sup>93</sup> A "utilitarian" property theory may embrace all the insights of "social functionary" theories and be distinguished from them only by its additional concern for the factors on which the theories of Hume and Bentham are focused. The classic exposition of the broader utilitarian approach is R. ELX, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914).

we turn to the property theory of David Hume.<sup>94</sup> That element we may identify as the power of suggestion of insecurity.

Property, according to Hume, rests on men's ingrained habits of mind, stemming from (but no longer directly dependent on) an original, historic perception of individual advantage to be derived from mutual forbearance to interfere with the possessions of others.

Unlike Aristotle, the Fathers, the Schoolmen, and Locke, Hume does not perceive the advantage of property institutions to lie in any direct relationship between private ownership and productivity; nothing in his theory of advantage is inconsistent with the proposition that the level of productivity would be the same even if all resources were collectively owned.<sup>95</sup> Hume's theory of advantage does require that there be all-encompassing *rules* governing the right to control goods, for its premise is that social existence, which has overwhelming advantages, would be impossible in the absence of such rules; but that premise can as well lead to collectivism as to private property. The explanation of private property requires, in addition to men's original perception of advantage from rules which make association possible, an historical evolution of customary acceptance of rules of a certain kind.

The key is Hume's historical starting point, which posits men initially in an atomistic, nonsocial situation. By his account, sexual attraction and natural affections among family members lead men into a first perception of the advantages of association — the efficiency of combined and divided labor, and the usefulness of sharing. The wish to associate gradually transcends the family group. But as each person approaches association with strangers, cognizant of potential advantages, he carries with him a certain accumulation of possessions. Since it is men's selfishness, not their gregariousness or their sympathy, which turns

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There is little in the present essay which does not echo some passage in Ely's stimulatingly reflective and suggestive opus. While Ely does not offer a satisfying systematic treatment of the bearing of the distinctive utilitarian insight on the compensation problem, the raw material is there. See 1 *id.* at 248-53; 2 *id.* at 765-90.

<sup>94</sup> The essential exposition of the brilliant conception is in D. HUME, A TREATISE OF HUMAN NATURE bk. III., pt. II, §§ 2-4, at 436-59 (Dolphin paperback ed. 1961).

<sup>95</sup> That is, Hume is not arguing that *incentives* depend on private ownership. Elsewhere, however, he does suggest that a market is required to solve the problem of efficient allocation, which implies a relation between property and productivity. See, e.g., D. HUME, WRITINGS ON ECONOMICS 78-80 (Rotwein ed. 1955).

them towards association, nothing in the process of associating necessarily implies any security of possessions, or any curbs on violations of such security. Yet people realize that no lasting association will be possible as long as they trespass against one another. As a result, there evolves a kind of tentative practice of mutual forbearance, which gradually solidifies into an established set of rules. Property, then, is a conventionally recognized stability of possession, the convention evolving out of selfish perceptions of the advantage in association. Originally, it pertains only to accumulations in existence at the moment of association, but the need for rules clearly extends to resources as yet unpossessed. You need rules governing acquisition as well as rules governing trespass. The doctrines of occupancy, prescription, accession, and succession are natural outgrowths of the original perception of the need for order. So, finally, are the doctrines governing consensual transfer, which combine the perceived advantages of exchange with the perceived advantages of order.

Property, then, evolves out of an original perception of advantage in association and out of the impossibility of association without rules governing the right to control and enjoy things. *Private* property emerges because, if you start with an assumption of atomism, the natural move will be towards simply stabilizing the possessions of men entering into association; collectivizing is a more complicated, less obvious solution. Stabilized private possession, then, comes to be regarded as indispensable to social existence; and it follows that rules governing acquisition and exchange must be developed.

Hume does not say that the property institutions of the present day rest on each person's continuing, conscious perception that, absent stabilized private possession, society would disintegrate. What he does say is that men's habits of mind have been shaped in accordance with that perception and all its ramifications, so that events which are inconsistent with, or which threaten, stabilized private possession are the cause of a kind of instinctive unease which demands rectification.

Now none of this directly explains why collectively determined encroachments on individual possession should be forbidden. Certainly it does not explain why wholesale collectivization should be resisted. But it may, at the least, suggest that, *as long as individual possession continues to be the norm*, there is serious disvalue in the spectacle of any encroachment on possession by pub-

lic authority which is suggestive of arbitrary exploitation of a few at the hands of the many. The mind moves from such a spectacle, by a short and easy mental transition, to the idea of that mutual disregard for the possessions of others which, by ingrained mental habit, in turn invokes the dire idea of social disintegration — with an attendant sensation of unease. Indeed, it would be characteristic of Hume to point out how the whole mental process is short-circuited so that the spectacle of majoritarian exploitation immediately induces uneasiness, without awareness of any connective tissue of ideas.

Before following up the significance of Hume's line of thought as it bears on the compensation problem, it will be convenient to trace the flowering of his insight in the property theory of Bentham.

A number of pre-utilitarian property theories rested, as we have seen, on behavioral premises indicating that productivity will be enhanced by pride and responsibility of office; or that productivity will be frustrated and consumption voided of satisfaction by the discord which only clear and simple rules of control can forestall; or that productivity demands planning and organization. Assumptions such as these stand independent of, though they perhaps suggest, the further assumption that a high level of productivity depends on arrangements which assure to every person who invests or labors that he will share in the fruits of his investment or labor to a predictable extent. This additional assumption, though certainly evident in Hume, seems to have been definitively clarified and elaborated by Bentham. It was he who stimulated emphasis on the relevance of appearance and suggestion to the intensity of productive activity, as well as to the maintenance of that state of association which itself lifts productivity to a new plateau. Bentham's emphasis is of peculiar importance for present purposes because it does, more satisfactorily than any theory yet canvassed, furnish the germ of a theoretically satisfying approach to compensation questions.

Property, according to Bentham, is most aptly regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources.<sup>96</sup> So regarded, property

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<sup>96</sup> The statement which is usually accepted as definitive of Bentham's position is J. BENTHAM, *THEORY OF LEGISLATION* chs. 7-10 (6th ed. 1890). This work is a collaboration, of obscure nature, between Bentham and his French "compiler," Etienne Dumont. See *id.* at iii-ix (translator's preface).

becomes "a basis of expectations" founded on existing rules; that is to say, property is the institutionally established understanding that extant rules governing the relationships among men with respect to resources will continue in existence. The justification — Bentham regards it as a practical necessity — for adherence to such an understanding is that only through such adherence can we hope for a minimally acceptable level of productivity. The human motivations which result in production are, he believes, such that they will not operate in the absence of secure expectations about future enjoyment of product. It is supposed that men will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings.

If one agrees with Bentham that the will to labor and the will to invest depend upon reliable assurances about the future enjoyment of any product, he must agree also that any unpredictable redistribution is potentially destructive of society's material well-being. For a newly conceived redistribution, no matter how accomplished or to what end, is always something of a disappointment to the expectations which Bentham regards as the essence of property. And the very act of redistributing implies that society will not scruple to effect like redistributions in the future. It is this implication or suggestion — this disavowal of perfect security of expectation — which utilitarian property theory chiefly deprecates.

We thus receive from Bentham a theory of social utility which can explain why collective allocational decision making, deemed unobjectionable in and of itself, *might* be deemed impermissible if attended by capricious redistributions. And we may be encouraged to try to derive from that theory some criteria for determining which collective allocational decisions, attended by what particular distributional impacts, should be deemed impermissible unless those impacts are offset by compensation payments. Still we must recognize that, despite its obvious and direct relevance to the general compensation problem, the utilitarian theory will not show us how to discriminate among capricious redistribution cases — will not, that is, show us how to perfect our general practice, certain to be retained, of compensating in some but not all of such cases — if its only implication is a general one militating broadly against *all* capricious redistributions. Given the framework of practices within which the compensation problem



actually arises in our society, the practical relevance of the utilitarian theory will be no greater than that of, say, the labor-desert theory until it has been shown that the utilitarian theory (unlike the labor-desert theory) is translatable into pertinent questions of degree.

The problem, then, is to show that utilitarian property theory, applied with utmost consistency, does *not* require payment of compensation in every case of social action which is disappointing to justified, investment-backed expectations.<sup>97</sup> There is no difficulty as long as our utilitarians will agree with us that productivity cannot be measured except in terms of individual satisfactions; that maximizing such satisfactions depends not only on the volume of the inputs of labor, land, and capital, but on the direction in which those inputs are steered, in other words, on sound allocating; that, because of human interdependence and the external effects inevitably associated with economic activity, the soundest allocations cannot be reached without some collective control; and that the necessary collective adjustments of market-determined activity are bound to occasion disappointment to justified expectations, under circumstances in which it would be practically impossible to arrive at a comprehensive set of apparently "correct" compensation settlements.

The utilitarian who admits this much will probably be unable to avoid the conclusion that it is sometimes right for society to adopt a measure which cannot practically be purged of a capriciously redistributive effect frustrating to justified expectations; he could avoid that conclusion only if he were of the implausible view that no social measure which is visibly disappointing to expectations can possibly improve the allocational picture enough to outweigh resultant losses in productive effort.

In sum, we must remember that the utilitarian's solicitude for security is instrumental and subordinate to his goal of maximizing the output of satisfactions. Security of expectation is cherished, not for its own sake, but only as a shield for morale. Once admit that not all capricious redistributive effects are totally demoralizing, and utilitarian theory can tell us where to draw the line between compensable and noncompensable collective impositions. An imposition is compensable if not to compensate would be critically demoralizing; otherwise, not.

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<sup>97</sup> We postpone discussion of the important point, and merely note it here, that not all expectations are "justified." See pp. 1236-44 *infra*.

## IV. UTILITY, FAIRNESS, AND COMPENSATION

*A. Compensation and Utility*

A strictly utilitarian argument leading to the specific identification of "compensable" occasions would have a quasi-mathematical structure. Let us define three quantities to be known as "efficiency gains," "demoralization costs," and "settlement costs." "Efficiency gains" we define as the excess of benefits produced by a measure over losses inflicted by it, where benefits are measured by the total number of dollars which prospective gainers would be willing to pay to secure adoption, and losses are measured by the total number of dollars which prospective losers would insist on as the price of agreeing to adoption. "Demoralization costs" are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered,<sup>98</sup> and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion. "Settlement costs" are measured by the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs. Included are the costs of settling not only the particular compensation claims presented, but also those of all persons so affected by the measure in question or similar measures as to have claims not obviously distinguishable by the available settlement apparatus.<sup>99</sup>

A measure attended by positive efficiency gains is, under utili-

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<sup>98</sup> Perhaps this is not the sort of harmful consequence which has usually been deemed relevant in utilitarian accounting. See Griffin, *Consequences*, 65 *PROC. ARIST. SOC'Y* 178-79 (1964-1965).

<sup>99</sup> This definition of settlement costs, vague as it is, immediately suggests serious questions of cost accounting. Assuming that the basic machinery of authoritative settlement (say, a court system) is already in existence, the settlement costs of recognizing that compensation is due for injury of a certain sort inflicted by a certain measure would seem to include: (a) the costs of bargaining to out-of-court settlements of all, some, or none of the claims occasioned by that measure which seem indistinguishable from the claim recognized; (b) the added (marginal) cost of operating the judicial system to settle those of the indistinguishable claims not settled by agreement; and (c) the costs of disposition, whether by agreement or by judgment, of all claims arising out of other measures, which claims would never have been urged had not the claim in question been recognized, reduced by any savings in the demoralization costs which those other measures would have entailed had no such claims been recognized.

tarian ethics, *prima facie* desirable. But felicific calculation under the definition given for efficiency gains is imperfect because it takes no account of demoralization costs caused by a capricious redistribution, or alternatively, of the settlement costs necessary to avoid such demoralization costs. When pursuit of efficiency gains entails capricious redistribution, either demoralization costs or settlement costs must be incurred. It follows that if, for any measure, both demoralization costs and settlement costs (whichever were chosen) would exceed efficiency gains, the measure is to be rejected; but that otherwise, since either demoralization costs or settlement costs must be paid, it is the lower of these two costs which should be paid. The compensation rule which then clearly emerges is that compensation is to be paid whenever settlement costs are lower than both demoralization costs and efficiency gains. But if settlement costs, while lower than demoralization costs, exceed efficiency gains, then the measure is improper regardless of whether compensation is paid. The correct utilitarian statement, then, insofar as *the issue of compensability* is concerned, is that compensation is due whenever demoralization costs exceed settlement costs, and not otherwise.<sup>100</sup>

Let us now focus on the problem of appraising demoralization costs. Since we are looking ultimately to the specification of practical methods for identifying compensable occasions, we may begin by saying that it obviously will not do to interview every potential compensation claimant and ask him how demoralized he expects to be if a given measure is adopted without provision for compensation. The objections to such a solution run far deeper than the obvious one about the costs of conducting such interviews. The interviewee probably will not himself know the answer to the question (putting aside the difficulty of his attaching a dollar value to his outrage and his loss of incentive even if he could appraise those subjectively) and, for strategic reasons, would not reveal the true answer if he knew it.

We are compelled, then, to frame the question about demoralization costs in terms of responses we must impute to ordinarily

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<sup>100</sup> This approach need not, despite appearances, entail a problem of infinite regress. The apparent problem is that a court, construing the "just compensation" clause to incorporate the utilitarian calculus as above formulated, would have to incur substantial settlement costs in the very process of comparing settlement costs with demoralization costs. The solution would be for the court to draw a restrictive boundary around the core of claims which it will entertain at all. That is, the utilitarian calculating could be left to the political organs, with the court intervening only to correct clear errors. Cf. pp. 1248-52 *infra*.

cognizant and sensitive members of society. Utilitarian algebra, it appears, cannot specify a sound compensation practice — the equation cannot be solved for that “value” of compensation which yields a maximum excess of efficiency gains over demoralization or settlement costs — until supposed facts about human psychology and behavior have been plugged into the equation as independent variables.

If we hypothesize a utilitarian defense of currently observable social practices pertaining to compensation, we can make some interesting deductions about the behavioral assumptions which must have entered into the utilitarian calculation. One clear characteristic of current practices is their reflection of a special urgency in the demand for publicly financed compensation when a loss has evidently been occasioned by deliberate social action.<sup>101</sup> Society has not yet placed itself under any systematic discipline designed to assure people of compensation for all economic losses inflicted by forces regarded as beyond social control, such as earthquake or plague. If, then, the just compensation requirement is supposed to rest on strictly utilitarian grounds — if, that is, it is supposed to rest on a purpose of forestalling demoralization which impairs the output of goods — there must be at work a tacit assumption that losses which seem the proximate results of deliberate collective decision have a special counterproductive potency beyond any which may be contained in other kinds of losses. It cannot, in other words, be simply uncertainty — awareness of the possibility of unpredictable and unpreventable future loss — which utilitarians engaged in rationalizing the just compensation practice judge to be intolerably demoralizing.

We are thus led to inquire whether there is any reason to suppose that a visible risk of majoritarian exploitation should have any greater disincentive effect than the ever-present risk that

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<sup>101</sup> This observation is not belied by such phenomena as social security, unemployment compensation, public assistance, or the emergent interest in auto compensation plans. Many of these schemes can, as my colleague Derek Bok will show in a coming issue of this magazine, be viewed as responsive to the spectacle of harm inflicted by more or less deliberate social policy. To the extent that they cannot be thus explained satisfactorily, they may indicate merely that “compensation” schemes can reflect purposes unrelated to general morale: promotion of sound allocation, avoidance of secondary economic effects, exploitation of generally appreciated advantages of insurance, or satisfaction of humanitarian impulses. I suggest nothing more than that, to the extent that compensation schemes do rest on purposes not involving notions of requital for harm “deliberately” inflicted, there is a markedly lesser degree of both systematic discipline and sense of obligation behind their creation. See Note, *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127-30 (1966).

accidents may happen, this being the only supposition which seems, on utilitarian premises, to justify a constitutional guaranty aimed specially against the former sort of risk. If I am able to mobilize my productive faculties under the general conditions of uncertainty which prevail in the universe, why should I be paralyzed by a realization that I am at the mercy of majorities?

There seems only one possible way to defend this behavioral supposition. The defense must begin with an imputation to human actors of a perception that the force of a majority is self-determining and purposive, as compared with other loss-producing forces which seem to be randomly generated. The argument must then proceed to the effect that even though people can adjust satisfactorily to random uncertainty, which can be dealt with through insurance, including self-insurance, they will remain on edge when contemplating the possibility of strategically determined losses. For when the bearing of strategy is evident, one faces the risk of being *systematically* imposed upon, which seems a risk of a very different order from the risk of occasional, accidental injury. One faces also the rational necessity of devoting a large proportion of his energies and resources to counter-strategy aimed at fending off the risk; where the possibility of loss will visibly be determined by strategy, that possibility cannot be conveniently dismissed from consciousness on the ground that, being uncontrollable, it is not worth thinking about.

Whatever the empirical verity of this behavioral picture, it does seem implicit in any attempt to rationalize current compensation practices in utilitarian (product-maximizing) terms. Accordingly, it seems in order to ask what criteria of compensability will emerge if the practice of compensating is taken to have the purpose of quieting people's unease about the possibility of being strategically exploited.

It seems obvious, to begin with, that this unease will be stirred by any spectacle of capricious redistribution which could easily have been avoided. Capricious redistributions will not be tolerated, even as accidental adjuncts of efficiency-dictated measures, when compensation settlements can be reached without much trouble, that is, when settlement costs are low. The clearer it is that the claimant has sustained an injury distinct from those sustained by the generality of persons in society, and the more obviously there appears to be some objectively satisfactory measure of his disproportionate or distinctive injury, the more compelling will his claim to compensation become.

Society, moreover, will have to avoid not only those capricious redistributions which a compensation payment could easily offset, but also those practically noncompensable ones which cannot plausibly be said to be necessitated by the pursuit of efficiency. Thus, measures whose efficiency is open to grave question will have to be rejected unless attended by compensation even though their arguable efficiency is enough to justify their adoption in some form. Payment of compensation in such cases may furnish a necessary assurance that the measure is not simply a disguised attempt to redistribute deliberately, by confirming the hypothesis that society deems the measure a "gainful" (efficient) one in the only ethically sure sense.<sup>102</sup> Therefore, as the collective allocational measure approaches the limit of doubtful efficiency, the claim for compensation will become more compelling.

Other intertwined branches of a compensability inquiry could grow out of a utilitarian purpose to cater to the sense of security by preserving an illusion of long-run indiscriminateness in the distribution of social burdens and benefits. Thus the magnitude of the imposition would plainly be relevant: is it of quotidian variety, or is it once in a lifetime mayhem? But magnitude of individual burden, no matter how purposively conceived,<sup>103</sup> reveals only a fragment, meaningless by itself, of the whole picture. We need additional information. For example, is the burden for which compensation is sought a rare or peculiar one, or do like burdens seem to have been widely, even though not uniformly, scattered about the community? Is there implicit in the measure some reciprocity of burdens coupled with benefits (as, for example, in a measure restricting a large area to residential development) or does it channel benefits and burdens to different persons? How likely does it seem that members of the class burdened by the measure were able to wield enough effective influence in the process leading to its adoption to have extracted some compensatory concession "in kind"?

### *B. Compensation and Fairness*

It is not the purpose of this essay to make a case for utilitarian ethics. Unquestionably, the provisional assumption of a utilitarian stance towards efficiency, property, and security is clarifying to a critical study of actual compensation practices. But there is

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<sup>102</sup> See pp. 1176-81 *supra*.

<sup>103</sup> See pp. 1228-33 *infra*.

no basis for concluding that the question of compensability is intelligible only when compensation is regarded as an instrument of utilitarian maximizing. Many observers, though they may admit that the question of compensability can logically be viewed as a question of efficiency, will insist that it can also be viewed as a question of justice to be decided without regard to the effect of the decision on the net social product. We must consider whether, in the name of justice, a person might not claim compensation (or society might not refuse compensation) regardless of the consequences for the net social product.

Since I am not prepared to embark on a general canvassing of philosophies of justice, I have selected for examination one recent, nonmaximizing account of justice which seems to hold forth special promise of illuminating the compensation problem, namely the account given by John Rawls of "justice as fairness."<sup>104</sup>

Rawls's theory attracts our attention because it is concerned with inequalities in the treatment — the quota of powers, honors, and incomes — received by individuals under collectively maintained arrangements. A cogent attempt is made to clarify the idea of justice as the special virtue of social arrangements within which such inequalities become acceptable. They are said to be acceptable — the arrangements producing them are deemed just — if those arrangements are consistent with principles which could command the assent of every member of a group of rational, self-regarding persons, convening under circumstances of mutually acknowledged equality and interdependence, to hammer out principles by which they will judge complaints against whatever rules and institutions may come to characterize their association. All of these persons are presumed to be aware that each is powerless either to impose his preferences on any other or to claim for himself, in advance, any particular position which may be constituted by a rule or institution. Social practices, then, are to be judged by principles which a person would favor if he had to assume that he might occupy the least advantageous position distinguishable under any rule or institution which might emerge. (The model embodies, in effect, the two very broad ethical propositions invoked at the outset of this article — that good is ultimately to be understood in terms of individually experienced sat-

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<sup>104</sup> See Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958), reprinted in *JUSTICE AND SOCIAL POLICY* 80 (F. Olafson ed. 1961); Rawls, *Constitutional Liberty and the Concept of Justice*, in *NOMOS VI: JUSTICE* 98 (C. Friedrich & J. Chapman eds. 1963); Rawls, *The Sense of Justice*, 72 *PHIL. REV.* 281 (1963).

isfactions, and that the respective claims of individuals to satisfaction cannot be ranked.)

Rawls finds that two fundamental principles would emerge from this convention of the circumspect. The first principle is a general presumption that social arrangements should accord no preferences to anyone, but should assure to each participant the maximum liberty consistent with a like liberty on the part of every other participant. The second principle defines a justification for departures from the first: an arrangement entailing differences in treatment is just so long as (a) everyone has a chance to attain the positions to which differential treatments attach, and (b) the arrangement can reasonably be supposed to work out to the advantage of every participant, and especially the one to whom accrues the least advantageous treatment provided for by the arrangement in question.

For illustration of these principles we may begin by imagining, as a mode of basic organization in which the principle of "equal liberty" is strictly adhered to insofar as economic life is concerned, a society where product is distributed to all in equal shares of purchasing power. If "equal liberty" were an unqualified principle we might have to choose some such form of organization. Rawls's second principle, however, permits us to opt for some other mode of organization which departs from the strict equality principle, as long as the occupant of each position constituted by the preferred mode should be able to see that the arrangement, precisely because it involves inequalities, improves his long-run prospects over what they would have been under the "equality" mode. So, under private property institutions, product is distributed in part according to an inevitably unequal pattern which reflects the fortuity of "factor endowments" — the morally accidental and unequal distribution among individuals of strength, skill, ambition, and ownership of physical resources (and, derivatively, of training, position, and influence). Such inequalities are deemed just, however, as long as it is clear that permitting distribution to take the form of returns to factors of production enhances the volume of production so significantly that (taking into account the society's other distributional practices) even the least well-endowed participant winds up better off than he could reasonably count on being under any version of strict equality. The justice of "capitalism" depends, then, on the beliefs that markets are essential to sound resource allocation,



and that allowance of negotiated returns is essential to productive incentive.

Now it is apparent that Rawls's two principles are most immediately adapted to judging fundamental social arrangements — those which establish the various stations in life to which different packages of lifetime expectations are attached — and are not directly applicable either to a particular compensation controversy or to a rule defining with some generality the cases in which compensation is to be paid. For an occasion of compensability is not likely to be an occasion of determining or assigning to stations. It is an interruption or dislocation which, while it may palpably harm the claimant, will probably leave him stationed as before with his basic life prospects unimpaired.

But justice is a virtue of rules, practices, and specific acts occurring within basic distributional frameworks, as well as of the basic frameworks themselves. It is not insuperably difficult to see how Rawls's two principles are to be applied by analogy to test the justice of a compensation practice. Analogous to the equal liberty principle would be a rule forbidding all efficiency-motivated social undertakings, which have the *prima facie* effect of impairing "liberties" unequally, unless corrective measures (compensation payments) are employed to equalize impacts. The second principle, however, would permit a departure from this uncompromising rule of full compensation if it could be shown that some other rule should be expected to work out best for each person insofar as his interests are affected by the social undertakings giving rise to occasions of compensation.

Although it is not easy to convert Rawls's second principle into a specific test of the fairness of a given compensability decision — in part because the principle is a great deal more complex and subtle than may appear on the surface — it will be worthwhile to make the effort for the added insight it may give us into the idea of fairness as it bears on the compensation problem.

What we want to know, then, is whether a specific decision not to compensate is fair. By the very asking of the question we adopt the vantage point of the disappointed claimant and assume on his part a capacity (a) to appraise his treatment and calculate his advantage over a span of time (that is, he is not without patience) and (b) to view the particular decision in question as a specific manifestation of a general practice which will be applied consistently to situations involving other people. If he is unable to extend his thinking in those two dimensions, there is no

possibility that immediately disadvantageous treatment will be acceptable to him because it is fair.

The relevant comparison, then, is between the general practices respectively represented by specific decisions to compensate and not to compensate in this particular case; and the crucial question is which of these general practices maximizes our claimant's opportunities over the time span covered by his patience, imagination, and ability to project a sense of continuing selfhood. Since, however, the claimant is supposed to understand that he may turn out to be the person who fares worst under whatever compensation scheme is adopted (a fair arrangement, remember, is one which is best for whoever turns out to be worst off), it is more straightforward to ask which of the two practices minimizes his risks.

Previous discussion helps us identify the relevant risks. The risk associated with the more stringent compensation practice is that its settlement costs will force abandonment of efficient projects. Opportunities to augment social output will, then, be missed, and this is matter of concern to our claimant because, no matter what distributional pattern eventuates, if there is more to be shared he stands to get more. The risk associated with the less stringent compensation practice is that of sustaining concentrated losses from efficiency-motivated social projects which otherwise would not have been sustained — losses which may partially or totally exclude their bearer from sharing in the general gains from social activity.<sup>105</sup>

The question, then, is whether the more or the less stringent

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<sup>105</sup> Here we note that the observer apparently must not concern himself with any risk that counter-productive effects associated with a less stringent compensation rule will reduce the shareable social product. Insofar as such effects are traced to a dampening of incentives by dramatizations of uncertainty, they are a negligible factor where the choice to be made is between two compensation rules neither of which makes any systematic or comprehensive attempt to insure against unexpected or catastrophic loss. And insofar as such effects are to be traced to resentment and outrage, they cannot without circularity be considered as risks relevant to an appraisal of fairness. We are interested in comparing risks entailed by social practices for their participants only because of our supposition that men will find acceptable any treatment, no matter how "unequal," which can be seen to be "fair" because it minimizes their risks. If the only reason which can be found for doubting that a given practice would minimize the risks of all participants is a fear that some participants would find its inequalities demoralizing despite the apparent risk-minimizing capacity of those inequalities, either that practice must be deemed fair or fairness as here conceived must be rejected as a criterion for judgment. The criterion becomes unmanageable and useless if one participant can impugn the fairness of some arrangement on the sole ground that others will fail to appreciate that fairness.

compensation practice minimizes the sum of these risks; or, re-translating the inquiry into one about the fairness of a particular decision not to compensate, the question is whether the practice represented by such a decision involves a greater or a less total of the two risks — of missed opportunities for augmenting shareable social output and of losses which impair the claimant's participation in such aggregate increments as are achieved — than does the practice represented by the opposite decision. But since a compensation practice is of complex and indeterminate composition — since, that is, its nature cannot be inferred by a simple process of generalizing from a single manifestation — the question of fairness must be reformulated one last time. A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.

If we set about to make practical use of this approach, we shall find ourselves asking much the same questions to determine whether a compensability decision is fair as were suggested by the utilitarian approach. The relevant risks plainly are minimized by insistence on compensation when settlement costs are low, when efficiency gains are dubious, and when the harm concentrated on one individual is unusually great. They are also minimized if insistence on compensation is relaxed when there are visible reciprocities of burden and benefit, or when burdens similar to that for which compensation is denied are concomitantly imposed on many other people (indicating that settlement costs are high and that those sustaining the burden are probably incurring relatively small net losses — else, being many, they probably could have been mobilized to deflect the measure which burdens them).

It is important, however, to note here the possibility that the utilitarian approach and the fairness approach will yield sharply inconsistent results in some situations. Whether they do will depend on the behavioral assumptions which are plugged into the utilitarian equation, and on whether utilitarian decision makers are required to assume that their decisions will be widely publicized and sensitively construed. Consider first a case involving impact of a superficially unusual sort, perhaps not likely either to cause a great stir in the community or to recur; for example, one in which conservation officials of the United States forbid

travel across a wilderness area, first by air and then by overland vehicle, with the result that the claimant is left with no practical access to his small hunting and fishing camp and is forced to close it down.<sup>106</sup> Fairness rather clearly requires compensation here. But the Great Administrator who presides over the utilitarian controls might calculate that, while the settlement costs of recognizing compensability could turn out to be substantial because of a liberalizing effect on precedents governing compensability of access impairments in general, he could reasonably count on holding down the demoralization costs of a failure to compensate either by preventing the matter from becoming widely known or by not revealing the general implications of this particular decision. There is no need for our purposes to delve further into the issue of whether utilitarian decision makers should be deemed free to base their decisions on such speculations about who will find out and how perceptively they will detect and generalize from the decisions' informing principles.<sup>107</sup> If the rule is that publication and perceptive interpretation of decisions must be assumed, then the divergence between utility and fairness will narrow sharply.

Yet even then it may not completely disappear. Even if utilitarian administrators are not permitted to count on keeping secret their decisions, or to disavow the general principles of action implicit in their specific acts, still they must be permitted to take due account of men's psychological makeups so far as those are supposed to be known. If, then, there are circumstances where a decision not to compensate would greatly demoralize men as they are supposed actually to be, even though that decision would be fully acceptable to the patient, far-seeing, reasonable folk who inhabit the fairness model, utility and fairness will yield different results — and utility, oddly enough, will favor the more liberal compensation practice. The significance of this point will emerge in the next section.

## V. THE RULES OF DECISION REVISITED

A brief recapitulation of the discussion up to this point may be helpful. We have, in effect, been searching for a useful and satisfying way to identify the "evil" supposedly combatted by the constitutional just compensation provisions, and have now sug-

<sup>106</sup> Cf. *Mackie v. United States*, 194 F. Supp. 306 (D. Minn. 1961).

<sup>107</sup> See Harrison, *Utilitarianism, Universalization, and Our Duty To Be Just*, in *JUSTICE AND SOCIAL POLICY* 55 (F. Olafson ed. 1961).

gested equating it with a capacity of some collective actions to imply that someone may be subjected to immediately disadvantageous or painful treatment for no other apparent reason, and in accordance with no other apparent principle, than that someone else's claim to satisfaction has been ranked as intrinsically superior to his own.

The discussion has also shown why avoidance of this evil is not the same thing as avoidance of all social action having capricious redistributive effects. The reasons begin with the universal acknowledgement that some collective constraint on individual free choice is necessary in order to minimize the frustrations produced by people's concurrent quests for fulfillment, and to exploit fully the potential benefits from human interaction; and that social control, therefore, can ultimately lead to fuller achievement by each of his own ends. It is true that collective action which depends for its legitimacy on such understandings must look ultimately to the furtherance of *everyone's* attainment of his own ends, without "discrimination," and that this latter requirement would most obviously be met if a way were found to distribute the benefits and costs associated with each collective measure so that each person would share equally in the net benefit. But such perfection is plainly unattainable. Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed "evenly" enough so that everyone will be a net gainer. The function of a compensation practice, as here viewed, is to fulfill a strongly felt need to maintain that assurance at an "acceptable" level — to justify the general expectations of long-run "evenness." If one feels impelled to refer this need back to a social interest in maximizing production, what we have called a utilitarian approach to compensation will be the result. If, however, the need is accepted on its own terms and for its own sake, as simply rooted in the condition of being a human person, then justice or fairness, rather than utility, will seem to be the key to compensation. The two approaches may lead to different results in some situations, but in general decisions made under their guidance turn on much the same factors — the disproportionateness of the harm a measure inflicts on individuals, the likelihood

that those harmed were in a position to extract balancing concessions, the clarity with which efficiency demands the measure, and so forth. In what follows, I shall often treat the two approaches as parallel, and use the word "fairness" to signify also that apparent evenhandedness which a utilitarian approach may be understood as requiring.

If it truly is important for society to subordinate its pursuit of efficiency to a discipline aimed at preventing outrages to fairness, then it may be worth asking whether the constitutional just compensation provisions present any hazard to sound social functioning. These provisions attract attention as the visible, formal expressions of society's commitment to fairness as a constraint on its pursuit of efficiency. The question is whether their magnetism is an energizing force, or a mesmerizing one. If it induces the habit of waiting upon the courts to administer a fairness discipline, and if courts are less than fully equal to the task or cannot perform it without serious damage to their effectiveness in other spheres, then there is cause for concern.

To argue at length for the unamazing proposition that the true purpose of the just compensation rule is to forestall evils associated with unfair treatment, is to imply that the proposition, for all its obviousness, is insufficiently understood or recognized in practice. We should, then, consider carefully the extent to which the "fairness" or utility rationale is already reflected, even if inexplicitly, in the judicial doctrines which presently compose the main corpus of our just compensation lore. My conclusion is that these doctrines do significantly reflect the line of thought which has been elaborated in these pages, and that this approach, indeed, derives some indirect support from its power to explain much that is otherwise mysterious about the doctrines. Nevertheless, the courts fall too far short of adequate performance to be left without major assistance from other quarters.

### *A. Physical Invasion*

It will be recalled that the factor of physical invasion has a doctrinal potency often troublesome on two counts. First, private losses otherwise indistinguishable from one another may, as in the flight nuisance cases, be classified for compensability purposes according to whether they are accompanied by a physical invasion, even though that seems a purely fortuitous circumstance. Second, purely nominal harms — such as many which accompany street-widenings or subterranean utility installations

— are automatically deemed compensable if accompanied by governmental occupation of private property, in apparent contradiction of the principle that the size of the private loss is a critically important variable. Both these seeming oddities may now seem easier to understand.

Actual, physical use or occupation by the public of private property may make it seem rather specially likely that the owner is sustaining a distinctly disproportionate share of the cost of some social undertaking. Moreover, there probably will be no need, in such a case, to trace remote consequences in order to arrive at a reasonable appraisal of the gravity of the owner's loss — a loss which is relatively likely to be practically determinable and expressible as a dollar amount. Furthermore, to limit compensation to those whose possessions have been physically violated, while in a sense arbitrary, may at least furnish a practical, defensible, impersonal line between compensable and noncompensable impositions — one which makes it possible to compensate on some occasions without becoming mired in the impossible task of compensating all disproportionately burdened interests.<sup>108</sup>

The most obvious argument, then, for physical invasion as a discriminant of compensability would be that it combines a capacity to hold down settlement costs — both as to determining liability and as to measuring damages — with at least some tendency to draw the line so that compensable losses do, as a class, exceed in magnitude those deemed noncompensable. To the extent that the physical invasion criterion really does have these attributes, it should satisfy the test of fairness whether viewed as independent of or as subservient to a test of utility.

But this justification for a physical invasion criterion is really rather weak. The capacity for such a criterion to minimize settlement costs is beyond question, but its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously. A rule that no loss is compensable

<sup>108</sup> This line of distinction seems not to have recommended itself to the dissenting judge in *State ex rel. Royal v. City of Columbus*, 3 Ohio St. 2d 154, 159, 209 N.E.2d 405, 409 (Ct. App. 1965), who wrote, in protest against the majority's authorization of compensation for harm caused by *direct* overflights, that "if the court today had launched a vessel of unknown dimensions for an indefinite voyage on an uncharted sea to an undisclosed destination it could not have been the author of more uncertainty. In effect, the plaintiffs, and countless numbers similarly or even remotely situated, will receive from a subdivision of the sovereign, acting in a sovereign capacity, varying amounts of money damages for injury to their sensibilities."

unless accompanied by physical invasion would be patently unacceptable. A physical invasion test, then, can never be more than a convenience for identifying *clearly compensable* occasions. It cannot justify dismissal of any occasion as *clearly noncompensable*. But in that case, the significance of the settlement-cost-saving feature is sharply diminished. We find ourselves accepting the disadvantage of a test requiring compensation on many occasions where losses in truth seem relatively insignificant and bearable, in return for the convenience of having a simple way to identify some — but by no means all — compensable occasions. This seems a questionable bargain.

There may be a way of shoring up the physical invasion test — viewing it as a way of identifying some but not all compensable occasions — if we are inclined to take a utilitarian rather than an “absolute” view of fairness. This requires some reflection on psychic phenomena. Physical possession doubtless is the most cherished prerogative, and the most dramatic index, of ownership of tangible things. Sophisticated rationalizations and assurances of overall evenness which may stand up as long as one’s possessions are unmolested may wilt before the stark spectacle of an alien, uninvited presence in one’s territory.<sup>109</sup> The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader. Perhaps, then, the utilitarian might say that as long as courts must fend with compensability issues, to lay great stress on the polar circumstance of a permanent or regular physical use or occupation by the public is sound judicial practice — even though, at the same time and in a broader view, to discriminate on such a basis seems unacceptably arbitrary.<sup>110</sup>

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<sup>109</sup> This observation, if correct, would help explain why “forced dedications,” in the form of conditions attached to subdivision approvals or building permits, are treated as less inevitably compensable than simple, outright trespasses and evictions.

<sup>110</sup> It must be noted that even on this reasoning “physical invasion” is too crude a shorthand. Consider the compensability question in relation to such “accidental” invasions as the sporadic, unforeseen flood runoff from a public drain not itself located on the complainant’s land, or the soot and dust occasionally propelled onto the complainant’s land by aircraft not flying directly overhead. There is no doubt that such “consequential” (as opposed to more directly, affirmatively exploitative) invasions are regarded as less obviously demanding of compensation than would be, say, the actual installation of the drain, or the airport runways, on the complainant’s land. See, e.g., *County of Winnebago v. Kennedy*, 60 Ill. App. 2d 463, 208 N.E.2d 612 (1965). The only generalization deducible from the welter of doctrines variously used to determine compensability in “con-



It is this evident arbitrariness which seems to require outright disapproval of the physical invasion criterion if we judge it by the standards of "absolute" fairness. For, true as may be the utilitarian controller's judgment that physical invasion raises special risks to the sense of security he wishes to inculcate, the rational actors of the fairness model must be expected to see that the relevant comparison is between large losses and small losses — not between those which are and are not accompanied by partial evictions.

### *B. Diminution of Value*

Earlier we found it hard to understand why compensability should be thought to turn on a comparison of the size of the claimant's loss with the preexisting value of that spatially defined piece of property to which the loss in value seems to be specifically attached. It can now be suggested that judicial reliance on such comparisons reflects a utilitarian approach to compensability, as qualified by some special behavioral assumptions.

The method of identifying compensable harms on the basis of the degree to which "the affected piece" of property is devalued offers several parallels to that of discriminating on the basis of physical invasion. Both methods, though they seem obtuse and illogical so long as the purpose of compensation is broadly stated

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sequential invasion" cases is that compensation is owing in some, but not all, such cases. See generally Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3.

It is clear, at any rate, that although the "invasion" element is indubitably present in these cases, such accidental, "unintended" governmental trespasses do not *automatically* trigger a "taking." Nor, apparently, does a deliberate physical invasion which is not part of a continuous regular pattern and which is followed by a prompt withdrawal. Cf. *Rymkevitch v. State*, 42 Misc. 2d 1021, 249 N.Y.S.2d 514 (Ct. Cl. 1964). But cf. *Chili Plaza, Inc. v. State*, 42 Misc. 2d 861, 248 N.Y.S. 2d 919 (Ct. Cl. 1964). Probably it can be said that only those trespassory acts which are implicitly assertive of ownership — in the sense necessary to ground an action of ejectment or to start running the statutory period for acquisition of title by adverse possession — amount to such physical invasions as automatically, without further inquiry, require a compensation payment. Cf. *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 86-87.

It is possible to see why a deliberate, affirmatively exploitative presence might be thought more obviously demanding of compensation than an accidental one; or why a regular, continuous physical presence might be thought more obviously demanding of compensation than occasional or sporadic entries. The sense of moral outrage probably is not so easily kindled when physical invasions appear to be accidents; and, as the character of the invasion moves from regularity to casuality, the obviousness of the harm, the obviousness of its distinctive or disproportionate size, and the obviousness of its dollar equivalent all diminish.

to be that of preventing capricious redistributions, gain in plausibility given the more refined statement that the purpose of compensation is to prevent a special kind of suffering on the part of people who have grounds for feeling themselves the victims of unprincipled exploitation. Moreover, the appeal of both methods rests ultimately in administrative expediency, in their defining classes of cases whose members will (a) usually be easy to identify and (b) usually, under certain behavioral suppositions, present a particularly strong subjective need for compensation.

As applied to the diminution of value test, these statements require explanation. We may begin by noticing a refinement, not mentioned earlier, which might initially seem only to deepen the mystery. It will be recalled that Justice Holmes, writing for the Court in the famous *Pennsylvania Coal* case,<sup>111</sup> held that a restriction on the extraction of coal, which effectively prevented the petitioner from exercising certain mining rights which it owned, was a taking of property and so could be enforced only upon payment of compensation. Holmes intimated strongly that the separation in ownership of the mining rights from the balance of the fee, prior to enactment of the restriction, was critically important to the petitioner's victory. But why should this be so? We can see that if one owns mining rights only, but not the residue of the fee, then a regulation forbidding mining totally devalues the owner's stake in "that" land. But is there any reason why it should matter whether one owns, in addition to mining rights, residuary rights in the same parcel (which may be added to the denominator so as probably to reduce the fraction of value destroyed below what is necessary for compensability) or residuary rights in some other parcel (which will not be added to the denominator)?

The significance of this question is confirmed by its pertinency to many comparable judicial performances. There is, for example, the widespread rule requiring compensation to the owner of an equitable servitude (such as a residential building restriction) when the government destroys the servitude's value by acquiring the burdened land and then using that land in violation of the private restriction embodied in the servitude. *Vis-à-vis* the servitude owner, the government cannot be said in the narrow sense to have "taken" any property. It has not, as in the air easement cases, engaged in an activity which would be an actionable eviction if privately instigated. It is not affirmatively

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<sup>111</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

exploiting any prerogative formerly held by the owner of the servitude. It is simply engaging in activity which, absent the servitude, might have been a nuisance; but government does not usually come under an automatic obligation to compensate whenever it maintains a nuisance.<sup>112</sup> Yet many courts award compensation to persons deprived by government action of the benefits of private building restrictions, without asking any questions about how much value, or what fraction of some value, has been destroyed.<sup>113</sup> Thus, government activity, on land adjacent to the complainant's, which would otherwise give rise to no claim to compensation, may support such a claim if it violates a building restriction of which the complainant is a beneficiary. If a justification exists for such a difference in treatment, it would seem to be that one's psychological commitment to his explicit, formally carved out, appurtenant rights in another's land is much more sharply focused and intense, and much nearer the surface of his consciousness, than any reliance he places on his general claim to be safeguarded against nuisances. This proposition, if valid, would not affect the "fairness" of noncompensation, but it means that a utilitarian, with his eye on the actual long term psychological effects of his decisions, will be wary of denying compensation to the affronted servitude owner.

For another example of the effect of functionally divided ownership, one can compare *United States v. Twin City Power Co.*<sup>114</sup> with *United States v. Virginia Electric & Power Co.*<sup>115</sup> The *Twin City* decision held that, when riparian lands are taken by the United States in connection with a river development project, just compensation does not include any element of value derived from the expropriated owner's actual or prospective exploitation of the flow of navigable waters. The Court reasoned that, because the "navigation servitude" of the United States gives it a paramount right at any time to divert or obstruct the flow of such waters, no one could form any valid expectation of the flow, and such an expectation, therefore, could never give rise to a compensable value.

The *Virginia Electric* case involved acquisition by the United

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<sup>112</sup> Cf. *Reichelderfer v. Quinn*, 287 U.S. 315 (1932); note 46 *supra*.

<sup>113</sup> An extensive review of the cases is contained in the dissenting opinion in *State Highway Comm'n v. McNeill*, 238 Ark. 244, 248, 381 S.W.2d 425, 427 (1964); see Annot., 4 A.L.R.3d 1137 (1965).

<sup>114</sup> 350 U.S. 222 (1956).

<sup>115</sup> 365 U.S. 624 (1961). Compare the discussion of these cases in Dunham, *supra* note 110, at 98-105.

States of a flowage easement over riparian lands which were already subservient to a flowage easement acquired in the past by the respondent. The United States contended, in essence, that no compensation was due to anyone. Such an argument was plausible in light of *Twin City*. The owner of the fee, having already parted with a flowage easement, could be regarded as indifferent to who did the actual flooding; while the respondent owned nothing except a flowage easement having no economic value apart from exploitation of the flow of navigable waters, a value held noncompensable in *Twin City*.

The Court, however, was not prepared to see the United States acquire something for nothing. It held that the owner of the easement must be compensated for the value of his easement, taken to be the negative value to the fee owner of the easement's existence, that is, the difference in value between an unencumbered fee estate in the affected lands and an estate burdened by the flowage easement. The respondent, in other words, was to be compensated in an amount equal to the minimum amount its easement should have cost it.

There is an obvious inconsistency between *Twin City* and *Virginia Electric*. In the latter case, a privately owned privilege of flooding riparian lands, economically valueless apart from potential exploitation of navigable waters, was held to be a compensable property interest even though in *Twin City* the Court had denied that any value thus contingent on forbearance by the United States could be recognized as inhering in an undivided fee. But there was a factual distinction between the two cases which one may speculate was at the root of the difference in results. In *Virginia Electric*, but not in *Twin City*, the fee had been functionally divided in such a way that if compensation were not required, a claimant would have been left in the position of owning a "something" whose value the government had utterly destroyed.

The "fraction of value destroyed" test, to recapitulate, appears to proceed by first trying to isolate some "thing" owned by the person complaining which is affected by the imposition. Ideally, it seems, one traces the incidence of the imposition and then asks what "thing" is likely to be identified by the owner as "the thing" affected by this measure? Once having thus found the denominator of the fraction, the test proceeds to ask what proportion of the value or prerogatives formerly attributed by the claimant

to that thing has been destroyed by the measure. If practically all, compensation is to be paid.

All this suggests that the common way of stating the test under discussion — in terms of a vaguely located critical point on a sliding scale — is misleading (though certainly a true representation of the language repeatedly used by Holmes<sup>116</sup>). The customary labels — magnitude of the harm test, or diminution of value test — obscure the test's foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

The nature and relevance of this inquiry may emerge more clearly if we notice one other familiar line of doctrine — that which enjoins special solicitude, when a new zoning scheme is instituted, for "established" uses which would be violations were the scheme applied with full retrospective vigor. The standard practice of granting dispensations for such "nonconforming uses" seems to imply an understanding that simply to ban them without payment of compensation, thus seriously reducing the property's market value, would be wrong and perhaps unconstitutional.<sup>117</sup> But a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective uses. What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted?<sup>118</sup> The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation. Here, then, is a case in

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<sup>116</sup> In addition to the *Pennsylvania Coal* opinion, see *Tyson v. Banton*, 273 U.S. 418, 445-46 (1927) (dissenting opinion).

<sup>117</sup> See *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930); *In re Ammon R. Smith Auto Co.*, 223 A.2d 683 (Pa. 1966).

<sup>118</sup> See generally G. LEFEOE, *LAND DEVELOPMENT LAW* 1474-99 (1966).

which functional division of spatially unitary property makes the same kind of difference it made in *Pennsylvania Coal* and *Virginia Electric*, although the division here exists only within the eye of the beholder whose feelings we are concerned about, and is not reflected in any title papers.

The worth of this kind of analysis in a utilitarian compensation program depends on a number of assumptions which, while not void of plausibility, are surely debatable. The assumptions are (1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several discrete "things" whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is an event attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one's net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease.

If these propositions are accepted, the parallelism between the physical occupation and diminution of value tests will be clear. Of the three propositions, the second surely is the most suspect. The first seems self-evident, and the third seems probably true. Thus, the claimant in *Pennsylvania Coal*, which supposed itself to own a mining interest before the incidence of the regulation, owned nothing of consequence afterward, but a residential owner in the regulated district still had essentially what he had before (though its market value may have been reduced). The claimant in *Virginia Electric* had owned a flowage right and now owns nothing, whereas the claimant in *Twin City* still has the (presumably) valuable riparian land it began with. The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified — which is what he had before.

### C. Balancing

Earlier it was argued that while the process of striking a balance between a compensation claimant's losses and "society's" net gains would reveal the *efficiency* of the measure responsible for those losses and gains, it would be inconclusive as to compensability. By viewing compensation as a response to the demands of fairness we can now see that the "balancing" approach,

while certainly inconclusive, is not entirely irrelevant to the compensability issue.

What fairness (or the utilitarian test) demands is assurance that society will not act deliberately so as to inflict painful burdens on some of its members unless such action is "unavoidable" in the interest of long-run, general well-being. Society violates that assurance if it pursues a doubtfully efficient course and, at the same time, refuses compensation for resulting painful losses. In this situation, even a practical impossibility of compensating will leave the sense of fairness unappeased, since it is unfair, and harmful to those expectations of the property owner that society wishes to protect, to proceed with measures which seem certain to cause painful individual losses while not clearly promising any net social improvement. In short, where compensability is the issue the "balancing" test is relevantly aimed at discovering not whether a measure is or is not efficient, but whether it is *so obviously* efficient as to quiet the potential outrage of persons "unavoidably" sacrificed in its interest. This conclusion does not, of course, detract from our earlier conclusion that even the clear and undisputed efficiency of a measure does not sufficiently establish its fairness in the absence of compensation.

#### *D. Harm and Benefit*

For clarity of analysis the most important point to be made about asking whether a restrictive measure requires a man to "benefit" his neighbors or only stops him from "harming" them is that this distinction (insofar as it is relevant and valid at all) is properly addressed to an issue different from, and antecedent to, the issue of "compensation" as we have now come to view it. We concluded earlier that the harm-benefit distinction was illusory as long as efficiency was to be taken as the justifying purpose of a collective measure. But we have for many pages past been treating the compensation problem as one growing out of a need to reconcile efficiency with the protection of fair, or socially useful, expectations. The issue we have been trying to clarify does not exist apart from the collective pursuit of efficiency. In this scheme of things, the office of the harm-benefit distinction cannot be to help resolve that issue. But the distinction, properly understood, does have a related use. It helps us to identify certain situations which, although in most obvious respects they resemble paradigm compensability problems, can be treated as raising no compensa-

tion issues *because the collective measures involved are not grounded solely in considerations of efficiency.*

The core of truth in the harm-prevention/benefit-extraction test — and the reason for its strong intuitive appeal — emerges when we recognize that some use restrictions can claim a justification having nothing to do with the question of what use of the available resources is the most efficient. If someone, without my consent, takes away a valuable possession of mine, he is said to have stolen and is called a thief. When theft occurs, society usually will do what it can to make the thief restore to the owner the thing stolen or its equivalent, either because “commutative justice”<sup>119</sup> so requires or because it is felt that there will be an intolerable threat to stable, productive social existence unless society sets its face against the unilateral decisions of thieves that they should have what is in the possession of others. The case is not essentially different if I own a residence in a pleasant neighborhood and you open a brickworks nearby. In pursuit of your own welfare you have by your own fiat deprived me of some of mine. Society, by closing the brickworks, simply makes you give back the welfare you grabbed; and, since you were not authorized in the first place to make distributional judgments as between you and me, you have no claim to compensation. The whole point of society’s intervention negates any claim to compensation.<sup>120</sup>

The point, then, is that the appeal of the tendered distinction between antinuisance measures and public benefit measures lies in the fact that the activities curbed by the first sort of measure are much more likely to have been “theft-like” in their origin than are activities restricted by the second sort. Measures of the “public benefit” type can usually be justified *only* in terms of efficiency, a justification which leaves the compensation issue unresolved, while “antinuisance” measures may be justified by con-

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<sup>119</sup> See THE ETHICS OF ARISTOTLE (THE NICOMACHEAN ETHICS) bk. V, ch. 4 (Thomson transl. 1955).

<sup>120</sup> The urgent compensation issue in this sort of case will arise when society decides, as occasionally it will, that in the interest of efficiency it will let stand the unilaterally imposed redistribution. Should society decide that the gains in efficiency revealed by the entrepreneur are worth having, it may deny the “victim” any relief by declining to legislate against the “obnoxious” activity and withholding the customary private nuisance remedy. See, e.g., *Rose v. Socony-Vacuum Corp.*, 54 R.I. 411, 173 A. 627 (1934). In such a case it is the failure to compensate the *victim* which must be justified. The available justifications are quite analogous to those for uncompensated impositions by public enterprise or regulation. See Calabresi, *supra* note 87, at 536-38.



siderations of commutative justice, or of the protection of orderly decision making, which negate any possible claim to compensation.

It should be clear, however, that no sharp distinction is thus established between the two types of measures. Activity which is obviously detrimental to others at the time regulations are adopted may have been truly innocent when first instigated. Failure to act upon this plain truth is responsible for some of the most violently offensive decisions not to compensate. The brickyard case is the undying classic.<sup>121</sup> The yard is established out of sight, hearing, and influence of any other activity whatsoever. The city expands, and eventually engulfs the brickyard. The brickmaker is then ordered to desist. That order reduces the market value of his land from 800,000 dollars to 60,000 dollars. There is no question here of disgorging ill-gotten gains: brick-making is a worthy occupation, and at the time of its establishment the yard generated no nuisance. No incompatibility with any use of other land was apparent. To say that the brickmaker should have foreseen the emergence of the incompatibility is fantastic when the conclusion depending from that premise is that we may now destroy his investment without compensating him. It would be no less erratic for society to explain to a homeowner, as it bulldozed his house out of the way of a new public school or pumping station, that he should have realized from the beginning that congestion would necessitate these facilities and that topographical factors have all along pointed unerringly in the direction of his lot.<sup>122</sup>

Just as the compensation issue raised by an ostensibly nuisance-curbing regulation cannot always be dismissed by assuming that the owner's claim is no stronger than a thief's or a gambler's, so conversely it will often be wholly appropriate to deny compensation because that assumption does hold, even though the measure occasioning the private loss seems to fall within the class of re-

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<sup>121</sup> *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>122</sup> It is true that at some point during the municipal expansion the possibility of an inefficient clash of uses may have become distinctly perceptible to a reasonably acute observer. But that circumstance could at most establish that the brickmaker should then have refrained from further investment. Even if we say that he should have, he will have a claim to compensation for the difference between the land's value at that instant and its present value under restrictions. It should be noted that such a resolution might be inexpedient even if it is not unfair. There might be a substantial demoralizing effect on economic activity from a rule declaring all investment vulnerable to retroactive frustration if it should later be decided that the investor should have foreseen a possible future incompatibility.

strictions on "innocent" activity for the enrichment of the public.

Suppose I buy scenic land along the highway during the height of public discussion about the possibility of forbidding all development of such land, and the market clearly reflects awareness that future restrictions are a significant possibility. If restrictions are ultimately adopted, have I a claim to be compensated in the amount of the difference between the land's value with restrictions and its value without them? Surely this would be a weak claim.<sup>123</sup> I bought land which I knew might be subjected to restrictions; and the price I paid should have been discounted by the possibility that restrictions would be imposed. Since I got exactly what I meant to buy, it perhaps can be said that society has effected no redistribution so far as I am concerned, any more than it does when it refuses to refund the price of my losing sweepstakes ticket.<sup>124</sup>

In sum, then, it would appear that losses inflicted by "nuisance prevention" may raise serious questions of compensation, while losses fixed by "public benefit" measures may not even involve any redistribution. If that is so, then surely we ought to be wary of any compensation rule which treats as determinative the distinction between the two types of measures. Such a rule has overgeneralized from relevant considerations which are somewhat characteristic of, but not logically or practically inseparable from, measures in one or the other class. If the relevant considerations can be kept in view without the oversimplified rule, then the oversimplified rule is merely a menace to just decision and should be dismissed.

Clarity of analysis is, at any rate, greatly improved by treating

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<sup>123</sup> See *Penn Township v. Yecko Bros.*, 420 Pa. 386, 217 A.2d 171 (1966); *Greenhills Home Owners Corp. v. Village of Greenhills*, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1966). Compare *City of Dallas v. Meserole*, 155 S.W.2d 1019 (Tex. Civ. App. 1941); *Colby v. Board of Adjustment*, 81 Colo. 344, 255 P. 443 (1927).

<sup>124</sup> But this argument calls for gingerly handling. Consider, for example, its applicability to the conduct of an administrative official who, lacking regulatory authority but wishing to hold down the eventual cost of acquiring a highway right of way, makes it his business over a decade to discourage new construction along the contemplated route by the simple, informal, and predictably effective means of pointedly reminding potential builders of his plans—but without offering to purchase affected land or to compensate for losses in site value caused by the informal building moratorium. See A. ALTSHULER, *THE CITY PLANNING PROCESS* 49-50 (1965); cf. *Commonwealth v. Spear*, 38 Pa. D. & C.2d 210 (C.P. 1965), *appeal dismissed*, *id.* at 224 ("official map" law unconstitutional unless recording of map effects compensable "taking"). Compare *Thurman v. Snowden*, 275 N.Y.S.2d 79 (Sup. Ct. 1966) (planning board may not delay action on subdivision plat on the ground that the state has tentative plans for using the land).

these considerations as logically antecedent to compensability issues. If efficiency-motivated social action has a painfully uneven distributional side-effect, the issue of compensability must be faced and resolved. But social action which merely corrects prior, unilaterally determined redistributions, or brings a deliberate gamble to its dénouement, raises no question of compensability. The true office of the harm-prevention/benefit-extraction dichotomy is, then, to help us decide whether a potential occasion of compensation exists at all. If one does, the compensability discussion must proceed from that point.

Two tasks remain before taking leave of this part of the discussion. First, we must show that the idea of a prior warning of possible collective action, which obviates any need for compensation when such action materializes, is not inconsistent with a proper utilitarian regard for security. Second, we must show that a necessary distinction (suggested by the theft analogy) between cases in which such a warning is and is not *implicitly* present is both real and manageable.

As for the first of these matters, the essential point is that it does not follow, from a perception that incentives will wither unless there are extensive spheres of activity in which reliable expectations can be formed, that such spheres must embrace all conceivable economic activity. If it is impossible to contemplate a productive society in which all reliances are insecure, it is yet possible to believe that men will advisedly speculate on occasion as long as the general and pervasive assumption is that expectations can be counted on. Social productivity may demand that reliability be the order of the day, without our denying that what appear to be deliberate speculations may be treated as speculations as long as such treatment is clearly enough confined so that it does not destroy the credibility of the usual presumption of a right to rely.<sup>125</sup>

No one, at least, would assert that productivity is unduly jeopardized when society refuses to honor the expectations of thieves that their enjoyment of stolen goods will continue unmolested or, what is the same thing, if thieves are discouraged (so far as it lies in society's power to discourage them) from forming such expectations in the first place. Wholly aside from justifying any resultant losses of productivity by offsetting against them the values — perhaps of a different order — of commutative justice, we can justify this particular refusal to admit expectations

<sup>125</sup> See H. SIDGWICK, *THE METHODS OF ETHICS* 268-71, 442-44 (7th ed. 1930).

wholly within a value system oriented towards consumption. For it may be said that the threat to productivity which would result from protecting the possessions of thieves — the threat stemming from society's failure to protect the expectations of all from being defeated by thievery — is far vaster than any loss in productivity on the part of thieves whose expectations are thwarted. Far from supporting protection of the thief's expectations, utilitarian theory forbids it, as do considerations of fairness.

A less obvious case is presented when it has been formally declared, or when a tacit understanding has arisen, that society reserves the right to preempt the exploitation of a certain narrowly described class of resources at any time, and that no one is to form any inconsistent expectations about the future use and control of those resources.<sup>126</sup> Such a declaration with respect to "all land" might have an intolerable effect on productivity;<sup>127</sup> but it might not when limited to, say, navigable waters<sup>128</sup> or liquor licenses.<sup>129</sup> Our society has, of course, issued

<sup>126</sup> Cf. Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238, 1250-53 (1960). Compare Professor Buchanan's argument that compensation is required only in respect of "changes in law" or "changes in the structural rules under which individuals make choices," but not in respect of changes "within the structure of existing law." Buchanan, *Positive Economics, Welfare Economics, and Political Theory*, 2 J. LAW & ECON. 124, 131-32 (1959).

<sup>127</sup> The objectionable effect might be curbed by furnishing a mechanism whereby the prospective land user could secure a firm commitment from the authorities that his proposed use will be allowed to run its course. This is, in essence, the British system of land use control. See generally Hart, *Control of the Use of Land in English Law*, in LAW AND LAND 3 (C. Haar ed. 1964); C. HAAR, LAND PLANNING LAW IN A FREE SOCIETY (1951). Its possible inconsistency with "liberty" values may be a more serious objection to it than any inconsistency with "security" values. See Dunham, *Property, City Planning, and Liberty*, in LAW AND LAND, *supra* at 28. An American variant, perhaps less potentially destructive of liberty, is the "special exception" — an administrative dispensation, to be granted under more or less preordained circumstances, from a generally applicable zoning restriction. See Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 71-80. Counter-productive effects may also be tolerable if the suspension of the claim to develop with security is definitely limited in duration, for example, by a stop-gap zoning ordinance which forbids any development for a short period while a comprehensive zoning scheme is being worked out. See *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (Dist. Ct. App. 1963). Compare the incident described in note 124 *supra*.

<sup>128</sup> The Supreme Court has come to regard it as "inconceivable" that anyone should acquire a vested right to exploit the navigable waters of the nation. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62-64 (1913); see Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963); cf. *Wofford v. State Highway Comm'n*, 263 N.C. 677, 140 S.E.2d 376, *cert. denied*, 382 U.S. 822 (1965) (no compensation where generally understood that highway reroutings, causing

a number of such declarations.<sup>130</sup> Yet people exploit navigable waters and avidly seek liquor licenses even though it is clear that commitments they make to such lines of endeavor may be rendered worthless by government action.

Utilitarian property theory, then, for all its emphasis on security of expectations, easily allows that compensation need not be paid in respect of investments which, when they were made, either (a) interrupted someone else's enjoyment of an economic good, as should have been apparent; or (b) were of a sort which society had adequately made known should not become the object of expectations of continuing enjoyment.<sup>131</sup>

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losses of access, might be undertaken); 49 U.S.C. §§ 1301(24), 1304 (1964) (appropriation of "navigable air space" to public domain). Professor Sax appears to criticize the "navigation servitude" because he sees no reason why private commitments to the use of navigable waters should be specially vulnerable to uncompensated public interruption. See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 52-53 & n.94 (1964). His footnote, however, seems to suggest that, passing the possible unwisdom of a social declaration that such private commitments will not be protected, historical understanding to that effect may itself be a reason for excusing society from the obligation to compensate. Compare *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) ("There . . . has been ample notice over the years that such property is subject to a dominant public interest."). Professor Dunham strongly questions the practice of denying compensation for value associated with the flow of navigable waters. See Dunham, *supra* note 110, at 104-05.

<sup>129</sup> See, e.g., *Opinion of the Justices*, 208 N.E.2d 823, 826 (Mass. 1965) (dictum).

<sup>130</sup> The usefulness and legitimacy of this technique may be seen where news of large-scale public development precedes its occurrence. It seems fair for the government to make clear, before the boom in land scheduled to be taken can commence, that compensation payments will not cover value attributable to the government's selection of the locale as a site for its project. See *United States v. Miller*, 317 U.S. 369, 377 (1943); cf. Dunham, *supra* note 126, at 1252-53. But see *Hard v. Housing Authority*, 219 Ga. 74, 132 S.E.2d 25 (1963).

<sup>131</sup> In addition to being clear and circumscribed, the declaration ought also to be confirmed in practice if occasional interruptive action is to avoid suggesting a threat to the generality of expectations. Thus the New Jersey court is opposed to enforcement of an overly restrictive zoning ordinance against a purchaser with notice if the apparent practice at the time of his purchase is to grant "variances" automatically upon request. See *Wilson v. Borough of Mountainside*, 42 N.J. 426, 201 A.2d 540 (1964). Similar concerns seem to have motivated the dissent in *United States v. Twin City Power Co.*, 350 U.S. 222, 229, 238-40 (1956).

Acceptance of "forewarning" as a justification for refusing compensation may tempt courts into circularity in disposing of compensation claims. A court may reject a claim on the false ground that legal doctrine, being enunciated by the court in the very course of ruling on the claim, establishes the lack of a basis for it in Benthamite "expectation." Compare *United States v. Cress*, 243 U.S. 316 (1917), with *United States v. Willow River Power Co.*, 324 U.S. 499 (1945). The difficulty of cutting into the circle — of determining whether a general understanding of noncompensability existed before the court's decision — may be gathered from the discussions in Dunham, *supra* note 110, at 76-81, 98-105.

The second problem raised by the concept of a prior warning of possible collective action concerns the difficulty of deciding whether such a warning, if implicit, was or was not given. An idea which is at the crux of these paragraphs — in a nutshell, that there is no need to compensate when social action interrupts or frustrates some mode of enjoyment of property which was, when the owner first began to orient his decisions towards that mode of enjoyment, evidently in conflict with other people's expectations already crystallized — will be resisted by many who have ruminated on these problems. The objection which is certain to be raised is that the proposition is based on untenable assumptions: that a person who inaugurates, say, a brickworks on his land *always* knows that his decision entails extraterritorial emanations bound to have *some* limiting effect on the choices open to owners of neighboring land (which is, after all, always owned by someone) no matter what uses those owners may eventually come to consider; that the instigator of such enterprises always, therefore, acts subject to "warning"; and that my suggested tool, accordingly, cuts no ice and decides no cases.

In one of its more arresting forms, the objection would imply that the brickmaker is able to "internalize" the benefits and costs of his operation by purchasing enough of the surrounding land to buffer adjacent holdings from the impacts of his brickworks. If he does that, then any consequential devaluation of land not actually employed in the brickmaking operation will show up in the brickmaker's own profit-and-loss ledger, which is where it belongs not only in justice but in the interest of efficiency. Since this reasonable course was open to the enterpriser at the time he committed himself to brickmaking, his failure to follow it fairly exposes him to the risk of restrictive legislation later on.

It seems doubtful that this form of argument really dispenses with the need to rely on the rule (let us call it the "earliest apparent expectation rule") that, in situations involving incompatibility among owners' preferences about the use of their respective properties, that preference should prevail whose likely existence ought first to have been evident to a detached observer. To see this, we might begin by asking *how much* of the surrounding land the brickmaker is to buy. Since different assumptions about what will turn out to be the "highest and best use" of the neighboring land obviously suggest different ranges of externally costly radiations from the brickyard, the buffer zone argument must

mean that the brickmaker is to assume the worst — that the owners of adjacent land will prefer to use their land for residences (no matter how wilful a choice that might be in the teeth of an existing brickworks). But such a rule hardly seems consonant with the dictates of efficiency. If it turns out that the neighboring land was “all along” destined for industrial uses, hindsight will show that no buffer at all was really necessary for “internalization” of the brickmaker’s costs; he will, then, have been required to invest more capital in brickmaking than brickmaking “really” required; and bricks will therefore cost more than they “should.” It may be said that he can turn the “excess” land to its most profitable use and thereby avoid having to treat its capital costs as part of the costs of bricks. But he is, after all, a *brickmaker*. Making bricks is, presumably, what he is best at and what he likes to do. Requiring him to invest in some other enterprise against his will is, then, presumably inefficient, apart from being an infringement of his liberty for purposes wholly speculative. The only way to avoid these objections is to require purchase of a buffer zone if, but only if, it is apparent that the adjacent land is destined for (or, in other words, has in all probability been mentally committed by its owners to) some specific use with which the brickworks would clash. But this is nothing other than the rule that you proceed at your own risk when you violate other people’s apparently crystallized and justifiable expectations.

Another way to challenge the buffer zone argument is to inquire whether it applies only to brickmakers, or whether it applies to homebuilders as well. One who breaks ground for a residence in the Los Angeles County wilderness will by that act foreclose *his* neighbor from the choice of building a brickworks, if the rule is that brickmakers must give way to homebuilders. But why, in that case, is it not incumbent on the homebuilder to acquire a buffer zone — enough surrounding land to insulate himself from the effects of any brickworks which an owner of adjacent land may choose to build — thereby “internalizing” all the consequences of *his* choice? True, he cannot really *know* that any neighboring landowner will ever have a brickworks in mind. But, by the same token, the brickmaker who builds first may not really know that anyone will want to make his home nearby. Surely we are again face to face with the impossibility of telling which of two incompatible activities is “the” nuisance, except by asking which actor acted only after the situation had

developed to the point where he should have realized that the other had already commenced to rely on *his* conflicting vision of the future.<sup>132</sup>

Let us admit that the brickmaker knows that, no matter what the future holds in store for the district where he builds his works, his act will surely, somehow, make a difference to someone else. This is true. But why is it such a devastating truth? Can we not easily (and should we not) distinguish an actor's knowledge that his act will make some kind of a difference, sometime, under circumstances unknown, to someone else, from his knowledge that his act will be injurious to someone else's formulated expectations of a distinctive and readily perceivable sort? This distinction is no more difficult to grasp or to apply than that implicit in the doctrine of vacant goods. It calls for judgments no more trying than what is required to decide between Pierson and Post.<sup>133</sup> When I shoot down wild quarry, or when I stoop to pick up the raw jewel lying in my path, I know that I am foreclosing others from the chance to acquire the particular asset I take. But I am not, by virtue of my knowledge, exposed to retroactive demands to disgorge. For such a duty to accrue, my action must have been specifically disappointing to someone else's outstanding expectations, and I must have had reason to understand that such was probably the case. If no other claim had been staked out, or if once staked out such a claim had been subjectively abandoned,<sup>134</sup> or even if not subjectively abandoned the asset had to all appearances been allowed to revert to nature's storehouse,<sup>135</sup> it was mine for the taking.

Now surely there are times when the destiny of land areas is indeterminate or unclear. "Wild" land in an undeveloped, isolated district may some day be used for residential development. But industry, or farming, or mining, might at an earlier stage be choices just as likely. As to some of these possibilities, a brickworks might be annoying; as to others, preclusive; as to others, innocent; and as to others, beneficial. There is no denying that the brickmaker may be grabbing some value for himself, but the value he grabs may be value in suspense, value unowned, value unspecified, vacant value. He acquires "possession" of it not by

<sup>132</sup> This point seems well recognized in private nuisance law. See *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N.E. 371 (1914); *Bove v. Donner-Hanna Coke Corp.*, 236 App. Div. 37, 258 N.Y.S. 229 (1932).

<sup>133</sup> See *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

<sup>134</sup> See R. BROWN, *LAW OF PERSONAL PROPERTY* 8-10 (2d ed. 1955).

<sup>135</sup> Cf. *Mullett v. Bradley*, 24 Misc. 695, 53 N.Y.S. 781 (Sup. Ct. 1898).



theft or conversion but by original occupation, which by all common understanding gives him title. By his act he may largely determine a district's destiny which was theretofore indeterminate. But perhaps he has done it at no one's expense. Perhaps what he has done is to crystallize value where none was apparent before.

## VI. INSTITUTIONAL ARRANGEMENTS FOR SECURING JUST COMPENSATION

We tend naturally to think of fairness as a standard against which to test political action, a discipline to be administered specifically and with deliberation, an extrinsic constraint to be imposed on an intrinsically nonfair political process. Such a conception is likely to lead without further conscious thought to an assumption, which for many surely will have an *a priori* feel, that the task of assuring the fairness of political action lies principally and ultimately with the courts. Thus it is that, when legal specialists turn their attention to the "legal system's" part in promoting fairness in collective undertakings through such a means as establishing a duty to pay "just compensation," they immediately perceive the problem as one to be solved by the promulgation of sound rules of decision. One can nonetheless challenge the attribution of preeminent responsibility to the judiciary, identify institutional impediments to adequate control of fairness by courts, and explore the possible advantages of *self-discipline* by legislatures and public administrators. But as the prelude to such a discussion, it is essential to adopt momentarily the notion that fairness could enter into political action, not as a constraint to be imposed upon a public decision making system — whether by judges as extrinsic discipline or by political actors as *self-discipline* — but rather as a quality built directly into the system of political decision making.

Perhaps it is possible to design a collective decision making procedure which — through the very rules which determine by whom, in what form and sequence, with the support of what fraction of voters, and so forth, measures may be introduced, debated, and passed — seems to assure that political bargaining by unreservedly self-interested actors would distribute benefits and burdens "evenly" or within whatever tolerances fairness admits. Such a system may be distinguished from what we now have chiefly by its capacity to prevent the formation of stable factions able to engage in a more or less systematic ganging-up — a malfunction

most difficult to prevent under simple majority voting. Its output, when examined in chunks covering a substantial span of time, would approximate that of a system requiring unanimity, but it would avoid somehow the prohibitive systemic costs that an actual unanimity rule would entail. If such a system could be devised, it would amount to a "fairness machine"<sup>136</sup> which could harness the self-interested tendencies of men to produce a fair distribution of the political payoff despite no one's having deliberately sought a fair outcome. The analogy to the economic market will be evident.

It is clear enough that if we had actually succeeded in designing such a fairness machine we would have no need of a fairness *discipline* or of the duty of just compensation which is a part of that discipline. The substantive prohibitions in bills of rights, among which just compensation clauses ought to be classed, would then be pointless. Less clearly true, but certainly worth exploring, is the proposition that the urgency of the fairness discipline recedes, or that the best means of administering it changes, as the political decision making system more closely approaches the ideal of the fairness machine. For the moment, the basic point is that the survival of bills of rights, just compensation clauses, and judicial activism can be viewed as testimony that we do not now have, in our sets of rules governing legislative procedure, any tolerably close approximation to a fairness machine. It seems unnecessary to inquire whether that is because some datum, some element of the human constitution, makes such a system a logical impossibility, or because human ingenuity has so far simply failed to see how one can be arranged, or because a decision making procedure which would succeed as a fairness machine would be so objectionable on other counts that it seems better to seek fairness through extrinsic discipline or political self-discipline. The truth is that fairness continues to enter into political action in the form of a discipline; and it continues to be important to ask who should administer that discipline or, more particularly, whether we are right in relying as heavily as we do on the courts.

At least two objections to heavy reliance on the judiciary are worth exploring: (1) Fairness as a standard for judging a political decision may simply be too difficult for courts to grasp

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<sup>136</sup> I am indebted for the expression, and for the thought which has been stimulated by it, to my colleague Charles Fried. He believes he owes the phrase to someone else, but is not sure to whom.

and apply successfully. In particular, restriction to the occasional foothold which litigation furnishes may disable courts from making competent judgments about fairness, or from prescribing adequate cures for its absence, since fairness is a quality of courses or networks of decisions rather than of any particular decision which may generate a case or controversy. (2) The yes-or-no alternative posed in constitutional adjudication, combined with judicial incapacity to invent nonlogical or artificial remedies, may be a critical disqualification.

It is of course true of other constitutional limitations, as it is of the just compensation clauses, that courts cannot by themselves enforce to the limits of social desirability the values or principles embodied in the limitations. The problem of judicial incapacity about to be discussed is not, then, peculiar to just compensation law. But it may be especially acute here for two reasons, both related to the extreme lack of specificity of the fairness principle in comparison with principles expressed in other provisions found in our bills of rights.

A first consequence of the over-arching generality, the global quality, of the fairness principle is that it effectively prevents courts from proceeding by the use of categories and presumptions. It may be difficult, but it remains feasible, for courts to identify those governmental acts which (for example) encroach on free expression, or invade a citizen's privacy, or deal unequally with classes of people, and to prevent such acts in the absence of special justification. In these cases the basic document provides sufficiently specific guidance to support judicial invalidation of a measure because it is of a certain kind, without the court's having to ask ultimate questions about efficiency and fairness. But no such convenience is available in the just compensation sphere. The court cannot be expected to proceed by presuming that every governmental act perceptibly entailing a capricious redistribution is improper unless specially justified. But between that inquiry and the ultimate question there seems to be no satisfactory stopping place.

A second consequence of the nonspecificity of fairness is loss of effect on the political decision making process itself. If a measure has an impact of curbing speech, or invading privacy, or classifying invidiously, we can expect that impact to be taken into account by those who must decide whether to adopt the measure. But legislators and administrators are likely to regard prevention of capricious redistribution not as a "policy" element

to be weighed in arriving at decisions, but rather as a technical adjustment to be made by courts after policy decisions have been made. Let it be determined what measures "the public interest" requires; and if, in the course of carrying out those measures, it appears that someone is sustaining unacceptable harm, the court can always award just compensation.

It is in the failure of judicial capability to jibe with this implicit legislative and administrative referral that the special danger lies.

### *A. The Difficulty of "Judging" Fairness*

The question to be investigated at this point is whether there is something about the content of fairness as a standard for testing the legitimacy of political action which unfits it for judicial use, and so suggests that reliance would be better placed on political self-discipline than on judicial discipline.

However difficult the fairness standard may be to formulate and apply, there is no obvious reason for supposing that political actors should be able to understand it better or handle it more deftly than judges can. There is, indeed, some ground for supposing the contrary. One way to define fairness is to say that a political output is fair when it approximates the expected output of a fairness machine — a system yielding results similar to those which unanimity would yield, but somehow freed from the operational costs attendant upon an actual unanimity rule. In making this comparison, the judge has an obvious advantage of detachment over the legislator who is actually involved on terms inconsistent with the hypothetical terms governing the fairness machine. But the judge may labor under a serious disadvantage too. In order to make use of the fairness machine comparison, he would need access to information which the legislator may have but which the judge usually cannot have; that is, he would need to see the decision which has been challenged in litigation in its whole systematic context — to know, for example, what vote trades, explicit and implicit, concerning past and future measures have been connected with it — in order to employ the objectified conception of fairness as an approximation to the output of a fairness machine.

Since he cannot usually expect to get the information required to objectivize the fairness judgment, the judge will have to resort to a subjective formulation. His judgment will have to reflect his answer to the question: ought the affected individual to find this

challenged decision acceptable because principles which can be said to be manifested in it promise risk-minimizing results over the long run? (Or, in the utilitarian formulation: do the relative social necessity, smallness, generality, and vagueness of the injury, taken together with the expense of arriving at effective settlements, indicate that it would be wasteful to try to counteract demoralization by compensating?) But such conceptions of fairness or utility, as the quality in an act which renders it inoffensive to ethical sensibilities despite its apparently discriminatory character, or not so demoralizing as to justify the expense of correcting its capriciously redistributive impacts, may be inescapably vague. Fairness so conceived is a subtle compound, whose presence in any given situation we can often sense (and even, perhaps, form a consensus about) but only through a mental chemistry hard to reconstruct except through impressionistic, almost conclusory discourse. The judgment is introspective and ineffable. It may, then, rest uneasily with judges whose decisions are supposed to derive their peculiar moral authority from an ability to invoke incisive and impersonal reasons for a decision. We should not be surprised at the emergence of a number of partial, imperfect, or overbroad surrogate rules from among which judges may pick and choose in order to avoid explaining compensability decisions in terms by which a litigant is, in effect, simply told that his sensation of having been victimized is not justified.<sup>137</sup> Such a set of rules will serve its purpose even though its components do not interrelate so as to indicate a unique choice of result, or do not contain within themselves any indication of which rule governs when more than one seems potentially applicable. For, if there is no intellectual discipline constraining the judge to select one imperfect rule rather than another to which his case could be fitted no less convincingly, we may imagine that he selects the rule which, while referring to some circumstance prominently visible in the case before him, also commands the result he feels to be fair.<sup>138</sup> If the rules cannot always *guide* a sentient judge to his decision, they may still render good service as props to imbue that decision with the

<sup>137</sup> We might, then, be prepared to find compensability opinions marred by the rhetoric and the opacity which seem in fact to have been found in them. Cf. Sax, *supra* note 128 at 42-46; Dunham, *supra* note 110, at 73.

<sup>138</sup> The existence of such a situation has been noted in Mandelker, *supra* note 110, at 8. Its implications for the integrity of the judicial process are explored in H.M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 407-26 (tent. ed. 1958).

appearance of ordinariness and impersonality, thereby enabling the judge to decide the "correct" issue (that of fairness) without being intolerably dictatorial and smug about it.

Contentment with this model of judicial action in compensability cases will in part depend on whether it fairly represents reality, or whether judges really can escape the distractions interposed by unsatisfactory rules and focus clearly on the question of fairness. But even if they can, we may object to a judge's evasion of open responsibility for the decision of fairness which (as we are now assuming) he in fact makes. We may feel that he thereby places himself beyond that professional criticism which forms an important part of the discipline to which he ought to be subject as a public official. Or we may feel that his disingenuousness too seriously vitiates the moral and educative potential of the just compensation provisions.

Our question about fairness as an apt standard for judging thus reflects not a suspicion that judicial personnel are less able than other men to understand or apply the content of the standard, but doubt stemming from a judicial predilection — one which we normally applaud because we deem it healthily responsive to limits we wish to keep in place around the judicial province — to seek an articulate doctrinal packaging for all judgments. The problem is that fairness resists being cast into a simple, impersonal, easily stated formula.

This is not to say that courts cannot usefully be put to work deciding at least some compensability issues. It is rather to suggest abandonment of any idea that courts can or will decide each compensability case directly in accordance with the precept of fairness. Hence, we need to search instead for some workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate. But if that is our choice (or our preferred description of what actually takes place) it is of the utmost importance that we clearly and frankly acknowledge it. The danger here is one of behaving *as if* courts were doing the whole job when the truth is that they are attentive only to "hard core" or "automatic" cases. To illustrate: a utilitarian approach to the problem might suggest a judicial rule that compensation is due only when there has been either (a) a physical occupation or (b) a nearly total destruction of some previously crystallized value which did not originate under clearly speculative or hazardous conditions. Such a rule would be workable; it would be internally consistent; and it would be ethically

inoffensive as far as it goes. True, its cut-off points are arbitrary, and it completely disregards some significant but less discussable dimensions of fairness. But these attributes in the rule would merely reflect its function as a rule *for courts to use* in the partial performance of a task for which judicial capabilities are not fully adequate.

In fact, the rule suggested in the preceding paragraph may actually be in force. I believe it would be found to describe fairly well the results actually reached in those just compensation cases to which it would purport to apply. But it rather clearly leads to denial of compensation in cases where fairness requires otherwise. To say that a court has replaced a fairness rule with some other rule which it can more comfortably and convincingly administer is to say that the court is deliberately courting error; and there can be no doubt that any such error must lie largely on the side of undercompensation, since one of the judge's prime concerns will be to avoid the promulgation of elastic precedent which threatens astronomical settlement costs for the future. Nor can we expect that this bias will be significantly counteracted by judicial willingness to stretch a tightly stated principle to cover a specially appealing case, for the carefully inculcated hesitancy of judges to override political majorities is here reinforced by a special factor. Even though the judge conceives fairness to be a function of an affected person's sensibilities, a particular kind of summation of what that person sees and feels, rather than an objective approximation to the output of a fairness machine, he will not be unaware that fairness is significantly affected by the systematics, continuities, and web-like interrelationships of the whole political process into which he cannot clearly see. And the very fact that the case is in litigation implies that the responsible officials who do have some sense of the political realities of the situation have decided that it is fair to enforce the challenged measure without compensation. If these officials have, for their part, simply sloughed the problem to the judiciary automatically, compensation is surely going to be denied in some cases where it "should have" been paid. At least, this will happen unless judges become less deferential to legislative and administrative decisions than we have usually thought they should be.

This line of argument is not, as it may at first seem to some, inconsistent with our earlier analysis of fairness. In line with that earlier analysis, it might seem that if the court's reckoning of prohibitive future settlement costs as a likely result of some

present departure from an established, strict, and sharp line of distinction is a sound one, then the disappointed litigant would be bound to acknowledge the risk-minimizing character of the rule which denies him compensation and so to accede to the result because it is fair.

The defect in this reasoning is its implicit assumption that the courts offer the only feasible forum and method for administering compensation discipline, that compensability decisions *must* be made indirectly through the promulgation of general rules of decision conforming to judicial requirements of incisiveness, impersonality, and precedential consistency. If, however, we can see no reason why political actors might not administer their own fairness discipline on a far less rigorous basis, we shall be unable to accept as fair a failure to compensate based on a settlement cost calculation which assumes inflexibilities applicable only to courts. In short, if political officials are capable of a finesse beyond the grasp of courts, then they are obliged to make use of it.

Judges, at least, seem to understand that this is so. We should notice the occasions upon which courts, in the course of rejecting plausible claims to compensation, trouble to observe that the legislature might, if it pleased, provide the compensation which the court cannot bring itself to exact.<sup>139</sup> How can it be that payments of public funds to private individuals, not in satisfaction of legal liabilities of state or nation and not noticeably in pursuit of the "general welfare" (unless the general welfare embraces the need to satisfy the demands of fairness), would not be "waste" or "gifts" of public assets?<sup>140</sup> The message seems to be that the courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require.

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<sup>139</sup> *E.g.*, *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143 (1966); *see* S. Res. 231, 80th Cong., 2d Sess. (1948); *Burkhardt v. United States*, 84 F. Supp. 553, 559-60 (Ct. Cl. 1949).

<sup>140</sup> The constitutionality of such payments has been sustained. *See, e.g.*, *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923); *Opinion of the Justices*, 208 N.E.2d 823 (Mass. 1965); *cf. United States v. Realty Co.*, 163 U.S. 427 (1896); *Pack v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789 (Tenn. 1965).



It would be wrong to suppose that our legislatures have been oblivious to such obligations. They have sometimes enacted general statutes directing courts to recognize some species of claim, whenever it arises, which courts on their own might hold non-compensable because of precedential considerations both retrospective and prospective.<sup>141</sup> A more obvious resort to peculiarly nonjudicial capabilities is the practice of enacting private bills to provide for compensation in cases where a court concerned to avoid the promulgation of unmanageable new doctrine, or unable to see clearly enough into the political context to make a firm judgment of unfairness, would feel bound to deny it. This is, of course, ad hoc business not comfortably situated with the legislature, either; and it is interesting to note the responsive emergence of "courts" within legislatures to marshal the facts and precedents (which have a factual bearing insofar as they impose limits on a claim of disappointed expectations). The legislature, by its act of invoking a quasi-judicial process, seems to attest that the claimant has not been compensated through politics, thereby helpfully clarifying the fairness issue.<sup>142</sup>

### *B. The Usefulness of Artificial Settlements*

A serious objection to the habit of leaving fairness discipline to the courts is that we may thereby miss opportunities to make good use of settlement methods too artificial or innovative for judicial adoption. A court, it seems, must choose between denying all compensation and awarding "just" compensation; the loss is

<sup>141</sup> *E.g.*, H.R. 3421, 89th Cong., 1st Sess. § 104 (1965) (compensation to holder of revoked permit for special use of national forest land); *cf.* Indian Claims Act, 25 U.S.C. § 70a (1964) ("claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity"; limited to claims presented by Indian groups; special tribunal established).

<sup>142</sup> Congressional committees may convene as quasi-judicial tribunals to decide whether private bills will be recommended for enactment. *See Note, Private Bills in Congress*, 79 HARV. L. REV. 1684, 1688-89 (1966). Or a claims bill may be held in abeyance pending a report from the Court of Claims, after what amounts to litigation of the case, concerning "the amount, if any, legally or equitably due from the United States to the claimant." *See* 28 U.S.C. §§ 1492, 2509 (1964). (*But see* *Glidden Co. v. Zdanok*, 370 U.S. 530, 572-73 (1962): are Court of Claims reports to Congress unconstitutional advisory opinions?) The key to the special usefulness of the report method lies in the court's steadfast refusal, having construed the word "equitable" in this context to have a "broad," "moral," and "nonjuridical" connotation, further to pin down its meaning. *See* *Harvey-Whipple, Inc. v. United States*, 342 F.2d 48, 53-54 (Ct. Cl. 1965); *Armiger v. United States*, 339 F.2d 625, 628 (Ct. Cl. 1964). There may be a real liberating effect in the general understanding that the court is engaged in occasional exercises of special grace, and not in vindicating legal rights (or incidentally promulgating precedents respecting them).

either a "taking" of "property" or it is not. If "just" compensation is essentially incalculable, or if the cost of computing it is very high, the court may be led to classify a situation as non-compensable.<sup>143</sup> If choice must be relegated to this framework, we shall not be able to exploit the substitutability of settlement costs and demoralization costs. It may be that even though that settlement which would reduce demoralization costs to zero would be prohibitively costly, there exists some relatively cheap form of settlement which would reduce demoralization costs so effectively that, by using it, we can reduce the total of settlement plus demoralization costs below what they would be in the absence of any settlement. Such a settlement technique, if one exists, is very likely to require legislative adoption.<sup>144</sup>

For illustration, consider the problem of "relocation payments" to people uprooted by various public development programs, particularly urban renewal.<sup>145</sup> When land is appropriated for clearance and redevelopment, its owner is, of course, compensated in the amount of its "fair market value." But, by the generally received doctrines, tenants are not constitutionally entitled to anything (unless nonsalvageable tenant-owned fixtures are destroyed), and tenant-owners are not constitutionally entitled to be compensated for the disruptive effects of changing neighborhoods and sinking new roots, or even, in case a business is uprooted, for good will destroyed, or, very possibly, for the cash outlay entailed in moving.<sup>146</sup> Justification is not hard to come by

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<sup>143</sup> For fascinating reflections on the sources of the all-or-nothing predisposition of courts, its costs, its cures, and its connections with the above-discussed fear of unruly precedent, see Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964).

<sup>144</sup> For an excellent illustration and discussion see Note, *An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings*, 3 HARV. J. LEGIS. 445-47, 450-51 (1966).

<sup>145</sup> See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS* (1965). The provisions in the Trade Expansion Act of 1962 for "adjustment assistance" to firms and employees injured by newly authorized foreign trade concessions could perhaps be cited as another example of a deliberate congressional response to fairness requirements. See 19 U.S.C. §§ 1901-78 (1964); S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* 55-80 (1964). But these provisions, without which it is said that the Act's trade liberalization policy "would have been more difficult to achieve" politically (*id.* at 55), may with equal plausibility be said to exemplify the possibility of an automatic tendency towards fairness in an aptly designed decision making system.

<sup>146</sup> STAFF OF SUBCOMM. ON REAL PROPERTY ACQUISITION OF THE HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., *STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL*

for judicial abstinence from such claims. Valuation of good will is a formidable problem. How far away is a person "entitled" to move? How do you translate into dollars the shock of changing neighborhoods and the damnable inconvenience of moving, or appraise the educational damage inflicted by midstream changes in schools? All these problems are multiplied a hundred or a thousandfold where large scale programs scatter large numbers of families. The imponderable and idiosyncratic nature of the losses involved, and the interminable wrangling over amounts which would result from imposing a legal requirement of "just compensation," furnish a classic instance in which compensation claims are defeated largely because of sheer impenetrability.

Yet the violent unfairness of many such operations is manifest. The social gains hoped for from some urban redevelopment programs, while plausible enough to override any "public purpose" objection, nevertheless depend on a still controversial conception. Easily identified, relatively small numbers of people are being handed a distinctly disproportionate and frequently excruciating share of the cost of whatever social gain is involved. Redevelopment has been typically sporadic and probably will be infrequent over the long run — a few explosions here and there in the community in the course of a lifetime. There is no palpable reciprocity; the sufferers rarely double as special gainers, and they must submit to the spectacle of private land developers (or new residents) moving in for what looks like a publicly subsidized benefit. Those dislocated are likely to be members of a social class which comes increasingly to be identified as a faction — "the urban poor."<sup>147</sup> Yet their influence and organization is not so great, certainly less than their numbers might indicate; and so the sense of having bargained for compensatory concessions probably brings little satisfaction. Altogether, the spectacle of uncompensated dislocations under these circumstances is an oppressive one.

Here is a situation in which a legislature can impose a useful fairness discipline which eludes the grasp of courts. There has, indeed, been a steadily expanding congressional solicitude for

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AND FEDERALLY ASSISTED PROGRAMS 54-55 (Comm. Print 1965) [hereinafter cited as SUBCOMMITTEE STUDY]; 2 P. NICHOLS, *EMINENT DOMAIN* §§ 5.76, 5.81 [2], 5.83, 5.84 (rev. 3d ed. 1963); Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 74-81 (1957). But cf. *United States v. General Motors Corp.*, 323 U.S. 373, 383 (1945); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

<sup>147</sup> See SUBCOMMITTEE STUDY 21.

persons displaced by federally financed redevelopment activities.<sup>148</sup> The first concession was to provide for payment of actual moving expenses occasioned by urban renewal programs. That even this innovation depended upon the exercise of special legislative and administrative capabilities, and would have been much harder to introduce judicially, is suggested by the inclusion of fixed monetary and mileage ceilings, and also of a device to minimize small claims settlement costs by making payments in fixed amounts to compensate for household moving expenses.<sup>149</sup>

Artificial methods have, moreover, been invented for recognizing the existence of essentially unappraisable losses in addition to the expense of moving. Fixed sums are payable to some businesses, without regard to proof of damage, presumably in respect of their destroyed good will and momentum.<sup>150</sup> "Relocation Adjustment Payments" are also available to some displaced households to acknowledge the likelihood of an increase in rental expense as a result of relocation.<sup>151</sup> There has, as yet, been no attempt to recognize by monetary payment the sentimental injury, or the loss of valued society, or the inconvenience and annoyance, which a forced move may occasion, but devices have been recommended for such purposes.<sup>152</sup>

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<sup>148</sup> See *id.* at 1-4; Pinsky, *Relocation Payments in Urban Renewal: More Just Compensation*, 11 N.Y.L.F. 80, 81-85 (1965). The most significant development since 1964 has been to extend the federal provisions beyond urban renewal, the field in which they originated, to a few other federally assisted land-taking activities. 42 U.S.C. § 3074 (Supp. I, 1965). The Select Subcommittee on Real Property Acquisition of the House Committee on Public Works has produced H.R. 13725, 89th Cong., 2d Sess. (1966) (a bill "to provide for equitable acquisition practices, fair compensation, and effective relocation assistance in real property acquisition for Federal and federally assisted programs . . ."), which has apparently been resting in the bosom of the Committee on Ways and Means since being introduced in March 1966. The bill (§ 101(a)) states one of its purposes to be "to promote public confidence in Federal land acquisition practices"; it embodies the recommendations of SUBCOMMITTEE STUDY. Compare H.R. 3421, 89th Cong., 1st Sess. (1965).

<sup>149</sup> 42 U.S.C. §§ 1465(b)(1), (c)(1) (1964); 24 C.F.R. §§ 3.109(a)(2), 3.101(m)(2) (1966). But see 24 C.F.R. § 3.105(a) (1966) (claimant may elect to recover actual expenses).

<sup>150</sup> 42 U.S.C. § 1465(b)(2) (Supp. I, 1965) (payment of \$2,500 to concerns with annual earnings under \$10,000); see SUBCOMMITTEE STUDY 131, 152-53.

<sup>151</sup> 42 U.S.C. § 1465(c)(2) (1964). The payment is in the amount of the difference between 20% of the claimant's annual income and an average yearly rental for minimally decent and adequate quarters, but it may not exceed \$500.

<sup>152</sup> See SUBCOMMITTEE STUDY 131, 152 (proposal for \$100 "dislocation allowance" to all displaced households, plus \$300 payment to displaced resident who owns a fee simple or life estate).

*C. The Need for Administrative Conscientiousness*

Settlement schemes, whether of legislative or judicial origin, are bound to be imperfect. There will be occasions on which recognition of these imperfections should spell the difference between approving and disapproving some collective undertaking. A danger of automatically entrusting the fairness discipline to courts is that public administrators may fail to take appropriate notice of this problem.

A superhighway, let us assume, is to be built through a densely settled urban area. Three routes are technologically feasible. One would go underground, would be minimally disruptive, and would be frightfully expensive. A second would travel through a university campus, entailing a large compensation liability but not an injury irreparable by money payments. A third would run across blocks of modest dwellings. Compensation liabilities would be incurred, but satisfactory settlements for tenants would be impossible. A fourth alternative would be not to build the highway. In this situation, the planner preoccupied with calculations of comparative costs will have no difficulty seeing the costs entailed by the first, second, and fourth possibilities. But if he is accustomed to transferring all responsibility for the fairness of his decisions to the judiciary, he will fail to take into account a significant cost entailed by the third alternative, that being the demoralization cost, or sense of injustice, remaining after the court has exerted its inadequate, even if maximum, effort to secure the payment of "just compensation." It is the duty of public officials to take such costs into account.<sup>153</sup>

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Present in the foregoing discussion (buried in it, if you like)

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<sup>153</sup> Cf. H.R. 13725, 89th Cong., 2d Sess. § 101(a)(12) (1966): "In determining the boundaries of a proposed public improvement, the head of the Federal agency concerned should take into account human considerations, including the economic and social effects of such determination on the owners and tenants of real property in the area, in addition to engineering and other factors." Since the bill elsewhere provides for compensation payments to offset dislocation losses, it can be inferred that the draftsmen are here recognizing that monetary compensation cannot practically be employed so as to fully repair such losses, so that project planners should deem it a significant objective to avoid them in the first instance. The project planners described in ALTSHULER, *supra* note 124, at 77-78, apparently understood their obligation to avoid inflicting noncompensable harms insofar as that was possible but did not often find it possible.

are the makings of a reconciliation between Holmes and Hobhouse.<sup>154</sup>

The Hobhouse dictum that a society cannot be called "rational" if it is unable to avoid choices between public weal and private ruin can surely claim our support as a statement pertaining to the long run. For a society which finds it "necessary" to sacrifice individuals irrevocably in the interest of the mass must believe in the reality of collective experience, or subscribe to a non-egalitarian ethic, or be unable to see or exploit the mechanisms of compensation — any of which traits would be regarded by most of us as a gross enough deformity to warrant the epithet "irrational."

But the Hobhouse dictum rings false if we have in mind the short run only. Within the confines of a single transaction we may indeed be put to a choice between public good and private security, for the possibility of adjustment through compensation may then be a merely theoretical and not a practical possibility. In such a context the Holmesian conception of a government which "cannot help" sacrificing individuals is meaningful and valid. That Holmes had some inkling of Hobhouse's perception of the long view is indicated by his insistence that civilized governments impose disproportionate hardship on citizens *only* when they cannot help it. That Hobhouse took his stand with specific reference to the long view appears from his choice of metaphor.

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<sup>154</sup> See p. 1166 *supra*.