

HOMELESSNESS AND THE ISSUE OF FREEDOM*

ABSTRACT

In this article the author explores the relationship between homelessness, the rules of public and private property, and the underlying freedom of those who are condemned by poverty to walk the streets and sleep in the open. The author focuses on the fundamental question of legal and moral philosophy: how should we think about homelessness, how should we conceive of it, in relation to a value like freedom? Some of the most fundamental and abstract principles of liberal value are at stake in any discussion of homelessness.

INTRODUCTION

There are many facets to the nightmare of homelessness. In this essay, I want to explore just one of them: the relation between homelessness, the rules of public and private property, and the underlying freedom of those who are condemned by poverty to walk the streets and sleep in the open. Unlike some recent discussions, my concern is not with the constitutionality of various restrictions on the homeless (though that, of course, is important).¹ I want to address a prior

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¹ See, e.g., Siebert, *Homeless People: Establishing Rights to Shelter*, 4 *LAW & INEQUALITY* 393 (1986) (no constitutional guarantee of adequate housing); Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 *CALIF. L. REV.* 595 (1989) (authored by Ades) (arguing that laws that proscribe sleeping in outdoor public areas violate the right to travel).

question – a more fundamental question – of legal and moral philosophy: how should we think about homelessness, how should we conceive of it, in relation to a value like freedom?

The discussion that follows is, in some ways, an abstract one. This is intentional. The aim is to refute the view that, on abstract liberal principles, there is no reason to be troubled by the plight of the homeless, and that one has to come down to the more concrete principles of a communitarian ethic in order to find a focus for that concern. Against this view, I shall argue that homelessness is a matter of the utmost concern in relation to some of the most fundamental and abstract principles of liberal value. That an argument is abstract should not make us think of it as thin or watery. If homelessness raises questions even in regard to the most basic principles of liberty, it is an issue that ought to preoccupy liberal theorists every bit as much as more familiar worries about torture, the suppression of dissent, and other violations of human rights. That the partisans of liberty in our legal and philosophical culture have not always been willing to see this (or say it) should be taken as an indication of the consistency and good faith with which they espouse and proclaim their principles.

I. LOCATION AND PROPERTY

Some truisms to begin with. Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location. Moreover, though everyone has to be somewhere, a person cannot always choose any location he likes. Some locations are physically inaccessible. And, physical inaccessibility aside, there are some places one is simply not allowed to be.

One of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where. For the purposes of these rules, a country is divided up into spatially defined regions or, as we usually say, places. The rules of property give us a way of determining, in the case of each place, who is allowed to be in that place and who is not. For example, if a place is governed by a private property rule, then there is a way of identifying an individual whose determination is final on the question of who is and who is not allowed to be in that place. Sometimes that individual is the owner of the land in question, and sometimes (as in a landlord-tenant relationship) the owner gives another person the power to make that determination (indeed to make it, for the time being, even as against the owner). Either way, it is characteristic of a private ownership arrangement that some individual (or some other particular legal person) has this power to determine who is allowed to be on the property.

The actual rules of private property are, of course, much more complicated than this and they involve much besides this elementary power of decision.² However, to get the discussion going, it is enough to recognize that there is something like this individual power of decision in most systems of private ownership. Private ownership of land exists when an individual person may determine who is, and who is not, allowed to be in a certain place, without answering to anyone else for that decision. I say who is allowed to be in my house. He says who is to be allowed in his restaurant. And so on.

The concept of *being allowed* to be in a place is fairly straightforward. We can define it negatively. An individual who is in a place where he is not allowed to be may be removed, and he may be subject to civil or criminal sanctions for trespass or some other similar offense. No doubt people are sometimes physically removed from places where they *are* allowed to be. But if a person is in a place where he is not allowed to be, not only may he be physically removed, but there is a social rule to the effect that his removal may be facilitated and aided by the forces of the state. In short, the police may be called and he may be dragged away.

I said that one function of property rules is to indicate procedures for determining who is allowed and not allowed (in this sense) to be in a given place, and I gave the example of a private property rule. However, not all rules of property are like private property rules in this regard. We may use a familiar classification and say that, though many places in this country are governed by private property rules, some are governed by rules of collective property, which divide further into rules of state property and rules of common property (though neither the labels nor the exact details of this second distinction matter much for the points I am going to make).³

If a place is governed by a *collective* property rule, then there is no private person in the position of owner. Instead, the use of collective property is determined by people, usually officials, acting in the name of the whole community.

Common property may be regarded as a sub-class of collective property. A place is common property if part of the point of putting it under collective control is to allow anyone in the society to make use of it without having to secure the permission of anybody else. Not all collective property is like this: places like military firing ranges, nationalized factories, and government offices are off-limits to members of the general public unless they have special permission or a legitimate purpose for being there. They are held as collective property for purposes other than making them available for public use. However, examples of common property spring fairly readily to mind: they include streets, sidewalks, subways, city parks, national parks, and wilder-

² The best discussion remains Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed. 1961); *see also* S. MUNZER, A THEORY OF PROPERTY 21-61 (1990); J. WALDRON, THE RIGHT TO PRIVATE PROPERTY 15-36 (1988).

³ *See* J. WALDRON, *supra* note 2, at 40-42; Macpherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 4-6 (C. Macpherson ed. 1978).

ness areas. These places are held in the name of the whole society in order to make them fairly accessible to everyone. As we shall see, they are by no means unregulated as to the nature or time of their use. Still, they are relatively open at most times to a fairly indeterminate range of uses by anyone. In the broadest terms, they are places where anyone may be.

Sometimes the state may insist that certain places owned by private individuals or corporations should be treated rather like common property if they fulfill the function of public places. For example, shopping malls in the United States are usually on privately owned land. However, because of the functions such places serve, the state imposes considerable restrictions on the owners' powers of exclusion (people may not be excluded from a shopping mall on racial grounds, for example) and on their power to limit the activities (such as political pamphleteering) that may take place there.⁴ Though this is an important development, it does not alter the analysis I am developing in this Essay, and for simplicity I shall ignore it in what follows.

Property rules differ from society to society. Though we describe some societies (like the United States) as having systems of private property, and others (like the USSR – at least until recently) as having collectivist systems, clearly all societies have some places governed by private property rules, some places governed by state property rules, and some places governed by common property rules. Every society has private houses, military bases, and public parks. So if we want to categorize whole societies along these lines, we have to say it is a matter of balance and emphasis. For example, we say the USSR is (or used to be) a collectivist society and that the USA is not, not because there was no private property in the USSR, but because most industrial and agricultural land there was held collectively whereas most industrial and agricultural land in the United States is privately owned. The distinction is one of degree. Even as between two countries that pride themselves on having basically capitalist economies, for example, New Zealand and Britain, we may say that the former is "communist" to a greater extent (i.e. is more a system of common property) than the latter because more places (for example, all river banks) are held as common property in New Zealand than are held as common property in Britain. Of course, these propositions are as vague as they are useful. If we are measuring the "extent" to which a country is collectivist, that measure is ambiguous as between the quantitative proportion of land that is governed by rules of collective property and some more qualitative assessment of the importance of the places that are governed in this way.⁵

⁴ In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the United States Supreme Court held that the California courts may reasonably require the owners of a shopping mall to allow persons to exercise rights of free speech on their premises under the California Constitution, and that such a requirement does not constitute a taking for the purposes of the Fifth Amendment to the Constitution of the United States.

⁵ For a 'more complete discussion, see J. WALDRON, *supra* note 2, at 42-46.

II. HOMELESSNESS

Estimates of the number of homeless people in the United States range from 250,000 to three million.⁶ A person who is homeless is, obviously enough, a person who has no home. One way of describing the plight of a homeless individual might be to say that there is no place governed by a private property rule where he is allowed to be.

In fact, that is not quite correct. Any private proprietor may invite a homeless person into his house or onto his land, and if he does there *will* be some private place where the homeless person is allowed to be. A technically more accurate description of his plight is that there is no place governed by a private property rule where he is allowed to be whenever *he* chooses, no place governed by a private property rule from which he may not at any time be excluded as a result of someone else's say-so. As far as being on private property is concerned – in people's houses or gardens, on farms or in hotels, in offices or restaurants – the homeless person is utterly and at all times at the mercy of others. And we know enough about how this mercy is generally exercised to figure that the description in the previous paragraph is more or less accurate as a matter of fact, even if it is not strictly accurate as a matter of law.⁷

For the most part the homeless are excluded from *all* of the places governed by private property rules, whereas the rest of us are, in the same sense, excluded from *all but one* (or maybe all but a few) of those places. That is another way of saying that each of us has at least one place to be in a country composed of private places, whereas the homeless person has none.

Some libertarians fantasize about the possibility that *all* the land in a society might be held as private property ("Sell the streets!").⁸ This would be catastrophic for the homeless. Since most private proprietors are already disposed to exclude him from their property, the homeless person might discover in such a libertarian paradise that there was literally *nowhere* he was allowed to be. Wherever he went he would be liable to penalties for trespass and he would be liable to eviction, to being thrown out by an owner or dragged away by the police. Moving from one place to another would involve nothing more liberating than moving from one trespass liability

⁶ Diluliu, *There but For Fortune*, NEW REPUBLIC, June 24, 1991, at 27, 28.

⁷ But this ignores the fact that a large number of people with no home of their own are kept from having to wander the streets only by virtue of the fact that friends and relatives are willing to let them share their homes, couches, and floors. If this generosity were less forthcoming, the number of "street people" would be much greater. Still, this generosity is contingent and precarious: those who offer it are often under great strain themselves. So the situation affords precious little security: at the first family crisis, the friend or relative may have to move out.

⁸ See, e.g., M. ROTHBARD, FOR A NEW LIBERTY 201-02 (1973) [emphasis in original]:

"The ultimate libertarian program may be summed up in one phrase: the *abolition* of the public sector, the conversion of all operations and services performed by the government into activities performed voluntarily by the private enterprise economy [...] Abolition of the public sector means, of course, that all pieces of land, all land areas, including streets and roads, would be owned privately, by individuals, corporations, cooperatives, or any other voluntary groupings of individuals and capital [...] What we need to do is to reorient our thinking to consider a world in which all land areas are privately owned."

to another. Since land is finite in any society, there is only a limited number of places where a person can (physically) be, and such a person would find that he was legally excluded from all of them (It would not be entirely mischievous to add that since, in order to exist, a person has to be *somewhere*, such a person would not be permitted to exist).

Our society saves the homeless from this catastrophe only by virtue of the fact that some of its territory is held as collective property and made available for common use. The homeless are allowed to *be* – provided they are on the streets, in the parks, or under the bridges. Some of them are allowed to crowd together into publicly provided "shelters" after dark (though these are dangerous places and there are not nearly enough shelters for all of them). But in the daytime and, for many of them, all through the night, wandering in public places is their only option. When all else is privately owned, the sidewalks are their salvation. They are allowed to *be* in our society only to the extent that our society is communist.

This is one of the reasons why most defenders of private property are uncomfortable with the libertarian proposal, and why that proposal remains sheer fantasy.⁹ But there is a modified form of the libertarian catastrophe in prospect with which moderate and even liberal defenders of ownership seem much more comfortable. This is the increasing regulation of the streets, subways, parks, and other public places to restrict the activities that can be performed there. What is emerging – and it is not just a matter of fantasy – is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around. Legislators voted for by people who own private places in which they can do all these things are increasingly deciding to make public places available only for activities other than these primal human tasks. The streets and subways, they say, are for commuting from home to office. They are not for sleeping; sleeping is something one does at home. The parks are for recreations like walking and informal ball-games, things for which one's own yard is a little too confined. Parks are not for cooking or urinating; again, these are things one does at home. Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land. If I am right about this,

⁹ Herbert Spencer was so disconcerted by the possibility that he thought it a good reason to prohibit the private ownership of land altogether.

“For if *one* portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held; and eventually the *whole* of the earth's surface may be so held; and our planet may thus lapse altogether into private hands [...] Supposing the entire habitable globe be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface. Hence, such can exist on the earth by sufferance only. They are all trespassers. Save by permission of the lords of the soil, they can have no room for the soles of their feet. Nay, should others think fit to deny them a resting-place, these landless men might equitably be expelled from the planet altogether.”

A. REEVE, PROPERTY 85 (1986) (quoting H. SPENCER, SOCIAL STATICS 114-15 (1851)).

it is one of the most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.

III. LOCATIONS, ACTIONS AND FREEDOM

The points made so far can be restated in terms of freedom. Someone who is allowed to be in a place is, in a fairly straightforward sense, free to be there. A person who is not allowed to be in a place is unfree to be there. However, the concept of freedom usually applies to actions rather than locations: one is free or unfree to do X or to do Y. What is the connection, then, between freedom to be somewhere and freedom to do something?

At the outset I recited the truism that anything a person does has to be done somewhere. To that extent, all actions involve a spatial component (just as many actions involve, in addition, a material component like the use of tools, implements, or raw materials). It should be fairly obvious that, if one is not free to be in a certain place, one is not free to do anything at that place. If I am not allowed to be in your garden (because you have forbidden me) then I am not allowed to eat my lunch, make a speech, or turn a somersault in your garden. Though I may be free to do these things somewhere else, I am not free to do them there. It follows, strikingly, that a person who is not free to be in any place is not free to do anything; such a person is comprehensively unfree. In the libertarian paradise we imagined in the previous section, this would be the plight of the homeless. They would be simply without freedom (or, more accurately, any freedom they had would depend utterly on the forbearance of those who owned the places that made up the territory of the society in question).

Fortunately, our society is not such a libertarian paradise. There are places where the homeless may be and, by virtue of that, there are actions they may perform; they are free to perform actions on the streets, in the parks, and under the bridges. Their freedom depends on common property in a way that ours does not. Once again, the homeless have freedom in our society only to the extent that our society is communist.

That conclusion may sound glib and provocative. But it is meant as a reflection on the cold and awful reality of the experience of men, women, and children who are homeless in America. For them the rules of private property are a series of fences that stand between them and somewhere to be, somewhere to act. The only hope they have so far as freedom is concerned lies in the streets, parks, and public shelters, and in the fact that those are collectivized resources made available openly to all.

It is sometimes said that freedom means little or nothing to a cold and hungry person. We should focus on the material predicament of the homeless, it is said, not on this abstract liberal concern about freedom. That may be an appropriate response to someone who is talking high-mindedly

and fatuously about securing freedom of speech or freedom of religion for people who lack the elementary necessities of human life.¹⁰ But the contrast between liberty and the satisfaction of material needs must not be drawn too sharply, as though the latter had no relation at all to what one is free or unfree to do. I am focusing on freedoms that are intimately connected with food, shelter, clothing, and the satisfaction of basic needs. When a person is needy, he does not cease to be preoccupied with freedom; rather, his preoccupation tends to focus on freedom to perform certain actions in particular. The freedom that means most to a person who is cold and wet is the freedom that consists in staying under whatever shelter he has found. The freedom that means most to someone who is exhausted is the freedom not to be prodded with a nightstick as he tries to catch a few hours sleep on a subway bench.

There is a general point here about the rather passive image of the poor held by those who say we should concern ourselves with their needs, not their freedom.¹¹ People remain agents, with ideas and initiatives of their own, even when they are poor. Indeed, since they are on their own, in a situation of danger, without any place of safety, they must often be more resourceful, spend more time working out how to live, thinking things through much more carefully, taking much less for granted, than the comfortable autonomous agent that we imagine in a family with a house and a job in an office or university. And – when they are allowed to – the poor do find ways of using their initiative to rise to these challenges. They have to; if they do not, they die.

Even the most desperately needy are not always paralyzed by want. There are certain things they are physically capable of doing for themselves. Sometimes they find shelter by occupying an empty house or sleeping in a sheltered spot. They gather food from various places, they light a fire to cook it, and they sit down in a park to eat. They may urinate behind bushes and wash their clothes in a fountain. Their physical condition is certainly not comfortable, but they are *capable* of acting in ways that make things a little more bearable for themselves. Now one question we face as a society – a broad question of justice and social policy – is whether we are willing to tolerate an economic system in which large numbers of people are homeless. Since the answer is evidently, "Yes," the question that remains is whether we are willing to allow those who are in this predicament to act as free agents, looking after their own needs, in public places – the only space available to them. It is a deeply frightening fact about the modern United States that those who have homes and jobs are willing to answer "Yes" to the first question and "No" to the second.

¹⁰ For a useful discussion, see I. BERLIN, *Introduction*, in *FOUR ESSAYS ON LIBERTY* i, xlv-lv (1969).

¹¹ See also Waldron, *Welfare and the Images of Charity*, 36 *PHIL. Q.* 463 (1986).

A. *Negative Freedom*

Before going on, I want to say something about the conception of freedom I am using in this essay. Those who argue that the homeless (or the poor generally) have less freedom than the rest of us are often accused of appealing to a controversial, dangerous, and question-begging conception of "positive" freedom.¹² It is commonly thought that one has to step outside the traditional liberal idea of "negative" freedom in order to make these points.

However, there is no need to argue about that here. The definition of freedom with which I have been working so far is as "negative" as can be. There is nothing unfamiliar about it (except perhaps the consistency with which it is being deployed). I am saying that a person is free to be someplace just in case he is not legally liable to be physically removed from that place or penalized for being there. At the very least, negative freedom is freedom from obstructions such as someone else's forceful effort to prevent one from doing something.¹³ In exactly this negative sense (absence of forcible interference), the homeless person is unfree to be in any place governed by a private property rule (unless the owner for some reason elects to give him his permission to be there). The familiar claim that, in the negative sense of "freedom," the poor are as free as the rest of us – and that you have to move to a positive definition in order to dispute that – is simply false.¹⁴

That private property limits freedom seems obvious.¹⁵ If I own a piece of land, others have a duty not to use it (without my consent) and there is a battery of legal remedies which I can use to enforce this duty as I please. The right correlative to this duty is an essential incident of ownership, and any enforcement of the duty necessarily amounts to a deliberate interference with someone else's action. It is true that the connection between property and the restriction of liberty is in some ways a contingent one: as Andrew Reeve notes, "even if I am entitled to use my property to prevent you from taking some action, I will not necessarily do so."¹⁶ But there is a similar contingency in any juridical restriction. A repressive state may have laws entitling officials to crush dissent. In theory, they might choose to refrain from doing so on certain occasions; but we would still describe the law as a restriction on freedom if dissidents had to take into account the likelihood of its being used against them. Indeed we often say that the unpredictable element of official discretion "chills" whatever freedom remains in the interstices of its en-

¹² For the contrast between "positive" and "negative" conceptions of freedom, see I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

¹³ The *locus classicus* of negative liberty, defined in this way, is T. HOBBS, *LEVIATHAN* 261-74 (C.B. Macpherson ed. 1968).

¹⁴ The claim that the poor become, if not rich, then at least well-off. This line of argument is discussed in *infra* Part VI. For the moment, it does not affect the point that *being* poor amounts to being unfree, even if there are ways of extricating oneself from that predicament (An analogy may help here: a prisoner who has the opportunity to obtain parole and fails to take advantage of that opportunity still remains unfree inasmuch as he remains imprisoned).

¹⁵ For a particularly clear statement, see Cohen, *Capitalism, Freedom and the Proletariat*, in *THE IDEA OF FREEDOM* 9, 11-14 (A. Ryan ed. 1979).

¹⁶ A. REEVE, *supra* note 9, at 107.

forcement. Thus, in exactly the way in which we call repressive political laws restrictions on freedom, we can call property rights restrictions on freedom. We do not need any special definition of freedom over and above the negative one used by liberals in contexts that are more ideologically congenial.

The definitional objection is sometimes based on a distinction between freedom and ability.¹⁷ The homeless, it is said, are in the relevant sense *free* to perform the same activities as the rest of us; but the sad fact is that they do not have the *means* or the *power* or the *ability* to exercise these freedoms. This claim is almost always false. With the exception of a few who are so weakened by their plight that they are incapable of anything, the homeless are not *unable* to enter the privately-owned places from which they are banned. They can climb walls, open doors, cross thresholds, break windows, and so on, to gain entry to the premises from which the laws of property exclude them. What stands in their way is simply what stands in the way of anyone who is negatively unfree: the likelihood that someone else will forcibly prevent their action. Of course, the rich do try to make it impossible as well as illegal for the homeless to enter their gardens: they build their walls as high as possible and top them with broken glass. But that this does not constitute mere inability as opposed to unfreedom is indicated by the fact that the homeless are not permitted even to *try* to overcome these physical obstacles. They may be dragged away and penalized for attempting to scale the walls.

A second line that is sometimes taken is this: one should regard the homeless as less free than the rest of us only if one believes that some human agency (other than their own) is responsible for their plight.¹⁸ However, the idea of someone else's being responsible for the plight of the homeless is an ambiguous one. It may well be the case that people are homeless as a result of earlier deliberate and heartless actions by landlords, employers, or officials, or as a result of a deliberate capitalist strategy to create and sustain a vast reserve industrial army of the unemployed.¹⁹ That *may* be the case. But even if it is not, even if their being homeless cannot be laid at anyone's door or attributed to anything over and above their own choices or the impersonal workings of the market, my point remains. Their homelessness *consists* in unfreedom. Though it may not be anyone's fault that there is no place they can go without being dragged away, still their being removed from the places they are not allowed to be is itself a derogation from their

¹⁷ This distinction is found in Hobbes's discussion: he defines liberty as the absence of "external impediments," and adds that "when the impediment of motion, is in the constitution of the thing it selfe, we use not to say, it wants the Liberty; but the Power to move; as when a stone lyeth still, or a man is fastned to his bed by sicknesse." T. HOBBS, *supra* note 13, at 262. It is found also in Berlin's account: "If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced." I. BERLIN, *supra* note 12, at 122.

¹⁸ Cf. I. BERLIN, *supra* note 12, at 123:

"It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness."

¹⁹ See 1 K. MARX, CAPITAL 781-802 (B. Fowkes trans. 1976).

freedom, a derogation constituted by the deliberate human action of property-owners, security guards, and police officers. To repeat, their having nowhere to go *is* their being unfree (in a negative sense) to be anywhere; it is identical with the fact that others are authorized deliberately to drag them away from wherever they choose to be. We do not need any further account of the *cause* of this state of affairs to describe it as, in itself, a situation of unfreedom.

Thirdly, someone may object that a person is not made unfree if he is prevented from doing something wrong – something he has a duty not to do. Since entering others' property and abusing common property are wrong, it is not really a derogation from freedom to enforce a person's duties in these respects. Ironically, this "moralization" of the concept of freedom certainly *would* amount to a shift in the direction of a positive definition.²⁰ It was precisely the identification of freedom with virtue (and the inference that a restriction on vice was no restriction at all) that most troubled liberals about theories of positive liberty.²¹

In any case, the "moralization" of freedom is confusing and question-begging in the present context. It elides the notions of a restriction on freedom and an unjustified restriction on freedom, closing off certain questions that common sense regards as open. It seems to rest on a sense – elsewhere repudiated by many liberals – that all our moral and political concerns fit together in a tidy package, so that we need not ever worry about trade-offs between freedom (properly understood) and other values, such as property and justice.²²

To say – as I have insisted we should say – that property rules limit freedom, is not to say they are *eo ipso* wrong.²³ It is simply to say that they engage a concern about liberty, and that anyone who values liberty should put himself on alert when questions of property are being discussed (The argument I have made about the homeless is a striking illustration of the importance of our not losing sight of that).

Above all, by building the morality of a given property system (rights, duties, and the current distribution) into the concept of freedom, the moralizing approach precludes the use of that concept as a basis for arguing about property. If when we use the words "free" and "unfree," we are already assuming that it is wrong for A to use something that belongs to B, we cannot appeal to "freedom" to explain why B's ownership of the resource is justified. We cannot even extol our

²⁰ For the idea of a "moralized" definition of freedom, see Cohen, *supra* note 15, at 12-14.

²¹ Cf. I. BERLIN, *supra* note 12, at 133:

“Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their ‘real’ selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfilment) must be identical with his freedom [...]”

²² The whole burden of Isaiah Berlin's work has been that such tidy packaging is not to be expected.

²³ It is not even to deny that they may enlarge the amount of freedom overall. Isaiah Berlin put the point precisely: "Every law seems to me to curtail *some* liberty, although it may be a means to increasing another. Whether it increases the total sum of attainable liberty will of course depend on the particular situation." I. BERLIN, *supra*, note 10, at xlix n. 1 (emphasis in original).

property system as the basis of a "free" society, for such a boast would be nothing more than tautological. It is true that if we have independent grounds of justification for our private property system, then we can say that interfering with property rights is wrong without appealing to the idea of freedom. In that case, there is nothing question-begging about the claim that preventing someone from violating property rights does not count as a restriction on his freedom. But the price of this strategy is high. It not only transforms our conception of freedom into a moralized definition of positive liberty (so that the only freedom that is relevant is the freedom to do what is right), but it also excludes the concept of freedom altogether from the debate about the justification of property rights. Since most theorists of property do not want to deprive themselves of the concept of freedom as a resource in that argument, the insistence that the enforcement of property rules should not count as a restriction on freedom is, at the very least, a serious strategic mistake.

B. General Prohibitions and Particular Freedoms

I think the account I have given is faithful to the tradition of negative liberty. One is free to do something only if one is not liable to be forcibly prevented from or penalized for doing it. However, the way I have applied this account may seem a little disconcerting. The issue has to do with the level of generality at which actions are described.

The laws we have usually mention general *types* of actions, rather than particular actions done by particular people at specific times and places. Statutes do not say, "Jane Smith is not to assault Sarah Jones on Friday, November 24, on the corner of College Avenue and Bancroft." They say, "Assault is prohibited," or some equivalent, and it is understood that the prohibition applies to all such actions performed by anyone anywhere. A prohibition on a general type of action is understood to be a prohibition on all tokens of that type. Jurists say we ought to value this generality in our laws; it is part of what is involved in the complex ideal of "The Rule of Law." It makes the laws more predictable and more learnable. It makes them a better guide for the ordinary citizen who needs to have a rough and ready understanding (rather than a copious technical knowledge) of what he is and is not allowed to do as he goes about his business. A quick checklist of prohibited acts, formulated in general terms, serves that purpose admirably.²⁴ It also serves moral ideals of universalizability and rationality: a reason for restraining any particular act ought to be a reason for restraining any other act of the same type, unless there is a relevant difference between them (which can be formulated also in general terms).²⁵

All that is important. However, there is another aspect of "The Rule of Law" ideal that can lead one into difficulties if it is combined with this insistence on generality. Legal systems of the kind we have pride themselves on the following feature: "Everything which is not explicitly

²⁴ For the connection between generality, predictability, and the rule of law, see F. HAYEK, *THE CONSTITUTION OF LIBERTY* 148-61 (1960).

²⁵ See R. HARE, *FREEDOM AND REASON* 10-21 (1963).

prohibited is permitted." If the law does not formulate any prohibition on singing or jogging, for example, that is an indication to the citizen that singing and jogging are permitted, that he is free to perform them. To gauge the extent of his freedom, all he needs to know are the prohibitions imposed by the law. His freedom is simply the complement of that.²⁶

The difficulty arises if it is inferred from this that a person's freedom is the complement of the *general* prohibitions that apply to him. For although it is possible to infer particular prohibitions from prohibitions formulated at a general level ("All murder is wrong" implies "This murder by me today is wrong"), it is not possible to infer particular permissions from the absence of any general prohibition. In our society, there is no general prohibition on cycling, but one cannot infer from this that any particular act of riding a bicycle is permitted. It depends (among other things) on whether the person involved has the right to use the particular bicycle he is proposing to ride.

This does not affect the basic point about complementarity. Our freedoms *are* the complement of the prohibitions that apply to us. The mistake arises from thinking that the only prohibitions that apply to us are general prohibitions. For, in addition to the general prohibitions laid down (say) in the criminal law, there are also the prohibitions on using particular objects and places that are generated by the laws of property. Until we know how these latter laws apply, we do not know whether we are free to perform a particular action.

It is *not* a telling response to this point to say that the effect of the laws of property can be stated in terms of a general principle – "No one is to use the property of another without his permission." They *can* be so stated; but in order to apply that principle, we need particular knowledge, not just general knowledge.²⁷ A person needs to know that *this* bicycle belongs to him, whereas *those* bicycles belong to other people. He needs that particular knowledge about specific objects as well as his general knowledge about the types of actions that are and are not permitted.

At any rate, the conclusions about freedom that I have reached depend on taking the prohibitions relating to particular objects generated by property laws as seriously as we take the more general prohibitions imposed by the criminal law. No doubt these different types of prohibition are imposed for different reasons. But if freedom means simply the absence of deliberate interference with one's actions, we will not be in a position to say how free a person is until we know everything about the universe of legal restraints that may be applied to him. After all, it is not

²⁶ For example, Dicey puts forward the following as the first principle of "the rule of law": "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188 (10th ed. 1959). Hobbes stated the same doctrine more succinctly: "As for other Liberties, they depend on the silence of the Law. In cases where the Sovereign has prescribed no rule, there the Subject hath the liberty to do, or forbear, according to his own discretion." T. HOBBS, *supra* note 13, at 271.

²⁷ For a discussion of how a lay person applies the rules of property, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 116-18 (1977).

freedom in the abstract that people value, but freedom to perform particular actions. If the absence of a general prohibition tells us nothing about anyone's concrete freedom, then we should be wary of using only the checklist of general prohibitions to tell us how free or unfree a person or a society really is.

These points can readily be applied to the homeless. There are no general prohibitions in our society on actions like sleeping or washing. However, we cannot infer from this that anyone may sleep or wash wherever he chooses. In order to work out whether a particular person is free to sleep or wash, we must also ask whether there are any prohibitions *of place* that apply to his performance of actions of this type. As a matter of fact, all of us face a formidable battery of such prohibitions. Most private places, for example, are off-limits to us for these (or any other) activities. Though I am a well-paid professor, there are only a couple of private places where I am allowed to sleep or wash (without having someone's specific permission): my home, my office, and whatever restaurant I am patronizing. Most homeless people do not have jobs and few of them are allowed inside restaurants ("Bathrooms for the use of customers only"). Above all, they have no homes. So there is literally no private place where they are free to sleep or wash.

For them, that is a desperately important fact about their freedom, one that must preoccupy much of every day. Unlike us, they have no private place where they can take it for granted that they will be allowed to sleep or wash. Since everyone needs to sleep and wash regularly, homeless people have to spend time searching for non-private places – like public restrooms (of which there are precious few in America, by the standards of most civilized countries) and shelters (available, if at all, only at night) – where these actions may be performed without fear of interference. If we regard freedom as simply the complement of the general prohibitions imposed by law, we are in danger of overlooking this fact about the freedom of the homeless. Most of us can afford to overlook it, because we have homes to go to. But without a home, a person's freedom is his freedom to act in public, in places governed by common property rules. That is the difference between our freedom and the freedom of the homeless.

C. Public Places

What then are we to say about public places? If there is anywhere the homeless are free to act, it is in the streets, the subways and the parks. These regions are governed by common property rules. Since these are the only places they are allowed to be, these are the only places they are free to act.

However, a person is not allowed to do just whatever he likes in a public place. There are at least three types of prohibition that one faces in a place governed by rules of common property.

(1) If there are any general prohibitions on types of action in a society, like the prohibition on murder or the prohibition on selling narcotics, then they apply to all tokens of those types performed anywhere, public or private. And these prohibitions apply to everyone: though it is only

the homeless who have no choice but to be in public places, the law forbids the rich as well as the poor from selling narcotics, and *a fortiori* from selling narcotics on the streets and in the parks.

(2) Typically, there are also prohibitions that are specific to public places and provide the basis of their commonality. Parks have curfews; streets and sidewalks have rules that govern the extent to which one person's use of these places may interfere with another's; there are rules about obstruction, jaywalking, and so on. Many of these rules can be characterized and justified as rules of fairness. If public places are to be available for everyone's use, then we must make sure that their use by some people does not preclude or obstruct their use by others.

(3) However, some of the rules that govern behavior in public places are more substantive than that: they concern particular forms of behavior that are not to be performed in public whether there is an issue of fairness involved or not. For example, many states and municipalities forbid the use of parks for making love. It is not that there is any general constraint on lovemaking as a type of action (though some states still have laws against fornication). Although sexual intercourse between a husband and wife is permitted and even encouraged by the law, it is usually forbidden in public places. The place for that sort of activity, we say, is the privacy of the home.

Other examples spring to mind. There is no law against urinating – it is a necessary and desirable human activity. However, there is a law against urinating in public, except in the specially designated premises of public restrooms. In general, it is an activity which, if we are free to do it, we are free to do it mainly at home or in some other private place (a bathroom in a restaurant) where we have an independent right to be. There is also no law against sleeping—again a necessary and desirable human activity. To maintain their physical and mental health, people need to sleep for a substantial period every day. However, states and municipalities are increasingly passing ordinances to prohibit sleeping in public places like streets and parks.²⁸ The decision of the Transit Authority in New York to enforce prohibitions on sleeping in the subways attracted national attention a year or two ago.²⁹

²⁸ Here are some examples. The City Code of Phoenix, Arizona provides: "It shall be unlawful for any person to use a public street, highway, alley, lane, parkway, [or] sidewalk [...] for lying [or] sleeping [...] except in the case of a physical emergency or the administration of medical assistance." A St. Petersburg, Florida ordinance similarly provides that: "No person shall sleep upon or in any street, park, wharf or other public place." I am indebted to Paul Ades for these examples. Comment, *supra* note 1, at 595 n.5, 596 n.7 (quoting PHOENIX, ARIZ., CITY CODE § 23-48.01 (1981); ST. PETERSBURG, FLA., ORDINANCE 25.57 (1973)).

²⁹ And New Yorkers have grown tired of confronting homeless people every day on the subway, at the train station and at the entrances to supermarkets and apartment buildings.

"People are tired of stepping over bodies," the advocacy director for the Coalition for the Homeless, Keith Summa, said,

Lynette Thompson, a Transit Authority official who oversees the outreach program for the homeless in the subway, said there had been a marked change this year in letters from riders.

Such ordinances have and are known and even intended to have a specific effect on the homeless which is different from the effect they have on the rest of us. We are all familiar with the dictum of Anatole France: "[L]a majestueuse égalité des lois [...] interdit au riche comme au pauvre de coucher sous les ponts [...]"³⁰ We might adapt it to the present point, noting that the new rules in the subway will prohibit anyone from sleeping or lying down in the cars and stations, whether they are rich or poor, homeless or housed. They will be phrased with majestic impartiality, and indeed their drafters know that they would be struck down immediately by the courts if they were formulated specifically to target those who have no homes. Still everyone is perfectly well aware of the point of passing these ordinances, and any attempt to defend them on the basis of their generality is quite disingenuous. Their point is to make sleeping in the subways off limits to those who have nowhere else to sleep.³¹

Four facts are telling in this regard. First, it is well known among those who press for these laws that the subway is such an unpleasant place to sleep that almost no one would do it if they had anywhere else to go. Secondly, the pressure for these laws comes as a response to what is well known to be "the problem of homelessness." It is not as though people suddenly became concerned about *sleeping* in the subway as such (as though that were a particularly dangerous activity to perform there, like smoking or jumping onto a moving train). When people write to the Transit Authority and say, "Just get them out. I don't care. Just get them out any way you can," we all know who the word "them" refers to.³² People do not want to be confronted with the sight of the homeless – it is uncomfortable for the well-off to be reminded of the human price that is paid for a social structure like theirs – and they are willing to deprive those people of their last opportunity to sleep in order to protect themselves from this discomfort. Thirdly, the legislation is called for and promoted by people who are secure in the knowledge that they themselves have some place where they are permitted to sleep. Because *they* have some place to sleep which is not the subway, they infer that the subway is not a place for sleeping. The subway is a place where those who have some other place to sleep may do things besides sleeping.

"At the beginning of last year, the tenor of those letters was, 'Please do something to help the homeless,'" Ms. Thompson said. "But since August and September, they've been saying: 'Just get them out. I don't care. Just get them out any way you can.' It got worse and people got fed up."
[...]

For the homeless, the new restrictions mean it is more difficult than ever to find a place to rest. Charles Lark, 29 years old, who said he had spent the last three years sleeping on subway trains and platforms, left New York on the day the subway-enforcement program began: "This is a cold-hearted city," he said. "I'm going to Washington. I hope it'll be better there."

Doors Closing as Mood on the Homeless Sour, N.Y. Times, Nov. 18, 1989, at 1, col. 2, 32, col. 1, col. 2.

³⁰ A. FRANCE, *LE LYs ROUGE* 117-18 (rev. ed. 1923) ("The law in its majestic equality forbids the rich as well as the poor to sleep under the bridges.").

³¹ See M. DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 232-36 (1990) for an excellent account of similar devices designed to render public spaces in downtown Los Angeles "off-limits" to the homeless as well as Davis's *Afterward* which follows this Essay. Davis, *A Logic Like Hell's: Being Homeless in Los Angeles*, 39 *UCLA L. REV.* 325 (1991).

³² See *supra* note 29.

Finally, and most strikingly, those who push for these laws will try to amend them or reformulate them if they turn out to have an unwelcome impact on people who are not homeless. For example, a city ordinance in Clearwater, Florida, prohibiting sleeping in public, was struck down as too broad because it would have applied even to a person sleeping in his car.³³ Most people who have cars also have homes, and we would not want a statute aimed at the homeless to prevent car owners from sleeping in public.

Though we all know what the real object of these ordinances is, we may not have thought very hard about their cumulative effect. That effect is as follows.

For a person who has no home and has no expectation of being allowed into something like a private office building or a restaurant, prohibitions on things like sleeping that apply particularly to public places pose a special problem. For although there is no *general* prohibition on acts of these types, still they are effectively ruled out altogether for anyone who is homeless and who has no shelter to go to. The prohibition is comprehensive in effect because of the cumulation, in the case of the homeless, of a number of different bans, differently imposed. The rules of property prohibit the homeless person from doing any of these acts in private, since there is no private place that he has a right to be. And the rules governing public places prohibit him from doing any of these acts in public, since that is how we have decided to regulate the use of public places. So what is the result? Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless. If urinating is prohibited in public places (and if there are no public lavatories) then the homeless are simply unfree to urinate. These are not altogether comfortable conclusions, and they are certainly not comfortable for those who have to live with them.

³³ “Bracing for the annual influx of homeless people fleeing the Northern cold, the police here [in Miami, Florida] have proposed an emergency ordinance that would allow them to arrest some street people as a way of keeping them on the move.

[...]

The new measure would replace a century-old law against sleeping in public that was abandoned after a similar statute in Clearwater, Fla., was struck down by Federal courts in January. The courts said the statute was too broad and would have applied even to a person sleeping in his car.

The new proposal seeks to get around the court's objection by being more specific. But it would also be more far-reaching than the original law, applying to such activities as cooking and the building of temporary shelters.

Terry Cunningham, a 23-year-old who lives on the steps of the Federal Courthouse, asked of the police, ‘Where do they expect me to sleep?’

City and county officials had no answer. ‘That's a good question,’ Sergeant Rivero of the Police Department said. ‘No one is willing to address the problem.’”

Miami Police Want to Control Homeless by Arresting Them, N.Y. Times, Nov. 4, 1988, at AI, col. 1, A16, col. 4.

IV. INTENTION, RESPONSIBILITY AND BLAME

I said the predicament is cumulative. I argued that if an action X is prohibited (to everyone) in public places *and* if a person A has no access to a private place wherein to perform it, then action X is effectively prohibited to A *everywhere*, and so A is comprehensively unfree to do X.

“However, people may balk at this point. They may argue: Surely prohibition is an intentional notion, and nobody is intending that A not be permitted to do X. We do intend that he should be prohibited from X-ing in public, but we don't intend that he should be prohibited from X-ing in private. That's just the way the distribution of property turns out. We don't intend as a society – and certainly the state does not intend – that there should be *no* place where A is permitted to do X. It just happens that way.”³⁴

We have already seen that this point about intention cannot be sustained at the level of individual acts. If a homeless tramp tries to urinate in a rich person's yard, the rich person may try to prevent that, and he is authorized to do so. There is no doubt about the intentionality of this particular restraint on this particular violation of property rules. However, the point of the present objection is that the rich person does not intend that there should be nowhere the tramp is allowed to urinate (indeed, he probably hopes that there is somewhere – provided it is not in his back yard). And similarly for each proprietor in turn. None of them intends that the tramp should never be allowed to urinate. That just happens, in an invisible hand sort of way, as a result of each proprietor saying, in effect, "Anywhere but here." Though each particular unfreedom involves an intentional restraint, their cumulation is not in itself the product of anyone's intention.

The objection can be conceded. We can tie judgments about freedom and unfreedom this closely to intentionality if we like. On that approach, all we can say about the homeless person's freedom is that he is unfree to urinate in place X and he is unfree to urinate in place Y and he is unfree to urinate in place Z *and ...* so on, for each place that there is. We refrain from the inference: "So he is unfree to urinate (anywhere)." However, even if we are scrupulous about not making that generalization, still there is *something* we can say at a general level about his predicament. We can say, for example, "There is no place where he is free to urinate." The logic of such a quantified sentence (i.e. "There is no place p such that he is free to urinate at p") does not commit us to any cumulation of unfreedoms, and it is an accurate statement of his position. Anyway, even if no one has intended that there be no place this person is free to urinate, it cannot be said that his predicament, so described, is a matter of no concern. It is hard to imagine

³⁴ Cf. 2 F. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 64 (1976):

“It has of course to be admitted that the manner in which the benefits and burdens are apportioned by the market mechanism would in many instances have to be regarded as very unjust if it were the result of a deliberate allocation to particular people. But this is not the case. Those shares are the outcome of a process the effect of which on particular people was neither intended nor foreseen by anyone [...].”

how anyone could think freedom important in relation to each particular restraint, but yet have no concern about the cumulative effect of such restraints. Moreover, even if our concern about the cumulation is not directly expressed in terms of freedom because freedom is taken to be an intentional notion, still it is at least in part freedom *related*. If we value freedom in each particular case because of the importance of choice and of not being constrained in the choices one makes, then that value ought to lead us to pay some attention to how many choices a person has left after each constraint has been exercised. From any point of view that values choice and freedom of action, it ought to be a matter of concern that the choices left open to a person are being progressively closed off, one by one, and that he is nearing a situation where there is literally nowhere, he can turn.

The fact that no one intended his overall predicament may mean that there is no one to *blame* for it. However, for one thing, each private proprietor will have a pretty good idea about how others may be expected to exercise their rights in this regard. It would be quite disingenuous for any of them to say, "I thought some of the other owners would let him use their property." Moral philosophers have developed interesting models of joint and collective responsibility for outcomes like these, and those models seem quite applicable here.³⁵ For another thing, those who impose a ban on these activities in public places certainly do know very well what the result of *that* will be: that the homeless will have almost nowhere to go, in the territory subject to their jurisdiction. Indeed, the aim – again, as we all know – is often to drive them out of the jurisdiction so that some other city or state has to take care of the problem. Even where this is not intentional, still the intentional infliction of harm is not the only thing we blame people for. "I didn't mean to," is not the all-purpose excuse it is often taken to be. We blame people for recklessness and negligence, and certainly the promoters of these ordinances are quite reckless whether they leave the homeless anywhere to go or not ("Just get them out. I do not care. Just get them out any way you can.").³⁶

In any case, our concern about freedom and unfreedom is not principally a concern to find someone to blame. An intentional attack on freedom is blameworthy in part because the freedom of those who are attacked matters. If freedom is sufficiently important to sustain moral blame for those who attack it, it ought to matter also in other cases where blame is not the issue. Sometimes we can promote freedom, or make people more free, or organize our institutions so that there are fewer ways in which their freedom is restricted, and we may want to do this even

³⁵ See D. PARFIT, *REASONS AND PERSONS* 67-86 (1984); D. REGAN, *UTILITARIANISM AND COOPERATION* (1980). The tenor of these works is that each person should pay attention, not only to the immediate consequences of her individual actions, but also to the consequences of a certain set of actions (which includes actions by her and actions by others). As Parfit puts it:

"It is not enough to ask, 'Will my act harm other people?' Even if the answer is No, my act may still be wrong, *because* of its effects on other people. I should ask, 'Will my act be one of a set of acts that will *together* harm other people?' The answer may be Yes. And the harm to others may be great."

D. PARFIT, *supra*, at 86 (emphasis in original).

³⁶ See *supra* note 29.

in cases where we are not responding with outrage to the moral culpability of an attack on freedom. Freedom is a multifaceted concern in our political morality. Sure, we blame those who attack it deliberately or recklessly. But we are also solicitous for it and do our best to make it flourish, even when there is no evil freedom-hater obstructing our efforts. Blame, and the intentionality that blame is sometimes thought to presuppose, are not the only important things in the world.

V. FREEDOM AND IMPORTANT FREEDOMS

I have argued that a rule against performing an act in a public place amounts in *effect* to a *comprehensive* ban on that action so far as the homeless are concerned. If that argument is accepted, our next question should be: "How serious is this limitation on freedom?" Freedom in any society is limited in all sorts of ways: I have no freedom to pass through a red light nor to drive east on Bancroft Avenue. Any society involves a complicated array of freedoms and unfreedoms, and our assessment of *how free* a given society is (our assessment, for example, that the United States is a freer society than Albania) involves some assessment of the balance in that array.

Such assessments are characteristically qualitative as well as quantitative. We do not simply ask, "How many actions are people free or unfree to perform?" Indeed, such questions are very difficult to answer or even to formulate coherently.³⁷ Instead we often ask qualitative questions: "How important are the actions that people are prohibited from performing?" One of the tasks of a theory of human rights is to pick out a set of actions that it is thought particularly important from a moral point of view that people should have the freedom to perform, choices that it is thought particularly important that they should have the freedom to make, whatever other restrictions there are on their conduct.³⁸ For example, the Bill of Rights picks out things like religious worship, political speech, and the possession of firearms as actions or choices whose restriction we should be specially concerned about. A society that places restrictions on activities of these types is held to be worse, in point of freedom, than a society that merely restricts activities like drinking, smoking, or driving.

The reason for the concern has in part to do with the special significance of these actions. Religious worship is where we disclose and practice our deepest beliefs. Political speech is where we communicate with one another as citizens of a republic. Even bearing arms is held, by those who defend its status as a right, to be a special assertion of dignity, mature responsibility, civic participation, and freedom from the prospect of tyranny. And people occasionally disagree about the contents of these lists of important freedoms. Is it really important to have the right to bear

³⁷ For a critique of the purely quantitative approach, see Taylor, *What's Wrong with Negative Liberty?* in THE IDEA OF FREEDOM, *supra* note 15, at 183.

³⁸ *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 270-72 (rev. ed. 1978) (discussion of the theory that a right to certain liberties can be derived from the "special character" of the liberties).

arms, in a modern democratic society? Is commercial advertising as important as individual political discourse? These are disputes about which choices have this high ethical import, analogous to that attributed, say, to religious worship. They are disputes about which liberties should be given special protection in the name of human dignity or autonomy, and which attacks on freedom should be viewed as particularly inimical to the identity of a person as a citizen and as a moral agent.

On the whole, the actions specified by Bills of Rights are not what are at stake in the issue of homelessness. Certainly there would be an uproar if an ordinance was passed making it an offense to pray in the subway or to pass one's time there in political debate.³⁹ There has been some concern in America about the restriction of free speech in public and quasi-public places⁴⁰ (since it is arguable that the whole point of free speech is that it take place in the public realm). However, the actions that are being closed off to the homeless are, for the most part, not significant in this high-minded sense. They are significant in another way: they are actions basic to the sustenance of a decent or healthy life, in some cases basic to the sustenance of life itself. There may not seem anything particularly autonomous or self-assertive or civically republican or ethically ennobling about sleeping or cooking or urinating. You will not find them listed in any Charter. However, that does not mean it is a matter of slight concern when people are prohibited from performing such actions, a concern analogous to that aroused by a traffic regulation or the introduction of a commercial standard.

For one thing, the regular performance of such actions is a precondition for all other aspects of life and activity. It is a precondition for the sort of autonomous life that is celebrated and affirmed when Bills of Rights are proclaimed. I am not making the crude mistake of saying that if we value autonomy, we must value its preconditions in exactly the same way. But if we value autonomy, we should regard the satisfaction of its preconditions as a matter of importance; otherwise, our values simply ring hollow so far as real people are concerned.

Moreover, though we say there is nothing particularly dignified about sleeping or urinating, there is certainly something deeply and inherently *undignified* about being prevented from doing so. Every torturer knows this: to break the human spirit, focus the mind of the victim through petty restrictions pitilessly imposed on the banal necessities of human life. We should be ashamed that we have allowed our laws of public and private property to reduce a million or more citizens to something approaching this level of degradation.

³⁹ The failure of First Amendment challenges to restrictions on panhandling does not bode well for the survival of even these protections. *See Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990). *But see* Hershkoff and Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991) (arguing that begging is protected speech).

⁴⁰ *See supra* note 4.

Increasingly, in the way we organize common property, we have done all we can to prevent people from taking care of these elementary needs themselves, quietly, with dignity, as ordinary human beings. If someone needs to urinate, what he needs above all as a dignified person is the *freedom* to do so in privacy and relative independence of the arbitrary will of anyone else. But we have set things up so that either the street person must beg for this opportunity, several times every day, as a favor from people who recoil from him in horror, or, if he wants to act independently on his own initiative, he must break the law and risk arrest. The generous provision of public lavatories would make an immense difference in this regard – and it would be a difference to freedom and dignity, not just a matter of welfare.

Finally, we need to understand that any restriction on the performance of these basic acts has the feature of being not only uncomfortable and degrading, but more or less literally *unbearable* for the people concerned. People need sleep, for example, not just in the sense that sleep is necessary for health, but also in the sense that they will eventually fall asleep or drop from exhaustion if it is denied them. People simply cannot bear a lack of sleep, and they will do themselves a great deal of damage trying to bear it. The same, obviously, is true of bodily functions like urinating and defecating. These are things that people simply have to do; any attempt voluntarily to refrain from doing them is at once painful, dangerous, and finally impossible. That our social system might in effect deny them the right to do these things, by prohibiting their being done in each and every place, ought to be a matter of the gravest concern.⁴¹

It may seem sordid or in bad taste to make such a lot of these elementary physical points in a philosophical discussion of freedom. But if freedom is important, it is as freedom for human beings, that is, for the embodied and needy organisms that we are. The point about the activities I have mentioned is that they are both urgent and quotidian. They are urgent because they are basic to all other functions. They are actions that have to be performed, if one is to be free to do anything else without distraction and distress. And they are quotidian in the sense that they are actions that have to be done every day. They are not actions that a person can *wait* to perform until he acquires a home. Every day, he must eat and excrete and sleep. Every day, if he is homeless, he will face the overwhelming task of trying to find somewhere where he is allowed to do this.

⁴¹ I hope it will not be regarded as an attempt at humor if I suggest that the Rawlsian doctrine of "the strains of commitment" is directly relevant here. J. RAWLS, A THEORY OF JUSTICE 175-76 (1971). If the effect of a principle would be literally unbearable to some of those to whom it applies, it must be rejected by the parties in Rawls's contractarian thought-experiment, known as the "original position": "They cannot enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty." *Id.* at 176. As Rawls emphasizes, this is a matter of the *bona fides* of bargaining, not of any particular psychology of risk-aversion.

VI. HOMES AND OPPORTUNITIES

That last point is particularly important as an answer to a final objection that may be made. Someone might object that I have so far said nothing at all about the fact that our society gives everyone the *opportunity* to acquire a home, and that we are all – the homeless and the housed – equal in *this* regard even if we are unequal in our actual ownership of real estate.

There is something to this objection, but not much. Certainly, a society that denied a caste of persons the right (or juridical power) to own or lease property would be even worse than ours. The opportunity to acquire a home (even if it is just the juridical power) is surely worth having. But, to put it crudely, one cannot pee in an opportunity. Since the homeless, like us, are real people, they need some real place to be, not just the notional reflex of an Hohfeldian power.⁴²

We also know enough about how the world works to see that one's need for somewhere to sleep and wash is, if anything, greatest during the time that one is trying to consummate this opportunity to find a home. The lack of liberty that homelessness involves makes it harder to impress, appeal to, or deal with the people who might eventually provide one with a job and with the money to afford housing. The irony of opportunity, in other words, is that the longer it remains unconsummated, for whatever reason, the more difficult it is to exploit.

In the final analysis, whether or not a person really has the *opportunity* to obtain somewhere to live is a matter of his position in a society; it is a matter of his ability to deal with the people around him and of there being an opening in social and economic structures so that his wants and abilities can be brought into relation with others'.⁴³ That position, that ability, and that opening do not exist magically as a result of legal status. The juridical fact that a person is not legally barred from becoming a tenant or a proprietor does not mean that there is any realistic prospect of that happening. Whether it happens depends, among other things, on how he can present himself, how reliable and respectable he appears, what skills and abilities he can deploy, how much time, effort, and mobility he can invest in a search for housing, assistance, and employment, and so on.

Those are abstract formulations. We could say equally that it is hard to get a job when one appears filthy, that many of the benefits of social and economic interaction cannot be obtained without an address or without a way of receiving telephone calls, that a person cannot take *all* his possessions with him in a shopping cart when he goes for an interview but he may have nowhere to leave them, that those who have become homeless become so because they have run out of cash altogether and so of course do not have available the up-front fees and deposits that landlords require from potential tenants, and so on.

⁴² See also the discussion in J. WALDRON, *supra* note 2, at 390-422.

⁴³ This idea is sometimes expressed in terms of "social citizenship." See King & Waldron, *Citizenship, Social Citizenship, and the Defense of Welfare Provision*, 18 BRIT. J. POL. Sci. 415 (1988); see also R. DAHRENDORF, *THE MODERN SOCIAL CONFLICT: AN ESSAY ON THE POLITICS OF LIBERTY* 29-47 (1988).

Everything we call a social or economic opportunity depends cruelly on a person's being able to *do* certain things – for example, his being able to wash, to sleep, and to base himself somewhere. When someone is homeless, he is, as we have seen, effectively *banned* from doing these things; these are things he is *not allowed* to do. So long as that is the case, it is a contemptible mockery to reassure the victims of such coercion that they have the *opportunity* to play a full part in social and economic life, for the rules of *property* are such that they are prohibited from doing the minimum that would be necessary to take advantage of that opportunity.⁴⁴

CONCLUSION

Lack of freedom is not all there is to the nightmare of homelessness. There is also the cold, the hunger, the disease and lack of medical treatment, the danger, the beatings, the loneliness, and the shame and despair that may come from being unable to care for oneself, one's child, or a friend. By focusing on freedom in this essay, I have not wanted to detract from any of that.

But there are good reasons to pay attention to the issue of freedom. They are not merely strategic, though in a society that prides itself as "the land of the free," this may be one way of shaming a people into action and concern. Homelessness is partly about property and law, and freedom provides the connecting term that makes those categories relevant. By considering not only what a person is allowed to do, but where he is allowed to do it, we can see a system of property for what it is: rules that provide freedom and prosperity for some by imposing restrictions on others. So long as everyone enjoys some of the benefits as well as some of the restrictions, that correlativity is bearable. It ceases to be so when there is a class of persons who bear *all* of the restrictions and nothing else, a class of persons for whom property is nothing but a way of limiting their freedom.

Perhaps the strongest argument for thinking about homelessness as an issue of freedom is that it forces us to see people in need as *agents*. Destitution is not necessarily passive; and public provision is not always a way of compounding passivity. By focusing on what we allow people to do to satisfy their own basic needs on their own initiative, and by scrutinizing the legal obstacles that we place in their way (the doors we lock, the ordinances we enforce, and the nightsticks we raise), we get a better sense that what we are dealing with here is not just "the problem of homelessness," but a million or more *persons* whose activity and dignity and freedom are at stake.

⁴⁴ And this is to say nothing about the appalling deprivation of ordinary opportunity that will be experienced by those tens of thousands of *children* growing up homeless in America. To suggest that a child sleeping on the streets or in a dangerous, crowded shelter, with no place to store toys or books, and no sense of hope or security, has an opportunity equal to that of anyone in our society is simply a mockery.