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## RESPONSE

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### PROPERTY'S PERSPECTIVE (OR OF WHOM TO BE JEALOUS)

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In response to Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157 (2012).

Those rowdy property plaintiffs—sometimes it's hard to tell what it is they want. Their desires are often much harder to decipher than those of plaintiffs in other common law fields. Tort litigation usually involves an individual who believes she has been wronged and asks a court to undo that wrong. The plaintiff compares her current situation to the reality she would have enjoyed if the injury had not befallen her. She then asks a court to provide the remedy necessary to get as close as possible to that “benchmark reality.”<sup>1</sup> Similarly, in contract disputes, the plaintiff compares her current situation to a reality where both parties abided by their respective agreements.<sup>2</sup> Unlike in a tort dispute, however, where the benchmark reality is simply the status quo ante, the benchmark reality in a contract dispute is likely to be contested, since it is not prescribed by law. Still, the law

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<sup>1</sup> A tort is defined as an event which causes injury “in circumstances where the law deems it just to require compensation.” SPECIAL COMM. ON THE TORT LIAB. SYS., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, REPORT TO THE AMERICAN BAR ASSOCIATION 1-3 (1984).

<sup>2</sup> A traditional definition of a contract is “a promise . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

stipulates that the benchmark reality ought to be defined according to the manifested intent of the parties.<sup>3</sup> Thus the benchmark reality in tort and contract law, though different, is well established in our legal system.

Of course, a court may rule that even though the defendant transported the plaintiff from the benchmark reality to the current one, she did not legally wrong her. It may decide, for instance, that when you accidentally stepped on your neighbor's prized petunias, you did not commit a tort. Or it may decide that when you delivered withering petunias to her you did not breach the sales contract the two of you had entered. Still, the underlying contention will often be uncontroversial: the plaintiff endured an injury and her standing worsened; the neighbor does not enjoy beautiful petunias. Even if the court finds it should not offer legal redress to an aggrieved party, it will usually recognize the alleged harm.<sup>4</sup> Legal liability for the harm is contested; the harm's occurrence, more often than not, is uncontested.

Property disputes often lack such clarity, and are therefore more baffling, but also, more interesting. Unlike a tort conflict, where the plaintiff was whole prior to the defendant's act, or a contract conflict, where she would have been whole had the defendant honored their agreement, in a property claim, the benchmark reality itself can be a subject of strenuous dispute. Parties offer competing visions of the "original" property world where the plaintiff was whole. The plaintiff will claim her entitlements have decreased as compared to her standing in the "original" property world. The defendant will imagine a different "original" property world and will claim the parties' entitlements have remained unchanged as compared to that point of reference.

To put it another way, in property claims, like in tort or contract claims, the plaintiff is asking the judge for more than she currently holds (or stands to hold). But in property claims, unlike in tort or contract claims, there is no point of reference of general applicability that can be used either to justify this request for more or set its amount. As a result, the plaintiff's wish for more—that is, her belief that she has been harmed—may appear nonsensical to others. The plaintiff believes she is justified in demanding more since she is comparing her current situation to her benchmark reality. But the defendant often imagines a different benchmark reality where the plaintiff never held the claimed entitlement at all; therefore, in the defendant's

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<sup>3</sup> See *id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

<sup>4</sup> Even with losses that cannot serve as basis for liability, courts often acknowledge the harm's existence. An "economic loss" is often not compensable in torts because the defendant had no duty to the plaintiff or because the defendant's act was not a "proximate cause" of the harm, not because no harm occurred. MARSHALL S. SHAPO, *PRINCIPLES OF TORT LAW* 405-08 (3d ed. 2010).

mind, the plaintiff was never harmed (let alone wronged). The judge, at whose doorstep the dispute is placed, must employ her own imagination to fairly view two contending and idealized property worlds. Inevitably, in order to determine whether the plaintiff was harmed, the judge must select one of these two worlds as the governing benchmark reality. This choice is the product of value-laden and policy-driven judgments. These judgments form the heart of so many property rulings.

For the judge to understand contending parties' legal claims and to then make an informed choice between them, it is thus vital to conceptualize many property disputes as involving two disparate planes of comparison imagined by the parties. Therefore, by using experimental evidence from behavioral social sciences to explain the attitudes of parties in property disputes, Professor Strahilevitz has written an Article<sup>5</sup> that is innovative and thought-provoking, and that demands careful consideration. At the same time, in light of the key attribute of property disputes sketched above, I doubt the ability of the specific variance in individual attitudes he highlights to explain property disputes.

Strahilevitz challenges legal scholars to apply findings from economics that show that while some people want to have more, others merely want to have more than others.<sup>6</sup> That is, Strahilevitz argues that some litigants will file suit not to generate more for themselves, but to make sure their opponents have less. If the litigant's claim is granted, her welfare will *increase* since she measures her happiness based on her wealth relative to her counterparty.<sup>7</sup> Yet for another person—say, the counterparty or the judge—who measures her own happiness in absolute terms, the plaintiff's claim may seem inexplicable, since even if granted, the suit will not generate more for her. Employing this distinction between absolutists (those who want more) and relativists (those who want more than others and can therefore derive happiness from others having less), Strahilevitz attempts to explain several mystifying property disputes.<sup>8</sup>

Strahilevitz's framework comes closer to solving these cases than many past attempts. Moreover, Strahilevitz has done property scholars a service by forcing us to consider these cases side-by-side for the first time. Appreciating the commonalities involved spurs property discourse forward. Still, I argue that these property mysteries—along with the common theoretical

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<sup>5</sup> Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157 (2012).

<sup>6</sup> See *id.* at 2158 (describing findings that some would prefer to have one scoop of ice cream and their neighbors none, rather than two scoops of ice cream and their neighbors three).

<sup>7</sup> See *id.* at 2159-62.

<sup>8</sup> *Id.* at 2165-75.

conundrum they highlight—are better conceived not as pitting a relative and absolute orientation against each other, but as conflicts between two divergent benchmark realities.

The inheritance cases involving adoptions within the bloodstream, on which Strahilevitz focuses, are a helpful example of this pattern. In these cases, heirs or devisees ask the court to prevent a fellow relative from taking a double share of the estate: one as a relative of the decedent, another as an adopted child of the decedent or of another of the decedent's relatives. Thus, for example, siblings and cousins of a grandchild who was at some point adopted by the deceased grandparent as her own child may object to that grandchild sharing in the estate as both child and grandchild.<sup>9</sup> Strahilevitz argues that some courts choose to perceive these plaintiffs as pressing a relative preference: in these courts' view, the plaintiffs' sole goal is to decrease the share of that grandchild's inheritance.<sup>10</sup> Subsequently, these courts refuse to enforce these plaintiffs' desire to derive satisfaction from the loss of another (in this case, a relative whose double share will be curtailed).<sup>11</sup> Or, to rephrase it in Strahilevitz's preferred terminology, these courts only contemplate absolute preferences, and the courts understand the plaintiffs to be pressing upon them a relative one.

Or are they? Strahilevitz writes that such courts believe that "it should make no difference to the plaintiff[s] whether a particular relative gets a larger share of a familial inheritance."<sup>12</sup> This belief is only coherent when "holding [the] plaintiff[s]' share[s] constant."<sup>13</sup> But the plaintiffs are *not* holding their shares constant. They are all asking for more; they are pursuing absolute claims.<sup>14</sup>

At the core of these disputes lie conflicting benchmark realities, not conflicting orientations. As Strahilevitz persuasively argues, courts that reject the plaintiffs' claim often compare—if not explicitly, at least implicitly—

<sup>9</sup> See, e.g., *In re Benner's Estate*, 166 P.2d 257, 259 (Utah 1946) (holding that a grandson adopted by a blood-related grandparent could receive a portion of her estate in both capacities); see also Strahilevitz, *supra* note 5, at 2167-68 (discussing the *Benner* case and a hypothetical based on its facts).

<sup>10</sup> Strahilevitz, *supra* note 5, at 2167-68 (describing the court's decision in *Brenner* as telling the plaintiffs "[y]ou should care only about what you receive, not about what you receive in relation to others").

<sup>11</sup> This is probably the minority position, seeing that the Uniform Probate Code, adopted in many states, limits an heir to one share only (whichever is larger). See UNIF. PROBATE CODE § 2-113 (amended 2010).

<sup>12</sup> Strahilevitz, *supra* note 5, at 2174.

<sup>13</sup> *Id.*

<sup>14</sup> Professor Strahilevitz admits that in the *Brenner* case, treating the grandchild as both a son and a grandson rather than only as a son, was meaningful for the plaintiff sisters "in absolute welfare terms." *Id.* at 2168.

the plaintiffs' situation to that of heirs or devisees of a decedent who adopted a stranger.<sup>15</sup> Such heirs or devisees face an estate reduced by two shares (one taken by the grandchild, another by the adopted stranger), the same reduction facing them when the relative seeks a dual share (as both grandchild and adopted child). If the only benchmark reality a judge can imagine is one in which an adoption occurs and hence an added child share will always be subtracted from the estate (in addition to the shares of all blood relatives), then indeed the plaintiffs in the adoption-within-the-bloodstream cases do not stand to realize any absolute benefit.

But of course, this is not the benchmark reality the plaintiffs in these cases are imagining and asking the court to restore. Rather, the plaintiffs envision a world where the decedent never adopted anyone. In that world, the defendant stood to inherit only as a grandchild and no one was to take an extra child share. Comparing their own situation, where the defendant grandchild is claiming a second share, to their imagined one, the plaintiffs are asking for more in absolute terms. By claiming a second share as an adopted child, the defendant reduces the remaining estate that should have been distributed equally among all the heirs or devisees. The relationship between the plaintiffs and defendant, that is to say, between the various heirs or devisees, is inherently, at least in these cases, a zero-sum game. Since the estate assets are fixed, reducing the share of the defendant will, by definition, increase in absolute terms the shares of the plaintiffs. In accordance, if it rejects the plaintiffs' claim, a court is not repudiating a desire for relative rather than absolute benefits; it is merely rejecting one benchmark reality—where no adoption occurred—in favor of another—where any adoption occurred.

Takings law—the command that property shall not be taken for public use without just compensation,<sup>16</sup> which Strahilevitz also addresses,<sup>17</sup> has historically been unable to avoid, or settle, a similar, benchmark reality-setting problem.<sup>18</sup> When the government adopts a regulation that harms

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<sup>15</sup> *Id.* at 2167-68, 2174-75.

<sup>16</sup> U.S. CONST. amend. V.

<sup>17</sup> Strahilevitz, *supra* note 5, at 2175-86.

<sup>18</sup> See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010) (displaying the widely-varied opinions and differing theories among the Supreme Court's justices regarding when a property right is taken); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-98 (1967) (illustrating the difficulty in setting a baseline to evaluate whether a property right has been taken); Jeremy Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743, 765 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) ("[Prof. Epstein's] efforts to derive limits on the public from predetermined private law fail precisely because he cannot eliminate the public component from the determination of private rights.").

some property owners but not others, is it singling out some owners, and must it therefore compensate them? Yes, if the court compares the impact of this particular regulation on the plaintiffs to its impact on others. No, or at least not necessarily, if the court compares the regulation's impact on the plaintiffs to the general impact of all governmental regulation on all owners.

For example, in the California case of *San Remo Hotel*, a San Francisco city ordinance obliged owners of residential hotel units, which typically housed low-income occupants, to pay a fee before converting those units for use by tourists.<sup>19</sup> Strahilevitz argues that the dissenting Justice Brown, who supported the plaintiff hotel owners, emphasized their relative standing, whereas the majority focused on their absolute standing.<sup>20</sup> What mattered to Justice Brown was that the fee applied only to these owners and not to others (those who did not own such hotels). Hence, according to Strahilevitz, the absolute quantitative burden represented by the fee was by-and-large immaterial to Justice Brown's position.<sup>21</sup> This description, however, slightly misrepresents the core of the Justice's position. While the magnitude of the loss endured by the plaintiffs may not have induced Justice Brown's scathing dissent, the presence of a loss, i.e., a decrease in the absolute wealth of the plaintiffs, was determinative for her. Justice Brown wrote: "[T]he facts of this case come down to one thing—the [government] has expropriated the property and resources of a few hundred hotel owners."<sup>22</sup> She warned that the ordinance was "expressly designed to shift wealth from one group to another by the raw exercise of political power."<sup>23</sup> For Justice Brown, the presence of an unshared and *absolute* loss—embodied in the expropriation and redistribution of wealth to which she alluded—was key.<sup>24</sup>

On the other hand, the majority opinion, which denied the takings claim, should not be read as deemphasizing the plaintiffs' relative standing.<sup>25</sup> Though Justice Werdegard underscored the limited extent of the loss experienced by the owners, she reached that conclusion by contending that the supposed loss should not be considered only in light of the comparative effects of "a single law," but by taking into account the burdens

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<sup>19</sup> *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 91-92 (Cal. 2002). Plaintiffs sought relief for violation of the California Constitution's Takings Clause. *Id.* at 101.

<sup>20</sup> Strahilevitz, *supra* note 5, at 2178-79.

<sup>21</sup> *Id.* at 2179 (noting that Justice Brown "barely mentions the \$567,000 payment").

<sup>22</sup> *San Remo Hotel*, 41 P.3d at 125-26 (Brown, J., dissenting).

<sup>23</sup> *Id.* at 126.

<sup>24</sup> *See id.*

<sup>25</sup> Strahilevitz, *supra* note 5, at 2179-80.

all owners in society carry, as “each [is] called upon from time to time to sacrifice some advantage . . . for the common good.”<sup>26</sup>

In a particularly striking portion of her opinion, Justice Brown compared the ordinance obliging the plaintiffs to subsidize affordable housing for the city’s poor to a hypothetical city order forcing small grocery store owners to give away food at cost.<sup>27</sup> Since grocery store owners were not subjected to such a regulation, it was unfair to enforce its equivalent on the *San Remo Hotel* plaintiffs.<sup>28</sup> Justice Werdegar was not swayed by this comparison. Her reasoning hints at an alternative understanding of the relationship between the plaintiffs and the hypothetical grocery store owners. For the majority, the plaintiffs’ standing under the new ordinance should be compared to that of the small grocery store owners who, even if not forced to sell food at cost, are forced to pay fees often not shared by other members of the public, and are subjected to specific regulations limiting their—but not others’—economic freedom.<sup>29</sup> The hotel owners impacted by the city ordinance were hence not all that different from the small grocery store owners. By broadening the comparison plane and by framing the dispute in more abstract terms, the loss to the *San Remo Hotel* plaintiffs became smaller. Actually, at some point, it simply disappeared: In the majority’s conception, the pre-ordinance ideal benchmark reality was not inhabited by owners *not* paying a hotel conversion fee; it was populated by owners paying all kinds of fees. If the plaintiffs started off in a world where, as the Supreme Court noted in the landmark *Penn Central* decision, “[l]egislation designed to promote the general welfare commonly burdens some more than others,”<sup>30</sup> they were not transported into another world when San Francisco passed its new ordinance.

This kind of comparison is exactly what Justice Rehnquist criticized in his fierce dissent in *Penn Central*.<sup>31</sup> Like Justice Brown in the later *San Remo Hotel* case, he argued for concrete comparisons of disparately impacted owners, not the broad and abstract comparisons to overall regulatory regimes suggested by the majority. The judicial embrace of such broad benchmark realities, he felt, provides carte blanche for the government to violate the Takings Clause of the Fifth Amendment.<sup>32</sup>

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<sup>26</sup> *San Remo Hotel*, 41 P.3d at 109.

<sup>27</sup> *Id.* at 127 (Brown, J., dissenting).

<sup>28</sup> *Id.* at 127-28.

<sup>29</sup> *See id.* at 109 (majority opinion).

<sup>30</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133 (1978).

<sup>31</sup> *See, e.g., id.* at 140, 147 (Rehnquist, J., dissenting) (contrasting the historical landmark ordinance with typical zoning regulations).

<sup>32</sup> *Id.*

The same vexing debate over what benchmark reality should control a property dispute materializes in routine conflicts between private owners. In another case Strahilevitz reviews,<sup>33</sup> *Woodrick v. Wood*, a life tenant sought to destroy a barn situated on the land.<sup>34</sup> The plaintiff, who held a remainder interest in the land, objected.<sup>35</sup> The Ohio court held that the barn's destruction could not constitute waste because the defendant submitted persuasive evidence that it would increase the land's value; hence the plaintiff could not enjoin it.<sup>36</sup> Nevertheless, the court compelled the defendant to pay damages to the plaintiff representing the barn's own value.<sup>37</sup> The grant of these damages is puzzling since American common law regards an action as waste only when it results in a loss in absolute fair-market-value terms.<sup>38</sup> As the court explained when denying the plaintiff's request for an injunction, the razing of the barn was not projected to generate any such losses.<sup>39</sup> Nonetheless, the court decided to compensate the plaintiff, because, as Strahilevitz hypothesizes, she stood to lose more than the defendant since, she, unlike the defendant, was sentimentally attached to the barn.<sup>40</sup> Strahilevitz understands the court's decision to stem from the judge's desire to consider the problem from a relative perspective despite the law of waste's exclusive focus on absolute harms.<sup>41</sup>

Strahilevitz's account offers a plausible explanation for a strange result. However, the remedial theory that enabled the result was not one that contrasted relative and absolute preferences, but one which contrasted subjective and objective property valuations. Normally, waste law compares a plaintiff to a "stock" owner who is only concerned with an asset's fair market value. The defendant in *Woodrick* pursued this benchmark reality.<sup>42</sup> However, the *Woodrick* court chose to consider also the idiosyncratic owner who put a subjective premium on the barn in question.<sup>43</sup> In other words, the court was willing, for damages but not for the injunction, to accommodate the

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<sup>33</sup> See Strahilevitz, *supra* note 5, at 2182-84.

<sup>34</sup> No. 65207, 1994 WL 236287, at \*1 (Ohio Ct. App. May 26, 1994).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*2-3.

<sup>37</sup> *Id.*

<sup>38</sup> The leading case for this rule is *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899).

<sup>39</sup> *Woodrick*, 1994 WL 236287, at \*2.

<sup>40</sup> See Strahilevitz, *supra* note 5, at 2184.

<sup>41</sup> *Id.* at 2184.

<sup>42</sup> See *Woodrick*, 1994 WL 236287, at \*2.

<sup>43</sup> See *id.* at \*3.

plaintiff, setting as the benchmark reality a discrete owner's ability to pursue her particular preferences.<sup>44</sup>

A similar clash between benchmark realities is present in *Brown v. Voss*,<sup>45</sup> the other property dispute Strahilevitz discusses.<sup>46</sup> In that case, Fred Voss's land was burdened by a private road easement for ingress to and egress from the neighboring parcel owned by Will Brown.<sup>47</sup> Later, Brown acquired another parcel on the far side of his land and used the easement to reach that parcel as well.<sup>48</sup> Voss sued, arguing that Brown could only use the easement to reach his original estate, not the parcel he acquired later, even though, because no additional structures were constructed on the new lot, this "added" use would not increase the burden experienced by Voss.<sup>49</sup> Strahilevitz's typology is appealing here as well. It is possible that Voss had a relative preference (a desire for Brown to have less—to lack the ability to use the easement as he desired). It is possible that Voss's suit was motivated by the mere wish to frustrate his neighbor's preferences, even though that result would not generate any objective benefit to him. This seems an even likelier explanation given the venomous relationship between the two characters.<sup>50</sup> Still, it may not be the most useful explanation for the case or for similar cases, where Voss's brethren usually prevail.<sup>51</sup>

Contrary to Strahilevitz's contention, Voss turned to legal action because he was seeking more, not so Brown would have less. Brown compared Voss's current burden, following the addition of the new parcel to the dominant estate, to the one Voss had carried immediately before. Compared to this benchmark reality, Voss indeed stood to lose nothing by the extension of the easement's benefit because no additional burden was placed on his property. But in Voss's mind, the relevant comparison was

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<sup>44</sup> Modern courts have been willing to similarly depart from traditional doctrine and focus on subjective valuation of land. See, e.g., Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759, 760-62 (2011) (noting an Illinois court decision recognizing that an owner's attachment to the community should be captured by definitions of ownership).

<sup>45</sup> 715 P.2d 514 (Wash. 1986) (en banc).

<sup>46</sup> See Strahilevitz, *supra* note 5, at 2180-82.

<sup>47</sup> *Brown*, 715 P.2d at 515-16.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> For more on their strained relations, see Elizabeth Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445 (1995).

<sup>51</sup> See, e.g., McLaughlin v. Bd. of Selectmen, 664 N.E.2d 786, 790 (Mass. 1996) ("It also is the long-established rule in the Commonwealth, as elsewhere, that after-acquired property . . . may not be added to the dominant estate . . . without the express consent of the owner of the servient estate . . . [and] absent such consent, the use of an easement to benefit property located beyond the dominant estate constitutes an overburdening of the easement." (final alteration in original) (quoting McLaughlin v. Bd. of Selectmen, 646 N.E.2d 418, 423 (Mass. App. Ct. 1995))).

different. He was comparing his current situation to his preferred benchmark reality, where a third party, not Brown, owned the parcel now added to Brown's estate. In that world, the parcel formed a separate estate, and therefore, it could not benefit from the easement over Voss's land without Voss's permission, whether or not such benefit would have increased the burden on Voss's estate. If one were to begin with Voss's benchmark reality in mind, when Brown extended the easement, he *did* take something from Voss. He deprived him, for example, of the ability to extract payment from the owner of the third parcel—a hypothetical third party or the real Brown—in exchange for the extension.<sup>52</sup>

This benchmark reality is not far-fetched. In fact, Voss's benchmark reality was based on traditional notions of property law. As an earlier court explained, "this classic rule of property law is directed to the rights of the respective parties rather than the actual burden on the servitude."<sup>53</sup> The common law holds that the benefit of an easement cannot be unilaterally extended beyond the right's formal contours even if in actuality the benefitted estate has expanded<sup>54</sup>—as it did when Brown purchased his second parcel.

Voss, imagining a reality where he could have demanded payment, was therefore clearly asking for relief in absolute terms. The only reason his insistence might seem inexplicable and petty is that many thinkers refuse to accept the formalist benchmark reality he and the old common law advocated. That baseline harkens back to a traditional idea of a formal "whole" and pre-determined property right, any deviation from which is defined as a harm.<sup>55</sup> This use of a supposed preexisting concept of "property" as a benchmark reality applicable to all property cases has suffered enough criticism that one ought not embrace it without justification.<sup>56</sup> It was when the law stopped

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<sup>52</sup> The possibility that Voss could, and should, have been paid for the extension of the easement (had the court not forced him to allow Brown to use it for damages in the amount of \$1, *see Brown*, 715 P.2d at 517) was raised by the dissenting justice, who noted that Washington law allows for the condemnation (for just compensation) of a private way of necessity. *See id.* at 519 (Dore, J., dissenting) (citing WASH. REV. CODE § 8.24.010 (2010)).

<sup>53</sup> *Nat'l Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D. W. Va. 1968).

<sup>54</sup> *See id.*

<sup>55</sup> The traditional idea of absolute property rights is associated with Blackstone's famous metaphor characterizing property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

Of course, many embrace this baseline when the government interferes with private property. *See, e.g., EPSTEIN, supra* note 18, at 7-18 (discussing the American constitutional law of takings against the background of Hobbes's and Locke's political philosophies). The position is easily debatable, but for present purposes, the reader need not question it. In the case discussed here, the conflict is between two private property rights. Since only one property right can prevail, the

mechanically relying on such a formalist baseline—following the realist onslaught—that the framing problem in property law emerged (a problem which I have highlighted here in a few aspects).<sup>57</sup>

By admitting the existence of this benchmark reality problem and by honestly grappling with it, legislators, judges, and theorists can help design the human relationships society desires. Structuring desirable social relations is, after all, property law's function.<sup>58</sup> If the realists taught us anything, it was that framing the baseline, or, in other words, choosing property's perspective, is not a mechanical exercise that can be discharged through deduction from formal concepts.<sup>59</sup> Rather, doing so inherently and inevitably involves normative judgment.<sup>60</sup> The ability to understand each party's perspective, and to empathize with their sense of absolute loss (or gain), is vital if one is to make a responsible normative judgment. In all the cases discussed above, a court had to assess and compare the parties' perspectives—their contending benchmark realities—in view of policy considerations.

In deciding whether the relevant comparison for plaintiffs in adoption-within-the-bloodstream inheritance cases is a world where no adoption took place, or instead a world where a nonrelative was adopted, the court opines

decisionmaker cannot evade the task of defining the undisturbed property right's contours by falling back on a notion of "absolute" property rights.

<sup>57</sup> The most famous attack on the reliance of classical legal thought on supposedly pre-determined legal concepts is Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Cohen criticizes older legal theories that relied on "legal magic and word-jugglery" and advocates a functional or scientific approach to legal theory. *Id.* at 821-22; see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 145-67 (1992) (describing the transformation of property law as it moved away from concepts based on land ownership).

<sup>58</sup> See JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 11, 13-15 (2000) (arguing that property law "establishes minimum terms for social interaction"); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760-61 (2009) (adopting a "commitment to human flourishing" as the heart of his "theory of the social obligation of ownership"); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 867-69 (2009) (encouraging the use of virtue ethics in property theory rather than simply a focus on economics in order to balance "aggregate welfare or wealth of society" with "the full spectrum of other human goods that land use decisions implicate").

<sup>59</sup> In a recent book, David Rabban shows that the realists were attacking a nonexistent enemy: the classical legal thinkers who preceded them were not deductive formalists. DAVID RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 3 (2012).

<sup>60</sup> For a forceful exploration of this insight, see generally Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911 (1989). Earlier, in a highly influential article, Duncan Kennedy showed that cost-benefit analysis is inevitably affected by the choice of a baseline in any given case. See Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 389-91 (1981).

on healthy family relations and the social meaning of adoption.<sup>61</sup> In deciding whether plaintiffs in a takings case should be compared to other owners as they are affected solely by the specific regulation at issue, or as they are affected by all governmental burdens, the court must discern if one individual is loaded with “more than *his just share* of the burdens of government.”<sup>62</sup> In deciding whether the benchmark reality in a waste case is set by the “stock” owner and her concern for fair market value or by the specific owner and her idiosyncratic valuation, the court identifies the values property should further.<sup>63</sup> In deciding whether, in the easement extension cases, to compare the servient estate owner’s standing to formal burdens or actual ones, the court sets the contours of neighborly relations, including, for example, the degree to which development decisions should be shaped by a neighbor’s concerns—or in the case of *Voss and Brown*, by a neighbor’s spite—rather than by overall efficiency.<sup>64</sup>

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<sup>61</sup> Thus, for example, decisions in these cases are affected by reigning legal and social attitudes towards adoption. Modern inheritance law was reformed once it was established that there are strong psychological and sociological reasons to perceive adoption as severing the adopted child’s relationship with the biological family and instituting a new relationship, identical in nature to the biological relationship, with the adoptive family. See, e.g., UNIF. PROBATE CODE § 2-114 (amended 2010) (describing the eradication of a biological parent’s inheritance through a child if the parental rights are terminated). In cases of adoption within the bloodstream, when the court compares the adopted relative to an adopted stranger, and thus allows her to inherit only one share, it is determining that from a social perspective there should be no difference, as far as intra-family relations are concerned, between these two scenarios. Most courts, as well as the Uniform Probate Code, appear to follow this reasoning. See *supra* note 11; see also Emilio S. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152, 186-87 (1966) (arguing that if the motive for the adoption by a relative parallels the motive of a conventional adoption, the same policy considerations should apply).

<sup>62</sup> *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (emphasis added).

<sup>63</sup> See Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 654, 694 (2006) (explaining that changes in the law of waste reflected changing political values and social structures).

<sup>64</sup> An example of a similar legal development is found in the law of encroaching structures. As with easements, traditional property law granted owners “absolute” formal rights: if a trespasser built a structure on her land, the owner could claim the structure without payment. *Dooley v. Crist*, 25 Ill. 453, 457 (1861) (“[W]hen a stranger constructs a building upon the land of another, without his consent, it becomes a part of the land, and he would become a trespasser by removing it.”). Many modern courts, however, refuse to use abstract “rights” as comparator: they do not compare the plaintiff whose land has been trespassed to an owner who has the absolute formal right to exclude. Rather they focus on the concrete circumstances of the case and compare actual benefits. As a result, they may oblige the plaintiff to sell the land to the improving trespasser, or pay the improver for the value of the improvements. See, e.g., *Somerville v. Jacobs*, 170 S.E.2d 805, 813 (W. Va. 1969) (holding that, in order “to do equity,” the landowner must compensate the trespasser for improvements). In these cases, courts have replaced formal property rules with flexible laws of unjust enrichment that explicitly allow for policy considerations (e.g., good faith or lack thereof, the social value of development of land, or the fairness and utility of singling the owner or the improver as the bearer of the risks of mistake).

These are all tough questions. Questions of perspective always are. We cannot avoid them by relying on a formal, supposedly natural, ownership perspective.<sup>65</sup> Strahilevitz has rendered an invaluable service by distancing us further from formalist pretensions, showing that even notions of welfare are pluralistic. The behavioral findings Strahilevitz showcases should not have been ignored for so long. Nonetheless, I do not believe that reliance on these behavioral economics findings can ease the tension inherent in making property's tough value calls. Property cases rarely involve a greedy party (an absolutist) combatting a status fetishist (a relativist).<sup>66</sup> They usually involve two parties that define their injuries (and the object of their greed) in relation to competing benchmark realities representing different statuses. Thus the court does not pick between greed and status fetishism. Rather, it decides whose benchmark reality is legally cognizable (that is, of whom we get to be jealous). That decision—the crafting of property's perspective—cannot be rooted in formalist abstractions or solely in certain phenomena observed by social sciences. It must be grounded in wise considerations of social welfare and fairness, which, of course, should be nuanced by the findings of the social sciences. These findings must be employed to substantiate welfare calculations and fairness judgments, but they cannot replace them. Try as we might to avoid them, property debates (mysteries, more properly) can only be solved through careful considerations of public policy.

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<sup>65</sup> See generally Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 28 (1984) (demonstrating “[t]he weakness of the theory that law is found and not made” (footnote omitted)).

<sup>66</sup> See Strahilevitz, *supra* note 5, at 2187 (criticizing courts and commentators for conceiving relative and absolute preferences in these derogatory terms).