

## **Claims of Need in Property Law and Politics**

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<https://doi.org/10.3167/th.2016.6314604>

*Abstract: Both courts of law and political theorists have grappled with the problem of giving the concept of 'need' a place in our reasoning about the rights and wrongs of property regimes. But in the UK, legal changes in the last 15 years have eroded the legal possibilities for striking some compromise between the claims of the needy and the rights of property owners. Against this backdrop this article compares three theoretical accounts of how the fact of human need should impact upon our thinking about property rights: the rights-based arguments of Jeremy Waldron, the radical democratic theory of Lawrence Hamilton, and the anarchist commentary of Colin Ward. While 'theories' of need have paid much attention to the nature of need 'itself', the paper argues that this comparison reveals another issue that is just as important: where and how should claims of need be registered in legal and political processes?*

**Keywords:** compromise, direct action, law, need, property, squatting.

### **1. Introduction**

In a landmark case in 1971, judges in the Court of Appeal of England and Wales held that squatters accused of trespass could not defend themselves against the charge by arguing that they were driven to the act out of 'necessity'. Lord Denning summarised the dangers of 'necessity':

If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine they were in need or would invent a need, so as to gain entry. The plea would be an excuse for all sorts of wrongdoing. So the courts must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and good. (Southwark L.B.C. v. Williams, [1971] CA 6170: 744)

And Lord Justice Edmund Davies commenting on earlier cases of a similar kind went as far as explicitly linking this defence of necessity with the threat of *anarchy*:

But when and how far is the plea of necessity available to one who is prima facie guilty of tort? Well, one thing emerges with clarity from the decisions and that is that the law regards with the deepest suspicion any remedies of self-help and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear - necessity can very easily become simply a mask for anarchy. (Southwark L.B.C. v. Williams, [1971] CA 6170: 746)

'Need', it seems, is a dangerous concept in society's moral vocabulary. Like all concepts in law, the meaning of 'need' or 'necessity' is something worked out over time as it is interpreted in various case-contexts and as precedents are set. But the judges' comments here capture a more specific legal and philosophical problem about the rule of law that is posed by the entrance of 'need' into questions of property rights: isn't the concept of 'need' impossible to thoroughly integrate into legal institutions and reasoning about property rights without destabilising the predictability and security of the whole property regime?

This is not, of course, an issue only for English courts. Laura Underkuffler has noted exactly the same reservations in US legal culture, contrasting 'needs' claims with the other bases upon which legal decisions about property disputes are justified and explained. 'In the politics of American property law,' she writes 'we do not simply throw the individual human needs of claimants into the hopper along with economic productivity, certainty, security, and other considerations' (Underkuffler 2010: 369). Her own argument, directed against this status quo and drawing support from the legal scholarship of Eduardo Peñalver and Sonia Katyal (2010), is that the fear of 'need' as a point of reference in legal reasoning about property is misplaced. What courts have denied in principle – that need matters – they have repeatedly supported in practice (for example by gradually giving title 19<sup>th</sup> century squatters on land in the Western states).<sup>i</sup> But despite her optimism, she is surely right also to observe that '[t]here seems to be a particular, deeply theoretical problem in recognizing individual human need as a part of the property calculus' (Underkuffler 2010: 369).

Taking 'need' into account in legal reasoning about property might mean a number of different things, which this paper will attempt to distinguish. While the paper briefly touches upon prominent philosophical 'theories' of need, its discussion lies at a tangent to this field of scholarship. My concern is not with developing philosophical theories of need as such, but with the political and legal possibilities for giving claims of need practical importance within the institutional frameworks that structure the world of property rights. On the other hand, this discussion of *possibilities* must also be distinguished from strictly legal scholarship on the concepts of 'need' and 'necessity' as they are employed in various jurisdictions. But while lying at a tangent to mainstream philosophical scholarship on the one hand, and interpretive legal scholarship on the other, I think that the specific problem addressed is a timely one. In England and Wales, the clash between housing needs and property rights came sharply into focus in 2012, when squatting in residential properties was made a criminal offense, punishable by a prison sentence. Needless to say Prime Minister David Cameron and (then) Housing Minister Grant Shapps did not pursue a philosophical discussion of the competing moral claims of property rights and basic needs, but the narratives developed around squatting in this British context do set the social scene for the relevance of the theoretical discussions that follow.

I begin section (2) with an outline of this public controversy; in section (3) I develop the problem of what it might mean to bring the claims of need into reasoning about the institutional organisation property; in section (4) I illustrate some possible answers to this problem with reference to the scholarship of legal philosopher Jeremy Waldron (4.1), political theorist

Lawrence Hamilton (4.2), and anarchist housing scholar Colin Ward (4.3), who tell us quite different stories about how need can, and should, enter into the decision-making processes of those with the power to structure property relations through law and policy-making. In section (5) I conclude with a discussion of the broader political and legal problem that these property scholars have given different answers to, namely the risks and hopes attached to carving out a space in law for the operation of this much feared and celebrated concept.

## 2. Recent Public Debate about Squatting in the UK

Two stories published by the BBC news on the same day in 2013 (11<sup>th</sup> June) starkly illustrate the range of social issues associated with property squatting in the UK. The first story documented the removal by riot police of political activists who had occupied a building in central London and were using it as a base for political protest over the G8 summit taking place in Northern Ireland at the time (BBC News 2013a). The second news report investigated a football ground in North London where around 50 Romanian migrants were living in makeshift dwellings that they had constructed there (BBC News 2013b). The first of these cases is clearly about protest and political visibility; the second clearly about basic needs and the attempt to remain invisible. Both are about squatting. Squatting and its criminalisation can be framed in radically different moral narratives depending on what kinds of examples are placed centre stage and which are marginalised, and this positioning of examples has been an important feature of the UK debate on squatting in recent years.

In 2012 squatting in residential properties became a criminal offence in England and Wales<sup>ii</sup> under the *Legal Aid, Sentencing and Punishment of Offenders Act*, and since then there has been pressure from some members of parliament to extend the criminalisation to non-residential property, which would then cover cases like that of the migrants mentioned above. From being formerly treated as a civil conflict between two parties (squatter and owner),<sup>iii</sup> 'squatting has been redefined as a crime against the state, requiring public punishment, retribution and censure' (Fox O'Mahony, O'Mahony, and Hickey 2015: 1).

Proponents of criminalisation have developed their arguments from the perspective of property owners, particularly individual home-owners. Prime Minister David Cameron gave an unambiguous moral summary of the issue: 'It is very important that home owners have proper protection from people, in effect, stealing their property, which is what squatting is. It is a criminal act and it is now a criminal offence' (HC Deb [2010-12] 545, col. 1130). Housing Minister, Grant Shapps, also placed the 'needs' and 'rights' of the home-owner centre-stage: 'Hard-working homeowners need and deserve a justice system where their rights come first...We're tipping the scales of justice back in favour of the homeowner...' (Shapps quoted in Johnson 2012).

In a context where the mainstream media had been heavily focussing on cases of displaced home-owners,<sup>iv</sup> this owner-centric approach by members of the government was unsurprising. As Shapps' statement illustrates, the language of 'need' can play a role in the moral rhetoric

around criminalisation, but it functions there as a support to the claims about 'rights' that frame the discussion in home-owners' favour.

Critics of the new law see this rhetoric of 'rights' and 'home' as a cynical veil disguising a political and economic agenda that aims to remove any obstacles to the use of housing as a locus for capital investment (Fox O'Mahony & O'Mahony 2015: 56). What seems to strengthen this claim is the fact that the figure of the displaced home-owner, on which attention had been focussed in parliament and the media, was largely a chimera: only a tiny percentage of squatting cases in the UK concerned displaced home-owners, while the rest concerned properties that were otherwise empty (SQUASH 2013: 11). And those few who had been displaced could *already* (under the previous laws) use the criminal courts to prosecute squatters who refused to leave. In short, the new law aimed specifically to benefit those who own *vacant* property.

More generally, anti-criminalisation arguments, like those of the activist group Squatters Action for Secure Homes (SQUASH), shift our attention from individual property rights to the *mismatch* between property rights and housing needs on a social scale: in 2012 50,290 households were registered as statutorily homeless in the UK, while almost 1 million properties stood empty (SQUASH 2013: 7 – 8). To publish statistics such as these is not so much a way to meet defences of exclusionary private property rights head on, as an attempt to reframe the discussion within a specific historical and social horizon in which the particular force of needs-claims becomes apparent.

One way that common law has traditionally addressed the misalignment between *possession* and *title* has been through the doctrine of adverse possession, whereby those who have used buildings or land for long enough without effective interference from the original title holder may (in some circumstances) claim the legal title for themselves. But the *Legal Aid Act 2012* together with the *Land Registration Act 2002* (which obliges squatters to notify the land registry of their occupancy) suggest that legislators have abandoned any compromise between, on the one hand, direct action that alleviates immediate needs and, on the other, strong property rights that protect owners against such actions. Ownership rights now include few corresponding responsibilities for owners, such as the efficient use of land (Cobb & Fox 2007; Fox O'Mahony & O'Mahony 2015: 52 – 56).

Whatever the intentions of legislators, the effect of these changes is to close the legal spaces in which 'property outsiders' (Fox O'Mahony 2014) can, albeit to a limited extent, push against the dominant norms of property ownership, and meet needs through self-help direct-action, without committing criminal offenses. The closure of these legal spaces in English and Welsh law should prompt us to ask broader theoretical questions about the relationship between property and claims of need: how *might* we imagine claims of need being integrated and made effective within the law and politics of property? In what follows I highlight first the problems with (section 3), and then the hopes for (section 4), making the concept of 'need' do effective work in legal reasoning, decision-making, and the practices through which property relations are structured.

### 3. The Problem with Need

Let us begin on a sceptical note. In his book on *The Idea of Property in Law* (1997) James Penner explicitly attacks property theorising that makes moral issues about need foundational to justifications and critiques of property as such. In his view this approach problematically blends issues about the interests that a society may have in establishing a property regime, and the interests that this society may have in *distributing* access to resources. The point might be put like this: to specify a universal property right held by everyone to certain basic resources in virtue of their basic needs, will both be arbitrary and will distort our understanding of the multiple roles that property plays in our lives.

‘Need’, he writes, ‘is an irredeemably dreary and short-sighted focus if we wish to understand the claims others may make upon us, and the duties and interests we may have in directing our attentions to others’ (Penner 1997: 204). The institution of property has, he claims, its foundation in the rational interest that humans have in exclusively determining the use of things. And this foundation gives us no ground for ‘determining the *extent* and the *character* of need’ or for drawing conclusions about the just minimum of property that people should have a positive right to (1997:204 emphasis added).

For Penner, then, ‘need’ is a problematic concept in a legal and philosophical vocabulary because it is normatively reductive: it pushes to the forefront of our thought only one narrow element of what he calls our ‘interest’ in the exclusive control of things. While many progressive property scholars (e.g. Alexander 2012; Singer 2000) would disagree with Penner’s claim that property law is, and should be, primarily about owners’ interests in exclusively determining how things are used, he is also surely right that ‘determining the *extent* and the *character* of need’ relevant to property justice is a problem to which there is no simple solution.

Despite Penner’s scepticism, in the long history of property theorising, many thinkers have been concerned with what need means for the institution of property. But by opening the door on the topic of need, they have, indeed, tended to leave huge questions hanging about what the imperatives of need mean for the exact scope and strength of property rights. We can get a sense of this by taking just a handful of examples drawn from Chris Pierson’s (2013) *Just Property: a history in the Latin West*. Pierson notes that for Thomas Aquinas (whom he here quotes) ‘In cases of dire necessity, “someone can also take another’s property secretly in order to succour his neighbour in need”, and this without committing the sin of theft [reference omitted]’ (2013: 92). For subsequent natural law thinkers like Grotius, Hobbes and Pufendorf property rights were in the end based on a more basic imperative of the natural law that peace and human prosperity should be promoted, which, looking back on these arguments, seems to open the question of what to do where property clashes with (rather than supports) this broader imperative (Pierson 2013: 166 – 188). And even the towering figure of modern property theory, John Locke, included provisos regarding the needs of others in his argumentation for a

regime of private property based on initial appropriation and labour, provisos which have caused a huge amount of subsequent debate (for an excellent overview see Pierson 2013: 208 – 245).

But, if we want to go beyond Penner's scepticism, on the one hand, and the moral imperatives and caveats of classical political philosophy, on the other, we need to ask what it *could* mean in practice to 'explicitly acknowledge human need – for human need's sake – as a part of the property rights calculus' (Underkuffler 2010: 376). Or put differently, if needs do matter for reasoning about property, how should the law come to 'know' about these needs?

One answer is that human needs are simply obvious (for example the need for food and shelter) and can be collected into lists that will in turn inform the drafting of legislation, which in turn will be applied in courts to interpret the claims of the parties to a property dispute. There are two immediate difficulties here.

First of all, the field of philosophical scholarship on 'human needs' is testament to the fact that the 'contents' of this idea of 'human needs' can be unpacked almost endlessly. Soran Reader (2007) has sifted through layer upon layer of nuances in the meaning of need distinguishing such categories as 'essential need', 'second-natural essential needs', 'dispositional needs', 'occurrent needs', and more.<sup>v</sup> Ian Fraser's (1998) unpacking of the concept of need in Marx's writing reveals 'natural needs', 'necessary needs', 'luxury needs', 'social needs', 'true social needs', 'human needs', 'egoistic needs', and 'radical needs'. Lawrence Hamilton (2003, discussed below) distinguishes 'vital needs', 'social needs' and 'agency needs'. No doubt these respective sets of distinctions are useful for testing moral intuitions (Reader) and constructing a theory of a just society (Hamilton and Fraser, both via Marx), but I refer to them here only to illustrate that while situations of need may be obvious in everyday life, the categorization of needs for the purposes of moral or legal reasoning is not straightforward. Even once the categories are in place, filling them out with specific content is likely to be deeply controversial.

The crux of the issue is that theorists of need tend to want the concept to do more normative work than simply justifying laws and policies that protect individuals against the threat of exposure, starvation, or other threats to life. Amartya Sen's (1984) approach to human needs in the context of development has been an inspiration for those who want to mobilise the concept of 'need' to explain and justify policies that distribute resources and opportunities in ways that not only ensure *survival* but promote real *participation* in the lived practices of a society. Essentially, these approaches use the concept of 'need' to underline what is *really* important for humans and to implore policy-makers to pay attention to *that*. I am by no means suggesting that this fails to have positive effects on policy-making, especially in combatting a naïve focus on GDP in development studies at the expense of other crucial indicators of development. But such a general theory of needs shifts the political problem to defining a reasonable 'needs-list' (even, or perhaps especially, where theorists emphasis the historical and social contingency of such lists), and also raises the crucial question of creating hierarchies between forms of needs so that more important needs trump less important ones in disputes, which, again, will be controversial.

One response to this kind of problem (discussed in section 4.2) is the idea that the identification of needs may occur ‘bottom up’ through processes of democratic participation as an alternative to top-down list making (Hamilton 2003).

Thus, this first set of difficulties with the list-legislate-and-apply suggestion concerns the complexity and the potential controversy surrounding the listing; the second difficulty concerns the application specifically in the field of property disputes. Even if, for example, the basic human need for shelter was made into a legitimate point of reference for legal reasoning in court cases about property disputes, the courts would still have to adequately reconstruct the life and circumstances of the party to whom the need may or may not be justly attributed. The process by which law comes to ‘learn’ about the state of needs in the actual social world at any time needs some structure. Lord Denning, quoted at the beginning of this article, feared that ‘Necessity would open a door no man could shut’ because he saw a slippery slope between real needs, imagined needs, and invented needs – a slope that the courts would not be able to find a footing on. Even regardless of questions about the honesty and dishonesty of trespassers as to their circumstances at the moment of entering someone else’s property, we have to notice that claims of need are inextricably bound to questions of context and life history: it is easy for anyone to put themselves in a position of need by taking the last train to a distant town on a cold night with no money in one’s pocket. When judging claims of need in the context of justifying deviations from the common norms of property control, context matters greatly. Where does our reasoning about the force of a needs claim stop: at the question of whether night of trespass (in a squatting case) was indeed a deadly cold one? Does it extend to the life history of the individual? Or even the social history of the social processes that has produced marginal and property-less social groups?

These questions are not posed in order to deny that law and policy-making can incorporate aspirations to respond to need. In fact, in the conclusion I will follow Underkuffler by arguing that the conservative worries about slippery conceptual slopes may be a red herring. The point here is simply that plugging need into property law is not merely a matter of connecting the dots from one to the other. The issue of housing needs, which the following discussion focusses on, is inevitably attached to broader questions about the just distribution of resources in society, and the institutional structures through which those resources are allocated (markets, organs of welfare states, informal economies, etc.). The confrontation between needs-claims and property rights is just one link in a much longer chain of issues about how societies produce situations of need and then respond to them. While Penner may be overly conservative when it comes to thinking about property rights through the problem of needs, he is surely right that ‘knowing need’ (‘determining the *extent* and the *character* of need’) is a problem. It is, I would argue, both a theoretical and a practical problem to which different answers may be given. In the next sections, we turn to some (partial) answers that have been generated in academic philosophy and social theory.

#### 4.1. Needs and the *Rechtsstaat*: Jeremy Waldron

Within recent political and legal philosophy Jeremy Waldron's (1993, 1997, 2000, 2009) work on rights and needs establishes with great clarity a liberal, but also progressively democratic, argument about the tension between private property and individual needs.

Waldron (1997) argues that political discourses based on the concept of 'rights' should not be pitted against political discourses based on the concept of 'needs', as many legal scholars have done.<sup>vi</sup> Rather, the language of rights should be used as a '*framework*' into which needs-claims can be carefully integrated as elements in a coherent and self-consistent system. Thus '[b]y themselves, claims of need are nothing more than particular suppliant pleas', but when integrated with a theory of rights they challenge us to address pressing social issues in theory and practice (Waldron 1997: 108). In short, '[t]he language of rights offers a framework and a sense of responsibility for articulating that challenge' (Waldron 1997: 108).

Waldron's point of reference here (1997: 106) is the ideal of the *Rechtsstaat*: a legal system of interlocking rights and duties that embodies generalised principles of justice that are equally applicable to all. The test of any claim about rights, in the context of the *Rechtsstaat*, is whether 'it can play a coherent part in defining systematically what a mass of people in society owe one another as equals' (1997: 106), and it is exactly this test to which needs-claims should be submitted in order to check them for their generalisability and hence their amenity to integration into the system. Put another way, Waldron is saying (1997: 106) that we need a coherent *theory* of needs in the same sense that we can aspire to have a coherent theory of rights: one in which the constituent claims add up to a consistent system that does not contain contradictions when we attempt to generalise the claims into rules. The alternative, refusing to take the route of theoretical systematisation and generalisation, would be 'to revert instead to less articulate forms of political demand' (1997: 109).

Thus, from Waldron's point of view, needs *can* be important points of reference in legal and political discourse, but they must be put in place by entering into philosophical theory, and then legal practice, through the door of generalisability; they must become integrated into rules that apply across persons, across time, and across social situations; they must become a predictable conceptual brick in a system. It is in this spirit that he brings his thinking about needs to bear on the issue of property.

Need is a particularly important conceptual window onto the situation of those, such as the homeless, who have extremely limited access to property (Waldron 2000; 2009). Waldron's main point in his arguments about homelessness and property is a perceptive one: while property rights are crucial for maintaining spheres of privacy and autonomy in our lives, these very same rights place a great burden of duty on those who have no property – the duty to respect others' property, while having none themselves that others need respect. In a world carved up by private property rights, the property-less are left to live out their lives in the public



spaces controlled by various authorities (state and private). Absolutely necessary actions that the propertied can perform in private – sleeping, urinating and defecating, eating, and drinking – are usually not tolerated in these spaces where the authorities and other users expect a pleasant and safe environment: ‘For someone who has no home [and] no access to a shelter, compliance with such an ordinance [prohibiting sleeping in public] would mean that *he must not sleep* (for there is now *no place* where his sleeping is permissible)’ (Waldron 2000: 397, original emphasis).

What we need, argues Waldron is a *theory* of needs that can be coupled to our normative theorising about property and give us a handle on these kinds of issues. ‘The point’, as he puts it ‘is that need provides a good standpoint for considering the justice of this institution. We can use a theory of needs to chart the significance of the deprivations that private property involves’ (1993: 215).

Taking the perspective of the property-less when trying to understand the concrete effects and the justices and injustices of current property laws is indeed a good idea, and is shared by other property scholars (Fox O’Mahony 2014; van der Walt 2009), but lacking in Waldron’s arguments here are any ideas about how a society should handle particular needs claims at specific points in time. His perspective on the problem – the emphasis on generalisability and rights – seems to be that of a codifier, not that of a judge (who must process specific needs claims) or a political reformer (concerned with the sites and forms of need-articulation). We can only assume that Waldron envisages legal reform through legislative processes in which a ‘theory of need’ is used to systematically determine ‘what a mass of people in society owe one another as equals’ (1997: 106) and thus build *rights* into the framework of the *Rechtsstaat* – rights that protect the needs identified in theory. I suggest that despite the sophistication of his argument, Waldron’s argument about how claims of need should impact upon the institution of private property lacks a detailed concern with the issues of *process* noted in the previous section and developed in the next.

#### 4.2 The State of Needs: Lawrence Hamilton

...in order for the modern state to become the kind of need-disclosing state envisaged here it would have to become a radically new kind of political authority. I call his radically new kind of authority, the state of needs. (Hamilton 2003: 18)

A clear contrast to Waldron’s approach is provided by Lawrence Hamilton’s work on property and needs. In his *Political Philosophy of Needs* (2003) Hamilton develops an account of human needs that places emphasis on ensuring a political framework within which social actors are empowered to identify and express their needs in public life. He presents a theory of needs that we might call ‘social’ in the sense that he thinks that the stock of things regarded as needs in a given society develops over time: these needs, he argues, can begin as ‘wants’, and then may gain more or less formal recognition as ‘needs’ depending on whether the social group in question has the ‘normative power’ to articulate a needs-claim that is subsequently accepted

(either formally in law or informally in practice) (2003: 71 - 72). Hamilton sees himself as building on the potentials left unexplored in Marx's conception of needs, especially the idea that human needs are dynamic rather than static (2003: 53 – 62).

The contrast with Waldron is stark. First, he wants to reject political theory that has a deontological focus on *rights*, while at the same time rejecting a utilitarian focus only on *wants*; second, he wants to reject needs-based political theory that presents a static vision of human needs (perhaps summarised in lists of basic needs).<sup>vii</sup> Waldron does not argue for such lists, but neither does he provide anything like the radical processual alternative envisaged by Hamilton.

In developing his argument Hamilton makes use of a threefold division of kinds of need: vital needs (general and basic, e.g. shelter); social needs (particular and historically contingent); and agency needs (what we need to operate as political agents in a particular society). These are all interlinked and the more general forms (vital and agency) tend to be expressed in terms of specific social needs (e.g. the need for a concrete source of information in order to be politically informed; the need for a car in order to participate in work and civic life; etc.).

What does the problem of property look like for Hamilton, then, given his processual and political take on needs that I have sketched here?

Hamilton (2006) puts this theoretical account to work in a discussion of land reform in post-apartheid South Africa, where, as a legacy of the totalitarian regime, white South Africans own a massively disproportionate amount of land. Here, he argues that the laudably progressive South African constitution, which integrates 'the nation's commitment to land reform' into its framework (Hamilton 2006: 135), nonetheless hampers actual property redistribution because its property clauses are formulated in the legal language of individual '*rights*'. This language of '*rights*' in fact ends up frustrating social justice, when the concrete social conditions to which these rights should apply are characterised by massive inequalities of resources, and access to services and information to begin with (2006: 138). As Hamilton expresses it '...the constitution unintentionally ossifies the positive rights of the status quo, like various kinds of existing property rights and the social relations and inequalities they guarantee and entrench' (2006: 138). His scepticism is that conservative rights (such as rights to existing property holdings) will trump the positive and aspirational rights embedded in Constitution (we might think of the right to housing). More abstractly put, Hamilton argues that rights-language may end up in conservatism because progressive social aspirations 'are given the same ontological form and moral value' as, for example, property rights, which means that a dispute where opposing moral claims clash will 'appear as a conflict over rights, which are then resolved within a formal juridical framework' (2006: 138).

What, then, *should* structure our politics of property if not rights? Hamilton's answer, although framed within proposals that sound reformist rather than revolutionary, is in fact very radical. Unsurprisingly the concept of '*need*' is the cornerstone of his argument.

The core of Hamilton's suggestion is that political processes of participation should be reformed, such that policies of resource allocation can be reviewed by citizens who are given the chance (at regular intervals) of articulating current needs, anticipating the development of their needs in the future, and deliberating over the policies required to respond to the conclusions of these 'need-evaluation' processes (2006: 140 – 141). Hamilton's aim is to escape the rigidity of relatively static rules and rights and replace them with the flexibility of a system based on the constant re-evaluation of just allocations of resources. The consequences of Hamilton's argument, when we come to the issue of property, are radical. With a political and legal system where the imperatives of 'need' win out over claims to 'rights'

Land could be possessed or owned for private consumption, use, and exchange, and this could be safeguarded in terms of rights, but these rights must not be understood or treated as *inalienable* individual rights. Rather, they would be rights to use and exchange (a use-right to property) that would be assessed periodically in line with needs. (Hamilton 2006: 142)

This would also imply that land was not inheritable, and that the 'properties and achievements' of private persons would no longer be the basis for entitlement (Hamilton 2006: 142). Such a vision of the political order is open to attack from at least two sides.

On the one hand, Hamilton has probably quite accurately sketched the worst nightmare of many a liberal political theorist: a social order in which the line between politics and the rule of law has been wiped away. Property is no longer any kind of refuge from the power of the state; just a temporary gift that might be retracted by the will of the majority. On the other hand, Hamilton's need-evaluation processes are perhaps also the worst nightmare of many an anarchist: why have centralised *power* when you are going to abolish centralised and consistent *rules*? That is the worst combination of all. If need can be our guide, then why do we have to have an authority that enforces the decisions to which an evaluation of needs brings us?

Both criticisms have bite, but both also risk being flippant in the face of the existing injustices that Hamilton's radical proposal is seeking to address. To the liberal property-defender one might well reply that the defence of property rights is of little use to those who have almost no property to defend. We might also point out how absurd is the situation, when those with very little property – especially in land – are not the minority as in Waldron's case of homeless people in the USA, but a huge section of the population. And to the anarchist critic, we could justifiably reply that the anarchist ideal of direct action is of little practical consequence for a social problem of this scale and for a society with this history.

A more contextually sensitive line of criticism to Hamilton's argument would be to look at South African legal developments in housing and property disputes in recent years, and ask whether his scepticism towards the progressive potential of rights is in fact borne out in practice. The right to have access to adequate housing enshrined in Section 26 of the Constitution (albeit restricted by the state's available resources and articulated as an aim to be progressively

achieved) has in fact been used by South African courts to stop evictions and force the hand of state authorities in providing alternative housing for those in need (Chenwi 2008). This housing right has indeed come into conflict with existing property rights in cases where land-owners seek the protection of their land from the incursion of squatters and squatters seek the realisation of their right to adequate housing. But the outcome is not inevitably conservative: property rights do not always, or even routinely, trump housing rights. In fact, current South African law will normally not allow evictions where homelessness will result (Wilson 2011: 266). The needs of those who face eviction are not automatically made invisible by the rights-based discourse through which the courts reason. This concern for needs in judicial reasoning would probably not count for Hamilton as a sufficiently radical recognition of the moral force of needs in the organisation of public life, but it does serve as a reminder that in practice we are not always faced with either/or decisions on political and legal strategy.

Hamilton's discussion should be read as an exercise in political imagination that explores the potential limitations with rights-based reasoning, and probably not as an outright denial of the practical importance of this reasoning in some contexts. While in many ways difficult to imagine in practice, Hamilton's suggestions about building a link between property and need through political processes of decision-making does make Waldron's more theoretically moderate solutions appear detached from social history and reality: the standpoint of need becoming strangely abstract and decoupled from actual institutional processes of information gathering and the organisation of power. For Hamilton, the concept of 'need' provides a way to imagine a radical route out of an extreme situation. Hamilton's strategy is, in the end, to replace unchanging *rules* with flexible political *judgements*, so that *power* can respond to *need* in the concrete historical circumstances that a society finds itself in. This suggestion contains a great deal of hope, but its risks are also certainly very great.

#### **4.3 Meeting Needs through Direct Action: Colin Ward**

Hamilton's sketch of a political and legal order based on the evaluation of what members of a society actually identify and express as their needs, captures quite clearly the ways in which the problem of 'need' can be used to return a sense for concrete social history to our abstract political theorising. The concept of 'need' becomes the moral lever with which to pull the institutional order into a better alignment with the social order, and the concrete problems therein. This levering is, however, to be carried out *periodically* in a process that is structured institutionally and which leaves centralised political power intact. The process whereby (restricted) property rights and property needs will be coordinated will be *intermittent* and centrally *organised*.

These features of his vision of 'the state of needs' are important because they distinguish his position from liberalism, on the one hand, and anarchism, on the other. In this section I consider an anarchist approach to need and housing. While Hamilton imagines property entitlements being restructured periodically based on social actors' information inputs into the political system of more or less direct democracy, anarchists believe that meeting human needs is best

done through direct action entirely outside – or in confrontation with – the political and legal system maintained by states. Although this sounds radical as a position within political theory, it is surely correct that in practice much of the time we learn about the confrontation between property rights and human needs *after the event* of informal acquisition or settlement. Law and policy makers usually do not have the luxury of drawing up a theory of needs and then planning the future of property law; they are confronted with the social *consequences* of this collision, for example in the figure of squatters. This fact does not, of course, mean that we must have an anarchist political response to this anarchistic aspect of social order. But the *post hoc* and potentially *ad hoc* approach to property and need that we find in anarchist scholarship is an important reminder that not everyone deeply concerned with need thinks that carefully structured legal and political processes are attractive solutions.

To sketch an anarchist approach to the problem of needs and property, we turn in this section to Colin Ward's scholarship. Ward follows Peter Kropotkin in imagining a society in which a lack of government produces not chaos, but a finely adjusted equilibrium between various social forces. The organisational networks of this society would operate on a number of scales, from the local to the international, and human needs of all kinds – from the most basic to the most complex – would be met through direct cooperation not mediated by a state: 'How crude the governmental model seems by comparison, whether in social administration, industry, education or economic planning. No wonder it is so unresponsive to actual needs' (Ward 1973: 52).

It may seem easy to dismiss such visions as utopian, but the merit of Ward's scholarship is to document specific cases in which anarchist organisation, occurring in the midst of states, seems undeniably valuable. Unlike Waldron and Hamilton, Ward is not so much developing a theoretical account of needs and property as simply illustrating what anarchism can look like. In *Housing: an anarchist approach* (1976) Ward documents amongst other things the post-war housing crisis in the UK, and the way in which both unused military barracks and empty private properties were occupied on a massive scale (in 1946 the government counted over 39,500 people squatting in camps in England and Wales, and 4,000 in Scotland). 'The campaign began' writes Ward 'with the effort to put right an obvious public scandal [insufficient housing for citizens], it spread to become a challenge of the hitherto hardly disputed right of the landlord to do as he liked with his own property without reference to public needs, and it ended with the official sanction of this challenge' (Ward 1976: 20).

To sharpen the contrast with forms of politics that focus only on intermittent need evaluation and satisfaction, it is worth pointing out that the anarchistic direct action came under attack from one of the architects of the British welfare state, Aneurin Bevan, who accused squatters of 'jumping their place in the housing queue'; '...in fact,' Ward replies, 'they were jumping out of the housing queue by moving into buildings which would not otherwise have been used for housing purposes' (Ward 1976: 23). Bevan's criticism implies that the coordination of need and resources can only be justly achieved if we abstract from specific situations of need and, from the vantage point of a central authority, organise the response to need on a national scale that

temporally and spatially removes decisions about resource allocation from the individual actors who need housing. For an anarchist, the temporality of the imaginary housing queue is, however, an affront to the moral pressure exerted by need in the singular historical situation.

In later work Ward (2002) also points out the ways in which property which is now fully integrated into our legal system often started decades or centuries back in time with the unofficial appropriation of land by those who needed a place to live. Houses now sitting in the middle of village greens were built on land appropriated from the commons, and houses now perilously close to public roads, often started as buildings *in* the very road, which has subsequently retreated a few metres. Ward's *Cotters and Squatters: housing's hidden history* (2002) documents the folklore, once widespread in Britain and elsewhere in the world, of the 'one-night dwelling': the idea that a house built between dusk and dawn on land claimed from the commons functioned a legitimate claim to that property. He is quick to note that this was never the case in formal legal codes, but this does not mean that the belief has not had an impact on people's actions over the centuries; actions that often gained post-hoc legitimacy. Again, the example illustrates the anarchist concern with immediacy and decentralisation: this folklore institution is a way to imagine the adjustment of property rights to property needs at a particular moment in time under specific circumstances – that is, not as part of an ongoing centralised legal process.

Anarchists see individual human lives, at specific points in time, colliding with general rules that are meant to apply consistently across time. Need is what becomes visible in this collision. Thus, Ward does not provide an answer to the question of how property law might be structured to incorporate issues of need; he provides instead a condemnation of the chronic inability of centralised power – even social democratic – to respond to the needs of individuals at specific moments in time, and thus an apology for self-help direct-action.

### **5. Need, Property, and Social Stability**

In their respective discussions Waldron, Hamilton, and Ward illustrate the differences between liberal, radical democratic, and anarchist approaches to the problem of making property institutions responsive to human needs. One of the central differences between them is in their assumptions about the proper sites of articulating the claims of need: in the legislature that designs the *Rechtsstaat*; in the political processes of the 'state of needs'; or in the direct action of property law-breakers.

While the last may seem like a particularly radical approach, surprisingly similar celebrations of 'property outlaws' have been articulated in recent legal scholarship. Peñalver and Katyal (2010), quoted above, have documented the many ways in which the violation of property laws has, in the long-run, led to the undoubtedly just reform of those laws. When civil rights protestors in the 1960s in the United States defied the property rights that gave canteen owners the legal ability to exclude African Americans from the premises, these protests opened the way to progressive legal change: 'By disobeying store owners' instructions to leave the premises, the

black students participating in lunch-counter sit-ins were, like the squatters in the American West, intentionally disregarding the very property rights they sought to change' (Peñalver and Katyal 2010: 64 – 65). Peñalver and Katyal do not go as far as framing this example as an issue about making needs visible, but their studies are highly suggestive: we should pay a great deal of attention to both the social events that show us something important about the justices and injustices of current property regimes, and to the parts of law – like the doctrine of adverse possession or the rights of squatters (now eroded in the UK) to protection from immediate eviction – that make claims of need visible and sometimes give them legal import. As Peñalver and Katyal point out with regard to US law '...existing property doctrines like the implied warranty of habitability, adverse possession, and necessity suggest that self-help redistribution is already accepted, in a circumscribed way, by current property laws' (2010: 138).

Thus while radical as a political ideal, there is also a rather modest lesson in the anarchist celebration of self-help: the vindication of direct action based on claims of need may have an anarchistic aspect as feared by Lord Justice Edmund Davies, quoted in the introduction, but in the long run, *ad-hoc* and *post-hoc* legitimacy has been granted to many 'property outsiders' without society collapsing, and perhaps even stimulating just legal reform. The closing, in England and Wales and other European jurisdictions (Manjikian 2013), of the legal spaces in which self-help was partially legitimised is the abandonment of a compromise between the rights of property owners to exclude and the rights of the non-owners to get a precarious foothold in the world of property. It is very often argued that the principle virtue of the institution of private property is the stability that it produces for societies. It is worth asking whether stability is in fact what is produced by forcing the claims of need into direct confrontation with the property regime, rather than holding open those spaces in which the institutional recognition of need in property disputes is possible, if only on a limited basis. It would be a great exaggeration to say that adverse possession and 'squatters rights' have the potential to rectify the injustices that the unequal distribution of property in society produces, but the logic of compromise that they enact between property 'insiders' and property 'outsiders' might be taken as a lesson rather than a threat. Despite the recent European experience, there is nothing inevitable about the progressive weakening of the legal position of property outsiders in modern societies. In South Africa squatting was decriminalised in 1998,<sup>viii</sup> and together with the housing rights protected in the Constitution (as noted in section 4.2) courts have subsequently been able to take need into account in property disputes without shaking the foundations of the legal order.

As the review of Waldron's, Hamilton's, and Ward's discussions of need and property has illustrated, the important question is not necessarily *whether* the claims of need and the rights of property are compatible in theory, but *where* and *how* the claims of need enter public life, law, and politics. There is risk involved in giving space to the claims of need in public life, whether by codifying, democratising, or vindicating self-help. By addressing needs through the specification of new rights, we may risk conservatism as Hamilton fears, but we may also risk generating legal and social uncertainty as rights-claims clash and courts are given the task of

striking balances. Introducing radical democratic processes of resource allocation would certainly risk sweeping away the line between politics and the rule of law, and anarchistic self-help risks destabilising other goods that we may value, such as welfare state policies. But these diverse risks should be weighed against what might be a greater risk for society in the long run: the risk involved in producing a political and legal culture that builds a firewall around private property against the claims of those that stand outside it.

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<sup>i</sup> Her point is of course not that everyone's needs have been weighed equally (Native American's needs clearly were not), but simply that many legal decisions cannot be explained adequately without introducing the assumption that the respective needs of the claimants matters in the minds of judges and wider society.

<sup>ii</sup> Squatting in residential properties was already a criminal offence in Scotland.

<sup>iii</sup> Even before the new 2012 law, squatters could be criminally prosecuted in a range of circumstances (for example refusing to leave when asked to do so by a relevant intended occupier, e.g. a tenant who was about to move in), but squatting itself was a civil offence.

<sup>iv</sup> For two excellent overviews of public debate around squatting in the UK and Europe more generally see Fox O'Mahony, O'Mahony, and Hickey (2015) and Manjikian (2013). The following newspaper headlines (from 2011) give an indication of the tone of the rhetoric: Jamieson and Leach (2011) 'The Middle Class Serial Squatters Exploiting the Law', *The Telegraph*; Anonymous (2011) 'Stop the Squatters: Criminalise this Unjust Behaviour', *The Telegraph*; McDermott and Wilkes (2011) 'Victory over the Squatters: Doctor and his Heavily Pregnant Wife Celebrate after Spongers are Ordered out of Their Home', *Mail Online*.

<sup>v</sup> See Reader 2007, chp. 5, for her development of many of these categories

<sup>vi</sup> His target is in particular Mark Tushnet (1984), but his criticisms would apply equally to Lawrence Hamilton's work discussed later in this article.

<sup>vii</sup> 'Complete lists of general human needs are archetypal examples of the dictatorship of theory: they are *meta*-political naturalisations of historically contingent human means and ends because they entrench a single moment in a dynamic process.' (Hamilton 2003: 12).

<sup>viii</sup> Prevention of Illegal Eviction from Unlawful Occupation of Land Act (1998), discussed in Chenwi (2008).



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