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# What's So Private About Private Property?

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WHAT'S SO PRIVATE ABOUT PRIVATE PROPERTY?

BY

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DISSERTATION

Submitted in partial fulfillment of the requirements for  
the degree of Doctor of Philosophy in Philosophy  
in the Graduate School of  
Binghamton University  
State University of New York  
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*Abstract*

This work attempts to determine what kinds of institutions—if any—the state should implement to protect private property, and investigates how individuals and communities operating within those institutions ought to behave. Because the laws produced by such institutions may conflict with community rights, social welfare, and justice, the political authorities—including judges and legislators—who operate the institutions must determine whether, and under what conditions, individual property rights ought to prevail over conflicting rights. I argue that considerations of privacy are necessary for making these determinations. Privacy—the condition that requires limitations upon the ability of others to access one’s physical spaces—has normative significance for moral behavior as well as for constitutional law and politics. Privacy’s value is promoted through private property rights, which are themselves shaped by the normative aspects of privacy. Because private property is valuable due to its intricate relationship to the promotion of privacy, states and communities ought to be able to infringe upon private property only to the extent they may infringe upon other privacy-oriented rights and interests. This infringement is encapsulated in the political act of eminent domain (or expropriation), which permits states to take private property for public use. Moral theory clarifies the role of law as political authorities use eminent domain to negotiate between private and community interests. In this work, I describe several such theories and then provide a contemporary property theory that claims the theory as an ancestor. I then ask the following questions: does this property theory facilitate eminent domain—the transfer of property from private to public—or does it make eminent domain more difficult by protecting private property against expropriation? I argue for a private property right that enjoys the same constitutional protection, known as strict scrutiny, as the privacy right, and conclude that the privacy aspects of property are best protected by a takings jurisprudence that

restructures the definition of takings based upon a reappraisal of the role of just compensation, a more narrow conception of public use, and a better understanding of how privacy interests can be objectified in physical spaces.

*For my parents.*

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### *Introduction*

In the introduction to his classic exploration of houses, homes, and other spaces, Gaston Bachelard informs us that he is engaging in an examination of *topophilia*—the love or strong sense of place. The investigations in *The Poetics of Space*, Bachelard explains, “seek to determine the human value of the sorts of space that may be grasped, that may be defended against adverse forces, the space we love.”<sup>1</sup> The work that follows shares Bachelard’s fascination with the phenomenological experience of space in the form of property—specifically, the kind of property that can embody privacy or private interests. This includes property considered as a physical space, such as land, as well as the things that inhabit those spaces, such as Bachelard’s “houses of things: drawers, chests, and wardrobes.”<sup>2</sup>

As a work of moral and political philosophy, these investigations into the nature and law of private property are framed by two general questions. First, what kinds of institutions should the state implement to protect private property, and second, how should we expect persons operating within those institutions to behave?<sup>3</sup> In terms of the first question, a property law— informed and supported by a property theory — that protects private property may conflict with community rights, social welfare, and justice. The property institutions must determine whether, and under what conditions, the private property right can override these community interests. The second question focuses on the moral rights and obligations held by not only by property owners but also by nonowners and, perhaps most importantly, by the political authorities tasked with the protection, regulation, and potential infringement of the private property right. In seeking the answers to these questions, I am interested in how privacy—the condition which requires limitation upon the ability of others to access one’s physical spaces—has normative significance for moral behavior and, eventually, for constitutional law and politics. I am primarily interested in

how property rights are shaped by the normative aspects of privacy. I aim to show that privacy is valuable and how its value is promoted through private property. I also aim to show if and when competing interests, such as those of the welfare of the community, override the privacy that is created through spaces, places, and locations. If private property is valuable because of its intricate relationship to the promotion of privacy, then states and communities ought to be able to infringe private property to the same extent it may infringe other privacy-oriented rights and interests, which is when the value of private property to the individual or group of individuals is outweighed by its value to the community. This infringement is encapsulated in the political act of eminent domain which, I will argue, should be a rare occurrence. To that end, I argue for strong private property rights.

A variety of moral theories can illuminate the role of law as it negotiates between private and community interests in the same piece of property. In chapters 2 through 5, I describe a ‘classic’ normative theory and provide a detailed expository account of the theory with an eye towards its application to the kind of private property theory I develop in chapter 1. I then provide a contemporary property theory that claims the classic theory as an ancestor, and ask the following questions: does this property theory facilitate eminent domain—the transfers of property from private to public—or does it make eminent domain more difficult by protecting private property against expropriation? I intend to find the derivation that best protects privacy by best inhibiting regulation and expropriation, and then embody it in law within the framework of constitutional property theory. These chapters each examine how crucial court decisions—primarily from the United States Supreme Court—reflect the target normative theories about property rights in an effort to determine whether any one theory justifies a reevaluation of takings jurisprudence in regards to stronger privacy and property rights. In the final chapter, I will argue for a private property right that enjoys the same constitutional protection, known as strict scrutiny, as the privacy right.

In chapter 1, I argue that instead of situating the right of self-ownership as the foundation of private property ownership, and instead of the proprietary theory of rights—which claims that privacy and all other rights are reducible to the property right—I argue that the right to privacy is the foundation of private property ownership. The justifications for both the privacy and property right consist primarily of the right to exclude and the corresponding duty not to interfere: if a person has no right to exclude others from their body, they have no privacy or right to it, and if a person has no right to exclude others from their property, then they have no property rights in that thing. The constitutional treatment of privacy in American jurisprudence is introduced and, because privacy is not universally understood as a valuable good, this chapter answers objections from feminist writers, many of whom claim that privacy promotes unjust patriarchy, as well as reductionists, who claim that privacy has no independent good or value of its own.

Chapter 2 begins by explaining the legal procedure of eminent domain as it has developed in American property and constitutional jurisprudence. The chapter then sets the format for the next three chapters by developing a ‘classic’ moral theory—here, Aristotelian virtue theory—into its modern derivation as the social obligation norm which its proponents posit as the foundation for a new property regime. The norm attempts to justify strong community rights against weakened individual rights and focuses exclusively on the duties of owners. The chapter defines the norm and how it is purported to be located in the jurisprudence by examining its potential impact on takings law, privacy rights, and other constitutional property norms. The norm fails for a variety of reasons. Contrary to the proponents of the norm, I argue that Aristotelian property theory prioritizes the moral obligations of nonowners, and that virtue ethics, while providing a foundation for some aspects of a morality of property, cannot form the basis of the kind of property law its proponents claim for it.

In chapter 3, Hegel’s property theory—the personhood theory—is brought into contemporary jurisprudence through the work of property theorist Margaret Jane Radin. Radin

claims a kinship with Hegel's complex property theory by arguing that personhood is developed primarily through the possession and ownership of personal property, the most important kind being the home and other personal yet nonfungible things. Hegel's property theory is the most intensively explored theory in this work, primarily because of its richness in terms of its ability to recognize the importance of property for human development—an importance which, I argue, has consanguinity with privacy rights. Although Hegel provides a strong property right, he develops an even stronger state right against private ownership that frustrates the kind of private property rights I defend. Despite touching upon some key aspects of Hegelian property and constructing a persuasive argument for the protection of homes against the use of eminent domain, Radin is primarily interested in developing a theory of noncommodification that ignores many of the crucial premises of Hegel's theory.

Chapter 4 is dedicated to the classic theory of Lockean property rights and their origin in self-ownership. Locke's property ideas are found in contemporary philosophy as the bases of both right and left libertarianism. Under scrutiny, Locke's property theory falls short of justifying the kind of strong individual property rights lauded by right libertarians: this is due to the failure of self ownership to provide a foundation for world ownership and also due to persuasive arguments that Locke's property theory supports strong communitarian limitations on the individual property right. Left libertarian property theories are inspired by this reading of Locke's work, and the idea of both unowned and communally owned natural resources is developed in this chapter. Specifically, left libertarianism argues that these resources are either unownable or ownable but only with very strict universal consent requirements. My privacy theory of property is put to the test by the general thrust of left libertarianism in regards to subsurface property and its potential for embodying an owner's privacy; to that end, the privacy theory is unable to justify strong rights in remote subsurface areas. Interestingly, American property jurisprudence coincidentally fails to recognize strong subsurface rights that are predicated solely on the rights of the surface property owner. In these subsurface areas, courts might—to the satisfaction of some

left libertarians—create a new commons where one had not existed before by using contemporary property law. That being said, right libertarianism’s strong property right best protects the kind of interests I argue for here, but, because I reject self ownership as the basis of world ownership, I attempt to draw out the privacy justifications nestled in this derivation. I conclude that the privacy aspects of property are best protected by a takings jurisprudence that restructures the definition of takings based upon a reappraisal of the role of just compensation.

Chapter 5 examines how efficiency considerations affect property rights. Like the preceding chapters, I show how a normative theory (utilitarianism) has shaped contemporary legal theory (the economic theory of law) as it relates to private property rights. There is a conflict between welfare economics and wealth maximization as the primary vehicles for the realization of efficiency. Although the economic theory of law broadly supports free markets, it is committed to the requirement that property rights be evaluated in terms of efficiency, and efficiency will frequently demand non-market solutions such as eminent domain. In particular, this chapter weighs the prospects for justifying a broad takings power for *private* individuals over corporate means of production on efficiency grounds. In the final section, prospects for the noncommodification of certain properties is reprised from Chapter 3 in more detail, the idea of the semiotics of markets is introduced, and a specific kind of property—cultural property—is tested against the semiotic objection. I conclude that efficiency considerations poorly protect private properties unless they promote efficiency, and because this condition disregards the property’s potential to have privacy components, efficiency considerations cannot protect private property.

The final chapter explores the moral constraints that surround privacy rights and how they intertwine with the political decisions about property rights. These decisions are made by legislatures when they regulate and take property, and by courts when they decide upon the constitutionality of the legislature’s actions. In this chapter, the argument is made for a fundamental right combining privacy and property, a right requiring that laws affecting the right



should be subjected to strict scrutiny. This chapter discusses how the standard of review is framed by the idea of fundamental rights, the kinds of scrutiny used by the courts, and how the courts have bifurcated property rights from other rights. After presenting—and, I hope, surmounting—a series of objections to the right, I explore the use of eminent domain to advance redistributive and egalitarian goals, and then offer a number of explanations why communities rarely use their constitutional right of democratic governance to pursue those goals. The exception is South Africa, who has used constitutional property and eminent domain to rectify past and present injustices in both ownership and distribution.

Throughout this work, takings law—including what is called eminent domain in the United States and expropriation in many other countries—is pitted against the private property right. This is because the jurisprudence of takings—and the ideology that both supports and challenges the parameters of takings—helps frames two further questions that are under constant scrutiny in these papers: “What is private property and what are the limits of the state’s actions towards it?”<sup>4</sup> In terms of state action, the Takings Clause of the Fifth Amendment clearly contemplates that the state may take private property for public use. The circumstances and justifications for takings, however, has been the subject of much controversy and litigation. I am interested in whether this and other statutes recognize—rather than create or construct—the private property right, and how the statutes guide states when they must make the determination to protect the property right or take the property it is purported to protect.

To that extent, many of the arguments that justify the right to privacy in ‘persons, houses, papers, effects’ can, *mutatis mutandis*, also justify the right to private property in those things. It is privacy—and the justifications for it—that makes bodies and private property *pro tanto* immune to interference by others. What is important about the personal privacy right is its demand for the right to exclude others from the body, and its demand that others not interfere with it. These demands are embodied in the person as the privacy right and do not implicate ideas about ownership or possession—although ownership or possession are certainly implicated by the

privacy aspects of external property. Similarly, what is important about the right to private property is its demand for the right to exclude others from the thing owned, and its demand that others not interfere with it: these demands are embodied in the thing as the property right. The private property right is the privacy right to exclude, and the correlative duty not to interfere, *objectified* in physical things: homes, diaries, computers, land, and safe deposit boxes. If a social norm or convention protects the right to privacy, the justifications for that right apply *pari passu* to the right to private property.

#### Notes

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<sup>1</sup> Gaston Bachelard, *The Poetics of Space* (Boston: Beacon Press, 1958), xxxv.

<sup>2</sup> *Ibid.*, xxxvii.

<sup>3</sup> Itai Sened, *The Political Institution of Private Property* (Cambridge University Press, 1997), 16.

<sup>4</sup> Harvey M. Jacobs, "Introduction," in *Private Property in the 21<sup>st</sup> Century: the Future of an American Ideal*, ed. Harvey M. Jacobs (Northampton MA: Edward Elgar, 2004), 6.

## Chapter 1

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### *The Privacy Theory of Property*

In this chapter, I focus on privacy, property, and private property. By examining the dichotomy between the public and private domains and the privacy and property rights that are constitutive of them, this initial chapter introduces the argument that property and privacy rights are derived from the same foundational *right to exclude*, and, hence, that both property and privacy rights impose the same foundational *duty of noninterference*.

I thus argue for the foundational relation between privacy and property that will be explored in great detail in the ensuing chapters. By explaining why the ‘private’ aspect of private property distinguishes it from other types of property and marks it for special moral and legal protections, I conclude that the values and interests protected by privacy rights are the same values and interests protected by property rights.

As Richard Arneson writes, “[t]here is a voluminous literature devoted to the analysis of the concept of privacy.”<sup>1</sup> However, according to Stephen Munzer, “academic discussions of the concept of privacy are in disarray.”<sup>2</sup> One of the primary causes of this disarray is the objection to the idea that privacy, and the right to it, are distinct from other rights. This objection, made most prominent by Judith Jarvis Thomson,<sup>3</sup> is known as the reductive account of privacy. This account claims that the right to privacy is not an independent right but “derivative” of other rights such as property rights or the right to bodily security. Because I am writing about the primacy of the private in a theory of property, I need to show why privacy is an independent value that is not swamped by property rights or other rights. I need to show why privacy is desirable in a variety of settings, and why the privacy aspect of private property makes forms of possession and

ownership worth protecting against interference from the state or community. Of the many theorists that take this approach to privacy, Ruth Gavison's influential 1980 article on both the descriptive and normative aspects of privacy is closest in spirit to the ideas I develop here, and I discuss it in depth in section 4.

Historically, privacy—and in the particular the much discussed 'public/private distinction'—has been a part of social and political life since both Greek and Roman times. The Ancient Greeks first described the bifurcation of human experience into the private (the *oikos*, or household) and public (the *polis*, or city).<sup>4</sup> Roman law, embodied in the *corpus juris civilis*, reads, "[p]ublic is that which regards the establishment of the Roman commonwealth, private that which regards individuals' interests, some matters being of public and other of private interest."<sup>5</sup> With this distinction in mind, this and subsequent chapters explore what Daniela Gobetti calls the "reciprocal implications between a thinker's private/public distinction and her conception of politics." This reciprocity, writes Gobetti, means that a political ideology gives a concomitant version of the distinction, and the distinction implies a certain kind of politics.<sup>6</sup> The link between the public/private distinction and political perspective is explored throughout this work. For example, for Marxists, a classless society places *all* social affairs within the domain of politics. No private sphere means no private property, and vice versa. If private property 'belongs' to the public, then private life belongs to it as well.<sup>7</sup>

The concept of privacy enters modern political theory with John Locke. For Gobetti, Locke recognizes that all persons are "endowed with a private domain of a kind."<sup>8</sup> As Judith Wagner DeCew writes, Locke argues that "what belongs to and is acquired by the self is private property and is distinctly separate from what is owned publicly or in common with all."<sup>9</sup> For Gavison, the modern interest in privacy is a response to the "change in the nature and magnitude of threats to privacy, due at least in part to technological change. The legal protection of the past is inadequate not because the level of privacy it once secured is no longer sufficient, but because

that level can no longer be secured.”<sup>10</sup> In other words, privacy rights have arisen with other modern rights, but they were not truly threatened until the modern era.

What, then, makes property private? It is not the simple defining fact that private property is just property that is not owned by the state—private property is not, for my purposes, a bland *contrast* with public property.<sup>11</sup> Private property, as a conceptual matter, must be something capable of containing or expressing something about the owner and their privacy. In terms of the relationship between rights as protections of both privacy and property rights, the prevailing understanding has been that property rights protect privacy.<sup>12</sup> I will be arguing that the opposite relationship occurs: by asserting a privacy right in property, property rights are subsequently protected by the privacy right. Unlike the reductionists, who reduce privacy claims to claims about property or autonomy, I am not reducing all property claims to privacy claims, and neither am I claiming that privacy claims are the only way to protect property. There are good reasons to justify private property that do not implicate the privacy interests of owners, and these are discussed in chapters 2 to 5. I maintain, however, that the strongest protections of property occur when owners can claim a nexus between the privacy right and the property right. A garden-variety property right is *ipso facto* a stronger right when an owner’s privacy rights are implicated in and into the property. This is due, in part, to the fact that in current American jurisprudence, privacy claims are more strongly protected than property claims. By piggybacking the (strong) constitutional privacy protections onto the ‘private’ part of (weakly protected) private property, I arrive, in chapter 6, at a constitutional theory of private property that, I hope, would be able to withstand what I argue to be the most serious threat to the privacy aspects of private property: the use of eminent domain by the state for ‘public use’ by the community.

The *right to exclude* is a necessary foundational component in both privacy and property rights, and ownership or strong possessory rights—a right to be there—are the best way to guarantee a right to exclude. So, the right to exclude is foundational for both privacy claims and property. The exclusion might be from a thing or a place or from information. However, my focus

in this chapter, or this work in general, is not upon privacy issues related to the torts of libel or slander or defamation or even protection of personality or publicity, or even the issues related to ‘big data’ or wiretapping. There is plenty of research being done in those areas already. Rather, I am interested in private spaces and places as they are fairly traditionally defined. There are places that are not controversially private, such as bodies and homes, but I am also interested in the privacy aspects of more contested areas such as businesses, intellectual properties, and ordinary objects such as those involved in the early privacy cases involving birth control.<sup>13</sup> Even simple items—such as an apple or a bag of nails—must occupy some space, and in order to make privacy claims about them, the *location* of those items in one space or another matters. For example, my privacy interest in my apple when it is located in my refrigerator at home is greater than when I have left it in the refrigerator at work. However, in both locations, the apple is still my private property, and my interests in it are infringed when it is stolen out of either refrigerator—yet, obviously, the privacy interest is greater in my home unit because of my enhanced privacy interests there. This work recognizes that the combination of the privacy and property rights that exist in the home or dwelling place create the paradigmatic private property right, a right which protects the boundaries of the home itself but also many of the items contained within it—again, these could be apples, bags of nails, or birth control devices. These items, I will argue, gain further private property protections by being *within* the home.

To that extent, I am interested in the legal entry into to these and other spaces and places by the state or the community. This can be done, of course, with drones and other invasive technologies. But those entries are typically undertaken for some surveillance purpose due to law enforcement interests, and are usually predicated upon suspicion that a crime has been committed. I am interested in how the law enters—and infringes privacy—when owners or possessors are *not* suspected of crime or deviancy: when they are, so to speak, *innocent*. The privacy violations that concern me are administrative, routine, utilitarian—yet, I will argue, constitute a more invasive entry than, say, those that are authorized by a search warrant.

Section 1 provides a general overview of property and the right to it. It introduces the idea that of the many rights property is said to protect, it is the right to exclude that constitutes the main or primary right. Section 2 provides a similar overview of privacy and the right to it, and also aligns the privacy right with exclusionary rights. Section 3 presents the reductionist account of privacy, which argues that privacy rights perform no independent work of their own in the face of property and property-like rights over the body. Ruth Gavison's influential account of privacy, presented in Section 4, argues against this account on the basis that both descriptive and normative accounts of privacy and the right to it constitute an independent and central value in both moral and legal theory. Section 5 and 6 explore, respectively, sociological and legal/constitutional accounts of privacy, while section 7 presents feminist objections to the value of privacy that stand apart from the reductionist objection. Section 8 examines the challenges of self-ownership for my theory of private property, and section 9 concludes by tying together privacy theory with property theory and unites them in the right to exclude and the duty of noninterference.

### **Section 1. Property Overview**

The predominant property theory in the literature and court decisions is the bundle theory of property. This theory views property not in the “vulgar and untechnical sense of a physical thing,”<sup>14</sup> but as the group of rights or incidents “inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it.”<sup>15</sup> Property is therefore the “set of government backed rights one has in the physical thing.”<sup>16</sup> The theory stands for the idea that there is no single primary or formal right that determines ownership.

This understanding of the right to property is metaphorical—the rights are often termed ‘sticks’ in the bundle<sup>17</sup>—but pervasive. Based on Tony Honoré's classic work, this theory of property rights enjoys widespread approval in the theoretical literature and, importantly, the jurisprudence. According to the theory, the right is not a single right, but a collection of incidents or sub-rights which combine to form the right to own some thing. A person becomes the “full

owner” of a property when he or she possesses certain rights, or "standard incidents of ownership,” in a mature, liberal legal system.<sup>18</sup>

According to property theorist Stephen Munzer, it is the combination of Honoré’s classic incidents with a Hohfeldian rights/claims analysis that constitutes the bundle theory.<sup>19</sup> According to Hohfeld, the word ‘property’ “is used to denote the legal interest (or aggregate of legal relations) appertaining to...a physical object.”<sup>20</sup> This aggregate is described by the well-known ‘fundamental legal conceptions’ of claim/rights, privileges (or liberties), powers, and immunities. A claim/right is a state of affairs such that the rights-holder has a claim on a duty-bearer for an act or forbearance that justifies coercive measures to extract the act or obtain compensation should the claim/right be in force or exercised.<sup>21</sup> The existence of the right entails the existence of the duty. Each one of Honoré’s incidents can be analyzed in terms of the claim/right and duty correlative relationship, and, if a sufficient number of them obtain, we are in the position to situate full ownership against which various types of incomplete or partial ownership might be compared.<sup>22</sup>

The bundle theory connotes a permissive stance on various kinds of property infringements due to its very nature as a bundle, where no particular underlying right serves to define ownership and no particular regulation or removal of any right constitutes a violation. Theories which tend to minimize the importance of robust property rights, such as the social-obligation norm,<sup>23</sup> the personhood theories,<sup>24</sup> and the utilitarian/efficiency theory,<sup>25</sup> utilize the bundle theory to justify the position that there is no significant infringement of the property right when one or more sticks in the bundle are trimmed, altered, or removed altogether, even when those rights are transferred from private owners to either the state or other private owners. The bundle theory also claims that property rights are relational between persons, and do not refer to rights that inhere in some physical thing. Because the right is not in some thing, the right is more easily regulated by rules, which purport to recognize the social or welfare roles that property ownership might incur to different degrees based on different conceptions of the property right.



The bundle theory faces a significant challenge from the exclusion theorists, who elevate the bundle's right to exclude above all other strands.<sup>26</sup> This theory is derived from the work of Thomas Merrill and Henry Smith, as well as the article "Defining Property Rights" by S. Douglas and B. McFarlane.<sup>27</sup> Exclusion theorists argue that the standard Hohfeld/Honoré property rights are reducible to a single right—the right to exclude—which correlates to some physical thing and not to relational rights between owners or the rest of the world. According to David Schmitz, "[t]he right to exclude is not just one stick in the bundle. Rather, property is a tree. Other sticks are the branches; the right to exclude is the trunk."<sup>28</sup> Even theorists such as Munzer, who deny that exclusion is the most important stick in the bundle, recognize that excludability as "the starting point of the investigation" into property rights.<sup>29</sup>

According to exclusion theorists, the right to exclude is the *sine qua non*, or indispensable, essential thing, about ownership,<sup>30</sup> and the right is violated when others interfere with an owner's efforts to exclude them. This understanding of property rights reflects the idea that what is important about property is its potential for being a repository of private interests and goals, where a simple set of duties, based on trespass considerations, reflects the core value of the privacy aspect of private property. The right to exclude does not, however, mean owners have no obligations, and maintains that owners are subject to traditional obligations not to interfere with, harm, defraud, or otherwise violate similar rights enjoyed by others.

This value is reflected in the right to exclude and the correlated duty not to interfere, which are generally the bases for the right and left libertarian approaches to property rights,<sup>31</sup> and, to an important but very circumscribed degree, the personhood theory as well.<sup>32</sup> The right to exclude and the duty not to interfere, it is argued, form the personal right to privacy, and it is the application of this right and this duty to property that justifies property rights. The right to privacy and the right of private property primarily protects the decision to exclude or admit others into a protected physical space. The right is violated when others (including the state) interfere with my

efforts to exclude them. Others assent to my assertions of privacy when they respect my privacy by not interfering with it. Privacy is therefore the subject of the next section.

## **Section 2. Privacy Overview**

In terms of definitions, privacy—the thing itself and not, quite yet, the right to it—is subject to a variety of interpretations. For starters, privacy can be understood as a *condition*. Both Stephen Munzer and Ruth Gavison agree upon this definition. For Gavison, privacy is a “condition of life” where an individual stands “*vis-à-vis*” with others.<sup>33</sup> For Munzer, “privacy is a condition in which the government and other individuals are not intruding into or gathering information about a person’s acts, decisions, affairs, or intimate qualities.” According to William Parent, “the condition of privacy is a moral value for persons who also prize freedom and individuality.”<sup>34</sup> Here, as in the definition of property, “excludability is central. Just as actual control may be thought of as the outward aspect of an efficacious power to exclude, so is privacy its inward aspect.”<sup>35</sup> This descriptive understanding of privacy as a verifiable condition of fact is discussed in depth in section 4.

The condition of privacy can be protected by rights. Like the property right, the privacy right is also a claim of immunity from interference—a right to left alone—and it is a characterization of the special interest we have in being able to be free from certain kinds of intrusions.<sup>36</sup> This claim necessarily implicates a right to exclude and the corresponding duty not to interfere. Privacy also consists in the control of transactions between persons and others, the ultimate aim of which is to enhance autonomy and minimize vulnerability.

According to Deckle McLean, privacy is also the right to control one’s own body (exemplified by reproductive and sexual conduct rights), security in one’s living space (as in the right to be free from unreasonable searches and seizures), and the prerogative to control, for example, one’s hair and dress styles and information about oneself.<sup>37</sup> Privacy serves, in this conception, a variety of ends including: *personal autonomy*, or individual control over when to go public; *emotional release*, which is respite from emotional stimulation and room to set aside

social roles; *self evaluation*, which is room to integrate experiences in a meaningful pattern, necessary for creative work; and *limited and protected communication*, including the room to share candid communication and confidences with trusted persons.<sup>38</sup>

According to Jeffrey Reiman, respect is the cornerstone of privacy, and by respecting privacy we respect each other as choosers. This respect exists in relationship to a community: it is a “social ritual by means of which an individual’s moral title to his existence is conferred...by means of which the social group recognizes—and communicates to the individual—that his existence is his own.”<sup>39</sup> Particularly in terms of bodies, the right to exclude others from entering the body and the correlative duty not to interfere with bodies is the primary right associated with bodily integrity. This right is discussed in detail in section 8.

Put another way, privacy, writes Annabelle Lever, is a combination of seclusion and solitude, anonymity and confidentiality, intimacy and domesticity,<sup>40</sup> but it is not restricted to single persons: two or more people can share their ‘privacy’ with one another and create a new, multi-person private space. Friendship is one of those spaces. As Anita Allen notes, “[f]riends participate in my personal world,” and it is in friendship that we experience a mutual accountability for private life.”<sup>41</sup> Privacy also allows us to make distinctions between friends and colleagues, lovers and doctors. According to James Rachels, this allows us to be professional and businesslike with some, loving and nurturing with others.<sup>42</sup> Private life is also important for regulating the “moral distance” between persons and the state: it is where, according to Paul Fairfield, “autonomy, self expression, and intimacy reside,” and the privacy rights serve to “protect individuals against encroaching majorities, institutions, and technologies.”<sup>43</sup>

One of the primary justifications for privacy is its relationship to autonomy, or control over our bodies and choices.<sup>44</sup> When we seek to avoid control over our bodies by others, when we seek to use them as we wish to satisfy our desires and our needs, when we seek our own reasons that do not fit into some established discourse about bodies, we are seeking the protection of privacy rights and not property rights over our bodies or lifestyles. What is truly remarkable about

the decision to give away a body part is not that it is property that is being given away, but that the privacy interest has been relinquished. The actual property—the thing—is secondary.

Privacy—in terms of bodies and the kinds of property I discuss here—is conceptually impossible without the right to exclude. It might be the right to exclude others from some physical thing (like a body, or an artwork, or a home) or from an emotion, or a thought, or a fear. We should respect others’ bodies and their decisions about their bodies not because it is one’s property, but because one’s body and their decisions about their body are private. In many ways, the claim that some activity or thought is private is both foundational and irreducible: in many cases, no further justification is required when someone says ‘it’s private.’

These concerns—for private lives and rights of privacy—correspond to liberal ideas about selfhood and autonomy, and they have important implications about what makes property private. If intrinsic to the idea of privacy is the unqualified title to private property which is as immune to interference as bodies and selves, then the conflict with egalitarian arrangements to redistribute wealth becomes obvious.<sup>45</sup> For philosopher Judith Wagner DeCew, privacy is not merely control over information—which has become the predominant approach to contemporary privacy talk—but also control over decision making, including “freedom from scrutiny and judgment, and protection from pressure to conform.”<sup>46</sup> This is decisional privacy, and decisional privacy is a key element in property ownership or possession. However, the question arises whether privacy does any ‘heavy lifting’ of its own in terms of rights. The reductionists, discussed in the next section, claim that it does not.

### **Section 3. The Reductionist Account of Privacy**

As DeCew observes, there are a variety of objections to both the existence of a distinct right to privacy, and to its efficacy as a moral or legal right. These objections constitute what DeCew calls the “narrow view” of privacy and it is supported by, most prominently, Judith Jarvis Thomson.<sup>47</sup> In her famous article on privacy rights, Thomson argues for replacing privacy rights with property rights because privacy rights lump together too many things, making for a right that

is too complex.<sup>48</sup> Privacy claims are therefore best understood as a subset of the right to own property and property-like rights over bodies, which make it wrong for others to look, listen, and touch us or our property without our permission.<sup>49</sup> This reductionist account of privacy, DeCew writes, argues that the right to privacy is not an independent right but “derivative” of other rights such as those involving property or rights to bodily security.<sup>50</sup>

Along these lines, Thomson argues that invading your home to paint your elbow green is wrong because of the invasion of the property right in the home and the property right over body. We can tell what is wrong in cases that *look* like privacy invasions by referring to other wrongs; in this case, wrongful invasions of rights over bodies and things. Therefore, it is wrong to refer to “the” right to privacy because “any privacy right can be explained in terms of other rights, notably property rights and rights to bodily security.”<sup>51</sup>

According to Gavison, who was the first to label this as the reductionist account of privacy, reductionists do not deny value of privacy, but deny that it is a useful legal concept.<sup>52</sup> The nonreductionist account—which both Gavison and I follow—recognizes that while privacy, property, and reputation are all interests worthy of protection, the law grants none of them absolute protection. However, when two interests—say property and privacy—are invaded in one situation, recovery may be compelled even though neither alone would suffice. Reductionists cannot account for the fact that an invasion of privacy, coupled with, for example, an invasion of a property right, makes that invasion *worse*. Unlike the reductionist account, the nonreductionist account recognizes that there is something additionally valuable about privacy claims that adds value to those other claims, particularly in terms of rights over bodies or things.

There are a variety of ways to describe how a reductionist account of privacy operates, but all of them utilize standard philosophical reductionist methodology.<sup>53</sup> This methodology utilizes the idea that some concept *x* *just is* (or *really is*) concept *y*, and that every instantiation of concept *x* is better or more productively understood as if it were concept *y*. In terms of Thomson’s reductionism, the privacy right reduces to other rights: any privacy right *just is* a

property right, the privacy right *just is* control over decisions, or privacy rights *just are* property-like rights over bodily integrity.

I engage, to a degree, in a certain amount of reductionism: on my account, privacy consists of the right to exclude and the corresponding duty of noninterference. But any definitional attempt to explain a contested concept like privacy is going to run into claims of reductionism, and there is nothing wrong or improper about reductionism itself in terms of conceptual analysis. The problem with reductionism in discussions of privacy, however, arises when the reductionist claim, which is that all privacy claims can be adequately described as ‘mere’ assertions of property rights, can be shown to be either unpersuasive or incorrect.

According to DeCew, the reduction of privacy to property rights is initially attractive because, understood as a condition,<sup>54</sup> privacy indeed appears to be capable of possession: we are said to possess our privacy information, and we do not want it possessed by others.<sup>55</sup> However, as both William Parent and Thomas Scanlon argue, it is just as plausible that “the reverse of reductionism is true, that other rights such as those of ownership or rights over one’s person are ‘derivative’ from privacy rights.”<sup>56</sup> It could also be true that liberty is ‘derivative’ from privacy rights.<sup>57</sup> This ‘reverse reductionism’ could be true, DeCew writes, “if there is a distinctive and important value designated by the term ‘privacy.’”<sup>58</sup>

According to Scanlon, privacy claims are varied, but have a common and unique foundation that is irreducible to other rights. For example, Scanlon writes, we do not better understand the issues surrounding electronic surveillance or the privacy interests involved in a free press by “consulting rights of ownership or even rights of the person.” Because “the rights of ownership and the rights of the person...are based in part on [the] interests which...underlie the norms of privacy,”<sup>59</sup> privacy rights are not reducible to property rights. Thomson is therefore incorrect when she argues that “every privacy right is really some other kind of right,”<sup>60</sup> and that we can resolve “unclearities” about our privacy rights by considering, for example, the rights of owners. Along these same lines, privacy is not reducible to the right to exclude; rather, the right

to exclude is the essential feature of both privacy and private property rights. To that extent, *pace* Thomson, we can resolve unclarities about property rights and ownership by better understanding privacy rights. Privacy is not about ownership, and, as I explain in section 8, rights about bodily integrity are also not about self-ownership.

For example, the legal cases which define the legal privacy right (cases involving contraception, the choice of a marriage partner, abortion, etc) are mostly about choosing and involve what is known as *decisional* privacy. Choosing and using a variety of property is also decisional. But, while the contraception cases might be said to involve property rights in the contraceptives themselves, they are really about the choice to beget a child, and that is not a property right. Similarly, *Loving v. Virginia* as well as *Obergefell v. Hodges*—the marriage rights cases—do not involve property at all, and nor do they involve what Thomson calls ‘property-like rights’ over the body. They may involve bodily autonomy rights, but, as DeCew notes, autonomy does not *protect* these actions or decisions:<sup>61</sup> it simply permits persons to choose to engage in those behaviors or not, and it makes them the actions of moral agents.

Ernest Van den Haag is also a reductionist, and his argument fails along the same lines as Thomson’s. According to Van Den Haag, “privacy is best treated as a property right. Property grants an owner the exclusive right to dispose of what he owns. Privacy is the exclusive right to dispose of access to one’s proper (private) domain. The genus is the same; the differentia lies in the origin and nature of what is owned.” For Van den Haag, every privacy invasion is a property invasion, and “any right to privacy is a right to exclude others from some property.”<sup>62</sup>

This is incorrect. Privacy rights with doctors, lawyers, or pastors (known more technically as the right of confidentiality) are unlike any property rights: although I might have to pay in order to enjoy them (this very true with doctors and lawyers; less true, perhaps, with pastors) I do not own the information I provide to them or the behavior or conditions they witness, nor may the professional sell this information without incurring a variety of liabilities; specifically, this kind information is not given to these professionals in the way other property

transfers are made. If the information were *just* property, then somehow my information, as property, is located in another's mind and I would, somehow, have a right to get it back.<sup>63</sup> This cannot be the case.

According to Alexander Rosenberg, if all privacy rights were just property rights and body rights violations, "then the right to privacy would just be an aspect of the right to property in a broad enough sense of the term to include ownership of the body. If privacy rights are a species or subject of property rights, they will require and submit to the sorts of argument available for justifying private property."<sup>64</sup> As I argue throughout this work, privacy rights are unique and separate from property rights, yet they provide the best foundation for the protection of property rights in the form of private property rights. This is not a didactic emphasis on this term: privacy really is what makes private property not merely property that is not public, but property that secures and provides a site for all the other (noncontroversially) privacy claims in bodies and many kinds of property.

Andrei Marmor has recently argued for a modified reductive account of privacy. For Marmor, privacy is the "interest in having a reasonable measure of control over the ways in which [persons] can present themselves (and what is theirs) to others."<sup>65</sup> This account attempts to reduce privacy to control over an environment. For Marmor, "[t]he right to privacy...is there to protect our interest in having a reasonable measure of control over ways in which we present ourselves to others. The protection of this interest requires the securing of a reasonably predictable environment about the flow of information and the likely consequences of our conduct in the relevant types of contexts."<sup>66</sup>

So, Marmor asks, what would count as a violation of a right to privacy? "The answer is that your right to privacy is violated when somebody manipulates, without adequate justification, the relevant environment in ways that significantly diminish your ability to control what aspects of yourself you reveal to others."<sup>67</sup> Contrary to Thomson's account, Marmor argues that privacy rights do the protecting in terms of property—or, as he phrases it, "environment." To show this,



Marmor uses Thomson's example of the picture in the safe. If a neighbor, Bob, uses an x-ray to see into Mary's safe and view her Picasso, Thomson claims that what appears to be a privacy violation is really a property rights violation because it is Mary's picture and the use of the x-ray is inconsistent with her ownership rights over it. For Marmor, the property angle is "tangential to the main underlying interest here, which is the interest in having control over concealment or disclosure." Bob is wrong because he is invading Mary's privacy by "manipulating her environment in ways that undermine her ability to control whether she shows her painting and to whom."<sup>68</sup> Whatever reasons Mary might have for choosing to keep her Picasso concealed from others, Marmor continues, "do not have any direct bearing on the question of what the legitimate interest is that the right to privacy is there to protect, or on what counts as a violation of this right. Bob the neighbor would have violated Mary's right to privacy regardless of her reasons for keeping the painting in the safe or, in fact, even if she kept it there for no reason at all."<sup>69</sup> The right to exclude as an essential feature of the right to privacy includes what Marmor believes is important about privacy in terms of control and the release of information, and it is clear that he is referring to the right to exclude in terms of the right invoked by the neighbor's peeping. Mary obviously has property rights in the picture—after all, it is *her* picture—but her ownership over it is not violated by Bob's x-ray.

The anti-reductionist account is most fully developed in Ruth Gavison's access theory of privacy, which is described in the next section.

#### **Section 4. Privacy as a Nonreductionist Value**

It is difficult to arrive at a noncontroversial conception of privacy. On the one hand, privacy appears to be relative across cultures. As Stanley I. Benn writes, "the application even of a quite general principle of privacy will be affected by culturally variant norms— those regarding family, say, or property."<sup>70</sup> Privacy, in this sense, has greater or lesser value based on the culture's attitudes towards it.<sup>71</sup> On the other hand, there are, both within and without those variations, certain facts and circumstances about privacy suggesting that it can be understood apart from

culture or tradition. These facts describe privacy as a person's state or condition that is unavailable to others—unexpressed thoughts constitute the most immediate example of this kind of privacy. Privacy, in this sense, is morally neutral.

Both the cultural aspects of privacy and the facts of privacy as an objective condition can provide a descriptive understanding of privacy. It is useful to first understand that there are private things that exist apart from moral valuation, and then attempt to determine how, and in what kinds of cultures, privacy has moral value.

The challenge faced in this section consists in moving from a nonnormative account of privacy (as both cultural and noncultural facts) to normative accounts in moral theory and then law. My approach draws heavily from Ruth Gavison's influential work in privacy studies. Gavison first shows that there are private things, and then determines why they are valuable. Her argument starts with a descriptive account in order to show why nonreductionism is preferable to reductionism, and then ends with a normative account of privacy's value as a central value in both moral and legal theory. This account not only shows how reductionism is incorrect, but also provides a foundation for a property theory that is predicated on privacy facts and rights.

Some things, such as unexpressed thoughts and ideas, seem naturally, or, for Raymond Geuss, "ontologically" private.<sup>72</sup> The concealed nature of thought suggests that our very embodiment naturally creates spaces in our being that are boundaried, private, and available to others only when we independently exercise our decision to 'go public,' and this decision certainly varies between different personality types, cultural influences, and factors related to class, race, and gender. Today, unexpressed thoughts, emotions, and attitudes are private parts of our interior mental life, but once we can read minds, this privacy is gone.<sup>73</sup> Until that time, privacy in these things, R.G. Frey writes, is not conventional primarily because, as naturally private things, their private status is not conferred by others or by society.<sup>74</sup> For Geuss, if some feature of one's life is ontologically private, it is "pointless to try to protect it from possible

surveillance”<sup>75</sup> because something that is naturally private cannot, by definition, be shared or known by others. When it is known, it is no longer ontologically private.

There are other things that also seem ‘naturally’ private, including the pleasures of sex and the displeasures of excretion. Also, privacy in the sense of the sharing of privacies is perhaps the chief facilitator for love, friendship, trust, and intimacy. A new sense of privacy is obtained by breaking down the withholding of privacy between persons resulting the intimate sharing of private facts, wishes, and dreams. Sometimes we want these known by everyone; sometimes, we do not.<sup>76</sup> The existence of privacy as a factual matter allows us to make that choice.

Gavison’s account of privacy begins with this understanding of privacy’s factual or descriptive properties. Hers is an attempt to “vindicate the way most of us think and talk about privacy issues.” Unlike the reductionists, she writes, “most of us consider privacy to be a useful concept. To be useful, however, the concept must denote something that is distinct and coherent.”<sup>77</sup> Gavison’s “antireductionist perspective”<sup>78</sup> has come to be known as the ‘accessibility’ approach to privacy, in which privacy is “the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are subject of others’ attention.”<sup>79</sup> Her goal, which I share, is showing how privacy has both descriptive and normative properties, and why privacy has a distinct, independent, and central value in human affairs.<sup>80</sup> Although her analysis does not focus on the privacy aspect of private property, she does provide a justification for protection against physical access by others, which, from my perspective, recognizes how property can be imbued with privacy interests and therefore make it deserving of the same heightened protection afforded to privacy interests related to intimacy, decision, or choice.

Gavison proceeds in three steps. First, she argues that privacy can be analyzed descriptively without looking at its value. In this sense, Gavison is trying to avoid frontloading a normative conception of privacy. Second, Gavison writes, after making determination about its descriptive properties, “privacy must have coherence as a value, for claims of legal protection of

privacy are compelling only if losses of privacy are sometimes undesirable and if those losses are undesirable for similar reasons.”<sup>81</sup> This focuses on invasions of privacy. Third, “privacy must be a concept useful in legal contexts, a concept that enables us to identify those occasions calling for legal protection, because the law does not interfere to protect against every undesirable event.”<sup>82</sup> This focuses on actionable violations of privacy.

For Gavison, using the same word in all three contexts “reinforces the belief that they are linked.” This linkage is established in response to the reductionist analyses of privacy, which deny “the utility of privacy as a separate concept” by severing these “conceptual and linguistic links.”<sup>83</sup> This neutral conception of privacy includes, among many other instances, “intruding or entering ‘private’ spaces.” But it also includes legal prohibitions on use of contraceptives, abortion, or sexual practices which authorize the state to invade bedrooms, for example, to search for evidence.<sup>84</sup>

Three other descriptive properties of privacy include secrecy, anonymity, and solitude. These are, Gavison writes, “distinct and independent, but interrelated, and the complex concept of privacy is richer than any definition centered around only one of them. The complex concept better explains our intuitions as to when privacy is lost, and captures more of the suggestive meaning of privacy.”<sup>85</sup>

Gavison’s approach has generated considerable support. As Weinreb observes, “‘That’s private’ is both a statement of fact and a prescription of how one ought to behave.”<sup>86</sup> Furthermore, “the adjective ‘private’ is commonly used as if it states matters of fact.” It also, he writes, “has normative force” and includes prescriptions “of how one ought to behave.”<sup>87</sup> These descriptive accounts of privacy fall back on the idea that privacy is a condition, and, *pace* reductionism, it seems strange to claim a right to a condition, even if it is one’s own condition.<sup>88</sup> Because privacy is a condition, Weinreb writes, “just about anything may be private: persons, places, things, actions, words, emotions,”<sup>89</sup> all of which can constitute a private domain where a person “as a person, has (a right to) a ‘space’ in which he is autonomous.”<sup>90</sup> If a person has a right

to a private space, then an invasion of that privacy is wrong, even with no harmful consequences or damages.<sup>91</sup>

Continuing with the idea that privacy is a condition, Michael A. Weinstein writes that privacy is ‘morally neutral.’ It is

a condition of being-apart-from-others. It is the voluntary limitation of communication to or from others for the purpose of undertaking activity in pursuit of a perceived good. Perhaps it is because privacy is a condition of being that so much of the discussion about it has been confused. A condition is not moral or valuable in itself. Rather, a condition is an opportunity for conducting an activity which may realize value in process or issue in a moral outcome.<sup>92</sup>

Although purely descriptive, a successful privacy claim means something, and it means something more than a simple property claim of ownership or possession. If one can make the argument that sex is private, then ‘private’ means ‘more protected against intrusion.’

In developing her access theory of privacy, Gavison draws upon these descriptive or morally neutral facts of privacy in terms of physical spaces and begins to make the connection between the condition of privacy and private property. In so doing, Gavison moves from a neutral description of privacy to an explanation of the normativity or desirability of privacy; in other words, its *value*.

Gavison: “Places and spaces, like gardens, beaches, room and theatres are public when anyone is entitled to be physically present in them; they are private when someone, or some group, having the right of access, can choose whether to deny or allow access to others.”<sup>93</sup> Access also pertains to resources, and a person has such access “if he is able to manipulate some elements in his environment to bring about new and intended states of affairs.”<sup>94</sup> But, most importantly, privacy can restrict physical access to an individual, and in doing so, it “insulates that individual from distraction and from the inhibitive effects that arise from close physical proximity with another individual.”<sup>95</sup> As DeCew writes, Gavison’s protection of accessibility privacy “allows individuals to control decisions about who has physical access to their persons through sense perception, observation, or bodily contact and to limit access that would be

unwelcome to reasonable individuals in the circumstances due to the distraction, inhibition, fear, and vulnerability it can cause.”<sup>96</sup>

This sounds very much like the private property right, which individuals lose when others gain physical access to them. Such losses occur in the following situations:

(a) a stranger who gains entrance to a woman's home on false pretenses in order to watch her giving birth; (b) Peeping Toms; (c) a stranger who chooses to sit on ‘our’ bench, even though the park is full of empty benches; and (d) a move from a single-person office to a much larger one that must be shared with a colleague. In each of these cases, the essence of the complaint is not that more information about us has been acquired, nor that more attention has been drawn to us, but that our spatial aloneness has been diminished.<sup>97</sup>

It is at this point we see the emergence of the argument for the moral value of privacy. Gavison: “Privacy thus prevents interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reaction. To the extent that privacy does this, it functions to promote liberty of action, removing the unpleasant consequences of certain actions and thus increasing the liberty to perform them. This promotion of liberty of action links privacy to a variety of individual goals. It also raises a number of serious problems, both as to the causal link between privacy and other goals, and as to the desirability of this function.”<sup>98</sup>

Because privacy adds to the value of liberty, particularly in terms of legal protection, reductionist accounts obscure the continuity of legal protection over time. They give the erroneous impression that the concern with privacy is modern, whereas in fact both the wish to invade privacy and the need to control such wishes have been features of the human condition from antiquity. The common-law maxim that a person's home is his castle; early restrictions on the power of government officials to search, detain, or enter; strict norms of confidence; and prohibition of Peeping Toms or eavesdropping all attest to this early concern.<sup>99</sup>

In other words, the privacy right is a kind of old wine in a new skin: it has long held a distinct, independent and central value for communities that also value, for example, autonomy. As Gavison notes, autonomy is linked to the function of privacy in promoting liberty. “Moral autonomy is the reflective and critical acceptance of social norms, with obedience based on an independent moral evaluation of their worth. Autonomy requires the capacity to make an independent moral judgment, the willingness to exercise it, and the courage to act on the results

of this exercise even when the judgment is not a popular one.”<sup>100</sup> Although we do not know what makes individuals autonomous, Gavison writes, “it is probably easier to be autonomous in an open society committed to pluralism, toleration, and encouragement of independent judgment rather than blind submissiveness. Privacy is needed to enable the individual to deliberate and establish his opinions.”<sup>101</sup>

The liberty that privacy protects must exist somewhere. As I will argue throughout this work, private property rights best protect this interest. Spaces become private when private activities, necessary for the exercise of liberty, inhabit those spaces, and ownership is the best, but not only, way to protect those spaces and the things within them. Although different cultures value privacy differently, privacy and the right protecting it are important features in cultures that value the liberties associated with liberal democracies.

### **Section 5. The Sociology of Privacy: Cultural Privacy**

Almost all societies have norms and rules about restricting access to childbirth, sex, excretion, and other behaviors. Although these matters may seem ‘naturally private,’ it ought to be clear that sexual acts can very public, and, as Weinreb, observes, even behavior related to excretory functions appear to be culturally conditioned. In fact, “privacy of this kind typically is obligatory; common human impulse though it may be, it is not a reflection of autonomy but an other-regarding aspect of conduct within the public realm.”<sup>102</sup> This reflects the idea that some things are not naturally, but normatively private: indeed, some things ought to be private and persons are obligated to keep them that way.

This section examines how privacy is relative between cultures, and why it is important for certain but not other cultures. As briefly explained in the introduction to this chapter, we can trace the origin of the private to the Ancient Greeks, who first described the bifurcation of human experience into the private (the *oikos*, or household) and public (the *polis*, or city). For the Greeks, the *oikos* concerned the family, reproduction, birth, and death. It was the realm of the female and maintained an inherent inequality. The man of the *polis*, on the other hand, denigrated

the bodily, private sphere, and finds his nobility in the public sphere, concerning himself with issues of state, reason, maleness, freedom, and civic virtue.<sup>103</sup> In Socrates' ideal city of the *Republic*, Plato eliminates the private because it "sows seeds of division." Among the relatively small 'guardian' class, wives, children, and property are held in common. For those who are involved in ruling the city, private life is abolished. Modern liberals reject this, primarily by supplementing a traditional private family life with a private individual life where, as in ancient Greece, men continue to rule. But here is the dialectical turn: in the modern version, the private is not denigrated but *exalted* over the public. So while "the social" existed as the space between the individual/household/private and the state, the social becomes integrated into in the private. Social inequalities—gender, race, property, and so forth—are therefore replicated in private life. Private life then centralizes private oppression through hierarchy by moving it out of the public gaze.

Because not all cultures value privacy, a universal or necessary understanding of it seems improbable. For example, in his classic study Alan Westin describes pre-literate societies where "fear of isolation leads individuals to believe...they are never wholly alone, even when they are in physical solitude." In these societies, a person who was truly alone was in "terrible peril, since hostile spirits were believed to be all around."<sup>104</sup> According to Rosenberg, "[s]ocial groups in which there is extreme equality, both of resources and power, and homogeneity of tastes, preferences, and mores, will not trouble themselves to establish rights of privacy."<sup>105</sup> According to anthropologists John M. Roberts and Thomas Gregor, 'high' privacy is associated with animal husbandry, domestication of large animals, and the intensive agriculture required by cereal crops. These factors, along with games of strategy (and not mere strength or chance), and "high gods" (spiritual beings who are present but not active in human affairs) lead to high privacy. Traditional or indigenous societies with simple structures (such as lean-tos) indicate a low preference for privacy. In a society such as the Mehinacu of the Xingú River basin in Central Brazil, who cannot avoid leaving their footprints on and near the soft earth of the river, privacy is compromised



because “[e]ach person’s footprint is well-known to his fellows,”<sup>106</sup> and each person is therefore easily tracked and detected. As Carl J. Friedrich writes, as a society becomes more ‘civilized’ it also becomes more private, and violations become more serious, more felt, and more important.<sup>107</sup> According to DeCew, the rise of technology in terms of mass transportation, communications, and handheld devices, have encouraged privacy while also threatening it.<sup>108</sup>

According to Benn, privacy is closely related to the idea of the free person in a “minimally regulated society, a way of life where, first, the average individual is subject only within reasonable and legally safeguarded limits to the power of others, and, second, where the requirements of his social roles still leave him considerable breadth of choice in the way he lives.”<sup>109</sup> This conception of privacy, Benn writes, “is closely bound up with the liberal ideal.”

The totalitarian claims that everything a man is and does has significance for society at large. He sees the state as the self-conscious organization of society for the well being of society; the social significance of our actions and relations overrides any other. Consequently, the public or political universe is all-inclusive, all roles are public, and every function, whether political, economic, or artistic, can be interpreted as involving a public responsibility.<sup>110</sup>

The liberal ideal is bound up with a certain conception of the individual. “Privacy,” writes Jeffrey Reiman, “is necessary to the creation of *selves* out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his *own*.”<sup>111</sup> This notion of the self, Gavison writes, relates to the liberal “notion of the individual, and the kinds of actions we think people should be allowed to take in order to become fully realized.” Privacy establishes the link between the liberal individual and their “mental health, autonomy, growth, creativity, and (their) capacity to form and create meaningful human relations.”<sup>112</sup>

Unlike cultures which disvalue privacy or lack it altogether, these properties of the individual “relates to the type of society we want. First, we want a society that will not hinder individual attainment of the goals mentioned above. For this, society has to be liberal and pluralistic. In addition, we link a concern for privacy to our concept of democracy.” Privacy in

liberal democracies, Gavison writes, is necessary for “creativity, growth, autonomy, and mental health,” and it is “central to the attainment of individual goals under every theory of the individual that has ever captured man's imagination.”<sup>113</sup>

Therefore, privacy may not be essential for all human life, but it is “essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy.” Thus, Gavison concludes, to the extent that privacy is important for the autonomy of individuals in liberal democracies, “it is important for democracy as well.”<sup>114</sup>

The privacy right, of course, is protected by the state in contemporary liberal democracies to greater or lesser degrees. Privacy permits individuals to establish their boundaries against others on their own terms. If liberalism aims for the creation of independent, flourishing humans, then it would appear that some measure of privacy—a changing, self-determined establishment of boundaries by individuals against others—is necessary. Without this possibility—and again, many people may choose to not assert any preferences about privacy, and no one is going to force anyone else to maintain boundaries that make privacy possible—there is nothing to kick against, so to speak, and the conditions for independent, considered action are lost.<sup>115</sup>

Perhaps it is the very possibility of having a private, interior mental life that permits one to explore their own concept of the good or the right that constitutes a prerequisite to the experience of liberty. The opposite of this kind of liberating privacy is scrutiny, surveillance, and observation,<sup>116</sup> resulting in the panoptical viewing of everything by everyone. This was the case in the film *The Truman Show*. Because his entire life has been, unbeknownst to him, broadcast on television as a kind of reality show in which everything, include his parents, his wife, and the sky are phony, Truman has no privacy whatsoever. He consequently has no self, or at least no *real* self, in part because of his false belief in the existence of his own private life. Once he discovers his true circumstances, he begins to become a non-public being—a person with a private self. Like Truman, a person developing in a constant panoptic society lacks privacy, and the total

negation of privacy is one of the reasons why prison, as well as the dystopia of George Orwell's *Nineteen Eighty-Four*, is so feared. According to Andrei Marmor, in the privacy-less global Panopticon, our lack of personal privacy also means that "our social lives...would be severely compromised."<sup>117</sup> Similarly, a world of Total Honesty, Marmor writes, "would be almost as horrific as a global Panopticon," where "every thought that comes to your mind is immediately communicated to others. That is not necessarily or exclusively an issue of privacy, of course, but it has a privacy correlate; some concealment and the ability to interact with people at arm's length are really quite essential for us to operate in the complex societies we live in."<sup>118</sup> This world would, however, be a world with no crime, where "a person could identify his enemies, anticipate dangers stemming from other people, and make sure he was not cheated or manipulated." Gavison: "Criminality would cease, for detection would be certain, frustration probable, and punishment sure. The world would be safer, and as a result, the time and resources now spent on trying to protect ourselves against human dangers and misrepresentations could be directed to other things."<sup>119</sup>

A society with no privacy is tyranny, and a free society provides the opportunity for extensive privacy. These opportunities can exist within current states or in one of the many possible utopian futures. For centuries religious groups have created these types of groups within the framework of the state, and, depending on a variety of factors, they can be admired for their autonomy, their rejection of authority, and their commitment to living off the grid. Perhaps trust is better developed in these smaller, localized communities,<sup>120</sup> and privacy (understood here as the right to exclude) in these spaces is less important than in larger ones. Again, no liberal is going to deny anyone's decision to create or join artist's communes, workers' production facilities, or nonhierarchical educational facilities where privacy is compromised due to agreement, and nor should they deny similar social arrangements that promote a deep understanding of the kind of private journey that some of us require in order to occasionally seek what writer Paul Bowles called 'le baptême de la solitude', or the baptism of solitude.<sup>121</sup>

## Section 6. Privacy as a Legal Concept

Because privacy is an integral part of American liberal democracy, it has been extensively legislated and litigated in terms of the rights that purport to protect it. As H. Tristram Engelhardt, Jr, writes, the right to privacy creates “freedom from unwarranted government intrusion” by establishing “fundamental limits on the authority of the government,”<sup>122</sup> and by granting “robust areas of privacy” in regards to consent, contract, and the market.<sup>123</sup> However, it has become a truism to remark—as DeCew and many others do—that “the term ‘privacy’ appears nowhere in the Constitution.”<sup>124</sup> While this is strictly true—the word itself does not appear there—the word “private,” the adjectival version of the noun “privacy,” *does* occur, and it occurs exactly once: in the takings clause, which states “nor shall private property be taken for public use without just compensation.” The importance of this occurrence for private property rights is explored in chapter 6, where I will argue that the “private property” in the Fifth Amendment creates—or recognizes the existence of—a strong privacy right, one which is perhaps the strongest constitutional privacy right because of its virtual enumeration there.

For DeCew, privacy claims are not only protections against government interference, so they are not merely liberty or autonomy rights. Privacy claims provide better reasons—over and in addition to reasons of liberty and autonomy—for increased protection of the locations where private behavior occurs.<sup>125</sup> With this recognition in mind, this section describes how the courts have treated the privacy right in general, with the understanding that a great many of the legal rules that have grown out of these decisions have significant import for the privacy theory of property as well. As DeCew observes, the *location* of behavior is important in terms of many privacy decisions, and the courts have recognized this in a variety of decisions.<sup>126</sup>

The birth of the privacy right in tort law in the late 19<sup>th</sup> century, stemming from Thomas Cooley’s “right to be left alone” and Warren and Brandeis’ right of “inviolable personality,”<sup>127</sup> led to the constitutional privacy right due to the fact that the “earliest constitutional challenges to federal law tied privacy interests to physical control over a dwelling or other property seized as a

tangible item.” As a result of these cases, DeCew writes, the “Fourth Amendment proscriptions against unreasonable searches and seizures obviously protect such interests as property and freedom of press, in addition to privacy.”<sup>128</sup>

The developed case law has protected a variety of actions and behaviors including the possession of obscenity in the home, the right against state-enforced sterilization, the right to use contraception, the right to abortion, the right to engage in consenting homosexual behavior, and, in at least one outlier case, the use and possession of marijuana in the home.<sup>129</sup> The most important of these cases is *Griswold v Connecticut*, which explicitly established the right for the first time as a right against the intrusion of the government into private life. In *Griswold*, a provider of contraceptive products and advice was charged with violating the state’s anti-contraception law. In striking down the law as a violation of the privacy rights of potential violators of the law—including both disseminators and users of contraceptives—Justice Douglas wrote: “We deal with a right to privacy older than the Bill of Rights, older than our political parties, older than our school system.”<sup>130</sup> Douglas found this right in a variety of constitutional provisions, such as the first amendment freedom to teach or dispel information, the third amendment’s protection of home, the fifth amendment’s protection against self incrimination, and the fourth amendment’s protection against unreasonable searches and seizures. The *Griswold* court held that a search for a constitutionally protected act or thing—here, birth control devices—is unreasonable because the only way to prosecute violations of this kind of law is to search the ‘marital bedroom,’ so that even if the law does not violate a first amendment speech right or some other principle, the methods used by law enforcement to determine violations of the law are unconstitutional as a matter of procedural due process.

In terms of property rights, *Griswold* can be read as a right to possess certain kinds of private property, which, in this case, consisted of birth control devices. *Griswold* only protected the right of married couples to possess these devices, but this protection was quickly provided to unmarried persons as well in *Eisenstadt v Baird*, which held that that the individual’s

constitutional right of privacy protects them from “unwarranted governmental intrusion” into, for example, the decision to have (or not have) a child.<sup>131</sup> Possession of pornography in the home was protected in *Stanley v Georgia*,<sup>132</sup> and privacy was also cited as grounds for ruling that laws against miscegenation were unconstitutional in *Loving v. Virginia*. While *Loving* is not related to property rights, *Stanley* clearly—like *Griswold* and *Eisenstadt*—protects both property in terms of possession as well as property in terms of the home. In *Stanley*, the Supreme Court held that an individual could not be prosecuted for possessing obscene materials in their home. The Court recognized that States' had "broad power to regulate obscenity," but "that power simply does not extend to mere possession by the individual in the privacy of his own home."<sup>133</sup>

As DeCew notes, tort privacy is mostly concerned with information, but the constitutional privacy cases deals with “zones” or places.<sup>134</sup> This is particularly true in *Moore v City of East Cleveland*, which found a privacy right in both family composition and the organization of dwellings in physical places such as the home. In *Rakas v. Illinois*, the Court makes the connection between privacy and property rights and the general right to exclude: “And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will, in all likelihood, have a legitimate expectation of privacy by virtue of this right to exclude.”<sup>135</sup>

This private property right clearly covers homes: as the Court stated in *United States v. Karo* (1984) it is “belaboring the obvious...that private residences are places in which the individual normally expects privacy..., and that expectation is plainly one that society is prepared to recognize as justifiable.”<sup>136</sup>

Mark Tushnet provides a constitutional theory, conventionalism, that explains how these cases have developed and taken hold in American jurisprudence. For Tushnet, privacy as a legal convention has developed out of constitutional rules which “rest upon what the (Supreme) Court describes as the normative understandings of the American people.” Conventionalism constitutes a descriptive account of the people’s normative understanding of the role that privacy ought to play in the negotiation between individuals and the state. *Griswold*, for example, (and many of the other contraceptive cases including *Eisenstadt*) can be understood through a conventionalist reading to mean that “the notions of privacy held by the American people rule out the possibility of a police search of bedrooms for evidence of contraceptive use.”<sup>137</sup>

As Richard Epstein points out, privacy also figures prominently in contract law because individuals regulate what kinds of information they share when they negotiate, and because persons may keep trade secrets private; the disclosure of this kind of private information is tortious. Epstein also notes that a variety of contractual agreements have traditionally demanded privacy or, more technically, confidentiality, including those between patient and physician as well as the previously-mentioned relationships between lawyer and client and between priest and penitent. The information shared in these relationships is not property in any traditional sense, making the reductionist account even more difficult to sustain.<sup>138</sup>

DeCew makes an important observation about the role privacy plays in constitutional interpretation and the standard of review that courts use to evaluate legislation that affects rights. As it stands, current constitutional standards require “‘strict scrutiny’ by the Court for cases concerning ‘fundamental values,’ and privacy has been judged one such value.”<sup>139</sup> Strict scrutiny requires that legislation regulating fundamental rights be narrowly tailored to serve a compelling government purpose. However, for legislation that affects ‘mere’ liberty rights, the less strict standard of rational basis applies. Therefore, if liberty interests also affect privacy, then “these privacy claims have a *greater* chance of being protected when they conflict with other rights or general interests than they would have if only liberty, or freedom from governmental interference,

were involved.”<sup>140</sup> Because of the direction of the jurisprudence, liberty is only protected by due process, and claims of due process violations are only protected by the rational basis standard. As DeCew recognizes, lawyers are not able to simply argue that “liberty” or “freedom” is curtailed by legislation, or that “totalitarianism” would result from the enforcement of some restrictive law.<sup>141</sup> In the conversational implicature of rights in American jurisprudence, the claim of liberty plus the right of privacy is much more powerful than the claim of liberty on its own.

What degree of legal protection of privacy is desirable? Privacy rights have been on the ascendant, and there is little reason to believe that the Court will retreat on these issues. These cases point to a growing recognition that the public’s right to regulate private behavior through legislation is limited. These rights also reflect the privacy interest in the home and in properties. It is not enough for a person to have private thoughts about their sexual behavior, but must also be secure in the exercise of their privacy in bedrooms, homes, and hotels. Privacy in spaces, therefore, is necessary for the exercise of sexual personhood. Property rights do not give rise to the private exercises therein, but the right to exercise private thoughts and desires make the value of the property right dependent upon the assertion of privacy. This opinion of the value of privacy, however, is not shared by all, and there has been a consistent and forceful objection to privacy and privacy rights lodged primarily by feminist philosophers and legal theorists.

### **Section 7. Feminist Objections to Privacy**

As Judith DeCew notes, feminist ethicists and legal theorists expose a “darker side of privacy.”<sup>142</sup> Many feminist theorists have long argued that the *personal is the political*, meaning that the purportedly ‘natural’ private domain of intimacy—the family and sexuality—is legally constructed, culturally defined, and the site of unjust power relations which are conscientiously designed to oppress women. For the most part, the emphasis in this area has been on the critical deconstruction of privacy rhetoric as part of a discourse on domination that legitimizes women’s oppression.<sup>143</sup> According to feminist legal scholar and privacy expert Anita Allen, feminists want to politicize these traditionally ‘private matters’ based on the idea that, under conditions of



patriarchy, the personal or private realm has always been political or at least politicized.<sup>144</sup> The gist of this critique is based on gender egalitarianism: under patriarchy, privacy cannot be coextensive with gender equality and it is therefore in tension with equality because it places the home beyond the reach of gender justice while it deprives privacy to women within their marriages and sexual relationships.<sup>145</sup> This crucial objection to the traditional understanding of privacy as a social good also supports the characterization of privacy as a product of capitalist and class-based domination.<sup>146</sup>

Obviously, the basic claim of the anti-privacy feminist philosophers is correct: the private has been the haven for the perpetuation of structural hierarchies, violence, and injustice. But it need not be. As Annabelle Lever notes, the traditional use of privacy to oppress is “by no means an unalterable or inescapable feature of privacy.”<sup>147</sup>

Another primary objection to strong privacy claims is *accountability*. Without accountability there is no responsibility. A society cannot afford to fully leave people alone—after all, most murders are committed ‘in private’—and there many ways in which our contemporary culture, for example, is not private due to a variety of non-coercive factors.<sup>148</sup> The idea here is that some activity might be private, but persons are still socially, politically, morally responsible to the community for many of the activities occurring in the private realm.<sup>149</sup> But accountability has limits, and society must have some interest in the action in order to claim the right to regulate it. As John Stuart Mill writes, “The individual is not accountable to society for his actions, in so far as these concern the interest of no person but himself.”<sup>150</sup> Mill, of course, was speaking for a society predicated on liberal democratic values. Perhaps a society that is not predicated on these ideals has no *need* for privacy. Too much privacy can create a disregard for public life,<sup>151</sup> while openness—a lack of needed or wanted privacy—encourages solidarity. At a deeper level of analysis, it could be argued that privacy is only necessary when it is a response to the attempted control or invasion of bodies or living spaces. Under this approach, privacy is a reaction to and a product of oppression and necessary only in conditions of struggle and

revolution. Consider further that privacies—and the interests privacy protects—are features or byproducts of capitalism, patriarchy, and possessive individualism. This line of critique suggests that privacy—in particular, the right protected by states against the state itself—is a kind of social control technique that encourages gendered violence and the artificial creation of spaces that promote selfishness, greed, and competition. At its extreme, this line of Marxian inspired critique claims that the very existence of the so-called private individual itself is both the target and foundation of capitalistic consumerism: economic repression drives consumers into private, antisocial worlds, and we respond with a vivid private life that brings us satisfactions unfound in the public realm.<sup>152</sup>

DeCew and Allen provide responses to these criticisms first by doubting that all privacy assertions are sexist. DeCew responds directly to claims by Carole Pateman, Catherine MacKinnon, and Susan Muller Okin.<sup>153</sup> Pateman, DeCew writes, claims that because there is no private realm for women there is also no decision making power, and that men use privacy claims to subjugate women. DeCew asks whether this is a normative objection: assuming there currently is no private realm for women—and certainly none in the past—feminists ought to be asking “should there be one?” for the future on the grounds that it is unlikely that all privacy is sexist.<sup>154</sup> According to DeCew, both MacKinnon and Okin think sexist privacy has encouraged the nonintervention by state into the home in order to refuse to encounter and stop men’s violence towards women, and that men make privacy rules to keep the state out while they rape and subjugate women.<sup>155</sup> MacKinnon: “The right of privacy is a right of men ‘to be left alone’ to oppress women one at a time.”<sup>156</sup> As DeCew notes, this fails to make distinction between justified and unjustified uses of state power.<sup>157</sup> Also, it should be obvious that secrecy or privacy also protects counterfeiters or illegal drug manufacturers, so it seems incorrect to claim that men pass privacy laws—such as the Fourth Amendment—to protect drug dealers or counterfeiters as well as perpetrators of sexual violence. Finally, DeCew notes that while feminists correctly want to do away with privacy because of its association with sexist oppression in the past, they are unable to

make a similar argument that considers both the role of privacy as a normative matter in future relationships.<sup>158</sup>

In response to the question of why there has been so much discussion and litigation over privacy, Anita Allen writes that the increase in privacy law corresponds to an overall increase in rights for everyone—including women.<sup>159</sup> For many feminists, ethical care, compassion, and community—not privacy—dominate women’s lives. But, as Allen argues, privacy should not be rejected because of harms done in private.<sup>160</sup> For Allen, the urge for privacy as “the longing for personal quiet time and personal decision making can linger long after the grip of patriarchy over women has been loosened.”<sup>161</sup> For Allen, privacy is a “rubric” for making decisions about sex, abortion, family, religion, and health care.<sup>162</sup> Privacy, then, exists as a normative idea independent of, and beyond, women’s oppression under it, and that idea consists in respect for solitude, the value of independent reflection, true intimacy, and moral choice.<sup>163</sup>

I mentioned earlier that the urge for privacy can be interpreted as a product of a fully commercialized, capitalist hierarchical state, where individual alienation is the result of worker exploitation, the wage system, or consumer anxiety. In this interpretation, we are driven to the private by externally oppressive factors over which we have no control: we *know* we are social beings, but under conditions of state capitalism our sociality is fetishized and commodified: it becomes a source of profit for the capitalist class. We are therefore forced into a private world where our power—formerly social, now private and individual—is realized in our freedom to privately choose our consumer goods.<sup>164</sup>

The idea here is that if there were no capitalism in public life (replace it with whatever you want: liberal democracy or democratic socialism), then there is no need for privacy as simultaneously a retreat from alienation and a source of it for both victims and aggressors. There are good reasons to reject this interpretation. Privacy permits a wide variety of experiences, and part of what is attractive about it is that there is always room for different expression of living. If you reject the private, then you should be free to find a community that also rejects it. If you

desire privacy, there are plenty of others that will respect that desire due to their sharing of that desire.

Let's get back to the idea that the personal is political. The idea behind this important slogan was to take what was considered private—reproduction, sexuality, gender identity—and get it out in the open and out of the closet, thereby making intimacy, desire, nature, and care part of both self knowledge and public life. At its core, this was a demand that men be forced to confront and include these issues and values in public/political life. If the private allows for oppression that is sanctioned by the public, then it should be politicized and eliminated by dispersing or diluting it. Still, as Emma Goldman writes, sexuality is a matter of personal liberty,<sup>165</sup> and this liberty can only be realized if there is liberty in public life as well, which demands the total absence of laws regulating how or with whom the body is used in consensual sexual interaction. Although Goldman sought to make the personal public, it was the public's *intrusion* into the personal that she wanted to eliminate. Such an elimination results in the kind of private life I advocate here. Love—and here she is speaking of women's love—is made possible by securing safe places, free from “busybodies, moral detectives, jailers of the human spirit.”<sup>166</sup> She is clearly calling for private spaces free from the hateful violence of a public whose own repressed sexuality causes them to seize, punish, and incarcerate the bodies of sexually emancipated persons. A culture that is oppressive in public life will encourage oppressive private lives, and vice versa. A public life free of laws punishing or regulating consensual sexual behavior will reflect a similarly emancipated private life as well. And, as Goldman observed, frank and open discussion of sex as part of public discourse should lead to increased liberty for individualized and concrete expressions of sexuality in private relationships.<sup>167</sup>

Oppressors want to make private sexual behavior a public issue through condemnation, prosecution, and vilification. This is accomplished by a literal invasion into private spheres and a transfer of private actions into public courtrooms, surveillance tapes, and criminal records. Writers like Goldman, by forcing not only a discourse about sexuality but also refusing the state

its claimed authority to punish through protest or refusal to obey, make the private into the public in order to secure those private spaces from invasion, prosecution, and incarceration.

A culture that is oppressive in public life will encourage oppressive private lives, and, I suspect, vice versa. It is likely that a public life free of laws punishing most forms of consensual sexual behavior will reflect a similarly emancipated private life as well. And, as Emma Goldman observed, the frank and open discussion of sex as part of public discourse should lead to increased liberty for individual, concrete expressions of sexuality in private relationships as well.<sup>168</sup>

### **Section 8. *Ton corps est à toi*: Private Property in Private Selves**

While there are good reasons to doubt the normative force of many feminist objections to the value of privacy and privacy rights, feminist objections to the idea of self-ownership align with the denial that privacy rights are simply property or property-like rights in the body. This section discusses what kinds of things fill the spaces between bodies and selves by examining whether ideas about privacy rights in the body better promote ideas about autonomy and liberty than ideas about property rights in the body. In my approach, where bodies are not understood as property, privacy is an attribute or feature of personhood which is in turn a unity of both person and body. Privacy is, under this conception, more like a skill or character trait or, as I argued in section 2, a *condition*. In this sense, my privacy, my athletic skill, or my virtue are not properties in an ownership sense, but indications that I am an athletic or virtuous person. I am not an owner of a body that, for example, writes or speaks. I am a speaker or a writer.

According to the self-ownership theory of property, it is the separateness of persons and personal self-ownership which gives persons the right to decide what happens to their body because their bodies *belong* to them. But in order for something to belong to someone, the ownership must come into being the same way that anything else comes to be owned, which is by meeting the minimum criteria of acquisition, use, and alienation. These criteria constitute the justificatory conditions for ownership. However, bodies—the subject or *res* of self-ownership—

are so substantially different than other types of things that they cannot be subjected to the ownership triad. To that end, I first discuss several justifications for the conceptualization of the body as property, as well as several objections.

The idea of the human body as a piece of property, where the soul or person who inhabits that particular body is considered its owner, is pervasive in political philosophy due perhaps to the strongly intuitive nature of the idea coupled with the rules of ordinary language. Phenomenologically, it certainly *feels* like I inhabit my body, and, in terms of the traditional use of the English language, it is in *my* body—as opposed to anyone else’s body—that I feel this inhabitation. My body is my body, and, as the title of this section suggests, your body is your body.<sup>169</sup> The body as property entails a certain metaphysics: the body is the property of the self or person who inhabits it.<sup>170</sup> In this last sense, the body is both the subject and object of the person inhabiting it, yet the owned body and the person are owned by the same ‘thing’: the person and their body. This conception may be intuitive, but it is grossly infelicitic—despite the major role it plays in political theory, it fails to provide a ‘happy’ explanation of the relationship between persons and bodies.<sup>171</sup>

According to Alan Hyde, there are three ways we can begin to understand the body’s role in politics. First, we can view the body as property or commodity. This is the view of the political theory that has grown up around the philosophy of John Locke and his conception of self-ownership.<sup>172</sup> Second, the body can be seen as a zone or place of privacy interests, skills, and attributes. Third, we can understand the body as inviolable or otherwise unavailable for distribution, forced transfers, and commodification. In this sense, we are justified to fight off demands and intrusions by others who attempt to distribute or commodify it.<sup>173</sup>

Liberals are generally in agreement about bodily autonomy and integrity in terms of reproductive freedom, organ donation, and suicide, and agree that decisions related to these behaviors are solely within the discretion of the individual whose body happens to possess this or that organ or, in the case of suicide, be a repository for their life or its cessation. For example, it is

inconsistent for a liberal to deny a body's owner (or possessor—we will address these problems below) the prerogative to give blood or a kidney to a friend or loved one, or to enforce a law that forces anyone to give up these fluids and organs. Surely, if we own anything at all (or so the argument goes), we own our blood, organs, and hair. We have the right to commit suicide because it is our body—our life—that we choose to terminate. Any law or norm that prevents this is coercive and contrary to liberal ideals. What about surrogacy? Assuming this kind of act is undertaken with plenty of conscience and autonomy at work between the parties, no one who values personal liberty and autonomy would prevent these kinds of interactions. What liberals ought to be suspicious of—and rightfully so—would be economic or coercive conditions that force women into these kinds of situations due to poverty, exploitation, or other human rights crises. In any event, laws that discourage or criminalize this kind of freely chosen behavior between autonomous persons are anathema to liberal conceptions of liberty and bodily autonomy. This is discussed in further depth in chapter 3.

Rights which grant broad liberties over the use and disposition of bodies are typically predicated on the idea of self-ownership. Self-ownership means that persons own themselves, and, in some conceptions of the right, this entails ownership of their bodies and some or all of its parts. Philosophers, working from so-called 'state of nature' positions, have been fairly consistent in arguing that in the state of nature—a hypothetical thought experiment intended to determine whether there are essential human attributes or 'natures' that are presocial and unconstructed—men naturally have, as John Locke said, a "property in their own person."<sup>174</sup> Because men own their persons, Locke claims, when men labor upon previously unowned property and 'mix' their personhood with that property, that previously unowned property becomes—like a man's body—his private, personal property. This conception of ownership has become the foundation of the labor theory of value: if a person puts their labor into their production, then the value of their labor (measured in time, expertise, the cost of raw materials, etc.) should be reflected in the value or price of the product. The sale of wage labor is the byproduct or extension of self- or body-

ownership rights, which ‘naturally’ inhere in all human bodies (according, again, to Locke and his intellectual progeny). In this sense, the conceptualization of an owned body is foundational to the idea of buying and selling the body’s labor.<sup>175</sup>

This characterization of the body and its labor as commercial property has several implications for how bodies can be ‘used’ by their ‘owners.’ If selves are owned, then self-ownership means that self-owners have the right to buy and sell their body as they would any other piece of property. Property rights generally protect how an owner decides to acquire, use, or dispose of something, and property rights also generally restrict how nonowners may or may not interfere with the owner’s decisions. Like property itself, persons are said to ‘possess’ the rights that protect them. *Proprietarianism* is the idea that all rights are property rights because of the idea that rights are ‘possessions.’ Proprietarians believe that, for example, speech rights are simply the right to use one’s bodily property—vocal chords, teeth, tongue, occasionally the brain—as one would use any other property, and those rights are violated when others (including the state) interfere with one’s property/speech rights by threatening to punish or actually punishing. One of the more interesting implications of proprietarianism involves body parts and organs. If you own your body, you clearly own the parts that make up your body. Accordingly, body parts are your property and may be sold or given away (the term philosophers like to use is *alienate*) at your discretion as an owner. Similar proprietarian conclusions can be drawn for rights associated with reproductive freedom, sexual conduct, drug use, and ownership claims in everything from toothbrushes to automobiles to tracts of land and natural resources, as well as for claims related to privacy which I will discuss shortly.

At one very simple level, self-ownership simply means that no one is or can be owned by another. Self-ownership, in this sense, means that one’s possessions (including their body or self) cannot be put into some social common property (through a tax or regulation) without their consent.<sup>176</sup> The flipside of this means that the creation of a property right (in bodies or selves) imposes some limitation on the natural liberties of others to do what they want with *their* own



bodies.<sup>177</sup> Body ownership emerges as a useful and pragmatic metaphor for the modern market participant who thinks of their body as a property *par excellence*, a unique type of property that sets the stage for all other types of ownership. In this conception, you own yourself, and this piece of property is so special that no one else can own it. Because it is a human body, it has a special status among one's many possessions.

What, then, justifies an individual's decision (I am avoiding the use of the word 'right' for the time being) to give away a body part or other tangible thing? Locke provides an answer. By mixing self-owned labor with previously unowned things, ownership just arises in those things as it arises in selves. This provides a very short trip from self-ownership to world-ownership (such as cell phones, cars, land, natural resources), and that was Locke's point. In his view, one's interest in their body is just as important and worthy of protection as one's interest in non-bodily things, and this entailment justifies the owned world that follows from his ideas.

But there are other answers. Self-ownership of oneself necessarily implies that there are other self-owners, who are *equally* entitled to freely alienate their body products with one another as forms of unregulated exchange, giving rise not only to a free market of body products (my blood for your kidney, my DNA for your hair, etc.) but also one for labor. This is both an equality argument and an economic argument which leads to a conception of freedom that includes unregulated exchanges of external/worldly things as well.

In terms of the problem of body commodification, the first approach is purely conceptual: if properties—all kinds, including bodies and selves—are things that are subject to the 'ownership triad' (they are capable of being acquired, used, and alienated) then perhaps we can show that bodies and selves are not ownable because they cannot conform to the triad. Selves are certainly used, and probably alienated, in various ways. Whether selves are capable of being acquired is, I think, the best question to ask in terms of their susceptibility for ownership. If bodies and selves cannot be acquired, then they cannot constitute ownable property. If this triad determines ownership of *all* things, including selves, then it also cannot account for either our own role in

acquiring personhood or the extent of the roles of other persons in the acquisition of personhood or, even more problematically, their *granting* or bequeathing of personhood as a property. Perhaps we are granted our persons when we are born or that we acquire our persons at some arbitrary stage in our development (an age, say, or some kind of test).<sup>178</sup> In any event, the acquisition of the self as a standard or typical piece of property is deeply problematic.

Part of the problem with self-ownership is its ineluctable association with natural rights. The idea that persons are born with the positive right to enjoy property rights in regards to the world's natural resources is the position of most left-libertarians, and a just system of property would probably allow the newly born or persons *in utero* the right to acquire property as a gift, and an unjust system would be one that arbitrarily denies this right.<sup>179</sup> This type of ownership is due solely to convention: as members in a particular social/political organization we can be granted purely posited property rights in our bodies in the same way we might be granted (legal) voting rights or the (legal) right to obtain an abortion. In this purely posited sense, we are born without selves, but are 'gifted' them to facilitate self-ownership as members of a community. We acquire ourselves whether we want to or not as a result of some norm, convention, or law. This forces the body-self to be "inscribed...into normal economic life" and represents Foucault's understanding of disciplinary power.<sup>180</sup> Conversely, the idea that persons *inherently* own some property as a *natural* fact—in themselves, for example, or as a share in the world's resources—is somewhat incoherent, and would also require that the acquisition/use/alienation triadic understanding of ownership be discarded unless it is a gift. But even if it were a gift, there would still be the issue of acquisition. An inherent ownership interest acquired by virtue of being a person—which sounds like good luck or karma—is quite a different thing than an ownership interest acquired through gift, exchange, or negotiation, which are, of course, sometimes the result of luck and sometime the result of factors such as effort, desert, or skill.

That being said, ownable things can certainly 'appear out of nowhere' as self-generated possessions, and perhaps the person/body as an owned thing can similarly appear *ex nihilo*. I am

thinking specifically of the intellectual property in scientific developments, artistic works, or the products of everyday mentality. If these products are truly mine, I acquired them without a grantor and without owning them previously, so perhaps my ownership of my body-self arises along the same lines: the acquisition is *nostra sponte* ('of our own accord') and without reference to the accord of others—in which case personhood as a property *can* occur in prepolitical states of nature or totally asocially and without the involvement of other persons. This is the nonconventional or natural understanding of self-ownership. Another way to view this problem—and potentially solve it—is to see ourselves as both subjects and objects of property rights. I own my intellectual property and perhaps my self because I acquired them from me: I am both grantor and grantee of the property. A third view considers intellectual property and the self as previously unowned property, and we—as the first to 'find' these 'properties'—have first occupier rights in these previously nonexistent and therefore unowned things.<sup>181</sup>

If it is unlikely that we have spontaneously acquired ourselves, then perhaps acquisition occurs at some contingent point between fertilization and death. This allows for the possibility that some persons do not and will never own themselves—very young children probably do not own themselves, nor do those who suffer from pathological conditions which do not permit them to provide for their own basic care. Hegel might approach the problem in the following way: we acquire bodies as internal property when we simultaneously objectify our will in external property. When we acquire things in the world, our personhood emerges as yet another acquired and owned thing. But this cannot be true—for Hegel, at least—because possession of a will is precisely what prevents persons from being owned in the first place, and lack of a will is what allows things in the world to be made into objects of the will through acquisition, use, and, most importantly, alienation.<sup>182</sup> Furthermore, personhood is not *acquired* through the acquisition and use of things: it is developed and perfected by both the will to own *and* the recognition by others of the will-made-objective. For Hegel, we are born with personhood but it is merely abstract until others recognize it as objective will *via* ownership of objects in the world. Personhood lies

dormant or immature until the world is subjected to will through the desiring, choosing and owning and—most importantly—the alienation of things. Through the medium of voluntary exchange, other persons recognize this objectification of will when they affirm each other’s potential and actual ownership of things.<sup>183</sup>

Because of the ontological and practical problems presented by self-ownership, I suggest that privacy forms the foundational basis for addressing and protecting the value of bodily integrity rights and interests. When we seek to deny others control over our bodies, when we seek to use them as we wish to satisfy our desires and our needs, when we pursue our own reasons that do not fit into some established discourse about bodies, what we are seeking are not property rights over our bodies or lifestyles (the right to acquire, use, and alienate), but *privacy* and its protection by a privacy right. By conceiving of the body as private space, it moves from property to a noncommodified “refuge away from the economic and political life of civil society.”<sup>184</sup> Within such a refuge, what is truly remarkable about the decision to give away a kidney, or to ‘give’ one’s body to another in the moment of desire, is not that it is property that is being exchanged, but that privacy is being shared or ‘given’ to another. The right to privacy, at its most basic, is the *right to exclude*. It might be the right to exclude others from some physical thing—a body, or an artwork or a home—or from an emotion, thought, or fear. I should respect your body and your decisions about your body not because bodies and decisions are property, but because your body and your decisions about your body are within your sphere of privacy. The private, autonomous body resists intrusion, and a body that can resist intrusion is an autonomous one.

These foundational conceptions of bodily integrity combine to form a powerful domain of privacy that is constitutive of freedom but avoids the problems associated with ideas of self-ownership. For example, because they are part of your body, you have deeply important privacy rights in your eyes, and others have an even more stringent duty not to interfere with them. Bodies, therefore, are things but not property and therefore not subject to ideas about ownership by selves or others. We need an adequate account of these interests, and also an account of the

structure and foundation of conventional norms erected to secure and protect these interests, specifying when, where, and in what ways we may not be observed, listened to, questioned, or kept track of.<sup>185</sup> These interests are best protected by the private property right, which is derived from the privacy interest outlined here and embodied into the world through the right to exclude and the correlative duty of noninterference.

### **Section 9. Deriving the Property Right from the Privacy Right**

As Richard Arneson writes, there is a strong affinity between a broad sense of privacy—one in which persons place themselves “where they will not be disturbed by anybody,” and where others (including the government) are prevented from interfering with the choices being made in that place—and private property. A good strategy for achieving this, Arneson writes, is to live in a regime that does not ban the desired action, “own some property in land,” and retire to it with like-minded individuals who wish to engage in that kind of activity without disturbance by the state or other individuals.<sup>186</sup>

As I will show in the following chapters, arguments for the right to private property are not only coextensive with arguments for the right to privacy in bodies, but the right to private property is largely supervenient upon the right to privacy: the private property right exists as a result of the foundational and pre-existing value of privacy. It is privacy—and the justifications for it—that makes bodies *pro tanto* immune to interference by others. These justifications are embodied in the person as the privacy right and do not at first blush implicate ideas about ownership or possession—although ownership or possession are certainly implicated by the privacy aspects of external property. Like the privacy right, what is important about the right to private property is its provision for the right to exclude others from the thing owned, and its demand that others not interfere with it. So, private property rights—conventionally, the right to own some quantifiable thing, framed in terms of the right of exclude and the duty of nonowners not to interfere—are predicated upon privacy rights in that thing, and justifications for privacy rights in bodies are *mutatis mutandis* the same justifications that support property rights in things.

If a person has no right to exclude others from their body, they have no privacy, and if a person has no right to exclude others from their property, then they have no property right.

Private property rights are therefore a species of privacy rights, and property rights—to varying depths and degrees, and in terms of several competing conceptions of both self ownership and world ownership rights—are best understood as rights in external things which give the rights-holders the power and security to control things and to exclude others from violating the integrity of those things. Importantly, as Christine Sypnowich writes, the domain of privacy is also “constituent of freedom, a condition for different kinds of social relationships, and it is because we value it that we might opt for institutions like individual ownership of property.”<sup>187</sup>

The power of the state, she continues, is therefore

checked for sake of an individual’s privacy. Property rights, whilst usually conceived in terms of market exchanges and the accumulation of capital, also refer to the more mundane but highly prized personal property that the state cannot invade or appropriate except under very special circumstances. Other rights, including freedom of conscience, opinion, association and expression involve respect for the citizen’s privacy from the state. Legal rights that protect the individual from arbitrary arrest, lack of counsel, or an unfair trial provide the means for precisely demarcating the private realm from the public.<sup>188</sup>

So, A has a right to privacy in their body when they have the right to control it and the right to exclude others, and A similarly has a right to private property when they have a right to control it and a right to exclude others. Although we may not be aware of it, it is often the privacy aspect of property rights that concern us when boundary crossings occur. For example, when a person runs through our back yard and we yell ‘this is private property!’, Sypnowich observes—astutely and correctly, I think—that we are not primarily concerned with interferences of our property right, but with an interference with the privacy we sought there.<sup>189</sup> It is privacy, in this case, that justifies the right to exclude others from this kind of property, and it is our privacy that we feel is violated in these cases.

The privacy interests in bodies and in external things differs not in kind but only in degree, and that degree is subjective: one interest—say, in bodily privacy—may be more

important to an individual than privacy in property, and this could be determined by their behavior in social situations where persons choose to relinquish those rights. For example, a person may choose to cover up most of their body when in public spaces, yet choose to not own or assert strong property rights in things—I am thinking here of nuns or monks in the many religious traditions. Others may choose to relinquish bodily privacy rights in public, yet draw the shades at home and assert a private property right there—here, I am thinking of nude beachgoers, who return home, draw the shades, and put on their pajamas at night. I do not argue that, as a foundational matter, bodily privacy is the more important or stronger right, although it seems intuitive that invasions of the body are more egregious than invasions of property: this intuition is pumped by the fact that crimes against the person—such as robbery by force or fear—are punished much more severely than, for example, shoplifting. Different people and different cultures value their privacy interests differently. There is no reason to posit a lexical preference for one type of privacy over the other, and both need protection by various moral and legal provisions.

Assuming, for the moment, that there is such a right to privacy, and that assertions of it can be fairly well determined by objective observation (fences, clothing, encryption), the question arises how the right is waived: in other words, when is the right to exclude transformed into an invitation to enter or share? On a very rudimentary level, the right to bodily privacy is waived—to varying degrees—when a person enters the public sphere, but it is debatable how persons undertake this kind of waiver. There is certainly a combination of the subjective intent to waive and a social determination whether the person has what the Supreme Court has termed a ‘constitutionally protected reasonable expectation of privacy...that society is prepared to recognize.’<sup>190</sup> On another rudimentary level, the right to private property is waived when the property becomes public. Again, this must be a combination or balance between the subjective intent to waive the right, and the willingness of the rest of the world to recognize the right. Intuitively, communities have a greater interest in asserting a community interest in the exercise

of property rights than in the exercise of bodily privacy rights, particularly when the exercise of property rights is undertaken for commercial purposes.

To conclude: the right to exclude and the duty not to interfere emerge as the primary considerations that a theory of property and its associated institutions should promote and protect—particularly when the right is infringed by eminent domain and its modern declinations into takings, regulatory takings, and exercises of the police power. The next chapter introduces these property concepts, and then evaluates how a privacy-based property right fares against a social norm which requires owners to relinquish those rights in order to maximize human flourishing.

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<sup>1</sup> Richard Arneson, “Egalitarian Justice Versus the Right to Privacy?” *Social Philosophy and Policy*, Vol. 17, No. 2, Summer 2000, 93 n11.

<sup>2</sup> Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), 92 n4.

<sup>3</sup> Judith Jarvis Thomson, “The Right to Privacy,” *Philosophy and Public Affairs* 4 (1975), 295 – 314.

<sup>4</sup> See, e.g., Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA: The MIT Press, 1989), 3.

<sup>5</sup> Cited in Daniela Gobetti, *Private and Public: Individuals, households, and body politic in Locke and Hutcheson* (New York: Routledge, 1992), 1; See also Habermas, *The Structural Transformation*.

<sup>6</sup> *Ibid.*, 2.

<sup>7</sup> Paul Fairfield, *Public/Private* (Lanham: Rowman & Littlefield, 2005), 8.

<sup>8</sup> Gobetti, *Private and Public*, 3.

<sup>9</sup> Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca: Cornell University Press, 1997), 11(citation omitted).

<sup>10</sup> Ruth Gavison, “Privacy and the Limits of Law,” *Yale Law Journal* Vol. 89, No. 3, (Jan. 1980), pp. 421-471, 465.

<sup>11</sup> Munzer, *A Theory of Property*, 25.

<sup>12</sup> See, e.g., Munzer, *A Theory of Property*.

<sup>13</sup> See, e.g., *Griswold and Eisenstadt*.



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<sup>14</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (quoting *U.S. v. General Motors*, 323 U.S. 373, 377-78 (1945)).

<sup>15</sup> *Ibid.*; see also Munzer, *A Theory of Property*, 16.

<sup>16</sup> Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington, D.C.: Island Press, 1999), 27.

<sup>17</sup> Munzer, *A Theory of Property*, 16.

<sup>18</sup> There are eleven such incidents: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the income of the thing; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incident of absence of term; (9) the duty to prevent harm; (10) liability to execution; and (11) the incident of residuary. See Honoré, Tony. "Ownership" in *Making Law Bind* (Oxford: Clarendon Press, 1987) cited in Thomas W Merrill, "Property and the Right to Exclude," 77 *Neb. L. Rev.* 730, 737 (1998).

<sup>19</sup> Munzer, *A Theory of Property*, 22.

<sup>20</sup> W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

<sup>21</sup> Lawrence Becker, *Property Rights: Philosophic Foundations* (Boston: Routledge and Kegan Paul, 1977), 11.

<sup>22</sup> Merrill, "Property and the Right to Exclude," 737.

<sup>23</sup> See chapter 2.

<sup>24</sup> See chapter 3.

<sup>25</sup> See chapter 5.

<sup>26</sup> See Merrill, "Property and the Right to Exclude." See also Thomas W. Merrill and Henry Smith, "What Happened to Property in Law and Economics?" *Yale L.J.* 111 (2001): 357, 389. See also Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimalist State* (Stanford: Stanford University Press, 1991) for the idea that the right to own is the right to non-interference in acquisition, use, and alienation in property.

<sup>27</sup> S. Douglas and B. McFarlane, "Defining Property Rights" in *Philosophical Foundations of Property Law*, eds. James Penner and Henry Smith (Oxford: Oxford University Press, 2013).

<sup>28</sup> David Schmitz, "Property and Justice" in *Ownership and Justice*, eds. Ellen Frankel Paul, Fred D. Miller Jr., Jeffrey Paul (Cambridge: Cambridge University Press, 2010), 80.

<sup>29</sup> Munzer, *A Theory of Property*, 89.

<sup>30</sup> Merrill, "Property and the Right to Exclude," 730.

<sup>31</sup> See chapter 4.

<sup>32</sup> See chapter 3.

<sup>33</sup> Gavison, "Privacy and the Limits of Law," 426.

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<sup>34</sup> DeCew, *In Pursuit of Privacy*, 28 (citing William Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs* 12 (1983), 269).

<sup>35</sup> Munzer, *A Theory of Property*, 92-93. See also Michael A. Weinstein, "The Uses of Privacy in the Good Life," in *Privacy and Personality*, eds. J. Roland Pennock and John W. Chapman (New Brunswick: Aldine Transaction, 2007). For Weinstein, "privacy is a condition of being-apart-from-others." Weinstein, "The Uses of Privacy," 95.

<sup>36</sup> See Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs*, Vol. 4, No. 4. (Summer, 1975), 315-322, 315.

<sup>37</sup> Deckle McLean, *Privacy and Its Invasion* (Westport: Praeger, 1995), 49 (citations omitted).

<sup>38</sup> *Ibid.*, 51 (citing Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 33-39).

<sup>39</sup> *Ibid.*, 55 (quoting Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs* 6 (1976) 26-44).

<sup>40</sup> Annabelle Lever, *On Privacy* (New York: Routledge, 2012), 4.

<sup>41</sup> Anita Allen, *Why Privacy Isn't Everything* (Lanham: Rowman & Littlefield, 2003), 53.

<sup>42</sup> James Rachels, "Why Privacy is Important" *Philosophy and Public Affairs*, Vol. 4, No. 4. (Summer, 1975), 323-333.

<sup>43</sup> Fairfield, *Public/Private*, 6.

<sup>44</sup> Andrei Marmor, "What is the Right to Privacy?" *Philosophy and Public Affairs*, Vol. 43, No. 1.

<sup>45</sup> Christine Sypnowich, "The Civility of Law: Between Public and Private," in *Public & Private: Legal, Political and Philosophical Perspectives*, eds. Maurizio Passerin d'Entrèves and Ursula Vogel (New York: Routledge, 2000), 100.

<sup>46</sup> DeCew, *In Pursuit of Privacy*, 5.

<sup>47</sup> *Ibid.*, 3.

<sup>48</sup> Lever, *On Privacy*, 72.

<sup>49</sup> *Ibid.*

<sup>50</sup> DeCew, *In Pursuit of Privacy*, 29.

<sup>51</sup> *Ibid.*, 3.

<sup>52</sup> Gavison, "Privacy and the Limits of Law," 459.

<sup>53</sup> For example, reductionism in the philosophy of mind claims that all mental states can be reduced to brain states. Therefore, because all brain states are physical, all mental states are physical as well. See, e.g., Daniel Stoljar "Physicalism," *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2016/entries/physicalism/> (accessed Jan. 3, 2017)

<sup>54</sup> See the introduction to this chapter.

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<sup>55</sup> DeCew, *In Pursuit of Privacy*, 28 (citation omitted). See also Marmor, “What is the Right to Privacy?” 6: “[W]hen we focus on what is wrong about the way in which some fact came to be known, we can normally explain it as a violation of one’s proprietary rights: somebody used something that is yours without your permission.”

<sup>56</sup> DeCew, *In Pursuit of Privacy*, 29 (citing Parent and Scanlon).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 29.

<sup>59</sup> Scanlon, “Thomson on Privacy,” 322.

<sup>60</sup> *Ibid.*

<sup>61</sup> DeCew, *In Pursuit of Privacy*, 41.

<sup>62</sup> *Ibid.*, 54.

<sup>63</sup> *Ibid.*

<sup>64</sup> Alexander Rosenberg, “Privacy as a Matter of Taste and Right,” *Social Philosophy and Policy* Vol. 17, No. 2, Summer 2000, 77.

<sup>65</sup> Marmor, “What is the Right to Privacy?” 4.

<sup>66</sup> *Ibid.*, 14

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, 17.

<sup>69</sup> *Ibid.*

<sup>70</sup> Stanley I. Benn, “Privacy, Freedom, and Respect for Persons,” in *Privacy and Personality*, eds. J. Roland Pennock and John W. Chapman (New Brunswick: Aldine Transaction, 2007). 13.

<sup>71</sup> These accounts are discussed in the following section.

<sup>72</sup> Raymond Geuss, *Public Goods, Private Goods* (Princeton: Princeton University Press, 2001), 76-77.

<sup>73</sup> Lloyd L. Weinreb, “The Right to Privacy,” *Social Philosophy and Policy* Vol. 17, No. 2, Summer 2000, 33.

<sup>74</sup> R.G. Frey, “Privacy, Control, and Talk of Rights,” *Social Philosophy and Policy* Vol. 17, No. 2, Summer 2000, 53.

<sup>75</sup> Geuss, *Public Goods*, 77.

<sup>76</sup> Weinreb, “The Right to Privacy,” 36.

<sup>77</sup> Gavison, “Privacy and the Limits of Law,” 422.

<sup>78</sup> *Ibid.*, 424.

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- <sup>79</sup> Ibid., 423.
- <sup>80</sup> Ibid., 471.
- <sup>81</sup> Ibid., 423.
- <sup>82</sup> Ibid.
- <sup>83</sup> Ibid.
- <sup>84</sup> Ibid., 441.
- <sup>85</sup> Ibid., 428-9.
- <sup>86</sup> Weinreb, "The Right to Privacy," 27.
- <sup>87</sup> Ibid., 42.
- <sup>88</sup> Emotions, hunger, and pain, for example, might all be conditions, but it would be unusual to claim ownership over them despite the fact that they are 'mine.'
- <sup>89</sup> Weinreb, "The Right to Privacy," 27.
- <sup>90</sup> Ibid., 34.
- <sup>91</sup> Ibid., 35.
- <sup>92</sup> Weinstein, "The Uses of Privacy," 88; see also Rosenberg: "Privacy does not (have) any intrinsic moral value. It is just a matter of withholding information from others." Rosenberg, "Privacy as a Matter," 73.
- <sup>93</sup> S.I. Benn and G.F. Gaus, "Introduction," in *The Public and the Private: Concepts and Action in Public and Private in Social Life*, eds. S.I. Benn and G.F. Gaus (New York: St Martin's Press, 1983), 7.
- <sup>94</sup> Ibid., 9.
- <sup>95</sup> Gavison, "Privacy and the Limits of Law," 446-7.
- <sup>96</sup> DeCew, *In Pursuit of Privacy*, 76.
- <sup>97</sup> Gavison, "Privacy and the Limits of Law," 433.
- <sup>98</sup> Ibid., 448.
- <sup>99</sup> Ibid., 464.
- <sup>100</sup> Ibid., 449 (footnote omitted).
- <sup>101</sup> Ibid., 450.
- <sup>102</sup> Weinreb, "The Right to Privacy," 33 (citing Barrington Moore Jr., *Privacy: Studies in Social and Cultural History* (Armonk, New York: M.E. Sharpe, Inc., 1984), 59-71).
- <sup>103</sup> Fairfield, *Public/Private*, 2.
- <sup>104</sup> Westin, *Privacy and Freedom*, 18-19.

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<sup>105</sup> Rosenberg, "Privacy as a Matter," 83.

<sup>106</sup> John M. Roberts, Thomas Gregor "Privacy: A Cultural View" in *Privacy and Personality*, eds. J. Roland Pennock and John W. Chapman (New Brunswick: Aldine Transaction, 2007), 202-206.

<sup>107</sup> Carl J. Friedrich, "Secrecy Versus Privacy: the Democratic Dilemma," in *Privacy and Personality*, eds. J. Roland Pennock and John W. Chapman (New Brunswick: Aldine Transaction, 2007).

<sup>108</sup> DeCew, *In Pursuit of Privacy*, 13.

<sup>109</sup> Benn, "Privacy, Freedom, and Respect," 21.

<sup>110</sup> *Ibid.*, 22.

<sup>111</sup> Jeffrey Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs* 6, no. 1 (Fall, 1976), 39 (cited in Weinreb, "The Right to Privacy," 39 (footnote omitted)).

<sup>112</sup> Gavison, "Privacy and the Limits of Law," 444.

<sup>113</sup> *Ibid.* (footnote omitted).

<sup>114</sup> "This is true even though democracies are not necessarily liberal. A country might restrict certain activities, but it must allow some liberty of political action if it is to remain a democracy. This liberty requires privacy, for individuals must have the right to keep private their votes, their political discussions, and their associations if they are to be able to exercise their liberty to the fullest extent. Privacy is crucial to democracy in providing the opportunity for parties to work out their political positions, and to compromise with opposing factions, before subjecting their positions to public scrutiny. Denying the privacy necessary for these interactions would undermine the democratic process." Gavison, "Privacy and the Limits of Law," 456.

<sup>115</sup> See Matthew Wilson, "Anarchism, Liberty, and Conflict," in *Anarchism and Moral Philosophy*, eds. Benjamin Franks and Matthew Wilson (New York: Palgrave/MacMillan, 2010).

<sup>116</sup> Weinreb, "The Right to Privacy," 39

<sup>117</sup> Marmor, "What is the Right to Privacy?" 7.

<sup>118</sup> *Ibid.*, 9.

<sup>119</sup> Gavison, "Privacy and the Limits of Law," 443.

<sup>120</sup> Jeff Shantz and Dana M. Williams, *Anarchy and Society: Reflections on Anarchist Sociology* (Boston: Brill, 2013), 19.

<sup>121</sup> Paul Bowles, "Baptism of Solitude," in *Their Heads are Green* (London: Abacus, 1963).

<sup>122</sup> H. Tristram Engelhardt, Jr. "Privacy and Limited Democracy: The Moral Centrality of Persons," *Social Philosophy and Policy* Vol. 17, No. 2, Summer 2000, 123.

<sup>123</sup> *Ibid.*, 125.

<sup>124</sup> DeCew, *In Pursuit of Privacy*, 95. As Richard Posner and many others have argued, there is no real constitutional basis for privacy due to the lack of the literal linguistic term, and the cases that purport to

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protect privacy are, in fact, concerned only with autonomy or liberty. Posner is therefore, like Thomson, a reductionist about privacy and its associated right.

<sup>125</sup> *Ibid.*, 7.

<sup>126</sup> *Ibid.*, 115.

<sup>127</sup> *Ibid.*, 14-18, citing Thomas Cooley, *Law of Torts* (1<sup>st</sup> ed. 1880, 2<sup>nd</sup> ed., 1888) and Samuel Warren and Louis Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).

<sup>128</sup> *Ibid.*, 18.

<sup>129</sup> Relying upon *Stanley v Georgia*, 394 U.S. 557 (1969), the Alaska Supreme Court held that the State could not prohibit possession of marijuana in the home. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975). Unfortunately, this case has not commanded much of a following.

<sup>130</sup> *Griswold v Connecticut*, 381 U.S. at 486; As Weinreb points out, Justice Douglas asserts, but gives no evidence for, this claim. Weinreb, "The Right to Privacy," 36.

<sup>131</sup> *Eisenstadt v Baird*, 405 U.S. 438 (1972), at 453.

<sup>132</sup> *Stanley v Georgia*, 394 U.S. 557 (1969).

<sup>133</sup> 394 U.S. at 568.

<sup>134</sup> DeCew, *In Pursuit of Privacy*, 24.

<sup>135</sup> *Rakas v. Illinois*, 439 U.S. 128 (1978), 143 n12.

<sup>136</sup> *United States v. Karo* 468 U.S. 705 (1984), at 714.

<sup>137</sup> Mark Tushnet, "Legal Conventionalism in the U.S. Constitutional Law of Privacy," *Social Philosophy and Policy* Vol. 17, No. 2, Summer 2000, 143.

<sup>138</sup> Richard Epstein, "Deconstructing Privacy: And Putting it Back Together Again," *Social Philosophy and Policy* Vol. 17, No. 2, Summer 2000, 20.

<sup>139</sup> DeCew, *In Pursuit of Privacy*, 80.

<sup>140</sup> *Ibid.*

<sup>141</sup> See the discussion of Jed Rubenfeld's property theory in chapter 6.

<sup>142</sup> DeCew, *In Pursuit of Privacy*, 5.

<sup>143</sup> Jean L. Cohen "Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy" in *Public and Private in Thought and Practice*, eds. Jeff Weintraub and Krishan Kumar (Chicago: University of Chicago Press, 1997), 136; See also Catharine MacKinnon, *Toward a Feminist Philosophy of the State* (Cambridge: Harvard University Press, 1989).

<sup>144</sup> Allen, *Why Privacy Isn't Everything*, 36-38.

<sup>145</sup> Lever, *On Privacy*, 23.

<sup>146</sup> See Alex Honneth, "Between Justice and Affection: The Family as a Field of Moral Disputes," in *Privacies: Philosophical Evaluations*, ed. Beate Rössler (Stanford: Stanford University Press, 2004).

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<sup>147</sup> Lever, *On Privacy*, 23.

<sup>148</sup> Allen, *Why Privacy Isn't Everything*, 4.

<sup>149</sup> *Ibid.*, 7.

<sup>150</sup> John Stuart Mill, *On Liberty* (Cambridge: Cambridge University Press, 1989), 1<sup>st</sup> para of ch 5.

<sup>151</sup> Allen, *Why Privacy Isn't Everything*, 6.

<sup>152</sup> This would be the case for Hannah Arendt, who, according to Gavison, complains that we “suffer from too much privacy, that we exalt the ‘private realm’ and neglect the public aspects of life, and that as a result individuals are alienated, lonely, and scared.” (Gavison, “Privacy and the Limits of Law,” 440, citing Hannah Arendt, *The Human Condition* (Garden City: Anchor Books, 1959), 23-73).

<sup>153</sup> See, e.g., Carole Pateman, “Feminist Critiques of the Public/Private Dichotomy,” in *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford: Stanford University Press, 1989); Catharine MacKinnon, *Toward a Feminist Philosophy of the State* (Cambridge: Harvard University Press, 1989); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

<sup>154</sup> DeCew, *In Pursuit of Privacy*, 85, 90.

<sup>155</sup> *Ibid.*, 88.

<sup>156</sup> MacKinnon, *Toward a Feminist Philosophy of the State*, 194.

<sup>157</sup> DeCew, *In Pursuit of Privacy*, 88.

<sup>158</sup> *Ibid.*, 90.

<sup>159</sup> Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, N.J.: Rowman & Littlefield, 1988), 26.

<sup>160</sup> *Ibid.*, 40.

<sup>161</sup> *Ibid.*, 35.

<sup>162</sup> *Ibid.*, 27.

<sup>163</sup> *Ibid.*, 36.

<sup>164</sup> This is Marx’s point in the *Economic and Philosophical Manuscripts*. See Karl Marx, *Early Writings* (New York: Vintage Books, 1975).

<sup>165</sup> Shantz and Williams, *Anarchy and Society*, 53.

<sup>166</sup> *Ibid.*, 57.

<sup>167</sup> *Ibid.*, 62.

<sup>168</sup> *Ibid.*

<sup>169</sup> In *Sex, Violence, and the Avant-Garde: Anarchism in Interwar France* (University Park: The Pennsylvania University Press, 2010), Richard Sonn writes (at 12) that *Ton corps est à toi* is the title of a

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1927 short novel by Victor Margueritte which “helped popularize anarchist neo-Malthusian ideals that sought to limit population growth and provide women with the means for effective birth control.”

<sup>170</sup> Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997), 81.

<sup>171</sup> See J.L. Austin on felicitic language in J.L. Austin, *How to do Things With Words* (Cambridge: Harvard University Press, 1962), 14 et seq.

<sup>172</sup> It is important to note, however, that Locke writes about ‘property in their own person’ and not their body.

<sup>173</sup> Hyde, *Bodies of Law*, 81.

<sup>174</sup> John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

<sup>175</sup> Hyde, *Bodies of Law*, 50.

<sup>176</sup> Epstein, “Deconstructing Privacy,” 5.

<sup>177</sup> *Ibid.*, 9.

<sup>178</sup> Locke suggests that this occurs when we become rational, i.e. adults. See Locke, *Two Treatises*, 2.55.

<sup>179</sup> See discussion in chapter 4.

<sup>180</sup> Hyde, *Bodies of Law*, 88.

<sup>181</sup> Of course, ownership of one’s thoughts and intellectual products poses a substantial problem for the theorist who claims we do not own our bodies, but the problem quickly vanishes when the right in intellectual products is seen primarily as a privacy, and not property, right (see *infra*).

<sup>182</sup> See G.W.F Hegel, *The Philosophy of Right* (Cambridge: Cambridge University Press, 1991), §57 and §65. See also chapter 3.

<sup>183</sup> This is discussed at length in chapter 3.

<sup>184</sup> Hyde, *Bodies of Law*, 80.

<sup>185</sup> Scanlon, “Thomson on Privacy,” 315.

<sup>186</sup> Arneson, “Egalitarian Justice,” 93.

<sup>187</sup> Sypnowich, “The Civility of Law,” 97.

<sup>188</sup> *Ibid.*, 98.

<sup>189</sup> *Ibid.*, 96.

<sup>190</sup> *Katz v. United States*, 389 U.S. 347 (1967), at 361 (Harlan, J., concurring).





## Chapter 2

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### *Virtue, Aristotle, and the Social-Obligation Norm for Property*

According to Gregory Alexander and Eduardo Peñalver,<sup>1</sup> property rights and property law should be governed by a social-obligation norm. The social-obligation norm is a theory of property law that is both functionalist and instrumentalist towards human flourishing. By claiming that human flourishing should be maximized through the actions of virtuous property owners, its proponents look to Aristotle and the theories of virtue that are derived from him (most importantly, the capabilities approach developed in recent years by Martha Nussbaum and Amartya Sen<sup>2</sup>) to develop a duty-based property law that is inspired by communitarian political obligations. The norm seeks to recharacterize the property right from primarily one of exclusion to one in which communities and nonowners are the beneficiaries of substantial duties on the part of owners in the form of a right to flourish, and, more significantly, to reconceive the liberal conception of the sovereignty and priority of the individual rights-bearer.

As the foundation for a proposed new property law regime, the social obligation norm:

1. is instrumentalist and collective: it give the community or state a greater right to participate in decisions about privacy property use and ownership than under the current property regime<sup>3</sup>;
2. claims for each person an equal right, as a matter of human dignity, to flourish,<sup>4</sup> which in turn grants them “the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities”<sup>5</sup>;

3. morally binds owners to “provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing”<sup>6</sup>;
4. prioritizes the community, the conception of which is “intentionally capacious: the state as well as families, voluntary associations”<sup>7</sup> over individual persons;
5. establishes the community as having a “have a moral status that is distinct from those of neighboring owners or non owning individuals”<sup>8</sup>; and
6. is legally enforceable through the coercive power of the state.

The distinct moral status of the community is based on idea that although individuals and their community are mutually interdependent, the community has normative priority over the individual in terms of individual rights. “We are, in short, inevitably dependent upon communities, both chosen and unchosen, not only for our physical survival but also for our ability to function as free and rational agents.”<sup>9</sup> Dependence creates “an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.”<sup>10</sup>

Although the norm is enforceable through the use of eminent domain (at the most coercive) and routine zoning decisions (at the least), Alexander writes that the adoption of the social-obligation norm would not substantially affect impact private property rights.<sup>11</sup> This chapter argues otherwise. By arguing that the law should prioritize the public interest by regulating and controlling property so that benefits inure both to the public and to the owner, the social-obligation theorists purvey a legally enforced expropriative and regulative norm that authorizes an extremely broad variety of noncompensated takings encompassing regulations ranging from the establishment of historic districts in urban areas to environmental measures in rural areas. For Alexander, these measures reflect an implied norm that requires property owners to conform to legislative and quasi-legislative efforts to preserve both cultural artifacts (such as buildings and their facades) as well as natural phenomena such as lakes and wetlands. By arguing that privacy concerns play a very small role in property disputes, Alexander’s approach

defaults to social or democratic prerogatives in almost all commercial property regulations, and, apparently, most personal property situations as well. This prioritizing of the public at the expense of the private is a key factor in determining whether his example of a social-obligation norm is desirable in a property scheme that seeks to maximize privacy interests and the personhood-enhancing values that flow from them.

There are five sections. Section 1 introduces the legal process of eminent domain and its statutory basis in the Takings Clause of the Fifth Amendment. Section 2 describes the norm, its background, and how Alexander and Peñalver situate it into the property law regime of the United States. This section focuses on defining the norm and how it sits in the jurisprudence by examining its potential impact on takings law, privacy rights, and other constitutional property norms. Section 3 analyzes the communitarian and Aristotelian origins of the norm. This section focuses on the normative background of property theories and how an Aristotelian property supports wide latitude for individual rights. Section 4 analyzes why and how the social-obligation theorists, as ‘property instrumentalists,’ distinguish their approach from utilitarianism and their shared pursuit of ends such as well-being and flourishing. Section 5 combines the virtue ethics of Aristotle with the political aspects of the norm in terms of their foundation for a new property regime. In this final section, I will argue that the social obligation norm fails to provide such a foundation.

### **Section 1. Introduction to Eminent Domain and Constitutional Takings**

This section describes the legal process of eminent domain contained in the jurisprudence of the Takings Clause of the Fifth Amendment, a jurisprudence that is said by many commentators to lie in a ‘muddle.’<sup>12</sup> According to legal scholar Jed Rubenfeld, “[t]he ‘eminent domain’ power refers to the state's prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good.”<sup>13</sup>

*Dominium eminens* was first described by Hugo Grotius in *De Jure Belli et Pacis* in 1625. It refers to the power of the state to take private property for public use. The power is

vested in a sovereign as the inherent right and ability to assume title and ownership over all levels of property within its jurisdiction. If a state enjoys this power—and apparently, all do—all property is “held subject to defeasance at the will of the State.”<sup>14</sup> Eminent domain is therefore the right of a state to convert A’s property—call it Blackacre<sup>15</sup>—to B’s property by way of a forced exchange. B might be the state itself or another non-state actor. If A is protected by a limiting statute, which places normative boundaries on the right of eminent domain, then the exchange might include compensation. The Fifth Amendment to the United States Constitution is such a statute. These exchanges might be achieved in a variety of ways, such as occupation of Blackacre by B or exchange of title from A to B. Besides the physical property itself, we can say that what is exchanged from A to B are A’s *rights* about Blackacre. These rights might be rights *in* Blackacre, rights *to* Blackacre, or rights arising from the nature of A and B’s agency *qua* agents, meaning that A’s rights in Blackacre might be more or less full due to A’s status as a private individual or as a legal fiction such as a church or corporation, and B—as a state actor—may have had various rights in Blackacre prior to the initiation of the transfer which it is simply reclaiming through its power of eminent domain. In democratic systems, eminent domain takes private property and places, or *legislates*, at some part of it into the public domain;<sup>16</sup> however, it is controversial whether a statute like the Fifth Amendment requires that the public, as opposed to a private party, becomes the owner of the property.

The Takings Clause consists of the last twelve words of the Fifth Amendment: “nor shall private property be taken for public use without just compensation.” Like many other Constitutional powers claimed by the state, there is no explicit or enumerated power of eminent domain in the United States Constitution.<sup>17</sup> Instead, the courts regard it as a power inherent in the nature of sovereignty, a power that requires no constitutional recognition.<sup>18</sup> Without some kind of restriction, such as the limitations of ‘public use’ and ‘just compensation,’ eminent domain would otherwise be absolute.<sup>19</sup> In the jurisprudence of the United States and many other countries,<sup>20</sup> this power—usually vested in the legislature but also found in the executive (as police

and emergency powers) and (rarely) the judicial branches<sup>21</sup>—is restricted by a combination of constitutional provisions and judicial review. In the United States, the Takings Clause recognizes the implicit power of eminent domain and restricts that power. If a party believes that their property has been unconstitutionally taken pursuant to the eminent domain power, the Clause requires the party (the *takee*) to show that (1) their ‘private property’<sup>22</sup> (2) has been ‘taken’ by the state (3) for a ‘public use’ (4) without ‘just compensation.’<sup>23</sup> If successful, the takee loses their property but receives compensation. When this occurs with compensation to the former owner, the property is ‘purchased,’ a forced or legal taking occurs, and the property enters the public domain, or, in many cases, a private domain that is purported to have a public purpose.<sup>24</sup> Property, or some number of sticks in the property rights bundle, also enters the public domain when its use is merely *regulated*: the state then ‘owns’ those regulated sticks in the bundle because the erstwhile owner is precluded from controlling those sticks or excluding others from entering that particular area because the right to control and exclude have been assumed by the state.

Takings, as a legal measure, is therefore the power of eminent domain restricted by public use and just compensation. If it takes, then the state must pay. Takings are broken down into two general categories:

1. *Real or confiscatory* takings: the state formally invokes its eminent domain power as a plaintiff in a lawsuit against the target property or property owner, usually pursuant to a measure passed by the legislature which authorizes the claim. In these cases, there is no dispute that property is taken under the eminent power—usually due to the actual or intended physical occupation of the property by the state—and litigation focuses on the just compensation requirement and rarely on the public use requirement.<sup>25</sup>
2. *Regulatory takings* or *inverse condemnation*: Here, the state denies that its measure effectuates a taking, thereby requiring the property owner to file a lawsuit—a ‘takings action’—claiming a taking due to regulation that has gone ‘too far.’ Takings cases

typically begin when a permit is denied, and the Government must take a final position on what it will or will not approve. If successful, the takee is awarded relief due to the state's 'regulatory taking' of their property. As a legal doctrine, the takings action emerged from the Supreme Court's 1922 opinion in *Pennsylvania v. Mahon*, which held that a mere use restriction, in the absence of physical occupation, could trigger the right to compensation.<sup>26</sup>

Takings actions are usually filed in response to the state's exercise of its police power. Exercises of the state's police power were traditionally used to abate nuisances which negatively affect the health, safety, morals, or comfort of the public. Nuisance abatement is not a taking and therefore noncompensable. Today, the police power permits the state to engage in a wide variety of noncompensable regulations that are not intended to abate nuisance, such as historic preservation, open space preservation, greenways, public beach access, growth control, vulnerable floodplains, and the activities of undesirable neighbors such as brickyards and slaughterhouses.<sup>27</sup> Zoning restraints, as uses of the police power, also purport to protect wetlands, coastal zones, barrier islands, alluvial valley floors, endangered species, lands unsuitable for surface mining, and other environmental concerns.<sup>28</sup>

In terms of judicial review, measures which result in both compensable takings and noncompensable regulation under the police power are subject to the rational basis standard, whereby legislation is constitutionally permissible if it is rationally related to a legitimate government objective.<sup>29</sup> The courts had previously applied a much closer standard when scrutinizing economic regulation,<sup>30</sup> and their abandonment of close scrutiny of economic regulation in the 1930s meant 'hands off' of most legislative regulation of property rights. The closer standard, known as strict scrutiny, is applied when legislation infringes fundamental rights or implicates a suspect classification such as race. If legislation implicates fundamental rights such as speech, religion, or procreation, the legislation will be struck down unless it is 'necessary to achieve a compelling governmental objective.'<sup>31</sup>

According to Alexander, whose work frames the issues in this chapter, the ‘muddle’ mentioned by other commentators is not unpredictability or normative disagreement - outcomes of takings litigation are overwhelmingly in favor of the government and against the property owner, and most agree that compensated takings for public use are a necessary evil—rather, it is the lack of transparency about the normative underpinnings of the court’s unwillingness to disclose its conceptions of the core purposes of constitutional property in an explicit and systematic way.<sup>32</sup> For Alexander, the social obligation norm provides such an underpinning.

## **Section 2. The Social Obligation Norm: Background and Cases**

“What sacrifices may the state legitimately ask private landowners to make concerning the use of their land? Stated somewhat differently, the question is: What obligations do landowners owe to their communities with respect to the use, condition, or care of their property?”<sup>33</sup>

This section explores answers to these questions by analyzing the underlying aim of the social-obligation norm and the implications for its implementation. This aim, it is argued, is a streamlined police power over private property rights, one that facilitates regulations over property by denying that the regulation amounts to a compensable taking or that it affects fundamental rights. Alexander and Peñalver seek to restrict the cases that require compensation by classifying them as exercises of the state’s regulative police power, which are legitimate so long as they serve the goals that the norm is intended to promote. The social-obligation norm is therefore an attempt—in part—to provide a moral basis and, *a fortiori*, a moral justification for non-compensated property regulation and expropriation. The norm emerges as the exercise of the traditional police power but under a different sail. As a new and improved police power, it attempts to gather together, under a single theory, jurisprudence that addresses harm (nuisance), modifies the right to exclude (trespass), or limits sovereignty (eminent domain), which either do not address the kinds of obligations Alexander and Peñalver want them to, or address them under very different conditions. Although the case law provides precedent for the understanding that



property ownership entails obligations to nonowners, these obligations do not, I will argue, support strong moral or legal connections between ownership and the kind of duties necessary for promoting a high level of flourishing and capabilities. This lack of a connection between ownership and obligation<sup>34</sup> results in the lack of an *explicit, or* positive, social-obligation norm.

According to Alexander, this is partly due to the background *nonconstitutional* political and legal culture of the United States, which has favored a non-democratic and individualistic conception of ownership that denies any social-obligation on the part of the owner.<sup>35</sup> Alexander is primarily concerned that the constitutionalization of property as a fundamental and protected right—which is, again, the aim of this paper—marks the end of political debate over property, and therefore entrenches extant and unjust distributions of wealth.<sup>36</sup> The result of constitutionalization is, for Alexander, the nondistributive nightwatchman state, immune from the operations of ‘normal’ majority-rule democratic politics.<sup>37</sup> By making property a constitutionally protected right—one protected by the strict scrutiny standard of review against legislative reorganization or redistribution—property and the issues associated with it are removed from the realm of ordinary and democratic public discourse, regulation, and control, which are implemented primary through the use of institutions such as state and municipal legislatures.

Property, for Alexander, demands extensive regulation in order to preserve these democratic institutions,<sup>38</sup> and the property jurisprudence of the United States should not be replicated in the constitutions of new states on the grounds that such replication will entail the replication of property inequalities as well.<sup>39</sup> This suggests that the property and wealth disparities present in the United States are the result of constitutional property protections; in other words, constitutional property is constitutive of wealth disparities, and wealth disparities deprive morally and politically equal co-citizens of their right to flourish. To avoid these disparities, Alexander argues that the state should regulate property more frequently in order to minimize inequality<sup>40</sup> on the grounds that a more equal distribution of resources will realize more capabilities, and is hence more just.<sup>41</sup> He purports to support robust property rights, but argues

that constitutional recognition is neither necessary nor sufficient for a legal regime of robust property rights.<sup>42</sup>

While there is no explicit social obligation in American law,<sup>43</sup> Alexander and Peñalver purport to find “robust” implications of property rights shaped by the social-obligation norm in American nuisance,<sup>44</sup> trespass,<sup>45</sup> and takings law,<sup>46</sup> and argue that courts and scholars are obligated to clearly identify and systematically develop the norm.<sup>47</sup> The norm is claimed to be ‘implicit’ in eminent domain proceedings and other encroachments upon private property interests,<sup>48</sup> and the property law that regulates these interests is improved and made more ‘transparent’ if judges were to utilize the norm in order to reveal the normative underpinnings of the law by disclosing their “conceptions of the core purposes of constitutional property in an explicit and systemic way.”<sup>49</sup> According to Alexander, the takings doctrine in American property law emerges as the best example of the implied social-obligation norm because the doctrine operates by defining the parameters of the public dimension of private ownership, resulting in a jurisprudence which “implicitly acknowledges that there is a public dimension of private ownership.”<sup>50</sup> Therefore, the “[p]ower of the state to expropriate property for public uses is premised on the necessity of subordinating private will to public well being.”<sup>51</sup> Like nuisance abatements, this power also extends to uncompensated regulations enacted and enforced pursuant to the state’s police power.

Alexander also supports extensive use of the takings clause in its negative incarnation (i.e., inverse condemnation) when it furthers what might be understood to be a social-obligation norm to promote culture, shape the aesthetic of the urban landscape, and preserve history. He views the establishment of historic districts, which limit the rights of property owners to develop, alter, or sell property due to the property’s alleged value to the community, as well as aesthetic restrictions on certain property uses, as both legitimate and desirable examples of the implementation of the norm by municipalities and their administrative agencies.

The *Penn Central* case,<sup>52</sup> which held that the owners of Grand Central Station did not deserve compensation for lost profits when New York City prevented the construction of a 55 story addition to the building due to its designation as a landmark, is cited approvingly as a legitimate regulation resulting in the preservation of “cultural meaning and identity.”<sup>53</sup> According to Alexander, human flourishing is promoted by preventing development of buildings such as Grand Central Terminal because such structures “are integral to an urban community’s identity,” and their destruction or radical alteration “erases collective historical memory” which results in not merely a different but “civically impoverished” culture.<sup>54</sup>

Although *Penn Central* is widely cited by the theorists as a potential source of the social norm, Alexander is clear that “nothing of the sort was acknowledged”<sup>55</sup> either in the holding or in *dicta*. Like most cases dealing with the expropriation or regulation of property, the Court looked to the economic impact of the regulation in its ruling—and not to virtue, flourishing, or social norms. As the most significant factor to consider in takings cases,<sup>56</sup> the Court’s analysis of the economic impact on the owners of Grand Central resulted in the ruling that the Landmark Commission’s denial of the building permit did not constitute a taking of Penn Central’s property for the following reasons.

1. there was no interference with the owner’s primary expectation or present use of Grand Central Terminal;
2. there was no showing the owners could not continue to make a reasonable return on their investment; and
3. The owner’s airspace rights were transferable to other parcels they owned in the immediate area.<sup>57</sup>

*Penn Central* has resulted in the establishment of at least six factors that are considered when a court rules on claims that regulations constitute compensable takings. These relevant factors, which derive primary from *Penn Central* as well as *Pennsylvania Coal Co. v. Mahon*,<sup>58</sup> are:

1. the diminution of value caused by the regulation;

2. whether the regulation prevented a harm to the public;
3. whether the regulation resulted in a reciprocity of advantage to the owner;
4. whether the regulation caused the destruction of existing property interests;
5. the character of the government action (e.g. whether it was physically or merely legally invasive); and
6. the extent to which government action interferes with the owner's investment backed expectations for the use of the property.<sup>59</sup>

*Penn Central* has in fact led to the creation of nationwide comprehensive landmark preservation legislation, whereby designated landmarks may not be demolished or significantly altered without government approval by a historical commission.<sup>60</sup> Owners of landmarks are therefore not entitled to the highest and best use of their property, but only an economically viable use. As Meltz notes, statutes that create landmarks might operate as a takings if they create an affirmative duty for the landmark owner to spend money for particularized maintenance and repair on the property.<sup>61</sup>

Because *Penn Central* was a regulatory or inverse takings case—the state did not take title or possession through eminent domain—the state's right to regulate the property was based on the police power and not the takings power. However, Alexander argues, both powers are based on the same assumption, which is that “the state's power to restrict private owners from using their property entirely as they wish, without paying compensation, is best explained by the notion that owners inherently owe society certain obligations.”<sup>62</sup> As I will show, both owners and nonowners are indeed bound by obligations, but it is wrong to try to find the source of such an obligation in the takings clause. According to Eric Claeys, the social obligation theorists can only make this type of claim only by relying on a crude and inaccurate characterization of private property as an owner's ‘sole and despotic dominion’ that grants owners “the right to exclude others, with no obligation owed to them.”<sup>63</sup> This view of view of property, Claeys argues, mischaracterizes the nature of private property rights, which have always operated with some

level of duty to non-owners and the community:

If one is going to ground property in some sort of exclusiveness, it is better to call property a domain of exclusive use, shaped with regard for the like use-interests of other owners and the interests of the public properly understood. Alexander and Peñalver trade on the discrepancy between the crudeness of the commonplace understanding of property and the qualifications one must add to that understanding to make it precise.<sup>64</sup>

The allegation that the power of eminent domain is premised on a social-obligation norm—even, as Alexander makes clear, an “implied” norm “indirectly acknowledged” by the takings clause—is not true to the history of eminent domain and property regulation in the United States. Eminent domain was never intended to promote a social-obligation norm—of any stripe—in owners, and understanding it to contain the roots of such a norm is misplaced. Eminent domain is a key feature of sovereignty and, for all modern nations, one of the inherent, necessary attributes of statehood. The payment of compensation for its exercise is a recognition that its implementation injures property rights, and a just state compensates for the exercise of eminent domain in virtue of its sovereign power over the nation’s land and patrimony. The moral duty—if it can be said to be a moral duty—imposed by the norm is owed by the *state* to the owner and not, as the theorists wish, by the owner to the state.

The social-obligation theorists also find the foundation of a social obligation norm in the law of nuisance. The roots of nuisance law are grounded in the 19<sup>th</sup> century United States Supreme Court case of *Mugler v. Kansas*, 123 U.S. 623 (1897), which holds, in *dicta*, that all property is held under the implied obligation that it not be injurious to the community. *Mugler* is widely considered to be the genesis of the state’s right to regulate property as a ‘nuisance’ pursuant to the police power. Nuisance law purports to stop or abate an owner’s ‘noxious use’ of their property because ownership does not permit the harming of the public. It is based on the legal maxim ‘*sic utere tue ut alienum non laedas*’ (‘use your own property in such a manner as to not injure that of another’) (1 Blackstone’s Commentaries 306).

*Mugler* involved a claim by a brewer that a Kansas alcohol prohibition ordinance, which outlawed the brewer’s commercial product, amounted to a compensable taking under the Fifth

Amendment because the ordinance “materially diminished” the value of his property and equipment, which was built specifically for brewing.<sup>65</sup> The Supreme Court denied that a taking occurred because Kansas possessed the power to declare a wide variety of properties to be nuisances, on the grounds that the properties and their intended uses were “injurious” to the morals, health, or safety of the public. When the state acts to abate an injurious use of property, owners are not entitled to compensation so long as the exercise of the police power addresses key health, safety, and welfare concerns.<sup>66</sup> The Court in *Mugler* reasoned that Kansas did not violate any property rights by declaring the production of beer to be a nuisance, and it specifically did not engage in an act of eminent domain because:

[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone for certain forbidden purposes is prejudicial to the public interests.<sup>67</sup>

*Mugler’s dictum* about an implied obligation not to harm the community might have been the “foundation for a fully developed notion of the implied obligation of owners,” but Alexander recognizes that this foundation “was never realized.”<sup>68</sup> *Mugler* and its progeny are nevertheless cited approvingly as precedent for two important key concepts for the social-obligation theorists: first, that the social obligation has roots in American jurisprudence, and second, that regulations that purport to promote human flourishing by abating nuisances can be validly characterized as exercises of the uncompensable police power rather than compensable takings. However, in their use of *Mugler* the theorists are in the same position as they are with *Penn Central*: they are searching for the foundational source of a social-obligation norm in order to situate it in the cultural, social, and legal history of the United States, but not merely as a norm prohibiting harm, but a norm that actively promotes a “fully developed notion of the implied obligation of owners.”<sup>69</sup> It is uncontroversial that owners cannot use their property to unjustly harm others, and a mistake to read anything more than an obligation to refrain from harming into either *Mugler* or

the nuisance law it inspired. *Mugler's* only obligation, which is true of all owners and nonowners, was to not harm others, and this does not entail promoting the kinds of benefits a true social obligation norm would demand.

Returning to *Penn Central* as a source of the norm, Alexander writes that a holding against the Landmark Commission in that case—which would permit Grand Central's owners to build the addition—would lead to the destruction of culture, capabilities, and flourishing in New York City. As an empirical question, this may be true—although I will argue otherwise. The issue, however, is whether the owners owe a social *obligation* to maintain the building in order to promote culture and flourishing. I believe that any social-obligation owed by its owners is met by *building* the addition rather than by *not* building it because the addition's potential to maximize overall well-being and efficiency.

Grand Central Station—an enormous train station with typical commercial space, serving, in 2013 alone, 21.6 million visitors<sup>70</sup>—is, according to Alexander, “indispensable” according to the perspective of the “relevant communities,” and this is one reason why its owners should not be permitted to build an addition upon it. It is part of the “architectural patrimony” of the City, and if the City were to lose “all” of its historic buildings, “its culture would be not merely different but civically impoverished.”<sup>71</sup> These sites are “integral to an urban community's identity and the identities of its inhabitants,” and the implication here is that if the owners were permitted to destroy the façade of Grand Central—and add yet another skyscraper to an already crowded skyline—there would be a ‘civic impoverishment’ in the culture of the city, a culture which (presumably) develops the capabilities which in turn promote human flourishing in the *polis*. Because historical landmarks create “collective urban memory,” erasure of this memory would “destabilize a society and its culture.”<sup>72</sup> Such a destabilization, writes Alexander, has “potentially severe political consequences” because repressive regimes tend to destroy the structures which “nurtured capacities necessary for robust free citizenship; not infrequently, part of the regime's effort at erasure involved architectural landmarks.”<sup>73</sup>

The claim that the addition of a 55-story office tower atop Grand Central Terminal would constitute the work of a repressive regime that seeks to erase the memories of past culture is hyperbolic. Grand Central Terminal is not the Statue of Liberty, and in seeking to maximize the value of its holdings, Penn Central and other owners do not operate as ‘repressive regimes’ that ‘destabilize’ the society and culture of New York by building multistory additions upon their commercial properties. In this context, Alexander also presents a false dichotomy: either *Penn Central* and all such cases are rightfully decided against private property rights, or humans cannot flourish. This is a false dichotomy because there are at least three possible outcomes from a ruling in Penn Central’s favor, and none of them spell the kind of civic disaster that Alexander describes. Had the Court declared the regulation a compensable taking, the three outcomes are as follows.

In the first possible outcome, the Landmark Commission is required to grant the permit, and Penn Central builds the tower. The result is increased jobs and taxes for the city,<sup>74</sup> resulting in increased well-being, efficiency, and private property rights—the goal of efficiency theorists—but gained at the cost of the Beaux Arts façade, ‘collective urban memory,’ and community control—the goals of the social-obligation theorists.<sup>75</sup> In the second outcome, the city continues to refuse the permit, but pays for the loss of profits due to the inverse condemnation of the airspace using the Court’s established formula for regulatory takings. The property remains privately owned, and city is culturally enriched but—quite literally—paying for it. This would amount to a victory for the property rights libertarians led by Richard Epstein—who demand compensation for *any* regulation that diminishes the value of a property right<sup>76</sup>—and perhaps this constitutes the ‘severe political consequences’ that the social-obligation theorists fear most: a ruling setting a precedent for increased payment of compensation, which chills future regulation of this kind. Alexander fears that a victory for the owners of Grand Central Terminal would motivate takings jurisprudence towards the kind of “strict scrutiny” analysis favored by Epstein and argued for in the conclusion of this work. This outcome preserves the kind of flourishing



provided by Grand Central that the social-obligation theorists claim for it—the building remains unchanged—but constitutes a political loss for proponents of increased property regulations.

In the third outcome—an outright taking—the City uses its power of eminent domain, takes the property, and pays just compensation for the fair market value of the landmark. Outright taking is, in fact, how many landmarks are preserved by the state: one of the earliest uses of eminent domain for such preservation was the securing of the Gettysburg battlefield in 1896.<sup>77</sup> The Supreme Court routinely endorses the preservation—through both regulation and takings—of structures and areas with special historic, architectural or cultural significance as a legitimate government goal.<sup>78</sup> For the social-obligation theorists, this is clearly the second-best option, and property rights libertarians such as Epstein would have no argument because of the provision of just compensation. The property is now publicly owned, the Beaux Art façade remains, and the city enjoys civic enrichment.<sup>79</sup> The first-best option for the social-obligation theorists is exactly what the Court did, in fact, decide: by holding that the preservation of Grand Central Station did not constitute a taking, the City was able to exercise its police power over private property rights, provide for varying types of putative benefits, and not pay any compensation. Despite not finding a social norm at work in its opinion, the Court—to the satisfaction of the social-obligation theorist—provides a moral basis and justification for further non-compensated property regulations.

*Penn Central* thus emerges as a paradigm example of the implied existence of the norm in the jurisprudence. Because the regulation in *Penn Central* did not require compensation, it is, for the social-obligation theorists, expressly *not* a takings, but an exercise of an uncompensable police power that “may impose an obligation on private owners of buildings within the historic district to sacrifice to some degree their autonomy regarding the use of their building.” This moral entitlement of non-owners results from the “use sacrifice” made by owners: in specific cases involving historic preservation, this sacrifice requires that “at a minimum [...] the owner owes surrounding owners an obligation to maintain the property values of everyone in the vicinity.”<sup>80</sup>

For the social-obligation theorists, *Penn Central* greatly expands the parameters of property owners' obligations to its community to include maintaining public aesthetic benefits. This reading of the police power is supported in part by both *Parking v Atlanta*,<sup>81</sup> which held that aesthetic considerations form part of the public welfare element of police power, and *Berman v Parker*,<sup>82</sup> where the United States Supreme Court gave "unqualified support to aesthetics as a legitimate regulatory concern, where the public has interest in assuring that the community is 'beautiful as well as clean, well balanced as well as carefully patrolled.'"<sup>83</sup> Regulation of open space can be supported by aesthetic concerns as well.<sup>84</sup>

Landmarks do much more, however, than create aesthetically pleasing spaces. According to Alexander, "[t]he Landmark Preservation Commission's designation of that building [Grand Central Station] as an historical landmark was a legal recognition that as owners of an obviously special, nearly unique, building, Penn Central owed the community of which it was a part an obligation not to use it in ways that would irrevocably destroy its architectural status." When the Court denied compensation, it judicially enforced the norm in the form of a "democratically sanctioned scheme of use-sacrifices required of all private owners of New York City buildings whose aesthetic and historic integrity the Commission has determined to be vital to the continuing well-being of the city's culture."<sup>85</sup>

Although he does not cite it directly as an example of the norm, the *Tahoe-Sierra* case can be viewed as an application of Alexander's norm in the effort to regulate the non-urban, natural environment in order to promote its aesthetically pleasing characteristics. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>86</sup> the TRPA, acting as a municipal regulatory agency empowered to issue new building permits, issued a thirty-two month moratorium on building new homes in the Tahoe Basin. This temporary legislation was intended to preserve the blue color of Lake Tahoe, which was threatened as the result of a huge increase in development around the lake.<sup>87</sup> This development was causing a nutritional build-up in the lake resulting in the growth of algae, which, in turn, threatened to cloud the once-crystal clear

visibility of the lake's water. The landowners, all of whom purchased lots prior to the enactment of the moratorium, sued for compensation due to the claimed regulatory taking of their property. Relying on *Penn Central*, the Supreme Court ruled that no takings occurred, and, among other rationales, held that a reciprocity of advantage due to the restriction might result in real estate values actually increasing due to the lake maintaining its characteristic blue color.<sup>88</sup> Like the regulation in *Penn Central*, the social-obligation theorists can read the norm into the Court's opinion, resulting in an implicit understanding that owners owe non-owners a substantial duty to use their property so that landmarks, whether they are train stations or grand lakes, are preserved, particularly when these landmarks are "vital to the well-being of the [area's] culture."<sup>89</sup> This means that property owners engage in a type of involuntary dedication to the public when they happen to create or own buildings or property that take on some undefined special character.

Trespass law is also claimed to reflect the implied existence of the norm, but primarily due to cases that *deny* property owners the right to assert trespassory claims against non-owners. The social-obligation theorists point to *State v Shack* as an example of the norm. In *Shack*, the New Jersey Supreme court held that trespassing convictions against a legal aid worker and a healthcare worker, who, against the wishes of a farmer/employer, entered upon his property in order to serve the migrant farm workers who resided there, were unconstitutional because under New Jersey State law, "the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute."<sup>90</sup> Property rights, held the Court, "serve human values."

They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.<sup>91</sup>

The implications of *Shack* for the social-obligation theorists is that human flourishing is dependent upon the capabilities of life and affiliation, and that migrant farm workers, as a community,

are particularly fragile and need certain property rights to enable them to perform their capabilities-developing function. The property right to receive visitors to the farms where they work and live was virtually the only effective means of providing them with access to such basic necessities as medical care, which are constitutive of the capability of life.<sup>92</sup>

The capability of affiliation creates socially just relations in this community by providing the workers with “equality and dignity otherwise denied them by their employer's treatment.”<sup>93</sup>

According to Peñalver, the situation in *Shack* represents an “easy case for legal intervention to enforce (in kind) the farmer’s moral obligations to his workers.

The workers were entitled to receive visitors in their place of residence as a matter of justice, and the intrusion of those visitors on the farmer’s own privacy and autonomy was minimal. By enforcing the farmer’s obligations to act virtuously, the law helped to protect innocent third parties (the farmworkers) from the resulting harm.<sup>94</sup>

For the social obligation theorists, *Shack* stands for the propositions that private property rights of owners should be adjusted when they conflict with the capabilities of affected non-owners, and that the social-obligation norm is not merely social or normative, but a legal right properly enforced by laws that limit private property rights. However, *Shack* is not a United States Supreme Court case, it is controlling only in New Jersey, and rather than being illustrative of the latent foundations of the norm in standard trespass law, it is an exceptional departure from the traditional, rights-based approach to trespass. According to Claeys, the fact that “*Shack* has not been followed often suggests [...] that other courts doubt its holding ‘fits’ basic trespass principles.”<sup>95</sup> Another commentator writes that *Shack* is “virtually meaningless outside its historical and economic context,” and questions “whether the case accurately expresses even a significant minority view of limits on the right to exclude.”<sup>96</sup>

Finally, Alexander’s approach emerges as both critical and comparative: American property law is less principled and less transparent than other countries, whose functionalist or instrumental approach to property asks whether property and takings law is actually solving legal

problems and not merely adjudicating disputes.<sup>97</sup> American property law is therefore improved, according to Alexander, by borrowing property law from Germany, whose constitution states that “property entails obligations and should serve the public interest,” and South Africa, whose social-obligation norm attempts to redress racial discrimination in property ownership, limit compensation based on the state’s role as a past subsidizer of a property’s value when it is taken, and require courts to consider the use, history, and acquisition of property in question.<sup>98</sup>

To summarize: in their attempt to locate a social obligation norm in American property law, the social obligation theorists offer a normative approach to property that fails to find convincing precedent in the case history and the common law as they relate to takings, nuisance, or trespass. It would be helpful, for a legal theory in particular, to find ancestral roots in the various narratives generated by judicial opinions, but the kind of owner obligations argued for by the social obligation theorists requires an inflationary and aspirational reading of the case law. But the theory is not cabined by the law, and to that extent purports to find doctrinal support in Aristotle’s philosophy of virtue. As I will argue in the next section, the theorists are unsuccessful here as well.

### **Section 3. Aristotelian Property, Communitarianism, and the Path to Virtue**

This section attempts to determine what an Aristotelian-inspired property theory consists in, and whether the social obligation norm tracks Aristotelian property. According to Alexander, the social-obligation norm is inspired, in part, by Aristotle, but it is not “strictly Aristotelian” because other sources that “do not rest on virtue ethics,” including Kant, Gewirth, and Raz, also influence the theory.<sup>99</sup> Peñalver also recognizes this debt, and wants to “reintroduce” the Aristotelian ethical tradition to property law.<sup>100</sup> Although the theory not “strictly” Aristotelian, nowhere does Alexander try to distinguish the normative implications of the social obligation norm from similar implications in Aristotle’s property theory. I am unsure what a strict Aristotelian property theory would look like, but I attempt to outline here what Aristotelian property rights might look like based on Aristotle’s own words. If Alexander is merely ‘inspired’

by Aristotle, it would be interesting to know what aspects of Aristotle's property theory—as opposed to his moral theory—influences the social obligation norm. Because Aristotle's property theory includes strong private property rights *against* the community, it is unlikely—or at least uncertain—that he was a communitarian about property and therefore unlikely that his property theory would inspire a modern communitarian property theory such as the social-obligation norm.

The social-obligation norm is a *legal* theory about property: it tries to establish what kinds of laws should govern owners and nonowners and what kinds of coercion states can use against individuals when regulating their property. Aristotle wrote directly on these issues. Therefore, an “Aristotelian approach to land use”<sup>101</sup> should, presumably, discuss what Aristotle said about land use. At minimum, an Aristotelian approach would seek to produce virtuous and good character in everyone, including both owners and nonowners. In this sense, Aristotle certainly had a clear conception of the ‘good’ and its indispensable role in human flourishing. It is less clear how he envisioned the role of property owners—and the role of property itself—in the promotion of human flourishing. Due to this lack of clarity, there are at least three ways to approach how ‘Aristotelian property’ might be interpreted: (1) Aristotle's writings on property are “too nebulous to sustain any serious critical discussion”: this is the view of Jonathan Barnes<sup>102</sup>; (2) Aristotelian property supports a kind of social democratic or communitarian property scheme with broad provisions for community control over private property; this is Martha Nussbaum's reading of Aristotle<sup>103</sup> and the reading supported by the social-obligation theorists; and (3) Aristotle's ideas about property reveal that he supports strong individual rights-like powers over property, in which case he is not a communitarian but—almost—a liberal about property. Fred D. Miller<sup>104</sup> and Peter Mayhew<sup>105</sup> support this reading.

The sustained arguments for the communitarian and rights-based readings will, I hope, show that Barnes' reading is too quick and that the communitarian readings are too generous. For others—call them the liberal Aristotelians—Aristotelian property prioritizes rights-like powers over a property scheme that, as Aristotle writes, is “private in ownership but public in use.” With

certain qualifications, I support this liberal and virtuous conception of property against the readings given to Aristotle by the social-obligation theorists. It is one thing to claim that a modern property law theory has a kinship with ‘Aristotelian virtue ethics,’ and quite another to actually look at Aristotle’s writing to see how Aristotle views virtuous property ownership and usage. This latter approach is taken by the ‘liberal’ readings of Aristotle’s property theory, which are fairly clear in their repudiation of the kinds of property obligations found in modern property theories such as the social-obligation norm.

### **Part 1. Aristotelian Property in Brief**

Aristotle’s property theory begins as a response and objection to Plato’s communism. In book IV of the *Republic*, Socrates argues that the guardians of Callipolis should not own property, be monogamous, or raise their own biological children because private property leads to greed, conflict, and discord among the guardians. For Plato, property has the potential to lead to vicious behavior and should therefore be banned for the guardians—although not for the craftsmen and artisans who keep the guardians fed and housed. Aristotle’s response to this property regime is well known. He supports a property regime where “property is private, use is common.”<sup>106</sup> This configuration has led to substantial disagreement about the extent of Aristotle’s conception of private and common property. He clearly rejects Plato’s communism by offering both practical reasons why it fails—for example, if harder work leads to equal pay for farmers, there will be “a world of trouble”<sup>107</sup>—and reasons of justice, where equals should get equal shares and inequals get unequal shares.<sup>108</sup> Because of their self-interest, private owners will also “improve their own well being” by making their property “more productive.”<sup>109</sup> Contrary to Plato’s communism, “private kinship bonds and private property are preconditions for happy and well ordered states” and not impediments to them.<sup>110</sup> A lack of private property leads to a city that will suffer from excessive unity,<sup>111</sup> and such unity in turn leads to “an increase in association” which will produce “an increase in the potential for conflict.”<sup>112</sup> This kind of unity, however, is appropriate for the household. Finally, Aristotle believes that private property and wealth do not

cause the social ills, such as neighbors fighting over a property line, that Plato attributes to them; rather, the problem springs from vice and the improper *use* of property and wealth.<sup>113</sup> The solution to these problems is virtue and education and not the kind of “legislation”<sup>114</sup>—found in Plato’s communism—that leads to the leveling of property or its confiscation.

When properly used, Aristotelian property entails *eudaimonia*, which Miller translates as “happiness” but can also be considered “flourishing.” It is an end, or *telos*, for both public policy and for individual decision making. For Aristotle, *eudaimonia* is (1) doing well with virtue, or (2) self sufficiency of life, or (3) the most pleasant way of life with security, or 4). a thriving state of possession and bodies with power to protect and put into action.<sup>115</sup> *Eudaimonia*, as we will see, is not always consonant with communitarianism.

## **Part 2. Communitarianism**

According to Alexander and Peñalver, the social-obligation norm is broadly Aristotelian, and it shares “common ground with communitarian, civic republican, and even ‘liberal’ property theories.”<sup>116</sup> Unlike other communitarian theorists, who, like Alastair Macintyre, limit community to family, tribe, and neighborhood rather than “state, nation, or class” on the grounds that modern states cannot hold common moral beliefs,<sup>117</sup> Alexander and Peñalver include the state as a part of the community.<sup>118</sup> Several theorists also recognize the communitarian foundation of the norm. David Lametti, for example, writes that Alexander and Peñalver’s social-obligation norm expresses the collective or communitarian values of property,<sup>119</sup> and Joseph Singer writes that the social-obligation norm is a communitarian and dignity-based approach to property law. Singer: “this communitarian analysis is more normatively attractive than efficiency analysis because it focuses our attention not only on market values but also on appropriate social relations.”<sup>120</sup>

Property theories tend to track certain foundational/metaphysical positions about individuals and their position in regards to various groups of individuals such as states and communities. Alexander and Peñalver’s property theory aligns with communitarians such as Charles Taylor, whose anti-individualism is well known.<sup>121</sup> Communitarians maintain that in



order to justify the obligations we owe to a community, there must be an intrinsic/non instrumental value for community and other persons. According to Shlomo Avineri, “community” itself is a normative concept that “describes a desired level of human relationships.” For communitarians, the community is a good in itself—it has intrinsic value—as well as a human need.<sup>122</sup> In terms of political theory, it has traditionally been juxtaposed with liberalism. To this end, liberalism is the politics of right, and communitarianism as the politics of common good.<sup>123</sup> The liberal approach prioritizes freedom and rights over the general good. There is considerable disagreement about what kinds of political policies flow from communitarianism, but “[a]ll communitarians hold in common advocacy for involvement in public life [and] increased participation in small communities, firms, and clubs.”<sup>124</sup>

According to Michael Sandel, communitarians have a definite conception of the good, whereas liberalism does not presuppose “any particular conception of the good”<sup>125</sup> nor does it have any *telos*, or end: because “the right is prior to the good,” liberalism refuses to choose from the available ends.<sup>126</sup> The social-obligation theorists share this focus on a definable, determinate end for social activity; for them, it is human flourishing.

### **Part 3. Property Communitarianism**

Erik Olsen suggests that the turn towards communitarian property and away from individualist property is explained by a variety of factors, including the threats of commodification and commercialism, that have made it “difficult to see property as a location with ethical and civic use values.”<sup>127</sup> Under individualist property regimes, broader social and civic responsibilities are “viewed as hindrances on private property rather than responsibilities that are entailed by it.” Such responsibilities mean “society functions as the ultimate property holder in the sense of being the ultimate arbiter of the meaning and value of property.”<sup>128</sup> Communitarian property would, for example, modify the property right enjoyed by modern corporations to include, for example, certain obligations to the community: they should support health, safety, interests of workers; they should compete fairly; they should promote consumer

protection and safety; and they should engage in environmental stewardship. These are costs that are either internalized or not, but they should be internalized when possible.<sup>129</sup>

Communitarian values are also present in Michael Sandel's theory of guardianship, which views property as an instrument which, "when used properly, can contribute to the cultivation and practice of moral and civic virtue"<sup>130</sup>; in doing so, it "denies individual ownership in favor of a more ultimate [or wider] owner or subject of possession of which the individual person is the agent."<sup>131</sup> This understanding of the community is important for the idea that a norm of property can also operate as an authoritative law, because "guardianship always involves someone or some group who acts authoritatively, or claims to act authoritatively, on behalf of either other members of the community or the community itself."<sup>132</sup> As a law that regulates both the definition of and practice of ownership, the social-obligation norm, like Sandel's theory of guardianship, views private property as being continually subjected to ownership-like claims by the community. In this sense, both private and communal assets and resources are seen as shared goods of the community, where guardianship is shaped not only by claims or norms of virtuous regard for these shared goods, but also by "claims and norms of at least a *de facto* jurisdiction over those assets and resources, or some aspect of the management, use, and disposition of them."<sup>133</sup> It is through this authority—a political authority of "higher communal ends"—that "the moral authority of communal ends" can confront and subsume the "atomist distortions of liberal individualism."<sup>134</sup>

According to Charles Taylor, atomism—the idea that human beings are self-sufficient individuals—is the opposite of Aristotle's social animal. Human beings are not self-sufficient alone or outside a polis.<sup>135</sup> Individuals can only achieve their identity in a certain type of culture, the infrastructure of which require stability and continuity and support from society as a whole. This infrastructure includes "bearers of culture" such as museums, universities, law courts, and television stations, as well as more mundane elements including buildings, sewers, power grids, and railroads.<sup>136</sup> These combine to produce "the free individual of the West," who "is only what

he is by virtue of the whole society and civilization which brought him to be and which nourishes him.”<sup>137</sup> For Taylor, the fact of the community-created person “creates a significant obligation to belong for whoever would affirm the value of this freedom; this includes all those who want to assert rights either to this freedom or for its sake,” and the obligation is “increased if we ourselves have benefitted from this civilization and have been enabled to become free agents ourselves.”<sup>138</sup>

#### **Part 4. The Social-Obligation Debt to a “Communitarian Aristotle”**

According to Peñalver, the social obligation norm is a “theory of owner obligation rooted in the Aristotelian tradition”<sup>139</sup> and the theorists want to “reintroduce the Aristotelian ethical tradition into discussions of property and land-use.”<sup>140</sup> To that extent, the social obligation norm is “rooted in the Aristotelian tradition of virtue ethics,” and “understands the purpose of property law to be the promotion of human flourishing, both of owners and non-owners.” In contrast to law and economics, “an Aristotelian approach to land use is capable of incorporating the important insights of positive (and even certain features of normative) economic analysis without succumbing to the temptation to treat economic consequences as the only factors to weigh in determining how to evaluate competing land-use regimes.”<sup>141</sup>

The social obligations theorists consider their theory of community “Aristotelian” because it “builds on the Aristotelian notion that the human being is a social and political animal and is not self-sufficient alone.”<sup>142</sup> The “Aristotelian conception of human beings as social and political animals operates for us as part of a substantive understanding of what it means to live a distinctively human life and to flourish in a characteristically human way.”<sup>143</sup> By allowing for many kinds of land use regimes, the norm is pluralistic in terms of consequences and not monistic, such as, for example the sole economic consequences promoted by the law and economics property tradition.<sup>144</sup> Aristotelian virtue ethics recognizes that the goal, or *telos*, of a property regime should be human flourishing: property owners and government actors are virtuous when they cooperate in order to promote flourishing through their expressions of practical wisdom.<sup>145</sup> Peñalver: “Our ability to flourish requires the presence of a material and

communal infrastructure that itself depends upon the contributions of each of us. We cannot value our ability to flourish without at the same time affirming an obligation to cooperate with others in order to sustain the shared infrastructure on which that ability depends.”<sup>146</sup>

For the social obligation theorists, Aristotelian property entails a duty or moral obligation to use one’s property to benefit others by promoting flourishing in the *polis*. Like the social obligation norm itself, such a conception of property prioritizes an owner’s duties over their rights. This communitarian reading of Aristotle locates primarily in the *Politics*, but also in the *Nicomachean Ethics* and other writings, a theory of property that prioritizes state or community regulation and control over private property rights. This theory is founded upon the idea that Aristotle regarded self-interest—the kind promoted by the type of private property that ‘houses’ the private life of the home—as a type of vice, which ought to be subsumed by the virtue of other-regarding actions such as generosity and moderation. The Aristotle-inspired communitarians, including the social-obligation theorists, argue that, due to their nature as political animals, individuals are dependent upon their communities and therefore obligated, as a moral duty, to support that community by virtuously offering up to their property or wealth on its behalf. Virtuous property owners, when faced with the choice of promoting their self-interest or promoting the flourishing of their community, will always choose the latter. On this view, the virtuous owner actively sacrifices their self-interest while the vicious owner asserts it. Unlimited acquisition is vicious, for sure, because it “prevents the agent from achieving the good life.”<sup>147</sup> Communitarian Aristotelians believe the political structure, acting as law, should serve these same ends. Considered as a communitarian theory, Aristotle’s property theory is therefore incompatible with liberal political goals such as individual rights, restraints on state power, and, obviously, the primacy of private property rights. It recognizes that Aristotle vindicates private property rights in principle, but resolves that these rights are subject to completing claims by the community. No communitarian argues for the outright elimination of private property, and most

would accept that it has a proper role in a just property regime. However, the right is easily defeasible by the community when the property right stands in the way of the community's flourishing.<sup>148</sup>

The social-obligation theorists turn to the Aristotelian tradition of the "social character of human beings" in order to establish the obligation of persons to use their property to promote the capabilities and flourishing of others in the community.<sup>149</sup> The obligation may also be predicated upon the self-interest of the owner and community, who both depend upon each other's mutual well being. However, according to Alexander and Peñalver, self-interest cannot explain the moral duty to promote flourishing because human beings, despite their striving towards autonomy, are inherently dependent and interdependent upon one another.<sup>150</sup>

Alexander and Peñalver's account of human flourishing and the conception of community upon which it is based also borrows from the "capabilities" approach developed in recent years by Nussbaum and Sen. According to Alexander, this approach

measures a person's well being not by looking at what they have, but by looking at what they are able to do. The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls "functionings," rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties. Social structures, including distributions of property rights and the definition of the rights that go along with the ownership of property, should be judged, at least in part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction.<sup>151</sup>

The capabilities<sup>152</sup> are developed through community and the individual's dependence and reliance upon a community in order to flourish, whereby "even the most seemingly solitary and socially threatened of these capabilities, freedom, depends upon a richly social, cultural, and institutional context; the free individual must rely upon others to provide this context."<sup>153</sup>

Communities are the mediating vehicles that allow persons to "acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities."<sup>154</sup> Dependency upon communities as resources in turn creates an "obligation to participate in and support the social

networks and structures that enable us to develop those human capabilities that make human flourishing possible.”<sup>155</sup> Put another way, by acknowledging our dependence upon others and the social networks that permit us to flourish, a moral obligation to support these networks arises.<sup>156</sup> For Peñalver, human flourishing results from the cooperation facilitated by communities, which in turn depends on the social infrastructure generated by cooperation.<sup>157</sup> As applied to property, this moral obligation to cooperate becomes the social-obligation norm at issue here, which is implemented into a legal obligation in the form of property law. For Peñalver, property law is a vehicle, purposefully driven toward a moral goal: the promotion of human flourishing.<sup>158</sup>

There are several possible bases for this obligation. One basis involves the idea that the development of a person’s long-term self interests are coextensive with the development of their community’s interests, due to the fact that “a community that aids and continues to aid a person's development as an autonomous moral agent depends for its well-being, as does the individual, upon that person's assistance to the community.”<sup>159</sup> Thus, in order to avoid self contradiction, a person who values their own flourishing must value the flourishing of their community as well, because “insofar as I regard my own flourishing as valuable and something that I ought to foster, insofar as I am a rational human being, then I am committed to fostering the flourishing of others insofar as they are rational human beings as well.”<sup>160</sup> The norm ultimately rests upon a holistic conception of persons and communities, whereby “individuals and communities interpenetrate one another so completely that they can never be fully separated.”<sup>161</sup>

### **Part 5. Is Aristotelian Property Communitarian?**

According to David Lametti, Aristotle’s conception of private property is “grounded in the fundamentally communitarian goal of the virtuous development of the city.”<sup>162</sup> Does Aristotle therefore subscribe to Lametti’s thesis that “the community, rather than the individual, the state, the nation, or any other entity, is and should be at the centre of our analysis and our value system”?<sup>163</sup> If Aristotle is communitarian, then his property theory ought to direct owners towards the interests of the community and prioritize those interests over the interests of the individual

property owner. His ethical and political theory would motivate this prioritization through virtue and political authority, respectively. According to Richard Kraut, this is a mistake. For Kraut, Aristotle “does not look to the community as the ultimate arbiter of values and standards.”<sup>164</sup> Aristotle, rather, wants to avoid strong limitations on private property and the redistribution of wealth.<sup>165</sup> Because of this standpoint on the protection of private property, Aristotle is an unlikely source of inspiration for a social obligation theory of property that purports to value communitarian over individual interests.

In this part, I defend the position of a variety of theorists, including Kraut, who argue against the communitarian interpretation of Aristotle’s property theory. These theorists agree that Aristotle’s ideas about property are closer to liberal ideas about individual rights due to Aristotle’s emphasis on the role of property for the ethical virtue of self love, the division between the public and private, and the restrictions Aristotle draws for the right of the community to expropriate property for public use. If, as I argue here, Aristotle’s writings on property are not conducive to a modern property theory such as the social-obligation norm, then modern theorists have three options: first, ignore them; second, distinguish them and show why they are not relevant; and third, state why an “Aristotelian approach to land use” does not include anything Aristotle actually said about land use. Alexander and Peñalver do, in fact, discuss Aristotle’s arguments in favor of private property in their *Introduction to Property Theory*.<sup>166</sup> Although this work is intended as an introductory or ‘survey’ work on property theory,<sup>167</sup> it is also normative in the sense that the authors argue that “the human flourishing theory, commonly associated with Aristotle(,)” offers an alternative to utilitarianism and law and economics, the “predominant legal property theory.”<sup>168</sup> As a result, they do not ignore Aristotle’s actual writings on property, but by mentioning them in a cursory manner they fail to distinguish Aristotle’s writings on property from their own “Aristotelian” modern property law. These distinctions would be helpful, and I attempt to make them here.

According to Peter Mayhew, “a central part of Aristotle's view of property” holds that it is better if “desirable ends are achieved by the improvement of a citizen's character through education than by an attempt to compel citizens to act in certain ways through the control or abolition of their property.”<sup>169</sup> Such desirable ends would include a generous spirit towards fellow citizens—particularly the poor—and support for the infrastructure of a flourishing *polis* that promotes the owner’s rational self-interest. What is doubtful—and this the major splitting point between communitarians and the property-rightists in this section—is whether Aristotle exhibits the kind of attitude about duties and the right of the community to enforce them that allow for extensive property interventions on behalf of the community’s interest in perfecting the flourishing of its members.

Aristotle certainly has a broad understanding of how a virtuous owner shares their property with the community, but this approach is not communitarian because it is based upon the owner’s willing and uncoerced participation in the polis; in fact, the idea that the state would engage in the type of redistribution imagined by the communitarians, and the social obligation theorists in particular, is, I argue, totally foreign to an Aristotelian conception of property. Aristotle, of course, is clear that virtue calls for communal use of many kinds of property. Wealthy citizens, for example, are virtuous when they share slaves and horses as well as supplies for travelers, and they ought to give the needy access to their land. Wealthy citizens are also crucial to the functioning of the city because they finance the military and the arts.<sup>170</sup> Peter Mayhew devotes considerable attention to the question whether this kind of use is voluntary—in which case an owner who does not share is merely vicious—or whether it is compelled by law, in which case the state or community may coercively impose its understanding of what ‘sharing’ should consist in through confiscation or expropriation. Martha Nussbaum and the social-obligation theorists support the latter interpretation. Mayhew argues for the former: first, making one’s own private property common is done voluntarily from virtue and in the manner of friends.<sup>171</sup> Second, the power to dispose of property, or to allow others to use it, must reside with



the owner. So Aristotle is not advocating the transferring of “rights” to the needy,<sup>172</sup> nor does he foresee any role for the community in the enforcement of these requirements of virtue. In practice, Mayhew writes, a needy person can use another’s lands because they voluntarily unfence them and not because they were compelled by law to allow their use. Lawmakers can certainly encourage—primarily through education—but not compel this kind of virtuous activity.<sup>173</sup>

Although they would have the political authority to compel it, the primary job of the legislator is not redistribution, but rather ensuring that owners have generous characters. Rather than focusing on redistribution or the effect of it upon nonowners, an Aristotelian virtue of ownership would focus upon the way wealth and money prevent the development of virtue, and why its overaccumulation leads to viciousness *in the owner*. He is not so much concerned with property’s ability to benefit the *polis*, nor its owner’s duty to use it to benefit the *polis*, but its propensity to harm its owner.<sup>174</sup> In fact, Aristotle is very astute about legislators being tempted to regulate and expropriate property, asking “Does the legislator just pass laws to make private owners make property available for common use?” Rather, legislators promote the flourishing of the *polis* and its members by first managing—and not creating—public lands, ensuring an education system that inculcates the virtues (primarily, generosity), and only then resorts to taxing the wealthy to achieve these ends.<sup>175</sup>

Therefore, Aristotle envisions a city with common property, but there is no indication that private property should be confiscated in order to convert it to common property or to use it to benefit the poor.<sup>176</sup> Also, the common land is meant to pay for common meals by being self-supporting. This reflects Aristotle’s idea that all should have sustenance, but it is the responsibility of the state to provide it and nothing indicates that private property should be expropriated for this purpose.<sup>177</sup>

Although much of this discussion focuses on property in land and agricultural goods, it is the household or *oikos* that forms an almost impenetrable barrier between individual and the

*polis*. This barrier is the key to understanding Aristotelian property. According to Olsen, the household in this context occupies the “primary ethical context of property.”<sup>178</sup> According to Miller, Aristotelian property ‘naturally’ belongs to the household,<sup>179</sup> the point of which is “the maintenance of the family.”<sup>180</sup> Households require property, but it is not property itself: households cannot be bought and sold.<sup>181</sup> When such property “becomes a ‘living presence’ by virtue of being conditioned as an instrument for life and the good life,” it is transformed into what Aristotle calls ‘true wealth.’<sup>182</sup> Citing Aristotle, Kraut writes, “between man and wife friendship seems to exist by nature, ‘for human beings are by nature couple forming (*sunduastikon*)—more so than political, inasmuch as the household is prior to and more necessary than the city.’”<sup>183</sup> Christophe Rapp notes that this first level of Aristotelian community—mere survival in a pre-*polis* ‘state of nature’ consisting of households—is still a community with a sense of justice even without a *polis*.<sup>184</sup> But men do not want to live only to survive: they want the good life, and this achieved only in the *polis*, which exists solely for the good life of the individual.<sup>185</sup> The end or *telos* of the *polis* is the good life of the individual, and the *polis* attains its *telos* if it “provides favorable conditions for the individual quest for happiness by its citizens and supports to the best of its ability these possibilities through education and good laws.”<sup>186</sup> Individuals choose that which is good for them, and not what is obliged by a “certain tradition or community.”<sup>187</sup>

In his book on Aristotle, Rosler also presents a focused argument against the popular view of Aristotle as a “fountain-head of communitarianism.”<sup>188</sup> According to Rosler, Aristotle “defends a moderate individualist position, i.e. a form of individualism which embraces other-regarding virtuous activity as a constituent of individual well being.”<sup>189</sup> Contrary to the communitarian emphasis on self-sacrifice, Aristotle’s political theory denies that a community’s “parts may be sacrificed in order to promote the general good or for the sake of a metaphysically higher being,” but may require sacrifice on the “individualistic grounds that the political community is needed for its parts to achieve moral perfection.”<sup>190</sup>

Rosler argues that communitarians are committed to a flawed conceptual understanding of duty: it is definitionally or conceptually true that members of political communities have political obligations and therefore—according to the communitarian—members have duties. That may be the case, writes Rosler, but there is no practical way to understand their import or role in political life.<sup>191</sup> The only way to understand the connection is through morals: there must be some moral basis—perhaps a contract or actual debt or actual benefit—to justify the demands of a communitarian social obligation. For example, property owners who happen to be members of politically disenfranchised groups—in the United States, this might include women and African-Americans or Native Americans of any gender—or any other property owning individual who do not enjoy full political rights and benefits are unlikely to be subject to social obligations towards the dominant or oppressive political groups on the grounds that their ownership is less profitable than other persons’ ownership. In fact, such groups have a demand for *more* individual or group property: their obligations to give or relinquish property are less strict or even nonexistent. According to Rosler, this is Aristotle’s nuanced understanding of political obligation: he does not endorse the idea that individuals, much less property owners, are obligated to their community simply in virtue of the fact that they are community members. This purely conceptual understanding is, I think, the kind offered by the social obligation theorists—and, perhaps, Nussbaum—and it is not an accurate portrayal of Aristotle’s understanding of moral obligation. “Hence,” writes Rosler,

Aristotle does not share what is usually regarded as a strong communitarian tenet, viz. that being a member of a political community gives us a reason for obeying and supporting it. He would be much more interested in exploring the moral history of the relationship between the political community and its members. It is only when the community fulfills its moral tasks that it has a right to demand allegiance from its members and that its members and subjects are morally required to abide by its decisions.<sup>192</sup>

Aristotle would not deny that community forms our identity, but the community must have a morally sound foundation.<sup>193</sup> We may be grateful for, and incur social debt on behalf of, the social institutions and language that “form us” but this does not, writes Rosler, “create in us a

floating debt which the current society can collect and use as it will.”<sup>194</sup> There is a significant gap between the necessity of a society or community for the development of the self, and the “obligation to belong to and/or obey the political authority of the particularly society from which he benefitted in this way.”<sup>195</sup>

To Aristotle, it would make little sense why a person would willingly forego their holdings to the community unless there was some advantage to them, and the idea that the community benefits as a separate agent apart from the owner’s benefit does not appear in his work. The idea that the community is a higher good that deserves one’s property or wealth to the detriment of the owner also makes no sense. Persons owe a duty of support to their community to the extent it allows them to flourish. If it does not allow persons to flourish, they owe it nothing. But the duty is not predicated on the simple fact that persons are dependent on communities or that their personhood is the product of communities; it is also not predicated on the idea that duty is the natural or logical outcome of an individual’s situatedness in (some) community. For Aristotle, persons owe no duty (to support through, for example, taxes) a community that has not contributed to their flourishing. In this sense, a ‘debt to society’ is not a metaphor: it is a real debt in the sense that the property owner has benefitted from the community’s efforts on his behalf—the owner has chosen to be benefitted, so to speak—but it is grounded on that initial benefit to the owner. But this version of rational self-interest is not how a communitarian justifies the priority of the community. Therefore, Aristotle is most likely not a communitarian.

#### **Part 6. Aristotelian Property: Private not Communitarian**

For Miller, book II of the *Politics*—the crux of Aristotle’s discussion of property—is not simply a vindication of a property system that permits private property rights: it explains what the rather cryptic phrase “private property, common use” means, and presents a reasoned argument why property arrangements should be organized to benefit the kind of individual private property rights that are, in many ways, incommensurate with strong communitarian objectives.<sup>196</sup> For

Miller, these considerations reveal Aristotle to be a theorist of individual rights because Aristotle provides many justifications for private property that echo contemporary ‘incidents’ of ownership, particularly those listed in Honore’s classic list.<sup>197</sup> For Miller, one of the key elements in Aristotelian property is the owner’s claim against interference.<sup>198</sup> Use and alienation of property are also up to the owner,<sup>199</sup> and, in accord with many contemporary property rights theorists, the community’s moral and political rights to regulate these rights claims are minimized.

Miller offers five criteria that Aristotle claims as justifications for private property over communal property due to the ability of private property to:

1. reduce quarrels and complaints about use, ownership, and control;
2. promote the improvement of property;
3. facilitate friendship;
4. foster natural pleasures such as self-love; and
5. make possible the exercise of virtues such as generosity and moderation.<sup>200</sup>

What is interesting about these justifications is that they do not merely support a property regime that permits *some* private property, as Nussbaum has argued;<sup>201</sup> rather, they justify a regime that *prioritizes* private property over communal property in most cases, and limits the ability of the community to engage in forced transfers of private property in order to benefit some public good.

The first criterion forms the basis of Aristotle’s well-known objection to Plato’s communism: whereas Plato advocates for the eradication of private property in order to reduce conflict among the guardians, Aristotle argues that carefully defined property rights actually help to avoid conflicts in terms of use.<sup>202</sup> Criterion 2 is very much in line with the efficiency goals of the law and economics theorists: Miller writes that Aristotle recognizes that “privatization gives individuals a much greater incentive to use property efficiently” while common property is subject to the tragedy of commons.<sup>203</sup> Criteria 3–5 presuppose the moderate individualistic view that political institutions “should promote the advantages of individual citizens, understood to

include virtuous activity”: criteria 3, in particular, reflects the idea that virtuous owners make property available to friends but not the general community or to ‘political friends.’ True friends indeed “do away with mine and yours”<sup>204</sup> and friends do not maintain strong claim of private property against one another, but this cannot be the basis of political associations.<sup>205</sup> Political friendship falls short of virtue based friendship, and this kind of virtue does not translate well from Aristotle’s ethics to his conception of political coexistence. Criterion 4 reflects the idea that self-love requires acting out of and according to their own rational judgment, which requires that owners must be able to determine how their property is used. Finally, criterion 5 recognizes that it is only through private property that generosity in the use and “alienation of property”—giving it away as the owner determines the demands of virtue—can be achieved. Miller: “Since one can act generously only if one acts voluntarily and by choice, one can act generously only if the use and alienation of property is up to oneself, and this is possible only in a system of private ownership.”<sup>206</sup>

### **Part 7. Aristotle on Redistribution and Expropriation**

In the *Politics*, Aristotle writes that the “surplus from public revenues should be collected and distributed among the poor, especially if one can collect such quantities as may enable them to acquire a piece of land, or, if not, to make a beginning in trade or farming.”<sup>207</sup> However, this is not an indication that he supports anything like the modern concept of eminent domain or the social-democratic impulse towards the redistribution of wealth or property. He is critical of democratic majorities when they confiscate the property of wealthier citizens,<sup>208</sup> and recommends that when confiscation does occur, the law should provide that “the property of the condemned should not be public and go into the treasury but be sacred.”<sup>209</sup> So, despite his recommendation that property also be ‘common in use,’ Aristotle is opposed to compulsory state expropriation of wealth or property:<sup>210</sup> such contributions—however mandated by the demands of virtue—must be voluntary in order meet those demands.<sup>211</sup> Like the natural acquisition of property to promote the health of the household, states or communities must acquire property ‘naturally,’ and, like theft in

general expropriation does not promote virtue nor happiness because it is unnatural: it is not earned well and nor does it promote the self-sufficiency of the state.<sup>212</sup>

However, a virtue-based opposition to expropriation does not mean that Aristotle opposes all regulation of property. Miller notes that Aristotle advocates for taxation to support defense and internal needs, the use of communal property to support the needy, and legal limits on the quantity of land that may be owned.<sup>213</sup> Writing in *The Athenian Constitution*, Aristotle also supports surprisingly modern restrictions on private property that pertain to various aspects of the urban environment of his era. He recommends that political officials charged with ‘town management’ provide ‘superintendence’ over private property including “buildings which encroach on the streets, balconies which extend over the streets, overhead drainpipes which discharge on the streets, and window shutters which open into the street.”<sup>214</sup> These restrictions all pertain to the outside of the house, and are intended to prevent private property owners from extending their private property into the public sphere. They prevent owners from trespassing onto public property and from harming those in the public sphere, both of which are legitimate restrictions on property even under the most libertarian conditions.

Therefore, it is a mistake to ascribe to Aristotle a theory resembling “modern socialism or social democracy.” Property owners should put their property to virtuous uses that benefit others, but this does not mean creating entitlements on the part of others to this property. Miller: “If others have a legally enforceable right to help themselves to one’s crops, it is not an act of generosity to permit them to do so.”<sup>215</sup> In other words, I might have duty of charity to the poor, but that does not give rise to a right of the poor to receive my charity.<sup>216</sup>

Although the social obligation theorists recognize that self-interest and reciprocity are reasons why one might voluntarily support their community, Aristotle appears to place a much higher importance on the relationship between self-interest and the flourishing of the community. Rosler writes that Aristotle understands the *polis* to be a product of human reason and not a natural entity;<sup>217</sup> it is rational, and not merely natural, for persons to live in the polis because the

*polis* enables individuals to live well. This relationship also enables the polis to flourish and this “common benefit” is what brings individuals and cities together.<sup>218</sup> The polis therefore operates, in large part, as a reciprocity arrangement whose associations obtain cooperation by promising some kind of reward to individuals.<sup>219</sup> For the social obligation theorists, this reciprocity might be constituted by the very infrastructure individuals and communities benefit from and to which they contribute. The community is a common enterprise, but one that could not function if it failed to provide the opportunity for its citizens to pursue self-love and self-interest. This relationship should be pursued not because it is natural or peculiar to us, “but because it is virtuous, good, worthwhile”; in this sense, the pursuit of, for example, the virtue of courage is “natural to the extent it is good or rational, not the other way around.”<sup>220</sup> It is therefore rational—meaning, ‘in their best interest’—for human beings to create and “remain in the *polis*.”<sup>221</sup> Self-preservation is not the sole reason for political participation; however, as Miller notes, prudence and self-interest—the kind of interests developed through the virtuous application of practical reason—guide persons to participate in a *polis* where their property rights will be respected by one another in a system of mutual advantage.<sup>222</sup> Therefore, duties to the community (particularly those characterized as ‘sacrificial’ or ‘other-regarding’) are fulfilled not merely because they are duties, but because they are reciprocal: the individual landowner is benefitted (through virtue-increase, wealth, etc.) when they act to promote the good of the community.<sup>223</sup> Rather than being duty-bound to the community due to its priority in any metaphysical sense—as communitarians claim—“citizens who live under a political regime which takes care of their well being would have a *good reason* for performing military duties, paying taxes, participating in office, and other requirements which embody the idea that citizens belong to the city.”<sup>224</sup> This ‘good reason’ is, of course, self-interest.

For Aristotle, self-interest and self-love are among the most important virtues, and one of the primary reasons to own property—which is contrary to communitarian objectives—is its ability to give pleasure to its owner.<sup>225</sup> Private property permits this when persons use their



property as a result of the exercise of their own judgment. Property makes this kind of judgment and pleasurable action possible.<sup>226</sup> So property ownership is connected to the feeling of affection for the self, and this is a virtuous trait of character. This contradicts, to a large extent, the idea that owners have a duty to give up property, which naturally leads to displeasure; unless, of course, it is done virtuously out of moderation and generosity. So, for Aristotle, there is pleasure in ownership as well as pleasure in sharing, and a virtuous owner seeks property, in large part, because of the pleasure it gives to themselves and to those who benefit from the owner's generosity.<sup>227</sup>

Mayhew argues that group ownership lacks the ability for property to give pleasure or self-love: group ownership therefore undercuts both the ability to find pleasure in private ownership as well as autonomy, and the ability to act according to own judgment. Communal ownership prevents persons from acting according to their own judgment, and communal owners cannot perform generous acts because they exercise no control over the property. Furthermore, we do not feel the same way towards communal property as we do our own.<sup>228</sup> As Mayhew notes, Aristotle writes approvingly that "doing favors for and helping friends, guests, or mates is most pleasant, and this happens [only] when property is private."<sup>229</sup> This kind of rational self-interest reflects an emphasis on the type of atomistic individual that 'does not exist' for communitarians<sup>230</sup> or for the kind of virtuous property owner envisioned by the social-obligation theorists.

To conclude: an Aristotelian property theory—such as the one I describe here—would certainly have to confront the rather clear elements in Aristotle's thought that contravenes the idea that the purpose of property law is "the promotion of human flourishing." Aristotle's many writings on property and land use reveals much about both Aristotelian virtue theory *and* the roles played by owners and nonowners in terms of practical reasoning. Aristotle's property theory is a practical version of his virtue theory: it describes how virtuous persons act, and what the law should or should not do in response, in terms of property. Because the social obligation theories

fail to give Aristotle's ideas on property much of an airing, they also fail to give contemporary owners and nonowners alike practical guidance for the kinds of actions virtuous persons ought to undertake in regards to one another's property.

#### **Section 4. Efficiency's Challenge to Virtue Theory**

This section considers the social-obligation theorists' objections to the utilitarian ethics of the law and economics theorists and their use of efficiency and welfare as the sole *telos* of a property regime.<sup>231</sup> It is a reframing, in many ways, of the familiar dispute between consequentialists, who prioritize the good over the right, and deontologists, who prioritize the right over the good. The objection to utilitarian efficiency ethics—which, for convenience, I will group together as law and economics—is a prevalent theme among communitarians, libertarians, virtue ethicists, and capability theorists, despite the concession that many of the same goals are reached through property regimes that aim towards flourishing—such as the social-obligation norm—or welfare, including various types of utilitarianism and primarily law and economics.<sup>232</sup> Although both are consequentialist/instrumentalist theories, the objection to law and economics is based on the claims that it is unsatisfactory because (1) it fails to consider non-economic factors in the evaluation of property's value to owners and nonowners; (2) it is monist, in that it considers only a single factor, welfare, as the good, instead of a plurality of factors; and (3) it is, unlike the social-obligation norm, indifferent to morals.<sup>233</sup> These objections are considered in light of the general thesis of this work, which attempts to justify strong private property rights—specifically, the right to exclude—as well as the powerful duty not to interfere with those rights by nonowners.

##### **Part 1. Law and economics fails to adequately assess property's value**

Because property plays a key role not only in trade and commerce but the quality of human lives, the social obligation theorists argue that property should not be wholly commodified in the way that markets insist, and nor should its value be based solely upon its potential for free market-style exchanges which attempt to maximize property's economic value. In “Land Virtues,” for example, Peñalver writes that homeowners in particular have inchoate and

occasional conflicting interests in their home's value that cannot be explained by the kind of "pure wealth maximizing" envisioned by property economists such as Harold Demsetz.<sup>234</sup>

According to Demsetz,

[i]f a single person owns land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land rights. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death. . . .In effect, an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future.<sup>235</sup>

This characterization of ownership motivation is incorrect in terms of what owners *actually* think or actually do with their property, particularly when it is their home. Peñalver is correct to observe that "market value is just one factor among many that motivate owners."<sup>236</sup> Demsetz's economic model fails to recognize that owners are motivated by, for example, moral obligation or by goods that do not correlate with market value, such as sentiments towards their community, feelings of belongingness, or other inchoate goods.<sup>237</sup> Homes are not merely investments.<sup>238</sup> However, Demsetz's model seem quite correct in terms of what fully rational owners *should* do in order to maximize overall social welfare: when one owner maximizes their property value, similar increases occur in the neighboring properties, and such maximization foreseeably leads to flourishing, welfare, or some other community goal. Of course, efficiency analysis *is* deeply normative when it proceeds from a utilitarian foundation that seeks to maximize welfare, and Peñalver admits to the normative use of economic analysis towards human welfare, but not towards human flourishing.<sup>239</sup>

Criticisms that economic analysis lacks a normative foundation are also centered upon the fact that it is *monist*: it relies upon only one factor, human well being, instead of the plurality of normative foundations that a property law might rest upon. As Joseph Singer writes,

[a]lthough economic analysis of property rights appears to be the dominant approach in law schools these days, the utilitarian moral theory on which it is based is generally regarded by moral and political philosophers as fatally flawed—at least unless it is supplemented or cabined by normative analyses of other kinds, such as considerations of justice, fairness, obligations, and ethics.

According to Singer, only a “morally constrained utilitarianism”—including, I believe, the social-obligation norm—is supported by contemporary theorists: to that extent, “all of them ask us to consider the ways that our actions affect others and the extent to which we could justify our actions to those affected by them.”<sup>240</sup>

Although they purvey a similar theory as the economic analysts, the social-obligation theorists set out upon a difficult journey: they wish to depart from law and economics, the ‘dominant’ property regime which pursues welfare, while recognizing that their alternative theory, which pursues flourishing, arrives at many of the same conclusions, regulations, court opinions, laws, and practical results as the dominant regime. To this end, they seek to explore the “limitations” of law and economics’ analysis of the good, which requires them to forego efficiency as the sole normative consideration of property law,<sup>241</sup> while, like law and economics, they “continue to employ a rational actor model of landowner behavior.”<sup>242</sup> To that end, a property law based on virtue as opposed to efficiency is “as good as utilitarianism but more forthright about its limitations.”<sup>243</sup>

There is a certain degree of windmill-tilting here: the virtue-based analysis of the social-obligation theorists and the utilitarian analysis of the economists end up at the same place more often than not, due primarily to the difficulty in establishing a bright line between the ends of flourishing and well-being, respectively. As a result, the objection to a law and economics property regime is not aimed at the results of that regime, but at the idea that law and economics somehow lacks a moral foundation: it is vicious in theory—due to the promotion self interest and the priority of private ownership—but promotes flourishing, or something very close to in the form of well-being, in practice.<sup>244</sup> Peñalver’s disagreement with Demsetz and other legal economists, however, is not over the fact that owners are not always economically rational by tending to have to have nonfungible attachments to their property. According to Katrina Wyman, Peñalver opposes economic analysis because some legal economists—Demsetz included—argue

for limited public decision-making about land use and maximized private decision making. But not all argue this way, and many economists justify far *more* regulation.<sup>245</sup> The argument therefore is not with Demsetz' claim about the motivation of owners, but with the claim that private ownership should be preferred over collective ownership due to its greater propensity for efficiency. The strain of law and economics that is taken to stand for the entire approach also ends up aligned with libertarian property interests in many situations, particularly those that support strong individual property rights. This also contributes to Peñalver's distrust.

Although they are critical of law and economics' view of property as instrumental towards the singular goal of well-being, the social-obligation theorists themselves are property instrumentalists who, according to Larissa Katz, lack a "clear idea of ownership with any independent normative content,"<sup>246</sup> and allocate property rights "in whatever way best promotes some societal goal"—in their case, that goal is flourishing.<sup>247</sup> Flourishing recognizes that (1) living within a particular sort of society and social relationships is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish; and (2) human flourishing must include at least the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternative choices.<sup>248</sup> For the social obligation theorists, flourishing is the end and property is the means.

Instrumentalist accounts, of course, disagree about what collective goals communities should have. Communities, by definition, have collective goals. As Katz notes, the outcome of the community's coercive efforts, including legislation, force, command, or law, will usually favor whatever collective goal attracts the interests of community at that time: it could be equality, excellence of virtue, or the aggregation of welfare. When individual property rights are allocated to best promote a collective goal, Katz writes, a conflict arises with libertarian conceptions of property rights, which are based on principles of exclusion and legitimate acquisition<sup>249</sup> and not upon the maximization of some collective goal. But even property

libertarians, as Claeys observes, should find it is hard to resist the claim—if true—that ‘minor revisions’ to the property law might lead to more flourishing, particularly when the means for achieving that result are claimed to be predicated on the advancement of virtue.<sup>250</sup> To this end, if the social-obligation norm can show that A’s property is the means to B’s end in terms of capabilities or opportunities to flourish, then there is a strong normative argument to use A’s property to that end. However, as legal economist Louis Kaplow points out, such a conclusion is problematic if “freedom, autonomy or consent [are] thought to be important.”<sup>251</sup> A property law that is predicated on the communitarian understanding that human beings are *not* independent or autonomous is conceptually barred from having any substantial connection to property’s potential for human independence, autonomy, and freedom. Because human beings are not autonomous, human autonomy is not one of the ends of the social-obligation norm. The norm therefore *encourages* interdependence by restricting the means—primarily, the right to exclude—which encourage autonomy. In other words, by denying the existence of autonomous beings, the social-obligation norm cannot, at the same time, promote autonomy or similar values.

Referring directly to the social-obligation theorists, Katz writes that their “system of property serves as a kind of ‘indirect morals legislation’ that coercively enforces owners’ moral obligation to make sacrifices that contribute to human flourishing. These sacrifices range from accommodations for nonowners (e.g., public access to private beaches) to contributions to public projects (e.g., the preservation of historic buildings or the surrender of land needed for roads, etc.).”<sup>252</sup> Hanoch Dagan refers to this as the ‘fetishization of interdependence,’<sup>253</sup> where property rights “do not (or at least ought not) enable individuals to withdraw from others and to pursue separate, selfish ends; rather, property is ‘a powerful vehicle for tying people more closely to their respective social groups.’”<sup>254</sup>

Peñalver’s objection to a market that places economic value on all property is also intended to provide justification for the establishment of certain types of properties that can be taken out of the market, which frustrates the basic tenants of law and economic theory’s reliance

on ‘moral-free’ ideas about market infrastructure or cost benefit analysis. By taking, for example, wetlands environments and housing for the homeless out of the market, via state ownership or other types of non-private ownership, the valuable land that supports these uses becomes ‘priceless’: the lands are better-protected, and, accordingly to Penalver, used more efficiently through collective ownership.<sup>255</sup> This is true for all common or publicly held land.

Again, this strategy is purely instrumental towards the development of community and interdependence. According to Peñalver, the “[a]bsence of market demand can also result from people’s belief that they are (morally) entitled to enjoy a particular good (such as clean air and water or the preservation of historic landmarks or endangered species) without paying for it or, relatedly, that there are certain goods that are so important that the logic and values of the market cannot do them justice.”<sup>256</sup>

Flourishing and well being may be, in fact, too closely aligned to justify the kind of change in the law that would be required to implement flourishing as law’s *telos*. Kaplow argues that all theories that seek to maximize some good, including the social-obligation norm, Rawls’ pursuit of primary goods, and Sen’s capabilities approach, are in fact seeking to maximize well being, or well being plus some other end.<sup>257</sup> But these theories fail because the addition of the ‘other end’ not only compromise freedom and autonomy by limiting choices, but they entail the use of various means of fulfillment which are “systematically assigned different weights than individuals themselves assign”<sup>258</sup> in terms of assessing their *own* well-being. “It follows that using such theories to design social systems tends to reduce individuals’ well-being, (and) in principle, every individual’s well-being.”<sup>259</sup> This reduction in well-being can be prevented, but only if individuals themselves are “freely permitted to determine the relative allocation of different types of goods that they will receive whether by directly expressing their wishes or through conversion between types of goods or by trading with each other,” which will circumvent a theory that purports to, for example, promote flourishing. Finally, for these kinds of theories to

be implemented, “it is necessary to defy individuals' consent and to subvert their freedom and autonomy, understood subjectively.”<sup>260</sup>

Kaplow concludes that a means-based theory, like flourishing, need not compete with a system that already instrumentally pursues well being, and nor should flourishing, or any other similar standard, constitute a “wholesale substitution [and] alternative approach to [the] normative assessment of individuals' situations” that welfare economics already pursues.<sup>261</sup> The adoption of the flourishing standard would “only warrant more modest refinements of the concept of well-being” rather than replacing it.<sup>262</sup> Flourishing collapses into well being, and the suggestion that a revolution in property law—one that would have drastic results for individual rights—is needed to achieve a moralized concept of well being is not convincing.

There is another disagreement with the legal economists that is worth mentioning. Peñalver challenges Demsetz' claim that individual ownership is better because collective control cannot acquire or use the knowledge that impacts how best to use land and how to make wise decisions about it, because collective owners are not motivated by the same incentives as private owners—primary, wealth maximization and efficiency.<sup>263</sup> Land use, then, has a certain epistemic requirement. The epistemic requirement suggested by the social-obligation norm places a very high informational cost on owners who wish to make informed judgments about their duties under the norm. Assuming that the social-obligation theorists would permit owners to act voluntarily before compelling them, owners ought to know what kinds of property uses promote flourishing, and then assess their ability to act to promote it. This requires the owners to possess some level of epistemic virtue: the virtuous owner must know their property is instrumental towards flourishing, and aim towards this goal. If owners lack this information, then they lack this kind of virtue by failing to aim towards this goal.<sup>264</sup>

In terms of Aristotelian virtue ethics, practical wisdom requires owners to determine whether and how much they ought to contribute to their communities. This obligation is not a rule (“every owner must do *x*”); in fact, Aristotle is strongly opposed to the establishment of this kind



of rule. Owners, of course, can fail to act virtuously despite their best effort. Imagine an owner who dedicates an acre of their crops to the community and the crop fails due to poor weather. The owner had virtuous intentions to contribute to their community, but no flourishing results. May the community act to take another, more profitable acre? If their taking impacts the ability of the owner to flourish, then it is presumably not permissible. But if it is surplus, and it promotes the flourishing of the community, then it is permissible under the norm. Because it is a consequentialist theory, moral compliance with the obligation consists in results and not intentions. However, the social-obligation theorists do not establish a normative baseline for 'surplus.'<sup>265</sup> It might constitute property that is not necessary for the owner's *own* flourishing, or might be property that does not contribute to the owner's flourishing. In either sense, the implication is that once an owner flourishes, then everything else is surplus and should be dedicated to the flourishing of others. This is a demanding standard, and probably unattainable by owners or by a property regime that purports to protect basic private property rights. It is unreasonable to expect owners to be able to determine whether one or another of their property uses promotes more or less flourishing in others. The informational and opportunity costs of determining the 'flourishing value' of one's property are prohibitively high; these costs could be internalized through rebates or subsidies, which of course might be more costly than outright externalization of costs. For this reason, defenders of the social-obligation norm appear committed to bypassing expectations that owners can make intelligent or meaningful determination about the flourishing-potential of their property. This situation requires the use of the state to enforce the norm through involuntary contributions, which redistribute property through eminent domain or other regulations.

There is, however, a method for providing owners with the epistemic grounds for assessing their property's potential towards the flourishing of the community, and it may so simple that it easily escapes notice. Nonowners can assert their interest in property in terms of its potential for their flourishing by making claims about it. These claims can be based on the

community's right *qua* community to have ownership-like interests in the property, whereby its value inures to their benefit or flourishing, or they can engage in the method that both law and economics and libertarian property theory prefer for determining ownership: they (the community) can offer to purchase it and become owners themselves. Through the community's offer, present owners are then apprised of their property's potential for providing flourishing to nonowners, and they can satisfy the demand that they be epistemically virtuous: they now know their property's value to the community, and can make well-informed decisions about voluntarily acting with virtue towards the flourishing of the community by selling their property or granting some other ownership right in it. On this basis, utilitarian and rights-based theories seem far more well-purposed towards informing owners about the community's stance towards their property than the free-standing moral obligation apparently required by the social-obligation norm.

### **Section 5. Possibilities for 'Virtue Property'**

This chapter concludes by attempting to situate the social-obligation norm into American property law by drawing out its implications for owners both with and without the abstractions of virtue theory. It asks whether virtue theory can build the appropriate foundation for a virtuous property law that recognizes and enforces social obligations while also protecting property rights. As I explain below, a primary property virtue—respecting property one does not own by fulfilling the duty not to interfere—is never mentioned by the social-obligation theorists. This virtue is already at the core of most moral and legal property regimes and practically universally accepted by all cultures.<sup>266</sup> Obviously, such a pedigree does not prove its value, but it does demand its consideration. This virtue constitutes the basis of the moral and legal norm and grounds the corollary right to exclude, both of which are key to the conception of private property discussed in this work. This omission is possibly explained by the fact that the social-obligation theorists are committed to the elimination of this right as the primary focus or value of property law,<sup>267</sup> perhaps they are committed to eliminating the primary property virtue that it corresponds to as well.

The following parts describes virtue theory, the virtues of the social-obligation norm, how virtue guides owners, and finally if and how virtue guides political authorities and the laws they implement.

### **Part 1. A Virtue Theory**

Rosalind Hursthouse has suggested that the ‘bare bones’ of a virtue theory begins by specifying what premises constitute right action: first, “an action is right iff it is what a virtuous agent would do in the circumstances.” Second, a “virtuous agent is one who acts virtuously, that is, one who has and exercises the virtues.” Third, a virtue is a “character trait a human being needs to flourish or live well.” The third premise makes the connection between virtue, as a character trait, and action, which is variously defined as flourishing, living well, or *eudaimonia*.<sup>268</sup> Virtues are the character traits required for the appearance or experience of *eudaimonia*. Virtue therefore guides action by saying, “act this way, or don’t act that way,”<sup>269</sup> but virtue does not lead to flourishing: it *is* flourishing. As Claeys writes, “the practice of virtue is coterminous with human flourishing which is coterminous with *eudaimonia*.”<sup>270</sup> Peñalver, connecting virtue to land use, writes, “virtues are acquired, stable dispositions to engage in characteristic modes of behavior conducive to human flourishing. [V]irtuous conduct [is] the behavior that flows from stable dispositions to use land in ways that characteristically promote human flourishing.” Because “decisions about land are...thoroughly suffused with moral content”, “law has an important role to play in encouraging virtuous land use.”<sup>271</sup>

As a virtue-based theory, the social-obligation norm urges owners to use their property virtuously: owners should *act* with moral virtue. Mere possession of “property virtue”—as a trait of character—does not make an owner virtuous. If property is used such that flourishing results, then the promotion of flourishing is virtuous. Because the norm is obligatory in the form of a legally-enforceable property law, the challenge for the social-obligation theorists is to show how “principles that work in ethics fit seamlessly into law or other forms of politics.”<sup>272</sup>

## **Part 2. The Virtues of the Social-Obligation Norm**

The social-obligation norm is the tool for a virtue-friendly regulation of property leading to a theory of practical action that, according to commentator Eric Claeys, refers to a “broad range of theories of practical philosophy that all place high priority on virtue and on human happiness understood as the disposition in which human reason regulates human passions.”<sup>273</sup> In order to implement virtue in a property law, the social-obligation theorists advocate that collective decisions should take precedence over individual decisions when better, more morally correct decisions require legal intervention. Eminent domain is the best example of this kind of decision. According to Peñalver, there are three goals of laws that rightfully override private land decisions and “command owners to act with virtue.” These are (1) protection of the poor and protection of future generations who might be harmed by private decisions (the externalization of harms); (2) the moral education of landowners, which teaches virtue by “constraining the behavior of nonvirtuous owners” including, for example, civil rights laws in housing and common carriers; and (3) constraining the private behavior of (already) virtuous landowners, by helping to clarify social obligations and coordinate virtuous action.”<sup>274</sup>

For Peñalver, human flourishing—the corollary of virtue—results from the cooperation facilitated by communities, which in turn depends on the social infrastructure generated by cooperation.<sup>275</sup> As applied to property, this moral obligation to cooperate becomes the social-obligation norm at issue here, which is implemented into a legal obligation in the form of property law. For Peñalver, property law is a vehicle, purposefully driven toward a moral goal: the promotion of human flourishing.<sup>276</sup> If met, the social obligation required by these goals results in a more productive and efficient use of land, which in turn promotes the goal of facilitating human flourishing.<sup>277</sup>

The social obligation theorists therefore want to use virtue as a normative framework for developing land use policy. To this end, Peñalver makes the “explicit argument that law, particularly land law, should be structured to promote certain virtues” which in turn promote

certain pluralistic ends or values. These ends or values include “personhood, liberty, and social welfare” which in turn foster human flourishing.<sup>278</sup> Specifically, land use should promote three virtues: (1) *industry*, for developing material wealth; (2) *justice*, which requires the sharing of surplus wealth and property with those in need; and (3) *humility*, which requires that land be used so as to avoid irreparable harm.<sup>279</sup> These ends are not achievable through social policies that simply tax wealth and redistribute it to others in the form of money or entitlements: according to the social obligation theorists, a virtuous property law requires in-kind distributions of the type of property that persons need to flourish.<sup>280</sup> Such property requires physical spaces to perform the types of activities that constitute a dignified human life: these resources are “essential not only for human beings’ brute physical survival, but also for the education of the young and for people to be able to participate in the social life of the community.”<sup>281</sup>

Jeremy Waldron, in his article “Homelessness and the Issue of Freedom,” has argued convincingly for the importance of such physical spaces.<sup>282</sup> Persons cannot flourish without the freedom to occupy a physical space for the performance of bathing, eating, or sleeping. When these spaces constitute homes, they become deeply important for the dignity and flourishing of their owners. Peñalver writes that “[o]nce a person (or a community) has sufficiently incorporated a piece of land into his life plans, exchanging that land for some other good (even a good of great economic value) or for some other piece of land can hinder, in some cases irreparably, his ability to flourish by short-circuiting long-term plans, deeply held commitments, and carefully constructed identities.”<sup>283</sup> Waldron and the social-obligation theorists support a political right, grounded in a virtue-based property law, that guarantees persons these physical spaces.

For Claeys, this is problematic because the theorists conflate claims about fundamental values or ends, which reside within the domain of ethics, the study of which “focus[es] on the choices individual actors make in their capacities as individuals and not citizens,” with claims about property and tort law, which “specifies and secures political obligations.”<sup>284</sup> As Waldron

notes, a property law should resolve disagreements or contests about resources including, obviously, property.<sup>285</sup> Property contests are primarily intended to resolve (1) who owns the property; (2) how it is used; and (3) who owns it next. But, as the social-obligation theorists argue, the law should also promote flourishing, which can conflict with determinations of ownership, use, and future owners.

According to Claeys, “principles that work well as hypothetical rules of practical conduct for individuals”—such as principles which promote flourishing—“may not work as well as compulsory rules of practical conduct for citizens.”<sup>286</sup> If virtue is indeed a proper subject for legislation, Claeys notes that “[o]ne of the main functions of law as an institution is to make the many who are not naturally virtuous more so—first by compelling them, then by shaming, habituating, teaching, and then ultimately persuading them.”<sup>287</sup> For example, when the norm is enforced as the result of the democratic process through legislation (specifically through the use of eminent domain), Alexander argues that it should not be disturbed or ‘interrupted’ by judicial review even if it is ‘wrong,’ as was the case in *Kelo*. The *Kelo* decision was “correctly decided”<sup>288</sup> in terms of the law on residential/redevelopmental takings, but, Alexander writes, the actual use of eminent domain by the city of New London was “likely wrong.”<sup>289</sup> What Alexander means here is that the Supreme Court was correct not to ‘interrupt’ New London’s exercise of its eminent domain power, but that New London’s use did not meet the flourishing standard. Alexander, therefore, prioritizes ‘the people’s right’ to make property determinations—even when they are wrong—over the non-democratic judicial review process that potentially and occasionally upholds individual property rights.<sup>290</sup>

### **Part 3. How Virtue Guides Owners**

I take the following to be the core objective of the social-obligation theorists: the wealthy should give property, *in kind* when the circumstances require it,<sup>291</sup> to promote virtue and hence happiness in their community<sup>292</sup> while still preserving a “domain of discretion organized to encourage owner self-preservation and advancement.” As Claeys notes, this second objective is

limited so that “public officials may decide how owners’ use rights will best promote specific claims about individual or civic flourishing.”<sup>293</sup> A property law that requires owners to justify the exercise of their ‘incidents of ownership’ *ex ante* in terms of virtue or flourishing them is exceedingly demanding, yet the social-obligation norm is apparently intended to provide that kind of oversight by supervising and restricting virtually any property decisions by individuals that might impact the group. Peñalver appears to support such oversight “[a]t least in the context of a resource as flexible as land,” because “without a relatively thick theory about the sorts of values that people are likely to want to pursue, we cannot reach very confident conclusions about whether letting them freely pursue those values through the allocation of private rights embedded within the market is likely to be, on net, harmful or beneficial relative to collective decision making.”<sup>294</sup>

The norm, then, should provide a guide for action that property owners should follow in order to fulfill their social obligations. On the one hand, the norm is quite clear and simple: it obligates owners to use the surplus value generated by appropriation of the value of their property to promote the capabilities which foster human flourishing. On the other, because the concept of flourishing or *eudaimonia* is, according to Hursthouse, “not an easy one to grasp,”<sup>295</sup> it is similarly difficult to determine what kinds of obligations can be demanded by the norm both legally (as, for example, when an owner’s property is subject to a takings) or non-legally (in the form of, for example, social pressure). The theorists need to explain how property owners should behave, specifically in regards to their *use* of their property, and in *response* to democratic assertions of control over their property, which can range from zoning restrictions to allocations for public use to outright expropriation. Property owners might be under the norm and fail in their obligations, but that does not entail confiscation or excessive regulation which is the outcome of compelled compliance. Here are several suggestions that might guide property owners operating under the norm; they are informal norms at the first stage of enforcement, but legally enforceable if the duty is not fulfilled.

1. property owners are obligated to give up their property if there is a public use for it that promotes human flourishing; this is in response to the exercise of police power, so owners should not request or accept compensation. This is the norm's claimed duty of *sacrifice*.<sup>296</sup> It requires that owners not oppose takings or litigate them because takings are the outcome of the democratic process.
2. Aesthetic, historic, or cultural determinations which regulate rights by democratic bodies take precedence over private property rights (the duty to *recognize culture*);
3. By becoming a property owner, one owes special duties above and beyond those of non-property owners; and
4. Property rights are not constituted by the right of owners to exclude or the duty of non-owners not to steal or interfere; rather, property rights obligate owners to promote flourishing in their communities.

If these are correct statements of the 'normative pull' of property ownership under the norm, then acting in accord with the norm while also pursuing one's rights under, for example, takings law becomes extremely difficult. Owners should not, according to the norm, challenge the use of eminent domain against their property if eminent domain leads to flourishing, and they cannot be a virtuous owner if their duty to promote flourishing is fulfilled through coercive law. If eminent domain is used to enforce the duty to promote flourishing—as Alexander claims—then eminent domain and its threatened use makes it impossible for actors to act virtuously.<sup>297</sup> Assume there is a general duty to  $\phi$ . If Stan is coerced to  $\phi$  and later compensated, Stan has not fulfilled their duty to  $\phi$ . Say Stan's property was used while **ϕing**, and destroyed, but Stan was paid fair and square for the use/destruction of their property. It cannot it be said that Stan fulfilled their duty to  $\phi$ . By way of analogy: there is a general duty to assist in emergencies. If Stan is coerced to assist and later compensated, it cannot be said that Stan fulfilled that duty. The social-obligation norm,



therefore, requires owners to forego their right to challenge attempted expropriations of their property or risk being labeled as vicious.

This exposes an inherent conflict within the implementation and enforcement of a virtue-based property law: once contributions become mandatory, “the virtue requirement seems dispensable: whether I pay what I owe depends not on my inherent generosity, but on my being a citizen with certain duties, independent of my pleasure or pain at having to contribute to the common good.”<sup>298</sup> This conflict is resolved—or not—with the possibility of a virtuous political authority charged with the implementation of a virtuous law of property.<sup>299</sup> However, a virtuous property law does not begin and end with owner’s obligations, and nonowners have obligations as well.

#### **Part 4. How Virtue Guides Non-Owners**

By ignoring the duty of nonowners, the social obligation theory focuses solely on the duties of owners and has tended towards the idea that owners owe unique duties to non-owners based on whether or not they own *more* than the non-owners. In describing the moral obligations of nonowners, legal theorist Carol Rose shows how the “outside perspective” of non-owners leads to the duty of noninterference—a duty which applies in both privacy and property situations. Non-owners, writes Rose, are not “persons who own little or nothing themselves” in a general sense. Rather, Rose uses the concept situationally, where non-owners are “those who in any given particular instance observe but do not own the thing observed.”<sup>300</sup> This is a very different perspective of the owner/non-owner dialectic, which tends, in political theory, and Marxist political theory in particular, to cleave persons into categories or classes and then pit them against one another based on the assumption that they have competing interests. Rose suggests that the situational, as opposed to general, characterization of the dichotomy gives a more true account of the psychology of owners and non-owners. Persons with substantial property are nevertheless non-owners of *some* property as much as persons with little or no property are also non-owners, and, similarly, a person with little property is still an owner, and the rest of the world (whether or

not they have meager or substantial holdings) are non-owners in regards to their property. On this account, non-owners owe the same duties to owners regardless of the size, wealth, or power of the owner's property (including large bank accounts, islands, homes, or toothbrushes) despite holding large, small, or no property themselves.

The obvious concern, as Rose notes, is that objects and possessions do not merely influence the development of personality, but define it. For Rose, property permits refuge and exclusion, or the "breathing room one needs for other projects." Rose: "A person needs space and security for the sake of privacy, calm, thought; in other words, one needs property for the sake of doing the things one wants to do in the world." Libertarian thinking, according to Rose, "builds on this protective quality of property[.]"<sup>301</sup>

"So," asks Rose, "how does it feel to be one who is confronted with the property of others?"<sup>302</sup> Everyone is the non-owner of something, so we all know what it is like not to own something. However, instead of encouraging respect for the property of others, the social obligation norm encourages non-owners to assess the property of others as potential sources for their own flourishing and promises a kind of moralized 'return' of unearned and unjustly owned property *in excelsius* to the state of nature, ripe for acquisition not by the group of non-owners but by the victims of ownership.

Instead of feeling this redistributive urge, Rose describes—no doubt with some humor—how nonowners might responded to a "bourgeois" virtue that is the result of a "random genetic mutation," one which gives rise to the "cooperative and non-transgressive psychological propensity" towards respect for the property of others, a gene which "build[s] on the outside psychology of *not* owning, of respecting the things *others* own, even when the owners are not around."<sup>303</sup> Rose recalls James Penner's example of the parking lot, which illustrates the idea of a non-owner's duty towards the property of others. When a person encounters a parking lot full of cars, that person has a minimal duty to leave the cars alone, and this duty "applies to all the autos in the lot except the one (if any) that you do own."<sup>304</sup> This duty exists even if that person does not

own a car or anything else, and it exists even if they do not know whether the owner is wealthy *or* working class.<sup>305</sup> What the non-owner *does* know in this case is that all of these items belong to someone else, and by knowing this they become a member of what Rose calls the “audience for the rights of others.”<sup>306</sup> “The critical point,” writes Rose, “about property is that the non-owner shows respect for the owner’s property even when the non-owner has little reason to fear the owner’s defense—that is, when the owner is not actually in possession, or when the owner is an “obviously weaker party who could not repel invasion.”<sup>307</sup> For Rose, a core attribute of property—and, for my purposes, for privacy as well—is “precisely that the non-owner respects the owner’s claim even when it is not defended.” There is, of course, fear of an owner’s wrath, law’s punishment, and other disincentives for taking what is not one’s own. “But that is not what makes a property regime work,” writes Rose. What makes it work is a world where non-owners respect ownership.<sup>308</sup> Property, particularly in things that are not possessed in the traditional way, such as stocks, bonds, and bank accounts, can only exist with the cooperation of non-owners.<sup>309</sup> By participating in such a system of trade, suggests Daniel C. Russell, this kind of cooperation can be evidence of the non-owner’s virtue.<sup>310</sup> This is because in a commercial or exchange society, virtue does not lie solely in the seller’s or owner’s motives or actions—this would be the position of the social obligation theorists—but in “the fact that [a non-owner does] not just take the bread.” Consider, Russell writes, Adam Smith’s example of a baker and someone who would like to buy their bread. The transaction starts with an offer (by the baker) and not a demand (by the buyer), and that way the buyer can pay the price “instead of saying ‘If you were virtuous, you would give me a loaf of bread.’”<sup>311</sup> In this situation, which characterizes a very large percentage of the relationships between owners and non-owners, the only thing between buyer and seller is not the seller’s duty to supply something to the buyer, or the buyer’s right to demand it, but the *price* to be agreed upon. The price is determined, in large part, by the seller’s right to their property, and by the buyer’s duty not to steal it. In terms of the social obligation norm, it is unclear why the theorists ignore this.

## Part 5. The Virtue Guided State and the Possibility of Virtue Politics

As I have shown, virtue shapes the right to exclude as well as the duty of noninterference, but what can virtue tell us about the implementation of rights and duties in a property law? As Mark Lebar suggests, a virtuous property law must make both the *demos* and political authorities (they are occasionally the very same group of people) virtuous as well, and some kind of constraint must in place to prevent the *demos* from acting on its own benefit and not from the standpoint of virtue. In other words, virtue must bind political authorities as well as the authority they claim.<sup>312</sup>

In terms of a political order, many contemporary virtue theorists coming from the Aristotelian tradition see political authority as an unproblematic or necessary feature of virtue ethics.<sup>313</sup> To the contrary, Lebar suggests that virtue ethics actually imposes a liberal *constraint* on the exercise of political authority. Because “the end or purpose of the polis is allowing citizens to lead a good life, which is the life of virtue[,] political institutions are devoted to making more virtuous *both* those exercising political authority and those subject to it, in each case for the sake of the contribution of that virtue to living well.”<sup>314</sup> The social obligation norm implies that regulations and takings must promote flourishing, which requires a virtuous political authority. How, then, does the norm make the *demos* or the legislator more virtuous? Determining a public use for property does not constitute nor promote flourishing, and taking property for a public ‘benefit’ seems to circle back on simple considerations for welfare.<sup>315</sup> A virtue ethic that requires a determination of flourishing for *all* property uses/regulations would create a major bottleneck for regulators. How, then, does a property virtue obligate officials—those who exercise political authority, and this can include officials, the *demos*, and the like—to act upon their good character by creating property rules that promote flourishing? In enacting and enforcing the norm, political authorities are tasked with either the direct promotion of flourishing through coercive laws, or indirectly by creating more virtuous owners who recognize their obligation to promote flourishing.<sup>316</sup>

Lebar develops the idea of a virtue-based political authority based on what he calls “Hursthouse’s Constraint.” According to Lebar, Hursthouse’s conception of virtue imposes a constraint on the exercise of political authority due to the concern that laws might cause others to act wickedly. A law that provides criminal punishment for abortion, for example, causes some persons, such as law enforcement officers, to act wickedly by threatening and harming abortion seekers.<sup>317</sup> In such cases, virtue is not concerned with individual actions, but with the actions of political authorities. Acting virtuously is therefore a problem for judges and legislators who are tasked with enforcing a “conception of the good” in their exercise of political authority.<sup>318</sup> Ordinary persons, in terms of virtue theory, do not and cannot ‘enforce’ conceptions of the good except for their own. This returns to the problem of compelled or coerced virtue, which usurps the agency of citizens who no longer act in accordance with their practical rationality, but with the orders of officials. This is also the problem of political authority in general, and specifically the problem of the practical implementation of the social obligation norm.

Therefore, instead of a conception of virtuous political authority that enforces obligations, the interests of the community, or capabilities, Lebar argues that virtue ethics is really about rights, such as the rights to life, liberty, and property.<sup>319</sup> A virtuous political authority provides for conditions for possibility of self-directed (*phronesis*) life where the “crucial element in good human life is the exercise of choice.”<sup>320</sup>

In arguing for a liberal political theory based on ‘ancient virtue ethics and modern politics,’ Douglas Rasmussen and Douglas Den Uyl<sup>321</sup> see rights as *metanorms*: they secure the possibility of flourishing or capabilities by allowing persons to make their own conception of the good life, but do not prescribe specific ends for how individuals should live. This constitutes a justification for a liberal political order that advances virtue *indirectly*. Such an order “does not promote virtue for virtue’s own sake; it promotes virtue regulation as an indispensable means for helping citizens enjoy their own and respect their neighbors’ rights.”<sup>322</sup> Virtuous action is not

possible without the kind of freedom and autonomy that rights are supposed to protect, so politics should protect the rights that can lead to virtuous actions.

For Lebar, the problem—as Hursthouse observes—is determining what a virtue-based property law requires for the *agents* who carry it out (including police, judges, legislators, citizens: anyone who can act with political authority).<sup>323</sup> How can authorities act upon and coerce those who see their actions as unwarranted or unjustified? What about those who reject flourishing as a legitimate aim for the exercise of political authority? As Lebar keenly observes, the social-obligation theorists need to anticipate their response when they are faced with the fact that some persons will reject their picture of human flourishing through property law,<sup>324</sup> and even view it as “illiberal.” “Any idea to use law to achieve an objectively determined goal,” writes Wyman, “inevitably runs the risk of this perception.”<sup>325</sup>

For example, voters and their legislatures are deeply opposed to the kind of takings used in *Kelo*.<sup>326</sup> They do not want their property taken and it would be wrong to characterize this as a vice or example of *pleonexia* (the insatiable greed for more things). The responses to *Kelo* indicate that Americans are opposed to ‘sharing’ private property for ‘public benefit.’ They are a community opposing to takings. The responses also raise—and answer—the question about who would want a formally recognized and legally enforceable social-obligation norm. According to Freddie Mac, 90% of all Americans will be homeowners at some point in their lives.<sup>327</sup> They would presumably want increased flourishing through better infrastructure, but they also want to ensure their property is not subject to being transformed into said infrastructure, or that political authorities tell them they may use it only as “‘excellent,’ ‘model,’ or ‘virtuous’ citizens would.”<sup>328</sup>

For Peñalver, this problem—the problem of political authority and its abuse—can be avoided by ensuring that the state is morally justified in using eminent domain to ensure compliance with the social-obligation norm only when: 1.) exclusionary property rights are inconsistent with the dignity of the excluded; 2). the recipient has an acute need for the property;

3). there is a relationship formed between recipient and owner's land; and 4). the owner has created a relationship with recipients that made them dependent on the owner.<sup>329</sup> If courts were to adopt this, the use of eminent domain (particularly the 'wrong' use of it in *Kelo*) might be avoided in a great many cases because of the high standards imposed by this formula. He recognizes the importance of private homes, and that the use of eminent domain can "fail to treat someone's home with the respect that it deserves" and "seriously insult their sense of dignity and self-worth."<sup>330</sup> Instead of justifying increased rights of homeowners which restrict the power of eminent domain, Peñalver suggests that the state give "due regard to the importance of the property in question to the lives of the people being displaced." In doing so, the state should refrain from the exercise of eminent domain against homeowners "except when necessary to accomplish important public objectives." If the state deprives owners for "reasons that appear to be insufficiently weighty or ill-considered, or when it offers them patently insufficient compensation, eminent domain becomes an affront to the dignity" of the homeowner, and eminent domain should not be used in that case.<sup>331</sup> Eminent domain should be used "only when necessary to accomplish important public goals," and public officials "must effectively communicate to the public that they understand and respect the importance of the private home and that they will not lightly dispossess owners, however politically vulnerable."<sup>332</sup>

Like Hursthouse's Constraint, Peñalver places a moral constraint on political authorities but refuses to frame the constraint in terms of rights. In fact, he explicitly rejects rights because they are 'exploited' by property rights groups who attempt to provide all property, and not only homes, with greater protection against eminent domain. Such protection for all private land is

an unnecessarily over-inclusive way of protecting people's castles; it permits a politically powerful, well-funded, and well-connected set of property owners to piggyback on the rhetorical power of a conception of property that has nothing to do with their own relationship to the land. Your home may be your castle, but Alcoa's aluminum mines do not possess, and should not be understood to share, the same lofty status.<sup>333</sup>

I am sympathetic to this, but he jumps too quickly from protecting the home to corporate mining interests, which, as I explain in chapter 4, have little privacy value and are therefore less protected

in terms of private property claims. There is a lot of property in between that deserves as much protection as the home. Like Margaret Radin, Peñalver wants to draw a line on the duty not to interfere at the home, but, as I argue in chapter 3, the line between personal and so-called ‘fungible’ property is not so easily drawn.

A powerful private property right would protect the interests that Peñalver discusses here, and the interest in the home, as private property that is strictly protected against the state and community, is a powerful and important one. Peñalver is correct in his analysis that markets do not capture this interest. But while Peñalver and the others can state how virtue demands that political authorities do not take homes—this, again, is Hursthouse’s constraint—they miss the opportunity to elaborate upon the political tool that preserves this important interests: it is the private property right on the one hand, and a law or other form of restraint that restrains political officials from violating their own duty not to interfere with an owner’s right to exclude, particularly in the home, on the other. This missed opportunity is understandable, because the social-obligation theorists are committed to a virtue property that is conceptually committed to community interests, in abrupt opposition to the right to exclude and practically ignoring the prime virtue in all property theories: the duty not to interfere with, or steal, or take property that you have no right to or do not own. The social-obligation theorists believe that owners will not use their property virtuously (due to “the predictable absence of adequate voluntary transfers”<sup>334</sup>) and so ‘jump to the chase’ in terms of compelling compliance, but inexplicably expect political authorities to act morally in restraining their grasping for private property and fail to provide any suggestion whereby other political authorities might act to restrain them. This restraint is the constitutional right to property discussed in chapter 6, and the more specific constitutional protection of the home pursuant to the strict scrutiny standard suggested, again, by Margaret Radin and defended in chapter 3.

Viewed another way, it could be argued that the social-obligation is reciprocal and applies vertically as well as horizontally, meaning it acts, like the takings clause, as a *restriction*



on regulations and takings by the state. This would mean that property regulation and takings are permissible only if they satisfy the norm. After all, the state is a property owner as well, and others (owners and non-owners alike) should also be able to restrict its use of property by a norm. Were this the case, then only takings, regulations, and restrictions that satisfy the norm (i.e., they promote human flourishing by developing the capabilities) would be permissible. It is highly unlikely that most takings and regulations would pass this test, which is clearly a higher standard to meet than mere ‘public use.’ In this way, the norm might actually backfire on its proponent’s goals and drastically limit the kinds of regulations and taking they would like to promote.

Wyman, writing in response to the social-obligation theorists, asks perhaps the most important question for a virtue-directed law: whether law can actually foster virtue if, as virtue ethicists maintain, “it is not virtuous to do the right thing to comply with a rule.”<sup>335</sup> In other words, the requirements of virtue may preclude the very possibility of virtuous rule-compliance. This is because people who change their behavior “due to a change in the law would not seem to be acting virtuously as virtue ethicists understand virtue; they would seem to be doing the right thing (assuming the law is morally justified) for the wrong reasons because their actions are dictated by external constraints rather than their own internal dispositions.”<sup>336</sup> One set of such external constraints arises from the enactment and implement of civil rights laws.

### **Part 5. Civil Rights: A Social Obligation Norm in Action**

The strongest and most visible argument for the existence of the norm in property law—a norm which restricts the traditional right to exclude and simultaneously fosters human flourishing and dignity in particular—is in regards to civil rights legislation which prohibits discrimination by private owners who operate properties designated as common carriers. This type of legislation “categorically restrict[s] the exclusion power of owners who use their real property on the market” and directly limits their right to claim the state’s protection against trespass. These laws may have also promoted more moral and respectful owners.<sup>337</sup> These are good examples of how a social-obligation norm might work, despite imposing a “significant curtailment of the common

law right of business owners to exclude on whatever ground they saw fit.”<sup>338</sup>

Ownership, according to commentator Jedediah Purdy, is “a building block of, and sets in motion, market relations. What may be less obvious is that what one might call ‘market property’ carries special limits on exclusion, in favor of a universalist principle that all comers must have access to market relations.”<sup>339</sup> Coupled with the reasoning in *Shack*, which purported to subsume the private interests of a property owner to the dignity and accessibility interests of his tenants, who were entitled to the same common carrier protections as users of quasi-public entities such as railways and restaurants, the obligation of common carriers not to discriminate based on race or other classifications is both socially and legally normative, but may be limited to what Purdy characterizes as an “open-market principle,” where “all must be able to join in the characteristic interactions of market life on terms equal in principle—that is, without legal disability from owning, buying, selling, or engaging others.”<sup>340</sup> Commercial and intellectual property necessarily involve reduced privacy claims, in the same way that opening one’s house to the public—or living in a glass house—reduces privacy claims. By entering the market, one ‘opens the curtains’ of their privacy by inviting customers.

In other words, the norm operates in common carrier settings related to housing, transportation, or other quasi-public facilities, but it is doubtful that this kind of reasoning applies to other types of property situations. *Shack*, in particular, is a considerable outlier in the jurisprudence, but not because of its holding: it is exceptional because of its language about capabilities and human flourishing, and, because it is exceptional, the case does not constitute the bellwether of future decisions that the social-obligation theorists wish it to be.

To the extent that there *is* a social-obligation norm for property that is reflected in American law and society, particularly in terms of nuisance, trespass, takings, and property that is private in title but public in function, the norm is not particularly complex and it is very limited in scope and application. The norm seeks to prevent unjust harm, as exemplified in the maxim ‘*Sic utere tue ut alienum non laedas*,’<sup>341</sup> and also operates as an attempt to govern situations of

necessity, which, as the maxim *necessitas non habet legem* reveals, cannot comprehensively be determined by law. The norm also reflects the right to exclude, with qualifications in terms of harm and necessity, but primarily imposes the duty not to steal or interfere with another's rightfully owned property. These maxims, described in detail in Chapters 1 and 6, operate not merely upon property owners, but upon all members of the community. The classic restriction on property rights involves the ownership of a knife: knife owners do not have the right to use their knife by sticking it in another's back.<sup>342</sup> But in this case, *ownership* of the knife is irrelevant: non-owners of knives are under as powerful a duty not to harm others as owners. Owners, of course, have strong exclusionary right to keep others from their knife, but others have an even stronger duty of noninterference (i.e. they must refrain from stealing it) as long as the owner/user is not violating their duty not to unjustly harm others with it. The social-obligation norm of non-interference is uncontroversial, morally apparent, and, in conjunction with the right to exclude, and an integral part of any property system.<sup>343</sup> Alexander and Peñalver acknowledge, in the setting of the *Kelo* case and its subsequent controversies, that the right to exclude is particularly strong with respect to the home, and seem supportive for it in homes as sites of capabilities and flourishing,<sup>344</sup> but either ignore this aspect of the norm for other types of properties, or privilege the duty to benefit others far above the duty not to interfere. That being said, the duty to respect existing property rights is undoubtedly the stronger duty from a historical and descriptive point of view,<sup>345</sup> but receives short (if any) shrift from the theorists.

### **Conclusion**

The norm might provide practical reasons for owners to voluntarily cede their property for public use in appropriate circumstances, but, of course, takings and regulations are *not* social norms: they legally coerce property owners in the event of non-compliance. Were the norm to be adopted by courts and legislatures, owners who refuse to comply with the norm are coerced into complying through the traditional mechanisms of eminent domain, taxation, and regulation.

Were owners to recognize the existence of the norm and the duty it imposes upon them, owners would employ their property for the benefit of all, and self regulate (via self governing moral laws) their private property interests so that benefits inure in the direction of human flourishing. Were owners convinced that they should use their property to promote flourishing (i.e. they believe/accept/acknowledge their duties under the norm), they would recognize that legitimate claims upon their property (again, in the direction of human flourishing) morally obligates them to forego i). self-interested claims for compensation, ii). the assertion of rights that entail litigation (and the related expenses for the community), and iii) the belief that their private property is their proverbial ‘sole and despotic dominion.’ The result, *ex hypothesi*, is the promotion of human flourishing without the related resentment or rights-violations that pre-norm property owners experience when their rights are infringed or violated. Owners who adopt the norm would instead experience a sense of community involvement, republican civic-mindedness, and benevolence towards nonowners (and other similarly-situated owners) that is far more compensatory than money or in-kind compensation. Owners experience the satisfaction of knowing that they have fulfilled a moral obligation and take pleasure in their virtuous actions. This is, I maintain, how Aristotle would understand the norm, but it is not how the norm plays out in the proposed property jurisprudence that supports the social-obligation norm as defended by Alexander and Peñalver.

## Notes

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<sup>1</sup> Gregory Alexander and Eduardo Peñalver write separately and together on issues related to property theory, including: Gregory S. Alexander, “The Social-Obligation Norm in American Property Law,” 94 *Cornell L.Rev.* 745 (2009); Gregory S. Alexander, *The Global Debate Over Constitutional Property* (Chicago: University of Chicago Press, 2006); Eduardo Peñalver, “Land Virtues,” *Cornell L. Rev.* 94:821 (2009); Gregory S. Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012); Gregory S. Alexander and Eduardo Peñalver, “Introduction,” in *Property and Community*, eds. Gregory Alexander and Eduardo Peñalver (New York: Oxford University Press, 2010); and Gregory Alexander and Eduardo Peñalver, “Properties of Community,” 10 *Theoretical Inq. L.* 127 (2009).

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- <sup>2</sup> Alexander, “The Social-Obligation Norm,” 751.
- <sup>3</sup> Alexander and Peñalver, “Properties of Community,” 128 n1.
- <sup>4</sup> *Ibid.*, 141.
- <sup>5</sup> *Ibid.*, 129.
- <sup>6</sup> Alexander, “The Social-Obligation Norm,” 774.
- <sup>7</sup> Alexander and Peñalver, “Properties of Community,” 128 n1.
- <sup>8</sup> *Ibid.*, 129.
- <sup>9</sup> *Ibid.*, 139.
- <sup>10</sup> *Ibid.*, 143.
- <sup>11</sup> Gregory S. Alexander, “Reply: The Complex Core of Property,” 94 *Cornell L.Rev.* 1063 (2009), 1069.
- <sup>12</sup> See e.g., Carol M. Rose, “Mahon Reconstructed: Why the Takings Issue is Still a Muddle,” 57 *S. Cal. L. Rev.* 561 (1984).
- <sup>13</sup> Jed Rubenfeld, “Usings,” *Yale Law Journal* Vol 102, 1077 (1993), 1081.
- <sup>14</sup> Edwin Rams (ed). *Valuation for Eminent Domain* (Englewood Cliffs: Prentice-Hall, 1973), 18–19.
- <sup>15</sup> ‘Blackacre’ is the standard abstraction for real property in property law discussion in first-year law school textbooks. However, for our purposes, there is no need to limit Blackacre to real property, i.e. land – it functions as a placeholder for anything that might be considered property, such as human bodies, intellectual innovation (e.g. creative works), oceans, widgets, apples, ecosystems, or money.
- <sup>16</sup> Frank Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law,” 80 *Harvard Law Review* 1165 (1967), 1190.
- <sup>17</sup> Compare, for example, the explicit provisions for the use of eminent domain in the South African constitution, which, unlike the U.S. Constitution, also includes detailed restrictions on the right to compensation. See chapter 6.
- <sup>18</sup> *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878); *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (Cir.Ct.1795).
- <sup>19</sup> Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington, D.C.: Island Press, 1999), 14; see also *U.S. v. Carmack*, 329 U.S. 230, 241-42 (1946).
- <sup>20</sup> Eminent domain in South Africa is discussed in Chapter 6.
- <sup>21</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 154, 158.
- <sup>22</sup> David A. Dana and Thomas W. Merrill, *Property: Takings* (New York: Foundation Press, 2002), 59 n88. According to Dana and Merrill, 99% of all eminent domain measures are used to acquire interest in land; the only non-real property Supreme Court decision is *Ruckelshaus*, involving the forced disclosure of a trade secret. See Dana and Merrill, *Property: Takings*, 144 n232.

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- <sup>23</sup> Dana and Merrill, *Property: Takings*, 58.
- <sup>24</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005).
- <sup>25</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 3.
- <sup>26</sup> *Ibid.*, 15.
- <sup>27</sup> *Ibid.*, 6-7.
- <sup>28</sup> *Ibid.*
- <sup>29</sup> See *Nollan v. California Coastal Commission*, 483 U.S. 825, 865 (1987) (Blackmun, J., dissenting).
- <sup>30</sup> See the infamous footnote 4 from *United States v. Carolene Products Company*, 304 U.S. 144 (1938), which established the rational basis standard of review for economic and property rights. This footnote and its progeny are discussed in depth in chapter 6.
- <sup>31</sup> See *Moore v City of East Cleveland*, 431 U.S. 494 (1977).
- <sup>32</sup> Alexander, *The Global Debate*, 217.
- <sup>33</sup> Alexander, "The Social-Obligation Norm," 794.
- <sup>34</sup> Alexander, *The Global Debate*, 15.
- <sup>35</sup> *Ibid.*, 8.
- <sup>36</sup> This is also concern for the constitution builders of South Africa; see chapter 6.
- <sup>37</sup> Alexander, *The Global Debate*, 9.
- <sup>38</sup> *Ibid.*, 31.
- <sup>39</sup> *Ibid.*, 35; this matter is discussed in chapter 6.
- <sup>40</sup> *Ibid.*, 16.
- <sup>41</sup> Jedediah Purdy, "A Few Questions about the Social Obligation Norm," 94 *Cornell L. Rev* 949 (2009), 952.
- <sup>42</sup> Alexander, *The Global Debate*, 20.
- <sup>43</sup> *Ibid.*, 100.
- <sup>44</sup> see *Mugler v. Kansas*, 123 U.S. 623 (1887).
- <sup>45</sup> *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (N.J. 1971).
- <sup>46</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).
- <sup>47</sup> Alexander, "The Social-Obligation Norm," 819.
- <sup>48</sup> *Ibid.*, 779.
- <sup>49</sup> Alexander, *The Global Debate*, 217.

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<sup>50</sup> *Ibid.*, 77.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

<sup>53</sup> Alexander and Peñalver, *Introduction*, 182.

<sup>54</sup> *Ibid.*

<sup>55</sup> Alexander, *The Global Debate*, 206.

<sup>56</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 132.

<sup>57</sup> *Ibid.*, 320.

<sup>58</sup> 260 U.S. 393 (1922); *Mahon* is considered the earliest regulatory takings case.

<sup>59</sup> Alexander, *The Global Debate*, 74-76.

<sup>60</sup> For New York State in particular, the Landmark Commission can designate buildings as landmarks if are at least 30 years old. Once designated, the commission must approve alteration or demolition by issuing a certificate of appropriateness. To limit the economic impact of the regulation, the owner may apply for a hardship provision if they are incapable of earning reasonable return on their property. Meltz, Merriam, and Frank, *The Takings Issue*, 316-318, 321. New York City's program, for example, allows for reasonable return of 6%.

<sup>61</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 321. Although these regulations achieve the purpose of the social-obligation norm, the focus of the question concerning regulatory takings is always on economic impact unless property is religious or charitable, in which case the test is whether the regulation seriously interferes with the religious or charitable purpose; in those cases, the regulation constitutes a compensable takings. Meltz, Merriam, and Frank, *The Takings Issue*, 325.

<sup>62</sup> Alexander, *The Global Debate*, 77.

<sup>63</sup> Eric Claeys, "Response: Virtue and Rights in American Property Law" 94 *Cornell L.Rev.* 889 (2009) 126, quoting Alexander, "The Social-Obligation Norm," 747.

<sup>64</sup> Claeys, "Response," 126-127 (footnotes omitted).

<sup>65</sup> *Mugler v. Kansas*, 123 U.S. at 657.

<sup>66</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 168.

<sup>67</sup> 123 U.S. at 668-669.

<sup>68</sup> Alexander, *The Global Debate*, 225.

<sup>69</sup> *Ibid.*

<sup>70</sup> Ann Shields, "The World's 50 Most Visited Tourist Attractions," *Travel+Leisure* (November 10, 2014).

<sup>71</sup> Alexander, "The Social-Obligation Norm," 795.

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<sup>72</sup> Alexander and Peñalver, *Introduction*, 182.

<sup>73</sup> Alexander, “The Social-Obligation Norm,” 795.

<sup>74</sup> *Penn Central* would certainly have been decided differently had the Court implemented the type of wealth maximization that the social-obligation theorists attribute to other takings analyses, the pursuit of which is favored by the law and economics school of property law. In fact, many of the justifications supporting takings in other measures, such as an increased tax base and expanded employment opportunities, would have certainly resulted had the owners been permitted to build the planned addition upon Grand Central Terminal. See chapter 5.

<sup>75</sup> See discussion of the rivalry between economics and philosophy in Section 4.

<sup>76</sup> See discussion of Epstein in chapter 5.

<sup>77</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 315; See also *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896).

<sup>78</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 319.

<sup>79</sup> The *Penn Central* case has interesting implications about the establishment of property rights over ‘cultural property.’ An analysis of this kind of right – and whether or not communities should make property claims about their culture and its artifacts is discussed in chapter 5.

<sup>80</sup> Alexander, “The Social-Obligation Norm,” 791.

<sup>81</sup> *Parking v Atlanta*, 450 SE 2nd 200, cert. denied, 1995.

<sup>82</sup> *Berman v Parker*, 348 U.S. 26 (1954).

<sup>83</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 226.

<sup>84</sup> See discussion of *Tahoe-Sierra*, *infra*.

<sup>85</sup> Alexander, “The Social-Obligation Norm,” 794.

<sup>86</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* 535 U.S. 302 (2002).

<sup>87</sup> Alexander, *The Global Debate*, 89.

<sup>88</sup> *Ibid.*, 91.

<sup>89</sup> Alexander, “The Social-Obligation Norm,” 794.

<sup>90</sup> *State v Shack*, 58 N.J. 297, 302.

<sup>91</sup> 58 N.J. at 303

<sup>92</sup> Alexander, “The Social-Obligation Norm,” 809.

<sup>93</sup> *Ibid.*

<sup>94</sup> Peñalver “Land Virtues,” 884.

<sup>95</sup> Claeys, “Response,” 150, citing to Morriss (see note 96, *infra*).



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<sup>96</sup> See Andrew P. Morriss, *Review of Jesse Dukeminier and James E. Krier, Property (4th Edition 1998)*, 22 *Seattle U.L.Rev.* 997 (1999), 1005.

<sup>97</sup> Alexander, *The Global Debate*, 10.

<sup>98</sup> *Ibid.* 21. The social-obligations in these property regimes – and their impact on a constitutional property right for the United States – are examined in chapter 6.

<sup>99</sup> Alexander, “Reply,” 1069.

<sup>100</sup> Peñalver, “Land Virtues,” 864.

<sup>101</sup> *Ibid.*, 828.

<sup>102</sup> Jonathan Barnes, “Aristotle and Political Liberty,” in *Aristoteles’ “Politik”: Akten des XI Symposium Aristotelicum Friedrichshafen/Bodensee 25.8-3.9.1987*, ed. Günther Patzig (Göttingen: Vandenhoeck and Ruprecht, 1990), 252. Cited in Peter Mayhew, “Aristotle on Property,” *The Review of Metaphysics*, Vol. 46, No. 4 (Jun., 1993), pp. 803-831, 803; see also Karen Margrethe Nielsen, “Economy and Private Property,” in *The Cambridge Companion to Aristotle’s Politics*, eds. Marguerite Deslauriers and Pierre Destrée (Cambridge: Cambridge University Press 2013), 69.

<sup>103</sup> See Martha Nussbaum, “Aristotelian Social Democracy” in *Liberalism and the Good*, eds. B. Douglas, G. Mara, and H. Richardson (New York: Routledge, 1990), 203-52.

<sup>104</sup> See Fred D. Miller, “Property Rights in Aristotle,” in *Aristotle’s Politics: Critical Essays*, eds. Richard Kraut & Steven Skultety (Lanham: Rowman & Littlefield, 2005).

<sup>105</sup> See Mayhew, “Aristotle on Property.”

<sup>106</sup> Miller, “Property Rights in Aristotle,” 132; Mayhew, “Aristotle on Property,” 804.

<sup>107</sup> Aristotle, *Politics*, II.5 1263a 8-15.

<sup>108</sup> Mayhew, “Aristotle on Property,” 806; Aristotle, *Politics* III.8 1280a16-22.

<sup>109</sup> Mayhew, “Aristotle on Property,” 811; Aristotle is rather contemptible of commercial trade and the wealth it produces. See Nielsen, “Economy and Private Property,” 74.

<sup>110</sup> Nielsen, “Economy and Private Property,” 75.

<sup>111</sup> *Ibid.*, 78; citing *Politics* II 2 1261a17-19.

<sup>112</sup> Mayhew, “Aristotle on Property,” 808.

<sup>113</sup> Nielsen, “Economy and Private Property,” 79.

<sup>114</sup> Aristotle, *Politics* II.5 1263b15.

<sup>115</sup> Miller, “Property Rights in Aristotle,” 125, citing Aristotle, *Politics in passim*.

<sup>116</sup> Alexander and Peñalver, *Introduction*, 128.

<sup>117</sup> See Shlomo Avineri and A. de-Shalit, “Introduction,” in *Communitarianism and Individualism*, eds. Shlomo Avineri and A. de-Shalit (Oxford: Clarendon Press, 1992), 3-4.

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<sup>118</sup> Alexander and Peñalver, *Introduction*, 139.

<sup>119</sup> David Lametti, “The Objects of Virtue,” in *Property and Community*, eds. Gregory Alexander and Eduardo Peñalver (New York: Oxford University Press, 2010), 4.

<sup>120</sup> Joseph Singer, “Democratic Estates: Property Law in a Free and Democratic Society,” 94 *Cornell L.Rev.* 1009 (2009), 1035; citing Alexander, “The Social-Obligation Norm,” 760-73.

<sup>121</sup> See, e.g. Alexander and Peñalver, *Introduction*, 149; see also, e.g. Charles Taylor, “Atomism,” in *Communitarianism and Individualism*, eds. Shlomo Avineri and A. de-Shalit (Oxford: Clarendon Press, 1992).

<sup>122</sup> Avineri and de-Shalit, “Introduction,” 6-7. Liberals, for that matter, would also agree that community has intrinsic value.

<sup>123</sup> *Ibid.*, 7.

<sup>124</sup> *Ibid.*, 9.

<sup>125</sup> Michael Sandel, “The Procedural Republic and the Unencumbered Self,” in *Communitarianism and Individualism*, eds. Shlomo Avineri and A. de-Shalit (Oxford: Clarendon Press, 1992), 15.

<sup>126</sup> *Ibid.*, 13. See also Sandel, “The Procedural Republic,” 14: “Liberal ethics asserts the priority of right, and seeks principles of justice that do not presuppose any particular conception of the good.”

<sup>127</sup> Erik J. Olsen, *Civic Republicanism and the Properties of Democracy* (Lanham: Lexington Books, 2005), 256.

<sup>128</sup> *Ibid.*, 257.

<sup>129</sup> *Ibid.*, 278.

<sup>130</sup> *Ibid.*, 119.

<sup>131</sup> Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 96-97, 103, 141; see also Olsen, *Civic Republicanism*, 118, 126.

<sup>132</sup> Olsen, *Civic Republicanism*, 127.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, 128.

<sup>135</sup> Taylor, “Atomism,” 32.

<sup>136</sup> *Ibid.*, 45.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, 45-46.

<sup>139</sup> Peñalver, “Land Virtues,” 863.

<sup>140</sup> *Ibid.*, 863-4.

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<sup>141</sup> Ibid., 828.

<sup>142</sup> Alexander, “The Social-Obligation Norm,” 760. At footnote 62, Alexander notes that this understanding of the social obligation norm “is one version of what I have called the ‘proprietary’ theory of property” in Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970* (Chicago: University of Chicago Press, 1997). There is no mention of Aristotle in this early work.

<sup>143</sup> Alexander and Peñalver, *Introduction*, 135.

<sup>144</sup> Peñalver, “Land Virtues,” 863.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid., 870 (footnotes omitted).

<sup>147</sup> Miller, “Property Rights in Aristotle,” 131.

<sup>148</sup> Olsen, *Civic Republicanism*, 282.

<sup>149</sup> Alexander, “The Social-Obligation Norm,” 768.

<sup>150</sup> Alexander and Penalver, “Properties of Community,” 135.

<sup>151</sup> Alexander, “The Social-Obligation Norm,” 763–764.

<sup>152</sup> According to Martha Nussbaum, the “central human functional capabilities” include life, bodily health, bodily integrity, senses, imagination, and thought, emotions, practical reason, affiliation, other species, play, and control over one’s political and material environments. See Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 78-80.

<sup>153</sup> Alexander, “The Social-Obligation Norm,” 766, citing Jürgen Habermas, *Struggles for Recognition in Constitutional States*, 1 Eur. J. Phil. 128, 132 (1993).

<sup>154</sup> Alexander, “The Social-Obligation Norm,” 766

<sup>155</sup> Ibid., 770

<sup>156</sup> Ibid.

<sup>157</sup> Peñalver, “Land Virtues,” 869.

<sup>158</sup> Ibid., 828.

<sup>159</sup> Alexander, “The Social-Obligation Norm,” 768.

<sup>160</sup> Ibid., 769.

<sup>161</sup> Ibid., 767.

<sup>162</sup> Lametti, “The Objects of Virtue,” 12.

<sup>163</sup> Andrés Rosler, *Political Authority and Obligation in Aristotle* (Oxford: Oxford University Press, 2005), 167 n43, quoting Elizabeth Frazer’s definition of communitarianism from Elizabeth Frazer,

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“Communitarianism,” in *The Oxford Companion to Philosophy*, ed. Ted Honderich (Oxford: Oxford University Press, 1995), 142.

<sup>164</sup> Rosler, *Political Authority*, 174 n57, quoting Richard Kraut, *Aristotle: Political Philosophy* (Oxford: Oxford University Press, 2002), 353-4.

<sup>165</sup> Mayhew, “Aristotle on Property,” 831.

<sup>166</sup> Alexander and Peñalver, *Introduction*, 83-84.

<sup>167</sup> *Ibid.*, xi.

<sup>168</sup> *Ibid.*, xi-xii.

<sup>169</sup> Mayhew, “Aristotle on Property,” 810, citing Aristotle *Politics* 1266b28-31.

<sup>170</sup> *Ibid.*, 817.

<sup>171</sup> See also Nielsen, “Economy and Private Property,” 83-84: “[C]ommon use is a privilege bestowed voluntarily by the owner,” and common use is both loaning items to neighbors, as well as “large scale public expenditures undertaken by citizens with the Aristotelian virtue of magnificence.” (*megaloprepeia*; See *Nicomachean Ethics*, IV 2).

<sup>172</sup> Mayhew, “Aristotle on Property,” 819.

<sup>173</sup> *Ibid.*, 820.

<sup>174</sup> *Ibid.*, 816.

<sup>175</sup> *Ibid.*, 828.

<sup>176</sup> *Ibid.*, 823.

<sup>177</sup> *Ibid.*, 824. Common meals are not provided solely as humanitarian gestures or as fulfillment of the duty of generosity: they promote the education of citizenry by building patrimony and permitting the poor to observe the ‘virtuous’ behavior and manners of the wealthy. They allow the young to observe correct ways of conducting oneself in a social context, and they also further civic friendship. According to Mayhew, it is unclear whether attendance at such meals was compulsory. See Mayhew, “Aristotle on Property,” 825 n60.

<sup>178</sup> Olsen, *Civic Republicanism*, 148.

<sup>179</sup> Miller, “Property Rights in Aristotle,” 129.

<sup>180</sup> Alan Ryan, *Property* (Minneapolis: University of Minnesota Press, 1988), 16.

<sup>181</sup> Olsen, *Civic Republicanism*, 149; this is precisely Radin’s point. See chapter 2.

<sup>182</sup> Miller, “Property Rights in Aristotle,” 155.

<sup>183</sup> Richard Kraut, “Nature in Aristotle’s Ethics and Politics” in *Freedom, Reason and the Polis: Essays in Ancient Greek Political Philosophy*, eds. David Keyt, Fred D. Miller Jr. (Cambridge: Cambridge University Press, 2007), 201 (citing *Nicomachean Ethics*, VIII.12 1162a17-19).

<sup>184</sup> Christof Rapp, “Was Aristotle a Communitarian?” *Graduate Faculty Philosophy Journal* Vol. 17, Nos. 1-2 (1994), 339.

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<sup>185</sup> Ibid., 340.

<sup>186</sup> Ibid., 341.

<sup>187</sup> Ibid., 342.

<sup>188</sup> Rosler, *Political Authority*, 167.

<sup>189</sup> Ibid., 227.

<sup>190</sup> Ibid., 223.

<sup>191</sup> Ibid., 167.

<sup>192</sup> Ibid., 170-71.

<sup>193</sup> Rosler, *Political Authority*, 171 fn 51, quoting Christine Korsgaard: “[T]o act from duty is not just to be moved by a blank conviction that an action is required, but rather to be moved by a more substantial thought that inherently involves an intelligent view of why the action is required.” Christine Korsgaard, “From Duty and for the Sake of the Noble: Kant and Aristotle on Morally Good Action,” in *Aristotle Kant and the Stoics. Rethinking Happiness and Duty*, eds. Engstrom and Whiting (Cambridge: Cambridge University Press, 1996), 203-36, 219.

<sup>194</sup> Rosler, *Political Authority*, 173, quoting Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 95.

<sup>195</sup> Rosler, *Political Authority*, 173 n54, responding to Taylor “Atomism.”

<sup>196</sup> Miller, “Property Rights in Aristotle,” 132.

<sup>197</sup> Ibid., 121.

<sup>198</sup> Ibid., 124.

<sup>199</sup> Ibid., 125.; see Aristotle *Rhetoric* Book 1 chapter 5, 1362a19-22: “The criterion of ‘security’ is the ownership of property in such places and under such conditions that the use of it is in our power; and it is ‘our own’ if it is in our own power to dispose of it or keep it. By ‘disposing of it’ I mean giving it away or selling it.”

<sup>200</sup> Ibid., 132.

<sup>201</sup> See Nussbaum, “Aristotelian Social Democracy,” 205: “Even when private property is permitted, it is to be held only provisionally, subject to claims of need.”

<sup>202</sup> Miller avoids the obvious problem about rights by claiming it is ‘up to’ one person and not another how property is to be used. Miller, “Property Rights in Aristotle,” 132. See also Aristotle, *Politics*: “Coexistence in a community...is always difficult, but especially so among those who share their property.” 1263b15 – 22.

<sup>203</sup> Miller, “Property Rights in Aristotle,” 133.

<sup>204</sup> Rapp, “Was Aristotle a Communitarian?” 346.

<sup>205</sup> Miller, “Property Rights in Aristotle,” 135.

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<sup>206</sup> Ibid., 134.

<sup>207</sup> Aristotle *Politics* VI.5 1320a35-b1 (cited by Miller, “Property Rights in Aristotle,” 137).

<sup>208</sup> Aristotle *Politics* VI.3 1318a24-6; III.10 1281a17-21 (cited by Miller, “Property Rights in Aristotle,” 138).

<sup>209</sup> Aristotle *Politics* VI.5 1320a 4-11; see also Miller, “Property Rights in Aristotle,” 138 n. 48.

<sup>210</sup> Nielsen, “Economy and Private Property,” 84.

<sup>211</sup> Ibid., 85.

<sup>212</sup> Ibid., 74-75.

<sup>213</sup> Miller, “Property Rights in Aristotle,” 139.

<sup>214</sup> Mayhew, “Aristotle on Property,” 827, quoting Aristotle, *The Athenian Constitution* 50.2.

<sup>215</sup> Miller, “Property Rights in Aristotle,” 139-140. To that extent, Nussbaum incorrectly claims that “housing policies that have been adopted in some socialist and social democratic countries, giving the homeless certain rights toward unoccupied or luxury housing,” is Aristotelian. See Nussbaum “Aristotelian Social Democracy,” 232 n86, 249.

<sup>216</sup> Fred D. Miller, Jr., *Nature, Justice, and Rights in Aristotle’s Politics* (Oxford: Clarendon Press, 1995), 96.

<sup>217</sup> Rosler, *Political Authority*, 74.

<sup>218</sup> Ibid., 72 (citing Aristotle *Politics* III.6 1278b17-30).

<sup>219</sup> Ibid., 142.

<sup>220</sup> Ibid., 63.

<sup>221</sup> Ibid., 80. Rosler notes the similarity to Hegel, who claims it is natural and rational, and not contractual, to create the state. “What seems to lie behind this comment is a warning against thinking of the state in terms of a contract, against transferring, in Hegel’s own words, ‘the determinations of private property to a sphere of a totally different and higher nature.’” Ibid., 80 n66.

<sup>222</sup> Miller, *Nature, Justice, and Rights in Aristotle’s Politics*, 129-131.

<sup>223</sup> Ibid., 137.

<sup>224</sup> Rosler, *Political Authority*, 224, citing to *Aristotle Politics. Books VII and VIII*, trans. with introduction and commentary Richard Kraut (Oxford: Oxford University Press, 1997), 173 (emphasis added).

<sup>225</sup> Mayhew, “Aristotle on Property,” 811.

<sup>226</sup> Ibid., 812.

<sup>227</sup> See R.F. Stalley, “Aristotle’s Criticism of Plato’s Republic,” in *Companion to Aristotle’s Politics*, eds. David Keyt and Miller (Oxford: Blackwell, 1991), 195.

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<sup>228</sup> Mayhew, “Aristotle on Property,” 814.

<sup>229</sup> *Ibid.*, 813, quoting Aristotle *Politics* 1263b5-8.

<sup>230</sup> Kraut notes that “the rational calculation self interest” (the normative explanation why we ought to pursue good communities) cannot solely explain why people are led to engage in the political life. We are also driven by a propensity or impulse (*hormê*) – a nonrational psychological proposition or political urge that is akin to the sexual urge – for political life. In this sense, the irrational and potentially dangerous drive to associate with strangers and so-called ‘political friends’ offers a very different interpretation of whether there exists a ‘obligation’ to community at all. These relationships (family, tribes, etc) are ‘noninstrumental. Richard Kraut “Nature in Aristotle’s Ethics and Politics” in *Freedom, Reason and the Polis: Essays in Ancient Greek Political Philosophy*, eds. David Keyt, Fred D. Miller Jr. (Cambridge: Cambridge University Press, 2007), 203-205.

<sup>231</sup> According to Claeys, the social-obligation theorists are engaged in a ‘rivalry’ between philosophy and economics. See Claeys, “Response,” 120.

<sup>232</sup> Amartya Sen’s capabilities approach is also an alternative to law and economics: “Well-being is best assessed not in the utility space but capability space, that is, in the freedom people have to do or be what they have reason to value.” See Amartya Sen, *Inequality Re-Examined* (Oxford: Clarendon Press, 1992) cited in Séverine Deneulin, “Recovering Nussbaum’s Aristotelian Roots” *Revista Cultura Económica* Año XXIX, No 81/82 Diciembre 2011: 31-37, 31.

<sup>233</sup> Peñalver, “Land Virtues,” 858 n149. See also Alexander, “The Social-Obligation Norm,” 748: “[T]he version of the social-obligation norm that I develop here is morally superior to other candidates . . . because it best promotes human flourishing . . .”

<sup>234</sup> Peñalver, “Land Virtues,” 847.

<sup>235</sup> Harold Demsetz, “Toward a Theory of Property Rights,” *57 Am. Econ. Rev.* 347, 354–58 (1967), 355 cited in Peñalver, “Land Virtues,” 846.

<sup>236</sup> Peñalver, “Land Virtues,” 840.

<sup>237</sup> *Ibid.*, 841.

<sup>238</sup> *Ibid.*, 834.

<sup>239</sup> *Ibid.*, 828.

<sup>240</sup> Joseph Singer, “Democratic Estates,” 1055.

<sup>241</sup> Peñalver, “Land Virtues,” 823.

<sup>242</sup> *Ibid.*, 824.

<sup>243</sup> *Ibid.*, 876.

<sup>244</sup> The possibility of a moralized property law is discussed in section 5.

<sup>245</sup> Katrina M. Wyman, “Response: Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment,” *94 Cornell L. Rev.* 991 (2009), 995.

<sup>246</sup> Larissa Katz, “Ownership and Solidarity: A Kantian Alternative,” *Legal Theory*, 17 (2001), 117–143, 125.

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<sup>247</sup> Ibid., 124.

<sup>248</sup> Alexander and Peñalver, “Properties of Community,” 135.

<sup>249</sup> Ibid., 119-120.

<sup>250</sup> Claeys, “Response,” 133.

<sup>251</sup> Louis Kaplow, “Primarily Goods, Capabilities...or Well-Being?” *The Philosophical Review*, Vol. 116, Oct. 2007 No. 4 pp. 603-632, 606.

<sup>252</sup> Katz, “Ownership and Solidarity,” 125, citing Penalver, “Land Virtues,” 878, and Alexander, “The Social-Obligation Norm,” 760, 774.

<sup>253</sup> Hanoch Dagan *Property: Values and Institutions* (Oxford: Oxford University Press, 2011); cited in Katz, 125 fn. 17.

<sup>254</sup> Katz, “Ownership and Solidarity,” 125, citing Dagan, *Property*, 57.

<sup>255</sup> Peñalver, “Land Virtues,” 850.

<sup>256</sup> Ibid., 851.

<sup>257</sup> Kaplow, “Primary Goods,” 606.

<sup>258</sup> Ibid., 632.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Peñalver, “Land Virtues,” 826.

<sup>264</sup> See, e.g., Linda Zagzebski, *Virtues of the Mind* (Cambridge: Cambridge University Press, 1996).

<sup>265</sup> The social obligation entails “...an obligation to share property, at least in surplus resources, in order to enhance the abilities of others to flourish[.]” Alexander and Peñalver, “Properties of Community,” 148.

<sup>266</sup> See Richard Pipes, *Property and Freedom* (New York: Vintage, 2000).

<sup>267</sup> See Gregory Alexander, “Governance Property,” *University of Pennsylvania Law Review* (Vol. 160, No. 7, June 2012), 1855: “[E]xclusion theory... is a distorted and misleading view of property[.]”

<sup>268</sup> Rosalind Hursthouse, “Virtue Theory and Abortion” *Philosophy and Public Affairs* Vol. 20, No. 3 (Summer 1991), 223-246, 225.

<sup>269</sup> Ibid., 226.

<sup>270</sup> Claeys, “Response,” 113.



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- <sup>271</sup> Peñalver, “Land Virtues,” 876.
- <sup>272</sup> Claeys, “Response,” 132.
- <sup>273</sup> *Ibid.*, 102-103.
- <sup>274</sup> Peñalver, “Land Virtues,” 870 -872.
- <sup>275</sup> *Ibid.*, 869.
- <sup>276</sup> *Ibid.*, 828.
- <sup>277</sup> *Ibid.*, 877.
- <sup>278</sup> Wyman, “Response,” 997-1000.
- <sup>279</sup> Peñalver, “Land Virtues,” 877-884.
- <sup>280</sup> *Ibid.*, 880.
- <sup>281</sup> *Ibid.*, 876-877.
- <sup>282</sup> Jeremy Waldron, “Homelessness and the Issue of Freedom” 39 *UCLA L. Rev.* 295 (1991).
- <sup>283</sup> Peñalver, “Land Virtues,” 881. Here, Peñalver makes a strong case *in favor* of individual ownership – particularly in homes – and *against* the community’s right and power to determine the conditions of ownership. I will return to this in section 5 and also in chapter 3.
- <sup>284</sup> Claeys, “Response,” 128.
- <sup>285</sup> Waldron, *The Right to Public Property* (Oxford: Oxford University Press, 1988), 32.
- <sup>286</sup> Claeys, “Response,” 129.
- <sup>287</sup> *Ibid.*, 130; citing Aristotle, *Nicomachean Ethics*, *supra* note 14, X.9, at 1179a33-80a14.
- <sup>288</sup> Alexander and Peñalver, *Introduction*, 179.
- <sup>289</sup> *Ibid.*
- <sup>290</sup> Alexander, *The Global Debate*, 34.
- <sup>291</sup> Property in terms of wealth might be given in the form of taxes paid in cash, but property *in kind* is given through transfers of real property and other noncash types of goods. The social obligation norm clearly contemplates that owners acting under the norm can be obligated to give up their property in kind for use or ownership by others. “The nonfungibility of various components of human flourishing...suggests that redistribution of land rights via in-kind transfers of ownership or occupancy will, at times, be the only appropriate way of fostering human flourishing, and that exclusive reliance on an aggregated system of taxation and monetary payments will be inadequate, efficiency considerations notwithstanding.” See Peñalver, “Land Virtues,” 882. In other words, the norm requires that owners give up specific property (say, a home) so that others might use that property as *their* home if ‘flourishing’ is the result. This is apparently true for *all* kinds of property, i.e. food, agriculture, clothing, medicine, etc.

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<sup>292</sup> Alexander and Peñalver, “Properties of Community,” 148. “[T]he state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities.”

<sup>293</sup> Claeys, “Response,” 127.

<sup>294</sup> Peñalver, “Land Virtues,” 849.

<sup>295</sup> Rosalind Hursthouse, “Virtue Theory and Abortion,” 226.

<sup>296</sup> Alexander, “The Social-Obligation Norm,” 782.

<sup>297</sup> Claeys, “Response,” 131.

<sup>298</sup> Nielsen, “Economy and Private Property,” 87.

<sup>299</sup> According to Wyman, there is something “faintly disquieting about the idea of a legal policymaker specifying an objective goal and then using that goal to select virtues that he or she will structure land law to attain.” And, “[r]equiring a legal decision maker to articulate an objectively desirable endpoint that would be the basis for land law could be in tension with the idea animating our pluralistic society that individuals have wide leeway to pursue their own ways of life.” Wyman, “Response,” 1009.

<sup>300</sup> Carol Rose, “Psychologies of Property (and Why Property is not a Hawk/Dove Game),” in *Philosophical Foundations of Property Law*, eds. James Penner, Henry Smith (Oxford: Oxford University Press, 2013), 272.

<sup>301</sup> *Ibid.*, 275.

<sup>302</sup> *Ibid.*, 279. According to Rose, literary examples tend to vilify owners and lionize the dispossessed.

<sup>303</sup> *Ibid.*, 288. The possibility that members of contemporary liberal democracies might possess this mutation when they choose not to engage in extensive property redistribution is discussed in chapter 6.

<sup>304</sup> *Ibid.*, 279.

<sup>305</sup> Of course, the make, model, and year of the car might facilitate the making of this distinction.

<sup>306</sup> *Ibid.*, 280.

<sup>307</sup> *Ibid.*, 282.

<sup>308</sup> *Ibid.*, 283.

<sup>309</sup> Rose, 283.

<sup>310</sup> Daniel C. Russell, “What Virtue Ethics can learn from Utilitarianism,” in *The Cambridge Companion to Utilitarianism*, eds. Ben Eggleston and Dale E. Miller (Cambridge: Cambridge University Press, 2014), 274.

<sup>311</sup> Russell, “What Virtue Ethics,” 273.

<sup>312</sup> Mark Lebar, “Virtue and Politics,” in *The Cambridge Companion to Virtue Ethics*, Daniel C. Russell (ed) (Oxford: Cambridge University Press, 2013), 267.

<sup>313</sup> Rosler, *Political Authority*, 4 and *passim*.

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<sup>314</sup> Lebar, “Virtue and Politics,” 268.

<sup>315</sup> See prior discussion of the ‘rivalry’ between virtue and economics.

<sup>316</sup> Although he does not develop the idea in the body of the article, Alexander recognizes that virtuous owners – those who give it up property on their own and without coercion – are both hard to come by and difficult to ‘create’ out of nonvirtuous owners, which apparently justifies the quick move from the possibility of the virtuous owner to the inevitability of the need for state action to enforce property obligations.

<sup>317</sup> This is Judith Jarvis Thomson’s example, but Hursthouse notes that there is a virtue theory undercurrent here.

<sup>318</sup> Lebar, “Virtue and Politics,” 273.

<sup>319</sup> *Ibid.*, 274.

<sup>320</sup> *Ibid.*

<sup>321</sup> See Douglas Rasmussen and Douglas Den Uyl, *Liberty and Nature* (La Salle: Open Court, 1991) and their *Norms of Liberty* (University Park: The Pennsylvania State University Press, 2005).

<sup>322</sup> Claeys, “Response,” 138.

<sup>323</sup> Lebar, “Virtue and Politics,” 277: “Hursthouse’s Constraint suggests that there is a paradox in the idea that virtuous persons can exercise coercive power in the political order.”

<sup>324</sup> *Ibid.*, 276. Claeys is more direct about these concerns: “In practice, theories centered around virtue reinforce such factions’ drives to be factious and acquire hegemonic power. Virtue theories can therefore be extremely destructive and inhumane. This possibility does not make all virtue regulation inappropriate, but it does make virtue theory problematic as a dominant category in politics.” Claeys, “Response,” 128.

<sup>325</sup> Wyman, “Response,” 1005.

<sup>326</sup> See Ilya Somin, *The Grasping Hand: Kelo v. City of New London & The Limits of Eminent Domain* (Chicago: University of Chicago Press, 2015) for data and statistics on the popular and legislative responses to *Kelo* (discussed, *infra*, chapter 6).

<sup>327</sup> James V. Berkovec and Peter M. Zorn, “Nearly 90 Percent of Americans Will Achieve Homeownership,” [www.freddiemac.com/finance/smm/apr97/berkzon.pdf](http://www.freddiemac.com/finance/smm/apr97/berkzon.pdf) (accessed October 31, 2016).

<sup>328</sup> Claeys, “Response,” 132.

<sup>329</sup> Peñalver, “Land Virtues,” 882.

<sup>330</sup> Eduardo Peñalver, “Property Metaphors and Kelo v. New London: Two Views of the Castle,” 74 *Fordham Law Review* 2971 (2006), 2975.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*, 2976.

<sup>333</sup> *Ibid.*

<sup>334</sup> Alexander and Peñalver, *Introduction*, 148.

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<sup>335</sup> Wyman, “Response,” 1003.

<sup>336</sup> *Ibid.*

<sup>337</sup> Eduardo Peñalver and Sonia Katyal, *Property Outlaws* (New Haven: Yale University Press, 2010), 69.

<sup>338</sup> *Ibid.*, 70 (footnote omitted).

<sup>339</sup> Purdy, “A Few Questions,” 951.

<sup>340</sup> *Ibid.* (footnote omitted).

<sup>341</sup> “Use your own property in such a manner as to not injure that of another.” (1 Blackstone’s Commentaries 306).

<sup>342</sup> The example is Nozick’s.

<sup>343</sup> See Thomas A. Merrill and Henry Smith, “The Morality of Property,” 48 *Wm. & Mary L.Rev* 1849 (2007), 1855.

<sup>344</sup> Alexander and Peñalver, *Introduction*, 178.

<sup>345</sup> See Merrill and Smith, “The Morality of Property”; see also David Schmitz, “Equal Respect and Equal Shares” *Soc. Phil. & Pol.* Vol. 19:1 Winter 2002, 257–259.

## Chapter 3

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### *Hegelian Property, Personhood, and Eminent Domain*

This chapter investigates Hegel's conception of property as a fundamental element in the ethical life of both individuals and communities, and attempts to determine the propriety and extent of Hegel's idea of property in terms of private and public law. For Hegel, private property allows for the recognition of oneself and one another, and property holding therefore permits recognition between conflicting persons and their competing wills. Regarding private law—the statutes and common law jurisprudence that regulates ownership claims between individuals—Hegel's conception *appears* modern and even liberal, but this portrayal ends abruptly when the liberal conception of private property rights abuts the ethical priority of the state and its unregulated sovereign authority over property. For Hegel, this is unproblematic because, like all rights, the private property right—as a purely abstract, formal, legal/juridical right—is itself a product or result of the very state that can claim priority over it. This reveals the dialectic inherent in the both the conception and exercise of the right, in which the private right to property at the level of civil society confronts the public right of the state, resulting in both the preservation and uplifting of the right, and, at the same time, its cancellation or annihilation it at the level of the state. This conflict is exemplified by the common law practice of eminent domain, where private property is subject to a decisional 'takings' by the state for (ostensibly) public use. Because Hegel fails to provide any vision of a public law that restricts state prerogative in terms of rights, it is debatable whether his theory of property can be said to be a rights-based theory in private law as well.

Hegelian scholars on one side of the debate, represented here by legal theorist Margaret Jane Radin, argue that the mere fact of residential occupancy should put an almost complete stop to residential eminent domain due to the importance of the home in the development of personality and freedom. Hegelian scholars on the other side of the debate, represented by Alan Brudner, argue that the Fifth Amendment's takings provision reflects a distinctively Hegelian position on expropriations, which requires persons to relinquish private property to the interests of the community. If the latter interpretation is correct, then property rights are easily overridden by claims of public use and, I will argue, underprotected on that basis. This chapter argues that the former interpretation should prevail, which, by limiting the state's prerogative to expropriate in all but the most exigent circumstances, results in the protection of the home as the *situs* of personhood, recognition, and ultimately, freedom.

Section 1 consists of two parts: Radin's property for personhood theory is followed by a critical analysis. Because of Radin's claim that homes should enjoy greater legal protection than other types of property, section 2 explores the importance of the home through a variety of lenses. Section 3 is a lengthy journey through Hegelian property, from its basis in personality and freedom to its role in civil society and finally its putative annihilation by the state's power of eminent domain. Section 4 revisits Radin's claims with a pair of critiques. The chapter concludes with the recognition that Hegelian property theory can provide robust *social* property rights—rights that also serve robust privacy interests—but, because those rights wither at the level of the state, a different kind of political theory is needed to promote and protect the privacy interest protected by private property.

### **Section 1. Takings and Personhood**

According to Margaret Jane Radin's modified Hegelian Personhood Theory, homes and personal property deserve strict constitutional scrutiny and protection, while commercial or fungible property deserve very little. Part 1 describes Radin's personhood theory; the main

critique, in part 2, is a response to Radin, primarily in regards to her ability to make a meaningful and principled distinction between fungible and nonfungible property.

### **Part 1. Radin's Hegelian Derivation**

Radin is attempting to use Hegel's property theory in order to "to develop a contemporary view useful in the context of the American legal system."<sup>1</sup> Arguing that Hegel's conception of the necessity of property for realizations of personality and freedom implicates legal norms that preclude the expropriation of homes, Radin justifies a robust right of private personal property in the home but denies similarly robust rights in non-personal or fungible property. For Radin, homes and personal property deserve to be protected by the strict scrutiny standard of constitutional review, which requires, in the jurisprudence of the U.S. Supreme Court, that legislation which infringes upon fundamental rights be struck down unless it is 'necessary to achieve a compelling governmental objective.' Under current law, measures which implicate property rights (including rights in homes) are subject to the far more permissible rational basis standard, which permits legislation if it is rationally related to a legitimate government objective. By arguing that persons have a fundamental right to the property that constitutes their homes and personal possessions, Radin presents a property theory where rights are important insofar as they promote the development of personality. For Radin, property and the rights that protect certain kinds of it are not instrumental towards personhood, but constitutive of it. Conversely, commercial or non-personal property deserves little, if any, protection: state regulation of this category of property are mere police powers, and do not even rise to the level of compensability unless (presumably) there is an occupation-type takings.

#### **Personal Property**

According to Radin, "[p]ersonal property marks out a category of things that become justifiably bound up with the person and partly constitutive of personhood. Thus, a normative view of personhood, and hence a normative view of human flourishing, is needed in order to identify which objects are appropriately personal."<sup>2</sup> Like the social obligation norm, Radin intends that

designating things as "personal property" serves to identify what things promote human flourishing:

I have attached the label 'personal' to property that is connected, and is understood morally as rightly connected to the proper development and flourishing of persons, understood primarily in its positive aspect, and I have attached the label 'fungible' to property that is not connected to persons in this way but instead is understood as representing interchangeable units of exchange value.<sup>3</sup>

These rights "form a continuum from fungible to personal," so that the personhood perspective "generates a hierarchy of entitlements: the more closely connected with personhood, the stronger the entitlement."<sup>4</sup>

For Radin, personal property describes, in particular, the home. She makes a "broad moral claim that the personal interest of an individual possessing a home should trump competing fungible interests,"<sup>5</sup> which entails the position that a tenant's interest trumps those of a landlord, and also that the personal interests of the mortgagor trumps the fungible interest of the lender.<sup>6</sup> Although Radin proposes that there is a continuum from protected personal to unprotected fungible (or commercial) property, personal property has greater moral weight and is deserving of greater legal protection. As examples, Radin notes that the use of property as a home is more closely connected to personhood than using it as a garbage dump for one's factory, and that airplane noise takes more from a hearing resident than from a hearing proprietor, which in turn takes more than from a nonhearing corporation.<sup>7</sup>

Radin's primary argument is that eminent domain should be severely restricted when the state seeks to acquire property that implicates interests in personhood, the home being the prime example of such property.<sup>8</sup> The reasons for this restriction are based on the idea that full personhood is developed in the privacy of the home, and homes are assumed to contain the other instances of personal property that allow for the injection of will into the world: family heirlooms, clothing, photographs, kitchen items, and so forth. Personhood and its development are, to a large extent, private affairs. Even if personhood or will is made objective through recognition by others,<sup>9</sup> the initial willful decision to choose this or that object as my willed object is *my* decision:



in fact, were the public involved, then it would be *their* will that causes me choose this or that property. An object that already has will in it—the will of other people or even the public—cannot be made the object of my personality. However, private ownership is not just about the right to use objects or to “feed ourselves, and our loved ones.” Rather, writes privacy scholar Annabelle Lever, it is about the “ability to find forms of these that suit us, and respond to our particular beliefs and needs, tastes and temperaments.”<sup>10</sup>

Homes are therefore uniquely important for the development of personality. Consequently, a taking of the home, even upon payment of the required fair market value, can never justly compensate a person who has been turned out of their home to ostensibly benefit the public good. This is because, for Radin, the market is not capable of determining the subjective value of personal property. As a result, the ‘just compensation’ requirement for forced transfers of personal property can never truly justly compensate.

In order to protect it, Radin therefore supports the strict scrutiny standard of review for expropriation of personal property:

In the case of personal property there should be some constitutional mechanism for keeping it in the hands of its holder except in dire cases. In other words, some kind of ‘compelling state interest’ test for compensated takings of personal, but not fungible, property seems to be appropriate. In essence, we should recognize a substantive due process limitation on the eminent domain power.<sup>11</sup>

Because of the importance of the home, Radin urges that the Supreme Court ask, “What conception of human flourishing—of personhood in the context of community—are we fostering by sustaining or disallowing” a statute or legislative measure that takes private property for public use.<sup>12</sup> Although “Radin is careful to note that the law has not recognized a personhood limitation on the power of eminent domain,” she argues that “favoring a personal interest could also mean giving it greater protection from state interference.”<sup>13</sup> In terms of takings, “Radin suggests that the state might be required to give better reasons for taking someone's home by eminent domain than taking land held solely for investment.”<sup>14</sup>

[P]erhaps we are unwilling to presume that all single-family homes are personal because many houses are held only for investment, and a subjective inquiry into each case slows down government too much. On the other hand, perhaps the personhood perspective is so deeply embedded that, without focusing on the problem, we expect that the condemning authority will take fungible property where possible.<sup>15</sup>

As it stands, eminent domain jurisprudence views *all* property as fungible. Radin is therefore looking not only for a moral limit on takings that will either prevent it or provide for increased compensation when it is implemented against personal property, but also for a way to *deny* compensation if the property interest is not closely connected to personhood.<sup>16</sup> The Takings Clause, therefore, should only protect *personal* property.

Radin's protection of the home extends to tenants in rental property as well. According to Benjamin Barros, Radin not only defends extensive regulatory rent control, but that "the centerpiece of her argument in favor of rent control is that the personal interest in the home trumps competing, fungible interests."<sup>17</sup> Radin:

[M]y claim is simply that the private home is a justifiable form of personal property, while a landlord's interest is often fungible. A tenancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority claim over curtailment of merely fungible interests of others.<sup>18</sup>

Therefore, for Radin, a rented home has the same moral status (at least in terms of the right to exclude and the duty not to interfere) as an owned home, and a tenant's right to her personal property in the form of a home is just as strong as the owner's right. Unless there is a 'compelling state interest' in the property, eminent domain cannot be used to evict and displace tenants as well as owners. Once secured in one's home, Radin's personal property right is truly *in rem*, a right against the world, which includes both the state and the actual owner of the property.

Because tenants have the same rights as homeowners, and because landlords have only fungible interest in their properties, any restriction of landlords' rights in favor of tenants' personhood rights pursuant to statute (mostly in the form of rent stabilization and housing codes) are explicitly *not* takings, but rather valid uncompensable exercises of the state's police power. According to Radin, housing regulations foster tenants' personhood by recognizing the

nonmarket significance of their homes. The result is that fungible or commercial property enjoys far less constitutional protection than personal property.

## **Part 2. Several Critical Assessments**

Because Radin's is a radical reinterpretation of the normative structures of both takings and landlord/tenant law, her property for personhood theory can be critiqued from a variety of angles. Although her argument for the protection of the home against eminent domain accords with several of the objectives contained herein—primarily, that homes should enjoy constitutional/strict protection—there are reasons to reject many of Radin's premises and conclusions in regards to the personal/fungible distinction, her reading of Hegel, and her larger purpose of arguing for the noncommodification of personal property. The first of these critiques is addressed here; the remaining critiques are found after the discussion of Hegel.

Like the social obligation theorists, Radin is trying to further the 'ethical purpose'<sup>19</sup> of private property. Together, these theories argue that if private property does not serve some ethical purpose or goal, particularly towards the furtherance of personality or human flourishing, then extensive regulation of property is justified to the extent it causes property to work towards those goals. For Radin, the distinction between protected and regulated property is most precisely drawn between personal and fungible property. As Radin is aware, there are many coordination and litigation problems with this approach.<sup>20</sup>

For example, if a person is planning on building a home on a vacant lot as their own residence, then Radin supports a wide latitude of rights because this constitutes *personal* property. If the same person is constructing a building (even the very same building) to rent to others as dwellings, then a large amount of regulation is acceptable because the property is now *fungible*. Once a home goes 'on the market,' its owners no longer enjoy the protections Radin proposes for personal property because persons living in homes slated for sale are *speculators*.

Property rights do, of course, create distinct power relationships between persons (both natural and artificial) and the state. By natural, I mean individual human beings; artificial persons

include corporations, churches, non-profit organizations, partnerships, trusts, and Indian tribes, all of which can own property and enjoy property rights in most liberal democratic property regimes. Radin would characterize all property owned by these groups as fungible and unprotected by constitutional property rights: as non-natural persons, it is axiomatic that they cannot own *personal*—and therefore protected—property. Their ownership rights are therefore out of the ambit of the state’s obligation to pay just compensation and they are subject to severe regulation and expropriation, despite the fact that they are important sites for the development of personhood. Several other problems arise for Radin’s theory when persons work out of the home or when farmers live on the land and profit through the sale of agricultural products. In these cases, the continuum between personal and commercial property becomes even more blurred and fails to assist the courts or other policymakers in making a distinction between the two kinds of property.

Radin is correct that there are limits on what can be called private property. But the distinction between personal/private property and other types ought to be drawn at the intersection of the rights of the private property owners and occupiers, and the right of the state or community of nonowners to regulate, expropriate, or otherwise interfere with the privacy-protecting aspects of the property. The fungible/nonfungible distinction deflates the opportunity for property to promote privacy interests. For example, there are certainly personhood/privacy claims in many commercial interests. As Annabelle Lever writes,

what can be said of families can be said of small businesses, too, which are often the repository of as many hopes and fears, time, attention, and resources as families, and as much the locus of collective ideals and close personal relationships, as families. This is particularly true of family owned and run small businesses, where the parents may spend the great part of their time, and where children, and their friends, will often work after school, at weekends, and during vacations.<sup>21</sup>

Barros agrees, writing that “Radin’s broad moral claim for favoring the personal interest in possession of a home over competing fungible interests is problematic. This claim is based on a general intuitive view of people’s personal connection with their homes, rather than a more

nuanced view recognizing that many important ties to the home are movable. Radin's claim is also problematic in its trivialization of the competing interests as merely fungible.”<sup>22</sup> Radin’s distinction, Barros correctly observes, is overbroad. Fungible wealth or property is property that is either replaceable by other tokens of that property (such as a dry erase marker) or by its monetary equivalent, with no loss in value to the property owner. Most mass produced goods are fungible: one dry erase marker is *ceteris paribus* as good or as valuable as any other. Cash money is similarly fungible. Radin argues that for the manufacturer or producer of the fungible good, there is no injection of personality into the good, and therefore the goal of property rights—the promotion of personhood—is never met. Of course, once the good has been appropriated by a person who makes it the repository of their objective will and demands recognition by others, the good becomes personal and strong property rights *ipso facto* emerge. *This* dry erase marker might be the one used by a doctoral student to sketch out the final, successful outline of their dissertation thesis, and it is *this* injection of will into the marker that precludes it from state confiscation, regardless of how much public good might result or how much compensation might be paid.<sup>23</sup>

Radin uses this terminology for *all* property held by speculators, landlords, or investors, and this is erroneous because many properties, such as land, art, or intellectual innovations, are clearly *not* fungible. Radin also claims that for the investor, a piece of land worth a fair market value of \$x is fungibly the same as cash money in the amount of \$x, and that speculative owners have no right to expect anything more from their investment than market price. This largely discounts the fact that investment property is held with the anticipation that the property will appreciate in time, and that the owner should have the right to ‘wait and see’ whether their expectations for the future value of the property will pay off. If an owner can reasonably expect their property to appreciate, then the synchronic payment of fair market value at time  $t^1$  deprives the owner of risking whether the property will appreciate at time  $t^2$ . Radin presumably avoids

this rather obvious fact about investment risks by arguing that there is no right to speculate in the first place, or, at least, no right worth protecting in a constitutional property scheme.<sup>24</sup>

Property scholar Jeffrey Douglas Jones is also critical of the personal/fungible distinction.

As Jones observes, Professor Radin

conjures the image of an individual situated in an environment where personal property enjoys some deliberate, perceptive foreground while fungible property languishes in a muted back. This picture fits with Radin's idea that the transformation of an object from fungible to personal property occurs only upon the investment of a person's will into a thing.<sup>25</sup>

As a result, Jones argues, it is not personal but rather *social* factors that determine whether homes or other items warrant protection. Jones: "[I]t is only in the context of the norms of liberal society that Radin concludes a home residence is property for personhood."<sup>26</sup> Jones uses war medals and weddings to illustrate the social recognition of the value of property. Jones: "For then the recognition of a war medal—or wedding ring—as property for personhood grows out of what wars mean—and what weddings mean—to the individuals themselves and to others within a particular system of values, much of which individuals inherit and culturally perpetuate rather than determine for themselves."<sup>27</sup>

Therefore, for Jones, the value of 'property for personhood' actually lies in its socio-cultural meaning:

Rather, [property law] would mean to protect certain socio-cultural meanings through legal regulation of the property to which those meanings attach. Similarly, property law would never be invoked in the name of personhood in order to assist particular individuals in identity security *per se*. Rather, property law in the name of personhood would be used to prop up treasured socio-cultural meanings that might otherwise be lost or endangered to particular groups whenever the underlying resources were themselves endangered.<sup>28</sup>

Because anything can be 'drafted into service' for personhood,<sup>29</sup> Radin's theory fails to "set forth any normative criteria for the legal recognition or legal disqualification of purported property for personhood."<sup>30</sup> Jones concludes that first, there is "no case for the special legal protection of *individual* personal property that is constitutive of personhood," and second, that property for personhood exists "in virtue of the socio-cultural meanings attached to the

underlying resources, not in virtue of the fact that such resources are constitutive of individual identity.”<sup>31</sup> Property should be protected, therefore, when it promotes something concrete and verifiable, such as welfare, and not personhood.<sup>32</sup>

So, while Radin supports a version of strong property rights that not only denies expropriation of homes but also protects privacy through the right to exclude and the imposition of a duty not to interfere, it does not protect the privacy interests of both personal *and* fungible property. These critiques show that privacy is a better measure of the level of protection required by different kinds of property, and the privacy of the home—as well as the reasons for granting it special moral and legal protections—is discussed in the following section.

## **Section 2. The Home and The Philosophy of Housing**

According to urban theorist John Rennie Short, the social organization of space

tells us much about the structure and functioning of society...The home is a key site in the social organization of space. It is where space becomes place, and where family relations and gendered and class identities are negotiated, contested, and transformed. The home is an active moment in both time and space in the creation of individual identity, social relations, and collective meaning.<sup>33</sup>

This section is both expository—it looks at the role of the homes from a sociological and anthropological perspective—and normative, in that it attempts to determine how and to what extent homes should be privileged in property law. It is intended as a crucible with which Radin’s claims about the constitutional priority of homes can be tested, and as a segue to a thorough analysis of Hegelian property, primarily in terms of its ability to promote personhood and withstand the eminent domain claims of the state.

Do homes protect privacy, or do privacy interests protect homes? If the former is true, then proprietorism is correct, and the property right protects the privacy right. I argue in support of the latter claim, which can restated as follows: it is the privacy of the owner that makes the property special and deserving of special moral and legal treatment by states and non-owners. People did not seek property or possessions and then find out they coincidentally protected their privacy: they sought privacy and found it in property, and, specifically, in the home.

### Modern Families, Households, and Homes

In a series of publications and books, Peter King has developed a social philosophy of housing. For King, “[h]ousing operates as a place of permanence and security—it functions as home—and thus insecurity, flux, and contingency are precisely those things that the home seeks to secure us against.”<sup>34</sup> Housing serves privacy, and privacy is the whole point of seeking out and maintaining the home. Strong privacy rights therefore permit us to live without external control over how we choose to live in the most intimate detail, and these choices are what determine us as individuals.

According to King, the word private is “derived from the past participle (*privatus*) of the Latin word *privare*, meaning to deprive.”<sup>35</sup> Private spaces, therefore, deprive others from accessing them. For King, housing is always private. As “the universal condition of housing...*it is a means, no matter how provided, that allows us to meet our private ends.*”<sup>36</sup> Housing “allows us to meet our own ends as private individuals free from the intervention of others.” It allows us to “protect the rights of individuals to live privately.”<sup>37</sup>

As King notes, “privacy is [also] something *we have*...It is a state *we are in*, or more properly *within*[.]” This understanding of privacy comports with the theory of privacy, outlined in chapter 1, that views it as a condition. King: “But privacy can also act as a side constraint on others, where we are restrained from entering another’s space.”<sup>38</sup> In terms of the buildings that constitute housing, there is an important difference between inhabited and uninhabited spaces: “We give the dwelling its particular and especial meaning by our inhabitation. The space would lose much of its meaning if it were empty, but comes into its true significance through its full inhabitation.”<sup>39</sup> One of the main functions of the dwelling “is to hold things in: to enclose those precious things and beings that we wish to protect.”<sup>40</sup> Homes and dwellings are therefore, King writes,

the most common form(s) of private property. What is interesting here is how the one word—private—affects and alters the meaning of the other. The word ‘private’ effectively gives meaning to ‘property’: it gives a sense of exclusivity and particular ownership. Private means the property is not shared but ring-fenced for the exclusive use



of certain persons: the term ‘private’ qualifies our understanding of property to the particular.<sup>41</sup>

For King, “use predominates over ownership and physicality, so that the ends to which housing is put are more significant than any sense of ownership and physicality.”<sup>42</sup> This understanding of the importance of the private home certainly correlates with much of Radin’s argument in favor of its legal priority over other kinds of property.

### **Personhood inside the Modern Home**

In her study of French apartment dwellings of the late 1980s, Sophie Chevalier writes that

[every] household displays in its décor elements that testify to everyday events, to individual or family history, materializing social relations near or far, living or dead. It is important to realize that most family-related objects, souvenirs, and even heirlooms are created out of mass-produced objects. Gifts and purchases are converted into family property.<sup>43</sup>

For Chevalier, an ‘inalienable environment’—the home—is constructed through the appropriation of mass-produced objects, where consumers “personalize” these objects by “integrating them into their way of life”<sup>44</sup> so that the familiar pieces of furniture—sofas, tables, chairs—become the “basic embodiments of ‘home’ and ‘family’.”<sup>45</sup> “The houses and the objects in them,” writes Chevalier, “circulate slowly outside of the sphere of market-related commodities eventually to become inalienable (as heirlooms). The longer the residence is in the family, the more legitimate its claim.” This includes the content and décor of the family residence.<sup>46</sup> Chevalier refers to the inhabitants of these homes as “so-called alienated suburbanites [who] create a meaningful universe,”<sup>47</sup> whereby the act of turning mass-produced objects into meaningful symbols of personhood “is not only objectification but also mediation: objects are by their material condition a reminiscent link to other individuals.”<sup>48</sup>

Chevalier’s research shows how fungible, mass-produced objects can become Radin personal property that promotes both personhood as well as a social link to others as a mediating device.

## **The Sociological Economy of the Household**

In *The Household: Informal Order Around the Hearth*, legal scholar Robert Ellickson writes that “[a] ‘household’ is a set of institutional arrangements, formal or informal, that govern relations among the owners and occupants of a particular dwelling space where the occupants usually sleep and share meals.” This would include a single person in a studio or a kibbutz of several hundred persons.<sup>49</sup> “The members of a household (that is, its owners and occupants) together manage a real estate enterprise that makes use of inputs of land, capital, and labor in order to provide shelter, meals, and other services.”

Households are different from families. Families have little to no control over their members (one cannot choose one’s parents) but persons choose their household partners. However, like families, households are “located in a geographical space called the home.”<sup>50</sup> It is typically “in the household that children first learn how to recognize and deal with challenges posed by endeavors involving common property and collective enterprise.”<sup>51</sup> Much of this analysis also applies to other forms of real estate typically co-owned by intimates, such as small farms or retail outlets.

For Ellickson, three factors determine the kind of household formations that occur in liberal societies:

1. private ownership;
2. freedom to exit; and
3. freedom of contract.<sup>52</sup>

As a result, the state does not regulate the creation or termination of household relationships.<sup>53</sup>

Ellickson: “A liberal society makes little effort to regulate an adult’s entry into, or departure from, a co-occupancy, co-ownership, or landlord-tenant relationship (at least in the absence of rent control). Relatively unconstrained market forces, in short, largely determine the shape of household institutions.”<sup>54</sup>

Ellickson concludes that the traditional small household has persisted because it is valuable: it is financially advantageous, it promotes liberty, and it protects privacy. This

conclusion does not entail 'special' legal protection for household properties or homes in regards to non-household properties, but it clearly supports the liberal idea that the formation and composition of households is primarily a private matter that should be enjoy a high level of immunity from regulation or interference from the state.<sup>55</sup>

### **The Home as Intuitively Privileged**

One of Radin's claims for the defense of the home is that such a claim is 'intuitive.' Consistent with Radin's intuition, Barros writes that the "home is associated with a range of feelings related to a long-term tie to a physical location. Home is the physical center of everyday life and is a source of feelings of rootedness and belonging. Home is the locus of a person's immediate family and can be a source of emotional warmth and personal comfort." According to Barros, the psychology of home reinforces Radin's intuitive view, in which homes are "sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks."<sup>56</sup> Home as a concept is far broader than a detached suburban home inhabited by a traditional nuclear family. "Home" includes urban apartments, both rented and owned, and many of the legal protections given to homes apply as strongly to rented homes as to owned homes. "Home" also includes the "dwellings of individuals, single parents, gays and lesbians, and other 'non-traditional' households."<sup>57</sup>

### **The Home and Eminent Domain**

The law has disclosed "a special respect for individual liberty in the home."<sup>58</sup> However, this protection has not restricted the power of the state to take, for example, homes as part of an economic development scheme.<sup>59</sup> In fact, homes do not enjoy any special constitutional protection in terms of the Takings Clause, and no court has denied a takings action because the property at issue was a home; in fact, most takings are of homes of poor and/or minority owners or residents.<sup>60</sup> According to Barros, a property law regime that permits eminent domain underprotects the personal interest in the home by failing to prioritize them.<sup>61</sup> Privacy law, however, *does* prioritize homes over other kinds of property. According to Barros, this

prioritization is “consistent with the intimate relationship between the cultural ideas of home and privacy.”<sup>62</sup> Outside of eminent domain law, homes, in comparison to other types of property such as the kind of property that Radin characterizes as fungible, are occasionally prioritized and given more legal protection than non-home properties.<sup>63</sup> Houses, writes Barros,

are expressly protected by the Third and Fourth Amendments to the Constitution, and homes are given more protection than other types of property, such as cars, in search and seizure law. The federal tax code strongly favors homeownership over home rental and ownership of other types of property.<sup>64</sup>

These rights protect the home and its occupants from state interference, while self-help in tort and criminal law—framed by self-defense or ‘stand your ground’ statutes—protect the home and its occupants from interference by nonowners or nonresidents by imposing higher sanctions for invasions of the home than for other invasions.<sup>65</sup> Barros concludes the home has indeed enjoyed different legal treatment from other properties. This is shown by “homestead exemptions, rights of redemption in foreclosure, just-cause eviction statutes, and residential rent control,” which show that “debtor-creditor laws and landlord-tenant laws give more protection to the possessory interest in the home than the law ordinarily gives to the possession of other types of property.”<sup>66</sup>

As Eduardo Peñalver writes, the home-as-castle metaphor is “not so much about the power of the property owner to do as he pleases, but about the inherent dignity of homeownership. Apart from, or perhaps in addition to, any connotation of unqualified power, the statement that one's home is a castle can be understood as a statement about the subjective importance and status that our society attaches to homeownership.”<sup>67</sup>

At this point, Radin’s argument, in which the personal aspect of the home prioritizes it the above other kind of property, seems to be on solid moral and legal ground. We turn now to an in-depth analysis of the putative source of Radin’s personhood theory, Hegelian property, in order to determine how Hegel’s ideas about property can be situated within a liberal property regime, what can be said about the role of property in the development of both personhood and societies,

and whether Hegelian property can provide the kind of bulwark against expropriation that Radin proposes for it.

### **Section 3. Hegelian Property**

#### **Part 1. Introduction**

According to Seyla Benhabib, Hegel provides “the most systematic analysis of the norms of personality, property and contract which are presupposed by modern exchange.”<sup>68</sup> The following analysis tests the extent to which Radin’s property theory is a Hegelian derivation for personal property rights—rights that, in appropriate situations, trump the property claims of the community. An analysis of Hegelian property is required to determine whether Hegelian property can support the kinds of rights I am advocating for here, to wit, strong property rights in both personal and fungible property that promote the owner or occupier’s privacy rights and interests.

#### **Rehabilitation and Cherry Picking**

Situating Hegel’s property theory into contemporary property jurisprudence raises up the twin issues of *rehabilitation* and *cherry-picking*. Rehabilitation involves either justifying or explaining away unacceptable aspects of Hegel’s—or anyone else’s—philosophy. Jeanne Schroeder, for example, provides a qualified rehabilitation of Hegel’s property theory in light of what she characterizes as Radin’s misinterpretation of Hegel.<sup>69</sup> According to Schroeder, Hegelian property can be rehabilitated in order to resolve the paradox regarding the degree to which property limitations (ethical, moral, political, legal) are consistent with freedom.<sup>70</sup> For Schroeder, Hegel agrees that there should be a limitation on takings to facilitate freedom and a just society, but he fails to provide an algorithm for settling this paradox. So, according to Schroeder, Radin is correct about this aspect of Hegelian property, but incorrect about others, and Hegelian property is therefore at least partially rehabilitated by Radin’s contemporary property theory.<sup>71</sup>

Cherry-picking, or selective reading, permits a commentator to latch onto certain aspects of a thinker’s *oeuvre* while disregarding the rest, much of which (particularly in the case of Hegel) is illiberal, sexist, or authoritarian. It is a kind of reverse rehabilitation: it permits a reader

to comment upon an individual topic without having to rehabilitate, or justify, other aspects. According to Robert Pippin, it is improper to cherry-pick sections of *Philosophy of Right* “as if they were individual chapters that one could consult about Hegel’s views on individual topics such as ‘property’.”<sup>72</sup> This raises the issue of whether Hegel’s property theory can be evaluated apart from the rest of *Philosophy of Right* and from his other writings. Axel Honneth suggests that it can, and provides a way to avoid charges of cherry picking while justifiably refusing to rehabilitate parts of Hegel’s philosophy.

In *Suffering from Indeterminacy*, Honneth proposes that “we can reach a productive understanding” of *Philosophy of Right* without either ‘rehabilitating’ Hegel’s concept of the state or “calling upon the state as a substance.”<sup>73</sup> This is because, for Honneth, Hegel’s concept of the state, and his concept of “spirit,” *cannot* be rehabilitated. Honneth terms this the *indirect mode* of reactualizing the *Philosophy of Right*; the *direct mode* entails a criticism that renders Hegel irrelevant because of the clearly objectionable positions he takes in terms of the state. A direct mode of reading many (perhaps the majority of) classical political theorists would mean that few could be studied because they all have features which render them objectionable, both to their contemporaries and to later commentators.

So, like Honneth, I aim to show how “the fundamental aim of the text and its construction as a whole,” particularly in regards to Hegel’s property theory, can be understood when Hegel’s “basic conception of the state has been rejected in principle.”<sup>74</sup> This will prove to be a difficult project, because, as Peter Stillman writes, Hegel’s complete political thought rests on property as its logical starting point. Stillman: “More so than most political thinkers[,] Hegel’s thought is grounded on property,” where “the right to property is the basis of the rights to life and freedom.”<sup>75</sup> It may also prove difficult to come up with a Hegelian property law if, as Schroeder writes, he fails to supply a practical, positive law of property<sup>76</sup> and if he does not give answers to “specific policy questions”<sup>77</sup> about law, ownership, and distribution.

In this section, I propose to read the property theory of *Philosophy of Right* in light of Hegel's ethical, legal, and political writings, but—like Honneth—will finally reject Hegel's conception of the state as being inconsistent with the kinds of rights proposed in the earlier sections of the book. I also hope to construct a version of a Hegelian property law and to provide some answers to policy questions. Under a Hegelian property regime:

1. property requires a broadly capitalist social and political economy;
2. the institution of private property is justified to the extent it contributes to individual freedom and individuality,<sup>78</sup> and this is particularly true for family property; homes, therefore, are uniquely protected;
3. Hegel's property theory is developmental: persons are not born ready for the ethical community nor for the state of nature, and property is therefore necessary for the development of persons as social beings;<sup>79</sup>
4. a democratic majority cannot expropriate 'for public use upon payment of just compensation'; however, the monarch can expropriate without restriction.

### ***Philosophy of Right: An Overview***

According to Alan Brudner, Hegel is arguing for the "moral necessity for private property," in which the institution of private property provides justifications for a variety of justice-promoting actions that are "normatively privileged" within a social and legal framework.<sup>80</sup> The goal of *Philosophy of Right* (at least in the sections on property's role in abstract right) is therefore to determine what kinds of conditions must be present for individuals to develop as legal persons, distinct from other animals who are wholly dependent upon nature to survive. Unlike those animals, persons are free to the extent they mutually recognize each other as such. For Hegel, institutions provide the conditions that permit this freedom, and it is by working within institutions that the things that make up the free individual are developed. These things are property. The abstract right to property is secured by the institution of private property, and the institution of private property is created and maintained by a social community that, in turn, is

conscious of the importance of private property for the development of the free individual. Unlike the heuristic starting points of liberal theorists such as Hobbes and Locke, Hegel's abstract right is not a state of nature filled with unsocialized beings who spontaneously develop a powerful system of rights and duties. The propertied and contracting persons in Hegel's abstract right are fully socialized by their family, civil society, and the state in order to prepare them for property ownership.<sup>81</sup>

When the state secures the property right through the establishment of institutions which codify the rights, define it, and punish those who violate it, it is bound by a certain logic: only private property creates free individuals, and persons are free to the extent they can exchange property in accord with rational desire. These free individuals in turn perpetuate the institution of private property by owning and exchanging property on the terms established by abstract right, which promotes the development of persons by permitting them to freely exercise their will upon the internal and external world. Because of the importance of property for personhood, the state must conscientiously choose to allow broad discretion for the acquisition, use, and alienation of property.

### **Reading *Philosophy of Right***

In the preface of *Philosophy of Right*, Hegel writes that “each individual is in any case a *child of his time*; thus philosophy, too, is *its own time comprehended in thoughts*.” As Jeremy Waldron notes, Hegel's theory of private property the result of its status as an institution in his era, and he sought to discover what was rational about the institution and whether it contributed to human freedom. “[I]f we are led to agree with Hegel that private property is a rational necessity, then we will be inclined to give a positive evaluation of some features of society...([such as] those that represent a progressive tendency towards private ownership) and a negative evaluation...of others.”<sup>82</sup> By seeking “standards of rationality within existing systems of thought and forms of life”,<sup>83</sup> Hegel engages in a critique of private property as the apotheosis of freedom in the 1800s.<sup>84</sup> To that extent, Joachim Ritter writes that it is important to understand that Hegel, despite



beginning *Philosophy of Right* with what appears to be a ‘state of nature’-type heuristic about property rights, is not attempting to create another Genesis-type story of the origin of property rights,<sup>85</sup> but is looking rather at how property actually operates within a civil law framework. For Ritter, Hegel is asking how freedom can emerge from a civil law that has developed over history and not how property was born from the Lockean or Rousseauian ideas of states of nature and noble savages. This is key to understanding the so-called ‘backwards’ reading of *Philosophy of Right*, in which the story of the free person actually begins at the end of the book, where the person is regressively situated in the state, civil society, and family, and then from morality to their ‘base’ personality in abstract right—which is where the book actually begins. Pippin endorses this reading—as he writes, *Philosophy of Right* “can and should be read backwards to front”<sup>86</sup>—and Ritter concurs that the book actually “starts from the relationship posited with civil law itself and according to which free individuals are connected with one another as persons in and through things *qua* property.”<sup>87</sup> The sequences of the book are therefore of a “logical and conceptual, rather than wholly empirical, nature.”<sup>88</sup> As Brudner notes, Hegel’s approach is “not to begin with a favoured interpretation (conception) of an abstract concept but rather to end with one.”<sup>89</sup>

### **Hegelian Property is Capitalist**

According to Honneth, as Hegel developed his system from his youth to his composition of *Philosophy of Right*, he

persisted in, or even held more strongly, the conviction that in such a culture of communicative freedom, or ‘ethical life,’ considerable space would have to be provided for that social sphere of action in which subjects could each pursue their private interests reciprocally in accordance with the conditions of the capitalist market.<sup>90</sup>

Hegelian property sits within a capitalist or market framework where it is the object of trade.<sup>91</sup>

Not only does he clearly oppose the abolition of private property (§§46R, 185R), he is severely critical of both the grounds for, and the effect of, Plato’s communism for the guardians of the city. Like modern libertarians, he also provides a detailed justification for the separation of civil

society and the state.<sup>92</sup> According to Kenneth Westphal, Hegel's approval of capitalism is qualified, but nevertheless "he did not oppose it and indeed based his political philosophy on a careful rethinking of modern political economy."<sup>93</sup> For Ludwig Siep, Hegel believes that individuals can pursue their abilities and plans "only in the context of the effectively private pursuit of interests, involving the free choice of profession or occupation and the private disposal over the means of production."<sup>94</sup> The modern era, Hegel writes in §261, promotes this private pursuit, in that modern human beings "expect their inner life to be respected" as much as we "expect to have our own views, our own volition, and our own conscience."<sup>95</sup> This appears to a reference to the right of privacy, which, Benhabib writes, Hegel interprets "in a double sense as entailing the moral and the economic freedom of the person."<sup>96</sup>

According to Hans-Christoph Schmidt am Busch,

[c]ontracts and market-like exchanges are not a possible institutionalization, but a necessary condition of the realization of personal respect...In fact, individuals who exchange commodities for money as well as individuals who exchange labor for money or money for money 'recognize each other as persons and property owners.' Therefore, commodity, labor, and capital markets can, in principle, be said to be (possible) institutionalizations of personal respect (see §80).<sup>97</sup>

According to Lisa Herzog,<sup>98</sup> Hegel clearly adopts Adam Smith's invisible hand when he writes that the system of needs—the most basic system in civil society, consisting of requirements for food, shelter, and other necessities—is best met in an economy where

subjective selfishness turns into a contribution towards the satisfaction of the needs of everyone else. By a dialectical movement, the particular is mediated by the universal so that each individual, in earning, producing, and enjoying his own account, thereby earns and produces for the enjoyment of others (see §199).

However, according to Peter Stillman, Hegel does not attempt to justify capitalism, which "simply follows from the play of private property in civil society,"<sup>99</sup> nor does he provide an apology for it because he provides for extensive regulation of property as well as the subjugation of the individual to the state.<sup>100</sup>

Having provided a brief capsule of Hegelian property, and having shown that Hegelian property requires a broadly capitalist social and political economy, we turn, in part 2, to the

difficult task of understanding Hegel's terms of art used in his description of property ownership: these include *personhood*, *recognition/respect/mediation*, and *freedom*. This discussion is followed by discussions of Hegel's difficult concept of abstract right (part 3), the transition from abstract right to ethical life (part 4), the role of property in ethical life (part 5), the extent of the right against the state (part 6), and finally, in part 7, the complex resolution of the property right in terms of eminent domain.

## **Part 2: Hegel's property: personhood, recognition/respect/mediation, and freedom**

According to Alan Carter<sup>101</sup> and many other commentators,<sup>102</sup> Hegel's property theory justifies property as a derivation from considerations related to *personhood*. Schmidt am Busch explains that Hegel derives the institution of private property from personhood by way of four theses.

“(1) “The person must give himself an external sphere of freedom.” (§ 41)

(2) This sphere of freedom must consist of entities that are “immediately different and separable” from the person.

(3) The human body, human capacities, and external things can be said to meet Hegel's criterion of difference and separability; however, they do so in different ways.

(4) The person can only give himself a ‘sphere of its freedom’ in private property.”<sup>103</sup>

In summary, Hegel argues that “as a person, the individual claims to decide on his own which goals to pursue; therefore, the external sphere of freedom he gives himself must consist of private property...(therefore), the institution of private property can be derived from his concept of the person.”<sup>104</sup> The following sections explore Hegel's personhood argument, beginning with the importance of *personhood* and its relationship to *recognition*, *mediation*, and *respect*, and then moving to *freedom*.

### **Personality and Subjectivity**

In §41, Hegel writes that

[t]he rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason. Even if my freedom is here realised first of all in an external thing,

and so falsely realised, nevertheless abstract personality in its immediacy can have no other embodiment save one characterised by immediacy.

According to Alan Patten, Hegel initially assumes that persons occupy the social world, and then asks what kinds of institutions must exist in a world occupied by persons. But this social world cannot be one consisting *solely* of persons and institutions; this, according to Patten, is the standard liberal understanding of the relationship between the individual and the community. Rather, these persons also need *subjectivity*, without which there are no property rights, no contracts, and no legitimate punishment; in other words, there are no persons *as subjects* who have rights, make contracts, or suffer the consequences of their actions. Without those features, there is no social world for persons to occupy.<sup>105</sup>

Subjectivity, Patten explains, is a person's independence from, and knowledge of, their situation, circumstances, and desires. Subjectivity is the basis for individual personality, and personality is the distance between oneself and one's situation. It is what gives persons the ability to evaluate and reflect on their ends.<sup>106</sup> According to Benhabib, this right of personality is not natural nor the result of reason: it is the result of a variety of historical processes, including the market economy, the struggle for recognition, reform, revolution, Christianity, the "spread of bourgeois market relations" and *Bildung*.<sup>107</sup> *Bildung* is constituted by the social experiences of education and culture, some of which develop into persons and their subjectivity. Only the institution of private property, Hegel will argue, allows persons use their education and culture as the material with which they construct their personalities as free subjects.<sup>108</sup>

Personality, however, is not given freely: it must be realized. To become a person, a human being must "at a minimum take possession of her body and acquire property in external things."<sup>109</sup> For Hegel, everyone has the capacity to become a person, but we only do so when we will our possession over life and body and then over other things.<sup>110</sup> Therefore, the institutions that regulate property, to the extent they permit the free development of personhood, are in turn

“derive[d] from our conception of ourselves as persons, that is, individuals who can abstract the contents from particular states of desire and recognise ourselves as possessors of will.”<sup>111</sup>

In order to better understand Hegel’s conception of the person, a comparison to Locke can be helpful. For example, when Locke asserts that “every Man has a Property in his own Person,” he is presupposing that the “essential human person is presocial, autonomous, and self acting.”<sup>112</sup> This, according to Schroeder, is the “solitary nomad of the primal liberal myth.”<sup>113</sup> Hegel’s critique of this approach consists of showing that those who are capable of entering into social or other types of contracts are *already* socialized, and that concepts such as ‘individuality’ are the products of, and not foundations for, social institutions. These persons understand property and contract, and they understand how violations of these rights constitute ‘wrong.’ The autonomous individual, according to Hegel, can only express and experience freedom as property ownership and contractual rights as the result of social relationship that have already defined them as a person. This is because “[t]he act of contract cannot generate the conditions of its own validity but presupposes background norms and rules the compliance with which confers validity on the contractual transaction. Hegel derives these background norms and rules from the rights of personality and property.”<sup>114</sup> This is a key point towards understanding Hegelian personhood and how it opposes traditional Lockean/liberal personhood.

Liberal theory also presupposes the ability to consent to another’s acquisition of property, acquisition being a “unitary act by the will to objectify itself and recognize itself as its own end” which is *not* based on the consent of other persons.<sup>115</sup> Hegel, on the other hand, presupposes a subjective person who has learned how to acquire and trade property pursuant to some configuration of social norms. These norms are comprised, in part, by the institution of private property itself. Because persons learn how to inhabit a properly configured system by being a part of it, they will use and trade property so that they recognize that the agents with whom they trade are persons as well. These kinds of actions (acquisition, use, and alienation by trade and exchange) are the types of actions through which persons experience freedom, and the relevant

institutions promote freedom to the extent they promote broad property and contractual rights. However, as Peter Benson explains, personality is indeterminate until it acts upon particular and determinate things by choosing them as their exclusive individual property. Benson: “The minimally presupposed articulation of positive freedom is that subjects be respected as persons having a juridical capacity to possess things as their individual property.”<sup>116</sup>

But property is not merely meant to meet an individual’s needs. For Thom Brookes, the rational aspect of property is in the *superseding* of mere subjectivity of personality (§§41, 41A), whereby “property is instrumental to our discovery of how we can improve upon a mere subjective judgment about freedom.”<sup>117</sup> In other words, we discover our freedom through property when we manipulate it, transform it, or, most importantly, alienate it. In doing so, we also alienate our will by placing it into an object that is external to it.

Another comparison to Locke is helpful at this point. Whereas Locke locates a person’s property in the externalized world as the result of mixing their labor into objects, Hegel is actually *internalizing* these objects.<sup>118</sup> Some of these internalized objects are religion, political beliefs, and other possessions, all of which come to the person through their culture and the *Bildung* it provides. These ‘things’ become the content of one’s personality. As a heuristic device, the full personality might be capable of shedding these things and end up as an abstract person—one who exchanges pursuant to contract, and gets punished for violating rights—but all persons (or, at least, free ones) internalize various aspects of the material world in which they live. For Hegel, the result is that there is no noble savage and no state of nature for her to inhabit. Put another way, there might be a state of nature, but it is not filled with anything resembling persons.

According to David Rose, personality requires property in order to demonstrate its particularity to the world. I assert myself as a free individual by the things I desire.<sup>119</sup> These desires fill the will and manifest themselves through action in the world. They become embodied in the world by the projection of myself in the world. They are constitutive of my identity. The most important of these desires is the desire for recognition. Although this desire is less important

in the *Philosophy of Right* than in Hegel's other writings, recognition is necessary for the creation of self-consciousness, which, in turn, is necessary for the objectification of the will through the medium of private property.

### **Recognition, Mediation, and Respect**

In §40, Hegel writes that “a person, in distinguishing himself from himself, relates himself to *another person*, and indeed it is only as owners of property that the two have existence (*Dasein*) for each other. Their identity *in themselves* acquires existence (*Existenz*) through the transference of the property of the one to the other by common will and with due respect of the rights of both—that is, by *contract*.”<sup>120</sup> It is not enough to will to own and take initial possession of something: the thing must be “ownerless,” which contemplates the “anticipated relation to others” (§51), whereby the inner act of the willing person “that says something is mine must also become recognizable by others.” (§51A).

The concept of recognition as a key concept in Hegelian property is introduced in paragraphs 182-184 of the *Phenomenology of Spirit*. Here, Hegel writes

this movement of self-consciousness in relation to another self-consciousness has in this way been represented as the action of *one* self-consciousness, but this action of the one has itself the double significance of being both its own action and the action of the other as well. For the other is equally independent and self-contained, and there is nothing in it of which it is not itself the origin. The first does not have the object before it merely as it exists primarily for desire, but as something that has an independent existence of its own, which, therefore, it cannot utilize for its own purposes, if that object does not of its own accord do what the first does to it... Each sees the *other* do the same as it does; each does itself what it demands of the other, and therefore also does what it does only in so far as the other does the same...They *recognise* themselves as *mutually recognising* one another.<sup>121</sup>

“Property is thus,” writes Dudley Knowles, “an essential element of self-consciousness.”<sup>122</sup>

Knowles:

If I am to determine myself, make something of myself, the self that is operated on must be recognisable by me in just the same way that it is recognised by others. If, therefore, we recognise the grasping of an object as taking possession, we do so precisely because we identify the will of the property holder in his grasp.<sup>123</sup>

This effort to “make something of oneself” constitutes the struggle for recognition, and, as Shlomo Avineri writes, property is a key moment in this struggle.<sup>124</sup> According to Steven Smith, “the desire for recognition is the quintessential human desire”: it is desiring the desire of another.<sup>125</sup> Above all, we desire to be treated with decency and respect: as Hegel’s argument develops, we see that persons are treated with decency and respect when their property is similarly treated. The right to recognition is therefore the right to dignity, respect, and civility.

This relationship rather clearly requires some kind of community, and this community arises through exchange and the institutions that promote it. As Michael Quante writes, it is through contract and exchange that property becomes the thing that mediates between two persons and thereby produces a “shared community of will” in that “both parties will the maintenance of the institution of property” and of their right.<sup>126</sup> For Hegel, objective property—the ‘things’ of the world—is the initial mediator between the intersubjectivities of subjective subjects. The result of this mediation is the “moment of mutual recognition between subjects [that] can only be achieved through the mediating object of property, contract, and abstract law.”<sup>127</sup> When individuals operate in a community of reciprocal recognition, “the object of property serves as a medium in and through which such recognition is manifested and given presence as a public sign.” The object of property is a social object because another person recognizes my will in it.<sup>128</sup> The crime of theft, for example, is the breakdown in the recognition of another’s will in their property: “crime is denial of right because it fails to engage in any mutual recognition with others (§95).”<sup>129</sup>

According to Honneth, recognition occurs when the property becomes subject to my ability to say ‘yes’ or ‘no’ to another potential property owner’s offer to exchange her property for mine.<sup>130</sup> If this exchange takes the form of a promise to exchange in the future (e.g., “I hereby agree to sell you my tractor in 30 days”), then despite the fact that no actual property has been exchanged, the willful act of promising (based, ideally, on the ‘bargained-for exchange’ so loved by contract theorists) moves the literal alienation of property into the realm of obligating one to



perform a future event.<sup>131</sup> Conversely, even a thief or robber recognizes my right to property by *denying* my right to say ‘yes’ or ‘no’ to an exchange, thereby refusing to permit me to engage in the willful withdrawal of my will from the *res* itself.

Like the institution of justice, which seeks to cancel the wrongness of crime, legal institutions serve to both create and protect the abstract rights to property and contract which allow the property owners or beneficiaries of contracts to be recognized as such. Unlike Locke, for whom the state merely protects and enforces pre-existing natural rights of property, the state’s legal institutions provide the framework within which the possessors of these rights become and develop as moral beings existing within moral communities.<sup>132</sup> Thus, the Hegelian first occupier is justified in his possession when he alienates property after his claim to it has been recognized. This occurs, according to Waldron, by simply letting others know his claim to ownership. But it is more than that: by placing will into property, the will “operates in a realm that transcends the subjectivity of inner mental life[.]”<sup>133</sup>

### **Respect**

Respect is the first ‘commandment’ of Hegelian property: “be a person and respect others as persons’ (§36). For Pippin, Hegel clearly means that we must respect abstract rights, including those that pertain to property.<sup>134</sup> Respect, Avineri writes, is keyed to recognition: it is “[t]hrough property [that] man’s existence is recognized by others since the respect others show to his property by not trespassing on it reflects their acceptance of him as a person.”<sup>135</sup> Respect also permits us to “identify ourselves through the medium of our property and to accord others equivalent status as they express and recognise themselves in their property.”<sup>136</sup> Ownership rights impose constraints and duties on other persons, whereby “my having these rights involves others recognizing me as a source of moral constraint and thus as a locus of respect.”<sup>137</sup>

Respect is, therefore, recognition of the duty not to interfere with another’s property right. Hegel writes in §113 that the origin of the moral duty not to interfere occurs when an owner recognizes the legal action whereby “I retain my property and let the other party to retain his.” As

Benson observes, respect for others is respect for the things that contain another's will, i.e., their property.<sup>138</sup> Benson: "In relation to others, the exercise of one's capacity for ownership is not to be conceived as a mere *liberty* but rather as giving rise to a genuine *right* that others have a *corresponding duty* to respect."<sup>139</sup> According to Schmidt am Busch, respect is also a key part of Hegel's capitalism. Respect "gives individuals who wish to cooperate economically a *prima facie* reason to favor market-like exchanges over state-regulated distributions of goods."<sup>140</sup> Market exchanges can therefore "be understood as possible institutionalizations of personal respect," due to the realization that "the structure of personal freedom seems to be larger in market economies than in state-regulated economies."<sup>141</sup> Respect is tied to freedom and the market because "individuals who wish to exchange goods on the market believe that such exchanges take place if and only if they want them to take place. Second, such individuals hold that they are entitled to decide independently from one another whether or not to consent to possible exchanges."<sup>142</sup> For Hegel, "there is thus no recognition of an individual as a person without recognition of individual property rights."<sup>143</sup> It is only through mutual recognition with another person, Brooks writes, that freedom is possible: "It is through someone else's recognition of a thing as mine that [freedom's] existence becomes more 'actual' and determinate."<sup>144</sup>

### **Freedom**

For Hegel, Richard A. Davis writes, "[m]an is not free because he has the ability to withdraw (from particularity), or even to choose this or that, and not simply because he somehow 'knows' himself to be free either. For a genuine freedom to be achieved there must be some definite contact with objective reality."<sup>145</sup> "At each step of the way," Davis continues, "property is thus the agent of this development of a consciousness of the ethical substance. Whether considered in its role in education, or in its more traditional, 'pure' form, property is ultimately responsible for bringing into existence an objective form of the concept of freedom that was one of the original goals of the will (§ 4)."<sup>146</sup>

Private property gives concrete expression of independence which is the essential part of being a person.<sup>147</sup> An independent agent is able to conceive of itself as independent from ‘anything given,’ but is also able to make choices that accord with its self-conception.<sup>148</sup> For Hegel, freedom is the will, and an individual person’s will is their subjective will. By putting their will in a thing through acquisition and use (§44), a person’s subjective will becomes ‘actual will’ in property by gaining embodiment in the external world (§45). When persons enter the world, they act in and upon it. When persons are not oppressed or restrained, they freely manipulate the world’s resources. The free will can give itself existence only by reference to an external ‘sphere of freedom’ (§41), “a collection of external object over which it alone has power.” According to Ritter, all things, including talents and skills, become both property and the subject of freedom. The interior life becomes ‘exteriorized’ (§43) in civil society through trade and exchange, which are framed by the legal contract. If the law allows for considerable ‘conflict’ in the pursuit of trade and exchange, then the law is consonant with freedom.<sup>149</sup> Conversely, persons who are not permitted to trade or exchange their property are not free.<sup>150</sup> For Hegel, this is partially an anthropological observation, and partially a normative understanding.<sup>151</sup>

As Ritter notes, Hegel is also aware of private property’s potential for moral ruin. Ritter: “It is at this point that we cannot pause and take this picture of freedom through property as Hegel’s final word on the issue. Property—as we learn later in civil society—can also (and here is the dialectic of property) through ‘diremption and difference’ (§§33 and 182) reduce all of human existence to buying and selling, thereby ‘loosening’ the relations that bonded persons together in the first place in order to create the civil law.” Here, “each individual is his own end and everything else counts for nothing” (§182A).<sup>152</sup> Despite this, Hegel insists that “property must possess the character of private property” (§46). As Ritter notes, the “externality of civil society that presents the dual spectacle of extravagance and distress also represents for Hegel the actual existence of human freedom,”<sup>153</sup> and freedom would be impossible without the ability to acquire and get rid of goods and assets.<sup>154</sup> Interestingly, Hegel suggests that we truly become owners not

by acquiring property, but when we “cease to be an owner of property” by getting rid of property through the alienation of it through contract. (§72).

Like alienation, the duty of noninterference also bridges the important connection between private property and freedom.<sup>155</sup> Hegel, Patten writes, derives this connection from Fichte. For Fichte (and, consequently, Hegel) private property as an institution makes personality possible; because of the importance of personality, private property is justified in placing others under duties such as the duty of non-interference.<sup>156</sup> Private property is the result of a person having the right to a sphere of the external world that is free from intervention by others.<sup>157</sup> For both Fichte and Hegel, the “[p]rivate property system centres on the way in which private property provides the individual property holder with a concrete perception of his own agency and in this way helps to constitute him as a free person.”<sup>158</sup> Non-interference, as a necessary feature of private property, also “plays an important role in self understanding whereby the individual defines themselves in relation (and contrast) with others.”<sup>159</sup>

To summarize: Hegel asks what kinds of actions are the actions of free persons. He concludes that free persons would be able to trade material objects amongst themselves with considerable autonomy and without undue oversight by a coercive authority. Therefore, as Waldron writes, the case for private property can be derived from the case for freedom of trade, rather than freedom of trade being derived from private property.<sup>160</sup> Different social orders, – manifested through various methods for the implementation of *Sittlichkeit*, may require different contractual or property norms, but, in order to be rational and to embody freedom, they must provide core protections through a private property and free contract regime.<sup>161</sup>

Most importantly, Hegelian property is not instrumental towards freedom, autonomy, or personhood. It is not a means to those ends: rather, it is constitutive of them. The right over the acquisition, use, and alienation property is an expression of free will, where the right is constituted by the “ensemble of conditions that express and realize the conception of the person as free and equal, or, more exactly, a possessing the moral powers proper to this conception of the

person.”<sup>162</sup> Put another way, right is the second nature of the will: it is not ‘natural’ or prior to or independent of free activity, but the result of it.<sup>163</sup>

### **Part 3. The Abstract Right of Property and Contract**

In §§34–104 of *Philosophy of Right*, Hegel introduces his concept of abstract right, which includes the right to property, the right to contract, and punishment for violations of those rights. The abstract right consists of the right of personality and the experience of freedom. The nature, purpose, and function of the abstract property right is the source of both understanding and misunderstanding Hegelian property, and it is capable of at least two interpretations. The first interpretation, discussed in this part, argues that abstract right is the *product* of ethical life and morality and the state-created institutions associated with them. This interpretation follows from a backwards reading of the book, and it is this reading, which views the abstract right to property as the conclusion (and not the foundation) of Hegel’s property theory, that is argued for here. The second interpretation views abstract right as a natural right that is foundational to the subsequent stages of morality and ethical life: it is pre-social, pre-institutional and very similar to the kind of possessive individualism advanced by Lockean liberals and exists pre-socially in a heuristic state of nature. Like the Lockean social contract, society and then the state are founded upon this right, which is modified to accord with the benefits of living in a state dedicated to the protection of property. This interpretation is associated with a forward or lexical reading of the *Philosophy of Right*, and it is untenable as a statement of Hegel’s property right. It is discussed in full in part 5.

#### **Abstract Right as a Product of Social Life**

For Peter Stillman, the abstract property right operates as a kind of idealized property right, where persons are equal in their capacity for property ownership, and where “full and complete” ownership is dependent solely on their personhood and “irrelevant of social status or hierarchy.”<sup>164</sup> The corresponding idealized—yet abstract—contract right is the way to move property along to others without domination or coercion. The persons who own and transfer property within abstract right operate freely, and the right to freely perform these specific actions

is essential to any conception of social freedom.<sup>165</sup> Hegel uses the idea of abstract right to determine what kind of human actions are necessary for freedom, and concludes that human freedom is only possible if persons can own and transfer property without substantial restriction. Because abstract rights must be concretized and contextualized by custom and social life, the abstract property and contract right is then shaped by morality and finally ethical life, neither of which fully subsume Hegel's insistence that freedom consists in the right to satisfy the will through free and consensual ownership and transfer of property.

For Locke, political philosophy starts with the property right as the most sophisticated and developed of rights, and all other rights are subservient to it. Property is therefore "not a task for the individual nor a problem for his political philosophy."<sup>166</sup> For Hegel, "abstract right functions in the exact opposite way." The values in abstract right, the very first of which is 'be a person and respect others as persons,' are "external to and prior to rights, which require a preexisting relational structure of reciprocally recognizing persons or free wills who have developed historically through *Sittlichkeit*."<sup>167</sup>

The abstract property right is the final, most elemental right that persists after a person's social and cultural contingencies have been 'stripped.' It is the right that must remain in order to preserve a person's freedom. Therefore, various social contingencies will determine how the right is enjoyed in a variety of civil societies and states, but the right must be in place if the society is to promote freedom. In this interpretation, property rights are the logical outcome of an ethical society populated with moral beings. According to this interpretation, persons enjoying the abstract property right are fully socialized by their families, their society, and their state. According to Brian O'Connor, "[a]bstract right is the sphere of the agent within a system of laws. Fulfillment of one's role within that sphere requires no more than simple adherence to the laws...Morality, by sharp contrast, refers to the perspective of the subject as an independent agent on what that subject ought to do."<sup>168</sup> As Siep writes, the abstract property right "presupposes institutions for its own realization [and] can also be limited by those institutions," primarily by

the “state’s own ‘capacity for action.’”<sup>169</sup> As Chad McCracken notes, contract law (and, by implication, property law) as it “actually functions in the modern social world is not an institution apart from civil society.”<sup>170</sup> The institutions that govern and protect abstract right are not independent from the law or from civil society: the abstract person always exists within the various institutions of civil society and ethical life, but not within the family or the state.

According to Westphal, abstract right is, in fact, abstract in three ways:

1. actions and principles are initially abstracted from interpersonal relations;
2. they are abstracted from moral reflection; and
3. they are abstracted from legal and political institutions.<sup>171</sup>

The abstraction, for Hegel, permits us to make determinations about the rationality of our property system, and this abstraction “presupposes a social ethos as one of its conditions of success.”<sup>172</sup> In other words: only persons who are fully socialized by ethical life are able to abstract themselves from that very life in order to understand right. According to Quante, morality and ethical life then *assist* abstract personality in its effort to become actual or concretized. The abstract right is therefore *empty* without moral reflection and an ethical community.<sup>173</sup> As Quante explains, the abstract person or will “necessarily implies a content that can only be found outside self consciousness.” This will has no content, and requires action or participation in the actual world. The self-conscious experience of freedom therefore “presupposes the existence of an external and immediately encountered world,”<sup>174</sup> and this world will necessary be filled with other persons who have developed customs, ethics, and a social life (*Sittlichkeit*).

So, freedom of the will in abstract right is a kind of incomplete freedom: the free will must act within an actual world defined by morality (how the will considers itself), ethical life (how others consider the will), and other persons.<sup>175</sup> As Quante observes, making a claim (say, of property) implicitly assumes that there are other persons who are ‘addressees’ of the claim.<sup>176</sup> In §38 Hegel writes that abstract right is “limited to the negative—*not to violate* personality and what ensues from personality.” Property, of course, is what ensues from personality, so abstract

right initially establishes a duty not to interfere with another's property. As Quante explains, "[a]n abstract right that contains a positive assertion in its external form (e.g., "the property of a person must be respected") depends in the final analysis on a prohibition" against the mistreatment of others by, for example, stealing from them.<sup>177</sup> The Hegelian right to property therefore formalizes the duty not to interfere with one's existent property, but it also formalizes the right to attempt to acquire property without interference.<sup>178</sup>

As Schroeder notes, we are born into the family and encounter moral and ethical rules and concepts *before* we encounter, and potentially own, property.<sup>179</sup> In other words, abstract right occurs *within* ethical life—a social structure of families, civil life, and the state—and not along a time line of the individual human being or in some presocial state of nature. In accord with the backwards reading of *Philosophy of Right*, the constitutive property relationships of possession, use, and alienation occur as the objective manifestations of abstract property right *after* a person has left their family and while they struggle for recognition within the imperfections of civil society. They struggle to meet their own needs within this system of needs. However, the self of abstract right *is* the self of "the atomistic individual external and indifferent to all other individuals."<sup>180</sup> This is, perhaps, the most important point to make about abstract right and the person that dwells there: it is a selfish being that inhabits, to varying degrees, all persons. But it is only a *part* of the fully socialized individual, and the *whole* of a fully unsocialized individual. As Brudner writes, "[t]he human individual is pictured as a bifurcated being: on one side, a generic person stripped of individuating features; on the other, a particular being rich in such features."<sup>181</sup> According to Benson, Hegel says libertarians are mistaken about property rights because they want to leave the right at the abstract level as a pre-social, natural right.<sup>182</sup> But the kinds of principles that establish the libertarian right cannot be spontaneously generated in a hypothetical state of nature. Various social institutions make the abstract/owning/contracting person possible.<sup>183</sup> For Gary Browning, this is what makes the abstract person "credible"<sup>184</sup> as a right-holding subject. Browning: "For Hegel, individuals' capacity to undertake free, meaningful



actions entitles them to the Nozickian rights of life and private property. In contrast to Nozick, though, Hegel does not see these abstract rights as absolute, undeveloped, side constraints on human action.”<sup>185</sup>

Benhabib writes that abstract right is Hegel’s term for natural right,<sup>186</sup> but also that the property and contract rights in abstract right are *formal*, meaning that property-owning persons are legal persons operating within a “formally correct procedure” consisting of “background norms and procedures” which “confer validity on the contractual relations,” which are derived from the rights of personality and property.<sup>187</sup> For Benhabib, contractual relations “presuppose the non-contracted and non-contractual capacity of individuals to be treated as beings entitled to rights.”<sup>188</sup> This capacity permits persons to freely enter into contracts, and to transfer their right to property pursuant to contract. These proprietary rights are “stipulated prior to the act of contract,” and the only way a person can contract is if they have full rights over the object of the contract, which is some thing or property.<sup>189</sup> For Benhabib, abstract right becomes the normative presupposition of “modern exchange relations,” or capitalism, constituted by “the reciprocal transfer of proprietary rights among formally equal property owners.”<sup>190</sup> Importantly, McCracken is correct to note that “abstract right cannot be made coherent in its own abstract terms[;] it must be supplemented with content from Ethical Life,” which “has the authority to mold Abstract Life in a variety of shapes, in order to heighten the rationality of the social order.”<sup>191</sup>

#### **Part 4. From Abstract Right to Civil Society**

Property, as an abstract right, is problematic. Persons for whom their property right is their only concern are “stubborn,” “emotionally limited,” and “uncultured” (§37A). Hegel’s normative property claims are, Pippin writes, incomplete. While “[w]e can appreciate the concrete nature of property claims (the extent of such rights, the transferability or inalienable character of some of what owns [such as labor power], [and] the taxation and regulation claims of the state,” we can only situate them “within a certain kind of ethical life” such as that described in Hegel’s discussion of modern *Sittlichkeit*.<sup>192</sup> Although civil society is marked by strong property rights,

there are also obligations and relationships, such as the family and state, that are not based on private property. All of these institutions are gathered together in the realm of *Sittlichkeit*, or ethical life.

The communal phenomena analyzed in ethical life (family, civil society, and the state) therefore provide the ground for the possibility of the phenomena in abstract right and morality.<sup>193</sup> Westphal: “In abstract right, property rights cannot be understood without reflecting upon action: how the rights are implemented and the kinds of phenomena that result from acting with property upon the world. In morality, moral reflection upon these principles of action requires a framing within a set of objectively valid norms. Ethical life shows how rational social life validates these norms both objectively and subjectively.”<sup>194</sup>

So, ethical life—a social framework of norms, laws, and practices that operate only because subjects actively participate in them—creates the possibility that persons might freely trade and contract for property (the actions of abstract right) and also engage in moral reflection (the actions of morality). Without ethical life, there is no free trade but only theft and barbarism, which are the products of failed moral reflection. According to Avineri, *Sittlichkeit* regulates free trade as the relationships between citizens or community members.<sup>195</sup> Here, property is “actualized and guaranteed in the system of needs and the administration of justice.”<sup>196</sup> For Stillman, *Sittlichkeit* is “rich in types of human relations, development, and freedom,” and it is here that “[p]roperty must be *aufgehoben*, both preserved and transcended, so that Hegel can get from the property centered starting point of abstract right to a *Sittlichkeit* that is institutionally pluralistic and varied.”<sup>197</sup> According to Charles Taylor, *Sittlichkeit* is constituted by the “moral obligations I have to an ongoing community of which I am part. These obligations are based on established norms and uses...it enjoins us to bring about what already is [so that] there is no gap between what ought to be and what is.”<sup>198</sup> As we shall see, the institutions that comprise ethical life—the family, civil society, and the state—vary in their treatment of private property, privacy, and eminent domain.

## Homes and Families

Hegel's discussion of the family is important because of its relationship to personality, private property, and homes. It is the first institution of ethical life, followed by civil society and then the state. In Hegel's anthropology, all persons begin within the communal family, which itself begins when two people become a single person in marriage (§162) and then become a "unity of love" (§181).<sup>199</sup>

According to Brooks, persons in families (unlike persons in the realms of right and morality) first encounter each other as real and concrete: persons in families are not abstract and there is a high level of mutual recognition between family members. We learn about obligations and duties in the family home, and we do so *without* abstract ideas about property or contract.<sup>200</sup> In families, persons are united by affection or love, whereas in the civil society they are united by the common bond which seeks to satisfy their own needs.<sup>201</sup> The family is the primary site of the development of personality,<sup>202</sup> and persons who later engage in 'proper' (i.e. consensual) property exchanges—characterized by respect, equal value, and recognition—are beings whose personalities were developed in families.

As Eric Weil describes, the family is where abstract person first finds concreteness. With the death of their parents and the adult child's departure from the home, the adult child is transformed into a private person who pursues their own ends in civil society.<sup>203</sup> Importantly, particularly in terms of the 'backwards' reading of *Philosophy of Right*, family intersubjectivity *precedes* abstract right, in that the kind of relationships that are developed in family and home are "a relatively autonomous ethical domain unto itself."<sup>204</sup>

According to David V. Ciavetta, Hegelian family property operates as a 'link' between the atomism of abstract right and the regulated or 'reconceived' property in ethical life.<sup>205</sup> It is essential for families to own their own property, and, contrary to Hegel's preferred system of private, individual property ownership, such property is held in common among all members of family (§170-2).<sup>206</sup> The family property that operates as a home for the family is the site "defined

essentially in terms of collective, spiritual practices whereby otherwise external, singular selves first experience each other in their constitutive belongingness to one another.”<sup>207</sup> According to Ciavetta, family property such the home is itself abstracted from the civil sphere, which is marked by self-interest, competition, and individuality. However, the family right is like the individual right: the family has exclusive right to acquire, use, possess, and alienate property, and enjoys legal protection against infringement.<sup>208</sup> The special role of the family home in terms of the state is shown by Hegel’s reading of *Antigone*, which recognizes that there is a “tension between family and public law of the land,”<sup>209</sup> resulting in the “opposition of the highest order in ethics and therefore in tragedy” (§166R), where the “family actually refuses to acknowledge the state.”<sup>210</sup>

### **The second institution of ethical life is civil society**

Citing §238, Waldron observes that civil society is intended to tear the individual from their family and make them self-sufficient.<sup>211</sup> More precisely, it serves an educative function by teaching this kind of sufficiency.<sup>212</sup> This self-sufficiency occurs within the freedom of the marketplace that forms the central basis of civil society.

Civil society itself is comprised of three institutions.<sup>213</sup> The first institution, the Administration of Justice, creates and administers statutory law. Through codification, it makes social practices—such as those governing property and contract—public and explicit, and is responsible for establishing courts of justice, which enforce the rights of property and contract (§209-228).<sup>214</sup> The second institution is the Public Authority, or police. This is a wide-ranging institution that encompasses familiar crime prevention and penal justice practices (§233). For example, according to §230, police are committed to ensuring security in property by “annulling infringements of property and personality” which is Hegel’s prolix term for punishing crime. The Public Authority also serves to counter the uncertainty that occur in a market-based economy. The police are responsible for price controls on basic commodities, e.g. bread (§236), as well as for civil engineering, utilities, public health (§236R), education, and poverty relief.<sup>215</sup> The Public

Authority is also responsible for the regulation of corporations, which are similar to trade associations and constitute the final institution in civil society.<sup>216</sup> Corporations help deal with the uncertainties of the market, and also minimize the power disparities between the “underclass of rabble” and the elite business class (§244; 253R).<sup>217</sup>

Civil society and its institutions are strictly distinguished from the final institution in ethical life, the central government, or the “strictly political state” (§273, 276). The central government is distinguished from the state proper, which is the “modern social world” and encompasses the “sum total of the institutions and individuals within a nation, including, but not limited to, the laws and legal system, the various bodies responsible for political decision-making and those responsible for public administration, the constitution, [...], economic concerns of all kinds, ethical traditions, religion, families, and individuals.”<sup>218</sup> According to Westphal, Hegel’s government comprises the monarch or Crown, the Executive, and the Legislature. Hegel’s Legislature is not, however, democratic, and it does not enact laws—although it does draft them for the Crown’s signature. Rather, laws are “enacted by the Crown and administered by the Executive” with input and advice from the Legislature, which consists of “high level servants with direct ties to the Crown and the Executive” and representatives from the Estates Assembly, a kind of class-based lobbying organization that provides “popular insight” to lawmakers so that legislation will “codify and protect the social practices in which one participates and through which one achieves one’s ends.”<sup>219</sup>

Except for his conception of the state, the kind of society that Hegel describes in these sections shares many features with contemporary liberalism. Hegel’s civil society, on the one hand, secures extensive property and contract rights by allowing persons the freedom to trade without significant state or regulatory oversight. They may also join the corporation of their choice in order to freely pursue an occupation or trade. On the other hand, because civil society is a Hobbesian “field of conflict in which the private interest of each individual comes up against that of everyone else” (§289R), it is marked by tension between private property and public

welfare. Hegel gives expansive authority to the police not only to prosecute and punish crime, but also to develop the corporations that are intended to provide assistance when markets fail as well as providing cooperation, mutuality, and ethical guidance. This guidance is, for Hegel, “crucial to offsetting the atomistic, self-seeking individualism basic to the *aporias* of modern market societies.”<sup>220</sup> Such guidance allows corporate members to “learn to pursue collective interests rather than narrow self interest and represent these in the political realm.”<sup>221</sup>

However, it is important to note that although Hegel seems to give broad powers to the police to provide welfare relief for the poor, at no time does he suggest that any of the institutions operating in civil society should be empowered to take property pursuant to eminent domain. What is most important in terms of private property rights is that the judicial and administrative state and corporations are subordinated to higher regulation by the ethical state.<sup>222</sup> This is discussed in full in part 7.

#### **Part 5. Individual and Communal Rights in Ethical Life**

At this point, we can begin to understand how the Hegelian property right is situated within ethical life. Like Aristotle, Hegel has been claimed by contemporary communitarians as one of their own,<sup>223</sup> and it is clear that for Hegel, “all forms of ethical life—family, civil society and state—are forms of communal living.”<sup>224</sup> However, it is a mistake to situate Hegelian property or the totality of social life into a communitarian framework.<sup>225</sup> Community practice as *Sittlichkeit* does not, for Hegel, mean that the community takes priority over individuals’ property and their exercise of abstract right: it means that the community has interests that the individual must respect, and, perhaps more importantly, the individual has interests (many of which are protected by abstract rights) that the community must respect.

Although Hegelian property is not communitarian—Hegel is adamant in his condemnation of communist theories of property, including Plato’s<sup>226</sup>—neither is it the ‘possessive individualist’ conception argued by Renato Cristi. According to Cristi, the conception of property in the mature Hegel of *Philosophy of Right*—the property of abstract right—foregoes

the earlier Hegelian property that is necessarily based on recognition.<sup>227</sup> The property of *Philosophy of Right*, rather, “dispenses with recognition and bears all the marks of a possessive individualist conception.”<sup>228</sup> As opposed to the interpretation of Hegelian property as the product of ethical life, Cristi interprets Hegel’s conception of property rights as constituted prior to intersubjective recognition, and logically and temporally prior to objective law and the constitution of legal system.<sup>229</sup>

Cristi cites §40 as the basis for a personality-based, as opposed to a recognition-based, property right. In that section, Hegel writes that “personality alone confers a right to things, and consequently [...] personal right is in essence a real right [...]. This real right is the right of personality as such.” According to Cristi, “[a] real right requires no mediation. It is constituted by the immediate possessive relation between a person and a thing. Other persons are not involved in this abstract relation.”<sup>230</sup> If correct, an individual living alone in the world comes to own and not merely possess property. In other words, Cristi argues that Hegel adds nothing to Locke’s conception that individual property ownership results from an individual’s labor over unowned things.

Cristi makes a very fine-grained point: although property rights do not entail recognition by others, and are *eo ipso* individualistic or personal, their transfer by contract requires recognition by others, at which point those rights then become social.<sup>231</sup> “Contract,” Cristi writes, “allows the formation of a ‘common (*gemeinsamen*) will’ for it makes it possible for an individual proprietor to relate ‘himself to another person’ (§40).” “The formation of this common will,” he continues, “is what allows the mediation of property through mutual personal recognition. Property is not anymore defined by the monological relation between a person and a thing; it is a social event constituted by the recognition of others.”<sup>232</sup> Furthermore, “Hegel’s individualist concept of property loses its abstraction and immediacy when he introduces recognition. Hegel does so in the paragraph that marks the transition from property to contract.”

Hegel:

This relation of will to will is the true distinctive ground in which freedom has its existence. This mediation whereby I no longer own property by means of a thing and my subjective will, but also by means of another will, and hence within the context of a common (*gemeinsamen*) will, constitutes the sphere of contract (§71).

In other words, for Cristi, Hegelian property is *individually personal* as the expression of will upon possession, but it is when it is the subject of contract that it mediates between the common will of persons.<sup>233</sup>

For Cristi, this understanding of property has a distinctly political aim. Hegel, he writes, prioritizes individualist property “[i]n order to override egalitarian aspirations and redistributive claims by the state...At the same time, he observes that the legal protection of private property requires its socialization.”<sup>234</sup> For Hegel, only a strong state can safeguard individual property, and it does this by protecting it against theft by common criminals as well as by expropriation by the *demos*. Cristi concludes that it is therefore not inconsistent for Hegel to affirm that only “a state which is strong [...] can adopt a more liberal attitude [...]” toward property and other rights.<sup>235</sup>

Cristi makes a distinction that, for Hegel, does not make a significance difference. Cristi argues that because Hegel supports strong property rights in initial, original possession or acquisition, Hegel is therefore a Lockean possessive individualist. But this initial agreement with Lockean original acquisition should not be overplayed. For Hegel, it is “immediately self-evident and superfluous” that “a thing belongs to the person who happens to be the first to take possession of it,” because a “second party cannot take his possession of what is already the property someone else.” (§50). For Hegel, the Lockean first appropriator does not merely labor upon unowned resources and therefore gain ownership in some state of nature; rather, Hegel’s appropriator is a fully socialized person whose appropriation conforms to moral and ethical rights and duties. Cristi’s claim also ignores the role of *self*-recognition in the initial appropriation of property. As Knowles writes, “[i]f I am to determine myself, make something of myself, the self that is operated on must be recognisable by me in just the same way that it is recognised by



others. If, therefore, we recognise the grasping of an object as taking possession, we do so precisely because we identify the will of the property holder in his grasp.”<sup>236</sup>

For Locke, the proverbial desert islander/first occupier owns the coconuts he gathers, the hut he builds, and the seashells he might eventually use for trade. Indeed, he even owns the land that he has labored upon, in spite of the fact that no one else recognizes his claim. For Hegel, on the other hand, a first occupier’s ownership is *undeveloped* until his right to use and/or alienate the property is recognized in the eyes of other persons, and it is in property and contract relationships that allow persons, as parties to the exchange or as persons who might challenge ownership, to recognize each other as such (§71). The social nature of ownership is constituted when “the embodiment which my willing thereby attains involves its recognisability by others” (§51). So, in the absence of others who might recognize his claim, the desert islander has no claim because property ownership is essentially a social and not natural fact. For Hegel, the Lockean first occupier is like a child who grabs and claims ownership based on want, but he does not yet own; the Hegelian first occupier, on the other hand, is “the rightful owner, however, not because he is the first but because he is a free will, for it is only by another’s succeeding him that he becomes the first” (§50). For Hegel, Locke’s property theory is not only ‘primitive’ but incomplete: the desert islander’s ownership becomes recognized only when abstract or legal right has *first* been guaranteed by the state, and *then* when confrontation occurs with another person who has the possibility of exercising their own abstract right to the property. Abstract right therefore itself consists in the actual civil (as well as penal) law that guides property owners and eventually litigators and jurists.<sup>237</sup>

Moreover, Cristi reads abstract right as lexically prior to contract, which does not accord with a backwards reading of *Philosophy of Right* and denies the existence of the fully socialized person who must be in possession of *both* property and contract rights while they operate within both morality and ethical life. Cristi’s interpretation, guilty as it may be of ‘cherry picking’ in terms of Hegelian property, succeeds in showing that the individual, abstract right is a very strong

right that succeeds in withstanding most nonowner claims against it. However, the ‘strong state’ that Cristi positions in order to protect property also has the prerogative to subsume it entirely through its sovereign power.

Unlike the Lockean appropriator, who labors in some unspecified way and thereby obtains a property right, the Hegelian appropriator identifies themselves “through the medium of our property” and thereby accords to others “equivalent status as they express and recognise themselves in their property.”<sup>238</sup> In §194, Hegel writes that it is “mistaken” to believe that the Lockean state of nature could possibly provide “man” with his needs, much less with a property right, because in such a state man has no moral understanding, including in particular the kind of understanding that provides the basis for property and contractual rights. *Contra* Rousseau, modern society and civilization is not the “degeneration and destruction of some originally ‘intact’ humanity.”<sup>239</sup> Freedom is the liberation from the power of nature, and this is accomplished by the will’s taking possession of property, trading it, and alienating it in accord with the right to exclude and the duty not to interfere. Hegel is clearly puzzled why anyone would argue that these kinds of moral stances would spontaneously arise in a state of nature. Humans, in fact, establish “rational control over nature” by the “the process of modernization all over the world.” For Ritter, this means that “tractors, electric plants, and machines of all kinds have finally come to be seen as symbols of freedom—symbols that inspire more passionate engagement and participation than the ideas of single and individually proclaimed political and spiritual freedoms.”<sup>240</sup> Such freedoms are abstract, but they become concrete through the institution of property.

Benhabib writes that Hegel accepts the conclusions of the individualist contractarians—individuals are entitled to rights—but denies the normative ground or historical origin of the kind of political authority that contractarianism attempts to justify; rather, Hegel “proceeds from the condition of a society of individuals who have recognized one another’s entitlement to be persons in order to describe the concrete forms of interaction compatible with this norm.”<sup>241</sup> Hegel denies

that the primary justification for the creation of the state is the protection of a pre-existing right to property. This, of course, is Locke's main claim. According to Benhabib, the issue is not under what conditions would a rightsholder, in a state of nature, consent to a limitation of their rights by a state—this, of course, is also Locke's position as well as Hobbes'. For Benhabib, Hegel's concern is rather with the justification of a state governed by the rule of law, exemplified by the promulgation of public statutes, fairness, and predictability, as well as the protection of rights.<sup>242</sup> These guarantees objectify rights by giving them "objective existence."<sup>243</sup> An entitlement to rights will not merely "justify practices of exchange in the market place,"<sup>244</sup> but *a fortiori* means that societies must operate according to the rule of law, the products of which are property and contract rights. Benhabib concludes that Hegel is not, therefore, a possessive individualist, contractarian, *nor* a Marxist because he "avoids reducing the normative dimension of collective life to a positivist science of society."<sup>245</sup>

Westphal comes to a similar conclusion. For Westphal, Hegel has an organic conception of the individual, but not the *conservative* organic conception proposed by MacIntyre, *et al.* Organicism, writes Westphal, opposes atomistic individualism by recognizing that people do not enter society fully formed, and Hegel maintains this perspective. Organicism becomes conservative by holding that individuals have no conception of themselves apart from their group, and this is not Hegel's perspective. Individuals are indeed formed by their society and "their society also suits them" as a result, but Hegel avoids the false dichotomy that either individuals are prior to society or society is prior to them. In terms of property, individuals meet their needs through the objects that society presents to them, but they are not therefore subservient to society. They have their "own response to their social context," and therefore "the issue of the ontological priority of individuals or society is bogus."<sup>246</sup>

## **Part 6. Property Rights, Poverty, and the State**

This part presents the question of whether Hegelian property rights, made concrete within the ethical lives of families, civil society, and the state, are merely private or broadly public. If

they are private, they exist only between citizens and one another. If they are public, they exist between citizens and the state, and citizens are therefore able to make property claims that can (in appropriate situations) trump the property claims of the state. Although Pippin notes that the rights claims from abstract right are “meant to be preserved in the subsequent stages of his analysis,”<sup>247</sup> it is also clear that those rights are different at the end of the book.<sup>248</sup> As Stillman notes, what begins as a robust defense of private property “does not hold true at the end of *Philosophy of Right*.”<sup>249</sup> This is because, as Waldron writes, Hegel’s property theory does not reflect any ‘absolutist spirit’ regarding private property: the right to it cannot ‘trump’ the demands of genuine ethical community or state.<sup>250</sup> Because of the antagonism between this actuality of property rights and social goals whereby “private property may have to be subordinated to higher spheres of right, such as a community or the state,”<sup>251</sup> Waldron questions whether Hegel has, after all, posited a theory of property rights, because “a putative right that yields in the face of every collective goal is not a right at all: it does no work of its own in the political theory that postulates it.”<sup>252</sup>

Although Waldron concludes that Hegel defends a general, as opposed to specific, rights-based theory of property, this section concludes with the suggestion that Hegel’s political or public theory of property is *not* ‘rights-based.’ This is because it lacks a conception of public law in terms of property and succeeds only in regulating property and contractual relationships between citizens—resulting in a social or private theory of property—leaving the relationship between the citizen and the state unregulated. As shown in this and the following part, Hegelian property rights, although strongly liberal at the social level, provide only a partial defense against eminent domain at the state or political level. This is not some tragedy for rights or the result of a totalitarian bent in Hegel’s philosophy: it is simply the recognition the state “does not exist as an organization for the satisfaction of needs and the maintenance of rights.”<sup>253</sup>

This part examines the Hegelian property right in light of 1) whether it is instrumental to, or essential for, freedom; 2) the kinds of moral goals property promotes; 3) Waldron’s argument

that Hegelian property is a general rights based regime and the implications of such a regime; 4) Hegelian property rights and poverty; and 5) the implications for Hegelian property as a public right against the state.

### **Property as Instrumental or Essential**

According to Schroeder, Hegelian property—unlike, for example, utilitarianism, where property is instrumental towards the goal of welfare—is not instrumentalist and it does not serve a social or political goal.<sup>254</sup> For Schroeder, Joseph Singer is an example of a property theorist who “tries to use property concepts and rhetoric to support external social goals, such as right of workers to acquire a plant.”<sup>255</sup> For Singer and other theorists, “property itself is seen as having no essence but merely a title for a legal conclusion—a bundle of sticks.”<sup>256</sup> Hegelian property is not instrumental towards freedom; rather, “property,” Waldron writes, “is the necessary medium through which the process of individual and social development occurs.”<sup>257</sup> Because it is necessary for freedom, it is not instrumental towards it, and Hegelian property cannot be said to serve as a bulwark against the state or in pursuit of social or political goals. It may, however, serve other moral objectives.

### **Hegelian Property As Moral Property**

Hegelian property rights clearly “allow persons to articulate freedom and stake their own *private* domain”<sup>258</sup> and “protects will by erecting fences around the objects where the will has become embodied,”<sup>259</sup> but it is also claimed to ‘prepare’ owners for understanding their rights and duties as citizens.<sup>260</sup> Waldron explains that property owning is important for the ethical development of human individuals because it is only through “owning and controlling property that [persons] can embody [their] will in external objects and begin to transcend the subjectivity of [their] immediate existence.” By using objects, [their] will stabilizes and matures and learns to take its place in a community of wills. This stabilization and maturation is an absolute prerequisite to ethical maturity.<sup>261</sup> Owning and working on something imposes discipline on the will, and ownership accords recognition to owner when others take his ownership to be a reason

for constraining their actions so far as his resources are concerned.<sup>262</sup> A person with no property gets none of these benefits; there is nothing external for him to *work* on that concretely registers his intention, and he cannot stabilize that intention. So without the disciplining of the will in term of both the owner's ability to make plans and others' restraint towards his resources, no benefits of recognition are afforded to the owner.<sup>263</sup>

### **Hegelian Property: A General or Special Right**

The question then turns to whether Hegel means for everyone to actually own property, or whether abstract right only guarantees the mere capacity or opportunity to own property. The actual/potential distinction is based on Waldron's discussion of Hegelian property rights as *general* or *specific*.

According to Waldron, an argument for private property is rights-based (either general or specific) just in case it takes some individual's interests (such as, for example, the development of their personality) as a sufficient condition for holding others (usually governments) to be "under duties to create, secure, maintain, or respect an institution of private property."<sup>264</sup> Hegel's is, for Waldron, a rights-based property regime. In terms of how the right is enjoyed by rightsholders, a rights-based property regime can be broken down into regimes that respect either special (SR) or general rights (GR).

If Hegel intends that everyone actually own property, then the provision of property is a general right that the state or some other institution must provide through the institution of private property. A general right to property, like the general right to freedom of speech, means that all persons by virtue of their humanity or citizenship enjoy the right. Unlike the special right, persons do not need to undertake some qualifying action that provides the right. The general right recognizes that property is inherently important due to its connection to individual liberty.

Special rights are associated with the property theory suggested in Robert Nozick's *Anarchy, State, and Utopia*. If the right is specific, then the state must merely provide an institution that permits the opportunity for ownership to arise upon the performance or occurrence

of some act or event. According to Waldron, a special right to property arises when persons perform some action that then grants them a right or entitlement over some property. Locke's labor-mixing theory is a special rights theory: by performing the requisite action—laboring upon unowned property and mixing one's self-ownership with the world's resources—the special right of ownership over that resource emerges. Special rights theories also include first occupier theories,<sup>265</sup> entitlement theories,<sup>266</sup> and reliance theories.<sup>267</sup> From the SR point of view, it is no matter of concern if some persons own nothing: they are propertyless because they did not perform the contingent actions that entitled them to property rights. So, Waldron concludes, Locke and Nozick are unconcerned if some persons are entitled to nothing.<sup>268</sup>

According to Waldron, Hegel wants to guarantee not only the institution of private property or that existing arrangements be respected, but that there should be (in the institution itself) a basis for a general right that is predicated upon an “overriding ethical concern if some people are left poor and propertyless.”<sup>269</sup> When a right is a general right, it serves interests directly: we ought to uphold private property because, Waldron argues, “[i]ndividuals have, to put it crudely, a general right to own things.”<sup>270</sup> The GR argument claims that even if its impossible to establish who is entitled to what, it is still desirable to have private property.<sup>271</sup> Hegel's, Waldron concludes, is a GR based theory.

Whether the right is special or general influences how we interpret Hegel's understanding of property allocation. In §49A, Hegel famously states that “everyone ought to have property.” Waldron interprets this to mean that the distribution of property—specifically in term of goods required for a minimally decent life—need not be distributed equally,<sup>272</sup> but that it be distributed so that *actual* ownership is the result. This is because in Hegel's ethics private property serves the general interest people have in negative liberty but not merely as an ‘acquisitive opportunity’: what is important is the socially beneficial results of actual ownership, and this is the logical outcome of property as a general right. If private property serves this type of negative liberty interest, then it is because owning something is a matter of being free to use it, where one is not

opposed in its use by the interference of others. This negative liberty interest is meaningless in a society where everything is privately owned if a person owns nothing; this person therefore has no liberty in such a society. In other words, if the opportunity for property is unconsummated, persons are unfree.<sup>273</sup>

### **Hegelian Property and Poverty**

Hegel is concerned that lack of property leads to a ‘rabble’ whose poverty not only causes immorality (where the “feeling of right, integrity, and honour...is lost”), but also the “inward rebellion against the rich, against society, the government, etc.”<sup>274</sup> So, when Hegel argues that ‘everyone must have property’ and that “free ownership” is a “fundamental condition” of the successful flourishing of the state, it appears that he is concerned with the provision of the material things that are necessary for survival, and with the fact that *Sittlichkeit*, or ethical life, demands that persons’ “particular welfare should also be promoted” (§229) and “treated as a right.” (§230). Therefore, Waldron concludes, recognition is only possible through actual ownership and the result is welfare promoting. This does not comport with Hegel’s somewhat complicated and unsatisfying discussion of poverty, which, contrary to Waldron’s interpretation, appears to favor the SR version of property.

Although it is clear that Hegel’s administrative state regulates *some* market failures in order to provide welfare to the poor, it is also clear that it cannot regulate *all* market failures.<sup>275</sup> Avineri frames Hegel’s assessment of the problem of poverty as follows: if Hegel leaves the state out of economic activity, the impoverished will also be left outside of it. If he brings in the state to solve it, the distinctions between state and civil society disappears.<sup>276</sup> This because the state then becomes a tool not merely for protecting property, but a tool for providing it as well. In order to avoid making the state such a tool, Hegel proposes three approaches for alleviating poverty: charity and voluntary institutions, redistribution through direct taxation, and public works.<sup>277</sup> However, none of these solutions will, in Hegel’s judgment, ‘cure’ the problem. If it was the burden of the rich (through private charity) or well-endowed public resources (through



redistribution via taxation) to provide services to the poor, Hegel argues, the resulting welfare without labor “is contrary to the principles of civil society and the feeling of self-sufficiency and honour among its individual members.” (§245). Welfare without work, it is argued, violates the dignity that work promotes. In order to dignify the poor, they must labor for their own welfare, but the ‘the crisis of overproduction’ results from giving the poor make-work.<sup>278</sup> Make-work, “public arrangements to provide for and determine the work of everyone,” occupies “the opposite extreme to freedom of trade and commerce in civil society.” Hegel offers the example of the building of the Egyptian pyramids,<sup>279</sup> which were undertaken for public ends, but, because of this, the individual’s work is, again, not mediated by his own will and interest. “This interest,” Hegel writes, “invokes the freedom of trade and interest against regulation from above,” but it is selfish and needs regulation to be brought back to the universal (§236).

Schroeder is correct when she writes that the Hegelian state imposes “restrictions on property to alleviate the degradation of the poor, which is likely to result from the *laissez-faire*, abstract regime of civil society.”<sup>280</sup> Market intervention justifies the imposition of taxes in order to satisfy the “most basic of needs” (§189) including the building of infrastructure and temples.<sup>281</sup> This also means that “legislatures may, without violating property rights, enact positive legislation limiting property rights and contractual freedom for the sake of the autonomy of all.”<sup>282</sup>

But the welfare measures available in civil society, such as the establishment of price controls on bread, for example, are not aimed towards providing *property* to the poor: nowhere does Hegel claim that property should be expropriated to provide in-kind transfers in an attempt to alleviate poverty or provide property for the poor. Overall eradication of the poor is, in Hegel’s eyes, impossible or economically unfeasible. Hegel recognizes that there are costs of freedom (including the moral depravity that accompanies poverty<sup>283</sup>) but that poverty cannot be abolished without also abolishing freedom. Therefore, Hegel’s rather feeble attempts to meaningfully address the issue of poverty are unrelated to the private property right. As Waldron writes, Hegel

does not attempt to link “the plight of the poor with the ethical arguments in favor of private property.”<sup>284</sup> Furthermore, state intervention to mitigate poverty “should be limited by the need to respect the ‘private’ space for individuality within civil society.”<sup>285</sup> As Cristi notes, the judicial state entrenches property, while the administrative state provides welfare—and not property—to those who lack it.<sup>286</sup> Poverty is therefore inevitable, but it cannot be remedied by the administrative state or through democratic means.<sup>287</sup>

The SR interpretation is therefore the more likely explanation for understanding Hegel’s assertion that everyone must have property. As Peter Benson argues, Hegelian ownership begins with the idea that freedom consists in persons having a “juridical capacity to possess things as their individual property.”<sup>288</sup> This is a positive conception of freedom in which ownership arises in the relationship between a subject (i.e. a potential owner) and a thing. But this freedom does not demand any particular end, or any end at all, and therefore the choice of ends is permissible or impermissible, but not obligatory.<sup>289</sup> As a result, the juridical capacity for ownership is negative (there is no positive duty upon persons to either obtain property themselves or help others so acquire), interactional and not merely individual (the right gives rise to corresponding duties [§155]), and external (a property owner’s actions must comport with other’s persons use of things as an ends in themselves).<sup>290</sup>

This means that there is no duty owed to *oneself* to undertake property ownership despite the existence of a duty to respect the will of another as objectified in their own property. This is because the rights and duties of ownership cannot coalesce in a single person, and therefore no one has any duty to ensure their own or anyone else’s initial acquisition.<sup>291</sup> As a result, Benson argues that right consists only in the capacity to own, and duty consists only in respect towards already-owned property. More importantly, if ownership is not a posited right, then there is nothing about a propertyless person’s needs or welfare that demands a distributive share of other persons’ property, and the coercion necessary to effectuate this (at least at the primitive state of abstract right) would violate the owner’s entitlement to her property.<sup>292</sup> This requirement to

respect each other's juridical capacity for ownership constitutes the extent of abstract right at this stage, and Hegel's conception of property rights closely tracks the privacy theory of property up to this point in the analysis.

### **The Property Right and the State**

On Ludwig Siep's account, rights and interests in the Hegelian system are subordinated to the state. But a state that serves exclusively for the protection of persons and property remains entirely dependent on particular constellations of interests and therefore can be terminated by its members as a purely private contract. For Hegel this ultimately leads back to the feudal form of the state. To avoid this, civil freedoms can be subordinated where the very existence of state is at issue or in the state of general emergency, where demands on rights may require that property interests be sublated. Siep argues that Hegel provides no indication of the appropriate limits with respect to 'fundamental rights' in this regard; nor does he suggest any procedure for permanently securing such rights against potential abuse or violation on the part of the state.<sup>293</sup> As a result, Hegel's philosophy of right seeks to protect individuals from one another, but not from the state itself.<sup>294</sup> Although there is significant conflict between individuals in civil society, there is no "tension between personal right and the governing power of the state," and therefore, for Siep, no protection of individual freedoms against the state monopoly of power.<sup>295</sup> "The protection of the individual in relation to the power of private persons and particular groups is essential," Siep writes, "but protection in relation to the preponderant power of the state is not." This is the "decisive limit of Hegel's liberal outlook."<sup>296</sup> For Siep, the "principal deficiency" inherent in *Philosophy of Right* is just this failure to establish a defense of fundamental rights against the state. In the case of "misuse of power on the part of the political authorities" (§295), Hegel relies on familiar institutions (such courts of appeal) culminating in 'the monarch' (§301). The state must also be "ethical, 'transparent' [and] involve genuinely 'functioning social and juridical practices'" that are codified and clear, and must be based on "thought" and "knowledge" and not be arbitrary.<sup>297</sup> These are admirable aspirations, but nowhere does Hegel indicate how they might

be enforced. Rights claims cannot be made where there are no “concrete conditions of their existence and enforcement”; such claims are, according to Pippin, “not really rights claims.”<sup>298</sup>

Honneth supports this interpretation. In *The I in We* Honneth writes that individuals must be able to “possess an exclusive portion of the external world, objects, or things (*Sachen*) (§42), in order to be able to actualize the preferences they have chosen without restriction.” However, this “free-space of subjective arbitrariness” is merely protected from “interference by *other subjects* who contest their possession,”<sup>299</sup> but not from interference by the state. In establishing this zone of private property, subjects “must be willing to concede *other subjects* the same claim to unhindered actualization of their personal freedom.”<sup>300</sup> Of course, legal or abstract right is not unlimited or absolute, and it is in the transition to the later stages of morality and ethical life that individuals are said to “link one’s will to a conception of a universal good.”<sup>301</sup> Honneth’s error (a minor one, but relevant to the point being made here) occurs when he ascribes the idea that right only protects an individual’s property from one another individual, and not from the state, to the “classical doctrines of private property” found in Locke and Kant. Locke, of course, presented a doctrine of private property upon which the nation itself is not only founded, but which protects property from many kinds of state intrusion as well. Despite struggling against their fellow citizens, the Hegelian property owner does not struggle for recognition against the state.

Even when the purely legal protections afforded to, for example, property rights, are reproduced in the “concrete person” of civil society (§182) where the goal of the administration of justice is the “protection of property” (§208), there is apparently no indication, stipulation, or even hint in the *Philosophy of Right* that state power in terms of property rights (and perhaps all rights) may or should be restricted or regulated at any level of abstract right, morality, or *Sittlichkeit*. Whatever protections are afforded property rights at the intersubjective level between subjects are non-existent between subjects and the state.

If “free will” is truly the “fundamental concept of the entire *Philosophy of Right*,”<sup>302</sup> then Hegel’s detailed and expansive plan for a civil society that purports to encourage the

objectification of will in its expansive ownership of things is remarkably “modern, liberal, (1980s) neo-conservative, formal, commercial, capitalistic, or market.”<sup>303</sup> But this conception fails because of Hegel’s unwillingness to acknowledge the possibility that free will requires that its exercise be guaranteed by restrictions upon state power as well. Although Hegel was cognizant of the clash of private interests against one another, the conflict between persons and communities, and the conflict between both persons and communities together against the state (§289), he was unwilling to create the types of protections in a public law that he found necessary in the private law. Hegel cannot countenance the idea that an individual property right, or even the property right of a community, can trump the superior right of the state. If private property denotes the “enduring, exclusive and relatively unlimited rights of use and decision that persons have in relation to enduring objects,” then Hegel’s theory of property is not a rights-based theory at all, because “a putative right that yields in the face of every collective goal is not a right at all: it does no work of its own in the political theory that postulates it.”<sup>304</sup>

This is not to say that a rights-based theory cannot have restrictions, or that the general welfare may trump individual rights on occasion. Hegel’s precursor Adam Smith appears to agree that the ‘sacred rights’ of property may be legitimately subsumed by the common good in appropriate circumstances. For example, writing in reference to the silver mines of Peru and the tin mines in Cornwall, Smith comments that the sovereign encourages the exploitation of natural resources as a source of revenue by permitting non-owners to claim mining rights on another’s property “without the consent of the owner of the land,” who is nevertheless paid a small “acknowledgement” by the miner or “bounder.” In both locations, “the sacred rights of private property are sacrificed to the supposed interests of public revenue.”<sup>305</sup> But for Hegel, this sacrifice is made without any regard, regulation, or protection of the interests that persons will naturally have in their things. Strong private rights, in terms of claims, lawsuits, or judgments against other subjects mean little if similar provisions are not made for public rights against the state.

For Benhabib, Hegel's prioritizing of private property constitutes a "Pyrrhic victory" because he "confined the validity of contractual transactions to the civil or private sphere alone, and robbed contract arguments of their political significance." This results in a reconciliation of the "liberal market society with an authoritative political state."<sup>306</sup> The authority of the political state is most apparent in Hegel's complicated approach to eminent domain, which, in true dialectical form, both uplifts and cancels the private property right at the same time.

### **Part 7. Hegel on Expropriation**

This part attempts to reveal the normative role of property law and eminent domain in Hegel's philosophy. In §46, Hegel writes that "private property may have to be subordinated to higher spheres of right, such as a community or the state," but that this "cannot be grounded in chance, in private caprice, or private advantage, but only in the rational organism of the state." So, after having normalized private ownership, Hegel recognizes that "exceptions may be made by the state," and the state "alone...can make them" (§46). This is clearly a recognition that the state may confiscate property, but it is unclear which state actors are authorized and what justifications—if any—must be provided.<sup>307</sup>

In section 1, I showed how Radin argues that Hegelian property can be construed to mean that the mere fact of occupancy should put an almost complete stop to expropriation due to the importance of the home in the development of personality and freedom. Alan Brudner argues, on the other hand, that the Fifth Amendment's takings provision better reflects Hegel's position on expropriations, which requires persons to relinquish private property to the interests of the community if the conditions of public use and just compensation are met. In this section, I argue that the former interpretation should prevail, which stands for the proposition that by limiting the state's prerogative to expropriate in all but the most exigent circumstances, the home, as the *situs* of personhood, recognition, and ultimately, freedom, is best protected. This, however, is not Hegel's conclusion: rather, Hegelian expropriation discloses the dialectic inherent in both the abstract conception and normative exercise of the right, in which the private right to property at

the level of civil society confronts the public right of the state, resulting in both the preservation and uplifting of the right, and, at the same time, its cancellation or annihilation of it by the state. The result is a strong defense against expropriations initiated by the *demos*, but no defense at all against takings by the ethical state.

This reading of Hegel relies upon 1) his denial of any contractual relationship between citizens and the state; 2) Hegel's distinction between civil society and the state; 3) a critical rejection of Brudner's attempted rehabilitation of Hegelian takings; and 4) Cristi's reading of the authoritative Hegelian state that both protects and annihilates property.

### **The Citizen and the State**

In the sections on contract (§§72-83) and specifically in §75, Hegel explicitly denies that a contractual relationship—the kind advocated by Hobbes, Locke, Rousseau, and Fichte—exists between the citizen within a state (a “contract of all with all”), between the citizens (individually or as a “unity of different wills”) and the state, or between persons in a marriage. He also denies that the state originated for the purpose of protecting private property “in opposition to the right of the sovereign and the state” where “the rights of the sovereign and the state [are] regarded as objects of contract and based on a contract[.]” (§75). §75 arrives after Hegel has argued forcefully for property rights that are actualized by the “common will” (§71) created by the contractual agreement. As discussed, *supra*, it is in the moment of this profoundly important agreement (the “transition from property to contract”) that the “contracting parties *recognize* each other as persons and owners of property,” (§71R; emphasis in original) and where the alienation of property allows its soon-to-be former owner to experience their independence from it as the experience of freedom *from* the thing itself.

This experience, however, does not hold between all citizens *qua* citizens, nor between citizens and the state. Hegel's state cannot be the product of a contract between citizens or between citizens (as a collective) and “the sovereign and the government” because contracts and

property originate in the arbitrary will of persons (as an “optional matter”), and this will cannot “break away from the state, because the individual is already by nature a citizen of it.” (§75).

According to Michael Wolff, Hegel reasons that if the end and purpose of state is located solely in, say, protection of property, then it “inevitably appears as ‘something arbitrary’ (or we can now say: as something contingent) whether individuals come together to form a state or not.”<sup>308</sup> The state cannot enter into a contract with anyone because it does not possess an arbitrary will (see §75A). The contract theorist is therefore committed to the idea that one can comprehend the ‘whole’ (here, the state) only as “an effect of the competing forces of the individual parts”<sup>309</sup> (here, the individual parts are citizens). For Hegel, this is backwards because states either exist *a priori* to individuals, or individuals are under a duty (based on rational destiny, necessity, or reason) to create one *ab initio*. Unlike the nature of contract, which is based on arbitrary will and not duty, Hegel’s concept of the state sees itself “as an end in and for itself, as thus ultimately an ‘organism.’”<sup>310</sup> Therefore, the end of the state cannot be, as it is for Locke, the protection of property: the end of the state *is* the state.

Also, because there is no ‘exchange of equivalents’ between citizens and state, there is no contract with the state, and states therefore cannot violate property or contractual rights.<sup>311</sup> According to Benhabib, these relationships (contract and property) exist only between persons and not between persons and the state. That kind of relationship is, of course, Hobbes’ version of the social contract, which results in “the contractarian tradition...confus[ing] a norm which has binding validity in the sphere of private transactions with norms governing the rights of political bodies like the state.”<sup>312</sup> When the state proper is confused with civil society, it is purported to exist solely for the protection of property—this, of course, is Locke’s position. But that is not the goal of the state, because, unlike property, the state is not optional. When it takes property pursuant to eminent domain, for example, the state cannot be obligated to exchange an equivalent (in the form of just compensation) pursuant to an express or implied contract such as the takings



clause of the Fifth Amendment. For Hegel, states simply are not obligated to respect this category of right.

### **The Distinction Between Civil Society and the State**

The public use and just compensation requirements are also absent in Hegelian expropriation due to Hegel's distinction between civil society and the state. This distinction means that property and contract rights, as well as the punishment of crimes associated with the violation of these rights, such as theft or fraud, lie within the realm of civil society, which itself is within the realm of the state. Civil society is tasked with the obligation to uphold these rights when they are violated by citizens to the detriment of others, whereas the state is *not* obligated to uphold property rights. This is because, for Hegel, the ultimate purpose of the state is not "the security and the protection of property and of personal freedom." (§258). According to Avineri, "under no condition should the state be conceived as an instrument for the preservation and defence of property,"<sup>313</sup> and, furthermore, the "state can't be mere executor of private, economic interests of citizens."<sup>314</sup> The state, however, *does* have the prerogative to protect property rights from what Cristi calls 'revolutionary democratization,' or redistribution for public use in violation of its owner's personhood rights. This is discussed in the last section.

### **Brudner's attempted rehabilitation of Hegelian takings**

According to Alan Brudner, a critical view of the Fifth Amendment can make it appear as a "paradox," a "kind of neurotic accommodation of mutually ambivalent opposites in a divided soul writ large."<sup>315</sup> In this interpretation, takings constitute a wrong that "annihilates the person" by unjustly taking their property. Takings, therefore, are incoherent because takings are incommensurate with personhood.<sup>316</sup> This, of course, is the position taken by Radin, *supra*. But Brudner reads this critical view in another, coherent way: "the contradiction inherent in civil society is logically surmounted in the political community (what Hegel calls the 'State') and [...] a takings law of the kind found in the Fifth Amendment reflects that solution."<sup>317</sup> The result is a rehabilitation of Hegelian property law that makes it familiar to the constitutional property

jurisprudence of United States. According this view, Hegel is in substantial agreement with the legal norms provided by the Supreme Court's contemporary jurisprudence of eminent domain, where the paradoxical subordination of private property to "higher spheres of right, such as a community or the state" (§46) is negated by the constitutional duty to compensate. But because Hegel provides no indication of the appropriate limits of state power with respect to 'fundamental rights' nor suggestions for permanently securing of such rights against potential abuse or violation on the part of the state, whatever protections are afforded property rights at the intersubjective level between subjects are non-existent between subjects and the state. Such an interpretation ignores the unique role of property in the development of personhood and the exercise of free will, both of which are preserved in Radin's preferable account of personal property which, again, deserves the protection of strict scrutiny in a constitutional jurisprudence that respects the unique importance of personal property rights as they struggle for recognition with competing demands by the community.

Brudner questions whether Hegel proposes the existence of an unqualified *in rem* right outside public law, and if so, how private property can still be subordinate to public welfare in terms of permissible takings.<sup>318</sup> For Brudner, the takings clause stands for the proposition that "forcible expropriations for an ordinary public end are permissible subject to an indefeasible duty to compensate the owner."<sup>319</sup> Brudner is correct to note that eminent domain is founded upon the state's "sovereign lordship over all things within its territory," but incorrect in his claim that compensation "qualifies its eminence"<sup>320</sup> for both Hegelian property and the constitutional property jurisprudence of the United States. His attempt to show specifically how Fifth Amendment takings jurisprudence has developed in a distinctly Hegelian manner is, therefore, unsuccessful.

Hegel's state, he argues, is a holistic entity containing both a public sphere aimed at the common welfare and a private sphere aimed at atomic persons. According to Brudner, the takings clause reflects the tension in the law of property between these spheres and also belongs to the

“constitution of a well ordered political community,”<sup>321</sup> where “the idea of a property that is established inside the state but outside the public sphere yields the configuration of norms contained in the takings clause.”<sup>322</sup>

Brudner locates the legitimacy of eminent domain in the citizen’s “positive right to the conditions of autonomy,” expressed as a welfare right to the “minimum level of resources needed to liberate the mind for the pursuit of self authored projects and to guarantee independence from those who would otherwise control the means of subsistence.”<sup>323</sup> This guarantee also includes equality under law. This equality requires the existence of institutions that further guarantee the rule of law in the form of systematic due process, reasoned decisions by the judiciary, and the public dissemination of all laws and statutes. For Brudner, these welfare and equality conditions are something that “subjects are entitled to from rulers as condition of authority,” and once they are implemented the abstract and negative right against intrusion cannot remain unaltered because citizens in civil society owe duties to one another, while persons in abstract right do not.<sup>324</sup> As a result, abstract right is merged into a civil society where there is “no property independent of the common welfare.”<sup>325</sup> “Thus,” Brudner concludes, “historically acquired holdings may be forcibly redistributed by the public authority without violating rights, providing that the redistribution is for the common welfare.”<sup>326</sup>

Because there is mutual recognition between individual and community, their relationship is one of mutual respect: “public authority and the person are ends only in being freely recognized by the other” by renouncing both the individual’s and the community’s claim to “exclusive end status.” Each is preserved by respecting the other.<sup>327</sup> Because the state “may take for ordinary public ends without consent,” public authority must respect private ownership through compensation because “property is recognized through the free market”; property, therefore, cannot operate “as an internal constraint on state authority.”<sup>328</sup>

Brudner’s conclusion is correct: the right to property withers at the level of the state. However, his analysis of the role and duty of the state as it expropriates private property

contradicts the two tenets of Hegelian property described in section 3, *supra*. First, Brudner writes that the two prerequisites for takings under the United States constitution, public use and just compensation, are consistent with Hegelian property because of duties owed by the state to the people as conditions of its authority. These duties include the provision of due process, welfare, and equality. Granting that these are the duties of the officials in civil society, they are not provided to citizens as a *quid pro quo* in return for the citizenry's grant of authority. This is the citizen/state relationship of the contractarian, where state action is conditioned upon the people's express or implied *imprimatur*. There is no contractual relationship between the Hegelian state and the people. Hegel's property owners have no political or moral power to change the terms of state expropriation (even if it were embodied in a constitution with provisions much like the United States takings clause) so it cannot be said that their enjoyment of certain property protections in the form of a public use or compensation requirement is the result of a grant of authority and, *a fortiori*, the contractual obligations that result from such a grant.

Brudner's interpretation also suffers from his failure to make any distinction between Hegel's forms of the state. In the proposed Hegelian constitution, there is nothing to suggest any statutory restrictions on eminent domain other than the assertions in §46, where Hegel writes that "private property may have to be subordinated to higher spheres of right, such as a community or the state." Private property is the norm, but "exceptions may be made by the state." Hegel qualifies this right of the state: it "cannot be grounded in chance, in private caprice, or private advantage, but only in the rational organism of the state." (§46). This means that state officials may not use expropriation as a way to personally profit from state action, nor that they can use it arbitrarily. They may, however, take property 'rationally.' This qualification immediately brings to mind the current jurisprudential standard of review for takings in the United States—the rational basis test—and perhaps Brudner could have based his analysis on this point. However, unlike the conditions imposed by Brudner, Hegel does not establish any such conditions, and, because of the structure of Hegel's state, enforcement of the property right against the improper

use of eminent domain is unavailable through judicial review.<sup>329</sup> Therefore, Hegelian eminent domain is a pure act of sovereignty and does not require the state to satisfy constitutional requirements of public use or compensation.

### **Expropriation by the Monarch but not ‘democratic majorities’**

Cristi agrees with Brudner’s general idea that Hegelian property provides *some* protection against eminent domain, but approaches the issue from a very different angle. According to Cristi, Hegelian property denies the power of eminent domain to the quasi-democratic/administrative agencies that constitute civil society, and suggests that the state, while not burdened with the requirement that it protect private property from violation by other citizens, may be obligated to protect it from democratic expropriation for redistribution or ‘public use.’ This, of course, is Radin’s perspective as well. Cristi writes that Hegelian property contemplates that the monarch protects property against the claims of democratic majorities, which are part of civil society (e.g., representatives from Estates). While the *demos* is part of the ‘state proper,’ it is not part of the monarchical state that Hegel believes should “protect private property from democratic redistribution.”<sup>330</sup> However, there is no provision to protect private property from the strong monarchical state itself, and true uses of eminent domain are, again, unchallengeable at the judicial level because of Hegel’s opposition to judicial review.<sup>331</sup>

According to Cristi, property and the right to it is regulated in the external state, which consists of the institutions of the police or administrative justice.<sup>332</sup> This subset of the state proper provides for the *protection* of property through administration of justice (§208,230); yet it can also regulate property, impose taxes (§184) and price controls, and otherwise provide for general welfare, particularly when charity fails and the state must therefore provide services such public poorhouses, hospitals, and streetlights.<sup>333</sup> In civil society, persons are particular and their property is protected. However, in the ethical state, governed by the executive (or monarch or prince) as well as the legislative and corporate institutions, universalizability occurs and there is no private property. While civil society and its institutions can regulate property, it cannot both

take and protect it at the same time; civil officials similarly cannot prevent the ethical state/monarch from using eminent domain.<sup>334</sup> Here, the Hegelian aim is to “negate political, [but] not economic liberalism”<sup>335</sup> by driving a strong wedge between the police or regulatory functions of the state and the state proper, the result being that the state proper is not part of civil society. Because it is not part of civil society, there is no right, property or otherwise, against it.<sup>336</sup>

For example, Alexander and Peñalver, using *Jacque v Steenberg*,<sup>337</sup> are correct to note that Hegelian property provides a justification for strong property rights against trespass.<sup>338</sup> In *Jacque*, the defendant was attempting to deliver a mobile home to its customer but the road was covered with snow and a sharp turn made the delivery difficult. The defendant asked plaintiff, a neighboring homeowner, for permission to pass over their field in order to deliver the mobile home. The plaintiffs refused. The Steenburg Homes employees used their property anyway, and drove their truck and product over the Jacque’s land. This resulted in a jury’s nominal damage award of \$1, and a punitive damages award of \$100,000.00. According to Alexander and Peñalver, the Hegelian property institutions in civil society (to wit, the administration of justice and the police) are committed to this kind of resolution. Hegelian property would also protect this home *against* those same institutions in civil society from attempting to expropriate it. However, because there is no private property at the level of the ethical state, and because of the distinction between the state and the institutions in civil society, Hegelian property fails to protect the Jacque residence from expropriation by the monarch, prince, or the various ministers and advisors who are responsible for operating the state proper.

As Fred Dallmayr writes, eminent domain is a sovereign act: it cannot constitute a violation of right nor could it be deemed ‘compensable’ by lesser institutions.<sup>339</sup> Hegel anticipated that the monarch and his appointed ministers can take, but not civil society functionaries.<sup>340</sup> These would include, in Hegel’s system, various officials operating within the administration of justice and the police. In modern jurisprudence, these institutions would include landmark commissions, urban redevelopment corporations, and local or municipal governments.

Therefore, Dallmayr concludes, “the people” in Hegel’s system of government—the functionaries, representatives in the Estates, and local officials—cannot appropriate property.<sup>341</sup>

Hegel supposes a liberal conception of the priority of subjective rights and private property, but these are not extended into the political sphere.<sup>342</sup> As Cristi notes, the prohibition against the state as the protector of property is intended to avoid turning it into “an instrument in the service of sovereign property owners” as well as a tool for the redistribution of that very property.<sup>343</sup> This is accomplished by reserving political power for “an executive of officials appointed by an hereditary monarch responsible to a merely advisory legislature, which is composed of members whose representation of a wider society is not established by democratic procedures.”<sup>344</sup> For Hegel, the strong monarchical state protects property from democratic redistribution, but not from the sovereign power of the monarch themselves. Therefore, Cristi concludes, an absolute monarch is the best safeguard against any revolutionary democratization of civil society and the redistribution of property that results from such democratization.<sup>345</sup>

James Madison thought a master property rule, such as the takings clause of the Fifth Amendment, could achieve the same goal. Like Hegel, Madison is anxious about the implications of a *demos* that might gain control over the property in its jurisdiction by implementing the state’s sovereign power of eminent domain in order to redistribute it.<sup>346</sup> Both theorists are distrustful that a democratic majority could use the power of eminent domain ethically. Madison responds to this anxiety with a statute—the Takings Clause—that serves to limit sovereign power by imposing a financial (just compensation) and evidentiary (public use) burden on the state. Hegel, on the other hand, does not grant the power of eminent domain for judicial or administrative officers, and, more importantly, does not burden the monarch with any limitations on its sovereign right to the property within its jurisdiction. Under no circumstances might a public land authority, appointed by democratically elected municipal government officials such as the authorities in *Kelo* and other cases, expropriate homes without the authority of the monarch or their ministers.

According to Cristi, despite identifying the importance of property, its necessity for personality, and its resilience to overregulation and expropriation in civil society, Hegel then subjugates it for authority. Hegel's attempt to reconcile freedom (in the form of property ownership) and authority (in the form of the state) fails.<sup>347</sup>

#### **Section 4. Radin Revisited**

Hegelian property, as we have seen, provides strong property rights in a liberal, market-based society. But those rights are in jeopardy when at least one manifestation of the state—the executive or monarch—decides to use its eminent domain power against private property. In light of this understanding of Hegel's property theory, we revisit Radin's attempted reinterpretation of it. In part 1 of this section, Jeanne Schroeder argues that Radin has misread Hegelian property as the result of her bias against commodification. Following upon Schroeder's critique, I show in part 2 that Radin's primary target is the market itself and not the promotion of property rights. This does not, I conclude, comport with Hegel's expansive liberalism about markets and cannot therefore constitute a Hegelian critique of property and property rights.

##### **Part 1. The Schroeder Critique**

Jeanne Schroeder writes that Radin engages in both a “common”<sup>348</sup> and a “fundamental”<sup>349</sup> misreading of Hegel. Her critique focuses on the interpretation of Hegelian property that grants ownership over external objects simply by the ‘insertion’ of will into the object. According to Schroeder, this rules out the possibility of two key Hegelian property concepts: first, the fact that intangibles and ‘internals’ such as opinions, beliefs, and religious views are part of Hegelian property, and second, the understanding that property ownership consists primarily in the recognition and respect granted by nonowners or contracting partners. The result, according to Schroeder, is a faulty reading of Hegel that is primarily oriented towards Radin's political ideas about the noncommodification of women's bodies (and the homes they occupy) instead of towards an understanding of Hegel's broadly liberal and market-oriented property regime.



Schroeder's primary critique of Radin focuses upon the possessory or personhood aspects of property as opposed to its recognition aspect. According to Schroeder, Radin (and many other commentators<sup>350</sup>) read Hegel to be justifying property as a relationship between a single subject (the owner or potential owner) and some external object. This reading imagines some kind of 'natural' relationship between subject and object that leads to ownership merely as the result of a person 'placing their will' into the thing (see §44). By focusing on the acquisition element in property, Radin sidesteps the alienation or contractual elements, where the parties to a property transfer are briefly united in a common will.<sup>351</sup> Hegel is clear that all three elements—possession (or acquisition), use, and alienability—are necessary and sufficient conditions for ownership. For example, Radin supports the incomplete commodification of houses, which is intended to protect occupiers of houses—persons in their homes—against the damaging effects of a fully commodified housing market. For Radin, the fact of possession entails a powerful right against all, including the owner (who might seek to repossess the premises or sell the house at a profit) or the state (who might use eminent domain to evict the resident as part of an economic redevelopment scheme). To this extent, Radin proposes that contractual relationships between tenants and owners should be strictly regulated.<sup>352</sup> Hegel, on the other hand, recognizes that the contractual or alienable element in property means that, for a brief moment, structures such as residential buildings are neither house nor home but *both* for the parties—this is the moment where an owner's will identifies with the next owner's will in a "unity of different wills" (§72-73). Radin proposes a market for buyers or occupants only, who are protected against the depersonalizing interests of sellers. Buyers, in due time, then become sellers, and another category of one-sided exchanges is initiated. This does not comport with Hegel's ideas about property *or* contract. Importantly, as Schroeder observes, there is no 'third person' in Radin's account: property is owned and enjoyed whether or not there are other persons or a social structure in place.<sup>353</sup> Hegelian property serves as a way to mediate the intersubjectivity between persons: it is not merely the 'receptacle of will' that Radin understands it to be.

## **Part 2. Market-Inalienability: Radin's Larger Project**

As Schnably notes, Radin is really attempting to critique market rhetoric in general.<sup>354</sup> As a result, her property theory is tied to a larger project: the noncommodification of personality.<sup>355</sup> This project attempts to show that certain markets are destructive of personhood and should therefore be heavily regulated or abolished. One of the primary ways to achieve this is by removing the possibility of commodification of these things by restructuring their status as property.

If something is property, then it is subject to markets, domination, and commodification. Things that are not property are not capable of commodification. Therefore, according to Radin, a categorical restructuring of personal property to 'market-inalienable' property would protect personhood better than stronger individual rights in those properties. Such items are, in Radin's terminology, 'contested commodities' and include infants and children, human reproductive materials (sperm, eggs, embryos), human biological materials (blood, organs, hair), human sexuality, labor, salaries to college athletes, monetization decrees in divorce or homemaker's services lawsuits, and monetary damages for pain and suffering in personal injury lawsuits. Baby selling and prostitution are threats to the personhood of women in particular.<sup>356</sup>

For Radin, the property right in the home and other types of personal or non fungible property is the last, best right: although Radinian property rights exist on a very steep 'continuum' from personal to fungible, homes provide the bright line between property that enjoys constitutional protection and property that enjoys very little protection. For Radin, the difference between personal and fungible property is the demarcation line between market inalienability and some version of a free market. The constitutional property right *ends* with the home. This denies the possibility for the home to provide the foundation for extending similarly robust rights to a wide variety of fungible goods, some of which have elements of personality in them, and all of which must be capable of embodying some degree of the kind of privacy interests persons have in the home or personal property. While there is indeed a continuum from the deeply personal and private to less protected properties, the slope of the continuum is much more

gradual that Radin has described. In fact, despite calling it a continuum, it is difficult to see where anything but personal property deserves protection in the form of property rights.

In the effort to personalize certain kinds of property, Radin's stated goal is to *protect* those items from the market. But in doing so, at least some property rights are infringed. "For Radin," Schnably writes,

the only way to counter commodification is to change the legal rules governing property and its transfer, making market-inalienable what was market-alienable. Once we take that approach, decommodification inevitably involves the imposition of a disability—that is, stripping someone of the legal right to make a market transfer of an object or an aspect of herself.<sup>357</sup>

Radin is primarily interested in eliminating women's bodies from marketization, and secondarily in eliminating homes of nonowners and tenants in particular. Radin's property right is therefore a right to a home that is immune from the kind of market forces that remove persons from neighborhoods due to gentrification, rising rents, or the arbitrary decision of landlords, as well as from market-driven but truly forced exchanges such as eminent domain. According to Radin, "[s]omething that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market."<sup>358</sup> Radin: "[M]arket inalienability is a particular species of nontransferability. It differs from the nontransferability that characterizes many non-traditional property rights—such as the entitlements of the regulatory and welfare state—that are not for sale but not to be given away either."<sup>359</sup> The moment a thing is marketized it is depersonalized, so market-inalienability is intended to preserve personalization. Bodies and homes are examples of the kind of things that are so private and integral to personality that they should not enter or be traded on the marketplace. As a result, Radin does not see homes—"occupied houses"—as a type of 'true' property. Homes, it is argued, are like bodies: because they are embodied with the personhood of their occupiers/owners, they are integral for personhood and they should not be fully market inalienable; rather, they should only be *incompletely* commodified. When items are market-inalienable, they may not be traded on a market—human babies, at this point, are market-inalienable in the United States. When items are

incompletely commodified, they are traded in a market but it is heavily regulated. Due to the variety of statutes that regulate homes, including building codes, landlord/tenant requirement, and rent control/stabilization, homes and housing are incompletely commodified to varying degrees depending upon the jurisdiction.<sup>360</sup> For Radin, the regulations that cause labor and housing to be incompletely commodified take personhood into account because the regulations “recognize[s] and foster[s] the nonmarket significance of work and housing.”<sup>361</sup>

For those things we accept as being appropriately identified with the person, a range of protections exists to shield them from market forces and wrongful treatment as fungible. The ability to establish oneself in relationship with things is promoted by the social aspect of incomplete commodification; once the relationship is established, the thing is personal.<sup>362</sup>

Like those of many property theorists,<sup>363</sup> Radin’s theory is an attempt to find a “comprehensive alternative to law and economics theory.”<sup>364</sup> These theories, including the social obligation norm theory, react to the dominance of law and economics in property theory, and object to the use of cost-benefit analysis, where human actions and social outcomes are evaluated in terms of actual or potential gains from trade, which is then measured in money.<sup>365</sup> Radin purports to find the germ of market-inalienability in Hegel. However, the kinds of things that Hegel claims are not capable of alienation and are, therefore, market-inalienable, include personality (slavery, serfdom, disqualifications on property, encumbrances), universal freedom of will, ethical life (*Sittlichkeit*), and religion.<sup>366</sup> There is no indication that homes are prima facie market-alienable or that tenants deserve strong protections against landlords in Hegelian property; however, Hegelian property does provide strong protections against certain state institutions when they attempt to use eminent domain, and to that extent Radin can be said to have arrived at property theory that successfully incorporates at least some Hegelian aspects. However, Hegelian property recognizes a much broader social right to property than Radin contemplates, and it is unlikely that Radin’s political ideas about noncommodification would find much sympathy in a Hegelian property regime. Noncommodification in response to the property theories influenced by the law and economics movement is explored in further detail in chapter 5.

## Conclusion

Radin's property theory, despite initially supporting a strong property right in the home against eminent domain (a right that would protect the privacy and private property interests implicated by the resident's occupancy) appears to promote personhood at the risk of creating a heavily regulated social environment that bears little resemblance to Hegel's free market. However, this reliance upon the state certainly finds some traction in Hegel's unfortunate theory of the authoritarian state, which, as we have seen, both protects property from one kind of intervention while leaving it fully exposed to other kinds. Radin turns to this authoritarian state to create the conditions of noncommodification for homes and bodies, and sees in it the possibility of providing a shield for these vessels of personhood against the evils of the market.

But this is not the kind of state that maintains an institution of *private* property. To that extent, we return to Honneth for a way out. Honneth suggested that Hegel could be read without making a commitment to his unacceptable conception of the state. To that extent, a Hegelian property theory, one in which Hegel's "basic conception of the state has been rejected in principle,"<sup>367</sup> can still provide robust *social* property rights—rights which also serve robust privacy interests—but, because those rights wither at the level of the state, a different kind of political theory is needed to promote and protect the privacy interest protected by private property. This theory, which blends the strong property right with libertarian (left and right) political theory, is explored in chapter 4.

## Notes

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<sup>1</sup> Margaret Jane Radin, "Property and Personhood," 34 *Stanford Law Review* 957 (1982), 959.

<sup>2</sup> Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," *Columbia Law Review*, Vol. 88, No. 8 (Dec., 1988), 1667-1696, 1687.

<sup>3</sup> Margaret Jane Radin, "Diagnosing the Takings Problem," in *Compensatory Justice*, ed. John W. Chapman (New York: New York University Press, 1991), 257.

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<sup>4</sup> Radin, "Property and Personhood," 986.

<sup>5</sup> D. Benjamin Barros, "Home as a Legal Concept," 46 *Santa Clara L. Rev.* 255 (2006), 281 (citing Margaret Jane Radin, "Residential Rent Control," *Philosophy & Public Affairs* Vol. 15, No. 4 (Autumn, 1986), pp. 350-380, 365-66).

<sup>6</sup> *Ibid.*

<sup>7</sup> Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), 140.

<sup>8</sup> "Home-ownership carries greater moral weight in the legal system than does ownership of vacant land held for investment." "The connection between people and residences is recognizable by us as normatively appropriate." "An example of a justifiable kind of relationship is people's involvement with their homes. This relationship permits self-constitution within a stable environment." "There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic." All of the preceding quotations are Radin's and cited in Stephen J. Schnably, "Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood," *Stanford Law Review*, Vol. 45, No. 2 (Jan., 1993), 347-407, 356, n43.

<sup>9</sup> This and other Hegelian property concepts are explained in section 3.

<sup>10</sup> Annabelle Lever, "Privacy, Private Property, and Collective Property," *The Good Society*, Volume 21, Number 1, 2012, 47-60, 55.

<sup>11</sup> Radin, *Reinterpreting Property*, 141.

<sup>12</sup> Radin, "Liberal Conception of Property," 1687.

<sup>13</sup> Schnably, "Property and Pragmatism," 358, n 56, and 358. See also Radin, "Property and Personhood," 986 (cited by Schnably, "Property and Pragmatism," 350 n 18: "The more closely connected with personhood, the stronger the entitlement" to protection of the property right.)

<sup>14</sup> Schnably, "Property and Pragmatism," 258 (citing Radin, "Diagnosing the Takings Problem," 259-60).

<sup>15</sup> Radin, "Property and Personhood," 1006.

<sup>16</sup> Radin, *Reinterpreting Property*, 156.

<sup>17</sup> Barros, "Home as a Legal Concept," 286.

<sup>18</sup> Radin, "Residential Rent Control," 365.

<sup>19</sup> Radin, *Reinterpreting Property*, 145.

<sup>20</sup> *Ibid.*, 142.

<sup>21</sup> Annabelle Lever, *On Privacy* (New York: Routledge, 2012), 55.

<sup>22</sup> Barros, "Home as a Legal Concept," 282. As Schnably notes, Radin's personal/fungible distinction has been influential: "See, e.g., *Silverman v. Barry*, 845 F.2d 1072, 1081 (D.C. Cir.) (condominium conversions), cert. denied, 488 U.S. 956 (1988); David L. Rosendorf, "Comment, Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights," 45 *U. Miami L. Rev.* 701, 709 (1990-1991) (homelessness); Michael H. Schill, "Privatizing Federal Low Income Housing Assistance: The Case of Public Housing," 75 *Cornell L. Rev.* 878, 934 & n.234 (1990) (public housing); Joseph William Singer, "The Reliance Interest in

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Property,” 40 Stan. L. Rev. 611, 661-62 (1988) (plant closings).” Schnably, “Property and Pragmatism,” 349 n10. Radin was also cited in the plaintiff’s brief in *Kelo v. City of New London* (545 U.S. 549) (2005).

<sup>23</sup> Heads of state often use multiple pens to sign significant pieces of legislation or treaties in order to pass those items on as mementos to the drafters or beneficiaries.

<sup>24</sup> In Radin’s opinion, extensive regulation of residential property owned as a fungible interest is never a taking. Radin, *Reinterpreting Property*, 144 n99.

<sup>25</sup> Jeffrey Douglas Jones, “Property and Personhood Revisited,” *Wake Forest Journal of Law & Policy*, vol. 1:1, 2011, 105.

<sup>26</sup> *Ibid.*, 118.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 128.

<sup>29</sup> *Ibid.*, 121.

<sup>30</sup> *Ibid.*, 131.

<sup>31</sup> *Ibid.*, 135.

<sup>32</sup> *Ibid.*

<sup>33</sup> John Rennie Short, “Foreword,” in *At Home: An Anthology of Domestic Space*, ed. Irene Cieraad (Syracuse: Syracuse University Press, 1999), x.

<sup>34</sup> Peter King, *A Social Philosophy of Housing* (Burlington: Ashgate, 2003), 6.

<sup>35</sup> Peter King, *Private Dwelling: Contemplating the Use of Housing* (New York: Routledge, 2004), 183 n3.

<sup>36</sup> *Ibid.*, 96 (emphasis in original).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, 40 (emphasis in original). King: “I can have my privacy without infringing on yours, but you cannot have mine, because the attempt will destroy it. This is because privacy is always a subjective state. We cannot take the privacy of another and use it ourselves. Privacy is not a transferable commodity, even though we might only gain it at the expense of another.” (*Ibid.*, 41).

<sup>39</sup> *Ibid.*, 42.

<sup>40</sup> *Ibid.*, 60.

<sup>41</sup> *Ibid.*, 87.

<sup>42</sup> *Ibid.*, 97.

<sup>43</sup> Sophie Chevalier, “The French Two-Home Project: Materialization of Family Identity” in *At Home: An Anthology of Domestic Space*, ed. Irene Cieraad (Syracuse: Syracuse University Press, 1999), 86.

<sup>44</sup> *Ibid.*, 86-87 (citation omitted).

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<sup>45</sup> Ibid., 87.

<sup>46</sup> Ibid., 92.

<sup>47</sup> Ibid., 93.

<sup>48</sup> Ibid., 94.

<sup>49</sup> Robert Ellickson, *The Household: Informal Order Around the Hearth* (Princeton: Princeton University Press, 2008), 1 (citation omitted).

<sup>50</sup> Ibid., 3.

<sup>51</sup> Ibid., 5.

<sup>52</sup> Ibid., 14 et seq.

<sup>53</sup> Ibid., 2.

<sup>54</sup> Ibid., 128.

<sup>55</sup> This was the Supreme Court's holding in *Moore v City of East Cleveland* (431 U.S. 494 (1977)).

<sup>56</sup> Barros, "Home as a Legal Concept," 277. However, as Barros notes, "[s]ome critics have attacked the ideology of home as part of a larger ideology of domesticity that has been used as a justification for discrimination against people who do not conform to traditional roles." Barros, "Home as a Legal Concept," 292 n153.

<sup>57</sup> Ibid.

<sup>58</sup> Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington, D.C.: Island Press, 1999), 257 n60.

<sup>59</sup> See, e.g. the forced removal of 341 farm families whose properties were expropriated to build the Tellico Dam (otherwise famous as the home of the snail darter) in 1977, and the forced removal of 1,362 Detroit homeowners to make way for a Cadillac plant (*Poletown v. Neighborhood Council City of Detroit*, 304 N.W. 2<sup>nd</sup> 455 [Mich. 1981]), reversed in *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786-87 (Mich. 2004).

<sup>60</sup> This is discussed in chapter 6.

<sup>61</sup> Barros, "Home as a Legal Concept," 258.

<sup>62</sup> Ibid., 257.

<sup>63</sup> Ibid., 255.

<sup>64</sup> Ibid., 256 (footnotes omitted).

<sup>65</sup> Ibid., 257, 260.

<sup>66</sup> Ibid., 276 (footnotes omitted).



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<sup>67</sup> Eduardo Peñalver, “Property Metaphors and *Kelo v. New London*: Two Views of the Castle,” 74 *Fordham Law Review* 2971 (2006), 2973.

<sup>68</sup> Seyla Benhabib, “Obligation, contract, and exchange: on the significance of Hegel’s abstract Right” in Z.A. Pelczynski, *The State and Civil Society in Hegel’s Political Philosophy* (Cambridge: Cambridge University Press, 1984), 161.

<sup>69</sup> See Jeanne Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine* (Berkeley: University of California Press, 1998).

<sup>70</sup> Schroeder, *The Vestal and the Fasces*, 294.

<sup>71</sup> Schroeder is trenchant in her criticism of Radin in other respects; see section 4.

<sup>72</sup> Robert Pippin, “Introduction,” in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 8.

<sup>73</sup> Axel Honneth, *Suffering from Indeterminacy* (Amsterdam: Van Gorcum, 2000), 18.

<sup>74</sup> *Ibid.*, 19.

<sup>75</sup> Peter Stillman, “Property, Freedom, and Individuality in Hegel’s and Marx’s Political Thought,” in *Property*, eds. J. Roland Pennock, John W. Chapman (New York: New York University Press, 1980), 130.

<sup>76</sup> Schroeder, *The Vestal and the Fasces*, 283; but cf. Michael Salter, who suggests that parts of *Philosophy of Right* can be read as a version of property law textbook, where Hegel’s sections on, for example, abstract right operates as a kind of ‘black letter law’: a way to provide definitions and resolve disputes without knowing anything about the parties. Michael Salter, “Hegel and the Social Dynamics of Property Law,” in *Hegel and Law*, ed. Michael Salter (Hants: Ashgate, 2003), 258. That being said, *Philosophy of Right* does not offer a list of laws governing either the state or the citizen, and Hegel knew that different forms of ethical life would necessarily lead to the promulgation of different laws. There are many rights, of course, that appear in the form of imperatives, including the right to sue (or “stand in court” [§221], which carries with it the duty to submit to the court’s authority), the right to choose a profession, and, of course, the right to private property. These rights appear to only protect citizens from violations by other citizens and not against the state.

<sup>77</sup> Stillman, “Property, Freedom, and Individuality,” 147.

<sup>78</sup> *Ibid.*, 134.

<sup>79</sup> The developmental thesis claims that property is necessary for the development of persons.

<sup>80</sup> Alan Brudner, *Unity of the Common Law*, Second Ed (Oxford: Oxford University Press, 2013), 22.

<sup>81</sup> Joachim Ritter, “Person and Property in Hegel’s *Philosophy of Right* (§§34-81),” in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 121.

<sup>82</sup> Jeremy Waldron, *The Right to Private Property* (Cambridge: Cambridge University Press, 1988), 345-7.

<sup>83</sup> Steven B. Smith, *Hegel’s Critique of Liberalism* (Chicago: University of Chicago Press, 1989), 10.

<sup>84</sup> David Edward Rose, *Hegel’s Philosophy of Right: A Reader’s Guide* (New York: Continuum, 2007), 150 n4.

<sup>85</sup> Ritter, “Person and Property,” 121 n9.

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<sup>86</sup> Pippin, “Introduction,” 11.

<sup>87</sup> Ritter, “Person and Property,” 106.

<sup>88</sup> Salter, “Social Dynamics,” 257.

<sup>89</sup> Brudner, *Unity of the Common Law*, 29.

<sup>90</sup> Honneth, *Suffering from Indeterminacy*, 21.

<sup>91</sup> Schroeder, *The Vestal and the Fasces*, 261. For Schroeder, Hegelian property as traded in the market can be “fungible property” and can also serve as a mediator. As such, “modern commercial relations allow us to form relationships and community far beyond our family or clan.”

<sup>92</sup> Smith, *Hegel’s Critique*, 236.

<sup>93</sup> Kenneth Westphal, “The basic content and structure of Hegel’s *Philosophy of Right*,” in *The Cambridge Companion to Hegel*, ed. Frederick Beiser (Cambridge: Cambridge University Press, 1993), 240.

<sup>94</sup> Ludwig Siep, “Constitution, Fundamental Rights, and Social Welfare in Hegel’s *Philosophy of Right*,” in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 284.

<sup>95</sup> Hegel notes that income was, apparently, a “private” matter in his era. See §240.

<sup>96</sup> Benhabib, “Obligation, contract, and exchange,” 167, citing §114 and the addition to §26.

<sup>97</sup> Hans-Christoph Schmidt am Busch, “Personal Respect, Private Property, And Market Economy: What Critical Theory Can Learn From Hegel,” *Ethic Theory Moral Prac* (2008) 11, 573–586, 583.

<sup>98</sup> Lisa Herzog, “Two Ways of Taming the Market: Why Hegel Needs the Police and the Corporations,” in *Hegel and Capitalism*, ed. Andrew Buchwalter (Albany: State University of New York Press, 2015).

<sup>99</sup> Stillman, “Property, Freedom, and Individuality,” 166 n2.

<sup>100</sup> Schroeder, *The Vestal and the Fasces*, 284. In terms of regulation, Hegel writes that the public has the right not to be cheated, which permits market commodities to be inspected by some kind of public authority (§236).

<sup>101</sup> Alan Carter, *The Philosophical Foundations of Property Rights* (New York: Harvester Wheatsheaf, 1989).

<sup>102</sup> See, e.g., John Sprankling, *Understanding Property Law* (Dayton: LexisNexis, 2007); Gregory S. Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012).

<sup>103</sup> Schmidt am Busch, “Personal Respect,” 579.

<sup>104</sup> *Ibid.*, 581; see also Benhabib, “Obligation, contract, and exchange,” 171: “the right of property is deduced from right of personality.”

<sup>105</sup> Allan Patten, *Hegel’s Idea of Freedom* (Oxford: Oxford University Press, 2002), 144.

<sup>106</sup> *Ibid.*, 145.

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- <sup>107</sup> Benhabib, "Obligation, contract, and exchange," 168-173.
- <sup>108</sup> Patten, *Hegel's Idea*, 146.
- <sup>109</sup> C.J. Pereira Di Salvo, "Hegel's Torment: Poverty and the Rationality of the Modern State," in *Hegel and Capitalism*, ed. Andrew Buchwalter (Albany: State University of New York Press, 2015), 108.
- <sup>110</sup> See Hegel, *Philosophy of Right*, §47.
- <sup>111</sup> Dudley Knowles, "Hegel on Property and Personality," *The Philosophical Quarterly*, Vol. 33, No. 130 (Jan., 1983), 45-62, 49.
- <sup>112</sup> Schroeder, *The Vestal and the Fasces*, 21.
- <sup>113</sup> *Ibid.*, 22.
- <sup>114</sup> Benhabib, "Obligation, contract, and exchange," 162.
- <sup>115</sup> Brudner, *Unity of the Common Law*, 56, n52.
- <sup>116</sup> Peter Benson, "The Priority of Abstract Right and Constructivism in Hegel's Legal Philosophy," in *Hegel and Legal Theory*, eds. Drucilla Cornell, Michael Rosenfeld, David Gray Carlson (New York: Routledge, 1991), 185.
- <sup>117</sup> Thom Brooks, "Political Philosophy," in *Hegel Key Concepts*, ed. Michael Baur (New York: Routledge, 2015), 79.
- <sup>118</sup> Schroeder, *The Vestal and the Fasces*, 279; see also Alexander and Peñalver, *Introduction*, 63, who write that for Hegel, the "person-object relation is reversed [from Locke], that is, the external is internalized."
- <sup>119</sup> Rose, *Hegel's Philosophy of Right*, 60.
- <sup>120</sup> See also Hegel, *Philosophy of Right*, §§71-72.
- <sup>121</sup> G.W.F. Hegel, *Phenomenology of Spirit* (Oxford: Oxford University Press, 1977), ¶¶182-184; cited in Knowles, "Hegel on Property and Personality," 56.
- <sup>122</sup> Knowles, "Hegel on Property and Personality," 57.
- <sup>123</sup> *Ibid.*, 50.
- <sup>124</sup> Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1974), 89; As Fred Dallmayr writes, the struggle for recognition exists in civil society but not at the ethical level of the state. Fred Dallmayr, *G.W.F. Hegel: Modernity and Politics* (Lanham: Rowman & Littlefield, 1993), 106.
- <sup>125</sup> Smith, *Hegel's Critique*, 116.
- <sup>126</sup> Michael Quante, "'The Personality of the Will' as the Principle of Abstract Right: An Analysis of §§34-40 of Hegel's *Philosophy of Right* in Terms of the Logical Structure of the Concept," in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 98.
- <sup>127</sup> Schroeder, *The Vestal and the Fasces*, 19.

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- <sup>128</sup> Benhabib, "Obligation, contract, and exchange," 172.
- <sup>129</sup> Brooks, "Political Philosophy," 81.
- <sup>130</sup> Axel Honneth, *The Struggle for Recognition* (Boston: The MIT Press, 1996), 18-19.
- <sup>131</sup> *Ibid.*, 51.
- <sup>132</sup> Waldron, *The Right to Private Property*, 364.
- <sup>133</sup> *Ibid.*, 363.
- <sup>134</sup> *Ibid.*
- <sup>135</sup> Avineri, *Hegel's Theory*, 136.
- <sup>136</sup> Knowles, "Hegel on Property and Personality," 55.
- <sup>137</sup> Waldron, *The Right to Private Property*, 303.
- <sup>138</sup> Benson, "The Priority of Abstract Right," 190.
- <sup>139</sup> *Ibid.*, 191.
- <sup>140</sup> Schmidt am Busch, "Personal Respect," 535 n31.
- <sup>141</sup> *Ibid.*, 582.
- <sup>142</sup> *Ibid.*
- <sup>143</sup> *Ibid.*, 581.
- <sup>144</sup> Brooks, "Political Philosophy," citing Hegel, *Philosophy of Right*, §§71,75.
- <sup>145</sup> Richard A. Davis, "The Conjunction of Property and Freedom in Hegel's Philosophy of Right *Zeitschrift für philosophische Forschung*, Bd. 43, H. 1 (Jan. - Mar., 1989), 111- 123, 119.
- <sup>146</sup> *Ibid.*, 123.
- <sup>147</sup> Patten, *Hegel's Idea*, 149.
- <sup>148</sup> Benson, "The Priority of Abstract Right," 180.
- <sup>149</sup> Ritter, "Person and Property," 121.
- <sup>150</sup> *Ibid.*, 112.
- <sup>151</sup> Peter Stillman, "Property, Contract, and Ethical Life," in *Hegel and Legal Theory*, eds. Drucilla Cornell, Michael Rosenfeld, David Gray Carlson (New York: Routledge, 1991), 207.
- <sup>152</sup> *Ibid.*, 113.
- <sup>153</sup> *Ibid.*, 114.

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- <sup>154</sup> Knowles, "Hegel on Property and Personality," 57.
- <sup>155</sup> Patten, *Hegel's Idea*, 139.
- <sup>156</sup> *Ibid.*, 152.
- <sup>157</sup> *Ibid.*, 153.
- <sup>158</sup> *Ibid.*, 157.
- <sup>159</sup> Waldron, *The Right to Private Property*, 376. As Schroeder notes, there is a substantial difference between the brute fact of possession as exclusion and the right to exclude others from interfering with one's possessions. Schroeder, *The Vestal and the Fasces*, 42.
- <sup>160</sup> Waldron, *The Right to Private Property*, 298.
- <sup>161</sup> Chad McCracken, "Hegel and the Autonomy of Contract Law," in *Hegel and Law*, ed. Michael Salter (Hants: Ashgate, 2003), 161.
- <sup>162</sup> Benson, "The Priority of Abstract Right," 179.
- <sup>163</sup> *Ibid.*
- <sup>164</sup> Stillman, "Property, Contract, and Ethical Life," 206.
- <sup>165</sup> *Ibid.*
- <sup>166</sup> *Ibid.*, 210.
- <sup>167</sup> *Ibid.*, 209.
- <sup>168</sup> Brian O'Connor, "Ethical theory," in *Hegel Key Concepts*, ed. Michael Baur (New York: Routledge, 2015), 72.
- <sup>169</sup> Siep, "Constitution, Fundamental Rights, and Social Welfare," 278.
- <sup>170</sup> McCracken, "Hegel and the Autonomy of Contract Law," 140.
- <sup>171</sup> Westphal, "The basic content," 247.
- <sup>172</sup> *Id.*, 249.
- <sup>173</sup> Quante, "The Personality of the Will," 84.
- <sup>174</sup> *Ibid.*, 89.
- <sup>175</sup> *Ibid.*
- <sup>176</sup> *Ibid.*, 92.
- <sup>177</sup> *Ibid.*, 94.
- <sup>178</sup> *Ibid.*
- <sup>179</sup> Schroeder, *The Vestal and the Fasces*, 270.

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<sup>180</sup> Alan Brudner, "Hegel and the Crisis of Private Law," in *Hegel and Legal Theory*, eds. Drucilla Cornell, Michael Rosenfeld, David Gray Carlson (New York: Routledge, 1991), 134.

<sup>181</sup> Alan Brudner, "Private Property and Public Welfare," in *Philosophical Foundations of Property Law*, eds. James Penner, Henry Smith (Oxford: Oxford University Press, 2013), 74 (citations omitted).

<sup>182</sup> Benson, "The Priority of Abstract Right," 203 n36; According to Brudner, abstract right is *not* in a state of nature, but it is stateless. Brudner, "Private Property and Public Welfare," 75.

<sup>183</sup> This, of course, is the realization that Rawls underwent in the transition of the original position from the purely abstract to the socialized and the political. According to Gary K. Browning, in *Political Liberalism* Rawls "takes care to signal that individuals cannot be supposed to exist outside of historical and social contexts." Gary Browning, *Hegel and the History of Political Philosophy* (New York: St. Martin's Press, 1999), 128. Rawls himself makes the Rawls/Hegel connection in *Political Liberalism* at xxvi, 285-8. See John Rawls, *Political Liberalism Expanded Edition* (New York: Columbia University Press, 2005). Browning: "Rawls agrees with Hegel that explanations of political association, analogous to a legal contract, presume the background conditions of social trust which they purport to explain. A situation of trust, for both Rawls and Hegel, is only tenable on the basis of settled political conditions that it is the object of a social contract to explain." (Browning, *Hegel*, 133, citing Rawls, *Political Liberalism*, 286-7).

<sup>184</sup> Browning, *Hegel*, 138.

<sup>185</sup> *Ibid.* (citation omitted).

<sup>186</sup> Benhabib, "Obligation, contract, and exchange," 160.

<sup>187</sup> *Ibid.*, 162.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*, 163.

<sup>190</sup> *Ibid.*, 161.

<sup>191</sup> McCracken, "Hegel and the Autonomy of Contract Law," 158.

<sup>192</sup> Pippin, "Introduction," 8.

<sup>193</sup> *Ibid.*

<sup>194</sup> Westphal, "The basic content," 254.

<sup>195</sup> Avineri, *Hegel's Theory*, 137.

<sup>196</sup> Stillman, "Property, Contract, and Ethical Life," 208.

<sup>197</sup> *Ibid.*

<sup>198</sup> Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1977), 376.

<sup>199</sup> Michael Theunissen, "The Repressed Intersubjectivity in Hegel's Philosophy of Right," in *Hegel and Legal Theory*, eds. Drucilla Cornell, Michael Rosenfeld, David Gray Carlson (New York: Routledge, 1991), 8.

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- <sup>200</sup> Brooks, "Political Philosophy," 84; see also Avineri, *Hegel's Theory*, 129.
- <sup>201</sup> Brooks, "Political Philosophy," 85.
- <sup>202</sup> Renato Cristi, *Hegel on Freedom and Authority* (Cardiff: The University of Wales Press, 2005), 68.
- <sup>203</sup> Eric Weil, *Hegel and the State* (Baltimore: The Johns Hopkins University Press, 1998), 43.
- <sup>204</sup> David V. Ciavetta, *Spirit, the Family, and the Unconscious in Hegel's Philosophy* (Albany: SUNY Press, 2010), 12.
- <sup>205</sup> *Ibid.*, 14.
- <sup>206</sup> *Ibid.*, 173.
- <sup>207</sup> *Ibid.*, 174.
- <sup>208</sup> *Ibid.*, 175.
- <sup>209</sup> *Ibid.*, 242 n30.
- <sup>210</sup> *Ibid.*
- <sup>211</sup> Waldron, *The Right to Private Property*, 379.
- <sup>212</sup> Salter, "Social Dynamics," 160; see also Herzog, "Two Ways," 154.
- <sup>213</sup> See Westphal, "The basic content," for a concise exposition of these institutions.
- <sup>214</sup> Westphal, "The basic content," 258.
- <sup>215</sup> See Westphal, "The basic content," 258, for the proposition that all of these functions are meant to be used in emergencies and not as part of a general or ongoing social program. Poverty and its potential for relief is discussed in depth in section 3, part 6.
- <sup>216</sup> Westphal, "The basic content," 259.
- <sup>217</sup> *Ibid.*
- <sup>218</sup> McCracken, "Hegel and the Autonomy of Contract Law," 144.
- <sup>219</sup> Westphal, "The basic content," 260-261.
- <sup>220</sup> Andrew Buchwalter, "Introduction," in *Hegel and Capitalism*, ed. Andrew Buchwalter (Albany: State University of New York Press, 2015), 4.
- <sup>221</sup> Herzog, "Two Ways," 155.
- <sup>222</sup> Cristi, *Hegel on Freedom and Authority*, 127.
- <sup>223</sup> See, e.g., Taylor, *Hegel*.
- <sup>224</sup> Theunisson, "Repressed Intersubjectivity," 9.

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<sup>225</sup> See Smith, *Hegel's Critique*, xi, for the position that Hegel is not a communitarian: "Hegel resisted the appeal of communitarianism as profoundly at odds with the deepest aspirations of modernity." But cf. Taylor, *Hegel*, at 381 for a deeply communitarian reading of Hegel.

<sup>226</sup> See Hegel, *Philosophy of Right*, §46: "The Idea of Plato's republic contains as a universal principle a wrong against the person, inasmuch as the person is forbidden to own private property."

<sup>227</sup> Renato Cristi, "Hegel on Property and Recognition" *Laval théologique et philosophique*, vol. 51, n° 2, 1995, p. 335-343. See Knowles, "Hegel on Property and Personality," 60, for a similar suggestion that the earlier Hegel of the *Jenerphilosophie* argued for a more social and less individualist conception of property and its regulation in civil society: "Nowadays, it is widely recognised that Hegel's portrayal of emergent capitalism contained strong critical elements. Very early in his career, his vision of economic science as reason shining through a mass of accidents was complemented by an awareness that the prevalent system of commodity- production and exchange was accompanied by severe structural defects. Labour is reduced to mindless unrewarding toil, fantastic and wasteful inequalities develop, the system itself slips out of gear, markets collapse and masses are reduced to poverty. This sets up one of the tasks of the State, that of restoring the mechanism which contingencies have weakened and this is to be achieved by redistributive taxation, by civil service supervision of corporate management and by a vigorous colonial policy."

<sup>228</sup> Cristi, "Hegel on Property and Recognition," 336; see also Cristi, *Hegel on Freedom and Authority*, 76. According to McCracken, it is "crude" but "hardly inaccurate" to say that Hegel's conception of the abstract contract right both illuminates and critiques the "philosophical underpinnings of a liberal individualist notion of contract[.]" McCracken, "Hegel and the Autonomy of Contract Law," 144. See also Knowles, "Hegel on Property and Personality," 57 n18: "In important respects the model owner in the account of property relations given in the section on Abstract Right looks very much like the possessive individualist familiar from recent accounts of classical liberal theory." According to Munzer, Hegel's property theory is individualistic. See Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), 82. Finally see Patten, *Hegel's Idea*, 158, for the idea that Hegelian property is individualistic and conflicts with communitarianism.

<sup>229</sup> Cristi, *Hegel on Freedom and Authority*, 20.

<sup>230</sup> Cristi, "Hegel on Property and Recognition," 336.

<sup>231</sup> *Ibid.*, 339.

<sup>232</sup> *Ibid.*

<sup>233</sup> But see Brooks, "Political Philosophy," 81: "Abstract right is the sphere of the interaction of two persons. It is not a sphere that includes a legal system, police force, judiciary, a state or prisons."

<sup>234</sup> Cristi, "Hegel on Property and Recognition," 341. The most radical interpretation of Hegelian individual property rights comes from Hegel's erstwhile student and critic Max Stirner, who rejects Hegel's attempt to socialize property rights; in fact, for Stirner, communities and states serve only to violate otherwise natural property rights. "[O]wnness is not any alien standard [;] as it is not in any sense an *idea* like freedom, morality, humanity and the like: it is only a description of the – owner." Max Stirner, *The Ego and its Own* (Cambridge: Cambridge University Press, 1995), 154. See also Browning, *Hegel*, 70: "For Stirner, the legal context of property rights undermines the individual who is not free to do what he will with his property. The egoist, for Stirner, will not and should not suffer the state to interfere in the slightest with his property. Mediation of the state between an individual and his property in Stirner's perspective abrogates the autonomy of the egoist."

<sup>235</sup> Cristi, "Hegel on Property and Recognition," 343 citing Hegel, *Philosophy of Right*, §270.



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- <sup>236</sup> Knowles, "Hegel on Property and Personality," 50.
- <sup>237</sup> Manfred Baum, "Common Welfare and Universal Will in Hegel's *Philosophy of Right*," in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 125.
- <sup>238</sup> Knowles, "Hegel on Property and Personality," 55.
- <sup>239</sup> Ritter, "Person and Property," 111.
- <sup>240</sup> Ibid.
- <sup>241</sup> Benhabib, "Obligation, contract, and exchange," 159.
- <sup>242</sup> Ibid., 164–166.
- <sup>243</sup> Ibid., 167, citing Hegel §§212,213,215,216.
- <sup>244</sup> Ibid., 160.
- <sup>245</sup> Ibid.
- <sup>246</sup> Westphal, "The basic content," 236.
- <sup>247</sup> Pippin, "Introduction," 11.
- <sup>248</sup> Ibid.
- <sup>249</sup> Stillman, "Property, Contract, and Ethical Life," 221.
- <sup>250</sup> Waldron, *The Right to Private Property*, 343.
- <sup>251</sup> Hegel, *Philosophy of Right*, §46. Note that these higher spheres of right do not take up the slack where charity fails and the state must therefore provide services such public poorhouses, hospitals, and streetlights. (§242). None of these indicia of the modern welfare require that property be subsumed: they only require the payment of taxes.
- <sup>252</sup> Waldron, *The Right to Private Property*, 349 (citing Ronald Dworkin *Taking Rights Seriously* (London: Duckworth, 1979), 92).
- <sup>253</sup> Dieter Heinrich, "Logical Form and Real Totality: The Authentic Conceptual Form of Hegel's Concept of the State" in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 263 (citing Hegel, *Philosophy of Right*, §41).
- <sup>254</sup> Schroeder, *The Vestal and the Fasces*, 147.
- <sup>255</sup> Ibid., 16 n37.
- <sup>256</sup> Ibid., 17.
- <sup>257</sup> Waldron, *The Right to Private Property*, 348.
- <sup>258</sup> Cristi, *Hegel on Freedom and Authority*, 16 (emphasis added).
- <sup>259</sup> Waldron, *The Right to Private Property*, 377.

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<sup>260</sup> Alexander and Peñalver, *Introduction*, 68.

<sup>261</sup> Waldron, *The Right to Private Property*, 377-378.

<sup>262</sup> *Ibid.*, 408.

<sup>263</sup> *Ibid.* Patten is critical of Waldron's endorsement of Hegel's claim that property allows for the self discipline needed to be properly functioning person. According to Patten, private property is neither necessary nor sufficient for learning self discipline because, for example, wealthy landowners can be – and often are – dissolute and immoral; their property does not force them to be stable or to discipline their will. If anything, Patten writes, propertylessness can motivate persons to be responsible, as well as to be subject to many other obligations and behaviors, such as the raising of children and rewarding employment; these, obviously, are not property *per se*. See Patten, *Hegel's Idea*, 141–142.

<sup>264</sup> Waldron, *The Right to Private Property*, 115.

<sup>265</sup> See, e.g. Locke, *Second Treatise of Government*, §27.

<sup>266</sup> See, e.g., Charles Reich, “The New Property,” *Yale Law Journal*, Vol. 73, No. 5 (Apr., 1964), 733-787.

<sup>267</sup> See, e.g., Joseph Singer, “The Reliance Interest in Property,” *Stanford Law Review* Vol. 40, No. 3 (Feb., 1988), 611-751.

<sup>268</sup> Waldron, *The Right to Private Property*, 131; For Waldron, it is a ‘mystery’ how Enlightenment theorists thought property was both a fundamental *and* special right – because, unlike other fundamental rights, it is “dependent on arbitrary contingencies of fortune and endowment.” Waldron, *The Right to Private Property*, 133.

<sup>269</sup> *Ibid.*, 342.

<sup>270</sup> *Ibid.*, 288.

<sup>271</sup> *Ibid.*, 290.

<sup>272</sup> *Ibid.*, 383.

<sup>273</sup> *Ibid.*, 410-411.

<sup>274</sup> Hegel, *Philosophy of Right*, §244.

<sup>275</sup> Cristi, *Hegel on Freedom and Authority*, 101.

<sup>276</sup> Avineri, *Hegel's Theory*, 151.

<sup>277</sup> *Ibid.*, 152.

<sup>278</sup> Weil, *Hegel and the State*, 106.

<sup>279</sup> Hegel fails to credit Aristotle as the source of this criticism. See Aristotle, *Politics* Book V, part XI. During the Great Depression, the Civilian Conservation Corps served a similar purpose.

<sup>280</sup> Schroeder, *The Vestal and the Fasces*, 283.

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<sup>281</sup> Kohei Saito, “Beyond Recognition in Capitalism: From Violence and Caprice to Recognition and Solidarity,” in *Hegel and Capitalism*, ed. Andrew Buchwalter (Albany: State University of New York Press, 2015), 46.

<sup>282</sup> Brudner, “Hegel and the Crisis of Private Law,” 151.

<sup>283</sup> Dallmayr, *Modernity and Politics*, 127.

<sup>284</sup> Waldron, *The Right to Private Property*, 380.

<sup>285</sup> Browning, *Hegel*, 139.

<sup>286</sup> Cristi, *Hegel on Freedom and Authority*, 21.

<sup>287</sup> *Ibid.*, 28.

<sup>288</sup> Benson, “The Priority of Abstract Right,” 185.

<sup>289</sup> *Ibid.*, 189.

<sup>290</sup> *Ibid.*, 189 – 192.

<sup>291</sup> *Ibid.*, 191.

<sup>292</sup> *Ibid.*, 195.

<sup>293</sup> Siep, “Constitution, Fundamental Rights, and Social Welfare,” 286.

<sup>294</sup> *Ibid.*, 287.

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*, 286.

<sup>298</sup> Pippin, “Introduction,” 15.

<sup>299</sup> Axel Honneth, *The I in We* (Malden: Polity Press, 2012), 26 (emphasis added).

<sup>300</sup> *Ibid.* (emphasis added).

<sup>301</sup> *Ibid.*, 27.

<sup>302</sup> Baum, “Common Welfare,” 125.

<sup>303</sup> Stillman, “Property, Contract, and Ethical Life,” 207.

<sup>304</sup> Waldron, *The Right to Private Property*, 349.

<sup>305</sup> Smith, *Hegel’s Critique*, 196.

<sup>306</sup> Benhabib, “Obligation, contract, and exchange,” 177. There is an extensive literature regarding Hegel’s purported authoritarianism. See, e.g., *Hegel’s Political Philosophy*, ed. Walter Kaufman (New York: Atherton Press, 1970).

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<sup>307</sup> Hegel also notes that the opposite can occur: the state can force collectively-owned property, such as monasteries, to be sold to private interests (§46), and state property in the form of public memorials may become privatized by prescription (i.e. non-use), when their “indwelling soul of remembrance and honour” is abandoned (§64). Such was the case when the Reformation upset the tradition of the publicly-supported Mass, where “the spirit of the old faith...had departed, and they [the buildings and property set aside for church functions] could consequently be taken possession of as property.” (§64 Addition). However, this only occurs when the state has withdrawn or alienated its own will from the public property and is not to be considered as any kind of privileging of private property rights against the state.

<sup>308</sup> Michael Wolff, “Hegel’s Organicist Theory of the State: On the Concept and Method of Hegel’s ‘Science of the State’” in *Hegel on Ethics and Politics*, eds. Robert Pippin, Otfried Höffe (Cambridge: Cambridge University Press, 2004), 316.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> As Benhabib notes, political rights of citizens are not private property, and the state may violate those rights without violating their property rights. Benhabib, “Obligation, contract, and exchange,” 164.

<sup>312</sup> Ibid.

<sup>313</sup> Avineri, *Hegel’s Theory*, 85.

<sup>314</sup> Ibid.

<sup>315</sup> Brudner, “Private Property and Public Welfare,” 91.

<sup>316</sup> Ibid., 92

<sup>317</sup> Ibid.

<sup>318</sup> Ibid., 77.

<sup>319</sup> Ibid., 72.

<sup>320</sup> Ibid., 69.

<sup>321</sup> Ibid., 74.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid., 89.

<sup>324</sup> Ibid., 90.

<sup>325</sup> Ibid., 91.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid., 93.

<sup>328</sup> Ibid.

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<sup>329</sup> Although Hegel “built a number of institutional guarantees into his government...it is difficult to accommodate a doctrine of judicial review of legislative or executive action.” Westphal, “The basic content,” 262.

<sup>330</sup> Cristi, *Hegel on Freedom and Authority*, 20.

<sup>331</sup> *Ibid.*, 8.

<sup>332</sup> *Ibid.*, 101.

<sup>333</sup> Hegel, *Philosophy of Right*, §242.

<sup>334</sup> Cristi, *Hegel on Freedom and Authority*, 93-94.

<sup>335</sup> *Ibid.*, 115 (emphasis omitted).

<sup>336</sup> Dallmayr, *Modernity and Politics*, 137.

<sup>337</sup> 563 N.W.2d 154 (Wis. 1997).

<sup>338</sup> Alexander and Peñalver, *Introduction*, 145.

<sup>339</sup> Dallmayr, *Modernity and Politics*, 150.

<sup>340</sup> *Ibid.*, 151.

<sup>341</sup> *Ibid.*, 152.

<sup>342</sup> Cristi, *Hegel on Freedom and Authority*, 166.

<sup>343</sup> *Ibid.*, 86.

<sup>344</sup> Browning, *Hegel*, 152.

<sup>345</sup> Cristi, *Hegel on Freedom and Authority*, 36.

<sup>346</sup> For an excellent discussion of “Madisonian anxiety” see Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990).

<sup>347</sup> Cristi, *Hegel on Freedom and Authority*, 2.

<sup>348</sup> Schroeder, *The Vestal and the Fasces*, xxi.

<sup>349</sup> *Ibid.*, 236.

<sup>350</sup> Schroeder includes Waldron in this group. Cristi’s radically individualistic reading of Hegelian property is also liable to these allegations.

<sup>351</sup> Schroeder, *The Vestal and the Fasces*, 49.

<sup>352</sup> These regulations would include those imposed by rent boards, rental control statutes, warranties of habitability, and so forth.

<sup>353</sup> Schroeder, *The Vestal and the Fasces*, 231; see also Cristi’s reading of Hegel’s property theory, *supra*.

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<sup>354</sup> Schnably, "Property and Pragmatism," 350, citing Margaret Jane Radin "Justice and the Market Domain," in *Markets and Justice* (1989), 165-197, 190 ("[I]n some cases market rhetoric itself can be viewed as an act injurious to personhood."); Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* Vol. 100, No. 8 (Jun., 1987), 1849-1937, 1885 ("[U]niversal market rhetoric does violence to our conception of human flourishing.")

<sup>355</sup> See Margaret Jane Radin, *Contested Commodities* (Cambridge: Harvard University Press, 2001).

<sup>356</sup> *Ibid.*, 127.

<sup>357</sup> Schnably, "Property and Pragmatism," 353.

<sup>358</sup> Radin, "Market-Inalienability," 1850.

<sup>359</sup> Radin, *Contested Commodities*, 19. Examples include social security or welfare benefits and some licenses such as a license to practice law, which is not transferable, but it is alienable: a licensee can relinquish it, but not to another person.

<sup>360</sup> *Ibid.*, 108. Labor is also incompletely commodified through the regulation or curtailment of the free market.

<sup>361</sup> *Ibid.*, 109.

<sup>362</sup> *Ibid.*

<sup>363</sup> See, e.g., Michael Sandel, *What Money Can't Buy* (New York: Farrar, Straus, and Giroux, 2012).

<sup>364</sup> Schnably, "Property and Pragmatism," 350.

<sup>365</sup> Radin, *Contested Commodities*, 5.

<sup>366</sup> *Ibid.*, 35.

<sup>367</sup> Honneth, *Suffering from Indeterminacy*, 19.

## Chapter 4

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### *Libertarian Directions in Self-Ownership, Property, and Privacy*

This chapter surveys the differences in the libertarian approaches to property, self-ownership, and takings. Libertarian property ideology has generated a large volume of commentary. As Joseph Singer notes, “[t]his new popularity of libertarianism can be attributed, to some extent, to a discomfort with cost-benefit analysis and its associated philosophy of utilitarianism. If liberty is a primary value, then the rights we cherish should not be put up for grabs simply because someone can show that the market costs of protecting those rights outweigh their benefits as measured in dollar terms.”<sup>1</sup>

Many, but not all, libertarians locate the genesis of their understanding of property rights in the *natural right of self-ownership*.<sup>2</sup> Self-ownership as a kind of property ownership was discussed in chapter 1, where it was subjected to a variety of skeptical arguments which cast doubt whether the self (or person, or body) can be considered an owned thing: a property. It reappears here because of its central role in the two primary branches of libertarian property theory and because of John Locke’s influence on both derivations. For Locke, “man had within himself the great Foundation of Property” (2.44)<sup>3</sup>: this, of course, is the idea that self-ownership is the basis for world-ownership. This chapter takes the skepticism introduced in chapter 1 to several further levels: if the self cannot be owned, then further doubts arise whether the ‘properties’ of the self (talents and abilities) can be owned, which, in turn, raises doubts about the ownership of the ‘properties’ of talents and abilities in the form of labor. The next set of doubts should be obvious: if there is no self-ownership, then it cannot provide any foundation for world-ownership; conversely, even if there *is* self-ownership, there is reason to doubt that has any

traction to things extending *beyond* the body, much less to the world's resources or to intangibles such as intellectual property. This type of claim is typical of some of the arguments supported by left-libertarian property theorists, many of whom argue in favor of certain individual property rights (in bodies and labor, for example) but against individual property rights in land or in profits.

This chapter is structured like the preceding two chapters: a 'classical' property theory (here, the Lockean natural rights of self ownership and world ownership) is analyzed in terms of its ability to provide justifications for contemporary legal/political property relationships. Through the work of C.B. Macpherson, Richard Tully, Jeremy Waldron, Matthew Kramer, and A. John Simmons, we find, in section 1, that Locke might actually be a property communitarian and not an individualist, which then leads to left-libertarian ideas represented, in section 2, by Michael Otsuka, Gijs Van Donselaar, John Christman, and James Grunebaum. These writers attempt to justify the denial of ownership and income rights in world resources. In section 3, I show that current American property jurisprudence might be pressed into service to achieve similar results—at least in terms of subsurface property rights. Finally, in section 4, the right-libertarian approach to property rights, found in Richard Epstein and David Schmitz, reveals that the privacy aspects of property are best protected by a takings jurisprudence that restructures the definition of takings based upon a reappraisal of the role of just compensation.

### **Section 1. Locke and his Legacy**

According to Richard Arneson, "Locke's doctrine of natural moral rights, incomplete as it is, forms the core of the tradition of deontological, rights based liberalism, a broad position that is perhaps the dominant contemporary view. On this view, the account of what we owe one another bottoms out in claims of individual claim rights correlated with strict moral duties."<sup>4</sup> At first blush, Locke's own position on the topic of private property appears fairly straightforward: private property in, for example, land and objects, is founded on each individual's prior possession of "a Property in his own Person."<sup>5</sup> A Lockean theory of self-ownership locates



private property in the property of one's own person, which gives rise to property in actions, which allows persons to mix their labor with things, which then gives property to persons. His insistence that the protection of property is the state's chief goal is well known; in fact, for Locke, private property is the "the basis of all political morality" according to Jeremy Waldron.<sup>6</sup> However, Lockean property, as a foundation for contemporary right-liberation property theory, is anything *but* straightforward. According to Karl Widerquist, "no one seems to agree on exactly what he was trying to say," and as a result, they have "interpreted him in strikingly different ways." Therefore, "[t]here is unlikely to be an 'a-ha' moment, when someone writes *the* interpretation, effectively ending the controversy."<sup>7</sup>

The controversy arises during the transition from the state of nature to civil society. According to C.B. Macpherson, the idylls of the state of nature and its communal property rules are eradicated by the constituted law of civil society, which is nothing more than a justification of the potential for unlimited person accumulation which is characteristic of past and current forms of capitalism. The Locke of James Tully, on the other hand, accepts Macpherson's reevaluation of the natural law in civil society, but argues that the legal system commands a positive submission of all property into a communitarian pot for redistribution. This directly contradicts A. John Simmons' claim that "Lockean individualism and voluntarism are opposed most dramatically by various naturalist and communitarian theories."<sup>8</sup>

Matthew Kramer's approach is perhaps the most interesting. For Kramer, the natural law persists in the civil arena, and both the natural *and* civil law are individualistic. However, they are individualistic only as the product of Locke's thoroughgoing communitarianism, which demands that individual property interests be submitted to the community whenever there is a conflict. Kramer's detailed exegesis presents a Lockean conception of property that is hardly the stuff of modern libertarianism, and makes a powerful claim that contemporary proponents of powerful private property rights look elsewhere for the genesis of extensive liberties in regards to holdings.

The most visible ‘descendant’ of Lockean property is Robert Nozick, who accepts Macpherson’s characterization of Lockean property as individualist and capitalist but without apology: Nozick’s property theory finds in Locke a justification for selfishness and a roughly unlimited right to accumulate in terms of the right of acquisition. However, Nozick’s attempt to justify world-ownership by way of Lockean self-ownership is unsuccessful, due in large part to the unlikelihood that selves are property, and that harms to one’s self as a property are substantially the same as harms to external things.

### **Part 1. Possessive Individualism or Communitarian Conventionalism**

Macpherson’s commentary on the rise of ‘possessive individualism,’ or capitalism, from Hobbes to the Levellers to Harrington and finally to Locke, is well known. Possessive individualism, on his account, is an ideology of human behavior whereby the individual is proprietor of his own person or capacities and therefore owes nothing to society in return for them. The individual, as owner of themselves, is not a ‘moral whole’ or part of larger social ‘whole.’<sup>9</sup>

Initially, Macpherson substantially concurs with Tully’s analysis: the appropriation of property in the Lockean state of nature is limited by requirements of usefulness and benevolence, which are boundaried by prohibitions against spoilage as well as the proviso that appropriation leave “enough and as good” for others.<sup>10</sup> Macpherson then argues that these limits are removed by the introduction of money into the state of nature, which then negates the natural law-imposed limitations on individual accumulation. Civil society, then, protects this unlimited accumulation on behalf of the landowning class, and Lockean property rights serve to justify an “unlimited natural right of appropriation, a right transcending the limitations involved in the initial acquisition.”<sup>11</sup> As a result, persons in civil society have an unlimited right of accumulation that permits waste, inefficiency, and greed—in other words, rights to property that are not only natural but *immune* to modification by competing convention or law that might attempt to redistribute property on behalf of nonowners. “Locke’s constitutionalism,” Macpherson writes, is therefore “a defence of the rights of expanding property rather than of the rights of the individual against

the state.”<sup>12</sup> Property rights that are unbounded by law or morals are, for Macpherson, the essence of capitalist private property, and Locke is guilty of clearing the way for the resulting inequality that is the product of the West’s private property regimes. Locke, therefore, is misread for the idea that individual rights against the state are directly protected in Locke’s state.<sup>13</sup> Rather, Macpherson concludes, it is the rights of the propertied class against the nonpropertied class that are protected.

Tully’s Locke engages in a sustained argument against Macpherson’s Locke. Their dialogue pits a compassionate, charitable steward of God’s lands, including “every beast of the field, and every fowl of the air” (Genesis 2:19), against a possessive individualist and apologist for a merciless capitalism. Tully not only denies that Locke be considered a capitalist or an architect of *laissez faire* political economy, but that Locke provides a justification for a version of private property right that is both communitarian<sup>14</sup> and one that establishes natural law as a basis for his theory of rights.<sup>15</sup> This theory not only supports certain property rights, but asserts a “radical constitutionalist theory of popular sovereignty and an individualist theory of resistance” designed to oppose arbitrary or absolutist government.<sup>16</sup> Tully agrees with Macpherson’s understanding of Locke’s moral restriction of property in the state of nature, but rejects the conclusion that Locke’s conception of conventional property lacks similar restrictions.

According to Tully, Locke begins with Scripture, which states that the world is a gift given by God to mankind in common.<sup>17</sup> Because mankind has a natural right to sustenance, Locke’s challenge is to individuate the common gift within the constraints of each man’s right to it.<sup>18</sup> This is a right “to make use of the Food and Rayment, and other Conveniences of Life, the Materials whereof he had so plentifully provided for them” (1.41). This right is different than the right to property which individuals ‘come to have’ pursuant to individuation, or acquisition for persons use. Locke derives this from fundamental laws of nature that mankind ought to be *preserved*; this is the primary duty of man due to his relationship with God and other men.<sup>19</sup>

Therefore, Tully writes, “[t]he first and fundamental law of nature is that mankind ought to be preserved.”<sup>20</sup>

The first Lockean right of property, therefore, is the right to be included in, or, more specifically, a right not to be excluded from, the common property provided by God,<sup>21</sup> and this right to common property is derived from the natural law of *preservation*. The natural law is the foundation of the right to gather things to preserve oneself. The primary role of the right is to “justify resistance to arbitrary and unjust rule. If a ruler arbitrarily violates my right or another’s right to preservation he has violated natural law” and must be punished.<sup>22</sup>

In order to preserve humankind, three rights are required:

1. The right to preservation itself;
2. The right to the liberty of preserving oneself and others;
3. The right to material possessions necessary for 1 and 2.<sup>23</sup>

According to Macpherson, property is constituted by the right to use that is “not conditional on the owner’s performance of any social function.”<sup>24</sup> But, according to Tully, “[i]t is never the case that, for Locke, property is independent of a social function,” and that social function is, specifically, the preservation of mankind.<sup>25</sup> As Alan Ryan observes, Locke praises the man who by enclosing land and employing his skill upon it “thus enriches mankind” by helping to preserve himself and, by direct implication, mankind. This is a benefit to mankind and not an act of “possessive individualism.”<sup>26</sup> For Tully, Locke’s challenge is to answer the question of property “within a context of positive duties to others, and equal claim to common goods, is his exposition of an alternative and morally superior system of property grounded in natural law.”<sup>27</sup> Although Locke writes that men should preserve themselves first, and then the rest of mankind (see 1.86), he never, Tully writes, “considers isolated and presocial individuals.” Rather, “since norms for the preservation of society and its members are constitutive of society, Locke’s analysis always presupposes men organized into a unified community.”<sup>28</sup>

Property in God's state of nature is natural, but in civil society it becomes conventional. Tully: "Locke's express statement that property under government is conventional contradicts the standard, but not exclusive, interpretation of Locke's analysis of property."<sup>29</sup> He is referring, of course, to Macpherson. Property in political society, Tully writes, is a "creation of that society."<sup>30</sup> Macpherson, however, reads Locke as arguing for a natural right in civil society as a justification for a 'naturalized' capitalism, where 'market men' support material inequality in civil society as a natural outgrowth of inequality in the state of nature where, according to Macpherson, owners are purported to lack any duties towards others: a natural right to the market justifies competition as 'natural' and normalizes the 'natural' desire to accumulate material possessions without limit.

In terms of self-ownership, Locke writes that "man had within himself the great Foundation of Property" (2.44): this, of course, is the idea that self-ownership is the basis for world-ownership. God is proprietor of man, and man is proprietor of his person and actions: "for Locke, God's right in man and man's resulting inclusive rights arise from God's act of making."<sup>31</sup> A person comes into being when they become a rational adult and a free agent by "using his reason to discover natural law and to direct his will in acting." (2.57).<sup>32</sup>

For Tully, Locke's is a *maker* or *action* theory: man "makes the actions of his person and so has a natural and exclusive maker's right in them."<sup>33</sup> Therefore, body and limbs are God's property, but actions (as the product of persons) are man's own.<sup>34</sup> Man comes to have property in workmanship by working in a God-like fashion.<sup>35</sup> This natural right to "moral property over his own" is the right to property. Locke: "Their persons are free by a native right, and their properties, be they more or less, are their own, and at their own dispose, and not at his; or else it is no property." (2.194). The property right holds against government in the sense that "[i]t cannot be taken from him without consent (2.193)."<sup>36</sup>

In response to Nozick's famous objections to Locke's labor theory,<sup>37</sup> Tully says Locke "sees the laborer as making an object out of the material provided by God and so as having

property in this product” similar to the way God made the world from other stuff he had created. For Locke, use for the sake of “making useful things ushers in ownership of those goods, and this activity necessarily entails the exclusion of others.”<sup>38</sup> Locke’s property right is conditioned on productive use,<sup>39</sup> and a use is productive if it promotes the preservation of mankind. Therefore, Tully argues, Macpherson is wrong to claim that Locke’s “whole theory of property is a justification of the natural right...to unlimited individual appropriation”<sup>40</sup> and without social obligation.<sup>41</sup> Rather, “[i]f land isn’t cultivated, you lose it and it reverts to the commons.” The reversion point is spoilage, and Locke is clear that if a person gathers up too much, so that the “Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature, and was liable to be punished.” (2:37). Punishment for violations of the law of nature consist in retributing to the criminal, “so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for Reparation and Restraint.” (2:8).

So, says Tully, there no right in land as such, “but only a use right in improved land conditional upon the use of its products.”<sup>42</sup> Macpherson is incorrect to the extent that he misreads Locke to argue for unconditional or absolute rights over land as possessive individualist or private property.<sup>43</sup> In fact, Tully writes, “Locke’s theory is *in opposition* to unlimited rights theory”<sup>44</sup> and there is a positive duty to sustain those in need: as Locke writes, a “needy brother has a right to the surplusage” of his brother’s goods.<sup>45</sup>

According to Richard Boyd, Locke is situated between classical Christianity, with duties of positive usage and improvement, and modern capitalist theories of “procedural justice” which have displaced the classical/moral theories. Boyd: “Locke’s defense of private property is at once natural and positive, utilitarian and grounded in natural rights, secular and theological, hedonistic and custodial.”<sup>46</sup> This defense involves substantial limits on the absolute right of property in the form of stewardship or custodial obligations.<sup>47</sup> These include the just usage or “no spoliation limitation” (2:46), and the ongoing duty to cultivate and use land (2:37). Violations of both ‘use

it or lose it' rules means another can take over (2:38). According to Boyd, Lockean private property "rests on a legitimate authority to exclude others...(but), [i]n order for this right to be either morally meaningful or practically enforceable...others have to acknowledge a reciprocal obligation to respect the moral relationship between proprietors and their possessions. In this way, property rights and others' duties are correlative."<sup>48</sup> Importantly, this right to exclude is not coextensive with a right to destroy or waste. So, ownership of property is "subject to the same custodial terms according to which we originally own ourselves" (2.24): because our ownership rights over ourselves do not include suicide, our ownership rights over external property also do not include wasting or destroying it.

Lockean property is therefore heavily regulated as a means to an end, and for Locke the end is the public good.<sup>49</sup> Tully takes an extreme view of this. For Tully, man gives up natural liberty for conventional liberty by entering society, and all possessions become common at that point and wholly subservient to the public good. If he is correct, then Lockean property cannot be said to support strong individual rights in civil society. As a result, it is a mistake to base, as certain libertarians are wont to do, powerful property freedoms in Locke's theory. According to Boyd, the traditional, libertarian reading is that Locke's property theory justifies a political theory of limited government and priority of individuals over communities. This reading supports the idea that because our "natural right to property is fundamental and inalienable, we have the right to abolish any government that infringes it."<sup>50</sup> There is reason to doubt this, says Boyd, because the natural and labor theories are replaced by positive title guaranteed by state and positive constitutions (2:50). Consenting to community and state, and their protection of property, entails its regulation, and as a result Locke ends up back at the "positivism of Hobbes."<sup>51</sup>

## **Part 2. Waldron, Kramer, Simmons**

This part continues to press the question of whether Locke is the "prophet of a new individualism"<sup>52</sup> who provides libertarians with the kind of rights structure they require to support a robust property right. The answer, I think, depends on consent, both in terms of 1) entering into

civil society and 2) obeying its duly enacted laws. Lockean consent is unquestioningly about providing legitimacy to majoritarian legislation or decision-making, which in turn is meant to provide representative power against despotic or executive power. When Locke says “no man may have property taken except with his consent,” he means that consent is given either directly or, as is usually the case, through an elected representative. Of course, for Locke, if one’s elected representative voted with the minority voices against some issue, it is the majority’s voice that is taken to be the consent of the people and the minority is either obligated to obey or welcomed to leave for another community.

The majoritarian *demos*, however, is fully empowered to regulate and take property in accord with natural law and right. According to Simmons, Locke’s primary concern was that government not be ‘arbitrary’ or that it violate natural right on the grounds that one cannot reasonably consent to such a government.<sup>53</sup> This provides for a property right that is subject to severe regulation by a democratic majority, so long as that majority is not arbitrary or acts without either direct or representative consent. Lockean property theory is therefore an unlikely ancestor for contemporary right-libertarian property theorists, who see property rights as a bulwark against this kind of majoritarianism.

Jeremy Waldron has the benefit of reflecting upon both Macpherson and Tully. He rejects Tully’s reading and agrees, to a large extent, with Macpherson.<sup>54</sup> Lockean property rights, according to Waldron, are natural in that they are acquired as a result of actions and transactions “that men undertake on their own initiative and not by virtue of the operation of any civil framework of positive rules vesting those rights in them.”<sup>55</sup>

According to Waldron, Locke presents a mixed general/specific theory of rights, where all persons have a general right to subsistence/sustenance, but only a special right to private property: persons must do something to own property, and, for Locke, this is achieved through acts of labor.<sup>56</sup> Like Nozick’s theory, Locke’s is a theory of historical entitlement: the right to property is determined by the historical record of its initial acquisition and its subsequent



transfer.<sup>57</sup> So Locke's right is special in that labor leads to ownership, but it is also a kind of moral imperative: if one does not labor, one cannot preserve oneself, and it is wrong not to preserve oneself. So, one ought to pursue property to sustain both oneself and the community.<sup>58</sup>

Tully's "defective"<sup>59</sup> and "completely mistaken"<sup>60</sup> reading of Locke is a "far more radical rereading of Locke" than Macpherson's due to Tully's claim that Locke did not conceive of the idea that private property rights could be non-conventional.<sup>61</sup> As Waldron observes, Tully objects to Macpherson's definition of private property as that which has no social function. Lockean property, of course, has the precise social function of preserving mankind.<sup>62</sup> Locke believed that it was good for humankind to develop the land from waste to largesse, in which case people lived better and had better lives. The only way to achieve this was by widespread individual enclosure, which not only provided for oneself and one's family, but also permitted the owner to benefit others through what Adam Smith would soon recognize as the value of labor's division.<sup>63</sup>

Waldron concurs with Tully that the Sufficiency Limitation is "simply the recognition, so far as acquisition is concerned, of everyone's original claim-right to an adequate subsistence from the resources of the world."<sup>64</sup> For Locke, there is no moral difference between a person who fails to make land profitable or one who allows its profits to spoil: both owners are equally poor stewards, and Locke is not content to permit such a misuse of property.<sup>65</sup> A system of private property and a relatively free market uses its rather visible hand to encourage this wasteful owner to sell to someone who values it more highly, or be subject to expropriation. Macpherson is therefore correct to relate "Locke's conception of human nature, along with Hobbes's, to the spirit of rising capitalism."<sup>66</sup>

Waldron's astonishment at Tully's communitarian conclusion is understandable: it would require all property brought in from the state of nature to be carved up and redistributed by the community "on the basis of the general good. In respect of these redistributed holdings, the community then falls under an obligation of natural law not subsequently to disturb them."<sup>67</sup> Tully's misreading is based on Locke's statement that, upon entering civil society, owners must

submit their possessions to the community.<sup>68</sup> Tully says that Locke means that properties become the possessions, or property, of the community. This, writes Waldron, is surely incorrect: by ‘submission,’ Locke meant that both property and person become subject to the dominion, or *law*, of the community. Locke clearly does not intend that persons become possessions of the community: they merely become subject to laws, and the same is true for their possessions.<sup>69</sup>

Tully’s communitarian/conventional interpretation, where rights change radically from nature to society, is unlikely to be an accurate one. For Waldron, it does not make much difference for the property rights enjoyed by persons as they transition from the state of nature to civil society.<sup>70</sup> This is, essentially, the claim of the right libertarians, who approve of this transition so long as it preserves the putative individual property right, and Macpherson, who is critical of it. However, Waldron locates an underlying communitarian foundation in Locke’s view, in which “all property rights, whether natural or conventional, are subject at all times to the general right of every man to a basic subsistence when his survival is threatened. That general right—the primeval right of Lockean communism—remains in the background of the whole of the theory.”<sup>71</sup>

Matthew Kramer challenges Waldron’s characterization of Locke’s communism—Kramer’s term is communitarianism—on the grounds that it is at the *foreground*, and not background, of the theory. If correct, Kramer provides not only a decisive reply to Macpherson, but also a rejoinder (in substantial agreement with Waldron) to Tully’s claim that Locke’s conventional property rights are a different species of rights than the natural rights that arise in the state of nature. According to Kramer, “every pattern of individualism in the state of nature and elsewhere is the product of communitarianism,”<sup>72</sup> and *all* of Locke’s entitlements are justified in terms of preserving and enhancing the species.<sup>73</sup> This is because Locke thought individual and group interests coincided, and that group interests predominated if they clashed with individual interests. Kramer: “No person was free to strive for comforts and conveniences when the routes of her striving were a danger to the collective weal.”<sup>74</sup> This is an unconventionally intriguing

claim, and requires some unpacking. If accurate, what emerges from Kramer's analysis is a Locke who cannot be relied upon as a theorist of possessive individualism or libertarian property rights.

Like Tully, Kramer sets out to show that Locke's "individualistic prescriptions concerning property turn out to be communitarian through and through."<sup>75</sup> However, Kramer has severe disagreements with Tully, and the primary bone of contention with Tully is over the labor theory of acquisition.<sup>76</sup> Kramer is primarily opposed to a natural right to property that is the product of Lockean self-ownership and labor, which is mixed with unowned resources to produce the right of ownership. If Locke is wrong about ownership 'arising' from the mixture of labor and things, then there is no natural right of ownership in the state of nature and, *a fortiori*, no natural right of ownership in civil society. Kramer's deeper point, I think, is to show that natural rights over property must fail, and that natural rights libertarians are misguided to rely upon Locke as a spiritual guide.

According to Kramer, the labor theory fails because there is no individual right to anything in Locke's property theory that is not in the service of the community. Locke's "structure of private property is consequentialist through and through"<sup>77</sup> and therefore no amount of labor can spontaneously generate a private property right *against* the community. Although there are individual rights in the state of nature, they "gain their justification solely as the vehicles of collective enterprise."<sup>78</sup> For Kramer, Lockean individual rights benefit the collective: people (normatively) should have individual rights because individual rights are instrumentally the best way to (nonnormatively) benefit the group.

Kramer appears to accept self-ownership and the ownership of capacities and abilities,<sup>79</sup> but rejects these as the basis for ownership of labor and, *ipso facto*, for the mixing of one's labor with unowned resources resulting in the 'natural' property right. For Kramer, self-ownership does not support the ownership of the products of one's labor, and Locke's labor theory does not bridge the gap between "labor in the object and labor within the subject."<sup>80</sup> "The right-creating power of human toil," Kramer writes, "was the link between the general entitlement to self

preservation and the concrete entitlements of individual ownership.”<sup>81</sup> However, this link is invalid because those entitlements are never concrete and always subject to claims by the community. These claims are the essence of Lockean natural law, and are hardly the stuff of libertarian property rights. Kramer: “Both of the major strands of self-ownership—the general privilege to employ one’s abilities, and the general right against encroachment by one’s fellows on the integrity of one’s person—were governed fully indeed by natural law’s communitarian impulse.”<sup>82</sup> Because his labor theory is invalid, Kramer writes, the labor-mixing theory of ownership is invalid as well. As a result, “Locke’s property is indefensible.”<sup>83</sup>

Tully, for reasons suggested below, argued that the right to property in civil society is conventional, meaning that Locke jettisons nature for positive rights in the transition from natural to civil society. *Pace* Tully, Kramer argues that all natural property rights carry over from state of nature to civil society.<sup>84</sup> According to Kramer, the property gains in the state of nature, as well as the duties to the community, are preserved through the conventions of civil society, which are also limited by those natural acquisitions.<sup>85</sup> For Kramer, not only does the natural right persist, but all of the natural rights have full force in civil society: they determine what the civil law must do. The argument, then, is over Locke’s natural law, and Kramer is obligated to show that Locke is not only communitarian through and through, but a natural lawyer through and through as well. Therefore, the obligation on owners in the state of nature persists in civil society, and the natural lawyer, operating within the boundaries of civil society, is required to justify a property regime that protects individual rights only insofar as they promote communitarian objectives. For Kramer, this is the primary reason for rejecting Lockean natural laws about self-ownership and labor as a foundation for civil law, and also for rejecting natural law as a basis for libertarian property rights. Furthermore, this is why natural rights libertarians are wrong: natural rights to property are not justified in the state of nature so, *a fortiori*, they are not justified in civil society.

Tully’s fault, according to Kramer, is that he avoids Locke’s extensive discussion of the importance of *consent*. Tully, Kramer argues, belongs to a category of thinkers who want to find

in Locke a property theory that does not leave the poor or the propertyless behind, and a conventional Locke, who legitimizes the communitarian aspects of the state of nature through positive law, might do just this. Tully and other thinkers have erroneously, according to Kramer, “committed Locke to allowing that a legitimate expropriation of property could take place without any consent from the affected owners. People who had earned rights of ownership in the natural state of humanity could not obstruct the taking of all of those rights as soon as the proper moment came for the transition to schemes of full fledged society and governance.” The preservation of communitarian interests from nature to civil society can only occur, Kramer suggests, if owners give up their rights—but Tully cannot explain how or why they would do this.<sup>86</sup> Tully’s transition from the state of nature to civil society preserves the natural law and, simultaneously but incongruously, divests owners for redistribution. What Tully does not consider is that a majority of owners, after consenting to enter civil society and consenting to the limited types of property regulation that are inevitable, might *not* consent to the kind of widespread expropriation Tully thinks would occur. If property in civil society is conventional, then it might move in the other direction (towards individualism and away from communitarian expropriation) depending on the consent given. But, if property in civil society is natural, then the undisputed ‘natural’ communitarianism of the state of nature is the ‘natural’ communitarianism of civil society. Tully cannot have it both ways.

Kramer’s conclusion is not that communitarian goals, such as utility or welfare, are *coincidental* or accidental products of individual rights. If they were, he would be rearguing Adam Smith’s point that individual self interest just happens to benefit rightsholders *and* the community—a win/win situation, as it were, for both individuals and communities.<sup>87</sup> Rather, Kramer argues just the opposite: that whatever individualism there is in Locke is the *product* of a selfless communitarianism, and self-ownership is merely instrumental towards serving communitarian obligation.<sup>88</sup> Whatever individualism and self interest is promoted by Lockean

property is only promoted to serve the community: “if possessive individualism characterized the state of nature, its predominance stemmed from its ability to promote communitarian ends.”<sup>89</sup>

What role, then, does consent play? Consent, as Simmons will show, cannot be given for just anything, but transitioning owners and owners in civil society (and similarly situated nonowners) certainly play a role in determining what kinds of property rights might govern in the jurisdiction of their choice. Locke is clear that property cannot be taken without consent, and owners, after consenting to general jurisdiction over them by the sovereign, might not consent to property restrictions. Or, they might consent—directly or through their elected representative—that all surplus property over a certain amount be taxed at a certain rate, or, familiarly, that private property not be taken except for public use without just compensation.

“Consent,” Simmons writes, “carves the boundaries of natural law.”<sup>90</sup> Simmons argues that the Lockean state of nature is a ‘moral’ condition, meaning that persons are not morally bound to a government until they consent. In this sense, all persons undergo a ‘trial period’ in the state of nature where they figure out whether they want to consent to this or that state. One leaves the state of nature when one consents to an ‘artificial’ or created civil state.<sup>91</sup> For Simmons, persons first consent to political obligations. This is actual, personal consent. It means, for Simmons, that persons obey the laws that do not contradict natural law, and they must support a functioning society through, for example, the payment of taxes.<sup>92</sup> Exiting the state of nature and entering civil society—either for the first time or as an emigrant to a new society—requires unanimous consent, but, Simmons writes, “this consent entails, Locke believes, consent to rule by the majority of the members in all subsequent matters” including the consensual taking of property (2.95-99) and, short of outright takings, a wide variety of property regulations.<sup>93</sup> Individuals retain the natural rights of preservation of self and Mankind, and at least one kind of property always remains even if the majority consents to widespread takings and redistribution: a person’s ‘person’ and their labor.<sup>94</sup> According to Simmons, no man could or would consent to having their right to subsist or preserve themselves violated, and a majoritarian law, even if it

were the result of a full and free democratic political participation, would be invalid were it to deny a person this right.<sup>95</sup> Resistance to this kind of power is justified, even if the power is derived from majoritarian decisions.<sup>96</sup> Consent therefore may be withdrawn, through resistance, when those ends are not met.<sup>97</sup> A taking for public use is therefore permitted under a Lockean property regime, and just compensation would be appropriate with consent. By the same token, electors are free to deny the state the right to take, and the same can be said for taxes, the provision of property to the poor through redistribution, and other regulatory schemes. In terms of majoritarian authority, political representation is not mandatory, but “well ordered commonwealths” (2.143) will consist of legislative bodies made up of representatives chosen “by the People” (2.213) who, interestingly, act “as the fence to their properties” (2.222).<sup>98</sup>

Simmons comes closest to providing a strong natural right to preservation—one that cannot be conventionally infringed on pain of resistance—and this approaches but does not constitute the libertarian property ideal. Simmons therefore exposes a flaw in libertarian theory: Locke lacks any strong, prescriptive protection of property rights unless they promote survival or preservation, and permits wide latitudes for regulation and expropriation if the correct procedures are met. Locke’s is therefore a strong due process right, but not a substantive one. Libertarians are committed to the latter, so they must turn elsewhere from Locke to find their common ancestor.

### **Part 3: Nozick’s Derivation of World-Ownership from Self-Ownership**

This part contains a critique of the moral basis of the right-libertarian theory of property, which is represented here by Nozick’s description of the moral equivalence of bodily and external property rights. I argue that Nozick makes a series of unwarranted steps when he moves from the moral right against physical aggression against the person to the moral right against injury to a person’s property. This unwarranted step is shown to be a category error, based on the assertion that rights in bodily integrity and rights in external property are different enough to be subject to different degrees of protection. If I am correct, then Nozick’s stated aim of narrowing the difference between bodily boundary crossing and external world boundary crossing is

unsuccessful. This argument tracks, to a large degree, Kramer's critique of Locke's progression from a natural right of self-ownership and labor to natural rights in external property.

As the paradigmatic example of a property rights libertarian, Robert Nozick's conception of property rights is well known. In addition to his entitlement theory of property rights, Nozick's connection between liberty and property is essentially Kantian: it is wrong to use persons as resources for others by forcibly extracting their property from them. If their property is justly acquired, then their liberty is also unjustly restrained by extracting their property because, for the property rights libertarians, liberty consists in the freedom to dispose of one's property without coercion. Nozick assumes *proprietaryism*, the view that all enforceable moral rights are moral property rights, or rights over things.<sup>99</sup> One such right is the right that persons may not physically aggress against others: because persons have an inviolable right to bodily integrity, no one may aggress against this border or boundary. This is the case because, for Nozick, persons maintain a property right in themselves. Nozick: "Individuals have rights, and there are things no person or group may do to the them (without violating their rights)."<sup>100</sup> As Thomas Nagel observed, this is unargued for, and the same can be said for Nozick's arguments for self-ownership as one of those rights.<sup>101</sup>

The self-ownership right extends to rights over external things as well, which Nozick identifies as "holdings." Because I have the right to bodily integrity in the property of my body, I also have the right to integrity in my holdings. Because we own ourselves, it is immoral for others to interfere with our personal bodily integrity, and because we own external property, it is similarly immoral for others to interfere with that as well. Put another way, he claims that it is impermissible to take my property because taking my external property (particularly for purposes of redistribution) is equivalent to taking the property that is my body. For example, taxation gives "(partial) ownership by others of people and their actions and labor. These principles involve a shift from the classic liberals' notion of self-ownership to a notion of (partial) property rights in *other* people."<sup>102</sup> This is aimed directly at Rawls's idea that natural talents are a common asset<sup>103</sup>



and therefore unowned by the persons who possess them. So, for Rawls, people possess them but do not deserve them and hence do not own them (or, least, do not own them with any kind of robust property right) because, for Rawls, you may only own what you deserve.<sup>104</sup> Obviously, things can be distributed which are not property (such as justice, for one very obvious example). Nozick agrees that a person's "talents and abilities *are* an asset to a free community"<sup>105</sup> and these benefits their owners and others; however, they belong to their possessors and taking them without consent is a kind of theft. The minimal state that recognizes and protects this type of right is, according to Nozick, the only type of justifiable state precisely because of this recognition, and any violation of this right to integrity in my holdings crosses the owner's boundaries and renders the state unjustly coercive and ultimately immoral. Similarly, it is the duty of the state to protect and punish persons who violate this right. So, the just state does not cross a property owner's boundaries, and the just state protects my boundaries and prosecutes those who cross them.

According to Nozick, "[p]olitical philosophy is concerned only with certain ways that persons may not use others; primarily, physically aggressing against them."<sup>106</sup> After offering a discussion of side constraints and supporting a broadly Kantian notion of respect for persons, Nozick claims that such side constraints "express the inviolability of other persons" and also "prohibit aggression against another."<sup>107</sup> This side constraint amounts to a right to bodily integrity. This right is buttressed by another argument: the doctrine of self-ownership, whereby persons possess "property in themselves."<sup>108</sup> Nozick locates the idea of self-ownership in Locke's state of nature, where individuals are in "a state of perfect freedom to order their actions and dispose of their possessions and persons as they see fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man."<sup>109</sup> In fact, as Robert Paul Wolff writes, all of the rights in part I of *Anarchy, State and Utopia* are couched in terms of boundary crossings, disadvantages, compensation, and these situations all pertain to property rights.<sup>110</sup> So—revisiting the question posed in chapter 1 in light of the previous discussion of

Locke's property theory—is the right to bodily integrity a legitimate basis on which to build the foundation of a right to property?

Nozick's answer is fairly simple: because we own ourselves, it is unjust for others to interfere with our personal bodily integrity, and because we own external property, it is similarly immoral for others to interfere with that as well. Put another way, he claims that it is not morally permissible to take my property because taking my external property (particularly for purposes of redistribution) is the moral equivalent of violating my bodily integrity.

Alan Ryan<sup>111</sup> locates the libertarian idea of self-ownership in Locke's account of a property in oneself as being merely one of rights and immunities, and, following A. John Simmons<sup>112</sup>, urges us to drop talk of 'property' altogether due to its contestable and controversial origins. Ultimately, Ryan argues, only a misreading of Locke leads to the conclusion that Lockean property theory entails the type of self-ownership concept advanced by Nozick, and such a reading should be discarded in favor of a view of property in one's person as a type of leasehold. Locke founded private property in, for example, land and objects, on each individual's prior possession of "a Property in his own Person."<sup>113</sup> According to this reading, a Lockean theory of self-ownership locates private property in one's own person, which gives rise to property in actions, which allows persons to mix their labor with things and results in one's property in their actions being 'transferred' to property in things. This is 'natural' and is said to exist pre-institutionally. But this is an error, according to both Ryan and Simmons, due to the fact that Locke's conception of property in oneself is *religious* (God owns us, and we merely lease our bodies from Him), and, more importantly, *social* and not 'natural.' It is social in the sense that, in our everyday experience, we lack the type of sovereign authority over our selves as well as over our external property, which results in the 'reverse' of the idealized libertarian picture presented by Nozick.<sup>114</sup> Ryan argues that this picture is necessary for the libertarian Nozickian's ultimate argument against redistribution of income, but that it is unsupportable. Here is how Ryan frames the argument:

First, Nozick argues that if we do not own ourselves, then others must have part ownership in us. If others have part ownership in us, then we are partial slaves to others. While this might support the general libertarian rejection of so-called victimless crimes, it is not really about property: it is about control. So, I might have the right to dye my hair blue, but not because I *own* myself and (by implication) my hair, but because I have the *right to control* what is on my head.<sup>115</sup> Second, in order to argue that distributive justice is immoral, Nozick claims that (somehow) distributive justice does something to *my* body: because our bodies are our property, we must extend to all property the same ‘tenderness’ we extend to rights of bodily integrity, privacy, and noninterference. This could be expressed in the form of an analogy: I own my body in the same sense that I own property in the external world, and hurting my property is as morally condemnable as hurting my body. So, when a part of my property is taken (say, in the form of taxes to support the poor), it is the moral equivalent of a pound of flesh. Ultimately, Ryan argues that whatever self-ownership might consist in, it is categorically different than autonomy and power of control, and Locke therefore does not provide Nozick with a ‘natural’ bridge from self-ownership to world-ownership.

Even granting that we own our bodies, and that we own our labor and talents,<sup>116</sup> a violation of our bodily integrity is manifestly different from a violation of whatever external things I might be said to possess. In order to make the connection between a property interest in our bodies and a property interest in external things, Nozick wants us to think of property redistribution as analogous to eyeball redistribution: when a state takes my property and gives it to others, it morally the same thing as the state yanking out my eyeball to give to others.<sup>117</sup> Both forms of redistribution must be condemned with the same moral force, because the same argument about my right to my eyes applies to my right to my justly acquired external property.

However, these are obviously two different types of harms. There is a moral urgency in protecting my eyeballs from attack from both a vicious zombie, interested only in their flavor, and from a government that wants to implement an eyeball lottery in order to rectify victims of

either past zombie/eyeball appropriation or unjust past governmental eyeball-distribution programs. However, absent some rather interesting defeaters,<sup>118</sup> appropriating a piece of land or other form of external property for the same purpose of implementing distributive justice involves a different set of interests, rights, and procedures.

For example, human life is at stake when bodily integrity is violated, and the greater the violation, the greater the threat of death. Although there are numerous examples showing that human life is endangered due to a violation of external property rights (say, a thief steals my iron lung, which I need to survive), it is difficult to see how the type of redistribution at issue in Nozick's work affects the property owner with the same sense of violence required for violations of bodily rights. In fact, the type of redistribution at issue here (e.g., taxation on wages or perhaps capital gains assessments on passive investments in real property) does not involve violence whatsoever. It could be argued that there is violence at some level, particularly in terms of the coercive threat of noncompliance. However, the differences between violations of bodily rights and property rights can be understood using an example from the Anglo-American common law tradition, which prescribes vastly different punishments for the crimes of robbery by force or fear on the one hand, and for pick pocketing on the other. Robbery occurs when a victim is directly confronted by the perpetrator and threatened with violence in order to force them to turn over their money, while pickpocketing occurs when a victim's property is taken (from their body) without their knowledge. Despite the fact that the pickpocket commits a minor act of violence (or, more, appropriately for this discussion, an act of boundary crossing) against the person by invading their pocket, it is not considered a violent offense due to the victim's complete lack of knowledge or fear, and because no force (as defined in legal or common-sense terminology) was used in the theft. As a result, punishment for pick pocketing is minimal, while robbery is typically an offense punishable by a term in state prison. In either case, the same property might be appropriated, but because of the lack of violence against the person in the pickpocket example, the crimes are categorized and punishment quite differently. This is because of the threat of

violence to the body is considered a far more serious moral transgression, and it is therefore categorized and punished quite differently. Such a distinction is not irrational.

Furthermore, it seems axiomatic that life is consistently more highly valued than property. In the above example, the thief might make the following offer: *your money or your life*. It is reasonable to assume that when faced with this option, most people choose to hand over their property because persons tend to value bodily integrity more than property on the grounds that property tends to be fungible and replaceable, whereas life and bodily integrity are not. Therefore, if Nozick's argument depends on the position that human beings value property rights as strongly as bodily rights, he is probably appealing to a minority of human beings whose interests in property rights are beyond the pale of the values of those who value life above property.

This simple taxonomy of value determination, which extends gradually from a right to bodily integrity, to a right to one's labors and talents, and then finally to a right to own external property, is reflected in both Locke's graduated theory of property ownership as well as Nozick's version of the labor theory.<sup>119</sup> However, Nozick denies the primary right to bodily integrity when he conflates aggression/boundary crossing of persons with aggression/boundary crossing of land/copyright/things because there is a significant moral difference between a state protecting life and liberty, on the one hand, and protecting property on the other. If this is correct, then an obvious question arises: why would he make such a mistake? Recall that Nozick believes that political philosophy, and not merely moral theory, is primarily concerned with ways persons may not *use* others: persons use others in the most egregious sense when they are "physically aggressing against them."<sup>120</sup> This amounts to a side constraint that expresses the inviolability of other persons. Because each person enjoys the benefits of this side constraint in the form of a right to bodily integrity, no one may physically aggress against your boundary because you are a separate person.<sup>121</sup> This constitutes the line or "hyper plane" around the moral space of the individual, and the body is the boundary that must not be crossed.<sup>122</sup> At this point, it is difficult to

see how this discussion concerns political philosophy at all: rather, it is the familiar second formulation of the Kantian categorical imperative and a bedrock of moral philosophy: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”<sup>123</sup> Nozick’s error lies both in his application of the imperative to external property when it should be limited to persons (as Kant makes clear), and in his application of a moral rule prohibiting physical aggression persons to a political stance regarding distributive justice. Self-ownership cannot provide the bridge from bodily rights to world-ownership rights; this is best achieved, as I argue in the conclusion to this chapter, through the use of privacy as a justification for both bodily rights and private property rights. It is privacy that best describes the interests persons have in their bodily integrity, and it is the ability of private property to contain this interest that forms the connection between persons and external property and makes external property worth protecting.

## **Section 2. Left-Libertarianism and World Ownership**

This section discusses how left-libertarians approach self-ownership and its implications for world-ownership. Left-libertarianism recognizes proprietorship’s call for strong self ownership rights in the body and the immediate uses of it, but argues that as a thing becomes more remote from the body and the labor used to produce it, the right of ownership becomes less powerful, culminating in the conceptually unowned natural world. At this end of the ownership spectrum, there is no such thing as private property in natural resources because there can be nothing private about oil, coal, diamonds, or iron. Similar arguments can be made about large corporate property, capital, and investments. Therefore, the left-libertarians would justify the protection of private property insofar as it is truly reflective of self-ownership and effort, but facilitate the forcible expropriation private property that creates a ‘parasitic’<sup>124</sup> relationship between the owner’s right to increase and the exploitation of unearned natural resources such as oil, coal, water, and minerals. This has fatal results for many kinds of private property, but particularly so for private property rights in subsurface things and places.

The primary cleavage with right-libertarians occurs not on the issue of self-ownership, but with the ownership of natural resources: while right-libertarianism attempt to establish ownership of the world as a logical entailment of self-ownership, left libertarians argue that “natural resources are owned in some egalitarian manner.”<sup>125</sup>

The biggest threat to the egalitarianism of the left-libertarians is the clever temerity of Nozick’s Wilt Chamberlain example and its implications for self-ownership. If self-ownership is a natural fact, then some selves will do things that either advance their welfare (if they are talented) or inhibit it (if they are disabled or otherwise lack whatever talents are valued in that society). If it advances, then self-ownership implies a right to the fruits of that ownership in the form of wealth, and if it inhibits it, then the talented ought to be required to compensate the less talented because no one deserves random good or back luck. Egalitarians wrestle with self-ownership because self-ownership implies ownership of one’s talent, and talent-ownership can rapidly upset egalitarian patterns and justify coercion (or, as Nozick puts it, “tyranny.”)<sup>126</sup>

According to Peter Vallentyne, “left-libertarianism endorses full self-ownership,” but permits the private appropriation of natural resources only “with the permission of, or with a significant payment to, the members of a society.” Like right-libertarianism, Vallentyne writes, left-libertarians are proprietarians, in that the basic rights of individuals are ownership rights.<sup>127</sup> Hillel Steiner concurs: rights are possessed, and all rights are property rights.<sup>128</sup> To that extent, Steiner approvingly quotes H.L.A. Hart: “[r]ights are typically conceived of as possessed or owned or belonging to individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled.”<sup>129</sup> According to Michael Otsuka, it is “uncontroversial” to claim that both that the right of self-ownership and the “injustice of murder, mayhem, or involuntary servitude” (i.e. the duty not to harm) are natural rather than conventional. This is because these rights and duties are not dependent upon laws or institutions, social conventions, or consensual agreement.<sup>130</sup>

Steiner also approvingly quotes Leveller Richard Overton for the idea not only that “we must each be self-owners,”<sup>131</sup> but that self-ownership is a natural right:

To every individual in nature is given an individual property by nature not to be invaded or usurped by any. For every one, as he is himself, so he has a self-propriety, else could he not be himself; and of this no second may presume to deprive any of without manifest violation and affront to the very principles of nature and of the rules of equity and justice between man and man. Mine and thine cannot be, except this be.<sup>132</sup>

For Steiner, self-ownership leads to unencumbered titles for things produced from one’s own things (see Michael Otsuka’s hair sweater, *infra*) but it cannot lead to the same outcome with unowned things. Initially unowned things can only be ownable by everyone: “our equal original property rights entitle us to equal bundles of (initially unowned) things.”<sup>133</sup> The Lockean proviso only entitles us to mix our liberty so as to leave enough and as good for others. Therefore, Steiner concludes, we are each “entitled to an equal share of (at least) raw natural resources.”<sup>134</sup> Were we to mix our labor with more than our share, we would relinquish our title to that labor. “Self ownership” and the “fruits of our labor,” Steiner concludes, are sufficient bases for “creating unencumbered titles both to things produced solely from self-owned things and to things produced from this equal portion of unowned things.”<sup>135</sup>

Otsuka agrees that we own ourselves and own the products of our labor, but do not have a right to the value of things created by other people or, for that matter, by nature, which add to our labor. This leaves an absolute property right that is as strong as the self-ownership right in *very* few and limited objects, such as a sweater created from one’s own body hair using solely one’s own labor. By distributing non-hair resources in an egalitarian manner, exchanges would be truly voluntary and not require forced exchanges (e.g. taxes) or encroachments upon the robust libertarian right of self-ownership.<sup>136</sup> To this end, it is possible to “distribute initially unowned world resources so as to achieve equality of opportunity for welfare in a manner that is compatible with each person’s possession of an unfringed libertarian right of self ownership that is robust rather than merely formal.”<sup>137</sup> This allows disabled persons the opportunity to



acquire enough worldly resources to better themselves by investing those resources to the same degree as able-bodied persons.

Gijs van Donselaar, in expanding on the Lockean idea of property and the importance of the Lockean Proviso, similarly claims that we only have property rights in the things we produce, but we do not produce natural resources such as water or oil or gold.<sup>138</sup> For van Donselaar, private endowments in terms of unrestricted property rights are inconsistent with the Lockean proviso, which is interpreted here as a restriction upon property rights that coerce others into buying privately owned goods.<sup>139</sup>

Echoing Proudhon, van Donselaar argues that one's true possessions (talents, capabilities, and so forth) cannot create land or coal, so ownership of the produce of land, such as wheat, is conceptually different than ownership of what is underneath it. Expropriation would be justified so that those who are most willing and possess the highest ability to exploit resources in the cheapest possible way are also those who should have the rights to control them.<sup>140</sup> Van Donselaar calls these "evanescent rights," which are rights to control productive property based on skill and efficiency and not upon first acquisition or even title.<sup>141</sup> Otherwise, making others worse off by coercing them to buy from the person who happens to be in control of resources—the owner, first appropriator, or inheritor of surface or mining rights—makes that owner a parasite. Parasitism, or exploitation, occurs when in virtue of a property rights relation between A and B, "A is worse off than she would have been had B not existed or if she would have had nothing to do with him, while B is better off than he would have been without A, or having nothing to do with her, or vice versa."<sup>142</sup> These kinds of situations arise when, according to Matt Zwolinski, a party "sells a right in which it has no independent interest"—no interest, that is, other than the interest in profiting from the sale of the right.<sup>143</sup> The proviso, therefore, "can never allow the establishment of exclusive rights in external objects. People's holdings in natural resources are always liable to adjustments in light of the justice of economic outcomes."<sup>144</sup> Implemented in the way Van Donselaar describes, the proviso can bring about more efficient

“and hence more just [...] distributions of external endowments” including collective ownership.<sup>145</sup>

John Christman and James Grunebaum develop their property theories around the importance of individual autonomy and self-ownership, which, they argue, cannot be the basis for income or resource ownership. Christman argues that there is a natural right to use and possess many things, but no natural right to the income from any thing. He provides an extended argument that frames ownership in terms of two sets of rights. The first set, in which ownership is framed as *control*, protects autonomy interests; the second protects income interests, and is framed as the right to *income* from the trade or rent of a property.<sup>146</sup> The income right is the right to exchange goods and to retain all goods received from others in such exchanges. Like the other left-libertarians, Christman argues for strong control rights in the individual but weak or nonexistent income rights. These rights, he argues, should vest in the community.

For Christman, the right of self-ownership, as well as the right over one’s labor, are natural rights, and natural rights are not contingent upon the state or other enforcement mechanisms.<sup>147</sup> A right is a natural right if its possession is justified only with reference to a certain set of natural attributes of persons, and without reference to social conventions, legal institutions or other institutional relationships within or among groups of persons.<sup>148</sup> Adapting Hart’s well-known definition of natural right, this right is limited to freedom or liberty, because those cannot be created or conferred by men’s voluntary action. Hart: “they have the right *qua* men and not only if they are members of some society or stand in certain relations to one another; it’s not created or conferred by men’s voluntary action.”<sup>149</sup>

Locke, Christman argues, does not establish a natural right to income from property; his natural property right only establishes the right to use, possess, and manage property.<sup>150</sup> So, Christman argues, because the right to income is conventional, and because the use of money is conventional, the natural rights argument fails. Similarly, the right to stored goods in terms of money is conventional, while the natural right to one’s labor only justifies working on land in

state of nature, and that is not how property law is regulated in the modern state. Therefore, the attempt to extend those natural rights to use and possess to a natural right to income fails because the state is “always present as an enforcement mechanism for the property rights that people have over their possessions;” its presence is “always manifested in any economic organization.”<sup>151</sup> This presence is felt mostly as the plentiful restrictions upon an owners’ use and transfer of goods, including OSHA, zoning, taxes, and so forth.<sup>152</sup> If the state determines that whatever possessory rights a person has does not include a right to income, then that person’s liberty is not violated.<sup>153</sup> The right to acquire and accumulate goods must be established by other means before claiming that right to liberty includes the right to acquire things.<sup>154</sup> Furthermore, although the opportunity to engage in market exchanges, which involve choosing and deciding among options, is important because it allows one to feel like their life is under control, income rights are not essential for this.<sup>155</sup>

Locke’s ‘tacit consent’ of inequality arises when the convention of money permits the conventional right to enlarge possessions. This is also where Locke acknowledges that conventional rights are subject to restriction for the common good.<sup>156</sup> Although external properties are instruments of our agency as much as our bodies are instruments of our agency, Locke—and Christman—interpret this to be no more than the right to use and possess.<sup>157</sup>

Like many of theorists in my study, Christman is critical of the way law and economics have come to dominate law, and property law in particular, such that a concern for productivity, for example, become an indirect justification for powerful income rights. The productivity argument goes like this: a state should adopt the property structure that best achieves its distributive and productivity goals. Liberal ownership does this, so states should promote liberal ownership. The value of liberty in this line of reasoning has been, according to Christman, “thrust into the shadows.”<sup>158</sup> However, he argues, if the liberal ownership right to income is more productive, then its proponents have to show that productivity *also* produces more liberty, and that productivity (i.e. a larger stock of privately held commodities) is distributed in a way that

increases overall liberty as well.<sup>159</sup> If people as owners have rights to trade goods and keep income in a world of unequally talented people and differential access to new goods, then people will enjoy different amounts of freedom.<sup>160</sup> Since liberal ownership in a market economy will inevitably result in great inequalities of income and wealth and therefore great inequalities of freedom, then the disvalue of these inequalities would justify favoring an alternative distribution based on a different ownership structure that serves to reduce such inequalities.<sup>161</sup>

Here, then, is Christman's task: he wants to show how restricted ownership leads to *more* freedom, and that the state does not disrespect anyone's rights if it maintains a property system that does not grant full liberal ownership and a right to income.<sup>162</sup> Rights of, for example, investors cannot be disrespected by denying them income from investments because investors do not 'deserve' profits based on, for example, weird, lucky, random or unpredictable market phenomena. No one morally deserves entrepreneurial profit or income based on luck, so the winning of profits, like rewards based on talents and dispositions, are not deserved.<sup>163</sup>

At this point, Christman takes on a distinctly familiar Rawlsian contour: even one's character (which gives one the 'edge' to be a skillful entrepreneur) depends on fortunate family and social circumstances which, Christman claims, one cannot claim credit for and cannot profit thereof. So the entrepreneur, who somehow finds the niche in the market that leads to sales and an economic surplus, either earns that niche by luck or character, neither of which she deserves.<sup>164</sup> Profit is not simply risk or innovation: it is the result of resource availability, information, lack of credit opportunities, and transaction costs, none of which are created by the entrepreneur who profits (directly or indirectly) from these factors, and neither are they the beneficial outcomes of their efforts.<sup>165</sup>

Christman concludes that "private liberal ownership should be rejected as the general pattern of property rights in a society,"<sup>166</sup> and replaced by the creation of a regime of control rights over the self with no corresponding individual right to income. The distinction between control and income ownership solves two of the 'problems' of self-ownership. The first problem

is equality and the second is autonomy. Equality becomes coextensive with self-ownership because self-ownership is just *control* ownership, and control ownership does not entail wide disparities in income because it does not entail desert for unearned profits.<sup>167</sup> Autonomy, for Christman, requires the kind of extensive control over oneself that is only possible through self-ownership, which is a “powerful way of expressing the principle of individual liberty,” or autonomy.<sup>168</sup> Autonomy consists of control over general aspects of the material conditions of one’s life, including social arrangements, leisure, or employment. Autonomy in these areas is met by control rights.<sup>169</sup> But “minimal autonomy requires more predictability than the market can provide,”<sup>170</sup> and minimum autonomy therefore requires basic housing, education, and medical services.<sup>171</sup> The state must therefore provide “whatever resources are necessary for the establishment of minimal autonomy.”<sup>172</sup> This is provided by redistributing income through market socialism, where firm management, labor markets, and production is determined by familiar market mechanisms and where income and profit is generated in traditional ways, but where the state “will have the claim to direct all income from those ventures,” meaning that “all profit generated by the firms...is collected by the state...[and] distributed equally to citizens as a ‘social dividend.’” This is “workable” because there are no individuals who have “private income rights to the profits of firms”, but “private individuals retain control rights.”<sup>173</sup> Curtailing the income rights of “some, through taxation and other measures, in order to redistribute resources, control over which is necessary to secure autonomy for others, is required by justice.”<sup>174</sup>

To summarize: self-ownership extends to control access to body and labor but not to the right to income from trade of these things.<sup>175</sup> Preventing persons from reaping benefits does not *ipso facto* prevent them from controlling their lives.<sup>176</sup>

Like Christman, James Grunebaum proposes a “new theory of ownership,”<sup>177</sup> *autonomous ownership*, which also divides property into two domains: 1) self and labor, and 2) land and resources. Property in the self/labor is incompatible with social or communal ownership which views these as no different than any other property (such as land or machinery). This is

what Grunebaum calls “real private ownership.” Property in land and resources is incompatible with real private ownership of land and resources, or wherever everyone cannot participate. So autonomous ownership excludes private ownership of land/resources as well as social ownership of self/labor.<sup>178</sup>

Because land and resources are independent of human labor, rights over land and resources vest in all members of the community.<sup>179</sup> Grunebaum’s point is that body/labor is categorically different than land/resources, and that very different rules ought to apply for these different cases.

As mentioned in the discussion of Christman, *supra*, Rawls’ work has proven to be a strong influence on the left-libertarian idea that self-ownership rights do not entail income or world property rights. This is due, in part, to Rawls’s conception of self-ownership. Rawls has what Grunebaum calls a “composite” understanding of self-ownership, where selves own part of themselves, and “at least a part of oneself, i.e., one’s share of the distribution of natural talents or abilities, is not privately but collectively or communally owned.” This is true not only for inherited traits, but those skills and talents gained through effort. For Rawls, the real owner of these properties is the community or nation.<sup>180</sup> Grunebaum: “the difference principle implies that possessors of natural talents have no special rights to the income their talents may earn in an economic system. Rights over the income from natural talents vest in all members of the community.”<sup>181</sup> Grunebaum also suggests that, for consistency, Rawls should support communal ownership of land and resources for the same reason he supports communal ownership of talents and abilities: ownership of land and resources is the result of “social contingency and natural fortune on distributive shares,”<sup>182</sup> and should therefore be subject to the same communal claims as natural talents and abilities.<sup>183</sup>

Rawls does not appear to express much preference in terms of private or public ownership of, for example, the means of production,<sup>184</sup> although he is clear that the right to own such means is *not* basic and therefore “not protected by the priority of the first principle” of

justice.<sup>185</sup> Such ownership would be decided, according to Samuel Freeman, by the difference principle.<sup>186</sup> However, he clearly supports both “the right to hold personal property and freedom from arbitrary arrest and seizure as defend by the concept of the rule of law.”<sup>187</sup> This basic liberty to hold personal property – with, again, no mention of private property – is repeated in *Political Liberalism*, alongside Rawls’ rejection of “wider property rights” involving ownership of or the right to control the means of production and natural resources.<sup>188</sup>

That being said, it is my position that Christman and Grunebaum are correct about the weaknesses of the justification of world ownership based on consideration of self-ownership,<sup>189</sup> however, there are several problems with their account. One of the key objections by left-libertarians to private world ownership is the idea that all first appropriations are illegitimate: there is no such thing as a legitimate or just first appropriation that does not run afoul of either the Lockean proviso, some other principle of justice, or ideas about group ownership. In response to this objection, Edward Feser argues that there is no such thing as an *unjust* initial acquisition, and that this kind of objection is subject to at least two counter-objections. First, Feser argues that like all possessors, first acquirers must *do* something to make something their own, and by doing something, there is more reason to give that person more rights over the thing than someone who does nothing. Most people in the world have done nothing in regards to unacquired property, and therefore have no ‘natural’ or implied interest in it.<sup>190</sup> This seems true for *all* kinds of ownership—even over selves—with the result that there is an action requirement that is missing in left-libertarian communal ownership theories. Even if property is a gift, the recipient must accept it. If Stan leaves a pile of manure on Ollie’s lawn, it does not magically become Stan’s property. However, if Stan rakes it and sells it, he has through his labor acted in such a way that gives him a better justification to benefit from it than someone who has done nothing.<sup>191</sup>

Feser’s second point in his defense of Lockean first acquisition theory is that the theory requires that the object of the first acquisition be unowned. Because it is unowned, no one has any rights to it, including ‘everyone’ as a common owner.<sup>192</sup> Ryan concurs on this issue: Locke’s

conception of mankind as ‘joint owners’ does not mean the same as a modern joint owner, who must seek consent or approval from other owners. Rather, property in Locke’s state of nature exists in a “no-owner condition” and consent is not required prior to individual acts of appropriation.<sup>193</sup> Even if the property were commonly owned, “then for this very reason they do not start out *unowned*, in which case there is no *initial* acquisition of *any* sort to speak of, unjust or otherwise.”<sup>194</sup> However, if the property were commonly owned “from the start” and not due to some transfer to the group, then the group’s initial acquisition would need justification as well, and this justification is surprising difficult to provide. As Nozick observes,

[w]e should note that it is not only persons favoring *private* property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don’t have (with regard to the same land and resources).<sup>195</sup>

Christman and Grunebaum also have a problem with what might be called the *fact of income*. We can assume that body ownership cannot be extended to a natural right of income ownership (Christman) or land/resource ownership (Grunebaum), but surely some persons will engage in this type of behavior resulting in the fact of income through the consenting acts of adults.<sup>196</sup> The use of coercion to deny this kind of behavior in order to prevent the fact of income would require a variety of control over those very persons, which results in a clear abridgment of their autonomy. If persons do not have the right to income from their labor or property (even at relatively modest levels) then, for Christman and Grunebaum, no violation of any natural right to liberty or autonomy occurs when they are coercively deprived of that income. Autonomous persons, I believe, must be permitted to engage in these kinds of behaviors. If there is no right to income, then seizure of property and punishment of persons is unproblematic when they generate income from labor or property. This strikes me as obviously incorrect.

There is at least one suggestion how communal rights over worldly resources provide for autonomy. Otsuka suggests that the self-ownership right is robust if and only if one has enough



rights over worldly resources to ensure they are not forced by necessity to assist others and sacrifice themselves. Self-ownership does not amount to much if persons have to constantly help others or sacrifice themselves because of others' needs. An egalitarian distribution of the world's goods relieves individuals from having to satisfy each other's needs; persons are freer by having less world ownership rights.<sup>197</sup> By giving each person a fair share of world resources measured in terms of equality of opportunity for welfare, Otsuka argues, no one is forced to come to anyone's assistance.<sup>198</sup>

The left-libertarian argument for equal ownership over world resources is a weak one, but, interestingly, a stream in current American property jurisprudence in terms of subsurface property rights corresponds both with left libertarian property theory as well as the privacy theory of property argued for in this work. The next section shows how the privacy theory of property cannot 'reach' certain places, so that private ownership over them enjoys less protection than other kinds of places.

### **Section 3. Legal Limits on Resource Ownership**

In this section, I show how American property jurisprudence corresponds with property theory in regards to subsurface ownership rights. This is achieved by showing how American property law exhibits a lacunae in the connection between ownership of surface land and ownership 'to hell below,' a lacunae which suggests that private property rights at significant depths below the earth's surface are unlikely if they are predicated on private property rights on the surface. Recall that we seek to justify private property based on a thing's ability to objectify one's privacy interests. If property cannot be a repository for privacy, it presumably cannot be private property. Therefore, a conception of property based on privacy interests has several important implications for private property and the literal and figurative 'depth' of ownership. It is figurative or metaphoric because the depth of a right determines its power and importance. Taken literally, the depth of a private right in property measures how far beneath the surface the right extends. As a property is less capable of reflecting or embodying the privacy interests of an

owner, that property is similarly less capable of being possessed and respected as private property. As should be clear by now, private interests are scalar—there are different degrees of privacy opportunities in things, starting with bodies and moving outwards—and depend to a large degree on the nature of the thing itself: bodies justify the highest degree of privacy due to the naturally private facts of thoughts and body processes, but things that are radically removed from bodies in a variety of senses are less capable of being repositories of personhood and *ipso facto* less deserving of the protections afforded by the right to exclude and the duty not to interfere.

In terms of the physical depth of the property right, it is probably impossible to assert a privacy interest in inaccessible items located deep within the earth. This is also true for other things like the moon, most if not all parts of the atmosphere we depend upon to live, and various parts of the ocean and seafloor. Technological advancements will probably change property claims in places that are either inaccessible today or so remote as to be practically inaccessible. However, in a privacy-based conception of property rights, accessibility is not the key factor in determining property rights: the key factor is whether privacy claims can be made about the property, and underground property—whose nature, features, value, characteristics are unknown and, in many cases, unknowable—is therefore a good candidate for the left-libertarian’s attempt to disqualify some natural resources from private ownership without disqualifying all of them.

Of course, rights in subsurface property ought to be recognized and protected like any other rights by exclusion claims and the nonowner’s duty not to interfere if an owner can show a privacy interests in the property. Subterranean dwellers, residing in underground homes, would certainly qualify for powerful rights in their homes as much as above-ground dwellers. By extension, homes located in high rise buildings, floating on the sea (or even underwater), in trees, cliffs and caves, or suspended in the air also qualify for protection, all of which suggest interesting implications for privacy rights in future homes beyond the Earth’s atmosphere.

But what about subsurface resources? They are truly ‘found’ resources and critically different in kind from all other types of resources including human labor, talents, crops,

developed or undeveloped surface lands, and the like. These resources include water, minerals (salt, of course, or the calcite used in antacids), graphite, rocks and gravel, as well as ores containing metals including gold, silver, and iron, clay, various gases and geothermal heat, and of course, petroleum. In this section, I will suggest that subsurface property resources can be jurisprudentially redescribed in order to become *res nullius*, or unowned things. Because current owners lack a privacy interest in this kind of property, it cannot be said that expropriation of these things constitutes a violation of their private property rights. The depths of a property right would therefore correspond directly to the depth of the privacy interest. How far might this interest extend?

John Sprankling shows that a surface owner's title does not extend as deep as the Western common law tradition has suggested. According to Sprankling, the legal maxim *Cuius est solum, eius est usque ad coelum et ad inferos*, or, simply, the *ad coelum* principle, meaning 'whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell,' is dead. If rights extended to the center of the earth, each landowner in the United States also owns a "slender column of rock, soil, and other matter stretching downward over 3900 miles from the surface to a theoretical point in the middle of the earth."<sup>199</sup> This property forms the *ad inferos* part of the *ad coelum* doctrine. Beginning in the 1930s, U.S. Supreme Court rulings began dismantling the heaven-oriented part of the *ad coelum* doctrine. In those rulings, rights in airspace that are delineated by the boundaries of one's land disintegrated with the introduction of technological inventions such as airplanes and radio waves, which meant that owners could not assert property rights that would prevent other persons from entering the column of air that extends upwards from a person's land. So if *ad coelum* is dead, why isn't *ad inferos*?

According to Sprankling, *ad inferos* is an unfounded poetic hyperbole, invented by English jurist William Blackstone in the 18<sup>th</sup> century,<sup>200</sup> and it is dead because it has never been binding law in the United States in the first place.<sup>201</sup> No appellate court opinion has ever considered whether an owner has rights down to the earth's core.<sup>202</sup> Real law—the case law that

formed the English and then American common law—uniformly supports a property owner’s rights down to approximately 100 feet from the surface, but beyond this point there is wide inconsistency. “Broadly speaking, the deeper the disputed region, the less likely courts are to rely on the center of the earth theory.”<sup>203</sup> So, assuming that surface owners have legally or morally powerful claims to own subsurface resources as they would to ownership of surface resources such as trees or agriculture, what should (quite literally) be the depth of their claims?

Using what is known about the make up of the earth’s crust, Sprankling shows that the interior of the earth is, like a liquid, constantly moving—which suggests that beyond the crust there is no identifiable *res*, or thing, to own. Furthermore, subsurface property rights have been defined to protect owners from invasions to portions of land that they *actually* use, and few landowners, even if they are miners or other types of exploiters, dwell beyond 1000 feet or so. Sprankling preliminarily concludes that a new model of subsurface ownership should consider the boundary to end at 1,000 feet, with an exception for mineral rights,<sup>204</sup> based on the claim that property owners would find this reasonably within their expected property rights, and because, like air rights, the property that lies *ad inferos* is in the actual possession of no one.<sup>205</sup> Therefore, private property simply does not extend very far into the earth, and public ownership is therefore appropriate.<sup>206</sup> The types of economically productive resources that exist within and beyond this thousand feet boundary of private ownership include groundwater, oil and gas reserves, hard rock minerals (including gold and silver), objects and properties embedded in the soil (including potentials for heat mining), and opportunities, such as carbon sequestration, for waste disposal.<sup>207</sup>

Due to the nature of the earth’s landmass, this analysis shows that many subsurface properties cannot possibly stand in any privacy relationship to its putative owner. Unlike the relationship between a farmer and their land, which can indeed nurture a privacy relationship, a miner or mine owner does not ‘farm’ or nurture their property. The farmer returns to the land each year to coax out a crop, while the miner visits a productive vein of ore just once or at least until the resource is *permanently* depleted. It is difficult to see how an owner of any surface

property can generate privacy interests in unknown or found objects deep below that property, and to the extent that a privacy interest cannot be asserted over a piece of property, that property cannot be said to be ‘private.’ Property rights would, however, extend as far down as a person could maintain they have a privacy interest. If there is no privacy interest, then there is no private property. Considered in this way, the left libertarians might gain support for their attempts to show that natural resources (at least those located deep within the earth) are incapable of being privately owned.

Consider the difference between a well that draws water for domestic use, and an oil well. Both draw resources from the ground, and ownership rights over the water and the oil are determined by ownership rights on the surface. However, the property owner’s privacy interest in the well water is significantly different than the oil owner’s interest. The water well owner would enjoy, under my theory, strong property rights in this resource due to its connection to privacy—it nurtures the home, it is necessary for a variety of human capabilities, and so forth—but the oil well owner would not enjoy such strong rights, particularly in proportion to the depth of the well. In fact, the water well owner’s rights would also diminish in proportion to the depth of the well, giving others—neighbors, perhaps—the right to use water found at deeper depths.

Therefore, many of the same objectives of left-libertarian property theory in the direction of non-private ownership of natural resources may already be present in American property jurisprudence. I am not claiming that the state or community thereby gains property rights in those interests. I am claiming, however, that the privacy argument fails—surface owners have no privacy claims to this kind of property—and that incursions or interferences with this kind of property are not *prima facie* unjust or violations of the right to exclude or the duty not to interfere. In other words, there is no right to exclude in terms of property a mile (or wherever the point may lie) below the surface of private property, and neither the self-ownership justification nor the privacy justification will prevent incursions. However, there may be other private and communal claims to subsurface property, and those claims are explored in chapter 5.

#### **Section 4. The Right Libertarians**

In this final section, I show how the right-libertarian approach to property rights provides one of the best protection of private property rights by proposing a takings jurisprudence that attempts to restructure takings law by broadening the definition of what constitutes a taking based upon a reappraisal of the state's duty to provide just compensation. This approach is framed by Richard Epstein and David Schmidtz.

Richard Epstein is considered one the most influential right-libertarian property theorists. Epstein is primarily concerned with forced property exchanges between individual owners and the state. Unlike Nozick, who would presumably oppose all takings because the structures necessary for the minimal state are financed only by taxation,<sup>208</sup> and because takings (at least in the United States) are not typically intended to rectify past injustices,<sup>209</sup> Epstein argues that “[w]ithout forced exchanges, social order cannot be achieved, given the holdout and free rider problem.”<sup>210</sup>

Because, Epstein writes, there is no real consent among citizens in modern states, then payment for forced exchanges attempts to account for both the monopoly of violence and the preservation of liberty and property; the bulwark, or protection of property against the state, is located in the form of compensation for forced exchanges. So, although Locke says there must be ‘consent’ to take property, he does not really mean it; for Epstein, the ‘consent’ requirement is rewritten to provide that property may be taken upon provision of just compensation.<sup>211</sup> Locke’s move from the state of nature to civil society now incorporates two elements of the eminent domain equation:

1. individuals give up the right to use force in civil society, but their property is protected;  
and
2. because there is no consent, there is no social contract as such, but forced exchanges are permitted which leave everyone better off.

So, according to Epstein, although Locke does not formally analyze the concept, the public use language of the takings clause is consistent with Locke's general conception of the rights of the state over property because the power of eminent domain can only be exercised for public good or use. Epstein, therefore, supports the use of eminent domain for the public good, but, as we shall see, his conception of what constitutes the exercise of compensable takings is incredibly broad. This conception is an attempt to curb the use of eminent domain, which produces a powerful disincentive for states to take property. The result, for Epstein, is a property right in, presumably, all kind of ownable things including natural resources, that is strengthened by the takings clause against the very use of power it purports to authorize.

For Epstein, the eminent domain clause is a specific protection for individuals against the state.<sup>212</sup> It builds upon the right of self-ownership in order to claim property rights against the state as a bulwark. The eminent domain clause in particular commands courts to strike down legislation where property is taken but just compensation is not paid.<sup>213</sup> However, these kinds of forced exchanges under the Fifth Amendment are characterized by three potential sources of conflict and abuse. The first involves state coercion, the second requires the payment of compensation, and the third examines the situation where the takings power "removes the property owner from the community altogether."<sup>214</sup>

In terms of coercion, takings cases typically first involve the state as a market participant. If the state needs land, it offers to buy it. Epstein notes that a voluntary exchange is usually preferable to coercion, but frequently this approach fails. For example, many takings cases involve multiple landowners, any one of which could stand her ground as a 'holdout' and stop a major redevelopment project by demanding an exorbitant price for her property. Epstein claims that a takings regime has as its "*raison d'être* the elimination of the holdout position."<sup>215</sup> Reluctant property owners are then forced to "take a price that is greater than he would have gotten through condemnation (net of expenses) but lower than he would have taken in voluntary exchange."<sup>216</sup>

Epstein's solution to the problem of takings is simple: any and all zonings and regulations are compensable takings,<sup>217</sup> including the types of 'partial takings' which merely restrict a property owner's right to exploit the full economic value of their property. The removal of any stick in the bundle constitutes a compensable taking.<sup>218</sup> For Epstein, "any state mandated alteration of contractual rights," such as debt relief legislation, "constitutes a partial takings of private property."<sup>219</sup> "All regulations, taxes and modifications of liability are takings of private property prima facie compensable by the state,"<sup>220</sup> and taxation is *prima facie* a takings.<sup>221</sup> For Epstein, the question is not 'what remains'—which is the question many judges ask in takings contests—but 'what was taken'?<sup>222</sup>

Because the state must compensate for these actions, it would quickly bankrupt itself—but only if it insists on continuing its regulatory policies. Obviously, compensation would come from taxes, and as a result all of these partial takings cases take government money and give it to private owners.<sup>223</sup> A powerful property right, for Epstein, therefore serves as a warning to the government to restrict its ambitions in terms of legislation, zoning, and regulation, the result being a nearly absolute property right due to the demand for compensation by the state for its violation. For Epstein and the libertarians who support this line of reasoning, the gamble is that the state actually throws down the gauntlet and begins wholesale expropriations for the public good with compensation.<sup>224</sup> In such a case, Epstein would have little to complain about.

The final conflict outlined by Epstein is the forced removal of the property owner from the community. At the most extreme end of takings litigation, persons refusing to leave their property are forcibly removed after the state has successfully condemned it. This is, as a final step in the eminent domain process, the most flagrant violation of one's privacy, and the most extreme example and outcome of how eminent domain violates privacy.<sup>225</sup>

Property rights libertarians and other conservatives tend to support the kind of formalist approach advocated by Epstein. They are particularly fond of court rulings which establish '*per se*' guidelines in terms of takings. For example, when states permanently intrude on property and



completely negate the right to exclude, the courts do not engage in any balancing or public use discussion because permanent intrusion is a *per se* taking.<sup>226</sup> As stated by the court in *Loretto* “there is no greater assault on private property rights than permanent physical invasion by government.”<sup>227</sup> Libertarians would also support the type of “unconstitutional conditions” created by the requirement of exactions (the conditioning of a building permit upon dedications of private land to the public) which raise judicial oversight to a heightened level of scrutiny. These *per se* conditions constitute Epstein’s “second best assault on the modern regulatory state,”<sup>228</sup> the first being the framing of all regulations as takings.

David Schmitz, another right libertarian, interprets the Lockean proviso in order to justify first-acquisition rights over unowned property and natural resources in terms of the removal of resources from the “common stock.”<sup>229</sup> Locke writes “[I]n order to be assured of the unquestionable Property of the Labourer, no Man but he can have a right to what is once joyned to, at least where there is enough, and as good, left in common for others.” For Schmitz, no single act of initial appropriation can satisfy the proviso: whenever any item is taken out of the common stock, there is an automatic violation of the proviso because there is necessarily not enough nor as good left for others.<sup>230</sup> The proviso renders defective all individual and group acquisitions by its very terms.<sup>231</sup> But, instead of conceding to the left-libertarians that the proviso entails continued communal ownership and ignoring it, Schmitz adopts Nozick’s suggestion that at least some kind of proviso is necessary, and this modified proviso requires potential acquisitioners to take into consideration what their appropriation does to others.<sup>232</sup>

This calls back into play Locke’s stipulations about usefulness and preservation. Contrary to the idea that every acquisition worsens everyone else, Schmitz argues that a proviso-ish rule might *require* taking goods from commons in order to prevent the tragedy of spoliation or destruction. One of the lessons of the tragedy of the commons is that goods left in the commons will be destroyed, so we are obligated to remove them and protect them (or, perhaps, privatize or restrict through the use of a public agency) and staking a claim is the only way to satisfy the

proviso *and* not starve.<sup>233</sup> Therefore, removing resources from the commons protects it for future generations,<sup>234</sup> and original appropriation is teleologically justified as a solution to the public goods problem of avoiding the tragedy of the commons.<sup>235</sup>

More important is Locke's recognition that by appropriating, owners will labor in order to improve value through additive or generative labor.<sup>236</sup> As Richard Boyd writes, "this assumption about the generative power of human labor does an enormous amount of justificatory work in Locke's subsequent defense of private property, allowing him to skirt many of the thorny distributional problems of inequality and scarcity." As a result, the purported possessive individualism of Lockean property theory assumes a kinder, gentler repose, and the right-libertarian reliance on Locke—and subsequent justification for a moral and arguably communitarian initial acquisition—provides a powerful response to left-libertarian critiques of both initial acquisition and subsequent world-ownership. This response, however, does not locate in Locke's property theory the kind of robust individual rights that are conventionally attributed to it.

## **Conclusion**

What then is the value of distinguishing between property and privacy conceptions of the body in terms of its integrity and autonomy? Alan Hyde observes that "perhaps the only difference between the property and privacy formulations is that property inscribes the body into normal economic life and thus represents...what Foucault calls 'disciplinary power,' while privacy inscribes the body into juridical personhood as a site or bearer of abstract political rights," or sovereignty.<sup>237</sup> The core violations of bodily autonomy and integrity are physical violence and rape, slavery, compelled pregnancy, invasive searches, compulsive heterosexuality, conscription or forced military service, compulsory inoculation or vaccination, and forced medication,<sup>238</sup> all of which appear to interfere with self-ownership and persistently invoke the language of property. As Anne Philips writes, "[b]odies alert us to reciprocity and what we have in common; property alerts us to inequality and what keeps us apart."<sup>239</sup> So, to preserve bodily autonomy and integrity,

perhaps we *require* a body-as-property discourse that allows us to say “this is mine, and you are wrong to interfere with, control, and discipline my possessions, including—my body.”<sup>240</sup>

The potential for bodies and selves to be property—as a metaphysical matter—was discussed in chapter 1, where I concluded that bodies and selves are probably not properly conceived as properties, and that self-ownership is, at best, a metaphor for other considerations and at worst, a falsehood. However, there may be great pragmatic or rhetorical value in the belief that we own our bodies, that the right of ownership is constitutive of our personhood, and that all persons, by virtue of their membership in the human race, similarly own their bodies. I assume that most persons understand the ideas behind the most general principles of ownership: that it is just for people to own (some) things and it is unjust to deprive them of those things. Consequently, I can imagine that this approach to rights in general can have a galvanizing effect on persons whose rights are either in jeopardy or emerging from a period of rights-denial or rights-neglect.

Perhaps we secretly know that persons do not own themselves or their bodies. Bodies *just are* things that are unownable. You can own your toothbrush and your clothes, but you cannot own your body. However, the very idea of self-ownership is very powerful and can inspire and justify all kinds of action by promoting autonomy, self-reliance, and independence. Buddhists have a term for this kind of gentle rhetoric: *upaya*, meaning “skillful means.” *Upaya* refers to the practice of lying for another’s good. Plato called this the ‘noble lie.’ In the Buddhist tradition, the use of skillful means to tell a noble lie originates from the parable of the Burning House in the *Lotus Sutra*. In the parable, children are playing in a burning house. The father yells at them to leave but, unaware of the danger, they refuse and continue to play. After all, they are children. The father decides to lie. He promises them toys, so they leave in pursuit of the promised toys just before the house is engulfed in flames. The Buddha reasons that the father did not engage in a sinful falsehood because the children were, in the end, saved. So, Buddhists justify a certain level of permissible ‘skillful means’ that prioritize enlightenment over ‘truth.’ This might be the case

with self-ownership: it is just a metaphor, and we know it, but it is the best one we have for convincing people that no one else owns them. Otsuka, for example, writes: “I concede that talk of property in persons might strike some modern ears as an artificial and unwarranted extension of the concept of property. But nothing will be lost if those who resist such talk simply mentally delete the words ‘property’ or ‘ownership’ throughout this book and replace them with an assertion of the relevant rights.”<sup>241</sup>

Nevertheless, privacy concerns help us find new ways of imagining the body and whatever rights might inhere in it. Here are a few suggestions for new paradigms. We don’t just ‘have’ bodies: we *are* bodies.<sup>242</sup> Parts of that body can change (kidney, liver, blood, corneas, limbs) and we remain the same person. If we perceive the body solely as something we have and use as property rather than something we *are*, then it is relegated to something we must command, a thing that often fails in its performance of its assigned tasks, a thing that distracts, disturbs or makes us suffer. This approach—being bodies instead of having bodies—avoids the denigrating objectification of the body as a mere instrument that belongs to a self rather than something that constitutes an essential expression of selfhood. So, our bodies belong to us but we do not claim ownership over them, in the same way that we can belong to a club without seeing ourselves as either owning or being owned by it.<sup>243</sup> But we still have privacy interests, and, as Jürgen Habermas writes, “a well protected private autonomy helps secure the generation of public autonomy just as much as, conversely, the appropriate exercise of public autonomy helps secure the genesis of private autonomy.”<sup>244</sup> In other words, if we are seeking autonomous, free acting communities, they need to be populated by autonomous, free acting persons, and the privacy contained in private property is necessary for their development.

I conclude that robust libertarian property rights have no true ancestor in classical property theory, and that self-ownership fails as a foundation for world ownership: like personal and private behavior, property has always been an object of detailed surveillance by law and authority. But the past is no argument about the future, and recent changes in Western social and

political theory and practice have brought gay marriage, civil rights, as well as property rights to the forefront. Libertarian property rights, including the self-ownership right (per Otsuka's suggestion) as merely metaphorical for other rights, are similar to modern civil rights: we can find suggestions and hints in the theories of the past, but full blooded civil rights—as well as property rights—are still on the horizon.

## Notes

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<sup>1</sup> Joseph Singer, "Democratic Estates: Property Law in a Free and Democratic Society," 94 *Cornell Law Review* 1009 (2009), 1038.

<sup>2</sup> See, e.g., Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 10; see also Peter Vallentyne, "Introduction" in *Left-libertarianism and its Critics: the Contemporary Debate*, eds. Peter Vallentyne and Hillel Steiner (New York: Palgrave, 2000), 1.

<sup>3</sup> All references to Locke's *Two Treatises of Government* are to Peter Laslett's definitive edition (John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960) and refer to the treatise followed by the paragraph or section number. Here, "2.44" refers to the second treatise, section 44.

<sup>4</sup> Richard Arneson, "Locke and the Liberal Tradition," in *A Companion to Locke*, ed. Matthew Stuart (Malden: Wiley-Blackwell, 2016), 530.

<sup>5</sup> Locke, 2.27.

<sup>6</sup> Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988), 18.

<sup>7</sup> Karl Widerquist, "Lockean Theories of Property: Justifications for Unilateral Appropriation," *Public Reason* 2 (1): 3-26, 2010. Although Widerquist is writing specifically in terms of Locke's argument(s) for initial appropriation, these comments can apply to Locke's property theory *pari passu*.

<sup>8</sup> A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), 75.

<sup>9</sup> C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962), 3.

<sup>10</sup> This is known, variously, as the Lockean proviso (Nozick) or the sufficiency clause (MacPherson). I will use Nozick's terminology.

<sup>11</sup> Macpherson, *Possessive Individualism*, 203.

<sup>12</sup> *Ibid.*, 257.

<sup>13</sup> *Ibid.*

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<sup>14</sup> See Richard Boyd, “Locke on Property and Money,” in *A Companion to Locke*, ed. Matthew Stuart (Malden: Wiley-Blackwell, 2016), 394: “By arguing against MacPherson, Tully...provide[s a] communitarian reading[s]” of Locke.

<sup>15</sup> Tully, *A Discourse on Property*, 55.

<sup>16</sup> *Ibid.*, 53 (footnote omitted).

<sup>17</sup> The persistent use of masculine pronouns is unavoidable, and every use of them – by Locke or anyone else – should be substituted by inclusive and gender neutral terms.

<sup>18</sup> Tully, *A Discourse on Property*, 3.

<sup>19</sup> *Ibid.*, 4.

<sup>20</sup> *Ibid.*, 45 (footnote omitted).

<sup>21</sup> *Ibid.*, 61.

<sup>22</sup> *Ibid.*, 62.

<sup>23</sup> *Ibid.*, 163.

<sup>24</sup> C.B. Macpherson *Democratic Theory: Essays in Retrieval* (Oxford: Oxford University Press, 1973), 126; Tully, *A Discourse on Property*, 99.

<sup>25</sup> Tully, *A Discourse on Property*, 99.

<sup>26</sup> Alan Ryan, “Locke and the Dictatorship of the Bourgeoisie,” in *Locke and Berkeley: A Collection of Critical Essays*, eds. C.B. Martin and D. M. Armstrong (Notre Dame: University of Notre Dame Press, 1968), 241.

<sup>27</sup> Tully, *A Discourse on Property*, 104.

<sup>28</sup> *Ibid.*, 49.

<sup>29</sup> *Ibid.*, 99.

<sup>30</sup> *Ibid.*, 98.

<sup>31</sup> *Ibid.*, 105.

<sup>32</sup> *Ibid.*, 106.

<sup>33</sup> *Ibid.*, 108.

<sup>34</sup> Importantly, “labour” and “action” are the same thing. See Tully, *A Discourse on Property*, 109.

<sup>35</sup> *Ibid.*, 110.

<sup>36</sup> *Ibid.*, 114; see also Locke: “Men therefore in society having property, they have such a right to the goods, which by the law of the community are their’s, that no body hath a right to take their substance or any part of it from them, without their own consent: without this they have no property at all; for I have truly no property in that, which another can by right take from me, when he pleases, against my consent.” (2.134).

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<sup>37</sup> Primarily, the ‘radioactive tomato juice poured into the sea’ example. See, e.g., Nozick, *Anarchy, State, and Utopia*, 175.

<sup>38</sup> Tully, *A Discourse on Property*, 119.

<sup>39</sup> *Ibid.*, 123.

<sup>40</sup> Macpherson, *Possessive Individualism*, 221.

<sup>41</sup> Tully, *A Discourse on Property*, 131; See Locke: “The same measures governed the possession of land too: whatsoever he tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar right; whatsoever he enclosed, and could feed, and make use of, the cattle and product was also his. But if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering, and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other.” 2.38

<sup>42</sup> Tully, *A Discourse on Property*, 123.

<sup>43</sup> *Ibid.*, 124; see also Ryan, “Dictatorship of the Bourgeoisie,” 245: “it is fair to point out that Locke never talks of an ‘absolute’ right to anything at all.”

<sup>44</sup> Tully, *A Discourse on Property*, 131 (emphasis added).

<sup>45</sup> *Ibid.*, 132, citing Locke 2.42.”But we know God hath not left one man so to the mercy of another, that he may starve him if he please: God the Lord and Father of all has given no one of his children such a property in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplusage of his goods; so that it cannot justly be denied him, when his pressing wants call for it: and therefore no man could ever have a just power over the life of another by right of property in land or possessions.”

<sup>46</sup> Boyd, “Locke on Property and Money,” 395.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 396.

<sup>49</sup> Tully, *A Discourse on Property*, 162.

<sup>50</sup> Boyd, “Locke on Property and Money,” 403.

<sup>51</sup> *Ibid.*, 410.

<sup>52</sup> Alan Ryan, *Property and Political Theory* (New York: Basil Blackwell 1984), 18.

<sup>53</sup> Simmons, *On the Edge of Anarchy*, 33 citing Locke 2.23.

<sup>54</sup> Waldron, *The Right to Private Property*, 140. However, there is substantial disagreement with Macpherson’s “Marxian analysis” (Boyd, “Locke on Property and Money,” 394) or class-based approach to his interpretation, which has been “decisively refuted.” (Waldron, *The Right to Private Property*, 140, citing Ryan, *Property*, and Simmons, *On the Edge of Anarchy*, 98). See also H.T. Dickinson: “We do not have to accept C.B. MacPherson’s extreme claim that Locke was anxious to defend unrestrained capitalism in order to agree with him that Locke was concerned above all else to protect private property from the deprivations of an absolute, arbitrary monarch.” H.T. Dickinson *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (New York: Holmes and Meyer Publishers, 1977), 68.

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<sup>55</sup> Waldron, *The Right to Private Property*, 138.

<sup>56</sup> *Ibid.*, 139.

<sup>57</sup> *Ibid.*, 138. Locke's and Nozick's are both theories of historical entitlement.

<sup>58</sup> *Ibid.*, 176.

<sup>59</sup> *Ibid.*, 141.

<sup>60</sup> *Ibid.*, 153.

<sup>61</sup> *Ibid.*, 140.

<sup>62</sup> *Ibid.*, 157 (citing Tully, *A Discourse on Property*, 99). *Pace* Tully, Waldron argues that the use it or lose it requirement – which clearly sets up property for expropriation if an owner permits their goods or land to perish or be wasted/destroyed – is completely *subjective*: “what counts as use and what counts as useless destruction is for the owner to decide: briefly, anything he takes to be useful to himself counts as a use of the object however wasteful it may seem to someone else.” (Waldron, *The Right to Private Property*, 161). Waldron does not support this claim, and it seems otiose in regards to Locke's concern for the moral and productive use of both persons and property.

<sup>63</sup> Waldron, *The Right to Private Property*, 192.

<sup>64</sup> *Ibid.*, 214 (citing Tully, *A Discourse on Property*, 129); the sufficiency limitation is Macpherson's term. See Macpherson, *Possessive Individualism*, 211.

<sup>65</sup> See footnote 63, *supra*.

<sup>66</sup> Waldron, *The Right to Private Property*, 220; see also Waldron, *The Right to Private Property*, 239, citing Tully, *A Discourse on Property*, 164-72.

<sup>67</sup> *Ibid.*, 233.

<sup>68</sup> Locke, 2.120.

<sup>69</sup> Waldron, *The Right to Private Property*, 240.

<sup>70</sup> *Ibid.*, 251.

<sup>71</sup> *Ibid.*, 241.

<sup>72</sup> Matthew Kramer, *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (Cambridge: Cambridge University Press, 1997), 244.

<sup>73</sup> *Ibid.*, 245.

<sup>74</sup> *Ibid.* According to Ryan, Locke employs utilitarian arguments, but cannot be called a utilitarian because he “never sets out to enquire how distributive principles summed as ‘justice’ or ‘equity’ relate to aggregative principles.” Ryan, *Property*, 8.

<sup>75</sup> Kramer, *Origins of Private Property*, 23.

<sup>76</sup> *Ibid.*, 93 n1.



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<sup>77</sup> Ibid., 121.

<sup>78</sup> Ibid., 128.

<sup>79</sup> Ibid., 140; see also Kramer, *Origins of Private Property*, 136, for the proposition that complaints about self-ownership are “silly dogmas.”

<sup>80</sup> Ibid., 252; on this point, Kramer is in substantial agreement with Grunebaum. See section 2.

<sup>81</sup> Ibid., 131.

<sup>82</sup> Ibid., 253.

<sup>83</sup> Ibid., 244.

<sup>84</sup> Ibid., 221.

<sup>85</sup> Ibid., 144.

<sup>86</sup> Ibid., 233.

<sup>87</sup> See Adam Smith’s famous remarks in book 1, chapter 2 of his *The Wealth of Nations*: “Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”

<sup>88</sup> Ibid., 253.

<sup>89</sup> Ibid., 246.

<sup>90</sup> Simmons, *On the Edge of Anarchy*, 25.

<sup>91</sup> A. John Simmons “Locke on the Social Contract,” in *A Companion to Locke*, ed. Matthew Stuart (Malden: Wiley-Blackwell, 2016), 418.

<sup>92</sup> Simmons, *On the Edge of Anarchy*, 60; See also Alan Brudner, “Private Property and Public Welfare,” in *Philosophical Foundations of Property Law*, eds. James Penner, Henry Smith (Oxford: Oxford University Press, 2013), 71, for the proposition the same Lockean social contract that institutes civil government authorizes the sovereign to tax in order to support it, and consent by majority authorizes specific amount of that tax.

<sup>93</sup> Simmons, *On the Edge of Anarchy*, 69, 96; Locke 2.139.

<sup>94</sup> Simmons, *On the Edge of Anarchy*, 65-67. “Every man has what may be called property, and inalienable property. Every man has a life, a personal liberty, a character, a right to his earnings, a right to religious profession and worship according to his conscience.” Dickinson, *Liberty and Property*, 227 (quoting J. Burgh *Political Disquisitions* (3 vols, 1774), i, 37).

<sup>95</sup> Simmons, *On the Edge of Anarchy*, 118 (unless, of course, they were duly convicted of a crime, in which case they have forfeited these rights).

<sup>96</sup> Ibid., 176.

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<sup>97</sup> Ibid., 71-3.

<sup>98</sup> following Simmons, *On the Edge of Anarchy*, 94. It should be obvious that *fence*, as used here, means a physical border and not a person who sells stolen property.

<sup>99</sup> Peter Vallentyne, "Nozick's Libertarian Theory of Justice", in *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*, eds. Ralf Bader and John Meadowcroft (New York: Cambridge University Press, 2011), 151. See also chapter 1.

<sup>100</sup> Nozick, *Anarchy, State, and Utopia*, ix.

<sup>101</sup> Thomas Nagel, "Libertarianism without Foundations" in *Reading Nozick: Essays on Anarchy, State, and Utopia*, ed. Jeffrey Paul (New Jersey: Rowman and Littlefield, 1981).

<sup>102</sup> Nozick, *Anarchy, State, and Utopia*, 172.

<sup>103</sup> Ibid., 228.

<sup>104</sup> John Rawls, *A Theory of Justice Revised Edition* (Cambridge: The Belknap Press of Harvard University Press, 1999), 89.

<sup>105</sup> Nozick, *Anarchy, State, and Utopia*, 228.

<sup>106</sup> Ibid., 32.

<sup>107</sup> Ibid., 32-33.

<sup>108</sup> Ibid., 171.

<sup>109</sup> Ibid., 10, citing Locke, 2.27.

<sup>110</sup> Robert Paul Wolff, "Robert Nozick's Derivation of the Minimal State," in *Reading Nozick: Essays on Anarchy, State, and Utopia*, ed. Jeffrey Paul (New Jersey: Rowman and Littlefield, 1981), 79.

<sup>111</sup> Alan Ryan, "Self-Ownership, Autonomy, and Property Rights," *Social and Political Philosophy*, Vol. 11, No. 2 (July, 1994), 241 – 258.

<sup>112</sup> A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 261.

<sup>113</sup> Locke, 2.27.

<sup>114</sup> Ryan, "Self-Ownership," 247-248.

<sup>115</sup> Ibid., 254-255.

<sup>116</sup> Even G.A. Cohen appears to support this assumption in G.A. Cohen, *Self-Ownership, Freedom, and Equality* (New York: Cambridge University Press, 1995).

<sup>117</sup> Talk of eyeballs as paradigmatic examples in distributive justice is due to Cohen, *Self-Ownership*, 70, 243-4.

<sup>118</sup> I am thinking of the fact that horse thieves in the Old West were hanged because their property crime was tantamount to depriving their victim of their ability to make a living *in toto*.

<sup>119</sup> Stephen R. Munzer, *A Theory of Property* (New York: Cambridge University Press, 1990), 38.

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<sup>120</sup> Nozick, *Anarchy, State, and Utopia*, 32.

<sup>121</sup> *Ibid.*, 33.

<sup>122</sup> *Ibid.*, 57.

<sup>123</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals*. Translated by H.J. Paton; *The Moral Law* (London: Hutchinson, 1956), 96.

<sup>124</sup> Gijs Van Donselaar, *The Right to Exploit: Parasitism, Scarcity, Basic Income* (Oxford: Oxford University Press, 2009).

<sup>125</sup> Vallentyne, "Introduction," 5.

<sup>126</sup> Cohen rejects self-ownership because it implies talent ownership, and talent ownership upsets egalitarian provisos; resources would have to be "differentially distributed to compensate for talent differences" and that would deny equal distribution. See Cohen, *Self-Ownership*, 162 n 31.

<sup>127</sup> Vallentyne, "Introduction," 1.

<sup>128</sup> Hillel Steiner, *An Essay on Rights* (Cambridge: Blackwell, 1994), 93.

<sup>129</sup> H.L.A. Hart, "Are There Any Natural Rights?" in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), 83.

<sup>130</sup> Michael Otsuka, *Libertarianism Without Inequality* (Oxford: Clarendon Press, 2003), 3.

<sup>131</sup> Steiner, 231.

<sup>132</sup> Steiner, 235, quoting Richard Overton, "An Arrow Against All Tyrants," in *The English Levellers*, ed. Andrew Sharp (Cambridge: Cambridge University Press, 1998), 55.

<sup>133</sup> Steiner, *An Essay on Rights*, 235.

<sup>134</sup> *Ibid.*, 236.

<sup>135</sup> *Ibid.*

<sup>136</sup> Otsuka, *Libertarianism*, 41.

<sup>137</sup> *Ibid.*

<sup>138</sup> Van Donselaar, *The Right to Exploit*, 51.

<sup>139</sup> *Ibid.*, 7-8.

<sup>140</sup> *Ibid.*, 53.

<sup>141</sup> *Ibid.*, 55, 63.

<sup>142</sup> *Ibid.*, 4.

<sup>143</sup> Matt Zwolinski, Review of Gijs Van Donselaar *The Right to Exploit: Parasitism, Scarcity, and Basic Income*, in *Ethics*, October 2010 Vol. 121, No. 1, 229.

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<sup>144</sup> Van Donselaar, *The Right to Exploit*, 24.

<sup>145</sup> *Ibid.*, 62.

<sup>146</sup> John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (Oxford: Oxford University Press, 1994), 7. The ‘myth’ of the title refers to full liberal ownership.

<sup>147</sup> Christman, *The Myth of Property*, 48.

<sup>148</sup> *Ibid.*, 49, citing John Rawls *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971), 505.

<sup>149</sup> Hart, “Are There Any Natural Rights?” 77-78.

<sup>150</sup> Christman, *The Myth of Property*, 52.

<sup>151</sup> *Ibid.*, 35.

<sup>152</sup> *Ibid.*, 41.

<sup>153</sup> *Ibid.*, 72.

<sup>154</sup> *Ibid.*, 73.

<sup>155</sup> *Ibid.*, 170.

<sup>156</sup> *Ibid.*, 52.

<sup>157</sup> *Ibid.*, 56.

<sup>158</sup> *Ibid.*, 81.

<sup>159</sup> *Ibid.*, 82. Christman thinks that even if it is admitted that total productivity were maximized under full liberal ownership, then system of wage labor and class division will inevitably and negatively impact freedom because wage laborers have no say in the organization and production decisions that directly influence their lives. Ownership of the means of production would permit the worker/owners to make decisions – such as whether to open or close a plant – which may cause them to move or change working hours, which directly enhance their freedom and control of their lives. See chapter 5 for a full discussion of this kind of right.

<sup>160</sup> *Ibid.*, 83.

<sup>161</sup> *Ibid.*, 82.

<sup>162</sup> *Ibid.*, 84.

<sup>163</sup> *Ibid.*, 87. This, of course, is a non-starter if desert is removed as a determiner of benefits or burdens. Also, it is too strong: perhaps the better approach is to determine what sorts of entrepreneurship might be justified. Certainly there are situations where profiting from investments are morally questionable, and certainly there are investments that lead to profits with nothing remotely resembling labor (investment of capital), but if we permit some but not all profits, we run into some fairly serious coordination problems about which profits we allow (Wilt Chamberlin-type athletes, entertainers, plumbers, doctors) and which we do not (usury, so called disaster profiteering, armaments, sex). This recalls the objection to the ‘semiotics of markets’ raised by Brennan and Jaworski, and discussed in chapter 5.

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<sup>164</sup> Ibid., 91.

<sup>165</sup> Ibid., 92.

<sup>166</sup> Ibid., 125.

<sup>167</sup> Ibid., 149.

<sup>168</sup> Ibid., 148.

<sup>169</sup> Ibid., 167.

<sup>170</sup> Ibid., 169.

<sup>171</sup> Ibid., 163.

<sup>172</sup> Ibid., 172.

<sup>173</sup> Ibid., 179-80.

<sup>174</sup> Ibid., 172.

<sup>175</sup> Ibid., 161.

<sup>176</sup> Ibid., 155.

<sup>177</sup> James Grunebaum, *Private Ownership* (New York: Routledge & Kegan Paul, 1987), 169.

<sup>178</sup> Ibid., 170. Like Christman, Grunebaum imagines he is protecting strong rights in one's body predicated on autonomy and control through a kind of market socialism. For Grunebaum, there must be a free market, but the "only form of socialism excluded by autonomous ownership are those which authoritatively assign people to jobs" and autonomy only restricts democratic authority over the choice of occupation or leisure time. Ibid., 171-72. This is a far more authoritative form of socialism than the kind supported by Christman.

<sup>179</sup> Ibid., 173.

<sup>180</sup> Ibid., 111.

<sup>181</sup> Ibid., 112. The difference principle, for example, does not limit how individuals use talents: it just taxes them for the income derived from their talents. See Grunebaum, *Private Ownership*, 113.

<sup>182</sup> Ibid., 114 (footnote omitted).

<sup>183</sup> Richard Epstein draws a more negative conclusion. For Epstein, Rawlsian self-ownership is nonexistent, and on that basis the (admittedly) arbitrary or lucky distribution and ownership of talents is not worthy of protection. Epstein warns that "once the distribution of native talents becomes a matter of social concern, then coercion is necessary to neutralize natural differences attributable to the luck of the draw." Richard Epstein, *Takings* (Cambridge: Harvard University Press, 1985), 341-342.

<sup>184</sup> Rawls, *A Theory of Justice Revised Edition*, 228, 239-242.

<sup>185</sup> Ibid., 54.

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- <sup>186</sup> Samuel Freeman *Rawls* (New York: Routledge 2007), 49.
- <sup>187</sup> Rawls, *A Theory of Justice Revised Edition*, 53.
- <sup>188</sup> Rawls, John *Political Liberalism Expanded Edition* (New York: Columbia University Press, 2005), 298.
- <sup>189</sup> This is spelled out in great detail in my discussion of Nozick's attempt to make the same connection in the previous section, and I find a way to deny at least some types of world property on privacy (but not self-ownership) grounds in the following section.
- <sup>190</sup> Edward Feser, "There Is No Such Thing as an Unjust Initial Acquisition," *Soc. Phil. & Pol* Vol 22, Number 1, 60-61.
- <sup>191</sup> For better or for worse, this is a variation on the facts in *Halsem v. Lockwood*, 37 (Conn.) 500, 1871.
- <sup>192</sup> Feser, "There Is No Such Thing," 59.
- <sup>193</sup> Ryan, *Property and Political Theory*, 30.
- <sup>194</sup> Feser, "There Is No Such Thing," 59 (emphasis in original).
- <sup>195</sup> Nozick, *Anarchy, State, and Utopia*, 178 (emphasis in original).
- <sup>196</sup> The phrase and idea originate in Nozick.
- <sup>197</sup> Otsuka, *Libertarianism*, 32.
- <sup>198</sup> *Ibid.*, 37.
- <sup>199</sup> John G. Sprankling, "Owning the Center of the Earth," 55 *UCLA Law Review* 979 (2008), 981.
- <sup>200</sup> *Ibid.*, 983.
- <sup>201</sup> *Ibid.*, 982.
- <sup>202</sup> *Ibid.*, 999.
- <sup>203</sup> *Ibid.*, 982.
- <sup>204</sup> *Ibid.*, 1021.
- <sup>205</sup> *Ibid.*, 1025.
- <sup>206</sup> *Ibid.*, 1025.
- <sup>207</sup> *Ibid.*, 1005.
- <sup>208</sup> Nozick, *Anarchy, State, and Utopia*, 26-27; these taxes are presumably not taxation on earnings and therefore not "on a par with forced labor." (Nozick, *Anarchy, State, and Utopia*, 169).
- <sup>209</sup> But see the South African constitution and the *Midkiff* case for examples of takings that purport to rectify property injustices based, respectively, on race and oligopoly.
- <sup>210</sup> Epstein, *Takings*, 337.

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<sup>211</sup> Ibid., 15.

<sup>212</sup> Ibid., 18: “The law can be an instrument by which men of property seek to define and defend their privileged position, but it can also be a weapon which even the most humble subjects might use to protect their rights.” Dickinson, *Liberty and Property*, 90.

<sup>213</sup> Epstein, *Takings*, 19.

<sup>214</sup> Richard Epstein, “Forced and Unforced Transfers,” in *Property Rights: Cooperation, Conflict, and Law*, eds. T. Anderson and F. McChesney (Princeton: Princeton University Press, 2003), 312- 313.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Epstein, *Takings*, 58.

<sup>218</sup> Ibid., 62.

<sup>219</sup> Ibid., 89.

<sup>220</sup> Ibid., 95.

<sup>221</sup> Ibid., 100.

<sup>222</sup> See, e.g., *Penn Central*.

<sup>223</sup> Epstein, *Takings*, 71.

<sup>224</sup> This is discussed in chapter 6.

<sup>225</sup> The relationship between takings and privacy is also discussed in chapter 6.

<sup>226</sup> Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington, D.C.: Island Press, 1999), 117.

<sup>227</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>228</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 256.

<sup>229</sup> David Schmitz, *The Limits of Government An Essay on the Public Goods Argument* (Boulder: Westview Press, 1991), 17.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid., 19.

<sup>232</sup> Ibid., 20, citing Nozick, *Anarchy, State, and Utopia*, 175 *et seq.*

<sup>233</sup> Ibid., 22-23 (citation omitted).

<sup>234</sup> Ibid., 25.

<sup>235</sup> Ibid., 33.

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<sup>236</sup> Boyd, “Locke on Property and Money,” 403.

<sup>237</sup> Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997), 88.

<sup>238</sup> *Ibid.*, 81.

<sup>239</sup> Anne Phillips *Our Bodies, Whose Property?* (Princeton: Princeton University Press, 2013), 45.

<sup>240</sup> Hyde, *Bodies of Law*, 80.

<sup>241</sup> Otsuka, *Libertarianism*, 15 n14.

<sup>242</sup> Phillips, *Our Bodies*, 111.

<sup>243</sup> *Ibid.*, 135.

<sup>244</sup> Jürgen Habermas, “Paradigms of Law,” 17 *Cardozo L. Rev.* 771 (1995 - 1996).



## Chapter 5

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### *The Economic Theories of Property Rights, Law, and Takings*

“[F]or what is land but the profits thereof?” – Sir Edward Coke, 1628<sup>1</sup>

This chapter concerns the justifications for using efficiency considerations in making determinations about property rights and covers eminent domain proceedings at one extreme, regulations such as zoning in the middle, and libertarian solutions at the other extreme. Like the preceding chapters, the general focus is on the impact of normative theory (here, utilitarianism) upon contemporary legal theory (here, the economic theory of law) as it relates to private property rights. In many ways, the economic theory of property law can be broadly construed as both an assumption about, and an extended proof of, Coke’s dictum.

According to Milton Friedman, “[t]he basic problem of social organization is how to coordinate the economic activities of large numbers of people.”<sup>2</sup> Although economic theory is typically referred to monolithically as *the* economic theory, the economic theory of property and property rights has produced two very broad solutions to the coordination problem described by Friedman. These solutions are provided in the theory of the firm (argued by libertarians) and the theory of the state (argued by the social-relations theorists, represented primarily by Joseph Singer).<sup>3</sup> For libertarians, efficiency is a product of extensive private property rights. An unregulated market is required to facilitate voluntary exchanges, and such exchanges lead to overall efficiency. In this theory, market failures are frequently caused by regulation. For social relations theorists, efficiency is produced through the regulation of private property rights, and market failure is frequently caused by the failure to regulate private property rights. Whatever the approach, market success or failure is a key component in all economic theory.

In section 1, the utilitarian normative foundations of economic theory are introduced, along with the establishment of the conflict between welfare economics and wealth maximization as the primary vehicles for the realization of efficiency. In section 2, I outline how the economic theory of law relates to property, property law, and property rights. This section is primarily aimed at Coase's rejection of Pigouvian welfare economics and the move towards market solutions to the problems of market failure, externalities, nuisance, and other property 'tragedies.' Although the economic theory of law broadly supports free markets, it is typically committed to the requirement that property rights be evaluated in terms of efficiency, and efficiency will frequently demand non-market solutions. This commitment is rejected by the libertarian economists in section 3, who reject Coase's economic theory, regulation, and takings *tout court*. Section 4 examines how economic theory has approached eminent domain, and explores Joseph Singer's reliance theory of property in considerable depth. Singer's theory attempts to justify a broad takings power for *private* individuals over corporate means of production on efficiency grounds; this approach to takings (and the property law that shapes takings) has the potential to encourage outcomes that are undoubtedly not within Singer's purview.

In the final section, the backlash against markets and market theory is reprised from Chapter 3 in more detail, and particularly in light of the economic theories discussed here. Jason Brennan and Peter Jaworski's recent work on the semiotics of markets is introduced, the anti-commodificationist argument is re-examined, and a specific kind of property—cultural property—is tested against the semiotic objection.

I conclude that if considerations of efficiency decide who owns what—through either a market (voluntary transfers) or through forced or legal transfers by a judge or the state—then private property interests are important only to the extent they promote efficiency. This disregards the property's potential to have privacy components, which are typically not determined through market transfers. The theory of private property I have advocated for in this work does not allocate property based on considerations of efficiency, but it does require strong protection

against both public and private takings based on the moral duty of noninterference that nonowners are obligated to observe. To paraphrase Rawls, economic theory does not appear to take the distinctions between people's property seriously, primary because private property has, for most iterations of the theory, only instrumental value. Economic theory, in general, does not provide a moral justification for the kind of privacy and economic rights argued for in this work. Because of this, economic theory only protects private property better than the preceding theories to the extent it can withstand claims to regulate or expropriate it, and economic theory is less likely to convince a court that privacy-compromising property regulations (primarily takings) are unconstitutional. As a result, there is no reason to prefer a legal system that uses economic theory to settle property contests if, as I argue here, the primary moral justification for private property is itself the protection of privacy.

### **Section 1. The Utilitarian/Consequentialist Foundation of Economic Property Theory**

The economics of law is primarily concerned with efficiency, and has attempted to distinguish efficiency from utility. According to A. Mitchell Polinsky, efficiency is “the relationship between the aggregate benefits of a situation and the aggregate costs of the situation.”<sup>4</sup> Although economists have, on occasion, derided the idea that utility is measurable<sup>5</sup> or even real,<sup>6</sup> the efficiency considerations of the economic approach to property rights are broadly utilitarian in their conception of the role of property rights as being instrumental toward welfare. While welfare is somewhat underdetermined by considerations of utility, and there is room for substantial disagreement about the ability of utility to produce welfare (and the ability of welfare to produce utility, for that matter) there is broad agreement (among economists) that property rights, like any other right or legal entitlement, are desirable just insofar as and to the extent that they are efficient. To this end, the economic theory of public policy—the laws and structures which guide the workings of the state—is, according to Frank Hahn, “relentlessly utilitarian” because “policy theories are ranked by their utility consequences.”<sup>7</sup> Takings, in particular, reflect

a strong utilitarian conception of property,<sup>8</sup> and economic utilitarianism, it will be argued, offers the most comprehensive justification of the takings doctrine.

Although John Rawls' theory of justice is committed to providing an alternative to utilitarian theory, Rawls also provides a clear definition of it: utilitarianism, for Rawls, is the "idea that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."<sup>9</sup> However, the distribution of satisfaction, in terms of all goods including rights and wealth, over the relevant persons is irrelevant.<sup>10</sup> Because this results in the conflation of "all persons into one" for purposes of establishing the good, Rawls famously concludes that "[u]tilitarianism does not take seriously the distinction between persons."<sup>11</sup>

Utilitarianism is a version of consequentialism. According to Bernard Williams, consequentialism "is the doctrine that the moral value of any action always lies in its consequences and that it is by reference to their consequences that actions, and indeed such things as institutions, laws, and practices, are to be justified if they can be justified at all."<sup>12</sup> The consequences aimed for by utilitarianism include "people's desires or preferences and their getting what they want or prefer."<sup>13</sup> John Harsanyi defends this kind of utilitarianism—preference utilitarianism—whereby social utilities are defined in terms of individual utilities, and each person's utility function is defined in terms of personal preference.<sup>14</sup> According to Harsanyi, "a morally right act is one that conforms to the correct moral rule applicable to this sort of situation, whereas a correct moral rule is that particular behavioural rule that would maximize social utility if it were followed by everybody in all social situations of this particular type."<sup>15</sup> The general rules governing these acts also form the basis for the institutions that shape and enforce the rules, which consist mostly of the laws by which the institutions are operated. A property law, for example, that implements utilitarian morality would therefore aim towards the maximization of social utility, or, as Harsanyi formulates it, "the social welfare function."<sup>16</sup>

A standard objection to classical utilitarianism argues that the maximization of social utility leaves no time or ability for self-directed actions such as leisure or entertainment, unless, of course, such actions lead to greater utility. In response, Harsanyi writes “[a]ny reasonable utilitarian theory must recognize that people assign a non-negligible positive utility to free personal choice, (and) to freedom from unduly burdensome moral standards trying to regulate even the smallest details of their behaviour.”<sup>17</sup> Harsanyi also notes that some behaviors, primarily those that are solely self-regarding or intrapersonal, are not capable of being analyzed by the utilitarian calculus: his example is that of intellectual honesty, or “admitting the truth to oneself,” which has important moral consequences for the individual “regardless of any possible positive or negative social utility this truth may have.”<sup>18</sup> Utilitarianism—at least the kind defended by Harsanyi—is therefore capable of recognizing the uniqueness of persons as well as the value and utility of self-directed action by leaving alone a sphere of moral life that is not constantly surveilled by the demands of social welfare.

According to Partha Dasgupta, if utilitarianism were to form the basis for a political theory, it would require “a central authority whose activities far exceed the...minimal state.” This authority, in order to implement the goals of distributive justice, would need to be engaged “with the task of redistributing purchasing power among individuals via taxes and subsidies.”<sup>19</sup> This raises again the common objection that utilitarianism cannot tolerate rights, and because it cannot tolerate rights it has no place in a liberal political order. However, for Dasgupta, the kind of rights that operate as constraints upon the pursuit of social welfare—property rights, for example—do not prevent a central authority from otherwise pursuing social welfare in the form of distributive justice: the exercise of such rights and their consequences, which “considerations of distributive justice...or efficiency, must not override,”<sup>20</sup> are simply excluded from the calculations of general utility. In other words, a political and economic program that seeks to maximize distributive justice is not necessarily one that fails to constrain itself from violating individual rights. Rather, according to Dasgupta, “the maximum social welfare that can be

achieved in the presence of these constraints is less than the level which could have been achieved had these constraints not been imposed.”<sup>21</sup>

By emphasizing how virtue precedes the ability to promote welfare, Philippa Foot denies that there are “better or worse states of affairs in the sense that consequentialism requires” because the pursuit of best outcomes in terms of maximizing welfare does not stand “outside” of moral evaluation.<sup>22</sup> The pursuit takes place “inside” morality because it is dependent upon virtue. For Foot, there are persons who act with *benevolence*, which intends to produce welfare in others, but it makes no sense to claim that their actions are motivated by a desire to perpetuate a better and more benevolent state of affairs without the motivating presence of this virtue.<sup>23</sup> Benevolent persons promote good states of affairs by way of acting upon their good virtue, and only virtuous persons are capable of determining what are good or bad or better or worse states of affairs. Consequentialism is therefore correct to emphasize good ends and the maximization of welfare, but only good people, who are in possession of the requisite virtues, are able to bring these consequences about.

Utilitarianism is translated into the language of economics most perspicaciously as welfarist consequentialism, which is the result of “simply adding up individual welfares or utilities” and assessing the consequences.<sup>24</sup> As a moral theory, the goodness of states of affairs in terms of welfarist consequentialism, are, according to Amartya Sen, “judged entirely by the personal utility features of the respective states.”<sup>25</sup> The maximal sum of individual utilities then provides the basis for “choosing economic policies to be applied to the real world.”<sup>26</sup>

There are many objections to the use of utility, efficiency and wealth by economic theorists as objective standards for moral theory and practical action. In terms of general welfare and utilitarian theory overall, Robert Nozick critically writes that redistribution (taking from Peter to give to Paul) simply takes from Peter, but Paul (as society) is not anything that experiences pleasure or pain or has a well-being that can be “maximized.”<sup>27</sup> Alan Carter writes that the pursuit of efficiency is not a fundamental moral obligation,<sup>28</sup> and Ronald Dworkin argues that wealth

itself is not a “component of social value.”<sup>29</sup> Many of these critics write in response to legal theorist and economist Richard Posner, who is himself a critic of utilitarianism but a defender of wealth maximization as the goal of economic theory.

According to Posner, the most severe critics of the economic approach to law are “those who attack it as a version of utilitarianism.” Posner has attempted to mollify critics by replacing utility with wealth maximization. He argues that economics and utilitarianism are distinguishable, and that “‘wealth maximization’ provides a firmer basis for ethical theory than utilitarianism does.”<sup>30</sup> Economics is not, writes Posner, simply applied utilitarianism. Rather, economic efficiency “is an ethical as well as scientific concept.”<sup>31</sup> According to Posner, utilitarianism “holds that the moral worth of an action, practice, institution, or law is to be judged by its effect in promoting happiness [...] aggregated across all of the inhabitants...of ‘society,’ which might be a single nation or the whole world.” Normative economics, on the other hand, judges these same behaviors on their ability to promote the social welfare.<sup>32</sup> “The ethics of wealth maximization,” writes Posner, “can be viewed as a blend of” utilitarianism and Kantian ethics, where “[w]ealth is positively correlated, although imperfectly so, with utility, but the pursuit of wealth, based as it is on the model of voluntary market transaction, involves greater respect for individual choice than in classical utilitarianism.”<sup>33</sup> For Posner, “Kantian” refers to a “family of related ethical theories that subordinate social welfare to notions of human autonomy and self respect as criteria of ethical conduct.”<sup>34</sup> “Wealth maximization,” Posner concludes, “as an ethical norm gives weight both to utility, though less heavily than utilitarianism does, and to consent, though perhaps less heavily than Kant himself would have done.”<sup>35</sup> More so than utilitarianism, wealth maximization is also the foundation of the kind of economic liberty that is enjoyed in free markets.<sup>36</sup> Free markets, in turn, function well when participants possess Kantian “conventional pieties” such as promise-keeping and truth-telling, which themselves maximize wealth by reducing the costs of policing the market.<sup>37</sup>

In contemporary American property jurisprudence, takings and regulation are subject to the lowest level of constitutional protection, so that any rational basis can justify the taking or regulation as a legitimate use of the state's police power irrespective of any actual welfare promotion. However, general welfare is surely the intention of legislative measures that take for either purely public use (such as roads or schools) or the public good in terms of economic development. In other words, the jurisprudence does not prescribe for welfare considerations, but they presumptively motivate all takings. However, as Frank Michelman notes, it would be 'strange' for courts to find that a taking is invalid because it fails to *de facto* maximize welfare.<sup>38</sup> A legislative or judicial requirement that regulations or takings promote welfare would change property law dramatically by adopting a 'rights-neutral' approach, where considerations of liberty or personhood are sacrificed to utility, but where social obligation might turn out to be the most efficient way to allocate and distribute the things and resources that are the object of property rights. These topics are discussed in more detail in section 4.

## **Section 2. The Economics of Law and Right**

According to economist Thomas Miceli, "property rights represent those things that one is entitled to do with one's property [,] whereas property law represents the legal rules that enforce those rights or entitlements."<sup>39</sup> This section examines, in part 1, how economic theory has shaped property law, and, in part 2, how it has shaped property rights.

### **Part 1. The economic theory of law**

The economic theory of law is primarily concerned with efficiency, and one of the foundations of the theory holds that efficiency is the result of voluntary use and exchange. However, if a use or exchange is inefficient, then government can initiate regulation or coerced exchanges to promote efficiency.<sup>40</sup> According to Polinsky, efficiency is "the relationship between the aggregate benefits of a situation and the aggregate costs of the situation." This is a simplified variation of Pareto efficiency or optimality, which holds that a situation is efficient or optimal "if there is no change from that situation that can make someone better off without making someone worse off."<sup>41</sup> With



certain exceptions, the law and economics analysis of the efficiency of a law is based on this criterion. For Polinsky, efficiency is contrasted with equity, which refers to the “distribution of income among individuals.” Economists analyze how aggregate benefits can be maximized, while philosophers, lawyers and legislators focus on the acquisition and distribution of the aggregation within the framework of rights, justice, or other moral considerations.<sup>42</sup>

As a moral concept, voluntariness is an important element of economic theory. According to James Buchanan, the results of voluntary exchanges are efficient, and exchanges are efficiency-increasing “[w]hen one person is seen to transfer goods voluntarily to another while the second person is seen to reciprocate with a return transfer;” this is true for exchanges from the “simplest to the most complex institutional structures.”<sup>43</sup> Exchanges are not efficient or not efficiency-increasing when there are “nonvoluntary changes in personal endowments of goods and services.”<sup>44</sup> Inefficiency arises from externalities, or when potential buyers and sellers are prevented from exchanges due to a variety of social factors.

For Buchanan, economics, as the “science of markets or of exchange institutions, commences with a well-defined structure or set of individuals rights and offers explanatory, predictive propositions concerning the characteristics of outcomes along with conditional predictions about the effects of imposed structural changes on such outcomes.”<sup>45</sup> Buchanan notes that his definition of economics is “at variance with those who define economics in terms of the central maximizing principle.”<sup>46</sup> Economic efficiency is therefore not the only type of efficiency. According to Buchanan and Roger Congleton, “[a] legal structure that embodies equal treatment is more efficient than one that introduces inequality.”<sup>47</sup> In fact, they note, generality or equality before the law might reduce economic efficiency while also facilitating the “operation and administration of law itself.”<sup>48</sup>

According to Richard Posner, economics is not primarily about money: rather, it is about resource use, and “money [is] merely a claim on resources.”<sup>49</sup> Posner: “when resources are being used where their value is greatest, we may say that they are being employed efficiently.”

Efficiency means “exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized.”<sup>50</sup>

Within the economic theory property law, legal rules are, according to Miceli, “designed to maximize the value of property.” These rules pertain to the use, exclusion, and transfer of property. Externalities impose unintended costs or benefits on others. Property law deals with incompatible uses (such as nuisances) by limiting an owner’s rights “so as to eliminate or minimalize the resulting external cost.”<sup>51</sup> Property and land use law, and the rights that both shape and result from property law, are, for a variety of reasons, an ideal environment within which considerations of efficiency can be evaluated. In fact, it was nuisance law (a subset of property law) that instigated the earliest discussions about the role of economics in law in Ronald Coase’s seminal works on property rights. The economic theory of law is profoundly shaped and guided by his work, which has been encapsulated into a theorem. According to The Coase Theorem, as long as property rights are well defined, it does not matter who has them if transaction costs are low enough so that market participants can compete against each other. For Miceli, this means that “[w]hen bargaining is possible, the efficient outcome can always be achieved in an externality setting by a voluntary transaction, even if the literal source or cause of the harm...is not held legally responsible for it.” The Coase Theorem “is a fundamental element of the economic approach to property law, and indeed, of the economic approach to law in general.”<sup>52</sup>

Economics is, according to Coase, “the science of human choice.”<sup>53</sup> It is based on the assumptions that “consumers maximize utility” and that “producers have as their aim to maximize profit or net outcome.” Markets, the institutions that “exist to facilitate exchange” and which “exist in order to reduce the cost of carrying out exchange transactions,” hold these apparently disparate goals together.<sup>54</sup> For Coase, commodity exchanges and stock markets are “highly regulated,” but not necessarily by government: these markets (as well as historical markets or fairs) are regulated by the participants themselves, although “an intricate system of rules and regulations would normally be needed”<sup>55</sup> in order to facilitate competition, fairness, and

security. These rules, according to Coase, “exist in order to reduce transactions costs and therefore to increase the volume of trade.”<sup>56</sup>

According to Coase, there is no difference between “rights such as those used to determine how a piece of land should be used and those, for example, which enable someone in a given location to emit smoke.”<sup>57</sup> Both are property rights that “will be acquired, subdivided, and combined, so as to allow those actions to be carried out which bring about that outcome which has the greatest value on the market. Exercise of the rights acquired by one person inevitably denies opportunities for production or enjoyment by others, for whom the price of acquiring the rights would be too high.”<sup>58</sup> Coase: “If rights to perform certain actions can be bought and sold, they will tend to be acquired by those for whom they are most valuable either for production or enjoyment.”<sup>59</sup>

In the absence of transaction costs, the law (and the property rights created by it) is irrelevant: the institutions serve no purpose and private property rights play no role.<sup>60</sup> However, Coase’s point is that in the real world, transaction costs (including the social costs mentioned in the title of Coase’s famous article) are *never* absent, and therefore law and rights play a substantial role in formulating the institutions that together make up the economic system.<sup>61</sup> The imaginary world of zero transaction costs is the world of modern economics (termed “blackboard economics”<sup>62</sup> by Coase), which Coase recommends discarding in favor of an analysis that takes into consideration the “real world of positive transaction costs.”<sup>63</sup> Blackboard economics calculates prices, taxes, and subsidies according to the economist’s provision of these factors, who then acts as an idealized state or government agency that is tasked with the creation and implementation of public policy. But, Coase argues, there is no single government agency responsible for creating or regulating economic activity (including taxes and subsidies); rather, the government chooses among the “social institutions which perform the functions of the economic system” by establishing new agencies, abolishing old ones, implementing new laws, delegating new authority, and nationalizing/denationalizing one industry or another,<sup>64</sup> all with an

eye ostensibly towards the maximizing of wealth through the minimization of ‘defects’ in the economic system through state action. This understanding of the role of the state is, Coase argues, the product of the “welfare economics” established by Arthur Pigou.<sup>65</sup>

According to Pigou, economics—and, by implication, property rights—must be subjected to “public intervention” when “there is reason to believe that the free play of self-interest” detracts from “the amount [of resources] that is required in the best interest of the national dividend,”<sup>66</sup> or market failure. Public intervention (typically in the form of taxes, but also including regulations and the use of eminent domain) is particularly justified when externalities, or the “effect of one person’s decision on someone who is not a party to that decision,”<sup>67</sup> are present. The classic examples of externalities are nuisances such as smoke or pollution, and the classic Pigouvian response to the presence of externalities is state regulation or taxation of property. Pigou says that many factors prevent efficiency, so government ought to step in to “control the play of economic forces in such wise as to promote the economic welfare, and through that, the total welfare, of their citizens as a whole.”<sup>68</sup>

Arguing against Pigou’s interventionist response to market failure, Coase’s point is that externalities are best minimized through strong and manifest property rights, and that the mere presence of externalities does not provide an immediate justification for government regulation. After all, Coase argues, the economic system is nothing more than “the effect of individuals’ or organizations’ actions on others operating within the system,”<sup>69</sup> and “if there were no such effects there would be no economic system to study.”<sup>70</sup> This, indeed, has been the legacy of the Coase Theorem, and establishes the connection between strong private property rights and minimum regulation. It rejects the Pigouvian reliance on regulation because it leads to “results which are not necessarily, or even usually, desirable,”<sup>71</sup> meaning that such actions do not produce efficient results.

Coase, and the economic theory he developed, attempts to force economic actors to deal with one another using voluntary/market solutions, and not to turn to the state to pursue forced or

legal exchanges whenever externalities or potential market failures arise. Although judges, who are responsible for implementing legal or forced exchanges, believe they affect “the working of the economic system (...) in a desirable direction,”<sup>72</sup> Coase and many other economists argue that judges and other political actors are either incapable of making efficiency-promoting decisions or unwilling to make the effort to produce such decisions. According to economist Thomas Miceli, this is because a court’s assignment of responsibility for an external harm “involves a value judgment regarding who is more deserving of legal protection.” As a result, the legal rule for assigning liability “will affect the distribution of wealth...because it determines who possesses the (valuable) underlying property right.”<sup>73</sup> So, writes Miceli, “the assignment of property rights will therefore always have distributional implications.”<sup>74</sup>

Property rights have transaction costs, and costs are impediments to bargaining. If parties to an externality cannot bargain (e.g., there are too many people or their rights are unsure), the legal rule established by judges determines the rights, and judges ought to choose the rule with efficiency in mind.<sup>75</sup> However, this is rarely the case. Because property rights are politically determined, Gary Libecap argues, politicians and judges serve as ‘brokers’ in responding to demands of competing interest groups.<sup>76</sup> As a result, interest groups with greater size, wealth, and homogeneity will have more resources to influence politicians, resulting in political pressures for more favorable definitions of property rights.<sup>77</sup> If one group creates pressure for more property redistribution, there is a correspondingly greater demand for protection of rights against redistribution.<sup>78</sup> According to Libecap, private claimants form lobbying groups and negotiate with bureaucrats who claim “decision making authority and rents from asset ownership and use.” This includes incumbent owners who are “seeking the police power of state to enforce their ownership claims,” new claimants who seek a redistribution of property rights and wealth, and third parties such as banks and financial institutions who have a stake in the assignment and security of property rights.<sup>79</sup>

According to Coase, when economists are annoyed by a variety of things caused by public license (such as planes, trains, sewage), they tend to “declaim about the disadvantages of private enterprise and the need for governmental regulation.”<sup>80</sup> However, Coase continues, behavior that economists “are prone to consider as requiring corrective action,” is, in fact, “often the result of governmental action.”<sup>81</sup> Zoning and other property use restrictions can be very costly and inefficient because it is “subject to political pressures and operat(es) without any competitive check.”<sup>82</sup> For Coase, the solution to the problem of efficiency is not simply using property rights in order to, for example, restrain those who cause inefficiencies such as nuisances through the use of legal techniques such as lawsuits or injunctions. Rather, the issue of property rights is subordinated to the issue of “whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produced the harm.”<sup>83</sup> The transaction cost of rearranging rights is high, and judges in nuisance cases not only rearrange rights but also determine how resources are employed. Unrestricted use can impose costs in non-economic terms as well, particularly when unrestricted use violates the rights of others or harms them. Certain uses, such as those producing smoke, noise, or pollution, may harm nearby residents or environment. These are externalities, or cost spillovers, and create inefficient uses of land and therefore may justify governmental limitation on property use/rights on economic grounds. This may reduce value, but the goal is to increase overall efficiency.<sup>84</sup>

In terms of private property rights, inefficiencies arise when private land becomes more valuable for public use. As economies develop, public lands such as highways, railroads, and airports, which are freely available to all, can become even more efficient. This is also true for lands dedicated to recreation and lands set aside for preservation. Unrestricted private ownership may hinder the creation of these public goods, so the state can justifiably step in to ensure these good are provided in the ‘efficient quantity.’<sup>85</sup>

For Miceli, the Invisible Hand Theorem, which is purported to guide welfare economics, stipulates that “in a competitive market setting, voluntary (or market) exchange will result in an

efficient allocation of resources” because in perfect conditions of competition, “property rights will end up in the hands of those parties who value them the most, or in those uses where they are most valuable, without the need for state intervention.”<sup>86</sup> So, self-interested private property ownership promotes optimal social conditions. In these perfect conditions, there is no need for governmental invention in order to improve efficiency, though “there may be a need or desire for it to intervene to achieve a more equitable distribution of wealth.”<sup>87</sup> According to Miceli, “the law acts as substitute for the market” when the market fails to facilitate efficient allocation of resources.<sup>88</sup>

The framework for determining the proper relationships between markets and law has been characterized as a blend of Coasean economics with the ideas suggested in Guido Calabresi and Douglas Melamed’s classic paper on assigning liability for external costs.<sup>89</sup> According to Calabresi and Melamed, the sticks in the bundle of property rights should be allocated to the agent who values them most highly. These rights lie on the boundary between (forced) eminent domain and voluntary exchange, which is marked by a choice between liability rules and property rules and ‘policed’ by the public use requirement. Voluntary exchanges between agents deal with property rules, while forced exchanges with compensation deals with liability rules. Voluntary exchanges guarantee full compensation but may not maximize efficiency. Forced or legal exchanges can ignore many costs, and introduces a degree of unfairness and inefficiency.<sup>90</sup> In any event, rights to the different sticks may shift from one agent to the other based on the different applicability of property and liability rules, resulting in the type of diminution of the right to exclude that the exclusionary theorists claim as the core property right.<sup>91</sup> This shifting can be achieved through the takings and regulatory processes, and the conception of property as a severable bundle certainly facilitates these processes.

So property rules, as consensual transfers, form the basis for market exchanges, while liability rules, because they allow for non-market or coerced transfers, form the basis of legal exchanges.<sup>92</sup> As long as the court sets the rights-holder’s true valuation of the right, the forced

transaction is said to be efficient. If the court fails, then the result is not efficient.<sup>93</sup> If transactions costs are low, property rules are efficient, but if they are high and courts are reasonably good at setting damages, then liability rules promote efficient exchanges that probably would not have occurred due to high costs of bargaining. In conjunction with the Coase Theorem, this understanding of efficiency constitutes the bedrock of the economic approach to property law.<sup>94</sup> As a result of this understanding, property, framed in terms of eminent domain, *is not protected by property rules*. As Leanne Fennell observes, if an owner has a right to refuse a sale on any grounds, then they have a property right governed by market considerations. If they have been made ‘an offer they can’t refuse’ (as in a takings situation) then their property is (un)protected by a liability rule and governed by legal or non-market rules including forced transfers.<sup>95</sup>

## **Part 2. The Economics of Property Rights**

“In the world of Robinson Crusoe property rights play no role.”  
– Political economist Harold Demsetz<sup>96</sup>

“Political economists are fond of Robinson Crusoe stories.”  
– Karl Marx, *Capital*, Vol. I

For Harold Demsetz, “[p]roperty rights define and protect those things that people can and cannot do with the assets under their control, including but not limited to land.”<sup>97</sup> According to economist Yoram Barzel, this definition needs some unpacking. For Barzel, *economic* property rights are constituted by “the ability to enjoy” or consume a good or asset directly or indirectly through exchange. These rights are distinguished from *legal* property rights, which are those assigned by the state to a person.<sup>98</sup> This definition of the property right places it between two points: legal rights, at the one end, are distinguished from natural or economic rights at the other. There is a wide lacuna between these conceptions. However, according to Barzel, the distinction made between “property rights and human rights is spurious.” The economic property right, for Barzel, is the basis for human rights, and “human rights are simply part of a person’s property rights.”<sup>99</sup>



For Barzel, legal rights that are enforced by government “enhance economic rights, but the former are neither necessary nor sufficient for the existence of the latter.”<sup>100</sup> For Barzel, possession of property gives the possessor economic rights, but ownership provides even more economic rights. These rights exist both within and without legal institutions. The economic right exists in state of nature-type situations, as well as in legal systems that contain property rights. In legal systems that might not feature legal property rights, the economic right would still exist.<sup>101</sup> James Buchanan agrees that “there is really no categorical distinction to be made between that set of rights normally referred to as ‘human’ and those referred to as ‘property.’”<sup>102</sup>

Other economists attempt to draw out how this characterization of property rights determines efficient uses of property. According to Harold Demsetz, one of the main functions of property rights is that of “guiding incentives to achieve a greater internalization of externalities.”<sup>103</sup> He restates this famous dictum slightly: “property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.”<sup>104</sup> Externalities consist of the imposition of costs or effects on third parties; polluting smoke from a factory is the classic example of an externality. Internalization maintains these costs between the contracting parties.<sup>105</sup> Property rights, therefore, encourage the contracting parties to ensure that the effects of their contract—usually bad effects, such as pollution, but Demsetz also includes beneficial effects such as property improvements—do not harm or benefit others by creating liability sanctions that promote the absorption of these externalities.

Demsetz sees property rights in terms of their association with their effects, and new rights emerge—and old rights are restricted—when new techniques are developed that produce new or unexpected externalities. His classic example is the development of private property rights over territories used for hunting by the Native persons of the Labrador Peninsula in the 17<sup>th</sup> century. Prior to contact with Europeans, Native persons hunted for food and fur with no impact, or externalization, on the supply of animals or the rights of all to hunt and trap. After contact with Europeans and the establishment of the fur trade, animals were in increasingly short supply due to

increased trade. Native persons responded by creating private property territories on behalf of individual families in order to hunt more efficiently. Demsetz's point here—and very similar points are made by Ellickson,<sup>106</sup> Coase,<sup>107</sup> and Acheson<sup>108</sup>—is that private property rights emerge in response to the associated emergence of both harmful and beneficial effects, and that such rights permit the efficient use of scarce resources without intending to produce, for example, social welfare, equality in distribution, or fairness. By implication, Demsetz's anthropological narrative intends to show that considerations of efficiency (illustrated here by the 'rational' creation of private property rights that encourage the "husbandry of fur-bearing animals"<sup>109</sup>) emerge spontaneously and without central planning even in historical settings that had not previously known (or had any use for) such rights. For the Labradoreans, private hunting and trapping territories internalized the externalities created by increasing scarcity (i.e., the depletion or extinction of the animals), and the lack of such rights in the prior system of common property hunting grounds, which failed to internalize the effects of hunting, were inefficient. Therefore, for Demsetz and many other economists, considerations of efficiency not only justify private property rights, but create them as well. For Buchanan, "economic exchange among persons is facilitated by mutual agreement on defined rights." Once rights are defined and settled, "economic interchange becomes almost the archetype of ordered anarchy,"<sup>110</sup> a situation where the role—if any—of the state is that of protecting these rights against aggression, theft, or fraud by 'legalizing' them through the creation of property institutions.

Posner agrees that the legal protection of property rights creates "incentives to use resources efficiently."<sup>111</sup> These incentives are created by the "parceling out among the member of society of mutually exclusive rights to the use of particular resources."<sup>112</sup> Posner: "If every piece of land is owned by someone, in the sense that there is always an individual who can exclude all others from access to any given area, then individuals will endeavor by cultivation or other improvements to maximize the value of land."<sup>113</sup>

Posner suggests three criteria for an efficient system of property rights. “The first is universality. Ideally, all resources should be owned or ownable by someone, except resources so plentiful that everybody can consume as much of them as he wants without reducing consumption by everyone else.” The second criterion is exclusivity, or the right to exclude.<sup>114</sup> The third criterion is transferability: “[i]f a property right cannot be transferred, there is no way of shifting a resource from a less productive to a more productive use through voluntary exchange.”<sup>115</sup> An efficient system of property rights is therefore able to minimize the externality problems that exist whenever persons “engage in activities which affect the welfare of other members of the community at large,”<sup>116</sup> and most—perhaps all—productive human activity affects the welfare of others.

According to Buchanan and Congleton, “nearly all of the productive effects of property rights systems can be analyzed as solutions to various externalities and commons problems.”<sup>117</sup> Externalities occur because the current system of rights, sanctions, and regulations “fail to provide incentives that allow Pareto-efficient outcomes to emerge.”<sup>118</sup> As a result, many externalities are political creations and not the result of market failure. Efficiency requires the regulation of externalities, and property rights are efficient to the extent that they contribute to the regulation of externalities. However, permanent assignment of property rights may, due to a variety of factors (including technology and climate change) become inefficient. So “most polities have procedures for amending property law through time as circumstances change” via politics, but this is more efficiently done through voluntary “Coase-like” exchanges.<sup>119</sup>

An illustration of this kind of exchange is Posner’s railroad and garage example: although a property owner has a qualified right to repel trespassing sparks from a passing railway, and although it is probably more efficient to compensate the owner than make the railroad install a spark arrester, one cannot park their car in a neighbor’s garage without their consent despite high charges at the local garage, parking tickets, and fear of theft. This is true even if the use of the garage is more valuable to the car owner than the garage owner. Why depart from economic

theory in these examples, which, by forcing one owner to accept compensation in the railroad case, also seems to require the ‘efficient’ transfer of the garage to the car owner?<sup>120</sup>

According to Posner, because “the market is a more efficient method of determining the optimal use of land than legal proceedings,”<sup>121</sup> the car owner ought to be able to persuade the garage owner to rent the garage to them. How should a court determine a legal claim to a right to use the garage against the owner’s wishes? It cannot make that determination because the transaction costs are *low* and therefore the property right is strong. Accordingly, the economist only advocates for the creation of ‘absolute’ property rights in “ideas, land, or labor” (here, the garage) when the “costs of voluntary transactions are low.”<sup>122</sup> However—and this is a key point for discussions about the efficiency of eminent domain—when “transaction costs are prohibitive, the recognition of absolute rights is inefficient.”<sup>123</sup> In such cases, “transaction costs preclude the use of voluntary transactions to thus move resources, and alternative allocative mechanisms to property rights must be found—such as liability rules, eminent domain, and zoning.”<sup>124</sup>

A policy of wealth maximization, therefore, subordinates rights, and property rights in particular, when voluntary transactions fail to deliver objects of value (i.e. property) to the persons (including artificial persons, such as the state) who value them the most due to high transactions costs. Rights are only absolute (‘true’ property rights as opposed to ‘mere’ liability rights) “in setting of low transaction costs,” such as the garage example.<sup>125</sup> Rights are protected, inversely, to rising costs.

### **Section 3. Libertarian Objections**

As Barzel notes, economists studying property rights “tend to be strong advocates of unregulated markets.”<sup>126</sup> Accordingly, there is considerable resistance to the use of efficiency in law or moral analysis, particularly in regards to property regulation and the use of eminent domain. Because of the kind of pragmatic or contingent approach to rights by theorists such as Posner, libertarians consider the law and economics theorists to be unprincipled, utilitarian, and willing to compromise absolute property rights in favor of group or communal rights.

Hans Hoppe is a libertarian economist—a *soi disant* ‘private property anarchist’<sup>127</sup>—who argues “the right to private property is an indisputably valid, absolute principle of ethics and the basis for continuous ‘optimal’ economic progress.”<sup>128</sup> For Hoppe, economic theorists suffer from a kind of amoral inconsistency. For example, public goods theorists, such as Buchanan in particular, argue that goods such as security are best provided by the state despite the existence of a free market for other goods (e.g., toothbrushes).<sup>129</sup> Hoppe argues that there is no principled way to make a determination between a public good and a private one, and that economists have no method for determining whether public goods (i.e., property rights in things controlled by state because the state is ‘efficiently’ the best agent to provide them) have positive and not negative consequences due to the absence of a competitive market for those goods.<sup>130</sup>

According to Hoppe, the public goods literature, and the economic theory that informs it, lacks a ‘true’ theory of ethics or rightful ownership due to the fact that efficiency is not the basis for a theory of morality or private property rights.<sup>131</sup> Hoppe: “all efficiency arguments are irrelevant because there simply exists no arbitrary way of measuring, weighing, and aggregating individual utilities or disutilities that result from some given allocation of property rights. Hence any attempt to recommend some particular system of assigning property rights in terms of its alleged maximization of ‘social welfare’ is pseudo-scientific humbug.”<sup>132</sup>

Hoppe’s understanding of economic property rights is similar to the distinction made by Barzel: economic rights, such as those stemming from possession, use, or enjoyment, emerge spontaneously or ‘naturally’ from language and common rules of conduct and they are either protected by or infringed upon by legal rules. These common rules, and not states or their laws, create market behavior.<sup>133</sup> Recognizing that the redistributive/utilitarian/welfarist state requires “a central authority whose activities far exceed the...minimal state,”<sup>134</sup> Hoppe concludes that such a state is immorally “aggressive” because it is “exempt from the capitalist rules of property acquisitions.”<sup>135</sup> These rules legitimize property acquisitions when they are voluntary and uncoerced market exchanges. Because the state that engages in efficiency-oriented economic

policies is exempt from these requirements, the state and the economists who provide justifications for coercive state action are jointly responsible for immorally aggressing against property rights. If, however, property rights are nothing more than the legal rights determined by the state (i.e., there are no economic rights that exist independently of legal rules) then the state is free to adjust those rights and rules in order to further the state's objectives without any infringing upon anyone's rights. Because property rights exist independently of the state, Hoppe concludes, states routinely violate those rights through the regulation and redistribution of property and wealth.

Like Hoppe, economist Robert Sugden locates the genesis of the property right in "principles of justice" which "gradually evolv[e] out of the interactions of individuals pursuing conflicting interests."<sup>136</sup> Sugden's property rights are based on game theory, or the idea that self-interest, operating within rules, produces the best outcomes. His objective "is to show that if individuals pursue their own interests in a state of anarchy, order—in the form of conventions of behavior that it is in each individual's interest to follow—can arise spontaneously." The various games are the conventions, and in each game each 'player' is expected to maximize their self interest usually by cooperating with 1) the rules, or conventions, and 2) with their 'opponents,' who are, in the non-game theoretic world, fellow citizens, tribespersons, and nonowners.<sup>137</sup>

Like Hoppe, Sugden is also opposed to the market interventions recommended by economists. According to Sugden, there can be "few real world markets in which economists have not diagnosed some kind of market failure and prescribed some kind of market intervention."<sup>138</sup> Most modern economic theory, Sugden writes:

describes a world presided over by a government (not, significantly, by governments), and sees this world through the government's eyes. The government is supposed to have the responsibility, the will and the power to restructure society in whatever way maximizes social welfare; like the US cavalry in a good Western, the government stands ready to rush to the rescue whenever the market "fails," and the economist's job is to advise it on when and how to do so. Private individuals, on the other hand, are credited with little or no ability to solve collective problems among themselves. This makes for a distorted view of some important economic and political issues.<sup>139</sup>

According to Sugden, “economics underestimates the ability of individuals to coordinate their behaviour to solve common problems: it is unduly pessimistic about the possibility of spontaneous order.”<sup>140</sup> For Sugden, the idea that law is a creation of government that is imposed on citizens is the “characteristically utilitarian view” that “economists usually take.” For most economists, the law “is a ‘policy instrument’ to be controlled by a benevolent social-welfare maximizing government.”<sup>141</sup> But for Sugden, law simply codifies behavior that arose out of anarchy or spontaneous order. Economists are expected to make ‘policy conclusions’ or recommendations to the government about what it ‘ought to do.’ They rarely, Sugden notes, do the opposite: observe government and then advise individuals.<sup>142</sup>

Sugden shares with Ellickson the effort to show that rights (including property rights) do not evolve through calculation or moral theories, but through spontaneous evolution that leads to conventions. Property rights are not ‘derived’ from other moral techniques but rather have evolved based on individual self-interest. Agreements, or “deals, treaties or contracts, feature in just about every aspect of social life.”<sup>143</sup> “The utility of an outcome to an individual,” Sugden writes, “is a measure of how much it is wanted by that individual.”<sup>144</sup> It need not be equated with self-interest, and “unselfish aims may come into conflict just as much as their selfish ones.”<sup>145</sup>

For Sugden, property rights, as well as conventions such as promises and mutual aid or cooperation, arise spontaneously in discrete cultures that otherwise have substantially different social and material histories. So, his conception attempts to be universal: these conventions are ones that “most human beings act on, and have acted on, in almost all places and times.”<sup>146</sup>

In terms of his fear of providing a simplistic conservative rationalization of unjust property relationships, where property rights are simply an “*ex post* rationalization of the law of property as it exists in liberal democracies,”<sup>147</sup> Sugden suggests that when there is a problem about distribution, there is a “natural prominence to solutions that base the assignment on some pre-existing relation between persons and objects.” His example is a coordination game similar to those discussed by Thomas Schelling. In one such game, a single black dot is surrounded by

white dots. One white dot is clearly closer than the others. Players are separately told to draw a line joining the black dot to one of the white ones, and they win a prize if they both choose the same dot. Sugden thinks that the players will both win because they will both choose the same white dot: the white dot that is closest to the black dot. Therefore, for game theorists, the relationship of *closeness* is important for the game and is also important for ownership, and charges of conservatism are unfounded.<sup>148</sup> So, conventions (“choose dot that is closest” and “respect existing rights”) might be potentially arbitrary from a moral standpoint, but, Sugden notes, they ‘work’ because they resolve disputes, provide security, and encourage confidence.<sup>149</sup> For example, in terms of the property convention of initial acquisition, the idea is that people do something to unowned property and then have superior claims to it. These and other property conventions, Sugden writes, do not arise from ‘reason alone.’<sup>150</sup> For Sugden (and for Hume, who provides much inspiration for Sugden’s property theory<sup>151</sup>) these conventions have a “natural prominence” both in games of property and property law itself.<sup>152</sup> Moreover, many animals have a sense of possession and territory, and “it would be surprising if it were not true for our species.” “We may be born with some innate capacity,” Sugden writes, to think in terms of individual ownership, that possession sets the stage for ownership, and that “ownership ought to be defended.”<sup>153</sup> Along these lines,

Sugden asks us to suppose that

there is an established convention that each person retains possession of those things he has possessed in the past. The corresponding norm against over-aggression is the Old Testament one: ‘Thou shalt not steal.’ Clearly, this convention favors some people much more than others. Those who start out in life possessing relatively little would much prefer many other conventions—for example, a convention of equal division—to the one that has become established. Nevertheless, it is in each individual’s interest to follow the established convention, given that almost everyone else does.... Provided I own *something*, thieves are a threat to me. So even if the conventions of property tend to favor others relative to me, I am not inclined to applaud theft.<sup>154</sup>

Interestingly, Sugden writes, “a convention can acquire moral force without contributing to social welfare in any way.”<sup>155</sup> This is true for a property rule such as *possession is grounds for ownership*, and it is also true for conventions such as “finders keepers” and the morality of



queues, which are moral rules that do not cause any increase in social welfare. So a convention might acquire moral force for everyone, including those whose welfare might increase without it.<sup>156</sup> Sugden: “For a welfarist, rights and obligations can be justified only as means for achieving the end of maximum social welfare.”<sup>157</sup> However, “[m]ost of us believe that we each have rights that cannot be legitimately overridden merely to increase the overall welfare of society.”<sup>158</sup> Sugden concludes that the classic utilitarian position, which requires maximizing the sum of happiness, is therefore insupportable.

#### **Section 4. The Economic Theory of Takings**

##### **Part 1. Takings and Efficiency**

Assuming that the utilitarian theory of property asserts that “property institutions should be shaped so as to maximize net utility,”<sup>159</sup> the question arises whether eminent domain is the appropriate means for maximization. If eminent domain proceedings were governed by economic theory (i.e., they were purported to increase welfare), the kinds of libertarian property rights discussed in the preceding section have little chance of surviving. Ideally, eminent domain should maximize some public purpose or advantage,<sup>160</sup> and occasionally governments may in fact accurately determine that private land may be more *valuable* were it providing a public good, and a forced sale may be necessary to provide those goods. However, this is not a constitutionally permitted use of the takings clause.<sup>161</sup> The question arises: does the economic theory of efficiency create constitutionally permitted uses of eminent domain?

Thomas Miceli argues that it does. According to Miceli, takings ought to promote efficiency, and, if they are efficient, then economic theory requires that no compensation is due. Conversely, compensation would be required as a kind of punishment for inefficient takings. This gives courts a substantial role in determining efficiency. James Buchanan takes the opposite tack: he wants to leave the courts out of the efficiency game and relegates them only to the determination of constitutionality. Joseph Singer wants a radical restructuring of eminent domain, one where private persons can make a case for public use as much as the state. Singer argues that

a kind of payoff occurs when private property rights in factories, for example, are compromised in order to ease the social burden of providing for the costs of displaced workers. Each of these approaches revolves around the axis of economics yet they derive from vastly different understandings of the role and goal of the law in determining takings contests.

According to Miceli, “the economic approach to takings focuses on whether or under what conditions a forced transfer (for that is what eminent domain allows) is preferred to voluntary (or market) exchange as a means of achieving the maximum value of the property in question.”<sup>162</sup> By providing both a positive (descriptive) and normative (prescriptive) approach to eminent domain, Miceli writes, economic theory can clarify the legal and political debate over the practice.<sup>163</sup> For Miceli, in democratic systems, the power of the state emerges from the citizens themselves. So, he asks, why should a group of citizens, acting in concert as the state, have a “power that none of them individually has—namely, to force another citizen or group of citizens to surrender or limit the use of their property.”<sup>164</sup>

Miceli says that in framing the question this way we are forced to examine the underlying economic rationale for eminent domain, which is “based on the goal of achieving an efficient allocation of land.”<sup>165</sup> Eminent domain is “a form of a liability rule in the sense that it entitles landowners to seek just compensation (damages) for their land but does not allow them to refuse the transaction.”<sup>166</sup> Despite this, forced exchanges sit well “within the larger context of an efficient legal and economic environment for exchange.”<sup>167</sup>

According to Buchanan, the results of voluntary exchanges are efficient, and the process increases efficiency “[w]hen one person is seen to transfer goods voluntarily to another while the second person is seen to reciprocate with a return transfer.” This is true for exchanges from the “simplest to the most complex institutional structures.”<sup>168</sup> Markets fail, and exchanges are not efficient or not efficiency-increasing when there are “nonvoluntary changes in personal endowments of goods and services.”<sup>169</sup> Nonvoluntary exchanges would include takings and other legal transfers.

There are at least two approaches to the court's role in making efficiency determinations. In his analysis of *Miller v. Schoene*,<sup>170</sup> Buchanan makes the argument that courts should not engage in economic or efficiency analysis when they decide takings cases. In *Miller*, the Supreme Court upheld a state statute that authorized the destruction of cedar trees because they were capable of carrying cedar rust, a disease that attacks nearby apple trees. Because the statute promoted public welfare and provided a public good, the state was authorized to employ its police power<sup>171</sup> and was not required to compensate the cedar tree owners. The court engaged in an early version of efficiency analysis, and determined that the apple trees were more valuable, in the aggregate, than the cedar trees.

According to Buchanan, "there is no role for the judiciary in the decision relating to the supply and financing of a public good"<sup>172</sup> because there is no way to guarantee that the state had reached an efficient decision when it prioritized the rights of apple tree owners over those of cedar tree owners.<sup>173</sup> The court, in essence, determined that the legislature had made the "right" decision in terms of efficiency. For Buchanan, the only role for the court is the determination of constitutionality,<sup>174</sup> and it should not evaluate the economic efficiency or inefficiency of the legislature's decision.<sup>175</sup> The court's sole role, then, should have been to determine whether the destruction of the cedar trees was an exercise of the police power or a compensable takings.

Miceli sees the role of the court quite differently. In order to bring regulation under control and incentivize owners, Miceli proposes the "efficient threshold rule." According to the rule, "full compensation should be paid if the government acts inefficiently (overregulates), but no compensation is due if it acts efficiently."<sup>176</sup> This rule penalizes overzealous governments for excessive regulation, and induces landowners to be more efficient than governments because efficient government regulations will result in zero compensation.<sup>177</sup> Although the rule requires the court to engage in complex computations in terms of efficiency, the rule can be implemented in much the same way that Judge Learned Hand's formula for negligence was implemented in

torts cases. In these situations, the court locates and imposes a rule which, for a variety of reasons, ‘sticks’ and becomes a legal test.<sup>178</sup>

Posner’s approach is similar to Miceli’s. According to Posner, eminent domain operates pursuant to very different principles than other kinds of property transfers. Owners might value property higher than the market, and “[t]he extra value I place on the property has the same status in economic value as any other value.”<sup>179</sup> In those cases, the use of eminent domain frustrates efficiency. In other situations, eminent domain is necessary to prevent monopoly—a legitimate economic reason to legally force property transfers—“although one applicable primarily to its use by railroads and other right-of-way companies rather than government.”<sup>180</sup> By ‘monopoly’, Posner is referring to the holdout problem and its (purported) effect upon prices: holdouts who, e.g., own in the path of a future railway line, will demand high prices, which will be reflected in the future costs of the railway’s services. Also, without eminent domain, low-valued land will stay in the hands of owners and not be transferred to the railway, who values it higher. The result is inefficiency, and eminent domain purports to overcome it through the use of compensation. According to Posner, “[t]he requirement of compensation operates to limit takings to circumstances where the value of land to the condemnor is in fact greater than the value to its present owner; to require the government merely to prove to a court’s satisfaction that the land was more valuable to it than to the condemnee would be a less efficient alternative.”<sup>181</sup> This analysis is a “straightforward economic justification of the compensation requirement.”<sup>182</sup> Compensation “increas(es) the security of the owner’s property rights and hence the incentive to improve land.”<sup>183</sup>

Under current nonefficient takings rules, the condemnor is *not* required to show a more valuable use, but is only required to compensate. This is inefficient “if the required compensation is not equal to the opportunity costs of the land seized.” Posner: “The disregard of nonmarket values...creates a systematic downward bias in the prices paid in eminent domain proceedings.”<sup>184</sup> So owners might have a higher value than the fair market value, and a forced

transfer at this lower rate is inefficient. The fair market value of a property ought to reflect “an estimate of the value of the price that the owner would have accepted for the property in a hypothetical market transaction.”<sup>185</sup> However, it fails to compensate for the subjective ‘premium’ that owners might attach to their property, and this is likely to be higher than market value in the case of homes.<sup>186</sup> Just compensation is therefore inefficient to the extent that it fails to give sellers the opportunity to name their price, and the fair market value as the determinant of just compensation “almost certainly undercompensates owners compared to what they would have demanded in a consensual sale.”<sup>187</sup>

In addition to determining fair market value, takings problems have two other (typically competing) goals: the provision of public goods, which states are obligated to provide due to the clause’s public use requirement (here, “‘public use’ equals ‘public good’”) on the one hand, and the solution to the holdout problem on the other, which is one of the goals of economic theory.<sup>188</sup> According to Miceli, the holdout problem is encountered when a land assembler (public or private) seeks to connect together contiguous small land parcels into a single large parcel suitable for projects such as highways and large real estate developments. Once “the process of assembly begins, individual sellers realize that they can impose substantial costs on the buyer by refusing to sell.” These sellers can then command higher-than-market values by holding out for prices that do not reflect the owners’ true valuations.<sup>189</sup>

In terms of private development, the holdout problem is most apparent when a developer buys the first of several contiguous properties at market price. Subsequent owners learn of the project and the sales price and demand increasingly higher (nonmarket) prices. Because sellers can command prices higher than their true valuation, and because buyers must pay these prices in order to assemble the required land, holdouts create positive externalities for sellers, negative externalities for buyers, and inefficiency overall.

One solution to the problem is forced sales. This could be achieved by the government’s use of eminent domain, or by simply changing the seller’s property right to one governed by a

liability rule, which would permit the buyer to ‘take’ the property subject to the payment of compensation with the assistance of the court.<sup>190</sup> This is essentially what was done in *Spurs v Del Webb*<sup>191</sup> but under different circumstances. The property in *Spurs* was a single tract of land, and the court’s ruling sought to remedy a market failure (nuisance) by essentially forcing the sale of the nuisance-creator’s property to what was presumed to be the person who valued the land more highly or efficiently. Similarly, a forced private sale of contiguous properties (for Miceli, a “private taking”<sup>192</sup>) in order to overcome the holdout problem would be efficient (and therefore desirable) under economic theory because both buyers and sellers would be trading (albeit involuntarily on the part of sellers) at their true valuations. However, as Miceli observes, most public takings cases do justify forced sales on these purely economic grounds, but on the grounds that the forced sale will benefit the public. Because a public purpose or benefit might be found in *any* kind of development—indeed, one of the primary justifications for increased and unregulated development is the expected increase in public goods—the public use requirement loses its ability to provide any restriction upon the use of eminent domain. Furthermore, the costs of determining the efficiency of this benefit are high or impossible to obtain, which suggests that takings based on public use are also inefficient. Therefore, Miceli concludes, public and private takings are better justified by framing the issue not in terms of public use or benefit, but in terms of overcoming the inefficiencies associated with the market failures that result from holdout problems.<sup>193</sup>

One of the most interesting examples of overcoming the holdout problem in land assembly, where prices are potentially nonmarket and inefficient because they are not the value at which owners would otherwise price their property, is the development of Disney World in Florida. The developer, Disney, created a series of ‘front’ buyers in order to purchase large contiguous parcels of ‘worthless’ swampland without alerting sellers of the magnitude of the project or the intentions of the buyer. By using the “law of undisclosed agency,”<sup>194</sup> stealth and

deception therefore allowed Disney to buy at market prices, sellers voluntarily sold at their true valuation, and the result was an efficient transfer of property rights.<sup>195</sup>

In terms of homes, the taking of homes by eminent domain is usually justified by the public benefits associated with a very different use of land: urban renewal. According to Miceli, “[t]he economics of urban renewal is based on the role of the government in correcting a market failure arising from so-called neighborhood externalities,” which arise from the fact that property values are determined not only by the owner’s efforts to increase their property’s value, but by the value or disvalue of the neighboring properties.<sup>196</sup> If an owner increases the value of their home through investment, they cannot capture the increased value that inures to their neighbor’s homes. Therefore, there is a disincentive to increase the value of their property, caused in part by each owner’s disincentive acting as a negative externality upon one another. As a result, all property values suffer, and neighborhoods become ‘blighted.’ The use of eminent domain in these situations is, according to Miceli, justified in order to overcome the inevitable holdout problems that will arise, but not because of any resulting increase in welfare, livability in the neighborhood, or concerns for social justice. In other words, efficiency only demands the elimination of holdouts through forced sales, and not the elimination of the conditions that led to the rise of blighted neighborhoods.

Miceli’s economic analysis of the holdout problem and its relationship to eminent raise a series of questions about the political justifications for taking private property. ‘Political justifications’ for taking private property (whether the taker is public or private) include the justifications relied upon by political authorities when they seek to take property as well as by courts when they rule on contested takings. They include, in addition to public use and the holdout problem, a variety of concerns about sovereignty, police power, and distributive justice. The *U.S. Steel* case is an example of an attempted private takings and addresses many of these concerns. This case, and Joseph Singer’s analysis of it, is worth a closer look.

## Part 2. Singer's Reliance Right of Nonowners

In “The Reliance Interest in Property”<sup>197</sup> and related work, Joseph Singer argues that a specific community—workers—have property rights in the property upon which they labor, a right that trumps the employer’s property rights should they (the employers) decide to cease production. The reliance interest is said to arise in situations similar to the one presented in *Local 1330, United Steel Workers v. U.S. Steel Corp.* (hereinafter, *US Steel*), where union workers sued to compel their employers, US Steel, to sell to them the steel plant that its owners were closing because of financial unproductivity.<sup>198</sup>

Although Singer makes broad arguments regarding the social justice angle of the union’s demands, and suggests that the union should have been able to rely upon promises purported to have been made to them by their employer (hence, the reliance interest), Singer is in fact making an *economic* argument for the transfer of the property. For example, he uses the language and analysis of the economic theory of property when he writes, “[w]e are obligated to recognize that the definition of property rights does not merely involve promoting the autonomy of the owner; *the allocation and exercise of property rights imposes externalities on others and on social life in general.*”<sup>199</sup> He also argues that the use of *private* eminent domain in the case would have resulted in the most efficient use of the factory.

Singer’s approach challenges what he calls the ownership model of property, where the rights of ownership are taken to be the essence of property. These rights are then normatively privileged at the expense of all the other social interests, relationships, and obligations that are associated with property. Singer’s alternative to the ownership model is the entitlement model, which “seeks to account for the social and contextual aspects of property that are left out of the ownership model.”<sup>200</sup> According to Erik Olson, these include the kinds of obligations that modern corporations owe communities, which include the following: the duty to support the health, safety, and interests of workers; the duty to engage in fair competition; the duty to provide consumer protection and safety; and the duty to practice environmental stewardship.<sup>201</sup>



For Singer, employees have property rights not only in their job security but also in the physical plant itself, which includes the actual property where they work and the machines and tools they work with. For Singer, the question “who owns the mill” is a hard one: “I also mean to call attention to the fact that even if it is ‘their mill,’ they do not necessarily have the legal power to use it in a way that destroys a community.”<sup>202</sup>

The facts of the case are straightforward. In 1980, US Steel, the owners of the steel mill in Youngstown, Ohio, informed their employees that they were closing the plant. Through their union, the workers sued to prevent the closure on the grounds of detrimental reliance, and requested injunctive and declaratory relief that would force the sale of the plant to them. Detrimental reliance is a common law cause of action that is used to force a party to perform under a promise based upon the other party’s reasonable reliance upon that promise. It is used to provide contract-type compensation where a legal contract does not exist. According to Singer, “[t]he initial theory of the lawsuit was that the local managers had explicitly promised the workers that the plants would not be closed as long as they were profitable and that the workers had relied on those promises to their detriment by agreeing to changed work practices to increase the plants’ profitability and by foregoing opportunities elsewhere.”<sup>203</sup> The union lost at the district court and in the Sixth Circuit Court of Appeal. Two years later, US Steel destroyed the plants.<sup>204</sup>

The property rights claimed by the union in *US Steel* included the right of the union to buy the plant in opposition to the company’s right to destroy it without consideration of the impact on the workers or the community, which largely depended on the continued operation of the plant.<sup>205</sup> Specifically, the union asked that the steel company be ordered to “[a]ssist in the preservation of the institution of steel in that community; [f]igure into its cost of withdrawing and closing the Ohio and McDonald Works the cost of rehabilitating the community and the workers; and [b]e restrained from leaving the Mahoning Valley in a state of waste and from abandoning its obligation to that community.”<sup>206</sup> Both the trial court and the court of appeals concluded that no such property right existed, and that the court did not have the authority to create one.

According to Singer, this case was wrongly decided, and the court should have found a property right arising from the workers' interest and relationship to the company.<sup>207</sup> Such a new legally protected interest would, Singer writes, "place obligations on the company toward the workers and the community to alleviate the social costs of its decision to close the plant."<sup>208</sup> The court could have, among many other suggestions from Singer, effected a legal transfer as a kind of private takings for fair market value.<sup>209</sup>

Although Singer finds this 'reliance interest in property' in a variety of rules,<sup>210</sup> nestled within his argument is an explicit economic justification offered in support of the proposed transfer:

In a conflict between the workers' personal reliance interest in property and the company's fungible investment interest in controlling or destroying the plant, the workers' interest should prevail. This choice holds so long as it is sensible from an economic standpoint to encourage continued use of the plant and the range of legal alternatives open to the workers is not sufficient to protect their reliance interests.<sup>211</sup>

Singer concludes by arguing that plant closings of this type are inefficient because they create substantial negative externalities which produce more social costs than benefits.<sup>212</sup> These include worker displacement, which "represents a loss of efficiency if the social cost of retraining workers for new jobs is less than the social benefit of this training,"<sup>213</sup> as well as unemployment payments by the state, where "the company externalizes the costs of providing for workers by displacing this cost onto the public sector and onto the community directly."<sup>214</sup> According to Singer, "[t]hese externalities are unlikely to be absorbed by the marketplace. Transaction costs are likely to be substantial when thousands of people are affected by the decision to close the plant. The costs include the well-known costs of bargaining, of getting together lots of people, and of strategic moves (holdout and freeloader problems)."<sup>215</sup> Regulation of plant closings "will correct the failure of the market to take account of the externalities of plant closings. Such regulation is therefore likely to increase the general welfare as measured by the standard of economic efficiency."<sup>216</sup>

Is Singer correct? Does economic theory provide both theoretical and practical justifications for the kind of judgment sought by the union in this case? There are a variety of reasons, not all of which are justified by considerations of efficiency, why Singer's reliance interest is not a desirable amendment to property law. The most striking suggestion by Singer is that relationships between employers and employees (at least the kind suggested here, which are not obviously property relationships) are property relationships that ought to be the subject of an *action to quiet title*. An action to quiet title is a legal procedure to determine the ownership or title of a property when its owner or its description is unknown or unclear. It would be used when, for example, adjacent property owners are in dispute over their mutual property boundaries because one or more of their titles are unclear or missing. Singer's reliance interest invites a massive demand upon courts because the interest would mean that ownership is presumed unclear and requires a declaratory judgment from the court, and it further provides that nonowners with *some* interest in the property should be awarded *some* ownership based on a variety of factors—none of which include ownership itself. For Singer, ownership is irrelevant, and searching for “the owner” in property contests “is fundamentally wrong. It is simply not the right question. To assume that we can know who property owners are, and to assume that once we have identified them their rights follow as a matter of course, is to assume what needs to be decided.”<sup>217</sup> Rather, the court in *US Steel* (and, I presume on Singer's behalf, in all property contests) should “decide who wins the dispute on grounds of policy and morality, and then . . . call that person the owner.”<sup>218</sup> From an economical perspective, this places huge transaction costs upon ownership and transfer because property rights would be largely undefined and constantly reassigned.

Furthermore, if workers were to have otherwise unstated property interests in their physical plant that is based on their reliance upon their continued employment, then the factory also has a similar unstated reliance property interest in the worker. All of Singer's arguments in support of the reliance interest would, *mutatis mutandis*, apply in the other direction: factory owners would presumably be able to prevent workers from quitting, and workers (in their new

capacity as owners) would also be able to make similar demands on other workers. Under current law, the factory has only a *contractual* interest in the worker's labor and a property interest in the things it already owns prior to the adding of value by the worker. The holistic approach advocated by Singer admits no boundary for determining whether property interests exist in other things and even other people.

If workers were to gain property rights in their factory through a newly implemented Singerian reliance interest, an endless re-assessment process would begin. First, it would need to be determined who else has a property right in the worker's property right. We can assume that each worker-*cum*-owner spends their money in the community (at the dentist, the grocer, the auto repair shop), all of whom can make similar demands on the worker as the Singerian workers made on the factory: every person—or, perhaps, corporation—who engages in market exchanges for things or labor becomes not a potential but an actual owner. If a group of workers were to pack up and leave for better jobs or climate, then Singer would give to the factory a property right in their labor as well as to every member of the 'community' that depended upon (or had a reliance interest in) the support of those workers. This is a remarkable conclusion, but one that seems to follow from the proposed terms of the reliance interest in property. It also appears obviously wrong, morally and economically. Singer is undoubtedly correct about the large social and economic impact of plant closings, but incorrect that economic theory—at least the type discussed in this chapter—would demand the kind of resolution he seeks for the workers in this and similar cases.

Finally, a transfer of ownership to workers (however achieved: as a voluntary/market or forced/legal transfer) is a transfer from one private owner to another, and the plant remains a private property subject to the same claims upon its ownership as those made by the workers. Were workers to assume private ownership of the steel plant, it is not difficult to see how other interested groups (the local municipality, for example) might be morally entitled to run or own the plant based on similar reliance-type claims.

Although the union also failed to convince the local municipality to use traditional *public* eminent domain to force the sale of the property to the government, who then could have transferred it to the union and its members, Singer advocates for extensive use of takings (real or threatened<sup>219</sup>) to transfer ownership from one private party to another. “Communities faced with major plant closings,” Singer writes,

need not wait for legislation, or even changes in common law, to protect themselves. Cities and public authorities should consider using their eminent domain powers to take plants that can be operated profitably and transfer them either to the workers themselves or to third parties who will keep them open. Such a taking would satisfy the public use requirement under the takings clause as long as the government body making the eminent domain decision determined that the taking was reasonably related to achieving the public purpose of correcting a market failure or otherwise promoting economic development or alleviating economic distress.<sup>220</sup>

Singer’s blithe resort to eminent domain to remedy ‘market failure’ whenever a private employer decides to close a business is balanced by his caveat that such use of the takings power ought to be ‘efficient.’ Of course, had the *status quo* been efficient, it is unlikely that the company would close shop, and highly unlikely that transfer of ownership would *eo ipso* result in an ‘efficient’ takings. In any event, he raises an interesting point: the kind of public takings he proposes is undoubtedly permissible under the current property jurisprudence, so why doesn’t it occur more often? There is no legal barrier should ‘The People’ decide to use takings—efficient or otherwise—for broadly redistributive purposes.<sup>221</sup> This question is taken up more fully in chapter 6.

### **Section 5. Market Backlash and the Semiotics of the Market**

This final section examines how nonowners might have property rights in cultural property or ‘heritage,’ and whether such property lies beyond the reach of economic theory and analysis and therefore the market. In chapter 2, I explored Alexander’s claims that buildings such as Grand Central Station deserved protection against its owner’s desire to modify the building because of its value as a cultural property. Although not explored in detail by Alexander, the claim that private property rights ought to be restricted in property that is simultaneously cultural

property is a powerful one: if correct, it would provide a strong moral foundation for nonowner property rights and justify a wide range of restriction, control, and transfer of a variety of private property holdings. In terms of economic theory, the designation of property as cultural property has the potential to stymie efforts to promote efficiency because of substantial transaction costs, and suggests that a market in cultural property is undesirable. To that extent, Brennan and Jaworski's otherwise keen analysis of the shortcomings of the anti-commodificationist's semiotic objection to markets, first discussed in chapter 3 and reinvestigated here, is subject to at least one counterexample in the form of cultural property.

### **Part 1. Markets, Semiotics and Shakespeare**

In *Markets Without Limits*,<sup>222</sup> Jason Brennan and Peter Jaworski offer a moral justification of markets but from a different angle than economic theorists (and libertarians) and in explicit opposition to the arguments of the anti-commodification theorists. For Brennan and Jaworski, a market in any commodity is morally desirable, and not merely acceptable, if gifting it is morally acceptable as well. This argument is not a standard libertarian one because the authors are not grounding their argument on property rights: they are not making an argument that the right to own means right to sell.<sup>223</sup> To the contrary, they argue that "if you can give something to someone, then you can normally sell it to that person."<sup>224</sup> Markets, they argue, do not create improper opportunities to trade things for money if there was nothing improper about giving those things away in the first place. If it is improper or immoral to possess or give something away, then it is *a fortiori* improper or immoral to sell it. The most effective example is child pornography, which is neither appropriate to own, give away *or* to sell on the market. Kidneys, however, *are* appropriately possessed and may appropriately be given away or donated such that they may also be appropriately sold at least under some conditions. Because they might be sold under some conditions, Brennan and Jaworski argue, there is nothing essential about their noncommodification. The conditions, which Brennan and Jaworski believe the anti-commodificationists would accept, involve regulating the kidney market so that, for example,

only the wealthy may sell and only the poor may buy. This kind of market regulation would eliminate so called ‘dire’ sales, and prove that a blanket prohibition of kidney sales, as well as a semiotic objection against such sales, is not justified. It would also save lives by making more kidneys available to those who need them.

Economists, as we have observed, deal in markets: the places where property, goods, and services are traded. Anti-commodificationists argue that certain things, such as properties, abilities, and body parts, should not be traded for money within a market. Margaret Radin’s argument, like those of similarly situated anti-commodification theorists Elizabeth Anderson, Michael Sandel, Benjamin Barber, and Michael Walzer, is that these kinds of markets—again, the primary loci of the economist—are immoral. Not only are some markets immoral, they argue, but persons who engage in the markets are immoral as well or at least risk becoming corrupted by the immorality of the market or its effects. Markets in some things are, for these theorists, symbolic of a culture’s disregard or disrespect for the things, derisively termed ‘commodities,’ that are traded at the market. For Brennan and Jaworski, this constitutes the *semiotic objection* to markets, which entails the idea that “[p]articipation in markets can express or communicate certain negative attitudes, or is incompatible with holding certain positive attitudes.”<sup>225</sup> For Brennan and Jaworski, the semiotic objection to markets fails for a variety of compelling reasons. Anti-commodificationists, it appears, ‘worry’ that markets do or will devalue that which is valuable. Examples are markets in ‘premium’ medical care such as concierge medical services, markets in queues of all kinds, and markets in sex, babies, and surrogacy. For example, Michael Sandel argues that selling something that is meant to be free produces inequality, as is the case when ‘the wealthy’ pay someone to stand in line for tickets to the otherwise ‘free’ Shakespeare in the Park summer event in New York City. The wealthy already have enough, Sandel argues, and obtain further advantages by buying what should be free.<sup>226</sup> If the semiotic objection is correct, permitting a market for the queue at this kind of event means that someone—American culture in general, or perhaps only New York City residents—disrespects what ought to be free: something

is lost, Sandel writes, “when free public theater is turned into a market commodity.”<sup>227</sup> Queues, for Sandel, are equalizers: it is somehow ‘egalitarian’ to wait in line.<sup>228</sup> Brennan and Jaworski cleverly reply that, in fact, queuing is *not* egalitarian because it rewards the idle and punishes the busy, and that the people who are punished by the current queuing requirements for seeing Shakespeare in the Park are the busy, working poor, who do not get a ticket to Shakespeare in the Park, “regardless of whether we forbid line-standing services or not.”<sup>229</sup>

In a market economy, write Brennan and Jaworski, “the systematic effect of private citizens’ pursuit of private ends is to create background conditions of wealth, opportunity, and cultural progress,” where welfare is maximized because of the “positive externalities created by an extended system of social cooperation” based upon private property exchanges.<sup>230</sup> Persons contribute to the common good and act as virtuous citizens when they engage in market activities, and market activities are productive towards welfare only when they are predominantly free.

According to Brennan and Jaworski, the commodification debate is supposed to determine “what sorts of things should be and should not be for sale;”<sup>231</sup> however, the “main *philosophical* debate about markets is whether markets introduce wrongness where there wasn’t any to begin with.”<sup>232</sup> A market in cultural heritage may introduce wrongness when cultural heritage, normally given away ‘for free,’ is based on symbolic or semiotic considerations. This example discloses at least one counterexample to Brennan and Jaworski’s argument, one which shows that not all semiotic objections are driven by unsupportable assumptions about the deleterious effect of markets upon attitudes towards the things traded there.

## **Part 2. A Market in Cultural Heritage?**

In *Penn Central*, the Supreme Court found that the police power justified the designation of Grand Central Station as a landmark and thereby prevented its modification and improvement. As a result, any diminution of its owners’ rights was not a compensable regulatory takings. This is the standard protocol for denying a regulatory taking by state-run landmark or heritage agencies. Under current law, an assertion that property is of ‘cultural significance’ satisfies the



public use requirement for takings; it would also satisfy the minimum standard of rationality for exercise of the police power short of an actual taking. Although the Court did not find that Grand Central Station *was* cultural or heritage property (it simply deferred to the Landmarks Preservation Commission's designation), it is Alexander's claim that it is or should be considered as such that is important here. For Alexander, this factor justifies the infringement of private property rights in this and, potentially, a great many number of otherwise private properties. Alexander, however, declines to argue that the right to regulate cultural property is a category of common property rights held by the affected community. Rather, it is the right to flourish that justifies the exercise of the police power: because there is a right to flourish, and because maintaining cultural heritage causes flourishing, and because destroying cultural heritage in buildings such as Grand Central Station diminishes human flourishing, states are therefore permitted to regulate in order to prevent that diminution. At this point there is a cognizable economic-like argument that rights should be transferred in order to promote efficiency at minimum and flourishing at maximum.

Claiming a right to flourish, particularly one that is fulfilled by the holding in *Penn Central*, is difficult, but perhaps a right to a cultural heritage, protected by the transfer of ownership rights from private owners to the state or community, better serves the kinds of goals that flourishing aims for. This involves turning private property into either state property or common property. As discussed in chapter 2, the Supreme Court has routinely permitted a variety of zoning and regulatory measures, as well as outright takings, that are meant to preserve landmarks, historical and archaeological sites. Regulations of this kind are implemented pursuant to the police power.<sup>233</sup>

According to Louise Grove and Susie Thomas, “[a] wide range of things and concepts may be construed as heritage, whether a physical monument, cultural or natural landscape, object, language, or even a way of life.” The destruction of heritage objects, for example, “causes harm beyond the immediate physical loss, due to the meanings and values which may be attached to it

and the access to collective memory and commemoration that may be lost alongside it.”<sup>234</sup> Buildings, and presumably the ground they are built upon, can be heritage objects which, “because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art, or science.”<sup>235</sup> However,

[h]eritage only becomes ‘heritage’ when it becomes recognizable within a particular set of cultural or social values, which are themselves intangible. Any item or place of tangible heritage can only be recognized and understood as heritage through the values people and organizations like UNESCO give it—it possesses no inherent value that ‘makes’ it heritage.<sup>236</sup>

Intangible cultural heritage includes rituals, family organization, agricultural practices, religious and spiritual beliefs, symbolism, literary histories, performing arts, and festivals based on calendar or games<sup>237</sup> as well as traditional intellectual property rights of folklore and the artists who make it.<sup>238</sup> All claims over tangible cultural property are based on the intangible values of that culture. It is one thing to claim that the people have a right to culture, and quite another thing to claim that they—or the State that is purported to act on their behalf—have property rights in the material objects that semiotically represent their culture. These types of claims can be very specific and parochial or incredibly broad, where all citizens of a state are ‘owners’ of its cultural heritage and the properties (public or private) in which it inheres.

According to Joe Watkins, heritage is a “resource in need of protecting, preserving, or managing. It can have multiple levels of value to multiple groups, and its management may be undertaken by individuals, by groups large and small, and by various branches of local, state, or national government.” Citing Peter Larkham, Watkins writes that the value of heritage takes into consideration *preservation*, or the unchanged form of “site or objects of major cultural significance”; *conservation*, or the restoration of old buildings so that modern use may be made of them; and *exploitation*, which allows for the use of heritage sites for recreation and tourism.<sup>239</sup>

While these designations primary apply to archaeology, historical buildings that are currently in use can also be included as archaeological sites. Such buildings may be places with historical significance that are subject to effort to preserve them in some historical and non-

improved state. According to the Antiquities Act of 1906, “archaeological resources are public resources and their uses should be regulated publicly for a public benefit rather than for private commercial or personal gain.” The act established the policy that “archaeological remains and manifestations of archaeological culture ‘belong’ to the American taxpayer.”<sup>240</sup> For these reasons, Grand Central Station may be a very recent archaeological ‘discovery,’ albeit one with a shorter life than, for example, Mt. Vernon or the Jamestown Settlement.

These types of items and properties are then drafted into service as part of a people’s patrimony and meant to be handed down from generation to generation. They need protection on the grounds that their loss or destruction “amounts to loss and impoverishment of the common cultural heritage of humanity.”<sup>241</sup> The goal of protection, which can assume many forms, from the use of eminent domain to criminal sanctions, “is to conserve human creations that may disappear; give world recognition; strengthen identity; enable social cooperation within and between groups; provide historical continuity; enhance creative diversity of humanity; (and) foster enjoyment.”<sup>242</sup>

In order to make the cultural property argument work for a case like *Penn Central*, Alexander needs to show how Grand Central Station is a work of cultural art, and that permitting its modification—must less its destruction—amounts to the destruction of a cultural property. By permitting the market (via private ownership) to determine the fate of a work of cultural art, which “belongs” to the people of New York (or whomever), we are engaging in the semiotics of a market which ‘represents’ our beliefs about art: it has been commodified, meaning that the market controls its owners’ decisions about its fate, and commodification ‘means,’ according to the semiotic objection, that we devalue it. By denying its commodification and rendering it incompletely commodified, the community can still assert a right in the property as a cultural heritage and, at the same time, not have to use public funds to maintain it—which it would if the city was found to have engaged in a regulatory takings, or if it condemned the building outright. The police power is then drafted into service as a very different beast, one that manifests not merely a concern for health or safety, but a concern for the objection of certain government

officials—and, undoubtedly, a large sector of the public—to a ‘market’ in cultural property. Had the market operated without regulation pursuant to voluntary exchanges within the meaning of economic theory, Grand Central Station would have lost at least part of its façade, and would have gained a skyscraper above it. The resulting building would have (again, according to the objection) semiotically revealed a culture that does not value great art or architecture because it permits a market that deals in this kind of transaction.

The issue here is whether a cultural property would have been lost to commodification, and whether Brennan and Jaworski are correct that the anti-commodificationist argument against a market in this kind of cultural property is unconvincing. The question turns, I believe, on what kinds of *intangible* cultural properties (i.e., properties that do not have monetary value but have other kinds of value) inhere—or do not inhere—within the walls and Beaux-Arts façade of the Station.

In ‘The Authentic Illusion: Humanity’s intangible cultural heritage, the Moroccan Experience,’ Ahmed Skounti offers the example of the Place Jemaâ el Fna in Marrakesh, Morocco. The Place Jemaâ el Fna is a tangible, physical space that cultural advocates want to preserve in order to maintain the intangible cultural events that take place there in the form of human activity: fortune tellers, herbalists, henna tattoo artists, traditional medicine, musicians, preachers, story tellers, acrobats, animal tamer, and the like.<sup>243</sup> Advocates sought to protect the physical space against modernization by the city so that the intangible events can flourish. As Skounti writes, community members complained about the changes to “*their* square,” which is “the square that they had got to know in the first decades of their life” and who regret the changes and “disappearance” of their square.<sup>244</sup> A chaotic public square, owned by the city as public property, is transformed into a ‘masterpiece’ that begs for preservation.

What is interesting about Grand Central Station, as well as the Place Jemaâ el Fna, is that as cultural properties, the actual physical spaces themselves are not important. It is the attitudes towards the spaces, and the intangible human events that populate them, that create the value in

the otherwise (culturally) valueless thing. So, arguing for the preservation of Grand Central Station as a cultural property is not arguing for the preservation of the tangible building, but for the preservation of the intangible cultural events, and the people who create them, that the building is purported to represent. However, unlike the intangible cultural symbolism of, for example, the Statue of Liberty, Grand Central Station's intangible cultural symbolism is unclear. Aside from the millions of commuters who move rapidly through it every day without much thought about its cultural value, the more stable elements in the building are chain restaurants and shops, national and local banks, and tour guide offices.<sup>245</sup> Based on this observation, the most likely intangible cultural heritage symbolized by Grand Central Station is free market capitalism.

What is also interesting about these kinds of claims is the argument against the characterization of cultural heritage as a kind of 'property' in the first place. According to this objection, if cultural heritage is viewed as property, then it is a commodity and the familiar objections from the anti-commodificationists resurface. Even if it is collective or state property, it is *still* property. Many working in this field "try to resist the tendency of heritage discourse to reduce culture to things, (and) we try to counter its privileging of physical fabric over social life."<sup>246</sup> On the one hand, in a private property regime, it might be assumed that the most secure way to prevent a property from being altered or destroyed is to grant someone, such as a private owner, or some thing (such as the State) powerful private property-like rights over the thing. But it must be the *right* owner, one who values the property in a particular condition and protects it against the world. On the other hand, ownership of the thing tends to collapse into ownership of the heritage itself, and this is the key factor in denying property rights in cultural objects to both private owners and the state. In other words, marking out cultural property as a non-commodity that is incapable of being owned (by either state or private owners) may be the best method for its preservation.

John Carman is highly critical of the tendency to characterize cultural objects as ownable property. Using language very similar to Radin's, Carman argues that cultural objects must not

be understood as property, which is what both private owners *and* the State are committed to doing in order to promote their respective interests. Cultural property can possess not simply financial value, but can also possess “the store of symbolic and cultural value the object represents.”<sup>247</sup> Heritage “as a collective store of cultural value is not intended for private ownership; the latter represents the appropriation of a sense of community for the enhancement of an individual’s own status, which in turn denies the very purpose of promotion of objects to ‘heritage’ status.”<sup>248</sup> This does not imply that the State ought to own heritage: although it is assumed that States own their heritage and their heritage objects, Carman objects to State ownership because “what passes to the State is almost invariably either full ownership or the power to exercise ownership-style rights over the object.”<sup>249</sup> Although private ownership results in a “loss of heritage object’s purpose,

we should not suppose that State ownership does anything different. It is much more likely that State ownership diverts heritage value away from the collectivity of members of the community claiming affinity with the heritage object...and towards the State as an institution. The result here is that the institution of the State—only one of a number of ways in which any society may organize itself—accrues to itself the sense of community carried by the heritage, and thereby affirms its own authority as if it is the natural and only legitimate carrier of a sense of community.<sup>250</sup>

In this way, cultural heritage becomes national heritage or patrimony through the possession of cultural property. Carman’s point is that preservation does not require that rights of ownership be granted to either private parties, the state, or even groups of archaeologists acting at ‘stewards’ of the sites. For Carman, when States own property, they assume the same exclusive right of access and use as a private owner, even when the ownership is vested in institutions such as museums or heritage preservation agencies.<sup>251</sup>

Recall, again, Grand Central Station. By restricting the right to alter or destroy a building such as Grand Central Station, the State, in the form of the Landmark Commission, has taken ownership of several sticks in Penn Central’s ownership bundle through its police power. Assuming that the people, through the Landmark Commission, now own several sticks in the bundle, the people or their representatives now have certain property rights in Grand Central

Station. These property rights are based upon the idea that at least part of the Station—the “cultural part”—is ownable in the first place. By ‘protecting’ privately owned property through legislation the State comes to have owner-like discretion over one of more of the sticks in the ownership bundle, and it is the State’s owner-like control over these sticks that permits or denies certain uses, modifications, or commercial prospects of the relevant property. States are obviously owners when they use eminent domain to take title to property, but it is less obvious that they are owners when they regulate in this manner. In other words, if the State owns cultural property by title or through regulation, then the property is owned in the same sense that it might be privately owned, and the State therefore participates in the commodification of the property and in the potential for disrespect that may result from commodification.

Again, Brennan and Jaworski reappear: a market in tangible cultural objects, according to the semiotic objection, signifies disrespect for intangible cultural heritage. However, if the property may be possessed and given away, then property can be sold and the objection can be overcome. Cultural heritage is typically given away, or transmitted, in a variety of ways: it is the method through which cultures pass on traditions, customs, art, and histories. Unless these are expressly ‘bad’ or immoral traditions or customs, then there is nothing immoral about possessing heritage or passing it on. However, the objection is *not* overcome if a market in cultural heritage, where cultural property is traded as a commodity, does in fact reveal a disrespect for the possession or transmission of the heritage as a non-market gift. This is primarily because tangible cultural property itself symbolically or semiotically represents the intangible properties of the culture: rituals, methods of family organization, agricultural practices, religious and spiritual beliefs, and so forth. Brennan and Jaworski’s analysis, I think, is not suited to deal with items that *themselves* have powerful symbolic or semiotic value, in which a market in the tangible goods entails a market in the intangible ones. In such a case, a market in the signified tradition, ritual, or custom *would* disrespect those traditions, rituals, or customs. A market in cultural property would reflect attitudes towards tradition as a ‘commodity,’ and a market in tradition would

disrespect the practitioners of that intangible cultural property. For example, a folk tale might be a cultural property that is normally given away or ‘handed down’ by parents to children as a bedtime story. A market where parents charged their children for the tale would disvalue the cultural property, and indicate that the parents who chose to charge for the transmission of the tale were engaging in an immoral market transaction. Therefore, a cultural intangible such as tradition would be appropriate to possess and give away but not to sell on the market, and Brennan and Jaworski are therefore unable to overcome at least one legitimate semiotic objection.

### **Conclusion**

On one level, takings are all about costs, and asks when the costs of public regulation ought to be left with a property owner and when it should be more broadly distributed and shared by the public.<sup>252</sup> In many cases, the regulated owner benefits from a reciprocity of advantage, where they actually profit over time from the state’s assumption of their costs.<sup>253</sup> When the state seeks to assume the costs, it can take on what had previously been the responsibility of private parties, including impact studies, cost expenditures for experts, surveyors, attorneys, the provision of paid governmental positions, and inspections. Certainly litigation, as an example of a transaction cost, is expensive if it becomes part of the process.<sup>254</sup>

One of the most economically unsavory aspects of takings is the practice of rent seeking, where private parties attempt to secure benefits of eminent domain through lobbying, influence, or appeals to the public.<sup>255</sup> Although it is generally considered that a taking must yield *some* public benefit or advantage, its use to subsidize non-market driven development can allow for eminent domain to produce too many of any given item, e.g., shopping centers, at least some of which would not otherwise be built except for the state’s interference in the market.<sup>256</sup> Oftentimes, “the primary beneficiaries of private takings tend to be real-estate developers, casino consortia, and large national or multi-national corporations,” while “the primary victims of these takings tend to be the economically disadvantaged, the elderly, and racial and ethnic minorities.”<sup>257</sup> While these results may not produce just outcomes for the victims, the efficiency



theorist can justify their implementation if net utility is the goal of eminent domain. Moreover, a recent study found virtually no evidence of a positive relationship between eminent domain activity and the level of state and local tax revenue.<sup>258</sup> In terms of political inclinations which prioritize welfare, it is a mistake to believe that eminent domain results in a more just distribution of property, or that property is flowing top-down from wealthy to poor or even to the public: the property of the wealthy is rarely the target of economic development takings.<sup>259</sup>

If considerations of efficiency decide who owns what, through either a market (voluntary transfers) or through forced or legal transfers by a judge or the state, then private property interests are important only to the extent they promote efficiency. Paraphrasing Rawls, economic theory does not appear to take seriously the distinctions between people's property, primary because private property has only instrumental value for the theory. Economic theory, in general, does not provide a moral justification for the kind of privacy and economic rights argued for in this work. Because of this, economic theory does not protect private property better than the preceding theories, and it is less likely to convince a court that privacy-compromising property regulations (primarily, takings) are unconstitutional. As a result, because private property has more than mere instrumental value, there is no reason to prefer a legal system that uses economic theory to settle property contests.

## Notes

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<sup>1</sup> Quoted by Justice Antonin Scalia in his majority opinion in *Lucas v. South Carolina Coastal Commission* 505 U.S. 1003 (1992), 1017.

<sup>2</sup> Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962, 2002), 12.

<sup>3</sup> According to Stephen Munzer, other social-relations property theorists include Margaret Jane Radin, Duncan Kennedy, and C.B. Macpherson. They are influenced by legal realists Morris Cohen and Robert Hale, and are united in their differences by their criticism of private property and their efforts to implement a social and not individual property regime. Such a regime attempts to weaken the public/private divide, promote egalitarianism in ownership, and use the law as a tool for creating new property rights based on dependence, community, and solidarity. See Stephen Munzer, "Property as Social Relations," in *New Essays in the Legal and Political Theory of Property*, ed. Stephen Munzer (Cambridge: Cambridge University Press, 2001), 36-75.

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<sup>4</sup> A. Mitchell Polinsky, *An Introduction to Law and Economics* (Boston: Little Brown and Company, 1983), 7, n4.

<sup>5</sup> See, e.g., Lionel Robbins, *An Essay on the Nature and Significance of Economic Science* (New York: Macmillan, 1932).

<sup>6</sup> Utility is a “nonexistent entity which plays a part similar...to that of ether in the old physics.” Ronald Coase, *The Firm, the Market, and The Law* (Chicago: University of Chicago Press, 1988), 2.

<sup>7</sup> Frank Hahn, “On some difficulties of the utilitarian economist,” in *Utilitarianism and Beyond*, eds. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), 187.

<sup>8</sup> Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Stanford: Stanford University Press, 1991), 17.

<sup>9</sup> John Rawls, *A Theory of Justice Original Edition* (Cambridge: The Belknap Press of Harvard University Press, 1971), 20.

<sup>10</sup> *Ibid.*, 17.

<sup>11</sup> *Ibid.*, 24.

<sup>12</sup> Bernard Williams and J.C.C. Smart, *Utilitarianism for and Against* (Cambridge: Cambridge University Press, 1973), 79.

<sup>13</sup> *Ibid.*

<sup>14</sup> John Harsanyi, “Morality and the theory of rational behavior,” in *Utilitarianism and Beyond*, eds. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), 54. According to Harsanyi, these preferences are one’s *true* rather than their manifest or expressed preferences. See *Ibid.*, 55.

<sup>15</sup> *Ibid.*, 41.

<sup>16</sup> *Ibid.*, 40.

<sup>17</sup> *Ibid.*, 60.

<sup>18</sup> *Ibid.*, 62.

<sup>19</sup> Partha Dasgupta, “Utilitarianism, information and rights,” in *Utilitarianism and Beyond*, eds. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), 200.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, 201.

<sup>22</sup> Philippa Foot, “Utilitarianism and the Virtues,” in *Consequentialism and Its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), 227.

<sup>23</sup> *Ibid.*, 238.

<sup>24</sup> Amartya Sen and Bernard Williams, “Introduction,” in *Utilitarianism and Beyond*, eds. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), 4 (footnote omitted).

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- <sup>25</sup> Amartya Sen, "Rights and Agency," in *Consequentialism and Its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), 188, footnote omitted.
- <sup>26</sup> J.A. Mirrlees, "The economic uses of utilitarianism" in *Utilitarianism and Beyond*, eds. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), 84.
- <sup>27</sup> Jonathan Wolff, *Robert Nozick*, 18.
- <sup>28</sup> Alan Carter, *The Philosophical Foundations of Property Rights* (Hemel Hempstead: Harvester, Wheatsheaf), 75.
- <sup>29</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 264.
- <sup>30</sup> Richard Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981), 48.
- <sup>31</sup> *Ibid.*, 13.
- <sup>32</sup> *Ibid.*, 49.
- <sup>33</sup> *Ibid.*, 66.
- <sup>34</sup> *Ibid.*, 55 n21 (citing Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977), 71- 72).
- <sup>35</sup> *Ibid.*, 98.
- <sup>36</sup> *Ibid.*, 67.
- <sup>37</sup> *Ibid.*, 67.
- <sup>38</sup> Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 *Harvard Law Review* 1165 (1967), 1207.
- <sup>39</sup> Thomas Miceli, *The Economic Theory of Eminent Domain: Public Theory, Private Use* (Cambridge: Cambridge University Press, 2011), 4.
- <sup>40</sup> *Ibid.*, 1.
- <sup>41</sup> Polinsky, *An Introduction to Law and Economics*, 7 n4.
- <sup>42</sup> *Ibid.*, n5.
- <sup>43</sup> James Buchanan, *Freedom in Constitutional Contract* (College Station: Texas A&M University Press, 1977), 136.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> James Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press, 1975), 19.
- <sup>46</sup> *Ibid.*, 182 n2.
- <sup>47</sup> James M. Buchanan and Roger D. Congleton, *Politics by principle, not interest* (Cambridge: Cambridge University Press, 1998), 9.
- <sup>48</sup> *Ibid.*

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<sup>49</sup> Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown and Company, 1972), 3 (footnote omitted).

<sup>50</sup> *Ibid.*, 3.

<sup>51</sup> Miceli, *The Economic Theory of Eminent Domain*, 5.

<sup>52</sup> *Ibid.*, 7.

<sup>53</sup> Coase, *The Firm, the Market, and The Law*, 2.

<sup>54</sup> *Ibid.*, 7.

<sup>55</sup> *Ibid.*, 9.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, 12.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, 14-15.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, 19.

<sup>63</sup> *Ibid.*, 15.

<sup>64</sup> *Ibid.*, 19.

<sup>65</sup> A.C. Pigou, *The Economics of Welfare*, 5<sup>th</sup> ed. (London: Macmillan & Co., 1952), 329-35.

<sup>66</sup> Coase, *The Firm, the Market, and The Law*, 20, citing Pigou, *The Economics of Welfare*, 331.

<sup>67</sup> *Ibid.*, 24.

<sup>68</sup> *Ibid.*, 135, citing Pigou, *The Economics of Welfare*, 129-130.

<sup>69</sup> *Ibid.*, 27.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, 96.

<sup>72</sup> *Ibid.*, 107.

<sup>73</sup> Miceli, *The Economic Theory of Eminent Domain*, 7.

<sup>74</sup> *Ibid.*, 7.

<sup>75</sup> *Ibid.*, 8.

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- <sup>76</sup> Gary Libecap, *Contracting for Property Rights* (Cambridge: Cambridge University Press, 1989), 16.
- <sup>77</sup> *Ibid.*, 17, 26.
- <sup>78</sup> *Ibid.*, 18.
- <sup>79</sup> *Ibid.*, 26.
- <sup>80</sup> Coase, *The Firm, the Market, and The Law*, 131.
- <sup>81</sup> *Ibid.*, 133.
- <sup>82</sup> *Ibid.*, 117.
- <sup>83</sup> *Ibid.*, 132.
- <sup>84</sup> Miceli, *The Economic Theory of Eminent Domain*, 1-2.
- <sup>85</sup> *Ibid.*
- <sup>86</sup> *Ibid.*, 4.
- <sup>87</sup> *Ibid.*
- <sup>88</sup> *Ibid.*, 11.
- <sup>89</sup> *Ibid.*, citing Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harv. L. Rev.* 85 1089 (1972).
- <sup>90</sup> Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington, D.C.: Island Press, 1999), 199.
- <sup>91</sup> Gregory S. Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), 30.
- <sup>92</sup> Miceli, *The Economic Theory of Eminent Domain*, 10.
- <sup>93</sup> *Ibid.*, 11.
- <sup>94</sup> *Ibid.*
- <sup>95</sup> Lee Anne Fennell, "Taking Eminent Domain Apart," *Michigan State Law Review* 2004: 957-1004, cited in Miceli, *The Economic Theory of Eminent Domain*, 61 n10.
- <sup>96</sup> Harold Demsetz, "Towards a Theory of Property Rights," in *Economics of Property Rights*, eds. Eirik G. Furubotn, Svetozar Pejovich (Cambridge: Ballinger Publishing 1974), 31.
- <sup>97</sup> Miceli, *The Economic Theory of Eminent Domain*, 1.
- <sup>98</sup> Yoram Barzel, *Economic Analysis of Property Rights*, 2<sup>nd</sup> Ed (Cambridge: Cambridge University Press, 1997), 3. Accordingly, Barzel would characterize Demsetz' definition as a *legal* property right.
- <sup>99</sup> *Ibid.*, 4.
- <sup>100</sup> *Ibid.*, 4.

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- <sup>101</sup> Ibid., 87.
- <sup>102</sup> Buchanan, *The Limits of Liberty*, 10.
- <sup>103</sup> Demsetz, “Towards a Theory of Property Rights,” 32.
- <sup>104</sup> Ibid., 34.
- <sup>105</sup> Ibid., 32.
- <sup>106</sup> See Robert Ellickson, *Order Without Law* (Cambridge: Harvard University Press, 1991).
- <sup>107</sup> See Coase, *The Firm, the Market, and The Law*.
- <sup>108</sup> See James Acheson, *Lobster Gangs of Maine* (Hanover: University Press of New England, 1988).
- <sup>109</sup> Demsetz, “Towards a Theory of Property Rights,” 36.
- <sup>110</sup> Buchanan, *The Limits of Liberty*, 18.
- <sup>111</sup> Posner, *Economic Analysis of Law*, 10.
- <sup>112</sup> Ibid.
- <sup>113</sup> Ibid.
- <sup>114</sup> Ibid., 12.
- <sup>115</sup> Ibid., 13 (footnote omitted).
- <sup>116</sup> Buchanan and Congleton, *Politics by principle*, 61.
- <sup>117</sup> Ibid., 62.
- <sup>118</sup> Ibid.
- <sup>119</sup> Ibid., 63.
- <sup>120</sup> Posner, *Economic Analysis of Law*, 21.
- <sup>121</sup> Ibid. (footnote omitted).
- <sup>122</sup> Posner’s use of the term ‘absolute’ refers to Calabresi and Melamed’s distinction between property rights and liability rights. For Posner, a property right in something is absolute when it “cannot be extinguished or transferred without the owner’s consent” (Posner, *The Economics of Justice*, 70). Here, an absolute right is the same as a property – as opposed to a mere liability – right in Calabresi and Melamed’s terms.
- <sup>123</sup> Posner, *The Economics of Justice*, 70.
- <sup>124</sup> Ibid.
- <sup>125</sup> Ibid., 71.
- <sup>126</sup> Barzel, *Economic Analysis of Property Rights*, 128.

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<sup>127</sup> Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer Academic Publishers, 1993), 16 n22.

<sup>128</sup> *Ibid.*, xi.

<sup>129</sup> *Ibid.*, 3.

<sup>130</sup> *Ibid.*, 6.

<sup>131</sup> *Ibid.*, 179.

<sup>132</sup> *Ibid.*, 9.

<sup>133</sup> *Ibid.*, 15.

<sup>134</sup> Dasgupta, "Utilitarianism, information and rights," 200.

<sup>135</sup> Hoppe, *The Economics and Ethics of Private Property*, 106.

<sup>136</sup> Robert Sugden, *The Economics of Rights, Co-operation, and Welfare*, 2<sup>nd</sup> ed (New York: Palgrave Macmillan 1986, 2004), xiii.

<sup>137</sup> *Ibid.*, xiv.

<sup>138</sup> *Ibid.*, 3.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*, 4.

<sup>141</sup> *Ibid.*, 5.

<sup>142</sup> *Ibid.*, 7.

<sup>143</sup> *Ibid.*, 12.

<sup>144</sup> *Ibid.*, 15.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*, 17.

<sup>147</sup> *Ibid.*, 107.

<sup>148</sup> *Ibid.*, 97-98, citing Thomas Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960).

<sup>149</sup> *Ibid.*, 99.

<sup>150</sup> *Ibid.*, 100.

<sup>151</sup> See Sugden, *The Economics of Rights*, *passim*.

<sup>152</sup> *Ibid.*, 102.

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<sup>153</sup> Ibid., 107.

<sup>154</sup> Ibid., 163-164. This point was also argued in chapter 2.

<sup>155</sup> Ibid., 170.

<sup>156</sup> Ibid., 171.

<sup>157</sup> Ibid., 178.

<sup>158</sup> Ibid., 181.

<sup>159</sup> Alexander and Peñalver, *Introduction*, 17.

<sup>160</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 198.

<sup>161</sup> Miceli, *The Economic Theory of Eminent Domain*, 152.

<sup>162</sup> Ibid., xi –xii.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid., 3.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid., 13.

<sup>167</sup> Ibid., 14.

<sup>168</sup> Ibid., 136.

<sup>169</sup> Ibid.

<sup>170</sup> *Miller v. Schoene*, 276 U.S. 272 (1928).

<sup>171</sup> The police power is intended to “protect the public from so-called noxious uses, defined to be those activities that are deemed harmful to health, safety, and welfare, broadly defined.” Miceli, *The Economic Theory of Eminent Domain*, 15.

<sup>172</sup> Buchanan, *Freedom in Constitutional Contract*, 103.

<sup>173</sup> Ibid., 6.

<sup>174</sup> Ibid., 106.

<sup>175</sup> Ibid., 107.

<sup>176</sup> Ibid., 20, 123.

<sup>177</sup> Ibid., 124.



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<sup>178</sup> According to Miceli, economic analysis has shown that the Hand formula “coincides with the efficient standard for determining negligence.” Miceli, *The Economic Theory of Eminent Domain*, 128 (footnote omitted).

<sup>179</sup> Posner, *Economic Analysis of Law*, 22.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*, n2.

<sup>183</sup> *Ibid.*, 23.

<sup>184</sup> *Ibid.*

<sup>185</sup> Miceli, *The Economic Theory of Eminent Domain*, 56.

<sup>186</sup> *Ibid.*, 57 (footnote omitted). A similar point is made by Peñalver. See chapter 3.

<sup>187</sup> Miceli, *The Economic Theory of Eminent Domain*, 15.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*, 27-28.

<sup>190</sup> *Ibid.*, 30.

<sup>191</sup> *Spurs v Del Webb*, 108 Ariz. 178, 494 P.2d 700 (1972).

<sup>192</sup> Miceli, *The Economic Theory of Eminent Domain*, 33.

<sup>193</sup> *Ibid.*, 34.

<sup>194</sup> *Ibid.*, 47.

<sup>195</sup> See Daniel B. Kelly, “The ‘Public Use’ Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence,” *Cornell Law Review* 92: 1-65 (2006).

<sup>196</sup> Miceli, *The Economic Theory of Eminent Domain*, 40.

<sup>197</sup> Joseph Singer, “The Reliance Interest in Property,” 40 *Stan. L. Rev.* 611–751 (1988).

<sup>198</sup> *Local 1330, United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264 (1980).

<sup>199</sup> Joseph Singer, “Democratic Estates: Property Law in a Free and Democratic Society,” 94 *Cornell Law Review* 1009 (2009), 1059 (emphasis added).

<sup>200</sup> Erik J. Olsen, *Civic Republicanism and the Properties of Democracy* (Lanham: Lexington Books, 2005), 27.

<sup>201</sup> *Ibid.*, 278.

<sup>202</sup> Singer, “The Reliance Interest in Property,” 637.

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<sup>203</sup> Ibid., 616.

<sup>204</sup> Ibid., 617.

<sup>205</sup> Singer casts the dispute in Hohfeldian terminology:

“(1) The union claimed both (a) a power to purchase the plant with a correlative liability in the company to have the plant transferred against its will to the union for its fair market price and (b) a right to have the plant not be destroyed with a correlative duty on the company not to destroy the plant if the union sought to exercise its power to purchase. (2) The company claimed both (a) an immunity from having the plant taken away from it involuntarily even with compensation (with a correlative disability in the union to force the company to sell the plant to the union) and (b) a privilege in the company to destroy the plant with the union having no right to legal relief on that account.” Singer, “The Reliance Interest in Property,” 618.

<sup>206</sup> Ibid., 619-620.

<sup>207</sup> Ibid., 621.

<sup>208</sup> Ibid.

<sup>209</sup> “They include, for example, the rules about adverse possession, prescriptive easements, public rights of access to private property, tenants’ rights, equitable division of property on divorce, welfare rights. These currently enforceable doctrines encompass the full range of social relationships, from relations among strangers, between neighbors, among long-term contractual partners in the marketplace, among family members and others in intimate relationships, and finally, between citizens and the government.” Ibid., 622-623.

<sup>211</sup> Ibid., 662.

<sup>212</sup> Ibid., 713.

<sup>213</sup> Ibid., 715-716.

<sup>214</sup> Ibid., 715.

<sup>215</sup> Ibid., 719.

<sup>216</sup> Ibid., 726.

<sup>217</sup> Ibid., 637–638.

<sup>218</sup> Ibid., 638.

<sup>219</sup> “The city may also threaten to use its eminent domain power as a way to force the company to enter into serious negotiations with workers who want to purchase the plant. The possibility that the city might exercise its takings power may make it unnecessary for it to be actually exercised.” Singer, “The Reliance Interest in Property,” 739.

<sup>220</sup> Ibid., 737-738.

<sup>221</sup> This is Leslie Bender’s argument in “The Takings Clause. Principles or Politics?” *34 Buffalo L. Rev.* 735, 816-29 (1985) (arguing for the use of eminent domain only when it redistributes property from the rich to the poor). Bender’s position is discussed in depth in chapter 6. See also *Hawaiian Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>222</sup> Jason Brennan and Peter Jaworski, *Markets Without Limits* (New York: Routledge, 2016).

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- <sup>223</sup> Ibid., 27.
- <sup>224</sup> Ibid., 29.
- <sup>225</sup> Ibid., 21.
- <sup>226</sup> Ibid., 160. See also Michael Sandel, *What Money Can't Buy* (New York: Farrar, Straus, and Giroux, 2012), 21-22, 33.
- <sup>227</sup> Ibid., 33.
- <sup>228</sup> Brennan and Jaworski, *Markets Without Limits*, 159.
- <sup>229</sup> Ibid., 161.
- <sup>230</sup> Ibid., 143.
- <sup>231</sup> Ibid., 147.
- <sup>232</sup> Ibid., 156 (emphasis added).
- <sup>233</sup> “(By) [e]xercising their police power...communities have adopted ordinances to control what the owners of historic buildings can do with their properties.” John Fowler, general counsel to the Advisor Council on Historical Preservation, quoted in *Landmarks Preservation and the Property Tax*, eds. David Listokin et al (New Brunswick: The Center for Urban Policy Research, 1982), 6.
- <sup>234</sup> Louise Grove and Susie Thomas, “Introduction,” in *Heritage Crime: Progress, Prospects and Prevention*, eds. Louise Grove and Susie Thomas (New York: Palgrave, 2014), 3.
- <sup>235</sup> UNESCO, in *The Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972, UNESCO article 1), cited in Grove and Thomas, “Introduction,” 3.
- <sup>236</sup> Laurajane Smith and Natsuko Agakawa, “Introduction,” in *Intangible Heritage*, eds. Laurajane Smith and Natsuko Agakawa (New York: Routledge, 2009), 6.
- <sup>237</sup> Noriko Aikawa-Faure, “From the Proclamation of Masterpieces to the *Convention for the Safeguarding of Intangible Cultural Heritage*,” in *Intangible Heritage*, eds. Laurajane Smith and Natsuko Agakawa (New York: Routledge, 2009), 25.
- <sup>238</sup> Ibid., 15.
- <sup>239</sup> Joe Watkins, “The Politics of Archaeology,” in *Negotiating Culture: Heritage, Ownership, and Intellectual Property*, ed. Laetitia La Follette (Amherst and Boston: University of Massachusetts Press, 2013) (citing Peter Larkham, “Heritage as Planned and Conserved” in *Heritage, Tourism, and Society*, ed. David L. Herbert (Ithaca: Cornell University Press, 1995), 86).
- <sup>240</sup> Watkins, “The Politics of Archaeology,” 20 (citation omitted).
- <sup>241</sup> Smith and Agakawa, “Introduction,” 30 (citation omitted).
- <sup>242</sup> Ibid., 31 (citing UNESCO Action Plan for the safeguarding of ICH as approved by the international experts on the occasion of the International Round Table on Intangible Cultural Heritage – Working definitions, organized by UNESCO in Turin, March 2001)

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<sup>243</sup> Ahmed Skounti, “The Authentic Illusion: Humanity’s intangible cultural heritage, the Moroccan Experience,” in *Intangible Heritage*, eds. Laurajane Smith and Natsuko Agakawa (New York: Routledge, 2009), 85-87.

<sup>244</sup> *Ibid.*, 87 (emphasis in original).

<sup>245</sup> See <http://www.grandcentralterminal.com/directory> (accessed October 7, 2016).

<sup>246</sup> Denis Bryne, “A critique of unfeeling heritage,” in *Intangible Heritage*, eds. Laurajane Smith and Natsuko Agakawa (New York: Routledge, 2009), 229.

<sup>247</sup> John Carman *Against Cultural Property: Archaeology, Heritage, and Ownership* (London: Duckworth, 2005) 73.

<sup>248</sup> *Ibid.*, 74.

<sup>249</sup> *Ibid.*, 76.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*, 119.

<sup>252</sup> Meltz, Merriam, and Frank, *The Takings Issue*, 103.

<sup>253</sup> *Ibid.*, 216.

<sup>254</sup> *Ibid.*, 335.

<sup>255</sup> See, e.g., Carla T. Main, *Bulldozed: “Kelo,” Eminent Domain, and the American Lust for Land* (New York: Encounter Books, 2007).

<sup>256</sup> David A. Dana and Thomas W. Merrill, *Property: Takings* (New York: Foundation Press, 2002), 201.

<sup>257</sup> Kelly, “The ‘Public Use’ Requirement in Eminent Domain Law,” 6. This point is emphasized in Chapter 6.

<sup>258</sup> Carrie B. Kerekes and Dean Stansel, “Takings and Tax Revenue: Fiscal Impacts of Eminent Domain,” Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, October 2014. <https://www.mercatus.org/publication/takings-and-tax-revenue-fiscal-impacts-eminent-domain> (accessed Jan. 11, 2017).

<sup>259</sup> Main, *Bulldozed*, 112.



## Chapter 6

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### *What's Wrong with Eminent Domain: the Case for a Constitutional Property Right*

“Our Constitution places the ownership of private property at the very heart of our system of liberty.” Barack Obama<sup>1</sup>

As Frank Michelman observes, “there is a puzzle about how to understand the idea of constitutionally guaranteed property rights within a regime of popular democracy.”<sup>2</sup> The puzzle, he continues,

is just that it is both an implicit premise of the constitutional system that individual holdings are always subject to the risk of occasional redistributions of values through the popularly ordained operations of government, both active and regulatory, and an explicit premise of the system that people can have property, be owners, not only as among themselves but also vis-a-vis the people as a whole organized as the State. And therein surely seems to lie a contradiction.<sup>3</sup>

This final chapter attempts to solve the puzzle by resolving the contradiction between property and popular sovereignty in the form of regulations including, primarily, eminent domain. Prior chapters have attempted to determine what are the best arguments for the *moral* property right. This chapter is about how the moral right becomes a political or legal right. Here, I make the case for the establishment of privacy and property rights as constitutionally protected fundamental rights. The discussion turns on the distinction between a right and a fundamental right. There are many rights, but the classification of a right as fundamental grants it special moral *and* legal protections, and different classifications require the state to meet different burdens and standards of review when its laws impact or infringe upon those rights. The United States Supreme Court for example, recognizes the civil rights of speech, religion, and reproductive freedom, as fundamental rights. The establishment of property as a fundamental right, on a par with these civil rights, seeks to establish what James Riker calls the commensurability between property and

other civil rights, and it is privacy that provides the connection between property and civil rights and thereby establishes their importance for the promotion of personhood and liberty. This jurisprudence permits the state, based on the rational basis standard of review, to take private property through eminent domain actions which, I believe, constitute the apex of privacy and property rights infringements. Other rights, such as speech and reproductive rights, enjoy protection by the much higher standard of strict scrutiny. The point is to provide similar constitutional protection for property as currently exists (and should exist) for privacy. This formulation of the property rights gives courts and legislators a method for evaluating property claims that is not only more perspicacious than present formulations, but also respects rights and protects interests.

Although I will take a variety of approaches to constitutional interpretation, I do not use, and nor do I need, any *particular* version of constitutional interpretation to make this argument. Nor do I take any normative position about which version is the correct one. That being said, it is beyond any serious doubt that 1) the Constitution protects privacy, property, and private property to some extent; 2) the Takings Clause permits some coercive or forcible takings; and 3) a change in the private property right can be affected by judicial review. Using these baseline assumptions, I will argue in this chapter for a constitutionally protected private property right that is protected by the strict scrutiny standard of review, which requires the state to justify incursions into property in the same way that the state must justify incursions into other fundamental rights.

As a personal or individual right, the property right is an exercise of *economic liberty*. Randy Barnett defines economic liberty as “the right to acquire, use, and possess private property and the right to enter into private contracts of one’s choosing. If the Constitution protects these rights, then the Constitution does protect economic liberty.” For Barnett, the evidence for Constitutional protection of private property and contract rights is “overwhelming.”<sup>4</sup> Barnett locates this evidence in the Privileges or Immunities Clause, the Due Process and Equal Protection Clauses, and the “original meaning of the Ninth Amendment.” Because the Supreme

Court has eliminated or ignored these, it has “deprived Americans of these express protections of all their natural rights, including their rights ‘to make and enforce contracts’ and ‘to inherit, purchase, lease, sell, hold, and convey real and personal property.’”<sup>5</sup>

I am not going to rehash Barnett’s claims for locating a fundamental property right in those clauses, but I am no less sanguine about finding a fundamental right to private property elsewhere in the Constitution and its related jurisprudence. In section 1, I make the case for a private property right protected by the strict scrutiny standard of review. In that section, I discuss the background of how the standard of review is framed by the idea of fundamental rights, the kinds of scrutiny used by the courts, and how the courts have bifurcated property from other rights. I also show how the property right is intertwined with the privacy right, and how the privacy interest in homes plays a key role in justifying the property interest in them as well. In section 2, a series of objections to the right—from Thomas Christiano, Frank Michelman, Jed Rubenfeld, and Itai Sened—are squared with the arguments in favor of the right. In section 3, “The Politics of Takings,” I explore the use of eminent domain to advance redistributive and egalitarian goals, and then offer a number of explanations why communities are not more prone to use their right of democratic governance to pursue those goals. Section 4 challenges those explanations, and examines how one national community, South Africa, has used constitutional property and eminent domain to rectify past and present injustices in both ownership and distribution, with the understanding that the idea of a constitutional right to property is capable of responding to specific cultural situations in order to satisfy the demands of justice.

### **Section 1. Making the Case for Strict Scrutiny**

In terms of judicial review, eminent domain and property regulations in general are subject to the rational basis standard, whereby legislation is constitutionally permissible if it is rationally related to a legitimate government objective.<sup>6</sup> Although there have been indications by the Supreme Court that the use of eminent domain may command a higher level of review, courts have not applied it. The courts had previously applied a much closer standard when scrutinizing



economic regulation, and their abandonment of close scrutiny of economic regulation meant ‘hands off’ of almost all legislative regulation of property rights. The more demanding standard, known as strict scrutiny, is applied when legislation infringes fundamental rights or implicates a suspect classification such as race. If legislation implicates fundamental rights such as speech, religion, or procreation, the legislation will be struck down unless it is ‘necessary to achieve a compelling governmental objective.’<sup>7</sup> Although some privacy claims enjoy strong protection by the Court, property claims are much less likely to be protected because the property right has not been held to be a fundamental right. Were the right to private property a fundamental one, then laws and regulations that affect the right would be subject to this much higher standard of review, and, I believe, many of the traditional uses of eminent domain—particularly those which permit its use for the taking of private homes for economic development—would be unlikely to withstand judicial review.

Procedurally, the private property right is created, so to speak, by the same jurisprudential procedure as, for example, the fundamental right of reproductive freedom: a high court—here, the United States Supreme Court—analyzes the applicable rules to determine whether a particular rights claim can be supported by the jurisprudence which has defined and refined the claim through legislation, history, and the common law of the jurisdiction. In the case of reproductive freedom, the Supreme Court found a right to privacy in both the Constitution and the social facts of marital and reproductive life that resulted in their determination that reproductive rights were fundamental, which rendered unconstitutional most of criminal sanctions which sought to bar the exercise of the right.<sup>8</sup> A Constitutional right to privacy protects the reproductive right by nullifying the state’s ability to violate the enjoyment of the right through sanctions, but the right can be limited if legislation is able to satisfy strict scrutiny.<sup>9</sup> Fundamental rights that are protected by strict scrutiny require that any law that has a substantial impact on the right must be narrowly tailored to advance a compelling state interest, and the law must be necessary to advance that

interest. The First Amendment speech right is similarly protected, and also requires the state to satisfy strict scrutiny in order to infringe it.

Part 1 discusses the kinds of scrutiny the Court has used to review property legislation and looks at the major cases. Part 2 shows what is wrong with the process of bifurcation—the partitioning of rights between economic and noneconomic—that the court has followed. Part 3 makes the case for the constitutional right, and part 4 discusses the role of judicial review in making that case.

### **Part 1. The Road to *Kelo*: Scrutiny from Footnote four to *Midkiff* to *Nollan***

According to Stephen Macedo, it is generally agreed that the Court’s inclusion of economic and property rights with other civil rights during the so-called *Lochner* era ended when the Court decided to give its imprimatur to New Deal legislation primarily in terms of an expanded commerce clause. For Macedo, the resulting “virtual non-review of cases involving economic liberty is an unconstitutional standard”<sup>10</sup> which I shall call *bifurcation*. Due to the bifurcation or division of rights by the Supreme Court in the famous footnote 4 of *Carolene Products*,<sup>11</sup> federal courts have held that legislatures may regulate economic rights using the police power or through eminent domain pursuant to the rational basis test, but are only permitted to regulate other noneconomic rights such as reproductive freedom or freedom of religion at the higher, or strict scrutiny, level of review. Because the Constitution does not provide for bifurcation, the Court should recognize economic and property rights by granting them a higher level of review.

There is “universal” agreement that the Supreme Court created a division between rights in footnote 4 of *Carolene Products*.<sup>12</sup> In essence, footnote 4 established different levels of review for what the Court determined to be different categories of rights. At issue in the case was the constitutional validity of the Filled Milk Act, through which Congress criminalized the interstate commercial trade of products which contained both milk and nonmilk fats. Pursuant to the act, the producer of ‘Milnut,’ a product which added coconut oil to condensed skimmed milk, was criminally charged with producing an “adulterated article of food, injurious to the public

health.”<sup>13</sup> The Court held that the act did not deprive the owner of his property without due process of law, and therefore the act did not transcend Congress’s power to regulate interstate commerce.

The court approved of Congress’s determination that Milnut and similar products are, in effect, nuisances, and that possession or production of them can subject violators to criminal prosecution. When Congress or other legislatures create statutes, Justice Stone writes, “the existence of facts supporting the legislative judgment is to be presumed,

for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”<sup>14</sup>

After establishing the rational basis standard for this kind of legislation, which permits the Congress to criminalize the manufacture or sale of a commercial product by regulating an economic right, the famous footnote 4 follows, which establishes a higher level of scrutiny for other noneconomic rights.

Although the note itself is somewhat obscure, there is little disagreement over its impact nor over its establishment of a bifurcated set of rights. According to Justice Stone, economic or property rights deserve less protection through the rational basis standard of review, which presumes the constitutionality of legislative enactments, while rights expressly protected in the Bill of Rights, or the rights of “discrete or insular minorities,” deserve “more searching judicial inquiry.”<sup>15</sup> These provisions are typically reserved for First Amendment type rights, privacy rights, or for the protection of unpopular political views. The outcome, according to constitutional property scholar James W. Ely, Jr., is a “judicially created dichotomy between property rights and personal liberties” and therefore a “sharply limited concept of property rights.”<sup>16</sup>

Bifurcation, and the use of the rational basis standard for property rights, guided the courts until *Nollan v California Coastal Commission*,<sup>17</sup> a regulatory takings case. The Nollans

owned a beachfront bungalow property that was situated between two public beach properties. When they applied for a permit to demolish the bungalow, the California Coastal Commission conditioned the permit upon the Nollan's provision of an easement consisting of a lateral access path across their rear (beach facing) property, so that the public could easily traverse from one public area to the other. The Nollans sued on the grounds that the condition constituted a violation of the takings clause. The Supreme Court agreed, holding that the state could not condition the issuance of the permit upon the Nollan's granting of a permanent public easement. The state could either pay for the easement without taking title to the property as a regulatory taking, or use eminent domain to take title to the strip of land. Either way, "it must pay for it."<sup>18</sup>

In terms of the appropriate standard of review, Justice Scalia writes "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."<sup>19</sup> As Jerold S. Kayden writes, the Court came close to applying strict scrutiny in footnote 3 of the case.<sup>20</sup> In that footnote, Justice Scalia writes

[o]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U. S. 255, 447 U. S. 260 (1980), not that "the State could rationally have decided" that the measure adopted might achieve the State's objective.

Justice Scalia seems incorrect here. In *Midkiff*, a case decided after *Agins* but before *Nollan*, the court found that in takings cases, the scope of public use is "coterminous with the scope of a sovereign's police power," and the standard for the public use clause requires that "the exercise of eminent domain power is rationally related to a conceivable public purpose."<sup>21</sup> *Midkiff*, of course, held that the use of eminent domain was rationally related to the state's interest in regulating and preventing oligopoly on the grounds that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."<sup>22</sup>

The most recent statement of the standard of review is found in *Kelo v. City of London*.<sup>23</sup> The Kelo case involved the use of eminent domain against residents of Fort Trumbull, a large, non-blighted neighborhood in New London, Connecticut. The city set out to purchase ninety acres of property in Fort Trumbull in order to turn the property over to the Pfizer pharmaceutical company, who intended to build facilities for the corporation that would include hotels, retail space, a corporate center, and other amenities. The city would own the property, and Pfizer would be the tenant. Although many residents accepted compensation and moved out after the plan was announced, Susette Kelo and six other owners did not. After losing at both the trial court and the Connecticut Supreme Court, Kelo and the others found themselves before the United States Supreme Court. As Ilya Somin notes, the NAACP, the Southern Christian Leadership Conference, the AARP, and the Hispanic Alliance of Atlantic County filed *amicus curiae* briefs in support of the plaintiffs. *Amicus* for the city were filed by development planners as well as state and local governments, groups which, Somin writes, “had an obvious and understandable interest in minimizing judicial scrutiny of the exercise of their eminent domain authority.”<sup>24</sup> In a 5-4 decision, the Court, per Justice Stevens, upheld the condemnation as a legitimate use of the takings clause, and found that the public benefit generated by the proposed use of the property constituted the ‘public use’ required by the clause.

According to Somin, *Kelo* is the first time the court permitted a nonblighted transfer for economic development.<sup>25</sup> In terms of the kind of scrutiny applied in the case, Somin writes that *Kelo* represents a limited withdrawal from the “ultradeferential approach adopted in *Berman* and *Midkiff*” by giving courts more power to scrutinize takings.<sup>26</sup> To that extent, *Kelo* is slightly more protective than rational basis.<sup>27</sup>

In his concurrence with Justice Stevens’ majority opinion upholding the use of eminent domain, Justice Kennedy concurred that the rational basis test does not constitute “complete deference” to the legislature. In doing so, “he left open the possibility that some takings,” such as

private takings that show a favoritism to private parties, should be presumed invalid.<sup>28</sup> In those cases, “a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate” if takees can show a presumption of “impermissible favoritism.”<sup>29</sup> But Kennedy does not elaborate, and it remains to be seen how or when this standard of review is to be implemented. The dissents concluded that private-to-private economic takings are unconstitutional. Otherwise, there is no meaningful limit on scope of condemnation.<sup>30</sup> As Justice O’Connor writes: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>31</sup> The slight adjustment of the rational basis standard suggested in *Kelo* has not had any significant impact upon the continued use of bifurcation by the courts in terms of economic and noneconomic rights.

## **Part 2. What’s Wrong with Bifurcation**

Indirectly referencing bifurcation, Gerald Gaus asks: “All liberals agree that at the core of their theory are persons with rights to bodily integrity, freedom of association, and freedom of conscience and speech...At what point does the person include her property?”<sup>32</sup> It is possible to interpret the Constitution as providing for the right based upon an interpretation of the due process and takings clauses that finds private property to be a fundamental right because of its inextricable relationship to personhood, liberty, and privacy. Because of this relationship, the Court should find that property and economic rights deserve the same strict standard of review currently applied to laws and regulations that impact other fundamental rights. This is facilitated, initially, by showing what’s wrong with bifurcation, and then refusing to make the kind of distinction between rights initiated by the Court in footnote 4 of *Carolene Products*. According to Jonathan R. Macey, this distinction between rights is untenable because of the “lack of a well-articulated basis upon which a distinction between economic rights and other human rights can be made.”<sup>33</sup> Like Macey, I show that “constitutional law should accord property rights the same dignity accorded other sorts of rights.”<sup>34</sup> Specifically, private property should be accorded the

same protection as other privacy rights because private property, just like private thoughts, conscience, or reproductive decisions, are all derivations of the general, fundamental right to privacy. In order to justify bifurcation— “the false distinction of preferred rights”<sup>35</sup>—the Court needs to show why “property and economic rights are less important to ordered liberty than other fundamental rights;” however, as Keynes writes, “there is no constitutional basis for distinguishing among property, economic, or other personal liberties.”<sup>36</sup> The court has, in fact, recognized this lack of distinction. In *Lynch v. Household Finance Corp.*, Justice Stewart writes

the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a "personal" right, whether the "property" in question is a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.<sup>37</sup>

However, despite this strong support against bifurcation, the Court has not yet found property to be a fundamental right. Speech, religion, procreative, and marital rights are clearly protective of the private nature of one’s conscience, belief system, and intimacy, and these attributes of personhood are private because of the limited nature of the public’s right to interfere with them. These attributes of personhood are also implicated when a person establishes private interests in external zones such as the home; in fact, the exercise of privacy is impossible without correspondingly private zones in the form of property, land, or residences. As classical scholar Fred D. Miller writes, “private property necessarily has a central place in any account of the private sphere, since it defines the location and means of private activities.”<sup>38</sup> The private property right provides security so that private actions can take place. Because these rights are no less fundamental than speech, religion, travel, and marriage rights, they should enjoy the same level of constitutional protection particularly when the property right is viewed as an extension of the core privacy right.

This understanding of privacy refuses to prioritize civil rights over property rights through the choice of different levels of judicial review. The fundamental liberty to speak or

worship should not be valued higher than the interest in reproductive freedom, and speech rights should not be preferred over the right to keep one's property against the use of eminent domain. Therefore, the interest in not being forcibly evicted from one's home by the state is no less fundamental than the interest in not being punished for the exercise of speech or reproductive rights. By distinguishing between the preferred freedoms of speech, liberty, and privacy and property rights, the Court has engaged in what Macedo calls an indefensible "double standard"<sup>39</sup> that ignores both the similar origins of these rights as well as their common foundation in the right to exclude and the duty not to interfere. The double standard means that the court applies strict scrutiny for laws that interfere with "preferred freedoms" such as speech, religion, and privacy or suspect classes/discrete and insular minorities, but rational basis for economic liberties and property rights.<sup>40</sup>

According to Macedo, "[p]roperty rights, the freedom to engage in a particular occupation, and other economic rights converge with personal values such as the security of the home, the survival of valued communities and associations, and the pursuit of happiness in a freely chosen way of life."<sup>41</sup> Therefore, "[p]ersonal security and privacy are...clearly linked with property ownership."<sup>42</sup> Because of the importance of these values, Macedo and I agree that the Court should apply a "heightened level of scrutiny to cases where individual economic liberty is at stake."<sup>43</sup>

William Riker makes a series of comparisons and analogies between the civil right of free speech and the right to private property. He locates the origin of these rights in the English common law beginning with the Magna Carta, where they are "conceptually intertwined and treated identically."<sup>44</sup> He argues that the civil rights and the property right protected similar interests against both other citizens and the King. To that extent, Riker writes, "[c]ivil and property rights look very much alike."<sup>45</sup> Riker's point is that civil rights are necessary for political participation, economic rights are necessary for economic participation, and that political and economic participation are intertwined.



Macey makes the claim for the fundamental right to property based on the implications of a bifurcated rights system for democratic politics. He argues that a bifurcated system permits political authorities to obtain, through regulation, private goods that are then redistributed or 'brokered' as public goods based upon the amount of influence from interest groups supporting one distribution over another.<sup>46</sup> In order to prevent any one group from having too much influence, these "interest group wealth transfers" ought to be costly, meaning that there ought to be a system of Constitutional separation of powers which regulates whether and how much political influence will result in judicially-sanctioned legislation. Under such a system, each branch of the government has "the authority to curb the activities of the others."<sup>47</sup>

According to Macey, the separation of powers doctrine has failed because the judiciary has failed to stop Congress's "propensity to transfer wealth from the politically disorganized to the politically powerful."<sup>48</sup> The politically disorganized group that supplies the transfers and are subject to regulation are "the public," who are not represented in the interest group bargaining process.<sup>49</sup> When the public is taxed through economic regulation, their wealth is brokered by political authorities who are committed to spending that wealth on funding legislation which benefits the authorities themselves and the interest groups that successfully lobbied for the legislation. Because the judiciary has abdicated their 'check' of this kind of political activity by bifurcating rights into legislatable, or economic, and nonlegislatable, or fundamental, rights, public goods are produced through the economic theory of regulation, or public choice theory.<sup>50</sup> Under this theory, "statutes are treated as commodities that are purchased by individual interest groups or coalitions of interests groups that outbid and outmaneuver other interest groups in the political process."<sup>51</sup>

According to this theory, economic rights are bifurcated from other rights in order to facilitate wealth redistribution by politicians. Redistribution finances the state and provides, through legislation, a variety of public goods. Were economic rights not bifurcated from other

rights, and were they subject to the same level of constitutional review as other rights, politicians would not be able to fund the state, and nor would they be unable to create public goods from private goods. Bifurcation is therefore a political decision made by political authorities in order to further statist objectives. According to Macey, bifurcation is possible due to “the decline of strict judicial scrutiny of legislative interference with economic rights,” which makes it easier for interest groups to influence Congress’s power to instigate wealth transfers.<sup>52</sup> One of the ways to achieve this is to give “special interest legislation a public interest façade.”<sup>53</sup> This is most clearly visible in the justification of regulation and takings (through public use or police power) predicated on the promotion of public welfare.

Macey suggests that legislators ‘permit’ noneconomic rights because, at least in terms of the speech and assembly rights, they allow special interests groups to form and then seek the implementation of their interests through legislation sponsored by elected officials. Legislators gain from nonregulation of noneconomic rights, and benefit from regulation of economic rights. Noneconomic rights and freedoms, which provide “protection against government interference”<sup>54</sup> in many areas, benefit their holders by promoting freedom and generating social welfare, and they also have low costs or externalities.

According to Macey, “the activities that take place within the private sector are, by definition, voluntary. By contrast, those activities that take place within the public sector under the authority of the state are, by definition, coercive; they would not exist without the nonvoluntary funding of those who are taxed to support them. Protecting economic liberties is, therefore, instrumental to protecting noneconomic liberties.”<sup>55</sup> There ought to be a strong, cognizable connection between coercive legislation and its intended benefit or purpose. According to Macey, the rational basis standard reduces litigation opportunities for the public and ‘exposure’ of the legislation by the judiciary. “From a public choice perspective, this judicial deference to Congress has deprived the public of an important source of information about the activities of Congress.”<sup>56</sup> Therefore, a stricter standard of review over property and economic

legislation would better protect both economic and noneconomic rights, and courts are obligated to establish this level of review in order to properly re-situate economic among noneconomic rights.

In regards to this issue, Edward Keynes asks when is property a “constitutionally protected private realm that is beyond consideration of public welfare?”<sup>57</sup> One way to repair the fissure of bifurcation is by showing that economic and property rights, as substantive rights, deserve substantive due process protection. A substantive due process right to property would provide such a place. In a line of majority and dissenting opinions by Justice Hugo Black, Black opined that there no substantive due process protections for economic rights,<sup>58</sup> but also that there are no similar protections for personal rights such the use of contraceptives.<sup>59</sup> As Keynes observes, the *Griswold* and *Casey* cases invoke due process in order to produce substantive privacy rights, but the Court otherwise repudiates “substantive due process as a protection of economic and property rights.”<sup>60</sup> This requires the Court to make a distinction, resulting in bifurcation, between categories of rights. For Keynes, courts should not make this distinction because the Constitution does not make it either.

As Randy Barnett has forcefully argued, footnote 4 has not been strictly observed, and that is a good thing for both privacy and property advocates. According to Barnett, Justice Douglas’ opinion in *Griswold* challenged footnote four by providing heightened scrutiny to privacy, a nonenumerated right. Douglas “distanced himself from *Lochner*” and its reliance upon the idea of substantive due process, yet still found a substantive right to privacy.<sup>61</sup> As a result, Barnett writes, “the right of privacy...violated the post-New Deal jurisprudence of Footnote Four.”<sup>62</sup> This would also be true of the Court’s opinion in *Casey*, which found that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before.”<sup>63</sup>

Barnett calls this kind of judicial decision-making “footnote 4 *plus*,” in which the Court takes footnote 4 and adds privacy and perhaps other rights, but still allows the court to pick and

choose which rights receive rational basis or strict scrutiny due to their status as fundamental or nonfundamental rights. Barnett argues that the bifurcation of rights in footnote 4 “runs afoul of the text of the Constitution” and footnote 4 plus does the same by letting judges “pick those unenumerated liberties they deem fundamental from those they dismiss as mere liberty interests.”<sup>64</sup>

According to Barnett, the “pure” footnote four approach would deny strict scrutiny not only to property rights, but also to many of the other rights intrinsically bound to the implied yet substantive privacy right.<sup>65</sup> Both privacy and property rights deserve equal protection, and therefore the court’s reliance upon bifurcation pursuant to the footnote should be discontinued. As a result, according to Barnett’s analysis, “virtually all current possessory crimes, such as laws that make illegal the possession by competent adults of ordinary firearms, intoxicating or therapeutic drugs, or pornographic images, are improper and unconstitutional.”<sup>66</sup> Discontinuance would also, I maintain, protect against other incursions into property through eminent domain or other types of property regulation.

A final note in light of Barnett’s libertarian objection to footnote 4. As Riker observes, the *Carolene Products* case itself is an example how bifurcation has operated to not only violate property rights, but also to inhibit what Macey calls “exposure” of improper influence on the legislative process. According to Riker, The Filled Milk Act was special interest, or protectionist, legislation designed to favor condensed milk processors, in that “the purported public-interest justification was a transparent masquerade for legislation that protected one segment of the dairy industry against another. The statute expropriated the property of one lawful business to the benefit of another and deprived the public of an inexpensive, healthy alternative to condensed milk products.”<sup>67</sup> Ely concurs that the case arose out of the “dairy industry’s long standing campaign against filled milk, a type of evaporated skimmed milk.”<sup>68</sup> Congress passed this special interest and anti-competitive legislation by making the determination that filled milk was injurious to health, and the Court simply accepted that determination as an exercise of the

government's police power. Supporters of the prohibition of, for example, marijuana, would find much of interest in this kind of judicial deference. Opponents, including those of us who believe that use of marijuana is protected by a variety of *substantive* privacy, property, and private property rights (including a right against punishment), would encourage a much higher level of review because of prohibition's impact on those fundamental rights.<sup>69</sup> Clearly, political opposition to items such as firearms would also benefit from strong or statist rules about property regulation, including the facilitation of increased police powers and an increased use of eminent domain, which, according to Robin Paul Malloy, "embodies a strongly emerging trend toward statist ideology."<sup>70</sup>

### **Part 3. Locating the Right: The Case for Constitutional Property**

In order to overcome bifurcation and determine that economic or property rights are constitutionally protected fundamental rights, courts must be able to 'find' the private property right within the constitutional jurisprudence. This right to property is already, so to speak, *there*. For example, the right to privacy was found through a lengthy discursive process that includes cultural evidence, statutory findings, the impact of criminal prosecution, first amendment rights, reference to other rights, and other considerations.<sup>71</sup> This right was found to be a fundamental right, despite the oft-repeated claim that the word privacy is not found 'anywhere' in the constitution. This claim is often made in order to deny that the constitution protects abortion or other privacy-related rights. But the claim that the word "privacy" is not in the Constitution is only half true.

"Privacy" is the noun form of the word "private," which is an adjective. For every instantiation of the noun "privacy," (e.g., when a person wants some privacy in order to ruminate over an important decision, in which case privacy is a noun or a thing, or, in this case, a place), there is a corresponding instantiation of the adjectival "private" (e.g., if that person finds some privacy for their deliberations, the place they have found, such as a room or perhaps simply their

own thoughts, is private). If a place is private is means that privacy is found there. Therefore, the use of the noun “private” always entails the adjectival or descriptive word “privacy.”<sup>72</sup>

The word “private” appears exactly *once* in the Constitution: in the takings clause. It is not used in conjunction with the word “right,” but, of course, that word also does not appear in conjunction with religion, speech or press—although it is used the final phrases of the First Amendment (“or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). It is also not used in the Third Amendment’s “right” against the quartering of soldiers, and nor is it used in the Fifth Amendment’s detailed protection of due process “rights.” Interestingly, the Fourteenth Amendment, which is universally understood to provide extensive equal protection rights, only explicitly mentions the “right to vote.” There is no real controversy over whether these provisions provide fundamental, constitutionally protected rights to equal protection, to the free exercise of religion, to speech despite the absence of the word “right.” Why should there be controversy over the right to private property? Or, more pointedly, to the existence of a right to privacy as an enumerated right—as the *only* enumerated privacy right—in things such as the Fourth Amendment’s ‘persons, houses, places, and effects’? The “enumerated right,” a phrase that only appears in the Ninth Amendment, found in the Fourth Amendment includes “the right of the people to be secure” in those places, and this right has been determined to be a penumbral source of the right to privacy when jurists have sought to locate such a right.<sup>73</sup> But the privacy right has always existed in the phrase “private property” despite the “second class” treatment of the right by various jurisprudential camps since, primarily, the rise of New Deal economic legislation in the 1930s. The kind of private property right referred to in the takings clause is precisely the kind of private property right advocated for here.

This is not a purely ‘textualist’ or literalist argument. Other historical factors, including the fact that the protections of the takings clause were the very first rights incorporated by the Fourteenth Amendment and applied to the states<sup>74</sup> also suggest the existence of a fundamental property right. Nor is the property right being cherry-picked from the rest of the Constitution,

which is replete with detailed references to property-like rights as well as the more established privacy rights. These references suggest that certain types of property are specifically protected. It is clear that arms have a special type of protection,<sup>75</sup> as do ‘persons, houses, papers, and effects.’<sup>76</sup> The First Amendment would suggest that books and things related to the press are specifically protected, and the same amendment suggests that places of worship, and the items used there (candles, votives, religious texts) also have some special protection. And, as stated above, the Third Amendment prohibits the quartering of soldiers in homes, and this clearly means private homes.

In Article 1, section 8, clause 8, the Constitution protects the property of “author and inventors,” such as books, creative works, and intellectual property, by granting them “the exclusive Right to their respective Writings and Discoveries.” Clause 1 of that section also empowers Congress “To lay and collect Taxes, Duties, Imposts and Excises” which “shall be uniform throughout the United States.” However, according to Section 9, clause 5, Congress lacks the power to tax or duty “Articles exported from any State,” (i.e. things or property). Clause 6 of the same section provides that “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” States may not “make any Thing but gold and silver Coin a Tender in Payment of Debts” (Section 10, clause 1), and nor shall they, without the Consent of the Congress, lay any “Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.” (Section 10, clause 2). Article VI, section 1, ensures that prior debts incurred “before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation,” and Amendment 18, repealed by the 21<sup>st</sup>, prohibited “the manufacture, sale, or transportation of intoxicating liquors.” These examples show that the Constitution clearly considers the role of property in its purview of the rights of citizens, states, and the Federal

government. This right is most clearly found in the right to private property expressed by the takings clause.

I argued in chapter 3 that homes deserve heightened constitutional protection. Although the Court has provided powerful protections for noneconomic rights and other private activities that take place inside homes, why has it not protected homes themselves? As Barros argues, homes should be protected by a higher level of scrutiny “to better ensure that homes taken by use of eminent domain are in fact required for public use,”<sup>77</sup> and to ensure that a higher-than market value compensation is provided to owners for the personal interest in the home.<sup>78</sup> As Barros observes, the *Kelo* majority “did not even discuss the possibility that homes could be treated differently than other types of property in the eminent domain context.” When taking into consideration the fact that homes enjoy strong protection in Fourth Amendment situations, “the Court's failure to address the unique nature of the home is striking.”<sup>79</sup>

For Barros, the private and personal interest in the home should lead legislatures to “restrict the scope of public use by prohibiting the taking of homes for purposes of economic development,” but also for “non-controversial uses such as roads and schools.” Heightened scrutiny would “permit municipalities to take a home only after making a finding that the property could not be purchased voluntarily and that there was no reasonable alternative course of action that would achieve the same public goal. Legislatures could take other steps to encourage municipalities to seize homes only as a last resort, such as requiring the payment of a premium above fair market value as compensation for taking a home.”<sup>80</sup>

Ilya Somin provides a cautious warning about this kind of approach. Although “condemnation of homes often inflicts great suffering,” the same can be said for “houses of worship and various other nonprofit institutions” as well as small businesses.<sup>81</sup> Also, Somin notes that the purpose of the kind of heightened scrutiny Barros recommends is to ensure that the public receives clear and significant benefits from the taking. “Unfortunately,” Somin writes, “the test creates a perverse incentive to increase the amount of property condemned than reduce it.”<sup>82</sup> As a



result, the bigger the development, the easier it becomes to claim it is ‘reasonably necessary’ to ensure completion and that “noncoercive alternatives will not suffice.”<sup>83</sup> Instead, Somin wants a categorical ban on economic development and blight condemnations, and this is best achieved by the recognition of a fundamental right to private property. Such a right would probably prohibit most uses of eminent domain over private residences. This would eliminate programs of economic development that transfer private property to other private owners. It would also provide similar protections to many kinds of commercial property as long as claims can be sustained that the property expresses the privacy interests of the owner(s).

According to Somin, stronger judicial enforcement also protects the discrete and insular minorities mentioned in footnote 4, whose properties are typically the target of eminent domain.<sup>84</sup> Somin: “Local governments are unlikely to target the property of the wealthy and influential for these kinds of takings, because they wish to avoid a difficult political struggle. But they rightly believe they can more easily overcome the resistance of the poor or politically weak.”<sup>85</sup> Constitutional scholar Ahkil Reed Amar also views the takings clause as a “prohibition” that “seems primarily designed to protect individuals and minority groups.”<sup>86</sup>

The dissenters in *Kelo* also used a fundamental rights approach that is shaped by footnote 4’s directive that courts should use strict scrutiny in order to protect ‘discrete and insular minorities.’ Justices O’Connor and Thomas claimed that eminent domain legislation works against the property interests of the poor and minorities.<sup>87</sup> This claim is supported by the research undertaken by Carpenter and Ross, whose study used census data and a sample of redevelopment project areas to verify the Justices’ claims.<sup>88</sup> “Compared with those in surrounding communities, significantly more residents in areas targeted by eminent domain are ethnic or racial minorities, have completed significantly less education and live on significantly less income.”<sup>89</sup> Apart from losing their homes, Justice Thomas, using language very similar to Michelman’s, *infra*, noted that “no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.”<sup>90</sup> Still worse, he continues,

It is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, e.g., *Goldberg, supra*, while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton, supra*, at 601, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante*, at 18, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante*, at 6, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.<sup>91</sup>

Justice Thomas makes an important point here in terms of the relationship between privacy and property. He asks why the court should defer to legislatures when they take homes pursuant to eminent domain, and then provide strict constitutional (i.e. nondeferential) standards for the issuance of a search warrant based on privacy concerns. As a result, a person's interest in their home is better protected against searches than takings. Here, Thomas makes the connection between Fourth Amendment privacy in the security of the home and Fifth Amendment privacy in the ownership and possession of it. This connection is meant to show that eminent domain undermines not only property but also privacy interests in the home, and, because it mandates the removal of persons and their personal property from their home for use by the state, it constitutes the apex of privacy and property rights infringements. Protections against eminent domain protect privacy in the ordinary sense that it is protected by the Fourth Amendment, and, by the same token, the use of eminent domain violates privacy as well as property interests.

The United States Supreme made the connection between property and privacy rights in *Soldal v. Cook County Illinois et al.*<sup>92</sup> In *Soldal*, the owner of a trailer home was illegally evicted from a mobile home park when the owners of the park towed the mobile home to another location. The local sheriff colluded with the owners of the park in the illegal eviction. "As a result of the state action in this case," writes Justice White on behalf of a unanimous court, "the Soldals'

domicile was not only seized, it literally was carried away, giving new meaning to the term ‘mobile home.’”<sup>93</sup> The Seventh Circuit, who were overruled by the *Soldal* holding, held that no Constitutional violation occurred because there was no search of the home in the traditional sense: it was never entered, and nor were items seized. This was an error, writes White, because the entire house was seized, and a seizure occurs where “there is some meaningful interference with an individual’s possessory interest in that property.”<sup>94</sup> Such seizures of property are “subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place.”<sup>95</sup>

Therefore, the movement of property, particularly in the form of a trailer home, can constitute a constitutional violation of the right to security in ‘person, houses, places, and effect’ even when state officials do not enter or search the property or otherwise engage in conventional Fourth Amendment-type actions. In the context of eminent domain, *Soldal* stands for the proposition that other provisions of the constitution, including the provision for security of houses in the Fourth Amendment, are relevant to determinations about the role that privacy ought to play in takings litigation. Future litigants in *Kelo* or *Poletown*-type situations would be wise to rely upon *Soldal*’s dicta and holding in the search for finding new ways to frame the argument against the taking of homes and other properties through eminent domain.

#### **Part 4. Judicial Review and Rights Foundationalism**

Having shown that the right is locatable in the constitutional jurisprudence, the only way to get to the right is probably through the use of judicial review, which would require the courts to revisit its property jurisprudence and find the fundamental right. Why would courts do this?

The due process and takings clauses, among many others, not only recognize and grant rights, but they also restrict the state’s ability to limit certain kinds of behaviors. As Barnett observes, this reflects the dichotomy of constitutional rights, which reflects the fact that there are at least two ways to view such rights. On the one hand, restrictions on liberties are presumed

constitutional until judges are convinced that the liberty interest at play is fundamental—this is the rational basis standard, and here the burden is on the rightsholder. On the other hand, restrictions are presumed unconstitutional unless judges are convinced by state that restrictions are necessary, proper, or compelling—which is the strict scrutiny standard, and there the burden is upon the state.<sup>96</sup> Another option would be a general policy against judicial review altogether. Alexander, for example, would like to see a restriction on judicial review of purportedly ‘legitimate’ land use decisions by agencies and law-making bodies and a wider range of opportunities for democratic or popular voices in property law. This is because, for Alexander, judicial review is a nondemocratic procedure that ‘interrupts’ ‘the people’s right’ to make property determinations.<sup>97</sup>

Because the states and their legislatures have not recognized the property right as fundamental, Ellen Frankel Paul writes that “[t]he most likely candidate for a countervailing internal force for the protection of property rights is the courts.”<sup>98</sup> Through judicial review, the courts should abandon bifurcation. Paul: “Just as it is now the rule in cases challenging laws on ‘equal protection,’ or ‘due process grounds,’ when states trench upon ‘fundamental rights,’ states should have to demonstrate that a compelling state interest overrides individuals’ economic interests.”<sup>99</sup>

Jurists who are also rights foundationalists are undoubtedly more prone to find this kind of right, and rights foundationalism reflects rights entrenchment. According to James Fleming, a right is entrenched if it “cannot constitutionally be revised, regardless of the extent to which a majority” of the citizenry support revision. According to Bruce Ackerman, rights foundationalists hold that “the Constitution is first concerned with protecting rights; only then does it authorize the People to work their will on other matters.”<sup>100</sup> The foundational rights protected by the Constitution are the kind of fundamental rights listed in the document in regards to speech, religion, and assembly, for example. When legislation threatens these rights, the classical

conception of judicial review considers courts to be “obligated to interpret the higher law of the Constitution and to preserve it against encroachments by the ordinary law of legislation.”<sup>101</sup>

It is this conception of judicial review that Richard Epstein, for example, believes is necessary to protect private property rights, and his position that uncompensated economic regulations are actually compensable takings would mean a huge increase in judicial power and intervention.<sup>102</sup> Epstein intends to show that judicial review will lead to less takings, but it could just as well lead to *more* police power due to judicial reviews that find *against* property rights. In fact, according to the data, the odds are stacked against property in the courts because the overwhelming majority of judicially reviewed cases *uphold* the taking. As political theorist Walter F. Murphy writes, in the U.S. as well as several other nations, “judicial review much more often than not sustains the validity of challenged policies.”<sup>103</sup> Why then would Epstein want more review if the deck seems stacked?

One of the factors that undoubtedly influences the court’s assignment of protection to property rights is its broad or narrow interpretation of the public use clause of the Fifth Amendment, and again, this reflects the jurists’ penchant for, or lack thereof, rights foundationalism. For Paul, the question of public use should be a judicial question, “but with no deference to legislative judgments and no presumption in favor of the constitutionality of a challenged takings.”<sup>104</sup> As Paul observes, this is the current practice in the constitutions of Arizona, Colorado, Mississippi, Missouri, and Washington.<sup>105</sup> As James Ely notes, “among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference.”<sup>106</sup> Somin notes that overruling *Kelo* would, by using the narrow approach to public use, deny that economic development (private to private) qualifies as public use.<sup>107</sup> The narrow view only permits transfers of private property to government or private entities that have a legal obligation to allow the general public to utilize the property. For example, the use of eminent domain to provide a utility service, which might be public (meaning it is owned by state) or private (owned and operated pursuant to a state license), would be a narrow public use. A broad

use, on the other hand, allows for eminent domain to be “used for virtually any project that might create some sort of benefit to the public”<sup>108</sup> The *Kelo* decision permits the broad interpretation, but a strict or heightened scrutiny would, mostly likely, reject it.

## **Section 2. Objections to Fundamental Rights Analysis**

There are a variety of reasons for opposing property as a fundamental, constitutionally protected right. Certainly, moral opposition to private property in general would deny property the status of a fundamental right. According to Merrill and Smith, this ‘property antipathy’ is found in “Proudhon's slogan that ‘property is theft,’ and build(s) through Marx and Engels with their call for the abolition of private property.” This tradition, they write, “has put property on the defensive in the minds of those drawn to thinking of public policy in moral terms.”<sup>109</sup> Property antipathy is also related to the desire for redistribution either through taxes or in kind distributions, or to the desire to provide the kind of autonomy Waldron has argued for on behalf of the homeless.<sup>110</sup> The biggest fear, I think, is the return to *Lochner* era substantive due process property rights, which, as Thomas Christiano argues below, may result the elimination of minimum wage or environmental protection regulations.

The following objections to the establishment of property as a fundamental right take a variety of tactical approaches to the issue. Part 1 examines objections that claim that private property is harmful. Christiano argues that it is harmful because it can be used to override the aims of democracy, and the aims of the democratic assembly in particular. In response, the use of the police power, which regulates harmful uses of property when it is a nuisance, is proffered as a political method for reigning in the property right. In Part 2, I discuss Frank Michelman’s defense of bifurcation on the grounds that there is no fundamental right against “asset depletion.” Part 3 explains Jed Rubenfeld’s pure textualist argument against fundamental rights overall, and, in Part 4, Itai Sened describes a starkly positivist account of property rights that dispenses with moralized concepts like ‘fundamental,’ yet still provides for significant property rights protections.

## **Part 1. Christiano, Capitalism, and the Police Power**

As Olsen writes, both Locke and Marx want to prevent private property and wealth from being “illegitimately converted into political authority;”<sup>111</sup> to that extent, political authority cannot be the direct and immediate entailment of wealth and property.<sup>112</sup> If economic rights are protected as much as noneconomic rights, meaning that both were considered fundamental and protected by the same level of strict constitutional scrutiny, what kind of effect does this have in either direction? Do economic rights swamp noneconomic rights? There is nothing immediately obvious in terms of conceptual compatibility. Part of the argument for noneconomic rights and against economic rights is that they are not compatible, or that one is more important or fundamental than the other. I think this is a mistake. The biggest fear is that the economic rights of one group—owners—will trump the noneconomic rights of nonowners. The primary reason to redistribute or deny at some arbitrary point is not that there is a moral degradation, but that wealth or property has harmed others: that possession of some item of property entails harm to at least one other person or their interests.

As Gaus writes, there is fear that “if the state does not act through coercive laws, there will be great private coercion”<sup>113</sup> through the use of property or wealth. Thomas Christiano believes that by exercising a ‘disproportionate influence over the political societies in which they operate,’<sup>114</sup> capitalists harm both the democratic process and other persons through a form of private coercion. By exercising what Christiano calls “fairly garden variety property rights,” capitalists could defeat democratic control over “the great majority of regulation and taxation by the government in pursuit of economic, environment, worker-safety, welfare, and redistributive policies.”<sup>115</sup>

Democracy, for Christiano, is defined as political equality, where citizens have an equal say in the organization of society because they have equal votes, where there is “equality in the process of deliberation,” and where there is “equality in the resources that go into making coalitions and bargaining over political aims and policies.”<sup>116</sup> Political equality is achieved

through a democratic division of labor: citizens choose aims or ends of society, and a subset of citizens, including politicians, interests groups, and experts, determine the means through the political process of drafting and implementing policies and legislation.<sup>117</sup> Capitalists, however, do not participate in the establishment of aims or goals, but they make it more or less difficult for government officials to make the goals feasible. Feasibility is not achieved through the democratic process, but capitalists can influence whether the implementation of the aims are feasible by, for example, threatening to fire workers to oppose democratic minimum wage laws, or moving factories abroad in order to oppose emission control laws. In fact, Christiano argues, the very ability to move to emissions-friendly countries reduces the likelihood that government officials will implement the will of the people (their aims) because enforcement will not be feasible.<sup>118</sup> Firms, therefore, have non-democratic effects on policy choices even when they have no influence upon the democratic process, and they still frustrate the aims of democratic interests “simply in virtue of being able to exercise their ordinary liberal property rights.”<sup>119</sup>

So, Christiano concludes, private property stymies democracy, and actions of capitalists act as ‘constraints’ on the government.<sup>120</sup> For example, assume that a law is proposed that requires capitalists to contribute 1% of all profits over \$1B to a fund to save manatees. The capitalists announce that they will draw back operations in order to ensure that profits do not exceed \$1B in order to avoid the tax—perhaps they do not like manatees. Christiano would argue that this constitutes political power that defeats democratically chosen aims—for Christiano, it “heads off democratic legislation”—and government officials are subjected to that power because they may choose to not implement the law despite the aims of the democratic majority. But the capitalists have not disobeyed anyone or influenced the *formation* of democratic aims.<sup>121</sup> However, they have stymied the realization of them.

Christiano believes there is a moral duty for all citizens, including capitalists, to “go along” with the decisions of the democratic assembly. So capitalist private property is limited by the “requirement to cooperate with the democratic assembly, just as officials have duties to



cooperate in the pursuit of the aims chosen by the democratic assembly.”<sup>122</sup> Capitalists have same duties as public officials, who have the same duties as everyone else, to cooperate with majoritarian aims.

However, Christiano recognizes that democratic assemblies may not abridge “fundamental rights of life, association, or privacy.” Certain aspects of a “right to private property are similarly fundamental”<sup>123</sup> to the extent that “abridgements of basic rights of personal private property are beyond” the basic limits of democratic assemblies.<sup>124</sup> This ‘fundamental’ property right does not include the right to own capital. Like Rawls, Christiano provides for the purely “personal” property right, which I call “toothbrush rights.” These rights protect a fundamental right to own, for example, a toothbrush, which is a right on par with freedom of expression or association. States that take toothbrushes for public use, or ban them altogether, step over limit. However, there is no such right to buy or sell or loan or make toothbrushes—this, of course, would be the capitalist right—and states might take over production and distribution with no effect on toothbrush rights. The right, then, is only over use: how one brushes, when one brushes, or if one brushes at all. There is probably no right to pick color or bristle softness—again, those seem to depend upon capitalist rights—and probably no right to own more than one.

As Christiano might argue, the best way to facilitate public oversight of private property is not through eminent domain, but through the police power: it is low cost, it preserves property tax income from owners, it superficially satisfies property rightists (because it does take property outright), and it gives the public a stick or two of interest in all regulated property. According to Justice Brennan, regulations promulgated under the state’s police power must be substantially related to the promotion of the health, safety, morals or general welfare of the public, and such regulations must benefit the public as well.<sup>125</sup> This establishes a very low bar for the exercise of the power.

Constitutional rights do not license wrongful harm, and preventing or rectifying unjust harm is a basic provision of the state.<sup>126</sup> While these provisions are typically served by the

criminal law by way of enforcement and punishment, the state's obligation for serving them in the realm of property law constitutes a legitimate exercise of state power. Consequently, the state should take and/or regulate property when it is used to wrongfully harm others. The harm must be unjust, because there are plenty of examples where we might harm others but the harm is not unjust and therefore not actionable.<sup>127</sup> Wrongful harm that results from the exercise of property rights is best exemplified by the concept of nuisance, but unjust harm can also result from the unjust acquisition or transfer of property rights. Nozick's theory of rectification attempts to right these wrongs. The idea is that property rights should be adjusted by the state itself or private parties acting within the institutions of justice when the right or possession is the result of injustice (as in theft), or when property is used to commit unjust acts. For Nozick, rectification is required when there is some stain on the chain of title which shows that an unjust acquisition or transfer took place at  $t^1$  (some point in the past), resulting in an unjust and reparable property right at  $t^2$  (i.e. the present day).<sup>128</sup> An unjust acquisition or transfer at  $t^1$  necessarily includes acquisitions or transfers that violate preexisting rights.

Therefore, just as the engagement in a harmful nuisance justifies the forced transfer or regulation of property rights from a culpable owner to another, justice in rectification authorizes the forced transfer of property rights from an *innocent* owner to a person harmed by the exercise of a property right.<sup>129</sup> Other examples of harm (culpable or otherwise) would include the use of property to cause the exploitation, dehumanization, or degradation of others. However, the mere fact of property ownership in some thing, or the accumulation of some arbitrary amount of wealth, cannot be said to harm anyone absent some showing that the property is or might be used to cause or permit unjust harm. Again, many types of harms are not unjust, so the burden would lie with the state (this is always the case when fundamental rights are subject to legislation and judicial review) to show the existence of the requisite causal or permissive nexus between the exercise of the incidents of ownership (the right to use, collect rents, modify, destroy, and so forth) and the unjust harm. This is a variation of the necessity requirement. Rights, particularly

property rights, should be infringed or outright denied when such infringement or denial is necessary to prevent or rectify some greater harm, or, as Nozick puts it, “moral catastrophe.” No property right is more important than rights against exploitation, dehumanization, or degradation or the perpetuation of moral catastrophe. Similarly, rights against these injustices are not property rights: exploitation and dehumanization are not condemnable as violations of one’s property, but one’s autonomy, dignity, and personhood, all of which are protected by the right of privacy, i.e., the right to exclude and the duty of non-interference.

The question persists how the nexus, claimed by Christiano, between property (as capital, ownership, or advantage) and harm is a causal one, and this seems to require, in the majority of cases, an *ad hoc* approach to particularized allegations of harm instead of a categorical one. Until a particular use of property is alleged to cause the harms at issue here, the owner’s right to control and exclude, as external manifestations of their privacy rights, should remain free of state interference or the kinds of democratic control suggested by Christiano.

## **Part 2. Michelman, Bifurcation, and Property Rights**

In this part, I will explain Frank Michelman’s objection to a constitutional property right, explain why we agree on at least one aspect of that objection, and then show why his account does not compel the rejection of a constitutionally-guaranteed property right. More importantly, I will show that Michelman’s account fails to protect many important rights because it requires justifications for rights claims in the form of a burden of proof standard that is incommensurate with a liberal-democratic understanding of fundamental rights.

Over the course of several articles, Michelman lodges what I consider to be the most powerful criticism of the type of constitutional property rights I advance here: that property rights on their own, considered in isolation from other rights and virtues such as liberty or dignity or privacy, do not demand either respect from nonowners or, in the case of the government, protection against regulation or takings *simply in virtue of ownership*. Michelman argues that

property rights are the product of other, more important, rights. A formal, constitutional property right, such as the right contained in the takings clause, does not protect or advance those rights. It merely enforces a rule that says, in effect, “some government action impaired some asset’s value, and compensation is due.” Such a rule has nothing to do with any other rules or values or injuries. For Michelman, the property right should be protected only if it advances other interests of the owner—primarily, political rights against oppression<sup>130</sup> but also intangible rights to community and security—and only if it does not impair similar interests of nonowners. Property rights have little normative force without reference to a broad catalogue of other rights, and a simple rule or formula that protects a basic property right, such as that contained in the takings clause, improperly privileges that basic right above other rights. For Michelman, the fear that a property clause will privilege property claims over others is a reason to bifurcate property from other rights, and, as a result of bifurcation, a reason to treat the property right as less deserving of protection than other rights.

As Michelman observes, the view that the right to property is a “basic human right” is, “to put it mildly, controversial within the broad stream of recent liberal political philosophy.”<sup>131</sup> For Michelman, any rights claim, including speech or religion or privacy claims, must be justified in terms of other rights or interests, and those claims are also subject to analysis in terms of harm or benefit to others. For example, a claim of freedom of speech would need to be situated into a larger right, such as freedom of expression, and that interest itself would be weighed against a variety of claims from others that might justify a restriction of that right.

In order to show why property is not a basic human right, Michelman asks us to imagine that a country’s constitution contains no property clause, and that a Lawgiver is contemplating adding a property clause to existing bill-of-rights type guarantees. Those guarantees comprise “an otherwise liberally full and adequate scheme of individual constitutional rights”<sup>132</sup> and include rights to “liberty, to dignity, to free self-expression and self-development, to personal security and privacy, to treatment as an equal, to legality and due process.”<sup>133</sup> Based on this foundation,

Michelman asks how should our constitutional Lawgiver “think about the question of a property clause?”<sup>134</sup>

In order to answer this question, Michelman’s first move is to substitute the term “property right” with an “individual asset-holder’s claim to constitutional-level protection against state action.”<sup>135</sup> Michelman argues that a property clause, as a distinct right in addition to those already protected, would only add “a special entitlement to a rule-formalist style of adjudication, when what is up for decision is a claim to constitutional-level protection against governmental disturbances of existing positions of asset-holding.”<sup>136</sup> This term, “asset infringing state activity,” is, in Michelman’s usage, another term for the state’s police power or for popular sovereignty rights over property. According to Michelman, this entitlement is not necessary because other entitlements ought to protect whatever legitimate interests might inhere in one’s property. For example, Michelman asks us to imagine a “landowner demanding full exchange-value compensation for currently idle land expropriated by the state for redistribution to the landless. The landowner’s lawyer would certainly invoke bill-of-rights guarantees respecting liberty, equality, dignity, privacy, and legality in support of this demand.”<sup>137</sup> Without a takings-style property clause, “the landowner would have to run his claim through notions of dignity, liberty, privacy, equality, legality, and so on.” Without a clause, Michelman argues that the owner’s successful claim for the full fair market value of their property in compensation for the taking would depend “on the court’s judgment about whether, in the given context, the state’s moral purposes are sufficient in weight and urgency to warrant any resulting (they might sometimes be quite marginal) infringements on the political-moral values spoken for by those other clauses.”<sup>138</sup> A clause would simply, or formally, grant compensation, even if the owner cannot show that any other rights are violated by the state’s action.

For Michelman, the Lawgiver should not create a constitutional property right, but should make property protection a directive through other means. “In other words, the constitution’s directive to courts and policymakers should not be to act on the (false) premise that every state

action redistributing asset values is liberally objectionable just as such, but rather to bear in mind that such actions can sometimes infringe on individual liberty or dignity in deeply objectionable and unjustifiable ways.”<sup>139</sup> Michelman clarifies that he is not arguing inclusion of a property clause; rather, he doubts “that the reason for any such inclusion should be to give recognition or protection to a supposed liberal basic right of the individual against asset-infringing state activity, for the simple reason that—as I believe—there is and can be no such liberally basic individual right.”<sup>140</sup> So, the Lawgiver might include a clause, but it would not protect a fundamental right to property, and nor would it stand apart from, or above, other fundamental rights.

In other words, in the absence of a property clause, justice might demand that the owner *not* be compensated in some cases. Without a clause, there exists no bright or “rule-formulaic” determination about either compensation or the priority of certain statuses, such as ownership, over other statuses, such as holding political rights. Michelman appears to argue that assets should be protected if they promote other liberal rights, so properties that are the object of state or community takings decisions should be subjected to litigation to see whether political rights are being upheld or violated if compensation were to be paid. A rule-formulaic account of property right is both undesirable and unnecessary because it would ignore a wide variety of other rights or interests that may be impaired when property claims are upheld.

Michelman is worried that if a state already guarantees a “full and adequate scheme” of rights, a constitutional property right gives formal recognition to a non-fundamental right and ignores “any further or other injury to liberty, dignity, equality, or legality.”<sup>141</sup> If a state violates a right to equality, there is no formal rule or simple fact that rightsholders can prove in order to seek rectification; however, a constitutional property right would permit an asset holder to formally show some degree of asset impairment and obtain relief against state action on that ground only, “never mind how slight may be the insults to anyone’s liberty, dignity, privacy, or equality, either in absolute terms or by comparison with impairments that otherwise will accrue to other people’s liberty, dignity, privacy, or equality.”<sup>142</sup>

In other words, for Michelman, a taking of private property for public use should not trigger a compensation obligation on the part of the state: rather, the state should compensate only when its actions insult liberty, dignity, privacy, or equality—all of which are fundamental rights. Actions against property should not enjoy a special or facilitated pleading requirement. Owners would need to “show some real, substantial, and disproportionate infringement of liberty, dignity, privacy, or whatever” due to government action.<sup>143</sup> Property rights, Michelman concludes, need to be bifurcated from other rights, and treated differently as well else they swamp those other rights.

Perhaps the only reason to grant a constitutional property right is because the Lawgiver “thinks that strict security against state- engineered impairments of assets lawfully obtained—just as such, and without any further regard to infringements on liberty or dignity or so on—is in and of itself a basic human right.”<sup>144</sup> If property were a basic right, then, in order to show a rights violation, claimants would not be required to show other violations such as impairments of dignity or respect.

Michelman suggest a Property Plus evaluation: if the property claim is coupled with other another right that should be protected as well, then property claims against expropriation might become fundamental. Michelman is committed to a high burden of proof that lies with the claimant, whose burden under Michelman’s scheme requires them to show a property infringement *plus* an infringement of a non-property right in order to deserve compensation. And here is where we agree: in order for a property claim to be constitutionally protected, it should also have a privacy claim, and that claim is already written into the takings clause. Where we disagree is on the burden of proof. Michelman places the burden on the claimant to show why the state ought not take, and this is true of the rational basis standard in general. Were private property treated like other fundamental rights, the burden would shift to the state to justify its taking, or “asset impairment,” according to the strict scrutiny standard: the state would need to show that its actions are the least restrictive means for achieving a compelling state interest, and

claimants are not required to show that any further rights are being violated. Michelman's standard would facilitate takings or impairments; my standard would make them more difficult.

Without a property clause, a rightsholder has to make the Procrustean argument that the state's action affects their dignity, or that their liberty was restricted. As a practical matter, this makes the job of the finder of fact (usually a judge or jury, or what I suspect many theorists would like to see: a Rawlsian department or bureau of redistribution who decides these types of cases) rather difficult. That being said, I agree with Michelman in spirit: property that is owned with no concomitant value has less protection against the community than property plus some other value. I believe that value is privacy, and that the constitutional property right that protects private property is capable of protecting many of the rights and interests that privacy also protects.

### **Part 3. Rubinfeld, Textualist Usings, and the Failure of Compensation**

Like Michelman, legal scholar Jed Rubinfeld views the right protected by the takings clause as a political right; to that extent, it protects property against *usings* by the state but not mere takings.<sup>145</sup> This is a novel interpretation of the clause. If property is used by the state, the political right against usings is violated only if the state does not provide compensation. Compensation is a political and not a property right, and it protects owners from being treated as mere means to the state's ends. If state action, in the form of property regulations or expropriations, does not impact liberty or otherwise exploit the state's power over its citizens, then the state action is not compensable.

Like Sened, Rubinfeld is primarily opposed to the idea that persons have fundamental rights or liberties, because such rights have "no place in constitutional interpretation."<sup>146</sup> In fundamental rights analysis, the court determines that some interest (such as personhood or autonomy) is too important "to be a legitimate object of state regulation."<sup>147</sup> Unlike privacy, personhood is not a right, and therefore cannot be the foundation for either a property right or a political right. Persons do, however, have a political right against having their bodies or their



property used by the state without compensation. In Rubenfeld's analysis, the only appropriate constitutional issue is whether the state has forcibly transformed something (say, a person's property or their body) into the property of the state through the state's *use* of the thing. In terms of takings, then, "[t]he dispositive question in compensation doctrine should never have been, 'Has the state taken something from an individual that qualifies as a fundamental deprivation?' It should have been, 'Has the state taken something for public use?'"<sup>148</sup> If the state simply regulates the thing, or, to use Michelman's terminology, "infringes the asset-holder's claim," then it has no obligation to pay.<sup>149</sup>

Rubenfeld's analysis focuses on the political meaning of a literal or textualist reading of the takings clause, which prohibits the taking of property for public use without just compensation. Whereas personhood and fundamental rights-type claims are vague, the takings clause provides a real, tangible political right against the state. If persons are subject to having their property taken and used by the government, this is a clear violation of a political liberty not to have one's property taken, and there is, according to Rubenfeld, no need to engage in talk about personality or 'fundamental deprivations.' The only issue is whether state action impacts the right of political liberty by taking and using private property.

States impact political liberty when they turn private property into state property by using it. So, a state might mandate how property is used by its *owner*, but that does not constitute a use by the state: by regulating, the state is not using the property at all.<sup>150</sup> Although the due process clause provides protection for property deprivations or takings in the form of regulations, the compensation clause makes "special provision for a specific class of deprivations: cases in which private property is not merely taken, but taken for public use."<sup>151</sup> The clause does not recognize property ownership as a fundamental right (again, for Rubenfeld, there are none); rather, it protects "against a fundamental political danger. Just as the right of privacy protects individuals from the conscription of their persons or futures, the right of compensation guards them against state instrumentalization in the form of a conscription of their property."<sup>152</sup>

For Rubenfeld, the use of eminent domain is politically objectionable because “a servitude is forced upon (the owner, who is) made in a small or large way an instrumentality of the state,” and because “we are not ordinarily obliged to see our persons, our lives, or our things taken over, occupied, conscripted into affirmative state service.”<sup>153</sup> Uncompensated takings are wrong to the “degree to which a citizen's things are made into the organs or instrumentalities of the state. Along with all the other functions that private property may serve, it stands as the material stratum in which independent citizens exercise their will.”<sup>154</sup> The political right of just compensation operates as a shield against this kind of injustice, and persons who are justly compensated when the state uses their property suffer no injustice.

Property is important because it “stands as the repository, the emerging reflection, of what ought to be [the owner’s] politically independent will. When, therefore, the state takes a thing marked off as belonging to a private person and puts it to use, the state goes beyond mere deprivation. It compromises the independence of his will; it impresses this embodiment of his independent subjectivity into state service, and to that degree the owner is instrumentalized as well.”<sup>155</sup>

Rubenfeld correctly notes the parallels between takings law and privacy law.<sup>156</sup> “[T]he right of privacy, understood as an anti-totalitarian right,” writes Rubenfeld, has nothing to do with the psychology or personhood of its bearer. Rather, we should be concerned with whether a law “affirmatively takes over and occupies individuals' lives.”<sup>157</sup> If it does, it does not matter that it violates a right, much less a fundamental one. For Rubenfeld, “it is not the freedom taken away by anti-abortion laws that makes them unconstitutional;

it is rather the degree to which, through them, the state has effectively taken over a woman's life. *Roe* protects against a specifically political danger: the danger of totalitarian state intervention into our lives. No single prohibition in our entire legal system has consequences that so thoroughly take over, physically occupy, and put to use an individual's entire existence as do those of a law prohibiting abortion.<sup>158</sup>

By discarding talk of fundamental rights, Rubenfeld’s analysis provides a robust yet deflationary justification for strong political rights that protect private property and privacy. From

my perspective, he fails to engage in the kind of language that is capable of serving those rights well within a system of jurisprudence that engages in rights talk, and, because he sees compensation as a political remedy that “cures” the “instrumentalization” of persons and their property, he is unable to take a stand against *compensated* takings that are capable of violating other political rights.

In terms of language, Rubenfeld rejects the way the Supreme Court has attempted to participate in the discussions about the justification for rights. Many of those justifications express a concern for the role internal or subjective factors play in the experience of the rightsholder, as well as in the duties of others—including the state. Rubenfeld is dismissive that a concept like personhood can support privacy or property rights against exploitation by the state, so he locates support for these rights in a political stance against totalitarianism. He is primarily concerned, I think, with the absence of enumerated rights such as privacy and property in the Constitution, and fears that the legal justification for these rights in the jurisprudence is shaky and prone to disappear should less-principled jurists revisit a case like *Casey*. *Casey* developed and modified the right to abortion by using the language of “personhood,” “identity,” and “fundamental,”<sup>159</sup> but it also upheld the right using the same language. Rubenfeld’s argument for the abortion right, on the other hand, is that totalitarianism ensues without it. He may be correct, but that does not mean that the jurisprudence of fundamental rights, predicated on extra-legal ideas such as privacy and personhood, is any less capable of protecting the political rights that are founded upon those ideas. Positivists like Rubenfeld (and Sened, *infra*) are dismissive of fundamental rights because the search for them takes the law outside of its ‘four squares’ in order to find foundational principles in either morals or nature. Unless rights are manifest in the state’s rules, such as those rights enumerated in the Constitution, legal positivists like Rubenfeld are forced to locate them elsewhere; in, for example, a political life that is free from totalitarianism. *Roe*, therefore, does not grant freedom or protect privacy, but it guards against “a specifically political danger: the danger of totalitarian state intervention into our lives.”<sup>160</sup> By the same token,

the takings clause does not protect privacy; rather, it is a positive, statutory, and political right against deprivations by the state.

In terms of the clause, Rubinfeld's characterization of it as an example of 'political will' embodied in property as a bulwark against the state is a remarkably thin one: despite the talk about instrumentalization of persons and their things by the state, Rubinfeld somewhat remarkably aligns with an unlikely ally, Richard Epstein, by taking the position that takings law prevents totalitarianism by mandating for, and providing, compensation. For Rubinfeld, courts should not take any factors into consideration other than compensation, such as personhood, or community, or the status of property as a home, when states use private property. If compensation is paid for usings, injustice cannot be the result and it cannot be claimed that states act beyond their limits. On the one hand, this simply appears to be a mistake about the jurisprudence of takings. On the other hand, it justifies a mechanistic application of the takings clause that fails to address the substantial evidence that takings law has led to clear injustices.

Michelman provides a compelling argument against the idea that compensation fully compensates, particularly in cases like *Poletown*, where community was also 'taken' through eminent domain. The right to community is a property-like right and the standing law of just compensation cannot include loss of community as a compensable property right. For the *Poletown* residents (and, by implication, the Fort Trumbull neighborhood at issue in *Kelo*), "an eminent domain taking of their homes and neighborhood, to be accompanied by compensation payments, is exactly what they are resisting. In these circumstances, we can easily see that property may represent more than money because it may represent things that money itself can't buy- place, position, relationship, roots, community, solidarity, status- yes, and security too."<sup>161</sup> Supporters of "pure" property rights decry only the loss of ownership in *Poletown*, while Michelman decries loss of political community. Michelman is correct that social factors make the property right more valuable, and that property's fair market value, paid out as part of the

requirements of the current takings jurisprudence, cannot compensate for the loss due to the non-fungibility of the right to community.

Michelman sees the same of kind of injustice occurring when tenants are evicted from their homes, either due to eviction, the termination of a lease, or the taking of their landlord's property. The property and community rights of tenants in at least some of these cases are protected by tenants' rights laws, wherein the government in turn acts on the tenant's behalf but also, it appears, violates the owner's own constitutional property rights. In Michelman's view, "the tenants in these cases also have interests at stake of the sort that the constitutional property clauses are meant to serve. They, after all, are the ones who stand to be uprooted and displaced from their homes and neighborhoods unless the law intervenes on their behalf."<sup>162</sup> Michelman argues that there is no difference between cases where the state uses eminent domain to uproot both owner and tenant, and cases where the owner evicts tenants. In those cases, a tenant "with an expired lease might have constitutionally cognizable property interests at stake to be legislatively counterposed against those of the building owners."<sup>163</sup> Michelman distinguishes the right of ownership from the right of property, and claims that property rights advocates are really arguing for ownership rights and not property rights.<sup>164</sup> Tenants have a right against having their property 'taken' by landlords at the end of an expired lease, but this right extends beyond the property itself: it would also include a right to community. So, when a court finds that, for example, rent control laws are constitutional, Michelman sees a constitutional property right arising in not only the tangible property that is the subject of the lease, but the intangible property-like rights that grow up around the real property, including community, stability, security, and, of course, liberty. This, according to Michelman, is how property rights under-protect the interests that are at stake when persons reside in property that they do not own that are located in communities where they have property-like interests.

For Michelman, persons have more than property rights invested in their property: they have property *as well as* other rights, and those other rights, such as liberty, are more important.

After all, compensation is meant to compensate for the loss of liberty to use or sell one's property. Therefore, a property clause would have to compensate for more than fair market value and would have to place a value upon intangible assets including the value of lost community, security, and liberty.<sup>165</sup> Also, compensation, set at fair market value, cannot take into consideration the real costs of eminent domain decisions that result in the massive relocation and demolition of neighborhoods. Among those costs are "the demoralization cost, or sense of injustice, remaining after the court has exerted its inadequate, even if maximum, effort to secure the payment of 'just compensation.'"<sup>166</sup> Like Peñalver, Michelman argues that it is the "duty of public officials to take such costs into account" when they make decisions pursuant to their eminent domain power.<sup>167</sup>

"Demoralization costs" add to the disutility created by takings. They accrue due to owners' frustrated expectations and insecurity regarding their plans to remain in their homes even if they are not takees. Michelman develops this idea from the property theories developed by Hume and Bentham. For Bentham, property is the "collection of rules which are presently accepted for governing the exploitation and enjoyment of resources."<sup>168</sup> Similarly, for Hume, property is a "conventionally recognized stability of possession," which evolved out of "selfish perceptions of the advantage of association," which is impossible without rules to govern the right to control and enjoy things.<sup>169</sup> Property rights give owners and nonowners a basis of expectation about the future: they provide an institutionally established understanding that rules about persons and their resources will continue.<sup>170</sup> This expectation of security through property law ensures productivity. Since we are accustomed to private possession, threats in the form of expropriations would cause unease and this demands rectification.<sup>171</sup> So, "as long as individual possession continues to be the norm, there is serious disvalue in the spectacle of any encroachment on possession by public authority which is suggestive of arbitrary exploitation of a few at the hands of the many,"<sup>172</sup> or redistribution.

Because takings are unpredictable and capricious, the possibility that an owner's property will be taken demoralizes owners. These costs are, in the present regime that requires that takers are only liable for the fair market cost of the property, uncompensable.<sup>173</sup> Like Peñalver's account of the obligation of political authorities to exercise a more comprehensive use of compensation, Michelman argues that it is the "duty of public officials to take such costs into account" when they make decisions pursuant to their eminent domain power.<sup>174</sup> Like Peñalver, Michelman also fails to provide a framework for the implementation of this duty. The duty to provide real compensation for takings falls on the takers, and neither Michelman nor Peñalver suggest how or why political authorities would be motivated to initiate and conform to this change in takings law. They agree that takings law is morally deficient because of its failure to truly compensate the dispossessed, but they approve of a process that still gives great deference to political authorities. Both Peñalver and Michelman agree that in many cases the use of eminent domain is unjust, and this is true primarily in cases where homes and neighborhoods are destroyed for either private use as well as more traditional public uses such as highways. However, they deny that a more robust property right is the best way for preventing these injustices, or the fear that a more robust right would lend itself to abuse by interests that do not deserve such a strong right. They default to the position that injustices can be cured by a more morally aware political authority.

The better approach, in my opinion, understands that full compensation is probably impossible, and that compensation of any kind cannot itself justify the use of eminent domain. Short of that, property rights as well as the other rights embodied by property are best protected by the recognition that the property right is, in fact, a basic and fundamental right. Like other fundamental rights, the claim that property is private property has "considerable normative force and puts a brake on expressions of public will that involve the disposition of private holdings."<sup>175</sup> Like the other fundamental rights, particularly those involving bodily integrity, private property permits us to create what Paul Fairfield calls *moral spaces*, which are "demarcations in the social sphere" and "less metaphorical than many other rights." Spatiality, writes Fairfield, "makes

possible or constitutes the ground on which individuals stand in their particularity” and permits persons to exercise the voluntary actions that “conditions of moral agency.”<sup>176</sup> Although all rights create a sphere or domain of noninterference, what is remarkable about the combined privacy and the property right is the fact that it does so “in a more direct and literal way, establishing relatively unambiguous territorial distinctions between physical, intellectual, or personal domains and the realm of public affairs. Both rights,” continues Fairfield, “are fundamental to the free negotiation of interpersonal proximity which is an elementary and pervasive feature of ethical relations.”<sup>177</sup> In other words, because private property rights are grounded in spaces, they are more directly observable and therefore more capable of expressing the moral agency of both the owner, who makes choices about their acquisition, use, and alienation of their property, as well as the agency of others, who also exercise and exhibit moral agency in terms of this readily-available or ‘at hand’ moral space in the way they treat the property of others. Framed this way, the private property right can be inserted into the discourse about rights that includes rights, such as speech and religion, which are already considered fundamental. It is unlikely that takers or legislators—the public officials who initiate takings—will make this kind of determination, so it is best achieved by a judicially-determined higher standard of constitutional review due to the fact that courts have been more willing to locate and guarantee fundamental rights than the other branches of government.<sup>178</sup>

That being said, Rubinfeld’s property theory—positivist or otherwise—offers a surprising justification for the constitutional protection of *all* private property rights against takings, including commercial or fungible property. Rubinfeld argues that “the link between private property—especially commercial property—and an individual’s political independence has shown itself too many times throughout history to be ignored.” The property interests at stake “apply equally to the Fourth Amendment’s search-and-seizure rights.

These rights similarly rest (at least in part) on the sense of personal investment that individuals in our legal system often (perhaps characteristically) attach to things they consider theirs. Yet the fact that a piece of property is purely commercial—say, a



warehouse—has never been held to nullify the operation of the constitutional guarantee. To make sense of such rights (under both the Fourth Amendment and the Compensation Clause), it is not necessary that the requisite relation between owner and property obtain in every case. It is sufficient, rather, if we acknowledge that this relation is possible and if we deem it worthy of protection against state abuse.<sup>179</sup>

Here, Rubinfeld is arguing that all property—both commercial and personal—is protected against uncompensated expropriation, and that there is no constitutional distinction between protecting one type of private property over the other. Both kinds of property are compensable if they are taken for public use. For Rubinfeld, there is no need to make determinations about the subjective intentions of the property holder: there are no differences between homes or other kinds of properties. To that extent, “[t]he Compensation Clause protects liberty and property; like the Third and Fourth Amendments, the Fifth Amendment protects liberty by protecting property. And there are good reasons why compensation is an appropriate remedy for a using, even though economic injury is not the gravamen of the constitutional harm.”<sup>180</sup>

Rubinfeld’s novel approach therefore supports portions of the private property theory I am advocating for here, but it suffers from a stingy account of the role of rights in liberal democracies. For Rubinfeld, rights lack moral or normative foundations and are solely the product of political struggles: they are only important in terms of their ability to pose a bulwark against totalitarianism, yet, in terms of the property right, their violation is easily repaired by the tendering of compensation. Rubinfeld is therefore forced to concede that massive rights infringements which use eminent domain to displace large communities and homes are politically oppressive, yet cured by compensation. As Michelman argued, this understanding of compensation cannot be correct, and as a result Rubinfeld’s novel research in the direction against fundamental rights is unsuccessful.

#### **Part 4. Sened, Public Choice, and Nonmoral Rights**

“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing more.” – Oliver Wendell Holmes<sup>181</sup>

According to Itai Sened,<sup>182</sup> property rights and institutions are purely positive: they are non-moral and non-normative. Governments are “rational entrepreneurs who produce law and order in return for political and economic benefits,”<sup>183</sup> and who also use their monopoly on force to protect property as well as other individual rights. These rights emerge because they “serve tangible interests of particular individuals... (as well as) the interests of central authorities that pay a remarkable cost to protect and enforce them.”<sup>184</sup> Like the position of the economists in chapter 5, Sened concludes that there is simply no need for the idea of fundamental moral or human rights, nor their justification, because a fundamental right of speech is justified solely on the grounds that it “makes governments and individual agents—i.e., every agent in society—better off.”<sup>185</sup>

Like Holmes’ motto, Sened argues that political institutions that protect property rights are not trying to “satisfy some abstract normative requirements.”<sup>186</sup> The state does not protect property because it aims at developing personhood or privacy: it acts in order to satisfy state interests. For Sened, a private property system exists because politicians, and the governments they manage, depend upon political support as well as tax revenues to fund their operations.<sup>187</sup> Governments grant property rights in order to improve productivity, which in turn, Sened argues, raises the tax revenues necessary for operating the government.<sup>188</sup> A private property system, in this derivation, has no moral basis, and politicians have “no ‘deep moral’ intention” when they set up “the institutional design of the new governments in a way that would be attractive for future investors.”<sup>189</sup>

In other words, if the government did not ‘gain’ from granting property rights, it would not do so. Agents who desire property rights can petition the government for property rights, and it is costly to petition the government. If the government grants the right, the property right in general becomes a public good to be enjoyed by everyone “regardless of whether they paid the cost of petitioning for these rights.”<sup>190</sup>

Securing a property right therefore involves a collective action problem: why would anyone engage in costly efforts to gain the property right when free riders end up with the very same rights? The implication is that persons will not expend the costs to earn the right without compensation, which consists of exclusive rights over particular property that are on par with everyone's exclusive rights over their property. The second implication is that if political authorities do not believe that it is in their best interests—"best interests" in this case includes the raising of taxes through political means to ensure the operation of the government—to grant property rights, then property rights either will not be granted, or granted with varying degrees of regulation that always reflect the interests of politicians in their operation of the government. If rights do not advance those interests, politicians are not motivated to grant them and as a consequence will not grant them.

In Sened's model, rights are not granted for moral reasons, primarily because there are no moral reasons for granting rights: rather, they are granted when enough people petition the government for the right, and politicians then engage in 'payoff' calculations when they determine whether to grant it.<sup>191</sup> If more people petition for the right, then there is a higher probability that the government will grant it. Otherwise, politicians have no motivation for granting rights.<sup>192</sup> Political agents are motivated to use private property to promote a more affluent society not because such rights are moral or natural, but because a more affluent society increases tax revenue and support from constituents.<sup>193</sup>

By removing all things normative from the discussion of property rights, Sened—and the economists before him, including Buchanan—errs on the side of the kind of property rights I endorse here. Despite its amoral positivist and realist conception of rights, Sened concludes that individual property rights ought to trump a variety of collectivist or statist approaches to property ownership. Now, Sened argues that such rights are coercive (and justifiably so, because they promote efficiency) and tend to support the coercive structure of the state, but his conclusions are not statist: they arrive at the same or similar property rights as those supported by my approach,

and we would agree that moralized opposition to property rights should not be formalized in the property law. Finally, despite his denial of the moral basis of many rights, Sened agrees that all rights, economic and noneconomic, occupy the same position *qua* rights, and to that extent, he denies that they ought to be bifurcated.

### **Section 3. The Politics of Takings**

According to Gary Minda, takings cases “fail to decide anything: knowing that regulation is not a taking if it advances the public interest or avoids a noxious use fails to tell us anything about regulation prohibiting developers to filling wetlands for commercial use.” Taking law requires judges to “look beyond the legal concepts of takings law in order to determine the boundaries between property and community.” This requires “pragmatic ethical answers” about which properties—specific ones, such as Kelo’s house, or general ones, such as those constituting cultural property that achieves some further purpose—remain private and which are legislated into the public domain. As a result, takings cases are “inextricably bound up with moral, philosophical, and political debates that have remained persistently immune to scholarly and judicial ‘solutions.’”<sup>194</sup> Courts can rectify this by entrenching the private property right against the state’s right to use eminent domain, thereby making it more difficult for states to use eminent domain for traditional public uses as well as the more recent public benefit-type transfers to other private owners.

However, the property right is *not* entrenched. As a result, writes Michelman, we are, “dealing with ‘two conflicting American ideals,’ both reflected in the Constitution: ‘the protection of popular government on the one hand’ and the protection of property rights on the other.”<sup>195</sup> This section explores this conflict on a more political level than previous sections. Using the work of Leslie Bender, Louis Putterman, James Buchanan, and Gerald Gaus, it examines several ways that popular government can be utilized—or not—in order to promote more democratic control over property. The section concludes, however, that democratic

majorities have good reasons to choose *not* to regulate or take property, both in non-ideal situations and when they act as Rawlsian deliberators in ideal situations.

As Radin notes, “[c]onstitutional protection of property against takings...is countermajoritarian,”<sup>196</sup> and it appears that Madison was speaking directly to this subject when he writes:

Wherever the real power in a government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.<sup>197</sup>

In terms of the power of popular government, Richard Posner writes that “a group of poor people may have much greater financial resources in the aggregate than one wealthy person or a small group of wealthy people.”<sup>198</sup> Even were they to lack financial power, Louis Putterman asks “why the overwhelming majority of citizens” in industrial democracies, “who collectively possess a very modest share of” their nation’s wealth and property, “do not use the political power conferred on them by democratic institutions to distribute more property to themselves.”<sup>199</sup> As I have shown, this kind of redistribution is permissible according to current interpretations of the takings clause, the taxing power, and other provisions. So, why don’t “they,” the democratic majorities, do it?

### **Part 1. *Midkiff*, Oligopoly, and Popular Sovereignty**

As I have shown, the property jurisprudence of the United States provides that a very low threshold be met in order to take property for public use. According to legal theorist Leslie Bender, the takings clause should be interpreted to only permit transfers for use by the public, and “the public,” in her interpretation, is constituted by the poor or propertyless. Like Michelman, Bender is interested in the loss of community that occurs in cases like *Poletown*, where persons were deprived of both community and home.<sup>200</sup> For Bender, community is not a property but a “higher” type of interest.<sup>201</sup> Eminent domain, Bender argues, ought only to be used to “benefit community and environment interests” and this can be done by making fungible or

developmental interests “yield” to community interests. There is no price on community, so no compensation can be “just”; as a result, for Bender, the ‘property’ that makes up a community “simply cannot be taken.”<sup>202</sup> The *Midkiff* case is the primary example of the ‘proper’ use of eminent domain.

As noted previously, *Midkiff* provides constitutional protection for the use of eminent domain in order to prevent oligopoly by permitting the state to force the transfer of ownership of a rented home from landlord to tenant. This situation is unique in the takings jurisprudence because the tenant was not displaced and because of the expressed nature of the legislation. Although the case “did not specifically proclaim that redistribution from the wealthy to the poor is a ‘public use/ purpose,’ it theoretically supported a legislative program designed to achieve that end.” Bender approves of this kind of use of eminent domain because it establishes a precedent for further uses of it to achieve the general goals of social justice: Bender “would like to think that our Constitution has room for this type of legislatively-sanctioned social and economic reorganization.”<sup>203</sup> But, as Bender recognizes, because the same judicial attitude of unquestioning deference permits desired rich to poor transfers as well as undesired poor to rich transfers, some method ought to be able to prevent the former while permitting the latter.<sup>204</sup>

Interestingly, Bender supports a version of heightened scrutiny in order to pursue this interpretation of the clause, but one that operates in the service of rich to poor transfers as a matter of public use, and not as a promotion of private property rights in general. Because it is a “special, constitutionally expressed limitation on the eminent domain power,” public use “should not be relegated to the same standard of review as the due process clause.”<sup>205</sup> So, Bender argues, heightened review should pertain to public use, and public use means something special here. It means taking from the rich to give to poor. Community cannot be taken for public use, but investment or fungible property can and ought to be taken. In this sense, heightened review means examining whether the public really benefits, and, if property can benefit the public, then that property ought to be governed by only due process protections.

What Bender wants protected, as a fundamental right, is community, “so that any government action that discriminated against or harmed a community would have to be carefully scrutinized.

Any time a taking detrimentally affects other public or social rights, such as health, safety or preservation of the environment, courts should also scrutinize it more closely. Takings of investment property, since it is fungible and monetarily compensable, might only be entitled to rationality review. In such cases, great deference to the legislature might be appropriate. A final approach would be to use different standards of review for takings where the government is the transferee from those where there is a private transfer to private parties, (which) should require a stricter standard of review, that is, more intense judicial evaluation.<sup>206</sup>

For Bender, a “literal reading of the takings clause” in regards to ‘public use’ would bar all private-to-private transfers.<sup>207</sup> To that extent, “[p]ublic use must mean public access and control. It necessarily involves transfers from the few to the many; from the wealthy to the less wealthy or poor or needy. It cannot mean the reverse. This redefinition of public use would still permit the *Hawaii Housing Authority* redistribution, but would prevent another *Poletown* from happening.”<sup>208</sup>

Bender concludes that takings should be restricted to “a small variety of cases in which the government acquires real property ownership, possession or full control (restrictions on use would never be takings) for government projects that service the public. In only those cases is the government constitutionally permitted to acquire property, and thereby required to provide just compensation.”<sup>209</sup>

Primarily because *Midkiff* is still good law, Bender’s analysis is within the scope of contemporary takings jurisprudence, and thousands of properties are taken each year by eminent domain. Given that communities have the power to redistribute, why haven’t more of them taken advantage of the opportunity?

Putterman offers three answers: first, inequalities are understood to be morally justified by luck or desert; second, redistribution might be inimical to voters’ interests; and third, wealthy people disproportionately influence political outcomes.<sup>210</sup> In terms of luck or desert, one reason

not to tax too highly or implement redistribution or leveling is the lottery factor, where “non-wealthy voters might prefer to leave open the possibility that they or their heirs could be wealthy in the future.” Voters weigh their risk of being insured against extreme poverty (via redistribution of high gain wealth) or possibly finding themselves or their heirs occupying the upper echelons of income that are used to guarantee insurance against poverty. By choosing not to redistribute, they choose to be either winners or losers in the lottery. The lottery factor indicates a “high, including unrealistic, subjective probabilities of wealth.”<sup>211</sup> Putterman: “So long as a large proportion of those with little wealth feel that they would be entitled to keep any fortune they might themselves come into, the ideological legitimacy of wealth must constitute a powerful barrier against proposals for redistribution.”<sup>212</sup> So, not only are owners entitled to what they earn, but also to what they are chosen to receive: fortunate ones are entitled to the property that lands on their doorstep.<sup>213</sup>

Putterman suggests that the masses also engage in “forbearance in redistribution” because of their fear that the kinds of policies required to substantially “level wealth would have negative long term consequences for the expected income levels of the average citizen.” This is a “fear of the unknown, material consequences of leveling”<sup>214</sup> where “less wealthy citizens may benefit or be hurt by leveling.”<sup>215</sup> Because the outcome is unknown, citizens with the power to act choose not to. Because redistribution might be inimical to their interests, voters are reluctant to act against the “moral legitimacy of wealth...obtained through various non-criminal routes.”<sup>216</sup>

Putterman suggests that the best explanation for the lack of redistribution, despite the clear right to do so, is that the wealthy prevent it. The wealthy probably cannot literally buy the votes of individuals, but representatives of the wealthy, such as politicians, are liable to bribes or influence.<sup>217</sup> Or, “[w]ealthier voters may participate more in the political process because they have more to lose.”<sup>218</sup> The wealthy may also influence belief and value formulation apart from voting and lobbying.<sup>219</sup> If this theory is true, Putterman suggests, the wealthy must lay out considerable cost and effort to retain their wealth by convincing the masses that inequality is in



their best interest. For this explanation to work, it must pay off through low levels of taxation, weak or ineffective property regulation, and fewer takings, and these effects must be the result of improper influence and not other factors (such as those influenced by desert or luck). The fact that inequality persists does not necessary mean the wealthy have hijacked both the political process and the political will of an otherwise powerful democratic assembly. And, of course, many wealthy people do not participate in these activities, and for good reason: according to Mancur Olson's research on collective action, wealthy persons as individuals, like the members of all large groups, are better off *not* contributing to their mutual best interest because the costs of participating, and the problem of free riders, are large. So, Putterman concludes, the wealthy influence the political system, but the extent of their influence and their actual influence against movements to redistribute their wealth is exaggerated.<sup>220</sup> Other factors, including the choice not to redistribute by the very people who stand to benefit from redistribution, are also relevant.

## **Part 2. *Pace Rawls*: Constitutional Property in the Original Position**

James Buchanan and Gerald Gaus both argue that Rawlsian deliberators, but not Rawls himself, would arrive at political positions that constitutionally align basic civil rights with property and exchange-type rights. Like the persons in Putterman's examples, Rawlsian deliberators also fail to exercise their right to extensive redistribution.

According to Buchanan, the exercise of many activities associated with noneconomic rights have minimal externalities other than invoking "mildly-felt meddlesome negative preferences," but their exercise can subject their practitioners to criminal sanctions and punishment "through the operation of ordinary politics."<sup>221</sup> To that extent, Buchanan suggests that "rational choice...would dictate skepticism with regard to the working of politicized majoritarian intervention with voluntary exchange."<sup>222</sup> Using examples of smoking, alcohol, sex, and "contracts for perpetual servitude," Buchanan uses the language of public choice to defend constitutional, and not *ad hoc* legislative, treatment of these kinds of behaviors. Any prohibition of voluntary exchanges for specific items would need to be constitutional and not 'merely'

legislative.<sup>223</sup> In this sense, Buchanan argues that the “constitutional stage chooser” in a Rawls-like original position would *not* legislate on issues like smoking or commercial sex or the voluntary exchange thereof, and that the constitutional rules that emerge from behind the constitutional veil of ignorance would, if truly impartial, not regulate “voluntary exchanges in such goods and services”<sup>224</sup> either. By implication, they would also not regulate a wide variety of other kinds of voluntary exchanges. The result is a constitutional right (or prohibition, as the case may be) to voluntary exchanges that is immune from the legislative process, which for Buchanan constitutes the “overt politicization of restraint on the exchange process.”

Such exchange is so important that restraints, if any, ought to be constitutionally imposed, developed under a veil of ignorance, and immune from local or legislative override. Because such restraint is unlikely to be imposed behind the veil, a “constitutional protection of voluntary exchanges between persons or organizations of persons”<sup>225</sup> results in a constitutional right to property, which protects the items that make exchanges possible.

Gerald Gaus also argues that Rawlsian deliberators, who, after justifying basic civil rights, would select private ownership and economic freedom—and not Rawls’s socialist scheme which, like other bifurcated regimes, strongly delineates between civil and property rights—when they select political programs designed to promote civil rights.<sup>226</sup> Persons in the original position would not, like Rawls, reject ‘capitalism’ and “they would conclusively reject all forms of socialism, including market socialism.”<sup>227</sup> This is because the deliberators would be aware of empirical studies that link civil liberties with extensive private ownership, including “private ownership of capital goods and financial instruments and institutions.” These studies show that extensive private ownership, which does not merely cover the kinds of property that Rawls would protect (such as toothbrushes or clothing), is a “requirement for a functioning and free social order that protects civil liberties.”<sup>228</sup>

According to Gaus, studies show that “private-property based regimes that protect property rights and overall economic freedom are the best protectors of civil liberties and, indeed,

of political rights.”<sup>229</sup> Rawls’ liberalism, on the other hand, calls for a redistributive branch of government that adjusts property rights “to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.”<sup>230</sup> Rawls also rejects ‘welfare state capitalism’ because it ‘permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the controls of the economy and much of the political life rests in a few hands.’ Finally, Rawl’s property owning democracy allows private property but only so that it operates by dispersing “the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy and, indirectly, political life as well.”<sup>231</sup> *Contra* Rawls, who believes that effective markets can be separated from “private ownership in the means of production,”<sup>232</sup> Gaus writes “[t]here has never been a political order characterized by deep respect for personal freedom that was not based on a market order with widespread private ownership in the means of production.”<sup>233</sup> As Gaus writes, “the basic liberties of the person and civil rights themselves ground a social and economic order based on extensive rights of ownership.” To that extent, “political orders based on the protection of property rights and economic freedom provide the only known basis of a regime that effectively protects the basic rights of persons. This is a great political value, and all reasonable members of the public must acknowledge it.”<sup>234</sup> Gaus’ claims are borne out, for example, in the market economies that grew out of the Eastern European former socialist bloc.

As Duncan Kennedy has shown in his article on Hungary’s efforts to reprivatize socially owned housing after the fall of state socialism, reprivatization is desirable not only because it promotes Kennedy’s goals of solidarity and participation, but because it respects the property rights of the current occupants of public housing, it is voluntary, it respects freedom of contract and private property rights, it maximizes profit, and the state’s participation would be minimal.<sup>235</sup>

Because the Rawlsian deliberators would be aware of this data, they would embrace a constitutional property right and reject Rawls’ own assessment of the role of the state in both restricting and redistributing private property. In other words, in addition to the non-ideal

operators in Putterman's examples, even hypothetical Rawlsian deliberators avoid large-scale democratic redistributions, despite having such power available to them through legal and democratic means.

#### **Part 4. Comparative Constitutional Property**

That being said, Buchanan and Gaus would recognize that Rawlsian deliberators and constitution-makers will be aware of fact that the constitutional treatment of property will vary among different historical patterns and cultural factors, and it would be remiss not to recognize that in some cases constitutional property provisions may need to be drafted in order to rectify prior and current injustices. For example, South Africa's constitution attempts to redress racial discrimination in property ownership, limit compensation based on the state's role as a past subsidizer of a property's value when it is taken, and require courts to consider the use, history, and acquisition of property in question. The South African constitution, which was intended to squarely confront the gross and extensive housing shortages that resulted from apartheid,<sup>236</sup> expressly attempts to reject a racist and authoritative past which imposed a near-total legal barrier to blacks owning land before and during apartheid. Within a framework of social transformation and social justice, Section 25 of the constitution attempts to redress racial discrimination in property ownership, limit compensation based on the state's role as a past subsidizer of a property's value when it is taken, and requires courts to consider the use, history, and acquisition of the property in question. Section 25 "leaves no doubt that private property rights are subject to social needs for land redistribution, tenure reform, and restitution of land rights."<sup>237</sup> It seeks to repatriate properties that were unjustly taken during the apartheid regime by inquiring into the justice of the present owner's title, and directs courts to examine not only whether the regime's racist policies played a role in the acquisition, but also whether the regime's infrastructure provided subsidies that resulted in "beneficial capital improvement of the property."<sup>238</sup>

In 1991, when apartheid ended and the debates over constitutional property began, whites constituted 14 percent of the population and owned 87 percent of land.<sup>239</sup> This disparity was the

result of the Land Acts of 1913 and 1936, which formed the basis of land allocation between black and white South Africans. The Acts provided “the basis on which blacks could be excluded not only from access to land, but also from its control.” When the Acts were eliminated and new policies were implemented, many white property owners were fearful that the value of their properties would be negatively impacted.<sup>240</sup> Faced with the problem of both protecting *and* redistributing property, the government anticipated claims by dispossessed people who were now occupying land they previously lived on, and by other landless people “moving onto any land where they could make a home on which they could farm or where they could live within easy access to their work.”<sup>241</sup> The country was also experiencing an extensive housing shortage.<sup>242</sup>

The debate over inclusion of a constitutionalized property right was therefore a contentious one among the constitution-builders. Opponents of the right feared that it would freeze the unjust maldistribution of resources or frustrate land reform,<sup>243</sup> and that “market and economic forces rather than...apartheid legislation and traditional forms of repression” would continue to oppress by ensuring racial imbalances in land ownership.<sup>244</sup> Proponents of property owners feared redistribution without compensation. It was finally agreed between the parties that “no positive right to property would be constitutionalized. Parties concurred that the inclusion of provisions in the Constitution prohibiting the arbitrary deprivation of property and providing for the expropriation of property in certain circumstances and subject to compensation, were perhaps more important safeguards and as such were adequate.”<sup>245</sup>

Although property rights are not ‘constitutionalized’ in South Africa, the new constitution contained a detailed formula for compensation determinations, which is radically different than in the United States. Compensation in South Africa recognizes that property holders who benefitted from unjust state policies should not receive full fair market compensation for their properties in the event of expropriation. According to Matthew Chaskalson, the ‘just and equitable’ compensation contemplated by Section 25(c) of the new constitution

would accommodate the payment of less than market value in appropriate circumstances. In particular, the reference to the history of acquisition of land was designed to free a future government from having to pay full market value compensation to the beneficiaries of forced removals who had originally obtained their land at sub market prices or with the assistance of soft government loans.<sup>246</sup>

This seeks to reduce the amount of compensation (to zero, perhaps) paid to expropriated landowners.

In contrast to the property norms of the United States, which tend towards the moral prohibition against theft coupled with exclusion rights, Africans have a social norm that did not regard “wealth or property in the ordinary sense, and therefore did not form part of a person’s estate...land is not property, it is something you use for a time and then abandon.” “African land,” writes Caiger, “therefore traditionally formed part of the social obligations within the community and could not be transferred through succession,” although rights of access to land could be inherited depending on “population density, land shortages, and soil impoverishment.”<sup>247</sup> White South Africans, on the other hand, saw land in much the same way as other European-based legal cultures, where land is “something owned, a right which can be asserted against the world at large and used at the exclusion of others.”<sup>248</sup>

Constitutions can impact property in other ways. For example, the Zimbabwean constitution, which originally tried to protect white farmers with a property clause, was amended in 1990 to remove its property clause, leading to easier access of the state to land acquisition.<sup>249</sup> Specifically, the amendments removed the right to ‘prompt payment’ for expropriated lands, and now permit the National Assembly to determine the principles of assessment and compensation for land which cannot be challenged in a court of law through the use of judicial review.<sup>250</sup>

One of the major differences between the United States and South African documents and the deeply political situations in which they were created involves the fact that the South African property reforms are primary intended to remedy two significant injustices that were present at the time of drafting: first, the repatriation of dispossessed black citizens with tribal, communal, and individual properties that were taken (or, more accurately, stolen) from them

under the jurisdiction of the Land Acts and subsequent apartheid regimes, and, second, the dire housing shortage. Repatriation and rectification for past injustices are not topics that are contemplated in American property law. However, there is nothing in the history of constitutional property in the United States to prevent the state from seeking to implement policies that achieve the same purposes as the South African constitution in terms of housing justice.

The sole case that appears to address and authorize housing justice in the United States is *Midkiff*. Like all other takings cases, *Midkiff* required the payment of just compensation, and it is here that the constitutional regimes of the two countries diverge: South Africa's property regime is structured to deny payments to undeserving owners, while the United States property trajectory is beholden to payments to the 'oligopolists' who are 'made whole' by the just compensation clause. The *Midkiff* court recognized the injustice of the property distribution, and agreed that the state was furthering a public use of the property by allowing tenants to force transfers of their apartments. Had the state attempted to exercise its police power by forcing *uncompensated* transfers, there is little doubt that the transfer scheme would have been found unconstitutional, and the state would have had to either pay compensation or be enjoined from enforcing the statute. However, *with* compensation, there is nothing in the jurisprudence that would prevent the Court from permitting legislation that uses eminent domain to provide housing to the homeless or to repatriate dispossessed communities. No specific constitutional property provisions are required to effectuate this kind of transfer. As Bender has shown, this is the only legitimate use of eminent domain based upon interpretation of the public use clause.

With the understanding of the social and legislative history of the South African property statute in hand, what can property jurists in the United States and other countries stand to learn from South Africa's example and experience? As Alexander makes clear, background legal institutions and culture play a central role in the 'normative pull' of constitutional property,<sup>251</sup> and the background of racial injustice and apartheid certainly shaped the South African conception of property rights. This recognizes that background institutions and cultures of different countries

reflect different property law regimes as well as different social obligation norms, and it is unlikely that the causes and contingencies that give rise to one nation's constitutional property law are ever fully replicated in another nation's experiences and constitution-making.

As leading South African property commentator Matthew Chaskalson observes, the South African and United States constitutions have very different points of origin, and they seek to accomplish different goals. Due to the effects of apartheid and the stated constitutional attempt to remedy them, South Africa recognizes the unjust provenance of many property claims and therefore does not purport to protect the title of existing owners; unlike the United States constitution, which historically and presently protects existing title, the South African constitution “drives a legislative programme of land restoration and rural restructuring.”<sup>252</sup> Many of the same problems of racism and original appropriation exist in the U.S. land regime, particularly in regards to lands traditionally linked to Native American tribes. Indigenous people and their lands would benefit from stronger constitutional property rights, but a thorough discussion of the necessity of a South African-style constitution in these cases, and its specific attempt to rectify past injustice, must wait for a later time.

## Notes

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<sup>1</sup> Barack Obama, *The Audacity of Hope* (New York: Crown, 2006), 149.

<sup>2</sup> Frank I. Michelman, “Property as a Constitutional Right,” 38 *Wash. & Lee L. Rev.* 1097 (1981), 1110.

<sup>3</sup> *Ibid.*

<sup>4</sup> Randy Barnett, “Does The Constitution Protect Economic Liberty?” *Harvard Journal Of Law & Public Policy* [Vol. 35, No. 1] 35 *Harv. J.L. & Pub. Pol’y* 5-12 (2012), 5.

<sup>5</sup> *Ibid.*, 5 (quoting the 1868 Civil Rights Bill).

<sup>6</sup> See *Nollan v. California Coastal Commission*, 483 U.S. 825, 865 (1987) (Blackmun, J., dissenting).

<sup>7</sup> See *Moore v City of East Cleveland*, 431 U.S. 494 (1977).

<sup>8</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade* 410 U.S. 113 (1973).



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<sup>9</sup> See, e.g., *Planned Parenthood of Southeastern Pa. v Casey*, 505 U.S. 833 (1992).

<sup>10</sup> Stephen Macedo, “Economic Liberty and the Future of Constitutional Self-Government,” in *Liberty, Property, and the Future of Constitutional Development*, eds. Ellen Frankel Paul and Howard Dickman (Albany: SUNY Press, 1990), 93-95.

<sup>11</sup> Jonathan R. Macey, “Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and ‘Other’ Rights under the United States Constitution,” *Social and Political Philosophy*, vol. 9, no. 1 (1992), 141-170, 155; *U.S. v Carolene Products Co.* 304 U.S. 144 (1938).

<sup>12</sup> Macey, “Some Causes and Consequences,” 155.

<sup>13</sup> 304 U.S. at 146.

<sup>14</sup> 304 U.S. at 152.

<sup>15</sup> Footnote 4 provides, in relevant part:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth...

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation...

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, national, or racial minorities.

whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

<sup>16</sup> James W. Ely, Jr., *The Guardian of Every Other Right*, 3<sup>rd</sup> ed (Oxford: Oxford University Press, 2007), 139.

<sup>17</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>18</sup> *Nollan*, 483 U.S. at 842. See, in general, Nicholas Mercurio, “The Takings Issue: A Continuing Dilemma in law and Economics” in *Taking Property and Just Compensation*, ed. Nicholas Mercurio (Boston: Kluwer, 1992), 15-17.

<sup>19</sup> *Nollan*, 483 U.S. at 834.

<sup>20</sup> Jerold S. Kayden, “Charting the constitutional course of private property: Learning from the 20<sup>th</sup> century” in *Private Property in the 21<sup>st</sup> Century: the Future of an American Ideal* ed. Harvey M. Jacobs (Northampton, MA: Edward Elgar 2004), 42. Ellen Frankel Paul and Howard Dickman claim that *Nollan* set a new “substantial interest” test for takings. Ellen Frankel Paul and Howard Dickman, “Introduction,” in *Liberty, Property, and the Future of Constitutional Development*, eds. Ellen Frankel Paul and Howard Dickman (Albany: SUNY Press, 1990), 7. However, this standard has not been applied.

<sup>21</sup> *Hawaiian Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) 240-1.

<sup>22</sup> 467 U.S. at 242.

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<sup>23</sup> *Kelo v City of New London* 545 U.S. 469 (2005). The Kelo story is widely told. The best book on the ‘human interest’ angle of the case is Jeff Benedict *Little Pink House* (New York: Grand Central Publishing, 2009), while Ilya Somin’s *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain* (Chicago: University of Chicago Press, 2015) provides more legal and policy analysis. A feature film based on the case, starring Catherine Keener, is scheduled to open in 2017.

<sup>24</sup> Somin, *The Grasping Hand*, 32.

<sup>25</sup> *Ibid.*, 113.

<sup>26</sup> *Ibid.*, 114.

<sup>27</sup> *Ibid.*, 2.

<sup>28</sup> *Ibid.*, 115.

<sup>29</sup> *Kelo v City of New London* 545 U.S. at 493 (Kennedy, J., concurring).

<sup>30</sup> Somin, *The Grasping Hand*, 127.

<sup>31</sup> 545 U.S. 469 (O’Connor, J., dissenting). The *Kelo* dissents are discussed in more detail in this chapter.

<sup>32</sup> Gerald Gaus, “Coercion, Ownership, and the Redistributive State: Justificatory Liberalism’s Classical Tilt,” in *Ownership and Justice*, eds. Ellen Frankel Paul, Fred D. Miller Jr., Jeffrey Paul (Cambridge: Cambridge University Press, 2010), 244.

<sup>33</sup> Macey, “Some Causes and Consequences,” 141.

<sup>34</sup> *Ibid.*

<sup>35</sup> William Riker, “Civil Rights and Property Rights,” in *Liberty, Property, and the Future of Constitutional Development*, eds. Ellen Frankel Paul and Howard Dickman (Albany: SUNY Press, 1990), 61.

<sup>36</sup> Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (University Park: The Pennsylvania State University Press, 1996), 135.

<sup>37</sup> *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), 552.

<sup>38</sup> Fred D. Miller, “Property Rights in Aristotle” in *Aristotle’s Politics: Critical Essays*, eds. Richard Kraut & Steven Skultety (Lanham: Rowman & Littlefield, 2005), 121.

<sup>39</sup> Macedo, “Economic Liberty,” 91.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 98.

<sup>42</sup> *Ibid.*, 120 n4.

<sup>43</sup> *Ibid.*, 91.

<sup>44</sup> Riker, “Civil Rights,” 55 n7.

<sup>45</sup> *Ibid.*, 55.

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- <sup>46</sup> Macey, "Some Causes and Consequences," 143.
- <sup>47</sup> *Ibid.*, 143-144.
- <sup>48</sup> *Ibid.*, 144.
- <sup>49</sup> *Ibid.*, 142 (footnote omitted).
- <sup>50</sup> *Ibid.*, 156.
- <sup>51</sup> *Ibid.*, 156, citing George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics*, vol.2, no. 1 (1971), 3-21.
- <sup>52</sup> *Ibid.*, 157.
- <sup>53</sup> *Ibid.*, 158 (footnote omitted).
- <sup>54</sup> *Ibid.*, 146.
- <sup>55</sup> *Ibid.*, 149.
- <sup>56</sup> *Ibid.*, 158.
- <sup>57</sup> Keynes, *Liberty, Property, and Privacy*, x.
- <sup>58</sup> *Ferguson v Skrupa* 372 U.S. 726 (1963).
- <sup>59</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965), Black, J., dissenting. Justice Black retired prior to the Court decided *Roe v. Wade* in 1973.
- <sup>60</sup> Keynes, *Liberty, Property, and Privacy*, xi; See *Griswold* and *Roe*.
- <sup>61</sup> Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004), 233.
- <sup>62</sup> *Ibid.*, 234.
- <sup>63</sup> 505 U.S. at 847.
- <sup>64</sup> Barnett, *Restoring the Lost Constitution*, 235-6. Barnett rests his case on the Ninth Amendment, arguing that although economic liberties and private property rights are "unenumerated" they constitute "other rights retained by the people." As I argue in part 3, there is persuasive evidence that property is not an "other" right retained by the people, but an enumerated one.
- <sup>65</sup> *Ibid.*, 236.
- <sup>66</sup> *Ibid.*, 352.
- <sup>67</sup> Keynes, *Liberty, Property, and Privacy*, 134 n21.
- <sup>68</sup> Ely, *The Guardian of Every Other Right*, 139.
- <sup>69</sup> See also Douglas Husak, *Overcriminalization* (Cambridge: Cambridge University Press, 2007).

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<sup>70</sup> Robin Malloy, "A Classic Liberal Critique of Takings Law: A Struggle Between Individualist and Communitarian Norms," in *Taking Property and Just Compensation*, ed. Nicholas Mercuro (Boston: Kluwer, 1992), 199.

<sup>71</sup> See, primarily, *Roe v. Wade*.

<sup>72</sup> Unless, of course, there are idiosyncratic or homophonic uses of private, such as when "private" refers to a rank in the military.

<sup>73</sup> See, primarily, *Griswold*.

<sup>74</sup> *Chicago Burlington RR* 166 U.S. 226, 239 (1897). The right to just compensation was the first right incorporated from the Bill of Rights to the states.

<sup>75</sup> See the Second Amendment.

<sup>76</sup> The Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>77</sup> D. Benjamin Barros, "Home as a Legal Concept," 46 *Santa Clara L. Rev.* 255 (2006), 295.

<sup>78</sup> *Ibid.*, 299.

<sup>79</sup> *Ibid.*, 297. As Barros notes, the Court's holding in *Kelo* "was not at all surprising. In two previous cases, the Court had held that eminent domain could be used to take property and transfer it to a private party as long as the taking served a public purpose. The Court also made it clear in those cases that courts should give great deference to legislative determinations of what constitutes a public purpose. *Kelo*, therefore, can be seen as simply following this trend of a flexible interpretation of 'public use' and judicial deference to the legislative branch." (*Ibid.*, 296).

<sup>80</sup> *Ibid.*, (footnote omitted).

<sup>81</sup> Somin, *The Grasping Hand*, 213.

<sup>82</sup> *Ibid.*, 214.

<sup>83</sup> *Ibid.*, 216.

<sup>84</sup> *Ibid.*, 4.

<sup>85</sup> *Ibid.*, 83.

<sup>86</sup> *Ibid.*, 77.

<sup>87</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>88</sup> Dick M. Carpenter and John K. Ro, "Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?" *Urban Studies* 2009; 46; 2447 (online version: <http://usj.sagepub.com/cgi/content/abstract/46/11/2447>); see also Somin, *The Grasping Hand*, 74-88, for an extended argument that judicial review of takings decisions can be used to "protect poor and minority populations who lack leverage in the political process."

<sup>89</sup> *Ibid.*

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<sup>90</sup> 545 U.S. 469, Thomas, J., dissenting.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Soldal v. Cook County Illinois*, 506 U.S. 56 (1992).

<sup>93</sup> 506 U.S. at 61.

<sup>94</sup> 506 U.S. at 63, citing *U.S. v Jacobsen*, 466 U.S. 109, 113.

<sup>95</sup> 506 U.S. at 68 (citations omitted).

<sup>96</sup> Barnett, *Restoring the Lost Constitution*, 5.

<sup>97</sup> Gregory S. Alexander, *The Global Debate Over Constitutional Property* (Chicago: University of Chicago Press, 2006), 34.

<sup>98</sup> Ellen Frankel Paul, *Property Rights and Eminent Domain* (New Brunswick: Transaction Books, 1988), 263.

<sup>99</sup> *Ibid.*, 264.

<sup>100</sup> Bruce Ackerman, *We the People, vol. 1: Foundations* (Cambridge, MA: Belknap Press, 1991), 13, cited in James Fleming, "We the Exceptional People," in *Constitutional Politics*, eds. Sotirios A. Barber and Ronald P. George (Princeton: Princeton University Press, 2001), 92.

<sup>101</sup> Fleming, 104 n7, citing *Federalist* 78 and *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

<sup>102</sup> Richard Epstein, *Takings* (Cambridge: Harvard University Press, 1985), 30-31. See also chapter 4.

<sup>103</sup> Walter F. Murphy, "Alternative Political Systems," in *Constitutional Politics*, eds. Sotirios A. Barber and Ronald P. George (Princeton: Princeton University Press, 2001), 15.

<sup>104</sup> Paul, *Property Rights and Eminent Domain*, 261.

<sup>105</sup> *Ibid.*, 268, n18.

<sup>106</sup> James W. Ely, Jr., "Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners, 2005 *Cato Sup. Ct. Rev.* 39, 62.

<sup>107</sup> Somin, *The Grasping Hand*, 242.

<sup>108</sup> *Ibid.*, 36.

<sup>109</sup> Thomas W. Merrill and Henry E. Smith, "The Morality of Property," 48 *Wm. & Mary L. Rev.* 1849, 1849-50.

<sup>110</sup> Jeremy Waldron, "Homelessness and the Issue of Freedom" 39 *UCLA L. Rev.* 295 (1991).

<sup>111</sup> Erik J. Olsen, *Civic Republicanism and the Properties of Democracy* (Lanham: Lexington Books, 2005), 195.

<sup>112</sup> *Ibid.*, 23.

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- <sup>113</sup> Gaus, “Coercion, Ownership, and the Redistributive State,” 241.
- <sup>114</sup> Thomas Christiano, “The Uneasy Relationship Between Democracy and Capital,” in *Ownership and Justice*, eds. Ellen Frankel Paul, Fred D. Miller Jr., Jeffrey Paul (Cambridge: Cambridge University Press, 2010), 196.
- <sup>115</sup> *Ibid.*, 197.
- <sup>116</sup> *Ibid.*, 199; citing Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press), 2008.
- <sup>117</sup> *Ibid.*, 199-200.
- <sup>118</sup> *Ibid.*, 201.
- <sup>119</sup> *Ibid.*, 202.
- <sup>120</sup> *Ibid.*
- <sup>121</sup> The example is mine; Christiano’s are minimum wage and emissions laws.
- <sup>122</sup> *Ibid.*, 208.
- <sup>123</sup> *Ibid.*, 212.
- <sup>124</sup> *Ibid.*, 213.
- <sup>125</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981), (J. Brennan, dissenting).
- <sup>126</sup> Feinberg, Joel. *The Moral Limits of the Criminal Law, Volume 1: Harm to Others*. (New York: Oxford University Press. 1984).
- <sup>127</sup> Such harms include business competition, emotions, failed love affairs, *force majeure*, etc.
- <sup>128</sup> Nozick is clearly aware of the difficulties posed by rectification for the minimal state, and acquiesces that “past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.” Nozick, *Anarchy, State, and Utopia*, 231.
- <sup>129</sup> Takings is not a solution for rectifying harm, because a taking requires compensation and harm is usually addressed by uncompensated nuisance abatement; in other words, if an owner is unjustly harming others, then their property is subject to seizure and outright dispossession and no compensation is due.
- <sup>130</sup> This is also Jed Rubenfeld’s position. See Jed Rubenfeld, “Usings,” *Yale Law Journal* Vol 102, 1077 (1993).
- <sup>131</sup> Frank I. Michelman, “The Property Clause Question,” *Constellations* Volume 19, No 2, 2012, 160 (footnote omitted).
- <sup>132</sup> *Ibid.*, 159.
- <sup>133</sup> *Ibid.*, 157.
- <sup>134</sup> *Ibid.*, 152.
- <sup>135</sup> *Ibid.*, 159.

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid., 158.

<sup>138</sup> Ibid., 159.

<sup>139</sup> Ibid., 161.

<sup>140</sup> Ibid., 161-162.

<sup>141</sup> Ibid., 159.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid., 160.

<sup>144</sup> Ibid.

<sup>145</sup> Rubinfeld, "Usings," 1081.

<sup>146</sup> Ibid., 1141.

<sup>147</sup> Ibid., 1102.

<sup>148</sup> Ibid., 1111.

<sup>149</sup> Here, Rubinfeld might support the South African as well as the Malaysian constitutional property schemes, which do not provide for compensation in the case of regulatory takings or inverse condemnation actions. Unlike the development of takings law in the United States, which provides for compensation when state action renders ownership totally unprofitable, compensation under the South African constitution is only due when the state engages in outright deprivation, acquisition or use of the property. Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000), 325.

<sup>150</sup> "In general, regulations directed at some perceived harm do not in this sense use the property they regulate; they merely proscribe a use to the owner or restrict him in exercising a use of his own choosing. That is the true appeal of the harm principle in compensation law. When, however, due to the extent of prohibitory regulation or the nature of the thing regulated, the law in effect appropriates property for a state-ordained use, proscription has crossed the line into conscription." Rubinfeld, "Usings," 1113.

<sup>151</sup> Ibid., 1119.

<sup>152</sup> Ibid., 1143.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid., 1144.

<sup>155</sup> Ibid., 1144 (footnote omitted).

<sup>156</sup> Ibid., 1139.

<sup>157</sup> Ibid., 1143.

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- <sup>158</sup> Ibid., 1142.
- <sup>159</sup> Ibid., 1102.
- <sup>160</sup> Ibid., 1142.
- <sup>161</sup> Frank I. Michelman, “Property as a Constitutional Right,” 38 *Wash. & Lee L. Rev.* 1097 (1981), 1112.
- <sup>162</sup> Ibid., 1114 (footnote omitted).
- <sup>163</sup> Ibid., 1114.
- <sup>164</sup> Ibid. (footnote omitted).
- <sup>165</sup> Frank Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law,” 80 *Harvard Law Review* 1165 (1967), 1201 n77.
- <sup>166</sup> Ibid., 1257.
- <sup>167</sup> Ibid., 1257; see also chapter 2.
- <sup>168</sup> Ibid., 1211 (footnote omitted).
- <sup>169</sup> Ibid., 1210.
- <sup>170</sup> Ibid., 1212.
- <sup>171</sup> Ibid., 1210.
- <sup>172</sup> Ibid., 1210-11 (emphasis in original).
- <sup>173</sup> Ibid., 1212.
- <sup>174</sup> Ibid., 1257; see also chapter 2.
- <sup>175</sup> Paul Fairfield, *Public/Private* (Lanham: Rowman & Littlefield, 2005), 101.
- <sup>176</sup> Ibid., 124.
- <sup>177</sup> Ibid.
- <sup>178</sup> As Macey argued previously in this chapter, legislators may have legitimate interests in bifurcating and restricting private property rights because of their obligation to fund the state through taxation.
- <sup>179</sup> Rubinfeld, “Usings,” 1144.
- <sup>180</sup> Ibid., 1145.
- <sup>181</sup> Oliver Wendell Holmes, “The Path of the Law,” in *The Essential Holmes*, ed. Richard Posner (Chicago: University of Chicago Press, 1992), 164.
- <sup>182</sup> Itai Sened, *The Political Institution of Private Property* (Cambridge: Cambridge University Press, 1997).
- <sup>183</sup> Ibid., 31.



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<sup>184</sup> Ibid.

<sup>185</sup> Ibid., 181.

<sup>186</sup> Ibid., 50.

<sup>187</sup> Ibid., 79.

<sup>188</sup> Ibid., 102.

<sup>189</sup> Ibid., 99.

<sup>190</sup> Ibid., 102-103.

<sup>191</sup> Ibid., 119.

<sup>192</sup> Sened argues that the Magna Carta, which granted property rights for 13<sup>th</sup> century English manor barons against King John's establishment of an extraordinary war tax, is precisely the kind of right that can emerge from his model. By securing for themselves the right to approve the King's taxing power through his signature of the Carta, the barons petitioned the government, made their preferences known, and convinced the government that it was in the King's best interest to grant the right. The result is not a moral right to property, but a purely positive or legal right. Although it relates almost exclusively to property rights against the King, the Magna Carta is, of course, considered a foundational document in the history of human rights as well. See Sened, *The Political Institution of Private Property*, 120-122.

<sup>193</sup> Ibid., 123.

<sup>194</sup> Gary Minda, "The Dilemmas of Property and Sovereignty in the Postmodern Era: New Solutions for the Regulatory Takings Problem," in *Taking Property and Just Compensation*, ed. Nicholas Mercuro (Boston: Kluwer, 1992), 142.

<sup>195</sup> Michelman (1981), 1109 (quoting John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 86-7).

<sup>196</sup> Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), 164.

<sup>197</sup> James Madison, "James Madison's Letter to Thomas Jefferson (October 17, 1788)" in *Madison, Letters and other Writings of James Madison vol. 1* (Philadelphia: J.B. Lippincott, 1867), 425 (cited in Barnett, *Restoring the Lost Constitution*, 32 n1).

<sup>198</sup> Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown and Company, 1972), 14.

<sup>199</sup> Louis Putterman, "Why Have the Rabble not Redistributed the Wealth? On the Stability of Democracy and Unequal Property" in *Property Relations, Incentives, and Welfare*, ed. John E. Roemer (New York: St. Martin's Press, Inc., 1997), 359.

<sup>200</sup> *Poletown Neighborhood Counsel v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (allowing Detroit to condemn an entire neighborhood and displace thousands of residents from their homes to clear land for the construction of a General Motors plant). According to Barros, "*Poletown* was recently overruled in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), though, like *Kelo*, *Hathcock* did not consider the possibility that homes could be treated differently than other types of property in the eminent domain context." (Barros, "Home as a Legal Concept," 296 n167).

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- <sup>201</sup> Leslie Bender, “The Takings Clause. Principles or Politics?” *34 Buffalo L. Rev.* 735, 816-29 (1985), 820, n323.
- <sup>202</sup> *Ibid.*, 824.
- <sup>203</sup> *Ibid.*, 816.
- <sup>204</sup> *Ibid.*, 818.
- <sup>205</sup> *Ibid.*, 825.
- <sup>206</sup> *Ibid.*, 826 -827. In this regard, Bender anticipates Radin’s bifurcation between fungible and personal or community property.
- <sup>207</sup> *Ibid.*, 829.
- <sup>208</sup> *Ibid.*, 828–9.
- <sup>209</sup> *Ibid.*, 831.
- <sup>210</sup> Putterman, “Why Have the Rabble not Redistributed the Wealth?” 360.
- <sup>211</sup> *Ibid.*, 369-70.
- <sup>212</sup> *Ibid.*, 373.
- <sup>213</sup> Marx would say that these interests and preferences are “prescribed for them by elites.” (Putterman, “Why Have the Rabble not Redistributed the Wealth?” 374). Nozick would respond: “From each as they choose. To each as they are chosen.” Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 160.
- <sup>214</sup> Putterman, “Why Have the Rabble not Redistributed the Wealth?” 379.
- <sup>215</sup> *Ibid.*, 381.
- <sup>216</sup> *Ibid.*, 379.
- <sup>217</sup> *Ibid.*, 376.
- <sup>218</sup> *Ibid.*, 377.
- <sup>219</sup> *Ibid.*, 378.
- <sup>220</sup> Putterman, 380.
- <sup>221</sup> James Buchanan, “The Contractarian Logic of Classical Liberalism,” in *Liberty, Property, and the Future of Constitutional Development*, eds. Ellen Frankel Paul and Howard Dickman (Albany: SUNY Press, 1990), 19.
- <sup>222</sup> *Ibid.*, 18.
- <sup>223</sup> Such was the case with alcohol in the United States. According to Buchanan, regulation of alcohol is appropriately Constitutional, but the decision to prohibit it was wrong. *Ibid.*, 19.
- <sup>224</sup> *Ibid.*, 18.

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- <sup>225</sup> Ibid., 19.
- <sup>226</sup> Gaus, “Coercion, Ownership, and the Redistributive State,” 258.
- <sup>227</sup> Ibid., 237-8.
- <sup>228</sup> Ibid., 251.
- <sup>229</sup> See Gaus, “Coercion, Ownership, and the Redistributive State,” 251-258, citing studies that purport to show the positive correlation between economic rights and civil rights in a variety of nations.
- <sup>230</sup> John Rawls, *A Theory of Justice Revised Edition* (Cambridge: The Belknap Press of Harvard University Press, 1999), 242-51.
- <sup>231</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press of Harvard University Press, 2001), 138.
- <sup>232</sup> Rawls, *A Theory of Justice Revised Edition*, 239.
- <sup>233</sup> Gaus, “Coercion, Ownership, and the Redistributive State,” 252.
- <sup>234</sup> Ibid., 272 – 3.
- <sup>235</sup> Duncan Kennedy, “Neither the Market Nor the State: Housing Privatization Issues” in *A Fourth Way? Privatization, Property, and the Emergence of New Market Economics*, eds. Gregory Alexander and G. Skapsa (New York: Routledge, 1994), 253 - 268.
- <sup>236</sup> Alexander, *The Global Debate*, 174.
- <sup>237</sup> Ibid., 161.
- <sup>238</sup> Constitution of the Republic of South Africa, Section 25, 3(d).
- <sup>239</sup> Andrew Caiger, “The Protection of Property in South Africa,” in *Negotiating Justice: A New Constitution for South Africa*, eds. Mervyn Bennun and Malyn D.D. Newitt (Exeter: University of Exeter Press, 1995), 114.
- <sup>240</sup> Ibid., 115.
- <sup>241</sup> Ibid.
- <sup>242</sup> Alexander, *The Global Debate*, 174.
- <sup>243</sup> Ibid., 155.
- <sup>244</sup> Yunus Carrim, “The ANC as a mass political organization,” in *Constitution Making in the New South Africa*, eds. Alexander Johnson, Siphon Shezi, and Gavin Bradshaw (London and New York: Leicester University Press, 1993), 98.
- <sup>245</sup> Kathleen Savage, “Negotiating South Africa’s New Constitution: An Overview of the Key Players and the Negotiation Process” in *The Post Apartheid Constitution: Perspectives on South Africa’s Basic Law*, eds. Penelope Andrews, Stephen Ellmann (Athens, OH: Witwatersrand U. Press/Ohio U. Press, 2001), 181.
- <sup>246</sup> Spitz and Chaskalson, *The Politics of Transition*, 318.

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<sup>247</sup> Caiger, 118 n15, citing T. W. Bennett, *Sourcebook of African Customary Law* (Cape Town: Juta & Co., 1991), 388-389.

<sup>248</sup> Caiger, "The Protection of Property in South Africa," 118.

<sup>249</sup> Savage, "Negotiating South Africa's New Constitution," 128.

<sup>250</sup> *Ibid.*, 126.

<sup>251</sup> Alexander, *The Global Debate*, 150.

<sup>252</sup> Spitz and Chaskalson, *The Politics of Transition*, 316 (citation omitted).

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### *Conclusion*

Jean-Jacques Rousseau famously locates the root of all evil not in money, but in the private property invented by the first owner and acquiesced to by the first ‘simple’ nonowners:

The first person who, having enclosed a plot of land, took it into his head to say this is mine and found people simple enough to believe him was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared, had some one pulled up the stakes or filled in the ditch and cried out to his fellow men: "Do not listen to this imposter. You are lost if you forget that the fruits of the earth belong to all and the earth to no one!"<sup>1</sup>

As I hope to have shown, both the owners and the neighbors-to-be in Rousseau’s parable have very good reasons for establishing this institution and rejecting the stake-puller’s admonitions. However, the connection drawn by the stake-puller between private property and the evils of civil society—to which I will add inequality and oppression—may not be only hortatory, in which case the institution of private property ought to be held to answer for its role in perpetuating inequality and oppression.

The issue here is whether property regulations, including takings and the exercise of the police power, can rectify these problems—many of which are caused by factors other than this particular institution—whether they cause them. I have already shown that the use of eminent domain disproportionately impacts minorities. Other state action is also suspect. For example, redlining is the joint effort between private property owners and political authorities to deny African-Americans the opportunity to rent or purchase properties in designated areas. The kind of strong private property rights argued for in this work might appear to perpetuate this kind of discrimination. In fact, the opposite is true. For example, Ta-Nehisi Coates makes the argument for the payment of reparations to victims of state-sponsored redlining who were denied the equal protection of the law when they applied for Federally subsidized mortgage insurance through the

Federal Housing Administration.<sup>2</sup> The FHA designated white neighborhoods as eligible for insured mortgages, and black neighborhoods, outlined in red on the maps used by loan officers, as ineligible. As a result, potential African American homeowners were denied the opportunity to own property. This was not, however, the sole province of the private interests of racist real estate agents. Rather, Coates writes, “the federal government concurred.” In fact, “[i]t was the Home Owners’ Loan Corporation, not a private trade association, that pioneered the practice of redlining, selectively granting loans and insisting that any property it insured be covered by a restrictive covenant—a clause in the deed forbidding the sale of the property to anyone other than whites.”<sup>3</sup>

The provision of reparations is a hotly contested topic, in part because the amount of reparations is difficult to determine and different persons have different claims based on individual experiences. But Coates shows that reparations in these specific cases are particularly just because the persons who were denied the equal right to own private property are readily identifiable through the documentary evidence: the loan applications, records of interviews, and the government’s own redlining maps.<sup>4</sup> For Coates, reparations in housing due to redlining are meant to compensate not for general damages to all African Americans, but for “specific damage to black people because they were black” when they attempted to buy property. In the case of redlining,

we have the maps. We know exactly where the communities are that were damaged. We have census report. We know who lived there. In cases of, for instance, the GI Bill or FHA loans that black people were not allowed to give, we have folks who could go before a claims office and say, ‘I tried to do this. This was denied to me.’ So we don’t have a problem of knowing where folks live. We don’t have a problem knowing what communities were affected. I would target those communities for investment and target those specific people, you know, given that they could prove what happened to them, for investment. That’s a very specific—that’s a limited case of reparations, but it’s what I focused on in terms of housing.<sup>5</sup>

Coates recognizes the value of private property, and describes how the state played a key role in preventing African Americans from taking part in the institution. Justice requires the rectification of this wrongful denial of the opportunity to own private property, and the kind of strong property

right I advocate for here includes a strong right against the state when it actively participates in preventing persons from owning private property, as it did in the situations Coates describes.

The constitutional right to private property I am proposing protects property that is capable of containing private interests, and to the extent that property is incapable of containing those interests, it cannot enjoy constitutional protection. This, again, protects one type of property (such as the protection of the home against eminent domain) but may also protect a wide variety of other properties that are not commonly associated with privacy. In addition to protecting homes, a private property right that is protected by the strict scrutiny standard of review would probably prohibit the criminalization of drugs, permit all Lyft, Uber, or individual vehicle-for-hire services by denying state-granted livery (or taxi) monopolies, forbid the prohibition of short term leases such as those used by AirBnB proprietors and customers, prohibit the regulation of most kinds of personal weapons including guns, outlaw most takings, and, very importantly, prevent civil forfeiture of property.

If there is a fundamental right to property that is predicated on privacy concerns, the exercise of eminent domain as well as the provision of criminal punishment for possession of protected property violates the right. If the property is a body, home, or personal property—sites which are primarily private and important for the development of personhood, autonomy, and freedom—then eminent domain is unjustified and should be constitutionally prohibited in these cases unless the state’s expropriative measure can pass strict scrutiny. Because the privacy interest diminishes from here, there are fewer opportunities for the development of personhood and autonomy, and less restrictions on the freedom-granting aspects of ownership the further one moves away from the home and body. The extreme end of the spectrum would disclaim both privacy and property claims in natural resources, and the use of eminent domain to divest private owners would not be presumptively unjust because of the unlikelihood that private ownership of these materials implicates privacy concerns or facilitates the development of personhood or the maximization of freedom. The middle ground between homes and natural resources would

encompass various levels of entrepreneurship, business investment properties, closely-held corporations, and other concerns which reflect the private intentions and plans of their proprietors and demand extensive property rights protections on those bases.

However, because many of these endeavors necessarily involve commercial transactions with the public, their protection is less than that enjoyed by the privacies inherent in the home or body. The extent to which owners do not or cannot make privacy claims about their property is the extent that constitutional private property claims cannot be made about that property. In other words, if there is nothing private about an owner's property, then there is no reason to respect their privacy rights in the property, and other interests (those of the community or nonowners) can make claims about the use of the property without violating the owner's rights. If property is not private, then its owner's right to exclude (and the duty of nonowners' not to interfere) are reduced in favor of eminent domain type proceedings or regulations that recognize this reduced right to exclude. This reduced ability to claim privacy protections is mostly due to the actions of owners themselves, who reduce their privacy or personhood interests in places and things in order to benefit or profit from using them in commerce, which results in the kind of *quasi* public property owned by providers of common carriers. If owners choose to use private property as quasi-public property, which is presumptively open to all, then they have consented to regulation by withdrawing their privacy interest in their property.

Too much privacy disregards public life,<sup>6</sup> while openness, or a lack of privacy, encourages solidarity. But privacy is not apolitical or detrimental to the political, and privacy claims, in fact, also help structure social and political life. A concern for privacy should therefore entail a concern for the private aspects of private property which, I have argued, promote the development of personhood through the enjoyment and exercise of liberty against the "adverse forces" mentioned by Bachelard in the introduction.



## Notes

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<sup>1</sup> Jean-Jacques Rousseau, *Discourse on Inequality*, Part Two.

<sup>2</sup> Ta-Nehisi Coates, “The Case for Reparations,” *The Atlantic* (June, 2014) (<http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>; accessed January 16, 2017).

<sup>3</sup> *Ibid.*

<sup>4</sup> Ta-Nehisi Coates “Interview: Ta-Nehisi Coates Is Voting for Bernie Sanders Despite the Senator's Opposition to Reparations,” *Democracy Now* ([https://www.democracynow.org/2016/2/10/ta\\_nehisi\\_coates\\_is\\_voting\\_for](https://www.democracynow.org/2016/2/10/ta_nehisi_coates_is_voting_for); accessed January 16, 2017).

<sup>5</sup> *Ibid.*

<sup>6</sup> Anita Allen, *Why Privacy Isn't Everything* (Lanham: Rowan and Littlefield, 2003), 6.

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*Boom Co. v. Patterson*, 98 U.S. 403 (1878).

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*County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

*Eisenstadt v. Baird* 405 U.S. 438 (1972).

*Ferguson v. Skrupa*, 372 U.S. 726 (1963).

*Griswold v. Connecticut*, 381 U.S. 479 (1965).

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*Hawaiian Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

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*Katz v. United States*, 389 U.S. 347 (1967).

*Kelo v. City of New London*, 545 U.S. 469 (2005).

*Local 1330, United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264 (1980).

*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

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*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

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*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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