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RESPONSE

SHOULD PROPERTY SCHOLARS EMBRACE VIRTUE ETHICS? A SKEPTICAL COMMENT

Katrina M. Wyman†

INTRODUCTION

*Land Virtues*¹ is a timely appeal to adopt a new normative framework to guide land-use regulation. As I write, policymakers in Washington are busily abandoning long-standing policy approaches in a desperate attempt to minimize the damage from what many are calling the worst financial crisis since the Great Depression.² As stock prices crumble and credit becomes harder to access, deregulation and faith in the free market have gone out the window, and the federal government has bailed out, nationalized, re-regulated, and brokered the sale of some of the country's most well known financial firms.³ These actions have prompted many analysts to argue that the anti-regulatory and small-government ethos that has dominated public policy since Ronald Reagan's presidency is giving way to new support for regulation and bigger government.⁴

† Professor, New York University School of Law. I received helpful comments on this Response at a summer workshop at NYU School of Law. Thanks also to Lisa Austin, Eric Claeys, Moshe Halbertal, Robert Howse, and Lewis Kornhauser for insights they offered as I was thinking about the many questions that *Land Virtues* raises, and to David Lametti and Eduardo Peñalver for reviewing a draft of this Response. Allison Welch provided helpful research assistance. The editors of the *Cornell Law Review* offered useful suggestions throughout the editing process.

¹ Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

² See, e.g., Edmund L. Andrews & Mark Landler, *U.S. May Take Ownership Stake in Banks to Ease Credit Crisis*, N.Y. TIMES, Oct. 9, 2008, at A1; Mark Landler & Edmund L. Andrews, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 4, 2008, at A1.

³ See, e.g., Edmund L. Andrews et al., *Fed in an \$85 Billion Rescue of an Insurer Near Failure*, N.Y. TIMES, Sept. 17, 2008, at A1; Eric Dash & Andrew Ross Sorkin, *In Largest Bank Failure, U.S. Seizes, Then Sells*, N.Y. TIMES, Sept. 26, 2008, at A1; Joe Nocera, *36 Hours of Alarm and Action as Crisis Spiraled*, N.Y. TIMES, Oct. 2, 2008, at A1.

⁴ See, e.g., Tim Arango & Julie Creswell, *Goodbye to All That*, N.Y. TIMES, Oct. 5, 2008, at BU1; Alex Berenson, *Power Plays: How Free Should a Free Market Be?*, N.Y. TIMES, Oct. 5, 2008, at WK1 ("Whoever becomes president in January, lawmakers will be under pressure to strengthen financial regulation and give more resources to agencies like the Food and Drug Administration, which have appeared overwhelmed in recent years."); Bob Davis et al., *Unraveling Reagan: Amid Turmoil, U.S. Turns Away from Decades of Deregulation*, WALL ST. J., July 25, 2008, at A1; Peter S. Goodman, *Taking Hard New Look at a Greenspan Legacy*, N.Y. TIMES, Oct. 9, 2008, at A1.

Written well before the current financial crisis, *Land Virtues* calls on scholars to abandon intellectual theories often thought to justify the faith in free markets that policymakers currently are jettisoning and to embrace an explicitly ethical framework to guide policymaking about land use. While Professor Peñalver does not describe his project in Kuhnian terms,⁵ *Land Virtues* seeks to launch a revolution in property scholarship⁶ that would supplant the dominant economic paradigm⁷ and replace it with an approach rooted in virtue ethics.

Will property scholars be as open as economic policymakers have been recently to abandoning longstanding ideas and adopting a new intellectual perspective? Only time will tell what, if any, impact the dramatic events of recent months will have in legal academic circles. In this Response I pursue what I hope is a more fruitful question for academic inquiry, namely whether property scholars should follow Peñalver's recommendations and embrace virtue ethics as a normative guide. I start by critically analyzing Peñalver's objections to economic analysis of law. I then identify four questions that Peñalver and other proponents of using virtue ethics as a normative guide in making public policy will need to confront to advance their case. I am skeptical that virtue ethics offers an attractive or a feasible framework to guide land use or other forms of regulation at this stage. But I applaud Peñalver's effort to resurrect the ancient tradition of thinking about property as an instrument for promoting certain character traits. The idea of using property law to foster virtue raises many fascinating questions for modern property theorists and is well worth further analysis.

I

PEÑALVER'S CRITIQUE OF ECONOMIC ANALYSIS

Peñalver's main argument for a virtue ethics-inspired approach to land-use policy is what he sees as the inadequacy of the dominant economic paradigm for analyzing land-use law. What seems to bother Peñalver most about this paradigm is the normative economic claim that law should be structured to maximize individual well-being, which he understands as a prescription for designing law to maximize

⁵ The reference is to THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

⁶ I use "property" to refer principally to land and therefore use the terms "property law" and "land law" synonymously. As the title *Land Virtues* implies, Peñalver's article is concerned mainly with the paradigm for land law, and when he uses the term "property" he seems to have land in mind. However, it seems to me that Peñalver's concerns with economic analysis apply beyond its application to land (or property) law and encompass its use in public policy generally. In theory, virtue ethics could be used to guide policy in many fields in addition to land (or property) law.

⁷ In Kuhn's terms, paradigms "provide models from which spring particular coherent traditions of scientific research." KUHN, *supra* note 5, at 10.

something like wealth or individual preferences. Thus, Peñalver suggests that there are “independent reasons for resisting” the idea that landowners should be encouraged to single-mindedly seek to maximize their land values.⁸ He warns that “[t]o assume that wealth or welfare maximization—or, for that matter, maximization of any single value—is the ultimate, or even the most important, goal of land-use decisions is to beg some crucial and contentious questions.”⁹ What attracts Peñalver to virtue ethics is the alternative and more expansive normative framework that he argues virtue ethics offers to guide land-use policy. Peñalver “calls for resort to a *broader* moral framework, one that is sufficiently capacious to encompass the value of personhood, the demands of liberty, and the important goal of enhanced social welfare.”¹⁰ In his view, “A theory of owner obligation rooted in the Aristotelian tradition provides such an inclusive vision.”¹¹ Elsewhere he explains that “virtue theory is able to explain why consequences for human beings’ material well-being ought to matter for land-use decision makers without adopting the position that those consequences are the only important moral considerations.”¹²

Strangely, even though he seems to object to economic analysis because of the normative economic claim, Peñalver does not spend much time explaining why he is uncomfortable with the idea that policy should be structured to promote individual preferences or wealth. Peñalver’s critiques of economic analysis instead focus first on the behavioral claim central to positive economic analysis—that individuals seek to maximize something like market value, wealth, or their preferences—and second on the policy preference of some legal economists for limited government involvement in land-use regulation. It is hard to figure out why Peñalver believes that these two critiques set the stage for embracing virtue ethics. He does not suggest that virtue ethics is inherently more predisposed than economic analysis to more government involvement in land use.¹³ Nor does he argue that virtue ethics presupposes a richer model of human behavior than economic

⁸ Peñalver, *supra* note 1, at 841.

⁹ *Id.* at 860.

¹⁰ *Id.* at 863.

¹¹ *Id.*

¹² *Id.* at 868.

¹³ See *id.* at 872–73 (“It bears emphasizing that rejecting welfare-maximizing theories of landowner obligation in favor of a virtue-based approach does not lead to an embrace of unrelentingly collective or statist decision making about land use. Even where we reach the conclusion that landowners’ self-interested calculations should give way to overriding moral considerations, the question whether to enforce coercively the demands of virtue through the force of law will turn, as virtue theorists have long understood, on a number of considerations.” (footnote omitted)).

analysis.¹⁴ Moreover, neither of these critiques is as devastating to economic analysis as Peñalver supposes.

Let's begin with the first critique, that economic analysis of land use is problematic because it starts from the premise that owners seek to maximize the market value of their land or their wealth.¹⁵ According to Peñalver, the picture is more complicated, as people often value land not only for monetary but also for non-monetary reasons.¹⁶ One problem with his critique is that many legal economists probably agree that there are a multitude of reasons why people value land. As *Land Virtues* acknowledges in a few places, economically oriented scholars often define the value individuals seek to maximize not as wealth but as a general unit like welfare that can encompass monetary as well as non-monetary goods.¹⁷ Moreover, Peñalver's first critique is hardly fatal even if it is valid. Economic analysts could respond by empirically examining what property owners seek to maximize and then updating their assumptions about what owners value.¹⁸ Indeed, economic analysis of law scholarship has taken a noticeable empirical turn in the past decade. Think of the emergence of the Society for Empirical Legal Studies, the *Journal of Empirical Legal Studies* in 2004,¹⁹

¹⁴ Peñalver suggests that virtue ethics is compatible "with a range of models of human behavior." *Id.* at 867–68.

¹⁵ *See id.* at 823–25, 833.

¹⁶ *See id.* at 832, 834–35, 837–38, 840.

¹⁷ *See id.* at 824 ("[A] number of contemporary legal economists, most prominently Louis Kaplow and Steven Shavell, have constructed their legal theories around the maximization of 'welfare,' a category of value that they understand to be significantly broader than 'wealth' and, indeed, to encompass anything and everything that people might desire.").

Sometimes when Peñalver recognizes that economic analysts define the value being maximized in broader terms, he introduces a new critique, namely that economic analysis is less useful when it assumes that owners seek to maximize something abstract like welfare. *See id.* at 835 n.54 (referring to "[t]he difficulties of measuring such an open-ended conception of value (or welfare or utility)"). This is a version of the well-known indeterminacy critique of economic analysis. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1067–68 (2000) (discussing the inadequacy of thin versions of rational-choice theory). This critique makes the valid point that since values such as utility or welfare are often unknowable by outsiders, economic claims that individuals seek to maximize values such as utility or welfare are difficult to test and hence to falsify. *See id.*; *see also* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989) (discussing Arthur Leff's argument in his 1974 review of Richard Posner's *Economic Analysis of Law* that "because a person's received utility is unobservable, the assumption of rational utility-maximization is strictly nonfalsifiable").

¹⁸ Korobkin and Ulen make the same suggestion with regard to the economic analysis of law generally. *See* Korobkin & Ulen, *supra* note 17, at 1075 ("The answer, we believe, is to . . . develop[] a more subtle, textured understanding of how actors make decisions in various situations, relying extensively on empirical data.").

¹⁹ Journal of Empirical Legal Studies, <http://www.wiley.com/bw/aims.asp?ref=1740-1453&site=1> (last visited Mar. 10, 2009).

and the annual Conference on Empirical Legal Studies, held for the third time in 2008.²⁰ The empirical research these institutions are showcasing and promoting has the potential to address Peñalver's concerns about the shakiness of the behavioral assumptions underlying economic analysis of law.²¹

Professor Peñalver's second critique concerns the policy preference of some legal economists for limited government regulation of land use.²² Peñalver seems to understand this position as being rooted in a normative belief that the policy goal should be to maximize the value of land, and a positive assumption that landowners are better able than government to achieve this goal because they are better informed and more motivated to maximize land values than distant government decision makers.²³ As I mentioned above, Peñalver dislikes the idea that policy should be structured to maximize land values or wealth, but he does not clearly explain why. On the other hand, he does offer several reasons for doubting the positive claim that landowners will do a good job of maximizing land values.²⁴ Ultimately, he emphasizes that whether private or public decision makers will do a better job of maximizing land values is an empirical question.²⁵

What is puzzling about Peñalver's second critique is its underlying premise that the value of economic analysis depends (at least partly) on the strength of the policy prescriptions generated by some legal economists. The fact that some legal economists have used economic ideas to derive policy recommendations that may—or may not—be problematic says nothing about the overall value of economic analysis. These legal economists simply could have misapplied the theory. Indeed, given that Peñalver opposes economic analysis partly because some legal economists argue for very little public decision making about land use, it is noteworthy that there are economically oriented scholars who maintain that economic analysis, when properly

²⁰ Journal of Empirical Legal Studies, <http://www.blackwellpublishing.com/society.asp?ref=1740-1453&site=1> (last visited Mar. 10, 2009).

²¹ Indeed, Peñalver is careful to underscore that his critique that economic analysis presumes an overly simplified model of human motivation would not apply to analyses that draw on behavioral economics or new institutional economics. Peñalver, *supra* note 1, at 824–25.

²² See *id.* at 826, Part II.B.2.

²³ See, e.g., *id.* at 848 (referring to “the normative dimension of the Demsetzian view of the incentives created by land’s market value”).

²⁴ Peñalver offers two reasons for doubting that private decision makers will necessarily make decisions that will maximize land values. In analyzing their options, private decision makers may not value goods that are not commonly traded in the market, “such as the health of wetlands and ecosystems, the extinction of species, or housing for the homeless.” *Id.* at 850. In addition, private landowners may not consider the impacts of their decisions on future generations or heavily discount the future if they do consider it. See *id.* at 854.

²⁵ See *id.* at 857–58.

applied, justifies a lot more government regulation than conventionally assumed. For example, in a recent book, *Retaking Rationality*, Richard Revesz, Dean of New York University School of Law, and his co-author Michael Livermore argue that “[c]ost-benefit analysis . . . can be an enormously powerful tool for proregulatory groups. It can show that the interests they represent—the environment, consumers, or workers—are not opposed to the economy.”²⁶ Revesz and Livermore maintain that progressive groups should stop allowing opponents to dominate debates about how cost-benefit analysis is done and instead take an active role in these debates in order to rid it of anti-regulatory biases that, they emphasize, are not inherent to the exercise.²⁷ *Retaking Rationality* helpfully reminds us that the policy implications of economic analysis are far less determinate than many opponents and proponents of regulation imagine.

In general, Peñalver’s critiques of economic analysis are somewhat mystifying. As I indicated above, a dislike for the normative economic claim that policy should be structured to maximize something like individual well-being or wealth seems to drive much of Peñalver’s discomfort with economic analysis. But he does not address in much detail why he objects to this claim, which—as he acknowledges—has already been widely criticized for decades.²⁸ His criticisms of the behavioral claim and policy prescriptions offered by some legal economists do not, in my view, highlight any inherent flaws in economic analysis that warrant great unease.

Indeed, even though he tries to set the stage for a virtue ethics-inspired approach to property by criticizing economic analysis, Peñalver recognizes that positive economic analysis has much to offer virtue ethicists like him.²⁹ The normative economic claim central to Peñalver’s discomfort with economic analysis—that policy should be structured to promote something like individual well-being or wealth—was central to early economic analysis of law, and some prominent scholars still advance it today.³⁰ But by and large contemporary

²⁶ RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 18 (2008).

²⁷ See *id.* at 10 (“This book challenges the liberal camp to rethink its position on cost-benefit analysis . . . [B]iases [against regulation] are not inherent to the methodology [of cost-benefit analysis]. If those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis.”).

²⁸ See Peñalver, *supra* note 1, at 823 & n.5 (noting that “[t]he literature critiquing law and economics is vast and rich” and citing “a few prominent examples”).

²⁹ See, e.g., *id.* at 827–28, 872, 873–74.

³⁰ For example, Richard Posner’s early classic, *Economic Analysis of Law*, intermixed normative and positive analysis. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2 (1972). More recently, Louis Kaplow and Steven Shavell attracted considerable attention among legal academics with their normative claim that the law should be designed to maximize individual well-being. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967 (2001) (“Our central claim is that the welfare-based normative

legal economists are practitioners of positive economic analysis of law, and they are increasingly using sophisticated theoretical and empirical tools to analyze the consequences of existing and proposed legal rules. The growth of empirical legal studies is evidence of this analytical orientation. Going forward, scholars could deploy positive economic analysis to predict whether policies intended to foster virtues would achieve these results, and to retrospectively assess whether virtue ethics-inspired property law was in fact producing the intended consequences. In my view, rather than critiquing economic analysis as Part II of *Land Virtues* does, virtue ethicists such as Peñalver who want to use virtue ethics to guide public policy should focus on elaborating the article's embryonic ideas for enlisting positive economic analysis to achieve their normative objectives.³¹ For public-policy minded virtue ethicists, co-option is likely to be a more promising posture to take toward positive (if not normative) economic analysis than antagonism.

II

FOUR QUESTIONS ABOUT VIRTUE ETHICS

The most intriguing aspect of *Land Virtues* is its proposal to use virtue ethics as a normative framework for developing land-use policy. As I mentioned earlier, virtue ethics appeals to Peñalver principally because he interprets it as urging policymakers to promote a broad range of consequences, including "personhood," "liberty," and "social welfare,"³² with the ultimate objective of "fostering human flourishing."³³ *Land Virtues* discusses three virtues that land law should promote in the service of fostering human flourishing, while alluding to the potential to use property to foster other virtues as well:³⁴ "industry,"³⁵ because "[m]aterial wealth is crucial to human flourishing;"³⁶ "justice,"³⁷ or sharing "surplus property with those [in need] . . . in

approach should be exclusively employed in evaluating legal rules. That is, legal rules should be selected entirely with respect to their effects on the well-being of individuals in society.").

³¹ See, e.g., Peñalver, *supra* note 1, at 827–28, 872, 873–74.

³² In three sentences that I already have quoted in part, Peñalver states:

The challenge for property and land-use theorists is to find a way to put the valuable tools of economic analysis to use [within land-use discussions] while restricting the normative ambition of those tools to their proper domain. Meeting this challenge calls for resort to a *broader* moral framework, one that is sufficiently capacious to encompass the value of personhood, the demands of liberty, and the important goal of enhanced social welfare. A theory of owner obligation rooted in the Aristotelian tradition provides such an inclusive vision.

Id. at 863.

³³ *Id.* at 882.

³⁴ *Id.* at 876–77.

³⁵ *Id.* at 877.

³⁶ *Id.*

³⁷ *Id.* at 880.

order to satisfy more fundamental needs;³⁸ and “humility,”³⁹ defined as using land in a precautionary way to avoid irreversible damage.⁴⁰

It is important to recognize that the idea that property could promote virtue and hence human flourishing has ancient roots. In an informative draft article, David Lametti analyzes the social functions that Aristotle, Cicero, and Thomas Aquinas posited for private property.⁴¹ Lametti argues that each of them saw private property as promoting certain virtues that in turn served to promote an overall good. Aristotle, for instance, regarded owning private property as one means of “cultivat[ing] the virtues of moderation and liberality”⁴² provided property was used consistently with these virtues. He envisioned the ethical development that private property promoted within individuals helping the city flourish, and the city’s flourishing contributing to human flourishing (*eudaimonia*) within individuals.⁴³ Thomas Aquinas embedded private property within an explicitly Christian teleology.⁴⁴ Like Aristotle, he envisioned property as a means of fostering virtues, adding “[c]harity, generosity, sharing and stewardship” to the list of virtues it promotes if properly used.⁴⁵ Aquinas’s overall goal was similar to Aristotle’s—to foster human development in order to achieve a broader goal—but he defined it in religious terms as “the Good life which is God’s will for human beings.”⁴⁶ In *Land Virtues*, Peñalver, who is well aware of these traditions, is consciously reviving the idea of private property as a tool for promoting certain virtues to achieve a broader vision. The human flourishing that Peñalver argues that law should promote is a secular version of the “Good life” that is the endpoint in Aquinas’s teleology, or an updated version of Aristotle’s concept of *eudaimonia*.⁴⁷

How does Peñalver’s idea of structuring property law to promote virtue and human flourishing compare to more modern and familiar

³⁸ *Id.*

³⁹ *Id.* at 884.

⁴⁰ *See id.* at 885.

⁴¹ David Lametti, *The Objects of Virtue* (2008) (unpublished manuscript, on file with author).

⁴² *Id.* at 11.

⁴³ *See id.* at 14 (“The virtue in the city is founded on the virtue of individuals and virtue of individuals is based on the virtue of the city. Each forms the other through laws and education, and the actions of virtuous individuals leading to a virtuous state of character aimed at the good.”). On the meaning of *eudaimonia*, see Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 902 (2009).

⁴⁴ *See* Lametti, *supra* note 41, at 38.

⁴⁵ *Id.*

⁴⁶ *Id.* *See also id.* (arguing that for Aquinas, “private property is an instrumental good (analogous to utility) but in the service of human development (dignity, development) within a Christian framework”).

⁴⁷ Peñalver describes his purpose as “to reintroduce the Aristotelian ethical tradition into discussions of property and land-use as an approach with much to offer.” Peñalver, *supra* note 1, at 864.

understandings of property? *Land Virtues* suggests that, like many economic analysts, Peñalver is a consequentialist who believes that law and policy should be adopted or retained based on their implications for human beings. But he rejects the normative economic claim that law should promote only a single value, such as wealth or welfare, and instead favors the pursuit of “a plurality of values.”⁴⁸ Furthermore, Peñalver rejects the idea embedded in much normative economic theory that the ends to which the law should aspire must correlate with what individuals subjectively believe to be in their interests. When scholars like Louis Kaplow and Steven Shavell argue that policies “should be selected entirely” based on “their effects on the well-being of individuals,”⁴⁹ they mean that policies should be evaluated based on their effects on what individuals “really care about,”⁵⁰ not based on what analysts think individuals actually or should care about.⁵¹ Peñalver, like other virtue ethicists, maintains that the law should aim to promote a series of ends that are objectively valuable as determined by a normative framework independent of individual preferences or desires.⁵²

Professor Peñalver’s belief that legal rules should be structured to promote an objectively determined concept of flourishing puts him in the company of scholars who believe that social policy should promote well-being, but define it using objective theories of well-being.⁵³ His preferred normative framework for policy also resembles the capa-

⁴⁸ *Id.* at 867.

⁴⁹ Kaplow & Shavell, *supra* note 30, at 967.

⁵⁰ *Id.* at 980 n.35.

⁵¹ *See id.* at 983–85, 1339–42 (arguing that the “moral force and appeal of welfare economics” comes from the fact that it promotes a person’s actual well-being instead of “some hypothetical notion of satisfaction”); *id.* at 1346 (“Under a welfare economic analysis, any actual preference is given weight because it reflects an individual’s actual well-being; there is no a priori basis under welfare economics for ignoring certain preferences.”). However, Kaplow and Shavell do not support giving weight to individual preferences based on imperfect information. *See id.* at 1331.

⁵² Peñalver, *supra* note 1, at 866 (“[V]irtue ethicists typically derive the content of their accounts of the virtues from an objective conception of what it means to live well or flourish in a distinctively human way.”); *id.* (“Depending on the theorist, the conceptions of the well-lived human life underlying virtue ethics will have varying degrees of thickness and content. Virtue theories agree, however, in this focus on flourishing and in refusing to assign value to some state of affairs merely because an individual happens subjectively to desire or prefer it.” (footnote omitted)); *see also* Martha C. Nussbaum, *The Supreme Court, 2006 Term—Forward: Constitutions and Capabilities: “Perceptions” Against Lofty Formalism*, 121 HARV. L. REV. 5, 14 (2007) (“The [capabilities approach] focuses on what people are actually able to do and be, not on whether their desires are satisfied. Desire is a malleable and inconstant element of people’s lives.”).

⁵³ Daphna Lewinsohn-Zamir is the leading exponent of a welfarist approach to property law that relies on an objective, rather than a subjective, definition of well-being. *See* Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1673 (2003) (“[A]ny adequate criterion of welfare must consist of strong objective components.”).

bilities approach promoted by Amartya Sen and Martha Nussbaum.⁵⁴ Under this approach, policy should be structured to allow individuals to enjoy freedoms that are objectively vital to enjoying a good quality of life.⁵⁵ Where *Land Virtues* departs from objective theories of well-being and capability theory is in the prominence it accords to using the law to promote virtue. Peñalver does not simply suggest that land law should seek to promote a plurality of objectively desirable ends. He argues for using law to promote virtue in order to achieve these ends.

Thus, the crux of *Land Virtues*'s contribution to contemporary theorizing about property—and law in general—is its explicit argument that law, particularly land law, should be structured to promote certain virtues. The ultimate goal of fostering these virtues is to promote an objectively desirable endpoint not too dissimilar from the endpoints favored by objective theories of well-being and capability theories.⁵⁶ In resurrecting an ancient idea that property should be regarded as a means of fostering virtue, *Land Virtues* leaves us with a thoughtful and challenging question: Should land law—which is Peñalver's main focus—be structured to promote virtue? I am skeptical that it should be but nonetheless intrigued by the idea. What follows are four questions that I think Peñalver needs to address before his argument for a virtue ethics-inspired approach to land law will gain much traction.

Question #1: Does the goal of promoting virtue, which underlies virtue ethics, make sense given that experimental psychology suggests that people are situationally rather than globally ethical?

My first concern with using land law to promote virtue has nothing to do with the idea of deploying land law—or any other kind of law—in this way, but rather with the idea central to virtue ethics that individuals should aspire to be virtuous. In promoting virtue, virtue

⁵⁴ See, e.g., Nussbaum, *supra* note 52, at 10 n.7 (listing sources explaining Nussbaum's and Sen's capabilities approaches and the differences between their approaches). Nussbaum provides a useful overview of her capabilities approach. See *id.* at 10–16. Gregory Alexander's article *The Social Obligation Norm in American Property Law* argues that property law does and should embody a commitment to promoting human flourishing as capability theorists such as Sen and Nussbaum define the concept. 94 CORNELL L. REV. 745, 751 (2009). Another article applying Sen's capability theory to property law, with a different goal than Alexander's, is Jedediah Purdy's *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1242–44 (2005).

⁵⁵ Nussbaum, *supra* note 52, at 11 (arguing that under the capabilities approach, "government is charged with securing for citizens a comprehensive set of necessary conditions for a life worthy of human dignity"); *id.* at 12 ("Government ought to give people a full and meaningful choice; at that point, the decision whether to take up a given opportunity must be their own.")

⁵⁶ See, e.g., *id.* at 10 (arguing that the end point of the capabilities approach is to support "human beings in the development and exercise of some central human abilities").

ethicists are not simply promoting good deeds. Virtue has a specific meaning in virtue ethics. As Peñalver explains, drawing on the scholarship of other virtue ethicists,

[v]irtues are acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing. . . . For example, a person who has the virtue of courage possesses a stable disposition to behave in certain characteristically brave ways in a broad range of situations where those lacking the virtue would flee.⁵⁷

In a very interesting new book, *Experiments in Ethics*, Kwame Anthony Appiah asks whether the goal of fostering virtue makes sense given the findings of experimental psychology about why human beings behave as they do.⁵⁸ As Appiah explains, many virtue ethicists believe that we should be seeking to acquire virtues, meaning, as Peñalver's definition of virtue underscores, "stable dispositions."⁵⁹ But social psychologists "find that character traits simply don't exhibit (in the current argot) cross-situational stability."⁶⁰ Appiah elaborates:

These psychologists are not globalists but "situationists": they claim . . . that a lot of what people do is best explained not by traits of character but by systematic human tendencies to respond to features of their situations that nobody previously thought to be crucial at all. They think that someone who is, say, reliably honest in one kind of situation will often be reliably dishonest in another. They'd predict that Oskar Schindler was mercenary, arrogant, hypocritical, and calculating sometimes . . . but not always; and that his courage and compassion could be elicited in some contexts but not in others.⁶¹

Experimental psychology shows that people exhibit "huge differences in behavior . . . from differences in circumstances that seem of little normative consequence."⁶² For example, a 1972 study "found that when you dropped your papers outside a phone booth in a shopping mall, you were far more likely to be helped by people if they had just had the good fortune of finding a dime in the phone's coin-return slot."⁶³ A 1994 study "showed that you were more likely to get change

⁵⁷ Peñalver, *supra* note 1, at 864.

⁵⁸ KWAME ANTHONY APPIAH, *EXPERIMENTS IN ETHICS* 38–39 (2008). Rob Howse drew my attention to the chapter in the book on virtue ethics.

⁵⁹ *Id.* at 38 (describing the reality that "most people simply [don't] display such multi-track, context-independent dispositions"); Peñalver, *supra* note 1, at 864.

⁶⁰ APPIAH, *supra* note 58, at 39.

⁶¹ *Id.* (second ellipsis in original) (footnote omitted).

⁶² *Id.* at 41.

⁶³ *Id.* (referring to Alice M. Isen & Paula F. Levin, *The Effect of Feeling Good on Helping: Cookies and Kindness*, 21 J. PERSONALITY & SOC. PSYCHOL. 384 (1972)).

for a dollar outside a fragrant bakery shop than standing near a 'neutral-smelling dry-goods store.'"⁶⁴

As Appiah indicates, the social-science research he discusses raises an obvious question for virtue ethics: Does it make sense to speak of fostering virtue given the significant impact of circumstantial factors on how people behave?⁶⁵ Maybe it would be better to try to induce desirable conduct by changing the circumstances in which people act—for example, by increasing people's "capacities and resources"—than by attempting to foster virtue.⁶⁶ It is possible that Peñalver and others have a convincing response to the social-psychology research that would reaffirm the relevance of using law to promote virtue. Indeed, after reviewing a draft of this Response, Peñalver graciously e-mailed me two very interesting articles that argue that virtue ethics survives the social-psychological research discussed by Appiah and others.⁶⁷ But at any rate, Peñalver and other proponents of using law to promote virtue need to offer some reassurance that virtue ethics is worth embracing given the challenge that social psychology seems to offer to the assumption—central to most virtue ethics—that it is possible to foster "stable dispositions" in human beings.

Question #2: Is it consistent with virtue ethics's concept of virtue to use law to promote virtue?

Assume that proponents of using law to promote virtue can offer a convincing argument for trying to foster virtue. Another issue the proponents of using law to promote virtue need to address is whether law truly can be used to promote virtue as virtue ethicists understand the concept. Or is using law to promote virtue incompatible with the idea of virtue central to virtue ethics?⁶⁸

As mentioned above, virtue ethics has a particular concept of virtue in mind, one aspect of which is that virtues are "stable dispositions." Another idea central to virtue ethics is that

[v]irtues do not consist simply of acquired dispositions to engage in certain *external* actions. They are far deeper character traits that, in

⁶⁴ *Id.* (citing Robert A. Baron & Jill Thormley, *A Whiff of Reality: Positive Affect as a Potential Mediator of the Effects of Pleasant Fragrances on Task Performance and Helping*, 26 *ENV'T & BEHAV.* 766 (1994)).

⁶⁵ *Id.* at 46 ("There are some philosophers . . . who take the social-science literature about character and conduct to pose a serious and perhaps lethal challenge to the virtue ethicist's worldview. Talk all you like about virtuous dispositions, the challenge goes: we're just not built that way.")

⁶⁶ *Id.* at 71 (suggesting that in light of the situation's importance the best solution is to "promulgate the circumstances in which our excellences can be elicited").

⁶⁷ John Sabini & Maury Silver, *Lack of Character? Situationism Critiqued*, 115 *ETHICS* 535 (2005); Gopal Sreenivasan, *Errors About Errors: Virtue Theory and Trait Attribution*, 111 *MIND* 441 (2002).

⁶⁸ Thanks to Lisa Austin for highlighting for me the possibility that law may not be compatible with promoting virtue as virtue ethicists understand the concept.

addition to manifesting themselves in specific actions, are bound up with a person's reasons for taking a particular action as well as her emotional state as she does so. A person who does the right thing for the wrong reasons is not virtuous.⁶⁹

One example Peñalver gives of doing the right thing for the wrong reason is doing something because of a prior rule,⁷⁰ by which he seems to mean a moral rule. He explains that

An action is 'brave' and therefore virtuous, not (ultimately) because it is consistent with a moral rule mandating a particular sort of action under a particular set of circumstances. The action is 'brave' because it is the sort of action that a brave person would undertake when confronted by that situation.⁷¹

Here is my question: Can law actually foster virtue if, as virtue ethicists maintain, it is not virtuous to do the right thing to comply with a rule? Peñalver does not seem to refer to a possible tension between using law to promote virtue and the idea central to virtue ethics that virtue requires acting for the right, meaning internal, reasons. Without mentioning such a dilemma, he argues that one reason for overriding "private decisions and command[ing] owners to act in accordance with virtue" is "to constrain the behavior of nonvirtuous owners and, over time, to teach them to act virtuously of their own accord."⁷² But 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.

One possibility, of course, is that individuals who initially change their behavior in response to law will later act properly for the right reasons because complying with the law will lead them to internalize the norm underlying the law. Peñalver identifies Title II of the Civil Rights Act of 1964 as an example where using the law to compel people "to act as if they possessed . . . virtue" actually has "foster[ed] virtue" over time by reducing racial discrimination.⁷³ But can we ever maintain that people are acting for the right reasons if their change in behavior ultimately is a response to law? Peñalver and other proponents of using the law to promote virtue need to wrestle more with the apparent tension between using law to promote virtue and the idea

⁶⁹ Peñalver, *supra* note 1, at 864–65 (providing the example of a person who saves a drowning child solely for the purpose of the acclaim and publicity that the act brings).

⁷⁰ *Id.* at 865.

⁷¹ *Id.* (citing ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999)).

⁷² *Id.* at 871. See also *id.* 871 n.207 (citing sources discussing the role of law in promoting virtue).

⁷³ *Id.* at 871.

embedded in virtue ethics that individuals are acting virtuously only if they act for the right, meaning internal, reasons. Perhaps there is a way of reconciling the use of law to promote virtue with the meaning of virtue in virtue ethics, or at least some theories of virtue ethics.⁷⁴ But greater attention to the tension is warranted as there is no point in trying to use law to try to promote virtue if using law to achieve it would defeat the effort.

Question #3: Is using law to promote virtue consistent with society's value pluralism?

If a legal policymaker is going to use land law or any other kind of law to promote certain virtues with the long-term goal of fostering human flourishing, the policymaker must have some concept of what human flourishing entails to identify the virtues that law must promote. Furthermore, to be consistent with virtue ethics, that concept of human flourishing must be one that is objectively determined: human flourishing cannot just be equated with satisfying individual preferences. As Peñalver explains, "virtue ethicists typically derive the content of their accounts of the virtues from an objective conception of what it means to live well or flourish in a distinctively human way."⁷⁵ As I mentioned above, *Land Virtues* highlights three virtues that property law should promote, but the article does so without telling us much about what its preferred endpoint of "human flourishing" entails.⁷⁶ One result is that it is difficult to discern why these are virtues that the law should promote.

There is, though, 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. One of the attractions of the normative economic claim that legal rules should be structured to promote individual preferences is that the promotion of individual preferences is antipaternalistic.⁷⁷ Antipaternalistic approaches are attractive in a liberal democratic society like the United States where we place a high value on allowing individ-

⁷⁴ In his response in this issue, Eric Claeys rejects the concern that "when politics legislates on virtue, it makes it impossible for actors to act virtuously." Claeys, *supra* note 43, at 921. Later, though, Claeys seems to acknowledge that some virtues probably cannot be achieved through law, referring specifically to charity. Quoting Robert George, Claeys states that "legally coerced charity is in an important sense not really charity at all: 'compelling the expressing of gratitude, or the giving of gifts . . . where people ought to express gratitude [or] give gifts . . . would have the effect of robbing these important practices of their meaning and value in social life.'" *Id.* at 944 (quoting ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 44 (1993)).

⁷⁵ Peñalver, *supra* note 1, at 866.

⁷⁶ Peñalver acknowledges that "[a] complete virtue theory of property would obviously include (or endorse) a fully elaborated and fully defended account of human flourishing," among other things, and that his article does not include such an account. *Id.* at 869.

⁷⁷ Lewinsohn-Zamir, *supra* note 53, at 1688.

uals to pursue their particular conceptions of the good life.⁷⁸ Requiring 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.⁷⁹

Peñalver and other proponents of using law to promote virtue need to address the concern that their project may be—or may be perceived as—illiberal. Any idea to use law to achieve an objectively determined goal inevitably runs the risk of this perception. Professor Nussbaum, for instance, recognizes the threat that the idea of government promoting a concept of human flourishing presents in a pluralistic society. She tries to argue that her capabilities approach avoids the threat because the approach only requires that people agree “on a group of capabilities as worthy of being promoted for all citizens in a pluralistic society.”⁸⁰ She insists that the approach does not require that people agree on “a comprehensive view of the good life.”⁸¹ I think that Nussbaum understates the agreement about fundamental issues that implementing the capabilities approach would require. Coming up with a list of the basic capabilities or freedoms that all individuals should inevitably enjoy would presuppose a shared sense of what it means to live a dignified life. Peñalver and other advocates of using law to promote virtue with the ultimate goal of achieving human flourishing need to acknowledge and discuss the potential inconsistency between their project and liberal commitments to encouraging individuals to pursue their own conceptions of the good life. I am not suggesting that Peñalver or others could not come up with answers to this concern. For example, there might institutional mechanisms for legitimately defining the overarching goal and the requisite virtues for achieving that goal. But virtue ethicists should, at the very least, acknowledge the issue.

⁷⁸ There are, of course, downsides to structuring law to promote individual preference satisfaction. For example, an individual’s preferences may not be in her interests if her preferences arise from a lack of information or societal inequalities. For an overview of the problems often identified with preference theories of well-being, see *id.* at 1677–86.

⁷⁹ In his response in this issue, Professor Claeys eloquently discusses the dangers of a politics focused on virtue, warning that “[w]hen politics is about legislating virtue and not about securing rights, it tempts sectarian believers to gain political power to compel subjects to be virtuous as defined by the teachings of their particular sect.” Claeys, *supra* note 43, at 926.

⁸⁰ Nussbaum, *supra* note 52, at 14 n.13.

⁸¹ *Id.*; see also *id.* at 20 (“The [capabilities approach] . . . is quite abstemious: it identifies a very short list of core entitlements that should be secured to all citizens as the basic entitlements of a just society. Beyond that short list, the [capabilities approach] does not make sweeping claims about the overall good. It allows people to make their own choices based on their different views of the good life.”).

Question #4: What is the payoff for property law?

Land Virtues makes an important contribution in resurrecting the idea of using property to promote virtue with the ultimate objective of encouraging human flourishing. It also goes further than just raising the idea of using property law in this way by identifying a number of virtues that property law could promote. But Professor Peñalver is largely silent about what exactly structuring land law to promote these three virtues and through them human flourishing would mean for the details of specific legal rules.⁸² I suspect that Peñalver or others will need to explain how property law would differ if it explicitly aimed to foster virtue before the idea of a virtue ethics-inspired approach to property will gain much of a following.

As Peñalver suggests at various points, contemporary American property law already promotes virtue, although this is by no means its sole function. For example, Peñalver argues, the institution of private property could be regarded “as an elaborate system of indirect morals legislation . . . whose principal goal is to encourage people to cultivate the virtue of industry . . . by offering landowners the reward of a privileged claim over the fruits of their labor.”⁸³ If property law already implicitly promotes virtue to some degree, how would the legal rules governing property change if we explicitly sought to structure property law to foster the virtues of industry, justice, and humility to allow humans to flourish? To take two issues that have preoccupied property scholars recently, what would a virtue ethics-inspired approach imply for how the public use requirement in the Takings Clause should be interpreted, and how compensation for eminent domain should be calculated? Or, to raise an issue that is currently preoccupying policymakers, what would a virtue ethics-inspired approach suggest about whether the government should assist homeowners who face foreclosure, and if so how any assistance should be structured?⁸⁴ Peñalver would have a stronger case for using virtue ethics as a normative guide to structuring property law if he could demonstrate that doing so would yield concrete payoffs for the law.

CONCLUSION

I started this Response by comparing the change that Professor Peñalver is urging property scholars to make in their normative framework to the shift that economic policymakers have recently made to

⁸² The only concrete implication Peñalver mentions is that using land law to promote “justice” might require more “redistribution of land rights via in-kind transfers of ownership or occupancy.” Peñalver, *supra* note 1, at 882.

⁸³ *Id.* at 878.

⁸⁴ See, e.g., Sheryl Gay Stolberg & Edmund L. Andrews, *\$275 Billion Plan Seeks to Address Crisis in Housing*, N.Y. TIMES, Feb. 19, 2009, at A1.

deal with the financial crisis. The comparison, of course, is inexact. But there is an underlying similarity between Peñalver's aim—to have property scholars adopt a plurality of goals for property law in which the pursuit of wealth would be only one objective—and the recent focus of economic policymakers on reining in the naked pursuit of self-interest and addressing its negative consequences. Both Peñalver's academic project and the policymakers' concrete task start from the same premise—that individuals should not be left completely alone to pursue their self-interest. As a *New York Times* columnist succinctly put it: "Greed, to put it mildly, is no longer good."⁸⁵ The virtues of justice and humility seem to be making a bit of a comeback, at least at the rhetorical level. These developments suggest that Peñalver's effort to revive the idea of using law to promote a range of virtues is not only intellectually intriguing, but also relevant to the times in which we are living. While there are a number of questions that he probably needs to address before his project will gain much of a following, Peñalver deserves credit for his attempt to articulate a modern framework for using property to promote virtue.

⁸⁵ Peter Steinfels, *Modern Market Thinking Has Devalued a Deadly Sin*, N.Y. TIMES, Sept. 27, 2008, at A19.

