

# THE SOCIAL-OBLIGATION NORM IN AMERICAN PROPERTY LAW

Gregory S. Alexander†

*This Article seeks to provide in property legal theory an alternative to law-and-economics theory, the dominant mode of theorizing about property in contemporary legal scholarship. I call this alternative the social-obligation theory.*

*I argue that American property law, both on the private and public sides, includes a social-obligation norm, but that this norm has never been explicitly recognized as such nor systemically developed. I argue that a proper understanding of the social obligation explains a remarkably wide array of existing legal doctrine in American property law, ranging from the power of eminent domain to the modern public trust doctrine. In some cases, social obligation reaches the same result as law and economics, but in other cases it does not. Even if it reaches the same result as law and economics, social-obligation theory provides a superior explanation.*

*At a normative level, I argue that the version of the social-obligation norm that I develop here is morally superior to other candidates for the social-obligation norm. It is superior because it best promotes human flourishing, i.e., enabling individuals to live lives worthy of human dignity.*

*Drawing on Amartya Sen and Martha Nussbaum's capabilities approach (which itself is based on the Aristotelian notion that the human being is a social and political animal, not alone self-sufficient), the social-obligation theory holds that all individuals have an obligation to others in their respective communities to promote the capabilities that are essential to human flourishing (e.g., freedom, practical reasoning). For property owners, this has important consequences. If we accept the existence of an obligation to foster the capabilities necessary for human flourishing, and if we understand that obligation as extending to an obligation to share property, at least in*

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† A. Robert Noll Professor of Law, Cornell Law School. I am indebted to Ben Barros, Peter Buchsbaum, Eric Claeys, Sheri Colb, Hanoch Dagan, Mike Dorf, Eric Freyfogle, Brett Frischmann, Jim Henderson, Bob Hockett, Yifat Holzman-Gazit, Molly van Houweling, Larissa Katz, Jim Krier, Doug Kysar, David Lametti, Rod Macdonald, Jed Purdy, Annelise Riles, Emily Sherwin, Joe Singer, Stewart Sterk, Laura Underkuffler, Jeremy Waldron, Andre van der Walt, Katrina Wyman, and Cui Zhuiyan for helpful comments and suggestions. Eduardo Peñalver provided me with exceptionally valuable comments. I am greatly indebted to him. I am also indebted to the law faculties of Tel Aviv University, Cornell Law School, The Hebrew University of Jerusalem, University of Florida, University of Kentucky, McGill University, and University of Minnesota where I presented this Article at faculty workshops. Comments provided at the 2008 Property Works-in-Progress Conference, in Boulder, Colorado, where this Article was also presented, were very helpful. I am indebted to the participants in that conference. The remaining errors—and doubtless they are legion—are solely mine.

*surplus resources, then it follows that to enhance the abilities of others to flourish, in the predictable absence of adequate voluntary transfers, the state should be empowered and may even be obligated to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities. None of this is meant to suggest that the state's power, even as it touches on the facilitation of the capabilities we are discussing, is unbounded. But the limits to the state's proper domain are supplied by the same principles that justify its action: the demands generated by the capabilities that facilitate human flourishing—freedom, practical rationality, and sociability, among others.*

INTRODUCTION .....	746
I. THE SOCIAL-OBLIGATION NORM IN CLASSICAL LIBERAL PROPERTY THEORY.....	753
II. THE CONTRACTARIAN VERSION OF THE COMMUNITY-BASED SOCIAL-OBLIGATION NORM.....	758
III. HUMAN FLOURISHING AND THE SOCIAL OBLIGATION OF OWNERSHIP .....	760
IV. THE SOCIAL OBLIGATION AT WORK: A PARTIAL TYPOLOGY.	773
A. Entitlement Sacrifices.....	775
1. <i>Eminent Domain</i> .....	775
2. <i>Remedies for Nuisance</i> .....	779
3. <i>Remedies Redux: A Comparative Perspective from             South Africa</i> .....	782
B. Use Sacrifices.....	791
1. <i>Historic Preservation Regulations and Penn             Central</i> .....	791
2. <i>Environmental Regulations</i> .....	796
3. <i>The Right to Exclude: Beach Access and Other             Controversies</i> .....	801
C. Some Implications for Intellectual Property.....	810
1. <i>Copyright Law</i> .....	810
2. <i>Patent Law</i> .....	812
D. The Limits of the Social-Obligation Norm .....	815
CONCLUSION .....	818

## INTRODUCTION

Private property ordinarily triggers notions of individual rights, not social obligations. After all, the core function of private property, at least according to conventional lore, is to insulate individuals from the demands of society both in its organized political form and its non-political collective form. Of course, the common law has long recognized limits on the exercise of property rights, limits that grow out of the needs of others in cases of conflicting land uses. The obvious example is the common law of nuisance, which courts developed

using the ancient maxim *sic utere tuo ut alienum non laedas* (“use your land in such a way as not to injure the land of others”) as their guiding principle. But such limits on property rights are the exception, not the rule, the periphery rather than the core.<sup>1</sup> The core image of property rights, in the minds of most people, is that the owner has a right to exclude others and owes no further obligation to them.<sup>2</sup>

That image is highly misleading. The right to exclude itself, thought by many to be the most important twig in the so-called bundle of rights,<sup>3</sup> is subject to many exceptions, both at common law and by virtue of statutory or constitutional provisions. For example, the common law requires landowners to permit police to enter privately owned land to prevent a crime from being committed or to make an arrest.<sup>4</sup>

More generally, property owners<sup>5</sup> owe far more responsibilities to others, both owners and non-owners, than the conventional imagery of property rights suggests. Property rights are inherently relational;<sup>6</sup>

<sup>1</sup> The core-and-periphery imagery owes to Duncan Kennedy. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976).

<sup>2</sup> See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). For an insightful discussion of how the right to exclude has changed over time in American property law, see Eric T. Freyfogle, *The Enclosure of America* (Ill. Pub. Law and Legal Theory Research Paper Series, Research Paper No. 07-10, 2007), available at <http://ssrn.com/abstract=1024846>. Larissa Katz has recently drawn an illuminating distinction between ownership as an *exclusive right* and the *right to exclude*. Arguing that exclusivity, not the right to exclude, is the core of the concept of ownership, she states:

[O]wnership, like sovereignty, is an exclusive position that does *not* depend for its exclusivity on the right to exclude others from the object of the right. What it means for ownership to be exclusive is just that owners are in a special position *to set the agenda for a resource*.

Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 277–78 (2008) (second emphasis added).

<sup>3</sup> See, e.g., J.W. HARRIS, PROPERTY AND JUSTICE 154–64 (1996); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68–104 (1997); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370–71 (1954); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

<sup>4</sup> See RESTATEMENT (SECOND) OF TORTS § 204 (1965).

<sup>5</sup> In using the term “property” as the object of entitlement claims, I mean what one might call “old style” property, especially land. The vast majority of takings disputes, certainly in the United States, involve land. In linking the right of property with access to food and shelter, I move beyond property as it is conventionally understood and include socio-economic rights. I am hardly the first to make this linkage. One strategy by which some proponents of so-called positive rights, i.e., socio-economic rights, have sought to gain recognition of such rights as a *constitutional* matter has been to adopt the republican definition of property as the material foundation for personal identity, self-governance, and participation in civic life. Under that definition, socio-economic rights are a species of, indeed perhaps the most important species of, the right of property. In American constitutional jurisprudence, the foremost exponent of this view has been Frank Michelman. For an early example, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659–61. Elsewhere in the world, the linkage between property and socio-economic rights is less controversial than it is here.

<sup>6</sup> Some of the important writings on the relational aspect of property include the following: JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000);

because of this characteristic, owners necessarily owe obligations to others. But the responsibility dimension of private ownership has been sorely under-theorized in American law. The law has relegated the social obligations of owners to the margins, while individual rights, such as the right to exclude, have occupied the center stage.

The purpose of this Article is to change this picture by drawing attention to the social-obligation norm in American property law.<sup>7</sup> The Article operates primarily at a normative level, but it does positive work as well. The normative claim is that the version of the social-obligation norm that I develop here is morally superior to other candidates for the social-obligation norm. It is superior because it best promotes human flourishing, i.e., my version of the social-obligation norm enables individuals to live lives worthy of human dignity. In some cases it may also promote social utility, economic efficiency, or similar values; but those values do not provide its primary normative foundation. Although the social-obligation theory developed here is not indifferent to efficiency, utilitarian, or similar considerations, its overriding normative commitment is to human flourishing.

On a positive level, I argue that American property law at times and in some places recognizes something like the social-obligation norm I propose here. However, to the extent that courts give effect to this norm, they do so only sporadically and implicitly. I do not contend that American property law widely recognizes this social-obligation norm. I do claim, though, that the social-obligation theory explains and justifies some of the most controversial recent judicial decisions, particularly those concerning the right to exclude.

Some of these doctrines and legal practices are explicable on other theoretical grounds as well as on the basis of the social-obligation norm. This is especially true of law-and-economics theory,<sup>8</sup>

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LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 *REV. CONST. STUD.* 1, 16 (1993); Eduardo M. Peñalver, *Property as Entrance*, 91 *VA. L. REV.* 1889 (2005); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 *U. CHI. L. REV.* 1237 (2005).

<sup>7</sup> For examples of other scholarly works that bear a family resemblance to the social-obligation theory developed in this Article, see ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003); ERIC T. FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* (2007); SINGER, *supra* note 6; UNDERKUFFLER, *supra* note 6; Kevin Gray, *Land Law and Human Rights*, in *LAND LAW: ISSUES, DEBATES, POLICY* 211 (Louise Tee ed., 2002); Purdy, *supra* note 6; Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 *CORNELL L. REV.* 1009 (2009); Joseph William Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611 (1988); David Lametti, *The Objects of Virtue* (unpublished manuscript, on file with author).

<sup>8</sup> An important terminological point needs to be made at the outset. Throughout this Article, I will use the terms “law and economics” and “the law-and-economics tradition” to embrace all normative positions that evaluate alternative possible legal regimes by reference to some scalar metric, be it “welfare,” “wealth,” “utility,” “preference,” or some cognate metric. Another term that I might have used to embrace all of these modes of analysis

whose protean character makes it possible to explain a wide range of outcomes in terms of maximizing social welfare. In this respect, then, law-and-economics and social-obligation theory explanations are not necessarily mutually exclusive. As I will discuss later, however, in some cases, law-and-economics explanations seem strained at best, disingenuous at worst; in these cases, the social-obligation theory provides the superior explanation. Part of its superiority stems from the fact that the social-obligation theory is transparent, direct, and candid in admitting that much, if not most, of the time a balancing approach is hard-pressed to determine which among alternative possible regimes or discrete decisions is most apt to promote human flourishing. Human flourishing, as I will later discuss, is an inherently polyvalent value. Many law-and-economics scholars tend to be either confused or disingenuous about this.

At the outset, I must make explicit an important preliminary point regarding property and its relationships to community and human flourishing. As I will later argue, both life in community with others and access to certain kinds of resources are requisites to human flourishing. Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally. In the interest of human flourishing, the community, or more colloquially, the state, affords legal recognition to asserted claims to resources. Accordingly, the state does not take away when it abstains from legally vindicating asserted claims to resources that are inconsistent with human flourishing or with community itself. In such cases, the community does not merely give. For the community, acting through the state's laws, is what transforms pre-legal claims into legally recognized property rights in the first place. That which is socially cognizable as property is only that form of access to resources that is consistent with human flourishing and community itself. The social-obligation norm is, then, in effect, the law's recognition of this

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is "consequentialist," but that term has several different meanings, including utilitarianism and welfare economics. See Philip Pettit, *Consequentialism*, in *A COMPANION TO ETHICS* 230, 230–31 (Peter Singer ed., 1991). In view of the greater use of the term "law and economics" in legal scholarship, I prefer to use that term.

I will be contrasting my social-obligation approach with a full family of approaches adopted by various legal scholars plying the "law-and-economics" tradition. Thus, I take into account the fact that law and economics has splintered into sundry variants since the 1970s, when Judge Richard Posner first promoted "wealth-maximization" as the solely relevant value (though he later turned away from that position). See *infra* note 11. Compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972), with RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 95–99 (2001) [hereinafter POSNER, *FRONTIERS*].

The differences and similarities among "utility," "wealth," "welfare," and the like are rigorously analyzed and the concepts critically evaluated in Robert Hockett, *Taking Distribution Seriously* (Cornell Legal Stud. Research Paper Series No. 08-004, 2008), available at <http://ssrn.com/abstract=110821>.

straightforward conceptual entailment of the way the legal system justifies the institution of private property itself. Another way of putting this point is to say that the very factor that makes the institution of private property a social good is also the very factor that renders its limits, i.e., human flourishing.

In recent years, law-and-economics analysis has dominated property scholarship. One goal of this Article is to offer an alternative to that mode of analyzing property disputes. Although law-and-economics theory certainly provides important insights into a remarkably wide range of property issues, its vision is limited and at times flawed. Perhaps the greatest flaw in law-and-economics theory is the poverty of its analysis of moral values and moral issues.<sup>9</sup> Other scholars have critiqued, in considerable detail, the moral and analytic failings of law-and-economics theory's exclusive concern with aggregate social welfare;<sup>10</sup> I need not revisit those criticisms here.

One weakness of the law-and-economics tradition does, however, bear special emphasis. Law-and-economics approaches to property are in effect searching for a way to vindicate a social-obligation norm. If the scalar maximandum in question is "welfare" or "utility," the social obligation is to maximize welfare or utility, as the case may be, even if doing so requires nonrecognition of someone's asserted property right. The account of the social-obligation norm that I offer in this Article, based as it is on human flourishing, is a better rendition of what these law-and-economics analysts are groping for. It is superior because the social-obligation norm recognizes, as law-and-economics theory tends not to, that human flourishing cannot be reduced to any single scalar metric. Moreover, in the case of a law-and-economics analysis that uses a richer, pluralistic metric like "welfare," the social-obligation norm denies that the plural relevant values can be measured with precision *ex ante*. The social-obligation theory

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<sup>9</sup> For an especially vivid example of the weakness of law and economics' moral theory, see Louis Kaplow & Steven Shavell, *Moral Rules, the Moral Sentiments, and Behavior: Toward a Theory of an Optimal Moral System*, 115 J. POL. ECON. 494 (2007) and LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

<sup>10</sup> For specific critiques of Louis Kaplow and Steven Shavell's version of welfarism, see Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003) (book review); Richard H. Fallon, Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979 (2003); Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791 (2003) (book review); Robert Hockett, *Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment* (Cornell Legal Stud. Research Paper Series No. 06-039, 2006), available at <http://ssrn.com/abstract=933129>. For general critiques of the moral foundations of law-and-economics theory, see, for example, ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); JULES L. COLEMAN, *MARKETS, MORALS, AND THE LAW* 95-132 (2d prtng. 1990); RONALD DWORIN, *A MATTER OF PRINCIPLE* 237-66 (1985); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 16-29 (1996). For a critique of utilitarianism generally, the modern classic is Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77-150 (1973).

developed in this Article explicitly recognizes both that human flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable. Because the multiple relevant inputs, such as aggregated access to nutrition, education, and the like, cannot be assigned comparable weights, they cannot be accommodated in a single social-welfare function that enables precise *ex ante* prediction. The social-obligation theory acknowledges this fact and candidly admits that the best we can do is to adopt an approach that frankly eschews any pretense of precise *ex ante* predictions.<sup>11</sup>

The Article begins with a sketch of the social-obligation norm in classical liberal property theory. In Part I, I contrast that thin conception of the social-obligation norm with another, more robust conception. This second conception links ownership's social obligation with the idea of community; community is the conception that I wish to examine most closely here. Because multiple conceptions of community exist, more than one version of the community-based conception of the social-obligation norm is possible. Part II focuses on one prominent version, developed by Dean Hanoch Dagan in a series of important and influential articles.<sup>12</sup> I will refer to this version as the contractarian theory to underscore how that theory locates and justifies the responsibilities that private owners owe to society on the basis of contract-based reciprocity. Part III is the core of this Article. It describes and defends a version of the social-obligation norm that seeks to promote human flourishing. That version draws on the capability approach developed in recent years by Martha Nussbaum and Amartya Sen.<sup>13</sup> Finally, I argue that the social-obligation norm defended here is implicitly at work in many corners of existing American property law. To illustrate this, I briefly discuss several areas of legal doctrine that can be explained on the basis of the social-obligation norm in its robustly civic version. The examples that I have chosen

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<sup>11</sup> The same acknowledgment may account for Judge Posner's abandonment of wealth-maximization in favor of what he calls pragmatism. See, e.g., POSNER, *FRONTIERS*, *supra* note 8, at 95–144; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26–33 *passim* (1990).

<sup>12</sup> See, e.g., Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000) [hereinafter Dagan, *Just Compensation, Incentives, and Social Meanings*]; Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007) [hereinafter Dagan, *The Social Responsibility of Ownership*]; Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771 (1999) [hereinafter Dagan, *Takings and Distributive Justice*].

<sup>13</sup> See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985) [hereinafter SEN, *COMMODITIES AND CAPABILITIES*]; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) [hereinafter SEN, *DEVELOPMENT AS FREEDOM*]; Martha C. Nussbaum, *The Supreme Court 2006 Term, Foreword, Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007); Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169 (1985).

fall into two categories. The first consists of cases in which property owners are compelled to sacrifice their entitlements in exchange for monetary compensation. In the language that Judge Guido Calabresi and A. Douglas Melamed made famous,<sup>14</sup> these are cases in which the entitlement is protected by a liability rule rather than a property rule. The second category of examples consists of cases in which the property owner keeps title to her asset but loses the right to use it in some way because of judicial or legislative regulation. Taken together, the two categories cover virtually the entire range of collective restrictions of property interests. Within each category, I provide several examples and show how they can be explained as implementing an implicit social-obligation norm. In addition, I discuss an important, recent constitutional-property case from South Africa in which the court's analysis strongly resonates with the social-obligation theory.

I do not argue that American property law currently embodies, *tout court*, the robust version of the social-obligation norm that I defend here. Such a claim would be sheer nonsense, as anyone slightly familiar with American property law knows. For example, one reason why American takings law is so murky is that American courts have failed to openly acknowledge, let alone rigorously develop, the social-obligation dimension of the constitutional idea of property.<sup>15</sup> Rather, my point is that the robust version of the social-obligation norm explains many of the most controversial legal practices in which owners have been required to sacrifice either some use of their entitlement or the entitlement itself.

It is one thing to recognize the existence of an implicit social obligation of private ownership; it is another thing to explicitly acknowledge such an obligation as a formal element of property law. Although American property law does implicitly acknowledge a social-obligation norm, it lacks any systematic development of that norm. Having never explicitly recognized a social-obligation norm as a formal aspect of takings jurisprudence, American courts have never developed the contours of that obligation. This Article attempts to fill in that gap.

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<sup>14</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>15</sup> GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 7 (2006).

I  
THE SOCIAL-OBLIGATION NORM IN CLASSICAL LIBERAL  
PROPERTY THEORY<sup>16</sup>

Several conceptions of the social-obligation norm exist, but two ideas are especially notable. The first is based on classical liberalism. This conception provides a strikingly thin understanding of the social obligations of private ownership. The classical liberal approach is limited to the negative obligation of the Anglo-American common law to avoid committing nuisance. The approach is captured by the *sic utere tuo* maxim and a weak affirmative obligation to contribute to the provision of public goods, such as national defense, law enforcement, and fire protection.<sup>17</sup>

The law-and-economics version of this view explains which affirmative obligations owners owe to their communities on the basis of the familiar problems of free riders and holdouts.<sup>18</sup> Individual owners are obligated to make contributions to the public fisc because voluntary means of financing public goods founder on the shoals of high transaction costs, free riders, and holdouts. What is conspicuously absent from the list of projects to which the individual owner's social-responsibility obligation must contribute is the redistribution of wealth done for the sake of equality of welfare. Eliminating (or nearly so) wealth-redistribution from the scope of legitimate social-responsibility objectives would cast serious doubt on the viability of, for example, the progressive income tax, the Social Security tax, and the unemployment benefits tax.<sup>19</sup> The thin version of the social-obligation norm requires

<sup>16</sup> Part I draws heavily from Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRES IN LAW 127 (2009).

<sup>17</sup> See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974) (discussing "the night-watchman state of classical liberal theory, limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts").

<sup>18</sup> In speaking of the law-and-economics version of the thin conception of the social obligation in this paragraph, I am referring to one particular, though prominent, version of law-and-economics theory rather than law-and-economics theory in general, commonly associated with well-known personalities on the Right such as Richard Epstein and Milton Friedman. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS]; MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). Epstein's views are perhaps more accurately characterized as libertarian and allied with Robert Nozick, who rejected utilitarianism. See NOZICK, *supra* note 17, at 26–53. However, Epstein has explicitly acknowledged utilitarian constraints on his libertarian theory, and his work is heavily inflected with economic analysis. See, e.g., RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM (2003) [hereinafter EPSTEIN, SKEPTICISM AND FREEDOM]; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979). Mainstream economists do not support wealth redistribution through property law, but they do support redistribution through other means, notably taxation, on utility- or welfare-maximizing grounds. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 9–10 (2d ed. 1983).

<sup>19</sup> See EPSTEIN, TAKINGS, *supra* note 18, at 295–303, 309–12.

affirmative action of the owner only for the purpose of providing narrowly defined public goods.

The thin conception of the social-obligation norm is not so much wrong as it is radically incomplete and indeterminate. It is descriptively inaccurate, and its descriptive inaccuracy makes it normatively unappealing as well. As Joseph Singer has pointed out, "It is well understood that owners cannot use their property to harm others, but it is not well understood how difficult it is to define what that means."<sup>20</sup> The problem with using the harm principle as the basis for defining the social obligations of ownership is that it misleads owners into believing that William Blackstone's description of ownership as conferring on owners "sole and despotic dominion"<sup>21</sup> over their property is accurate. That description wasn't accurate in Blackstone's time,<sup>22</sup> and it certainly isn't accurate today. Modern property law imposes a wide range of obligations on owners. For example, landlords must act to maintain their buildings in habitable conditions for their tenants, including, perhaps, keeping air conditioning systems in good repair.<sup>23</sup> Owners of residential real estate must disclose to potential buyers the existence of all known defects in the premises, including, according to one view, neighborhood noise problems.<sup>24</sup> Landowners may not construct buildings on their property in a way that interferes with their neighbors' access to sunlight used for solar power.<sup>25</sup> The list of legally imposed obligations on owners continues to grow.

The thin version of the social-obligation norm underlies what Michelman calls the "possessive" conception of constitutional property rights. According to the possessive version of the constitutional right of property, Michelman states: "[W]e primarily understand property in its constitutional sense as an antiredistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends."<sup>26</sup> As Michelman points out, the social-obligation norm can thicken even under the aegis of this "possessive" conception of constitutional property. Not only does the conception sometimes accept a surprisingly broad range of regulatory measures undertaken to correct "market failures," but it may also

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<sup>20</sup> SINGER, *supra* note 6, at 16.

<sup>21</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES \*2.

<sup>22</sup> For what Blackstone actually thought, see Carol M. Rose *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603-06 (1998); David B. Schoff, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES IN LAW 103 (2009), available at <http://www.bepress.com/til/default/vol10/iss1/art5>.

<sup>23</sup> See *Park Hill Terrace Assocs. v. Glennon*, 369 A.2d 938, 941-42 (N.J. Super. App. Div. 1977).

<sup>24</sup> See *Alexander v. McKnight*, 7 Cal. Rptr. 2d 453, 455-56 (Cal. App. 1992).

<sup>25</sup> See *Prah v. Maretti*, 321 N.W.2d 182, 186-91 (Wis. 1982).

<sup>26</sup> Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987).

tolerate explicitly redistributive acts of the state as necessary health or safety measures.<sup>27</sup> Still, as Michelman notes, on these occasions we are apt to feel (at least to the extent, that we are under the influence of thin social-responsibility thinking), even if we do not admit that the regulation has transgressed the boundary between the owner's zone of personal autonomy and the legitimate need of the state to act in the interest of providing public goods.<sup>28</sup>

The thin conception of the social-obligation norm is illustrated in a controversial decision of the U.S. Supreme Court several years ago. In *Lucas v. South Carolina Coastal Council*,<sup>29</sup> the Court, in an opinion by Justice Anton Scalia, held that a state environmental regulation designed to protect public safety and ecological security against hurricanes was per se unconstitutional if its economic impact on a landowner was to reduce the value of his land to nothing. The Court, however, carved out a limited exception to this categorical rule. The exception states that a regulation would be constitutionally valid if an owner's planned use of his land constituted a nuisance as defined by traditional state, not federal, law. The state supreme court had held that the regulation did not amount to an unconstitutional taking because the regulation was aimed at abating a public harm and cited several earlier decisions of the U.S. Supreme Court.<sup>30</sup> Those cases had generally been understood to say that whenever a land-use regulation is aimed at preventing harm to the public, the regulation is valid, regardless of its economic impact on affected landowners.<sup>31</sup> Justice Scalia, however, offered a new interpretation of those cases, which significantly reduced their impact. He stated that the "public-harm-abatement" test, also known as the "noxious-use" test, was really nothing more than an early formulation of the test for determining whether the regulation in question fell within the state's so-called "police power." That is, the abatement doctrine was only determining whether a regulation was a legitimate governmental control.<sup>32</sup> In his view, the conclusion that a challenged land-use regulation was legitimate because it was an attempt to abate a public nuisance amounts to saying nothing more than that the regulation is a permissible exercise

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<sup>27</sup> See *id.* at 1319–20.

<sup>28</sup> See *id.*

<sup>29</sup> 505 U.S. 1003 (1992).

<sup>30</sup> See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 595–96 (1962) (holding that use of a state's police powers to proscribe excavation on private property was appropriate in light of public safety concerns); *Miller v. Schoene*, 276 U.S. 272, 281 (1928) (holding that use of a state's police powers to mandate destruction of diseased trees was appropriate to protect other economic interests); *Hadacheck v. Sebastian*, 239 U.S. 394, 409 (1915) (upholding a city ordinance prohibiting brick making despite no other potential use for an owner's land).

<sup>31</sup> See DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 147–48 (2002).

<sup>32</sup> See *Lucas*, 505 U.S. at 1022–25.

of governmental power. This does not necessarily mean that the regulation may not be successfully challenged as a taking under the Fifth Amendment's Just Compensation Clause.<sup>33</sup>

Justice Scalia added one further bit of work to the public-harm abatement test. He stated that if a land-use regulation goes so far as to reduce the market value of the land to zero, the regulation will be struck down as an unconstitutional taking, unless the owner's intended use of the land constitutes a public nuisance.<sup>34</sup> Now, nuisance law is notorious for its murkiness; many courts have approached the question of what actions constitute a public nuisance in a dynamic way and take into account changes in social conditions. These courts have recognized, for example, that activities that may have been acceptable to the public one-hundred years ago are not acceptable today in a congested urban environment. That was not Justice Scalia's view, however. He asserted that the state may avoid its obligation to compensate owners in cases of total economic wipe-outs only if "[t]he use of [the] properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of [the] background principles of nuisance and property law explicit."<sup>35</sup> In other words, only regulations that prohibit a use that historical state law has *always* prohibited as a nuisance do not trigger the state's obligation to compensate the owner. In effect, then, this reading of the "noxious-use" doctrine freezes those uses of land that are for constitutional purposes a nuisance—meaning that the owner is responsible to the public for its well-being and may be regulated by the state without compensation—just for those actions that state common law has *never* permitted at any time in its history.

This version of the "noxious-use" doctrine is one approach to developing a social-obligation norm. It has the apparent advantage of making the scope of the social-obligation norm relatively clear and certain by anchoring it in a fixed private-law norm. That advantage is, however, only apparent. As Justice Harry Blackmun in his *Lucas* dissent<sup>36</sup> and a number of academic commentators<sup>37</sup> have pointed out, Justice Scalia's approach to handling the problem of the scope of the nuisance exception begs many questions. Why should judge-made law alone rather than statutory law or common law define nuisance for purposes of takings law? Why should federal judges defer to state

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<sup>33</sup> See *id.* at 1026.

<sup>34</sup> See *id.* at 1027.

<sup>35</sup> *Id.* at 1030.

<sup>36</sup> See *id.* at 1052–55 (Blackmun, J., dissenting).

<sup>37</sup> See, e.g., DANA & MERRILL, *supra* note 31, at 106–09; Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 *passim* (1996); William T. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1406–08 (1993).

courts in defining state law for constitutional purposes rather than interpreting state law themselves? Why should the meaning of nuisance be frozen in the nineteenth century? To the extent that the common law controls, what if, as is commonly the case, the background decisions defined nuisance in a dynamic way, creating an evolving body of nuisance law rather than a static one?<sup>38</sup> Even if we assume that it is normatively desirable to restrict the social-obligation norm to traditional nuisance law, *à la Lucas*, that approach will be very difficult to implement in anything like the clear and settled way that Justice Scalia had in mind.

Rather than inquiring, as Justice Scalia does, what limitations are inherent in title to land, one might develop the social-obligation norm by focusing directly on the *obligations* of ownership. The language of obligation is certainly not absent from American takings jurisprudence. Both the liability of property to condemnation for public use and losses resulting from exercises of the police power are, as Justice Felix Frankfurter stated, “properly treated as part of the burden of common citizenship.”<sup>39</sup>

But if American courts have occasionally invoked the language of obligation and duty in takings cases, courts have not systematically set about developing a coherent constitutional norm of the social obligation of ownership. Courts instead deploy the language of obligation here and there in takings cases,<sup>40</sup> but nothing in American law resembles a sustained account of a constitutional norm predicated on the idea that private ownership entails obligations to act (or refrain from acting) for the purpose of promoting the collective good of the community.

A fully developed social-obligation norm requires some social vision, that is, some substantive conception of the common good that serves as the fundamental context for the exercise of the rights and duties of private ownership. Of course, many conceptions compete to describe the collective good of the community. Precisely for this reason, the substantive scope of the social obligation of ownership is highly and inevitably contestable. As Kevin Gray points out, “At stake are rival views of the political balance to be maintained between individual and community interests.”<sup>41</sup> Gray goes on to state that defining exactly which social obligations inhere in private ownership “highlights crucial questions about the implicit content of *citizenship*.”<sup>42</sup>

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<sup>38</sup> For a penetrating critique of Justice Scalia’s version of originalism generally, see Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

<sup>39</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

<sup>40</sup> See cases cited *supra* note 30.

<sup>41</sup> Gray, *supra* note 7, at 240.

<sup>42</sup> *Id.*

## II

THE CONTRACTARIAN VERSION OF THE COMMUNITY-BASED  
SOCIAL-OBLIGATION NORM

The first conception of the social-obligation norm is premised on a social vision that, in the words of Dean Hanoch Dagan, “underplays the significance of belonging to a community, perceives our membership therein in purely instrumental terms, and insists that our mutual obligations as members of such a community should be derived either from our consent or from their being to our advantage.”<sup>43</sup>

The second conception of the social-obligation norm is considerably thicker.<sup>44</sup> It picks up where the first conception leaves off, taking the idea of belonging in a community seriously and building on that idea to develop a social-obligation theory that is liberal even while it focuses on community. In recent years, Dagan has most fully developed this contractarian<sup>45</sup> version of the community-based conception of social obligation in a series of important articles.<sup>46</sup> Dagan is committed to the project of normatively developing the social dimension of property law, both in the private and public legal spheres. The basis for any conception of the social-obligation norm is justice. But obviously many theories of justice compete. The theory of justice that underlies the thin, non-community-based conception of the social-obligation norm is classical liberalism, the same theory that underlies approaches to constitutional protection of property such as Epstein’s, for example.<sup>47</sup> A community-based conception of the social-obligation norm must be based upon a theory of justice that allows a greater capacity for wealth redistribution. Such a conception seems to underlie the approach to constitutional property that Dagan has developed.<sup>48</sup> His approach appears to be based on a theory of justice that is clearly liberal, but not *classically* so, at least not consistently. The

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<sup>43</sup> Dagan, *Takings and Distributive Justice*, *supra* note 12, at 771–72 (citation omitted).

<sup>44</sup> For examples of such a conception see SINGER, *supra* note 6, at 197–216; Dagan, *Takings and Distributive Justice*, *supra* note 12, at 771–73; Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J. L. & JURISPRUDENCE 217, 241–48 (1993).

<sup>45</sup> It is important to clarify the sense in which I am using the term “contractarian.” Contractarianism is a broad methodological approach in moral philosophy that does not yield any particular substantive moral position. So, although many libertarians, such as Nozick, have used contractarian arguments, the contractarian approach has also been deployed in favor of wealth redistributive views such as those of John Rawls. See, e.g., EPSTEIN, *TAKINGS*, *supra* note 18, at 334–44 (comparing Rawls’ and Nozick’s theories); NOZICK, *supra* note 17, at 10–53 (laying out the philosophical reasons for a minimal state). The important point is not to confuse contractarianism with libertarianism.

<sup>46</sup> See, e.g., Dagan, *Just Compensation, Incentives, and Social Meanings*, *supra* note 12; Dagan, *The Social Responsibility of Ownership*, *supra* note 12; Dagan, *Takings and Distributive Justice*, *supra* note 12.

<sup>47</sup> See EPSTEIN, *TAKINGS*, *supra* note 18, at 331–34.

<sup>48</sup> See Dagan, *Takings and Distributive Justice*, *supra* note 12, at 767–91.

fact that it remains firmly tethered to the liberal political tradition is indicated clearly, I believe, by his understanding of community.<sup>49</sup>

Dagan's conception of community shares with the earlier versions of community a commitment to methodological individualism. That is, it assumes that the basic unit of social organization is an individual, understood as fully autonomous from one's very beginning.<sup>50</sup> From this perspective, communities are agglomerations of autonomous individuals, drawn together to act volitionally for the realization of certain shared ends. Community is valuable only insofar as it contributes to the satisfaction of some individual preference.<sup>51</sup> Community is never an end in itself. On this view, the relationship between the self and communities is both contractual and welfarist.<sup>52</sup> The self and communities are bound together by mutual agreement, sometimes express but commonly implied, to associate with each other to pursue some shared end.<sup>53</sup>

According to this contractarian theory of community, what motivates the self to act as a member of one or more communities is preference maximization. Individuals associate with each other in groups in order to maximize their own personal welfare. Individuals choose to act with others, to participate as members, if they hold what Charles Taylor calls "convergent" goods, which he distinguishes from "shared" goods.<sup>54</sup> Convergent goods are those in which individuals have a common interest; for example, the common interest of tenants in preventing a fire in their building. By contrast, goods are shared when "part of what makes it a good is precisely that it is shared, that is, sought after and cherished in common."<sup>55</sup> The good is not mine—it is ours. With convergent goods, individuals interact in pursuit of indi-

<sup>49</sup> See *id.* at 774–75.

<sup>50</sup> See *id.* at 771–74.

<sup>51</sup> See *id.* at 791–92.

<sup>52</sup> Dagan contends that his theory of community is not contractual but constitutive. See Hanoch Dagan, Re-Imagining Takings Law 7–8 (Sept. 1, 2007) (unpublished manuscript, on file with author) [hereinafter Dagan, Re-Imagining Takings Law]. However, he also rejects an ethics of sacrificing, arguing that owners should not be under any obligation that involves sacrifice on their part, but that owners should only be obligated to forego their preferred uses if a good reason exists to believe that an owner will gain some short- or long-term benefit in return for what the owner gave up. See Dagan, *Takings and Distributive Justice*, *supra* note 12, at 769–70. This connection between some foregone preference and reciprocal gain, however, is exactly what makes his theory contractual. To be sure, Dagan's theory does not require any immediate or direct tit-for-tat exchange, but it does limit the owner's obligation to forego preferred uses to situations in which the owner experiences some sort of state-enabled gain in connection with her property. The social-obligation theory is non-contractual precisely because it requires no showing of a likely gain, short- or long-term, to justify non-enforcement of some use that the owner prefers.

<sup>53</sup> See Dagan, *Takings and Distributive Justice*, *supra* note 12, at 772–74.

<sup>54</sup> Charles Taylor, *Social Theory as Practice*, in 2 CHARLES TAYLOR, PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 96 (1985).

<sup>55</sup> *Id.*

vidually defined ends that happen to overlap with the ends pursued by others.<sup>56</sup> The goods are not constitutive of the group or community.

From a contractarian perspective such as this, communities can only make demands of their members if those demands are likely to pay back each individual in the community in the long, if not the short, run.<sup>57</sup> That is, membership in a community, political or otherwise, does not ever warrant sacrifices by its members that are highly unlikely to remain uncompensated, even in the long run.<sup>58</sup> Uncompensated involuntary sacrifices violate the basic commitment to personal autonomy and the protection of legitimate individual expectations.<sup>59</sup> To expect individuals to make personal sacrifices for the common good is legitimate just insofar as accounts will even up in the long run, that is, so long as reasonable grounds exist to believe that the total long-term burdens that the individual bears will balance out the total long-term benefits she receives.<sup>60</sup>

### III

#### HUMAN FLOURISHING AND THE SOCIAL OBLIGATION OF OWNERSHIP<sup>61</sup>

A second conception of community exists that is more robust and, in that sense, more demanding than Dagan's view. Elsewhere my colleague Eduardo Peñalver and I have called this thicker conception of community the "ontological" conception.<sup>62</sup> It might also be called "Aristotelian" for it builds on the Aristotelian notion that the human being is a social and political animal and is not self-sufficient alone. The ontological conception stresses the fact that although human beings value and strive for autonomy, dependency and interdependency are inherent aspects of the human condition. Although a full explication of the theoretical foundation of this conception is beyond the scope of this Article,<sup>63</sup> I begin this Part by describing its key normative commitment to human flourishing and briefly summarizing the argu-

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<sup>56</sup> See *id.* (noting that shared goods are "essentially of a community" whereas convergent goods involve simply common interests of individuals, "irrespective of whether they have some common understanding of [them]").

<sup>57</sup> See, e.g., Dagan, *The Social Responsibility of Ownership*, *supra* note 12, at 1266–67.

<sup>58</sup> See *id.*

<sup>59</sup> See Dagan, *Takings and Distributive Justice*, *supra* note 12, at 758.

<sup>60</sup> See *id.* at 776.

<sup>61</sup> Part III draws heavily from Alexander & Peñalver, *supra* note 16.

<sup>62</sup> See *id.* at 129, 134. This understanding of the social-obligation norm is one version of what I have called the "proprietary" theory of property. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970 passim* (1997).

<sup>63</sup> For a fuller discussion of the philosophical underpinnings of this version of the social-obligation norm espoused in this Article, see Alexander & Peñalver, *supra* note 16, at 134–45.

ment linking that ideal with a concrete theory of the social obligation of ownership.

At the core of the Aristotelian tradition is the belief that a distinctively human life exists toward which all of one's capabilities should be directed.<sup>64</sup> Although many different ways of living such a life are apparent, many of these are also bad ways of living. Actions that contribute to living the distinctively human life are right and to be encouraged. Certain dispositions to do such actions—called virtues—are needed to live such a life. 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>65</sup>

Any adequate account of human flourishing must stress two characteristics.<sup>66</sup> First, “human beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent upon, other human beings.”<sup>67</sup> Living within a particular sort of society, a particular web of social relationships is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish. Language itself—possibly even the capacity to so much as think—is an artifact of community. Community is constitutive of human flourishing in a very deep sense; perhaps community even comprises humanity (as that term is used by many understandings).

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<sup>64</sup> JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 7 (2006). For a general study of Aristotle's ethical theory, see RICHARD KRAUT, *ARISTOTLE ON THE HUMAN GOOD* 15–154 (1989).

<sup>65</sup> Alexander & Peñalver, *supra* note 16, at 135, 135–36; see also Gordley, *supra* note 64, at 8. But, as James Gordley has stated, “The Aristotelian ethical tradition is out of fashion.” GORDLEY, *supra* note 64, at 7. Still, in recent years there has been a revival of Aristotelian ethics, or “virtue ethics,” as it is now commonly called. Rosalind Hursthouse defines virtue ethics in this way:

Virtue ethics is currently one of three major approaches in normative ethics. It may, initially, be identified as the one that emphasizes the virtues, or moral character, in contrast to the approach which emphasizes duties or rules (deontology) or that which emphasizes the consequences of actions (consequentialism). Suppose it is obvious that someone in need should be helped. A utilitarian will point to the fact that the consequences of doing so will maximise well-being, a deontologist to the fact that, in doing so the agent will be acting in accordance with a moral rule such as “Do unto others as you would be done by” and a virtue ethicist to the fact that helping the person would be charitable or benevolent.

Rosalind Hursthouse, *Virtue Ethics*, in *Stanford Encyclopedia of Philosophy*, intro. (rev. ed. Fall 2007), <http://plato.stanford.edu/archives/fall2007/entries/ethics-virtue>. See generally ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999).

<sup>66</sup> I must emphasize that the patterns of human life consistent with human flourishing will be richly diverse and varied. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 85 (1980).

<sup>67</sup> Alexander & Peñalver, *supra* note 16, at 135; see also *id.* at 134–45.

The second characteristic of human flourishing that I must note is that human flourishing must at least include 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 alternatives. These two characteristics of human flourishing, developing necessary capabilities and decision-making skills, are deeply interconnected. We cannot develop an adequate capacity to discern among multiple available life horizons by ourselves. Such a capability can only be developed through and with others who teach us discernment both directly and by their examples.

The account of human flourishing on which the thicker conception of community adopted in this Article is based borrows from the “capabilities” approach developed in recent years by Martha Nussbaum and Amartya Sen.<sup>68</sup> That approach measures a person’s well-

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<sup>68</sup> See sources cited *supra* note 13. Much has been written, of course, critiquing both Sen’s and Nussbaum’s versions of the capabilities approach. The best of these critiques are G.A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, in *THE QUALITY OF LIFE* 9, 9 (Amartya Sen & Martha Nussbaum eds., 1993) and Thomas W. Pogge, *Can the Capability Approach Be Justified?*, 30:2 *PHIL. TOPICS* 167 (2002). Although this is not the appropriate occasion to respond to all of the criticisms of Sen and Nussbaum, I need to respond briefly in order to explain why I find the neo-Aristotelian capabilities approach an attractive foundation for the social-obligation theory.

First, one of G.A. Cohen’s central criticisms of Sen is that he espouses an inappropriate “athletic” image of the self. See Cohen, *supra*, at 22–25. As Philip Pettit has pointed out, this is a strange criticism. Nothing in Sen’s theory presupposes anything like athletic activity. See Philip Pettit, *Capability and Freedom: A Defence of Sen*, 17 *ECON. & PHIL.* 1–2 (2001). Sen’s account of flourishing is perfectly consistent with someone who takes the view of physical exercise attributed to the late Robert Hutchens, former President of the University of Chicago, who allegedly quipped, “[w]henver the urge to exercise comes over me, I lie down until it passes.” This mistaken linkage between capability and an athletic life leads Cohen to overlook the important connection in Sen’s theory between capability and freedom. See Cohen, *supra*, at 16–17.

Second, Thomas Pogge compares Sen’s capabilities approach with what he views as its “resourcist” (e.g., Rawlsian) and welfarist competitors and finds Sen’s approach inferior as a “public criterion on social justice.” Pogge, *supra*, at 167. But, Pogge’s critique rests on a mistaken understanding that capabilities have strictly instrumental value. Sen in fact makes reasonably clear that at least some of the capabilities have intrinsic as well as instrumental value. So, capabilities are not strictly comparable with resources.

Finally, Kaplow has recently argued that theories such as Sen’s, which regard the means of fulfillment, such as capabilities, as the ends of an ideal theory, are problematic and inferior to welfarist theories because at least some means are incapable of justification as intrinsically good. See Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?*, 116 *PHIL. REV.* 603, 604–05 (2007). He argues that means theories, including Sen’s, that have multiple dimensions struggle with this problem because they require weighing the various means to determine which situation is best for an individual. According to Kaplow, this means that it will be necessary to give individuals more of some means and less of others than is ideal from the perspective of maximizing their well-being. Hence, all such theories are inferior to welfarist theories. See *id.* at 605–06.

Here, Kaplow is essentially (mis)appropriating Richard Arneson’s “indexing problem” argument and misunderstanding its import. See Richard J. Arneson, *Primary Goods Reconsidered*, 24 *NOÛS* 429, 445–46 (1990) [hereinafter Arneson, *Primary Goods Reconsidered*]; see also Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *PHIL. STUD.* 77 (1989).

being not by looking at what they have, but by looking at what they are able to do.<sup>69</sup> The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction,<sup>70</sup> or what

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The question that Kaplow's (Arneson's) claim poses concerns welfarism itself. How is any central authority that is charged with the responsibility of maximizing aggregate welfare supposed to do so, given the indexing problem, i.e., how to attach weights to disparate goods so that one can non-arbitrarily tell whether one person enjoys a higher overall welfare level than another? See Arneson, *Primary Goods Reconsidered*, *supra*, at 445–46. Kaplow seems not to appreciate that Arneson's argument effectively undermines the practicability of welfarism in his (Kaplow's) sense as an actual policy goal. See *id.* at 446 ("Unless one assumes . . . that it is possible to make social policy judgments based on perfectionist claims to knowledge of what is good for people, and so of what value their resource shares really have . . . then we are stuck with a subjectivist welfare standard, like it or not.").

<sup>69</sup> SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 13, at 10–11 ("A functioning is thus different both from (1) having goods (and the corresponding characteristics), to which it is posterior, and (2) having utility (in the form of happiness resulting from that functioning), to which it is, in an important way, prior.").

<sup>70</sup> I recognize that many analysts will deeply contest the claim that there are objectively valuable patterns of living. The question of whether and how an objective conception of moral values is possible is, of course, a central topic in moral philosophy. As Arneson states, an objective "theory of what makes someone's life go best . . . is a complex animal." Richard J. Arneson, *Human Flourishing Versus Desire Satisfaction*, 16 *SOCIAL PHIL. & POL'Y* 113, 117 (1999). This is not the occasion for addressing it fully. For present purposes, I should clarify that what I mean by "objective" is that the truth of claims about what patterns of living are valuable is not strictly dependent on the subjective states of mind of the affected agents (or what Matthew Adler and Eric Posner call "mental-state views") or personal preferences ("preference-based accounts" in Adler's and Posner's parlance). See MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 29–32 (2006). Adler and Posner oddly distinguish between "welfare" and "value," arguing that "the nub of the difference" between the two is that welfare is "essentially responsive to the welfare subject's point of view," whereas value is not. *Id.* at 33. Their characterization of the welfare agent's subjective point of view as "the nub of the difference" is infelicitous. Just as many versions of "welfare" or "well-being" compete, so too do multiple conceptions of "value" compete. Indeed, because of the strong similarities between some counterpart conceptions of each, one can understand "welfare" and "value" as virtually synonymous. For example, one can understand value in preference satisfaction or even mental state terms. "Value" is a verb as well as a noun; hence, the value that inheres in something is, at least in part if not entirely, a function of someone actually valuing it. On this understanding, value is a matter of that person's mental state, rather than, as Adler and Posner have it, an objective matter in the sense that value is independent of mental states or preferences.

Sen and Thomas Nagel have persuasively argued that the objectivity of moral values is not necessarily inconsistent with taking subjectivity and subjective judgments into account. Supporting the objectivity of moral values, Sen has pointed out the fact that moral evaluation is "position-relative" does not imply that moral values are relative. As Sen states, "Moral valuation can be position-relative in the same way that statements such as '[t]he sun is setting.' The truth of that statement varies with the position of the person, but it cannot vary from person to person among those standing in the same position." Sen, *supra* note 13, at 184.

Nagel offers a somewhat different version of objectivity, but, like Sen, he takes subjectivity into account. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 4–6 (1986). He argues that moral values can be objective even while they are appropriate to the subject. *Id.* Our subjective values are the starting point, but only the starting point, in a process that, by detaching ourselves from our individual perspectives, leads us incrementally to construct a conception of the truth about what we and others should and do want. *Id.* at 138–40. As Nagel states,

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.

Importantly, Nussbaum and Sen distinguish between the first-order patterns that constitute well-lived human lives (“functionings”) and the second-order freedom or power to choose to function in particular ways, which they call “capabilities.”<sup>71</sup> As Sen explains, “A person’s ‘capability’ refers to the alternative combinations of

We begin with a partial and inaccurate view, but by stepping outside of ourselves and constructing and comparing alternatives we can reach a new motivational condition at a higher level of objectivity. . . . [W]hen we detach from our individual perspective and the values and reasons that seem acceptable within it, we can sometimes arrive at a new conception which may endorse some of the original reasons but will reject some as false subjective appearances and add others.

*Id.* at 140. As Nagel points out, this process of developing an account of objective moral values is not a matter of naturalistic psychology. *Id.* at 142 (“What we see . . . is not just people being moved to act by their desires, but people acting and forming intentions and desires for reasons, good or bad. That is, we recognize their reasons as *reasons*.”); see also Thomas Nagel, *The Limits of Objectivity*, in 1 THE TANNER LECTURES ON HUMAN VALUES 77 (Sterling M. McMurrin ed., 1980).

Yet another version of moral objectivity is Ronald Dworkin’s argument that our practices of arguing on behalf of values commits us to the proposition that some truth of the matter exists in the realm of moral values. See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87, 88–89 (1996). The common human practice of making normative arguments and assertions—“What she did was wrong!”—is unintelligible in the absence of a commitment to normative objectivity. See *id.* at 96. For other general defenses of moral objectivity, see JAMES GRIFFIN, *VALUE JUDGMENT: IMPROVING OUR ETHICAL BELIEFS* (1996); Philippa Foot, *Does Moral Subjectivism Rest on a Mistake?*, 15 O.J.L.S. 1 (1995). In addition, Daphna Lewinsohn-Zamir has developed an objective conception of well-being, which she applies to property law. See Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1672–73 (2003).

My colleague Robert Hockett has pointed out that claims that normative positions are merely subjective expressions of what the speaker likes or prefers encounter a problem of recursivity. See Robert Hockett, *Pareto Versus Welfare* 4 (Cornell Legal Stud. Research Paper Series No. 06-027, 2006), available at <http://ssrn.com/abstract=930460>. Claims of the subjectivity of value judgments, on that view, could then themselves be said to be merely subjective. On this view, the claimant is doing no more than expressing a personal preference. Of course, this is not what such claimants are doing. If they claim that normative statements are purely subjective, they are stating what they believe to be true and want us to accept as the truth, not merely what they prefer. See *id.*

Law-and-economics analysts strongly tend to reject objective-good theories in favor of theories that define the good strictly on subjective grounds, particularly preference- or desire-satisfaction theories. The problems with preference-satisfaction theories (even those that limit the preferences that should be satisfied to so-called “informed preferences”) are carefully discussed in Arneson, *supra*, at 113–42.

<sup>71</sup> See, e.g., NUSSBAUM, *supra* note 13, at 87–88; SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 13, at 70–86.

functionings that are feasible for her to achieve.”<sup>72</sup> Among the functionings that are necessary for a well-lived life are *life*, including certain subsidiary values such as health; *freedom*, understood as including the freedom to make deliberate choices among alternative life horizons; *practical reasoning*; and *sociality*. Although the actual achievement of these and other functionings is a necessary component of any plausible conception of the well-lived life, the experience of choosing among a number of possible valuable functionings (perhaps even including the choice not to function in certain ways) is *itself* an important functioning.<sup>73</sup> Accordingly, a proper concern for human autonomy requires looking beyond mere functionings to include the capabilities that various social matrices generate for their members.<sup>74</sup>

There is ample room for robust debate about exactly what capabilities are the crucial components of human flourishing.<sup>75</sup> I shall not dwell on this debate because the crucial point for my purposes is that one cannot acquire these capabilities or secure the resources to acquire them by one’s self. This is because the physical process of human development mandates our dependence on others for a great deal of the time during which we are cultivating the necessary capacities.<sup>76</sup> This form of dependence is perhaps most clear with respect to life and its subsidiary goods. We enter the world utterly dependent on others for our physical survival.<sup>77</sup> Even upon reaching adulthood, we continue to place at least partial physical dependence (and even emotional or psychological dependence) on others as we move through a dangerous world. Often, little more than dumb luck separates the independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence once again looms ever larger.

But the social and material dependence of the capabilities necessary for human flourishing goes well beyond the physical dependence we exhibit at the beginning and end of life. Life, freedom, practical rationality, sociality, and their attendant functionings can meaningfully exist only within a vital matrix of social structures and practices.

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<sup>72</sup> SEN, DEVELOPMENT AS FREEDOM, *supra* note 13, at 75.

<sup>73</sup> *See id.* at 75–76.

<sup>74</sup> *See id.* at 74–76; *see also* Purdy, *supra* note 6, at 1258–63 (discussing Sen’s conception of freedom).

<sup>75</sup> *Compare, e.g.,* NUSSBAUM, *supra* note 13, at 78–80, *with* FINNIS, *supra* note 66, at 81–90.

<sup>76</sup> *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 35, 34–37 (2004) (“[A] state of dependency is a natural part of the human condition and is developmental in nature.”).

<sup>77</sup> *See* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 71–74 (1999) (explaining that beginning in infancy, each individual must undertake the transition from depending on what we are taught by others to being an “independent practical reasoner”).

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>78</sup> Taylor puts the point this way:

[W]e live in a world in which there is such a thing as public debate about moral and political questions and other basic issues. . . . What would happen to our capacity to be free agents if this debate should die away, or if the more specialized debate among intellectuals who attempt to define and clarify the alternatives facing us should also cease, or if the attempts to bring the culture of the past to life again as well as the drives to cultural innovation were to fall off? What would there be left to choose between? And if the atrophy went beyond a certain point, could we speak of choice at all?<sup>79</sup>

Alastair MacIntyre similarly discusses how we necessarily depend upon others to develop as beings capable of engaging in practical reasoning: "We become independent practical reasoners through participation in a set of relationships to certain particular others who are able to give us what we need."<sup>80</sup> From the earliest age and well into adulthood, if not for our entire lives, we receive from and we rely on parents, teachers and mentors, and friends for lessons about planning and evaluation, causes and consequences, self-restraint and discipline: these are the raw materials from which the capability of practical reasoning emerges. 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.

Communities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities.<sup>81</sup> Even (or more properly, precisely) as free, rational persons, we never cease to operate within and depend upon the matrices of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense to others with whom we are connected as members of one or typically

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<sup>78</sup> See Jürgen Habermas, *Struggles for Recognition in Constitutional States*, 1 EUR. J. PHIL. 128, 132 (1993).

<sup>79</sup> CHARLES TAYLOR, *Atomism*, in 2 TAYLOR, PHILOSOPHICAL PAPERS, *supra* note 54, at 205.

<sup>80</sup> MACINTYRE, *supra* note 77, at 99.

<sup>81</sup> The conception of community which underlays my approach to the social-obligation norm owes much to the following works: ROBERT BELLAH ET AL., *HABITS OF THE HEART* (2d ed. 1996); HURSTHOUSE, *supra* note 65; MACINTYRE, *supra* note 77; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); CHARLES TAYLOR: *THE MAKING OF THE MODERN IDENTITY, SOURCES OF THE SELF* (1989).

An older but still rich exposition of this approach to community is Jacques Maritain, *The Person and the Common Good*, 8 REV. POL. 419, 449–50 (1946). I am indebted to Peñalver for bringing this article to my attention.

more communities. Our identities are literally constituted by the communities of which we are members. Asked who we are, we inevitably talk about the communities where we were born and raised, our nation, our family, where we attended school, our friends, our religious communities and clubs. Indeed, individuals and communities interpenetrate one another so completely that they can never be fully separated.<sup>82</sup>

The communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations, and the scope of our aspirations. The homeless person, accustomed to receiving little more than abuse or neglect, may come to expect little more out of life.<sup>83</sup> Similarly, although membership in certain communities can obviously be based upon contract or voluntary agreement, the very possibility of these voluntarily associative relationships depends upon our prior and continuing (and typically involuntary) participation in or exposure to communal institutions. These institutions impart to us the information and capacities that give us the tools needed to permit us to understand and engage in voluntary choosing at all.<sup>84</sup>

Beyond nurturing the individual capabilities necessary for flourishing, communities of all varieties serve another, equally important function. Community is necessary to create and foster a certain sort of society, one that is characterized above all by just social-relations within it.<sup>85</sup> By “just social-relations,” I mean a society in which individuals can interact with each other in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy.<sup>86</sup> Communities foster just relations with societies by shaping social norms, not simply individual interests.<sup>87</sup>

Precisely because capabilities are essential to flourishing in a distinctively human way, development of one’s capabilities is an objective human good, something that we ought (insofar as we accept these particular capabilities as intrinsically valuable) to promote as a good

<sup>82</sup> For an elaboration of this idea, see Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 21–28 (1989).

<sup>83</sup> See SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 13, at 21 (“A person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-fulfillment if he or she has learned to have ‘realistic’ desires and to take pleasure in small mercies.”).

<sup>84</sup> See TAYLOR, *supra* note 79, at 196–98; Alexander, *supra* note 82, *passim*.

<sup>85</sup> See ALEXANDER, *supra* note 62, at 1–3, *passim*.

<sup>86</sup> An alternative formulation for such a society is one that borrows from the South African Constitution, which refers to “an open and democratic society based on human dignity, equality and freedom.” S. AFR. CONST. 1996 § 36(1).

<sup>87</sup> Of course, this is not to say that all communities promote just social-relations. Many examples, past and present, exemplify communities that do not promote just social-relations. The point that I am making is that communities have the capacity to do so by virtue of their social-norm-shaping function.

in and of itself. As a matter of human dignity, every person is equally entitled to flourish. This being so, every person must be equally entitled to those things essential for human flourishing, i.e., the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities. In the absence of these capabilities and supporting resources, recognition of the entitlement to flourish is simply an empty gesture. But not every society will be equally conducive to human flourishing. The cultivation of the capabilities necessary for flourishing depends upon social matrices, and the condition of those matrices varies among societies, sometimes quite widely. A society that fosters those functionings and capabilities that are necessary for human flourishing is morally better than one that is either indifferent or (even worse) hostile to their manifestation.

Just why does a person have an obligation to others in the community to promote the requisite capabilities? Several possible bases for this obligation exist. Within the Aristotelian tradition, the reason is directly related to the social character of human beings. Human flourishing requires not only virtues, but also resources. Each of us desires resources to enable development of the capabilities that are essential for human beings. Being social animals, moreover, humans want those resources not only for themselves but also for others so that they develop the capabilities for flourishing as well.<sup>88</sup> Hence, human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life (though not necessarily what they want).<sup>89</sup>

A second possible basis for the obligation is some notion of long-term self-interest. The idea is 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.

Another alternative basis for the obligation draws on Alan Gewirth's universalizability principle, which he derives from Immanuel Kant's Categorical Imperative.<sup>90</sup> The basic idea behind Gewirth's principle is that if as rational agents we acknowledge that we have rights, in order to avoid contradicting ourselves we must acknowledge that all persons, as rational agents in the same relevant sense, have

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<sup>88</sup> See GORDLEY, *supra* note 64, at 8.

<sup>89</sup> As Gordley points out, the Aristotelian concept of human flourishing also rests on commutative justice, the object of which is to enable each person to obtain what she needs for the development of the essential capabilities without unfairly inhibiting others' abilities to do the same. See *id.*

<sup>90</sup> See ALAN GEWIRTH, REASON AND MORALITY 104-07 (1978).

rights as well.<sup>91</sup> Thus, Gewirth stated, “the mutuality of human rights is a stringent kind of symmetrical relation whereby each person has rights to freedom and well-being against all other humans [and] every other human also has these rights against him, so that he has correlative duties toward them.”<sup>92</sup> Gewirth termed a society based on this principle of universalizability (or consistency) a “community of rights,”<sup>93</sup> and he noted that not only does the community support the members’ rights, but also that the members have obligations to the community.<sup>94</sup>

The argument I am making here is the same. My affirmation, as a rational moral agent, of flourishing as a good has normative consequences. If I value my own flourishing, then to avoid self-contradiction, I must value the flourishing of others as well. That is to say, 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. As I discussed earlier, each individual’s commitment to develop his or her own necessary capabilities results from nothing more than the fact that he or she is a rational human being. That being so, rationality constrains each of us to acknowledge not only the right of every other human being, as a rational moral agent, to develop the same capabilities, but also our obligation to foster their development in others in ways that are appropriate to us. Our affirmation of the moral value of the requisite capabilities means that we recognize that capabilities have a special moral status and that we acknowledge as a good that those capabilities develop both in ourselves and in others.<sup>95</sup> To avoid contradicting ourselves, we must make the same normative commitment to developing them in others as we have committed to developing them in ourselves.

If human capacities such as survival (including physical health), the ability to engage in practical reasoning, and to make reasoned decisions about how to live our lives are components of the well-lived life, then surely we are all obligated to support and nurture the social structures without which those human capabilities cannot be developed.<sup>96</sup> Consequently, from the standpoint of the capabilities necessary for human flourishing, how we participate in political and social communities cannot just be an expression of our preexisting autonomy; our participation cannot be solely a volitional act we commit for

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<sup>91</sup> See *id.* at 105.

<sup>92</sup> ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 305–06 (1996).

<sup>93</sup> Gewirth’s notion of a “community of rights” is a latter-day version of Kant’s “Kingdom of Ends.”

<sup>94</sup> GEWIRTH, *supra* note 90, at 83.

<sup>95</sup> See TAYLOR, *supra* note 79, at 194.

<sup>96</sup> *Id.* at 197.

instrumental reasons such as preference satisfaction. Our participation in community is also an objectively grounded obligation rooted in our recognition of the value of the capabilities that are necessary for the well-lived life. Taylor has expressed this social vision in the following terms:

[S]ince the free individual can only maintain his identity within a society/culture of a certain kind, he has to be concerned about the shape of this society/culture as a whole. He cannot . . . be concerned purely with his individual choices and the associations formed from such choices to the neglect of the matrix in which such choices can be open or closed, rich or meagre.<sup>97</sup>

Stated differently, acknowledgment of our human dependence upon others and upon the social matrices that nurture the capacities that enable us to flourish creates for us a moral obligation to support these matrices. The major claim here, in short, is that our (and others') dependence creates, for us (and for them), 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.

The repayment of this debt "is not and cannot be a matter of strict reciprocity," MacIntyre points out.<sup>98</sup> Reciprocity, at least in any ordinary sense of that term, cannot account for this obligation for several reasons. First, the persons to whom we are required to give are often not the same as those from whom we received. One cannot predict in advance the persons to whom we shall be required to give. It might be our parents, but it might be total strangers from whom we have received nothing.

Second, even if the persons to whom we give are the same as the persons from whom we previously received some benefit, what we give is often not the same as what we received.<sup>99</sup> This is commonly the case between parents and children and indeed between all persons of different generations whenever some form of nurturing is involved. What our parents gave to nurture us as we developed into healthy and stable adult persons capable of making thoughtful choices is typically quite different from the kind of care they later require of us as their

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<sup>97</sup> *Id.* at 207; *see also id.* at 187. John O'Neill has expressed a similar point in terms of what he calls "the distribution of care." John O'Neill, *Property, Care, and Environment*, 19 ENV'T & PLANNING C: GOV'T & POL'Y 695, 696 (2001). As O'Neill points out:

Care for particular places which embody the life of a community that has an existence over time is often expressed through resistance to liberal property rights. We express mutual obligations to members of our community through a denial of exclusive property rights to particular individuals or corporations over certain common goods.

*Id.*

<sup>98</sup> MACINTYRE, *supra* note 77, at 100.

<sup>99</sup> *See id.*

dependency grows with age.<sup>100</sup> Moreover, often the amounts differ, sometimes very considerably. As members of flourishing social networks, we understand that what we give, we often give unconditionally because the measure of what is expected of us is the need of others rather than what we have already received or expect to receive in the future.<sup>101</sup> This is most obviously true between parents and children, but it also holds true in wider relationships, that is, relationships outside the family.<sup>102</sup> We give to our friends, colleagues, neighbors, and others in the myriad of social networks that constitute our ordinary lives, and we give to them according to their need rather than as repayment for the benefits they have conferred upon us in the past. If reciprocity is at work here, it is so only in the attenuated sense that we ourselves need these social networks to continue our own development as persons possessing those human capacities essential to being fully responsible moral agents. The real basis of our obligation here is not reciprocity but dependency. We need to belong to such social networks for the development of certain essential human capacities, and that dependence places on us an obligation to maintain those nurturing social networks.

Citizenship in its broadest sense is one of the most important forms of social-network membership characterized by the process that I have been describing. Americans are apt to think of citizenship as something detached from everyday life, as a matter of public rituals and occasional role-playing. But in another sense, citizenship is a matter of interacting with others for the sake of the common good. It, too, involves dependence on others to become autonomous individuals. Here as well, our dependence creates debts, and once again, our repayment of these debts is not strictly a matter of reciprocity. Why we owe, what we owe, and to whom we owe repayment cannot be calculated, at least not solely, on the basis of some sort of quid-pro-quo schedule. We owe because we are dependent on each other and because we are members of a community. What we owe is as often as not determined by the needs of others rather than what we have received. Similarly, the identity of persons to whom we are obligated does not always depend on their having directly given to us. We are obligated to our children, for example, not because of what they have given to us in some immediate or superficial sense but by virtue of our relationship with them.

Of course, one may take this thicker conception of the social obligation too far. We must protect important values like fairness, individual respect, and human dignity even as we recognize that community

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<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 108.

<sup>102</sup> See *id.* at 102–07.

membership involves the possibility of unreciprocated sacrifices. This is an aspect of the irreducible tension that runs throughout all of the law of property, especially constitutional property, and it at least partly explains why takings law is unavoidably muddy.<sup>103</sup> But if we limit recognition of our contributory obligations strictly to circumstances where an individual eventually receives a benefit as valuable as the burden the individual has sustained, then we weaken our conception of community and hinder it from fostering human flourishing. Human flourishing depends not simply upon participation in networks of social relationships but upon the existence of social relationships that are non-strategic. If the community's reciprocity to the individual is the sole touchstone for whether and when individuals owe obligations to the community, this implicitly operates on the same contractarian logic in which the community's legitimacy depends on its serving the well-being of the ontologically prior individual, rather than, in some sense, constituting the individual.

Responding to an earlier explication of the human flourishing-based social-obligation theory,<sup>104</sup> Dagan has argued that a "naive dismissal of property's protective role may . . . lead to the systemic exploitation of weak property owners and to a cynical abuse of social solidarity, subverting the very aims it intends to further."<sup>105</sup> This leads him to conclude that "some skepticism about the disproportionate contribution to the community's well-being is appropriate, particularly when contributions are required from politically weak or economically disadvantaged landowners."<sup>106</sup>

A number of problems with this argument are apparent. First, it may lead to results that are regressive. This view is basically a variation on the familiar argument that redistributive measures end up hurting the poor. Epstein, for example, forthrightly states:

It is a melancholy truth that in practice redistribution often works in favor of those who have political power and not those who have genuine need. The only moral case for redistribution is to overcome differences of wealth in the service of those with real human needs. Once redistribution becomes a legitimate function of government, it is likely to be unleashed in ways that flatly contradict this purpose.<sup>107</sup>

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<sup>103</sup> See Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENT. 259, 260-61 (1992); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 599 (1991); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-69 (1984).

<sup>104</sup> See ALEXANDER, *supra* note 15.

<sup>105</sup> Dagan, *Re-Imagining Takings Law*, *supra* note 52, at 9.

<sup>106</sup> *Id.*

<sup>107</sup> EPSTEIN, *SKEPTICISM AND FREEDOM*, *supra* note 18, at 61.

The lesson that Epstein, like others on the political Right, draw from this apparent insight, is that government should never (or at least rarely) engage in redistribution. The same regressive outcome may be true of Dagan's argument.<sup>108</sup> Because of its regressive effects, Dagan's argument seems to confound his desire to have burdens fairly spread through his concept of reciprocity.

Another problem with the argument is that its empirical foundations are at least contestable. The argument poses one of those unanswerable public-choice puzzles: is the discrete and insular minority uniquely disadvantaged or is it, to the contrary, uniquely advantaged in a democratic political process? There is simply no incontestably correct answer. Those who make the argument nearly always assume that a correct answer exists, and their argument is based on just that—an unsubstantiated assumption.

None of this is to deny Dagan's point concerning expectations.<sup>109</sup> If individuals must make sacrifices for the benefit of society, they commonly do so with an expectation that their sacrifice will be reciprocated in some fashion at some point in the future, and those expectations are often legitimate. The theory that long-term as well as short-term, or even immediate forms, of reciprocity need to be taken into account in determining whether monetary compensation is due is correct as far as it goes.<sup>110</sup> Dagan's theory of long-term reciprocity is one way of identifying and isolating cases in which individuals might abuse the social-obligation norm, frustrate legitimate expectations, or disproportionately burden the poor or other politically weak groups.<sup>111</sup> However, there is no a priori reason to believe that such cases will be the rule rather than the exception. As I indicated earlier, whether discrete and insular minorities are uniquely disadvantaged or uniquely advantaged<sup>112</sup> in ordinary democratic political processes is an empirical question, any answer to which will be inherently contestable. To assume that the poor will always be politically disadvantaged is simply begging the question.

#### IV

#### THE SOCIAL OBLIGATION AT WORK: A PARTIAL TYPOLOGY

Having sketched the theoretical foundation and character of this human flourishing-focused version of the social-obligation norm, the

<sup>108</sup> See *supra* text accompanying notes 44–53.

<sup>109</sup> See Dagan, *Re-Imagining Takings Law*, *supra* note 52, at 14.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 8–9.

<sup>112</sup> Strictly as a matter of public-choice theory, for example, there are more than a few well-organized interest groups representing the poor and various minority groups in legislatures at both state and federal levels.

question naturally becomes just what the social-obligation norm includes. What exactly is the content of this version of the social-obligation norm? The most general guide that I can give is that an owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing. These are the benefits necessary to the members' development of those human qualities essential to their capacity to flourish as moral agents and that have some reasonable relationship with ownership of the affected land. To make that general guide clearer, this Part provides several examples of legal doctrines that can best be explained on the basis of the social-obligation theory that I have defended. The list is intended to be illustrative, not exhaustive. What will emerge is a partial typology of social-obligation practices extant in American property law and cognate fields. The point is not that current American property law, public and private, has already fully internalized the idea that private owners owe thick responsibilities to the communities to which they belong. It has not. But American property law has partially internalized social obligations, albeit indirectly and confusingly. The purpose of this Part, then, is to illustrate how the human flourishing-focused conception of the social-obligation norm in fact operates (and might operate) in American law and to call for open acknowledgment of its existence and explicit development of its parameters. Traces of an implicit social-obligation norm are scattered throughout American property law. The law would gain much clarity if the norm were acknowledged as the basis for the relevant legal practices.

This Part has both positive and normative objectives. It seeks to provide an explanatory account of doctrinal practices in which private owners are required to sacrifice their ownership interests in some way. It also discusses when and why this version of the social-obligation norm justifies the community requiring such sacrifices of private owners. The results of the social-obligation theory will sometimes overlap with the prescriptions of law-and-economics analysis but certainly not always. The social-obligation theory will sometimes call for individual sacrifices that law-and-economics theory will not, and it will explain certain doctrinal practices that law-and-economics analysis has difficulty explaining. More fundamentally, as we will see, the focus of the social-obligation theory is different from that of law-and-economics analysis, other theories derived from utilitarianism, as well as that of classical liberalism.

The examples are divided into two categories. The first are cases of entitlement sacrifices through forced sales. Owners are required to sacrifice some property interest to the community in exchange for monetary compensation. In the language of Judge Calabresi and Me-

lamed,<sup>113</sup> the owner's entitlement is protected by a liability rule rather than a stronger property rule. The second category consists of instances in which the owner keeps the property but is prohibited from using it in some way that the community regards as against its collective interest.

### A. Entitlement Sacrifices

There are many occasions in which property law protects owners incompletely in the sense that it requires the owner to sell an entitlement unwillingly and at an objectively set price. Ordinarily, of course, no one may take private property at any price unless the owner voluntarily sells it, but this is not always the case. This section considers a few of the many examples of state-sanctioned forced sales. In recent years the conventional explanation of these forced-sale doctrines has been economically based. Because of high transaction costs, the transfer of the entitlement will not occur even though such a transfer would benefit all concerned. Protecting the entitlement through a liability rule, meaning that others have a right to take the property so long as they compensate the owner, maximizes economic efficiency under such circumstances.<sup>114</sup> Without suggesting that forced sales may not be justified on such instrumentalist grounds, I want to suggest in this section that another, perhaps in some cases better, way of understanding forced sales is as an aspect of the social obligation inherent in private ownership. A few examples should suffice to establish the point.

#### 1. *Eminent Domain*

Scholars from Hugo Grotius<sup>115</sup> to Judge Posner have offered several rationales for the power of eminent domain, a power that can be traced back to ancient Rome. The reigning conventional wisdom is Judge Posner's: what justifies the power of the state to force the sale of private property is economic efficiency.<sup>116</sup> Eminent domain is necessary to overcome monopolies that occur when desirable government projects are site-specific. To pick a familiar example, say a city plans to build a new airport on land that is privately owned by several own-

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<sup>113</sup> See Calabresi & Melamed, *supra* note 14.

<sup>114</sup> See, e.g., *id.* at 1106.

<sup>115</sup> See HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI TRES 807 (Francis W. Kelsey trans., Oxford Press 1925) (1646) (“[T]he property of subjects belongs to the state under the right of eminent domain; in consequence the state . . . can use the property of subjects . . . for the sake of the public advantage. But . . . when this happens the state is bound to make good at public expense the damage to those who lose their property.”).

<sup>116</sup> RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 55, 55–56 (6th ed. 2003) (“[L]and that would have been more valuable to a right-of-way company than to its present owners will remain in its existing, less valuable uses, and this is inefficient.”).

ers. No other site is feasible, so the city must acquire each of these parcels. As economists have long pointed out, this means that each owner has a monopoly on an asset critical to the government's plan and each is in a position to extract monopoly rents from the government in exchange for selling his or her parcel. Eminent domain allows the government to achieve the benefit of building the airport at a lower cost to taxpayers than would be the case if the government had to acquire each parcel through market transactions.<sup>117</sup>

One can understand eminent domain in terms of the social obligation as well. The capacities necessary for individuals to flourish as autonomous moral agents require the existence not only of social networks within which individuals carry out the activities that enable individuals to experience freedom, but also what Taylor calls "the mundane elements of infrastructure without which we could not carry on these higher activities."<sup>118</sup> These elements of infrastructure include just the sorts of public projects for which the power of eminent domain is typically exercised: roads, airports, utility lines, public buildings, communication systems, and the like.<sup>119</sup> This infrastructure is literally the foundation upon which our society, our culture, and our polity rests. It is no exaggeration to say that without this infrastructure, our civilization—the very civilization that nurtures those qualities through which we experience ourselves as free individuals capable of making choices among alternatives and defining for ourselves our wants, needs, and values—would not exist. Each of us as a member of this political community, then, depends upon the continued effectiveness of this infrastructure, and that dependence requires that individuals bear some responsibility for maintaining our infrastructure.

Eminent domain is a legal and political process for determining just what that responsibility is. At its most general level, the power of eminent domain represents our collective judgment that the state is justified in demanding of us, as members of the political and social community that nurtures us as flourishing individuals, under certain conditions, the sacrifice of title to our land in exchange for just compensation, measured at fair market value.

Although eminent domain has a fair-share component, it also has an element of individual sacrifice. Its effects are necessarily concentrated on those whose property is condemned. Because "just compensation" is, under current American judicial doctrine, fair market value

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<sup>117</sup> *Id.* For a particularly clear explanation of the economic problem and how eminent domain solves it, see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81–82 (1986).

<sup>118</sup> TAYLOR, *supra* note 79, at 205.

<sup>119</sup> *Id.* at 205–06.

compensation<sup>120</sup>—which does not reflect the owner’s subjective valuation and might be inadequate even if “just compensation” were defined to include subjective value<sup>121</sup>—those who lose their property through eminent domain really do lose something that the rest of us (who are paying our taxes in part to fund their compensation) do not. Perhaps a conception of reciprocity can explain this aspect of eminent domain, but it requires an attenuated form of reciprocity.

The fact that the power of eminent domain is collective creates an obvious risk of abuse. The political community is justified in demanding this entitlement sacrifice only to the extent that the demand represents a bona fide determination of what is in the community’s best interests by a legitimate representative expression of that community. If instead the political process has been highjacked by interest groups who disproportionately benefit from the exercise of eminent domain, the community’s demand is not justified. Determining just when the exercise of eminent domain is the perverse result of interest-group politics is obviously a difficult matter. One suggested rule of thumb is that the risk of abuse is greatest if condemnation of the land is followed by retransfer of the land to one or a few private parties and the price charged by the government on retransfer is less than the compensation award, based on the opportunity cost formula.<sup>122</sup> This strikes me as very useful rule of thumb for courts to use. The mere fact that government charged less on the retransfer than the amount of the condemnation award should not lead a court necessarily to conclude that the taking was not for a “public use.” But it should be strong evidence that what Thomas Merrill calls “secondary rent-seeking”<sup>123</sup> has occurred and lead to heightened judicial scrutiny of the government’s demand of the landowner.<sup>124</sup>

Although the human flourishing-based social-obligation theory overlaps with the law-and-economics theory in its broad contours, the two are not identical. The law-and-economics theory says that individuals are obligated to sacrifice their own private well-being for the sake of the common good, defined as aggregate wealth.<sup>125</sup> From the per-

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<sup>120</sup> See JESSE DUKEMINIER ET AL., *PROPERTY* 956 (6th ed. 2006).

<sup>121</sup> The point here is simply that not all subjective attachments are reducible to monetizable terms.

<sup>122</sup> Merrill, *supra* note 117, at 87–88.

<sup>123</sup> By “secondary rent-seeking,” Merrill means efforts by interest groups to acquire (or defeat) a legislative grant of eminent domain. See *id.* at 86.

<sup>124</sup> See generally Gregory S. Alexander, *Eminent Domain and Secondary Rent-Seeking*, 1 N.Y.U. J. L. & LIBERTY 958, 960 (2005) (suggesting that “the problem of secondary rent-seeking may be the basis for developing a useful test of whether and when the exercise of eminent domain for the purpose of municipal economic development violates the public use limitation”).

<sup>125</sup> This assumes that the criterion used for efficiency is Kaldor-Hicks rather than Paretian. If the Pareto criterion is used, then no sacrifice of wealth is involved. But in the real

spective of the social-obligation theory, the problem is not with law-and-economics theory's call for individual sacrifice but with its simplified and simplistic definition of the common good. This is one reason why many economically minded analysts have difficulty understanding why people react so strongly and negatively to using eminent domain for projects like shopping malls.<sup>126</sup> From the law-and-economics point of view, what matters is that high transaction costs are standing in the way of some wealth-maximizing use of land. Law-and-economics theory posits that the purpose of eminent domain is to avoid high transaction costs. The use to which the land itself is to be put is irrelevant. It could be a bridge, a road, or a shopping mall for all the economist cares.

Certainly, one can say something in favor of this perspective. What sensible person would say that the wealth of a society is irrelevant? The problem is, as others have noted,<sup>127</sup> wealth is not a social value if considered apart from the mechanism pursuant to which it is distributed.<sup>128</sup> Moreover, although it does not seem inherently illegitimate or immoral for a political community to ask some individuals to sacrifice so that the wealth of their society can increase, even when that wealth is in private hands, the analysis of sacrificing quickly becomes complicated in ways that are difficult for law-and-economics analysis to capture entirely. For example, will the private beneficiary of eminent domain be engaged in a business that creates good jobs for the local community? Is the use of eminent domain really necessary in a given case, or is it just politically easy because of the political powerlessness of the affected group? These are questions that law-and-economics analysis cannot answer, at least not easily, nor can the social-obligation theory answer them easily. The difference, however,

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world Pareto conditions almost never exist, and so when economists talk about an outcome being efficient, they mean Kaldor-Hicks efficient. Kaldor-Hicks efficiency, unlike Pareto efficiency, involves losers. See POSNER, *supra* note 116, at 12–13.

<sup>126</sup> This is far more true of welfarist law-and-economics analysts than it is Right-libertarians. Epstein, for example, has strongly criticized the result in *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that general benefits accruing to a community constituted a “public use” under the Fifth Amendment). See RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 83–87 (2008); Richard A. Epstein, *Blind Justices: The Scandal of Kelo v. New London*, WALL ST. J., July 3, 2005, <http://www.opinionjournal.com/extra/?id=110006904>; see also *infra* notes 137–40 and accompanying text.

<sup>127</sup> See, e.g., DWORKIN, *supra* note 10, at 246 (“[A] gain in social wealth, considered just in itself and apart from its costs or other good or bad consequences, is no gain at all.”).

<sup>128</sup> If Bill Gates were born rich and the rest of us were born poor, and if Gates were never known to do anything with his wealth that in any way benefitted anyone, then the more manna that falls from Heaven into Gates' home would, quite literally, not amount to a gain in *social* wealth at all. It would amount to more aggregate manna but not to aggregate social wealth. To deem wealth a social good apart from its mode of distribution is to conflate preference satisfaction with social goods. I owe this point to Hockett. See Hockett, *supra* note 8.

is that under the social-obligation theory they must be faced directly and openly, and they will not be analyzed in terms of a conception of the common good that is limited to aggregate social wealth. Rather, they will be addressed from the perspective of a substantive conception of the goods that are necessary to a well-lived human life and the social structures necessary to foster those goods.

## 2. Remedies for Nuisance

Remedies for nuisances and other interferences with property entitlements raise the same basic problem as that involved in eminent domain law. When and for what reasons is it justifiable for the state to deprive a private owner of property in exchange for a monetary award that may not compensate her at the level of the owner's subjective valuation? In law-and-economics terms the question is instead the conditions under which an owner's entitlement should be protected by a liability rule, which involves a forced sale very much like eminent domain, rather than a property rule, which usually involves an injunction against the interfering activity. Ever since the classic article by Judge Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability*,<sup>129</sup> law-and-economics scholars have endlessly debated this question from the perspective of a single social good—aggregate social wealth. But just as eminent domain can be understood in terms of the social obligation of ownership, so can remedies for nuisances and other encroachments upon private property interests. Consider the famous case of *Boomer v. Atlantic Cement Co.*<sup>130</sup> There, the court granted an injunction against a nuisance, but the injunction was to be vacated upon payment by the defendant of permanent damages to the plaintiff.<sup>131</sup> In effect, then, the defendant who caused the nuisance was allowed to pay damages rather than suffer an injunction if the defendant found damages cheaper than shutting down its operation, which was almost certainly the case. The court's rhetoric was redolent of economic interests and utility, but notions of individual sacrifice and social obligation were not far from sight. The court candidly acknowledged that its remedy represented a direct departure from the well-established New York rule that once a nuisance has been found, an injunction will issue against the offending activity despite the existence of a great disparity between the economic effect of the injunction and the effect of the nuisance.<sup>132</sup> Under this rule the owner sacrifices nothing of his or her property interest, which is fully protected. Under *Boomer's* damages remedy, the owner is required to sac-

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<sup>129</sup> Calabresi & Melamed, *supra* note 14.

<sup>130</sup> 257 N.E.2d 870 (N.Y. 1970).

<sup>131</sup> *Id.* at 875.

<sup>132</sup> *See id.* at 872.

rifice an entitlement through a forced sale that yields a price that may or may not fully compensate the owner.

Just as the conventional wisdom explains eminent domain in terms of avoiding high transaction costs to maximize aggregate wealth, so most legal theorists today rationalize *Boomer* in wealth-maximizing terms.<sup>133</sup> Social-obligation theory may complement the wealth-maximizing explanation of *Boomer* by reading the case as one in which the individual owners were legitimately required to sacrifice their entitlement (freedom from the pollution caused by the defendant's cement plant) as part of their civic obligation to support "the mundane elements of infrastructure without which we could not carry on [the] higher activities"<sup>134</sup> of deliberating with each other, engaging with each other in economic exchange, living lives within families, groups of friends, discovering ourselves, and the myriad of other activities through which we experience freedom and fulfillment. Without industries such as the defendant's, the culture in which we live—the culture that nurtures those goods that are essential for a well-lived human life—would not be possible, at least not in the form as we know it. Because industries like the defendant's, the argument would go, are an essential part of the infrastructure undergirding that culture, individual sacrifices to maintain them may have to be made, particularly by property owners whose entitlements the industries directly affect.

Some courts have made exactly this sort of individual sacrifice argument in determining that some activity was not a nuisance despite the fact that it substantially harmed a property interest. In *Estancias Dallas Corp. v. Schultz*,<sup>135</sup> for example, the court approvingly quoted the following language from a previous case:

"Some one must suffer these inconveniences rather than that the public interest should suffer. . . . These conflicting interests call for a solution of the question by the application of the broad principles of rights and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works

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<sup>133</sup> Judge Calabresi and Melamed cited *Boomer* as exemplary of the use of a liability rule for purposes of economic efficiency. See Calabresi & Melamed, *supra* note 14, at 1116 n.55. The law-and-economics literature on *Boomer* is staggeringly large. For representative examples, see Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 717 n.4 (1996) (arguing the superiority of liability rules); see also Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 7, 7 (Peter Hay & Michael H. Hoeflich eds. 1988) (arguing that nuisance victims should be presumptively entitled to property rules, in the form of injunctions); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damages Remedies*, 32 STAN. L. REV. 1075, 1079 n.10 (1980) (discussing the potential holdout problem in *Boomer*).

<sup>134</sup> TAYLOR, *supra* note 79, at 205.

<sup>135</sup> 500 S.W.2d 217 (Tex. App. 1973).

hardships on the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property."<sup>136</sup>

The argument basically tracks the individual-sacrifice theory sketched earlier to explain eminent domain from a social-obligation perspective. It applies as equally to the remedy issue involved in *Boomer* as it does to the substantive question of whether a nuisance exists.

It is also possible that the human flourishing-based social-obligation theory would generate the opposite result in *Boomer*, as perhaps it would in some of the more controversial eminent domain cases, including *Kelo v. City of New London*.<sup>137</sup> In *Boomer*, we might conclude that because the defendant's activity enables the flourishing of those human capacities through which we experience individual freedom only in a very attenuated way, a forced sale of the plaintiff's entitlement to live in her home free from constant noise and pollution cannot be justified on the basis on her obligations to her community.<sup>138</sup> Not every social structure or political institution, and not every social activity, is necessary to foster the goods that are required for a well-lived life. From the perspective of developing these essential goods, some social structures or activities are more important than others. A tighter nexus between the institution whose activity is under challenge and the goods necessary to a well-lived life is required before the political community can legitimately demand that an owner sacrifice her property entitlement.<sup>139</sup> Arguably, in *Boomer*, the required nexus does not exist.

A proponent of this version of the social-obligation theory might reach the same conclusion with respect to *Kelo*. One might conclude that the development project in that case will promote the development of those human capacities necessary for robust moral autonomy only in very attenuated ways, such as a marginal increase in available jobs, rather than, to pick an obvious example that would be an easy case for the social-obligation theorist, providing a new public li-

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<sup>136</sup> *Id.* at 219 (quoting *Storey v. Cent. Hide & Rendering Co.*, 226 S.W.2d 615, 619 (Tex. 1950)).

<sup>137</sup> 545 U.S. 469 (2005).

<sup>138</sup> As my former colleague Doug Kysar has reminded me, injunctive relief might also have been technology-forcing, leading industry to develop substitute processes and products that do not cause childhood asthma and other air pollution-related harms.

<sup>139</sup> A more complete elaboration of the social-obligation theory requires a fuller discussion of the degree of proximity between the institution or activity in question and the relevant human-flourishing goods and the nature of the requisite proximity. Such a discussion awaits future work. At this point, however, I wish to emphasize that the proximity that should be required is of the sort that is determinable only in the context of particular conflicts. That is, I reject the possibility of a proximity standard that applies up-front and across the board. I thank Hockett for urging me to clarify this point here.

brary.<sup>140</sup> The social-obligation theorist would remain constantly mindful of the risk that the state may demand more of private owners than it legitimately can and that we must limit the sacrifices that society asks owners to make in the interest of maintaining a society and a polity that nurture human goods essential to a well-lived life.

### 3. *Remedies Redux: A Comparative Perspective from South Africa*<sup>141</sup>

The human flourishing-based version of the social-obligation norm I have described can be the basis for social transformation. Recognition of the social-obligation norm, even in its thick version, will not necessarily lead to social transformation, but it can serve as the basis for a profound change in the way in which a society and polity are structured.

A recent and ongoing example is South Africa. The property clause of the 1996 South African Constitution incorporates a thick social-obligation norm through its explicit commitment to land reform and racial justice.<sup>142</sup> It states, for example, that “[t]he state must take reasonable legislative and other measures, within its available re-

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<sup>140</sup> How a proponent of the social-obligation theory would actually decide *Kelo* would depend upon a number of facts concerning the actual elements and effects of the Pfizer project at issue in New London. My point is simply suggestive.

<sup>141</sup> Part IV.A.3 draws heavily from ALEXANDER, *supra* note 15.

<sup>142</sup> The property clause of the 1996 South African Constitution provides as follows:  
SECTION 25. PROPERTY

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
  - (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
- (4) For purposes of this section—
  - (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
  - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the

sources, to foster conditions which enable citizens to gain access to land on an equitable basis.”<sup>143</sup> It further provides that a “person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”<sup>144</sup> Equally striking, if not more so, are cognate provisions that create an array of positive socio-economic rights, notably a right to housing and health care.<sup>145</sup> The result is a constitu-

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extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection (6).

S. AFR. CONST. § 25.

For leading commentaries on the South African constitutional property clause, see generally AJ VAN DER WALT, *CONSTITUTIONAL PROPERTY LAW* (2005); Geoff Budlender, *The Constitutional Protection of Property Rights*, in GEOFF BUDLENDER ET AL., *JUTA'S NEW LAND LAW 1-1 passim* (1998); Theunis Roux, *Property*, in 3 *CONSTITUTIONAL LAW OF SOUTH AFRICA* 46-i (Stuart Woolman et al. eds., 2d ed. 2006).

<sup>143</sup> S. AFR. CONST. 1996 § 25(5).

<sup>144</sup> *Id.* § 25(6).

<sup>145</sup> Several provisions of the 1996 Constitution create socio-economic rights. Among the most important of these are the following:

SECTION 26. HOUSING

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation [sic] of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

SECTION 27. HEALTH CARE, FOOD, WATER, AND SOCIAL SECURITY

- (1) Everyone has the right to have access to
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants [sic], appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
- (3) No one may be refused emergency medical treatment.

SECTION 28. CHILDREN

- (1) Every child has the right . . .
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices . . . .
- (3) In this section “child” means a person under the age of 18 years.

tion that has been called “the most admirable constitution in the history of the world.”<sup>146</sup> Even if one considers that assessment excessive, there is no question that the South African Constitution is a truly remarkable document, one that is unprecedented and that unambiguously seeks to be transformative in nature. Its overriding goal is effecting the fundamental transformation of a society that has suffered profound political and economic injustices, not only during the formal apartheid regime created in 1948, but also during the years of de facto apartheid before that.<sup>147</sup> The very fact that the South African Constitution aims at being one of the primary engines of a fundamental social transformation in its society makes it historically unparalleled and worthy of serious attention from constitutional scholars around the world.

In the context of South Africa today, “social transformation” primarily means land reform. The eventual outcome of the country’s attempt to realize its verbal commitment to creating “an open and democratic society based on human dignity, equality and freedom”<sup>148</sup> depends heavily on its ability to radically transform its land regime, not only as a legal system but as a social reality. South Africa is a country where landlessness and homelessness are nearly ubiquitous among non-whites, where literally millions of blacks live in the desperate poverty of “informal” housing settlements (i.e., squatter settlements),<sup>149</sup>

SECTION 29. EDUCATION

(1) Everyone has the right

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

*Id.* §§ 26–29.

For leading scholarly discussions of socio-economic rights in South Africa, see generally Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in 2 CONSTITUTIONAL LAW OF SOUTH AFRICA, *supra* note 142, at 33-i; A.J. van der Walt, *A South African Reading of Frank Michelman’s Theory of Social Justice*, 19 S. AFR. PUB. L. 253 (2004); Murray Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 S. AFR. J. HUM. RTS. 284 (2004).

<sup>146</sup> CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 261 (2001).

<sup>147</sup> Indeed, the preamble itself indicates that the Republic adopted the 1996 Constitution so as to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.” S. AFR. CONST. 1996 pmb. For a valuable historical discussion of the pre-apartheid era practices that paved the way for legal apartheid, see LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 154–86 (3d ed. 2000).

<sup>148</sup> S. AFR. CONST. 1996 § 36(1).

<sup>149</sup> “Homelessness” is an amorphous and unhelpful concept in any society, but especially so in South Africa. There, hundreds of thousands of people live in informal (and illegal) squatter settlements. These people do live in homes in a sense, but the homes are grossly inadequate. Some are former farm workers who migrated to urban areas. Some are urban wage earners who cannot afford decent housing. Most are unemployed.

Land redistribution in South Africa has occurred at a frustratingly slow pace. The maldistribution of land ownership continues to follow racial lines. When apartheid ended, the new, democratically elected government promised that it would transfer 30 percent of white-owned commercial farmland to non-whites by 2014. In its 2006–07 Annual Report,

and where many blacks still do not enjoy secure land-tenure rights.<sup>150</sup> Without access to land and to more secure tenure rights, South Africa's black majority will find no solace in the noble sentiments expressed in the new political and legal rhetoric, including that of the Constitution.

The constitutionally compelled programs for land redistribution and tenure reform are still ongoing, with 2014 as the current target date.<sup>151</sup> South Africa has made progress, but given the magnitude of the country's landlessness problem today, an enormous amount of work remains. Huge numbers of black South Africans continue to live in squatter settlements in appalling conditions, and more and more such settlements continue to be built. Many settlements are the result of the migration of job-seeking blacks from the poorer states such as Limpopo and the Eastern Cape to urban areas in wealthier states like the Western Cape. Other settlements are the result of illegal evictions of black farm workers from white-owned farms.<sup>152</sup>

The ubiquity and conditions of these squatter settlements is one of the most shocking sights to the first-time visitor to modern South Africa. These settlements, which are sometimes created following illegal invasions of either public or private land,<sup>153</sup> but more commonly

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the South African Department of Land Affairs reported that less than 5 percent had been transferred. DEP'T OF LAND AFFAIRS, S. AFR., ANNUAL REPORT: 1 April 2006–31 March 2007 (2007), available at <http://unpan1.un.org/intradoc/groups/public/documents/CPSI/UNPAN028127.pdf>. Informal housing settlements, or so-called shanty towns, continue to be created throughout the country. Although many of the inhabitants are migrants from rural areas to urban areas in search of jobs, others are farm workers who are the victims of illegal evictions, sometimes carried out by local authorities. See MARC WEGERIF ET AL., NKUZI DEV. ASS'N, STILL SEARCHING FOR SECURITY: THE REALITY OF FARM DWELLER EVICTIONS IN SOUTH AFRICA 27–28 (2005), available at [http://www.nkuzi.org.za/docs/Evictions\\_Survey.pdf](http://www.nkuzi.org.za/docs/Evictions_Survey.pdf).

<sup>150</sup> Many of the strategic objectives for providing tenure security for people living and working on farms were not achieved as of 2007. See DEP'T OF LAND AFFAIRS, *supra* note 149, at 61.

Much of the current insecurity regarding land tenure is the result of lingering effects of the past, including not only apartheid, but also conquest. See Budlender, *supra* note 142, at 1–70 (“The history of South Africa reveals that much current tenure insecurity is the result of laws, policies and practices which started with conquest and ended in apartheid.”). For an excellent overview of the historical practices that have made black land tenure commonly insecure, see CHARLES VAN ONSELEN, THE SEED IS MINE: THE LIFE OF KAS MAINE, A SOUTH AFRICAN SHARECROPPER 1894–1985, at 3–11 (1996).

<sup>151</sup> As of March 31, 2007, 93 percent of the land restitution claims filed had been settled. The remaining claims are the most difficult ones, rural claims, mostly in the poorest provinces. See COMM'N ON RESTITUTION OF LAND RTS., S. AFR., ANNUAL REPORT: 2006/07, at 3 (2007), available at [http://land.pwv.gov.za/restitution/Annual\\_reports](http://land.pwv.gov.za/restitution/Annual_reports).

<sup>152</sup> See *supra* note 149 and accompanying text.

<sup>153</sup> As the South African Constitutional Court stated in *Port Elizabeth Municipality v. Various Occupiers*, “The term ‘land invasion’ . . . must be used with caution.” 2004 (12) BCLR 1268 (CC) at 1280 n.22 (S. Afr.). The term, Justice Albie Sachs points out, [C]an be stretched to cover widely dissimilar cases, [such as] where a relatively small number of people have erected shacks and lived on undevel-

the result of state-created settlements under apartheid laws, differ in size, but all of them are inhabited by desperately poor (and mostly Black) South Africans living in desperate conditions.

Land invasions have a long history in South Africa. The way in which the South African government has historically reacted to land invasions directly informs the relationship between the property right and the right to housing under the Constitution.<sup>154</sup> With the end of the apartheid regime in 1993, land invasions by poor Blacks and the creation of informal and unauthorized housing settlements continued apace. The years of apartheid policies had created an acute housing shortage for Blacks in many parts of the country. In response to the land-rights provisions of section 25 and specifically to the direct command to the state to “take reasonable legislative . . . measures, . . . to achieve the progressive realisation of [the right to have access to adequate housing]” in section 26(2),<sup>155</sup> local governments enacted housing programs aimed at meeting housing needs. But the combination of the high demand for adequate low-cost housing and constrained government budgets has left many desperately poor people with no alternative to the deplorable, informal housing settlements.

The transformation to a just society, a society in which decent housing is provided to every South African, will, of course, take years. The process will require a combination of several factors, among which are economic development, education, and above all a serious policy commitment at the highest level of South Africa’s government. In the meantime the problem will persist and land invasions will continue. These land invasions will present opportunities for courts themselves to act in creative and socially transformative ways, reaching decisions on the basis of the thick communitarian social-obligation norm to ameliorate the intolerable conditions that are the lingering result of apartheid. Evidence supports the notion that the South African courts have risen to the occasion. Perhaps no case better illustrates this than the South African Supreme Court of Appeal’s remarkable decision in the case of *Modder East Squatters & Others v. Modderklip Boerdery (Pty) Ltd.*<sup>156</sup>

In *Modderklip*, some 400 residents of an informal settlement in Johannesburg moved onto adjacent land that they mistakenly thought

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oped land for relatively long periods of time, or the situation in *Grootboom* where although a thousand desperate people occupied a hillside due to be developed for low-cost housing, no intent to jump the queue was shown and a remedy was not refused, or [where] there had been a deliberate and premeditated act culminating in the unlawful invasion and occupation of a large tract of land.

*Id.*

<sup>154</sup> *Id.* at 1276–77.

<sup>155</sup> S. AFR. CONST. 1996 § 26(2).

<sup>156</sup> 2004 (8) BCLR 821 (SCA) (S. Afr.).

was owned by the city. In fact, the land was a private farm owned by Modderklip Boerdery Ltd. Within six months, the new settlements included 18,000 people living in 4,000 shacks.<sup>157</sup> The owner sought to evict the occupants, relying on the Prevention of Illegal Eviction and Unlawful Occupation of Land (PIE) Act. The lower court granted an eviction order, but the occupants failed to vacate. Meanwhile, the Modder East settlement had grown to 40,000 inhabitants.<sup>158</sup> An execution writ was issued, and the sheriff was ordered to execute it. The sheriff insisted on a large sum of money<sup>159</sup> to cover the estimated cost of employing a private firm to carry out the eviction and demolition of the shacks. The owner was unable or unwilling to pay the sum, especially because it exceeded the estimated value of the land. Modderklip then filed trespassing charges against the occupants, some of whom were found guilty. The sheriff, however, failed to take any action, treating the matter as a civil dispute. Modderklip then sought assistance from various public bodies. The President referred the matter to the Department of Land Affairs, which referred the matter to the Department of Housing, which did not respond.<sup>160</sup> In the meantime, the sheriff had increased the sum required for eviction. Understandably frustrated, the owner once again went to court and obtained a declaratory order forcing all of the relevant government officials (including the National Police Commissioner) to take all necessary steps to remove the unlawful occupants (e.g., the enforcement order).

The case before the Supreme Court of Appeal was a combined application from the state appealing the initial eviction order and the enforcement order. The court denied leave to appeal the eviction order but granted the appeal from the enforcement order in part. The court then issued a different enforcement order.<sup>161</sup>

At first blush the case appears to be solely a matter of private law: the enforcement of a simple eviction order. Indeed, that is exactly how the state and the police initially treated the case. The Supreme Court of Appeal took a different view of the situation, however, observing that this attitude “does not reflect an adequate appreciation of the wider social and political responsibilities [that the Constitutional Court in previous cases] identified in respect of persons such as the present occupiers.”<sup>162</sup> In the court’s view, the case posed an apparent conflict between two constitutional duties of the state: its duty to pro-

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<sup>157</sup> *Id.* at 824.

<sup>158</sup> *Id.* at 825. The settlement had just one water tap, and the only facilities were rudimentary pit toilets. *Id.*

<sup>159</sup> R1.8 million (approximately \$181,000 at the time of publication). *Id.*

<sup>160</sup> *See id.* at 825–26.

<sup>161</sup> *Id.* at 826.

<sup>162</sup> *Id.* at 828.

tect Modderklip's ownership rights under section 25 and its duty to provide access to adequate housing under section 26. The court treated the state's failure in this regard as simultaneously a breach of Modderklip's section 25 property right and the occupants' section 26 housing right.<sup>163</sup> The basis for that conclusion was section 7(2) of the Constitution, which provides that the state is under a duty to "respect, protect, promote and fulfil [sic] the rights in the Bill of Rights." In the court's view, by failing to provide the occupants with alternative housing in accordance with section 26, the state failed to protect the owner's section 25 property right, as section 7(2) requires. The court stated:

[I]n a material respect the State failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual . . . .<sup>164</sup>

Failure to protect one right, in other words, meant failure to protect another right. The theory is that the constitutional duty to protect and promote fundamental rights, derived from a constitutional provision placing such a duty on the state, places a general duty on states to protect their citizens from all infringements of their fundamental rights, even if the actions of other individuals, rather than the state, threaten those rights.

On appeal, the Constitutional Court acknowledged that the eviction order was correct and that Modderklip was entitled to it. But the court conditioned that right on the state first providing alternative land or housing to the squatters. It explicitly ordered the state to comply with its constitutional obligations by providing land so that the eviction could proceed (unless, of course, the state elected to purchase or expropriate the land).<sup>165</sup> The occupants were entitled to remain on Modderklip's land until the state provided them with alternative land. In the meantime the owner, Modderklip, was entitled to receive from the state the compensation the Supreme Court of Appeal had awarded.<sup>166</sup>

Both the Supreme Court of Appeal and the Constitutional Court focused on the state's obligations, but the decision implicates the private landowner's obligations as well. It seems likely that in the long run the state will be compelled, as a practical matter, to acquire either new land or, more likely, the land currently occupied. In the meantime, however, the law would protect Modderklip's constitu-

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<sup>163</sup> See *id.* at 841-42.

<sup>164</sup> *Id.* at 834.

<sup>165</sup> See *id.* at 841-42.

<sup>166</sup> *Id.* at 842.

tional property right through a liability rule rather than a property rule, i.e., through damages rather than through eviction, even though only the latter would have restored Modderklip's right to possession.<sup>167</sup> In effect, both courts forced the state to exercise its eminent domain power by acquiring at least a temporary interest in Modderklip's land, something akin to a determinable tenancy. This remedy is clearly less than what Modderklip wanted. Even if the damages were equal to the fair rental value of the occupied portion of its farm, Modderklip was not likely satisfied with this remedy. The right of exclusive possession of its farm—its entire farm—is what Modderklip really wanted, but the courts held that Modderklip was constitutionally obligated to sacrifice that entitlement.

Modderklip's sacrifice is no trivial matter. The court forced Modderklip to continue a relationship with a contingent of squatters that was the equivalent of a small city's population, a relationship that doubtless it was eager to terminate. Moreover, as time goes by, the force of the squatters' claims to remain on its land permanently will grow even stronger, increasing the pressure on the state to expropriate the land outright, albeit with some compensation to Modderklip.

This compelled sacrifice cannot be squared with classical liberal principles. It was not voluntarily undertaken and is not justified as essential to the preservation of equal (negative) liberty. Likewise, it is difficult, although perhaps not impossible, to justify on utilitarian grounds. Although one might justify the forced transfer of property on utilitarian grounds,<sup>168</sup> the utilitarian calculus seems indeterminate with respect to two features of the *Modderklip* decision: (1) the court's use of a liability rule rather than, as in the case of adverse possession, a direct transfer of the entitlement to the squatters; and (2) the court's

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<sup>167</sup> See *id.* at 841–42; *supra* text accompanying notes 163–164.

<sup>168</sup> In the absence of externalities or high transaction costs, utilitarians generally favor voluntary transfers of property because individuals are in the best position to know the value they place on a piece of property. As my colleague Eduardo Peñalver has argued, however, it is possible to justify forced transfers of property on utilitarian grounds if one has reason to believe that the maldistribution of wealth has impeded the ability of parties to express their preferences through voluntary, market transactions. See Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1142–44 (2007) (explaining “redistributive value” and “informational value” of forced transfers). But the law is usually careful to hem in exceptions to the normal rule in favor of voluntary transactions in order to increase its confidence that any particular forced transfer is actually justified on the grounds of market failure. This is apparent, for example, in the case of adverse possession, which imposes a number of barriers in front of the squatter, in part as a means of filtering out those who are truly unable to express in the market the value they place on the land and in part as a means of limiting adverse possession to owners who clearly do not place a very high value on the land being possessed. In this case, one has reason to think that the squatters placed a very high value on the land they occupied, but, given Modderklip's speedy response to the land invasion, one has no reason to think that Modderklip valued the land any less. See *Modderklip* 2004 (8) BCLR at 824.

decision to require the state, rather than the squatters, to pay Modderklip for the right to remain on the land.

In contrast to these difficulties, the *Modderklip* result, both in its broad outlines and in its specific details, fits very comfortably within the social-obligation theory developed in this Article. The squatters' access to land for dwellings is surely a component of the minimal material conditions for human flourishing, on almost any conception. The capabilities of life and freedom, for example, are virtually meaningless if one does not have a place one is entitled to be.<sup>169</sup> The state therefore labors under an obligation to work to provide its citizens with the opportunity to obtain such access. One crucial way the state can do this is by providing the legal and social underpinnings for a robust and prosperous market economy. But when a market economy is built on distributions of resources that are themselves skewed by past injustices, as in the case of South Africa, or when markets, as they are prone to do, operate to the exclusion of those at the bottom of the economic ladder, the state's intervention in the economy is justified, provided the intervention is undertaken non-arbitrarily and in a manner consistent with principles of subsidiarity.<sup>170</sup>

As a large landowner, Modderklip is under an obligation to contribute from its own property in order to assist in providing the squatters with the opportunity to obtain the resources they need to flourish. Modderklip's obligation is not unlimited, however. After all, it is an obligation that falls on all property owners within the national community, and therefore should not be placed on just one property owner's shoulders. The preferred method for discharging that obligation, from any number of standpoints, then, would be through a well-structured system of land reform. Within such a program, a large landowner like Modderklip would still bear a disproportionate burden (disproportionate, at least, on a per capita basis, though not on the basis of wealth or landownership). But a legislatively mandated, systematic process of redistribution could be made both transparent and predictable, and the costs of redistribution spread as widely as possible. In the absence of adequate state action to work towards such a systematic solution, however, self-help by people like the Modder East squatters is both predictable and understandable; but such self-help,

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<sup>169</sup> See, e.g., Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 302-04 (1991) (discussing restrictions on freedom of homeless individuals).

<sup>170</sup> By "subsidiarity," I mean

[T]he notion that the state ought not arrogate to itself functions that can be performed just as well, if not better, by smaller, more intimate communities . . . provides meaningful limits on state power by creating a presumption in favor of private or local solutions unless such solutions are demonstrably not up to the task.

Alexander & Peñalver, *supra* note 16, at 148-49.

left unremedied, places an excessive demand on the targeted landowners, like Modderklip. The obvious solution is to try, after the fact, to craft a remedy that best approximates the obligations and entitlements of each of the parties.

The court's opinion in the *Modderklip* case appears to do just that. It weaves a respectful path between the obligations of the state and Modderklip, as well as the entitlements of both Modderklip and the squatters. The opinion prohibits the squatters from being thrown back into landlessness, but it also helps spread the costs of that decision for the landowner by ordering the state to compensate Modderklip for the loss of its land. It holds out the possibility that the landowner might recover its land at some point in the future, but it also invites the state to acquire the land through its power of eminent domain in order to give it over to the squatters as part of the operation of South Africa's ongoing process of land reform.

## B. Use Sacrifices

The second scenario in which we can explain existing legal practices in terms of a social-obligation norm are cases in which the owner keeps his or her property but is prohibited from using it in some way that the community regards as against its collective interest. Conceivably, this might include a wide variety of land-use regulations and other forms of restrictions on the use or enjoyment of property. I will limit the discussion to four examples: historic preservation laws and the *Penn Central Transportation Co. v. New York* decision, nuisance regulations, the public trust doctrine, and the obligations associated with ownership of art and objects of cultural heritage.

### 1. *Historic Preservation Regulations and Penn Central*

Historic preservation laws—which restrict in significant respects the uses to which owners of historically important buildings or owners of land located within historic districts may put their properties—may be understood as consistent with this Article's social-obligation theory. Suppose a city agency responsible for protecting designated historic districts disapproves a proposed plan to remodel a residence located within a designated historic district. The agency's reason is that the proposed redesigned style would be "conspicuously incompatible" with the character of existing buildings and general area of the historic district. The agency is saying, at a minimum, that the owner owes surrounding owners an obligation to maintain the property values of everyone in the vicinity. Given the unique character of the neighborhood, property owners in historic districts are in relation-

ships of interdependency that confer on each of them particular obligations that urban landowners otherwise do not have.<sup>171</sup>

The agency may also be saying that the general public welfare that justifies exercises of the state's police power 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. Owners are nested not only within communities of contiguous neighbors but also within their wider urban communities. The unique identities of their buildings, from which the buildings' owners enjoy ample economic benefits, are not the result of the labor of the buildings' owners, present, past or both, alone. Rather, their special identity has depended upon various forms of support, including, but by no means limited to, material support provided by persons and institutions throughout the entire urban community. This dependency imposes on the buildings' owners an obligation to maintain the very uniqueness the wider community has enabled. That obligation may involve economic sacrifices that would not normally be legally imposed on the private owners of buildings.

The Supreme Court's controversial *Penn Central* decision<sup>172</sup> illustrates both points. In that case, the New York City Landmark Commission had previously designated the famous Grand Central Terminal, which Penn Central then owned, as a historical landmark because of the building's incomparable nineteenth-century *beaux-arts* facade. Penn Central wished to erect a multi-story commercial building atop the Terminal, and the Commission disapproved two submitted plans claiming that both plans would do serious damage to unique aspects of the Terminal. The owner went to court, claiming that the Commission's denial of its plans to develop the airspace above the Terminal amounted to an unconstitutional taking of its private property.<sup>173</sup>

The Court upheld the Commission's actions. It first concluded that no substantial diminution in value would occur because the owner was still able to earn a reasonable return on its investment.<sup>174</sup> Moreover, the Court said, the Commission's development denial did not eliminate all of the owner's possible uses of its preexisting rights in the airspace above the Terminal. The owner had been granted transferable development rights (TDRs) in the airspace, and it could use those rights to develop the airspace above other buildings that it owned in the vicinity.<sup>175</sup> Writing for the majority, Justice William

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<sup>171</sup> See, e.g., *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 310 (Mo. 1970) (denying permit to build residence not conforming to the architectural style of neighborhood if nonconformity would affect the value of surrounding properties).

<sup>172</sup> 438 U.S. 104 (1978).

<sup>173</sup> *Id.* at 115-19.

<sup>174</sup> *Id.* at 136.

<sup>175</sup> *Id.* at 137.

Brennan stated: "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the owner] and, for that reason, are to be taken into account in considering the impact of the regulation."<sup>176</sup> The Court concluded next that the Commission's action did not interfere with any investment-backed expectation of the owner because the company had not yet invested any money in the development project.<sup>177</sup> Finally, Justice Brennan pointed out that the denial of the development permit did not involve a physical invasion by the government of the owner's airspace. Rather, he said, the effect of the action was similar to that of a routine zoning decision.<sup>178</sup>

One way of justifying the *Penn Central* decision is on the basis of the norm of reciprocity. Something like a reciprocity norm seems to have been involved in the New York Court of Appeals' opinion in *Penn Central*, in which the court relied on reasoning that echoed Henry George's theory that society has a legitimate interest in exploiting that portion of a resource's value that is due to society's contribution.<sup>179</sup> The New York court stated:

It is enough . . . that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.<sup>180</sup>

Dagan has justified the *Penn Central* decision on the basis of his version of the reciprocity norm. Under his "intermediate conception of long-term reciprocity"<sup>181</sup> theory, the regulatory agency is not required to pay compensation

if, and only if, the disproportionate burden of the public action in question is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magnitude to the land-

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<sup>176</sup> *Id.* In dissent, Chief Justice William Rehnquist vigorously challenged that assertion. In his view, TDRs have relevance only as compensation for a taking, and as compensation they were inadequate because they are not "a full and perfect equivalent for the property taken." *Id.* at 150 (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)) (Rehnquist, J., dissenting).

<sup>177</sup> *Id.* at 130 n.27, 136 (majority opinion).

<sup>178</sup> *Id.* at 135.

<sup>179</sup> See generally HENRY GEORGE, *PROGRESS AND POVERTY* (Country Life Press 1955) (1879). For a more comprehensive application of George's "single-tax" idea to modern takings law, see T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988).

<sup>180</sup> *Penn Cent. Trans. Co. v. City of New York*, 366 N.E.2d 1271, 1273 (N.Y. 1977).

<sup>181</sup> Dagan, *Takings and Distributive Justice*, *supra* note 12, at 769.

owner's current injury that she gains from other—past, present, or future—public actions (which harm neighboring properties).<sup>182</sup>

Dagan believes that under this intermediate version of reciprocity, no compensation was due to the owners of Grand Central Terminal. Dagan views the owner's benefit as arising from the various other regulatory measures that protected and enhanced New York City's "tourist attractions, business, and industry,"<sup>183</sup> especially in midtown Manhattan, where Grand Central Terminal is located. Thus, argues Dagan, the owners "will benefit directly and proportionately in the long-term from the aggregated benefits of the city's public actions, despite the transient disproportionate burden."<sup>184</sup> Stated differently, he argues, as did the New York Court of Appeals, that the appropriate denominator to use in calculating the degree of loss to the owner should not be the value of the parcel as it was immediately affected, but rather "the plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings."<sup>185</sup>

Surely there is something to this point. The designation of Grand Central Terminal as a historic landmark in all likelihood made it an even bigger tourist attraction than it already was. More tourists generated more revenue for the owner. The rent that Penn Central received from tenants running commercial operations, including retail concessions, within the building likely increased as a result of rent-escalation clauses that are common in commercial leases for retail stores. The marginal revenue increase should be seen as the result of the regulatory action of the New York City Historical Landmark Commission, providing exactly the kind of long-term reciprocity of advantage that Dagan has in mind. Coupled with the further fact that nothing arbitrarily identified Grand Central Terminal as subject to the restriction (for they were the owner and they were the ones proposing the change in question), the case for a compensation requirement becomes weaker and weaker. As persuasive as Dagan's argument is, another way of looking at the decision directly addresses a question that critics of the decision pose. Rather than focusing on reciprocity, the social-obligation theory addresses this question: 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?

The social-obligation theory recognizes that because individuals can develop as free and fully rational moral agents only within a par-

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182 *Id.* at 769–70 (footnote omitted).

183 *Id.* at 797.

184 *Id.* at 798.

185 *Id.* (quoting *Penn Cent.*, 366 N.E.2d at 1276–77).

ticular type of culture,<sup>186</sup> all individuals owe their communities an obligation to support in appropriate ways the institutions and infrastructure that are part of the foundation of that culture. This support may sometimes involve sacrificing personal preference-maximizing uses of property. *Penn Central* is such a case. A property owner's obligations to its community may include maintaining public aesthetic benefits as well as physically safe and healthy premises.<sup>187</sup> This is especially true with respect to a building like Grand Central Terminal. The Landmark Preservation Commission's designation of that building 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 unique architectural status. The Court's decision sustaining the uncompensated rejection of the owner's plans to develop that building in ways that would have done just that was a judicial enforcement 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.

Although it is certainly true that not every aspect of a community's infrastructure is necessary to maintain the kind of culture that enables development of those qualities without which no individual can experience meaningful freedom or practice personal responsibility, buildings like Grand Central Terminal are, at least from the perspective of the relevant communities, indispensable. Were New York City to lose all of its historic architectural patrimony, its culture would be not merely different but civically impoverished. Distinctive architectural sites are integral to an urban community's identity and the identities of its inhabitants. Historical landmarks create collective urban memory; destruction or radical alteration of such landmarks erases collective historical memory. Erasure of historical memory destabilizes a society and its culture, with potentially severe political consequences. It is no accident that repeatedly throughout history, repressive regimes have sought to erase the historical memories of past cultures that nurtured capacities necessary for robust free citizenship; not infrequently, part of the regime's effort at erasure involved architectural landmarks.

Private ownership of those aspects of a society's infrastructure upon which the civic culture depends comes with special obliga-

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<sup>186</sup> See *supra* text accompanying note 97.

<sup>187</sup> See *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy . . .").

tions.<sup>188</sup> Those obligations may require that an owner forego compensation, even long-term, in-kind compensation, if an urban authority legitimately invokes its power to protect private property from being altered in ways that would permanently destroy its civically unique and supportive aspects. The development of Grand Central Terminal contemplated in *Penn Central* would have inflicted on the community of New York a significant loss of cultural meaning and identity. No compensation should be constitutionally required to prevent a private owner from inflicting such a loss in the first place, a loss that is fundamentally at odds with the obligations of the owner of that property.

## 2. *Environmental Regulations*

Virtually every environmental regulation, federal, state, and local, can be explained in terms of the civic version of the social-obligation norm. Consider wetlands regulations, for example. The basic story of wetlands and legal regulation of their use is well-known by now. The contribution of wetlands to maintaining the well-being of fragile and complex ecosystems is enormous. Wetlands perform a remarkable variety of valuable functions, ranging from filtering and storing water to providing fish and wildlife habitats. At the same time, prior to the 1970s, wetlands were disappearing at an alarming rate, as population increase and urban development created greater pressure to fill in wetlands, making them available to commercial and residential development. Since then, wetlands have been widely regulated at both federal and state levels.<sup>189</sup> These regulations have, however, provoked no small amount of constitutional challenges to their validity.

Are wetlands regulations takings of private property for which the state must pay the owners compensation, or are they a sacrifice that owners must make as an aspect of the obligation they owe to the communities? At one level, one easily understands why the affected landowners claim wetlands regulations take their property. At time one, they were free to develop their land by draining the wetland or filling it. At time two, the state has effectively removed that entitlement to develop from their bundle of rights and taken the property on behalf of the general public. If the public wishes to have such a benefit, the owners argue, fine, but the public has to pay for it.

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<sup>188</sup> O'Neill similarly argues that the relationship between land, community identity, and the obligation of care that attends those resources that uniquely embody civic identity may affect our normative understanding of the property relations with respect to such resources. See O'Neill, *supra* note 97, at 698.

<sup>189</sup> The body of federal law upon which wetlands regulations are based is known as the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

The problem with the argument is, of course, that it assumes the answer to the very question the challenged regulation poses. Does the owner of wetlands have the legal entitlement to develop it, resulting in the destruction of the wetland ecosystem? How can we answer this question without begging the question?

This is the problem that has bedeviled courts that have tried to resolve takings challenges to wetlands regulations and other forms of environmental restrictions under the so-called “noxious-use” doctrine.<sup>190</sup> That doctrine basically provides that if the regulation in question seeks to abate a noxious use, then no compensation is due the affected owner. Animating the doctrine is the idea that the use the regulation prohibits was never part of the owner’s bundle of rights to begin with; hence, the regulation does not deprive the owner of any aspect of ownership.<sup>191</sup> Commentators usually locate the doctrine’s origins in the famous nineteenth-century case of *Mugler v. Kansas*.<sup>192</sup> The Supreme Court in that case upheld a state statute prohibiting the operation of a brewery. The court based its conclusion that the statute did not effect a taking on this central insight: “[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”<sup>193</sup> This statement might have been the foundation for a fully developed notion of the implied obligation of owners, but that potential was never realized. The Court subsequently applied the doctrine in *Hadacheck v. Sebastian*<sup>194</sup> and other cases following it.<sup>195</sup> Numerous state court decisions have also relied on the doctrine.<sup>196</sup>

The doctrine’s current status in modern takings law is somewhat murky. The Supreme Court appeared to affirm it in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>197</sup> but just a few years later, in *Lucas v.*

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<sup>190</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022–24 (1992) (discussing the Court’s historical treatment of the noxious use principle).

<sup>191</sup> See *id.* at 1027.

<sup>192</sup> 123 U.S. 623 (1887).

<sup>193</sup> *Id.* at 665.

<sup>194</sup> 239 U.S. 394, 411 (1915).

<sup>195</sup> See *Goldblatt v. Hempstead*, 369 U.S. 590, 595–96 (1962) (holding that use of a state’s police powers to proscribe excavation on private property was appropriate in light of public safety concerns); *Miller v. Schoene*, 276 U.S. 272, 281 (1928) (holding that use of a state’s police powers to mandate destruction of diseased owned trees was appropriate to protect other economic interests).

<sup>196</sup> See, e.g., *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1382–83 (Fla. 1981) (sustaining an ordinance prohibiting development of wetlands); *Sibson v. State*, 336 A.2d 239, 243 (N.H. 1975) (same); *Just v. Marinette County*, 201 N.W. 2d 761, 772 (Wis. 1972) (same).

<sup>197</sup> 480 U.S. 470, 504–06 (1987) (sustaining Pennsylvania’s use of its police powers to limit underground mining operations on safety grounds, despite a contractual agreement between the mining operation and the impacted landowners).

*South Carolina Coastal Council*,<sup>198</sup> the Court severely undermined the doctrine's significance. Seemingly rejecting the conventional view of the doctrine as a categorical rule of no-taking if the regulated activity imposed a general harm, the *Lucas* Court relied on an argument that several scholars, especially economists and law-and-economics scholars, have made over the years.<sup>199</sup> These scholars have argued that the fundamental problem with the doctrine, as conventionally understood, is that it seems to beg the question.<sup>200</sup> As a test for determining whether regulations do not constitute takings, the noxious-use doctrine "will not work unless we can establish a benchmark of 'neutral' conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation)."<sup>201</sup>

The point is a clever one, but too clever by half. As economist William Fischel has quipped, "It is cleverness of this sort by which economists read themselves out of the takings debate."<sup>202</sup> Fischel's sensible point is that from the ordinary person's perspective, one has little difficulty in distinguishing between, for example, a regulation restricting the size or location of highway billboards, on the one hand, and another regulation limiting the amount of toxic emissions from factories, on the other. As Fischel pithily states, "'Down' does not become 'up' just because one can invert oneself on a trapeze."<sup>203</sup> From the "Ordinary Observer's"<sup>204</sup> viewpoint, the billboard regulation, as an aesthetic regulation, provides the public with a benefit, while the emissions regulation, as a health measure, prevents a public harm.

The noxious-use doctrine may be understood to represent, then, an effort to define the contours of the landowner's property right in view of the conditions of social interdependency and the obligations to which interdependency gives rise. As I previously discussed,<sup>205</sup> be-

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<sup>198</sup> 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.")

<sup>199</sup> As far as I am aware, Michelman first made this argument in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Although Michelman's more recent work certainly places him outside the ranks of law-and-economics scholars, his earliest work was among the first generation of economics-influenced legal scholarship, a point that I made in Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1545 (1982).

<sup>200</sup> See, e.g., Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L. REV. 433 (1995).

<sup>201</sup> Michelman, *supra* note 199, at 1197.

<sup>202</sup> WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 354 (1995).

<sup>203</sup> *Id.*

<sup>204</sup> The term "Ordinary Observer" was first coined by Bruce Ackerman in his influential 1977 book. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

<sup>205</sup> See *supra* text accompanying notes 90-96.

cause we are all necessarily dependent on various communities to help us develop the essential human capabilities that are requisite for our lives to flourish, we are obligated to contribute to maintain the vitality of those facets of our communities that contribute to the cultivation of those capabilities. From this perspective, the harm-prevention-versus-benefit-conferral conundrum is altogether beside the point, a distraction from the real question. Rather than asking whether the regulation in question is one that prevents a public harm or confers a benefit upon the public, the more helpful question to ask is whether the landowner's obligation to contribute to the vitality of capabilities-nurturing elements of her community includes restrictions on an owner's land use for environmental purposes like wetlands preservation.

One may understand the cases in which courts have relied on the noxious-use doctrine to support their decisions to sustain such regulations against constitutional challenges as affirming the existence of precisely such an obligation. Exactly what human good or capability is involved will not necessarily be the same in every case involving environmental regulations; but certainly one such good that is likely to be involved is the good of life, or physical survival, which includes ancillary goods such as health. It seems quite plausible to suppose that the preservation of wetlands is necessary for the health of various ecosystems upon which human beings are dependent. That is, wetlands are indeed part of the infrastructure that nurtures the capabilities that are the foundation of a well-lived life. If that is the case, then wetlands not only deserve our support for our own well-being, but more to the point, those who own land containing wetlands are obligated to contribute to the integrity of their wetlands for the benefit of the community served by the wetlands.<sup>206</sup>

This may have been something like what the Florida Supreme Court had in mind in a well-known wetlands decision. In *Graham v. Estuary Properties, Inc.*,<sup>207</sup> the court sustained the validity of a wetlands regulation against a takings challenge. Struggling to find some objective criteria for distinguishing between environmental regulations that prevent harms to the public and those that confer benefits to the public, the court stated:

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<sup>206</sup> Kysar has pointed out to me that there are substitutes for many of the ecological services that wetlands provide. However, no substitute exists for the opportunity to experience what Kant expressed in terms of "the Sublime." As Kant explained, sublime humility is gained standing before non-human natures whose grandeur exceeds our comprehension. See IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 102–05, 116–19 (J.H. Bernard trans., 2d rev. ed. 1914) (1790). See generally IMMANUEL KANT, *OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME* (John T. Goldthwait trans., Univ. of Cal. Press 1960) (1763).

<sup>207</sup> 399 So.2d 1374 (Fla. 1981).

It would seem . . . that if the regulation preventing the destruction of the mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant harm to the public, the exercise of the police power would be reasonable. On the other hand, if the retention of the forest simply created a public benefit by providing a source of recreational fishing for the public, the regulation might be a taking.<sup>208</sup>

Read one way, this is no more than another way of restating the question-begging harm-prevention-versus-benefit-conferral distinction. But one can read this key passage another way; this reading links the social-obligation norm and the capabilities theory that I have described. The court may have been trying to express the idea that if the mangrove forest at issue in *Graham* was part of the infrastructure whose vitality is essential to support and nurture the human capabilities that are the foundation for a well-lived life, then its owner is obligated to contribute to the community's health. For in that case the physical health of the community is inextricably linked with the ecological health of the mangrove forest. If, however, the contribution that mangrove forests make to the development of the essential human goods is substantially attenuated (or non-existent), then the owner owes the community no obligation to maintain the mangrove's health.

The point can be generalized. One can generally apply social-obligation norm analysis to all sorts of environmental regulations, ranging from the federal Endangered Species Act<sup>209</sup> to the development moratoria at issue in *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>210</sup> For example, the social-obligation norm provides a better explanation of why the federal Eagle Protection Act was upheld under the takings clause in *Andrus v. Allard*.<sup>211</sup> The Court in that case relied on the familiar bundle-of-rights conception of ownership, stating, "[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."<sup>212</sup> The bundle-of-rights metaphor is an unsatisfactory way of explaining why the statute is valid because it really begs the question. One could just as easily argue, as Epstein has,<sup>213</sup> that

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<sup>208</sup> *Id.* at 1381.

<sup>209</sup> 16 U.S.C. §§ 1531–43 (2006).

<sup>210</sup> 535 U.S. 302 (2002) (holding that a development moratorium was a regulation of property from private use rather than an acquisition of property for public use and thus did not constitute a taking).

<sup>211</sup> 444 U.S. 51 (1979) (holding that the Act, which prohibited the sale of lawfully purchased eagle parts and thus reduced the value of an owner's property, was simply a regulation and not a taking).

<sup>212</sup> *Id.* at 65–66.

<sup>213</sup> See EPSTEIN, TAKINGS, *supra* note 18, at 57–62.

the bundle of rights is unitary so that removing any one twig from the bundle itself constitutes a taking. The whole bundle-of-rights metaphor ought to be abandoned.<sup>214</sup> It would have been far more helpful (and candid) if the Court had asked whether the owners of artifacts made with parts of bald or golden eagles owed their communities an obligation not to use those assets as a market commodity. Stated differently, the question we should ask is whether the owner's obligation to contribute to the well-being of those institutions and other aspects of the owner's political culture that nurture the capacities necessary for the kind of individual freedom that we associate with rights-bearing includes restrictions on her commercial use of such artifacts. The answer to this question does not seem obvious to me. The case would have to be made on some sort of connection between the eagle (golden as well as bald) as a political symbol and the vitality of our political culture. In any event, I need not provide an answer for it is the question that interests me. Reframed in terms of the social-obligation theory, the question posed in *Andrus v. Allard* is harder than the facile one framed by the Court, but that is precisely the one that should have been addressed.

### 3. *The Right to Exclude: Beach Access and Other Controversies*

Another controversial set of recent decisions that one can better explain in terms of social-obligation theory concerns the right to exclude. The right to exclude has never been absolute, of course, but judicial decisions over the past few decades have significantly whittled away at its breadth. One of the most controversial contexts in which this narrowing has occurred is public access to beaches. Although courts have provided the public access to beaches on various doctrinal grounds,<sup>215</sup> the most important—and controversial—of these has been the public trust doctrine.<sup>216</sup>

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<sup>214</sup> For critiques of the bundle-of-rights conception, see SINGER, *supra* note 6, at 9–13; Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002); Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517 (2003); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994).

<sup>215</sup> See, e.g., *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970) (dedication); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974) (custom); *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Rhodes*, 404 S.E.2d 677 (N.C. 1991) (prescription); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) (custom).

<sup>216</sup> Other expansive uses of the public trust doctrine include use of and access to all waters usable for recreational purposes, see *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984); preservation of inland wetlands, see *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972); and protection of wildlife and their habitats, see *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996).

The controversy surrounding the public trust doctrine has gained steam in recent years as some courts have used it to extend public access to beaches, including privately-owned dry-sand portions of beachfront property,<sup>217</sup> concomitantly reducing the scope of the right to exclude. As one scholar has stated:

To some, the doctrine . . . is a check on government attempts to give away or sell [important natural] resources for short-term economic gain. To . . . others, it is a back-door mechanism for judicial taking of private property without just compensation through a clever argument that the property was never 'private' in the first place.<sup>218</sup>

Historically, public access to beaches was quite limited. Basically, the public was permitted to access only the land between the mean high and low tide lines, i.e., wet-sand areas. The purposes for which the public was permitted to access this land were also limited—only fishing.<sup>219</sup> In recent years some courts have added recreation as one of the purposes for which the public is entitled to use the wet-sand portion of a beach.<sup>220</sup> The more striking expansion of beach access via the public trust doctrine, custom, and other doctrinal headings, however, has been the extension to privately-owned dry-sand portions of the beach. The New Jersey Supreme Court has taken the lead in this expansion of public beach access via the public trust doctrine. In *Matthews v. Bay Head Improvement Ass'n*,<sup>221</sup> the court held a private nonprofit entity which owned or leased most of the beachfront lots in Bay Head did not have an unlimited right to exclude members of the public from the dry-sand portion of its beach. "The public must be afforded reasonable access to the foreshore [i.e., wet-sand area] as well as a suitable area for recreation on the dry sand."<sup>222</sup> In defining the contours of this right of reasonable access to privately owned dry-sand areas, the court identified four factors as relevant: "Location of the dry sand area in relation to the foreshore, extent and availability

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The modern revival of interest in the public trust doctrine begins, of course, with the classic article by Joseph Sax. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

<sup>217</sup> See, e.g., *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

<sup>218</sup> Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 699 (2006).

<sup>219</sup> Navigable waters themselves were also subject to public access for navigation and commerce, as well as for fishing.

<sup>220</sup> See, e.g., *Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972); *Thornton v. Hay*, 462 P.2d 671 (Or. 1969); *Hixon v. Pub. Serv. Comm'n*, 146 N.W.2d 577 (Wis. 1966). But see, e.g., *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (refusing to extend the public trust doctrine to recreational uses); *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974) (same).

<sup>221</sup> 471 A.2d 355 (N.J. 1984).

<sup>222</sup> *Id.* at 366.

of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner . . . .”<sup>223</sup>

The holding in *Matthews* was bolstered by the fact that the Bay Head Improvement Association was, in its view, a “quasi-public” entity.<sup>224</sup> Subsequently, in *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club*,<sup>225</sup> the court expanded the scope of public access under the public trust doctrine, holding that a private beach club that was not a quasi-public entity was required under the *Matthews* reasonable access norm to provide members of the public with access to the beach across its dry-sand area. Applying the four factors that it had set out in *Matthews*, the court concluded that the club was required to make its upland sand area, though privately owned, available for use by the general public, although it could charge appropriate fees for certain services the club provided.<sup>226</sup> Quoting *Matthews*, the court stated:

“[R]ecognizing the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public’s rights in private beaches are not coextensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.”<sup>227</sup>

The significance of this holding is that it lifts the restriction on public beach access to dry-sand areas owned by quasi-public entities. Under *Raleigh Avenue Beach Ass’n*, the public is entitled to access dry-sand areas regardless of who the owner is.

The practical impact of this expansion of the public trust doctrine on the traditional right to exclude may or may not be significant, depending on how courts apply the four-factor test from *Matthews* in various circumstances. Even if the practical impact is slight, however, *Raleigh Avenue Beach Ass’n*’s symbolic impact on the right to exclude is considerable, for it muddies the seemingly crystalline traditional rule that a private owner of the dry-sand portion of the beach may exclude others at will by imposing a reasonable access requirement.

The beach access cases will present difficulties for law-and-economics analysis. Certainly, if utility is measured by the willingness-to-

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<sup>223</sup> *Id.* at 365.

<sup>224</sup> *Id.* The court concluded that the improvement association satisfied its obligation by opening up its membership to everyone rather than limiting it to Bay Head residents and by making daily and seasonal passes available for sale to nonresidents. *Id.* at 369.

<sup>225</sup> 879 A.2d 112 (N.J. 2005).

<sup>226</sup> *Id.* at 125.

<sup>227</sup> *Id.* at 121 (quoting *Matthews*, 471 A.2d at 326).

pay metric,<sup>228</sup> it may be argued that the results in cases like *Matthews* are sub-optimal. Although it may be the case that the beach users collectively would value the entitlement more than the owner would, the decision to assign the entitlement to them without compensating the owner may be inefficient for two reasons. First, the result will quite possibly create what Frank Michelman called demoralization costs.<sup>229</sup> In this context, these costs may be quite high, as the owner faces the prospect of complete strangers sunning themselves in front of her house on her beach.<sup>230</sup> Second, by diluting the right to exclude with respect to one type of publicly valuable resource, these decisions create uncertainty for present and future owners of other resources that their ownership rights might become subject to the same kind of dilution if the public demand for the resource they own similarly increases in the future. The economic value of resources is maximized over time by a system of clearly delineated property rules giving owners robust exclusionary rights.<sup>231</sup> Property law's traditional doctrine on beach access was precisely such a regime, and the recent cases represent a significant departure from that cost-minimizing approach.

If the willingness-to-pay metric is abandoned in favor of the more expansive concept of welfare, *Matthews* and cases like it pose difficulties for welfare analysts. As I pointed out previously,<sup>232</sup> the problem is arriving at a true scalar measure of welfare ex ante. Lacking such a measure, welfare analysis is unable to produce a social welfare function that is usable in actual decision making with any sort of precision.

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<sup>228</sup> I recognize that most law-and-economics theorists have moved away from the unitary value of wealth-maximization and its attendant willingness-to-pay metric in favor of the more capacious value of welfare. I have already discussed the problems with the social welfare function. See *supra* text accompanying notes 10–11.

<sup>229</sup> See Michelman, *supra* note 199, at 1214.

<sup>230</sup> These demoralization costs could be offset by protecting the beach owner through a liability rule rather than a property rule, i.e., compensating the owner rather than legally prohibiting the behavior. This is one way of understanding the Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which forbade a state commission from conditioning a rebuilding permit on the transfer of a public beachfront easement without compensating the applicant landowner. From a law-and-economics perspective, however, the weakness of this solution is that it creates a problem of high information costs. See Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1753–90 (2004) (describing the information-cost advantages of property rules over liability rules).

<sup>231</sup> See Smith, *supra* note 230, at 1755 (“Traditionally, one of the purposes of property is to internalize the costs and benefits of a wide range of uses of an asset on the owner. The owner then has an incentive to maximize the value of the asset, and . . . the owner's maximization of private value will at the same time maximize the social value of the asset.”); see also Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454–55 (2002) (describing exclusion theory's view of resource owners as “gatekeepers” who have been delegated decision-making authority with respect to resources).

<sup>232</sup> See *supra* text accompanying note 10.

Now, it is certainly the case that the social-obligation theory provides no greater potential for yielding precise ex ante measurements of human flourishing. Where social-obligation theory is superior to welfarist law-and-economics analysis is in its greater transparency about the following facts: (1) the law must balance a great plurality of goods and ills in these inherently complex conflicts and (2) no algorithm is available ex ante by which we can reduce all these goods and ills into a singular scalar metric which can then be straightforwardly applied in future conflicts of this kind.

A human flourishing-focused social-obligation theorist might attempt to justify the expansion of public access to privately-owned beaches on the basis of the following scenario. Imagine that you are a single parent living in a public housing project in Camden, New Jersey. It is August, and your non-air-conditioned apartment is sweltering. You and your five-year-old daughter would very much like to spend the day at the beach. You take the bus (you have no car) on the long ride to the stop on the New Jersey shore nearest your home. The beach there is privately owned, and the nearest public beach is several miles away, inaccessible by public transportation. The beach in front of you is beautiful. It is also empty because the owner works in New York City and visits his beach home only sporadically. You might try to trespass and perhaps get away with it, but reluctantly (and much to the chagrin of your hot and cranky daughter) you choose to obey the law and take the long bus ride back to Camden.<sup>233</sup>

This is not an invariable scenario for poor city-dwellers, of course. Some of them, at least, can reach public beaches.<sup>234</sup> What the story does illustrate is the subtle and sometimes not-so-subtle ways in which access to recreation is limited or simply unavailable for poor people. Recreation is not a luxury but a necessity, especially for the poor. It is an important aspect of the capabilities of both life and affiliation. With respect to life as a good, ample and growing medical evidence indicates that recreation and relaxation contribute importantly to good health, reducing the risk of diseases ranging from depression to heart disease. Yet some of the very groups who need recreation the most do not, as a practical matter, have access to it. This includes women and especially single mothers. It is no coincidence that the frustrated would-be beachgoer in my story was a single parent. Single mothers are notorious self-sacrificers, literally jeopardizing their

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<sup>233</sup> If you find yourself sympathizing with the owner in this scenario, please read the paragraph again.

<sup>234</sup> When Robert Moses planned the highways and bridges in New York City and Long Island in the 1930s, he intentionally designed hundreds of bridges that led to the beaches sufficiently low that no buses could pass under them. His aim was to exclude the poor from the beaches. See Langdon Winner, *Do Artifacts Have Politics?*, 109 *DÆDALUS* 121, 123–24 (1980).

health for the sake of their children. I do not suggest that public access to privately-owned beaches is the magic elixir to improve the health of young single mothers. I do suggest, however, that recreation is an important aspect of health, which is itself a vital dimension of the capability of life, and that providing all persons, including poor people, with reasonable access to basic modes of recreation and relaxation would materially contribute to the goal of being capable of living lives worth living.

Recreation also supports affiliation as a good. As a good, affiliation encompasses subsidiary goods such as friendship and social participation.<sup>235</sup> Indeed, affiliation, or sociability, as it might also be called, may explain, or partly explain, many of the circumstances in which courts have recognized some version of a reasonable access rule that limits the common law right to exclude. Affiliation includes the ability “to recognize and show concern for other human beings, to engage in various forms of social interaction; [and] to be able to imagine the situation of another.”<sup>236</sup> Affiliation is the indispensable means through which communities create just social relations. By teaching us how to be concerned for others, how to show that concern, and how to place ourselves in their shoes, communities inculcate in us values of equal dignity, equality, respect, and justice, as well as individual autonomy.

No one has written more eloquently about the role of recreation in creating healthy social relationships than Carol Rose. In her justly celebrated article *The Comedy of the Commons*, Rose, paraphrasing the great nineteenth-century landscape designer Frederick Law Olmstead, wrote:

[R]ecreation can be a socializing and educative influence, particularly helpful for democratic values. Thus rich and poor would mingle in parks, and learn to treat each other as neighbors. Parks would enhance public mental health, with ultimate benefits to sociability; all could revive from the antisocial characteristics of urban life under the refining influence of the park’s soothing landscape.<sup>237</sup>

Substitute “beach” for “park,” and the point is the same. Rose goes on to point out that these socializing benefits can be maximized only if recreation is “open to all at minimal costs, or at costs . . . borne by the general public, since all of us benefit from the greater sociability of

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<sup>235</sup> NUSSBAUM, *supra* note 13, at 82–83, 92.

<sup>236</sup> Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23 (2007).

<sup>237</sup> Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779 (1986) (footnotes omitted).

our fellow citizens.”<sup>238</sup> As Rose concludes, “[T]his value should not be ‘held up’ by private owners.”<sup>239</sup>

Under the traditional law on beach access, sociability was indeed “held up” by private citizens. Public beaches and parks do exist, of course, but in many parts of the country, they are few and far between. Access to them is often difficult or impractical for the urban poor, the very people who in some ways need recreation the most.

We live in a society characterized by conditions of increasing congestion and social interdependency. The social-obligation theory recognizes that those very conditions, especially our interdependency, create for all property owners an obligation to contribute, in ways that are appropriate to them, to the vitality of the community’s material infrastructure that facilitate the cultivation of affiliation, among other essential human capabilities. For private beach owners, this obligation may include providing members of the general public with reasonable access to portions of their beach, depending upon various circumstances of the sort specified by the court in *Raleigh Avenue Beach Ass’n*. This obligation is not open-ended. Under the social-obligation theory, the issue in beach-access cases is whether the landowner’s obligation to contribute to the vitality of capabilities-nurturing aspects of her community includes sharing with members of the general public access to her land, at least at certain times and under certain circumstances. If members of the public wish to use private beach property for recreational purposes and have reasonable means of gaining access to a public beach, as will frequently (perhaps usually) be the case, the owner’s right to exclude is preserved.

Public access to privately-owned land is hardly unprecedented. The common law provides a number of examples of situations in which the private landowner is obligated to permit members of the public to enter her property for the purpose of furthering one or more of the necessary capabilities in some way. The family home is the obvious example of property that is closed to the public. Yet, even here outsiders may be privileged to enter. A may enter B’s house, for example, for the purpose of saving B’s or A’s life.<sup>240</sup> One can explain this rule as a means of promoting personal security, a capability that is surely required for the well-lived life. With respect to shared property, tenants have long been permitted to receive visitors, and unless an agreement provides otherwise, landlords are not free to exclude such visitors.<sup>241</sup>

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<sup>238</sup> *Id.* at 780.

<sup>239</sup> *Id.*

<sup>240</sup> See RESTATEMENT (SECOND) OF TORTS § 197, cmt. h (1965).

<sup>241</sup> See, e.g., *State v. DeCoster*, 653 A.2d 891 (Me. 1995); *Williams v. Lubbering*, 63 A. 90 (N.J. 1906).

Affiliation, or sociability, is at work in the common-law rule restricting the landlord's right to prevent tenants from receiving visitors. The space that the tenant has rented is her home, and the home is one of the primary venues in which social interaction, through which the capacity to sympathize and empathize with others develops, occurs.

Affiliation as well as health, as an aspect of the capability of life, may also explain controversial right-to-exclude cases like *State v. Shack*.<sup>242</sup> In that case, two defendants entered private property to aid migrant farmworkers employed and housed on the property. The defendants worked for government-funded organizations that provided health-care and legal services to migrant farmworkers. The owner-employer demanded that the defendants leave his property, and they refused. The defendants were convicted of violating the New Jersey criminal trespass statute. On appeal, the New Jersey Supreme Court held that no trespass had occurred nor had a breach of the right to exclude. The court said that title to land could not include dominion over people whom the owner allows on the land, in this case, the farm workers. The owner's property right is not absolute and must be accommodated with the interests of others.

Attempts to explain the court's decision in *Shack* that recognize the farm workers' right of access on the basis of law-and-economics theory encounter the same problems that I identified in connection with the modern beach access cases. The problem for the welfarist strand of law-and-economics analysis is that it is unable to produce a social welfare function that is usable in actual decision making with any sort of precision.<sup>243</sup> When the welfare analyst attempts to construct an actual social welfare function, she will take cognizance of the various specific determinants of welfare and realize that one must make trade-offs among them. She will then encounter difficulties in providing precise ex ante rates of exchange as among these various determinants. If she is honest, she will ultimately have to concede that she can do little more than muddle through particular controversies as they arise, i.e., ex post.

The human flourishing-minded social-obligation theorist will admit this difficulty up front. Her analysis will be transparent about the existence of plural and incommensurate social goods and ills in the dispute and about the unavailability of an algorithm by which we can, ex ante, reduce all these goods and ills to a single scalar metric.

Among the determinants that the social-obligation theorist who is committed to human flourishing will take into account are the capa-

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<sup>242</sup> 277 A.2d 369 (N.J. 1971).

<sup>243</sup> See Hockett, *supra* note 8, at 32-33.

bilities of life and affiliation. As the court pointed out in *Shack*, migrant farm workers are a rootless and isolated community, often unaware of the opportunities that exist for them to meet their needs to medical care.<sup>244</sup> As a community, migrant workers 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.

Affiliation will also enter into the analysis. In the context of *Shack*, affiliation takes on a more fundamental meaning, literally grounding the capability of life, without which it would be impossible for the lives of the migrant farm workers to flourish. Affiliation is, moreover, the foundation for creating just social relations in the migrant farm community by providing the workers with equality and dignity otherwise denied them by their employer's treatment.<sup>245</sup>

Still, *Shack* is an unusual case in which affiliation is at work to explain why some limited form of public access to privately-owned land has been ordered. The more typical setting is recognition of a quasi-public interest in land where the location either functions as a kind of civic commons or is otherwise open to members of the public.<sup>246</sup> In these contexts, affiliation takes on a more straightforward meaning. It means the wide spectrum of ordinary socializing activities that are the necessary foundation for any robust civil society, ranging from cheering at a Little League baseball game with other parents to chatting with companions on a walk along the beach. In these sorts of socializing events, as Rose has shown,<sup>247</sup> place matters.

The requisite socializing activity—affiliation—often, though not always, is site-specific. It cannot be carried on just anywhere but must be done in a particular venue or at least a particular type of venue. Baseball must be played on an open (hopefully) grassy area, whereas beachcombing requires an unobstructed beach. Modern public trust doctrine cases commonly involve just this situation, i.e., circumstances in which some social activity that nurtures the capability of affiliation is tied to a particular venue or at least a particular type of land, such as the beach. The plaintiff is in effect asking the court to recognize the owner's obligation to enable that activity and to define the contours of the owner's property interest in a way that does so.

The question we should ask in these cases is whether the owner's general obligation to contribute to the human flourishing of others

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<sup>244</sup> See *Shack*, 277 A.2d at 372–73.

<sup>245</sup> See *id.* at 374.

<sup>246</sup> See KEVIN GRAY & SUSAN FRANCIS GRAY, *LAND LAW* 282–87 (4th ed. 2006).

<sup>247</sup> Rose, *supra* note 237, at 758–61.

includes a specific obligation to promote affiliation by providing some sort of reasonable public access to her land. The answers to that question will not come easily nor uniformly. Whether public access to some form of land will promote affiliation in a significant way will not always be clear, warranting even some limited form of public access under the public trust doctrine.<sup>248</sup> Small wonder, then, that courts in cases like *Matthews* and *Raleigh Avenue Beach Ass'n* have struggled to develop some sort of metric by which they may cabin the reasonable access rule and identify its scope of operation. The need to nurture affiliation will not always justify public access. But surely, as social conditions change and make affiliation more difficult, the good of affiliation will justify some version of a reasonable access rule in some circumstances where public access to privately-owned land is sought for recreational purposes.

### C. Some Implications for Intellectual Property

Although the primary focus of this Article is on traditional forms of property, especially land, the social-obligation theory developed here has implications for intellectual property as well. I cannot develop the full implications of my social-obligation theory for intellectual property here, but some brief and very tentative observations will indicate how the social-obligation theory might bear upon intellectual property rights.

#### 1. *Copyright Law*

Social-obligation theory may usefully contribute to ongoing debates over the scope of copyright protection. The fair use defense to alleged copyright infringement is an obvious example.<sup>249</sup> The fair use doctrine is usually explained as a transaction-costs-minimizing mechanism that permits the public to engage in otherwise efficient uses.<sup>250</sup> But, as several commentators have pointed out, transaction costs do not provide a complete explanation for the fair use doctrine.<sup>251</sup> Brett Frischmann and Mark Lemley have argued that part of the reason why copyright law creates a fair use semi-commons is to facilitate spillovers, i.e., positive externalities.<sup>252</sup> Licensees may fail to consider or capture these spillover benefits to third parties. Individually, the value of

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<sup>248</sup> Cf. *id.* at 780–81.

<sup>249</sup> See 17 U.S.C. § 107 (2006).

<sup>250</sup> See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY* (2003).

<sup>251</sup> See, e.g., Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 287–89 (2007); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1034 (2002); Glynn S. Lunney Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 996 (2002).

<sup>252</sup> Frischmann & Lemley, *supra* note 251, at 284–85, 288.

these benefits may be small, but in the aggregate they may substantially benefit communities.<sup>253</sup> As Frischmann and Lemley write, “Using a work for educational purposes, for example, not only benefits the users themselves, but also, in a small way, benefits others in the users’ community with whom users have interdependent relations—reading and learning builds socially valuable human capital.”<sup>254</sup> As this passage indicates, strong similarities exist between Frischman and Lemley’s theory and the social-obligations theory. Like Frischmann and Lemley, the social-obligation norm supports a capacious fair use doctrine. Copyright owners and their licensees owe obligations to members of their communities to promote those capabilities that are essential to human flourishing. Their contributions to the flourishing of these communities in turn have feedback effects on the development of the copyright owners themselves.

Copyrighted works contribute to several of the essential human capabilities, including practical reasoning (through education), freedom (also through education), and sociability. Copyright law itself promotes the development of these capabilities by creating incentives to produce literary, musical, artistic, and other works<sup>255</sup> without which we could scarcely develop into truly free moral agents and good neighbors. But, as the above passage from Frischmann and Lemley suggests, we also need a robust commons area. Too much copyright protection, excluding third parties from access to these ennobling works, seriously risks undermining copyright law’s contribution to promoting the essential human capabilities.

Copyrighted works tend to have wide benefits, wider perhaps than traditional forms of property. There are several reasons for this. For instance, the communities to which copyright owners and licensees belong and are dependent, multiple, and overlapping. The same is true for owners of traditional property, of course, but even more so for rights holders of intellectual property. Their communities include those who have contributed resources, including prior ideas, that have facilitated the production of their protected asset. Typically, the number of such persons will be very large. Even geniuses have no truly new ideas. As Isaac Newton famously remarked, “If I have seen farther, it is by standing on the shoulders of giants.”<sup>256</sup> Dependency is universal and ubiquitous.

Communities multiply and layer in another relevant way as well. Writers, artists, and other producers of copyrighted works depend

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<sup>253</sup> *Id.* at 288.

<sup>254</sup> *Id.* at 289.

<sup>255</sup> *See id.* at 284–85.

<sup>256</sup> Letter from Isaac Newton to Robert Hooke (Feb. 5, 1676), *quoted in* ON THE SHOULDERS OF GIANTS 725 (Stephen Hawking ed., 2002).

upon various and multiplying social structures to enable the very creation of their work. These social structures include networks that create the infrastructures that are necessary for certain types of artistic work. The old image of the hermit artist working in isolation in her garret, if it was ever true, is a myth today. Artists and writers, regardless of their level of success, are enmeshed in multiple social networks that support and nurture their work.

The existence of multiple and overlapping communities in the world of copyright means that the copyright owner or license holder, because of their dependency on members of their communities, owes obligations to a wide range of persons to nurture the capabilities necessary for those persons to flourish. It also means that as members of those wide and ever-expanding networks flourish, the artists themselves flourish by virtue of the feedback effects of flourishing networks. The overall effect of the social obligation, then, is synergistic.

## 2. *Patent Law*

Access to life-saving or life-extending patented drugs is another issue to which the social-obligation theory may contribute some insights. Intellectual property rights, including patents, restrict public access to pharmaceuticals that may be necessary for human flourishing. From the perspective of promoting essential capabilities, notably health, those who own these intellectual property rights may owe members of their communities, including the global community, an obligation to facilitate access to these resources for those who cannot afford them. There are several ways, all of them some version of a commons-based regime, by which this obligation might be implemented.

One possibility is compulsory licensing.<sup>257</sup> In the current pro-market intellectual property climate, compulsory licensing is out of favor; nevertheless, it is worth considering. Article 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides a list of conditions for issuing compulsory licenses.<sup>258</sup> Normally, one's attempts to obtain a license under commercially reasonable terms must have failed over a reasonable period of time.<sup>259</sup> However, in cases of "national emergencies" or "other circumstances of extreme urgency," one is not required to first attempt

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<sup>257</sup> For a general discussion of compulsory licensing policies, see Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853, 857-64 (2003).

<sup>258</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

<sup>259</sup> In addition, Article 31 provides that the patent holder is entitled to "adequate remuneration," a term that TRIPS does not define. *Id.* art. 31(h). Moreover, the license is

to obtain a voluntary license.<sup>260</sup> Certainly, one can argue that in many countries around the world, particularly Africa, there is “extreme urgency” to produce and distribute at the lowest possible cost anti-malarial drugs and antiretroviral (ARV) combination therapy drugs, which can substantially extend the lives of HIV and AIDS victims.

The argument under the social-obligation theory for issuing compulsory licenses for such drugs is relatively straightforward, although not unproblematic. The problem is not in determining whether any necessary capability is involved in low-cost access to ARV drugs in places like sub-Saharan Africa; for it is obvious that life is literally at stake for the victims of HIV and AIDS in these places. Freedom is also quite at stake for such victims.<sup>261</sup> The hard questions are whether and on what basis patent holders or those who hold licenses to produce and distribute ARV drugs have an obligation, by virtue of their property right, to make the drug available to HIV and AIDS victims in lesser-developed countries at sub-market prices. The patent holders and licensees of such drugs are nearly always either large multinational pharmaceutical firms based in the West (usually the United States) or American universities. In what sense do such firms and universities belong to the same communities as sub-Saharan African nations, and on what basis could they possibly owe poor African victims of HIV and AIDS any obligation to nurture those capabilities essential for human flourishing? There are many possible bases for membership within a community, one of them being the sets of social relationships within which one develops and engages in practical reasoning. For an individual, these sets of relationships will begin with one’s family and expand to friends, neighbors, and co-workers. But what about corporate firms, universities, and similar entities? Despite their size and the nature of their composition, these entities do engage in practical reasoning just as individuals do, and they are dependent on others for their development in ways that are similar to the dependency that characterizes the human condition. The sets of relationships within which these firms develop and engage in practical reasoning are often much broader than those of individuals. This is especially true of the multinational companies and elite universities that are the most likely holders of patents or licenses. The term “global community” has become a meaningless cliché in most contexts, but applied to multinational firms and elite American universities, it rings true. The world literally *is* their community. They would not be who they are without the world. Their dependence on the rest

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“non-exclusive,” meaning that the patent-holder can continue to produce the patented product. *Id.* art. 31(d).

<sup>260</sup> *Id.* art. 31(b).

<sup>261</sup> See generally SEN, DEVELOPMENT AS FREEDOM, *supra* note 13.

of the world creates obligations for them; and among these is the obligation to use their property rights in ARV drugs to nurture the necessary capabilities of humans in countries in which they do business in appropriate ways. This includes making ARV drugs available to victims of HIV and AIDS who would be otherwise unable to gain access to these drugs. Making ARV drugs available does not necessarily mean providing them free of charge. Exactly what fee the firm charges could be set by agreement between the firm and each country, for example. The important point is that the property-rights holder would not use its position to exclude those who cannot afford to pay its normal price.

A second, less intrusive approach is open licensing for university innovations, an idea first suggested in an article by Amy Kapczynski, Yochai Benkler, and others.<sup>262</sup> As Kapczynski, Benkler, and their colleagues note, over the past twenty-five years, American universities have taken a much more active role in not only biomedical research and development, but also in patenting and licensing the research tools they develop.<sup>263</sup> The authors point out that under current practices, university technology transfer offices (TTOs) focus almost entirely on maximizing revenues but that this need not be so. TTOs could choose to include global health in their calculus for purposes of setting licensing revenue structures.<sup>264</sup> As the authors note, universities are, after all, different kinds of organizations than pharmaceutical firms, with different purposes, different revenue structures, and different research and development incentives.<sup>265</sup> Universities are dependent for their very existence on philanthropy and, especially with respect to large research universities, public funding.

Kapczynski, Benkler, and their colleagues propose two commons-based approaches by which research universities might contribute to closing what the authors call the “access gap.”<sup>266</sup> The first is “equitable access licensing.”<sup>267</sup> These are equitable access provisions of licenses that universities negotiate with drug companies to give third parties, such as manufacturers of generic medicines, freedom to operate in lesser-developed countries with respect to the licensed technology or any derivative product. It would do so through open-source licenses with so-called “copyleft” characteristics. The second approach

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<sup>262</sup> Amy Kapczynski, Samantha Chaifetz, Zachary Katz & Yochai Benkler, *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 BERKELEY TECH. L.J. 1031 (2005).

<sup>263</sup> *Id.* at 1079–81.

<sup>264</sup> *Id.* at 1085.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 1046.

<sup>267</sup> *Id.* at 1090–91.

is what they call “Neglected Disease licensing.”<sup>268</sup> The idea here is to facilitate research in treatment for diseases that the scientific community tends to neglect. Scientists engaged in research on neglected diseases would be given freedom, via license exemptions, to conduct experiments on proprietary university technologies. The exemption further permits the researcher engaging in this work to market all the resulting products in lesser-developed countries.

Although both the compulsory license proposal and the proposal of Kapczynski, Benkler, and their colleagues implement the social-obligation theory, the latter is probably more attractive for pragmatic reasons. Unlike the compulsory license proposal, granting open licenses for university innovations requires no change to any national or international regime.<sup>269</sup> At the same time, its effects may be significantly more limited than a compulsory license approach.

#### D. The Limits of the Social-Obligation Norm

The social-obligation theory is not antithetical to property. To the contrary, it respects and protects property rights in the vast majority of cases. To begin with, it is important to emphasize two broad limits to the social-obligation norm that help constrain its restrictions on property rights. The first of these are limits that are intrinsic to the norm itself. For example, autonomy interests will limit the social-obligation norm if no equivalently weighty countervailing interests are present. I shall illustrate this in the discussion of *Jacque v. Steenberg Homes, Inc.* that follows.<sup>270</sup> The second broad category of limits are those that are based on prudential concerns about the proper scope of legal enforcement of moral norms even when such an interest is present. In the ensuing discussion, I will note some examples of this category.

Although I cannot define the precise scope of the social-obligation norm here, I can provide some sense of the two categories of limits by briefly considering some examples of the property-protective aspect of the social-obligation theory developed in this Article. These examples should dispel any anxiety that the social-obligation norm threatens property rights in a fundamental way.

Consider, for example, *Jacque v. Steenberg Homes, Inc.*,<sup>271</sup> a widely known right-to-exclude case. In that case, home owners, Lois and Harvey Jacque, sued Steenberg Homes for damages for intentional trespass to the Jacques’ land.<sup>272</sup> Steenberg delivered a mobile home

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<sup>268</sup> *Id.* at 1109–10.

<sup>269</sup> *Id.* at 1113.

<sup>270</sup> 563 N.W.2d 154 (Wis. 1997).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 156–58.

by plowing a path across the Jacques' snow-covered field despite strenuous protests from the Jacques. Although other means of accessing the delivery location were available, Steenberg used the path across the Jacques' land because that was the easiest route for him. The jury awarded the Jacques \$1 in nominal damages and \$100,000 in punitive damages. On appeal, the Wisconsin Supreme Court held that if a jury awards nominal damages for intentional trespass, the jury may also award punitive damages, and thus the court upheld the verdict.<sup>273</sup>

The social-obligation theory confirms this result. The Jacques had strong capability-related reasons for excluding Steenberg Homes. The most important of these interests was the Jacques' autonomy and privacy. The common law historically, and properly, attached great weight to the interests of home owners in protecting their privacy and associational autonomy by recognizing a robust right of home owners to exclude the public from entering their property without permission. Although this right has long been subject to certain limited exceptions, such as the privilege of firefighters to enter to protect the home, the right to exclude has generally been strongest with respect to the home. From the perspective of social-obligation theory, with its focus on human capabilities necessary for the well-lived life, this emphasis on privacy of the home makes sense. The home is the central locus for developing and experiencing all, or nearly all, of the capabilities necessary for human flourishing.<sup>274</sup> The capability of sociality, for example, depends upon one's having a sense of security, a sense that many, perhaps most, people experience most strongly in their own homes. The more vulnerable we feel to others' power, both physically and emotionally, the less apt we are to form healthy relationships with others. The legal right to exclude others from entering our homes, absent a compelling reason (a reason that itself is instrumentally tied to one or more of our necessary capabilities), creates an environment within which individuals experience the sense of personal security that is essential to the capacity to develop healthy social relationships. This analysis suggests that in *Jacque*, the legal interest in promoting the home owners' capability of sociality, among other capabilities, was quite strong. Steenberg Homes' intentional trespass directly threatened the Jacques' sense of security, however small the economic damage to the Jacques' property may have been.

Assessing the other side of the ledger, Steenberg Homes' flourishing interests, is a more complicated matter. The initial problem is how to treat the status of corporations within the framework of

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<sup>273</sup> *Id.* at 165–66.

<sup>274</sup> See generally D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

human flourishing.<sup>275</sup> I need not resolve that difficult question here, for under any approach to the corporation, little threatened the human flourishing interest of the defendant in *Jacque*. If we treat Steenberg Homes, Inc., as a collective entity capable of moral agency, little to no injury to its capability of flourishing resulted from the court's decision. The corporation's sole interest was in reducing its costs of delivering a mobile home. The marginal cost that resulted from enforcing *Jacque's* right to exclude in no way threatened the firm's economic viability. If instead we reduce the corporation (Steenberg Homes) to its individual shareholders, again we are left with the same result. Each shareholder's interest in the case was purely economic. The marginal economic impact on the value of the shareholder's stock could not have been significant, if indeed there was any effect whatsoever. Whatever flourishing interest of either Steenberg or its shareholders was implicated, then, paled in comparison with the *Jacques'* interest in maintaining the security and safety of their family home.

I hasten to add that this is *not* to say that a corporation will always lose under the social-obligation theory's focus on human flourishing. I do not take the position of rejecting the property rights of corporations in all cases or even in all cases in which corporate interests conflict with individual interests. I leave open the possibility that corporate interests might prevail over the claims of individuals under the social-obligation theory. But *Jacque* is certainly not one of those cases.

The same concern with the privacy and security of one's personal home justifies the property owner's right to exclude even if enforcement of that right may result in forms of discrimination that are otherwise completely unacceptable. Consider, for example, the "Mrs. Murphy" exception in the federal Fair Housing Act's ban on racial

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<sup>275</sup> The status of collective entities such as corporations under a human flourishing moral theory is an extraordinarily difficult topic. One approach is that of normative individualism. This means reducing the entity to its human components. The argument is that we should sustain the good of the corporation as a community because its good is an aspect of the flourishing of individual human beings. In the case of corporations, that would mean focusing on the interests of corporate shareholders (and perhaps employees as well, although this itself is a matter of debate). The other approach is collectivist, treating the entity itself as a moral agent entitled to dignity. Will Kymlicka takes the former approach in the context of cultural communities. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995). The corporatist approach is associated with Hegel. See generally G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821). Taylor takes this approach with respect to cultural communities such as the Quebecois. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994). On the general question of the moral status of corporate entities, see generally MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986).

and other forms of discrimination by landlords in the selection of tenants.<sup>276</sup> Although the statute bars landlords from refusing to rent to otherwise qualified applicants on the basis of race, religion, gender, national origin, or familial status, it permits them to do so if the unit in question is part of a dwelling intended for occupancy by no more than four families living separately and the owner actually occupies one of the units. One can understand this exception and other statutorily permitted forms of discrimination in housing<sup>277</sup> as reflecting the same concern with protecting the associational interests of owners in the privacy of their homes. In that context, a robust right to exclude is most easily justified on the basis of nurturing the capabilities necessary for human flourishing.

The right to discriminate in the context of one's home illustrates the gap between moral obligations and legal enforcement of such obligations. It is quite arguable that morally I ought not to discriminate on the basis of factors such as race in selecting my friends. Legal enforcement of that moral obligation is an altogether difficult matter, however. It would be sheer folly for the law to attempt to enforce all moral norms.<sup>278</sup> Thomas Aquinas argued that the law should enforce those moral norms that are necessary for the maintenance of human society.<sup>279</sup> Attempts to enforce laws prohibiting racial discrimination in selecting one's friends would almost certainly founder. The violation of privacy interests in any attempt to do so is sufficiently great that prudence counsels against it. Much the same is true of discrimination in other settings involving strong privacy and intimate associational interests, and these settings would seem to include the sorts of situations covered by the exceptions in the Fair Housing Act.

#### CONCLUSION

Joseph Singer has trenchantly observed, "Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist."<sup>280</sup> He is right. American property law is not solely about either individual freedom or cost-minimization. It is also about human flourishing and supporting the communities that enable us to live well-lived lives. To these ends, property recognizes that owners

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<sup>276</sup> *E.g.*, 42 U.S.C. §§ 3603(b)(2), 3604(a) (2006) (exempting owner-occupant landlords with four units or less from federal housing anti-discrimination rules).

<sup>277</sup> *See, e.g.*, 42 U.S.C. § 3607(b)(1) (excepting "housing for older persons" from federal housing anti-discrimination rules).

<sup>278</sup> *See* THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-I, Q. 96, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (c. 1265-73).

<sup>279</sup> *Id.*; *see also* Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 *YALE L.J.* 732, 746 (2007).

<sup>280</sup> SINGER, *supra* note 6, at 18.

owe obligations. Yet, although American property law implicitly includes a robust social-obligation norm, courts and scholars have failed to identify, let alone systematically develop, that norm. This Article has attempted to begin filling that gap.

The time has come for property scholars to come to grips with the social-obligation norm. To do so, they will need to end the virtual hegemony of law-and-economics analysis in property theory. Law-and-economics theory cannot provide a satisfactory account of many of the obligations that courts have imposed on property owners. Its moral dimension is too anemic to do justice to the values that inhere in those obligations, values that notably include human flourishing. The social-obligation theory takes those values seriously. It recognizes that ownership and obligation are deeply connected with each other and that their mediating connection is community. It further recognizes that no inherent conflict exists between legal support of the communities that facilitate human flourishing and legal respect of the moral autonomy of the individual. Finally, it recognizes that the obligation imposed on owners to sacrifice their property interests in some way can often be justified on the basis of cultivating the conditions necessary for members of our communities to live well-lived lives and to promote just social relations, where justice means something more than simply aggregate wealth-maximization. Explicit recognition of this social-obligation norm is long overdue. It is high time for property scholars to begin developing a social-obligation theory.

