

HEINONLINE

Citation: 10 Theoretical Inq. L. 127 2009



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Sat Jun 14 06:22:28 2014

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1565-1509](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1565-1509)

Properties of Community

Gregory S. Alexander* and Eduardo M. Peñalver**

The relationship between individuals and communities — all manner of communities, but especially the state — is a central preoccupation of property theory. Even though the relationship between individuals and community stands at the conceptual center of property theory, the theories of community underlying discussions of property are frequently left implicit. The dominant approaches to property in Anglophone scholarship, utilitarian and classical liberal theories, treat communities as agglomerations of individuals. Moreover, they eschew substantive accounts of justice, favoring what Charles Taylor has called "procedural" conceptions. In this Article, we offer an ontological conception of community that views the individual and community as mutually dependent. In contrast with the two competing theories we describe, we favor a substantive conception of justice built around the notion of human flourishing. Although we are reluctant to embrace any particular label for our view, it is broadly Aristotelian in its framework. Once we have sketched the outlines of our theory, we will describe how our ontological theory might operate, using State v. Shack and a prominent South African property case as our central examples.

INTRODUCTION

The relationship between individuals and communities — all manner of communities, but especially the state¹ — is a central preoccupation of property

* A. Robert Noll Professor of Law, Cornell Law School, Ithaca, NY.

** Professor of Law, Cornell Law School, Ithaca, NY.

We are deeply grateful to the following friends and colleagues, who provided valuable comments and suggestions on prior drafts: Hanoch Dagan, Annelise Riles, Emily Sherwin, Joe Singer, Andre van der Walt and participants in many fruitful discussions at the Cegla Center conference on Community and Property in Tel Aviv.

¹ Our conception of communities is intentionally capacious, embracing the state as well as smaller groups, including families, voluntary associations and the like. As

theory. Across a broad range of property thought — from utilitarian to Lockean to Hegelian — scholars have expended enormous efforts explaining what owners can do with their property and the extent to which the community or the state can participate in those decisions. The mountainous literature on the subject of regulatory takings is a testament to scholars' interest in questions concerning the relationship between individuals and community as mediated through property.

The nexus between theories of property and community is perhaps tightest in Hegelian property theory, where property practically stands in the place of the individual herself. Within such a conception, working out the contours of an owner's rights becomes the delineation of the proper relationship between the individual and the community around her. Although the connection is admittedly less direct within other theoretical frameworks, discussions of property rights, from whatever perspective, necessarily reflect ideas about the proper domain and limits of individual and community power.

Property stands so squarely at the intersection between the individual and community because systems of property are always the creation of some community. As property theorists of all stripes have long recognized, "[i]n the world of Robinson Crusoe property rights play no role."² Moreover, systems of property have as their subject matter the allocation among community members of rights and duties with respect to resources that human beings need in order to survive and to flourish.³ These allocative decisions are crucially important both to individuals, owners and non-owners alike, and to the community as a whole. Jeremy Waldron is therefore surely correct when he says that "our interest in property is effectively an interest in the political and economic structure of society."⁴ In other words, whenever we discuss property, we are unavoidably discussing the architecture of community and of the individual's place within it.

Even though the relationship between individuals and community stands at the conceptual center of property theory, the normative theories of

our discussion below of human flourishing and the social matrices that are necessary for the development of the capabilities that are necessary for human flourishing should make clear, we emphasize the role of small groups, such as families and friends. That said, we also emphasize that the state, which we consider to be a community, plays an important role here as well. See Part III *infra*.

2 Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

3 See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 32 (1988) (describing the problem of "allocation" as the central concern of property law).

4 *Id.* at 328.

community underlying discussions of property are frequently left implicit. This is particularly common in discussions of private ownership, which is to say in most contemporary property scholarship. In such discussions, the focus is often fixed firmly on the person of the "owner," and all others reduced to the amorphous category of "non-owner." This way of talking about ownership obscures the possibility that the "community" may have a moral status that is distinct from those of neighboring owners or non-owning individuals.

We will begin this short Article by briefly describing two approaches to community that dominate contemporary property scholarship: law and economics' utilitarian theory and liberal contractarianism. Our goal in describing these theories will not be to set the table for their refutation. Instead, we seek simply to trace the common assumptions and characteristics that both approaches share. By and large, these theories treat communities as agglomerations of individuals. Moreover, they eschew substantive accounts of justice, favoring what Charles Taylor has called "procedural" conceptions.⁵ We will use these agglomerative, procedural theories of community as a baseline with which we contrast our own.

Instead of offering critiques of each of these competing approaches, a project that would require a much longer undertaking, we will move on in Part II to describe our own theory of community, a theory whose premises are radically different from the currently dominant theories. Unlike the theories we describe in Part I, ours is based on an ontological conception of community that views the individual and community as mutually dependent. Also in contrast with the two dominant theories we describe, we favor a substantive conception of justice built around the notion of human flourishing. Although we are reluctant to embrace any particular label for our view, it is broadly Aristotelian in its framework. It finds common ground with theories that have gone under the names of "communitarian," "liberal communitarian," "republican," "civic republican," and even certain theories that have simply called themselves "liberal."

Once we have sketched out the alternatives (agglomerative and procedural versus ontological and substantive), we will describe how our ontological theory might operate, using a prominent South African property case as our central example. We do not intend to provide a full statement or a complete defense of our ontological theory in this Article. Space limitations preclude us from providing anything that elaborate. Rather, this short Article should

5 See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 85 (1989).

be considered more in the nature of a prolegomenon to more extensive work that we intend to continue to develop in the future.

I. TWO CONTEMPORARY THEORIES OF COMMUNITY

A. Utilitarian/Economic

Utilitarian theory, of which normative law and economics is perhaps the most prominent contemporary exemplar, has as its ultimate aim the maximization of aggregate welfare, understood most broadly as the satisfaction of individual preferences. Utilitarian analysis of community is refracted through this maximizing lens. Although theorists have approached the deceptively simple goal of welfare maximization through a variety of strategies, three broadly shared features of the utilitarian analysis of community are particularly significant for our purposes: the centrality of the individual within utilitarian calculus; the contractarian tendencies that this methodological individualism engenders; and, finally, utilitarian discussions of the appropriate boundaries of community.

Within normative economic theory, individual preferences are the sole source and measure of value. Economic theories, of course, differ widely in terms of how they go about measuring those preferences, but they all share this fundamental focus.⁶ Utilitarian theories typically have little to say, however, about how individuals come to have the preferences they do, generally treating their preferences as exogenous, or given, when in reality they often respond to the very distributive questions with which economists concern themselves.⁷

The result of this constellation of commitments is to instrumentalize the utilitarian account of community. Within utilitarian theory, community is only valuable insofar as it contributes to the satisfaction of some individual's preferences. Conversely, community or sociality is never, for the economic theorist, an end in itself.

The central utilitarian question, then, is whether a particular community or a particular model of community will enhance or diminish individual

⁶ See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 67-68 (1999).

⁷ See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 136-48 (2000). Some economic theorists do favor correcting actual preferences and replacing them in utilitarian calculus with preferences that are idealized in some way. See, e.g., J.C. HARSANYI, *RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SCIENCES* (1977).

preference satisfaction. Because the individual is in the best position to know what his preferences are and what sorts of communal attachments will satisfy them, utilitarian theorists of community stress the importance of permitting individuals to choose for themselves the communities into which they will enter.⁸ And, once they have entered such communities, these theories affirm for similar reasons the importance of preserving relatively unencumbered rights of exit from them.⁹

Perhaps the most interesting and complex discussions of community within utilitarian theory concern the question of what might be termed community ecology. The landscape of options available to individuals as they go about satisfying their preferences may have a significant impact on aggregate welfare. Utilitarians, then, must be concerned about maintaining the sorts of communal landscapes that will be most conducive to maximizing individual preference satisfaction.

The most prominent example of this concern in action is in the body of literature elaborating on and refining the Tiebout hypothesis. According to Tiebout, when conditions permit individuals to vote among local communities by selective entrance into or exit from those communities, the relationship between local communities and their potential residents comes to resemble a competitive market in which individual preferences are more likely to be satisfied than in an alternative in which individuals lack the ability to "vote with their feet."¹⁰ Although Tiebout was concerned with markets for local government, the same basic argument holds for private communities as well. A landscape in which communities must compete with each other for membership, the argument goes, will be one in which individual preferences are more likely to be satisfied than they would be in a communal landscape in which they had few options from which to choose.¹¹

The consequence of this approach for utilitarian discussions of the state is a tendency towards suspicion of state power, insofar as the state is a

8 See, e.g., JAMES M. BUCHANAN, PROPERTY AS A GUARANTOR OF LIBERTY 16 (1993); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

9 See, e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 567-68 (2001).

10 See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see also WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS ch.3 (2001).

11 See FISCHER, *supra* note 10, at 58-59, 63; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 710-19 (1973); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1388-92 (1994).

community that the individual has not chosen.¹² Utilitarian suspicion of state power is likely to be extremely sensitive to the state's scale and context. Based on the Tiebout hypothesis, a utilitarian is likely to subject to a greater degree of scrutiny demands made by large, unchosen communities that are, as a consequence of their unchosen nature, less susceptible to the discipline of competition.

In sum, the utilitarian conception of community is instrumental and procedural. Community is valuable, but not intrinsically so. Rather, it has value only insofar as it contributes to the satisfaction of individual preferences, whatever they might be. The best way to ensure that a community will act so as to satisfy those preferences is to maintain a robust "market" for communities, both public and private, within which individuals are free to enter and exit communities in accordance with their own preferences. Where such a market is absent, or where individual choice is impaired, utilitarian theorists believe, there is a lesser likelihood that communities will act in ways that are welfare-maximizing.

B. Classical Liberal Contractarian

Like the utilitarian, the classical liberal contractarian conception of community begins with the individual. The results of the classical contractarian's analysis end up resembling in many ways the utilitarian discussion of community. The liberal, contractarian discussion of the relationship between individuals and the communities to which they belong begins with the mature individual in an idealized state of maximal negative liberty and with the total absence of involuntary communal commitments or obligations. From this starting point, liberal contractarian theorists typically seek to derive rules for society that preserve as much of this hypothetical state of nature as possible, at least as to the individual's experience of liberty, while permitting everyone to gain from the benefits of community life. They demand that the move from this hypothetical (and idealized) situation of isolation and freedom to one of social obligation should be either the result of actual choice or, when an external constraint is imposed, should require that the constraint itself be justified by the need to preserve (or enhance) every individual's enjoyment of liberty.¹³

12 See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1076 (1980).

13 See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, §§ 123-31 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Randy Barnett's libertarian political theory provides a contemporary illustration of these moves. On the one hand, Barnett praises voluntary associations and welcomes the substantial restrictions they often impose on individual liberty, but he does so only to the extent that joining such associations is in fact voluntarily. "Under conditions of unanimous consent," he argues, "liberty is not inconsistent with both heavy regulation and even the prohibition of otherwise rightful conduct."¹⁴

Accordingly, like many property libertarians, he celebrates the restraints on individual freedom assumed by those who join private residential communities. At the same time, however, he is extremely suspicious of the state, precisely because he views it as an unchosen community from which exit is extremely costly. "The larger the land area," Barnett observes, "the higher the cost of exit and thus the less meaningful is 'tacit' consent to the jurisdiction of the lawmaking process. Most modern cities are probably too large, but even if they are small enough, states are certainly too large to command meaningful unanimous consent."¹⁵ Consequently, he favors dramatically limiting the power of virtually all territorially defined governments to intrude upon individual liberty. Drawing heavily on Lockean political theory, Barnett argues that the principal purpose of government must be limited to the protection of a constellation of negative individual liberties, such as private property and freedom of contract, the operation of which helps us to preserve the individual liberty present in the prepolitical state of nature.¹⁶

From where does Barnett derive the content of these negative liberties? From an implicit account of the human person as an uncoerced individual, living free from the constraints of involuntary community life. It is for this reason that Barnett, like other classical liberals, talks about the appropriate terms on which individuals hypothetically "enter" society.¹⁷ One can only "enter" society, even hypothetically, if one was not already there to begin with. Liberal contractarians understand the being who enters into society and trades away her preexisting liberty to be a fully formed, rational and autonomous individual.¹⁸

14 See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 43 (2004).

15 *Id.*

16 *Id.* at 75.

17 See *id.* at 69-76.

18 See 2 CHARLES TAYLOR, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 187, 187-89 (1985).

C. Conclusion

Although these two influential accounts of community differ from each other in important respects, they also share a number of common features. Most importantly, within both theories, the individual stands ontologically prior to the community. Communities are voluntary associations of individuals pursuing "convergent" ends that are themselves independent of the community and rooted in the individual's own preexisting goals and desires. (The exception in this regard is the state, and precisely because the state is not a voluntary community, it is subject to a degree of suspicion and limitation not accorded other communities.) As a result of this basic orientation, both approaches treat the good of the community as derivative of the good of individuals, and therefore as fundamentally instrumental.

Finally, when they turn to exploring the relationship between individuals and their communities, both approaches adopt what amounts to a procedural stance. Utilitarian theories of community do not associate any substantive ends with the maximization of utility. Instead, they focus on the freedom with which individuals may locate, enter and exit communities and the existence of robust competition among communities for members. Similarly, contractarians do not posit substantive accounts of the proper relationship between individuals and their community. Rather, relying on actual agreements or hypothetical bargains struck in the state of nature or some other such evaluative device, they elaborate procedural norms to adjudicate the demands that communities may make on their members and their members' property.

II. AN ARISTOTELIAN THEORY OF COMMUNITY

A. Human Flourishing/Human Capabilities

In contrast with the contractarian and utilitarian conceptions of community, the social vision underlying our understanding of the demands that communities may make on their members views membership in or belonging to communities not as adventitious, but rather as inherent in the human condition. At its root, this conception of community rests upon a thicker conception of the good human life than is embraced within the procedural accounts of community and justice that we have been describing. It builds on the Aristotelian notion that the human being is a social and political animal, not a self-sufficient one. It stresses the fact that although human

beings value and strive for autonomy, dependency and interdependency are inherent aspects of the human condition.

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. Although a full account of what we mean by human flourishing is beyond the scope of this Article, we shall argue that any adequate account of human flourishing must stress two characteristics. 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. To put the point even more directly, 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.

The second characteristic of human flourishing to be stressed is that human flourishing must include at least the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternative choices. This is what authentic, robust freedom must involve. As we will argue, these two characteristics of human flourishing are interconnected.

Before we discuss in more detail these two characteristics of human flourishing and the relationship between human flourishing and the obligations of community, two qualifications are in order. First, it is important to state at the outset that to identify our conception of community as rooted in a substantive, and broadly Aristotelian, conception of human flourishing is not to commit ourselves to the notion that there is only one way in which human beings can flourish. To the contrary, we believe that the patterns of human life consistent with the pursuit of human flourishing will be richly diverse and varied. John Finnis illustrates the point nicely:

Besides limitless diversity in . . . forms of pursuit, there is diversity in the depth, intensity and duration of commitment, in the extent to which the pursuit of a given value is given priority in shaping of one's life and character. One man's recognition of the value of truth may elicit from him the response of a lifetime of austere self-discipline and intellectual grind; another's may evoke a commitment sufficient only to enjoy the intellectual play of a good argument; another's may carry him no further than a disposition to grumble at the lying propaganda on his television set . . . This diversity results not only from the fact that truth is not the only basic value, but also from the fact that human beings (and thus whole cultures) differ in their determination,

enthusiasm, sobriety, far-sightedness, sensitivity, steadfastness, and all the other modalities of response to any value.¹⁹

The goal is to identify a framework for describing human flourishing that, as Martha Nussbaum puts it, "allows a great deal of latitude for diversity, but one that also sets up some general benchmarks" for evaluating the practices that prevail within a particular society as either conducive to or inconsistent with the achievement of the well lived life.²⁰

Second, we do not intend to insert ourselves into philosophical debates about the metaphysical foundations of human flourishing or how we come to know what it means to flourish in a distinctively human way. The account of flourishing we espouse is, we believe, broadly appealing and capable of being uncoupled, at least to a degree, from these tangled philosophical controversies. Like Nussbaum, we are confident that its normativity is recognizable from within a diverse range of conceptions of the good life, generating what Nussbaum, following Rawls, has termed an "overlapping consensus."²¹ Accordingly, for the purposes of this Article, we will not wade into the thicket surrounding questions such as whether the content of human flourishing is best understood as rooted (ultimately) in observations about human beings' essential nature or whether instead they are (ultimately) derived, as John Finnis and others have argued, from self-evident truths about what is good for human beings.²²

The account of human flourishing on which we build draws heavily on the work of Amartya Sen and Martha Nussbaum. Developed in opposition both to aggregative accounts of human well-being prominent with economic analysis and to narrowly rights-based accounts that pay little or no attention "to the substantive freedoms that people end up having,"²³ Sen's and Nussbaum's "capabilities" approach measures a person's well-being not by looking at what they have, but by looking at what they are able to do.²⁴ The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls "functionings," rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties. As Sen observes,

19 See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 85 (1980).

20 NUSSBAUM, *supra* note 7, at 50-55.

21 *Id.* at 76-77.

22 *Id.* at 76; FINNIS, *supra* note 19, at 33-42, 60-62.

23 SEN, *supra* note 6, at 66.

24 AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 10-11 (1985).

[t]he concept of "functionings," which has distinctly Aristotelian roots, reflects the various things a person may value doing or being. The valued functionings may vary from elementary ones, such as being adequately nourished and being free from avoidable disease, to very complex activities or personal states, such as being able to take part in the life of the community and having self-respect.²⁵

Social structures, including distributions of property rights and the definition of the rights that go along with the ownership of property, are to 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.

Nussbaum and Sen make an important distinction 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." As Nussbaum explains, "[a] persons's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve."²⁶ Although the actual achievement of certain functionings, such as a minimal degree of social participation, are necessary components of any plausible conception of the well-lived life, the experience of choosing from among a number of possible valuable functionings (perhaps even including the choice not to function in certain ways) is *itself* an important functioning.²⁷ Accordingly, a proper concern for human autonomy leads us to follow Nussbaum and Sen in broadening our evaluative horizons beyond mere functionings to include the capabilities that various social matrices generate for their members.²⁸

What exactly are the capabilities we regard as crucial components of human flourishing? Scholars have proposed lists of varying lengths which, despite their substantial and noteworthy overlap, leave ample room for robust debate. Nussbaum, for example, would include "having opportunities for sexual satisfaction and for choice in matters of reproduction" among the capabilities necessary for human flourishing,²⁹ whereas the ability to make such choices appears to be notably absent from John Finnis's corresponding list of basic human goods.³⁰ Finnis, on the other hand, would include "religion"

25 SEN, *supra* note 6, at 75.

26 NUSSBAUM, *supra* note 7, at 87-88.

27 *Id.*

28 SEN, *supra* note 6, at 74-76; *see also* Jedediah Purdy, *A Freedom-Promoting Approach to Property*, 72 U. CHI. L. REV. 1237, 1258-63 (2005).

29 NUSSBAUM, *supra* note 7, at 78.

30 *Compare id.*, with FINNIS, *supra* note 19, at 81-90.

as a basic human good, whereas Nussbaum leaves it off her list.³¹ While there might be ways to harmonize the various competing lists, for example by pitching particular capabilities at differing levels of generality, we will sidestep such controversies by focusing on four capabilities that we hope will be relatively uncontroversial: (1) *life*, a good we take to include subsidiary goods such as health and security; (2) *freedom*, which includes identity and self-knowledge; (3) *practical reason*, which Aristotle defined as "the capacity of deliberating well about what is good and advantageous for oneself";³² and (4) what Nussbaum calls "*affiliation*," a good that encompasses subsidiary goods such as social participation, self-respect, and friendship.

B. Dependence and Obligation

Although they may vary in any number of respects, well-lived lives will be marked by, among other things, the presence of these capabilities (life, freedom, practical reason, and sociality). The crucial point that we wish to make about these capabilities is that no individual can acquire them or secure the resources to acquire them by herself. This is because the process of human beings' physical development mandates our dependence on others for a great deal of the time during which we are cultivating the necessary capacities. 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.³³ Even upon reaching adulthood, we continue to risk at least partial physical dependence on others as we move through a dangerous world. It is often little more than dumb luck that separates the independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence looms ever larger.

But the dependence of the capabilities necessary for human flourishing on the individual's social and material context goes well beyond the physical dependence we exhibit at the beginning and end of life. Freedom, practical reason, sociality and their attendant functionings can meaningfully exist only within a vital matrix of social structures and practices. Even the most seemingly solitary and socially threatened of these capabilities, freedom, depends upon a rich social, cultural and institutional context, for the presence

31 See NUSSBAUM, *supra* note 7.

32 ARISTOTLE, NICOMACHEAN ETHICS bk. VI, ch. 5, at 152 (Library of Liberal Arts 1962).

33 See ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS 71-74 (1999).

of which the free individual must rely on others. Charles 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 cultural 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?³⁴

MacIntyre similarly discusses how we necessarily depend upon others to develop as beings capable of engaging in practical reasoning. "We become independent practical reasoners," he argues, "through participation in a set of relationships to certain particular others who are able to give us what we need."³⁵ 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, the raw material from which the capability of practical reason 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. Even (or more properly, precisely) as free, rational persons, we never cease to operate within and depend upon the matrix of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense with others with whom we are bound as members of one or typically more communities. Each of our identities is 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.³⁶

Viewed from the perspective of the capabilities we are discussing, the

34 TAYLOR, *supra* note 18, at 205.

35 MACINTYRE, *supra* note 33, at 99.

36 For an elaboration of this idea, see Gregory S. Alexander, *Dilemmas of Group*

utilitarian focus on communities as a means to satisfy preexisting preferences and the contractarian focus on the voluntary assumption of community life reflect impoverished understandings of the nature and importance of community. 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 receive little more than abuse or neglect, may come to demand little more out of life.³⁷ Similarly, while 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 that impart to us the information and capacities that give us the tools needed to permit us to understand and engage in voluntary choosing to begin with.³⁸

Beyond nurturing the individual capabilities necessary for flourishing, communities of all varieties³⁹ 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.⁴⁰ By "just social relations," we 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.⁴¹ Communities foster just relations with societies by shaping social norms, not simply individual interests.⁴²

Precisely because the capabilities we have described are essential to what it means to flourish in a distinctively human way, their development is an objective human good, something that we ought (insofar as we accept these particular capabilities as intrinsically valuable) to promote as a good in and of itself. Every person is equally entitled, as a matter of human dignity, to

Autonomy: Residential Associations and Community, 75 CORNELL L. REV. 1, 21-28 (1989).

37 See SEN, *supra* note 24, 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.").

38 See TAYLOR, *supra* note 18, at 196-98.

39 See *supra* note 1.

40 See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 1-3 *passim* (1997).

41 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).

42 Of course, this is not to say that all communities promote just social relations. There are many examples, past and present, of communities that do not. The point that we are making is that communities have the capacity to do so by virtue of their social-norm-shaping function.

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. As we have pointed out, the cultivation of the capabilities necessary for flourishing depends upon social matrices, and the condition of those matrices varies among societies, sometimes quite widely. If we are to avoid self-contradiction, we should judge a society that fosters those functionings and capabilities that are necessary for human flourishing to be better than one that is either indifferent or (even worse) hostile to their manifestation. In Part III, we will discuss how the obligation to foster these capabilities might be met. At this point, it is enough to establish that the obligation exists.

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. It might be possible, for example, to base it on some notion of long-term self-interest. The idea here is that communities that aid the person's development as an autonomous moral agent depend for their well-being on the person's helping it and that, because of her dependence on the community, the individual's own well-being likewise depends on her (and others') provision of that help. Without necessarily rejecting that argument, we prefer to base the obligation on a version of Alan Gewirth's universalizability principle.⁴³ The basic idea behind that principle is that if, as rational agents, we have rights, then in order to avoid contradicting ourselves we must acknowledge that all persons, as rational agents in the same relevant sense, have them. 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."⁴⁴ Gewirth termed a society based on this principle of universalizability (or consistency) a "community of rights," and he noted that not only does the community support the members' rights but also the members have obligations to the community.⁴⁵

Our argument is broadly similar: If an individual, as a rational moral agent, values her own flourishing, then to avoid self-contradiction, she

43 ALAN GEWIRTH, *REASON AND MORALITY* (1978).

44 *Id.* at 6.

45 *Id.* at 83.

must appreciate the value of others as well. As we 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, then rationality constrains each of us to acknowledge the right of every other human being, as a rational moral agent, to develop the same capabilities. This conclusion has certain normative consequences. Because we value the development of the capabilities of others just as we do our own, we are obligated, under certain circumstances, to foster their development. Our valuing the requisite capabilities means that we recognize that they have a special moral status and that we acknowledge that it is good that we develop them in ourselves.⁴⁶ To avoid contradicting ourselves, we must make the same normative commitment to their development in others just as we have committed ourselves to developing them in us.

If there is agreement that our physical survival, and our capacities to engage in practical reasoning, to participate in the social life of the community, and to make decisions about how to live our lives, are valuable components of the well-lived human life, as we assume there is, then there should also be agreement about the obligation to support and nurture the social structures without which these human capabilities, or goods, cannot be experienced. Moreover, if those around us have rights with respect to specific material resources in order to develop their essential capabilities, those social structures will include mechanisms for providing those people with the necessary material resources, or, at the very least, with a reasonable opportunity to acquire them.⁴⁷ If we affirm the value of these goods, and if they can only exist within particular sorts of social contexts, then it would seem irrational to deny that we are obligated to participate in and contribute to the vitality of those social structures.⁴⁸

Accordingly, viewed 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 and rationality; it cannot be solely a volitional act committed for instrumental reasons such as preference satisfaction. It is also an obligation rooted in our recognition of the objective value of the capabilities we have been discussing. In other words, acknowledgment of our human dependence upon others, on the social matrices that nurture the capacities that enable us to flourish, creates for us

46 See TAYLOR, *supra* note 18, at 194.

47 Accordingly, if they are to have much practical meaning, "general rights" accounts of property must include a commitment to social structures along the lines we are describing. See WALDRON, *supra* note 3.

48 *Id.* at 197.

a moral obligation to support these matrices. Our claim, 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.

But exactly to whom or what are individuals obligated, and for what? The answers to these questions are neither straightforward nor uncontroversial. One point that we wish to stress is that the obligation that individuals owe to others by virtue of their inherent embeddedness in and dependence upon communities cannot be limited by the notion of reciprocity, at least not in any strict, first-order sense.⁴⁹ It might be possible to express our view in terms of some kind of second-order of reciprocity, such as an entitlement to receive and an obligation to give, where the boundaries of both the obligation and entitlement are based on the same standard: need. Such a standard of obligation, however, will frequently and justifiably demand disproportionate sacrifice from those who have more, along a number of different axes, for the (disproportionate) benefit of those who have less.

Moreover, in practice, those to whom we are required to give will often not be the same as those from whom we have received. There is no way of predicting in advance who are the persons to whom we shall be required to give. It might be our parents, but it might be strangers from whom we have received nothing. Even if they are the same, what we are obligated to give is often not the same as what we received, and often the amounts will differ, sometimes very considerably. As members of flourishing social networks, we understand that what we give we must 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.⁵⁰ 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 first-order, quid pro quo schedule. Indeed, such self-interested calculation will undermine the very solidarity on which the social matrix depends.⁵¹ We owe and we pay because we have been, and continue to be dependent, and because we are members.⁵²

49 See MACINTYRE, *supra* note 33, at 100.

50 *Id.* at 108.

51 See Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE* 159, 165-72 (Nancy L. Rosenblum ed., 1989) (discussing the need for patriotism, or something like it, if free societies are to be sustainable).

52 It may be useful here to distinguish between perfect and imperfect obligations. A perfect obligation is one that is owed to specific individuals, whereas imperfect obligations are not owed to anyone in particular. We contemplate that the obligation to contribute to fostering the development of the capabilities is general, not specific.

Our essential obligations, then, are to belong, to participate, and to contribute.⁵³ Our inherent dependence upon community to enable us to become independent rational beings commits us to belonging to and to participating in communities. Many different kinds of communities foster essential human capacities; none is entitled to a monopoly on our attention and efforts. The important point, however, is that we cannot be indifferent to the character of our communities, our society, or indeed our culture as a whole. As Taylor puts it:

[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.⁵⁴

It might be objected that to the extent that our theory requires that individuals sometimes sacrifice their preferences for the sake of maintaining the conditions in which the capabilities necessary for human flourishing develop, it dangerously exposes individuals to the risk of effacement.⁵⁵ This is not, however, a reason to be suspicious of demands for sacrifice or of the notion that sacrifice may be a virtue. Instead, it is a reminder that we must be on the alert for situations in which the same individuals or communities are compelled to sacrifice, time and again, suggesting that they are being singled out because of their membership in a particularly disadvantaged or vulnerable (sub)group. A community that evinces a proper respect for all of the dimensions of human flourishing that we have discussed would repudiate such a state of affairs, preventing a legitimate demand of sacrifice from becoming exploitation and the loss of self.

Specifically, the aspects of flourishing we have in mind are freedom and

It may be satisfied by contributions to the community or the state. It is because the obligations are usually general that the state has such an important role to play in coordinating their fulfillment.

There may be circumstances in which the obligation requires contributions of specific assets or to specific individuals. The presence of such circumstances helps to explain the results in the cases that we discuss in Part III, *State v. Shack* and *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd*. We owe this point to Steve Munzer.

53 See TAYLOR, *supra* note 18, at 198.

54 *Id.* at 207.

55 Hanoch Dagan, Re-Imagining Takings (May 23, 2007) (unpublished manuscript), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=990946.

practical reason. Respect for the role of freedom in the well-lived human life operates to prevent the community from subjugating the individual to communal ends to such a degree that the individual's separate existence becomes meaningless. As our previous discussion emphasized, membership in and sacrifice for the preservation of various social matrices is justified by the need to develop those human capacities that are essential to the very ideal of moral autonomy that underlies the concern with effacement of the self. In our view, far from undermining personal autonomy, communities (and the sacrifices that maintain communities) are necessary for it to exist. The other dimension of flourishing that works against self-effacement is practical reason. The obligation to foster the capability of practical reason condemns situations in which the self is so distorted by oppression that she voluntarily assumes the servile role of serial self-sacrificer, placing in jeopardy the well-being not only of herself but also possibly of others, such as dependent family members.⁵⁶ A commitment to the capacity to deliberate well about what is good and advantageous for oneself, Aristotle's definition of practical reason, obligates us to avoid placing ourselves or others in such situations.

III. WHAT CAN THE STATE LEGITIMATELY DEMAND OF THE INDIVIDUAL?

Just because human flourishing depends upon social matrices, it does not follow that *the state* may properly make demands upon us to foster the development of the capabilities in others. In early societies human beings' needs for their proper development were met by local, or face-to-face communities. This continues to be the case today.

It is important to recognize that the state itself is a community. But it bears emphasizing that the state is just one community among many, one that, in light of its considerable coercive power, if allowed to expand without limit, risks undermining human flourishing by arrogating to itself powers and functions that have the effect of weakening or supplanting other dimensions of the social matrices essential to the development of the human capabilities we have been discussing. Clearly, then, there is no a priori connection between the social dependence we have been describing and the need for, or permissibility of, direct state action in support of human capabilities. We

56 For such a scenario, see Jean Hampton, *Selflessness and the Loss of Self*, in *ALTRUISM* 135, 135-36 (Ellen Paul Frankel et al. eds., 1993).

certainly cannot rule out, for example, the possibility that there may once have been a time or a place where the bonds of affection and reciprocity between members of a tightly knit community were sufficient to ensure that each person's entitlement to the resources and relationships necessary to develop the capabilities requisite for human flourishing was met without the coercive intervention of any state.

At least within the modern capitalist economy, however, a strong case can be made that guaranteeing to individuals the necessary access to many of the material and social prerequisites for the capabilities we are describing is beyond the abilities of private, voluntary communities, considered either individually or in cooperation with one another. Although a full argument to this effect is beyond the scope of this Article, it seems beyond dispute that, at least since the rise of modern capitalism, the uncoerced actions of private entities have never been sufficient to supply all members of society with access to all of the resources necessary for them to have the opportunity to develop the capabilities necessary for human flourishing.⁵⁷

If that is the case, what are the implications for the demands the state is entitled to make on the property of its citizens? Like all animals, human beings need access to the resources necessary for physical survival. As even some of the most stringent of property rights libertarians have acknowledged, the extreme need of some in the community trumps the property rights other people hold over their surplus resources.⁵⁸ In essence, acknowledging this right to resources necessary for physical survival constitutes an acknowledgment of the existence of an entitlement to the assistance of others under certain circumstances, and, given the difficulty of ensuring compliance with such obligations in the modern, depersonalized economy, to the assistance of the state, through directly redistributive measures, in obtaining survival resources or in fending off attempts by private owners to prevent those in need from taking them. From the point of view of the obligation to foster human flourishing, the state's qualification of individual property rights in order to protect the lives of individual community members

57 See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191 (1962) ("In small communities, public pressure can suffice [to meet the needs of the poor] even with private charity. In the large impersonal communities that are increasingly coming to dominate our society, it is much more difficult for it to do so.").

58 See RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM* 98-100 (2003). *But see* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 238 (1974) ("Even to exercise his right to determine how something he owns is to be used may require other means he must acquire a right to, for example, food to keep him alive; he must put together, with the cooperation of others, a feasible package.").

makes perfect sense.⁵⁹ Similar arguments, founded in the protection of human health or the health of future generations, can justify the state's demand that individuals use their property in ways that do not permanently harm the environment.

In addition, the long period of intellectual and moral training necessary to function as practically rational beings within modern capitalist societies points in the direction of some minimal provision for the well-being and education of the young, irrespective of the wisdom, diligence, or luck of their parents. Almost by definition, such an entitlement will demand that the state implement a degree of economic redistribution and regulation, either in cash or in kind. Those whose parents do not wish to educate their offspring must be compelled to do so, at least to a point, and those who cannot afford education must have that education provided to them at the expense of others. Moreover, this redistributive educational process arguably entails ensuring that the parents of such children have the economic resources necessary to provide a suitable environment in which the educational effort can take root.

Finally, some exclusive control over resources is necessary in order to facilitate the capability of sociality.⁶⁰ As many analysts, ranging from Adam Smith to Amartya Sen, have pointed out, the precise content and quantity of the property necessary for a viable social life will vary, both between different societies and within the same society over time.⁶¹ Nevertheless, because human beings experience sociability as an imperative and not as a choice, all societies must struggle with the challenge of providing adequate opportunities for individuals to obtain the things they need in order to function as social beings without at the same time undermining the necessary incentives for productive activity. In the context of a modern post-industrial society like our own, this observation points in the direction of a human right to a social safety net that guarantees a substantial basket of resources. However the details are conceived, attention to human beings' social needs pushes strongly in the direction of a state obligation to take steps to provide substantial and realistic opportunities for people to obtain the property required for them to

59 See THOMAS AQUINAS, *SUMMA THEOLOGIAE*, IIa, IIae, Q. 66, a.7 (Blackfriars trans., 1948); FINNIS, *supra* note 19, at 191-92.

60 See Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

61 See AMARTYA SEN, *RESOURCES, VALUES, AND DEVELOPMENT* 324-45 (1984); ADAM SMITH, *THE WEALTH OF NATIONS* bk. V, ch. ii, pt. 2 (Everyman ed. 1991) (1776); see also JAMES RYAN, *A LIVING WAGE* 126-27 (1912).

be able to participate at some minimally acceptable level in the social life of the community.

In short, 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 surplus resources, in order to enhance the abilities of others to flourish, then it follows that, in the predictable absence of adequate voluntary transfers, the state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities. 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 sociality, among others.

For instance, the substantive good of human freedom limits the intrusions that the state ought to be permitted to make into the sphere of private decision-making. Similarly, the material necessities of life are, it has been amply demonstrated, more likely to be provided in a relatively free market than in one subject to pervasive central planning.⁶² Finally, the capability of human sociality, although it may require a degree of state support, will be impaired by an all-encompassing state that acts arbitrarily or crowds out civil society, as typically occurs within totalitarian states.

The appropriate boundaries of state action are the stuff of endless argument. We do not pretend to provide definitive answers; we simply observe that the same principles that generate demands for the infrastructure of human flourishing, that call upon the state to foster human capabilities, also provide a basis for resisting the totalizing claims and for limiting the demands the state can properly make upon individuals and subsidiary communities. Two principles are particularly worth mentioning. First, the principle of subsidiarity — the 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

62 In other words, costs that result from redistribution (e.g., reduced productivity due to high marginal taxes or demoralization) will be relevant to the specification of the state's obligations in this regard. But it is important to understand that those costs are subservient to the more fundamental goal of human flourishing. And it may be that the goal of attaining a society in which human flourishing is more fully realized justifies some tradeoffs in economic efficiency and productivity.

solutions are demonstrably not up to the task. Second, prohibiting arbitrary state action protects individual dignity, by requiring the state to explain its actions on the basis of generally applicable principles.⁶³

To summarize, then, the dependence of human capabilities on community and on the material resources of the community create obligations, the satisfaction of which is not strictly a matter of reciprocity with respect to any particular person or even the community. Because the efforts of private, voluntary communities are not sufficient to satisfy these obligations, the state has a vital, although not unbounded, role to play alongside private communities in fostering the requisite human capabilities. The role of the state, however, is restrained by the very same concerns for human flourishing that justify the legitimate demands it may make on citizens and their property.

IV. THE COMMITMENT TO FLOURISHING IN ACTION: TWO CASES

In this Part we discuss two cases to illustrate our theory and to make it more concrete. One is a decision known to virtually every American who teaches property law and to many non-Americans as well. The other is perhaps less well-known, but is equally compelling, if not more so. It involves a dispute under the property clause of South Africa's Constitution.

A. *State v. Shack*

The well-known case of *State v. Shack*⁶⁴ illustrates how the reallocation of property rights to members of small and vulnerable communities help nurture multiple capabilities. In *Shack* 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 there was no trespass, no breach of the right to exclude. The court said that title to land cannot include dominion over people whom the owner allows on the land, in this case the farmworkers. The owner's property right is not absolute and must be accommodated with the interests of others. As the court pointed out, migrant farm workers are

63 FINNIS, *supra* note 19, at 270 (discussing the rule of law).

64 277 A.2d 369 (N.J. 1971).

a rootless and isolated community, often unaware of the opportunities that exist for them to meet their medical, legal and other needs. As a community they 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. The court's decision to provide the farm workers with the right of access in *Shack* would be difficult to assess on utilitarian grounds. On the one hand, a utilitarian might argue that aggregate utility is enhanced by forcing the farmer to permit the farmworkers to receive guests on his land. The actual burden on the farmer is trivial compared to the benefits received by the farmworkers. On the other hand, if utility is measured by the unmodified willingness-to-pay metric favored by many law-and-economics analysts, it seems extremely unlikely that the result of the case is a net gain. The farm owner would almost certainly have been willing to pay more for the right to exclude healthcare and legal services providers than migrant farm workers would be willing to pay for the right to receive them as visitors. Moreover, even if wealth (or utility or welfare) might be enhanced by granting the farmworkers a limited right to control access to the farm, it is not clear that those gains are not outweighed by the long-run costs of qualifying an unambiguous right to exclude.⁶⁵ The plausibility of the utilitarian arguments on both sides of the *Shack* outcome, and the technical difficulty (impossibility?) of adjudicating between them (on utilitarian grounds), highlights a fundamental problem with utilitarian theory.⁶⁶

But even setting to the side the question of its indeterminacy, utilitarian theory struggles in at least two other ways to make sense of the court's decision in *Shack*. First, while most contemporary utilitarian theorists treat the satisfaction of preferences as the ultimate goal of social choice, the *Shack* court declines to consider preferences in reaching its decision. Indeed, it suggests that the farmworkers' preferences for some other good, such as more pay, would not provide a reason for permitting them to trade away their right to determine whether to receive visitors on the farmer's land.⁶⁷ The

65 See Richard A. Epstein, *How to Create — Or Destroy — Wealth in Real Property*, 58 ALA. L. REV. 741, 751 (2007).

66 See J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM, FOR & AGAINST* 137 (1973).

67 277 A.2d at 372 ("[T]he needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.").

court's analysis of the objective requirements of human "dignity" (by which it appears to mean something very close to the notion of flourishing we have been describing) is inconsistent with utilitarianism's moral subjectivism.⁶⁸ Second, and relatedly, utilitarian theory's need to reduce every human good to a single unit of value makes it extremely difficult for that theory to do justice to the multivalent nature of the conception of human flourishing that underlies the *Shack* court's rejection of trade-offs between, say, wages and the right to socialize. For the utilitarian, everything is, ultimately, substitutable with everything else. The problem is simply in determining the rate of exchange. Thus, for the utilitarian, the *Shack* court's decision to require that the farmworkers enjoy a right to control access (in other words, its use of an "inalienability rule" remedy) could unproblematically be replaced with, for example, an award of adequate monetary relief to the injured farmworkers.⁶⁹ But the concept of human flourishing resists such reductive exchanges.⁷⁰ If a human being requires practical reason, sociability, and material resources to flourish, a deficiency in, say, practical reason cannot be offset by increasing the amount of money at his disposal. From the standpoint of the approach we are advocating, then, the *Shack* court's insistence on an *in-kind* reallocation of exclusion rights from the farmer to the farmworkers makes perfect sense.

The decision in *Shack* is even more clearly incompatible with classical liberal contractarianism. The farm owner did not consent to allow *Shack* and his colleague to enter his farm. Nor is there a plausible way in which the farmer would receive any benefit from allowing them onto his land. Indeed, the court's decision to require the farmer to permit the farmworkers to receive guests on his land seems to transfer certain property rights from the farmer to the farmworkers, a transfer for which the farmer is uncompensated.

The decision is not difficult to justify on the basis of our theory, however. Providing the farm workers with access to information about basic legal and healthcare services addresses at least three of the capabilities that we have identified as necessary for the well-lived life — freedom, practical reasoning and affiliation. The property right promotes freedom in both a positive and a negative sense. In a positive sense, members of the community now have the right to be visited by certain people in the only place where it is

68 *See id.*

69 When utilitarians have favored the creation of inalienability rules, they have grounded them in the subjective moral sensitivities of observers, not in the objective conceptions of moral worth at work within the *Shack* court's opinion. *See, e.g.,* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112-13 (1972).

70 *See* NUSSBAUM, *supra* note 7, at 62.

feasible to meet in conditions of privacy and respect, i.e., where they live. Concomitantly, the same property right serves freedom in the negative sense that the farm workers are free to reject that affiliation if they so choose. The property right they gain as a result of the court's decision does not compel them to receive legal service providers or anyone else. It simply puts them in the same position as the farm owner vis-à-vis certain visitors.

The decision also promotes practical reasoning. The legal service providers were visiting the farm workers to inform them about their legal rights. Practical reasoning, at least as Aristotle understood it, is concerned with action. It involves critical reflection about how we plan our lives.⁷¹ As practical reasoners, we deliberate about how we ought to act, given a set of available alternatives. The property right allocated to the farm workers in *Shack* directly promotes this capability. Information is a necessary condition for practical reasoning. Specifically, deliberation about our plans of action requires a reasonable amount of information about the range of available alternatives. That information includes basic knowledge about one's legal rights as they bear on a wide range of activities but especially one's work. But exactly that sort of information is unlikely to be available, at least not very meaningfully, to individuals in situations of social isolation, as were the migrant farmworkers in *Shack*. As the court recognized, "[s]ince the migrant workers are outside the mainstream of the communities in which they are housed and are unaware of their rights and opportunities and of the services available to them, they can be reached only by positive efforts tailored to that end."⁷²

In addition to their isolation, migrant farmworkers are, characteristically, uneducated, poor, politically powerless (especially at the time of the *Shack* decision), and without access to legal services or ordinary sources of information about legal rights. As a practical matter, without the services of the sort provided them by the defendants in *Shack*, migrant farmworkers simply would not be in a position to deliberate about the exercise or non-exercise of any of their legal rights. Their practical reasoning about these important questions would be substantially impaired in the absence of an entitlement to receive the information provided by the defendants. Requiring the owner-employee to grant them access strengthened the farmworkers' community and promoted their well-being.

Affiliation was involved in *Shack* at both immediate and deeper levels. At an immediate level the decision promoted affiliation by ensuring that

71 See *id.*

72 277 A.2d at 372-73.

otherwise isolated farmworkers could receive in their homes (or the closest place that they had for a home) visitors of their own choosing.⁷³ In its simplest form affiliation means sociability, the capacity to interact well with others. The property right recognized in *Shack* directly promotes that capacity. The farm was their home, and the home is one of the primary venues in which socialization occurs.

At a deeper level, 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."⁷⁴ It 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. In the context of *Shack*, the entitlement to receive visitors who provide vital services nurtured the ability of the community of migrant farmworkers to teach these values of respect and equal dignity. The service providers themselves served as role models, neutralizing the example of the owner-employer, whose behavior conveyed anything but a message of respect, equal dignity and just social relations.

Nor did the court's decision in *Shack* unduly intrude on the farmer's own flourishing. The asymmetric relationship between the farmworkers, the farmer and the farm itself mean that, from the standpoint of human flourishing, the case did not present a zero-sum game. Enhancing the freedom, practical reasoning and affiliation of the farmworkers did not necessitate a concomitant reduction in the farmers' enjoyment of those same goods. The farmer did not depend upon his right to exclude the defendants in order to develop his own capacity for practical reason. Accordingly, depriving him of the right to exclude did not do violence to his pursuit of that capability even though it substantially enhanced the ability of the farmworkers to do the same. In addition, the entry of the defendants onto his farmland does not really force an unwanted substantive relationship on the farmer in a way that does serious violence to the farmer's interest in affiliation. The nature of the land on which the landowners resided, and the farmer's relationship to it (as employer and landlord), meant that the defendants' presence on the land had virtually no impact on the farmer's personal affiliations apart from any (illegitimate) interest he had in keeping

73 *Id.* at 374 ("[T]he migrant worker must be allowed to receive visitors there of his own choice . . .").

74 NUSSBAUM, *supra* note 7, at 79.

his workers isolated and vulnerable.⁷⁵ Finally, the court's decision respected the farmer's freedom. After all, as the court implicitly recognized, even after its decision, the farmer retained a substantial degree of freedom with respect to the entry of strangers onto his land. If the farmer placed an overriding value on his privacy, he was free to protect it by not housing farmworkers on his land.

As the foregoing makes clear, the conception of human flourishing on which our discussion depends is an objective one. That is, unlike many adherents of the utilitarian/economic account of community, who take human beings' preferences as they find them, we believe those preferences are susceptible to objective evaluation according to the degree to which they foster the flourishing, both of their possessor and of others. For example, no matter how powerful the farmer's desire to exclude the *Shack* defendants, thereby isolating his workers, we do not view the Court's decision overriding that desire as in any way harming the farmer or injuring his *legitimate* interests in controlling access to his property. This is because any desire the farmer had to isolate his workers was, objectively, inappropriate insofar as it was inconsistent with those workers' entitlements to the social interactions necessary to flourish. Indeed, far from harming the farmer, by requiring the farmer to conform his behavior to his moral obligations, the law affirmatively helped him to find the path towards an objectively better way to use his land.

To summarize, the New Jersey Supreme Court's decision in *State v. Shack* is difficult to reconcile with classical liberal conceptions of property rights as well as with the utilitarian methodology favored by law and economics. The decision makes good sense, however, from the perspective of an account of human flourishing that focuses on the capabilities of freedom, practical reason, and affiliation. And, finally, this is true even if we consider the situation from the point of view of the farmer's own interest in developing those capabilities.

B. *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*

The South African Constitution is replete with provisions that express the commitment of the state to take an active role in fostering the ability

⁷⁵ It is easy to see how different categories of land might yield different conclusions on this score. Had the defendants, for example, been seeking access to the farmer's *home*, the intrusion on his own capability to control his affiliations would have been much greater.

of South Africans to flourish. These provisions balance the validity of state action that is necessary to ensure access to the resources needed for flourishing with a protection of the subsidiary institutions, including private property, that reflect the dignity of the individual and the limited nature of the state's proper domain. The Constitution's property clause, for example, begins by affirming that "[n]o one may be deprived of property except in terms of laws of general application, and no law may permit arbitrary deprivation of property."⁷⁶ But the very same clause also incorporates an explicit commitment to land reform and racial justice. It declares that "[t]he 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." 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." The result is a constitution that affirms both the importance of state action to promote access to the resources necessary for human flourishing and the limits on state action imposed by individual dignity.

The success of South Africa's attempt to realize its verbal commitment to creating an "open and democratic society based on human dignity, equality and freedom"⁷⁷ depends heavily on its ability to cope with its enormous housing problem. South Africa is today a country where landlessness and homelessness are common among non-whites and where literally millions of blacks live in the desperate poverty of informal "housing settlements" (i.e., squatter settlements). Without access to land and to minimally decent legal housing, the ability of a member of South Africa's black majority to flourish will be severely compromised. There is evidence that the South African courts have risen to the occasion. No case better illustrates this than the widely-noted decisions of the Supreme Court of Appeal and the Constitutional Court in the case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*⁷⁸

The dispute was sparked when 400 residents of an informal settlement in Johannesburg moved onto land that they mistakenly thought was owned by the city. In fact, the land was privately owned by Modderklip Farm. Within six months, the new settlement had exploded to comprise 18,000 people living in 4,000 shacks. The owner sought to evict the occupants, relying on the Prevention of Illegal Eviction and Unlawful Occupation of Land

76 S. AFR. CONST. 1996 § 25.

77 *Id.* § 36(1).

78 2004 (8) BCLR 821 (SCA), *aff'd on other grounds*, 2005 (5) SA 3 (CC).

(PIE) Act. The lower court granted an eviction order, but the occupants failed to vacate. In the meantime, the Modder East settlement had grown to 40,000 inhabitants.⁷⁹ An execution writ was issued, and the sheriff was ordered to execute it. She insisted on a large payment⁸⁰ 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, probably 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 of South Africa referred the matter to the Department of Land Affairs, which referred the matter to the Department of Housing, which did not respond. 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 (the enforcement order).

The Supreme Court of Appeal framed the legal problem as an apparent conflict between two duties of the state, both of which were embodied in the South African Constitution: its duty to protect Modderklip's ownership rights and its duty to provide the squatters with access to housing.⁸¹ In the Court's view, the state had failed to carry out either of these duties. The legal 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 fulfill the rights in the Bill of Rights." In the Court's view, by failing to provide the squatters with adequate housing in accordance with section 26, the state had created a situation in which those squatters were justified in taking circumstances into their own hands, thereby failing to protect the owner's section 25 property right. 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 individual⁸²

79 The settlement had just one water tap, and the only sanitation facilities were rudimentary pit toilets.

80 R1.8 million (then worth approximately \$275,000).

81 See *Modderklip*, 2004 (8) BCLR at 841.

82 *Id.* at 834.

In an important way, the Court suggested, protection of the property-owner's rights depended upon the state's provision of adequate resources to the poorest of its citizens. Failure to protect one right, in other words, meant failure to protect the other.

On appeal, the Constitutional Court acknowledged that the eviction order was correct and that Modderklip was entitled to that order. But the Court conditioned that right on the state's 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 eviction could proceed (unless, of course, the state elected to purchase or expropriate the land). 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 awarded by the Supreme Court of Appeal.

Both the Supreme Court of Appeal and the Constitutional Court focused on the state's obligations, but the decisions implicated 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, Modderklip's constitutional property right will be protected through a liability rule rather than a property rule, i.e., through damages rather than through eviction.

This qualification of Modderklip's property rights is no trivial matter. It has been forced 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 payment of some compensation to Modderklip. The courts' unwillingness to ratify Modderklip's desire to remove the squatters from its land illustrates the courts' willingness to take seriously the obligations of owners, not only as they concern owners' direct relationship with the state but also in relation to the needs of other citizens.

This compelled sacrifice cannot be squared with classical liberal principles. It was not voluntarily undertaken, and it 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 the forced transfer of property can be justified on utilitarian grounds,⁸³ the utilitarian calculus seems indeterminate with respect to two

83 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

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 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 our theory of community and obligation.

Squatters' access to land for housing is surely a component of the minimal material conditions for human flourishing, by almost any measure. The capabilities of life and freedom, for example, are virtually meaningless if someone does not have a place in which they have a legally-recognized entitlement of residence.⁸⁴ The state therefore has 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 it is undertaken non-arbitrarily and in a manner consistent with principles of subsidiarity.

Modderklip illustrates another aspect of our theory. The post-Legal Realist conventional wisdom regarding the concept of ownership is to emphasize ownership as a relationship among persons with respect to things and to disparage the person-property link.⁸⁵ Our theory, although not repudiating the

the value they place on a piece of property. As one of us has argued elsewhere, however, it is not impossible to justify forced transfers of property on utilitarian grounds when there is reason to believe that the maldistribution of wealth has impeded the ability of parties to express their preferences through voluntary market transactions. See Peñalver & Katyal, *supra* note 60, at 1145-52. But the law is usually careful to restrict exceptions to the rule favoring voluntary transactions in order to increase society's 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 to squatting, in part as a means of identifying 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 the negative economic effects of adverse possession to owners who do not place a high value on the land being possessed. In this case, there is 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, there is no reason to think that he valued the land any less.

84 See, e.g., Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

85 On the Realist conception and criticisms of it, see JOSEPH WILLIAM SINGER,

relational insight behind the Realist conception, also acknowledges the special relationship that can exist between persons and property. Thus, in *Modderklip*, by the time the case reached the courts, the squatters were already strongly attached to the land they occupied. It had, quite literally, become their home. True, the same land was also Modderklip's farm, but it was not its dwelling place, just as the land on which the migrant workers in *State v. Shack* lived was not the owner-employer's dwelling place. The character of the particular land the squatters occupied as nonfungible (to them) explains why from the perspective of our theory, monetary redistribution (through the tax system or some other form of transfer payment) would not have provided a satisfactory alternative solution. The squatters' capabilities of freedom and affiliation could not be adequately nurtured through some monetary substitute for that land. The state could fulfill its obligation to nurture those capabilities best by honoring the nonfungible role the land they had made their home had come to play in their lives.⁸⁶

It is important to note that the state's obligations are not unlimited. An unlimited and immediate obligation to provide housing to South Africa's entire homeless population might well bankrupt the state or prevent it from meeting other, equally fundamental obligations, a result that would do little to promote the interest in human flourishing underlying South Africa's constitutionally entrenched commitment to a legal right to housing.

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

ENTITLEMENT: THE PARADOXES OF PROPERTY 9-13 (2000); Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517 (2003); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996); J.L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994).

86 Although the notion of nonfungibility as we are using it bears a superficial resemblance to that concept as discussed by Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), we mean something substantially different. Whereas Radin uses nonfungibility to refer to the strength of the subjective attachment an individual exhibits towards a particular item of property, our focus is on the role the property plays within an individual's pursuit of an objective account of human flourishing. Of course, as a behavioral matter, these two senses of nonfungibility will overlap to a certain extent. Moreover, Radin subsequently modifies her commitment to individuals' subjective attachments by introducing the notion of flourishing as a limitation on the sorts of subjective bonds society should honor. It is clear, however, that, for her, subjective attachment remains the essence (and sine qua non) of nonfungibility whereas, for us, attachment is, if anything, merely a *consequence* of nonfungibility.

opportunity to obtain the resources they need to flourish. However, just like the state's obligation, Modderklip's obligation is not unlimited. After all, it is an obligation that falls on all property owners, and therefore should not be imposed on just one property owner.

As in *Shack*, the various opinions in *Modderklip* walk a careful path between the respective obligations of the state and of Modderklip, as well as the entitlements of both Modderklip and the squatters. They prohibit the squatters from being thrown back into landlessness, but they also help spread the costs of that decision by ordering the state to compensate Modderklip for the loss of its land. They hold out the possibility that the landowner will recover its land at some future point, but they also invite 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.