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RESPONSE

VIRTUE AND RIGHTS IN AMERICAN PROPERTY LAW

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INTRODUCTION: ON VIRTUE AND FRYING PANS

In Plato's *Republic*, Socrates persuades his conversationalists to help him construct a city organized around commerce. Glaucon, who has an idealist streak, dismisses this city as a "city of pigs."¹ In response, Socrates sketches for Glaucon an ideal city ruled by the most virtuous citizens—the philosophers.² To make the city as just and harmonious as possible, the philosophers abolish the institution of private property. They require the auxiliary citizens to use external assets only in cooperation, to contribute to common civic projects.³

This conversational thread presents a tension that is simply unsolvable in practical politics in any permanent way. Politics focuses to an important extent on low and uncontroversial ends, most of which are associated with comfortable self-preservation. "Property" is the most powerful legal metaphor for these ends. But if politics is *only* about property, it seems materialistic, lacking a proper respect for the peaks of human excellence. "Justice" may be understood to strive for such peaks; "virtues" by definition aim for them. Yet a politics of vir-

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¹ PLATO, THE REPUBLIC 372d4–5 [hereinafter REPUBLIC]; PLATO, THE REPUBLIC OF PLATO 49 (Allan Bloom trans., 2d ed. 1991) [hereinafter REPUBLIC (Bloom trans.)]. Bloom translates the Greek term *hyón* as "sows"; "pigs" is a more common translation. For Socrates' sketch of the city of comfortable preservation, see REPUBLIC, *supra*, at 369b5–372d2; REPUBLIC (Bloom trans.), *supra* at 46–49.

² See REPUBLIC, *supra* note 1, at 428e2–429a4; REPUBLIC (Bloom trans.), *supra* note 1, at 107.

³ See REPUBLIC, *supra* note 1, at 464b8–465e2; REPUBLIC (Bloom trans.), *supra* note 1, at 143–45.

tue and justice can easily devour property. In its commonsensical understanding, after all, property consists of dominion—a domain of freedom to decide how to apply the object of ownership to his own life plans, independent of direction from philosopher-kings or anyone else. When property is an owner's right to use his own as a philosopher thinks most likely to bring out his excellence, it is not property anymore. The contrast between the city of pigs and the city of justice forces readers to choose between comfortable self-preservation and virtue. At a more primal level, it also forces everyone—that is, anyone who is not a philosopher-king—to choose between an attachment to perfect justice and a selfish desire to enjoy his own without being governed by anyone else. Most theories of politics muddle between these two extremes.

This conversational thread leapt to my mind when I first read the lead articles in this Issue. The implications raised by this thread present some of the most fundamental issues in political philosophy and modernity. Legal scholarship operates far more often down among the trees than over such vast forests, and I am grateful to Professors Gregory Alexander and Eduardo Peñalver for opening legal scholarship up to these themes.

The Social-Obligation Norm in American Property Law (“*The Social-Obligation Norm*,” for short, by Alexander)⁴ and *Land Virtues*⁵ (by Peñalver) also deserve a considerable amount of praise. Both introduce to property scholarship a general approach to practical philosophy I find quite sensible, even if Alexander and Peñalver apply that school differently from the manner in which I do. Both use that approach to push back against economic analysis of property, for reasons that I may not necessarily endorse but with which I sympathize. In the process, however, *The Social-Obligation Norm* and *Land Virtues* may encourage lawyers and scholars to leap out of an economic frying pan into a political-philosophy fire.

Let me restate my reactions more systematically. First, to an extent, *The Social-Obligation Norm* and *Land Virtues* both suggest to some extent that one family of philosophical theories can explain descriptively and justify normatively features of American property law that economic analysis cannot explain as effectively. I avoid these economic comparisons as much as I can in this Response.

Instead, I focus on the prior question whether the philosophical theories discussed in *The Social-Obligation Norm* and *Land Virtues* make significant contributions to legal philosophy. They do. Both articles mine virtue ethics for their proverbial pay dirt in American property

⁴ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

⁵ Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

law. The genus of “virtue ethics” theories belongs to a family of approaches to practical philosophy I will call here “virtue-friendly” theories of practical action. As used here, “virtue-friendly” theories refer to a broad range of theories of practical philosophy that all place high priority on virtue and on happiness, which in turn is understood as a reflective state of character that disposes an actor to deploy his reason, to regulate his passions, in pursuit of the most meaningful sources of satisfaction possible. This family includes the practical theory of Aristotle, many natural-law theories from the medieval and early Enlightenment periods, and contemporary virtue ethics.

Virtue-friendly theories start from a wide range of metaethical starting assumptions, and they differ about how happiness, reason, passions, conscience, and virtues all relate to one another. Even so, virtue-friendly theories have important commonalities, and they have not received the attention they deserve in property scholarship. Virtue-friendly philosophical theories informed Anglo-American and Continental law in their formative years. Equally important, such theories also anticipate and finesse important criticisms associated particularly with contemporary Kantian deontological practical philosophy. *The Social-Obligation Norm* and *Land Virtues* both belong in this loose family of virtue-friendly theories, and both illustrate how virtue-friendly theories avoid one of the biggest problems associated with Kantian philosophy. Both articles therefore significantly advance practical philosophy in law.

Finally, *The Social-Obligation Norm* and *Land Virtues* are even more original because they put front and center a question that follows straightforwardly from the thread of *The Republic* with which I began: Does a theory of virtue require a system of political rights and private law organized around virtue, or can a theory of virtue be reconciled with a politics and private law of rights? This question has been surprisingly neglected—not only in American private-law scholarship but also in virtue ethics scholarship. Although *The Social-Obligation Norm* and *Land Virtues* take no final position on the tension between virtue and rights, both seem fairly optimistic that theories of virtue can justify legal regimes organized around the pursuit of virtue.

I think the legal system does have, and may tolerate, a little virtue-centric regulation. Yet, there are also important reasons to be pessimistic that a legal system can remain humane while promoting actively “virtue” or some of the virtues. The concept of “virtue” establishes a hierarchy for practical action. Any theory that places high operational priority on virtue has a built-in tendency to encourage actors to prefer the highest and most demanding virtues over common-denominator virtues. That tendency is fairly innocuous in ethics, where individual actors can decide for themselves how willing

or able they are to perfect themselves. The same tendency, however, challenges law and politics to their foundations. In those domains, competing religious, ethnic, or partisan factions find it hard to resist the temptation to use virtue theory as an ideological tool, to establish hegemony over rival factions in their local communities.

This problem led early Enlightenment theorists to try to banish "virtue" as a dominant category in political theory. "Property" is a dominant theme in American law and politics because it serves as a metaphor for liberalism—a political regime organized around rights, to keep off-limits from the government the power to compel citizens to follow any one contestable theory of virtue. Now, rights-based political theory does not totally banish virtue. But liberal political orders deal with virtue regulation *very* carefully. When such orders promote virtues, they promote the least controversial and most encompassing virtues: patriotism, civility, sexual restraint, or industry. Moreover, when they promote such virtues, liberal political orders generally refrain from promoting virtue for virtue's sake; instead, they claim that citizens' rights cannot be secure unless citizens are virtuous enough to respect one another's rights freely.

Although I am enthusiastic about many aspects of *The Social-Obligation Norm* and *Land Virtues*, it gives me great pause that both articles tout virtue theories so enthusiastically without considering this historical and political context. By promoting virtue theories so unabashedly in the details of property law, *The Social-Obligation Norm* and *Land Virtues* threaten the role that "property" plays as a political metaphor in liberal political orders. Of course, many of the specific prescriptions of *The Social-Obligation Norm* and *Land Virtues* do not reopen the problems that led to the Enlightenment. But a few do. In any case, readers who are interested in *The Social-Obligation Norm* and *Land Virtues* (as they should be) should pause to consider why virtue theory might apply straightforwardly in ethics but then backfire in property law.

I

VIRTUE ETHICS AND THE DEONTOLOGY TRAP

A. Law, Philosophy, and Social Science

Because the issues I am raising seem pretty far afield from the main intentions of *The Social-Obligation Norm* and *Land Virtues*, let me start from Alexander and Peñalver's point of departure and work outward. In property as elsewhere in private law, scholarship is influenced by a rivalry between social-science and humanistic approaches

to scholarship. In its most pointed form, as Alexander⁶ and Peñalver⁷ both recognize, this rivalry takes the form of a contest between economics and philosophy.⁸ I assume it is not controversial to say that most scholars regard economics as having contributed more to our understanding of property than philosophy. Fairly commonly, scholars claim that economic analysis now “reign[s] unchallenged as the predominant theoretical mode of analysis in private law scholarship and pedagogy.”⁹ It is not nearly so common for scholars to make similar claims about any sort of philosophy.¹⁰

These perceptions shape a great deal of private-law philosophical scholarship. In particular, they force philosophically interested scholarship to satisfy three different expectations. Two are obvious: Philosophically oriented legal theory must explain why the philosophy it is using is internally coherent and philosophically plausible. It must also explain descriptively and justify normatively features of legal doctrine that a competent doctrinalist could not figure out for herself. The third is comparative, and in some tension with the first two: A philosophical theory must add value that economic analysis does not already add. It is a tall order to respond to all three demands in one article. But if an article as philosophically ambitious as *The Social-Obligation Norm* or *Land Virtues* does not try, some readers will ignore it for not explaining the philosophy, while others will ignore it for not justifying itself in relation to the now-dominant interdisciplinary mode of analysis.

The Social-Obligation Norm and *Land Virtues* both try to straddle these competing expectations. The former focuses more on philosophical interpretation of the law, the latter more on philosophy's payoff toward economics,¹¹ but both articles address all three expectations. In this Response, I abstract as much as I can from Alexander and Peñalver's comparative claims about economic analysis. I have some general sympathy for their intentions, but I prefer in this Response to focus as much as I can on the philosophical issues. Philoso-

⁶ See Alexander, *supra* note 4, at 747–48, 750–51.

⁷ See Peñalver, *supra* note 5, at 832–60.

⁸ For one helpful overview, see Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1514–20 (2003) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002)). Throughout this Response, I assume that “economic analysis” integrates explanation, normative prescriptions, and underlying practical philosophy in a manner similar to that in which theories of practical philosophy do. That assumption may seem a category mistake to many readers, but it would be too distracting for me to question the assumption here.

⁹ Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 357 (2007).

¹⁰ For dissenting opinions, consider JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 1–63 (2001); STEPHEN A. SMITH, *CONTRACT THEORY* 14–31 (2004).

¹¹ See Peñalver, *supra* note 5, at 860–86.

phers are more likely than we lawyers to pore over what Blackstone called "dispute[s] that savour[] too much of nice and scholastic refinement."¹² Although it is inevitable that we lawyers be more practical than philosophers, we should also anticipate the questions that philosophers will ask when we draw on philosophical sources. In this Part, I hope to help *The Social-Obligation Norm* and *Land Virtues* anticipate philosophical criticisms I have encountered in similar scholarship of my own.¹³

B. Deontology Versus Consequentialism

The philosophical aspects of Alexander's and Peñalver's articles deserve careful study and emulation. Both anticipate a complaint, about one prominent version of deontology, that leads many non-philosophical scholars to brush aside casually philosophical legal scholarship.

Until fairly recently, most normative scholarship on practical philosophy¹⁴ could be sorted out into two competing camps—"deontology" and "consequentialism." "Deontological" practical theories focus primarily on a practical actor's obligation or duty. If deontology were to be reduced to a couple of slogans, one would be, "[W]hat makes a choice right is its conformity with a moral norm," and the other would

¹² 2 WILLIAM BLACKSTONE, COMMENTARIES *8.

¹³ See Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. (forthcoming 2010), manuscript at 3–4 (George Mason Univ. Sch. Law & Econ. Research Paper No. 08-20, 2008), available at <http://ssrn.com/abstract=1117999>.

¹⁴ This response uses the term "practical philosophy" to describe philosophical inquiry studying human action and its proper ends and constraints. (For another example of this usage, see Stephen Buckle, *Aristotle's Republic or, Why Aristotle's Ethics Is Not Virtue Ethics*, 77 PHIL. 565, 575 (2002).) As used here, "practical philosophy" encompasses "ethical philosophy," the inquiry into individual human action, and "political philosophy," the inquiry into human action by groups organized into cities, nations, and other political communities. The term excludes conceptual philosophy and philosophical investigation into nonhuman phenomena. Most other forms of philosophy are devoted solely to understanding phenomena; practical philosophy makes primary the question of how humans ought to live and act. See ARISTOTLE, NICOMACHEAN ETHICS II.2, at 1103b26–32 [hereinafter NICOMACHEAN ETHICS]; ARISTOTLE, NICOMACHEAN ETHICS 23 (Joe Sachs trans., 2002) [hereinafter NICOMACHEAN ETHICS (Sachs trans.)].

"Moral" philosophy might be a more fitting term for the subject matter considered here. This Response will use "moral" when absolutely necessary to do so as a synonym for "applying a general metaethics and philosophical approach to a practical situation" but will avoid its use otherwise. Some scholars equate "moral" with "ethical" so that it excludes the "political." In addition, for many readers, the term "moral" presumes the "law conception of ethics" that G.E.M. Anscombe deplored and sought to overcome by the recovery of virtue ethics. G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 5 (1958). In that light, the term "moral" has some built-in tendency in favor of deontological and against consequentialist theories of practical action. See, e.g., Bernard Williams, *Morality, The Peculiar Institution*, in VIRTUE ETHICS 45, 48–49 (Roger Crisp & Michael Slote eds., 1997) (contrasting utilitarianism with deontology by calling the former "a marginal member of the morality system" and the latter the "central . . . version of morality").

be, “[S]ome choices cannot be justified by their effects—that no matter how morally good their consequences, some choices are morally forbidden.”¹⁵ More technically, a theory is deontological if it judges the morality of a choice primarily by whether it conforms to a moral norm and not primarily by whether the choice leads to good consequences. The Right, so to speak, takes priority over the Good.¹⁶

“Consequentialist” theories reverse the relationship between the norm and its consequences. Consequentialists “hold that choices—acts and/or intentions—are to be morally assessed solely by the states of affairs they bring about.”¹⁷ Consequentialists must identify some conception of “the Good,” that is, “states of affairs that are intrinsically valuable”; consequentialist ethical theories then encourage “whatever choices increase the Good.”¹⁸

Like many classifications, the deontology-consequentialism divide is subject to many qualifications and misunderstandings.¹⁹ For example, unless “deontology” and “consequentialism” are defined precisely, they do not state mutually exclusive alternatives, as “non-consequentialism” and “consequentialism” do. “Deontology” may be understood fairly broadly, to cover approaches holding that moral norms are not *solely* reducible to good consequences. It may be understood more narrowly (as this Response does), to cover approaches that stress moral norms derived largely without considering consequences.²⁰ It may also be understood extremely narrowly, to refer only to theories of practical philosophy closely associated with Immanuel Kant.²¹ Similarly, some philosophers use “consequentialism” to re-

¹⁵ Larry Alexander & Michael Moore, *Deontological Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2 (Winter 2007), <http://plato.stanford.edu/archives/win2007/entries/ethics-deontological>.

¹⁶ See *id.*; Roger Crisp & Michael Slote, *Introduction*, in VIRTUE ETHICS, *supra* note 14, at 1, 1–2; Robert B. Louden, *Toward a Genealogy of ‘Deontology’*, 34 J. HIST. PHIL. 571 (1996); Gregory Trianosky, *What Is Virtue Ethics All About?*, 27 AM. PHIL. Q. 335, 338 (1990).

¹⁷ Alexander & Moore, *supra* note 15, § 1.

¹⁸ *Id.*

¹⁹ See, e.g., ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 37–38 (1999) (identifying “inadequacy in the slogan ‘Utilitarianism begins with the Good, deontology with the Right’”) (emphasis added); Trianosky, *supra* note 16, at 335 (listing nine tenets of “neo-Kantianism” and warning that these tenets are “not necessarily Kant’s own view” and are not always “uniformly understood or carefully distinguished by [their] adversaries”).

²⁰ Consider Michael S. Moore’s usage in Michael S. Moore, *Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Restrictions*, 27 LAW & PHIL. 35 *passim* (2007).

²¹ See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 401, at 17 (Lewis White Beck trans., Macmillan Publ’g Co. 2d ed. 1990) (1785) (“Thus the moral worth of an action does not lie in the effect which is expected from it or in any principle of action which has to borrow its motive from this expected effect. For all these effects . . . could be brought about through other causes and would not require the will of a rational being, while the highest and unconditional good can be found only in such a will.”). Here and subsequently, the first page citation refers to Kant’s original pagination (which Beck provides in the margins), the second to the translation in the Beck edition.

fer broadly to any school of practical thought that prioritizes the Good over the Right. (This Response employs that usage.) Others, however, assume that "consequentialism" refers specifically to its "paradigm case," welfare-maximizing act utilitarianism as set forth by Jeremy Bentham, John Stuart Mill, Henry Sidgwick, and others.²²

Notwithstanding these subtleties and many others, legal scholars continue to use "deontology" and "consequentialism" coarsely as opposites. They also tend to assume that most or all "deontological" theories are Kantian, that most or all "consequentialist" theories closely resemble welfare-maximizing act utilitarianism, and that the consequentialism-versus-deontology divide is foundational. For example, in *Fairness Versus Welfare*, Louis Kaplow and Steven Shavell posit a spectrum of possible justifications for government actions running from the pure consequentialism of welfare economics to a "pure principle of fairness" grounded in deontological Kantian ethics.²³

Separately (and again making all necessary qualifications for broad generalizations), legal scholarship has tended to map the economics-versus-philosophy divide²⁴ in law onto the consequentialism-versus-deontology divide in practical philosophy. For example, prominent political philosophy built on deontological rights claims—especially John Rawls's *A Theory of Justice* on one hand²⁵ and Robert Nozick's *Anarchy, State, and Utopia* on the other.²⁶ Leading philosophical tort scholarship appeals to Kantian claims of right and fairness.²⁷ Legal scholars therefore conclude, at least as a convenient first approximation, that philosophical claims of rights or fairness must be grounded in deontology (usually some variation on Kantian deontology) if they are going to remain philosophical at all.

To illustrate, consider the debate associated with *Fairness Versus Welfare*. Kaplow and Shavell acknowledge that many legal policy analysts "hold mixed normative views," in which deontological norms impose side constraints on consequentialist policy analysis or vice versa.²⁸ After making this qualification, however, Kaplow and Shavell assume

²² Walter Sinnott-Armstrong, *Consequentialism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY §§ 1, 3 (rev. ed. Spring 2006), <http://plato.stanford.edu/entries/consequentialism> (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JOHN STUART MILL, UTILITARIANISM (1861); HENRY SIDGWICK, THE METHODS OF ETHICS (1874)); accord Justin Oakley, *Varieties of Virtue Ethics*, 9 RATIO 128, 143 (1996).

²³ KAPLOW & SHAVELL, *supra* note 8; see also *id.* at 16–38; accord LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 42 (2002) (assuming and applying the distinction between consequentialist and deontological theories of action).

²⁴ And, more generally, the social science-versus-humanities divide.

²⁵ See JOHN RAWLS, A THEORY OF JUSTICE 23–32 (1971).

²⁶ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33, 300–04 (1974).

²⁷ See, e.g., ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 4 (1999); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 84–113 (1995).

²⁸ KAPLOW & SHAVELL, *supra* note 8, at 43.

that “notions of fairness [are] principles used in normative analysis such that at least some weight is given to factors that are *independent of individuals’ well-being*.”²⁹ In other words, philosophy’s job is to limit welfare maximization with deontological side constraints that have no direct connection to “individual well-being.” Jules Coleman has criticized *Fairness Versus Welfare*, but in doing so he has accepted the basic divisions Kaplow and Shavell posit between deontology and consequentialism. When Coleman classifies the various likely reader groups in the book’s audience, he distinguishes among “the fellow travelers along the law-and-economics highway,” “the uncommitted law professor,” and “the deontologists—philosophers and legal theorists committed to the idea that some or other deontic considerations must play an independent role in assessing legal practice as well as calls for its reform.”³⁰

C. The Deontology Trap

Deontological practical theory has also come in for considerable criticism. Many varieties of deontology, especially Kantian ones, make practical prescriptions while abstracting away from the seediness and disorderliness that human passions inject into human behavior. Because deontological theories elevate the Right over the Good, they have at least some built-in tendency to make secondary the anthropological and psychological analyses that make human behavior determinate and intelligible. Specialists in virtue ethics often give pride of place to G.E.M. Anscombe,³¹ and particularly to a 1958 essay Anscombe wrote to call attention to several dead ends in which she believed contemporaneous ethical scholarship to be then stuck.³² Anscombe dismissed Kantian ethics based on “universalizable maxims [as] useless without stipulations as to what shall count as a relevant description of an action with a view to constructing a maxim about it.”³³ In a similar survey of post-1800 ethics, Alasdair MacIntyre criticized Kant for making “the autonomy of ethics . . . logically independent of any assertions about human nature”; by contrast, he praised Hume and Aristotle for seeking “to preserve morality as something psychologically intelligible.”³⁴ Modern political theorists have lodged

²⁹ *Id.* at 44 (emphasis added).

³⁰ Coleman, *supra* note 8, at 1512.

³¹ See, e.g., Oakley, *supra* note 22, at 128.

³² Anscombe, *supra* note 14.

³³ *Id.* at 2.

³⁴ ALASDAIR MACINTYRE, *Hume on the 'Is' and the 'Ought,'* in *AGAINST THE SELF-IMAGES OF THE AGE* 109, 124 (Univ. Notre Dame Press, 2d prtng. 1984) (1971).

similar criticisms against Rawls and Nozick, alleging that they draw on "bad sociology"³⁵ or a "naïve psychology."³⁶

Of course, deontologists have responses to such criticisms. A well-developed account of human action, the deontologist might concede, must account for passions, desires, and other sources of human motivation. The concept of obligation, she would continue, takes priority in the sense that it focuses human desires and other motivating forces, so that they cease to work against moral ideals and instead supply actors with defensible rational motives for action.³⁷ In addition, the deontologist might continue, consequentialists take on and attack straw men when they suggest that the practical theories of Kant and other deontologists leave no room for virtue.³⁸

These objections have some force, and deontologists can avoid many of these criticisms by specifying carefully how psychological and social consequences inform deontological norms. Nevertheless, some deontological theories suffer from these criticisms, especially Kantian theories. For example, when Kant explains his account of morality, he illustrates with the example of suicide. For Kant, the exemplary moral actor is someone who has no reason to live "but is still in possession of his reason sufficiently to ask whether it would not be contrary to his duty to himself to take his own life."³⁹ Yet hardly anyone ever faces this choice. Kant's example is so removed from everyday experience that his morality seems irrelevant to the problems and capabilities of most individuals. By contrast, in the *Politics*, Aristotle observes that "most men will endure much harsh treatment in their longing for life, the assumption being that there is a kind of joy inherent in it and a natural sweetness."⁴⁰ Although Aristotle does not deal here with the issue of suicide, his comment does suggest a way to think about its ethics—specifically, by inquiring first what ethical significance we should take from life's inherent pleasantness. In this respect, Kant confirms MacIntyre's criticisms, and Anscombe was on the right track

³⁵ Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 324 (1984).

³⁶ Ingrid Creppell, *Locke on Toleration: The Transformation of Constraint*, 24 POL. THEORY 200, 201 (1996).

³⁷ See BARBARA HERMAN, *Making Room for Character*, in MORAL LITERACY 1–28 (2007). For other defenses of deontological ethics, see BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* (1993); ROBERT B. LOUDEN, *KANT'S IMPURE ETHICS: FROM RATIONAL BEINGS TO HUMAN BEINGS* (2000); ROBERT B. LOUDEN, *MORALITY AND MORAL THEORY: A REAPPRAISAL AND REAFFIRMATION* (1992); J.B. Schneewind, *The Misfortunes of Virtue*, 101 ETHICS 42 (1990).

³⁸ See Buckle, *supra* note 14, at 566–67 (conceding that Kant treats the virtues); Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?*, 3 J. ETHICS 163, 165, 170 (1999) (same); *id.* at 170 (same for Rawls).

³⁹ KANT, *supra* note 21, at 422, 38.

⁴⁰ ARISTOTLE, *POLITICS* III.6, at 1278b28–30 [hereinafter *POLITICS*]; ARISTOTLE, *THE POLITICS* 94 (Carnes Lord trans., Univ. of Chicago Press 1984) [hereinafter *POLITICS* (Lord trans.)].

to look to Aristotelian ethics for a more psychologically grounded alternative.⁴¹

In any case, this “bad psychology” criticism has seeped into contemporary legal scholarship. It is not hard to find legal scholars ridiculing deontological rights or duty claims. Such claims (or so the derision goes) imbibe a “heavy overdose of intuition[,] revelation,”⁴² or “necessary truths that the astute analyst can deduce from first principles applicable regardless of circumstance, time, and culture.”⁴³

Separately, critics complain that deontological rights or duty claims (especially Kantian claims) seem too categorical to implement in practice. In some cases, Larry Alexander and Michael Moore explain, two or more deontological claims may come into conflict, in which case “there is an aura of paradox” in any attempt to subordinate one seemingly categorical claim to another.⁴⁴ In others, “there are situations—unfortunately not all of them thought experiments—where compliance with deontological norms will bring about disastrous consequences.”⁴⁵

These two criticisms create what I am calling here the “deontology trap.” To apply the trap, conventional consequentialists make two competing and difficult demands on deontologists. If deontological rights may never justly be sacrificed, then they create absurd or extreme results in some cases. Once deontologists concede that deontological rights *may* be sacrificed, however, the trap springs: Deontological norms are not really deontological at all. They are rather broad presumptions, justified by “rule”-consequentialist reasoning but ultimately subject to exceptions when a consequentialist calculus requires exceptions. At that point, deontologists have compromised on the only important question of principle, and everything else is a just matter of degree. In James Gordley’s description, “either rights must be sacrosanct or they must depend on utilitarian considerations and so be defeasible when those considerations so dictate.”⁴⁶ The basic thrust of this two-step trap is to say that any normative the-

⁴¹ See Trianosky, *supra* note 16, at 339 (complaining that “the Kantian tradition does take morality to be autonomous in the extreme”); accord Nussbaum, *supra* note 38, at 173 (“[I]f emotions are just subrational stirrings or pushes that have nothing to do with thought or intentionality, there is not much that is interesting to be said about their relationship to ethics. They can be fed or starved, but they cannot be cultivated as parts of a character that has a unitary focus.”).

⁴² RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 15 (1998).

⁴³ Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 805–06 (2001).

⁴⁴ Alexander & Moore, *supra* note 15, § 4.

⁴⁵ *Id.*

⁴⁶ JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 11 (2006).

ory that mixes rights and consequences “cannot form an intellectually coherent whole,” because it “must ‘disaggregate [sic] into a mixture of utilitarian and rights-based justifications.’”⁴⁷

This trap has also seeped into legal scholarship. For example, Kaplow and Shavell set the deontology trap in their title—*Fairness Versus Welfare*. They then spring the trap by positing a situation in which a deontological norm has disastrous consequences—say, it “reduce[s] the well-being of *every* individual.”⁴⁸ If the deontologist qualifies the norm to conserve social welfare, she concedes that a consequentialist theory of social welfare takes priority over deontology.⁴⁹ If, however, the deontologist refuses to qualify a deontological norm to promote the welfare of every individual, “fairness-based analysis stands in opposition to human welfare at the most basic level.”⁵⁰ Q.E.D. Kaplow and Shavell give attribution, appropriately enough, to “consequentialist philosophers (often, it turns out, utilitarians) who criticize nonconsequentialists (deontologists).”⁵¹

This criticism is also typical in property scholarship, where Alexander and Peñalver are confronting it. Consider the doctrine of adverse possession. When Margaret Jane Radin criticized deontological tendencies in Richard Epstein’s early work, she challenged Epstein to reconcile adverse possession with deontological property rights.⁵² Assume that a title owner’s possessory interest in the exclusive control and enjoyment of her land is justified by a Kantian deontological right.⁵³ If the title owner neglects her land for long enough, however, at some point the squatter’s claim on the land and society’s claim on

⁴⁷ *Id.* at 11–12 (quoting SMITH, *supra* note 10, at 52 n.16).

⁴⁸ KAPLOW & SHAVELL, *supra* note 8, at 52.

⁴⁹ *See id.* at 62–81 (recasting fairness-based norms as utilitarian social norms).

⁵⁰ *Id.* at 58. For a lengthier critique of Kaplow and Shavell’s argument, suggesting that the argument is analytically tautological, see Coleman, *supra* note 8, at 1525–30.

⁵¹ KAPLOW & SHAVELL, *supra* note 8, at 52 n.72 (citing J.J.C. Smart, *Introduction*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 5 (1973)).

⁵² *See* MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 108–09 (1993). Until roughly 1985, Epstein was more properly classified as a deontologist. Compare Larry Alexander & Maimon Schwarzschild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 QUINNIPIAC L. REV. 657 (2000) (critiquing Epstein’s current metaethics), with Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783, 787–90 (2000) (clarifying his utilitarian theory and defending them from Alexander and Schwarzschild’s critique). Unless the text (as here) indicates otherwise, when I refer to Epstein, I mean the utilitarian Epstein.

⁵³ Adverse possession illustrates the deontology trap even if the deontological claim right runs the other way. Assume the squatter’s claim to ownership is grounded in a deontological labor-desert right to control and enjoy land he is actually using. That deontological right might then come under pressure from consequentialist considerations about the utility of clear land titles. Among other things, clear titles reduce disputes over land and land use, and they simplify commercial land transactions. As in the text, as soon as the consequentialist considerations outweigh the deontological right, the philosophical justification of adverse possession seems weak or incoherent. *See* RADIN, *supra* note 52, at 107–09.

the active cultivation of the land must take priority. Because adverse possession is an institution that “the functioning legal system . . . cannot do without,” Radin concludes, “‘absolute’ entitlements” are absurd.⁵⁴ Once *that* concession is made, Radin suggests, it would be hard to justify consequentially a broad conception of title ownership and a narrow conception of adverse possession. After all, “it is hard to construct a utilitarian argument concluding that an entitlement gained through first possession is fixed for all time. Utilitarianism is too empirical for such absolutes.”⁵⁵

Of course, as metaethics or general categories of metaethics, consequentialism and deontology do not always or necessarily require different prescriptions to particular problems. “Rule” consequentialism can justify rules that are to a great degree broad, formal, and unqualified. Deontologists may analyze rules inquiring whether they satisfy deontological constraints from one case to the next. Even so, in both practical philosophy and law, instrumentalists have strongly preferred consequentialism (specifically welfare-maximizing act utilitarianism), while formalists have preferred deontological theories. In addition, in both practical philosophy and law, practical philosophy has suffered because it has been tarnished with the criticisms of Kantian deontology just recounted.

D. Virtue Ethics and Virtue-Friendly Practical Philosophy

If one takes a longer view, however, these perceptions of practical philosophy are mistaken. As Julia Annas explains, “In the tradition of Western philosophy since the fifth century B.C., the default form of ethical theory has been some version of what is nowadays called virtue ethics; real theoretical alternatives emerge only with Kant and with consequentialism.”⁵⁶ Although the following discussion will highlight some of the differences internal to this tradition, Annas is surely right to describe this tradition as a tradition. More important for us lawyers, the tradition to which Annas is referring⁵⁷ has heavily influenced Anglo-American property law.⁵⁸ It is confusing and anachronistic to project the consequentialism-versus-deontology dichotomy onto this tradition.

⁵⁴ *Id.* at 109.

⁵⁵ *Id.*

⁵⁶ Julia Annas, *Virtue Ethics*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 515 (David Copp ed., 2005).

⁵⁷ Or, more specifically, the tradition of political philosophy corresponding to the tradition of ethical philosophy to which Annas is referring. See *infra* part II.

⁵⁸ See, e.g., GORDLEY, *supra* note 46, at 148–54 (recounting influence of Aquinas and Scholastic conceptions of use on subsequent property law). See generally STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME (1991) (tracing the development of property rights in early Enlightenment natural-law and -rights theories).

I am going here to try to define “virtue ethics” and other virtue theories more precisely than they are understood in conventional legal scholarly wisdom.⁵⁹ At the outset, let me acknowledge that that it is rather hard to pin down what “virtue ethics” is. One way to situate virtue ethics is as a collection of ethical theories that all happen to stress moral character more than now-dominant understandings of deontology or utilitarianism. Rosalind Hursthouse introduces virtue ethics in this manner: “[I]n contrast to an approach which emphasizes duties or rules (deontology) or one which emphasizes the consequences of actions,” virtue ethics “emphasizes the virtues, or moral character.”⁶⁰ Virtue and character refer to “acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing.”⁶¹ In core versions of virtue ethics, the practice of the virtues is coterminous with human “flourishing,” the term that Peñalver and Alexander⁶² implicitly equate with the Aristotelian term of art *eudaimoneia*.⁶³ *Eudaimoneia* literally means “well-being,” or “divine good fortune,” but it may also be translated as “happiness,” as long as “happiness” is understood as “‘true’ or ‘real’ happiness or ‘the sort of happiness worth seeking or having,’ and not ‘whatever happens to make an actor happy at a particular moment, without regard for how other reasonable actors would rate that form of happiness.’”⁶⁴

This presentation of virtue ethics proceeds only at the level of “loose slogans,”⁶⁵ however, and it also excludes a wide range of “virtue theories,” which, though not “virtue ethics” theories in the strict sense, still stress the virtues more than the conventional alternatives described in the last two sections. So let us broaden slightly, define different virtue theories more precisely, and situate them in relation to a few prominent taxonomies of practical philosophy. Again, before proceeding, let me confess freely and without reservation that my classification will not be satisfying to all virtue theorists. Such theorists do not agree unanimously among themselves about which theories even

⁵⁹ For other reference guides, see Rosalind Hursthouse, *Virtue Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. ed. Fall 2007), <http://plato.stanford.edu/archives/fall2007/entries/ethics-virtue/>; Oakley, *supra* note 22, at 132–34; Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 71 (2006).

⁶⁰ HURSTHOUSE, *supra* note 19, at 1.

⁶¹ Peñalver, *supra* note 5, at 864.

⁶² See Alexander, *supra* note 4, at 748.

⁶³ See NICOMACHEAN ETHICS, *supra* note 14, I.4, at 1095a16; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 3.

⁶⁴ Hursthouse, *supra* note 59, § 2. See also *id.* (“The trouble with ‘happiness’, on any contemporary understanding of it uninfluenced by classically trained writers, is that it connotes something which is subjectively determined.”).

⁶⁵ HURSTHOUSE, *supra* note 19, at 4. I am grateful to Nelson Lund for encouraging me to make this clarification.

count as “virtue theories” or “virtue ethics theories.” Virtue ethics could be understood as an “*alternative*” to standard deontological and consequentialist approaches, but it could also be understood more modestly, as “a way of *augmenting* one of the two main ethical theories of actions and rules.”⁶⁶ Separately, while most virtue ethics theories and their cousins are “neo-Aristotelian” to some degree,⁶⁷ particular theories can vary widely in how “Aristotelian” or “neo” they are.⁶⁸ Different scholars use many of the relevant taxonomy terms in different senses. Most important, rather than classifying normative obligations according to two or three external standards, many ethical philosophers instead prefer to treat different theories according to their own particular internal metaethical terms.

With these disclaimers, let me make a few attempts to situate the more prominent virtue theories. “Virtue ethics,” as used here, refers specifically to theories of human practical action that start with “virtue” in their foundations as consequentialist approaches start with the Good, or deontological theories do with the Right.⁶⁹ Virtue ethics theories in this strict sense have “*aretaic*” foundations, referring to *aretê*, the Greek term for “excellence” or “virtue.”⁷⁰ “Virtue theory” (again as used here) refers here to theories that seek to augment the virtues within non-*aretaic* foundations.⁷¹ Some consequentialist (in the broad sense) theories take this approach, stressing that the virtues are in practice necessary components for achieving pleasure or other proxies for good consequences.⁷² Traditional natural-law theories also stress the virtues without making them central. The virtues are not pursued strictly for their own sakes, but rather as part and parcel of humans’ fulfilling their natural purpose or purposes.⁷³

⁶⁶ Buckle, *supra* note 14, at 565; *see also* Crisp & Slote, *supra* note 16, at 2–3 (arguing that virtue ethicists “carve out [their] own niche [by making] essential reference to the rationality of virtue itself”); Robert B. Loudon, *On Some Vices of Virtue Ethics*, in VIRTUE ETHICS, *supra* note 14, at 201, 204, 216 (contrasting a “mononomic” understanding of virtue ethics with one that “coordinate[s] irreducible or strong notions of virtue” along with strong conceptions of act-focused ethical theories); Nussbaum, *supra* note 38, at 165, 168 (assuming that deontologists and consequentialists may both draw on virtue ethics).

⁶⁷ *See, e.g.*, PHILIPPA FOOT, *Virtues and Vices*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 1, 1–2 (2d ed., Oxford Univ. Press 2002) (1978) (arguing that Aristotle and St. Thomas Aquinas are foundational).

⁶⁸ *See* PETER PHILLIPS SIMPSON, VICES, VIRTUES, AND CONSEQUENCES: ESSAYS IN MORAL AND POLITICAL PHILOSOPHY 93 (2001) (contrasting “neo-Aristotelians” who emphasize the “Aristotelian” with those who emphasize the “neo”).

⁶⁹ *See* SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 304 (1996) [hereinafter OXFORD DICTIONARY OF PHILOSOPHY].

⁷⁰ *See* Richard Parry, *Ancient Ethical Theory*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1 (Fall 2004), <http://plato.stanford.edu/archives/fall2004/entries/ethics-ancient/>.

⁷¹ *See* Hursthouse, *supra* note 59.

⁷² *See, e.g.*, Ben Bradley, *Virtue Consequentialism*, 17 UTILITAS 282, 282–83 (2005).

⁷³ *See* OXFORD DICTIONARY OF PHILOSOPHY, *supra* note 69, at 394.

Scholars dispute whether Aristotle's own practical theory is aretaic or some alternative. At one point, Aristotle defines the human good (and *eudaimoneia*) primarily as "a being-at-work of the soul in accordance with virtue" or "the best and most complete virtue."⁷⁴ This passage supports the view that Aristotle's practical theory is aretaic. The human good consists not of pleasure, or of good things happening to the actor, but exclusively of the actor's doing what an excellent actor would do. Others, however, while recognizing that Aristotle treats virtue as constitutive of happiness, also read him to suggest that virtue is simultaneously productive of happiness.⁷⁵ Still others read Aristotle to treat happiness as a cluster concept, covering possession of the external goods and fortunes necessary to enjoy happiness, the virtues, and other factors.⁷⁶ Yet no matter how Aristotle relates happiness to the virtues, his practical theory focuses considerably on virtue and an objective and reflective understanding of individual happiness. These emphases cause his practical philosophy to differ substantially from contemporary Kantian deontology or welfare-maximizing act utilitarianism.

I will refer to the diverse collection of theories that track Aristotle's as "virtue-friendly" theories. As used here, "virtue-friendly" means that, in its application to practice, the theory in question makes virtue *operationally* central even if it is not *foundationally* central. Of course, there is no way to avoid confusion totally between aretaic theories and virtue theories with different core normative foundations. Even so, in this context, the operational similarities matter more than the foundational differences. I hope the term "virtue-friendly," construed ecumenically, accurately portrays the class of theories involved.

Let us consider next how virtue-friendly schools of practical philosophy relate to the divide between deontology and consequentialism explained thus far. To begin with, virtue-friendly theories are not deontological in the Kantian sense.⁷⁷ By definition, all virtue-friendly theories (however loosely "virtue-friendly" is used) articulate the ob-

⁷⁴ NICOMACHEAN ETHICS, *supra* note 14, I.7, at 1098a16–18; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 12; accord Crisp & Slote, *supra* note 16, at 2 (describing Aristotle as having "perhaps one of the most radical virtue ethics ever, since he can be understood to be saying that there is *nothing* worth having in life except the exercise of the virtues").

⁷⁵ See JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 154–55 (1988) ("The aim of the *Nicomachean Ethics* is to give one a reflective understanding of *how one can achieve happiness by living an ethical life within society*." (citing NICOMACHEAN ETHICS, *supra* note 14, I.2, at 1094a18–25) (emphasis added)); accord JULIA DRIVER, UNEASY VIRTUE 70 (2001).

⁷⁶ See, e.g., Fred D. Miller Jr., *Property Rights in Aristotle*, in ARISTOTLE'S POLITICS: CRITICAL ESSAYS 121, 125 (Richard Kraut & Steven Skultety eds., 2005) (quoting ARISTOTLE, RHETORIC 1360b14–17); accord OXFORD DICTIONARY OF PHILOSOPHY, *supra* note 69, at 127 (suggesting that it is possible to understand virtue ethics in such a manner that the "equation between acting virtuously and flourishing is broken").

⁷⁷ See Oakley, *supra* note 22, at 138–39.

jects of human action in terms of some combination of virtuous activity or happiness understood as reason and the moral sense regulating the passions.⁷⁸ They do not draw normative prescriptions solely from the idea of a norm or a rational will; the prescriptions are also grounded in anthropological observations about what make individuals happy or outstanding. As Jonathan Lear explains of Aristotle's account of human action, virtues are really "organized desire[s]": "[C]haracter does motivate us to act in certain ways, and, in Aristotle's world, desire is the only motivating force for human action."⁷⁹

To illustrate, consider the following definition of virtue: as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods."⁸⁰ To begin with, this definition presumes an egoist framework: Actors consider what is good in a broad sense in light of what is good for them. Actors also judge those choices relative to external goods—life itself, wealth, fame, or power—that "genuinely are goods."⁸¹ Yet people can pursue and acquire these external goods without becoming virtuous; in fact, the excessive pursuit of some of them (say, wealth) can make people vicious (greedy). "Virtue" clarifies the goals of practical action by helping the actor appreciate human goods to the extent that (and *only* to the extent that) "mature," "serious," or "reasonable" actors would desire them. Virtue, however, also reveals a different class of goods, "internal" to human action, which cannot be enjoyed except by development and practice. So the external good of wealth turns out to be justified to a very great extent by the extent to which the actor uses it to support internal goods including industry, the character traits one acquires from practicing a calling, or the traits that come from practicing sociable virtues that require a minimum of property. Of course, different virtue-friendly theories could pick at different points of this stock definition. Perhaps the external goods ought to be irrelevant to the normative account of human action. Different theories might make the virtue of industry, the owner's state of pleasure, or different conceptions of the owner's happiness metaethically paramount. In addition, scholars

⁷⁸ See NICOMACHEAN ETHICS, *supra* note 14, I.8–9, at 1099a13–17, 1099b25–28; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 14, 15.

⁷⁹ LEAR, *supra* note 75, at 164.

⁸⁰ ALASDAIR MACINTYRE, AFTER VIRTUE 191 (2d ed. 1984) (emphasis removed); *see also id.* at 184 (defining an "internal" means to a human end as one in which "the end cannot be adequately characterized independently of a characterization of the means").

⁸¹ *Id.* at 196.

may even reasonably debate whether some of the main virtue-friendly theories are in fact deontological.⁸²

Nevertheless, the important point here is this: In contrast to Kantian deontological approaches, the stock definition just given requires the ethical actor to justify some combination of external and internal goods by their tendency to contribute to an objective and reflective conception of happiness. As Stephen Buckle explains, such goods are judged not in relation to "some sort of 'purely rational' being" but rather in relation to a moral account of "self-love[, which] must be accorded a central place in any *workable* ethical theory regarding human beings."⁸³ If self-love and other desires establish the foundations, virtues organize them to fulfill the higher parts of human nature. As Justin Oakley explains, "character-traits such as benevolence, honesty, and justice are virtues because they feature importantly among an interlocking web of intrinsic goods—which includes courage, integrity, friendship, and knowledge—without which we cannot have eudaimonia" and also because "these traits and activities . . . are regarded as together partly *constitutive* of eudaimonia."⁸⁴

Virtue-friendly theories also differ from the most conventional and consequentialist of consequentialist theories—welfare-maximizing act utilitarianism.⁸⁵ Conventional act utilitarianism takes "utility" or "preferences" more or less as they come, without second-guessing them too deeply.⁸⁶ By contrast, virtue-friendly theories are more critical of utility. Let me illustrate with Samuel Pufendorf, a natural-law jurist who wrote in the early seventeenth century, a century or two before virtue-friendly theories waned and ethical philosophy hardened around the consequentialism-versus-deontology dichotomy. Pufendorf anticipated a common criticism of act utilitarianism—that utilitarians impose "upon the less informed by employing the ambiguous word 'utility,' which has a double use, as it is considered from different points of view."⁸⁷ Pufendorf recognized utility as a phenomenon relevant to practical action, but he distinguished between "apparent" utility and "rational" utility or utility "judged useful by sound reason."⁸⁸ "Apparent" sources of human utility or pleasure are low-

⁸² See, e.g., Bernard H. Baumrin, *Aristotle's Ethical Intuitionism*, 42 THE NEW SCHOLASTICISM 1, 5, 12 (1967) (classifying Aristotle as a deontologist, while defining "deontologist" to refer to any nonconsequentialist theory); Nussbaum, *supra* note 38, at 168–69 (suggesting that virtue ethics consists of anti-utilitarians and anti-Kantians).

⁸³ BUCKLE, *supra* note 58, at 70, 71.

⁸⁴ Oakley, *supra* note 22, at 133.

⁸⁵ See, e.g., Smart, *supra* note 51, at 9–12, 30–57 (describing act-utilitarian theory).

⁸⁶ See Sinnott-Armstrong, *supra* note 22, §§ 1, 3 (discussing the hedonism inherent in classic utilitarianism).

⁸⁷ 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO II.3.10, at 195 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688).

⁸⁸ See BUCKLE, *supra* note 58, at 68 (citing 2 PUFENDORF, *supra* note 87, II.3.10, at 195).

grade, meaningless, or destructive; rational utilities enlarge an actor's happiness as understood by a reasonable, objective, and morally well-formed observer knowing that actor's life situation.⁸⁹ In addition, act utilitarianism suggests that different forms of happiness, and different actors' perceptions of utility, are more or less commensurable.⁹⁰ By contrast (though of course within limits), natural-law and other virtue theories are more likely to assume that different forms of human good are "intrinsically variegated."⁹¹

Conventional act utilitarianism also tends to be duty-centered. To the extent that utilitarianism claims to prescribe a decision-making process for ethical or political actors, it establishes a duty (maximize utility) that does not treat the actor's interests differently from those of anyone else affected by the actor's act. By contrast, virtue-friendly approaches are "agent-centered" or "agent-relative."⁹² They assume that practical theories must give actors reasons for action that are especially relevant to their circumstances and (especially) the desires that particularly motivate them to action. At least as important, virtue-friendly approaches stress that the actor's choices and conduct shape the actor's future habits, capacity for action, and capacity for appreciating truth, justice, beauty, and other goods.⁹³ Because "[v]irtue ethicists . . . believe reference to character is *essential* in a correct account of right and wrong action," they distinguish "virtue ethics from act-consequentialist theories . . . , [which] allow us to say what acts are right without referring to character at all."⁹⁴ "[T]he good" is properly understood "not [as] a passive external consequence of acting virtuously"; "rather, the good is active, and acting virtuously is a constituent part of what a good human life consists in."⁹⁵

Finally, conventional act utilitarianism focuses on consequences in a more direct manner than virtue-friendly theories do. Act utilitarianism judges each act, on a case-by-case basis, asking whether the act increases net utility. It is probably impossible to make any single generalization about how virtue-friendly theories apply as a group in rela-

⁸⁹ See Nussbaum, *supra* note 38, at 168 (noting that many virtue theorists "question" utilitarianism's "narrowly technical conception of reason").

⁹⁰ See *id.* at 182.

⁹¹ ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 13 (1993).

⁹² E.g., Crisp & Slote, *supra* note 16, at 3; Loudon, *supra* note 66, at 205; see, e.g., Buckle, *supra* note 14, at 569 & n.12.

⁹³ See Daniel Statman, *Introduction to Virtue Ethics*, in VIRTUE ETHICS: A CRITICAL READER 3, 3–5 (Daniel Statman ed., 1997) (explaining why standard utilitarianism presumes a moral duty to act independent of agent-relative considerations); see also Alexander & Moore, *supra* note 15, § 2.1 (defining "agent-centered" and "agent-relative").

⁹⁴ Oakley, *supra* note 22, at 131.

⁹⁵ *Id.* at 133.

tion to consequences. Let us therefore illustrate with a few different representative approaches.

Consequentialist analysis is downplayed in virtue ethics theories (in the strict sense) because they are aretaic. Aretaic approaches judge whether actions are right by whether the actor "*honors*" or "*exemplifies*" the right virtues in the course of acting.⁹⁶ In such theories, consequence maximization simply does not describe what motivates actors to act. Thus, in the case of friendship, "I am not required by virtue ethics to *maximise* my friendships," nor "to have the best friendship(s) which it is possible for me to have," but rather "I ought to have *excellent* friendships, relative to the norms which properly govern such relationships."⁹⁷

Natural-law theories consider consequences, but they subordinate consequences more than standard act utilitarianism does. Generalizations are especially dangerous here, because natural-law theories vary widely depending on how they understand "nature" and "law," and on how the reader understands deontology, consequentialism, and virtue ethics. Let us consider Pufendorf again here, as a late but still-representative example of a prominent natural-law tradition. In Pufendorf's theory, an actor should take account of foreseeable consequences in the exercise of prudence, which tries to determine how best to do what natural law prescribes.⁹⁸ But the actor does not need prudence until he first determines which courses of action accord with the natural law. It turns out that acting in accord with one's nature promotes utility: "[N]ot only are [actions in accord with natural law] reputable, that is, they tend to maintain and increase a man's standing, reputation, and position, but they also are useful, that is, they procure some advantage and reward for a man, and contribute to his happiness."⁹⁹ To say that "the law of nature is expedient," however, is not the same as saying that it is "founded in expediency."¹⁰⁰ Pufendorf determines whether a certain source of utility is "rational" by considering "the future consequences" of different courses of action, but those consequences are judged ultimately not by their tendency to promote pleasure or subjective value but "by sound reason."¹⁰¹ Ultimately, utilities and consequences are judged as worthy depending on whether they accord with human nature, specifically actors' natures as selfish beings who must live in society with others to survive and to be happy.¹⁰² Here, too, Pufendorf illustrates

⁹⁶ *Id.* at 144.

⁹⁷ *Id.* at 143-44.

⁹⁸ See 2 PUFENDORF, *supra* note 87, I.2.4, at 24.

⁹⁹ See *id.* II.3.10, at 196.

¹⁰⁰ BUCKLE, *supra* note 58, at 67.

¹⁰¹ 2 PUFENDORF, *supra* note 87, II.3.10, at 195.

¹⁰² See BUCKLE, *supra* note 58, at 62-74.

how natural-law theories defy the anachronistic deontology/consequentialism dichotomy. Sociability simultaneously establishes both a deontological imperative (because it instills in humans a need to obey the rules of their society) and a consequentialist goal (because people benefit greatly from social and political association).

Still other virtue-friendly theories consider consequences within a consequentialist normative framework. In the opinion of virtue-friendly consequentialists, when virtue ethics (in the strict sense) focuses on virtue for virtue's sake, it makes the mistake "of missing the point, of misdirecting our focus inward, onto our own motivation, instead of outward, onto the goods and ills of the world."¹⁰³ A consequentialist may focus on the virtues for any of several different reasons. The virtues may enlarge the sum of good consequences indirectly, by establishing coarse "rules" that, though not perfect proxies for good consequences, are still better proxies than case-by-case deliberation consistent with act utilitarianism.¹⁰⁴ Or, a consequentialist may construe "good consequences" more critically than welfare-maximizing act utilitarianism and settle on "eudaimonistic" consequentialism, "which claims that certain states make a person's life good without necessarily being good for the person in any way."¹⁰⁵ This approach "starts from a vision of the good and always commends acts to the degree that they promote the good," but it differs from welfare-maximizing theories of consequentialism by defining the good in active and agent-relative terms.¹⁰⁶

Of course, deontologists may fairly try to "expos[e] the slippery slope into moral solipsism on which [consequentialists] must stand," and to argue that "rule" utilitarianism is really deontological moral theory covered over with consequentialist window dressing.¹⁰⁷ Similarly, deontologists, virtue ethicists, and natural-law theorists may each wonder whether eudaimonistic consequentialism's account of "good consequences" covers over moral analysis better explained and justified by each of their own preferred metaethics.¹⁰⁸ It suffices to say here that such accounts of consequentialism are not implausible, and that they are substantially different from welfare-maximizing act utilitarianism.

¹⁰³ James Griffin, *Virtue Ethics and Environs*, 18 SOC. PHIL. & POL'Y 56, 63 (1998).

¹⁰⁴ See *id.* at 60–61.

¹⁰⁵ Sinnott-Armstrong, *supra* note 22, § 3.

¹⁰⁶ THOMAS HURKA, *PERFECTIONISM* 60 (1993); see *id.* at 55–60.

¹⁰⁷ Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 329 (1985).

¹⁰⁸ Hurka acknowledges this argument in HURKA, *supra* note 106, at 59.

E. Virtuously Finessing the Deontology Trap

These and other virtue-friendly theories can respond to the criticisms conventional consequentialists make of conventional deontology. First, by starting with ordinary human passions, desires, and psychological faculties, such theories satisfy MacIntyre, Anscombe, and others' demand that practical philosophical theory stay close to human psychology. Legal scholars sympathetic to Kantian deontology might find these traditions useful, by the way, even if they prefer ultimately to hang on to deontological first principles. If a Kantian agrees that deontology needs to be complemented with a well-developed psychology of human practical action, virtue-friendly theories might provide that complement—even if they do not convince the Kantian to abandon deontology entirely.¹⁰⁹

Let me illustrate by examining adverse possession in light of Samuel Pufendorf's theory of natural law.¹¹⁰ In Pufendorf's account, human life is typified by a natural neediness and necessity. Individual humans need not only such basic external goods as food and the raw materials for clothes and shelter but also a domain of discretion in which they may be left alone to use those external assets productively for their own self-preservation.¹¹¹ This domain of discretion does not automatically entitle individuals to a moral right. Yet it does establish an interest, or what Buckle calls a "moral power, since it produces a moral effect, an effect on the legitimate actions of other human beings."¹¹² In a world without political divisions, this interest or power would entitle each human being to be left alone while appropriating assets from the common stock for her own personal and immediate consumption.¹¹³ However, humans also have powerful sociable tendencies, which they cannot fulfill without entering such intimate and closed communities as families, extended families, associations, or countries. The natural law requires that property be qualified and given specificity within such communities; good fences, after all, make

¹⁰⁹ See, e.g., HURSTHOUSE, *supra* note 19, at 120 (acknowledging the possibility that one can "add on an Aristotelian account of the emotions" to a Kantian account of deontic obligations).

¹¹⁰ One could develop an aretaic justification of property rights, and some have done so. See, e.g., Miller, *supra* note 76, at 124–26. Such justifications are so foreign to modern conceptual categories, however, that it would be distracting to rely on them as part of what is meant to be a meat-and-potatoes example relevant in contemporary law. I use Pufendorf as a substitute because he writes early enough to be close to the medieval tradition, in which virtue was a dominant category in political thought, but also late enough to speak in modern accents regarding natural rights. See *infra* note 167 and sources cited therein.

¹¹¹ See 2 PUFENDORF, *supra* note 87, IV.3.1, at 524.

¹¹² BUCKLE, *supra* note 58, at 92.

¹¹³ See 2 PUFENDORF, *supra* note 87, IV.4.2, at 532; accord BUCKLE, *supra* note 58, at 96–97.

good neighbors.¹¹⁴ To enjoy society, however, associates must also restructure their acquisitive activities. Unless they produce more in less time, they will not leave time for social leisure.¹¹⁵

Taken together, these two natural imperatives entitle members of an organized society each to enjoy a domain of noninterference, proportionate to assets they are using productively for their own self-preservation, leaving unused assets alone for other members of the society to use productively in the future. When associates create new stock by their labor, the society acts in accord with its natural ends by rewarding their labor with exclusive property. When associates use existing stock, the society accomplishes its ends by protecting use rights without conferring exclusive property rights.¹¹⁶ Even so, each associate's domain of exclusive use is subject to correlative duties. Each must harmonize her natural selfish interests with her natural sociable interest in encouraging the survival and flourishing of her associates.

Of course, on its face, Pufendorf's account of law and politics does not focus on the virtues anywhere near as much as a contemporary virtue ethics scholar. Because he is a natural lawyer, Pufendorf's metaethics lead him to start his inquiry asking what aspects of human behavior are "natural," and then what moral significance these natural aspects have. Practically, however, the virtues follow cleanly from the natural analysis. The social norms and laws that help man fulfill the sociable sides of his nature channel his selfish tendencies in ways that secure his self-preservation without letting self-preservation take precedence over sociability. In other words, these norms and laws aim to instill in citizens a reflective understanding of happiness practically quite similar to virtue ethics. For example, Pufendorf proscribes a "useless and wanton destruction of animals"—not because it is bad for the animals, but because it habituates people to an "insensate cruelty" and "tends to the hurt of all human society."¹¹⁷

A jurist following Pufendorf would need to consider many practical and prudential factors to apply his general account to the case of adverse possession. It is *not* enough to appeal, as Kantian deontologists do, to such abstract universal assertions as: "[T]he right of property [is] the embodiment of the agent's freedom in the external world."¹¹⁸ The law could embody owner freedom more broadly, by endowing owners with exclusive control and use over every part of

¹¹⁴ See 2 PUFENDORF, *supra* note 87, IV.4.6, at 539–40.

¹¹⁵ See *id.*; accord BUCKLE, *supra* note 58, at 100–01.

¹¹⁶ See 2 PUFENDORF, *supra* note 87, IV.4.6, at 539–40; accord BUCKLE, *supra* note 58, at 102–03.

¹¹⁷ See 2 PUFENDORF, *supra* note 87, IV.3.6, at 531; accord BUCKLE, *supra* note 58, at 92 & n.148.

¹¹⁸ WEINRIB, *supra* note 27, at 176.

their closes, or more narrowly, by protecting owners' exclusive control and use over the parts of their closes that they are actually using.¹¹⁹

By contrast, Pufendorf's natural-law theory settles the choice sequentially, by appeal to experience interpreted in light of prudence.¹²⁰ As a first cut, prudence suggests that the law endow land owners with fairly exclusionary rights of control and use. In a well-developed commercial economy, land can be deployed to a wide range of productive uses, a wide cross-section of the citizenry is skilled enough to deploy the land to one or more of those uses, and owners and developers have relatively free access to capital to convert land to their preferred uses. Ordinarily, this process of rapid conversion is enlarged better by establishing a broad exclusionary regime than by a narrow usufructuary regime. The former has the drawback of letting owners keep land they are not using. Yet the possibility of selling to higher-value users ultimately enlarges the free use all owners get from land.¹²¹

On the other hand, the presumption in favor of exclusionary boundary rules may be reversed, if a big enough gulf exists between the title owner's formal and exclusionary land claims and the interests of a person actively using the land. If a nonowner squats on the property and the title owner sleeps on her rights for a decade, the owner's interest seems to lack weight, while the squatter's interest in the land seems relatively valuable. At that point, legal exclusion becomes seriously removed from the selfish and industrious passions that justify Pufendorf's interest in labor. Of course, this exception must be reconciled also with Pufendorf's account of human sociability. Trespass law awards punitive remedies to owners who suffer deliberate trespasses.¹²² This rule reinforces property-respecting social norms if the

¹¹⁹ In *Jacque v. Steenberg Homes, Inc.*, for example, a mobile-home company trespassed across the vacant and unused field of a retired couple to deliver a mobile-home on time when the public road was blocked by snow. Steenberg Homes was making productive use of the field, the Jacques were not, and the crossing caused the Jacques no actual harm. Yet the Jacques were entitled to a trespass cause of action and \$100,000 in punitive damages. 563 N.W.2d 154 (Wis. 1997). The holding reinforced an exclusionary regime, but the facts seem to justify an exception respecting Steenberg Homes's harmless and productive use of the Jacques' exclusionary right.

¹²⁰ See 2 PUFENDORF, *supra* note 87, I.2.4, at 24. This is a fact that James Gordley overlooks. Gordley explains adverse possession on the ground that "when an owner does not intend to put property to productive use, he does not have ownership in its true sense." GORDLEY, *supra* note 46, at 144. To make this explanation satisfying, Gordley must explain why trespass law at its core endows owners with ownership of land they have not yet used.

¹²¹ Cf. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81-82 (1985) (justifying the same result in economic utilitarian terms).

¹²² See, e.g., *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) (suggesting that, when a court considers whether to refrain from entering an injunction ordering the removal of a trespassory encroachment, it should enter the injunction if the trespasser encroached in bad faith, irrespective of the balance of hardships); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d at 157-58, 163-66 (upholding a \$100,000 punitive damage award

owner asserts her rights immediately after someone invades them. If the owner waits a decade or more later, however, she undermines the link between punishment and social norm. At that point, the law can flip ownership from nonusers to users without undermining the norms. Neither Pufendorf's natural-law theory nor any other virtue-friendly theory can say precisely when property law should flip from trespass's presumptive exclusionary regime to adverse possession's usufructuary exception. Yet such theories can justify the basic contours of both and focus attention on the questions that trigger the flip.

Virtue-friendly theories may also reduce greatly the distance between instrumentalist and consequentialist argument on one hand and formal, deontological, rights-based argument on the other.¹²³ In Richard Posner's analysis of adverse possession, the doctrine enlarges joint utility. By not monitoring her land over many years, a title owner signals that her utility in it is low; by occupying it and using it over the same time, the squatter signals that his utility in it is high.¹²⁴ This argument begs a few important questions. Posner's interpretations of the parties' subjective valuations are conclusory. To be thorough, Posner would first need to show that the parties' utility functions are commensurable. Assuming they were, he would then need to cite empirical evidence demonstrating, in rigorous social-science fashion, that squatters really do generally have high subjective values, that title owners do not, and that in adverse-possession cases there really is a high risk that title owners will try to hold out to expropriate squatters' subjective value. In addition, Posner's interpretation is economically incomplete. It focuses on *ex post* concerns without considering seriously an *ex ante* concern that (as Posner explicitly recognizes else-

against a bad-faith trespasser even though the trespass caused no physical damage to the owner's property and allowed the trespasser to complete a contract that a severe blizzard would otherwise have made impossible to perform).

¹²³ In this regard virtue theories may help respond to a challenge issued by Jules Coleman: to understand both utilitarian welfare and deontic claims of justice and fairness in light of more fundamental human interests:

Once we realize that welfare is connected to a person's interests—what is good for him, and not merely to what he desires or to his gratification or joy—it should be clear that whatever it is in that account that explains the value of welfare explains as well the importance of the law's regulating human affairs according to various principles of justice and fairness.

Coleman, *supra* note 8, at 1543.

¹²⁴ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 78–79 (7th ed. 2007). I use Posner's justification of adverse possession as a point of contact not with economic analysis generally but rather with act-utilitarian modes of justification. Economic analysis, conducted differently with proper regard for informational and act-specific limitations, avoids many of these problems. I understand this to be an important point of Henry E. Smith's contribution to this theme Issue, see Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

where¹²⁵) is usually associated with property: adverse possession may sanction theft and destabilize social norms that minimize theft. To avoid *ad hoc* economic analysis, one would need to determine in a rigorous way whether the *ex post* consequence trumps the *ex ante* or vice versa. To do that, one would need further empirical information.

I do not want to be understood as saying that Pufendorf's or other virtue-friendly approaches answer these valuation or empirical questions comprehensively. But virtue-friendly approaches have at least two things working in their favor. First, on the valuation question, virtue-friendly analyses probably describe better how people do assess adverse possession. People do not make judgments finding that the squatter does have high utility in the land and the title owner does not; rather, people intuit that both have behaved such that the former's interest objectively deserves to be treated as more weighty than the latter's. If Posner's utility interest-balancing sounds plausible, it may be because his portraits of the interests piggyback on implicitly moral judgments. Second, virtue-friendly approaches are at least candid and realistic. They confess that they lack perfect empirical information. Pufendorf works with the little he knows he knows—that individual human beings are selfish, their selfishness may be directed toward productive or rapacious activities, and the productive activities can be made to accord with humans' concurrent sociable tendencies. Of course, this analysis is general and fairly intuitive. But it does explain the law more or less as it comes. It stays within the realm of psychological generalizations upon which people feel reasonably comfortable relying when they make practical moral decisions. It is open to revision on the basis of evidence more convincing and specific than everyday generalizations. In the meantime, however, it does not restate commonplace intuitions in fancy social-science jargon and then pretend that the jargon somehow makes the intuitions more scientific or precise. For these and other reasons, I suspect, Peñalver's critique of economic analysis has some force to it¹²⁶—at least, as long as the critique is focused properly on economic analyses with act-utilitarian foundations similar to Posner's.

As should be clear by now, virtue-friendly practical theories finesse the deontology trap. *Land Virtues* nicely states the contribution in general principle. On one hand, deontological duty and rights claims are often too "rigid" to square with many "consequentialist intuition[s]."¹²⁷ This contrast is contestable if one construes deontology to refer to nonconsequentialist approaches as a group; it makes con-

¹²⁵ See POSNER, *supra* note 124, at 31–32 (discussing the "dynamic" influences of property law on ownership and investment).

¹²⁶ Peñalver, *supra* note 5, at 832–60.

¹²⁷ *Id.* at 861.

siderable sense if “deontology” is a shorthand for Kantian deontology. On the other hand, to avoid copious information requirements and controversial value judgments, it helps to put economic analyses in a “broader moral framework, one that is sufficiently capacious to encompass the value of personhood, the demands of liberty, and the important goal of enhanced social welfare.”¹²⁸

Adverse possession illustrates one last time. The title owner’s right to be free from trespassory invasions of exclusive control seems “deontological” at first blush,¹²⁹ but it is actually the product of psychological analysis of how people do behave and prescriptive analysis of what will make them genuinely happy given what we know about the selfish and sociable sides of most humans’ natures. The prescriptions that follow from this analysis serve only as starting presumptions. Adverse possession “consequentially” corrects the law’s absolute tendencies in one repeat situation in which the assumptions behind trespass doctrine break down. But the consequentialist correction is focused and limited by the imperative to make the law enlarge owners’ and would-be owners’ concurrent interests in productive use. When scholars assert that a philosophical approach to adverse possession must enforce absolute rights or give way to instrumentalist analysis, they are attacking a straw man.

Of course, I do not mean to suggest that virtue-friendly approaches to practical philosophy are superior across the board; nor do I understand Alexander or Peñalver to be making such a claim. Virtue-friendly theories are subject to important criticisms, which need to be fleshed out fully.¹³⁰ My point here is simpler. Many legal scholars who prefer conventional utilitarian approaches to consequentialism often lampoon or dismiss philosophical theories of practical action while relying on several criticisms most commonly associated with Kantian deontology. By contrast, many scholars of different forms of virtue-friendly philosophy have assumed that this criticism may safely be explained away in a footnote.¹³¹ Before blithely dismissing a long

¹²⁸ *Id.* at 863 (emphasis removed).

¹²⁹ Specifically, the title owner’s right to be free from trespassory invasions seems the product of a formal rule justified by universal prescriptions made by Kantian deontology. Non-Kantian deontological approaches might take a more nuanced approach than the “deontological” approach assumed in text. Among other things, deontological approaches might establish a series of priorities for different relevant norms (for the use of land, for the formal control of unused but still-owned land, and so forth), which might generate a series of rules of decision.

¹³⁰ For criticisms, see Loudon, *supra* note 66; Christopher W. Gowans, *Virtue and Nature*, 25 SOC. PHIL. & POL’Y 28, 29 (2008); Statman, *supra* note 93, § 5, at 18–22.

¹³¹ See, e.g., BUCKLE, *supra* note 58, at 70 n.61 (explaining why “[n]atural law theories are . . . essentially non-Kantian,” in large part because “psychological intelligibility is . . . a non-accidental feature” of such theories).

and important tradition of practical philosophy, legal scholars would do well to consider those footnotes.

II

THE UNEASY RELATION BETWEEN ETHICS AND POLITICS

Although I am enthusiastic about the family of practical theories on which Alexander and Peñalver rely, I do have some reservations about how they apply those theories. To repeat, in commonplace usage, "property" refers to a domain of freedom to decide how to apply the object of ownership to one's own life plans, independent of direction from philosopher-kings or anyone else. Alexander describes this view as "a right to exclude others[, with] no further obligation [owed] to them."¹³² Yet the commonplace view is a little simplistic, and because it is Alexander is swinging at a straw man. If one is going to ground property in some sort of exclusiveness, it is better to call property a domain of freedom to determine use exclusively, shaped with regard for the like domains of other owners and the interests of the public properly understood.¹³³ Alexander and Peñalver trade on the discrepancy between the crudeness of the commonplace understanding of property and the qualifications one must add to that understanding to make it precise. When they do so, they recast property too far to the other end of the spectrum, where property consists of an owner's right to do (only) that which discharges social obligations,¹³⁴ what contributes to human flourishing,¹³⁵ or the responsibility to do what is virtuous.¹³⁶ In fairness, in both articles, property remains, much of the time, a domain of discretion organized to encourage owner self-preservation and -advancement. All the same, on the margins where it matters, both articles recommend that this domain of discretion be limited, so public officials may decide how owners' use rights will best promote specific claims about individual or civic flourishing.

There are at least two problems with these approaches. One problem, internal to property law, provides Henry Smith's point of departure from *The Social-Obligation Norm*: more often than *The Social-*

¹³² Alexander, *supra* note 4, at 747.

¹³³ See Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U.L. REV. 617 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007)) (critiquing the right to exclude conception in favor of a conception of an exclusive right to determine the use of property); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) (proposing an exclusive right of agenda-setting); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003) (proposing an exclusive right of use).

¹³⁴ See Alexander, *supra* note 4, at 747.

¹³⁵ See *id.* at 748.

¹³⁶ See Peñalver, *supra* note 5, at 826.

Obligation Norm and *Land Virtues* recognize, property law promotes both individual goods and social welfare by *avoiding* pursuing first-order goals and instead by vesting owners with autonomy as a second-order means by which owners may pursue those first-order goals.¹³⁷ I might quibble with a few of Smith's examples,¹³⁸ and his response confirms my concern that too many legal scholars conflate all moral accounts of duties and rights with "deontological" accounts of the same.¹³⁹ Those reservations aside, I concur with the main thrust of his response.

This Response focuses on a separate problem: the relation between virtue-friendly theories and a political community's overarching moral-constitutional order. In practice, when a theory of practical action makes "virtue" operationally central as a political category, it has some built-in tendency to conceive of politics as a mountain and not as a plain. People can coexist on plains, but there can be only one king of the mountain. Politics often involves large struggles in which some factions seek to acquire control or superior status over others. In practice, theories centered around virtue reinforce such factions' drives to be factious and acquire hegemonic power. Virtue theories can therefore be extremely destructive and inhumane. This possibility does not make all virtue regulation inappropriate. But it does make virtue theory problematic as a dominant category in politics. I would be far more comfortable with *The Social-Obligation Norm* and *Land Virtues* if they specified when virtue theories exacerbate or avoid politics' factious tendencies.

The Social-Obligation Norm and *Land Virtues* raise these problems by assuming without serious qualification that they may mine virtue ethics for pay dirt in law. This assumption raises a complicated set of issues. Virtue theories articulate fundamental values or ends for human action. Almost all recent virtue scholarship has tried to illustrate its claims about fundamental values or ends by illustrating with examples from *ethics*—the realm of practical philosophy focusing on the choices individual actors make in their capacities as individuals and not citizens. Most of the law, however, belongs to the field of *politics*. Although there are exceptions (legal ethics), most of the primary law (especially property and tort) specifies and secures political obligations. Principles that work well as hypothetical rules of practical conduct for individuals may not work as well as compulsory rules of practical conduct for citizens.

It is striking how gingerly leading virtue scholarship treads around the topic of virtue politics. In *On Virtue Ethics*, Rosalind Hur-

¹³⁷ See Smith, *supra* note 124.

¹³⁸ See *infra* Part V.C.

¹³⁹ See Smith, *supra* note 124, at 967.

sthous focuses carefully on “normative ethics, not political philosophy,” because “justice is so contested . . . a topic that it would need” independent treatment in political philosophy.¹⁴⁰ At least some virtue ethicists go where Hursthouse fears to tread. In her writings (which provide important inspiration for *The Social-Obligation Norm*¹⁴¹), Martha Nussbaum generates political prescriptions from virtue principles.¹⁴² Even so, Nussbaum has been fairly criticized for assuming too blithely that what works in ethics works as easily in politics.¹⁴³ Fred Miller, Jr., has explored whether Aristotle’s virtue-centered theories of ethics and politics might be compatible with a liberal politics of rights,¹⁴⁴ but he claims only to have “ma[d]e a start” at answering what he regards as a vast and problematic field.¹⁴⁵ In their 1997 essay collection *Virtue Ethics*, editors Roger Crisp and Michael Slote foresaw “in the not-too-distant future . . . a companion volume called Oxford Readings in Virtue Politics.”¹⁴⁶ To my knowledge, that companion volume has not yet been published.

In his Reply, Alexander suggests that I am repeating some of the extreme tendencies of the Critical Legal Studies (CLS) movement here when I say that most of the law belongs to politics.¹⁴⁷ I am not channeling CLS here; I *am* channeling Aristotle.¹⁴⁸ Alexander, Peñalver, and I all agree that “most contemporary virtue theorists work within the Aristotelian (or . . . closely related . . .) traditions”¹⁴⁹ I am sure we all agree that Aristotle is a helpful guide for understanding the relations among ethics, politics, and law. Readers should *not* misunderstand me to say that the following survey explains these relations in any exhaustive sense; Hursthouse, Miller, and other

¹⁴⁰ HURSTHOUSE, *supra* note 19, at 5. Hursthouse thinks that the topic of justice, personal and political, is not only contested but also “corrupted.” See *id.*; see also Rosalind Hursthouse, *Virtue Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 4 (rev. ed. Fall 2007), <http://plato.stanford.edu/archives/fall2007/entries/ethics-virtue/> (“Although Plato and Aristotle can be great inspirations as far as [virtue ethics are] concerned, neither, on the face of it, are attractive sources of insight where politics is concerned.”).

¹⁴¹ See Alexander, *supra* note 4, at 751 n.13.

¹⁴² See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 7–8 (2000) (arguing for “a form of political liberalism in connection with the capabilities idea”).

¹⁴³ See John Lewis, *Giving Way: Martha Nussbaum and the Morality of Privation*, 8 U. CHI. L. SCH. ROUNDTABLE 215, 216, 217 (2001) (reviewing NUSSBAUM, *supra* note 142) (complaining that Nussbaum “seems to assume that every moral good should become a constitutional guarantee”).

¹⁴⁴ See Fred D. Miller, Jr., *Virtue and Rights in Aristotle’s Best Regime*, in *VALUES AND VIRTUES: ARISTOTELIANISM IN CONTEMPORARY ETHICS* 67 (Timothy Chappell ed., 2006).

¹⁴⁵ *Id.* at 67.

¹⁴⁶ Crisp & Slote, *supra* note 16, at 25.

¹⁴⁷ Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063 (2009), at 1068.

¹⁴⁸ “The laws seem to be the works of the political art.” NICOMACHEAN ETHICS, *supra* note 14, X.9, at 1181a23; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 200.

¹⁴⁹ Peñalver, *supra* note 5, at n.168; accord Alexander, *supra* note 4, at 760–61.

virtue ethicists are absolutely right to steer around these relations carefully. That said, we lawyers are going to need to walk through the door of virtue political theory now that Alexander and Peñalver have opened it. Aristotle is as good a tour guide as we are going to get to explain what lies on the other side.¹⁵⁰

If understood in light of virtue ethics, ethics and politics both aim at promoting happiness: ethics the happiness of the individual actor, politics the concurrent happinesses of all the members of the political community. Ethics and politics thus overlap considerably. Aristotle illustrates this overlap simply in how he structures the arguments of the *Politics* and the *Nicomachean Ethics*. After discussing individual ethics at length, the *Nicomachean Ethics* ends by suggesting that “perhaps we might also have more insight into what sort of [political regime] is best . . . and by using what laws and customs,”¹⁵¹ at which point the inquiry cycles into politics. After the *Politics* conducts that discussion, the last chapter considers how the lawgiver should structure education.¹⁵²

Yet huge differences remain between ethics and politics. Ethics focuses on the choices and actions of a single individual; politics adjusts and reconciles the interests of the many individuals living together in a common political community. By its very nature, ethics self-selects a higher class of practitioners than politics does. Those who study ethics voluntarily do so “not in order that [they] might know what virtue is, but in order that [they] might become good.”¹⁵³ By contrast, because everyone in the community must live under the same laws and rulers, politics forces citizens who are naturally virtuous to get along with citizens who have little or no natural inclination to be virtuous. In Aristotle’s diagnosis, there are far more of the latter than the former.¹⁵⁴

That disparity creates obvious problems. One of the main functions of law as an institution is to make the many who are not naturally virtuous more so—first by compelling them, then by shaming, habitu-

¹⁵⁰ Although I cite Aristotle heavily in this Part and the next, I am not prepared to suggest that I am interpreting Aristotle accurately on all the points covered in this Response. It suffices for my argument that Aristotle makes a number of observations and normative prescriptions about the relations between law and politics and that these observations are so sensible that they should be considered in complete analyses of virtue politics.

¹⁵¹ NICOMACHEAN ETHICS, *supra* note 14, X.9, at 1181b20–22; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 200. Sachs uses “constitution” though I prefer “political regime.”

¹⁵² See POLITICS, *supra* note 40, VIII, at 1337a42b; POLITICS (Lord trans.), *supra* note 40, at 229–41.

¹⁵³ NICOMACHEAN ETHICS, *supra* note 14, II.2, at 1103b27–29; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 23.

¹⁵⁴ See NICOMACHEAN ETHICS, *supra* note 14, X.9, 1179b10; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 196.

ating, teaching, and then ultimately persuading them.¹⁵⁵ Yet the less virtuous have an important say-so in the laws, and they usually do not like being told that they are vicious and need to be made better. Group opinion also shapes politics more directly than it does ethics. When an individual studies ethics, he may conform his life to his highest good as *he* perceives that good.¹⁵⁶ Politics, by contrast, reconciles the conflicting interests of different members of the political community toward the conception of the common good the citizenry settles on.¹⁵⁷ That shared conception comes not from any single individual but from group opinion, produced by culture, political arguments, elections, or—worst case—victory after civil war. Civic virtue is therefore more politicized, and more likely to encourage civil strife, than individual virtue.

Consider antiobscenity and antipornography laws. On one hand, virtue-friendly theories can provide sound justifications for such laws. If unchecked, sexual passions encourage people (especially men) to view others (especially women) “as bodily objects of desire and potential sexual release and gratification, . . . rather than as full persons with personal and individual sensitivities.”¹⁵⁸ Pornography and public obscenity are scandalous¹⁵⁹ because they teach citizens that they may pursue those passions wherever they lead. Common sexual mores (and the personal moderation, civility, and relational goods they promote) depend on support from public laws, religious teaching, family prescriptions, and general social norms. Public obscenity and pornography delegitimize all of these authorities. Some virtue-friendly theories would emphasize that obscenity and pornography are bad because they encourage citizens to be lusty, others that the lusts lead to the degradation or abuse of others, and different virtue-friendly theorists may disagree reasonably about which kinds of sexual publications are innocuous or obscene or pornographic. Even so, at a high level of generality, most virtue-friendly theories agree that some sexual publications are problematic, and they converge in similar diagnoses and cures for the problem.

On the other hand, there are also familiar arguments why it might not be a good idea to have the law bar obscenity or pornography across the board. A well-ordered society depends to a large de-

¹⁵⁵ See NICOMACHEAN ETHICS, *supra* note 14, X.9, at 1179a33–80a14; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 196–97.

¹⁵⁶ At least, as long as he does not violate any laws in the process.

¹⁵⁷ See POLITICS, *supra* note 40, I.1, at 1252a1–6; POLITICS (Lord trans.), *supra* note 40, at 35.

¹⁵⁸ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 217 (1980); see GEORGE, *supra* note 91, at 95–96, 155–57; accord U.S. CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH §§ 2351–57, at 564–66 (1994) (specifying moral offenses against chastity).

¹⁵⁹ See U.S. CATHOLIC CONFERENCE, *supra* note 158, § 2284, at 550.

gree on its citizens' being able to turn away from obscene materials without direct legal supervision. Overzealous regulation can interfere with citizens' teaching themselves or their friends and family how to turn away. Obscenity and pornography regulations are also hard to draft in a clear and fair manner.¹⁶⁰ Different citizens may disagree about where to draw the line between tolerable and indecent, and the differences relate back to deep disagreements about religion and morality. If public officials enforce such regulations hamhandedly and puritanically, the enforcement efforts can backfire. On the third hand, however, these counterarguments can also be abused, by citizens who do not think that pornography is immoral but know they cannot say so publicly without triggering a backlash in support of morals laws. As a result, even in ideal circumstances, it is prudent for a political community to refrain from regulating legally some publications that are probably ethically obscene or pornographic.

The law may neither prohibit everything that is unethical nor require everything that is ethical. If a virtue-friendly theorist wants to broaden out from ethics to politics, she must therefore anticipate two important complications. One is to assume mistakenly that ethics can or should be apolitical. According to this view, when politics legislates on virtue, it makes it impossible for actors to act virtuously.¹⁶¹ This claim assumes unrealistically that individual citizens can self-improve in their ethical lives without serious prior formation from politics and law. As Robert George explains, "[T]he law must first settle people down if it is to help them to gain some appreciation of the good, some grasp of the intrinsic value of morally upright choosing, some control by their reason of their passions."¹⁶²

The other danger is to assume unrealistically that the principles that work in ethics fit seamlessly into law or other forms of politics. This is the problem that so concerns me about *The Social-Obligation Norm* and *Land Virtues*. Most of a community's laws are political in the respect I mean here. The political community uses law as one of several tools to regulate conflicting interests—and as probably the most important tool for teaching citizens what kinds of conduct they should emulate and avoid. Citizens understand intuitively that laws make distributive comparisons indicating which virtues take the highest priority in the community. These comparisons provoke citizens to wage

¹⁶⁰ "[T]he existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79 (1973) (Brennan, J., dissenting).

¹⁶¹ Katrina M. Wyman describes this view without embracing it herself in her Response in this Issue, Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991, 1002–04 (2009).

¹⁶² GEORGE, *supra* note 91, at 25–26. For an excellent analysis of Aristotle's analysis of this issue, see Buckle, *supra* note 14.

"culture war" fights. When politics encourages citizens to use law to make citizens virtuous, it encourages factious citizens to use "virtue" as a political and ideological bludgeon to help their own factions acquire dominance and to subordinate rival factions.

In his Reply, Professor Alexander suggests I am making a category mistake here. If law has room for judicial ethics, lawyer ethics, the ethics of agents, and other similar fields, he suggests, there is no reason why property law cannot import ethics as well.¹⁶³ As should be clear by now, I neither mean nor need to claim that all law is political, or that no sort of ethics can bleed into law. Moreover, these fields of ethics are all exceptions confirming the underlying rule. In these fields, the virtues instituted by law regulate an actor understood to enjoy a context-specific responsibility to act as a steward of some sort. The context and bilateral relationship make it easy for the political community to agree on what an "excellent," "model," or "virtuous" fiduciary or professional is supposed to do—or (more easily and more often) *refrain* from doing. But such contexts and relationships are definitely not the norm in most of law—especially property. I doubt citizens who are otherwise strangers to one another will take it lying down if the political authorities tell them they may use their property (only) as "excellent," "model," or "virtuous" citizens would.¹⁶⁴

III

VIRTUE POLITICS?

The questions I am raising are questions of prudence. But prudential considerations range from the mundane to the world-historical. It is one thing for a virtue theory to vary how smut laws are enforced between Las Vegas and Provo. It is quite another to reopen the fight between medieval throne-and-altar virtue theory and Enlightenment liberalism.

Atmospherically, and in many of their examples, *The Social-Obligation Norm* and *Land Virtues* both intimate that property law would be better off if virtue theory were moved out of the "periphery" to the "core" of property.¹⁶⁵ As an abstract proposition, this suggestion makes some sense. As the discussion in Part I suggested, virtue-friendly accounts of property do not necessarily make rights or duties

¹⁶³ See Alexander, *supra* note 147, at 1068.

¹⁶⁴ Cf. MACINTYRE, *supra* note 80, at 205 ("[A] virtue is not a disposition that makes for success only in some one particular type of situation. What are spoken of as the virtues of a good committee man or of a good administrator or of a gambler or a pool hustler are professional skills professionally deployed in those situations where they can be effective, not virtues.").

¹⁶⁵ See Alexander, *supra* note 4, at 747 (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976)).

or social obligations primary.¹⁶⁶ A normative interest lies at the core, and the rights and correlative duties follow from the interest. So analytically, I can imagine a legal and social regime that puts virtue duties at the core and rights out at the periphery.

Politically, however, deep historical, theological, and political complications all counsel that property lie at the core of political discourse, and that rights lie at the core of property and the community's constitutive political theory. By stressing rights, these prudential concerns suggest, the law should let slide legally and politically many uses of property that might not pass muster ethically. Again, in discussing these concerns, the discussion barely scratches the surface of an extremely wide and messy set of topics. Again, however, if *The Social-Obligation Norm* and *Land Virtues* are going to reopen the door to virtue political theory, readers deserve at a minimum a refresher course on why Enlightenment political theorists tried to barricade that door shut for good.¹⁶⁷

Every so often, political and ethical scholarship experience a communitarian revival criticizing property's selfish tendencies.¹⁶⁸ In our liberal society, it is easy to understand why a communitarian alternative seems attractive. In important respects, contemporary law and politics are atomizing. Enlightenment liberalism is deliberately hardwired to have many of the characteristics of the city of pigs that so offended Glaucon's senses of nobility and excellence. Virtue theory provides a strong set of arguments, with a respectable pedigree in the philosophy canon, to question liberalism's atomizing tendencies on communitarian grounds. Furthermore, as it is usually presented, virtue theory seems innocuous. "Flourishing" is certainly hard to disagree with,¹⁶⁹ and "virtue" certainly seems appealing when used to justify industry and other encompassing and uncontroversial virtues.¹⁷⁰

Yet such communitarian complaints are historically contingent. They suffer from the same "bad sociology" and "naïve psychology"

¹⁶⁶ See *supra* notes 110–16 and accompanying text.

¹⁶⁷ This section and the next will explain the basic issues in the political-theory terms in which virtue-friendly early Enlightenment political philosophers portrayed those terms. To appreciate the issues fully, one would also need a sound appreciation of the history of the same period, and specifically the full range of historical forces that caused medieval law, which applied natural-law principles, to evolve into modern law, which drew on natural rights. For two excellent starts into that topic, see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997); Benjamin Straumann, *Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius's Early Works on Natural Law*, 27 *LAW & HIST. REV.* 55 (2009).

¹⁶⁸ Indeed, Professor Alexander deserves pride of place in this project. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* (1997); James W. Ely, Jr., Book Review, 43 *AM. J. JURIS.* 227 (1998) (reviewing ALEXANDER, *supra*).

¹⁶⁹ See Alexander, *supra* note 4, at 748.

¹⁷⁰ See Peñalver, *supra* note 5, at 877–86.

criticisms that have been directed at liberal political theories grounded in Kantian deontology.¹⁷¹ Such communitarian arguments, the response runs, take for granted the tough-minded choices early Enlightenment theorists made to confine virtue and elevate rights as the dominant category of political discourse. "In its formative period," Enlightenment's sympathizers stress, "liberalism . . . engaged in a critique of classical virtue."¹⁷²

Since we are all Aristotelians here, let me again use Aristotle's main writings on ethics and politics as points of contact with the Enlightenment's departures. First, a virtue theorist living after 1600 might politely reject Aristotle's claim that the virtues establish a hierarchy clearly enough to order a community's politics. I am not saying here that all prominent Enlightenment theorists were Aristotelians. Yet otherwise faithful Aristotelians might reasonably have agreed with David Hume's analysis of the relation between virtue, religion, and politics:

[T]o assign the largest possessions to the most extensive virtue, and give every one the power of doing good, proportioned to his inclination . . . [,] so great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it; and the total dissolution of society must be the immediate consequence. Fanatics may suppose, *that dominion is founded on grace, and that saints alone inherit the earth*; but the civil magistrate very justly puts these sublime theorists on the same footing with common robbers, and teaches them by the severest discipline, that a rule, which, in speculation, may seem the most advantageous to society, may yet be found, in practice, totally pernicious and destructive.¹⁷³

Notwithstanding their deep differences in other respects, progressives and conservatives in contemporary politics agree on Hume's diagnosis. Rawlsian Charles Larmore identifies "the deepest departure from the Aristotelian perspective" in this claim: "On matters concerning the meaning of life, discussion among reasonable people has seemed to liberals to tend naturally not toward consensus, as Aristotle thought, but rather toward controversy."¹⁷⁴ Similarly, traditionalist Alasdair MacIntyre acknowledges that "the liberal individualist standpoint partly derives from the evident fact that the modern

¹⁷¹ See *supra* notes 35–36 and accompanying text.

¹⁷² Christopher J. Berry, *Adam Smith and the Virtues of Commerce*, in NOMOS XXXIV: VIRTUE 69, 69 (1992); see CHRISTOPHER J. BERRY, *THE IDEA OF A DEMOCRATIC COMMUNITY* (1989).

¹⁷³ DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* III.ii, at 25–26 (Open Court Publishing Co. 1966) (1777).

¹⁷⁴ Charles Larmore, *The Limits of Aristotelian Ethics*, in NOMOS XXXIV: VIRTUE, *supra* note 172, at 185, 192; see CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987).

state is indeed totally unfitted to act as moral educator of any community."¹⁷⁵ Robert George has sympathetically restated Aristotle's case for public-morals legislation, and yet George still recognizes that Aristotle "plainly failed to allow room in his ethical and political theory for the diversity of irreducible human goods which . . . are the bases for a vast range of valuable, but mutually incompatible . . . ways of life."¹⁷⁶ *Land Virtues* relies substantially on MacIntyre and George's work, by the way, to explain and justify virtue theory.¹⁷⁷ I am puzzled why the article does not consider seriously what both authorities regard as a serious limitation of virtue theory.

Enlightenment liberalism has a separate critique: Whether or not the virtues could have ordered a consensual and harmonious politics in Aristotle's day, the political program he prescribed for ancient Greece would backfire now, in the historical, political, and theological conditions of modernity.¹⁷⁸

When Aristotle writes about politics and legislation, he presumes he is speaking of a community small enough that public officials know citizens personally well enough to judge them on the basis of their characters. He warns that an indefinitely large city does not count as a city properly speaking.¹⁷⁹ He does not identify any single number of citizens as ideal, but he suggests at one point that a city may be too large if it is large enough to support an army of 5,000 citizens.¹⁸⁰ Aristotle treats religion extremely circumspectly. When he traces his genealogy of politics in Book I of the *Politics*, Aristotle explains why the city emerges from the family—but he ignores religion and religious law.¹⁸¹ Separately, although my interpretation on this point may be idiosyncratic, I read Aristotle to hint that the city must subordinate the priesthood even as it maintains civic respect for religion.¹⁸² If re-

¹⁷⁵ MACINTYRE, *supra* note 80, at 195.

¹⁷⁶ GEORGE, *supra* note 91, at 38.

¹⁷⁷ See Peñalver, *supra* note 5, at 887 n.260 (citing MACINTYRE, *supra* note 80); *id.* at 873–74 & n.207 (citing GEORGE, *supra* note 91).

¹⁷⁸ Within the context of a *polis* and an ethical theory intended to accompany it, the strategy of pointing to a *phronimos* makes a certain sense. However, to divorce this strategy from its social and economic roots and to then apply it to a very different sort of community—one where people really do not know each other all that well, and where there is wide disagreement on values—does not [make sense].

Louden, *supra* note 66, at 213.

¹⁷⁹ See POLITICS, *supra* note 40, VII.4, at 1326a25–27; POLITICS (Lord trans.), *supra* note 40, at 204.

¹⁸⁰ See POLITICS, *supra* note 40, I.2, at 1252a24–53a39; POLITICS (Lord trans.), *supra* note 40, at 35–38.

¹⁸¹ See POLITICS, *supra* note 40, I.2, at 1252a24–1253a39; POLITICS (Lord trans.), *supra* note 40, at 35–38.

¹⁸² See POLITICS, *supra* note 40, VII.8, at 1328b11–13; POLITICS (Lord trans.), *supra* note 40, at 210 (proposing to make the priestly offices simultaneously fifth and first in priority in the well-ordered city).

ligious rituals are given too high a public priority, the religious impulse "assumes a position of imperious independence from which it presumes to contend against the family" and even the city.¹⁸³

Oversimplified greatly, Aristotle presumes it is possible to establish a small political community; of citizens closely knit by nationality, heritage, and religion; around a common political morality and a prolix code of laws emphasizing one or a few virtues as the keys to a right way of life. In modern politics, nation-states have anywhere from hundreds of thousands to billions of citizens. The commonalities of race, blood ties, and common language that Aristotle presumed no longer exist. Neither do the local knowledge or the familiarity he also presumed government officials would have. Communitarian laws may therefore ignite ethnic, religious, or class-driven civil wars. They may tempt each race, sect, or class to acquire power, and then to legislate its own factious advantage—perversely in the name of making the entire citizenry virtuous. Most important, religion is more capable of destabilizing domestic politics now (meaning in the West over the last half-millennium) than it was in Aristotle's time. Christianity is a universal revealed religion.¹⁸⁴ When politics is about legislating virtue and not about securing rights, it tempts sectarian believers to gain political power to compel subjects to be virtuous as defined by the teachings of their particular sect. Since Enlightenment philosophy is universalist, non-religious political ideologues can suffer from the same temptations.

One might object that this portrait of politics is too dour. Yet as Aristotle explained, when not properly shaped by background laws and customs, man "is the most unholy and the most savage" of the animals.¹⁸⁵ There are many parts of the world where politics is this dour. In those areas, when political rulers assume it is appropriate to use force and law to favor one way of life as higher than others, the results are depressing. For example, the country of Rwanda used to include a majority of poorer, agrarian Hutus and a minority of richer, better-educated, and more professionalized Tutsi. The two ethnic groups were rivals. Between the 1970s and 1990s, a Hutu government, led by head of state Juvenal Habyarimana, led a campaign of genocide against the Tutsis. To legitimate the genocide, Habyarimana's ruling party propagated a political ideology that "glorified the [Hutu] peas-

¹⁸³ Thomas G. West, *Introduction* to *FOUR TEXTS ON SOCRATES* 9, 15 (Thomas G. West & Grace Starry West trans., rev. ed. 1998) (commenting on Plato's dialogue *Euthyphro*).

¹⁸⁴ See, e.g., *Matthew* 28:18–20. The same can be said of the other major monotheistic revealed religions; it just so happens that Christianity has been the most influential of these religions in the Western world.

¹⁸⁵ See *POLITICS*, *supra* note 40, I.2, at 1253a35–36; *POLITICS* (Lord trans.), *supra* note 40, at 38.

antry" and subordinated the Tutsi as "petty bourgeois."¹⁸⁶ The ideology did so in part by declaring peasant life to be virtuous ("giv[ing] all kinds of physical labor its value back") and professional life vicious ("fight[ing] [a] form of intellectual bourgeoisie").¹⁸⁷

One might reasonably wonder whether this example is fair. All theories of politics have their success stories and their embarrassments, and perhaps I am focusing too much on virtue theories' embarrassments. On the other hand, in political theory it is often a very good idea to focus on the worst-case scenario. Rights-based regimes always come with a soft permissiveness. In bad cases, they devolve into anarchy; in the worst cases, anarchy encourages tyrants or totalitarian regimes to take over on the pretext of reestablishing order. Virtue-based regimes encourage the tyrants and the totalitarians straightaway. In not only their worst but also their bad cases, virtue-based politics embolden a control group to wage civil war, to acquire comprehensive political control, on the pretext of wanting to compel everyone else to be virtuous.

IV RIGHTS POLITICS!

In short, in the political, religious, and ethnographic conditions that inform modernity, liberal politics is probably more humane and prudent than pure virtue politics. Liberalism refers to a political regime that creates space for each citizen to think about or believe what he finds most needful. To do so, liberalism organizes politics not around the pursuit of virtue but the protection of rights. "Virtue" theory inherently points toward rivalrous and contestable visions of individual excellence; "rights" theory inherently focuses on common-denominator interests like life, prosperity, and family. Thus, in a liberal order, "property" becomes a dominant metaphor for the ends upon which government should focus, and an implicit warning about the ends that government should avoid.

This contrast explains why my argument reminds Alexander of the CLS movement.¹⁸⁸ One of the hallmarks of CLS theory is that it rejects the public-private distinction. Aristotelian virtue politics differs significantly from the CLS movement in many ways, but like CLS it leaves extremely little space for the private sphere.¹⁸⁹ Mixing rights

¹⁸⁶ Philip Verwimp, *Development Ideology, the Peasantry, and Genocide: Rwanda Represented in Habyarimana's Speeches*, 2 J. GENOCIDE RES. 325, 326 (2000).

¹⁸⁷ *Id.* at 325 (quoting Major-General Juvenal Habyarimana, Message of the Head of State (May 1, 1974)).

¹⁸⁸ See *supra* note 147 and accompanying text.

¹⁸⁹ See Harry V. Jaffa, *Aristotle*, in HISTORY OF POLITICAL PHILOSOPHY 64, 65–67 (Leo Strauss & Joseph Cropsey eds., 2d ed. 1972). But see Miller, *supra* note 144 (reading Aris-

theory and Aristotelian virtue theory seems like mixing oil and water. Without making *very* careful qualifications, one or the other ingredient is going to be distorted heavily in the mixture. Maybe neo-Aristotelian virtue theories blend more smoothly. But maybe the "neo" elements in those theories make them too superficial to appreciate the world-historical differences between antiquity and modernity.

Modern liberalism, let me hasten to add, is not totally incompatible with virtue ethics or other virtue theories. In theory, virtue-friendly political theories justify liberalism as a second-best regime. As Larmore explains, "Aristotle cannot be our guide" to political practice because "the cultivation of virtue . . . cannot be our common political bond, though it keeps its importance in other areas of social life," specifically because "the meaning of life is a natural object of disagreement."¹⁹⁰ Liberalism is defensible in a virtue framework as the most humane and prudent means realistically available to secure the most virtue and *eudaimoneia* possible. In practice, virtue regulation still remains important in a liberal political order. In such an order, however, politics tends to focus on the low and encompassing virtues, like civility, patriotism, sexual modesty, and industry. Furthermore, the liberal order advances virtue *indirectly*. At least in public rhetoric, such an order does not promote virtue for virtue's own sake; it promotes virtue regulation as an indispensable means for helping citizens enjoy their own and respect their neighbors' rights.

One concise way to illustrate the Enlightenment alternative is to consider Locke's writings.¹⁹¹ Locke serves as a lightning rod for the communitarian criticisms discussed in Part III. His anticipatory responses to those criticisms are hard to appreciate because his diagnosis of the Enlightenment is more circumspect than Hume's could be a century later. Yet Locke deliberately structures Lockean liberalism to compartmentalize virtue as far away from politics as possible. To be clear, in his metaethics, Locke is far from being a virtue theorist in the strict sense of the phrase.¹⁹² Although it would take me too far afield

tote's political theory to be at least somewhat compatible with some theories of rights); *supra* notes 165–66 and accompanying text.

¹⁹⁰ Larmore, *supra* note 174, at 195.

¹⁹¹ I have explained why the claims made about Locke in the following paragraphs interpret Locke faithfully in Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke's Thought*, 25 SOC. PHIL. & POL'Y 201 (2008).

¹⁹² See JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING II.21.55, at 269 (Peter H. Nidditch ed., 1979) (criticizing "the [p]hilosophers of old" for "in vain enquir[ing], whether *Summum bonum* consisted in Riches, or bodily Delights, or Virtue, or Contemplation: And they might have as reasonably disputed, whether the best Relish were to be found in Apples, Plumbs, or Nuts; and have divided themselves into Sects upon it"); PETER C. MYERS, OUR ONLY STAR AND COMPASS: LOCKE AND THE STRUGGLE FOR POLITICAL RATIONALITY 123 (1998) ("[Locke] does not see in [natural human sociality] a natural inclination toward lawfulness or virtue.").

to defend the claim here, I follow others¹⁹³ who regard Locke as a eudaimonistic consequentialist.¹⁹⁴ True, in the *Two Treatises*, Locke hardly ever mentions the term “virtue.”¹⁹⁵ Yet, at least in his epistemological and ethical writings, Locke is interested in virtue. When he explains the motivations for human actions, Locke sets “our greatest good” as “the highest perfection of intellectual nature, [which] lies in a careful and constant pursuit of true and solid happiness.”¹⁹⁶ Locke just prefers to assign the perfection of human character and the pursuit of happiness (to the extent they may be so confined) to the private realm. Locke’s *Some Thoughts Concerning Education* impresses on parents that they must educate their children to appreciate that “the great principle and foundation of all virtue and worth is this, that a man is able to *deny himself* his own desires, cross his own inclinations, and purely follow what reason directs as best though the appetite lean the other way.”¹⁹⁷

To understand why Locke goes to such lengths to privatize virtue, one must understand how Locke views Christianity. He regards Christianity as valuable because it inculcates virtue in people who lack the means, the leisure, or the inclination for higher ethical education. That is one of the main lessons of *The Reasonableness of Christianity*.¹⁹⁸

¹⁹³ See, e.g., JOHN COLMAN, JOHN LOCKE’S MORAL PHILOSOPHY 195–96 (1983) (both describing Locke’s political philosophy as having hedonistic foundations); MYERS, *supra* note 192, at 137–72; Nomi M. Stolzenberg & Gideon Yaffe, *Waldron’s Locke and Locke’s Waldron: A Review of Jeremy Waldron’s God, Locke, and Equality*, 49 INQUIRY 186, 197–202 (2006) (reviewing WALDRON, *infra*, and reading Locke to be a utilitarian); Thomas G. West, *Nature and Happiness in Locke (Unabridged)* (2004), http://www.claremont.org/publications/pubid.659/pub_detail.asp (book review) (arguing that Locke is a eudaimonistic consequentialist). *Contra* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE’S POLITICAL THOUGHT 82, 102, 225 (2002) (reading Locke to be a deontologist and a divine-command theorist); Peter Laslett, *Introduction to LOCKE, TWO TREATISES OF GOVERNMENT* 3, 81–82 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter “TWO TREATISES”] (“Locke’s ethical statements . . . point in many directions at the same time.”).

¹⁹⁴ See *supra* notes 105–06 and accompanying text.

¹⁹⁵ See, e.g., Robert A. Goldwin, *John Locke*, in HISTORY OF POLITICAL PHILOSOPHY 476, 476–510 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987). Locke considers the possibility that “some one good and excellent Man, having got a Preheminency amongst the rest, had this Deference paid to his Goodness and Vertue . . . that the chief Rule . . . by a tacit Consent devolved” into absolute monarchy. TWO TREATISES, *supra* note 193, II.94, at 329. In context, however, this example confirms Locke’s overall reserve toward virtue understood as an open-ended goal of political life. Virtue is part of the monarchical political system Locke seeks to displace. Similarly, Locke acknowledges that “Age or Virtue may give men a just Precedency” over their peers—but not to the point that the former may claim the power to rule the latter without their consent. *Id.* II.54, at 304.

¹⁹⁶ LOCKE, *supra* note 192, II.21.51, at 266.

¹⁹⁷ JOHN LOCKE, *Some Thoughts Concerning Education*, in SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING § 33, at 25 (Ruth W. Grant & Nathan Tarcov eds., 1996) (1693).

¹⁹⁸ See JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY ¶¶ 241–45, at 169–85 (George W. Ewing ed., 1965) (1695).

But Locke's *A Letter Concerning Toleration* focuses on Christianity's destructive tendencies in politics. Anticipating Hume, Locke warns, "No Peace and Security, no not so much as Common Friendship, can ever be established or preserved amongst Men, so long as this Opinion prevails, That *Dominion is founded in Grace*, and that Religion is to be propagated by force of Arms."¹⁹⁹

Locke therefore limits the extent to which *politics* may regulate virtue. The Lockean commonwealth may regulate a few virtues—but only low, encompassing, and uncontroversial ones, and even then only indirectly. The greatest concession Locke makes to virtue is that the commonwealth may regulate "rectitudo morum," or "rectitude of morals."²⁰⁰ When Locke's first English translator mistakenly translates this term as "virtue,"²⁰¹ he misses the point. Locke is going out of his way to avoid giving virtue-crats respectable public reasons for stirring up quarrels or contentions²⁰² about more elite and rivalrous perfectionist virtues. The commonwealth may regulate civic virtues only to the extent that such virtues cover the moderation and self-restraint necessary for citizens to govern themselves politically and privately—like the anti-obscenity laws discussed in Part II.²⁰³ Even then, the Lockean commonwealth does not *claim* that it is making citizens virtuous; it promotes virtue through the backdoor. Lockean liberalism justifies virtue regulation as an indispensable element of "rights infrastructure."²⁰⁴ In other words, the commonwealth inculcates self-restraint, civility, and other character qualities not for their own sakes; rather, without such qualities, citizens can neither enjoy their own rights nor respect their neighbors'. This argument makes virtue regulation seem secondary. Locke makes primary *rights*—most of all property, which occupies the central chapter of the *Two Treatises*.²⁰⁵

Sir William Blackstone approaches rights, duties, and regulation in the same spirit. Blackstone acknowledges that all individuals are endowed with rights and duties. In his political theory, individuals are entitled by natural law to enjoy rights "whether out of society or in it."²⁰⁶ Duties, however, need to be broken down by whether "human

¹⁹⁹ JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 18 (London, Awnsham Churchill 1689).

²⁰⁰ JOHN LOCKE, *Epistola de Tolerantia: A Letter Concerning Toleration* 122 (Raymond Klibansky ed., J.W. Gough trans., 1968) (1689).

²⁰¹ LOCKE, *supra* note 199, at 40–41.

²⁰² See LOCKE, *supra* note 193, II.34, at 291.

²⁰³ See *supra* notes 158–60 and accompanying text; see also Claeys, *supra* note 191, at 223–24.

²⁰⁴ Michael P. Zuckert, *On Constitutional Welfare Liberalism: An Old-Liberal Perspective*, 24 SOC. PHIL. & POL'Y 266, 270 (2007).

²⁰⁵ LOCKE, *supra* note 193, II.5, at 303–320.

²⁰⁶ 1 BLACKSTONE, *supra* note 12, at *123.

municipal law should at all explain or enforce them.”²⁰⁷ For example, “[p]ublic sobriety is a . . . duty [properly] enjoyed by our laws; *private* sobriety is a . . . duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction.”²⁰⁸

Important sources in American law and politics follow Locke and Blackstone’s approach from the American Founding until well into the nineteenth century. Of course, not all public actors in this era subscribed to virtue-friendly theories of politics and law. In addition, modern scholars must charitably discount for the fact that practical legal reasoning in this time span skimmed over or finessed “dispute[s] that savour[ed] too much of nice and scholastic refinement.”²⁰⁹ Even so, the political theory that operated as a common-denominator political morality in this period was influenced substantially by Pufendorf, Locke, Hume, Blackstone, and other similar jurists and theorists. The amalgamation that resulted is practically compatible with a wide range of virtue-friendly theories notwithstanding their philosophical differences.²¹⁰ (In the remainder of this Response, I will refer to this common-denominator political morality as “American natural-rights theory.”)

The Federalist’s treatment of faction tracks much of what I have said in this and the previous part, most of all in Numbers 10²¹¹ and 51.²¹² But *The Federalist* was not universally respected at the time of ratification; it targeted swing voters in New York by arguing against the anti-Federalists in that state. So let me focus on an organic document, Virginia’s 1776 Declaration of Rights, authored principally by George Mason, the namesake of my law school. Article 1 of the Declaration of Rights provides:

That all Men are by Nature equally free and independent, and have certain inherent Rights, of which, when they enter into a State of Society, they cannot, by any Compact, deprive or divest their Posterity; namely, the Enjoyment of Life and Liberty, with the Means of

²⁰⁷ *Id.* at *124.

²⁰⁸ *Id.*

²⁰⁹ 2 *id.* at *8.

²¹⁰ See, e.g., MARK WARREN BAILEY, *GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910*, at 24–84 (2004) (describing the standard catechism of law, ethics, politics, and theology learned by college students in the second quarter of the nineteenth century at leading liberal arts colleges).

²¹¹ See, e.g., *THE FEDERALIST* No. 10, at 77, 79 (James Madison) (Clinton Rossiter ed., 1961) (suggesting that “the latent causes of faction are . . . sown in the nature of man” and include “zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice,” “an attachment to different leaders,” and “the various [sic] and unequal distribution of property”).

²¹² *THE FEDERALIST* No. 51 (James Madison), *supra* note 211, at 320, 324 (explaining how the American political order secures civil rights with “the multiplicity of interests” and religious rights with “the multiplicity of sects”).

acquiring and possessing Property, and Pursuing and obtaining Happiness and Safety.²¹³

This article declares that the basic orientation of Virginia's government is to secure "inherent rights"—including "the means of acquiring and possessing [p]roperty." At a minimum, these rights are consistent with virtue-friendly theories of politics, for all the rights declared aim ultimately at "pursuing and obtaining [*h*]appiness."

Now, some communitarians might fear, and some libertarians hope, that "happiness" here refers to an extremely subjective and self-regarding conception of individual well-being. In context, however, "happiness" means *eudaimoneia* or some diluted but still-faithful modern rendition of it. Rather than take my word for it, consider article 15 of the Declaration: "That no free Government, or the Blessings of Liberty, can be preserved to any People but by a firm Adherence to Justice, Moderation, Temperance, Frugality, and Virtue, and by frequent Recurrence to fundamental Principles."²¹⁴ This declaration (and others like it²¹⁵) also confirm that Founding Era Americans promoted social virtues only in the indirect style suggested by Locke and Blackstone. Governments may encourage and inculcate virtues, but only the lowest-hanging fruits on the virtue tree. The Declaration covers moderation, temperance, frugality, but not religious orthodoxy, speculative excellence, the excellences of farming, business, or the martial life, or other rivalrous individual virtues.

This background explains, as standard property policy arguments do not, why property serves as the "keystone right" in many contemporary liberal societies.²¹⁶ It is not that property rights are sacrosanct or free from any limits; rather, property serves as an organizing metaphor for a liberal political order. In *Federalist 10*'s phrase, in a liberal order the "first object of government" is the "protection of the [diverse] faculties," "from which the rights of property originate."²¹⁷ The pre-modern society Aristotle presumed had economic scarcity, which created overwhelming political, economic, and familial competition. By tapping into human creative capacities, property reduces the scar-

²¹³ VA. DECLARATION OF RIGHTS art. I (June 12, 1776).

²¹⁴ *Id.* art. XV (June 12, 1776).

²¹⁵ See, e.g., MASS. CONST. of 1780, Declaration of Rights, art. 3 (stating that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality"); Northwest Ordinance art. 3 (1787) (assuming "[r]eligion, morality, and knowledge [to be] necessary to good government and the happiness of mankind").

²¹⁶ See generally Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996).

²¹⁷ THE FEDERALIST NO. 10, *supra* note 211, at 78. But see THE FEDERALIST NO. 3 (John Jay), *supra* note 211, at 44, 45 (describing public safety as the first object of government).

city and softens the competition.²¹⁸ By transferring maximal control over wealth-creating resources to individuals, the liberal commonwealth encourages citizens to practice and acquire virtues of industry, self-mastery, and moderation. In most virtue-friendly accounts, these are fairly low-hanging fruits on the virtue tree. Yet whatever their limits, industry and the other property-related virtues are necessary to any more complete account of happiness, and they are indispensable preconditions to the exercise of the higher virtues. Equally important, by focusing political "justice" on the protection of property, the liberal polity focuses the public's attention on how well the government is enlarging interests that all can agree benefits all. By the same token, when "property" is the keystone right, the liberal commonwealth steers out of the realm of public justice supposedly true, guaranteed paths to universal peace and security in this life or to salvation in the next.

Of course, this liberal outlook is not beyond criticism. Communitarians may say that virtue-friendly liberalism mixes apples and oranges. It takes for granted that the citizenry is formed by and practices classical and medieval principles of virtue that the liberal polity does not and cannot inculcate on its own.²¹⁹ Separately, CLS theorists want to abolish the public-private distinction liberalism establishes, on the ground that liberalism encourages too much private oppression. Members of racial, national, religious, or ideological groups can harass, stigmatize, or subordinate non-members, the argument goes, as or more effectively in private associations than they can when one such group seizes the levers of government.²²⁰ Pluralists may complain that virtue-friendly theories of rights are still too demanding. Even though virtue-based rights theories are less demanding than simple virtue political theory, they still allow a considerable amount of backdoor virtue regulation, and they require citizens to subscribe to important common-denominator political opinions about rights. In that respect, they are still significantly more conformist and communitarian than pluralist accounts of liberalism.²²¹ Aristotle suggests a fourth line of criticism: By encouraging technological development, the liberal polity quietly encourages materialism and destabilizes law, religion, and other influences that form moral character.²²²

²¹⁸ See BUCKLE, *supra* note 58, at 124; Paul A. Rahe, *The Political Needs of a Toolmaking Animal: Madison, Hamilton, Locke, and the Question of Property*, 22 SOC. PHIL. & POL'Y 1 (2005).

²¹⁹ See, e.g., MACINTYRE, *supra* note 80.

²²⁰ See, e.g., ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996) (examining racism and stigmatization in both governmental and nongovernmental contexts).

²²¹ See Claey's, *supra* note 191, at 224–30.

²²² See POLITICS, *supra* note 40, II.8, at 1268b22–1269a28; POLITICS (Lord trans.), *supra* note 40, at 72–73.

Here, it is enough to say that, in the political, theological, and historical conditions of the contemporary world, there are important reasons why the political community might make property rights and not virtue duties the core of the political order. One cannot have it both ways.

V

RECONSIDERING *THE SOCIAL-OBLIGATION NORM* AND *LAND VIRTUES*

A. Overview

Some readers might wonder whether I am leading up to suggesting that *The Social-Obligation Norm* and *Land Virtues* are fundamentally misguided. I am not. At the level of theory, I applaud Alexander and Peñalver for drawing on an underused body of practical philosophy to articulate fundamental values relevant to property law. In legal and political practice, I also happily agree that property law can accommodate a considerable amount of virtue regulation without sliding down the slippery slope to ethnic expropriation and genocide as in Rwanda. Although Blackstone thought it inappropriate for the law to regulate private drunkenness, he defended on virtue grounds a “gleaning” exception to the common law of England, which entitled the poor to pick grain left over in fields after farmers had finished their harvests.²²³ Even now, obscene materials, and property used in the course of obscene conduct, are usually subject to confiscation or forfeiture on the ground that they constitute public morals nuisances.²²⁴ Although the following suspicions would need to be confirmed, I also suspect that virtue ethics or close cousins to it can explain and justify obligations in areas of property law that have the relational character I described in Part II²²⁵—the fiduciary duties of will administrators or trust executors; a present estate holder’s duty not to waste land subject to future interests; or the reciprocal rights and duties of co-tenants.

Yet both articles go further. Both make many atmospherical suggestions that contemporary property law “insulate[s] individuals from the demands of society,”²²⁶ that flourishing or virtue duties should dis-

²²³ See 3 BLACKSTONE, *supra* note 12, at *212–13. Blackstone justified these laws on the ground that they inculcated charity, specifically as understood in the Mosaic law. See *id.* at *213; accord *Leviticus* 23:22; *Ruth* 2:2.

²²⁴ See, e.g., *Bennis v. Michigan*, 516 U.S. 442 (1996) (rejecting a due process challenge by a wife to block a forfeiture proceeding against a car, co-owned with her husband and used by the husband to solicit a prostitute, even though the wife did not authorize or even know how her husband was using the car).

²²⁵ See *supra* notes 163–64 and accompanying text.

²²⁶ Alexander, *supra* note 4, at 746.

place rights at the core of property,²²⁷ or that the legal-political order can tolerate a mix of virtue and rights theory.²²⁸ Here is where I draw the line. The first suggestion does not accurately describe the core of American property law as I understand it. The latter two suggestions, if made without careful qualifications, threaten to disrupt the rights-based justificatory structure of our liberal political order. Because this disruption could have dramatic political implications, those latter two suggestions deserve to be considered by standards as severe as the implications are grave.

Let me illustrate briefly with doctrinal points of contact upon which *The Social-Obligation Norm* and *Land Virtues* specifically focus. I apply to both articles the criteria that Alexander follows explicitly and Peñalver follows implicitly. Both articles are positive to the extent they “provide an explanatory account of doctrinal practices in which private owners are required to sacrifice their ownership interests in some way.”²²⁹ Both are normative to the extent that the virtue theories they propose rationalize “when and why [those virtue theories] justif[y] the community requiring such sacrifices of private owners.”²³⁰

B. Nuisance Remedies

Scratch the surface of American property rights, and more virtue-friendly theory lurks underneath than its rights-based structure first suggests. That is my main reaction to *The Social-Obligation Norm*’s positive claims. Let me illustrate using that article’s discussion of nuisance remedy doctrine as a point of contact.²³¹ Generally, equity presumes that a complainant is *not* entitled to equitable relief unless his remedy at law is inadequate.²³² Nuisance law flips this principle to presume that a land owner *is* entitled to abatement if she is suffering a substantial and ongoing nuisance.²³³ Nuisance law flips this presumption once again, however, if the defendant can show that it and the local community will suffer hardship far greater from an order abating the

²²⁷ See *id.* at 747.

²²⁸ See Alexander, *supra* note 147, at 754–55.

²²⁹ Alexander, *supra* note 4, at 774.

²³⁰ *Id.*

²³¹ *Id.* at 779–82.

²³² See, e.g., *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217, 219 (Tex. App. 1973).

²³³ See *id.* at 221–22 (suggesting that the court would deny the injunction only if the polluter could satisfy a “‘stern rule of necessity rather than on the right of the [polluter] to work a hurt, or injury to his neighbor’” (quoting *Storey v. Cent. Hide & Rendering Co.*, 226 S.W.2d 615, 619 (Tex. 1950))); *Quinn v. Am. Spiral Spring & Mfg. Co.*, 141 A. 855, 857, 858 (Pa. 1928) (holding that the defendant must move equipment in its iron and steel plant in order to minimize damage to a neighbor’s house and providing for an injunction if the defendant could not comply).

defendant's pollution than the plaintiff will suffer from being limited to damages only.²³⁴

This series of rules and exceptions confirms the contributions that *The Social-Obligation Norm* makes, as fleshed out in Part I: *The Social-Obligation Norm* sketches a relation between rights and responsibilities that is much richer and closer to the moral phraseology in doctrine than current scholarship. Nuisance remedies are simple but foundational elements of property doctrine. They are also extremely contested symbolic territory in legal scholarship because of their close association with Calabresi and Melamed's economic taxonomy of property rules and liability rules.²³⁵ If scholars assume that the deontology trap makes a clinching philosophical argument, nuisance's pattern of rules and exceptions seems nonsensical.

If, however, property rights are understood as claim rights that are justified and limited by virtue-friendly theory, the philosophical account of rights and remedies is far harder to dismiss. One need not rely specifically on American natural-rights theory or Nussbaum and Sen's theory of human flourishing;²³⁶ most virtue-friendly theories (and many other non-virtue-friendly theories) would converge on the following general justification.²³⁷ Owners' interest in labor for their own personal ends vests owners not only with the control over their lots they get from trespass law²³⁸ but also with a domain of practical discretion to choose how to deploy their land toward many possible uses, for many possible individualized ends. This domain explains why nuisance law flips the presumption against equity, and "deontologically" makes polluters abate pollution threatening neighbors' interests in the free and active use of their own property. Because all owners' property rights are all grounded ultimately in similar interests, however, the pollutees' rights must be qualified "consequently," in cases in which an injunction threatens to restrain the like rights and underlying interests of the polluter and people who have close relations with the polluter. Because property rights are oriented toward enlarging sociable owners' free use of their properties, nui-

²³⁴ See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873, n.* (N.Y. 1970) (noting the number of employees and the amount invested in a cement plant before declining to permanently enjoin the plant as a nuisance); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 661, 666-67 (Tenn. 1904) (declining to permanently enjoin mining and manufacturing operations, but granting damages after comparing the value of the industry to the surrounding property).

²³⁵ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²³⁶ See Alexander, *supra* note 4, at 762-64.

²³⁷ See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 49 (1997) ("If we believe in any fairly robust interest in autonomy, then the interest in determining the use of things is in part an interest in trying to achieve different goals.").

²³⁸ See *supra* Part I.E.

sance doctrine may rearrange or qualify legal rights by taking account of the consequences different rearrangements have for the moral interests underlying the rights. At the same time, the moral interest focuses the consequentialist reallocation.

That said, I am concerned that *The Social-Obligation Norm* may overstate its positive claim in relation to nuisance remedies. I am a little unclear what precisely *The Social-Obligation Norm* claims to explain about remedial doctrine in nuisance. The article *could* be read to claim that it provides the first significant explanation why the nuisance cases that rely on justice theory and not economic analysis qualify the entitlement to an injunction at all. If that is the claim, I am not persuaded. In American property law, many equity decisions relied on common-denominator American natural-rights theory to explain when a nuisance plaintiff was no longer entitled to an injunction. Even Blackstone, author of the “sole and despotic dominion” definition of property,²³⁹ qualified that definition for external assets that “must still unavoidably remain in common”—including “air, and water,” used by “mills, and other conveniences.”²⁴⁰ Nuisance remedy doctrine applies that proviso in straightforward fashion to pollution cases. In cases “of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property,” it has long been settled that nuisance “law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.”²⁴¹

Perhaps *The Social-Obligation Norm* is making a more precise explanatory claim: When courts decide to limit a prevailing plaintiff to damages (“Rule 2” or plaintiff-prevailing “liability rule” cases²⁴²), they do so relying on the Nussbaum-Sen capabilities approach. In other words, when a court limits a plaintiff-owner to damages, it usually relies on the fact that the productive activity producing the noxious pollution provides “an essential part of the infrastructure undergirding th[e] culture” necessary to the pollutee and the polluter’s commu-

²³⁹ 2 BLACKSTONE, *supra* note 12, at *2.

²⁴⁰ *Id.* at *14.

²⁴¹ *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 667 (Tenn. 1904); see JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 200–05 (2001); Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 647–48, 656–63 (1976).

Some of the confusion here stems also from a tendency in the cases to describe property in terms of the lay conception of the “right to exclude.” As Alexander correctly notes, “exclude” focuses on the right without the correlative duty. If property refers to a domain of “[e]xclusivity,” “exclusive use” accentuates the fact that boundaries steer parallel discretion to many different owners simultaneously. See *supra* note 133 and accompanying text.

²⁴² See Calabresi & Melamed, *supra* note 235, at 1116.

nity.²⁴³ I read the equity cases differently. I prefer to categorize the Rule 2 cases into two periods. One consists of cases starting with and following on *Boomer v. Atlantic Cement Co.*²⁴⁴ I would not use theories of justice to explain these cases. On their faces, *Boomer* and cases following it rely instead on instrumentalist utilitarian interest-balancing consistent with sections 826–28 of the *Restatement (Second) of Torts*.²⁴⁵

The other period covers nuisance cases up through the 1960s. These cases do speak in the phraseology of justice and rights. Descriptively, however, I do not read them to apply a capabilities approach. The pre-1970 cases do not consider seriously whether the plaintiff's rights claims should be qualified because the defendant's land use supplies infrastructure contributing importantly to the plaintiff's flourishing. The cases I regard as the leading cases focus on two factors. First, they inquire whether the noxious pollution is the product of "a lawful enterprise engaged in the utilization of a natural product of the community in the manufacture of a useful and necessary commodity," and, if so, then on whether the economic hardship to the defendants and others greatly outweighs the plaintiffs' hardships.²⁴⁶

In this phrasing, it does not matter whether there is a "nexus between the [defendant] whose activity is under challenge and the goods necessary to a well-lived life" ²⁴⁷ All that matters is that the defendant's product be legitimate—"lawful," "useful," or "necessary."

²⁴³ Alexander, *supra* note 4, at 780.

²⁴⁴ 257 N.E.2d 870 (N.Y. 1970). In fairness, even after *Boomer*, many modern cases continue to weigh the equities more skeptically than *Boomer* encourages. See, e.g., *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217 (Tex. App. 1973). Even in *Boomer*, on remand, the trial court awarded the plaintiffs quadruple the actual damages it had determined they had suffered before appeal. See Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in *PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET* 7, 8–11 (Peter Hay & Michael H. Heoflich eds., 1988). For a skeptical account of *Boomer*, consider Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 *GEO. MASON L. REV.* 923 (1999).

²⁴⁵ *RESTATEMENT (SECOND) OF TORTS* §§ 826–28 (1979). I might use a theory of justice to interpret an instrumentalist opinion if the opinion's instrumentalist arguments are so question-begging they seem likely to be recasting instrumentally latent and unarticulated claims of justice. Posner's economic analysis of adverse possession reads this way to me. See *supra* notes 124–25 and accompanying text. That possibility might apply to economic analysis of nuisance remedies, but whether it does or not is a question too complicated and tangential to explore here.

²⁴⁶ *King v. Columbian Carbon Co.*, 152 F.2d 636, 638 (5th Cir. 1945); see *Pendoley v. Ferreira*, 187 N.E.2d 142, 146 (Mass. 1963) (giving "[d]ue consideration . . . to the [defendants'] economic interest in an orderly, rather than a hurried, liquidation of their [polluting business]"); *Gilbert v. Showerman*, 23 Mich. 448 at *4 (1871) (denying injunctive relief where "the business of the defendants is . . . lawful in itself and necessary to the community"); *Storey v. Cent. Hide & Rendering Co.*, 226 S.W.2d 615, 617 (Tex. 1950) (focusing on whether the defendant engaged in a "lawful" activity); see also H.G. WOOD, *A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS: INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY* 1182 (3d ed. 1893) ("[T]he effect upon the defendant's business and interests will be considered.").

²⁴⁷ Alexander, *supra* note 4, at 781.

This approach avoids (at least, as much as the law can) playing favorites among different legitimate uses. If the defendant's use hits the plaintiff where the plaintiff lives, at first blush it ought to be abated—not because it is *per se* valueless, but because the defendant's use steals more than its fair share of active use-discretion. If the hardship to the defendant and other parties dependent on it greatly outweighs the hardship to the plaintiff, however, the plaintiff's interest in use choice must give way to the similar but greater interests of the defendant and its associates.²⁴⁸

Alexander may instead be making a normative argument, that the Sen-Nussbaum capabilities approach adds a consideration that is not now but should be added to in current nuisance doctrine. Here, however, I have serious questions. Residential plaintiffs and defendant factory owners both contribute by their uses to different capabilities and modes of flourishing in a well-ordered society. Because the capabilities approach cuts both ways, the court must cut through the parties' competing arguments by prioritizing the parties' land uses according to local conceptions of flourishing. Some cases take an approach similar to this, but they have not gained traction, in large part because they are obviously political.²⁴⁹ For reasons Henry Smith sketches in his response, I find the approach taken in pre-*Boomer* nuisance cases more palatable because it is less political.²⁵⁰

C. Trespass Liability

One may fairly wonder whether I am too pessimistic, or even paranoid, about the possibility that political forces will overwhelm the capability of judges, regulators, and other relevant public officials. Maybe we ought to trust such officials to use prudence to resolve the conflicts I am raising. Yet just because someone is paranoid does not mean there is not reason to be worried.

Let me illustrate with *State v. Shack*,²⁵¹ which gets substantial treatment in both lead articles. Before proceeding, I freely confess that, while I am critical of *Shack*, I do not think its holding is disastrous. American law muddles along tolerating other unjustifiable exceptions on trespassory rights,²⁵² and it has also survived *Shack* without sliding

²⁴⁸ Provided the law recognizes that the plaintiff has suffered *some* invasion of rights and holds the plaintiff harmless for the taking with proper damages.

²⁴⁹ *Carpenter v. Double R Cattle Co.*, 701 P.2d 222, 227 (Idaho 1985), takes this approach, but the case is regarded as an outlier. See, e.g., RICHARD A. EPSTEIN, *TORTS* 361 (2001) (praising the "strong dissent" for "rightly denounc[ing]" the majority's approach).

²⁵⁰ See Smith, *supra* note 124, at 985–86.

²⁵¹ 277 A.2d 369 (N.J. 1971).

²⁵² See, e.g., *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 77, 88 (1980) (holding that a state law did not violate property rights when it prevented a private shopping center from excluding individuals seeking signatures for a petition).

down the slippery slope to Rwanda. Even so, one lesson from virtue ethics is that people become vicious not in big steps but by habituating themselves not to act virtuously in a series of small steps. *Shack* is the legal equivalent of one of these missteps. Alexander and Peñalver both treat *Shack* as a model case illustrating their virtue approaches. In doing so, both confirm an important problem with virtue theory: It is too easy and tempting for all of us to assume that *our* causes are virtuous, and that our opponents' are not.

In *Shack*, a federal Legal Services Corporation (LSC) attorney and a federal Southwest Citizens Organization for Poverty Elimination (SCOPE) field worker went onto a farm to meet migrant laborers who were working that farm and being housed at a campsite on it.²⁵³ The farm owner denied their request to meet the laborers in their camp and offered to produce the laborers to them instead. When the attorney and field worker declined this offer and refused to leave, the farm owner instituted a criminal trespass action.²⁵⁴ To reverse the attorney and fielder worker's convictions, the New Jersey Supreme Court qualified the possessory interest in exclusive control at the core of trespass, so that the owner's right to exclude turns on whether the utilities in favor of exclusion outweigh the utilities in favor of no exclusion. In *Shack*, the migrant laborers' dependent condition and possible exploitation tipped the balance.²⁵⁵ Peñalver cites this case as a good example of virtue ethics in action; it illustrates the social responsibility of farmer-owners to respect the obligations of justice understood as respect for the minimal conditions the migrant workers need to flourish.²⁵⁶ Alexander cites it to illustrate how affiliation contributes to human flourishing.²⁵⁷

That is the standard version of *Shack* on the facts and in the law reviews; now let me complicate the story. To begin with, the legal issue in *Shack* was quite narrow. Again, the farm owner offered to notify his migrant-boarders that they had visitors. (I think it would be appropriate to make this duty an obligation on the farm owner.) So the question was not whether the migrants were going to be denied meaningful access to the outside world; the issue was instead whether their dignity interests required not just notice but also the same rights as tenants to invite guests onto the farmer's land.

Separately, in my legal opinion, and contrary to Alexander and Peñalver's, *Shack* departs substantially from foundational principles of trespass. As a first approximation, trespass law presumes that "[a]ny

²⁵³ See *Shack*, 277 A.2d at 370.

²⁵⁴ See *id.* at 370–71.

²⁵⁵ See *id.* at 373–75.

²⁵⁶ Peñalver, *supra* note 5, at 883–84.

²⁵⁷ See Alexander, *supra* note 4, at 808.

physical entry upon the surface of the land is a trespass,"²⁵⁸ or (in Blackstone's words) that "every entry [on the owner's soil] without the owner's leave, and especially if contrary to his express order, is a trespass or transgression."²⁵⁹ There have always been exceptions to this rule (private necessity²⁶⁰), of course, and the law continues to develop new ones (airplane overflights²⁶¹). I doubt *Shack* can be justified as such an exception. That *Shack* has not often been followed suggests to me that other courts doubt its holding "fits" basic trespass principles.²⁶²

Next, there are good reasons for suspecting that there was more blame to go around in *Shack* than comes across in the case's statement of facts. Because the convictions were not defended on appeal,²⁶³ the careful reader must discount for the possibility that the record on appeal was one-sided. The case was also prosecuted as a *criminal*-trespass action against the LSC and SCOPE workers. Although government-funded advocates are not the same as police or other government executive officers, a court might reasonably conclude that any criminal-trespass holding against the former might set a precedent against the latter. Moreover, the LSC and SCOPE workers were trespassing on the farm owner's property to protect the interests of migrant farm workers, a generally unrepresented class. At the same time, the New Jersey Supreme Court acknowledged euphemistically in *Shack* that "[d]ifferences had developed between" the farm owner and the legal-service attorney and the field worker in previous confrontations.²⁶⁴ Inquiring minds would want to know more about those differences.

Most important, farm owners and migrant advocates have fought one another bitterly in farm communities since the LSC was established, and each group has its own virtues and vices.²⁶⁵ Politically, the immediate issue in these disputes is whether migrant farm workers may organize and join agricultural-worker unions. Government-funded migrant advocates and union organizers want the migrants to organize; farm owners do not. This political conflict is understood by the contestants to be a stand-in for a more fundamental virtue con-

²⁵⁸ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 70 (5th ed. 1984).

²⁵⁹ 3 BLACKSTONE, *supra* note 12, at *209.

²⁶⁰ See, e.g., *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

²⁶¹ See, e.g., *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1930).

²⁶² See Andrew P. Morriss, *Review of Jesse Dukeminier and James E. Krier, Property (4th Edition 1998)*, 22 SEATTLE U. L. REV. 997, 1005 (1999) (calling *Shack* "virtually meaningless outside its historical and economic context" and questioning "whether the case accurately expresses even a significant minority view of limits on the right to exclude").

²⁶³ See *State v. Shack*, 277 A.2d 369, 370 (N.J. 1971).

²⁶⁴ *Id.*

²⁶⁵ See Morriss, *supra* note 262, at 1005–06.

flict: whether farmers or agricultural-union leaders and government-funded lawyers and case workers deserve to be the "leading citizens" in agricultural communities. Advocates and union organizers think that many farm owners are racist or domineering, and that owners subordinate their migrant laborers to keep them ignorant of their wage and union rights.²⁶⁶ For their part, farmers would not last long at farming if they did not genuinely like farming and enjoy land.²⁶⁷ Suburban and urban residents thus may not appreciate sufficiently why a boundary invasion might be more offensive to a rural owner, who values land for its own sake.²⁶⁸ As for the advocates and union organizers, farmers think many of them are carpetbaggers, socialists, or activists too eager to take the law into their own hands.²⁶⁹

With that context, *Shack* does not seem sympathetic enough to appreciate the farm owner's injury claim. When the law presumes that every entry is a *prima facie* trespass, it protects an owner's interest in not having her land commandeered by a stranger to broadcast a message to which she objects. First Amendment "compelled speech" doctrine focuses on this problem more than property or tort scholarship do,²⁷⁰ but trespass institutionalizes the same principle by presuming harm from any entry. Maybe the euphemistic earlier "disputes" occurred because on previous occasions the LSC attorney and SCOPE field worker had fomented dissension between the farm owner and his farmhands. Later after *Shack*, in the 1970s and 1980s, LSC personnel ran institutes training field workers to conduct surveillance explicitly modeled after paramilitary techniques. These materials encouraged researchers to conduct "muckracking," specifically with a view toward "neutraliz[ing] opposition."²⁷¹ Landowners might not have been able to stop trainee-lawyers from meeting with potential clients, but one can understand why they might not have wanted to contribute their own property to such adversarial surveillance.

²⁶⁶ For an academic exposition of the case for protecting migrant workers, see MARC LINDER, *MIGRANT WORKERS & MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* (1992).

²⁶⁷ See WENDELL BERRY, *THE GIFT OF GOOD LAND: FURTHER ESSAYS CULTURAL AND AGRICULTURAL* (1981) (exploring how farmers enjoy closeness to land and the practice of farming independent from their monetary benefits).

²⁶⁸ Cf. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40-120 (1991) (finding that ranchers and farmers internalize strong social norms to respect one another's boundaries, even when local trespass rules sanction such invasions).

²⁶⁹ See *Howard Gault Co. v. Tex. Rural Legal Aid, Inc.*, 615 F. Supp. 916, 922-26 (N.D. Tex. 1985).

²⁷⁰ See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only").

²⁷¹ BARRY GREEVER, TRAIN INSTITUTE, *STRATEGIC AND TACTICAL RESEARCH POWER STRUCTURE ANALYSIS* 14, 16 (1981); see *id.* at 58.

Of course, maybe the farmer in *Shack* had previously mistreated his laborers in ways that the LSC attorney and the SCOPE field worker had a right and responsibility to prevent. Still, given what *Shack* does say, and given what later became known about LSC information-gathering techniques, the farmer's perceived interest is more significant than the case or most commentary suggests. Henry Smith, by the way, does not consider these possibilities, either, or how they might shape the farmers' utility functions.²⁷² This omission suggests that Henry Smith's indirect economic analysis is not entirely free of the utility-valuation problems inherent in the Posnerian economic analysis he criticizes.²⁷³

That background helps clarify why *Shack* is so problematic as an illustration of virtue theory in practice. First, virtue politics could easily make *Shack* and other similar confrontations more extreme. *The Social-Obligation Norm* and *Land Virtues* both consider only two solutions to *Shack* exist: enforce rights theory to the benefit of the farm owner, or use virtue theory to the benefit of the migrants and their advocates. However, once theorists and judges let the virtue cat out of the liberal bag, the migrants and their advocates will not be the only parties appealing to virtue principles. As Alasdair MacIntyre has explained, every particular theory of virtue "claims not only theoretical, but also an institutional hegemony" for the virtue at the top of its theoretical pyramid.²⁷⁴ In a virtue regime, the farmers would argue that industry, attachment to the land, and other agricultural virtues deserve to be the hegemonic virtues.

In practice, I am extremely skeptical that judges can distinguish the virtuous and vicious in Solomon-like fashion often enough to avoid the problems they will create. *Land Virtues* suggests that judges may settle such disputes by applying "justice,"²⁷⁵ but this suggestion just reinforces my skepticism. Aristotle defines distributive justice as a principle by which citizens enjoy the benefits of political society in proportion to the extent to which they contribute to the society's common good.²⁷⁶ I am puzzled how *Land Virtues* can conclude so confidently that the virtue of justice is on the side of the government-funded migrant advocates. The local control group could organize the shared common political good around numerical equality, wealth, breeding, intelligence, post-graduation education—or the farmer- and laborer-specific criteria that make *Shack* so factious. All virtue-friendly theories establish an argument structure that presumes that

²⁷² See Smith, *supra* note 124, at 982–84.

²⁷³ See *id.* at 962–63.

²⁷⁴ MACINTYRE, *supra* note 80, at 186.

²⁷⁵ See Peñalver, *supra* note 5, at 884.

²⁷⁶ See NICOMACHEAN ETHICS, *supra* note 14, V.3, at 1131a24–b12; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 84.

the community's shared principles of justice can say which people and interests are more virtuous than everyone else and their interests. In practice, however, such theories do not help determine which virtues are in fact the most virtuous. To make matters worse, they embolden the winners and antagonize the losers.

Next, *Shack's* holding compresses the spheres of ethics and politics, and it confuses the distinctions between and the proper roles of different virtues. I would say that the virtue that best justifies *Shack's* holding is not "justice" but "charity." But that cannot be right, because charity is an ethical virtue, not a political one. As Robert George explains, legally coerced charity is in an important sense not really charity at all: "compelling the expressing of gratitude, or the giving of gifts . . . where people ought to express gratitude [or] give gifts . . . would have the effect of robbing these important practices of their meaning and value in social life."²⁷⁷ If, on the other hand, *Shack* instead reflects "justice," it conflates ethical justice, an actor's right actions in his individual conduct in relation to others, whoever they may be, with political justice, an actor's right action in relation to other citizens. When justice is so conflated, we are not too far from the rule of judicial philosopher-kings.

That theoretical confusion can have palpable practical consequences. Exclusive property rights facilitate social interactions. By establishing an owner as the gatekeeper, they let him establish relations with the one person he chooses to let in through the gate and not with the nine he prefers to exclude.²⁷⁸ Such relations provide the starting point for the mutual exercise of such basic virtues as commercial and political civility. *Shack* interferes with this process for establishing the virtues. One might say that *Shack* is different, because the farm owner has already established social relations with the migrants, which relations *Shack* merely seeks to equalize.²⁷⁹ Such efforts, however, can also backfire, by signaling to owner-gatekeepers that they might be better off without licensees who may insist on more intimate social relations than the owners themselves want. In the 1980s and 1990s, a successful California fruit farmer custom-built \$1.6 million in duplex houses for 400 migrant workers. After California legal-services lawyers sued him for overtime wages (worth \$1,971.60), he tore down

²⁷⁷ GEORGE, *supra* note 91, at 44; accord POLITICS, *supra* note 40, II.5, at 1263b11-14; POLITICS (Lord trans.), *supra* note 40, at 61.

²⁷⁸ See PENNER, *supra* note 237, at 74-75.

²⁷⁹ See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (arguing that, when individuals rely on relations organized around property assets, their reliance can grow into property interests in those assets).

the structures to avoid leaving his business exposed as a target for future lawsuits.²⁸⁰

Finally, *Shack* can be understood not as an application of virtue ethics but rather as an illustration of judicial hubris and self-deception. Imagine a situation in which a large boy takes a large coat belonging to a small boy and forces the small boy to take his small coat in exchange. The example reinforces how porous “justice” is as a political concept. The small boy has legal justice on his side, but the large boy has translegal justice on his. Xenophon uses this example in the *Cyropaedia*,²⁸¹ however, to teach a deep lesson about the motivations of ambitious office-seekers. As a young boy, before he becomes King of Persia, Cyrus sits in judgment over the two boys and judges that the big boy acted justly. His tutor beats him because, in Persia, a republic governed under the rule of law, justice means legal justice.²⁸² By sitting in judgment of his peers, Cyrus manifests a disposition to wish that his peers be dependent not on the rule of law but on him, as small children are to a patriarch. He is beaten because he uses translegal justice as a cover to advance ambitions that are tyrannical in a republic. To complicate things, Cyrus is self-deceived. He may think he genuinely loves perfect justice, but his “ways of justice subordinate justice to his imperial enterprise.”²⁸³

Anyone who thinks that public officials can use prudence to steer clear of the pitfalls of virtue politics needs to consider whether those officials can withstand the self-deception Xenophon portrays in Cyrus. As a matter of aretaic adjudication, maybe decisions like *Shack* display prudence, equity, and other judicial virtues. Although *Shack* does depart from ordinary boundary rules, its rule of decision is not followed elsewhere in trespass very often, and the “one off” protects a powerless class of individuals and their lawyers. On the other hand, decisions like *Shack* could also reflect a complicated tyrannical impulse. Judges might think they are doing what is equitable and prudent. In reality, however, maybe they are appealing to a perfectionist theory of politics to restructure the law, to redistribute property, and ultimately to dispense justice in a manner encouraging all parties to become dependent on them. Of course, in cases like *Shack*, maybe judges who claim only to be “following the law” are in reality favoring the existing power structure—and deceiving themselves about *their* own motivations. But if all factions may accuse their rivals of being self-deceived and tyran-

²⁸⁰ See Rael Jean Isaac, *Who Funds the Left? The GOP*, WALL ST. J., June 23, 1995, at A14, Lexis Nexis Academic.

²⁸¹ 1 XENOPHON, *CYROPAEDIA* I.3.16–17, at 40–43 (G.P. Goold ed., 1994) (1914).

²⁸² See *id.* at I.3.17–18, at 42–43.

²⁸³ See ROBERT FAULKNER, *THE CASE FOR GREATNESS: HONORABLE AMBITION AND ITS CRITICS* 144 (2007); see *id.* at 140–44.

nical, it makes even more sense to marginalize virtue in law and politics.

To be sure, the law and political leaders could diminish the possibility of judicial vice by passing general prophylactic legislation. The least controversial response would be to create a public office for LSC, SCOPE, and other government-funded advocates to meet potential migrant-clients. More controversially, such legislation could regulate the access of LSC lawyers and government-funded field workers to migrants on farmer property to certain regular hours.²⁸⁴ Citizens follow general laws more obediently than court orders they regard as the products of the caprice of individual judges.²⁸⁵ Here, prudence would have to judge. The farmers, the government-funded advocates, and migrant workers all have legitimate interests, but any of them may use their legitimate interests as pretexts to disregard the interests of the others. Prudence would also want to know whether legislation made it up to farmers for their lost exclusivity rights by giving them other legislative help (say, in farm assistance), or to migrants and their advocates for lost access rights (say, with more migrant assistance). These possibilities confirm that virtue theory can apply to disputes like *Shack* and in a humane way. But applying it is *quite* complicated. Among other things, note that the least controversial solutions provide charity to the migrants while respecting the property claims of the farm owners. The state promotes public virtue, but without telling owners that virtue requires them to sacrifice their own to the interests of their rivals.

CONCLUSION

For far too long, utilitarian legal scholars have dismissed philosophical legal scholarship with a two-step trap: Kantian philosophy may be ignored because it is too doctrinaire; and any other philosophical account of law may be ignored because it is incoherent. This trap is overdrawn. The deontology trap does not apply to virtue ethics, many theories of natural law or rights, or many other virtue-friendly theories of practical philosophy. By dismissing these theories so quickly, contemporary legal scholarship is cutting itself off from serious engagement with a wide range of prominent philosophical authorities written before the eighteenth century. *The Social-Obligation Norm* and *Land Virtues* provide two model scholarly examples how *not* to get bogged down in the deontology trap.

On the other hand, in virtue ethics and in political-philosophy scholarship, scholars still regard it as an open and extremely impor-

²⁸⁴ I thank Peter Byrne for encouraging me to consider this possibility.

²⁸⁵ See NICOMACHEAN ETHICS, *supra* note 14, X.9, at 1180a22-24; NICOMACHEAN ETHICS (Sachs trans.), *supra* note 14, at 198.

tant question whether the prescriptions of virtue ethics can be transplanted seamlessly from the field of ethics back to the field of politics. This Response has sketched several reasons, persuasive in their own right and prominent in the development of classical liberalism, why this transplantation might not take. Because the modern world has large nations, with populations made diverse by race, ethnicity, nationality, religion, and ideology, a politics of virtue may be suicidal—and a politics of property *rights* may be more humane. The more “virtue” is a dominant theme in property regulation, the less effective “property” is in politics, as a liberal metaphor steering religious, ethnic, or ideological extremism out of the public square. Similarly, in law, in cases like *Shack*, virtue principles may bring to the surface “culture war” overtones that are kept discreetly submerged by a rights-based focus to property law.

This background does not totally undermine *The Social-Obligation Norm* and *Land Virtues*’ arguments. Virtue principles surely have a role to play in traditional morals laws regulating property, and in filling out the reciprocal obligations of people who have joint interests in a single asset. But the background does complicate the lead articles’ story. If virtue theory deserves to be used in property law, it ought to be used around the periphery and not at the core.

