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Private Property in Western Legal Philosophy

Introduction

This essay will discuss different schools of thought on property law. Starting from Locke and libertarians in the first part we will proceed to the utilitarian view on the subject. The second part will deal with theories that emphasise social obligation of property and assert that private property is essential for human flourishing. In the last, third part of the essay we will refer to takings jurisprudence in the USA as a fine example how various theories of property find their way into the practice.

Part I. From Locke to Utilitarianism

a. Locke

According to John Locke's theory, 'labour' entitles a person to a thing. The 'labour theory' serves as a justification of initial acquisition of private property. Only after the formation of a government and civil society under the social contract, the legitimate government will fix the rules of property. [1] Locke's theory of 'initial acquisition' proceeds in following ways: God gave all the resources to humanity. [2] Unclaimed resources were part of common ownership and could be appropriated by anyone through mixing his labour with it. [3] Everyone has a property in his own person. [4] Whenever a person by his labour changes a thing from its natural state, he mixes with it something that is his own. [5] He "in that way makes it his property" [6], thus he is entitled to it.
However, Locke provides several limitations to the otherwise absolute right to the fruits of one's labour. Firstly, one can appropriate only as much as one can use beneficially before it spoils, as far as "nothing was made by God for man to spoil or destroy." [7] Locke solves the problem that the first limitation, a 'spoilage' proviso, poses

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[1] J. Tully, A Discourse on Property: John Locke and his Adversaries (1980) at 98-99; 157-170

[2] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 25

[3] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 37

[4] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 27

[5] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 27

[6] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 27

[7] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 31

to civil society, by introducing a notion of money. When a government is formed it will be possible to create a non-perishable and productive form of property, i.e. money. If someone appropriates more than can be used, he can exchange it for money.

Another limitation is a famous "Lockean Proviso". Stating that no other man can have a right to something with which someone's labour is mixed, Locke goes on to say: "at least where there is enough, and as good, left in common for others." [8] Problems stemming from this restriction were not solved by him. It should be noted that Locke while talking about property presumed the world with an abundance of resources. [9] As Jeremy Waldron noted "talk of property makes little sense except against a background of scarcity" [10]. Given the scarcity of resources, major means of production, for example, cannot be privately owned without depriving others of opportunity. Some commentators criticizing Locke's theory even note that his proviso represents a foundation of socialism rather than "possessive individualism'. [11] Others note that the proviso is a priori impossible to satisfy, and refer to a so-called 'zipping' problem identified by Robert Nozick. [12]

The third limitation on the absolute right to property is of most significance. Locke's classical work contains the right to 'subsistence'. It means that everyone is entitled to the necessities of life. This proviso begs an inevitable conclusion that those who are able to work must give up some of their products for people who need them to live. [13] Therefore, being an inherent component of property - the right to 'subsistence' - with its strong distributional implications, survives the natural state and becomes a source of authority for a government in Civil Society. [14]

Locke asserts repeatedly that government should protect private property, [15] though the condition for enter-

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[8] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 27; Epstein suggests that better view would be to consider property as un-owned before it is acquired - John Stick, *Turning Rawls into Nozick and Back Again*, 81 Nw. U. L. Rev. 363 1986-1987 at 390 fn. 146

[9] Especially due to the newly discovered America

[10] Jeremy Waldron, Book Review, 102 Ethics 401, 403 (1992)

[11] **Lawrence C. Becker, Property rights: Philosophic Foundations at 43**

[12] This problem can be formulated this way: "If the presumptive last appropriator of a finite resource, Z, does not leave enough or as good of a resource for others, then he cannot legitimately acquire property. But in that case, the next to last appropriator, Y, has limited Z's rights and Y's acquisition is therefore not legitimate. But in that case, W (Y's predecessor) has limited Y's rights and W's acquisition is therefore not legitimate. The problem of "enough and as good" zips back to the very first appropriator, A, even though there was "enough and as good" remaining at the time of A's first acquisition" - Stephen R. Munzer, A *Theory of Property* (Cambridge University Press 1990) at 269; Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 176

ing Civil Society implies surrender of certain rights, including those to property. The latter will be preserved through the limitation placed on government to act only in the interests of "public good". Property can be taken from its legitimate owner only with his consent and through compensation. But controversially, Locke explains 'consent' as being both explicit and 'tacit'. The latter type of consent was straightforwardly rejected by Richard E. Epstein, [16] as bearing a risk of limitlessness of governmental power.

To sum up, Locke's acknowledgement of the right to 'subsistence' provides a good ground for deliberations on distributive justice. As well as his emphasis on government's duty to preserve private property conjoined or contrasted with its obligation to promote 'public good', is a good basis to explore the ever-lasting tension between governmental power and private rights of an individual. It is suggested here, that Lockean theories of property cannot be used convincingly to oppose the redistribution of wealth.
However, libertarian authors purporting to refine Locke's theory and adjust its evident flaws, choose a rout towards more absolute rights to property.

b. Nozick

In this section we will briefly discuss a theory of a prominent libertarian philosopher, sometimes referred to as a neo-Lockean – Robert Nozick.
Robert Nozick explicitly rejected Locke's justification of property based on mixture of one's labour with a thing, without providing his own theory of acquisition. [17] Nor the right of subsistence found a place in Nozick's theory.
However, he adopted a narrower version of Lockean proviso, which represents the limitation to the strict prin-

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[13] Stephen R. Munzerh, A *Theory of Property* (Cambridge University Press 1990)

[14] *Jeffrey M. Gaba, John Locke and the Meaning of the Takings Clause*, Missouri Law Review, Vol. 72, No. 525, 2007 at 539; Establishment of Civil Society was important for three main reasons: for the necessity of "an established, settled, known law"; because the State of Nature lacked "impartial Judge" who would employ established law; and finally for the purpose of enforcing rights and duties, i.e. "power to back up and support a correct sentence, and to enforce it properly" John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 124- 126

[15] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) para. 131

[16] Richard A. Epstein, Takings, (1985) at 15.

[17] He famously questions whether mixing a tomato juice with an ocean makes a person entitled to the latter or urges him to dispense with tomato juice. Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 174-175

ciple that the property justly acquired should not be coercively taken for the benefit of others. According to Nozick's proviso one cannot acquire title to "the total supply of something necessary for life". [18] He provides an example of a water hole [19], which cannot be appropriated by anyone if there is only one like that in the desert. But on the other hand if someone saves that water hole, for instance, from drying up, he can exclude others from using it, as far as such an action will not leave anyone worse off in comparison with what they would have been without appropriation. [20] Otherwise, if the breach of the proviso cannot be avoided one should compensate for it.

Thus Nozick's task to justify inalienable right to property becomes much easier, since he abandons all the handcuffs and difficulties found in Locke's theory: labour based argument for appropriation; the right to subsistence and Locke's proviso in its broad understanding.

In comparison with Locke, there is little room for redistribution of wealth in Nozick's work.

c. Redistribution of wealth – Nozick and Rawls

This section discusses the theories of Nozick and that of liberal-egalitarian philosopher - John Rawls and lingers on the most interesting distinguishing features between their works, which is an attitude toward distributive justice. It could be simply stated here that Rawls accepts taxation for the purposes of distribution of wealth and Nozick does not. [21]

For Egalitarians, the starting point of discussions on economic justice is – equality. This point of departure presupposes equal distribution of property and assesses the deviation from that line. On the contrary, libertarians' presupposition is for liberty and the first question stemming from such caveat is the extent and nature of coercive interference with property rights. [22]

According to Rawls' 'difference' principle the distribution of wealth should be carried out on equal terms, unless unequal distribution will result in more gain for the poorest group in the long-run than they would have under complete equality. Rawls makes clear that the implementation of the difference principle requires an extensive system of taxation and transfer payments. [23]

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[18] Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 179

[19] Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 180

[20] Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 180-181

[21] John Stick, Turning Rawls into Nozick and Back Again, 81 Nw. U. L. Rev. 368 1986-1987 at 368

[22] Thomas C. Grey, Property and Need: The Welfare State and Theories of Distributive Justice, 28 Stan. L. Rev. 877 1975-1976 at 878

[23] J. Rawls, A Theory of Justice (1971) at 275-279

In contrast, being a vigorous proponent of a minimal-state [24], Nozick perceives the term -"distributive justice" as suggesting that "some thing or mechanism uses some principle or criterion to give out a supply of things". [25] For him "there is no central distribution, no personal or group entitled to control all the resources, jointly deciding how they are to be doled out." [26]

Along with other Libertarians, he believes that economic assets should be left in the hands of those who justly acquired them initially or received them through free and fair individual transaction.[27] He compares forced disposition of one's assets with theft.

But sometimes, things are appropriated through fraud, violence and other non-permissible ways. In such situations Nozick allows distribution of assets, i.e. for the purposes of corrective justice, the process termed as - rectification. Rectification is one of the three principles of Nozick's entitlement theory [28] and arguably, one of the weakest parts in his work.

He concedes the extensive role of regulation to rectify past injustices but he himself acknowledges that one cannot possibly go too far back to redress them, or as he puts it "although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them." [29] It is suspicious that a minimal state, drawn up by Nozick with its restricted powers and reduced to the role of night-watchman, will be sufficient to achieve such goals, and a much more authoritative state will be required. [30]

Collin Farelly uses this 'flaw' to justify taxation within the theory of Nozick. He states that if for Nozick ""taxation is on a moral par with forced labour" we must add: if and only if no considerations of injustice could apply to justify such taxation. The minimal state is only justified provided all past injustices have been rectified. " [31]

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[24] A state which serves as a "night-watchman" for the limited purpose of enforcing the rights and duties existing in the state of nature - Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974)

[25] Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 149

[26] Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 149

[27] Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 Stan. L. Rev. 877 1975-1976 at 877

[28] Other two principles are: just acquisition, which is based on Lockean notion of mixed-labour; transferability, i.e. no property can be transferred with the owner's consent - Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 150-153

[29] Robert Nozick, Anarchy, State, and Utopia, (Basic Books Inc. 1974) at 231

[30] George C. Christie The Moral Legitimacy of the Minimal State, 19 Ariz. L. Rev. 31 (1977)

[31] Colin Farrell, An Introduction to Contemporary Political Theory (London: Sage, 2004), 49.

On the other hand, Rawls proceeds by stating that in the system of 'natural liberty', initial distribution of assets "is strongly influenced by natural and social contingencies". [32] People, with their scarce talents and skills receive assets through accidents or good fortune and to let those accidents to succeed would be unjust, at least where it is possible to correct the inequality produced by such enrichment. For Rawls "the initial endowment of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view." [33] Injustice of the system of natural liberty lies precisely in the fact that it permits those factors to improperly influence the process of distribution.

Rawls introduces the notion of "veil of ignorance" [34], i.e. the original position where individuals are bargaining without knowing personal histories or characteristics, talents and abilities thus having no advantage towards others who they are going to agree on a social contract with, or as Rawls puts it: "no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like". [35] In a position like this, one can truly consider the morality of an issue.

Nozick criticizes Rawls' view on moral arbitrariness. For him people's well-being is the product of their own choices and their choices are the result of their heredity or external environment. Rawls' criticism of natural liberty, according to Nozick is a 'nullification' of people whether talented or not and that we have to take people as they are. [36]

Nonetheless, Nozick's theory is considered by many as unworkable [37] or 'radically incomplete'. [38] Nozick has serious difficulties in "the transition from a state of nature characterised by self-interested individuals to a stable state community." [39] Nozick views the functioning of the minimal state through its clients' contributions. Only

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[32] J. Rawls, *A Theory of Justice* (1971) 72

[33] J. Rawls, *A Theory of Justice* (1971) at 311-312

[34] J. Rawls, *A Theory of Justice* (1971) at 136-142

[35] J. Rawls, *A Theory of Justice* (1971) at 12

[36] It would be useful to remember Milton Friedman's colourful saying with regard to unfairness of initial distribution: "Life is not fair. It is tempting to believe that government can rectify *what nature has spawned*"

[37] Steiner, *Slavery, Socialism, and Private Property*, in Nomos XXII: Property 244, 252-53 (1980).

[38] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) at 754 see also: Michael Walzer, *Liberalism and the Art of Separation*, 12 Pol. Theory 315, 324 (1984);
Ingrid Creppell, *Locke on Toleration: The Transformation of Constraint*, 24 Pol. Theory 200, 201 (1996).

[39] Eduardo M. Penvaler, Reconstructing Richard Epstein, 15 Wm. & Mary Bill Rts. J. 429 (2006-2007) at 430

the latter, who purchase the services of the state, will receive protection and enforcement policies. However moving from ultra-minimal state towards minimal state requires involvement of non-members of the community and for these purposes they will be "given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultra-minimal state". [40]

As other prominent libertarian author, Richard E. Epstein noted, Nozick rules out all forced exchanges and without the latter the problems of holdouts and free-riders will not be settled. [41] For Epstein himself, individuals are at liberty to use their property as they wish unless they harm others. [42] In the latter circumstances government may interfere and exercise its 'police power'. This attitude was illustrated by the US Supreme *Court in Lucas v. South Carolina Coastal Council* [43]. In that case Justice Scalia restricted obligations of a property owner to a mere nuisance law.

The main focus of libertarians on the distinction between what is harmful and what is not with regard to property use is one of the main grounds for their criticism. They are compared with welfarists who likewise reduce the whole discussion on property to mere costs and benefits analysis. The latter view will be discussed right below.

d. Utilitarianism

Utilitarian justification for private property is simple. According to this theory people in general live better off under private property regime than in any other property system. There are several arguments in support of this statement. Firstly, as Aristotle points out, when property is owned in common, quarrels will often break out as some will complaint about the discrepancy between his effort and received recompense. [44] As Aristotle says "(m)en pay most attention to what is their own: they care less for what is common" [45]. People in common ownership are susceptible to neglect their duties in hope that others will do work instead of them [46].

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[40] Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974) at 27

[41] Richard A. Epstein, Takings, (1985) at 337-338; Epstein himself introduces libertarian understanding of individual rights which, as a system is bound by utilitarian constraints. He justifies some coercion "on the ground that it allows all individuals to achieve a higher state of well-being than they could do by their own efforts..." Richard A. Epstein, *Scepticism and Freedom: A Modern Case for Classical Liberalism* (2003) at 7;

for discussion of problems with holdouts and free riders see: Lloyd Cohen, *Holdouts and Free Riders*, 20 J. Legal Stud. 351 1991;

[42] Richard A. Epstein, *Takings*, (1985) at 60

[43] 505 U.S. 1003 (1992)

[44] Aristotle, *Politics*, 1262b (trans. Barker, p. 48)

[45] Aristotle, *Politics*, 1261b (trans. Barker, p. 44)

[46] Aristotle, *Politics*, 1261b (trans. Barker, p. 44)

Moreover, one commentator described the problem with co-ownership as "the tragedy of the commons". [47] According to his example, when a land is owned in common by herdsmen, each of them is locked in the system that forces them to increase their herd "without limit – in a world that is limited".[48] The reason for that is the gain a particular herdsman receives from additional animal and the cost which is bore by the community in general, i.e. only a fraction of that loss per herdsman. Eventually, the land is overgrazed, i.e. the resource is overused.

Utilitarianists also argue that free market economy works more efficiently than centralized economy. Von Mises points to two main problems socialist planners face: what to produce and how to produce it. [49] In the free market, decisions are made in a decentralized way in response to price signals, every individual seeks to maximize his profits, and the system turns out to be efficient. When individuals are focused on their own gain they are "led by an invisible hand to promote... the public interest". [50]

Given that Utilitarianism looks at the wealth maximization of the society in general, an individual's right not to be deprived from a hard-won property for any whatsoever candid public goal cannot be properly protected under this theory.

Utilitarianism focuses on benefits of private property system as a whole and not on merits of private ownership on individuals. The security in possession is important as long as it helps an individual to achieve a reasonable degree of happiness. [51] Obviously such constraint against uncontrolled acquisition serves the object of satisfaction of human expectations they have from private ownership. This is without doubt the very purpose we are trying to pursue when questioning the justification of takings. However utilitarian attitude is too broad and tends to neglect owners' interests and rights to their property. Consequentialists take utility maximization as a main goal. If striping someone of his property achieves this goal, taking into account, for instance *Pareto* or *Kaldor-Hicks* efficiency [52], no further question arises on legitimacy of this action. Expanded total welfare is itself the answer.

Part II. Human Flourishing

So far we have been discussing the libertarian, liberal-egalitarian and welfarist focus on property law. Libertar-

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[47] Hardin, Garrett (1968), 'The Tragedy of the Commons,' *Science*, 162: 1243-8

[48] Hardin, Garrett (1968), 'The Tragedy of the Commons,' *Science*, 162: 1243-8

[49] Von Mises, 'Economic Calculation', pp. 77 ff

[50] A. Smith, *The Wealth of Nations* (Modern Library, New York, 1973), p. 423

[51] **Lawrence C. Becker, *Property rights: Philosophic Foundations* at 58**

[52] For the definition of the terms see Stephen R. Munzer, *A Theory of Property* (Cambridge University Press 1990) at 200-202

ians concede no obligations stemming from the property except that it should not be used to harm others. Utilitarians concentrate on profit-maximization and preference-satisfaction and consider rights and obligations of owners from that point of view. Egalitarians move one step forward and linger on distributive questions. However as Singer [53] notes, the limitation of the liberal-egalitarian approach is its focus on individual rights, which are by all means important, but so are obligations too. Rights and obligations are different ways of approaching the problem. [54]

Thus we turn to the philosophers who consider the obligations of property owners as a basis of property law. In this part we will deal with the role of private property based on the Human Flourishing approach. We will discuss those philosophers and theories which consider private property as an important aspect for the normal development of a human being. For this purpose we will refer mainly to Social-obligation theory elaborated by Gregory S. Alexander.

a. Alexander

Several leading philosophers recently signed 'a statement of progressive property' [55]. Common understanding of property as a control of assets by individuals is recognized by the authors to be both legally and intuitively powerful. Nevertheless this sole conception is not sufficient to deal with internal tensions and "inevitable impacts of one person's property rights over others" [56]. Thus they suggest to focus on "the underlying human values that property serves and the social relationships it shapes and reflects." [57] Those values include human flourishing, freedom, right to acquire knowledge and physical security, right to make choices and live on one's own terms. The important emphasise is made on just social relationships and just distribution as a part of social interests that those values promote.

This *statement* serves as a blueprint for Professor Alexander, who develops his social-obligation norm theory [58] which he contrasts and proclaims as an alternative to law-and-economics theory of property.

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[53] Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 Cornell L. Rev. 1009 2008-2009

[54] Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 Cornell L. Rev. 1009 2008-2009 at 1044

[55] Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer, Laura S. Underkuffler, *A Statement of Progressive Property*, 94 Cornell L. Rev. 743 2008-2009

[56] Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer, Laura S. Underkuffler, *A Statement of Progressive Property*, 94 Cornell L. Rev. 743 2008-2009

[57] Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer, Laura S. Underkuffler, *A Statement of Progressive Property*, 94 Cornell L. Rev. 743 2008-2009

[58] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745(2009)

Alexander criticises the conventional view of private property as a bundle of rights, where the most important twig is the right to exclusion. Though he admits that many restrictions are imposed on the latter right, unfortunately for him, they represent only the 'periphery image' of property rights while the core in the view of many is still the right to exclude others. Alexander rejects the thin concept of social-obligation norm proposed by Nozick and the law-and-economics version of that concept by Epstein. He calls those theories incomplete and indeterminate.

Before introducing his own theory, Alexander refers to a contractarian version of community-based social-obligation norm developed by Hanoch Dagan. The latter considers profit maximization as a main motivation for an individual to act as a member of the community. Dagan understands a community as prima facie an agglomeration of individuals and that the community is valuable so far as it contributes to preference-satisfaction. This evidences that his theory is based on liberal theory of justice, but as Alexander notes not on the *classical* one. In comparison to Michelman [59] who advocates long-term reciprocity and Epstein supporting strict proportionality, Dagan introduces the notion of long-term reciprocity and at the same time disallows "overly extreme transient imbalances" [60]. Individuals who are the basis of community are obliged to contribute to the public good only if such sacrifice will even up in the long-term and provided such contribution does not result in "overly extreme" imbalance.

In comparison with Dagan, Alexander does not look for any reciprocity of advantage. Alexander criticises the bundle-of-rights picture proposed by law-and-economics. His theory's quintessence is a sacrifice of an owner for the promotion of capabilities necessary for human flourishing.

This thick Social-obligation theory holds that individuals have an obligation towards others to promote their capabilities [61] essential for human flourishing. The obligation to foster those capabilities extends to sharing property. Government should "compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities." [62]

According to Alexander, the relationship between communities - especially the state - and individuals is central

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[59] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 Harv. L. Rev. 1165 (1967)

[60] Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741, 771 (1999) at 767

[61] Capabilities essential for human flourishing were identified by Martha C. Nussbaum under the subheadings: Life; Bodily health; Bodily integrity; Senses, imagination, and thought; Emotions; Practical Reason; Affiliation; Other species; Play; Control over one's environment. See Martha C. Nussbaum, Women and Human Development: The Capabilities Approach (2000); 78-80

[62] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745(2009) at 746

to property theory. Utilitarianism as well as Liberal Contractarian theories of property consider communities as agglomeration of individuals. Unlike these dominant theories, which avoid "substantive accounts of justice, favouring ... "procedural" conceptions" [63], Alexander's conception of community supports the conception of justice which is built on the notion of human flourishing. He perceives "the individual and community as mutually dependent" [64]. It builds on Aristotelian notion that people alone are not self-sufficient. Alexander points out that "although human beings value and strive for autonomy, dependency and interdependency are inherent aspects of the human condition." [65]

Human flourishing which is the main purpose of a robust social-obligation norm proposed by Alexander consists of two aspects. First, only in a community, in relation to other human beings is possible to develop "the capacities necessary for a well-lived and distinctly human life." Secondly, human flourishing "must include at least the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternative choices." [66]

Thus, as everyone is entitled to flourish, individuals should also be entitled to the property resources required to achieve that goal. Therefore the society is obligated to provide necessary access to such resources. The proper system of private property must imply an obligation to share resources and on certain occasions the state should redistribute those resources.

b. Criticising Alexander

Henry E. Smith criticises Alexander on two main points. Firstly, Alexander underlines the importance of ex post decision when the nexus between the needs of certain people and property in question is identified. Smith does not reject the importance of property to human flourishing, on the contrary he argues that whenever necessary "owners' rights must give way to larger social interests," [67] as it happens with regard to airplane over flights, antidiscrimination etc. But the decision should not be made *ex post* rather up-front and across the board. This would save information costs.

Secondly, for Smith, exclusionary right as a core in the basic architecture of private property is extremely

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[63] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745(2009)

[64] Gregory S. Alexander and Eduardo M. Penalver, *Properties of Community*,10 Theoretical Inq. L. 127 2009

[65] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745(2009) at 760

[66] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745(2009) at 762

[67] Henry E. Smith, *Mind The Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 Cornell L. Rev. 959 (2008-2009) at 965

important as far as it works against the whole world, thus enabling owners not to delineate their rights directly. Exclusionary right is not an end in itself, it serves vaguely articulated purposes and that is precisely its virtue. It could not operate in a direct way. This does not lead us to absolute right. This right is rebuttable in certain circumstances.

Smith argues that Alexander's focus on ends in his theory ultimately undermines justification for chosen means. In his view both Alexander's theory and that of law-and-economics are similar with respect to purposes but differ when it comes to the means to get there. [68] Smith notes that Alexander does not tell reader what constitutes a sufficient nexus between the need and social obligation of the owner to justify an owner's duty to furnish his property to others. [69] Furthermore, Alexander does not answer the question "Why me?" that could be asked by those who may have to give up their property. [70]

To sum up, social-obligation norm theory by Alexander along with '*personality*' theory elaborated by Margaret Jane Radin [71], '*virtue ethics*' by Eduardo M. Penalver [72], '*capabilities*' theory by Amartya Sen and Martha Nussbaum [73], with little differences from each other, locate human flourishing in the centre of property law and put on the individuals an obligation to promote it.

Part III. Takings

Takings jurisprudence is a good basis to explore the relationship between property owners and the community, in particular - the state. It is a battlefield of individual and collective interests.

The Takings Clause of the Fifth Amendment to the Constitution of the United States provides that "*private property shall [not] be taken for public use without just compensation*."

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[68] Henry E. Smith, *Mind The Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 Cornell L. Rev. 959 (2008-2009) at 960

[69] Henry E. Smith, *Mind The Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 Cornell L. Rev. 959 (2008-2009) at 961

[70] Henry E. Smith, *Mind The Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 Cornell L. Rev. 959 (2008-2009) at 962

[71] Margaret Jane Radin, *Reinterpreting Property*, 35-71 (1993)

[72] Eduardo M. Penalver, *Land Virtues*, 94 Cornell L. Rev. 821, 832-860 (2009)

[73] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000); Amartya Sen, *Rationality and Freedom* 206-220 (2002).

Libertarian bench's view on takings was expressed by Epstein [74], who proposed a strict proportionality rule, i.e. compensation is necessary whenever a taking's impact on the owner is disproportionate to the burden assumed by other beneficiaries of that government activity.

As Dagan notes such rule not only preserves owners from exploitative governmental practices and from abuse of power by planning authorities but also may block justifiable government actions and would give a landowner a complete veto over any consideration of regulation or activity which will be in the interests of public. Thus strict proportionality rule is "an undesirable distributive criterion." [75]

Utilitarian approach to this issue is considered from the point of view of maximizing net gains and minimizing net losses. Michelman [76] introduced three terms for this purpose: "demoralization costs" – the costs resulting from social unrest or impaired incentives due to the non-compensation to the owners; "settlement costs" – the compensation costs adequate to avoid "demoralization costs", and "efficiency gains"- "the excess of benefits produced by a measure over losses inflicted by it" [77] not including the two 'costs' mentioned above.

If the demoralization and settlement costs both exceed the efficiency gains of the proposed action, the latter will not be worth its costs. If the situation is reversed, i.e. efficiency gains exceed other costs; government will have to choose to pay lower of these costs. On the other hand government should not pay if settlement costs exceed demoralization costs.

Dagan rejects both full-compensation and non-compensation regimes of takings. [78] As he notes, in the former situation, for example, land owners tend to overinvest in the property as they bear no risk of being deprived of it without compensation. On the other hand, when government never compensates owners will probably be far more cautious which will result in underinvestment. Neither of these ways are justifiable from the view of efficiency. Thus government should "*sometimes compensate*". [79]

Alexander proposes a direct focus on social-obligations of private owners. He argues that American courts have

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[74] Richard A. Epstein, *Takings*, (1985)

[75] Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741, 771 (1999) 761

[76] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967)

[77] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) at 1214

[78] Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741, 771 (1999) at 748-751

[79] Stephen R. Munzer, *A Theory of Property* (Cambridge University Press 1990)

never fully developed the social-obligation norm in takings jurisprudence. Though they sometimes refer to social obligation of holdings in takings cases there is no "sustained account of a constitutional norm" [80] proclaiming private ownership as entailing obligations to promote the collective good of the community.

The question arising from the constitutional provision is when a government action will be considered as a taking for public use. The main problem for the courts dealing with Takings Clause has always been the proper distinction between takings for public purposes and regulations. We should distinguish takings for distributive purposes from the exercise of government's police power.
In the former situation, when government takes someone's property in order, for example, to improve infrastructure for public purposes, payment of compensation to the owner will be necessary. In contrast, when government is involved in zoning, nuisance abatement, business regulation etc, and for this purposes introduces, for instance, restrictive regulations, prohibits certain kinds of businesses or particular use of land, it will not have to compensate, as such activities fall within the sphere of a state's 'police power' [81]. However, the line between compensable and non-compensable takings cannot be easily drawn.
Takings of private property for distributive purposes are not favoured by most of legal thinkers. [82] The requirement of compensation acknowledges owners' rights, whereas regulations depriving people of their property supports the idea of owners' social-obligations towards others. The latter is where all the theories coincide with each other. The distributive nature of regulations and their extent is a subject of fierce polemic among scholars. This debate is reflected in judicial decisions as well. [83]
However, the size of this essay does not allow us to further explore the above distinction.

Keeping in mind all the schools of thought on property law referred to in this essay we now turn to the famous decision of the US Supreme Court in *Kelo v. City of New London* [84]. The case concerned a condemnation of a private property by the City of New London for the purpose of multibillion redevelopment project undertaken by the private company.

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[80] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745 (2009) at 757

[81] Richard A. Epstein, *Takings*, (1985); Joseph L. Sax, Takings and the Police Power - 74 Yale L.J. 36 1964-1965 at 36

[82] A. Mitchell Polinsky, *An Introduction to Law and Economics*, 2ed (1983) at 9-10

[83] The case of *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393, 415 (1922) provided, the regulation may be so onerous that it could amount to taking. Otherwise if a regulation goes "too far", it may fall under the restriction of the Constitutional Amendment.

[84] 545 U.S. 469 (2005)

The plaintiffs argued that the exercise of eminent domain cannot be used to allow for economic development by private entities, as far as such action was not within the concept of "public use" stipulated in the US Constitution. However, the court employing the notion of "public benefit" which evidently is wider than the term "public use" [85] held that since the taking would result in the economic growth benefiting the community; it was governed by the Fifth Amendment and therefore was legitimate.

The emphasis the court put on the enhanced welfare can be understood within the realm of utilitarianist philosophy; however it is arguable whether the 'settlement cost' conjoined with 'demoralisation cost' caused by governmental action exceeded 'efficiency cost' or not. [86]

It was by no means surprising that the libertarian wing harshly criticised the decision in *Kelo*, calling it 'truly horrible'. [87]

But most interestingly, *Kelo* represents unacceptable extremity for social-obligation theorists as well. Alexander suggests a rule of thumb to identify potential abuse of takings jurisprudence. He criticises the situation when government condemns the land in order to retransfer it to private parties and the awarded compensation is more than the price charged on the retransfer. [88] The latter action should not be allowed.

Though the decision in *Kelo* seems to disappoint everyone, the way different legal thinkers condemn it, still provides a good example of where those theorists stand.

Conclusion

In his article, Penalver [89] warns against becoming bound by metaphors. The 'bundle of rights' vision of property is susceptible to ignore that some rights are more important than others. The latter approach would somehow justify *Kelo* at the expense of ignoring the right to exclusion. On the other hand the '*my home is my castle*' metaphor goes too far to establish an absolute right to property or in Blackstone's words a "sole and despotic dominion", [90] thus rejecting social-obligation as a part of the core of property rights.

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[85] Richard E. Epstein, *Blind Justices*, http://www.opinionjournal.com/extra/?id=110006904;

[86] The polls held after the decision showed 90 percent of Americans against it. See: http://www.castlecoalition.org/resources/kelojpolls.html

[87] Richard E. Epstein, *Blind Justices*, http://www.opinionjournal.com/extra/?id=110006904;

[88] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745 (2009) at 777

[89] Eduardo M. Penalver, *Property Metaphors and Kelo v New London: Two Views of the Castle*, 74 Fordham L. Rev. 2976 2005-2006

[90] William Blackstone, 2 Commentaries *2

Though Smith is right in asserting the crucial role of exclusionary rights, it is by no means absolute and can be rebutted. As Radin points out absolute entitlements to property are absurd.[91] It is submitted here that the right to exclusion represents a core of property structure; nonetheless the core is more complex than that. Ownership serves individual liberty but is not, as libertarians would think, confined to it. Ownership entails social obligations as well.

However, in this author's view Alexander and his colleagues by stressing the social-obligation norm in property law, err in not considering any kind of reciprocity of advantage as a workable test. This author endorses Hanoch Dagan's proposal, that the benefits from coercive governmental action should even up in long-term and at the same time the action should not overly prejudice an owner causing extreme imbalance. Dagan's focus on local communities [92] that a member has duty to promote is more realistic than an obligation of an individual towards the *mankind* as a whole.

It could be said, that social-obligation theories have a more human face than utilitarianism. However, social-obligation theories seem to be less convincingly founded on moral considerations. Urging individuals to support hypothetical communities within indefinite boundaries leads to too much sacrifice and too little chances of counter benefit.

There are no 'castles' and no simple pictures of 'wigs' in property law. Everything is more complex but at the same time we all have a *gut feeling* of what is right and what is not. We should not be afraid to follow this feeling. We know that most individuals would not sacrifice their '*sweet homes*' to promote human rights in other parts of the world. And for sure no one would do it to further enrich greedy business entities. If individuals do not receive any benefit either in the long or short run, than making up theories that do not have a basis in real life will be of little help.

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[91] Margaret Jane Radin, *Reinterpreting Property*, 35-71 (1993) at 109

[92] Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741, 771 (1999) at 774-777