

THE AFFIRMATIVE DUTIES OF PROPERTY OWNERS:
AN ESSAY FOR TOM MERRILL

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ABSTRACT

As a result of his ownership of property, Rip Van Winkle might have incurred a variety of criminal and civil liabilities during the course of his twenty-year sleep. Possibilities are a conviction for neglecting care of his livestock, civil liability to a neighbor for having failed to contribute to the costs of a fence along a common boundary, and forfeiture of his lands for having failed to pay local property taxes. This essay investigates the nature of these affirmative obligations of owners. Concerns about curbing information costs, a central theme in Tom Merrill's scholarly works, underlie the structure of many of these duties, and help explain their relative paucity. The analysis illuminates several recent strands of property theory, including Larissa Katz's notion that a state may choose to "govern through owners." It reveals major defects in Gregory Alexander's argument that owners should bear a generalized obligation to share their wealth. Alexander's proposed duty would greatly increase the information costs that individuals would bear in navigating daily life, and would embroil property adjudicators in tasks far better handled by drafters of tax and welfare legislation.

INTRODUCTION

A statue of Thomas Drummond, British Under-Secretary for Ireland from 1835 to 1840, stands in Dublin's City Hall. Inscribed on its base is a quotation from a letter that Drummond wrote to landlords vexed by agrarian uprisings: "*Property has its duties as well as its rights.*"¹ Drummond was prescient. Especially since 2000, North American property scholars have been putting forth rival theories of the overarching nature and normative purposes of property institutions. The

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1. R. BARRY O'BRIEN, THOMAS DRUMMOND, LIFE AND LETTERS 284 (1889) (Letter to the Tipperary Magistrates).

issue that Drummond highlighted—the duties of property owners—is central in three emerging clusters of property theory.

This essay is written in honor of Tom Merrill, the imminently deserving recipient of the most recent Brigham-Kanner Prize for property scholarship. Influenced by the law-and-economics approach, Merrill, both by himself and in works co-authored with Henry Smith, has emphasized the merits of arranging property institutions with an eye to reducing the informational burdens and other transaction costs of resource management. Merrill, however, has yet to systematically address issues of owners' duties. I contend that Merrill's information-cost perspective helps illuminate the nature of the duties that legal systems impose on owners of property. For example, when an owner has pertinent "local knowledge"—a favorite phrase of Tom's²—lawmakers are more likely to impose a duty that exploits that comparative advantage.

Larissa Katz, a participant in this conference, is a pioneering member of what might be called the Canadian school, currently a smallish cluster of theorists. Katz contends that an owner commonly should be conceived as holding an "office" that carries with it certain affirmative responsibilities to provide services to the state.³ Katz and kindred analysts thereby feature an aspect of property law that law-and-economics scholars have seldom explored.

Gregory Alexander is perhaps the most conspicuous member of the self-styled Progressives, a third pertinent cluster of property law scholars. Alexander contends that an owner of large amounts of property is obligated, or at least should be, to share that wealth to enhance the capabilities of others who are less well-endowed.⁴ I argue, contrary to Alexander, that property law seldom in fact imposes this duty, and indeed should not. My claim is not that redistribution from rich to poor is inappropriate, but that it is better pursued by means of broad tax and welfare programs, as opposed to tinkering with the rules of property law. Merrill's emphasis on information costs supports this view. To help individuals navigate the world, the law should

2. See, e.g., Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2081 (2012).

3. Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029 (2012); see also Christopher Essert, *The Office of Ownership*, 63 U. TORONTO L.J. 418 (2013).

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

define entitlements in particular assets as simply as possible.⁵ Redistributive efforts require determinations of the wealth and capabilities of specific individuals. To make these determinations, tax officials and welfare workers are better situated than judges, not to mention people navigating everyday life.

I. TOM MERRILL: THE NATURAL

I first met Tom Merrill when he was a student in one of my courses. I wish I could say that the course was Property, but actually it was Torts. Tom has deep roots in Iowa, and law school enrollments have a regional tilt. After a stint in Oxford on a Rhodes scholarship, in fall 1974 Tom chose to matriculate at the University of Chicago Law School. As it happens, during the 1974–1975 academic year I was a visiting professor at Chicago. During the winter and spring quarters, I was originally scheduled to teach Property to half the first-year students. In October, however, Harry Kalven unexpectedly died of a heart attack at age 60. Kalven had traditionally taught Torts to Chicago's entire first-year class. At Dean Phil Neal's request, I agreed to switch from Property to Torts, a course that I had taught several times.

The Torts class included about 170 students. Tom was a bit older than most, and one of the most memorable members of an exceptional group that included a half-dozen budding talents who would later win acclaim in legal academia. I included in my assignments and lectures large doses of Calabresian analysis, the cutting edge of Torts theory at the time.⁶ Calabresi stressed the relevance to law of asymmetries in actors' information, a theme that Tom likely found congenial.

After Tom entered teaching, we gradually rekindled our relationship. Particularly memorable was a 2001 conference on "The Evolution of Property Rights" that Henry Smith and Tom organized at Northwestern Law School. During 2008–10, Tom's overly brief stint on the Yale Law faculty, we enjoyed regular Friday lunches. It of course helped that our wives, Kim and Lynn, hit it off.

5. Merrill's contribution to this volume stresses the benefits of enabling individuals to quickly "differentiate between things that are mine and not mine as we navigate through everyday life." Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 2 (2014).

6. See especially GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

Tom is, without question, one of the leading property theorists of our era. He works ceaselessly and produces more high-quality work in an hour than many of us can produce in three. And he possesses exceptional analytic abilities and expository skills. Aware of these comparative advantages, Tom, when turning to a fresh topic of law, typically starts by laying out, with enviable clarity, both the issues and the landscape of the current scholarly debate. These attributes have enabled him to become a central figure in two relatively disparate fields—property law and federal administrative law.

Carol Rose and I twice co-edited editions of a reader entitled *Perspectives on Property Law*.⁷ These editions included excerpts from about 50 articles and books, each followed by our own notes and questions. Partly to control a shameful tendency to include our own writings in the reader, Carol and I imposed a ceiling of three on the works of any individual author. The primary author to bump up against this ceiling was Tom Merrill. In the second edition, published in 1995, Carol and I included excerpts from Tom's articles on adverse possession and the trespass/nuisance distinction.⁸ When preparing the third edition, which appeared in 2002, Carol and I were committed to including lengthy sections of two articles that Tom had published in 2000. One addressed the political economy of tradable emissions permits.⁹ The other was the classic article on the *Numerus Clausus* principle, the maiden effort of the team of Merrill and Smith.¹⁰ To enforce our ceiling of three, Carol and I had to excise from the reader one of Tom's worthy earlier works.

Few legal casebooks achieve major conceptual advances. In the field of property, an exception was the Dukeminier and Krier casebook of 1980. In 2005, Merrill teamed with Smith to produce a casebook that represented another quantum leap in property theory.¹¹

7. ROBERT C. ELLICKSON, CAROL M. ROSE, & BRUCE A. ACKERMAN, *PERSPECTIVES ON PROPERTY LAW* (2d ed. 1995; 3d ed. 2002). The second edition was a successor to BRUCE A. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* (1975). Henry Smith took command of the fourth edition, published in 2014.

8. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1984–1985); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

9. Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 ILL. L. REV. 275.

10. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

11. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (1st ed. 2007). The second edition was published in 2012.

Among their many innovations, Merrill and Smith folded landlord-tenant law and trust law into an overarching conception of “entity property,” and placed the takings issue under the broad heading of “government forbearance” in the altering of property rules.

Unlike many awardees of the Brigham-Kanner prize, Tom also is a master lawyer. His name has appeared on 91 briefs filed in cases before the United States Supreme Court.¹² While his three-year stint as Deputy Solicitor General accounted for most of these, 24 of the 91 either preceded, or followed his work in that role.¹³ In the famous *Kelo v. City of New London*,¹⁴ Merrill’s brief, written with John Echeverria to defend the constitutionality of the city’s condemnation, was one of 42 submitted on the merits. Tea leaves suggest that it was influential. Justice Stevens’s majority opinion cites an obscure Supreme Court precedent, *O’Neill v. Leamer*,¹⁵ a case mentioned in only 2 of the 42 briefs: Merrill and Echeverria’s and one other.¹⁶ Besides analyzing law, Tom has directly contributed to its making.

II. OWNERS’ DUTIES, NEGATIVE AND AFFIRMATIVE

As Thomas Drummond contended, property owners indeed have both entitlements and obligations. When examining obligations, legal analysts conventionally distinguish between negative duties—that is, obligations to refrain from certain behaviors—and affirmative duties—that is, obligations to act.¹⁷ This distinction appears, for example, in the law of covenants, which traditionally has been particularly hostile to requiring a transferee of land to assume the burdens of an affirmative covenant.¹⁸

12. This number was the product of a search, conducted on November 11, 2013, of Westlaw’s SCT-BRIEF-ALL database.

13. Tom signed 8 of the 24 in his capacity as a supervisor of Yale Law School’s Supreme Court Clinic.

14. 545 U.S. 469 (2005).

15. 239 U.S. 244 (1915).

16. *Kelo*, 545 U.S. at 483 n.11.

17. See, e.g., RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 509–89 (10th ed. 2012) (chapter on “Affirmative Duties”).

18. See, e.g., *Eagle Enterprises, Inc. v. Gross*, 349 N.E.2d 816, 820 (N.Y. 1976) (stating that an “affirmative covenant is disfavored in the law because of the fear that this type of obligation imposes an ‘undue restriction on alienation or an onerous burden in perpetuity’” (quoting *Nicholson v. 300 Broadway Realty Corp.*, 164 N.E.2d 832, 835 (N.Y. 1959))). Roman jurists similarly were averse to the running of burdens of affirmative covenants. See BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 142–43 (2008).

The distinction between negative and affirmative duties is slippery, and partly for that reason, controversial. The duty of the owner of a cement plant to control the emission of particulates, for example, could be characterized as a negative duty to avoid acts of pollution, or as an affirmative duty to install abatement technologies. Because both tort and criminal liabilities are presumptively thought to be imposed for wrongful acts, as opposed to failures to act, scholars in those two fields have been the primary analysts of the propriety of liabilities for omissions.¹⁹

A. *The Negative Duties of Owners*

Although the bulk of this essay focuses on owners' affirmative duties, a preliminary summary of their negative duties is appropriate. In a society with private property, the owner of a resource typically has broad powers to: (1) determine its use; (2) transfer it by sale, gift, or otherwise; and (3) exclude others from it.²⁰ Nonetheless, it is old hat that the law circumscribes in many ways an owner's exercise of these three powers. In an introductory course on property law, a student encounters an array of doctrines and statutes that impose civil and criminal penalties on owners who misbehave. Nuisance doctrines and zoning ordinances, for example, limit a landowner's choices of uses, and traffic laws constrain the choices of the owner of a motor vehicle. Limits on owners' powers of alienation also are common.²¹ And, as Merrill himself has stressed, an owner's right to exclude is

19. See, e.g., Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 559–61 (1988); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980). Weinrib offers a distinction between a “real nonfeasance” and a “pseudo-nonfeasance.” In an instance of the latter type, the duty-bearer would have participated in some fashion in creating the risk that performance of the duty would have mitigated. *Id.* at 254–58. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. (forthcoming 2014), provides a valuable review of sources that explore the act/omission distinction.

20. Compare Merrill, *supra* note 2, at 2068:

[W]hat is often loosely described as the “right to exclude” can be characterized with greater precision as twin rights of residual managerial authority and residual accessionary rights. Give someone the right to exclude the world from some thing, and, almost without exception, that person will have residual managerial authority and residual accessionary rights over the thing. The right to exclude is critical not for its own sake, but because it yields these two further attributes.

21. See, e.g., Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1375–80; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

hardly unfettered.²² For instance, a stranger may have a right to enter private land for reasons of private or public necessity, and the owner of a public accommodation presumptively must serve all comers.

Property scholars have devoted little attention to a particular set of negative duties that are pertinent to my later discussion of Gregory Alexander's claim that property law inherently has a redistributive thrust.²³ Some legal systems have directed an owner of rural lands to refrain from impeding entries by individuals searching for food. Among the relevant passages in the Hebrew Bible is LEVITICUS 19:9–10:

When you reap the harvest of your land, you shall not reap to the very edges of your field, or gather the gleanings of your harvest. You shall not strip your vineyard bare, or gather fallen grapes of your vineyard; you shall leave them for the poor and the alien.

The Deuteronomic Code employs more sharply edged categories—“the alien, the orphan, and the widow”—to identify the beneficiaries of rights to enter fields.²⁴ In ancient China, a similar crop-sharing norm seems to have been honored.²⁵ In Europe during the Middle Ages, poor residents of open-field villages customarily were entitled to glean crop remnants after a harvest.²⁶ Venerable American decisional law similarly recognized the rights of hunters and fishers to enter unenclosed and uncultivated private rural lands to search for

22. See, e.g., Merrill, *supra* note 5, at 8–9; see also THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 399–449 (2d ed. 2012) (on “exceptions to the right to exclude”).

23. See *infra* text accompanying notes 81–113.

24. DEUT. 24:19–21.

25. The classic collection of ancient Chinese poetry, comprising works dating from the 11th to 7th centuries B.C., includes the following verse:

There stand some backward blades that were not reaped,
Here some corn that was not garnered,
There an unremembered sheaf,
Here some littered grain,
Gleanings for the widowed wife.

THE BOOK OF SONGS 171 (Arthur Waley trans., 1937). I thank Shitong Qiao for providing this source.

26. See David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 111–12, 118–19 (2009) (discussing *Steel v. Houghton*, 126 Eng. Rep. 32 (C.P. 1788), a decision that controversially refused to acknowledge legal rights to glean).

quarry.²⁷ With the rise of the welfare state, these legal rights to enter private lands to obtain food have mostly been eliminated.²⁸

B. The Affirmative Duties of Owners

Property scholars, although conscious of many of the negative limits on an owner's use, transfer, and exclusion rights, have devoted little systematic attention to owners' affirmative duties.²⁹ Most of what follows is a foray into this underexplored terrain. Because the negative/affirmative distinction potentially is elusive, for clarity I invoke the legal situation of a property-owning Rip Van Winkle who has fallen into a 20-year slumber.³⁰ The affirmative duties of owners are revealed by the civil and criminal liabilities that Van Winkle might incur while asleep.³¹ As we shall see, these might include a criminal conviction for neglecting care of livestock, civil liability to a neighbor for having failed to contribute to the neighbor's costs of fencing a common boundary, and forfeiture of Van Winkle lands for failure to pay local property taxes.

Although affirmative duties of this sort are hardly unknown, for three reasons lawmakers tend to be reluctant to impose them. First and foremost, an affirmative duty typically impinges on an individual's freedom and self-actualization more than a negative duty does.³² A homeowner is apt to resent a city ordinance that orders a homeowner to keep an abutting public sidewalk in good repair more than an

27. See, e.g., VT. CONST. ch. II, § 67 (entitling hunters to enter unenclosed lands); *McKee v. Gratz*, 260 U.S. 127 (1922) (Holmes, J.) (recognizing customary rights to enter unenclosed and uncultivated land to hunt or fish, until the owner sees fit to prohibit entries); *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244 (1818) (affirming a right to hunt on unenclosed and uncultivated private land).

28. See *infra* text accompanying notes 110–12.

29. *But cf.* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 962 n.18 (2009) (briefly discussing affirmative duties).

30. In 1819, Washington Irving first published the short story that featured this character.

31. By this test, the duty of a rural landowner to allow entries by hunters and gleaners is negative, not affirmative, because those entrants would be able to walk past a sleeping Van Winkle.

32. See Oskar Liivak & Eduardo M. Peñalver, *The Right Not to Use in Property and Patent Law*, 98 CORNELL L. REV. 1437, 1466–67 (2013); Weinrib, *supra* note 19, at 268. A lyric from *Me and Bobby McGee*, a Kris Kristofferson song most famously sung by Janis Joplin, expresses an owner's possible reaction to the legal imposition of excessive affirmative duties: "Freedom is just another word for nothing left to lose."

ordinance prohibiting raucous late-night parties. A government that compels an owner to act takes command of a portion of the owner's resources, and, when duties are non-delegable, time. By contrast, a negative duty limits an owner's set of choices but does not impinge on the freedom to select from the options that remain.

Second, affirmative duties have a disproportionate tendency to add complexity to property law.³³ Two owners of abutting lots can readily understand a rule negating any legal duty to contribute to the costs of a unilaterally built party wall. By contrast, if the law were to impose a duty to contribute, the owners would be more likely to consult attorneys and become embroiled in litigation.

Third, the legal imposition of an affirmative duty is particularly likely to diminish intrinsic motivations to act in the same manner.³⁴ Compared to a person who has altruistically refrained from acting, a person who has committed a helpful act is more likely to feel a warm glow of self-satisfaction and to anticipate status rewards from others. Because the legal compulsion of an act typically diminishes these intrinsic rewards, the creation of a new affirmative legal duty tends to be less successful in altering behavior than would otherwise be expected. There is little evidence, for example, that a law mandating rescues by bystanders actually increases the incidence of bystander rescues.³⁵ Similarly, a law requiring an abutting owner to contribute to the costs of a party wall might do little to increase cost-sharing between neighbors.

33. See Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 106 (2005) (asserting that property law seldom imposes affirmative duties on owners in order to avoid increasing transaction costs).

34. On the devaluation of intrinsic motivation, see, e.g., Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine "The Moral Sentiments": Evidence from Economic Experiments*, 320 SCIENCE 1605 (2008); Edward Deci, Richard Koestner & Richard Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCH. BULL. 627 (1999); Emad H. Atiq, Note, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070 (2014) (arguing that the erosion of intrinsic motivation is undesirable in itself, regardless of effects on behavior).

35. Few American states impose a duty on a bystander to rescue a stranger even if the rescue would be virtually costless. See EPSTEIN & SHARKEY, *supra* note 17, at 511–23. In these situations, the bystander has superior information and superior ability to act, conditions commonly found in contexts where affirmative duties are imposed. The results of an empirical study of rescue situations, however, suggest that creation of a duty to rescue would not noticeably increase the incidence of Good Samaritan behavior. David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 712 (2006).

III. THE AFFIRMATIVE DUTIES OF AN OWNER WHO IS A CHEAPEST SERVICE PROVIDER

I now offer a selective overview of the affirmative legal duties of owners. This Part reviews owners' obligations to provide in-kind services. Parts IV and V turn to the obligations of owners to contribute funds to help finance the provision of public goods.

A. Governing Through Owners Who Have Special Information

Owners and other decentralized actors commonly have fine-grained information that a government agent could not readily obtain. As Merrill has emphasized, a system of private property takes advantage of this local knowledge by, for example, giving an owner wide latitude to choose among alternative uses of a resource.³⁶ Many of the affirmative duties of owners are similarly based on the likelihood that they have special knowledge. In contexts where they do, a government may decline to engage staff or contractors to provide a particular service but instead call on owners to provide it.

This possibility brings to mind Guido Calabresi's pioneering emphasis on the relevance, in tort law, of asymmetries in information and ability to act. Calabresi urged the imposition of tort liabilities on "cheapest cost avoiders."³⁷ Property law, for its part, tends to require an owner to affirmatively provide a service only when the owner is the "cheapest service provider," that is, the party most likely to both possess pertinent information and be in the best position to act on that knowledge. To borrow Larissa Katz's locution, when these conditions are met, a state understandably may choose to govern through owners.³⁸ Examples follow.

B. Duties of Owners of Animals and Custodians of Children

Responding to people's altruistic feelings about some members of the animal kingdom, governments seek to protect domestic animals

36. See, e.g., Merrill, *supra* note 2, at 2081.

37. Writing with Hirschhoff, Calabresi urged lawmakers to allocate the risks of accidents to the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." Guido Calabresi & Jon T. Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060–61 (1972).

38. See Katz, *supra* note 3.

from abuse and neglect. To accomplish this goal, governments conscript the services of animals' owners and custodians. An owner who has failed to feed or otherwise care for a pet or farm animal risks a criminal conviction,³⁹ forfeiture of the neglected animal,⁴⁰ and perhaps an injunction against future possession of similar animals.⁴¹ Transaction cost considerations underlie this assignment of responsibility. The owner of a domestic animal typically is physically proximate to it and has special knowledge of both its condition and its likely response to various forms of care. The provision of care to an animal also tends to enhance its value, a fact that enhances the political legitimacy of a legal obligation of animal care.

Few of us will assume an affirmative legal duty more momentous than that of care for a child. A child, of course, is not conventionally considered a proper object of ownership. Indeed, to refer to a child as someone's "property" is to dehumanize the child. Nonetheless, the considerations just identified help illuminate why legal systems impose duties of child care on parents and custodians and also why these obligations enjoy virtually universal political support.⁴² Love impels much of the care that parents and other custodians bestow on children. But family law serves as a backstop. Failure to provide care to a child may give rise to a variety of state interventions. These

39. See, e.g., ALA. CODE § 13A-11-14(a)(2) (2014) (criminalizing the "cruel neglect" of an animal in custody); IND. CODE ANN. § 35-46-3-7(a) (West 2014) (criminalizing the reckless, knowing, or intentional abandonment or neglect of a vertebrate animal in custody); *People v. Riazati*, 129 Cal. Rptr. 3d 152 (Cal. App. 2011) (affirming convictions for neglect of various animals); Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91 (2005).

40. See, e.g., *State v. Sheets*, 677 N.E.2d 818 (Ohio Ct. App. 1996) (affirming orders that defendant surrender neglected horses and not own horses in county during probationary period). In a number of other contexts, legal rules incentivize owner care by authorizing forfeiture of the neglected asset. A landowner who fails to police against entrants, for example, may forfeit ownership to a long-term adverse possessor. And the owner of a trademark who has failed to detect and prevent misleading uses of the mark may be held to have forfeited it to the public domain. See, e.g., *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959).

41. See, e.g., *Stulp v. Schuman*, 2012 WL 3755617 (Colo. App. 2012) (enjoining, at the behest of the state Commissioner of Agriculture, a rancher who had neglected cattle from future possession of livestock in county). See generally Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63 (2011).

42. Merrill and Smith are willing to apply property concepts to claims to things, but not persons. See MERRILL & SMITH, *supra* note 22, at 19. I take a more expansive view of the potential applications of property theory. See Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8(3) ECON. J. WATCH 215, 219 (Sept. 2011); cf. JOHN LOCKE, 2 TWO TREATISES ON CIVIL GOVERNMENT § 27 (Peter Laslett ed., Cambridge Univ. Press 1988 (1690)) (famously asserting that "every man has a property in his own person").

range from the mild, such as a visit by a representative of a child protection services agency, to the major, such as loss of custody of the child.⁴³ Less commonly, a guardian's neglect of duty to a child might trigger prosecution for a crime⁴⁴ and, conceivably, tort liability to the child.⁴⁵ The typical superiority of both a guardian's knowledge of a child's condition and special capacity to act on that knowledge makes these sanctions uncontroversial.

C. Affirmative Duties to Neighbors in Time

An owner of a time-limited interest in a tangible asset typically has a variety of affirmative obligations to provide services to owners of prior and subsequent interests. Consider a residential tenant who has leased a top-floor apartment for a term of years. The tenant has a present interest in the leased premises, and the landlord, a reversion. Broadly accepted legal rules impose affirmative duties, perhaps unalterable by contract, on both parties to the lease. The rules of permissive waste require the tenant to affirmatively care for the apartment, for example, by closing windows during a violent rainstorm.⁴⁶ Again, this rule rests on asymmetries in information and capacity to act. The tenant typically would have unrivaled knowledge of what windows are open, and would be in the best position to close them.

A landlord's duties to a residential tenant under the implied warranty of habitability rest on a similar transaction-cost asymmetry. Adopted most famously in *Javins v. First National Realty Corporation*,⁴⁷ this immutable warranty compels a landlord to repair

43. See, e.g., *In re Rhonda "KK,"* 620 N.Y.S.2d 541 (N.Y. App. Div. 1994) (affirming termination of custodial rights of parents who had failed to protect their daughters from their son's sexual abuses); see generally ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

44. See, e.g., *People v. Scully*, 513 N.Y.S.2d 625 (N.Y. City Crim. Ct. 1987) (affirming conviction of father who allowed his spouse to abuse his child); David Pimentel, *Criminal Child Neglect and the "Free Range Kid,"* 2012 UTAH L. REV. 947.

45. See Benjamin Shmueli, *Love and the Law, Children Against Mothers and Fathers*, 17 DUKE J. GENDER L. & POL'Y 131 (2010) (discussing tort liability for child neglect); but see *Burnette v. Wahl*, 588 P.2d 1105 (Or. 1978) (rejecting action by children against mother for damages stemming from emotional neglect).

46. See Liivak & Peñalver, *supra* note 32, at 1461–62.

47. 428 F.2d 1071 (D.C. Cir. 1970).

certain defects in a leased abode, such as a roof leak. Although Judge Skelly Wright's opinion in *Javins* includes passages that suggest that distributive-justice considerations influenced his thinking,⁴⁸ the opinion stresses transaction-cost considerations. Judge Wright observes that landlords typically have better knowledge than tenants about how to repair building defects, better access to repair sites, and better incentives to consider the long-run benefits of repair options.⁴⁹ In these instances they are, in short, cheapest service providers.

D. Affirmative Duties to Neighbors in Space

According to Mancur Olson, even a state functioning as a “stationary bandit” would choose to provide public goods that its citizens would value.⁵⁰ Economists define a *public good* as a service that is either non-rivalrously consumed, such as national defense, or a service, such as a local playground, for which a provider could not readily collect fees from entrants. Because a private entrepreneur typically cannot make a profit when providing a public good, these services are natural candidates for governmental undertakings.

Although a government commonly provides public goods through its own employees or those of private contractors, in some contexts it may conscript property owners, particularly landowners, to labor for public ends.⁵¹ Katz, a pioneering analyst of these practices, invokes as her central example the affirmative obligation, in some cities, of a landowner to clear snow from an abutting public sidewalk.⁵² Some cities have ordinances that subject an owner who has failed to shovel

48. Judge Wright quotes a New York decision that asserts that landlords are wealthier than tenants and have superior bargaining power. *Id.* at 1079–80. Other passages in *Javins*, however, downplay poverty as a factor. *See, e.g., id.* at 1074: “[w]hen American city dwellers, both rich and poor, seek ‘shelter’ today”

49. *Id.* at 1078.

50. MANCUR OLSON, POWER AND PROSPERITY 6–12 (2000). In *Governing Through Owners*, *supra* note 3, at 2030–35, Katz envisions state leaders and landowners as rivals for power, as they indeed may be. But in many contexts, a government may be more plausibly viewed as an institution that residents and owners voluntarily establish to provide public goods that they would not otherwise enjoy.

51. *See* Katz, *supra* note 3, at 2031, 2048–51 (observing that the benefits of many government services are territorially limited).

52. *Id.* at 2031–32, 2051. Katz stresses the affirmative duties of landowners to provide in-kind services to neighbors, not their duties to contribute to the funding of services that others provide (the subject of Parts IV and V of this Essay).

to a fine or other criminal sanction.⁵³ Tort law also may serve as a prod. At least one state supreme court has held that an owner of a commercial property has a duty of care to pedestrians who might slip on ice on an abutting public sidewalk.⁵⁴

A municipality that orders landowners to shovel snow from abutting sidewalks takes advantage of their local knowledge. Katz quotes an excerpt from an opinion of the New York Court of Appeals: “It is not expected, and cannot be required, that the [city] shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens.”⁵⁵ It is significant that a shoveling ordinance imposes on a landowner the duty to shovel an *abutting* sidewalk, and not, for example, an equivalent stretch located directly across the street. A shovel-your-own-sidewalk policy eliminates a variety of transaction costs. The distance of a shoveler’s walk to the task is slightly reduced. Far more important, a shovel-your-own-sidewalk policy takes advantage of local knowledge.⁵⁶ The owner of a lot knows best, for example, which of its shrubs can best withstand a pile of deposited snow. In addition, because an owner uses an abutting sidewalk more often than the sidewalk across the street, the owner is more sharply incentivized to perform the task well. This increases the likelihood of voluntary compliance with an imposed duty to shovel. And again, when the performers of a duty reap some benefits from performance, political opposition to imposition of the duty is lessened.

A frontier issue is the legal duty of an owner of land to affirmatively groom the premises for the benefit of neighbors. An owner who fails to attend to the appearance of an abandoned building increasingly risks nuisance liability to neighbors, imposition of a municipal fine, and government condemnation of the structure.⁵⁷ Some

53. See *id.* at 2032 n.7 (citing various ordinances, some of them likely imposing criminal sanctions).

54. See *Mirza v. Filmore Corp.*, 456 A.2d 518, 521 (N.J. 1983). This decision is an outlier. Most state courts adhere to the traditional common-law rule that an abutting owner has no such duty. See, e.g., *Wiseman v. Hallahan*, 945 P.2d 945 (Nev. 1997) (reviewing decisional law).

55. *Taylor v. City of Yonkers*, 11 N.E. 642, 642 (N. Y. 1887).

56. Katz’s discussion of the allocation of responsibilities for suppressing a fire in a theater implicitly recognizes the importance of economizing on information costs. See Katz, *supra* note 3, at 2041–43.

57. See, e.g., *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001) (rebuffing owner’s constitutional challenge to city’s demolition of two vacant and deteriorated apartment buildings);

legislatures and courts similarly have overturned the traditional rule that a landowner has no duty to abate hazards posed by the growth of natural vegetation.⁵⁸

In exceptional circumstances, a government may require a landowner to erect a structure on a vacant parcel. In ancient Rome, an owner who had demolished an apartment building (*insula*) had a duty to immediately replace it, a policy likely motivated in part to assure lateral support of adjoining structures.⁵⁹ Some governments in early Colonial America required landowners, at pain of forfeiture to the collectivity, to improve lots that had been allocated to them.⁶⁰ To perfect claims under the Homestead Act of 1862, owners similarly had to improve their lands.⁶¹

All of the affirmative duties discussed in this section are far more politically contested than, say, the affirmative duty of a guardian to care for an animal or a child. Many cities, for example, do not require an abutting owner to clear snow from a public sidewalk, and some state legislatures and local governing bodies have enacted laws that limit the tort liability of an abutter to a sidewalk pedestrian.⁶² In addition, in most jurisdictions, a landowner has no affirmative duty to control natural conditions or build a structure.⁶³ And, to the

City of Chicago v. Nielsen, 349 N.E.2d 532 (Ill. App. Ct. 1976) (authorizing city to demolish abandoned building that owner had refused to refurbish); Kenneth Canfield, Note, *A Nuisance Law Approach to the Problem of Housing Abandonment*, 85 YALE L.J. 1130 (1976); Angela Hart, *In Crackdown, SF Abandoned Building Fee Hiked Ninefold*, SF PUBLIC PRESS (Feb. 12, 2010), available at <http://sfpublicpress.org/news/2010-02/in-crackdown-sf-abandoned-building-fee-hiked-900> (describing San Francisco ordinance imposing annual \$6,885 “registration fee” on owner of abandoned building).

58. See, e.g., *City of Montgomery v. Norman*, 816 So. 2d 72 (Ala. Crim. App. 1999) (rejecting landowner’s constitutional challenges to ordinance criminalizing overgrowth of vegetation); James T. R. Jones, *Trains, Trucks, Trees and Shrubs: Vision-Blocking Natural Vegetation and a Landowner’s Duty to Those Off the Premises*, 39 VILL. L. REV. 1263 (2009).

59. See Peter Garnsey, *Urban Property Investment*, in *STUDIES IN ROMAN PROPERTY* 123, 133–36 (M.I. Finley ed., 1976).

60. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–63 (1996).

61. Act of May 20, 1862, ch. 75, § 2, 12 Stat. 392, 392 (repealed 1976).

62. See, e.g., *Cuapio v. Skrodzki*, 966 N.Y.S.2d 438 (N.Y. App. Div. 2013) (construing regulation to exempt owner of two-family home from duty of care); *Divis v. Woods Edge Homeowners’ Ass’n*, 897 N.E.2d 375 (Ill. App. Ct. 2008) (construing Illinois statute that requires abutter’s misconduct to be willful or wanton).

63. See Jones, *supra* note 58, at 1270–77; Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1319–24 (2014) (describing negative impacts of empty lot in downtown Boston).

consternation of some observers, the owner of a patent has no duty to use it.⁶⁴ Affirmative legal duties have downsides—in particular, loss of liberty, added legal complexity, and the devaluation of intrinsic motivation.⁶⁵ In some contexts, lawmakers seem to consider these decisive.⁶⁶

IV. THE DUTIES OF AN OWNER TO CONTRIBUTE TO THE COSTS OF PUBLIC GOODS

A government, instead of commanding an owner to render a valued service, may order the owner to pay money to compensate another party that has rendered the service. A landowner thus might be legally required to bear a portion of the costs of a party wall that a neighbor has built or the costs that a municipality has incurred to repave a street. Because a duty to contribute funds does not commandeer an owner's time, an affirmative duty of this sort impinges less on liberty interests than does a non-delegable duty to perform a service.

Legal duties to contribute to project costs vary, primarily according to the number of parties benefiting from the project. To distinguish the range of contexts, I employ three adjectives. When the beneficiaries of a project are few, as in the case a party wall, the unilateral builder of the wall is conferring *private* benefits. In contexts where beneficiaries are more numerous, the law of special assessments provides pertinent adjectives. In special assessment law, the repaving of a minor street or other improvement that benefits a few dozen or hundred landowners is said to confer *special* benefits on them. By contrast, the building of a new city hall or other broadly beneficial project is said to confer *general* benefits. A local government traditionally has been entitled to impose special assessments on landowners to recoup special benefits, but not general benefits.⁶⁷

64. See Liivak & Peñalver, *supra* note 32 (asserting that a duty to use a patent would deter creation of blocking patents).

65. See *supra* text accompanying notes 32–35.

66. The owner of a patent typically has special information about the patent and is best situated to provide it. One commentator therefore has proposed that a patent holder have a duty to disclose patent information to other researchers. See Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information?*, 25 HARV. J.L. & TECH. 531, 586–96 (2012). When considering this proposal, lawmakers should also give weight to the downsides of affirmative duties.

67. See ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 654–62 (4th ed. 2013).

A. Restitutionary Obligations to Private Benefactors

Owners of land and other resources of course may succeed in contracting with one another to finance a boundary fence or other mutually beneficial private project. Even when parties are few, however, transaction costs may thwart contracting. In such an instance, the legal imposition of an affirmative duty to contribute is a possible alternative. Perhaps to deter free-riding, in some instances judges have held that the law of restitution requires an urban landowner to defray part of the costs that a neighbor incurred to improve a party wall.⁶⁸ And a few state statutes require, in some situations, a rural landowner to partially reimburse an immediate neighbor for costs incurred to fence a common boundary.⁶⁹

In small-number contexts, however, this legal approach is unusual. In the absence of a contract, in most jurisdictions there is no common-law duty to share the costs of a party wall.⁷⁰ The co-owner of a condominium unit similarly is not unilaterally entitled to redo the kitchen and force the other co-owners to contribute to the costs of the renovation.⁷¹ Some state courts have even held that a statute mandating the sharing of fence costs between abutting neighbors violates constitutionally protected property rights.⁷² In contexts where benefits are private, lawmakers typically conclude, on balance, that it is better to force the potential beneficiaries of a project to contract *ex ante*. They may sense that this approach not only is less legally

68. See, e.g., *Campbell v. Mesier*, 74 Johns. Ch. 333 (N.Y. Ch. 1820) (Kent, Ch.).

69. See, e.g., *Kingman v. Williams*, 36 N.E. 667 (Ohio 1893). See generally Annotation, *Constitutionality of Fencing and Stock Laws*, 6 A.L.R. 212 (1920). In practice, in these contexts owners of rural land are more likely to apply informal norms than formal legal rules. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 65–81 (1991).

70. See Note, *Party Walls—Compensation for Use in the Absence of Agreement*, 21 HARV. L. REV. 222 (1908) (citing sources). There is a lack of scholarly consensus on what the common-law rule should be. Compare Daniel Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, 36 LOY. L.A. L. REV. 831, 849–52 (2003) (favoring restitution in a context of this sort) and Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189 (2009) (urging expansion of restitutionary obligations), with Doug Rendleman, *When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991, 1009–11 (2003) (disfavoring restitution).

71. See MERRILL & SMITH, *supra* note 22, at 640. In the co-ownership context as well, parties are highly unlikely to turn to formal law when resolving disputes. See ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* 120–23 (2008).

72. See, e.g., *Sweeney v. Murphy*, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972) (holding that statute that required owner who had no livestock to share fencing costs was unconstitutionally “oppressive”); *Choquette v. Perrault*, 569 A.2d 455 (Vt. 1989) (endorsing *Sweeney* outcome). But see, e.g., *In re Petition of Bailey*, 626 N.W.2d 190 (Minn. App. 2001).

complex than a rule that compels cost-sharing *ex post* but also is less likely to sap intrinsic motivations to cooperate.

B. Restitutionary Obligations to Governments or Associations That Confer Special Benefits

Especially between 1850 and 1930, local governments in the United States commonly imposed mandatory special assessments on private landowners to help finance street and utility improvements. Special assessment law permitted this practice only when the improvement in question could be characterized as a “local” one that would confer “special benefits.” Whatever its shortcomings, this financing system created political pressure against the installation of wasteful local improvements.

Special services to discrete territories commonly continue to be financed in similar fashion. In the twenty-first century, numerous special government districts, such as business improvement districts, provide ongoing services to discrete territories and primarily finance their operations by taxing owners of benefited lands. A developer who requires land purchasers to become members of common interest community, such as a condominium association, uses an analogous institutional arrangement. A member who fails to pay the community’s periodic assessments typically risks loss of the unit through a foreclosure proceeding. When a developer has neglected to empower the association’s governing board to impose mandatory assessments, some courts have held that this power is inherent.⁷³ These rulings recognize that, as the beneficiaries of a project or service grow in number, the necessity of deterring free-riding swamps the downsides of imposing affirmative legal duties.

C. Duties to Pay General Taxes to Finance General Governmental Operations

A municipality cannot feasibly finance all of its operations by means of special charges on benefited landowners. To defray the local share of the costs of, for example, policing services, building a new city hall, and providing services to the homeless, a municipality tends instead to levy general taxes, most pertinently, ad valorem taxes on owners of real and (perhaps) personal property.

73. See, e.g., *Sullivan v. O’Connor*, 961 N.E.2d 143 (Mass. App. Ct. 2012); *Perry v. Bridgetown Cmty. Ass’n*, 486 So.2d 1230 (Miss. 1986).

In the distant past, a government instead might require a landowner to contribute specific tangible inputs, not money, to the general public fisc. In the ancient Near East, the owners of large estates commonly were obligated to provide soldiers to the monarch.⁷⁴ In early feudal England, an owner who held land by military tenure similarly was compelled to provide knights to the king.⁷⁵ Compared to a monetary obligation, a duty to contribute a good or service in-kind is costly to administer and also intrudes more on taxpayer autonomy. As time has passed, these obligations therefore have mostly been cashed out. In England, for example, the feudal duties of landowners to provide knights to the king typically were eventually converted into obligations to pay money.⁷⁶

In the twenty-first century, a landowner's most financially burdensome affirmative obligation typically is the duty to pay general property taxes to units of local government.⁷⁷ These taxes have become major sources of local revenue, partly because the immobility of land makes them hard to evade.⁷⁸ On awakening, Van Winkle likely would find that he had forfeited ownership of all his lands to the highest bidders at government tax sales.

V. AN OWNER'S DUTIES TO CONTRIBUTE TO THE COSTS OF SOCIAL INSURANCE

Progressive theorists of property law stress the importance of distributive justice and would employ doctrines of property law to advance that objective. In this Part, I contest not the Progressives' goal,

74. See Raymond Westbrook, *Introduction: The Character of Ancient Near Eastern Law*, in 1 A HISTORY OF ANCIENT NEAR EASTERN LAW (Raymond Westbrook ed., 2003) 1, 54–55 (describing kings' grants of land in return for certain services or payments).

75. See Mark A. Senn, *Shakespeare and the Land Law in His Life and Works*, 48 REAL PROP. TR. & EST. L.J. 111, 156–57 (2013); cf. Douglas W. Allen, *Homesteading and Property Rights; Or, "How the West Was Really Won,"* 34 J.L. & ECON. 1 (1991) (describing the federal government's promotion of homesteading to quell Native American opposition); Katz, *supra* note 3, at 2054–55 (providing historical examples of a state's use of owners to defend frontiers and maintain peace).

76. See MERRILL & SMITH, *supra* note 22, at 502–03.

77. Governments also commonly tax property transfers and income that owners receive from property.

78. The benefits of a local government's general activities within its boundaries tend to be positively capitalized into value of land. The property tax thus can be conceptualized as a lumpy benefits charge that a municipality imposes in return for conferring general local services. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 5–8 (2001).

but rather their choice of instrument. The provision of social insurance rightly has become one of the central functions of governments. Property doctrine, however, is an ill-suited means to that end.

A. The Inevitability of a System of Social Insurance

Virtually every human society develops institutions to transfer resources to those who have unusual difficulty in providing for themselves. In a hunter-gatherer band, for example, a successful hunter typically has a duty to share the carcass of a large animal with other band members.⁷⁹ Some doctrines of property law have had a similar thrust. As noted, especially prior to the twentieth century, many societies have required owners of rural land to allow entry by hunters, gleaners, and others likely to be short of food.⁸⁰ Over many millennia, hierarchical institutions typically have evolved to supplement, and perhaps even supplant, these more decentralized systems of social insurance. Prior to the twentieth century, the roles of religious and fraternal organizations commonly rivaled those of governments.

During the twentieth century, of course, governments in the United States, like those in other developed nations, greatly expanded their efforts to provide a safety net to those who might fall on hard times. Partly because a household can more easily move to a new locality or new state than to a new nation, the federal government has financed most of these efforts, primarily by drawing on revenues raised by means of payroll taxes and the progressive income tax. In many contexts, these welfare-state programs have crowded out more traditional methods of social insurance.

B. Gregory Alexander's Conception of the Duty of a Property Owner to Share

A self-conscious school of Progressive property scholarship first surfaced in 2009.⁸¹ Merrill has plausibly identified “forced-sharing” as the

79. See Alan Barnard & James Woodburn, *Property, Power and Ideology in Hunting and Gathering Societies: An Introduction*, in HUNTERS AND GATHERERS 2: PROPERTY, POWER, AND IDEOLOGY 4, 17 (Tim Ingold, David Riches & James Woodburn eds., 1988).

80. See *supra* text accompanying notes 24–27.

81. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

core principle that unites this scholarly cluster.⁸² The Progressives plainly vary in their views. To simplify, I focus on the work of Gregory Alexander, one of the most visible members of this loose alliance. Alexander asserts that an overarching “social-obligation norm” should govern, and to some extent already does govern, legal definitions of property rights.⁸³ In Alexander’s words, “the state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor.”⁸⁴

Alexander’s analysis of *Jacque v. Steenberg Homes, Inc.*⁸⁵ suggests that he regards a routine property dispute to be an appropriate setting for the application of this sharing principle. Merrill and Smith start their casebook with *Jacque*, a controversy that arose out of events in a snowy field in rural Wisconsin.⁸⁶ In that instance, the Supreme Court of Wisconsin reinstated a jury’s award of \$100,000 punitive damages against a small corporation whose employees had failed to honor a retired farmer’s insistence that they not transport a mobile home across a field that he co-owned with his wife. Because the mobile home company had no plausible claim of necessity, Merrill, who favors a robust right to exclude, endorses the outcome in *Jacque*.⁸⁷

Alexander ultimately agrees that *Jacque* was correctly decided.⁸⁸ But his approach requires him to determine whether his forced-sharing principle would justify a trespass in this instance. Alexander thus is compelled to assess the worthiness, as a matter of distributive justice, of the parties involved in the dispute. This requires him to determine how alternative outcomes would have affected the parties’ relative “capabilities” to achieve “human flourishing.”⁸⁹ Because the Jacques’ home was located near the field where the trespass

82. Merrill, *supra* note 5, at 23–24.

83. Alexander, *supra* note 4; see also Gregory S. Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451 (2013).

84. Alexander, *supra* note 83, at 458. See also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 17–18 (2000) (“Some obligations legitimately rest on owners to share their wealth to enable nonowners to have an opportunity to become owners.”); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 882 (2009) (“... [R]edistribution of land rights via in-kind transfers of ownership or occupancy will, at times, be the only appropriate way of fostering human flourishing.”).

85. 563 N.W.2d 154 (Wis. 1997).

86. MERRILL & SMITH, *supra* note 22, at 1–7.

87. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1871–74 (2007).

88. Alexander, *supra* note 4, at 815–17.

89. Alexander derives these conceptions from the works of Amartya Sen, Martha Nussbaum, and Aristotle. *Id.* at 749–51, 760–72.

occurred, he concludes that the trespass had jeopardized the Jacques' "capability of sociality." Turning to the mobile home company and its shareholders, Alexander declines to adopt a rule that corporations and shareholders inherently lack interests in human flourishing. He implies that their stakes instead are fact-sensitive. If denial of entry across the Jacques' field would have affected the "economic viability" of Steenberg, the case might be difficult to resolve.⁹⁰ But the interests of Steenberg and its shareholders were minor and "purely economic." Alexander concludes, "Whatever flourishing interest of either Steenberg or its shareholders was implicated, then, paled in comparison with the Jacques' interest in maintaining the security and safety of their family home."⁹¹

This approach places significant additional informational burdens on actors. Imagine that the Jacques, upon learning of Steenberg's intentions, had telephoned an attorney for advice. A responsible attorney would then have had to anticipate how a judge ultimately would decide the matter if litigation were to ensue. If Alexander's principles were to have been in effect, the attorney, among other tasks, would have had to quiz Harvey and Lois Jacques about their current levels of capability, determine the effects of an entry on their sense of security in their home, and assess the financial viability of the Steenberg firm.

Some devotees of the sharing principle might be willing to make lumpier decisions about the relative merits of distributive claims. The Deuteronomic Code entitled "aliens, orphans, and widows" to enter fields for food, even though some aliens, for example, certainly would not have been impecunious.⁹² This sort of class-based approach to the making of redistributive judgments likely would reduce informational burdens, but at the sacrifice of precision.⁹³ Alexander, when analyzing *Jacque*, shows some willingness to generalize, for example, about homeowners' needs for security. But, as noted, he is unwilling to conclude that a corporation and its shareholders inherently lack protectable capabilities.⁹⁴ His sharing principle apparently requires parties

90. *Id.* at 816–17.

91. *Id.* at 817.

92. *See supra* text at note 24.

93. See Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 174–76 (2003) (distinguishing between individual and class-based determinations of distributive merit).

94. If property law were to systemically discriminate against corporations, the creator of a small business would have an additional incentive to select another business form.

to a property dispute to make individualized assessments of their respective circumstances.⁹⁵

To Merrill and other scholars intent on limiting the information costs of property rules, Alexander's legal approach is, to put it gently, a non-starter. Many everyday property disputes involve strangers thrown together in brief encounters. A Starbucks patron doing work on a laptop benefits from the existence of a rule that entitles a laptop owner flatly to refuse, without further discussion, a stranger's request to borrow the device. Would it be better to require the laptop owner and its would-be borrower to enter into a discussion about their relative wealth and capabilities?

C. The Advantages of Redistribution by Means of Broad Welfare Programs Financed Through General Taxes

Virtually all legal commentators regard the pursuit of distributive justice to be a legitimate concern of lawmakers. This generalization applies not only to Progressives, but also to law-and-economics scholars. Tom Merrill, who plainly gives weight to considerations of economic efficiency, has repeatedly urged lawmakers to attend to a variety of other values, including distributive justice, individual freedom, personhood, and communitarianism.⁹⁶ Louis Kaplow and Steven Shavell have prominently acknowledged that policies that maximize welfare may fail to satisfy concerns about distribution.⁹⁷ And so have Richard Posner and many others.⁹⁸

95. Singer states that Alexander would not treat "each property case as one of first impression." Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1307 & n.66 (2014). But Alexander's discussion of *Jacque* does reveal a strong aversion to categorical rules.

96. Merrill, *supra* note 2, at 2081–94; *see also* Merrill, *supra* note 5, at 11–13, 23–24; Merrill & Smith, *supra* note 87, at 1850, 1857. For doubts that any version of utilitarianism can capture the moral basis of private property, *see id.* at 1850–51, 1867.

97. The opening paragraph of Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001), reads:

The thesis of this Article is that the assessment of legal policies should depend exclusively on their effects on individuals' welfare. In particular, in the evaluation of legal policies, no independent weight should be accorded to conceptions of fairness, such as corrective justice and desert in punishment. (However, the logic leading to this conclusion does not apply to concern about equity in the distribution of income, which is often discussed under the rubric of fairness.)

98. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 344 (8th ed. 2011) (recognizing distributive justice as a distinct concern); *see also* ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY:*

But most law-and-economics scholars, including Merrill,⁹⁹ conclude that distributive goals are better pursued by means of broad tax and welfare programs than by the introduction of distributive considerations into the rules for resolving ordinary private law disputes.¹⁰⁰ Considerations of efficiency, horizontal equity, and relative institutional competence all support this stance.

First, as noted, the harnessing of private law doctrine to the cause of redistribution would greatly increase the amount of information individuals would need to navigate the world.¹⁰¹ Determinations of the relative neediness, or capabilities, of parties to a property dispute commonly are complex. In a welfare state such as the United States, the staffs of tax and welfare agencies and private charities typically have better information pertinent to the pursuit of distributive justice than do ordinary citizens, attorneys, and judges.¹⁰²

THE BIG TRADEOFF (1975); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7–10 (2d. ed. 1989).

99. Merrill, *supra* note 5, at 24; Thomas Merrill & David M. Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 27 YALE J. REG. 1, 38 (2010).

100. See, e.g., POLINSKY, *supra* note 98, at 124–27; Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000). *But cf.* Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998) (asserting that, on account of individuals' excessive optimism, contingent civil liabilities might have less effect on incentives to work than income taxes would); *but see* Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001) (asserting that the mainstream position is logically flawed and premised on untenable assumptions). See generally Logue & Avraham, *supra* note 93 (providing an incisive overview of competing considerations). Some Progressives, perhaps most, are aware that law-and-economics scholars typically favor using taxation and welfare policies as the chief instruments of distributive justice. See, e.g., Peñalver, *supra* note 84, at 880.

101. With Merrill's stress on simplicity, compare the views of Hanoch Dagan, an energetic scholar with a distinctive voice. At times Dagan seems to value legal complexity for its own sake. The abstract of one of his articles reads in part:

[T]his Essay calls for a pluralist turn in private law theory and argues that a structurally pluralist and moderately perfectionist understanding provides a better account of private law generally and of property law more particularly. The multiplicity and complexity implied in such an understanding are also normatively valuable for liberal private law and should facilitate a variety of social spheres embodying different modes of valuation.

Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1409 (2012). *But see*, e.g., Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1269 n.96 (2007) (recognizing advantages of simplicity).

102. See, e.g., Logue & Avraham, *supra* note 93, at 173–74 (noting that taxing authorities have superior information about individuals' income and wealth). In 2009, governments in the

Second, the principle of horizontal equity—that is, the like treatment of persons situated alike—typically supports placing burdens of providing aid to the poor on taxpayers generally, as opposed to concentrating those burdens on members of smaller subgroups, such as property owners involved in private-law disputes.¹⁰³ Alexander and Peñalver themselves recognize the importance of horizontal equity. They highlight a decision of the Constitutional Court of South Africa that dealt with a corporation’s petition to evict tens of thousands of squatters from its lands.¹⁰⁴ Alexander and Peñalver applaud the court’s decision not only to delay the eviction but also to order the government of South Africa to compensate the corporation for damages arising out of the squatting.¹⁰⁵ Why this expression of concern for a corporation, an unlikely object of Progressive sympathy? Alexander and Peñalver conclude that, at least in this instance, the duty to share surplus property was “an obligation that falls on all property owners, and therefore should not be imposed on just one property owner.”¹⁰⁶ In this particular case there also was a horizontal equity issue on the receiving side. The court’s decision transferred resources to the squatters involved in the litigation, ultimately at the expense of the government of South Africa. Might not other poor and landless households in South Africa have been just as deserving of aid? Because tax and welfare programs typically have broader reaches, their effects tend to be more even-handed than the effects of judicial rulings in particular property disputes.

Third, in developing his conception of a duty to share property, Alexander gives little weight to the relative legitimacy and competence of alternative institutions. His lengthy discussions of judicial decisions such as *Jacque* and the New Jersey beach access cases imply that he sees state judges as major architects of redistributive efforts.¹⁰⁷ Virtually all citizens, however, have a stake in redistributive

United States spent \$2.1 trillion on transfer payments to individuals. See U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT 351 tbl.539 (2012). Taken together, federal taxation and expenditure policies have a sharply progressive tilt. See Congressional Budget Office, *The Distribution of Federal Spending and Taxes in 2006*, 37 exh. 24 (Nov. 2013).

103. See Kaplow & Shavell, *supra* note 100, at 823.

104. *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*, 2005 (5) SA 3 (CC).

105. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 159–60 (2009). As it happens, I agree with both prongs of the court’s decision in *Modderklip*.

106. *Id.* at 160.

107. Alexander, *supra* note 4, at 815–17 (discussing *Jacque*); *id.* at 801–07 (discussing

questions, and these issues are deeply contested. In a democracy, legislators, not judges, typically are the more legitimate framers of social-insurance policy.¹⁰⁸ Moreover, Alexander implicitly would enhance the relative prominence of states, the primary makers of property law in the United States, in redistributive policy. This also is dubious. As noted, because households are mobile, redistributive policy generally is best fashioned at the national level.¹⁰⁹

D. The Waning of Rural Landowners' Obligations to the Poor

Alexander asserts that the legal duties of owners generally have been proliferating.¹¹⁰ In important respects, however, the trend is otherwise. The duties of an owner of an orchard or farm to provide access to the needy have ebbed. In the United States, rights to enter private lands to hunt, fish, or glean received greater legal protection in 1800 than in 2014.¹¹¹ When Britain enacted a “right to roam” statute in 2000, it forbade a roamer from hunting on private land and refused to authorize roaming on plowed land.¹¹² With the growth of the welfare state, lawmakers have largely cashed out the social-insurance duties of rural landowners—that is, converted them into obligations to pay general taxes to the state.

It is notable that in pocket after pocket of property law, including, for example, adverse possession, inheritance, nuisance, and takings, formal legal doctrine does not ask a judge to give weight to the relative deepness of the pockets—or, to use Alexander’s preferred term, capabilities—of the contesting parties.¹¹³

Matthews v. Bay Head Improvement Ass’n, 471 A.2d 355 (N.J. 1984) and Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005)).

108. Cf. Logue & Avraham, *supra* note 93, at 253–57 (analyzing, but not endorsing, this argument).

109. See *supra* text following note 80. A case for some involvement of local governments in redistribution is made in Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35 (1973).

110. See, e.g., Alexander, *supra* note 83, at 453: “As society has grown more complex and more interdependent, the obligations [of owners] have thickened.”

111. See *supra* text accompanying notes 24–27; see also Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 677–84 (2011).

112. See Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375, 407–08 (2007). On the scope of rights to roam in other European nations, see Sawers, *supra* note 111, at 684–89. Few of these nations authorize a roamer to hunt or fish, but some recognize a right to gather berries and mushrooms. *Id.*

113. For criticism of the current legal stance, see, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999).

CONCLUSION: CONFINING PROPERTY LAW TO WHAT IT DOES BEST

Lawmakers at times assign to a property owner affirmative duties to provide specific services, such as providing care to a domestic animal and clearing snow from an abutting city sidewalk. In these instances, the owner typically both benefits personally from performing the service and also has special pertinent knowledge and ability to act on that information. The increasing specialization of labor and capital suggests, if anything, that the scope of owners' duties to provide these sorts of in-kind services will tend to contract. In many contexts, an owner lacks the skills and equipment to provide a service as capably as a specialist hired by a government agency could provide it. Until a century ago, many states called on adult males to contribute stints of road duty.¹¹⁴ None continue to enlist amateurs in this fashion.

To marshal resources, governments instead are inclined to impose on owners obligations to make monetary payments such as benefits charges and general taxes. A duty to pay burdens individual autonomy less than does a duty to serve. But even a duty of an owner to pay increases the informational complexity of the property system. In some contexts, this consideration, coupled with the risk that imposing a legal duty will crowd out intrinsic motivations to contribute funds, counsels against the creation of a duty to pay.

Distributive justice is a worthy goal. With the rise of the welfare state, however, landowner duties to aid the poor rightly have declined. As Tom Merrill has stressed, simple rules of property law enable individuals to navigate a world full of strange objects and unfamiliar people. Gregory Alexander's wish to burden owners with a generalized legal duty to share would greatly complicate this navigation. A legal institution, even one as fundamental as property law, should not be asked to do too much. In Henry Smith's words:

To assert that doctrines are part of an issue-by-issue balancing of values like community, autonomy, efficiency, personhood, labor, and distributive justice is to commit the fallacy of division. These are all important values for the system to serve, but the bundle

114. See *Butler v. Perry*, 240 U.S. 328 (1916); Michael H. LeRoy, *The Inequality of Sacrifice: Reducing Moral Hazard for Bailed-Out Homeowners: The Case for Compulsory Community Service*, 36 J. LEGIS. 139, 143–44 (2010).

picture [of property rights] creates the expectation that the pieces of the system will serve these values individually and separably as well as collectively. Little attention is directed toward the possible specialization of the parts in achieving the goals of the whole.¹¹⁵

In a nation with a full-fledged welfare state, putting issues of distributive justice into play in a routine trespass dispute would be a grave mistake.

115. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1719 (2012).