

RESPONSE

A FEW QUESTIONS ABOUT THE SOCIAL- OBLIGATION NORM

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I applaud Gregory Alexander for proposing an innovative view of property, one focused on the obligations of ownership. His project locates what I think of as the liberal aim of personal freedom (meaning both formal autonomy and real opportunity) within a social context of distributive choices and conceptions of mutual obligation. That is, he is asking what counts as a free society, and he is putting property regimes at the center of the answer. I want to set out some questions about where his project goes from here.

A couple of preliminary issues are worth raising at the start. One is a simple question about the scope of Professor Alexander's social obligation principle: is it national, global, or something else? The legal examples come—almost inevitably—from national property regimes. Professor Alexander's justifying argument for the social-obligation principle, though, seems to press in a strongly cosmopolitan direction. His argument for a requirement to value in others those potential capabilities that one values in oneself, if it holds, seems most likely to hold for all humanity: its logic is universal, not national. If that is the idea, it puts the project at a considerable distance from the national regimes that furnish the article's important examples, at least in respect of scope.

The second preliminary question is about the interaction between two roles property law might play in this project. The first role is as a *distribuendum* of a freestanding theory of distributive justice, which should share around property rights as it does other parts of what John Rawls called primary goods and what Amartya Sen might regard as the preconditions of achieving an adequate set of human capabilities.¹ The second is as a source of insight about appropriate principles of distributive justice. I get more of the first feeling from

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¹ See JOHN RAWLS, *A THEORY OF JUSTICE* 78–81 (rev. ed. 1999); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 74–77 (1999).

Professor Alexander's argument that a strong social-obligation norm should be binding on all upon pain of inconsistency, but more of the second from his discussion of cases. As my other questions will suggest, I am friendly toward a hybrid of the two.

The other questions are more speculative, really invitations to Professor Alexander or others to consider future projects. Several also intersect with my preliminary questions; answers to the later questions might illuminate the earlier ones.

The first such question concerns how far the idea of obligation might reach in making sense of the full scope of property law as it now exists. I read the legal examples in Professor Alexander's article as involving telling exceptions to the conventional operation of property rights, in which authoritative third-party actors (courts, sometimes in conjunction with legislatures) abridge the exclusion power to enshrine an overriding social interest. I wonder whether it might be fruitful to see in the same light features of "normal property" involving no case-specific exception. For one example, consider the bounds of property: what it is that cannot be owned. Limits on the domain of ownership form a defining feature of property rights with definite implications for the meaning of the ownership regime.² The prohibition on owning human beings is not a utility-maximizing rule, but an expression of a commitment to the in-principle equality of all persons.³ That commitment is not an exogenous constraint on property rights, but a feature of our property regime: everyone has the legal capacity to be an owner, and no one can be owned. To participate in American property law is, therefore, to embrace an obligation to honor a version of human equality, an obligation so basic to property law that it easily becomes invisible.

² I have discussed this issue as one internal to the development of the American property regime in Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047 (2007). For a view of the same issue that is more concerned to define the limits of that regime's appropriate operation, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* 16–101 (1996) (surveying reasons against extending the domain of property).

³ As to the normative basis of the prohibition, I find it uncontroversial that a demonstration that slavery would increase utility, according to the relevant formula (total maximization, maximum average, a distribution-sensitive formula, or whatever else), would not be taken as sufficient reason to reinstate it. For a satirical treatment of this issue offering a Swiftian proposal to reinstitute slavery as a development tool, see Press Release, World Trade Org., WTO Announces Formalized Slavery Model for Africa (Nov. 13, 2006), *available at* <http://www.gatt.org/wharton.html>. As to the matter of the historical causation of abolition, recent work tends strongly toward the view that abolition cannot be explained by pursuit of material welfare (one standard proxy for utility) and instead represented a triumph of a new conception of equal human freedom. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 231–49 (2006) (surveying historiographic work done in recent decades).

That obligation to honor interpersonal equality is more visible, however, if one thinks of it as organizing other limits on ownership. Consider certain traditional and contemporary limitations on the power to exclude: the common carrier obligation to admit all comers and requirements under civil rights law to give up racial and other group biases upon committing residential housing to the market rather than keeping it as a primary residence.⁴ These are not strict limits on the exclusion power, of course, but they categorically restrict the exclusion power of owners who use their real property on the market. It is uncontroversial that ownership is a building block of, and sets in motion, market relations. What may be less obvious is that what one might call “market property” carries special limits on exclusion, in favor of a universalist principle that all comers must have access to market relations.

Now consider in this light a canonical exception to the exclusion power, the New Jersey Supreme Court’s ruling in *State v. Shack* that a farmer could not prevent social workers or other guests from visiting resident migrant laborers on his private land.⁵ It might be that the most illuminating way to understand this case is as part of a broader obligation, instinct in ownership, to honor human equality. The farmer’s violation of that obligation in *Shack* was his effort to use his ownership right to impose a subordinate status on resident employees, denying them access to ordinary social interactions (with guests) and information about their legal rights (that the social workers sought to offer).⁶ It is at the heart of the obligation enshrined in the common carrier and civil rights laws, and the deeper commitment to equality in the bounds of ownership, that there is no caste in property law. The positive meaning of that idea might be thought of as an open-market principle: all must be able to join in the characteristic interactions of market life on terms equal in principle—that is, without legal disability from owning, buying, selling, or engaging others.⁷

⁴ For discussions of common carrier duties, see 3 WILLIAM BLACKSTONE, COMMENTARIES *164–66 (setting out the traditional common-law view); A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53 (2005) (arguing that the doctrine had a relatively restricted scope in the nineteenth century); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292–94, 1303–48 (1996) (arguing that the doctrine represented a strong limit on owners’ exclusion power in the earlier decades of the nineteenth century). For civil rights exclusions, see Fair Housing Act, 42 U.S.C. §§ 3601–19 (2006).

⁵ 277 A.2d 369, 374–75 (N.J. 1971).

⁶ See *id.*

⁷ For a discussion of the social vision behind this principle, see EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT* 7–15 (2001) (describing the moral aims of Adam Smith’s reformist program). I have developed this argument with particular reference to property regimes in Purdy, *supra* note 2, at 1079–1100.

The conception of equality I am describing concerns equal access to market processes, not equality in the outcomes of those processes. In this respect it is less ambitious in its conception of justice than Professor Alexander's account, which aims at a just distribution of the resources necessary to realize human capabilities.⁸ It strikes me as quite possible, though, that one might build on the conception I am describing as instinct in our property regime, moving in the direction of Professor Alexander's position. That development has plenty of historical precedent, from the proregulatory Supreme Court Justices of the *Lochner* era, who argued that only regulation could ensure real equality in the "struggle for subsistence,"⁹ to Progressive Era Presidents such as Woodrow Wilson and Franklin Roosevelt, who insisted that their regulatory and redistributive programs were the only way to make the traditional American aims of security and opportunity real in industrial society.¹⁰ I have argued for a version of it on the basis of a view of property and markets that emerged in the early-modern thought of figures such as Adam Smith, in which property rights and markets were the instruments of a conception of society that put at its center relations of reciprocity and persuasion, rather than hierarchy and command.¹¹

My second question concerns the mode of justification for the social-obligation view. I understand Professor Alexander's argument as a broadly Kantian one: it achieves its account of obligation by applying a strict standard of consistency to the individual's activity of valuation.¹² Clearly, Professor Alexander is in strong philosophical

⁸ See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 774 (2009) ("[A]n owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing. These are the benefits necessary to the members' development of those human qualities essential to their capacity to flourish as moral agents and that have some reasonable relationship with ownership of the affected land.").

⁹ *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

¹⁰ See Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: GEORGE WASHINGTON TO BARACK OBAMA (2009), available at <http://www.bartleby.com/124/> ("By using the new materials of social justice we have undertaken to erect on the old foundations a more enduring structure for the better use of future generations."); Woodrow Wilson, First Inaugural Address (Mar. 4, 1913), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, *supra* ("Our duty is to cleanse, to reconsider, to restore, to correct the evil without impairing the good, to purify and humanize every process of our common life without weakening or sentimentalizing it.").

¹¹ See Purdy, *supra* note 2, at 1079–1100. See generally Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1242, 1297 (2005) (arguing in favor of a "freedom-promoting conception of property" that "centers on the development of capabilities, with special emphasis on expanding people's set of viable choices and replacing relations of domination and subordination with reciprocity" (emphasis omitted)).

¹² For a discussion of the Kantian project of moral justification in contrast to that of Hegel, see CHARLES TAYLOR, *HEGEL* 365–78 (1975).

company here, and I don't mean to second-guess the approach, but I would like to point out another way of proceeding. Professor Alexander's account of humanity—what Kant and some later thinkers would have called philosophical anthropology—is quite deliberately in a different vein than that of Aristotle and Hegel.¹³ This is the source of his learned and extremely illuminating discussion of interdependence and the emergence of individual personality, even the superficially hyperindividual quality of autonomy, from a web of relationships, institutions, and traditions.

That tradition has a problem with justification, however, if justification means vindicating one's position in a way that no one can rationally deny. The Aristotelian/Hegelian tradition postulates that people always reason within cultural contexts, and that what counts for them as a reason is culturally conditioned.¹⁴ Some might see this as a counsel of normative despair, a sure road to "relativism," but for figures such as Charles Taylor (whose work Professor Alexander keenly grasps), there is no hint of despair in the idea.¹⁵ Rather, there is recognition that, like autonomy, rationality and the aspiration to normative universalism—meaning both honoring all equally and seeking to persuade all—are culturally specific achievements, and extraordinary ones.¹⁶ As I read Professor Taylor, he believes that this implies a preferred approach to normative reasoning, an ethics of articulacy that requires being as clear and complete as possible in our accounts of the worldviews we share, what Taylor has recently called the "social imaginaries" in which experience finds its shape and meaning.¹⁷ Such reasoning makes possible a kind of persuasion in which people come to recognize their own experience in the description being given, or are persuaded to adopt new aspirations as truer expressions of their own experience and identity. This is the way, for

¹³ See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 71–74 (1999) (discussing the character of human interdependence); TAYLOR, *supra* note 12, at 365–78; CHARLES TAYLOR, *Atomism*, in POWERS, POSSESSIONS, AND FREEDOM 39, 55–57 (Alkis Kontos ed., 1979).

¹⁴ See sources cited *supra* note 11.

¹⁵ See CHARLES TAYLOR, *Comparison, History, Truth*, in PHILOSOPHICAL ARGUMENTS 146, 164 (1995) (arguing that an understanding of multiple cultures is important "[n]ot only to avoid political and military conflict where possible, but also to give people of every culture some sense of the immense gamut of human potentialities"); TAYLOR, *Explanation and Practical Reason*, in PHILOSOPHICAL ARGUMENTS, *supra*, at 34, 58–59 [hereinafter TAYLOR, *Explanation and Practical Reason*] (arguing that individuals who have an understanding of multiple cultures "have a truer grasp of the human condition than those for whom alternative ways are utterly inconceivable").

¹⁶ See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 81–106 (1989) (giving a critical but respectful account of the ambition of universalism in contemporary moral thought).

¹⁷ See *id.* at 53–107; see also CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 1–30 (2004) (setting out the idea of a social imaginary in relation to the program of articulation).

instance, that religious conversion has always occurred (when not by the sword) and that, today, the blandishments of personal liberty and prosperity make their appeal against traditional ways of life.¹⁸

I think this sort of reasoning exactly characterizes Professor Alexander's *Commodity & Propriety*, one of the best books ever written about the social and political visions attached to American property law.¹⁹ So, I wonder what it would have been like for Professor Alexander in his article to set aside irresistible argumentation and instead present the social-obligation vision of property as the best expression of a tradition in which we—Americans, common lawyers, moderns—make sense of our lives. In raising the question, I do not mean to find fault, but I do suspect the result of this approach would be compelling in a different way than the argument Professor Alexander develops in his article. It might run along these lines: The idea that we have rights, but not obligations, in our economic activity and the communities in which it takes place, is a pleasing illusion (to some). It appeals to ideas of self-mastery, self-authorship, and personal responsibility, which all have deep roots in the American ethos.²⁰ But it is not (to borrow a phrase from Professor Taylor) the best account of what we value in ourselves, others, or the institutions and practices we share.²¹ It is not the best account because, as Professor Alexander admirably points out,²² it neglects the fact that autonomy arises from traditions and communities, so imagining that it could be self-sustaining without also sustaining those is self-undermining. But it is also not the best account because, in fact, our tradition shows a pervasive regard for responsibility and contribution, particularly toward the ideal of a national community in which all can realize their potential. This is the vision of political membership and political economy that motivated Abraham Lincoln and Frederick Douglass to seek equal citizenship for all and an end to human property; Franklin Roosevelt to seek a redefinition of property rights in the direction of universal security and opportunity; and contemporary reformers—Professor Alexander among

¹⁸ I give some concrete examples of how this might work in relation to women's participation in labor markets in Purdy, *supra* note 2, at 1101–07.

¹⁹ See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* (1997).

²⁰ For instances of this idea, see Abraham Lincoln, Address Before the Wisconsin State Agricultural Society (Sept. 30, 1859), available at http://www.nal.usda.gov/speccoll/exhibits/lincoln/lincoln_wisconsin.html (praising the principles of free labor as aligning reward with desert in almost all cases); see also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 155, 164 (1988) (quoting Northern Republicans on the virtues of the system).

²¹ See TAYLOR, *supra* note 16, at 57–58 (setting out what he calls the “best account” principle).

²² See Alexander, *supra* note 8, at 765 (“[A] proper concern for human autonomy requires looking beyond mere functionalities to include the capabilities that various social matrices generate for their members.”).

them—to argue that our political and legal culture has swung too far in the direction of winner-take-all, loser-pays economic libertarianism.²³ As one reader, I find that American tradition a source of compelling illumination about why I value what I value and what it means to take this seriously. This is akin to the demand for consistency in reasoning, but it is a different kind of appeal, and one that strikes me as consonant with much of Professor Alexander's work, in this article and elsewhere.

Third, I wonder what it would be like to treat law and economics as part of a tradition that participates in the property-and-markets debate about the meaning of interpersonal equality. This might seem a stretch, but consider the sources and commitments of the main law-and-economics normative approaches to assessing institutions: wealth maximization and Pareto optimality. Wealth maximization is basically a variant of utilitarianism, which has settled on a metric more tractable than the immeasurable quality of pleasure. For uber-utilitarian Jeremy Bentham and his followers, the moral gravamen of the program was (in significant part) that it counted the well-being of all alike; those reformers scorned obscurantist modes of reasoning that they saw as preserving the inequitable privileges of elites.²⁴ Utilitarianism, then, was in good part a view about equality, and as a mode of justification, it relied on the idea that all who participated in social life were obliged to respect that idea of equality—that is, to embrace a set of institutions and rules designed on the principle that the welfare (or, happiness) of each counted alike.

Although the next assertion will probably surprise (and fail to persuade) some, I think the Pareto-efficiency criterion, with its restriction of evaluation of states of affairs to pair-wise comparisons by individuals—that is, individual rankings of two alternatives as respectively better and worse—also reflects commitment to an idea of human equality. The backdrop to this idea is mainstream economists' rejection of interpersonal utility comparisons that limited "scientific" comparisons to the Pareto-criterion question: does any given individual prefer state of affairs A to B, or the reverse? Interpersonal utility com-

²³ I give an interpretation of these aspects of American tradition in JEDEDIAH PURDY, *A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM* (forthcoming 2009) (manuscript at 25–32, 43–45, 184, on file with author).

²⁴ Consider this presentation of Bentham's thought and motives by commentator of mixed sympathy:

In the eighteenth century the most active instinct was that of reaction against theological tyranny and against social injustice. Hence the fashionable moral theory was that which asserted, in the crudest form, the right of man to enjoy himself in this life and the right of every man to an equal chance of enjoyment.

F.C. Montague, *Introduction to JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT* 1, 35 (F.C. Montague ed., Oxford, Clarendon Press 1891) (1776).

parisons, by contrast, would make it possible to ask whether one individual is better off than another, and by such comparisons of utility levels, ask which state of affairs maximizes overall utility in aggregate or on average (or optimizes it according to some distribution-sensitive criterion). Historically, the rejection of interpersonal utility comparisons in Anglo-American economics owes centrally to Lionel Robbins. Professor Robbins attacked interpersonal comparison as unscientific, claiming that because utility is unobservable, there is no basis for asserting that one person is enjoying more of it than another.²⁵ But Robbins also charged the ambition to make interpersonal comparisons with failure to respect the distinctness of individual desire, judgment, and choice. He worried that summing utility obscured the all-important fact that my judgments are my judgments, and as good as anyone else's, even if I choose things that the official metric does not treat as welfare enhancing (such as shoes over health care or concert tickets over a warm jacket in November).²⁶ He also believed that utilitarian summing sloughed over cultural differences in what counted as well-being and, somewhat more creepily, whose well-being counted. Robbins observed that he had no scientific way of dissuading a Brahmin from believing himself capable of ten times as much happiness as an Untouchable.²⁷

One might believe one or both of these conceptions of human equality is insufficient, or perhaps even that a view of equality that implied sole adherence to Paretianism would commit its own *reductio ad absurdum*.²⁸ I think it would be a terrifically interesting project, though, to approach both branches of law-and-economics welfare analysis, as well as the simpler but more tractable proxy of wealth maximization, as parts of a tradition that has its own versions of the obligations imposed by (its own conceptions of) human equality, versions that are in contrast to Professor Alexander's, but also in potential conversation with it. The intertraditional conversation I am imagining would require stripping away a fair amount of theoretical elaboration and approaching law-and-economics welfare analysis by way of its social imaginary. It would, however, chime with some constructive developments in economic thought, including Professor Sen's emphasis on the importance of both rough-and-ready interpersonal utility com-

²⁵ See LIONEL ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE 1-21, 104-58 (2d rev. ed. 1952).

²⁶ See *id.* at 140 ("There is no way of comparing the satisfactions of different people.").

²⁷ See *id.*; see also Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635, 637 (1938) (noting that this idea could render the entire "science" of economics useless).

²⁸ See AMARTYA SEN, *The Possibility of Social Choice*, in RATIONALITY AND FREEDOM 65, 92-94 (2002) (explaining that the liberal paradox theorem "shows the impossibility of satisfying even a very minimal demand for liberty when combined with an insistence on Pareto efficiency (given unrestricted domain)").

parisons and libertarian procedural protections, and even of democracy, in any compelling picture of welfare.²⁹

Fourth, I am interested in knowing more about the relationship between social obligation and personal freedom in Professor Alexander's thinking. I find it very attractive that he puts a high value on the capacity for autonomy and enjoyment of meaningful opportunity³⁰ (both of which I think belong in a conception of freedom), and that he presents social obligation as entailing the promotion of these qualities in others' lives. I wonder whether Professor Alexander would go further and say not just that individuals can become more free when others act on a social obligation to promote their freedom, but that sometimes the very act of honoring social obligations makes us—all who adopt the obligation—more free. I think this is how many Americans understand antidiscrimination law, including its housing-law dimensions: its constraints make us freer not only inasmuch as we are its potential victims, nor just inasmuch as it assists the right-minded in performing nondiscriminatory acts that they would have wished anyway, but also by virtue of committing us to a social practice of equality and reciprocal respect, that is, making us a free society. Now, this is a positive conception of freedom in the strong, Isaiah Berlin–esque sense of identifying freedom with achievement of a certain kind of life, and much suspicion attaches to that kind of conception.³¹ The idea that a free society has value over and above its (real and hugely important) usefulness to many of that society's members in their extant aims is also an instance of what Professor Taylor calls irreducibly social goods, those that can be enjoyed only via membership in and identification with a collective.³² This idea, too, is controversial, implying as it does a departure (though it can be a modest one) from methodological individualism. Despite both points of controversy, and to repeat, this seems to me to be how many of today's Americans understand some of our basic legal obligations. I wonder whether Professor Alexander would be inclined to embrace this image of the relationship between obligation and freedom.

I am glad to have the chance to comment on such thought-provoking work by a scholar from whom I have learned a great deal. I

²⁹ *Id.* at 77–92.

³⁰ See Alexander, *supra* note 8, at 815 (“[A]utonomy interests will limit the social-obligation norm if no equivalently weighty countervailing interests are present.”).

³¹ See ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 131 (1969) (“I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true . . .”).

³² See CHARLES TAYLOR, *Irreducibly Social Goods*, in *PHILOSOPHICAL ARGUMENTS*, *supra* note 15, at 127.

look forward to watching this project develop and, I hope, to continuing conversation about it.