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Of Property Rights and Rights to Property

JAMES E. KRIER*

In 2004, President George W. Bush said, “I believe in private property so much, I want everyone in America to have some.”¹ Much earlier, in 1948, an economics professor from the University of Texas expressed the same sentiment in strikingly similar terms. When asked by an investigatory committee of the Texas legislature whether he favored private property, he replied, “I do . . . and so strongly that I want everyone in Texas to have some.”²

Even putting aside the possibility that the President’s speechwriters found inspiration in an unacknowledged source, there are several interesting things to note about these two statements. More than a half-century stands between them. One speaker, President Bush, was and is a Republican politician somewhat to the right. The economist, in contrast, was a well-known leftist. Yet despite the distance between the two men in years and ideological outlooks, both seemed to endorse the property system and the wide distribution of property rights. I am inclined to think that most Americans would express similar sentiments today, although the meanings they attach to their words might vary considerably when it comes down to particulars. And regarding particulars, I am confident that there is much less contentiousness about the operation of the property system for any given distribution of rights than there is about what the actual distribution of

* Earl Warren DeLano Professor, University of Michigan Law School. The remarks here have been prompted by a conversation with (as opposed to a speech to) students and faculty of Ohio Northern University, Pettit College of Law, as part of the Dean’s Lecture Series. I am grateful to Dean Rick Bales and the faculty and students of the law school for providing the opportunity to talk with them about property. Two themes ran through our conversation: first, the importance of property rights, and, second, concerns about the distributive implications of property rights. Those are the themes pursued here.

1. Remarks to the Republican Governors Association, 1 PUB. PAPERS 260 (Feb. 23, 2004). Bush repeated his views on private property in almost exactly the same words on seven subsequent occasions over the months of February through May 2004. *See* Remarks at a Bush-Cheney Luncheon in Louisville, 1 PUB. PAPERS 280 (Feb. 26, 2004); Remarks at a Bush-Cheney Reception in Los Angeles, 1 PUB. PAPERS 306 (Mar. 3, 2004); Remarks at a Bush-Cheney Luncheon in Santa Clara, California, 1 PUB. PAPERS 321 (Mar. 4, 2004); Remarks at a Bush-Cheney Luncheon in Dallas, Texas, 1 PUB. PAPERS 333 (Mar. 8, 2004); Remarks at a Bush-Cheney Reception in Houston, Texas, 1 PUB. PAPERS 338 (Mar. 8, 2004); Remarks at a Bush-Cheney Reception in East Meadow, New York, 1 PUB. PAPERS 369 (Mar. 11, 2004); Remarks at the American Conservative Union 40th Anniversary Gala, 1 PUB. PAPERS 872 (May 13, 2004).

2. DON CARLETON, RED SCARE: RIGHT-WING HYSTERIA, FIFTIES FANATICISM, AND THEIR LEGACY IN TEXAS 22 (1985) (footnote omitted).

rights should be. In other words, property rights are one thing, and rights to property quite another.

I. PROPERTY RIGHTS

According to William Blackstone in his *Commentaries on the Laws of England*, written on the eve of the American Revolution and extraordinarily influential in the early legal history of the United States, “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”³ Property doctrine has changed a lot since Blackstone’s time, of course, but his words about property rights are, as Stuart Banner notes, “just as true today.”⁴ What accounts for mankind’s high regard for property?

One view, supported by theory and evidence, suggests that in the course of natural evolution, respect for possession came to be hardwired into the human brain. Nonhuman animals, runs the account, had found a reproductive advantage by behaving in the following manner: They defended items and territories in their possession, but deferred to those in the possession of others.⁵ Humans appear to have learned, early in their history, that it was advantageous to behave in the same manner, and especially after the invention of agriculture about ten millennia ago.⁶ Interestingly, the *de facto* norm of deference to possession that developed among humans preceded the advent of governments and formal legal systems. To be sure, the norm amounted to less than a full-blown *de jure* system of property rights, but it nevertheless provided the core concept—recognition of a right in possessors to exclude others from their possessions. When governments and formal property systems did eventuate, virtually all of them adopted a right to exclude as a central feature of their property regimes.⁷

Today, the right to exclude is generally regarded as the *sine qua non* of property.⁸ Notice that the right to exclude logically implies two other

3. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

4. STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 2 (2011).

5. See generally JOHN MAYNARD SMITH, EVOLUTION AND THE THEORY OF GAMES (1982).

6. For a full discussion of the leading literature, see James E. Krier, *Evolutionary Theory and the Origin of Property*, 95 CORNELL L. REV. 139, 150-58 (2009). The rise of agriculture also provoked the development of constructive possession, such that deference extended not just to things one actually possessed, but also to things carrying indicia of belonging to some person even though the person is absent for the moment, such as tilled fields. See *id.* at 158.

7. Hence the notion that possession is the root to title or the origin of property. See, e.g., Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

8. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (“[T]he right to exclude others . . . is the *sine qua non*. Give someone the right to exclude . . . and

rights. Namely, a right to use and a right to transfer to third parties. After all, if there is a right (*de facto* or *de jure*) to exclude, that is equivalent to saying that owners are free to use what is theirs, and also free to convey what is theirs to others who thereby become the new owners with the same rights as the erstwhile ones. All of these rights are *in rem*—they empower owners as against the world at large, providing, in Blackstone’s famous words, “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁹

No wonder humankind would find property an attractive institution. From the viewpoint of individuals, property provides owners a large degree of autonomy, privacy, and freedom within their domains. From the viewpoint of society at large, it provides citizens with incentives to invest in resources, manage them in productive fashion, and transfer them to others as may suit their preferences.

So property rights seem to be a very good thing—for those who have some.

II. RIGHTS TO PROPERTY

A. *In General*

We saw above that voices from across the political spectrum claim that they approve of property so much that they want everyone to have some, but (as also noted earlier) it is not at all clear what these words might mean to any particular person who expresses such a sentiment.¹⁰ For example, someone like President Bush would probably approve of property *even if* not everyone has some, whereas the economist from the University of Texas might approve of property *only if* everyone has some. In any event, it is not saying much to endorse a property system so long as it provides “some” property for everyone without explaining how much property, and of what kinds. Jeremy Waldron has concluded, after the most careful scrutiny, “there is no right-based argument to be found which provides an adequate justification for a society in which some people have lots of property and

you give them property. Deny someone the exclusion right and they do not have property”). The right to exclude may be shared. Suppose, for example, a limited-access commons owned by 100 people as tenants in common. No common owner may exclude any other common owner, but may exclude anyone else. A limited-access commons, then, is common property as among the commoners, but private property as between the common owners and the rest of the world. (Bear in mind, then, that “private” property is not limited to sole proprietorship, meaning a single owner.) A universal commons is not a kind of property at all, because by definition everyone has a right of access and thus no one has a right to exclude.

9. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

10. See *supra* notes 1-2 and accompanying text.

many have next to none.”¹¹ In other words, even if we can find justification for a system of private property, this does not mean we can find justification for any old system, without regard to its particular content. President Bush was speaking of property for everyone in the context of advocating various initiatives on his administration’s agenda to support home ownership, small business ownership, private retirement accounts, and health care accounts. What the economist’s program (if any) might have been, I do not know, but I expect it would be along the lines of property for everyone sufficient to provide a decent life for each person, which seems not to have been on Bush’s agenda.

There is a contemporary philosophical literature endorsing a right to property of roughly the sort I have imagined the Texas economist favoring. Stephen Munzer, for instance, argues that property systems—even systems where some have more property than others—are justifiable only if “(1) everyone has a minimum amount of property and (2) the inequalities do not undermine a fully human life in society.”¹² Munzer refers to the first clause as the Floor Thesis and the latter as the Gap Thesis.¹³ Under the Floor Thesis, the minimum property holdings rightly required might vary with the society or culture in question, but must provide personal items, food, shelter, and funds for or access to education and health care in amounts sufficient to satisfy basic human needs and ensure the development of basic human capabilities.¹⁴ The Gap Thesis is harder to summarize in a few words, but its essence is as follows: Even if everyone has the required minimum property holdings, large gaps between the best off and the worst off are still unjustifiable if they “interfere[] with appropriate amounts of control, privacy, and individuality, with the development of property-related virtues, and with the opportunities for meaningful work.”¹⁵ Munzer mentions various examples of what he has in mind: Extreme and visible inequalities can lower self-esteem and create understandable resentment, be an affront to a sense of equal moral worth, and distort the operations of legal and political processes.¹⁶

B. Snapshots of Some Data

How does the United States measure up in terms of the foregoing? Begin with the Floor Thesis and consider the country’s poverty rate. Although there is contention about the way the federal government

11. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 5 (1988).

12. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 227 (1990).

13. *Id.* at 229.

14. *See id.* at 244-46.

15. *Id.* at 247-48.

16. *See id.* at 249.

calculates the poverty threshold, and thus the poverty rate, in essence the rate indicates the percentage of the population with insufficient income (not including capital gains or noncash benefits from government programs) to purchase the food, clothing, health care, and shelter needed to meet the minimum threshold standards. The official poverty rate in 2013 was 14.5%.¹⁷ Almost 44% of this group (about twenty million people) lived in families with incomes below one-half of their poverty threshold.¹⁸ The poverty rate for children under the age of eighteen was 19.9%, the good news being that this was a decline from 21.8% in 2012,¹⁹ the bad news being that the United States nevertheless ranks among the worst in developed countries.²⁰ One final statistic regarding poverty in the United States: The number of homeless people—people with no private place to call their own—in 2013 was estimated to be about nineteen out of every ten thousand people.²¹

Turn now to the Gap Thesis, which refers to the difference between people with a lot and people with very little. According to a recent report, inequality regarding both income (how much you make) and wealth (how much you have) has been on the increase in the United States.²² The top 10% of earners garnered half of overall income in 2012, the highest proportion since records have been kept.²³ As to wealth, in 2013, the top 10% held about 75%,²⁴ the top 3% about 54.4%,²⁵ and the top 1% about 36%.²⁶ Even those in the top 1% suffered inequality of a sort: “the wealthiest 0.1 percent, and especially the 0.01 percent, have left the rest of the 1 percent in the dust.”²⁷

17. U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 12 (2014).

18. *Id.* at 16.

19. *Id.* at 12.

20. See Christopher Ingraham, *Child poverty in the U.S. is among the worst in the developed world*, THE WASHINGTON POST (Oct. 29, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/29/child-poverty-in-the-u-s-is-among-the-worst-in-the-developed-world/>.

21. NATIONAL ALLIANCE TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA 2014, at 9, n.2 (2014). For discussion of homelessness and the extraordinary limitations it imposes on individual freedom, see Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 U.C.L.A. L. REV. 295 (1991).

22. See Annie Lowrey, *The Wealth Gap in America Is Growing, Too*, N.Y. TIMES (April 2, 2014, 10:15 AM), http://economix.blogs.nytimes.com/2014/04/02/the-wealth-gap-is-growing-too/?_r=0

23. *Id.*

24. See *Top 10 percent of US households control nearly 75 percent of all wealth*, MY BUDGET 360, <http://www.mybudget360.com/wealth-inequality-america-top-10-percent-of-us-households-control-75-percent-of-wealth/> (last visited May 28, 2015).

25. See *Wealth Inequality*, INEQUALITY.ORG, <http://inequality.org/wealth-inequality> (last visited May 28, 2015) (“The top 3 percent now hold over double the wealth of America’s poorest 90 percent of families”).

26. See Aimee Picchi, *The “1 percent” are richer than you thought*, CBS NEWS (July 15, 2014, 12:26 PM), <http://www.cbsnews.com/news/the-1-percent-are-richer-than-you-thought/>.

27. Lowrey, *supra* note 22. In this connection, consider a recent article, Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCIENCE 838 (2014), reporting that wealth and income

Recall that in speaking of his Gap Thesis, Munzer suggested that extreme and visible inequalities between the best off and the worst off are unjustifiable if they lower self-esteem and create understandable resentment.²⁸ In that connection, let me mention a few recent items from the news reporting on the rich versus the poor in New York City. The first item has to do with housing, which is very expensive in The Big Apple and in short supply for low-income residents. A report bearing the title “Don’t Let Rich People Own Apartments They Don’t Live In” asserts that “thousands of spacious New York apartments are bought and held by wealthy people who do not actually live in them. They are used instead as wildly expensive substitutes for hotels.”²⁹ At the same time, the City “has 54,000 people living in homeless shelters and a public housing system with a waiting list of a quarter-million people and \$18 billion in unfunded budget needs.”³⁰

New York City has an Inclusionary Housing Program that permits developers to build larger-than-usual residential projects if, as part of the project, they also provide low-income housing, on-site or off-site.³¹ One recently approved development has on-site affordable housing, but low-income residents must use a different entrance than the one provided for their rich neighbors, perhaps to spare the latter ““from the terrible awkwardness of regularly encountering people whose lifestyles differ from theirs, or something.””³² Yes, perhaps, but consider also the scheme from

distributions at the top of the distribution are fractal in nature, meaning that patterns seen in examining, say, the share of the top 10% as compared to the bottom 90% repeat themselves in an increasingly more fine grained pattern: the wealth of the top 1% increases faster than the wealth of the top 10%, the wealth of the top 0.1% faster than that of the top 1%, the wealth of the top 0.01% faster than that of the top 0.1%, and so on. See also Neil Irwin, *The \$179 Million Picasso That Explains Global Inequality*, N.Y. TIMES, May 13, 2015, http://www.nytimes.com/2015/05/14/upshot/the-179-million-picasso-that-explain-s-global-inequality.html?_r=0&abt=0002&abg=1 (drawing conclusions from Piketty and Saez’s article regarding wealth inequality).

28. See MUNZER, *supra* note 12, at 249.

29. Hamilton Nolan, *Don’t Let Rich People Own Apartments They Don’t Live In*, GAWKER.COM (Aug. 14, 2014, 1:00 PM), <http://gawker.com/don-t-let-rich-people-own-apartments-they-don-t-live-in-1621527767>. According to a *New York* magazine article (with the title “Stash Pad”) mentioned in the Gawker.com story, “[t]he Census Bureau estimates that 30 percent of all apartments in the quadrant from 49th to 70th Streets between Fifth and Park are vacant at least ten months a year.” Andrew Rice, *Stash Pad*, N.Y. MAGAZINE (Jun. 29, 2014), <http://nymag.com/news/features/foreigners-hiding-money-new-york-real-estate-2014-6/index1.html>.

30. Nolan, *supra* note 29.

31. See generally Zoning Tools: Inclusionary Housing, NYC Planning, NYC.GOV, http://www.nyc.gov/html/dcp/html/zone/zh_inclu_housing.shtml (last visited May 28, 2015).

32. Lucy Westcott, *New York City Approves ‘Poor Door’ for Luxury Apartment Building*, NEWSWEEK (July 21, 2014 5:49 PM), <http://www.newsweek.com/new-york-city-approves-poor-door-luxury-apartment-building-260218> (quoting Caroline Bankoff, *Fancy Upper West Side Building Will Have a Separate Door for Poor People*, N.Y. MAGAZINE (July 21, 2014 4:12 PM), <http://nymag.com/daily/intelligencer/2014/07/building-will-have-a-separate-door-for-poor.html>).

the viewpoint of the low-income residents, regularly and publicly identified as people of lower status.

A second item: Auction prices for fine art have soared unbelievably as of late. The *New York Times* reported that Christie's sold more than \$1 billion worth of art in three days in early May 2015, in "a spectacle of excess at the highest level," according to one observer.³³ The reporter saw the event as "a symptom of widening income inequality" and a reflection of the popularity of expensive art as a "status symbol,"³⁴ just as are separate entrances for the wealthy (indicating high status) and the poor (low status).

Across the world and over a long period of human history, the sorts of affronts worked by conspicuous consumption were the target of sumptuary laws, defined by *Black's Law Dictionary* as "[a] statute, ordinance, or regulation that limits the expenditures that people can make for personal gratification or ostentatious display."³⁵ Sumptuary laws are pretty much unknown today (although we can see distant relatives, such as luxury taxes on the purchase of fancy automobiles). However justified they might be thought to be, they are unlikely to be revived. People offended by the prevailing distribution of rights to property in the United States will have to look elsewhere for reform. A pertinent question is whether the law of property provides a means.

C. Property Law and Rights to Property

In considering this issue, it is important to bear in mind that property law viewed as a *system* has two components. The first has to do with the body of doctrine governing the rights of people who *are* owners; the second has to do with the distribution of the right *to be* owners. So, for example, under the early common law property system, married women had essentially no rights to own property, but this was eventually changed by Married Women's Property Acts, such that now women have the same ownership rights as men.³⁶ Modern property doctrine treats women just as it treats owners generally—in an evenhanded fashion. Yet notice that the early common law system likewise treated all owners in an evenhanded fashion, but happened to declare that married women could not be owners.

The Married Women's Property Acts, then, did not change the first component of the property system, but did change the second by working a

33. Scott Reyburn, *Christie's Has Art World's First \$1 Billion Week, Widening Divide With Sotheby's*, N.Y. TIMES, May 13, 2015, <http://www.nytimes.com/2015/05/14/arts/design/art-auction-sale-s-at-christies-top-1-billion-this-week.html> (internal quotations omitted).

34. *Id.*

35. BLACK'S LAW DICTIONARY 1574 (9th ed. 2009). For a general account on sumptuary law, see ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW (1996).

36. See generally JESSE DUKEMINIER ET AL., PROPERTY 384-85 (8th ed. 2014).

fundamental redistribution of the right to be an owner. There have been arguments advanced over the years to make other fundamental changes of a similar sort—for example, by way of a constitutional right to the minimal entitlements necessary to a decent life.³⁷ But no such constitutional right has been created by constitutional amendment or recognized by the Supreme Court. Legislation provides another means of reform, but nothing fundamental has been enacted and, especially at the federal level, is impossible to imagine given the divisive political climate.

An alternative approach is to argue for judicial reform of the common law property system. Arguments of this sort have been around for some years. Morris Cohen, a legal philosopher, acknowledged in an article written on the eve of the Great Depression that “the essence of private property is always the right to exclude others,”³⁸ but he maintained that this right “must be supported by restrictions or positive duties on the part of the owners, enforced by the state as much as the right to exclude others”³⁹ Some 50 years later, C.B. Macpherson argued in a similar vein that the right *not to be excluded* was as much the essence of property as the right to exclude.⁴⁰

Viewpoints like those of Cohen and Macpherson might seem to represent a radical reformation of Blackstone’s notion of property as “sole and despotic dominion,”⁴¹ but that is hardly the case. Blackstone’s statement was misleading even in his own day, as he well knew. In an earlier, less well-known passage of his *Commentaries*, he observed that the right of property in an owner “consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*,”⁴² which imposed any number of limitations on the rights to exclude, use, and transfer.⁴³ Thus, Cohen and Macpherson’s ideas were entirely consistent with the common law principles of private ownership.

This can be said as well of a current round of scholarship that echoes to some degree the views of Cohen and Macpherson. I refer to it as the

37. See, e.g., Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993) (discussing the arguments and obstacles the poor confront).

38. Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 12 (1927).

39. *Id.* at 21.

40. C.B. MACPHERSON, *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 201 (1978).

41. See 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

42. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *134 (emphasis added).

43. See, e.g., Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, in NOMOS XXII: PROPERTY 101, 119-24 (J. Roland Pennock & John W. Chapman eds., 1980) (discussing limitations on property rights during Blackstone’s time, such as those arising from the law of nuisance, exceptions to trespass, the right of the sovereign to expropriate, rules of inheritance, and so forth); see also David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEOR. INQ. L. 103 (2009).

Progressive Property movement, because some of its chief contributors refer to it that way in *A Statement of Progressive Property*.⁴⁴ Here are the highpoints of that statement:

- The common conception of property as protection of individual control over valued resources is both intuitively and legally powerful. Sometimes the expression of this idea focuses on the right to exclude others and sometimes on the free use of what one owns. . . . [These are] inadequate as the sole basis for resolving property conflicts or for designing property institutions.
- Property implicates plural and incommensurable values.
- Some of these values promote individual interests, wants, needs, desires, and preferences. Some promote social interests, such as environmental stewardship, civil responsibility, and aggregate wealth. Others govern human interaction to ensure that people relate to each other with respect and dignity.
- These values are not solely a matter of satisfying personal preferences. Values can generate moral demands and obligations.
- Values promoted by property include life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one's life on one's own terms. They also include wealth, happiness, and other aspects of individual and social well-being.

44. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) [hereinafter *A Statement of Progressive Property*]. This item appears in a special issue of the Cornell Law Review, entitled *Property and Obligation*. In my discussion, I focus mostly on one article in the issue, see Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). Other works of interest in the progressive property vein, in addition to the articles within the special issue of the Cornell Law Review, include: GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003).

- Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.⁴⁵

Notice that the Progressive Property statement adopts a vision of a just system of property similar to that set out by Professor Munzer.⁴⁶ Also in accordance with Munzer, the Progressive Property scholarship devotes most of its pages to philosophical arguments in support of a property system that, as noted in the last paragraph of the *Statement of Progressive Property* quoted just above, aims to “promote the ability of each person to obtain the material resources necessary for full social and political participation.”⁴⁷ However, the scholarship gives little concrete attention to the problem or problems that such a system is suppose to help solve. For example, no data, such as that sketched in Section B above, is set out in the scholarship. Instead, there is simply an assumption that matters are not right. Let us forgive this neglect of empiricism on the ground that reasonably fine-grained attention to the facts is unnecessary because any intelligent citizen should know that there is a poverty problem in the United States. The questions are why, and what to do about it.

Judging at least from the Progressive Property literature of interest to me here, an important *why* is a certain prevailing academic mindset about property, and an important *what to do* is doctrinal change of a particular sort. Regarding mindset, the culprit is law-and-economics, which, as Gregory Alexander rightly notes, “has dominated property scholarship” in recent years.⁴⁸ He concedes that law-and-economics theory provides important insights, but finds it deeply flawed by “the poverty of its analysis of moral values and moral issues [and its] exclusive concern with aggregate social welfare”⁴⁹ Its practitioners, in his view, focus too much on the rights of property owners and too little on their obligations—too much, in particular, on the right of owners to exclude, as opposed to the obligation of owners to others, both owners and non-owners.⁵⁰ A better approach, in Alexander’s view, is to focus on what he calls a “social-obligation norm in American property law,”⁵¹ a norm that would recognize not just the right of

45. *A Statement of Progressive Property*, *supra* note 44, at 743-44.

46. *See supra* note 12 and accompanying text.

47. *A Statement of Progressive Property*, *supra* note 44, at 744.

48. Alexander, *supra* note 44, at 750.

49. *Id.* (footnotes omitted).

50. *See id.* at 747-48.

51. *Id.* at 748.

owners to exclude but also, as Macpherson put it earlier, “the right [in others] not to be excluded.”⁵²

Professor Alexander’s account is both normative and positive; it argues that the norm he has in mind should be the law, and that, to some degree, it is the law, although it appears “only sporadically and implicitly.”⁵³ Regarding the latter, his chief doctrinal examples include extended discussion of entitlement sacrifices worked by eminent domain and nuisance law, and use sacrifices worked by historic preservation regulations, environmental regulations, and rules placing limitations on the right to exclude (regarding public access to beaches, for example).⁵⁴

All of these examples could in my view be explained in terms of, say, the law-and-economics viewpoint, but I accept the social-obligation norm as an interesting competing viewpoint. And to his credit, Alexander acknowledges that the viewpoint reflects considerable respect for protection of property rights in most cases.⁵⁵ However, Alexander insists that “American property law is not solely about either individual freedom or cost-minimization. It is also about human flourishing and supporting the communities that enable us to live well-lived lives.”⁵⁶

And so perhaps it is, but not yet in a way that grants rights *to* property of the sort I have been discussing. If indeed the social-obligation norm is reflected in property law, it is mostly by way of limiting the rights of property owners. The limitations, moreover, do little if anything to feed the hungry, shelter the homeless, clothe the cold, treat the ill, or educate the masses. It is, to be sure, good that those in need have access to historic sites, to beaches and other recreational facilities, to public parks and streets, to a healthy natural environment, and so forth, but to observe that they thereby promote human flourishing is something of a joke, I reckon, to those dwelling below the poverty line—akin to telling people with inadequate means to nutritious meals that they are free to eat cake.

When Macpherson wrote of an individual right not to be excluded by others, he had in mind a “right to equal access to the means of labour and/or the means of life.”⁵⁷ I believe the Progressive Property scholars have essentially the same objective in mind, but limitations on the rights of property owners do not accomplish it. Access to land owned by others is not the same as owning land oneself, especially in terms of autonomy. This is the difference between rights of property owners and a right to be

52. MACPHERSON, *supra* note 40, at 201.

53. Alexander, *supra* note 44, at 748.

54. *See id.* at 773-810.

55. *Id.* at 815.

56. *Id.* at 818.

57. MACPHERSON, *supra* note 40, at 201.

property owners, and expanding the right to be property owners is something that the common law courts in their common law mode are extraordinarily unable to accomplish. Revolution aside, such a fundamental redistribution of wealth will be achieved by the political system if it is achieved at all, and the prognosis is not promising. In an essay published some years ago, Jean Baechler ventured the view that “the politics of redistribution, taken by itself, has every chance of falling to its lowest common denominator, namely, public relief of misery.”⁵⁸ One could argue that this is what we see today, with not much likelihood of change. A recent item in the *New York Times* points out that since the 1970s, wealth and income inequality has been on the rise, making it reasonable to suppose that public opinion favoring redistribution has been on the rise as well, but it has not: “Americans’ desire to soak the rich has diminished even as the rich have more wealth available that could, theoretically, be soaked.”⁵⁹ So long as attitudes like this persist, there will be no fundamental right of everyone to own property. Property law cannot rise above the culture in which it is embedded.

58. Jean Baechler, *Liberty, Property, and Equality*, in NOMOS XXII: PROPERTY, *supra* note 43, at 285.

59. Neil Irwin, *Why Americans Don't Want to Soak the Rich*, N.Y. Times (Apr. 17, 2015), <http://www.nytimes.com/2015/04/19/upshot/why-americans-dont-want-to-soak-the-rich.html?abt=0002&abg=1>.