VIRTUE AND RIGHTS IN AMERICAN PROPERTY LAW

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

This conversational thread presents a tension that is simply unsolvable in practical politics in any permanent way. Politics focuses to an important extent on low and uncontroversial ends, most of which are associated with comfortable self-preservation. “Property” is the most powerful legal metaphor for these ends. But if politics is only about property, it seems materialistic, lacking a proper respect for the peaks of human excellence. “Justice” may be understood to strive for such peaks; “virtues” by definition aim for them. Yet a politics of virtue can easily devour property. In its common-sensical understanding, after all, property consists of dominion -- a domain of freedom to decide how to apply the object of ownership to his own life plans, independent of direction from philosopher-kings or anyone else. When property is an owner’s right to use his own as a philosopher thinks most likely to bring out his excellence, it is not property anymore.

The contrast between the city of pigs and the city of justice forces readers to choose between comfortable self-preservation and virtue. At a more primal level, everyone -- that is, anyone who is not a philosopher-king -- is also forced to choose between his attachment to

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

\(^2\) See REPUBLIC, supra note 1, 428e2-429a4; Bloom trans., REPUBLIC, supra note 1, at 107.

\(^3\) See REPUBLIC, supra note 1, at 464b8-465e2; Bloom trans., REPUBLIC, supra note 1, at 143-45.
perfect justice and his selfish desire to enjoy his own without being governed by anyone else. Most theories of politics muddle between these two extremes.

This conversational thread leapt to my mind when I read the lead Articles in this Issue. The implications raised by this thread present some of the most fundamental issues in political philosophy. They are also some of the most explosive political questions about modernity. Legal scholarship operates far more often down among the trees than over such vast forests, and I am grateful to Professors Gregory Alexander and Eduardo Peña\textsc{\textit{l}}ver for elevating the discussion. \textit{The Social-Obligation Norm in American Property Law} ("The Social-Obligation Norm," for short, by Alexander\textsuperscript{4}) and \textit{Land Virtues} (by Peña\textsc{\textit{l}}ver)\textsuperscript{5} also deserve a considerable amount of praise. Both introduce to property scholarship a general approach to practical philosophy I find quite sensible, even if Alexander and Peña\textsc{\textit{l}}ver apply that school differently from the manner in which I do. Both use that approach to push back against economic analysis of property, for reasons with which I may not endorse but do appreciate. Yet in pushing back against economic property analysis, I worry, \textit{The Social-Obligation Norm} and \textit{Land Virtues} may encourage lawyers and scholars to leap out of an economic frying pan into a political-philosophy fire.

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

Instead, I focus on the prior question whether the philosophical theories discussed in \textit{The Social-Obligation Norm} and \textit{Land Virtues} make significant contributions. They do. Both articles mine theories of virtue ethics for their proverbial pay-dirt in American property law. The genus of “virtue ethics” ethical theories belong to a broad family of approaches to practical philosophy I will call here “eudaimonistic.”\textsuperscript{6} As used here, “eudaimonistic” refer to a broad range of theories of practical philosophy that, from different metaethics, all place high priority on virtue and human happiness understood as the disposition in which human reason regulates


human passions. Eudaimonistic practical philosophy has not received the attention it deserves in legal scholarship, and especially not in property scholarship. Eudaimonistic philosophical theories informed Anglo-American and Continental law in their formative years. Equally important, such theories also anticipate and finesse important criticisms associated particularly with contemporary deontological philosophy. By illustrating how eudaimonistic theories of practical philosophy avoid these deontology criticisms, *The Social-Obligation Norm* and *Land Virtues* significantly advance the credibility of practical philosophy in law.

Finally, *The Social-Obligation Norm* and *Land Virtues* are even more original because they put front and center a question that follows straightforwardly from the thread of *The Republic* with which I began: Does a theory of virtue require a system of political rights and private law organized around virtue, or can a theory of virtue be reconciled with a politics and private law of rights? This question has not the attention it deserves--not in American private-law scholarship, and not in virtue ethics scholarship. Although *The Social-Obligation Norm* and *Land Virtues* take no final position on the tension between virtue and rights, both seem fairly optimistic that theories of virtue can justify legal regimes organized around the pursuit of virtue. I think the legal system does have, and may tolerate, a little virtue-centric regulation. Yet there are also important reasons to be pessimistic that a legal system can promote virtue actively. As a matter of history and political philosophy, the early Enlightenment can be understood as a decisive rejection of the claim that the political order can promote high virtues directly.

“Property” is a dominant theme in American law and politics because it serves as a metaphor for liberalism -- a political regime organized around rights, specifically to keep off-limits from the government the power to compel citizens to follow any one particular and controversial theory of virtue. Especially in the theological, political, and historical conditions in which modern Western societies exist, it would be inhumane to organize the law primarily around virtue.

Many of the specific prescriptions of *The Social-Obligation Norm* and *Land Virtues* do not reopen the problems that led to the Enlightenment. But a few do. In addition, virtue theory could be co-opted in other areas -- especially the property law of developing countries -- where virtue theory could be destructive. In any case, if *The Social-Obligation Norm* and *Land Virtues* interest readers in the possibilities of virtue ethics (as they should), those readers should pause to consider the factors that limit how directly virtue ethics should apply to property law.
I. Eudaimonism and the Deontology Trap

A. Law, Philosophy, and Social Science

Because the issues I am raising seem pretty far afield from *The Social-Obligation Norm* and *Land Virtues*’ main intentions, let me start where Alexander and Peñalver do and work outward. In property as elsewhere in private law, scholarship is influenced by a rivalry between social-science and humanistic approaches to scholarship. In most pointed form, as Alexander and Peñalver both recognize, this rivalry takes the form of a contest between economics and philosophy. I assume it is not controversial to say that most scholars regard economics as having contributed more to our understanding of property than philosophy. It is fairly common to see scholars claiming that economic analysis now “reign[s] unchallenged as the predominant theoretical mode of analysis in private law scholarship and pedagogy.” It is not so common for scholars to make the same claim about any sort of philosophy.

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

*The Social-Obligation Norm* and *Land Virtues* both try to straddle these competing expectations. The former focuses more on philosophical interpretation of the law, the latter more on philosophy’s pay-off toward economics, but both Articles address all three expectations. In

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7 See Alexander, *supra* note 4, at *7-9-10*.
8 See Peñalver, *supra* note 5, at *36-130*.
12 See Peñalver, *supra* note 5, at *40-137*.
this Response, I abstract as much as I can from Alexander and Peñalver’s comparative claims about economic analysis. I have some general sympathy for their intentions, but I prefer in this Response to focus as much as I can on the philosophical issues. Before philosophical theory can start throwing stones, it had better first get its own house in order.

B. Deontology Versus Consequentialism

The philosophical aspects of Alexander and Peñalver’s Articles deserve careful study and emulation. Both anticipate a complaint about deontology that leads many non-philosophical scholars to brush aside casually philosophical legal scholarship.

Until fairly recently, most normative scholarship on practical philosophy could be sorted out into two competing camps—“deontology” and “consequentialism.” “Deontological” practical theories focus primarily on a practical actor’s obligation or duty. If deontology were to be reduced to a couple of slogans, one would be, “[W]hat makes a choice right is its conformity with a moral norm,” and the other would be “[S]ome choices cannot be justified by their effects — no matter how morally good their consequences, some choices are morally forbidden.” More technically, a theory is deontological if it judges the morality of a choice only by whether it

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14 This response uses the term “practical philosophy” as a term describing philosophical inquiry studying human action and its proper ends and constraints. (For another example of this usage, see Stephen Buckle, Aristotle’s Republic or, Why Aristotle’s Ethics Is Not Virtue Ethics, 77 PHIL. 565, 575 (2002).) As used here, “practical philosophy” encompasses “ethical philosophy,” the inquiry into individual human action, and “political philosophy,” the inquiry into human action by groups organized into cities, nations, and other political communities. The term excludes conceptual philosophy and philosophical investigation into non-human phenomena. Most other forms of philosophy are devoted solely to understanding phenomena; practical philosophy makes more primary the question of how humans ought to live and act. See ARISTOTLE, NICOMACHEAN ETHICS II.2, at 1103b26-32 (Oxford University Press, 1894) [hereinafter “NICOMACHEAN ETHICS”]; ARISTOTLE, NICOMACHEAN ETHICS 23 (Joe Sachs trans. 2002) [hereinafter “Sachs trans.”].

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

conforms to a moral norm, and not by whether the choice leads to good consequences. The Right, so to speak, takes priority over the Good.16

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

Like many classifications, the deontology-consequentialism divide is subject to many qualifications and misunderstandings.19 For example, some philosophers use “consequentialism” to refer to any school of practical thought that prioritizes the Good over the Right. (This Response employs that usage.) Others, however, assume “consequentialism” refers specifically to its “paradigm case,” act utilitarianism as set forth by Jeremy Bentham, John Stuart Mill, Henry Sidgwick, and others.20 In addition, theories of practical philosophy may be “consequentialist” in some respects but not others. All virtue theories and virtue-friendly theories are consequentialist in the sense that they elevate the Good over the Right, but many are not consequentialist in the sense that they oblige actors to maximize the Good as they conceive of it. Even so, legal scholars continue to use “deontology” and “consequentialism” coarsely as opposites, and the deontology/consequentialism divide is regarded as foundational. For example, in Fairness versus Welfare, Louis Kaplow and Steven Shavell posit a spectrum of possible justifications for government actions running from the pure consequentialism of welfare economics to a “pure principle of fairness” grounded in deontological Kantian ethics.21

17 Alexander & Moore, supra note 15, § 1.
18 Id.
19 See, e.g., ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 37-38 (1999) (identifying “inadequacy in the slogan ‘Utilitarianism begins with the Good, deontology with the Right’”); Trianosky, supra note 16, at 335 (listing nine tenets of “neo-Kantianism,” warning that these tenets are “not necessarily Kant’s own view,” and warning that they are not always “uniformly understood or carefully distinguished by [their] adversaries”).
20 See Walter Sinnott-Armstrong, Consequentialism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3 (Edward N. Zalta ed., Fall 2008) (http://plato.stanford.edu/entries/consequentialism) § 1 (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JOHN STUART MILL, UTILITARIANISM (1861); HENRY SIDGWICK, THE METHODS OF ETHICS (1874)); accord Justin Oakley, Varieties of Virtue Ethics, 9 RATIO 128, 143 (2 September, 1996).
Separately (and again making all necessary qualifications for broad generalizations), legal scholarship has tended to map the economics-versus-philosophy divide in law onto the consequentialism-versus-deontology divide in practical philosophy. For example, prominent political philosophy built on deontological rights claims—especially John Rawls’ *A Theory of Justice* on one hand and Robert Nozick’s *Anarchy, State, and Utopia* on the other. Leading philosophical tort scholarship appeals to Kantian claims of right and fairness. Legal scholars therefore conclude, at least as a convenient first approximation, that philosophical claims of rights or fairness must be grounded in deontology (usually some variation on Kantian deontology) if they are going to remain philosophical at all. The debate around *Fairness versus Welfare* again illustrates. Kaplow and Shavell acknowledge that many legal policy analysts “hold mixed normative views,” in which deontological norms impose side constraints on consequentialist policy analysis or vice versa. After making this qualification, however, Kaplow and Shavell assume that “notions of fairness [are] principles used in normative analysis such that at least some weight is given to factors that are independent of individuals’ well-being.” In other words, philosophy’s job is to limit welfare maximization with deontological side constraints that have no direct connection to “individual well-being.” Jules Coleman has criticized *Fairness versus Welfare*, but in doing so he has accepted the basic divisions Kaplow and Shavell posit between deontology and consequentialism. When Coleman classifies the various likely reader groups in the book’s audience, he distinguishes among “the fellow travelers along the law-and-economics highway” (the consequentialists), “the uncommitted law professor,” and “the deontologists—philosophers and legal theorists committed to the idea that some or other deontic considerations must play an independent role in assessing legal practice as well as calls for its reform.”

C. The Deontology Trap

Deontology practical theory has also come in for considerable criticism. Deontology, its critics argue, tends to make practical prescriptions about moral choices while abstracting away...
from the seediness and disorderliness that human passions inject into human behavior. Because
deontological theories elevate the Right over the Good, they make secondary the study of human
anthropology and psychology that make human behavior determinate and intelligible.
Specialists in virtue ethics often give pride of place to G.E.M. Anscombe, and particularly to a
1958 essay Anscombe wrote to fall attention to several dead ends in which she believed
contemporaneous ethical scholarship to be then stuck. Anscombe dismissed Kantian ethics
based on “universalizable maxims [as] useless without stipulations as to what shall count as a
relevant description of an action with a view to constructing a maxim about it.” In a similar
survey of post-1800 ethics, Alasdair MacIntyre criticized Kant for making “the autonomy of
ethics . . . logically independent of any assertions about human nature”; by contrast, he praised
Hume and Aristotle for seeking “to preserve morality as something psychologically
intelligible.” Modern political theorists have lodged similar criticisms against Rawls and
Nozick, alleging that they draw on “bad sociology” or a “naïve psychology.”

Of course, deontologists have responses to such criticisms. A well-developed account of
human action, the deontologist might concede, must account for passions, desires, and other
sources of human motivation. The concept of obligation, she would continue, takes priority in
the sense that it focuses human desires and other motivating forces, so that they cease to work
against moral ideals and instead supply actors with defensible rational motives for action. In
addition, the deontologist might continue, consequentialists take on and attack straw-men when
they suggest that the practical theories of Kant and other deontologists leave no room for
virtue. Nevertheless, it is reasonable for other philosophers not to be convinced by these
responses. For example, after noting such responses, Martha Nussbaum still concludes: “[I]f
emotions are just subrational stirrings or pushes that have nothing to do with thought or

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29 See, e.g., Oakley, supra note 20, at 128.
30 See Anscombe, supra note 14.
31 Id. at 2.
(1978).
35 See BARBARA HERMAN, MAKING ROOM FOR CHARACTER, in MORAL LITERACY 1-29 (2007). For other defenses of
deontological ethics, see ROBERT B. LOUDEN, KANT’S IMPURE ETHICS: FROM RATIONAL BEINGS TO HUMAN BEINGS
(2002); BARBARA HERMAN, THE PRACTICE OF MORA L JUDGMENT (1993); ROBERT B. LOUDEN, MORALITY AND
MORAL THEORY: A REAPPRAISAL AND REAFFIRMATION (1992); Jerome B. Schneewind, THE MISFORTUNES OF VIRTUE,
36 See Buckle, supra note 14, at 566-67 (conceding that Kant treats the virtues); Martha C. Nussbaum, VIRTUE ETHICS:
A MISLEADING CATEGORY?, 3 J. ETH. 163, 165 (1999) (same); id. at 170 (same for Rawls).
intentionality, there is not much that is interesting to be said about their relationship to ethics. They can be fed or starved, but they cannot be cultivated as parts of a character that has a unitary focus.” Without a “non-consequentialist model of rationality,” critics conclude, “deontology will always be paradoxical.”

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

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

These two criticisms, especially the latter, create what I am calling here the “deontology trap.” To apply the trap, conventional consequentialists make two competing and difficult demands on deontologists. If deontological rights may never justly be sacrificed, then they create absurd or extreme results in some cases. Once deontologists concede that deontological rights may be sacrificed, however, the trap springs: Deontological norms are not really deontological at all. They are rather broad presumptions, justified by “rule”-consequentialist reasoning, but ultimately subject to exceptions when the consequentialist calculus requires exceptions in particular cases. At that point, deontologists have compromised on the only important question of principle, and everything else is a matter of degree. Instrumentalist consequentialist specialists have more special expertise than deontologists (or so the specialists

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37 Alexander & Moore, supra note 15, § 4. See also James Griffin, Virtue Ethics and Environments, 18 SOC. PHIL. & POL’Y 56, 60 (1998) (suggesting that “[t]he uncodifiability of ethics creates problems for many deontologists”); James Trianosky, supra note 16, at 339 (complaining that “the Kantian tradition does take morality to be autonomous in the extreme”).
40 Id.
conveniently claim) to say whether and in what circumstance rule-based rights claims should be qualified. In James Gordley’s description, “either rights must be sacrosanct or they must depend on utilitarian considerations and so be defeasible when those considerations so dictate.”41 The basic thrust of this two-step trap is to say that any normative theory that mixes rights and consequences “cannot form an intellectually coherent whole,” because it “must ‘disaggregate [sic] into a mixture of utilitarian and rights-based justifications.’”42

This trap has also seeped into legal scholarship. Kaplow and Shavell set the deontology trap in their title -- *Fairness versus Welfare*. They then spring it by positing a situation in which a deontological norm has disastrous consequences -- say, it “reduce[s] the well-being of every individual.”43 If the deontologist qualifies the norm to conserve social welfare, he concedes that a consequentialist theory of social welfare takes priority over deontology.44 If, however, the deontologist refuses to qualify a deontological norm to promote the welfare of every individual, “fairness-based analysis stands in opposition to human welfare at the most basic level.”45 Kaplow and Shavell give attribution, appropriately enough, to “consequentialist philosophers (often, it turns out, utilitarians) who criticize nonconsequentialists (deontologists).”46

This criticism is also typical in property scholarship, where Alexander and Peñalver are confronting it. Consider the doctrine of adverse possession. When Margaret Jane Radin criticized deontological tendencies in Richard Epstein’s early work, she challenged Epstein to reconcile adverse possession with deontological property rights.47 Assume that a title owner’s possessory interest in the exclusive control and enjoyment of her land is justified by a deontological right.48 If the title owner neglects her land for long enough, however, at some point the squatter’s claim on the land and society’s claim on the active cultivation of the land must take priority. Because adverse possession is an institution “which it appears the

42 *Id.* at 11-12 (quoting SMITH, supra note 11, at 52 n.16).
43 KAPLOW & SHAVELL, supra note 9, at 52.
44 See *id.* at 62-81 (recasting fairness-based norms as utilitarian social norms).
45 *Id.* at 58. For a lengthier critique of Kaplow and Shavell’s argument, suggesting that the argument is analytically tautological, see Coleman, *supra* note 9, at 1525-30.
46 *Id.* at 52 n.72 (citing J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 5 (1973)).
48 Adverse possession illustrates the deontology trap even if the deontological right claim runs the other way. Assume the squatter’s claim to ownership is grounded in a deontological labor-desert right to control and enjoy land he is actually using. That deontological right might then come under pressure from consequentialist considerations about the utility of clear land titles. As in the text, as soon as the consequentialist considerations outweigh the deontological right, philosophical justification of adverse possession seems weak or incoherent.
functioning legal system . . . cannot do without,” Radin concludes, “‘absolute’ entitlements” are absurd.49 Once that concession is made, Radin suggests, it would be hard to justify consequentially a broad conception of title ownership and a narrow conception of adverse possession. After all, “it is hard to construct a utilitarian argument concluding that an entitlement gained through first possession is fixed for all time. Utilitarianism is too empirical for such absolutes.”50

Of course, by themselves, consequentialism and deontology do not always or necessarily require different prescriptions to particular problems. Scholars who prefer ad hoc, case-specific, instrumental analysis of problems are going to incline to consequentialism, and those who prefer broad, formal, unqualified rules are going to incline to deontology. Yet these correlations are not perfect. For example, Richard Epstein (after his consequentialist turn) thinks that deontology, properly understood and applied, generates prescriptions practically equivalent with consequentialism properly understood and applied.51 Even so, in both practical philosophy and law, philosophical theories that do not follow act utilitarianism have suffered because of the standard criticisms of deontology just recounted.

D. Virtue Theory and Eudaimonist Practical Philosophy

If one takes a longer view, however, these perceptions of practical philosophy are surprisingly narrow and contingent. As Julia Annas explains, “In the tradition of Western philosophy since the fifth century B.C., the default form of ethical theory has been some version of what is nowadays called virtue ethics; real theoretical alternatives emerge only with Kant and with consequentialism.” 52 Many theories in the tradition to which Julia Annas refers53 have

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50 Id.
53 Or, more specifically, the tradition of political philosophy corresponding to the tradition of ethical philosophy to which Annas refers. See infra part II.
specifically influenced Anglo-American property law.\textsuperscript{54} It is confusing and anachronistic to project the deontology-consequentialism divide onto this tradition.

I am going here to try to define “virtue ethics” and “virtue theory” in a few ways that may help clear up the anachronisms and explain why a good deal of pre-1800 practical theory deserves more credit than it gets from conventional legal scholarly assumptions.\textsuperscript{55} One way to situate virtue theory is as a collection of practical theories that all happen to stress character more than now-dominant understandings of deontology and utilitarianism. Rosalind Hursthouse introduces virtue ethics in this manner: “in contrast to an approach which emphasizes duties or rules (deontology) or one which emphasizes the consequences of actions,” virtue ethics “emphasizes the virtues, or moral character.”\textsuperscript{56} Virtue and character refer to “acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing.”\textsuperscript{57} In core versions of virtue theory, the virtues are coterminous with human flourishing. In other versions, the virtues are usually not understood as ends in themselves but rather as means to securing human “flourishing,” the term that Peñalver and Alexander\textsuperscript{58} implicitly equate with the Aristotelian term of art eudaimoneia.\textsuperscript{59} Eudaimoneia literally means “well-being,” or “divine good fortune,” but it may also be translated as “happiness,” as long as “happiness” is understood as “true” happiness, “objective” happiness, or “happiness worth having,”\textsuperscript{60} and not “whatever happens to make an actor happy at a particular moment, without regard for how other reasonable actors would rate that form of happiness.”

As Hursthouse herself recognizes, however, this presentation of virtue ethics proceeds only at the level of “loose slogans.”\textsuperscript{63} Let me try to define virtue ethics more precisely, in relation to a few prominent taxonomies of practical philosophy. Now, virtue theorists do not agree unanimously among themselves about what virtue theory is and where it fits in relation to other practical theories. For example, virtue ethics and theory could be understood as an

\textsuperscript{54} See, e.g., GORDLEY, supra note 43, at 149-54 (recounting influence of Aquinas and Scholastic conceptions of use on subsequent property law); STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY (1991) (tracing the development of property rights in early Enlightenment natural-law and -rights theories).

\textsuperscript{55} See generally Larry Solum, Natural Justice, 51 AM. J. JURIS. 65, 71 (2006); Oakley, supra note 28, at 132-34.

\textsuperscript{56} HURSTHOUSE, supra note 19, at 1.

\textsuperscript{57} See Peñalver, supra note 5, at *151-54.*

\textsuperscript{58} See Alexander, supra note 4, at *8*.

\textsuperscript{59} See NICOMACHEAN ETHICS, supra note 14, at I.4, at 1095a16; Sachs trans., supra note 14, at 3.

\textsuperscript{60} HURSTHOUSE, supra note 19, at 9-10.

\textsuperscript{63} HURSTHOUSE, supra note 19, at 4. I am grateful to Nelson Lund for encouraging me to make this and the following clarifications.
“alternative” to standard deontological and consequentialist approaches, but they could also be understood more modestly, as “a way of augmenting one of the two main ethical theories of actions and rules.”\(^{61}\) Separately, while most virtue theories are “neo-Aristotelian” to some degree,\(^{62}\) particular theories can vary widely in how “Aristotelian” or “neo-” they are.\(^{63}\) Classification is even more difficult because different scholars use many of the relevant taxonomy terms in different senses.

With these disclaimers, let me make a few attempts to situate some of the most prominent alternatives. Virtue theory, as used here, refers specifically to theories of human practical action that start with “virtue” in their metaethics, as consequentialist metaethical approaches start with the Good, or deontological theories do with the Right.\(^{64}\) This Response, however, focuses on a wider range of theories of practical action, which treat the virtues operationally as primary, even if they are not metaethically foundational. Some consequentialist (in the broad sense) theories take this approach, stressing that the virtues are in practice necessary components for achieving pleasure or other proxies for good consequences.\(^{65}\) Traditional natural-law theories and Aristotle’s practical philosophy also stress the virtues without making them central. The virtues are not pursued for their own sakes but rather as means by which humans fulfill their natural purpose or attain eudaimoneia, respectively.\(^{66}\)

I will refer to this collection of virtue-friendly theories as “eudaimonistic.” As used here, “eudaimonistic” means that, in its application to practice, the theory in question places high priority on virtue. Eudaimonistic theories rate virtues highly especially as a means to an actor’s attaining a state in which his reason is as free as is practically possible to regulate his passions in the pursuit of ends chosen by his reason and not by passions, passion-bred vices, or an absence of reflection caused by habituation. Of course, by doing so, I risk inviting further confusion,

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\(^{61}\) Buckle, supra note 14, at 565. See also Nussbaum, supra note 36, at 165, 168 (assuming that deontologists and consequentialists may both draw on virtue ethics); Crisp & Slote, supra note 16, at 2-3 (arguing that virtue ethicists “carve out [their] own niche [by making] essential reference to the rationality of virtue itself”); Robert B. Louden, On Some Vices of Virtue Ethics, in VIRTUE ETHICS, supra note 16, at 201, 204, 216 (contrasting between a “mononomic” understanding of virtue ethics and one which “coordinate[s] irreducible or strong notions of virtue” along with strong conceptions of act-focused ethical theories).

\(^{62}\) See, e.g., PHILIPPA FOOT, Virtues and Vices, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 1, 1-2 (2d ed. 2002) (arguing that Aristotle and St. Thomas Aquinas are foundational).

\(^{63}\) See PETER PHILLIPS SIMPSON, VICES VIRTUES, AND CONSEQUENCES: ESSAYS IN MORAL AND POLITICAL PHILOSOPHY 93 (1999).

\(^{64}\) See OXFORD DICTIONARY OF PHILOSOPHY, supra note 6, at 304.


\(^{66}\) See OXFORD DICTIONARY OF PHILOSOPHY, supra note 6, at 394.
especially between pure virtue-centric theories and theories with Aristotle’s specific eudaimonist metaethics.\footnote{See, e.g., Robert T. Miller, Book Review, \textit{Faith \& Phil.} (forthcoming 2009) (reviewing Michael J. Perry, \textit{Toward A Theory of Human Rights} (2007)) (referring to eudaimonism as one species of metaethics on a par with deontology, natural law theory, divine command theory, and consequentialism).} Even so, in this context, the operational similarities matter more than the metaethical differences. In addition, Aristotle does deserve pride of place in this tradition.\footnote{See Sinnott-Armstrong, supra note 20, § 3 (using the term “eudaemonistic consequentialism” out of “deference to its Aristotelian roots”).} I hope the term “eudaimonistic,” construed ecumenically and differently from “eudaimonist,” accurately portrays the class of theories involved.

The next question is then how eudaimonistic schools of practical philosophy relate to the divide between deontology and consequentialism explained thus far. To begin with, eudaimonistic theories are not deontological.\footnote{See Oakley, supra note 20, at 138-39.} By definition, all eudaimonistic theories (however loosely “eudaimonistic” is used) to some extent articulate the objects of human action in terms of happiness, happiness at least in part in terms of what is pleasing to the actor, and pleasure in terms of things that are some combination of objectively good and assumed by the actor to be good.\footnote{Nicomachean Ethics, supra note 14, at [1099a13-17, 1099b25-28]; Sachs trans., supra note 14, at 14, 15. Accord Philippa Foot, \textit{Natural Goodness} 9-24 (2001) (defining morality in terms of practical rationality, and particularly the practical actor’s desire to enlarge her own good); Peñalver, supra note 5, at *151-159* (Virtues “are bound up with a person’s reasons for taking a particular action as well as her emotional state as she does so.”).} For example, Alasdair MacIntyre posits that there exist “internal and external goods,” and he defines virtue as “an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.”\footnote{Alasdair MacIntyre, \textit{After Virtue} 190-91 (2d ed. 1984) (emphasis removed); see also id. at 184 (defining an “internal” means to a human end as one in which “the end cannot be adequately characterized independently of a characterization of the means”).} So practical action is judged in part relative to external goods -- life itself, wealth, fame, or power -- which “genuinely are human goods.”\footnote{Id. at 196.} People can pursue and acquire these external goods without becoming virtuous. In fact, the excessive pursuit of some of them can make vicious. Wealth is a useful external good, but the excessive pursuit and enjoyment of it can undermine an actor’s industry, thrift, and moderate enjoyment of other human goods. “Virtue” and “happiness” clarify the goals of practical action by helping the actor appreciate human goods that “mature,” “serious,” or “reasonable” actors appreciate.\footnote{See id. at 192.} So the pursuit of the external good of wealth is justified by the
extent to which the actor uses it to support such external goods as life, familial love, and the practice of activities that require more specialized virtues. The pursuit of wealth is also justified and limited by the extent to which it comports with the virtue of industry and steers away from the vices of greed and laziness. Of course, different schools pick at different points of MacIntyre’s example, debating whether the virtue of industry, the owner’s state of pleasure, the owner’s happiness understood as the practice of good actions, or other factors ought to be metaethically paramount. The important point here is this: In contrast with deontological approaches, approaches like MacIntyre’s require the ethical actor to justify both external and internal goods by their tendency to contribute to human happiness properly discerned. As Justin Oakley explains, “character-traits such as benevolence, honesty, and justice are virtues because they feature importantly among an interlocking web of intrinsic goods -- which includes courage, integrity, friendship, and knowledge -- without which we cannot have eudaimonia” and also because “these traits and activities . . . are regarded as together partly constitutive of eudaimonia.”

Eudaimonistic theories also differ from conventional consequentialist theories. To keep this discussion manageable, I will distinguish the eudaimonistic tradition only from the most consequentialist of consequentialist theories -- “act-utilitarian” theories. Conventional act utilitarianism takes “utility” or “preferences” more or less as they come, without second-guessing them too deeply. By contrast, traditional eudaimonistic theory is more critical of utility. Some sources of human utility or pleasure are low-grade, meaningless, or destructive; others enlarge an actor’s happiness as understood by a reasonable, objective, and mature observer knowing that actor’s life situation. In addition, act utilitarianism suggests that different forms of happiness, and different actors’ perceptions of utility, are more or less commensurable. By contrast, eudaimonistic theories are more likely to assume that different forms of human good are “intrinsically variegated.”

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74 Oakley, supra note 20, at 133.
75 See, e.g., Smart, supra note 48, at 9-12, 30-57 (describing act-utilitarian theory); J.A. Mirrlees, The Economic Uses of Utilitarianism, in UTILITARIANISM AND BEYOND 63, 65 (Amartya Sen & Bernard Williams eds., 1988).
76 See Sinnott-Armstrong, supra note 20, §§ 1, 3 (discussing the hedonism inherent in classic utilitarianism).
77 See MACINTYRE, supra note 77, at 197-98. Accord Nussbaum, supra note 36, at 168 (noting that many virtue ethics “question [utilitarianism’s] narrowly technical conception of reason”).
78 See Nussbaum, supra note 36, at 182.
Conventional act utilitarianism also tends to be duty-centered. To the extent that utilitarianism claims to prescribe a decision-making process for ethical or political actors, it establishes a duty (“maximize utility”) that does not treat the actor’s interests differently from those of anyone else affected by the actor’s act. By contrast, traditional eudaimonistic approaches are “agent-centered” or “agent-relative.” They assume that practical theories must give actors reasons for action that are especially relevant to their circumstances and (especially) the desires that particularly motivate them to action. At least as important, such approaches stress that the actor’s choices and conduct shape the actor’s future habits, capacity for action, and capacity for appreciating truth, justice, beauty, and other goods. Because “[v]irtue ethicists . . . believe reference to character is essential in a correct account of right and wrong action,” they distinguish “virtue ethics from act-consequentialist theories . . ., [which] allow us to say what acts are right without referring to character at all.” “[T]he good” is properly understood “not [as] a passive consequence of acting virtuously”; “rather, the good is active, and acting virtuously is a constituent part of what a good life consists in.”

Finally, conventional act utilitarianism focuses on consequences in a more direct manner than eudaimonistic theories do. Act utilitarianism judges each act, on a case-by-case basis, asking whether the act increases net utility. It is probably impossible to make any single generalization about how eudaimonistic theories apply as a group in relation to consequences. Broadly speaking, particular eudaimonistic theories can be sorted by the extent to which they are consequentialist (in the broad sense) or non-consequentialist. Non-consequentialist approaches judge whether actions are right by whether the actor “honors” or “exemplifies” the right virtues in the course of acting. Aristotle’s virtue theory may be read in this manner, for Aristotle defines the human good primarily as “a being-at-work of the soul in accordance with virtue” or

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80 Crisp & Slote, supra note 16, at 3; Louden, supra note 64, at 205; Buckle, supra note 14, at 569 & n.12; Oakley, supra note 20, at 142-43.
82 See Oakley, supra note 20, at 131.
83 Id. at 133.
84 See HURSTHOUSE, supra note 19, at 163-91 (considering whether morality is beneficial because the dispositions it fosters are intrinsically or only instrumentally good);
85 Oakley, supra note 20, at 144. See also B.H. Baumrin, Aristotle’s Ethical Intuitionism, 42 THE NEW SCHOLASTICISM 1 (1968).
“the best and most complete virtue.” 86 The human good consists not of pleasure, or good things happening to the actor, but rather as the actor’s practicing virtue. Non-consequentialist eudaimonist approaches reject act-utilitarian consequence maximization simply because it does not describe what really motivates actors to act. Thus, in the case of friendship, “I am not required by virtue ethics to maximize my friendships,” nor “to have the best friendship(s) which it is possible for me to have,” but rather “I ought to have excellent friendships, relative to the norms which properly govern such relationships.” 87

Other consequentialist eudaimonistic approaches “treat[] rightness as ultimately a function of the value(s) an agent promotes” — again understanding those values in an objective, agent-relative, and virtue-relative way. 88 Aristotle hints at such an approach, for he goes on to argue that the practice of virtue is not only virtuous but also pleasant and beautiful. 89 In the opinion of these consequentialists, when a virtue theory focuses on virtue for virtue’s sake, it makes the mistake “of missing the point, of misdirecting our focus inward, onto our own motivation, instead of outward, onto the goods and ills of the world.” 90

Some consequentialist eudaimonistic approaches can be understood as maximizing consequences — but if they do so, they do so indirectly. 91 They assume that actors will pursue their own interests, but they advise their actors not to forget that their interests consist in complete and long-term happiness, and especially in the goods that arise from sociable interaction among virtuous friends. Virtuous dispositions may be mere means to the ends of securing to actors reasonable human goods, 92 but they are usually more effective means than reasoning how to maximize the good on a case-by-case basis in every situation. 93

Still other consequentialist eudaimonistic approaches construe consequentialism’s “Good” as the state in which actors are exhibiting human excellence in the course of their activities. “Good consequences” are then understood to include bringing about the state of

86 NICOMACHEAN ETHICS, supra note 14, I.7, at 1098a16-18; Sachs trans., supra note 14, at 12; Crisp & Slote, supra note 16, at 2 (describing Aristotle as having “perhaps one of the most radical virtue ethics ever, since he can be understood to be saying that there is nothing worth having in life except the exercise of the virtues”).
87 Oakley, supra note 20, at 144.
88 Id.
89 See NICOMACHEAN ETHICS, supra note 14, at I.8, at 21-24; Sachs trans., supra note 14, at 13-14
90 Griffin, supra note 38, at 63.
91 See, e.g., Louden, supra note 64, at 204; Larry Alexander, Pursuing the Good--Indirectly, 95 ETHICS 315 (No. 2, 1985).
92 See GEORGE, supra note 86, at 12-13.
93 See Griffin, supra note 38, at 60-61 (describing virtue ethics as proceeding through informational shortcuts).
affairs in which actors in fact act as excellent human actors ought. This approach “starts from a vision of the good and always commends acts to the degree that they promote the good,” but its consequentialism is considerably different from act utilitarianism because the two approaches define and determine the Good so differently. 94

E. The Eudaimonism Finesse

In any case, eudaimonistic theories can respond to the criticisms conventional consequentialists make of conventional deontology. First, by starting with ordinary human passions, desires, and psychological faculties, such theories satisfy MacIntyre, Anscombe, and others’ demand that practical philosophical theory stay close to human psychology. Legal scholars sympathetic to deontology might find these traditions useful, by the way, even if they prefer ultimately to hang on to deontological first principles. If a Kantian agrees that deontology needs to be complemented with a well-developed psychology of human practical action, eudaimonistic theories might provide that complement -- even if they do not convince the Kantian to abandon deontology entirely. 95

Let me illustrate using adverse possession again. The following sketch of the relevant moral interests is somewhat cursory (and it abstracts from important complications to be discussed after this Part) but it should still suffice for our purposes here. 96 It is fairly easy to articulate a eudaimonistic justification for property understood as a domain of discretion in which owners are entitled to acquire and use land productively for their own personal needs. For example, a farmer who uses land to grow crops generates an external good -- food, an obvious means to self-preservation. In the practice of farming, the farmer cultivates several internal goods -- the virtues of industry and self-reliance, and also the virtues associated with being an excellent farmer. When the farmer sells crops for money, the money gives the farmer the means with which to achieve other life ends. That wealth can support the affectionate relations one gets from family and friendship, which are reasonable external goods. These goods in turn require the farmer to cultivate the internal goods necessary to be a good family man and friend. Other owners can make similar arguments connecting their property to their own life ends.

94 See Thomas Hurka, Perfectionism 60 (1996); see id. at 55-60.
95 See, e.g., Hursthouse, supra note 19, at 120 (acknowledging the possibility that one can “add on an Aristotelian account of the emotions” to a Kantian account of deontic obligations).
96 synthesis of Miller, Jr., Buckle on Pufendorf, Kent, Wilson.
Taken together, all these various goods justify owners’ enjoying a domain of discretion or non-interference in relation to their land. Psychologically, even if individuals excel at some lines of work and not others, and even if individuals differ in the extent to which they are lazy or industrious, all individuals are hardwired with some selfish tendencies to acquire and produce for their own self-preservation and advancement. Morally, however, these selfish interests must be reconciled with social interests. All (or practically all) individuals are made happier if they live in organized society. They cannot do so without according to their friends and fellow citizens the same opportunities to provide for their own self-preservation and advancement. All eudaimonistic theories therefore subject each owner’s domain of exclusive use to correlative duties to respect other owners and would-be owners’ concurrent interests in their properties.

It is more complicated to determine which set of legal rules best secures and enlarges this eudaimonistic interest in the case of adverse possession. It is not enough to appeal, as many deontologists do, to abstract universal principles like “the right of property [is] the embodiment of the agent’s freedom in the external world.” The law could embody owner freedom by endowing owners with exclusive control and use over every part of their land, or by protecting owners’ exclusive control over the land they are actually using. Abstract claims about freedom cannot settle those choices. By contrast, eudaimonistic theory settles the choice consequentially, by appeal to experience. In a well-developed commercial economy, land can be deployed to a wide range of productive uses, a wide cross-section of the citizenry is skilled enough to deploy the land to many of those uses, and owners and developers have relatively free access to capital to convert land to their preferred uses. Ordinarily, this process of rapid conversion is enlarged better by establishing a broad exclusionary regime than by a narrow use-driven regime.

On the other hand, the presumption in favor of exclusionary boundary rules may be reversed, if it can be shown that a big enough gulf exists between the title owner’s formal and

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97 WEINRIB, supra note 25, at 176.
98 In Jacque v. Steenberg Homes, for example, a mobile-home company trespassed across the vacant and unused field of a retired couple to deliver a mobile-home on time while the public road was blocked by snow. Steenberg Homes was making productive use of the field, the Jacques were not, and the crossing caused the Jacques no actual harm. Yet the Jacques were entitled to a trespass cause of action and $100,000 in punitive damages. 563 N.W.2d 154 (Wisc. 1997). The holding reinforced an exclusionary regime, but the facts seem to justify an exception respecting Steenberg Homes’s harmless and productive use of the Jacques’ exclusionary right.
99 This is a fact that James Gordley overlooks. Gordley explains adverse possession on the ground that “when an owner does not intend to put property to productive use, he does not have ownership in its true sense.” GORDLEY, supra note 43, at 144. To make this explanation satisfying, Gordley must explain why trespass law at its core endows owners with ownership of land they have not yet used.
100 See, e.g., Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73 (1985).
exclusionary land claims and the interests of a person actively using the land. If a non-owner squats on the property and the title owner sleeps on her rights for a decade, the owner’s interest seems relatively valueless to her, and the squatter’s interest in the land seems relatively valuable. At that point, legal exclusion becomes seriously removed from the selfish, productive, and industrious passions that justify a eudaimonistic interest in labor.\footnote{Cf. Oliver Wendell Holmes, Jr., The Path of the Law, 110 Harv. L. Rev. 991, 1008 (1997) (reprinting 10 Harv. L. Rev. 457, 477 (1897)) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.”).} Now, this exception must be reconciled also with the policies informing the rule that deliberate trespasses should be deterred and corrected with punitive damages.\footnote{See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wisc. 1997).} This rule reinforces property-respecting social norms if the owner asserts her rights immediately after they have been encroached. If the owner waits a decade or more later, however, this shaming function is seriously compromised. Eudaimonistic theory cannot say precisely when property law should flip from trespass’s presumptive exclusionary regime to adverse possession’s usufructuary exception. Yet it does explain and justify the basic contours of both, and it focuses attention on the questions that trigger the flip.

On the other hand, eudaimonistic theory may reduce greatly the distance between instrumentalist-consequentialist argument on one hand and rights-based argument on the other.\footnote{In this regard eudaimonistic theory may help respond to a challenge issued by Jules Coleman: to understand both utilitarian welfare and deontic claims of justice and fairness in light of more fundamental human interests: “Once we realize that welfare is connected to a person’s interests—what is good for him, and not merely to what he desires or to his gratification or joy—it should be clear that whatever it is in that account that explains the value of welfare explains as well the importance of the law’s regulating human affairs according to various principles of justice and fairness.” Coleman, supra note 9, at 1543.} In Richard Posner’s analysis of adverse possession, the doctrine enlarges joint utility. By not monitoring her land over many years, the title owner signals her utility in it is low; by occupying it and using it over the same time, the squatter signals his utility in it is high.\footnote{See Richard A. Posner, Economic Analysis of Law 78-79 (7th ed. 2007). I use Posner’s justification of adverse possession as a point of contact not with economic analysis generally but rather with act-utilitarian modes of justification. Rule-utilitarian economic analysis, properly conducted, avoids many of these problems. I understand this to be an important point of Henry E. Smith’s contribution to this theme Issue, see Mind the Gap: The Indirect Relation Between Means and Ends in American Property Law, 94 Cornell L. Rev. (forthcoming 2009).} Posner’s interpretations of the parties’ subjective valuations are conclusory. To be thorough, Posner would first need to show that the parties’ utility functions are commensurable. Assuming they were, he would then need empirical evidence demonstrating that squatters have high subjective values, that title owners do not, and that in adverse-possession cases there really is a high risk that title owners will try to hold out to expropriate squatters’ subjective values. Even if
these points can be established, Posner’s interpretation is economically incomplete. It focuses on ex post concerns without considering seriously an ex ante concern that (as Posner explicitly recognizes elsewhere\textsuperscript{114}) is usually associated with property -- the relation between theft and security of investment. Adverse possession may destabilize social norms that minimize theft. To avoid ad hoc analysis, one would need to determine in a rigorous way, with more empirics, whether the ex post consequence trumps the ex ante or vice versa.

I do not want to be understood as saying eudaimonistic approaches answer these valuation and empirical questions comprehensively. But eudaimonistic approaches have at least two things working in their favor. First, on the valuation question, the eudaimonistic analysis probably describes better onto how people do assess adverse possession. People do not make judgments finding that the squatter does have high utility in the land and the title owner does not; rather, people decide both have behaved such that the former’s interest objectively deserves to be treated as more weighty than the latter’s. Here, if Posner’s utility interest-balancing sounds plausible, it may be because his portraits of the interests piggyback on implicitly moral judgments. Second, on the empirical issues, eudaimonistic approaches are at least candid and realistic. They confess that they lack perfect empirical information, and they work with the few broad generalizations they can make about human behavior. Of course, their empirical analyses are general and fairly intuitive. But they do explain the law more or less as it comes. They stay within the realm of psychological generalizations on which people feel reasonably comfortable relying when they make practical moral decisions. They are open to revision on the basis of evidence more convincing and specific than everyday generalizations. In the meantime, however, they do not restate common-sense intuitions in fancy social-science jargon, and then pretend that the jargon somehow makes the intuitions more scientific or precise.

As should be clear by now, eudaimonistic practical theories finesse the deontology trap. Land Virtues nicely states the contribution in general principle. On one hand, deontological duty and rights claims are often too “rigid” to square with many “consequentialist intuition[s].”\textsuperscript{115} On the other hand, because contemporary normative economics operates on a consequentialist base, it has a built-in tendency to require the copious information and controversial value judgments just illustrated in Posner’s analysis of adverse possession. To make those determinations and

\textsuperscript{114} See id. at 32 (discussing the “dynamic” influences of property law on ownership and investment).

\textsuperscript{115} Peñalver, supra note 5, at *138-44.*
judgments manageable, it helps to put them in a “broader moral framework, one that is sufficiently capacious to encompass the value of personhood, the demands of liberty, and the important goal of enhanced social welfare.” Adverse possession illustrates one last time. The title owner’s right to be free from trespassory invasions of exclusive control seems “deontological” at first blush, but it actually is the product of psychological analysis of how people do behave and prescriptive analysis of what will make them genuinely happy given what we know about their psychological natures. The prescriptions that follow from this analysis serve only as a starting presumption. Adverse possession “consequentially” corrects the law’s absolute tendencies in one repeat situation in which the assumptions behind trespass doctrine break down. But the consequentialist correction is focused and limited by the imperative to make the law enlarge owners and would-be owners’ concurrent interests in productive use. When scholars argue that a philosophical approach to adverse possession must enforce absolute rights or give way to instrumentalist analysis, they are attacking a straw man.

Of course, I do not mean to suggest that eudaimonistic approaches to practical philosophy are superior across the board; nor do I understand Alexander or Peñañver to be making such a claim. Eudaimonistic theories are subject to important criticisms, which need to be fleshed out fully. My point here is simpler. Many legal scholars who prefer conventional utilitarian approaches to consequentialism often lampoon or dismiss philosophical theories of practical action with several criticisms most commonly associated with Kantian deontology. By contrast, many scholars of different forms of eudaimonistic philosophy have assumed that this criticism that can be explained away in a footnote. Eudaimonistic philosophers should probably explain themselves more fully to legal scholars, but legal scholars would do well to consider their footnotes.

II. The Uneasy Relation Between Ethics and Politics

Although I am enthusiastic about the family of practical theories on which Alexander and Peñañver rely, however, I do have some reservations about how they apply those theories. To repeat, in commonplace usage, “property” refers to a domain of freedom to decide how to apply the object of ownership to his own life plans, independent of direction from philosopher-kings or

104 See id. at *151-54.
105 For criticisms of virtue ethics, see Louden, supra note 64; Christopher W. Gowans, Virtue and Nature, 25 Soc. Phil & Pol’y 28, 29 (2008); Statman, supra note 88, § 5.
106 See, e.g., BUCKLE, supra note 56, at 70 n.61 (explaining why “[n]atural law theories are . . . essentially non-Kantian,” in large part because “psychological intelligibility is . . . a non-accidental feature” of such theories).
anyone else. Alexander describes this view as “the right to exclude others, with no obligation owed to them.”\textsuperscript{107} Yet the commonplace view is a little bit of a caricature, and because it is Alexander is setting up a straw man to swing at. If one is going to ground property in some sort of exclusiveness, it is better to call property a domain of exclusive use, shaped with regard for the like use-interests of other owners and the interests of the public properly understood.\textsuperscript{108} Alexander and Peñaalver trade on the discrepancy between the crudeness of the commonplace understanding of property and the qualifications one must add to that understanding to make it precise. When they do so, they recast property too far to the other end of the spectrum, where property consists of an owner’s right to do (only) that which discharges social obligations,\textsuperscript{109} what contributes to human flourishing,\textsuperscript{110} or the responsibility to do what is virtuous.\textsuperscript{111} In fairness, in both Articles, property remains, much of the time, a domain of discretion organized to encourage owner self-preservation and -advancement. All the same, on the margins where it matters, both Articles recommend that this domain of discretion be limited so public officials may decide how owners’ use rights will best promote specific claims about individual or civic flourishing.

There are at least two problems with these approaches. One problem is internal to property law, and Henry Smith’s Response to \textit{The Social-Obligation Norm} explains it excellently: More often than \textit{The Social-Obligation Norm} and \textit{Land Virtues} recognize, property law promotes both individual goods and social welfare by avoiding pursuing first-order goals, and by instead vesting owners with autonomy as a second-order means by which owners may pursue those first-order goals.\textsuperscript{112} I might quibble with a few of Smith’s examples, and with his tendency to describe many moral approaches to property as “deontological,”\textsuperscript{113} but I concur with the main thrust of his Response.

\textsuperscript{107} Alexander, supra note 4, at *1-2*.
\textsuperscript{109} See id. at 3.
\textsuperscript{110} See id. at 5.
\textsuperscript{111} See Peñaalver, supra note 5, at 8.
\textsuperscript{113} See, e.g., Smith, supra note 113, at [108].
This Response focuses on a separate problem: the relation between virtue theory and a political community’s overarching moral-constitutional order. In political practice, theories centered around virtue (in the broad, eudaimonistic sense) are capable of getting hijacked by perfectionists. When so hijacked, virtue theories can be far more destructive and inhumane than other theories of politics. This possibility does not make all virtue regulation inappropriate, but it does make virtue regulation problematic. I would be far more comfortable with *The Social-Obligation Norm* and *Land Virtues* if they specified when flourishing or virtue theories exacerbate and avoid those problems.

Both *The Social-Obligation Norm* and *Land Virtues* assume that they may mine virtue theories for pay-dirt in law. Virtue theory has been applied overwhelmingly to *ethics*. Most of the law, however, belongs to the field of *politics*. Although there are exceptions (legal ethics), most of the primary law (especially property and tort) specifies and secures political obligations. Principles that work well as hypothetical rules of practical conduct for individuals may not work as well as compulsory rules of practical conduct for citizens.

It is telling that leading virtue-theory scholarship steers carefully around the topic of virtue politics. In *On Virtue Ethics*, Rosalind Hursthouse focuses carefully on “normative ethics, not political philosophy,” because “justice is so contested . . . a topic that it would need” independent treatment in political philosophy. At least some virtue ethicists go where Hursthouse fears to tread. In her writings (which provide important inspiration for *The Social-Obligation Norm*) Martha Nussbaum generates political prescriptions from virtue principles. Even so, Nussbaum has taken criticism for assuming too blithely that what works in ethics works as easily in politics. Fred Miller, Jr. has explored whether Aristotle’s (virtue-centered) theories of ethics and politics might be compatible with a liberal politics of rights, he claims

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126 Hursthouse, supra note 19, at 5. Hursthouse thinks that the topic of justice, personal and political, is not only contested but also “corrupted.” *Id.* See also Rosalind Hursthouse, “Virtue Ethics,” The Stanford Encyclopedia of Philosophy § 4 (2008) (url at http://plato.stanford.edu/entries/ethics-virtue/) (“Although Plato and Aristotle can be great inspirations as far as [virtue ethics are] concerned, neither, on the face of it, are attractive sources of insight where politics is concerned.”).

114 See Alexander, supra note 4. at *8 & n.14*.

115 See Martha C. Nussbaum, Women and Human Development 7-8 (2000) (arguing for “a form of political liberalism in connection with the capabilities idea”)


only to have “ma[d]e a start” at answering what he regards as a vast and problematic field. In their 1997 essay collection *Virtue Ethics*, editors Roger Crisp and Michael Slote foresaw “in the not-too-distant future . . . a companion volume called Oxford Readings in Virtue Politics.” To my knowledge, that companion volume has not yet been published.

In his Reply, Alexander suggests that I am repeating some of the extreme tendencies of the Critical Legal Studies movement here when I say that most of the law belongs to politics. I am not channeling CLS here; I am channeling Aristotle. Alexander, Peñalver, and I all agree that “most contemporary virtue theorists work within the Aristotelian (or . . . closely related . . .) traditions.” I assume we can also agree that Aristotle provides common ground for understanding the relations between ethics, politics, and law.

Speaking eudaimonistically, ethics and politics both aim at promoting happiness. Ethics aims at the happiness of the individual actor, politics of the concurrent happinesses of all the members of the political community. Because of that focus, ethics and politics overlap considerably. Aristotle illustrates this simply in how he structures the arguments of the *Politics* and the *Nicomachean Ethics*. After discussing individual ethics at length, the *Nicomachean Ethics* ends by suggesting “perhaps we might also have more insight into what sort of political regime is best . . . and by using what laws and customs.” Ethics cycles into politics. After the *Politics* conducts that discussion, the last chapter considers how the lawgiver should structure education, at which point the argument cycles back to ethical formation.

Yet there remain huge differences between ethics and politics. Ethics focuses on the choices and actions of a single individual; politics adjusts and reconciles the interests of the many individuals living together in the political community. By its very nature, ethics self-

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118 Id. at 67.
119 Crisp & Slote, supra note 16, at 25.
121 The laws seem to be the works of the political art.” ARISTOTLE, *NICOMACHEAN ETHICS*, supra note 14, X.9, at 1181a23; Sachs trans., supra note 14, at 200.
122 Peñalver, supra note 5, at n.*150*; accord Alexander, supra note 4, at *14*.
123 ARISTOTLE, *NICOMACHEAN ETHICS*, supra note 12, X.9, at 1181b20-22; Sachs trans., supra note 14, at 200. Sachs uses “constitution” where I prefer “political regime.”
124 Although I cite Aristotle heavily in this Part and the next, I am not prepared to suggest that I am interpreting Aristotle accurately on all the points covered in this Response. It suffices for my argument that Aristotle makes a number of observations and normative prescriptions about the relations between law and politics, and that these observations are so sensible that they should be considered in complete analyses of virtue politics.
selects a higher class of practitioners than politics does. Those who study ethics voluntarily do so “not in order that [they] might know what virtue is, but in order that [they] might become good.”¹²¹ By contrast, because everyone in the community must live under the same laws and rulers, politics forces citizens who are naturally virtuous to get along with citizens who have little or no natural inclination to be virtuous. In Aristotle’s diagnosis, there are more of the latter than the former.¹²² That leads to a separate problem: Politics aims make the less-virtuous more so. One of the main functions of law as an institution is to make the many who are not naturally virtuous more so -- first by compelling them, then by shaming, habituating, teaching, and then ultimately persuading them.¹²³ Yet the less virtuous have an important say-so in the laws, and they do not like being told that they are vicious and need to be made better. Group opinion also shapes politics more directly than it does ethics. When an individual studies ethics, he can conform his life to what he believes to be his highest good.¹²⁴ Politics, by contrast, reconciles the conflicting interests of different members of the political community toward the conception of the common good the citizenry settles on.¹²⁵ That shared conception comes not from any single individual but from group opinion, produced by culture, political arguments, or victory after civil war. Civic virtue is therefore more politicized, and more likely to encourage civil strife, than individual virtue.

Many if not most of a community’s laws are political in these respects. The political community uses law as one of several tools to regulate conflicting interests, and as probably the most important tool for teaching citizens what kinds of conduct they should emulate and avoid. Citizens understand intuitively that laws make distributive comparisons indicating which virtues take the highest priority in the community. These comparisons provoke citizens to wage “culture war” fights. Neither The Social-Obligation Norm and Land Virtues treat these complications with the seriousness they deserve. That omission detracts significantly from two Articles claiming to be Aristotelian in outlook.¹²⁶ The law simply may not neither prohibit everything that is unethical nor require everything that is ethical.

¹²¹ ARISTOTLE, NICOMACHEAN ETHICS, supra note 14, II.2, at 1103b27-29; Sachs trans., supra note 14, at 23.
¹²² See ARISTOTLE, NICOMACHEAN ETHICS, supra note 14, X.9, at 1179b10; Sachs trans., supra note 14, at 196.
¹²³ See ARISTOTLE, NICOMACHEAN ETHICS, supra note 14, X.9, at 1179a33-80a14; Sachs trans., supra note 14, at 196-97.
¹²⁴ At least, as long as he does not violate any laws in the process.
¹²⁵ See ARISTOTLE, POLITICS, supra note 137, I.1, at 1252a1-6; Lord trans., supra note 137, at 35.
¹²⁶ These arguments are presented not only in Aristotle but also in GEORGE, supra note 86, at 25-28, 31-32, and John Finnis, see NATURAL LAW AND NATURAL RIGHTS 260-66 (1980).

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Consider anti-obscenity and -pornography laws. On one hand, such laws have sound eudaimonistic justifications. If unchecked, sexual passions encourage people (especially men) to view others (especially women) “as bodily objects of desire and potential sexual release and gratification, . . . rather than as full persons with personal and individual sensibilities.”127 Pornography and public obscenity are scandalous128 because they teach citizens that they may pursue those passions wherever they lead. Common sexual mores (and the personal moderation, group civility, and relational goods they promote) depend on support from public laws, religious teaching, family prescriptions, and general social norms. Public obscenity and pornography delegitimize all of these authorities. On the other hand, there are also familiar arguments why it might not be a good idea to have the law bar obscenity or pornography across the board. Obscenity regulations are hard to draft in a clear and fair manner.129 Different citizens may disagree about where to draw the line between tolerable and indecent, and the differences relate back to deep disagreements about religion and morality. If public officials enforce such regulations hamhandedly and Puritanically, the enforcement efforts can backfire. On the third hand, however, these counter-arguments can also get abused, by pornographers and other citizens who don’t think that pornography is immoral but know they cannot say so publicly without making it more respectable to support morals laws. As a result, even in ideal circumstances, it is prudent for a political community to refrain from regulating legally some publications that are probably ethically obscene or pornographic.

These and other similar complications explain why virtue theory has focused so much thus far on virtue ethics. If a virtue theorist (or, more generally, any virtue-friendly eudaimonist) wants to broaden out from ethics to politics, she must consider two important dangers. One danger is to assume mistakenly that ethics can or should be apolitical. According to this view, when politics legislates on virtue, it makes it impossible for actors to act virtuously.130 This claim assumes unrealistically that individual citizens can self-improve in their ethical lives.

128 See CATECHISM OF THE CATHOLIC CHURCH, supra note 146, § 2296, at 551.
130 Katrina M. Wyman describes this view without embracing it herself in her Response in this Issue, Should Property Scholars Drop Economics for Virtue? A Skeptical Comment?, 94 CORNELL L. REV. (No. 4, forthcoming 2009), manuscript at 112-13 (manuscript on file with Cornell Law Review).
without serious prior formation from politics and law. As Robert George explains, “the law must first settle people down if it is to help them to gain some appreciation of the good, some grasp of the intrinsic value of morally upright choosing, some control by their reason of their passions.”131

The other danger is to assume unrealistically that the principles that work in ethics fit seamlessly into law or other forms of politics. This is the problem that so concerns me about The Social-Obligation Norm and Land Virtues. “Virtue” is a much more problematic and divisive goal in politics than in ethics. In his reply, Professor Alexander suggests I am making a category mistake here. If law has room for judicial ethics, lawyer ethics, the ethics of agents, and other similar fields, he suggests, there is no reason why property law cannot import ethics as well.132 As should be clear by now, I neither mean nor need to claim that all law is political, or that no sort of ethics can bleed into law. Moreover, judicial ethics,133 legal ethics, and fiduciary ethics are all exceptions confirming the underlying rule. In these and other similar fields, the virtues instituted by law regulate a well-understood personal relationship, centered around an actor understood to enjoy a context-specific responsibility to act as a steward of some sort. The context and bilateral relationship make it easy for the political community to agree on what an “excellent,” “model,” or “virtuous” fiduciary or professional is supposed to do or refrain from doing. But such contexts and relationships are definitely not the norm in most of law -- especially property. I doubt citizens who are otherwise strangers to one another will take it lying down if the political authorities tell them they may use their property (only) as “excellent,” “model,” or “virtuous” citizens would.153

III. Virtue Politics?

This difference is crucial to any eudaimonistic account of political regulation of property. Atmospherically, and in many of their examples, The Social-Obligation and Land Virtues both intimate that property law would be better off if virtue theory were moved out of the “periphery”

131 GEORGE, supra note 86, at 25-26. For an excellent analysis of Aristotle’s position on this issue, see Buckle, supra note 14.
132 See Alexander, supra note 133, at *4*.
153 Cf. MACINTYRE, supra note 77, at 205 (“[A] virtue is not a disposition that makes for success only in some one particular type of situation. What are spoken of as the virtues of a good committee man or of a gambler or a pool hustler are professional skills professionally deployed in those situations where they can be effective, not virtues.”).
to the “core” of property.\textsuperscript{154} As an abstract proposition, this suggestion makes some sense. As the discussion in Part I suggested, eudaimonistic accounts of property do not necessarily make rights or duties or social obligations primary. An interest lies at the core, and the rights and duties are both in orbit. So analytically, I can imagine a legal and social regime that puts virtue duties at the core and rights out at the periphery. Politically, however, deep historical, theological, and political complications all counsel that property lie at the core of political discourse, and that rights lie at the core of property and the community’s constitutive political theory. By stressing rights, these prudential concerns suggest, the law should let slide legally and politically many uses of property that might not pass muster ethically.

Every so often, political and ethical scholarship experience a communitarian revival criticizing property’s selfish tendencies.\textsuperscript{134} In our liberal society, it is easy to understand why a communitarian alternative seems attractive. In important respects, contemporary law and politics are atomizing. Enlightenment liberalism is hardwired deliberately to have many of the characteristics of the city of pigs that so offended Glaucon’s senses of nobility and excellence. Virtue theory provides a strong set of arguments, with a respectable pedigree in the philosophy canon, to question liberalism’s atomizing tendencies on communitarian grounds. Furthermore, as it is usually presented, virtue theory seems innocuous. “Flourishing” certainly sounds nice,\textsuperscript{135} and “virtue” certainly seems appealing when used to justify industry.\textsuperscript{136}

Yet in other scholars’ opinion, such communitarian complaints are historically contingent. They suffer from the same “bad sociology” and “naïve psychology” criticisms that have been directed at deontological political theories of liberalism.\textsuperscript{137} Such communitarian arguments, the response runs, take for granted the tough-minded choices early Enlightenment theorists made to confine virtue and elevate rights as the dominant category of political discourse. “In its formative period,” Enlightenment partisans stress, “[Enlightenment] liberalism

\textsuperscript{154} Alexander, supra note 4, at *1* (attributing Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1737 (1976)).
\textsuperscript{135} See Alexander, supra note 4, at *48*.
\textsuperscript{136} See Peñalver, supra note 5, at *64*.
\textsuperscript{137} See supra notes 33-34 and accompanying text.
In a critique of classical virtue. Before bringing communitarian virtues back to politics (or the private law), virtue theorists and their fellow travelers need to remember why early Enlightenment liberals tried to banish them four centuries ago.

Enlightenment liberalism departs from Aristotelian virtue theory in two important ways. Philosophically, it attacks head-on Aristotle’s claim that the virtues establish a hierarchy clearly enough to order a community’s politics. David Hume restated the problem with this claim as follows. If mankind were to pass a law to assign the largest possessions to the most extensive virtue, and give every one the power of doing good, proportioned to his inclination . . . [,] so great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it; and the total dissolution of society must be the immediate consequence. Fanatics may suppose, that dominion is founded on grace, and that the saints alone inherit the earth; but the civil magistrate very justly puts these sublime theorists on the same footing with common robbers, and teaches them by the severest discipline, that a rule, which in speculation, may seem the most advantageous to society, may yet be found, in practice, totally pernicious and destructive.

Notwithstanding their deep differences on other points, progressives and conservatives in contemporary politics agree on Hume’s diagnosis. Rawlsian Charles Larmore identifies “the deepest departure from the Aristotelian perspective” in this claim: “on matters concerning the meaning of life, discussion among reasonable people has seemed to liberals to tend naturally not toward consensus, as Aristotle thought, but rather toward controversy.” Similarly, traditionalist Alasdair MacIntyre acknowledges that “the liberal individualist standpoint partly derives from the evident fact that the modern state is indeed totally unfitted to act as moral educator of any community.” Robert George has restated sympathetically Aristotle’s case for public-morals legislation, and yet George still recognizes that Aristotle “plainly failed to allow room in his ethical and political theory for the diversity of irreducible human goods which . . .


165 See, e.g., *Politics, supra* note 137, III.4, at 1276b30-31; Lord trans., *supra* note 137, at 90 (concluding that “the virtue of the citizen must necessarily be with a view to the regime”); *Aristotle, Nicomachean Ethics, supra* note 14, I.7, at 1098a16-18; Sachs trans., *supra* note 14, at 12 (defining the human good as a “being-at-work of the soul . . . in accordance with the best and most complete virtue”).


168 *MacIntyre, supra* note 77, at 195.
are the bases for a vast range of valuable, but mutually incompatible . . . ways of life.”

Land Virtues relies substantially on MacIntyre and George’s work, by the way, to explain and justify virtue theory. I am puzzled why the Article does not consider seriously what both authorities regard as a serious limitation of virtue theory.

Enlightenment liberalism has a separate, historical critique: Whether or not the virtues could have established a consensual and harmonious politics in Aristotle’s day, the program he prescribed for ancient Greece would backfire now, in the historical, political, and theological conditions that typify modernity. When Aristotle writes about politics and legislation, he presumes he is speaking of a community small enough that public officials know citizens personally well enough to judge them on the basis of their characters. He warns that an indefinitely large city does not count as a city properly speaking. He does not identify any single number of citizens as ideal, but he suggests at one point that a city may be too large if it is large enough to support an army of 5,000 citizens. Aristotle treats religion extremely circumspectly. When he traces his genealogy of politics in Book I of the Politics, Aristotle explains why the city emerges from the family -- but he ignores religion and religious law. Separately, although my interpretation on this point may be idiosyncratic, I read Aristotle to hint that the city must subordinate the priesthood even as it maintains civic respect for religion. If priestly offices are given too high a public priority, the religious impulse “assumes a position of imperious independence from which it presumes to contend against the family” and even the city.

Oversimplified greatly, Aristotle presumes it is possible to establish a small political community, of citizens closely knit by nationality, heritage, and religion, around a common political morality emphasizing one or a few virtues as the keys to a right way of life. In modern

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169 GEORGE, supra note 86, at 38.
170 See Peñalver, supra note 5, at *76 n.230* (citing MACINTYRE, supra note 77); id. at *56-57 & n.179* (citing GEORGE, supra note 86).
139 “Within the context of a polis and an ethical theory intended to accompany it, the strategy of pointing to a phronimos makes a certain sense. However, to divorce this strategy from its social and economic roots and then to apply it to a very different sort of community--one where people really do not know each other all that well, and where there is wide disagreement on values--does not.” Louden, supra note 64, at 213.
173 See POLITICS, supra note 137, VII.4, at 1326a25-27; Lord trans., supra note 137, at 204.
174 See POLITICS, supra note 137, II.6, at 1265a4-17; Lord trans., supra note 137, at 64.
175 See POLITICS, supra note 137, I.2, at 1252a24-53a39; Lord trans., supra note 137, at 35-38.
176 See POLITICS, supra note 137, VII.8, at 1328b11-13; Lord trans., supra note 137, at 210 (proposing to make the priestly offices simultaneously fifth and first in priority in the well-ordered city).
politics, nation-states have anywhere from hundreds of thousands to billions of citizens. The commonalities of race, blood ties, and common language that Aristotle presumed no longer exist. Neither do the local knowledge or the familiarity he also presumed government officials would have. Communitarian laws may therefore ignite ethnic, religious, or class-driven civil wars. Each race, sect, or class may be tempted to acquire power, and legislate its own factious advantage in the name of making the citizenry virtuous. Most important, religion is more capable of destabilizing domestic politics now (meaning in the West over the last half-millennium) than they were in Aristotle’s time. Christianity is a universal revealed religion.\(^{178}\) When politics is about legislating virtue and not about securing rights, it tempts sectarian believers to gain political power to compel subjects to be virtuous as defined by the teachings of their particular sect.\(^{179}\) Secular ideologues are subject to similar temptations.

One might object that this portrait of politics is too dour, or that the tensions can be mediated by the virtuous official acting prudently on the spot. Yet as Aristotle explained, when not properly shaped by background laws and customs, man “is the most unholy and the savage” of the animals.\(^{180}\) There are many parts of the world where politics are this dour and untameable. In those areas, when political rulers assume it is appropriate to use force and law to favor one way of life as higher than others, the results are awful. For example, the country of Rwanda used to include of majority of poorer, agrarian Hutus and a minority of richer, better-educated and more professionalized Tutsi. The two ethnic groups were rivals. Between the 1970s and 1990s, a Hutu government, led by head of state Juvenal Habyarimana, led a campaign of genocide against the Tutsis. To legitimate the genocide, Habyarimana’s ruling party propagated a political ideology that “glorified the [Hutu] peasantry” and subordinated the Tutsi as “petty bourgeois.”\(^{181}\) The ideology did so in part by declaring peasant life to be virtuous (“giv[ing] all kinds of physical labor its value back”) and professional life vicious (“fight[ing] [a] form of intellectual bourgeoisie”).\(^{182}\)
One might reasonably wonder whether this example is fair. All theories of politics have their success stories and their embarrassments, and perhaps I am focusing too much on virtue theory’s embarrassments. On the other hand, in political theory it is often a very good idea to focus on the worst-case scenario. Rights-based regimes always come with a soft permissiveness, but their worst case is usually anarchy. Virtue-based regimes always come with some fractiousness, but in their worst case they embolden a control group to wage civil war, to acquire comprehensive political control, and to tell everyone else what is virtuous.

IV. Rights Politics!

In short, a eudaimonistic political theorist might reasonably conclude that, in the political, religious, and ethnographic conditions that inform modernity, it is generally imprudent for a political regime to use law to promote virtue as a direct goal of government. Liberal politics are more prudent. When a political community embraces liberalism, it may still advance eudaimonistic virtue interests, but primarily the low and encompassing ones, like civility, patriotism, family, and industry. In such a community, “property” becomes a dominant metaphor for the ends on which government should focus, and an implicit warning about the ends that government should avoid.

One concise way to illustrate the Enlightenment alternative is to consider Locke’s writings. Locke serves as a lightning rod for the communitarian criticisms discussed in Part III, and he deals with these criticisms more circumspectly than Hume does a century later into the Enlightenment. Yet Locke deliberately structures Lockean liberalism to compartmentalize virtue away from politics. To be clear, in his metaethics, Locke is far from being a virtue theorist, and in the Two Treatises, his main writing on politics, Locke hardly ever mentions the term “virtue.” Yet, at least in his epistemological and ethical writings, Locke focuses on the

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183 See JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING § 2.21.55, at 269 (Peter H. Nidditch ed., 1979) (criticizes “the philosophers of old” for “in vain enquir[ing], whether Summum bonum consisted in Riches, or bodily Delights, or Virtue, or Contemplation: and they might have as reasonably disputed, whether the best Relish were to be found in Apples, Plumbs, or Nuts, and have divided themselves into Sects upon it”); PETER C. MYERS, OUR ONLY STAR AND COMPASS: LOCKE AND THE STRUGGLE FOR POLITICAL RATIONALITY 123 (1998) (“[Locke] does not see in [natural human sociality] a natural inclination toward lawfulness or virtue”). I have explained why the claims made about Locke in the following paragraphs interpret Locke faithfully in Claeys, supra note 179.

184 See, e.g., Robert A. Goldwin, John Locke, in HISTORY OF POLITICAL PHILOSOPHY 476-510 (Leo Strauss & Joseph Cropsey eds., 3rd ed. 1987). Locke considers the possibility that “some one good and excellent Man, having got a Preheminency amongst the rest, had this Deference paid to his Goodness and Vertue . . . that the chief Rule . . . with a tacit Consent devolved” into absolute monarchy. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § II.94, at 327 (Peter Laslett ed. 1988) [hereinafter “TWO TREATISES”]. In context, however, this example confirms Locke’s
phenomena that interest eudaimonistic theorists.\textsuperscript{185} When he explains the motivations for human actions, Locke sets “our greatest good” as “the highest perfection of intellectual nature, [which] lies in a careful and constant pursuit of true and solid happiness.”\textsuperscript{186} And Locke is interested in virtue. He just prefers to assign the perfection of human character and the pursuit of happiness (to the extent they can be so confined) to the private realm. Locke’s \textit{Some Thoughts Concerning Education} impresses on parents that they must educate their children to appreciate that “the great principle and foundation of all virtue and worth is this, that a man is able to \textit{deny himself} his own desires, cross his own inclinations, and purely follow what reason directs as best though the appetite lean the other way.”\textsuperscript{187}

To understand why Locke goes to such lengths to privatize virtue, one must understand how Locke regards Christianity. He regards Christianity as valuable because it inculcates virtue in people who lack the means, the leisure, or the inclination for higher ethical education. That is one of the main lessons of \textit{The Reasonableness of Christianity}.\textsuperscript{188} But Locke’s \textit{A Letter Concerning Toleration} focuses on Christianity’s destructive tendencies in politics. “No Peace and Security,” he warns, “no not so much as Common Friendship, can ever be established or preferred amongst Men, so long as this Opinion prevails, That \textit{Dominion is founded in Grace}, and that Religion is to be propagated by force of Arms.”\textsuperscript{189}

In response, Locke limits the extent to which law and politics may regulate virtue. The Lockean commonwealth may regulate a few virtues -- but only low, encompassing, and uncontroversial ones, and even then only indirectly. The greatest concession Locke makes to overall reserve toward virtue understood as an open-ended goal of political life. Virtue is part of the monarchical political system Locke seeks to displace. Similarly, Locke acknowledges that “age or virtue may give men a just precedence” over their peers -- but not to the point that the former may claim the power to rule the latter without their consent. \textit{Id.} § II.54, at 304.


\textsuperscript{186} \textit{Locke, supra} note 183, § 2.21.52, at 304.

\textsuperscript{187} \textit{John Locke, Some Thoughts Concerning Education, in Some Thoughts Concerning Education and Of the Conduct of the Understanding} ¶ 33, at 25 (Ruth W. Grant & Nathan Tarcov eds. 1996) (1693).

\textsuperscript{188} \textit{See John Locke, The Reasonableness of Christianity} ¶¶ 241-45, at 169-85 (George W. Ewing ed. 1965).

\textsuperscript{189} \textit{A Letter Concerning Toleration} 40-41 (Awnsham Churchill pub., 1689).
virtue is that the commonwealth may regulate “rectitudo morum,” or “rectitude of morals.”

When Locke’s original English translator mistakenly translates this term as “virtue,” he misses the point. Locke is going out of his way to avoid giving virtue-crats respectable public reasons for stirring up quarrels or contentions over more elite and rivalrous perfectionist virtues. The commonwealth may regulate citizen virtues only to the extent that such virtues cover the moderation and self-restraint necessary that citizens may govern themselves politically and privately -- like the anti-obscenity and -pornography laws discussed in Part II. Even then, the Lockean commonwealth does not claim it is making citizens virtuous; it instead argues that these virtue regulations are indispensable elements of “rights infrastructure.” Locke’s political theory is structured to make this limited virtue regulation seem secondary. Locke makes primary rights -- most of all property, which occupies the central chapter of the Two Treatises.

Theorists like Locke brought about a common political morality treating rights, duties, and regulation in the same spirit. For example, Sir William Blackstone acknowledges that all individuals are endowed with rights and duties. In his political theory, individuals are entitled by general natural law to enjoyment of the rights “whether out of society or in it.” Duties, however, need to be broken down by whether “human municipal laws should at all explain or enforce them.” For example, “[p]ublic sobriety is a . . . duty [properly] enjoyed by our laws: private sobriety is a . . . duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction.”

Important sources in American law and politics followed a similar political morality from the American Founding until well into the twentieth century. Of course, not all public actors in this time span subscribed to eudaimonistic theories of politics and law, and it is probably impossible now to go back and determine which laws and judicial decisions were intended to be

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191 A LETTER CONCERNING TOLERATION, supra note 189, at 40-41. See Claeys, supra note 177, at 223. I am indebted to Thomas West for this insight.
192 TWO TREATISES, supra note 184, II.34, at 291.
193 See Claeys, supra note 177, at 223-24.
195 LOCKE, TWO TREATISES, supra note 184, II.5.
197 Id. at 120.
198 Id.
eudaimonistic. Even so, the political that operated as a common-denominator political morality in this period was influenced substantially by eudaimonistic theories of rights, and the amalgamation that resulted is compatible with most such theories.\footnote{See, e.g., Mark Warren Bailey, Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910, at 24-84 (2004) (describing the standard catechism of law, ethics, politics, and theology learned by college students in the second quarter of the nineteenth century at leading liberal arts colleges).} (In the remainder of this response, I will refer to this common-denominator political morality as “American natural-rights theory.”) The Federalist’s treatment of faction tracks much of what I have said in this and the previous part, most of all in Numbers 10\footnote{See, e.g., The Federalist No. 10, at 45, 47 (Clinton Rossiter ed. & Charles R. Kesler intro., 1999) (suggesting that “the latent causes of faction are . . . sown in the nature of man” and include “zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice,” “an attachment to different leaders,” and “the serious [sic] and unequal distribution of property”).} and 51.\footnote{The Federalist No. 51, in The Federalist, supra note 199, at 288, 292 (explaining how the American political order secures civil rights with “the multiplicity of interests” and religious rights with “the multiplicity of sects”).} But The Federalist was not universally respected at the time of ratification; it targeted swing voters by arguing against the anti-Federalists. So let me focus on an organic document, Virginia’s 1776 Declaration of Rights, authored principally by George Mason, the namesake of my law school.

Article 1 of the Declaration of Rights provides:

Article 1. That all Men are by Nature equally free and independent, and have certain inherent Rights, of which, when they enter into a State of Society, they cannot, by any Compact, deprive or divest their Posterity; namely, the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and Pursuing and obtaining Happiness and Safety.\footnote{Virginia Declaration of Rights Art. 1 (June 12, 1776).}

This Article declares that the basic orientation of Virginia’s government is to secure “inherent rights”—including “the means of acquiring and possessing property.” At a minimum, these rights are consistent with eudaimonistic theories of politics, for all the rights declared aim ultimately at “pursuing and obtaining happiness.” Now, some communitarians might fear, and some extreme libertarians hope, that “happiness” here refers to an extremely subjective and self-regarding conception of individual well-being. In context, however, “happiness” as a public term of art meant a state of satisfaction in which reason uses the virtues to tame and regulate the passions. Rather than take my word for it, consider article 15 of the Declaration:

15. That no free Government, or the Blessings of Liberty, can be preserved to any People but by a firm Adherence to Justice, Moderation, Temperance, Frugality, and Virtue, and by frequent Recurrence to fundamental Principles.\footnote{Virginia Declaration of Rights Art. 15 (June 12, 1776).}
This declaration (and others like it\textsuperscript{145}) also confirms that Founding Era Americans promoted social virtues only in the indirect style suggested by Locke and Blackstone. Governments may encourage and inculcate virtues, but only the lowest-hanging fruits on the virtue tree. The list covers moderation, temperance, and frugality, but not religious orthodoxy, speculative excellence, the excellences of farming, business, or the martial life, or other rivalrous individual virtues.

This background explains, as standard property policy arguments do not, why property serves as the “keystone right” in many contemporary liberal societies.\textsuperscript{204} It is not that property rights are sacrosanct or free from any limits. Yet property serves as an organizing metaphor for a liberal political order. In \textit{Federalist 10}’s phrase, in a liberal order the “first object of government” is the “protection of the [diverse] faculties” “from which the rights of property originate.”\textsuperscript{146} The pre-modern society Aristotle presumed had economic scarcity, which created overwhelming political, economic, and familial competition. By tapping into human creative capacities, property reduces the scarcity and softens the competition. By transferring maximal control over wealth-creating resources to individuals, the liberal polity encourages citizens to practice and acquire virtues of industry, self-mastery, and moderation. In most eudaimonistic accounts, these virtues are fairly low virtues. Yet whatever their limits, industry and the other property-related virtues are necessary to any more complete account of happiness, and they are indispensable pre-conditions to the exercise of the higher virtues. Equally important, by focusing political “justice” on the protection of property, the liberal polity focuses the public’s attention on how well the government is enlarging interests that all can agree benefit all. It steers out of the realm of public justice controversial questions about supposedly true, guaranteed paths to universal peace and security in this life or salvation in the next.

It is worth clarifying what eudaimonistic rights theories do and do not hold. On one hand, they do make an important break with Aristotle. As Larmore explains, “Aristotle cannot be our guide” because “the cultivation of virtue . . . cannot be our common political bond, though

\textsuperscript{145} See, e.g., Northwest Ordinance (1787) Art. 3 (assuming “[r]eligion, morality, and knowledge [to be] necessary to good government and the happiness of mankind”); Massachusetts Constitution of 1780, Declaration of Rights art 3 (“the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality”).


\textsuperscript{146} \textit{FEDERALIST No. 10}, supra note 199, at 46. \textit{But see \textit{FEDERALIST No. 3}, supra note --, at 9, 10 (describing public safety as the first object of government).}
it keeps its importance in other areas of social life," specifically because “the meaning of life is a
natural object of disagreement.” On the other hand, this liberal eudaimonistic “outlook is not
the same as skepticism. . . . The point is that . . . we would be foolish not to expect our views to
meet with some disagreement in a calm and careful discussion.” And if reasonable friends
cannot agree about virtue or the meaning of life in calm and careful discussion, it is suicidal to
expect less-than-reasonable citizen-strangers to reach agreement in politics. Liberalism focuses
political life on the interests and virtues that politics can promote competently.

Of course, this eudaimonistic liberal outlook is not beyond criticism. Communitarians
may say that eudaimonistic liberalism mixes apples and oranges. It proposes a theory of
government predicated on rights, but it assumes the citizenry follows classical and medieval
principles of virtue that a liberal polity cannot reinforce. Separately, CLS theorists may say
that eudaimonistic liberalism encourages too much private oppression. Members of racial,
national, religious, or ideological groups can harass, stigmatize, or subordinate non-members, the
argument goes, as or more effectively in private associations than they can when one such group
seizes the levers of government. Pluralists may complain that eudaimonistic political rights
theories are still too demanding. Even though such theories are less demanding than virtue-
based theories of politics, they still allow a considerable amount of backdoor virtue regulation,
and they require citizens to subscribe to important common-denominator political opinions about
rights. In that respect, they are still significantly more conformist and communitarian than
pluralist accounts of liberalism. Aristotle suggests a fourth line of criticism: Any polity that
encourages technological development quietly destabilizes law, religion, and other influences
that form moral character. Here, it is enough to say that, in the political, theological, and
historical conditions of the contemporary world, there are important reasons why the political
community might make property rights and not virtue duties the core of the political order.

206 Larmore, supra note 167, at 195.
208 See, e.g., MACINTYRE, supra note 77, at 205 (modernity’s “liquidation of the self into a set of demarcated areas
of role-playing allows no scope for the exercise of dispositions which could genuinely be accounted virtues in any
sense remotely Aristotelian”).
210 See CLAEYS, supra note 179, at 224-30.
211 See POLITICS, supra note 137, II.8, at 1268b22-1269a28; Lord trans., supra note 137, at 72-73.
V. Reconsidering The Social-Obligation Norm and Land Virtues

A. Overview

Some readers might wonder whether I am leading up to suggesting that The Social-Obligation Norm and Land Virtues are fundamentally misguided. I am not. I do mean to push back against atmospherical suggestions in both Articles that contemporary property law “insulate[s] individuals from the demands of society,”211 or that flourishing or virtue duties should displace rights at the core of property. The former suggestions do not fairly characterize the bulk of American property law as I understand it.212 The latter raise philosophical problems not considered thoroughly enough in either Article.

Yet Alexander and Peñalver could accomplish many of their more specific intentions without these atmospherical suggestions. Property law can accommodate a considerable amount of virtue regulation without sliding down the slippery slope to ethnic expropriation and genocide as in Rwanda. Although Blackstone thought it inappropriate for the law to regulate private drunkenness, he defended on virtue grounds a “gleaning” exception to the common law of England, which entitled the poor to pick grain left over in fields after farmers had finished their harvests.213 Even now, obscene or pornographic materials, and property used in the course of obscene conduct, are usually subject to confiscation or forfeiture on the ground that they constitute nuisances against public morals.214

So let me turn briefly to the doctrinal topics on which The Social-Obligation Norm and Land Virtues specifically focus. I apply to both Articles the criteria Alexander follows explicitly and Peñalver follows implicitly. Both Articles are positive to the extent they “provide an explanatory account of doctrinal practices in which private owners are required to sacrifice their ownership interests in some way.”215 Both are normative to the extent that the virtue theories they propose rationalize “when and why [those virtue theories] justif[y] the political community’s requiring such sacrifices by private owners.”216

211 Alexander, supra note 4, at *1.*
212 See id.
213 See 3 BLACKSTONE, supra note --, at *212-13. Blackstone justified these laws on the ground that they inculcated charity, specifically as understood in the Mosaical law. See 3 id. at *213; accord THE BIBLE Lev. 23:22; id. Ruth 2:2.
214 See, e.g., Bennis v. Michigan, 517 U.S. 1163 (1996) (rejecting a due process challenge to a state prosecution confiscating a car used by a husband with a prostitute, even though the wife and co-owner of the car did not endorse or even know how her husband was using it).
215 Alexander, supra note 4, at *89-90.*
216 Id.
B. Nuisance Remedies

To keep the discussion manageable, let me illustrate with one point of contact with each Article. Most of what I have to say about *The Social-Obligation Norm* can be said using its discussion of nuisance remedy doctrine.217 Generally, equity presumes that a complainant is not entitled to equitable relief unless his remedy at law is inadequate.218 Nuisance law flips this principle, to presume that a land-owner is entitled to abatement if she is suffering a substantial and ongoing nuisance.219 Nuisance law flips this presumption once again, however, if the defendant can show that it and the local community will suffer hardship far greater from an order abating the defendant’s pollution than the plaintiff will suffer from being limited to damages only.220

This series of rules and exceptions confirms the point I made in Part I: *The Social-Obligation* sketches a relation between rights and responsibilities that is much richer and closer to the moral phraseology in doctrine than current scholarship. Nuisance remedies are simple but foundational elements of property doctrine. They are also extremely contested symbolic territory in legal scholarship, because of their close association with Calabresi and Melamed’s economic taxonomy of property rules and liability rules.221

If scholars assume that the deontology trap makes a clinching philosophical argument, nuisance’s pattern of rules and exceptions seems to make nonsense out of justice claims. If, however, property rights are understood in eudaimonistic terms, the philosophical account of rights and remedies are far harder to dismiss. One need not rely specifically on American natural-law/natural-rights theory or Nussbaum and Sen’s theory of human flourishing;222 most

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217 Alexander, *supra* note 4, at *103-13.*
219 See id. at 221-22 (suggesting that the court would deny the injunction only if the polluter could satisfy a “‘stern rule of necessity rather than on the right of the [polluter] to work a hurt, or injury to his neighbor’” (quoting Storey v. Central Hide & Rendering Co., 226 S.W.2d 615, 619 (Tex. 1950)); Quinn v. American Spiral Spring & Mfg. Co., 141 A. 855, 857, 858 (Pa. 1928) (internal quotations omitted) (holding that the defendant must move equipment in its iron and steel plant in order to minimize damage to a neighbor’s house and providing for an injunction if the defendant could not comply).
220 See, e.g., Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 873, n.* (N.Y. 1970) (noting the number of employees and the amount invested in a cement plant before declining to permanently enjoin the plant as a nuisance); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 661, 666-67 (Tenn. 1904) (declining to permanently enjoin mining and manufacturing operations, but granting damages, after comparing the value of the industry to the surrounding property).
222 See Alexander, *supra* note 4, at *13.*
eudaimonistic theories would converge on the following general justification. Owners’ eudaimonistic interest in labor vests owners not only with the control over their lots they get from trespass but also with a domain of practical discretion to choose how to deploy their land to many possible uses, for many possible individualized ends. This domain explains why nuisance law flips the presumption against equity, and “deontologically” makes polluters abate pollution threatening neighbors’ interests in the free and active use of their own property. Because all owners’ property rights are all grounded ultimately in similar eudaimonistic interests, however, the pollutees’ rights must be qualified “consequentially,” in cases in which an injunction threatens to restrain the like rights and underlying interests of the polluter and people who have close relations with the polluter. Because eudaimonistic property rights are oriented toward enlarging the free use of property understood as a practical interest, nuisance doctrine may rearrange or qualify legal rights by taking account of the consequences for the interests underlying the rights. At the same time, the eudaimonistic interests focus the consequentialist reallocation.

That said, I am concerned that The Social-Obligation Norm may overstate its positive claim in relation to nuisance remedies. I am a little unclear what precisely The Social-Obligation Norm claims to explain about remedial doctrine in nuisance. The Article could be read to claim that it provides the first significant explanation why nuisance cases that rely on theories of justice (not economics) qualify the entitlement to an injunction at all. If so, I am not persuaded. In American property law, many equity decisions relied on the common-denominator theory of natural law and rights described in part IV to explain when a nuisance plaintiff was no longer entitled to an injunction. Even Blackstone, author of the “sole and despotic dominion” definition of property, qualified that definition for external assets which “must still unavoidably remain in common” -- including “air, and water,” used by “mills, and other conveniences.” Nuisance remedy doctrine applies that proviso in straightforward fashion to pollution cases. In cases “of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property,” it has long been settled that nuisance “law must make

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

224 See supra section I.E.

228 2 BLACKSTONE, supra note 195, at *2.

229 2 id. at *14.
the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.”

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

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

The other period covers nuisance cases up through the 1960s. These cases do speak in the phraseology of justice and rights. Descriptively, however, I do not read them to apply a capabilities approach. If they did, courts would consider substantially whether the plaintiff’s rights claims should be qualified because the defendant’s land use supplies infrastructure contributing importantly to the plaintiff’s flourishing. The cases I regard as dominant do not rely


Some of the confusion here stems also from a tendency in the cases to describe property in terms of the common-place “right to exclude” described in Part II. See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wisc. 1997). As Alexander correctly notes, “exclude” focuses on the right without the correlative duty. If property refers to a domain of “[e]xclusivity,” the term “exclusive use” accentuates the fact that boundaries steer parallel discretion to many different owners simultaneously. See sources cited supra note 120.

225 See Calabresi & Melamed, supra note 224, at 1116.

226 Alexander, supra note 4, at *107-08.*

233 257 N.E.2d 870 (N.Y. 1970). In fairness, even after Boomer, many modern cases continue to weigh the equities more skeptically than Boomer encourages. See, e.g., Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Civ. App. 1973). Even in Boomer, on remand, the trial court awarded the plaintiffs quadruple the actual damages it had determined they had suffered before appeal. See Daniel A. Farber, Reassessing Boomer: Justice, Efficiency, and Nuisance Law, in Property Law and Legal Education: Essays in Honor of John E. Cribbet 7, 8-11 (Peter Hay & Michael H. Heoflich eds., 1988). For a skeptical account of Boomer, consider Roger Meiners & Bruce Yandle, Common Law and the Conceit of Modern Environmental Policy, 7 GEO. MASON L. REV. 923 (1999).

234 RESTATEMENT (SECOND) OF TORTS §§ 826-28 (1979). I might use a theory of justice to interpret an instrumentalist opinion if the opinion’s instrumentalist arguments if the instrumentalist arguments are so question-begging they seem likely to be recasting instrumentally latent and unarticulated claims of justice. Posner’s economic analysis of adverse possession reads this way to me. See supra section I.E. That possibility might apply to economic analysis of nuisance remedies generally, but whether it does or not is a question too complicated and tangential to explore here.
significantly on this factor. They focus instead first on whether the noxious pollution is the product of “a lawful enterprise engaged in the utilization of a natural product of the community in the manufacture of a useful and necessary commodity,” and then on whether the economic hardship to the defendants and others greatly outweigh the plaintiffs’ hardships.235

In this phrasing, it does not matter whether there is a “nexus between the [defendant] whose activity is under challenge and the goods necessary to a well-lived life.”236 The first consideration is simply whether the defendant’s product is legitimate -- “lawful,” “useful,” or “necessary” -- and the second then asks whether the defendant’s hardship is an order of magnitude larger than the plaintiff’s. This approach avoids (at least, as much as the law can) playing favorites among different legitimate uses. If the defendant’s use hits the plaintiff where the plaintiff lives, at first blush it ought to be abated -- not because it is per se valueless, but because the defendant’s use steals more than its fair share of active use discretion. If the hardship to the defendant and other parties dependent on it greatly outweigh the hardship to the plaintiff, however, the plaintiff’s interest in use choice must give way to the similar but greater interests of the defendant and its associates.227

Alexander may instead be making a normative argument, that the Sen-Nussbaum capabilities approach adds a consideration that is not now but should be added to in current nuisance doctrine. Here, however, I have serious questions. Residential plaintiffs and defendant factory owners both contribute by their uses to different capabilities and modes of flourishing in a well-ordered society. Since the capabilities approach cuts both ways, the court must cut through the parties’ competing arguments by prioritizing the parties’ land uses according to local conceptions of flourishing. Some cases take an approach similar to this, but they have not gained traction largely because of that political judgment.238 For reasons Henry Smith sketches in his

235 King v. Columbian Carbon Co., 152 F.2d 636, 638 (5th Cir. 1945). See also Storey v. Central Hide & Rendering Co, 226 S.W.2d 615, 617 (Tex. 1950) (“lawful” activity); H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS: INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 1182 (3rd ed. 1893) (“[T]he effect upon the defendant’s business and interests will be considered.”).

236 Alexander, supra note 4, at *109-11.*

227 Provided the law recognizes that the plaintiff has suffered some invasion of rights, and requires the defendant to pay compensation for the invasion.

238 Carpenter v. Double R Cattle Co., 701 P.2d 222, 227 (Idaho 1985), takes this approach, but the case is regarded as an outlier. See, e.g., RICHARD A. EPSTEIN, TORTS § 14.4, at 361 (2001) (praising the “strong dissent” for “rightly denouncing” the majority’s approach).
Response, I find the approach taken in pre-Boomer nuisance cases more palatable because it is
less political.\textsuperscript{239}

C. Trespass Liability

One may fairly wonder whether I am too pessimistic. Perhaps public officials can use
prudence and other virtues we associate with statesmen to mediate the concerns I have raised. I
have two reactions. First, since Alexander and Peñalver are going against deep legal and
political design principles in the law, I think they bear the burden of convincing pessimists like
me that they are not opening Pandora’s box. Second, some of the examples in the Articles
confirm my concerns.

Let me illustrate with a point of contact from \textit{Land Virtues, State v. Shack}.\textsuperscript{240} Let me
state at the outset that, while I am critical of \textit{Shack}, I do not think its holding is disastrous.
American law muddles along tolerating other unjustifiable exceptions on trespassory rights,\textsuperscript{228}
and it has also survived \textit{Shack} without sliding down the slippery slope sketched at the end of Part
III of this Response. Even so, one lesson from virtue ethics is that people become vicious not in
big steps but by habituating themselves not to act virtuously in a series of small steps. \textit{Shack} is
the legal equivalent of one of these missteps, and \textit{Land Virtues}’ treatment of the case is
troubling.

In \textit{Shack}, a federal Legal Services Corporation ("LSC") attorney and a federal anti-
poverty ("SCOPE") field worker went onto a farm to meet migrant laborers who were working
that farm and being housed at a camp site on it.\textsuperscript{229} The farm owner denied their request to meet
the laborers in their camp and offered to produce the laborers to the LSC attorney and SCOPE
worker instead. When the attorney and field worker declined this offer and refused to leave, the
farm owner instituted a criminal trespass action.\textsuperscript{230} To reverse the attorney and fielder worker’s
convictions, the New Jersey Supreme Court qualified the possessory interest in exclusive control
at the core of trespass, so that the owner’s right to exclude turns on whether the utilities in favor
of exclusion outweigh the utilities in favor of no exclusion. In \textit{Shack}, the migrant laborers’

\textsuperscript{239} See Smith, \textit{supra} note 113, at *124-25*.
\textsuperscript{240} 277 A.2d 369 (N.J. 1971).
\textsuperscript{228} See, e.g., Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 77, 88 (1980) (holding that a state law did not violate
property rights when it prevented a private shopping center from excluding individuals seeking signatures for a
petition).
\textsuperscript{229} See \textit{Shack}, 277 A.2d at 370. “SCOPE” stands for “Southwest Citizens Organization for Poverty Elimination.”
\textit{Id.}
\textsuperscript{230} See id. at 370-71.
dependent condition and possible exploitation tipped the balance. Peñalver cites this case as a good example of virtue ethics in action; it illustrates the social responsibility of farmer-owners to respect the obligations of justice understood as respect for the minimal conditions the migrant workers need to flourish.

In my legal opinion, and contrary to Peñalver’s, Shack departs substantially from foundational principles of trespass. As a first approximation, trespass law presumes that “[a]ny physical entry upon the surface of the land is a trespass,” or (in Blackstone’s words) that “every entry [on the owner’s soil] without the owner’s leave, and especially if contrary to his express order, is a trespass or transgression.” There have always been exceptions to this rule (private necessity), of course, and the law continues to develop new ones (airplane overflights). I doubt Shack can be justified as such an exception, and the fact that Shack has not been followed often suggests to me that other courts doubt its holding “fits” basic trespass principles.

Separately, there are good reasons for suspecting that there was more blame to go around in Shack than the case’s statement of facts suggests. Because the convictions were not defended on appeal, the careful reader must discount for the possibility that the record on appeal was one-sided. The case was also prosecuted as a criminal-trespass action against the LSC and SCOPE workers. Although government-funded advocates are not the same as police or other government executive officers, a court might reasonably conclude that any criminal-trespass holding against the former might set a precedent against the latter. Moreover, the LSC and SCOPE workers were trespassing on the farm owner’s property to protect the interests of migrant farm workers, a generally unrepresented class. At the same time, the New Jersey Supreme Court acknowledged euphemistically in Shack that “[d]ifferences had developed between” the farm

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231 See id. at 373-75.
232 Peñalver, supra note 5, at *232.*
234 3 BLACKSTONE, supra note 195, at *209.
owner and the legal-service attorney and the field worker in previous confrontations. Inquiring minds would want to know more about those differences.

Farm owners and migrant advocates have fought one another bitterly in farm communities since the LSC was established, and both groups have their own virtues and vices. Legally, these disputes center on whether farmers follow applicable migrant-assistance laws, health and safety laws, and wage laws, and on whether migrant workers should unionize. Politically, these lawsuits are understood by the contestants to be a stand-in for a more fundamental virtue conflict: whether farmers or agricultural-union leaders and government-funded lawyers and caseworkers deserve to be the “leading citizens” in agricultural communities. Advocates and union organizers think that many farm owners are racist or domineering, and that owners subordinate their migrant laborers to keep them ignorant of their wage and union rights. For their part, farmers think the advocates and union organizers are carpetbaggers and socialists, who assume that the justice of their cause allows them to disobey basic property laws.

With that context, Shack does not seem sympathetic or imaginative enough to the owner’s claim of injury. When the law presumes that every entry is a prima facie trespass, one of the things it does is to protect an owner’s interest in not having her land commandeered by a stranger to broadcast a message to which the owner objects. First Amendment “compelled speech” doctrine focuses on this problem more than property or tort scholarship do, but trespass institutionalizes the same principle by presuming harm from an entry without proof of actual damage. Blackstone’s gleaning doctrine is exceptional, but one assumes the exception does not let gleaners go looking for violations on the farm they can report to local authorities. Maybe the euphemistic earlier “disputes” occurred because on previous occasions the LSC attorney and SCOPE field worker had fomented dissension between the farm owner and his farmhands. Later after Shack, in the 1970s and 1980s, LSC personnel ran institutes training field workers to conduct surveillance explicitly modeled after military warfare and reconnaissance

240 See id. at 1005-06.
243 See, e.g., Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (“this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only”).
techniques. These materials encouraged researchers to conduct “muckracking,” specifically with a view toward “neutraliz[ing] opposition.” Land owners might not have been able to stop trainee-lawyers from meeting with potential clients, but one can understand why they might not have wanted to contribute their own property to such adversarial surveillance. Of course, maybe the farmer in Shack had previously mistreated his laborers in ways that the LSC attorney and the SCOPE field worker had a right and responsibility to prevent. Still, given what Shack does say, and given what later became known about LSC information-gathering techniques, the farmer’s perceived interest is more significant than the case or most commentary suggests.

That background helps clarify why Shack is so problematic as an illustration of virtue theory in practice. First, virtue politics could easily make the confrontation in Shack more extreme than it was. As Alasdair MacIntyre has explained, every particular theory of virtue “claims not only theoretical, but also an institutional hegemony” for the virtue at the top of its theoretical pyramid. In a virtue regime, the farmers would argue that industry, attachment to the land, and the other farming virtues deserved to be the hegemonic virtues; migrant advocates and agricultural-union leaders would tout social justice and benevolence. In a dispute like this, “justice” cannot serve as the decisive virtue, contrary to Land Virtue’s suggestion. Aristotle defines distributive justice as a principle by which citizens enjoy the benefits of political society in proportion to the extent to which they contribute to the society’s common good. Land Virtues assumes that justice is on the side of the government-funded migrant advocates, but this assumption begs many unanswered questions about how the political community defines the common good -- in terms of numerical equality, wealth, breeding, intelligence, or the factious criteria likely to matter in Shack. Virtue theory establishes an argument structure that acknowledges that some people and interests are more virtuous than others, but in practice it does not help determine which virtues are in fact the most virtuous. That combination is the worst of both worlds; it escalates disputes like Shack.

Next, Shack’s holding compresses the spheres of ethics and politics, and it confuses the distinctions between and the proper roles of different virtues. Again, Land Virtues uses Shack to illustrate the potential of the virtue of “justice.” I would say that the virtue that best justifies

244 BARRY GREEVER, STRATEGIC AND TACTICAL RESEARCH POWER STRUCTURE ANALYSIS 14, 16 (1981); see id. at 58.
245 MACINTYRE, supra note 77, at 186.
246 See NICOMACHEAN ETHICS, supra note 14, V.4-5; Sachs trans., supra note 14, at 85-91.
Shack’s holding is “charity.” But that cannot be right, because charity is an ethical virtue, not a political one. As Robert George explains, legally coerced charity is in an important sense not really charity at all: “compelling the expressing of gratitude, or the giving of gifts . . . where people ought to express gratitude [or] give gifts . . . would have the effect of robbing these important practices of their meaning and value in social life.” If, on the other hand, Shack instead reflects “justice,” it conflates ethical justice, an actor’s right actions in his individual conduct in relation to others, whoever they may be, with political justice, an actor’s right action in relation to other citizens. It is not very far from that state to the rule of philosopher-kings.

That theoretical confusion can have palpable practical consequences. Exclusive property rights facilitate social interactions. By establishing an owner as the gatekeeper, they let him establish relations with the one person he chooses to let in through the gate and not with the nine he prefers to exclude. Such relations provide the starting point for the mutual exercise of basic virtues like civility. Shack interferes with this process for establishing the virtues. One might say that Shack is different, because the farm owner has already established social relations with the migrants, which relations Shack merely seeks to equalize. But such efforts can backfire. For example, in the 1980s and 1990s, a successful California fruit farmer custom-built $1.6 million in duplex houses for 400 migrant workers. After California legal-services lawyers sued him for overtime wages (worth $1,971.60), he had the duplexes tore down to avoid exposing his business to further litigation or harassment.

Finally, Shack can be understood not as an application of virtue ethics but rather as an illustration of judicial hubris and self-deception. Imagine a situation in which a large boy takes a large coat belonging to a small boy, and then forces the small boy to take his small coat in exchange. The example reinforces how porous “justice” as a political concept, for legal justice favors the small boy and translegal justice favors the large boy. Xenophon used this example in the Cyropaedia, however, to teach a deep lesson about the motivations of those who seek public office. As a young boy, before he becomes King of Persia, Cyrus sits in judgment over the two boys and judges that the big boy acted justly. His tutor beats him because, in Persia, a

247 GEORGE, supra note 88, at 44. George follows here an insight made by Aristotle in the NICOMACHEAN ETHICS, supra note 14, II.5.
248 See PENNER, supra note 226, at 74-75.
251 XENOPHON, CYROPAEDIA I.3.16-17, at 40-43 (G.P. Goold ed. 1994) (1914).
republic governed under the rule of law, justice means legal justice. Cyrus gets beaten because he is disposed to prefer translegal justice. By wishing to sit in a position where he may supply translegal justice to others, Cyrus manifests a disposition to want others to be dependent on him as small children are to a patriarch. Cyrus suffers from self-deception. He professes to love perfect justice, but his “ways of justice subordinate justice to his imperial enterprise.”

A fully capacious conception of virtue jurisprudence must consider and in what circumstances whether judges can withstand the self-deception Xenophon portrays in Cyrus. As a matter of virtue jurisprudence, maybe decisions like *Shack* display prudence, equity, and other judicial virtues. After all, *Shack* does establish a departure from ordinary boundary rules, not followed in other fields of trespass law, to protect a powerless class of individuals and their lawyers. On the other hand, decisions like *Shack* could also reflect a complicated tyrannical impulse. Judges might think they are doing what is equitable and prudent, when in reality they are appealing to a perfectionist theory of politics to change the law, to favor some partisans over others, and to do all this in a manner encouraging all parties to become dependent on them. Of course, in cases like *Shack*, maybe judges who claim only to be “following the law” are in reality favoring the existing power structure -- and deceiving themselves about their motivations. But if both sets of partisans may use virtue theory to criticize judges for being self-deceived and tyrannical, it just goes to show that virtue theory exacerbates politics.

To be sure, the law and political leaders could diminish the possibility of judicial vice, by resolving the access dispute with general legislation. Such legislation could regulate the access of LSC lawyers and government-funded field workers to migrants on farmer property to certain regular hours. Or, the local community could build a public hall where LSC lawyers and field workers could talk to migrant workers. Citizens follow general laws like these more obediently than court orders they regard as the products of the caprice of individual judges. Here, prudence would have to judge -- whether the law protected each party’s claim, stopped each party from grandstanding, defused the distributive fight driving the dispute, or integrated the dispute into broader disputes about related issues. These possibilities do confirm that virtue

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252 See *id.* at 1.3.17-18, at 42-43.
253 See Robert Faulkner, *The Case for Greatness: Honorable Ambition and Its Critics* 144 (2007); *see id.* at 140-44.
254 I thank Peter Byrne for encouraging me to consider this possibility.
255 See *Nicomachean Ethics*, supra note 14, X.9, at 1180a22-24; Sachs trans., *supra* note 14, at 198.
theory can apply to disputes like *Shack*, and in a humane way. But applying it is quite complicated, even in a fairly low-stakes cases like *Shack*.

**Conclusion**

For far too long, instrumentalist legal scholars have dismissed philosophical legal scholarship with a two-step trap: Deontological philosophy can be ignored because it is too doctrinaire; and any other philosophical account of law can be ignored because it is incoherent. This trap is overdrawn. The deontology trap does not apply to virtue ethics, many theories of natural law or rights, or many other eudaimonistic theories of practical philosophy. By dismissing these theories so quickly, contemporary legal scholarship is cutting itself off from serious engagement with a wide range of important sources. By injecting this tradition of practical philosophy into property scholarship, *The Social-Obligation Norm* and *Land Virtues* provide two model scholarly examples how not to get bogged down in the deontology trap.

On the other hand, in virtue ethics and in political-philosophy scholarship, scholars still regard it as an open and extremely important question whether the prescriptions of virtue ethics can be transplanted from the field of ethics back to the field of politics. This Response has sketched several reasons, persuasive in their own right and prominent in the development of Enlightenment liberalism, why this reimportation project might backfire. Neither *The Social-Obligation Norm* nor *Land Virtues* considers adequately how virtue theory might destabilize property law -- or property’s function as an organizing metaphor for rights-based politics.

This background does not totally undermine *The Social-Obligation Norm* and *Land Virtues*. But the background does complicate their story. If virtue theory deserves to be used in property law, there are good reasons for suspecting it belongs around the law’s margins and not at its foundations.