

# PRIVATE OWNERSHIP AND HUMAN FLOURISHING: AN EXPLORATORY OVERVIEW

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“Property belongs to a family of words that, if we can free them from the denigrations that shallow politics and social fashion have imposed on them, are the words, the ideas, that govern our connections with the world and with one another: property, proper, appropriate, propriety.”<sup>1</sup>

## 1 Introduction: Imagination and the weight of the past

South Africa’s ongoing journey of social transformation has included an effort to reassess private property as a defining national institution, particularly private rights in land and natural resources. In calm times, a society typically takes its property regime for granted, giving little thought to its origins or possible alternatives. For South Africa, though, times remain agitated and need-filled. Appropriately, legal scholars and others are taking a hard look at the nation’s property systems and cultures, asking basic questions and revisiting fundamentals.

This article on private property is wide-ranging and suggestive, and meant to contribute to this on-going review. It begins from three, related places. In a thoughtful introduction to a recent book on property, scholars Hanri Mostert and Thomas Bennett contend that “the only legitimate reason for the existence of property rights is their contribution to human well-being”, which is to say, they explain (borrowing from an American legal scholar), their contribution to “human flourishing”.<sup>2</sup> Individuals flourish when they enjoy opportunities “to become fully developed persons in a particular social context”.<sup>3</sup> Private ownership, they state, needs to foster this goal, better than it has. Mostert’s and Bennett’s policy stance connects with the lofty aims of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which supply a second point of beginning. The Constitution calls for a new social order in which all South Africans are adequately fed and housed and enjoy freedom, dignity, and equal treatment.<sup>4</sup> This new order should include, the Constitution instructs, widespread, equitable access to land and natural resources along with land restitution and improved security of land tenure.<sup>5</sup>

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<sup>1</sup> W Berry “Whose Head is the Farmer Using? Whose Head is Using the Farmer?” in W Jackson, W Berry & B Colman (eds) *Meeting the Expectations of the Land* (1984) 19, 30

<sup>2</sup> H Mostert & T Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) 5 quoting MJ Radin “Property and Personhood” (1981) 34 *Stan L Rev* 957 1001

<sup>3</sup> Mostert & Bennett (eds) *Pluralism and Development* 6

<sup>4</sup> Ss 1, 9, 10, 11, 26, 27 of the Constitution

<sup>5</sup> S 25

Providing a third departure point are various writings in which Professor André van der Walt questions the prevailing intellectual understanding of property at law.<sup>6</sup> Ideologically dominant today, Van der Walt laments, is a “rights paradigm” of ownership that frames and constrains public thought about private rights. It is a paradigm that serves “to resist or minimise change, including change brought about by morally, politically and legally legitimate and authorised reform or transformation activities”.<sup>7</sup> The time has come, he contends, to entertain “fundamental challenges to the very foundations of the existing property regime”.<sup>8</sup> The rights paradigm itself needs revision if not replacement. So long as the paradigm remains dominant and “frustrates reformist or transformative policies, it is difficult to imagine theoretical space where further and stronger justice-inspired reforms of the property regime can be developed”.<sup>9</sup> As for legal change, it must reach beyond “interventions in the current distribution of property rights and privileges” to include “reform of the system of property rules and practices as such”.<sup>10</sup>

These three points of beginning pose a number of vital, insistent questions, perhaps most cleanly presented in Mostert’s and Bennett’s chosen language: In what ways does private ownership relate to human flourishing, understood in light of the Constitution? What is the nature of the linkage, and how complex is it? Finally, if as Van der Walt contends an intellectual paradigm shift is needed, then what old modes of property thought should be pruned and what new ideas fertilised?

This article engages with these fundamental questions, though necessarily, given space constraints and the subject’s breadth, in the form of an overview. Its central aim is to identify the many ways that private property relates to human flourishing. The task is challenging, both because human flourishing is a complex ideal and because inherited assumptions about private property are deeply rooted. The work requires (to use Cicero’s much-quoted words) that one escapes the tyranny of the present, perhaps as a prelude to major reform, perhaps instead as a means of confirming the wisdom of long-standing arrangements.

A review of private ownership calls for a clear-eyed look at the institution and how it functions. It also requires a normative assessment of its many consequences and a fair-minded admission of the ill effects that private ownership can and does have for many people. This article engages the foundational questions from a progressive perspective, as do Professors Mostert, Bennett, and Van der Walt. But the article’s chief value lies, not in its proposed normative stances (which are, due to space, only hastily defended),

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<sup>6</sup> Van der Walt, Mostert, and Bennett are by no means the only scholars writing on the subject. Recent writings by others include, for instance, A Price “The Influence of Human Rights Law on Private Common Law” (2012) 129 *SALJ* 330; GS Dickinson “Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing in Johannesburg” (2011) 27 *SAJHR* 466; FI Michelman “Liberal Constitutionalism, Property Rights, and the Assault on Poverty” (2011) 22 *Stell LR* 706

<sup>7</sup> AJ van der Walt *Property in the Margins* (2009) viii

<sup>8</sup> 14

<sup>9</sup> ix

<sup>10</sup> 10

but instead in its dissection of the institution and its probing of the complex links between ownership and flourishing. That intellectual framework should aid readers regardless of normative or political leanings, as well as readers in other nations with similar liberal ideals.

The article is organised into six substantive parts. The first sets the stage by surveying the elements of human flourishing in its full complexity, paying attention, as appropriate, to the flourishing of non-owners as well as owners. The second part considers the many ways that private ownership can either increase or decrease that flourishing. It digs deeply in the sense that it looks not merely at private ownership in isolation but considers private property as the foundation of a market economy and as a legal arrangement that, in operation, has facilitated widespread economic inequality. An assessment of private ownership becomes fuller and more complex when these social realities are part of it.

The article's third part looks at the morality of private ownership, a necessary inquiry given the ways private property can operate to decrease as well as increase human flourishing. The argument here – to look ahead – is that private ownership as commonly known can only be justified morally on consequentialist grounds; that is, it can be legitimate only insofar as it brings net benefits to almost everyone. It is not enough to point out the many ways private property expands the liberties and flourishing of the owner. The fourth section extends this moral inquiry by taking up a common claim: Property law today may not be ideal, it may not even be legitimate, but we are nonetheless committed to it because of overriding needs for stability in property entitlements. It is a powerful argument, and deserves careful attention. How much stability do we need for private ownership to yield its many benefits, and stability of what type? The question is central to every property reform effort.

The two final parts return to the opening claims of leading South African scholars. Van der Walt points to the need to reconsider the “rights paradigm” in property. As part five notes, however, the rights paradigm is only one of several inherited ideas about ownership due for reassessment. Indeed, most Western ways of discussing property share the same conservative limitations as the rights paradigm: They too serve to entrench current entitlements, to divert attention from property's dark sides, to forestall serious moral engagement, and to cast doubt on democratic reforms. The final part identifies possible new directions, highlighting two provocative strands of what is termed progressive property thought.

## **2 The many elements of human flourishing**

Human flourishing is a complex topic of inquiry yet it is possible to sketch its many elements rather quickly. For starters, people need food to survive and thus places where they can gain the food. They need shelter from the elements and physical places where they can live, thrive, and enjoy privacy. Increasingly they need education and access to professional health care. Particular resources and landscapes hold special values for people, so access

to them also plays a role. According to many, people can thrive only when they enjoy chances to develop themselves fully – their talents and personalities – and to exercise skills in meaningful ways.<sup>11</sup> Such flourishing is possible only when people feel stability in their lives and have confidence in their ability to meet basic needs over time; confidence in eating regularly, sleeping safely, and avoiding undue dangers.

Aside from such obvious matters, human flourishing is linked to stable communities and sound interpersonal relations. Necessarily this means stability in land-occupancy arrangements and in one's ability to live in a place without disruption, with family and friends. According to happiness studies, wealth beyond reasonable levels brings only modest gains to individual well-being: social relations, respect from others, and a sense of accomplishment all count as much or more.<sup>12</sup> A longstanding claim is that people gain full satisfaction only through public engagement and service to others. Similarly, some forms of flourishing require chances to perform before crowds, to teach or lead others, and otherwise to engage with groups. In short, humans are social beings and thrive in social settings.

Human flourishing can be understood as an all-inclusive category, one that draws in every factor related to happiness, health, and welfare. It seems useful, however, to tease out of this rich composite two particular components of flourishing, which could also stand apart as separate goals for a well-designed property-ownership system.<sup>13</sup>

One quasi-distinct component is the ideal of equality or fair, proportionate treatment. Any individual might gain happiness by rising above and exploiting other people. But for a society as a whole, plentiful evidence suggests that inequality diminishes overall human welfare.<sup>14</sup> It reduces welfare for the dominated and mistreated while fuelling widespread, costly social ills. Accordingly, greater social equality tends to promote overall human well-being, including the happiness of the most well-off.

The other quasi-distinct component of human flourishing, usefully considered separately, has to do with our planetary home. At some level, human flourishing requires the good care of land to keep it ecologically productive. A well-designed property regime would encourage if not insist upon ecologically sound land uses. Legitimate concerns for the land, however, can extend beyond nature's ability to meet today's human needs. Moral concerns can extend to future generations, including them within the community of people whose flourishing is morally important. When they are included, good land use – a goal of a property regime – would include the conservation of land for their enjoyment. In a similar way, moral concerns about nature can be based

<sup>11</sup> For example, MC Nussbaum *Creating Capabilities: The Human Development Approach* (2011); A Sen *The Idea of Justice* (2009)

<sup>12</sup> E Deiner & R Biswas-Diener *Happiness: Unlocking the Mysteries of Psychological Wealth* (2008); J Bronsteen, C Buccafusco & J Masur "Well-Being Analysis vs Cost-Benefit Analysis" (2013) 62 *Duke LJ* 1603

<sup>13</sup> I thank Joe Singer who, in comments on a draft of this article, drew attention to this point

<sup>14</sup> For example JE Stiglitz *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2012); T Noah *The Great Divergence: America's Growing Inequality Crisis and What We Can Do About It* (2012)

on claims that nature itself – or parts of it, particularly other species – possess intrinsic value, which we ought to respect. In any event – whether concern for nature and future generations is a separate goal, or instead a component of overall long-term human flourishing – ecological considerations should feature prominently in the normative aims of a private-property regime.<sup>15</sup>

These days, economic calculations are often used to estimate overall human welfare. The standard economic tools used for this purpose are helpful enough, but they need to be used cautiously given their embedded assumptions. For one, most welfare calculations simply measure the monetary values of market transactions.<sup>16</sup> They evaluate transactions only in terms of money spent, and include in the calculations all market transactions, whether or not they promote flourishing. Thus, money spent on security guards to protect the wealthy is just as socially beneficial as the same amount of money spent on early childhood education. Similarly, rises in diseases are economically good when they stimulate increased spending on health care. Economists are hardly unaware of this problem and sometimes make adjustments. But the more that economic models are altered to deal with such defects, the more they cease being anything special in the way of an assessment methodology; the more they become, instead, simply all-things-considered assessments of all relevant factors (a summing up in which economists have no especial expertise). In addition, the preferences people express as individual consumers in the market often differ considerably from the ones they express as citizens in the voting booth.<sup>17</sup> For that reason (and others like it), the satisfaction of individual preferences through the market (the most common economic welfare measure) is not the same as satisfying preferences people have as citizens – preferences that they can satisfy only by working together through public means.<sup>18</sup>

As this suggests, human flourishing is a complex, pluralistic vision.<sup>19</sup> Simply to see the complexity, though, is an important lesson, and so is the

<sup>15</sup> The progressive literature critiquing private property in ecological terms is substantial. For example ET Freyfogle *The Land We Share: Private Property and the Common Good* (2003) (citing sources); TW Frazier “The Green Alternative to Classical Liberal Property Theory” (1995) 20 *Vt L Rev* 299. Two works that deserve broad audiences are CA Arnold “The Reconstitution of Property: Property as a Web of Interests” (2002) 26 *Harv Envt'l L Rev* 281; ML Duncan “Reconceiving the Bundle of Sticks: Land as a Community-Based Resource” (2002) 32 *Envt'l Law* 773.

<sup>16</sup> The assumption is that money spent by consumers satisfies their individual preferences and thus increases their welfare. The contrast of preference-satisfaction with flourishing is considered in GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1859 (“unlike the concept of welfare, as that concept is commonly used in law-and-economics scholarship, human flourishing is not solely a matter of satisfying personal preference nor solely a matter of agency sovereignty”).

<sup>17</sup> M Sagoff *The Economy of the Earth* (1988) 51-57, 65-67.

<sup>18</sup> This important reality – too often overlooked – can be illustrated with the well-known story of the tragedy of the commons, the tragedy that arises when (to use one popular example) the cattle grazers on a commons each add more cattle, leading to overgrazing and ecological decline. As often noted, it makes economic sense for an individual grazer to add more cattle, because the extra forage eaten by the cattle is all gain for the grazer. But it also makes economic sense for the grazer to join with others to reduce grazing to protect the commons for the long term. The latter choice is one that the grazer would make as a citizen, in common with others. The former choice is the one that grazer would make in isolation, as a market participant. Both are economically rational, which is to say economic rationality can differ greatly depending on the mode of decision-making.

<sup>19</sup> On the pluralism of human flourishing see GS Alexander “Pluralism and Property” (2011) 80 *Fordham L Rev* 101; DB Rasmussen “Human Flourishing and the Appeal to Human Nature” (1999) 16 *Soc Phil & Pol'y* 1.

lesson that human flourishing is deeply laced with moral and prudential choices. As noted, sound thinking about overall flourishing should consider our foundational dependence on nature and ecological health. Sound thinking should also recognise the many ways communities are more than the sum of their individual parts, the ways that, like natural systems, social communities have emergent properties that add to human flourishing. People do not typically flourish in isolation, any more than they thrive on lands that are ecologically impoverished. They require social roles and satisfying relationships, which is to say communities of varying sizes.

Given this complexity, it is no easy task to come up with a formula or set of measures to gauge human flourishing. But the task must be undertaken if a property system is to function well. If human flourishing is the goal – and thus the measuring stick for assessing today’s regime – we have no choice but to give content to the ideal.<sup>20</sup>

### 3 How private ownership relates to human flourishing

How then does private ownership relate to human flourishing? A short answer is easily given: it does so in multiple, contradictory ways, aiding flourishing in some ways and detracting from it in others, depending on how flourishing is defined and on the structure and operation of the property regime being assessed.

#### 3.1 The owner, neighbours, and nature

In many obvious ways private ownership can aid an individual owner. It can supply land for growing food; it can supply places to live, work, play, and worship; it can provide security in tools and other possessions; and it can provide places to gather with friends. In terms of satisfying such basic needs,

<sup>20</sup> Having proposed overall human flourishing as the normative aim of private property, it is useful to consider what alternative aims a property regime might have. One alternative is that property simply exists on its own; it is based on some Ideal or Form or otherwise can really take only one basic shape. That stance (briefly discussed below) is hard to support given the wide variety of property regimes that exist and have existed in the world. A much-different stance is that property should aim to promote, not humans as a discrete species, but the entire community of life – what American conservationist Aldo Leopold termed the land community. ET Freyfogle “Leopold’s Last Talk” (2012) 2 *Wash J Env’tl L & Pol* 236; P Burden “What Is Good Land Use? From Rights to Relationships” (2010) 34 *Melbourne U L Rev* 708. That stance would insist that property owners use nature in ways consistent with its ecological health – an overriding aim, but one that still leaves considerable flexibility for human choices, and thus room to pay attention also to other aspects of human flourishing.

The main alternative to human-flourishing is a much-narrower normative view that links property to the welfare of owners with no direct concern for the non-owners, future generations, and the larger ecological landscape. A version of this approach visible in American scholarship proposes, in effect, that property norms should facilitate transactions among property owners, enabling owners to maximise market values and shifting assets to their highest (market) valued uses. For example HE Smith “Property as the Law of Things” (2012) 125 *Harv L Rev* 1691; LA Fennell “The Problem of Resource Access” (2013) 126 *Harv L Rev* 1471. The guiding assumption is that widespread commodification and the free transferability of property (with low transaction costs) offer the best arrangement, although the approach lacks a normative means of defining “best” and resorts to a tautology (a result is best if a free market produces it). Property is chiefly a tool that owners use to get ahead by negotiating. It is not a social arrangement that society structures and reforms over time to promote social aims and ideals, nor are property regimes criticised for fostering social ills (for example, economic inequality, exploitation, ecological degradation, declines in democracy).

private ownership clearly benefits the owner, enhancing her flourishing. These are important points, and they provide the point of beginning.<sup>21</sup>

To take the next step, digging deeper, it helps to distinguish between a private property regime (using land as the clearest example) and a less-ordered land-use arrangement, one in which might makes right. In a lawless world, a person with power can stake out territory and keep other people away, enjoying exclusive use. This arrangement resembles a property system, but we would not typically term it private property, and for good reason. Private property does not emerge when a person seizes land and says “this is mine”. It arises only later, when other people accede to the claim and largely respect it.<sup>22</sup> Private property, that is, is not merely a way of carving up territory among hostile parties. It is a social arrangement that somehow arises among members of some tribe, extended family or other social collective. Private ownership is a way of sharing a landscape that is more or less respected by members of a group. The group order might rest on duress or autocratic power or it could function more democratically. The norms governing ownership could be upheld by stern enforcement mechanisms; instead, people might respect them voluntarily. But some social order is essential before we can say that a particular people embrace private property.<sup>23</sup>

To this need for a social order and collective agreement we can add the inevitable presence of physical scarcity. Scarcity exists when resources are not plentiful enough to satisfy the desires of all. It can also exist when resources are plentiful but vary in quality and location, leading to excessive demand for more valuable options. Scarcity calls for a method of rationing or allocating resources among competing claimants. It also means, by definition, that the control of land or resources by one person necessarily reduces options for other people. To this extent (and without yet taking up other factors), the recognition of property rights in some people (thus promoting their flourishing) can and does decrease the flourishing of other people – the people who have no property or less desirable property.<sup>24</sup>

This reality is easily seen in landscapes in which everything is owned and yet many people remain landless.<sup>25</sup> In a world without private ownership (as

<sup>21</sup> I put to one side as relevant but tangential the longstanding claim (made strongly by Plato and later Christian writers) that private ownership has ill effects on the character of the owner LC Becker *Property Rights: Philosophic Foundations* (1977) 96

<sup>22</sup> CM Rose “The Moral Subject of Property” (2007) 48 *Wm & Mary L Rev* 1899 (“claims to property only make sense in a social context where there is some level of cooperative behaviour”); J Brewer & S Staves (eds) *Early Modern Conceptions of Property* (1996) 3

<sup>23</sup> A useful recent study on the social emergence of norms is PH Robinson “Natural Law and Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors” (2013) *U Ill L Rev* 433

<sup>24</sup> Among the nineteenth century writers commenting on this effect – and using it to question private rights in land – was Herbert Spencer:

“Supposing the entire habitable globe be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface They are all trespassers Save by permission of the lords of the soil, they can have no room for the soles of their feet” H Spenser *Social Statics* (1851) 114-115, quoted in A Reeve *Property* (1986) 85

<sup>25</sup> The plight of the homeless is variously considered in J Waldron “Homelessness and the Issue of Freedom” (1991) 39 *UCLA L Rev* 295; JB Baron “Homelessness as a Property Problem” (2004) 36 *Urban Lawyer* 273; R Biswas-Diener & E Diener “The Subjective Well-Being of the Homeless, and Lessons for Happiness” (2006) 76 *Social Indicators Research* 185

here defined), all people could use nature as they like, in competition with others. With the advent of a property regime this initial liberty is cut back. In short, while the creation of property expands liberty (of owners), it also diminishes liberty, both of the landless and of landowners themselves, who can no longer roam and use the countryside at will. These reductions in liberty can increase greatly for people who fail to respect the property rights of others and are arrested or imprisoned.<sup>26</sup>

Merely to add this single, familiar element to the narrative of private property can change the tone of discussions, which too often dwell only on owners.<sup>27</sup> Private property yields costs as well as benefits. Accordingly, to know whether property promotes human flourishing overall we need to consider the effects on people other than the owner. Perhaps they indirectly receive benefits that exceed their obvious losses. But we need to identify and quantify those benefits before we can judge whether they, too, are better off.

There are many ways private ownership can aid non-owners, directly and indirectly, even as it limits their liberties. When ownership is widespread – when nearly all community members have secure access to property – then the community as such and its governance processes are likely enjoy greater stability, benefiting everyone. Similarly, widespread ownership can help found and stabilise a social order, fostering interpersonal ties that greatly enhance welfare.<sup>28</sup> It can help support family stability and, with economic growth, foster the arts, celebrations, and acts of generosity. Widespread ownership disperses power in society and can encourage people to take responsibility for their conduct.<sup>29</sup>

Property's ability to encourage economic activity provides its most-cited social benefit. With reasonably secure rights owners have incentives to develop and use lands in ways that create spill-over economic gains for the community. Economic activities can promote human flourishing for people other than the owner, including tenants and employees. The point, of course, is obvious – private property can encourage initiative and promote growth with widespread benefits. Indeed, so prominent is this link between private property and economic growth that it is sometimes offered (simplistically and unhelpfully) as a stand-alone justification: Private property is legitimate because it promotes economic growth. The observation is important and true, yet significantly incomplete.

Intensive economic uses of land and resources often generate harms that cross property boundaries, harms that interfere with the flourishing of neighbours

<sup>26</sup> ET Freyfogle "Property and Liberty" (2010) 34 *Harv Envt'l L Rev* 75; DB Barros "Property and Freedom" (2009) 4 *NYU JL & Liberty* 36. The ideas here also build on two books of mine, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) and *The Land We Share: Private Property and the Common Good*.

<sup>27</sup> For example RA Epstein "The 'Necessary' History of Property and Liberty" (2003) 6 *Chapman L Rev* 1 (equating liberty with liberty of the property owner alone).

<sup>28</sup> J Purdy "A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates" (2005) 72 *U Chi L Rev* 1243. A useful comparison on this point is presented in B Bryan "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13 *Can J L & Juris* 3.

<sup>29</sup> The effects of property on an owner's sense of self are considered in many works, including J Waldron *The Right to Private Property* (1988) chs 8-10; S Munzer *A Theory of Property* (1990) ch 6.

or community members. Intensive activities can also degrade the land itself in ecological terms, sapping fertility or future use-value in ways that affect future users and other life forms.<sup>30</sup> Land degradation is more likely to occur when a legal regime authorises it. At the same time, however, secure legal rights in nature can give an owner greater ability to act as steward of the land, using nature in sensible ways and avoiding the kinds of degradation that can afflict an open-access commons. Thus, in terms of environmental change and pursuit of environmental goals (for example ecological sustainability), private property plays multiple roles. It can encourage and help justify degradation; it can also facilitate and protect good land uses.<sup>31</sup> A well-designed system would, of course, encourage the good and discourage or ban the unwanted.

### 3.2 Capturing the income of others

In the ordinary world of scarcity, holders of ownership rights over land and resources are commonly empowered to charge other people for the right to use their property, as licensees, tenants, and the like. Similarly, owners can hire people to work on or with their property. People given such access may use the owner's property for their own direct benefit, enjoying its use value (as, for example, the renter of a home). Instead, they might use the owner's property for economic production (as a tenant or employee), in which case the thing owned and used is a capital asset, or capitalist property. In either case, the owner is highly likely to benefit by demanding, in exchange for the use, a portion of the earnings or benefits gained from the land use.

This arrangement is both familiar and widely accepted, so much so that it is easy to miss the element in it of what Marx and others have termed exploitation.<sup>32</sup> The owner of private property extracts income from the people given permission to use the property. The property-use arrangement, of course, will also typically benefit the user – hence the user's willingness to pay for the use right, in cash or labour. But the benefit to the user does not eliminate the underlying loss or cost that comes from having to pay for a right to use. Paying to use an asset is not as good as using it for free.

In cases of extreme resource scarcity, individuals who control an essential resource can exploit other people quite substantially, extracting most of the earnings or benefits that come from using the resource. Once again, such arrangements are common. On balance they might make sense. But their legitimacy is not obvious. Why should some people be able to insist that other

<sup>30</sup> The transition to clear private property rights has at times worsened the problem. JR McNeill "Tragedies of Privatization: Land, Liberty, and Environmental Change in Spain and Italy, 1800-1910" in JF Richards (ed) *Land, Property, and the Environment* (2002) 222

<sup>31</sup> ET Freyfogle "Property Rights" in RC Anderson (ed) *Berkshire Encyclopedia of Sustainability* 10 (2012) 193

<sup>32</sup> My comments pertain most directly to land and other parts of nature, without improvements. Exploitation, in Marxist terms, occurs when the value created by a person's labour is taken away by a property owner in whole or in part. In the case of improved property, the calculations are more difficult but do not materially change the situation. Then exploitation comes to the extent that labour/earnings are captured by an owner in excess of the labour used to create the improvement. D Harvey *A Companion to Marx's Capital* (2010) 109-134

people pay them money to use an item of property, particularly land that the owner did not create?

At this point, it is merely necessary to take note of the income transfer that occurs when an owner is paid to use an asset. Property law allows an owner to insist on payment, which is to say that property law empowers owners to extract income from others. Strictly in terms of the income flow, the flourishing of the property owner goes up and the flourishing of the payer goes down.

A similar income transfer occurs when property is sold. The purchaser in effect forgoes past and/or future income in order to make the purchase, while the seller's flourishing is correspondingly benefited by the income shift. The sale situation is more factually complicated because the seller likely was a purchaser and the purchaser in turn might soon sell the asset to yet another owner. But these complications merely divide up the pluses and minuses of individual flourishing among multiple people. We see this obviously when a person goes into great debt to buy an asset, and for many years thereafter must contribute a significant share of earnings to the seller as compensation.<sup>33</sup> It is private property that allows some people to live off the labours of others.

### 3 3 Competition, the market, and exchange value

Secure private-property rights help stimulate the emergence of markets. They too, and their consequences, should be part of the overall assessment of ownership. Markets facilitate economic growth and thus the enhanced human flourishing that accompanies such growth. Property's roles in supporting market activities can vary significantly, based on what can be owned, how intensively it can be used, and transferability. As markets emerge, they can give owners greater incentives to use lands intensively, thus fostering greater degradation. On the other side, markets can encourage owners to manage lands more sensitively to maintain long-term productivity.

Markets also have the effect of shaping the ways people assign value in the world, to physical things (including parts of nature) and also to humans and their labour.<sup>34</sup> They affect, that is, the ways people see the world and value what they see. Market transactions exalt exchange value and implicitly invite people to use such values when assessing the world, distinguishing the valuable from the valueless. An item without exchange value can seem less worthy because of it; a person whose labour commands a low market price can similarly decline in status and self-esteem. Things in the world that are not bought and sold can be overlooked entirely. In this way, the dominance

<sup>33</sup> It may help in assessing this very common situation to distinguish two cases: one in which the property being sold was physically created by means of the seller's labour, and the other the case of unimproved land. In the former, the seller is in effect alienating his labour. In the latter, he is only giving up an intangible legal claim not based on labour. The morality of the latter case is thus not immediately clear. Why should a seller of land be able to extract future income from the purchaser, given that the seller did not create the land? It is relevant but not sufficient to say simply that the seller bought the land from someone else.

<sup>34</sup> A classic study is K. Polanyi *The Great Transformation: The Political and Economic Origins of our Time* (1944).

of market thinking can displace older modes of evaluating people, based on character, talent, and moral acts. It can also displace older ways of seeing nature, more use-oriented and holistic. Private property does not, alone, bring about these shifts in understanding. But it is central to the overall process.

As they thus provide new methods of valuation and new opportunities for economic gain, transferable property rights and markets can foster increased competition, fuelling selfishness and greed. Markets and individual ownership can encourage preoccupation with personal welfare, understood in isolation from group welfare. This can sap social cohesiveness and concern for the less fortunate. Gift-giving and sharing can diminish in such a society as competitive bargaining and market transactions become the new norm. Similarly, the giving and sharing that does still occur can take on more negative connotations; it can be demeaning to recipients and make acts of sharing more problematic. At the same time, however, considerable wealth can empower individuals to give generously at economic levels never before possible.

In some settings, a property-rights regime can evolve in ways that vest vast resources in the hands of comparatively few. This morally undesirable arrangement gives to the wealthy great power to exploit and control others. (This could come about by using market processes, control over government or the military, control over long-distance trade and finance, or in other ways, but private property is central to it.) Given the principles of marginal benefits, great disparities in income always reduce overall human welfare, sometimes dramatically.<sup>35</sup> Moreover (and as recent research explains), economic inequality also is strongly linked to a wide variety of individual and social ills, which bring their own, often tragic reductions in welfare.<sup>36</sup> Yet further declines in flourishing can come when wealthy elites dominate government and manipulate it to their perceived advantage. Social conflict can then worsen. Public policies can favour the few at the expense of the many.

Social strife, particularly crimes against property, can in turn lead to otherwise wasteful expenditures to protect property, in the form of security services, physical barriers, and alarms. Such security measures can worsen social divisions and sap senses of community, mutual-dependence, and shared fate (for example in the form of gated communities). As it gains momentum, social strife can lead to more overt challenges to a property regime, and thus to further, wasteful expenditures to defend against the challenges. When challenges include calls to seize property and redistribute it, even when not implemented, the property system as such can be shaken. Owners and potential investors can pull back from socially beneficial decisions. Private property, that is, can undercut itself.

<sup>35</sup> That is, a given amount of income contributes more to overall human flourishing when it goes to a poor person with basic unmet needs than when it goes to a wealthy person whose reasonable material needs are all satisfied

<sup>36</sup> R Wilkinson & K Pickett *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2009)

#### 4 The implications for property as an institution

These various comments on the links between property and human flourishing provide a background for further comments on private property as a social institution. They also lay a foundation for taking up the calls of Mostert, Bennett, Van der Walt and others to reassess private property in its fundamentals.

As noted so far, the links between private property and human flourishing are numerous and complex. A regime of property rights can increase flourishing, decrease it or do both at once. The balance of costs and benefits depends on many factors: how property is defined and distributed; what valuation methods are used; and whether a regime shows concern for social relations, ecological realities, and future generations.

Given these benefits and burdens, private property is manifestly a morally complicated institution – a long-standing reality too often now unmentioned.<sup>37</sup> By its very nature private property empowers some people to harm, dominate or otherwise control other people – even if only by insisting that they stay away. And the power involved, importantly, is state power – police, courts, prisons: sovereign power, put at the beck and call of private owners. How can we justify this state coercion, this use of state power to limit personal liberties? It is no justification, of course, to respond that we are punishing people because they have violated property rights, for it is the property rights themselves that need justifying. Nor can property be justified simply by reference to the benefits it brings to owners. A justification needs to account for all effects, for good and ill, for owners and everyone else.

At one point in Anglo-American thought, property seemed morally grounded in claims that people owned themselves and their labour and should, as a result, own the value created by their labour.<sup>38</sup> If they mixed labour with a tract of land or other thing, they had a moral claim to control the resulting asset. This reasoning – often associated with John Locke<sup>39</sup> – has been thoroughly criticised over the generations, not because it lacks moral truth but because the necessary qualifications on it are so great that it ends up having little practical force in justifying private property as we know it.<sup>40</sup> It does not explain why one person gets to mix labour with land to the exclusion of someone else. It does not explain why a person should claim the value an asset has apart from labour added to it. In terms of history, labour-

<sup>37</sup> It is usefully remembered that John Locke's struggle in his writings on property was to find some way to justify one person's assertion of rights when individual ownership in a thing deprived all others of their pre-existing use rights to it

<sup>38</sup> A detailed look at early modern thought on property in its social and political contexts is EM Wood *Liberty & Property: A Social History of Political Thought from Renaissance to Enlightenment* (2012); TA Horne *Property Rights & Poverty: Political Argument in Britain, 1605-1834* (1990) A highly useful survey, still perhaps the best, is R Schlatter *Private Property: The History of an Idea* (1973) Also useful on intellectual history are ML Duncan "Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis" (1996) 26 *Env't'l Law* 1095; FS Philbrick "Changing Conceptions of Property in Law" (1938) 86 *U Pa L Rev* 691

<sup>39</sup> Schlatter *Private Property* 151-161

<sup>40</sup> Becker *Philosophic Foundations* 36-43 (concluding that the effects of scarcity "defeat most of the point of Locke's argument", which then provides "a foundation for socialism rather than 'possessive individualism'")

focused reasoning has been used to challenge property arrangements rather than defend them, particularly capitalist property. Socialist, communist, and anti-slavery advocates: all have used the labour theory to confront working arrangements they deemed exploitive.

A second line of moral reasoning offered to uphold private property focuses on the ways ownership is helpful if not essential for individual personal development.<sup>41</sup> As noted, a person can develop her personality and prosper more fully with property rather than without. This reasoning is helpful in getting straight on the many benefits that can come from a private property system, though it struggles to deal with situations in which one owner's personality-based claims clash with those of another owner.<sup>42</sup> But as also observed, this reasoning is woefully incomplete because it only looks at the benefits of property to the owner and ignores all else. It is only a fragment of a justification and cannot stand alone.

This defect of personality- or capabilities-based moral reasoning points toward the only sound moral reasoning that can be used to sustain private ownership. An adequate justification needs to take into account all consequences, for all people (owners and non-owners) and for the social and natural communities that help sustain them, if not also for future generations and other life forms. That is, private ownership can be morally justified only when its questionable effects are more than offset by overall benefits for essentially everyone; only when the benefits of a property regime are so substantial, and so widespread, that nearly everyone ends up being better off because of it.

As moral reasoning, this consequentialist argument is not beyond dispute. One could claim, for instance, that society should have no power to infringe individual liberties in the way property systems do.<sup>43</sup> The consequentialist approach, though, is widely accepted, albeit with little overt recognition. Once one admits that property cannot be grounded on the desires of the owner, the consequentialist approach is the only one left standing.<sup>44</sup> It is certainly the only justification that makes sense when the normative aim is to promote overall human flourishing.

A consequentialist justification can be powerful and wide-ranging in that it can, in theory, justify a great array of property entitlements. But it is a limited justification also in that it works only when the underlying claim is factually true, only when nearly everyone is better off due to the property regime.<sup>45</sup> Moreover, it should not be enough simply to say that a society with private

<sup>41</sup> For example MJ Radin "Property and Personhood" (1982) 34 *Stan L Rev* 957

<sup>42</sup> See Freyfogle *The Land We Share* 102-134

<sup>43</sup> The political stance termed "libertarian" is typically associated today with expansive individual property rights. The connection, however, depends upon the particular liberties that one chooses to promote. Given how property also limits liberties, a moral stance that emphasises different liberties could lead to a much-different outcome, to a libertarian opposition to nearly all forms of state-enforced property rights.

<sup>44</sup> The various rationales for property are critically assessed in Becker *Property Rights*. Several of the lines of thinking that I include under the rubric of consequentialist reasoning are considered separately by Becker, apart from what he terms the utilitarian justification.

<sup>45</sup> The need for ownership to be widespread is considered in JW Singer *Entitlement: The Paradoxes of Property* (2000) 141; FI Michelman "Liberties, Fair Values, and Constitutional Method" (1992) 59 *U Chi L Rev* 99

property is better off than one with no private property. That justification is too simplistic. Private property, as noted, is a highly flexible institution. Property rights can and do take a wide variety of shapes and sizes, in terms of what can be owned and what it means to own. Rights can be more or less exclusive and definite; can last for varied periods of time; can be more or less transferable or divisible; can be subject to various use-limits designed to promote social aims; and can be interwoven with the rights of others in ways that attend to nature, social contexts, and much more. A sound moral justification would need to support separately every component of property rights. It would need to explain how each coercive element of ownership promotes not just overall human flourishing but flourishing that is widely enough spread to encompass nearly everyone.

This is the situation we confront today. Private ownership is a flexible, evolving, human constructed arrangement that can yield and has yielded substantial benefits, distributed in highly unequal ways. It promotes human flourishing but, in all likelihood, could do so to a much greater extent. It benefits many people, probably most, but the losers are also numerous and their plight worsened by living in a world where other people control essentially everything. Land degradation continues apace, much of it undertaken by property owners. Too many land-use practices are sapping the land's fertility in ways harmful to future generations. And economic inequality in much of the world is high and rising as income flows benefit private owners. The moral legitimacy of it all is questionable.

What changes to the system might make it more legitimate? What changes could improve the system's ability to foster human flourishing, now and in the future, for everyone from the poorest to the richest?

## 5 The need for stability

No private property system is apt to be optimal, in the sense of fully enhancing overall net benefits. Carefully crafted legal reforms, then, would likely bring gains pretty much everywhere. And some property regimes around the world fairly cry out for change. On the other side, legal change itself can do more harm than good. Key benefits of private property arise only when a system is reasonably stable, allowing people to make and carry out long-term plans. Economic investment in particular is threatened when investors fear unduly disruptive legal change. Homes and farms can fall into disrepair or decline in fertility when legal uncertainty (in tandem with other uncertainties) make capital improvements problematic. The tension is thus clear, between stability and change. Both are needed, and in just the right amounts.<sup>46</sup>

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<sup>46</sup> The discussion in the text critiques claims made about the desirability of limiting the powers of lawmakers to revise the elements of ownership. It does not address the reasons why the law should protect individual owners from being singled out for burdens, nor the proper limits on the use of the power of expropriation.

It is useful to take up this need for stability in property rights because so much resistance to reform efforts relies on it.<sup>47</sup> Some stability in rights is plainly essential, but how much? To get at the question, one needs to probe the claim. Why is stability important? If we could answer that question, clarifying the need, it should be possible to identify when, and to what degree, needs for stability should impose limits on otherwise-attractive reform initiatives.

Arguments supporting stability in widely applicable property laws largely focus on economic activities and expectations with a secondary emphasis on the role of private ownership in providing a check on misguided governmental conduct. Underlying the economic-related argument is the simple fact that a person will not sow a crop if she cannot reliably reap the harvest. A landowner will not erect a building if he cannot use it for at least most of its useful life. When such security is lacking, people are prone to skim the land of its riches and to forgo productive improvements. This argument for stability, as thus phrased, is a consequentialist one: Protection is good because it encourages behaviour that society values. It thus fits easily into the overall moral framework set forth above, which accounts for all consequences.

Even a quick inquiry into this claim for stability suggests that stability is more needed in some ways and some settings than in others. If we want a farmer to plant crops, for instance, the right to harvest the crops must be protected. Yet it is less clear that the farmer as landowner also needs a protected right years later to construct a factory or shopping mall on the land. Such a right does not seem necessary to stimulate the crop growing.<sup>48</sup> Phrased generally, an owner needs substantial protection of *existing* improvements on the land and for *existing* uses of the land, more so than for prospective improvements and uses.<sup>49</sup> Further, even the protection for existing improvements might be tied to the useful life of them. Protection beyond that, while desirable from the owner's perspective, is less plainly needed. To use an older and still valuable distinction, landowners mostly need protection for the *use* value of their current activities. They have much less need for protection for *exchange* values of property, particularly when exchange value is elevated due to prospects for shifting the property to another use.

Land values are inherently speculative when based on prospects for initiating different land uses. Once an owner actually begins a land use, protection is needed; without it, the use may not be started and society could lose. But how and to what extent does society benefit by going further and protecting speculative land values?<sup>50</sup> What is in it for people generally – and not just

<sup>47</sup> A related argument, not considered here, asserts that property rights should remain essentially unchanged if their original acquisition was fair and if subsequent transfers thereafter were fair. A critical look at original acquisition claims is presented in JW Singer "Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity" (2011) 86 *Ind LJ* 763

<sup>48</sup> See Becker *Property Rights* 65 ("The security required for the cultivation of land does not include the need to exclude people from walking across a fallow field.")

<sup>49</sup> BM Haddad "Property Rights, Ecosystem Management, and John Locke's Labor Theory of Ownership" (2003) 43 *Ecol Econ* 46

<sup>50</sup> This property-as-investment view is useful contrasted with two others – property as castle, and property as bulwark of citizenship – in JW Singer "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" (2006) 30 *Harv Envt'l L Rev* 309

the poor and landless – when they relinquish democratic powers to impose new limits on future land-use options? There are reasons why society might want to promise protection for future land-use options, mostly to avoid unduly rapid private development (driven by a fear that development rules might suddenly change). But this benefit needs to be put in context and compared with other costs and benefits. Generally speaking, there is little wrong with a legal system in which land purchasers take their chances; in which the right to develop or change land uses is determined entirely by the laws in effect at the time of action, not at the time of land purchase.<sup>51</sup>

This element of legal stability arises starkly in the case of valuable subsurface minerals. A mining company that drills or digs a mine, and otherwise improves a mining site, needs legal protection for these improvements and for the use value of the on-going enterprise. Without such protection, the mining would not likely occur. But what of the owner of potential mineral-bearing lands who has not yet begun any mining and simply holds title to the land? Perhaps we want to offer legal protection for future extraction in order to avert overproduction in the present (particularly in oil and gas fields). But without having some specific public benefit to point to, it is simply not clear why and how society benefits by offering such legal protection. The labour theory/just deserts argument does not apply. In terms of social utility, society does not benefit by having a particular person purchase and hold the land. At this point no person has done anything that benefits society and that society would care to encourage. The effect of legal protection is simply to augment land prices, a consequence that could easily prove harmful to a community rather than beneficial.

The central conclusion here is that landowners need substantial but by no means unlimited stability in property law in order to encourage them to improve their lands in socially productive ways.<sup>52</sup> Existing uses need far more protection than do plans to engage in different, future uses. Land values as such, apart from improvements, typically require little protection except the protection that comes from fair treatment under laws of wide application.

The second claim behind calls for legal stability is that property rights usefully check bad government and are needed for that purpose. This too is a consequentialist claim, and so it also can be mixed in with the overall normative assessment of a property regime, including its mechanisms for change over time. This line of reasoning, just like the economic one, no doubt has merit but also calls for careful probing. Exactly how would inflexible property rights improve government, and what forms of bad decision-making might it forestall?<sup>53</sup> To be sure, poor government decision-making is a major danger. But is it appropriate to dump on a property regime the burden of averting it, particularly when inflexible property norms get out of date and are less and less successful in promoting overall flourishing? Is it appropriate,

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<sup>51</sup> I consider the limited importance of a right to develop in Freyfogle *On Private Property* 84-104

<sup>52</sup> The point is made in J Waldron *The Rule of Law and the Measure of Property* (2012) 72-74, 102-109

<sup>53</sup> The issue here has to do with limits on law-making powers to revise property rules, not on the ways (mentioned earlier) that widespread ownership can diffuse power and thus help keep government in check

when property norms get out of date, to pay owners to act more responsibly when the payment comes from tax money (itself a form of private property, taken without direct compensation)?

If a particular government is so flawed that it ignores laws, then property laws would not likely help; they too can be ignored (and have been, in countries that have seized private holdings). If the particular concern is over snooping government agents, then perhaps the better remedy is strong constitutional protection against illegitimate searches and seizures. If the problem is that particular owners are singled out for extra burdens – not borne by other, similarly situated owners – then the need is for a constitutional right of equal protection and perhaps constitutional protection for interferences with property rights that are *not* based on new, widely applicable laws.

The danger here – the one that stable rights protect against – is the danger that a lawmaking body will unwisely alter existing property rights, doing more harm than good. Surely the best response to the danger is to push for better decision-making processes. It is also to push for constitutional limits that allow lawmakers to update property norms to keep the institution moral and productive while protecting owners from being singled out for unfair burdens and from government acts that are not legitimate revisions of widely prevailing laws.

## 6 Intellectual pruning

### 6.1 Reconsidering the rights paradigm

In his many writings questioning property's intellectual framing, Professor André van der Walt has raised pointed questions about familiar ways of thinking and talking.<sup>54</sup> He has been particularly forceful in questioning what he terms the "rights paradigm", an understanding of property that assigns to an owner nearly unlimited powers and implicitly questions restrictions on that power. Under the rights paradigm it is not an owner's power that requires moral or prudential justification. It is the limits that a government might put on that power.

Van der Walt is certainly right in his criticisms to the extent that he presses them. The rights paradigm and its variants – the dominion model of property; the absolute-ownership model – are strongly slanted to favour existing interests. The paradigm does not shut off all criticism or call for change in property norms.<sup>55</sup> But it begins from one end of the debate, not from a central position. It presumes that strong landowner powers are good, without regard for overall consequences. It starts the story with only one character – the landowner – and expects critics to add other characters to the narrative. Its

<sup>54</sup> For example Van der Walt *Property in the Margins*; AJ van der Walt "Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa" (2008) 19 *Stell LR* 325; AJ van der Walt "A South African Reading of Frank Michelman's Theory of Social Justice" (2004) 19 *SAPL* 253; AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *CCR* 77

<sup>55</sup> Kevin Gray offers a sensitive probing of rights-based thinking, as applied in the European Convention on Human Rights 1950 213 UNTS 221, in K Gray "Land Law and Human Rights" in L Tee (ed) *Land Law: Issues Debates and Policies* (2002) 211

framing diminishes the chance that all relevant considerations will come to light.<sup>56</sup>

Applied to property, rights rhetoric suggests that property exists initially if not solely to benefit the owner. It is a flawed suggestion in many ways, not the least in failing to highlight how property benefits the public as a whole.<sup>57</sup> It suggests that property somehow arises apart from social agreement, but that simply is not so. An owner has rights only to the extent that other people honour the rights, and they need to have adequate justification for doing so. Here it helps to see how property rights differ from other, true rights – the right of religious belief or right to due process of law, for instance. Everyone can have these rights, and they arise at birth or upon entry into a country. A right to property, though, is different. Some people have property and others do not, and one person's claim of property limits what others can do. A true right to property would be a claim to an equal share of the land or of the planet as a whole, a right that arises at birth. The right to property has been talked about in this way,<sup>58</sup> and still is sometimes,<sup>59</sup> but this is by no means the kind of right enshrined in the rights paradigm that Van der Walt challenges.

The rights paradigm enjoys indirect support today because it is implicit in much economics-influenced writing on property, writing that typically equates benefits to owners with the common good. Economically oriented writing on property is vast and complex. Much of it, though, comfortably assumes that property law should help owners engage in desired transactions and otherwise maximise the values of their lands.<sup>60</sup> Much writing talks about market imperfections, and at least some commentators call for law changes that diminish these imperfections. But the central point remains: property law should help increase property prices and support a well-functioning market, an approach that allegedly would benefit the public more than other property systems.<sup>61</sup>

Much can be said about this literature. For this purpose, it is important to note that it typically accepts the legitimacy of familiar property arrangements and rarely interjects moral and social factors. It thus has the same discussion-limiting effect as the rights paradigm in its more overt form.

<sup>56</sup> The point is forcefully made in RW Gordon "Paradoxical Property" in J Brewer & S Staves (eds) *Early Modern Conceptions of Property* (1996) 108 ("The price that has been paid for the compulsive power of the absolute dominion trope has been a heavy one, a maddeningly persistent tendency to suppress and to deny the collective and collaborative elements, the necessity of mutual dependence, inherent in social endeavor, and a consequently enormous distortion of our common capacities to understand and regulate our social life")

<sup>57</sup> It also ignores various forms of communal or social ownership. Good perspectives on that are offered in L Godden & M Tehan (eds) *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (2010); CP Rodgers, E Straughton, AJ Winchester & M Pieraccinni *Contested Common Land: Environmental Governance Past and Present* (2011)

<sup>58</sup> On the influence of this thinking in eighteenth century US see WB Scott *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (1977) 36-58

<sup>59</sup> For example E Wickeri & A Kalhan "Land Rights Issues in International Human Rights Law" (2010) 4 *Malay J Human R* 16

<sup>60</sup> A prominent conservative scholar embracing this view, Lee Anne Fennell, has recently and thoughtfully raised questions about it. Fennell (2013) *Harv L Rev*

<sup>61</sup> See CM Rose *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994) 52 (contrasting the individualistic, preference-satisfying view of property with a "traditional, quite divergent understanding of property as propriety")

For instance, little is said in economic writing about property as a tool of domination, about the injustice of unequal property distributions, or about the ways markets contribute to increased inequality and multiple social ills. Public decision-making processes are largely pushed aside except insofar as they implement lessons of economists on how best to enhance markets and property values. Studies of human happiness, concerns for aesthetics, and environmental morality are all pushed aside as mere factors for individual consumers to consider in formulating their preferences, not for lawmakers to consider in reforming ownership norms. The world is typically (though not always) presented in atomistic terms, comprised of autonomous individuals, with only occasional recognition of families and the emergent properties of neighbourhoods and communities.

The rights paradigm in its various forms usefully emphasises the importance of private property, and it highlights the need to respect private rights once they exist (particularly, as noted, on-going property uses and improvements).<sup>62</sup> The paradigm's considerable downside is that it constrains discussion and thinking. It makes it legitimate, even for scholars, to talk about property while ignoring whole categories of relevant factors and implications. It is rhetoric that needs to be used, if at all, with great care.

## 6.2 The social contract and natural rights

If this is true, if the rights paradigm and its variants provide a distorted frame for discussions, then what alternative frame might take its place? How might we talk about property as an evolving institution, one that yields benefits but also poses dangers, an institution that aids owners greatly but does so, or ought to do so, only when society benefits also?

Before using the above comments to sketch an answer, it may help to extend Van der Walt's critique to take note of various other intellectual frames, also used to talk about property, that share many of the limitations of the rights paradigm. They too need to be highlighted, for pruning or at least very careful use.

One frame, less common than generations ago, is the narrative of the social contract, which in one influential form contends that private property arose in pre-social times and that individual owners then formed governments to protect their property.<sup>63</sup> Such state-of-nature, social-contract thinking came to the fore in the seventeenth century and continued through the eighteenth. When originally presented the story was not intended as an historical claim; not intended as a description of anything that really happened. Instead it was offered for its presumed insights. (Rousseau in the eighteenth century was perhaps the first to give the story credence as history.)<sup>64</sup>

<sup>62</sup> A thoughtful consideration of the many rhetorical variants on the centrality of property rights is CM Rose "Property as a Keystone Right" (1996) 71 *Notre Dame L Rev* 329

<sup>63</sup> The use of this reasoning in the United States is surveyed in M Hulliung *The Social Contract in America: From the Revolution to the Present Age* (2007)

<sup>64</sup> H Rosenblatt (ed) "Introduction" in JJ Rousseau *Discourse on the Origin and Foundations of Inequality among Men* (2011) 11

History aside, the social contract story makes little logical sense when property is understood as more than simply might-makes-right. Property arises by social consensus or through social governance; a society in some form must come first. Property requires shared understandings or norms, which is to say some form of law. Early societies routinely provided property rights to all group members, with many rights held in common. Societies were not set up so that some individuals could own everything while others had nothing. The social-contract story was constructed specifically to justify existing rights in the face of attack, from above or below.<sup>65</sup> In it, property implicitly benefits owners at the expense of others. It is a hegemonic narrative that supports elites, too biased and dismissive of popular power to help discussions of property today.

A related line of talk uses the terms “natural rights” and “natural law” and contends that property owners somehow acquired more or less expansive powers out of a presumed natural order.<sup>66</sup> This literature is useful insofar as it carries forward lessons from Roman continental legal pasts. But there is no reason why forms of ownership developed centuries ago, for far different circumstances and usually to benefit then-existing elites, should carry special weight today. The reference to “nature” is, of course, a fanciful one; the proffered elements of ownership bear no resemblance to the kinds of physical arrangements that Isaac Newton and Johannes Kepler explained in their scientific writings. Presumably the term natural law is employed to give particular ideas a timeless air that transcends politics and current preferences. If so, it is rhetoric that unhelpfully limits debate and forestalls needs to justify particular rights morally and prudentially. Like the state-of-nature/social-contract reasoning, this natural law/rights rhetoric should be used with care if at all. Ideas contained in it can certainly play roles. But they need to stand on their own, without gaining influence from any actual or fictitious pedigree.

### 6.3 Three troubling dichotomies

Three particular dichotomies appear with some regularity in discussions about private property. They too are usefully brought into focus and thought about critically, because they too can inhibit the kind of full inquiry into property that so many scholars now view as necessary.

The first of them is the purported split within a lawmaking community between proprietary and sovereign powers; the split between power based on property ownership and power derived from governmental authority. This distinction does have validity and is sometimes useful. But it is a dangerous dualism when brought into property-reform discussions. Property is shaped

<sup>65</sup> The line of reasoning is typically attributed to late sixteenth-century French philosopher Jean Bodin, who used it to support the Crown’s powers over property. It was soon attacked in England by royalist apologist Richard Filmer, who claimed that property was based instead on a gift from God (to Noah’s sons and down to the crown heads of the age). Schlatter *Private Property* 118-130, 152-153.

<sup>66</sup> Such reasoning was routinely used by medieval and early modern writers when expedient and discarded when not. Schlatter *Private Property* 47-161. A recent revival is ER Claeys “Takings, Regulations, and Natural Property Rights” (2003) 88 *Cornell L Rev* 1549.

by law, and rights exist in the real world only when recognised and protected by law.<sup>67</sup> Descriptively, Jeremy Bentham had it right:

“Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases.”<sup>68</sup>

Owners do not want government to stay away; they want government on their side. Paradoxically, perhaps the greatest value of the proprietary-sovereign distinction in property discourse is to help explain why, when it comes to investing power in property owners, these two forms of power overlap.<sup>69</sup>

The dangers of the proprietary-sovereign distinction are significant. It confuses thinking on where property comes from and how it operates. It also clouds thinking on the morality of the arrangement; the morality of using public power to benefit some people at the expense of other people. In the modern age, actions by private parties are more likely to escape criticism than actions of government. Accordingly, the proprietary-sovereign distinction pushes actions by owners into a category where scrutiny is less.

Similar to this dichotomy is the public-private distinction, which in a different way also divides the world into spheres. Under this division of society, property exists in a private realm, presumably available to serve private interests (those of the owner), while government inhabits a public realm and promotes public interests. Through this lens, property seems to exist simply to benefit the owner, while public laws and regulations sustain the public interest. By implication it is legitimate for owners to act only in their interest, with government entrusted to look after broader concerns.<sup>70</sup>

The confusions and dangers of this reasoning are perhaps apparent enough from what has been said. In fact, private property in land legitimately exists chiefly to serve the public interest, not private interests initially. The public-private distinction misses this point, just as it errs in implying that private property somehow exists apart from law and government. Further, it unhelpfully suggests that clashes over property rights are best assessed by some “balancing” of private and public interests, a balancing that breeds confusion and lessens chances that an inquiry will fully engage all moral and prudential factors.<sup>71</sup>

Comments about the last two frames – the proprietary-sovereign and public-private dichotomies – also explain why it is confusing and unhelpful to

<sup>67</sup> The variety of property arrangements that arise under informal law is surveyed in A Bell & G Parchomovsky “Property Lost in Translation” (2013) 80 *U Chi L Rev* 515

<sup>68</sup> J Bentham *The Theory of Legislation* (1789) ch VIII quoted in CB MacPherson (ed) *Property: Mainstream and Critical Positions* (1978) 52

<sup>69</sup> A classic, skilful use is M Cohen “Property and Sovereignty” (1927) 13 *Cornell LQ* 8

<sup>70</sup> The practice of property law, and much of its content, is rightly put in the private law category; I do not mean to suggest otherwise. What is public is the drafting and revision of laws that vest owners with power backed by the state

<sup>71</sup> By way of example, we might consider the landowner who wants to erect a building on a wetland, a structure that lawmakers deem harmful to the public interest. What would it mean to balance the competing interests? Allow construction of a smaller building? A better approach is to get clear first on whether the building is in the public interest. If not, the question then becomes: Notwithstanding that the building as such conflicts with the public interest, are there nonetheless reasons related to property as a functioning institution that would make it wise to allow building to proceed?

presume that property laws come in two distinct forms (the third dichotomy): those that *define* property rights, and those that *regulate* uses of these rights. This distinction is rarely presented overtly. Instead, it lies beneath the surface as people talk about government “regulation” and whether it does or does not cut too deeply into individual rights. The image only makes sense if property rights are somehow defined by a body of law that exists apart from, and is unaffected by, the regulation. In Anglo-American law, this underlying body of law is typically the common law, most often the common law as modified up through the late nineteenth century – when it most favoured owners and intensive land uses. But laws are laws, and it is the province of the legislature to replace old ones with new ones.<sup>72</sup> Old laws do not somehow linger on, as if they had not been amended. A property owner’s rights can only be determined by taking into account all laws that apply to the property and uses of it, without regard for the name given to the law. To be sure, some laws are of highly localised application, and there are critical reasons to distinguish among laws based on the unit of government enacting them and their scope of application.<sup>73</sup> But laws do not come in two distinct types and the functions of articulating (and redefining) rights and regulating uses of them are far from distinct.

## 7 New growth

These various ways of thinking and talking about private property are the ones that dominate in Western societies.<sup>74</sup> Other rhetoric exists, to be sure, but even leftist, social-justice writing often accedes to these rhetorical frames and seeks space within them to interject competing values.<sup>75</sup> Most striking from this list is that each of these frames is slanted to favour existing owners. None of them brings out moral considerations clearly; none explains that property is a product of law and necessarily changes in content as law changes; none makes clear that property can be understood overall as a tool that society uses to foster its welfare and with individual rights derivative of that group welfare. This latter, socially focused line of thinking is hardly new; Benjamin Franklin embraced it, so did John Stuart Mill and Oliver Wendell Holmes to name a

<sup>72</sup> See *Munn v Illinois* (1877) 94 US 134 (“A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and it is no more sacred than any other... the common law... as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.”)

<sup>73</sup> Freyfogle *The Land We Share* 174-176

<sup>74</sup> I do not assess the bundle-of-sticks metaphor as a property frame because it is used in multiple, conflicting ways and thus lacks coherence. It is critically considered in the Arnold and Duncan articles in n 16. An attempt to resuscitate it is offered in JB Baron “Rescuing the Bundle of Rights Metaphor in Property Law” (2013) 81 *U Cin L Rev* (forthcoming)

<sup>75</sup> An especially useful inquiry into alternative lines of thinking – stressing and lamenting the continued dominance of the rights paradigm – is J Williams “The Rhetoric of Property” (1998) 83 *Iowa L Rev* 277. I do not consider here the thoughtful writing on cultural claims to property, which also directly challenges the individual rights paradigm, for example KA Carpenter, SK Katyal & AR Riley “In Defense of Property” (2009) 118 *Yale LJ* 1022, nor writing that calls for greater retention of customary norms in the process of modernisation. For example J-P Platteau “The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment” (1996) 27 *Dev & Change* 29

few. But it seems almost heretical to assert the claim in today's neoliberal times.

An important newer view of property is one that begins by conceding ground to the above, pro-owner rhetorical frames, but then interjects further elements into the discussion. The claim is that private ownership entails responsibilities in addition to rights.<sup>76</sup> Strong individual rights remain, to be sure, but they are in this view qualified or mitigated by attendant duties, to neighbours, to communities as such, and to opposing parties in property transactions (leases and mortgage loans in particular). The origin and legal status of these responsibilities are put up for discussion.

One important function of this social-relations reasoning is to bolster the legitimacy of regulatory limits on using property: If property inherently includes inchoate responsibilities and if a legislature imposes an express responsibility or limit, then the validity of the legislature's action is clearer, given the existence of the inchoate responsibilities. In this role, the language of responsibility does not itself directly limit landowner rights. Instead it encourages and facilitates legislative creation of new limits. Language of responsibility also has value in common law litigation and when interpreting statutes and regulations by colouring the discursive context. It invites courts to see value in social relations, family ties, and neighbourhood bonds. It invites them also to consider the plight of people on the margins before enforcing property rights mechanically.

This social responsibility approach – also referred to as a virtue-based approach – adds fresh elements to discussions of property. It portrays people as social beings, and draws attention to the vital importance of healthy social interactions and communities. It reminds us of the landless and the poor. It highlights the ways that one person's exercise of rights can disrupt the lives of other people, owners and non-owners alike. And it accentuates the normative complexity of the institution, a complexity that calls for choices democratically made. As Professor Joseph Singer urges, a well-functioning property system is one that enhances democracy by promoting and protecting the social relations that are central to it.<sup>77</sup>

The alternative to this virtue- or responsibility-based line of property reasoning is one that, to a greater extent, wipes the intellectual slate clean and

<sup>76</sup> Important works include, in addition to previously cited works by Alexander and Singer, JW Singer *The Edges of the Field: Lessons on the Obligations of Ownership* (2000); GS Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell L Rev* 745; GS Alexander & EM Peñalver "Properties of Community" (2009) 10 *Theoretical Inquiries L* 217; EM Peñalver "Land Virtues" (2009) 94 *Cornell L Rev* 821; J Nedelsky "Reconceiving Rights as Relationships" (1993) 1 *Revue d'Études Constitutionnelles* 1 A critical look at several contributions to this literature is E Rosser "The Ambition and Transformative Potential of Progressive Property" (2013) 101 *Cal L Rev* 107 This literature is usefully supplemented with the growing writing on what is termed the social obligation norm in property, often linked to the work of Léon Duguit MC Mirow "The Social-Obligation Norm of Property: Duguit, Hayem, and Others" (2010) 22 *Fla J Int'l L* 191

<sup>77</sup> JW Singer "Democratic Estates: Property Law in a Free and Democratic Society" (2009) 94 *Cornell L Rev* 1009; JW Singer "Property Law as the Infrastructure of Democracy" in MA Wolf (ed) *Powell on Real Property* (2011) 11-1

reimagines property afresh.<sup>78</sup> It begins with the idea that private ownership (particularly of land and resources) is a tool that society uses to promote its interests. Property rights are based on law and are defined and redefined over time by lawmakers in an effort to promote the common good. In this approach, the limits on rights arise at the beginning, because the rights themselves extend only to the particular extent set by law. Ownership entails no inherent rights, nor does it derive from an intellectual model that presumes a particular package of entitlements. As a result, no later balancing is needed except when a law expressly calls for it. There is no need to weigh public interests against private interests in a kind of apples *versus* oranges assessment. The public interest is central, and private rights exist to the extent their recognition helps promote that public interest. Responsibilities and virtues are taken into account when defining the rights, not tacked on later.

In this approach, property rights are best crafted based on all-things-considered assessments, giving, to be sure, due weight to the many social benefits that come by creating and protecting secure individual entitlements. Elements of ownership can be expressed as standards rather than clear rules to give courts greater discretion to consider all relevant factors before allowing owners to enforce their rights.

The benefit of this latter approach, over the virtue- or responsibility-based approach, is that it more fully pushes aside the slanted frames for property that so cloud and encumber current discussions, including the rights paradigm that Van der Walt questions. It gets away from the idea that property exists chiefly to benefit the owner; gets away from the idea that property rights are based on either some extra-legal source (nature, pre-social times, a metaphysical ideal) or upon legal elements put in place generations ago. In brief, it takes the offense. Better than others, this realist, positivist intellectual paradigm invites a full consideration of the many ways private property contributes to human flourishing, for good and for ill. It invites exploration of all opportunities to revise property law while alerting lawmakers to the need for thorough inquiries and cautious action.

Van der Walt is right in wanting to curtail if not eliminate the rights paradigm as a rhetorical frame. Other inherited modes of thought need similar pruning. What should grow in their place is an understanding of property as a dynamic, flexible, evolving social institution; one that can bring both gains and costs; one that can promote both flourishing and exploitation. Property's social and moral complexities have always existed, even when covered up. Surely an open embrace of them can yield better outcomes for all.

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<sup>78</sup> In the United States, a willingness to recast basic elements of property is perhaps most prominent in writings about ecological degradation. For example H Doremus "Climate Change and the Evolution of Property Rights" (2013) 4 *UC Irvine L Rev* (forthcoming); MC Blumm "The Public Trust Doctrine and Private Property: The Accommodation Principle" (2010) 27 *Pace Envtl L Rev* 649; JB Ruhl "Making Nuisance Ecological" (2008) *Case W L Rev* 753; JC Nagle "From Swamp Drainage to Wetlands Regulation to Ecological Nuisances to Environmental Ethics" (2008) 58 *Case W L Rev* 787. A particularly useful collection is D Grinlinton & P Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011)

## SUMMARY

This article begins with claims that private property should promote human flourishing and constitutional ideals and that the transformation of property law now needed calls for a paradigm-shift in thinking about the institution, beginning with a major revision of the “rights paradigm”. Private ownership in obvious ways benefits an owner. But as explained, the links between private rights and human flourishing are complex, implicating not just owners but neighbours, surrounding communities, the landless, future generations, and other life forms. The recognition of private rights can both expand and curtail human flourishing. As for human flourishing, it is equally complex in that it is affected by many factors going beyond physical needs and consideration. The reform of property rights cannot fairly look only at how property rights benefit an owner, nor can property rights be justified on that basis. Property rights are created by law and involve the use of state power to protect rights by curtailing the liberties of non-owners and others. The only sound moral justification of this use of coercive power – this use of state power to help owners control and dominate others – rests in the ways a well-designed property regime can foster the welfare of nearly everyone, owners and non-owners alike. Law thus should not vest an owner with a power that does not, on balance, promote overall human flourishing. Inherited ways of thinking about private property cloud these realities and distort inquiries into property’s origins and moral and practical consequences. Much of this thought is best wiped away with discussion begun from a new place, from an express recognition of private property as an evolving, socially created, morally complex institution that can both promote and undercut human flourishing, an institution that must be carefully calibrated to maintain its moral legitimacy and maximise its social benefits.