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## Reply: The Complex Core of Property

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## REPLY

### THE COMPLEX CORE OF PROPERTY

Gregory S. Alexander†

In this Reply, I respond to critiques of my article, *The Social-Obligation Norm in American Property Law*,<sup>1</sup> by Professors Henry Smith,<sup>2</sup> Eric Claeys,<sup>3</sup> and Jedediah Purdy.<sup>4</sup>

#### *Bridging the Gap Between Core and Periphery: A Reply to Henry Smith*

Professor Henry Smith's critique is grounded in his basic rule-utilitarian point that the right to exclusion must be understood as the core of ownership, a point that he has eloquently, and repeatedly, made elsewhere. Not surprisingly, given his earlier works in property theory, his desire to define ownership as exclusion is based on information-cost considerations. The point is captured in the following statement from his response:

At its core, property draws on an everyday morality that it is wrong to steal and violate others' exclusion rights. Because property requires coordination between large numbers of anonymous and far-flung people, there are good information-cost reasons for relying on simple lay moral intuitions when it comes to the basic setup of property. This does not mean that information costs are the only reasons for setting things up this way, but an information-cost theory is compatible with a large range of moral theories other than a narrow case-by-case utilitarianism that disregards the basic problem of information and morality. Thus, use balancing is reserved for

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† A. Robert Noll Professor of Law, Cornell Law School. Eric Claeys, Jed Purdy, and Henry Smith humble me by writing such thoughtful and penetrating critiques of my article "The Social-Obligation Norm in American Property Law." I am deeply grateful to them for having done so and to the Editors of this volume of the *Cornell Law Review* for both soliciting their critiques and for giving me the opportunity to reply. I am also greatly indebted to Hanoach Dagan, Bob Hockett, and Eduardo Peñalver for very helpful comments and suggestions on this Reply. Special thanks to Joe Jolly for excellent editorial work.

<sup>1</sup> Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

<sup>2</sup> Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

<sup>3</sup> Eric R. Claeys, Response, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009).

<sup>4</sup> Jedediah Purdy, Response, *A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949 (2009).

situations of high stakes in which other solutions (like contracts) are not likely to work.<sup>5</sup>

Property, in other words, *is* exclusion, and everything else is a deviation from property.

There is a basic difficulty in Smith's response. He conflates the binary opposition between exclusion and social obligation, or as he has framed it in his earlier work, exclusion and governance,<sup>6</sup> with the more familiar distinction between rules and standards, treating these two binary oppositions as though they were somehow synonymous.<sup>7</sup> Throughout his response, Smith implies that his critique of my article, targeting as it does my ostensible support of open-ended standards, entails a critique of my support of the social-obligation norm in property law. But this entailment is false. There are multiple ways to reconcile support of rules, or at least rule-like norms, with a relatively robust conception of the social-obligation norm. One path, which Dean Hanoch Dagan has defined with great clarity, is to focus less on property as such and more on property institutions and the ways in which the social-obligation norm embedded in these institutions is (or at least should be) rule-like.<sup>8</sup> This approach permits a supporter of the social-obligation norm to promote stability and predictability in the property system, a goal that Smith stresses.

The social-obligation theory described and defended in my article is another path. Like Dagan's approach, it suffers from no conflict between the two binary oppositions. Contrary to Smith's reading, the social-obligation theory does not involve ad hoc analysis of the sort he describes. Nor does it purge exclusion from the core of ownership. What the social-obligation theory recognizes—and Smith does not—is that the core of property is complex, certainly more complex than the simple image of the virtually absolute right to exclude depicted in Smith's critique.

Both of these points—my rejection of ad hoc analysis and the complexity of the core of property—can best be made in the context of several right-to-exclude cases from New Jersey, a jurisdiction that has taken the lead in defining the complex core of property. One of the important New Jersey right-to-exclude cases is *Uston v. Resorts Inter-*

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<sup>5</sup> Smith, *supra* note 2, at 971 (citations omitted).

<sup>6</sup> See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) (arguing that exclusion and governance are distinct components of property rights).

<sup>7</sup> See, e.g., Smith, *supra* note 2, at 976 (noting that “[e]xclusion and governance are related to rules versus standards”).

<sup>8</sup> See Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1558–70 (2003) (developing a theory of property as an institution, “structuring and channeling people’s relationships” and “subject to ongoing normative . . . reevaluation and possible reconfiguration”); Hanoch Dagan, *Restitution’s Realism*, in PHILOSOPHICAL FOUNDATIONS OF UNJUST ENRICHMENT (Robert Chalmers et al. eds., forthcoming 2009).

*national Hotel, Inc.*<sup>9</sup> In that case, an Atlantic City casino excluded Ken Uston, a well-known card-counter. Uston argued that the casino had violated its duty to provide reasonable access to the public. The New Jersey Supreme Court agreed.<sup>10</sup> After noting that the common law once gave proprietors of places open to the public a nearly absolute right to exclude, the court said that the common law has since changed. The modern position is: “[T]he more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property.”<sup>11</sup>

Referring to that case, Smith states, “One wonders how it promotes human flourishing to mandate that casinos permit access to card counters unless the casino commission bans them.”<sup>12</sup> The connection between human flourishing and access to casinos is indirect, but it exists. If Title II of the Civil Rights Act of 1964<sup>13</sup> represents a direct effort to prevent racial exclusion,<sup>14</sup> which surely promotes human flourishing, then cases like *Uston* signify indirect efforts to prevent invidious forms of exclusion by qualifying the right to exclude for owners who have made their property open to virtually everyone. The *Uston* court itself alluded to this connection. In explaining the basis for its sliding-scale rule, the court referred to the “‘good old common law’” at the heart of both civil rights statutes and the Fourteenth Amendment’s guarantee of equal protection.<sup>15</sup> Contrary to what many commentators believe, the common law has not always given owners the right to exclude in arbitrary, unreasonable, or discriminatory ways. At the time of the Fourteenth Amendment’s enactment, the common law gave patrons of places open to the public a right of reasonable access. As the *Uston* court pointed out,<sup>16</sup> this broader original common law rule of reasonable access provided grounds for non-white plaintiffs to recover damages if owners of restaurants and other places open to the public refused to serve them.<sup>17</sup> Then, a rule of reasonable access serves to advance the policy of preventing invidious

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<sup>9</sup> 445 A.2d 370 (N.J. 1982).

<sup>10</sup> *See id.* at 371.

<sup>11</sup> *Id.* at 374 (quoting *State v. Schmid*, 423 A.2d 615, 629 (N.J. 1980)).

<sup>12</sup> Smith, *supra* note 2, at 984.

<sup>13</sup> 42 U.S.C. § 2000a–a6 (2006).

<sup>14</sup> The 1964 Civil Rights Act prohibits discrimination on several other grounds in addition to race. Among them are religion and national origin. *See id.* § 2000a(a).

<sup>15</sup> *Uston*, 445 A.2d at 374 (citing *Goldberg v. Maryland*, 378 U.S. 226, 296 (1964) (Goldberg, J., concurring)).

<sup>16</sup> *See id.* at 373–74.

<sup>17</sup> *See, e.g., Ferguson v. Gies*, 46 N.W. 718 (Mich. 1890) (reversing and granting a new trial to a plaintiff who was denied service on the basis of his race).

forms of discrimination in places open to the public, particularly when a violation of Title II might be difficult to establish.<sup>18</sup>

Cases like *Uston* illustrate that although the right to exclude is part of the core of ownership, the core is more complex than exclusion alone. How one defines the core of property depends on what values one thinks property serves. It is no accident that libertarians strongly tend to define the concept of ownership solely in terms of the right to exclude. To them, ownership is all about individual liberty and only individual liberty. A more sophisticated moral theory would yield a more complex conception of the core of ownership. Such a theory would understand in pluralistic terms the values that private ownership serves, including but not limited to individual liberty. Some other values that ownership serves include human dignity, just social relations, and self-development. All of these values, along with others, constitute the moral foundation of the complex core of ownership. The right to exclude, serving as it does the legitimate value of individual liberty, is not the sole constituent of ownership's core. The "everyday morality" to which Smith refers is not nearly as limited as he suggests.<sup>19</sup> Common moral intuitions extend significantly beyond injunctions against theft and trespass. They include perceived obligations to share and conserve, at least at times. Hence, *pace* Smith, qualifications on the right to exclude are not deviations from core moral intuitions underlying property, but rather expressions of those moral intuitions. Consequently, when courts such as the New Jersey court in *Uston* limit the casino owner's right to exclude by the public's right of reasonable access, they are not deviating from the core of ownership, but instead are negotiating among a complex collection of moral components of a common law concept, one courts have long understood as being multivalent.

Smith's second point concerns the putative ad hoc nature of the social-obligation theory. Smith's concern is captured in the following statement: "When Alexander and others see *State v. Shack* as a paradigm of how to decide property cases, they are advocating removing any presumption in favor of owners' exclusion rights."<sup>20</sup> There is a certain ambiguity in this statement. Does Smith mean that I want owners' rights to exclude to be determined on an ad hoc basis? I am advocating no such thing.

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<sup>18</sup> The common law rule permitting proprietors of businesses open to the public a broad right to exclude developed only later, when American courts began to adopt the English rule announced in *Wood v. Leadbitter*, 153 Eng. Rep. 351 (Exch. 1845). *See, e.g.*, *Shubert v. Nixon Amusement Co.*, 83 A. 369, 369-70 (N.J. 1912).

<sup>19</sup> Smith, *supra* note 2, at 971.

<sup>20</sup> *Id.* at 983 (citation omitted).

Smith's error is reading *Shack* as a purely ad hoc determination. But viewed in the context of New Jersey right-to-exclude case law, *Shack* fits within an identifiable pattern that provides a degree of regularity, if not a strict rule, to New Jersey's right-to-exclude decisions. In *State v. Schmid*,<sup>21</sup> the New Jersey Supreme Court held that under the state's constitution, individuals have a free speech right to distribute political leaflets on the Princeton University campus by virtue of the fact that the university, though private, invited numerous public uses of its resources in order to fulfill its broader educational ideals and goals. Later, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,<sup>22</sup> the same court held that this free speech right extended to protestors against the first Gulf War who were distributing leaflets in the "public" areas of shopping malls. And, as I have already discussed, in *Uston*, the court restricted a casino owner's right to exclude a patron, stressing the same factor, namely, "'the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property.'"<sup>23</sup> Although this norm is certainly a standard, rather than a binary, on-off rule, it is certainly not at the open-ended, ad hoc end of the scale where Smith put it. Under *Shack* and its cognate New Jersey right-to-exclude decisions, an owner's right to exclude is very much alive and well, and the limits on that right are reasonably predictable.

The social-obligation theory is to similar effect. As I indicated in the article,<sup>24</sup> the social-obligation theory in the main is consistent with the strong protection of private property rights, including the right to exclude. As the New Jersey right-to-exclude cases illustrate, the substantive parameters of the social-obligation norm can develop in a way that permits robust generalizations regarding the limits of the right to exclude. The social-obligation norm does not signify the sacrifice of law-like predictability in the pursuit of purely ad hoc determinations of what social justice demands. Property remains property; ownership, ownership.

But Smith may have a different objection in mind when he links *Shack* with a no-presumption position. He may mean that I do not want to privilege the right to exclude as somehow enjoying a special status for ownership as a conceptual matter, in his sense of core-and-periphery. Here, I agree with him, as I have already indicated. However, to the extent that Smith is suggesting that rejecting exclusion as

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<sup>21</sup> 423 A.2d 615 (N.J. 1980).

<sup>22</sup> 650 A.2d 757 (N.J. 1994).

<sup>23</sup> 445 A.2d 370, 374 (N.J. 1982) (quoting *Schmid*, 423 A.2d at 629 (N.J. 1980)).

<sup>24</sup> Alexander, *supra* note 1, Part IV.D.

the sole core of ownership requires purely ad hoc adjudication of actual exclusion rights, he is incorrect, for reasons I have just indicated.

*Can Property Law Be Virtuous: A Reply to Eric Claeys*

Professor Eric Claeys' critique<sup>25</sup> performs the very useful task of placing Professor Eduardo Peñalver's<sup>26</sup> and my articles within a broader intellectual context. Although Claeys is sympathetic with our efforts to draw attention to the potential contributions of what he calls "virtue-friendly practical philosophy" to law, particularly property law, he is wary of some of the normative implications of such an endeavor.<sup>27</sup> Claeys' fundamental doubt is about whether virtue ethics can or should contribute anything useful to virtue politics.<sup>28</sup> This is, of course, a large and complex issue, as Claeys recognizes, and I cannot possibly respond to his concerns in anything like a complete way here. I will confine my comments to a few suggestive remarks that may indicate why I believe I do not need to address the very difficult dilemma he poses.

First, I do not think it is helpful to cast the issue in terms of a choice between "virtue" or "rights." A major theme of Peñalver's article is that we need to have a conversation about how the law can strike the proper balance between the two. Indeed, I read Claeys' response as agreeing that the issue needs to be discussed.

Second, and along the same lines, in my view the distinction between ethics and politics is not categorical. Claeys is making the basic category mistake of supposing that ethics is confined to the personal realm. Obviously, there is such a thing as personal ethics, but there is also such a thing as public ethics. Distinguished philosophers such as Bernard Williams and Michael Oakeshott have made their careers by developing public ethics. Public ethics concerns politics both in its most obvious sense, namely, the behavior of public officials, and in its more quotidian moments with smaller publics. The developing field of military ethics is yet another variation of public ethics.

Even if one were to agree with Claeys' distinction between ethics and politics, it would still not follow that ethics has nothing to contribute to law. Claeys' statement that "[m]ost of the law . . . belongs to the field of *politics*"<sup>29</sup> is curiously reminiscent of Critical Legal Studies' slogan in the 1970s. We need not rehearse the debate over that claim to realize that law differs from politics in ways that make ethics relevant to law, even if ethics is not relevant to politics. To cite only one exam-

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<sup>25</sup> Claeys, *supra* note 3.

<sup>26</sup> Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

<sup>27</sup> Claeys, *supra* note 3, at 901.

<sup>28</sup> *See id.* Part II.

<sup>29</sup> Claeys, *supra* note 3, at 1068.

ple, how else can we understand recent efforts to develop the law governing lawyers in light of ethical theories?<sup>30</sup>

One senses that, at bottom, what most concerns Claeys is the possibility that an Aristotelian-inspired social-obligation theory will fundamentally undermine private property rights.<sup>31</sup> Claeys is, of course, correct about this. But as I tried to make clear in my article, the social-obligation theory takes private property rights seriously. The theory is inspired, in part, by Aristotle, but it is not strictly Aristotelian. Other sources, including Kant, Gewirth, and Raz, among others, that influence the theory do not rest on virtue ethics. Moreover, other theories, including welfarism, if taken to logical but absurd extremes, pose the same risk of wiping out the distinction between public and private ownership. Practitioners of these theories do not follow them to these lengths for obvious reasons, not the least of which is sound judgment. There is no reason to suppose that the results should be any different with virtue politics.

*Distributive Justice and the Social-Obligation Theory:  
A Reply to Jedediah Purdy*

Professor Jedediah Purdy's response<sup>32</sup> does me the favor of forcing me to clarify the relationship between distributive justice and the social-obligation theory. It also compels me to clarify the relationship between the social-obligation theory and the property case law discussed in my article.

To begin with, although the capabilities approach, upon which the social-obligation theory draws in part, is not a theory of justice in the distribution of what John Rawls called primary goods,<sup>33</sup> it clearly has implications for resource distribution. Under the capabilities approach, the relevant distribuenda are human capabilities, but as critics, including Professors Ronald Dworkin and G.A. Cohen have pointed out, "capabilities" is an ambiguous concept that can be interpreted to include external as well as internal distribuenda.<sup>34</sup> Even assuming that capabilities include external distribuenda, a program of justice in the distribution of capabilities does not necessarily commit

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<sup>30</sup> See, e.g., DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in *LEGAL ETHICS AND HUMAN DIGNITY* 99 (2007); W. Bradley Wendel, *Civil Obedience*, 104 *COLUM. L. REV.* 363 (2004); W. Bradley Wendel, *Legal Ethics as "Political Moralism" or the Morality of Politics*, 93 *CORNELL L. REV.* 1413 (2008).

<sup>31</sup> See Claeys, *supra* note 3, at 921–29.

<sup>32</sup> Purdy, *supra* note 4.

<sup>33</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 78–80 (rev. ed. 1999) (1971).

<sup>34</sup> See RONALD DWORIN, *SOVEREIGN VIRTUE* 285–303 (2000); G.A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, in *THE QUALITY OF LIFE* 9–53 (Martha Nussbaum & Amartya Sen eds., 1993).

Professor Amartya Sen<sup>35</sup> or other proponents of the capabilities approach to a full-throated legislative policy of redistribution of income or wealth. There may be pragmatic or prudential reasons that counsel against large-scale legislative redistribution of income or wealth on the basis of the capabilities approach. At any rate, I need not take a position on that question for present purposes.

In the case of the judicial decisions based on the social-obligation theory, there is no wealth or entitlement redistribution as such. The term "redistribution" presupposes the existence of some neutral distribution of the property entitlement, which the social-obligation norm then redistributes. But as my comments on Smith's critique indicate,<sup>36</sup> that argument begs the question. The initial distribution of the entitlement is the very question to be decided. The core of ownership is more complex than the right to exclude standing alone. The social-obligation theory does not redistribute entitlements so much as it defines them in the context of this complexity. Thus, cases like *State v. Shack*,<sup>37</sup> *Matthews v. Bay Head Improvement Ass'n*,<sup>38</sup> and *Penn Central Transportation Co. v. New York City*,<sup>39</sup> do not involve any judicial redistribution of entitlements. Rather, the courts in those cases defined the parameters of the ownership involved in each case, finding that the core of the owner's title consisted of more than the simple right to exclude all members of the public, including the state. In each of these cases, the court was considering a question as a matter of first instance, not modifying prior case law. The court in each case did not redistribute the owner's entitlement to another individual or to the public at large on the normative basis of an externally imposed social good that trumped the owner's interest. Rather, the court concluded that as a conceptual matter the ownership interest did not include the asserted right to exclude.

Purdy reads my discussion on property cases "as involving telling exceptions to the conventional operation of property rights."<sup>40</sup> My aim in discussing the cases I did was twofold: first, to illustrate the operation of the social-obligation norm, and second, to argue in favor of a theory that is not only normatively attractive, but also one that better distills the spirit or direction of recent leading judicial decisions, decisions that have already or are likely to influence other courts. These cases themselves provide a theory of property entitlement that, as my previous discussion of Smith's critique indicates, de-

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<sup>35</sup> For an example of Sen's work on the capabilities approach, see AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

<sup>36</sup> See *supra* pp. 1063-68.

<sup>37</sup> 277 A.2d 369 (N.J. 1971).

<sup>38</sup> 471 A.2d 355 (N.J. 1984).

<sup>39</sup> 438 U.S. 104 (1978).

<sup>40</sup> Purdy, *supra* note 4, at 950.

finest the contours of the complex core of ownership. In this sense, then, I resist the characterization of the cases as “telling exceptions to the conventional operation of property rights.”<sup>41</sup>

Finally, Purdy invites me to speculate on how I might have written my article differently, in a way that more closely follows the ideas that I developed in an earlier book, *Commodity & Propriety*.<sup>42</sup> I can scarcely improve on the account that Purdy himself provides of “a tradition in which we—Americans, common lawyers, moderns—make sense of our lives.”<sup>43</sup> The social-obligation theory is indeed what I called in that book a “proprietary” vision. I chose a non-historical mode of justification because my objective was overtly normative as well as positive. As Purdy correctly points out, Professor Charles Taylor insightfully argues that normative persuasion is best accomplished by providing accounts of our “social imaginaries,”<sup>44</sup> that is, shared visions and experiences. Part of the purpose of my discussion of the cases was to provide just such an account, an account of our modern proprietary vision and experience. In this sense at least, my article’s *modus operandi* is continuous with that of *Commodity & Propriety*.

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<sup>41</sup> *Id.* That said, I find Purdy’s equality principle (that is, the idea that inherent in ownership of market property is the obligation that “all comers must have access to market relations,” *see id.* at 951) quite attractive. This principle nicely captures cases like *Shack*, but I am less certain that it would capture all of the cases covered by my social-obligation theory (e.g., the beach access cases).

<sup>42</sup> GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* (1997).

<sup>43</sup> Purdy, *supra* note 4, at 954.

<sup>44</sup> CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 1–30 (2004).