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## **THE SOCIAL-OBLIGATION NORM IN CONSTITUTIONAL PROPERTY LAW**

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Private property rights and social obligation are commonly perceived as in tension with each other, if not antithetical. After all, the core function of property rights, at least according to the conventional wisdom, is to insulate individuals (including firms) from the demands of society, both in its organized political form and its non-political collective form. It is true, of course, that the common law has long recognized limits on the exercise of property rights, limits that grow out of the needs of others in cases of conflicting land uses. The obvious example is the common law of nuisance law, which judges developed using the ancient maxim *Sic utere tuo ut alienum non laedas* (“Use your land in such a way as not to injure the land of others”) as their guiding principle. But such limits on property rights are the exception, not the rule, the periphery rather than the core.<sup>2</sup> The core image of property rights in the minds of most people is the owner’s right to exclude others, with no obligation owed to them.<sup>3</sup>

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I am indebted to Eduardo Peñalver and Joe Singer for very helpful comments and suggestions.

<sup>2</sup>The core-and-periphery imagery owes to Duncan Kennedy. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>3</sup>See, e.g., Thomas W. Merrill, *The Right to Exclude*, 77 NEB. L. REV. 730 (1998).

That image is highly misleading. The right to exclude itself, thought by many to be the more important twig in the so-called bundle of rights,<sup>4</sup> is subject to many exceptions, both at common law and by virtue of statutory or constitutional provisions. For example, the common law requires land owners to permit police to enter privately-owned land to prevent a crime from being committed or to make an arrest.<sup>5</sup> More generally, property owners<sup>6</sup> owe more duties to others, both owners and non-owners, than the conventional imagery of property rights suggests. It is no exaggeration whatsoever to say that property law, on both public and private sides, in all legal systems recognizes, sometimes explicitly, sometimes implicitly, a social-obligation norm, that is, a norm that imposes responsibilities on owners as well conferring rights on them.

Property rights are inherently relational.<sup>7</sup> That is, they are embedded in and in turn give

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<sup>4</sup>See, e.g., J.E. Penner, *THE IDEA OF PROPERTY IN LAW* (1997); J.W. Harris, *PROPERTY AND JUSTICE* (1996); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1959); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

<sup>5</sup>See Restatement (Second) of Torts § 204.

<sup>6</sup>In using the term “property” as the object of entitlement-claims, I mean what one might call “old style” property, especially land. The vast majority of takings disputes, certainly in the U.S., involve land. In linking the right of property with access to food and shelter, I move beyond property as it is conventionally understood to include socio-economic rights. I am hardly the first to make this linkage. One strategy by which some proponents of so-called positive rights, i.e., socio-economic rights, have sought to gain recognition of such rights as a *constitutional* matter has been to adopt the republican definition of property as the material foundation for personal identity, self-governance, and participation in civic life. Under that definition, socio-economic rights are a species of, indeed perhaps the most important species of, the right of property. In American constitutional jurisprudence, the foremost exponent of this view is Frank Michelman. (For an early example, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, WASHINGTON UNIVERSITY LAW QUARTERLY 1979: 659.) Elsewhere in the world the linkage between property and socio-economic rights is less controversial than it is here.

<sup>7</sup>The relational aspect of property has been most forcefully expressed in recent years by Laura S. Underkuffler, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003), Joseph William Singer, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000), and Jennifer Nedelsky, *Reconceiving Rights as Relationship*, REVIEW OF CONSTITUTIONAL STUDIES/ REVUE D’ÉTUDES

structure to relationships. The relational character of property rights means that ownership involves responsibilities and obligations as well as privileges. But the responsibility dimension of private ownership has been both underappreciated and under-theorized. The social obligations of owners have been relegated to the margins while individual rights such as the right to exclude have occupied the center stage.

The purpose of my presentation today is to begin to correct this imbalance by opening a discussion of the social-obligation norm in property law. I will first sketch two basic conceptions of the social-obligation norm, one that accords with classical liberal thought, the other that links ownership's social obligation with the idea of community. It is the latter conception that I wish to examine most closely here. After sketching the two basic versions of the social-obligation dimension of private ownership, I will then unpack the second, community-linked conception, drawing a further distinction between two versions of it. One is a version set forth in a recent series of important and influential article by Hanoch Dagan, the Dean of the Law Faculty at Tel Aviv University. I will refer to this version as the contractarian theory to underscore how that theory locates and justifies the responsibilities that private owners owe to society on the basis of some sort of quid-pro-quo. I will then distinguish the contractarian version from another version of community-linked social obligation theory, one that I will call "civic." It is the civic version of social obligation theory that I will to defend here.

Finally, I will examine the implications of this civic conception in more detail. To illustrate what this civic version of ownership's social obligation might look like concretely, I will briefly focus on constitutional protection of property in one jurisdiction. The jurisdiction I

have selected – the United States – will be surprising to many because American property law is probably the last place where one would expect to find an operationalized social-obligation norm. Most legal observers believe that the image of property rights as nearly absolute is more true in the United States than in any other legal system in the world. At first blush, the constitutional law of property in the United States supports this perception. The U.S. Constitution’s property clause (or the closest we have to such a clause) is the takings clause of the Fifth Amendment. That text of that provision, unlike the property clauses of national constitutions elsewhere in the world,<sup>8</sup> contains no social-obligation provision as such. It acknowledges the limited character of the American constitutional right of property only indirectly, by permitting the state to expropriate property under particular circumstances (for “public use” and upon payment of “just compensation”). Beyond this, there is no formal textual recognition of social obligation of property.

Many non-American commentators have pointed to the American experience as the case-in-chief for the claim that constitutional protection of property virtually freezes the extant distribution of wealth, making well-nigh impossible attempts by legislatures to create a more just society through regulation and redistribution of property.<sup>9</sup> In fact, this is a seriously misleading view of the status of property rights in the United States. Although it is certainly the case that property enjoys a considerable degree of legal protection in the U.S., it is simply not the case that the American Constitution’s takings clause either freezes the distribution of wealth or significantly limits the power of legislatures to impose substantial restrictions on how land may

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<sup>8</sup>See, e.g., Germany, South Africa.

<sup>9</sup>E.g., debates over property as part of Canadian Charter of Human Rights of 1982.

be used. This is so despite the absence of an explicit social-obligation clause such is found in other 20<sup>th</sup> century constitutions around the world, such as Germany and South Africa.

I do not argue that American constitutional property law currently embodies, *tout court*, the civic version of the social-obligation norm. Such a claim would be sheer nonsense, as anyone slightly familiar with American takings law knows. Indeed, I have elsewhere argued that one reason why American takings law is so murky is the fact that American courts have failed openly to acknowledge, let alone rigorous develop, the social obligation dimension of the constitutional idea of property.<sup>10</sup> My point rather is that traces of the civic conception of the social-obligation norm can be found even in this most unlikely of places. To illustrate this, I will look at three corners of American constitutional property law.

## I. TWO CONCEPTIONS OF THE SOCIAL OBLIGATION OF OWNERSHIP

### A. *The Thin Conception*

In broad terms two competing conceptions of the social responsibility norm can be identified. The first conception provides a thin understanding of the social obligations of private ownership. It is limited to Anglo-American common-law's negative obligation to avoid committing nuisance, captured by the *sic utere tuo* maxim, and a weak affirmative obligation to contribute toward the provision of public goods, such as national defense or police and fire protection.

The economic version of this same basic view explains which affirmative obligations owners owe to their community on the basis of the familiar problems of free riders and holdouts. Individual owners are obligated to make contributions to the public fisc because voluntary means

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<sup>10</sup>Gregory S. Alexander, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* (2006).

of financing public goods founder on the shoals of high transaction costs, free riders, and holdouts. What is conspicuously absent from the list of projects to which the individual owner's social-responsibility obligation must contribute is the redistribution of wealth done for the sake of equality of welfare. The purging of wealth-redistribution from the scope of legitimate social-responsibility objectives would mean, for example, that the progressive income tax, the Social Security tax, and unemployment benefits taxes are all illegitimate.<sup>11</sup> The thin version of the social-obligation norm requires affirmative action of the owner only for the purpose of providing public goods, narrowly defined.

The thin conception of the social-obligation norm is not so much wrong as it is radically incomplete and indeterminate. As Joseph Singer has pointed out, "It is well understood that owners cannot use their property to harm others, but it is not well understood how difficult it is to define what that means."<sup>12</sup> The problem with using the harm principle as the basis for defining the social obligations of ownership is that it misleads owners into believing that Blackstone's description of ownership as conferring on owners "sole and despotic dominion" over their property is accurate. It wasn't accurate in Blackstone's time,<sup>13</sup> and it certainly isn't accurate today. Landlords must act to maintain their buildings in habitable conditions for their tenants, including, perhaps, keep air conditioning systems in good repair.<sup>14</sup> Owners of residential real

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<sup>11</sup> See Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), pp. 295-303, 309-312.

<sup>12</sup> Singer, *ENTITLEMENT*, p. 16.

<sup>13</sup> For an account of Blackstone's actual views, see Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 *Yale L. J.* 601 (1998).

<sup>14</sup> See, e.g., *Park Hill Terrace Assocs. v. Glennon*, 369 A.2d 938 (N.J. App. Div. 1977).

estate must disclose to potential buyers the existence of all known defects in the premises, including, according to one view, neighborhood noise problems.<sup>15</sup> Landowners may not construct buildings on their property in a way that interferes with their neighbors' access to sunlight used for solar power.<sup>16</sup> And the list of legally-imposed obligations on owners continues to grow.

### *B. Community-Based Conceptions of the Social-Obligation Norm*

The thin conception of the social-obligation norm that I have just described is premised on a social vision that, in the words of Hanoch Dagan, “underplays the significance of belonging to a community.”<sup>17</sup> Dagan goes on to say that the first conception’s social vision “perceives our membership [in a political and social community] in purely instrumental terms, and insists that our mutual obligations as members of such a community should be derived either from our consent or from their being to our advantage.”<sup>18</sup>

The second conception of the social obligation norm is considerably thicker.<sup>19</sup> It picks up where the first conception leaves off. Although a full explication of the theoretical foundation of this conception is beyond the scope of this paper, some comments about the character of this conception are necessary to distinguish it from the thin classically liberal conception of the

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<sup>15</sup> See *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453 (Cal. App. 1992).

<sup>16</sup> See *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982).

<sup>17</sup> Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 85 741, 771 (1999).

<sup>18</sup> *Id.*, pp. 771-72 (footnote omitted).

<sup>19</sup> For examples of such a conception see, Dagan, *Takings and Distributive Justice*, pp. 771-774; Joseph William Singer and Jack Beerman, *The Social Origins of Property*, 6 CANADIAN J. OF L. & JURIS. 217, 241-248 (1993); Singer, ENTITLEMENT, pp. 197-216.

social-obligation norm.

### 1. The Contractarian Version

A community-based conception of the obligation that property owners owe to their communities must rest, obviously, on a theory of community. The basis and scope of the social obligation will depend upon an understanding of the nature of the self and relationship between the self and social networks within which the individual expresses herself. This is obviously a large and complex topic, one that I can only touch upon here. For present purposes, it is enough to distinguish between two different understandings of community and of the relationship between the self and communities. These two understandings yield two distinct versions of the community-based conception of the social obligation norm.

The first the version developed by Hanoch Dagan in several excellent and influential papers over the past several years.<sup>20</sup> Dean Dagan is committed to the project of normatively developing the social dimension of property law, both in the private and public legal spheres. The basis for any conception of the social obligation norm is justice. But there are, as we all know, many competing theories of justice. The theory of justice that underlies the thin conception of the social-obligation norm is the classical liberal theory, the same theory that underlies approaches to constitutional protection of property such as Richard Epstein's, for example.<sup>21</sup> A thicker conception of the social-obligation norm must be based upon a theory of justice that allows a greater capacity for wealth redistribution. Such a conception seems underlie the approach to constitutional property that Dean Dagan has developed. His approach appears to be

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<sup>20</sup>See Dagan,

<sup>21</sup>See Epstein, TAKINGS

based on a theory of justice that is rooted in a theory of justice that firmly liberal, but not *classically* so. The fact that it remain firmly tethered to the liberal political tradition is indicated clearly, I believe, by his understanding of community.

Dean Dagan's conception of community is premised on a conception of the self as autonomous. From this perspective communities are nothing more than agglomerations of individuals, drawn together to act volitionally for the realization of certain shared ends. On this view, the relationship between the self and communities is both contractual, strategic, and welfarist. The self and communities are bound together by mutual agreement, sometimes express but commonly implied, to associate with each other for strategic ends. What motivates the self to act as a member of one or more communities is preference-maximization. Individuals associate with each other in groups in order to maximize their personal welfare. Individuals choose to act with others, to participate as members, when they hold what Charles Taylor calls "convergent" goods, which he distinguishes from "shared" goods.<sup>22</sup> Convergent goods are those in which individuals have a common interest, say, the common interest of tenants in preventing a fire in their building. By contrast, goods are shared when "part of makes it a good is precisely that is it shared, that is, sought after and cherished in common."<sup>23</sup> The good is not mine; it is ours. With convergent goods, individuals interact in pursuit of individually defined ends that happen to overlap with the ends pursued by others. The goods are not constitutive of the group or community.

From a contractarian perspective such as this, communities can make of its members only

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<sup>22</sup> Charles Taylor, *PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES* 96 (1985).

<sup>23</sup> *Ibid.*

those demands that it is likely to pay back in the long, if not the short, run.<sup>24</sup> That is, membership in a community, political or otherwise, does not ever warrant sacrifices by its members that are highly unlikely to remain uncompensated, even in the long run.<sup>25</sup>

Uncompensated involuntary sacrifices violate the basic commitment to personal autonomy and the protection of legitimate individual expectations. It is legitimate to expect individuals to make personal sacrifices for the common good just insofar as accounts will be evened up in the long run, that is, so long as there exist reasonable grounds to believe that the total long-term burdens that the individual bears will balance out with the total long-term benefits she receives.<sup>26</sup>

## 2. The Civic Version

There is a second conception of community that is more robust and, in that sense, more demanding than Dean Dagan's. In recognition of its relationship with the practice of citizenship, I will call this thicker understanding of community the "civic" conception.<sup>27</sup>

The basic difference between the contractarian and civic conceptions of community concerns the requirement of reciprocity. While the contractarian conception requires that the community in some fashion give back something to us in exchange for what we have given, the thicker conception of community that I want to defend here<sup>28</sup> considers sacrifice -- true sacrifice,

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<sup>24</sup> See, e.g., Dagan [CORNELL L. REV. article, forthcoming]

<sup>25</sup> See *ibid.*

<sup>26</sup> Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 776 (1999).

<sup>27</sup> The civic understanding of the social obligation norm is essentially what I have called "proprietary" theory of property. See Alexander, *COMMODITY & PROPRIETY passim*.

<sup>28</sup> I discuss this conception at somewhat greater length in Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989).

that is, giving with no expectation of reciprocation – is sometimes required merely by virtue of membership in a community. It holds that being members of communities means that sometimes we may have to make sacrifices even though, individually, we may not plausibly receive even long-term compensation that remotely approximates the sacrifices we made. With respect to political communities, citizenship in and of itself involves the possibility of uncompensated and unreciprocated sacrifices for the maintenance and well-being of the polity. An obvious example is military conscription. Without necessarily committing myself to restoration of the draft in the United States, I simply want to point out that one possible basis for justifying compulsory military service is the notion that membership in a political community may entail non-compensable sacrifices for the good of the entire community, as well as enjoyment of the fruits of community membership.<sup>29</sup>

Of course, there is a legitimate concern that this thicker conception of community may be taken too far. Important values like fairness, self-realization, and human dignity need to be protected, even as we recognize that community membership imposes the risk of unreciprocated sacrifices. This is an aspect of the irreducible tension that runs throughout all of the law of property, particularly constitutional property, and at least partly explains why takings law is unavoidably muddy.<sup>30</sup> But if we limit recognition of our contributory obligations strictly to circumstances where the individual eventually gets a benefit as valuable as the burden she has

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<sup>29</sup>See Michael J. Sandel, *What Money Shouldn't Buy*, 5 THE HEDGEHOG REVIEW 77, 90 (Summer 2003).

<sup>30</sup>See Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COM. 259, 261 (1992); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 599 (1991); Carol M. Rose, Mahon *Reconstructed: Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566–69 (1984).

sustained, then we weaken our conception of community and hinder it from fostering human flourishing, which depends upon not simply upon participation in networks of social relationships but upon the existence of social relationships that are non-strategic. Making the community's return contribution to the individual the sole touchstone for whether and when individuals owe obligations to the community ends up implicitly operating on the same contractarian logic in which the community's legitimacy depends on its serving the well-being of the ontologically prior individual, rather than, in some sense, constituting the individual.<sup>31</sup>

In contrast with the contractarian understanding of community, the social vision underlying the second understanding views membership in or belonging to communities as inherent in the human condition. At its root, the thick conception of community rests upon a particular ontological understanding. It builds on the Aristotelean notion that the human being is a social animal, not self-sufficient alone. The nature of the human condition is dependency and interdependency. Membership in political and social communities is an inevitable product of the human condition, rather than solely a volitional act committed for instrumental reasons.<sup>32</sup> Each person's identity is inextricably connected in some sense with others with whom the individual is embedded as a member of one or typically more communities. These communities are related to

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<sup>31</sup>The conception of community which underlays my approach to the social-obligation norm owes much to the following works: Alastair MacIntyre, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (1999); Rosalind Hursthouse, *ON VIRTUE ETHICS* (1999); Charles Taylor, *SOURCES OF THE SELF*; Michael Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE*; Robert Bellah, et al., *HABITS OF THE HEART*

An older but still rich exposition of this approach to community is Jacques Maritain, *The Person and the Common Good*, 8 REV. POL. 419, 449–50 (1946). I am indebted to Eduardo Peñalver for bringing this essay to my attention.

<sup>32</sup> For an elaboration of this idea, see Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, *CORNELL LAW REVIEW* 75 (1989): 1, 21-28.

the self in a constitutive sense. Each person's identity is literally constituted by the communities of which s/he is a member.

Membership in communities may be based upon contract or voluntary agreement but not necessarily. Indeed, community in its thickest sense can never be strictly reduced to an agglomeration of autonomous individuals. Individuals and community interpenetrate each other so that they cannot be completely separated. Our sense of ourselves as independent grows out of our relationships with others. As Alastair MacIntyre states, "We become independent practical reasoners through participation in a set of relationships to certain particular others who are able to give us what we need."<sup>33</sup> We receive from, we rely on parents, teachers and mentors, friends, co-workers, and so on throughout our lives. We are inevitably dependent upon these people not only for our livelihood but, paradoxically, for our complete ability to function as independent agents. MacIntyre points out that the upshot is that we exist in and emerge from these relationships in a state of debt. By virtue of our inherent embeddedness in communities, we owe obligations to others. Charles Taylor has expressed this social vision in the following terms:

[S]ince the free individual can only maintain his identity within a society/culture of a certain kind, he has to be concerned about the shape of this society/culture as a whole. He cannot . . . be concerned purely with his individual choices and the associations formed from such choices to the neglect of the matrix in which such choices can be open or closed, rich or meagre.<sup>34</sup>

The repayment of this debt "is not and cannot be a matter of strict reciprocity," MacIntyre points out.<sup>35</sup> Those to whom we are required to give are often not the same as those from whom

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<sup>33</sup>MacIntyre, *DEPENDENT RATIONAL ANIMALS*, p. 99.

<sup>34</sup> Charles Taylor, *Atomism*, in Charles Taylor, *2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* (1985), pp. 187, 207.

<sup>35</sup>MacIntyre at 100.

we received. There is no way of predicting in advance who are the persons to whom we shall be required to give. It might be our parents, but it might be total strangers from whom we have received nothing. Even if they are the same, what we give is often not the same as what we received, and often the amounts differ, sometimes very considerably. As members of flourishing social networks, we understand that often what we give we give unconditionally, because the measure of what is expected of us is the need of others rather than what we have already received or expect to receive in the future.<sup>36</sup>

Citizenship in its broadest sense is one of the most important forms of social network membership characterized by the process that I have been describing. Americans are apt to think of citizenship these days as something detached from everyday life, as a matter of public rituals and occasional role-playing. But in another sense, citizenship is a matter of interacting with others for the sake of the common good. It, too, involves dependence on others to become autonomous individuals. Here as well, our dependence creates debts, and once again, repayment of these debts is not strictly a matter of reciprocity. Why we owe, what we owe and to whom we owe repayment cannot be calculated, at least not solely, on the basis of some sort of quid-pro-quo schedule. We owe because we are dependent, we are members. What we owe and to whom we owe is just as often as not determined by the needs of others rather than what and from whom we have exactly received what we ourselves needed.

This is not at all to deny that expectations that our sacrifices for the well-being of society will be reciprocated in some fashion are frequently justified. The theory that long-term as well as short-term or immediate compensation needs to be taken into account in determining whether

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<sup>36</sup>Id. at 108.

compensation is due seems to me correct as far as it goes. For there is genuine reason for concern that the social-obligation norm might be carried too far. It may end up oppressing the poor and politically weak, as Dean Dagan argues.<sup>37</sup> His theory of long-term reciprocity serves as a useful way to identify and isolate such cases of exploitation.<sup>38</sup> But in a well functioning polity unreciprocated sacrifices will not invariably be visited disproportionately on the poor or underprivileged, and justice does not always require that sacrifices for the polity's well-being be reciprocated or compensated.

One final point needs to be made about the reciprocity requirement as it affects a requirement for payment of compensation for public land-use regulations. Dean Dagan has argued that courts should apply different levels of compensation according to the type of community that is involved, a local community of a larger one. But the distinction between local and broader communities is not self-defining. The relevant local community of an affected landowner will vary depending upon the identity and size of the landowner. My local community is not the same as that of a larger, public-traded corporate land developer. The large corporate developer's community is not confined to one city or even one state, as mine is. Some developers operate on a national or indeed an international scale. This difference in the character and size of our communities affects the calculus of reciprocity. Dean Dagan's notion is that long-term reciprocity is greater (and therefore a lower of monetary compensation is required) when local community is the actor than where a large community is the actor imposing the sacrifice on the landowner. But because large corporate land developers operate on such a vastly greater scale

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<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

than I do, what we as landowners can legitimately be expected to tolerate – that is, our respective reciprocity bases – will differ substantially. Where the landowner’s reciprocity base is extensive, there is less legitimacy in an expectation of monetary compensation because the likelihood of long-term compensation is greater.

## II. THE SCOPE OF THE SOCIAL OBLIGATION

Having sketched the theoretical foundation and character of this thicker, civic conception of the community-based version of the social-obligation norm, the question naturally becomes just what it includes. What exactly is the content of this version of the social obligation norm? The best answer that I can give is that the owner must provide the society of which she is a member those benefits that the society reasonably regards as necessary and that have some reasonable relationship with ownership of the affected land. In this Part I shall provide one example of a circumstance in which the community-based social-obligation norm should require no compensation. I wish to emphasize that my point is not that current American constitutional property law already has internalized the idea that private owners owe thick responsibilities to the communities to which they belong. My purpose rather is simply illustrative, hoping that this example might help clarify the civic conception.

Areas of public land-use regulatory law such as zoning and historic preservation law may be understood as being based on such an implicit civic obligation. When a city’s Architectural Review Board disapproves plans to build a residence whose style is conspicuously incompatible with that of its neighbors, the board is saying, at a minimum, that the owner owes surrounding owners an obligation to maintain everyone’s property values.<sup>39</sup> It may also be saying that the

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<sup>39</sup> See *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970).

public welfare that justifies exercises of the state's police power includes an obligation to maintain aesthetic values as well as to protect physical safety and health.<sup>40</sup> When the owners of New York City's Grand Central Terminal building, with its incomparable nineteenth-century *beaux-arts* facade, were denied the legal right to develop the air space directly atop the building,<sup>41</sup> this was a legal recognition that as owners of an obviously special, nearly unique building with respect to which they owed the community of which the building was a part an obligation not to use it in ways that would irrevocably destroy its unique architectural status.

The constitutional arrangement involving this civically-based social obligation of owners is not one-sided; it is reciprocal. The owner gets in return for what is given. The reciprocity involved in the deal, however, may be attenuated, with no requirement of either immediate in-kind compensation or complete proportionality. To elaborate on an earlier example, one might understand the result in the important Supreme Court decision in the *Penn Central* case in terms of the reciprocity component of a social responsibility norm.

Penn Central Transportation Corp. was required to give up its right to develop the air space above Grand Central Terminal, which it owned, by virtue of its responsibility to preserve for the benefit of the entire community an endangered urban architectural species. The building's benefit to the community, its historical importance and aesthetic near-uniqueness, was beyond doubt, and as a member of the very community that would benefit from the deal, Penn Central got in return for giving.<sup>42</sup> True, what it got was not of immediate benefit to Penn Central, nor

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<sup>40</sup> See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>41</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>42</sup> This argument is a version of what Hanoch Dagan calls the "attenuated conception of reciprocity." Dagan, *Takings and Distributive Justice*, p. 769.

was the benefit directly or completely proportional to what the owner gave up, the very valuable right commercially to develop the air space above its building. But it did get something.

One might understandably object that this benefit, which Penn Central obtained as a member of the community at large, is simply too attenuated to create any meaningful reciprocity. In contrast with such an “attenuated” form of reciprocity,<sup>43</sup> Hanoch Dagan has proposed what he calls an “intermediate conception of long-term reciprocity.”<sup>44</sup> Under that theory the regulatory agency is not required to pay compensation “if, and only if, the disproportionate burden of the public action in question is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magnitude to the landowner’s current injury that she gains from other—past, present, or future—public actions (which harm neighboring properties).”<sup>45</sup> Professor Dagan believes that under this intermediate version of reciprocity no compensation was due to Penn Central. The benefit that he sees as having been provided to Penn Central arose from the various other regulatory measures that protected and enhanced New York City’s “tourist attractions, business, and industry,”<sup>46</sup> especially in midtown Manhattan, where Grand Central Terminal is located. Thus, argues Dagan, Penn Central “will benefit directly and proportionately in the long-term from the aggregated benefits of the city’s public actions, despite the transient disproportionate burden.”<sup>47</sup> Surely there is something to this point. The designation of Grand

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<sup>43</sup> See *ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.*, pp. 769-770 (footnote omitted).

<sup>46</sup> *Id.*, p. 797.

<sup>47</sup> *Id.*, p. 798.

Central Terminal as a historic landmark in all likelihood made it an even bigger tourist attraction than it already was. More tourists generated more revenue for the owner. The rent that Penn Central received from tenants who run commercial operations, including retail concessions, within the building likely increased as a result of rent-escalation clauses that are common in commercial leases for retail stores. This marginal gain in profit should be seen as the result of the regulatory action of the New York City Historical Landmark Commission, providing exactly the kind of long-term reciprocity of advantage that Dagan has in mind. Once this fact is coupled with the further fact that there was nothing arbitrary about identifying Grand Central Terminal as subject to the restriction (for they were the owner and they were the ones proposing the change in question), the case for a compensation requirement becomes weaker and weaker.

### **III. FROM SOCIAL OBLIGATION TO SOCIAL TRANSFORMATION**

The thick communitarian version of the social obligation norm I have described can be the basis for social transformation. Recognition of the social obligation norm, even in its thick communitarian version, will not necessarily or always, lead to social transformation, but it can serve as the basis for a profound change in the way in which a society and polity are structured.

A recent example is South Africa. The property clause of the 1996 South African Constitution incorporates a thick social obligation norm through its explicit commitment to land reform and racial justice.<sup>48</sup> It states, for example, that “[t]he state must take reasonable legislative

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<sup>48</sup>The property clause of the 1996 South African Constitution is section 25. It provides as follows:

25      Property

1.      No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” It further provides that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.” Equally striking, if not more so, are cognate provisions

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2. Property may be expropriated only in terms of law of general application–
    - (a) for a public purpose or in the public interest; and
    - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
  3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including–
    - (a) the current use of the property;
    - (b) the history of the acquisition and use of the property;
    - (c) the market value of the property;
    - a. the extent of direct state investment and subsidy of the acquisition and beneficial capital improvement of the property; and
    - (e) the purpose of the expropriation.
  2. For purposes of this section–
    - a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
    - b. property is not limited to land.
  3. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
  4. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
  5. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
  6. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from provisions of this section is in accordance with the provisions of section 36(1).
  7. Parliament must enact the legislation referred to in subsection (6).

that create an array of positive socio-economic rights, notable rights to housing and health care.<sup>49</sup>

The result is a constitution that has been called “the most admirable constitution in the history of

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<sup>49</sup>Several provisions of the 1996 Constitution create socio-economic rights. Among the most important of these are the following:

#### Section 26. Housing

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

#### Section 27. Health Care, Food, Water, and Social Security

- (1) Everyone has the right to have access to
  - a. health care services, including reproductive health care;
  - b. sufficient food and water; and
  - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights
- (3) No one may be refused emergency medical treatment.

#### Section 28. Children

- (1) Every child has the right
  - ...
  - c. to basic nutrition, shelter, basic health care services and social services;
  - d. to be protected from maltreatment, neglect, abuse or degradation;
  - e. to be protected from exploitative labour practices
  - ...
- (3) In this section “child” means a person under the age of 18 years.

#### Section 29. Education

- (1) Everyone has the right
  - a. to a basic education, including adult basic education; and
  - b. to a further education, which the state, through reasonable measures, must make progressively available and accessible.

the world.”<sup>50</sup> Even if that assessment is considered excessive, there is no question that the South African Constitution is a truly remarkable document, one that is truly unprecedented and that unambiguously seeks to be transformative in nature. Its overriding goal is effecting the fundamental transformation of a society that has suffered profound political and economic injustices not only during the apartheid regime that was formally created in 1948 but also during the years of de facto apartheid before that.<sup>51</sup> The very fact that the South African Constitution aims at being one of the primary engines of a fundamental social transformation in its society makes it historically unparalleled and worthy of serious attention by constitutional scholars around the world.

In the context of South Africa today, “social transformation” primarily means land reform. The eventual outcome of the country’s attempt to realize its verbal commitment to creating “an open and democratic society based on human dignity, equality and freedom”<sup>52</sup> depend heavily on its ability radically to transform its land regime, not only as a legal system but as a social reality. This is so in a country where landlessness and homelessness are the norm among non-Whites, where literally millions of Blacks live in the desperate poverty of “informal” housing settlements (i.e., squatter settlements).<sup>53</sup>

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<sup>50</sup>Cass R. Sunstein, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001), p. 261.

<sup>51</sup>For a valuable historical discussion of the pre-apartheid era practices that paved the way for legal apartheid, see Leonard Thompson, *A HISTORY OF SOUTH AFRICA* (2000), pp. 154-187.

<sup>52</sup>SA Constitution, section 36(1).

<sup>53</sup>“Homelessness” is an amorphous and unhelpful concept in any society, but especially so in South Africa. There, hundreds of thousands of people live in informal (and illegal) squatter settlements. See Michael Aliber, *Overview of the Incidence of Poverty in South Africa for the 10-Year Review*, paper prepared for the Human Sciences Research Council, November 2002, p. 12. These people do live in homes in a sense, but the homes are grossly inadequate. Some are

The constitutionally-compelled programs for land redistribution and tenure reform are now largely complete. They are successful as far as they go, but given the vast scale of the problem of homelessness in South Africa today, they have barely scratched the surface of that country's enormous housing problem. Huge numbers of Black South Africans continue to live in shanty towns with their appalling conditions, and the migration of jobless Blacks from the poorer states such as Limpopo and the Eastern Cape continue to migrate to urban areas in wealthier states like the Western Cape in search of jobs. Most of these desperate souls end up in shanty towns.

The ubiquity and conditions of these shanty towns is one of the most shocking sights to the first-time visitor to modern South Africa. These settlements, which are created following illegal invasions of either public or private land,<sup>54</sup> differ in size, but all of them are inhabited by desperately poor (and mostly Black) South Africans living in desperate conditions. Land

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former farm workers who migrated to urban areas. Some are urban wage-earners who cannot afford decent housing. Most are unemployed.

Land redistribution in South Africa has occurred at a frustratingly slow pace. The maldistribution of landownership continues to follow racial lines. When apartheid ended, the new, democratically-elected government promised that it would transfer 30 percent of white-owned farmland to non-whites in five years. Ten years later, only 2 percent had been transferred. More than 90 percent of all of South Africa's commercial farmland remains in the hands of just 50,000 white farmers. Land invasions by squatters are still an almost daily occurrence today. See Sharon LaFraniere and Michael Wines, *Africa Puzzle: Landless Blacks and White Farms*, N. Y. TIMES, Jan. 6, 2004, p. A1.

<sup>54</sup>As the Court stated in *Port Elizabeth Municipality*, "The term land invasion . . . must be used with caution." The term, Sachs pointed out, "can be stretched to cover widely dissimilar cases, [such as] where a relatively small number of people have erected shacks and lived on undeveloped land for relatively long periods of time, or the situation in *Grootboom* where although a thousand desperate people occupied a hillside due to be developed for low-cost housing, no intent to jump the queue was shown and a remedy was not refused, or [where] there had been a deliberate and premeditated act culminating in the unlawful invasion and occupation of a large tract of land." *Id.* at n.22.

invasions have a long history in South Africa. The way in which the South African government historically has reacted to land invasions directly informs the relationship between the property right and the right to housing under the Constitution.<sup>55</sup>

With the end of the apartheid regime in 1993, land invasions by poor Blacks and the creation of informal and unauthorized housing settlements continued apace. The years of apartheid policies had created an acute housing shortage for Blacks in many parts of the country. In response to the land-rights provisions of section 25 and specifically to section 26(2)'s direct command to the state to "take reasonable legislative . . . measures, . . . to achieve the progressive realization of [the right to have access to adequate housing]," local governments enacted housing programs aimed at meeting housing needs, but the combination of the high demand for adequate low-cost housing and constrained government budgets has left many desperately poor people with no alternative to the deplorable informal housing settlements.

The transformation to a just society, a society in which decent housing is provided to every South African, will, of course, take years. The process will require a combination of several factors, among which are economic development, education, and above all a serious policy commitment at the highest level of South Africa's government. In the meantime the problem will persist and land invasions will continue. These land invasions will present courts with opportunities for courts themselves to act in creative and socially transformative ways, reaching decisions on the basis of the thick communitarian social-obligation norm to ameliorate the intolerable conditions that are the lingering result of apartheid. There is evidence that the South African courts have risen to the occasion. Perhaps no case better illustrates this than the

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<sup>55</sup>*Id.* at [15].

Supreme Court of Appeal's widely-noted decision in the case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*

In that case some 400 residents of an informal settlement in Johannesburg moved onto adjacent land that they mistakenly thought was owned by the city. In fact, the land was privately owned by Modderklip Farm. Within six months the new settlements included 18,000 people living in 4,000 shacks. The owner sought to evict the occupants, relying on the Prevention of Illegal Eviction and Unlawful Occupation of Land (PIE) Act. The lower court granted an eviction order, but the occupants failed to vacate. Meanwhile the Modder East settlement had grown to 40,000 inhabitants.<sup>56</sup> An execution writ was issued, and the sheriff was ordered to execute it. She insisted on a large sum of money<sup>57</sup> to cover the estimated cost of employing a private firm to carry out the eviction and demolition of the shacks. The owner was unable or unwilling to pay the sum, especially since it exceeded the estimated value of the land. Modderklip then filed trespassing charges against the occupants, some of whom were found guilty. The sheriff, however, failed to take any action, treating the matter as a civil dispute. Modderklip then sought assistance from various public bodies. The President referred the matter to the Department of Land Affairs, which referred the matter to the Department of Housing, which did not respond. In the meantime, the sheriff had increased the sum required for eviction. Understandably frustrated, the owner once again went to court and obtained a declaratory order forcing all of the relevant government officials (including the National Police Commissioner) to take all necessary steps to remove the unlawful occupants (the enforcement order).

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<sup>56</sup>The settlement had just one water tap, and the only facilities were rudimentary pit toilets.

<sup>57</sup>R1.8 million (approximately \$275,000).

At first blush the case appears to be solely a matter of private law, enforcement of a simple eviction order. Indeed that is exactly how the state and the police initially treated the case. The Supreme Court of Appeal took a different view of the situation, however. It observed that this attitude “does not reflect an adequate appreciation of the wider social and political responsibilities [that the Constitutional Court in *Grootboom*] identified in respect of persons such as the present occupiers.”<sup>58</sup> The case in fact posed an apparent conflict between two constitutional duties of the state: its duty to protect Modderklip’s ownership rights under section 25 and its duty to provide access to adequate housing under section 26. The court’s resolution of this apparent conflict was premised on its assumption that the state was under a constitutional duty to break the impasse by removing the main obstacle to enforcement of the eviction order, namely, the lack of available alternative land for the occupants. The court treated the state’s failure in this regard as simultaneously a breach of the occupants’ section 26 housing right and Modderklip’s section 25 property right.<sup>59</sup> The hard question, one that the court handled rather summarily, was why the state was under a constitutional duty to provide the occupants of Modder East with alternative housing.<sup>60</sup> Putting that aside, the important aspect of the case was the basis for the court’s conclusion that the state had violated both its duty to protect Modderklip’s section 25 property right and the occupants’ section 26 housing right. The basis

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<sup>58</sup>2004 (8) BCLR at 828.

<sup>59</sup>*Id.* at 841.

<sup>60</sup>The court based its conclusion on the *Grootboom* decision, but the implications of that decision on the instant case are rather more complex than the court allowed. Among other concerns is the possibility that queue-jumping, which the *Grootboom* court clearly stated must not be permitted or encouraged, might be encouraged under the court’s view. The court concluded that because the occupants had mistakenly believed that the land was municipal land no queue-jumping was involved in the case. *Id.* at 832.

for that conclusion was section 7(2) of the Constitution, which provides that the state is under a duty to “respect, protect, promote and fulfill the rights in the Bill of Rights.” In the court’s view, by failing to provide the occupants with alternative housing in accordance with section 26, the state failed to protect the owner’s section 25 property right, as section 7(2) requires. The court stated:

[I]n a material respect the state failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers need for land to fall on an individual . . . .<sup>61</sup>

Failure to protect one right, in other words, meant failure to protect another right.

The protective-duty theory has yet to be fully developed by South African courts, but cases cited by the Supreme Court of Appeal provide some guidance. The court cited cases from the European Court on Human Rights, the Inter-American Court of Human Rights, and the African Commission.<sup>62</sup> The theory adopted in those cases is that the constitutional duty to protect and promote fundamental rights, derived from a constitutional provision placing such a duty on the state, places a general duty on states to protect their citizens from all infringements of their fundamental rights, even when those rights are threatened by the actions of other individuals rather than the state. The Supreme Court of Appeal’s opinion in *Modderklip* indicated that this means that the state must more than merely add new laws or creating legal procedures to protect the constitutional rights of owners and the housing rights of occupants. The state had already

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<sup>61</sup>*Id.* at 834.

<sup>62</sup>*Id.* at 832 n.17, citing *X & Y v. The Netherlands*, [1985] 8 EHRR 235 (ECHR); *Union des Jeunes Avocats v. Chad*, 9<sup>th</sup> Annual Activity Report 72 (African Commission); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 15<sup>th</sup> Annual Activity Report 30 (African Commission); and *Velásquez v. Rodríguez v. Honduras*, 28 ILM 291 (1989) (Inter-American Court of Human Rights).

created a new eviction process, and it had set in motion a program for providing adequate housing for all citizens. These existing procedures and programs, however, were not adequate to protect the constitutional property and housing rights involved in the case. The owner was not able to get its eviction order executed, nor were the unlawful occupants presented with an alternative source of adequate housing. A new approach was required, one that was not provided by either existing common law or statutory law. Specifically, the needed approach must assure that when the owner's property right is effectively protected by removing the occupants from its land, the occupants' housing right is in turn protected. Presumably that means that the state must somehow find alternative housing for the occupants. Exactly what that will entail remained unclear from the court's opinion.

On appeal, the Constitutional Court refused to decide whether it could order the state to expropriate land under such circumstances.<sup>63</sup> It held instead that the award of compensation granted by the Supreme Court of Appeal was appropriate, explicitly acknowledging that the effect of the award was the same as ordering purchase by the state.<sup>64</sup> When the dust settles, what is clear is that until and unless the state provides alternative land, the occupants were entitled to remain on Modderklip's land.

The fact that the Constitutional Court decided the case under a different theory than that used by the Supreme Court of Appeal should not obscure the importance of the Court's endorsement of the appellate court's remedy. This remedy represents a significant change from

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<sup>63</sup>The Court's unwillingness to reach this matter was due to the fact that there was no indication whether or not the state owned other land to which it could have relocated the occupiers. Were such land available to the state, the Court said, it would not be just and equitable for the Court to order the state to acquire specific land on Modderklip's farm. *Id.*, par. 64.

<sup>64</sup>*Id.*, par. 62.

the approach taken under traditional South African law. No existing judicial or statutory law provided for such a remedy. It enables the transformative aim of the Constitution to be fulfilled by assuring that desperately poor persons are not left homeless once again. In the long run the state will be compelled, as a practical matter, to acquire either new land or, more likely, the land currently occupied. In the meantime the owner's constitutional property right under section 25 is protected, albeit through a liability rule rather than a property rule, i.e., through the remedy of damages rather than eviction, would restore its possession of the occupied land. This remedy may not satisfy all of the relevant parties. The state may or may not provide the occupiers with alternative land, and even if it does, it may or may not provide that land quickly. In the meantime, the owner will be forced to maintain its relationship with an enormous contingent of occupiers, a relationship that *Modderklip* probably would not continue. Doubtless *Modderklip* would prefer to have its land back rather than just getting compensation, relieving it of the necessity of dealing with the equivalent of a small city's population as well as permitting it to use the land for possibly different (and possibly more remunerative) purposes. But money is better than nothing, and given the serious possibility that evicting the occupiers would have been found to constitute a violation of their section 26 rights, it seems that the owner's preferred remedy—eviction—would not have been granted by the courts, including the Constitutional Court. In such circumstances, where no remedy will satisfy anyone, the award of money damages is both creative and just. It further illustrates the capacity and willingness of the South African courts to take seriously the Constitution's social-obligation norm in an effort to move toward social transformation, however slightly. Indeed, the *Modderklip* decision could well serve as a model for courts elsewhere who take seriously the idea that obligation imposes duties while at the same time fully respecting the

institution of private ownership.

#### IV. CONCLUSION

Professor Joseph Singer has trenchantly observed, “Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.”<sup>65</sup> He is right. Collectively, these duties constitute a private-law version of a social obligation norm, a template for the development of an explicit constitutional norm of the social obligation inherent in ownership. The private-law social obligation norm, like the private-law meaning of ownership itself, does not control the substantive meaning of the constitutional norm, but it does establish the basic principle that private ownership confers duties as well as rights, a point often lost in discussion about the relationship between individual owners and the state. In this paper I have argued not only that ownership and obligation are deeply connected with each other but, equally if not more important, that their mediating connection is community. I have further argued that a normatively robust understanding of community recognizes that membership in a political community, including a liberal democratic community, in and of itself involves the possibility of uncompensated and unreciprocated sacrifices for the maintenance and well-being of the polity. Obviously, private ownership is meaningless if such sacrifices are routinely or arbitrarily demanded by the state. But private ownership and sacrifice as property owners for the well-being of the properly-ordered community, one may say the *virtuous* community, are not mutually exclusive notions. Indeed, unless private property exists to serve the properly-ordered community, what is its point?

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<sup>65</sup> Singer, ENTITLEMENT, p. 18.

