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PROPERTY NORMS:  
REFLECTIONS ON THE  
EXTERNALITIES OF OWNERSHIP

*Joseph William Singer*

**ABSTRACT**

*Property norms not only justify the legal rules that allocate control over valued resources but shape our experience of the social world and the appropriate contours of human relationships. In fulfilling these functions, norms first orient us by telling us who is an "owner" and who is a "non-owner" with regard to any particular entitlement in a particular resource. Second, they tell owners when they are obligated to take into account the effects of their actions on others and when they are entitled to think of their own interests alone. In so doing, they define which externalities we as a society must pay attention to, worry about, and seek (if possible) to prevent. By reference to the values promoted by property law and narratives about the situations in which those values are thought to be appropriate, property norms tell us when something should be viewed as an externality and when it can appropriately be viewed as a "self-regarding act" and of no legitimate concern to others. Third, when we recognize the existence of externalities, property norms help us prioritize conflicting interests, needs, and wants to resolve disputes among owners and between owners and non-owners.*

*We must critically analyze norms to develop contextually basic justifications for particular property law rules and institutions. Such critical analysis is not incompatible with normative argument. On the contrary, we will not understand property law or how the institution of property functions unless we articulate our background understandings and bring to consciousness what Charles Taylor has called the "strong evaluations" underlying them. Only then can we reasonably decide what norms should govern particular property rights in a free and democratic society that treats each person with equal concern and respect.*

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*Joseph William Singer*<sup>β</sup>

*A certain rich man was enjoying a banquet. As he sat at the groaning table he could see outside the window, at the door of his home, an old woman, half starved, weeping. His heart was touched with pity. He called a servant to him and said: "That old woman out there is breaking my heart. Go out and chase her away."\**<sup>γ</sup>

Felix S. Cohen

§ 1.0 *Norms, entitlements & harms*

Every morning since 9/11, Donald Lamp has hung an American flag outside his condominium balcony.<sup>1</sup> Like many Americans, he wanted to express his solidarity with his fellow countrymen and his strong support for the values that Americans hold dear. But his understandable display of patriotism was met with an unexpected response. The condominium association ordered him to take the flag down; it violated a condominium rule prohibiting external adornments such as wind chimes, banners, and flags. This decision became national news, partly because Lamp is the father-in-law of United States Supreme Court Justice Clarence Thomas, and partly because of popular

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<sup>γ</sup> FELIX S. COHEN, *Indian Claims*, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 264 (Lucy Kramer Cohen ed. 1960).

<sup>1</sup> *Apartment dweller, managers clash over flag display*, Associated Press, June 6, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=13469>. See also Tony Mauro, *An unwelcome met for free speech*, USA TODAY, Aug. 18, 2004, at 13A; Eric Olson, *Father-in-Law of High Court Justice Defies Rule, Flies Flag*, ST. LOUIS POST-DISPATCH, May 29, 2004, at 6.

outrage at the idea that one's neighbors could have the power to prevent an owner from flying an American flag from the balcony of one's home at a time when the United States was under attack from foreign enemies. Indeed, last summer the Congress of the United States passed a federal law protecting the right of home owners to display the American flag – a law that expressly makes unenforceable any condominium rule or restrictive covenant to the contrary.<sup>2</sup>

Donald Lamp believed he had a right to fly an American flag from his own home and the Congress of the United States agreed with him. “A man's house is his castle,” said Sir Edward Coke, and many Americans embrace that view with a vengeance.<sup>3</sup> From Lamp's perspective, although his neighbors were clearly *interested* in regulating his use of his land, their interests were *not legitimate*. On this view, we can say that his property use was what John Stuart Mill would have called a “*self-regarding act*.”<sup>4</sup> His actions on his land did not harm others in any tangible way and his neighbors therefore have no legitimate interest in stopping him from doing as he wished. This *castle* or *ownership* conception of property views legally imposed restrictions on the ability to act freely on one's own land as limitations on the rights of the owner and presumptively illegitimate.<sup>5</sup> From this perspective, the federal statute protecting the right to display the American flag was a *deregulatory* law that restored the freedom of owners to use their property as they see fit without meddlesome interference by the community.<sup>6</sup>

Lamp's neighbors did not see it that way. They bought units in a condominium partly so that they could collectively regulate the external

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<sup>2</sup> *Freedom to Display the American Flag Act of 2005*, 4 U.S.C. § 5 note (Pub. L. 109-243, 120 Stat. 572 (July 24, 2006)). The statute provides, at §3:

A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.

Section 4 of the statute contains an exception for “any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association.”

<sup>3</sup> Sir Edward Coke, *Third Institute of the Laws of England* 162 (1644).

<sup>4</sup> JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., Penguin Books, 1974)(1859).

<sup>5</sup> Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314–322 (2006).

<sup>6</sup> On the complex relation between property and freedom, see Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005).

appearance of the property, as well as the use of individual units. From the neighbors' point of view, Lamp's act in flying the flag was anything but a self-regarding act; it was a kind of nuisance – an attack on the vested property rights of his neighbors and an illegitimate use of his property. By flying the flag, he interfered with his neighbors' bargained-for property rights, depreciating both the value of their investments in their homes and the setting in which their homes were located. Whatever he might claim, Lamp simply did not *own* the right to fly a flag from his balcony; by buying property subject to a condominium declaration, he had impliedly agreed to be bound by rules adopted by his neighbors. In contrast to the *castle* or *ownership* conception of property, we might call this the *good neighbor* or *environmental* conception of property. This view conceptualizes property rights as *socially situated*.<sup>7</sup> The view that the use of one's land often affects the legitimate interests of neighbors (and thus may be limited to the extent necessary to protect those legitimate interests) is associated with a conception of property rights as *overlapping* or *imbricated*.<sup>8</sup> Physical borders between owners may define the space within which owners are free to act but those borders do not define the scope of the owner's freedom – nor of the owner's property rights. This view takes for granted that owners have *obligations* as well as rights and that one purpose of property law is to regulate property use so as to protect the security of neighboring owners.<sup>9</sup> From this perspective, the federal statute protecting the right to display the American flag effected both a *deprivation* of property rights and an intrusive limitation on freedom of contract.

How do we choose between the *castle* conception and the *environmental* conception of property? Must we choose? In fact, both conceptions are important to the structure of property as a social and legal institution, and both have a hold on us.<sup>10</sup> When we are imagining the owner exercising his property rights, the *castle* conception looms large in our minds; others have no claim to take from the owner what is his and we start from the assumption that owners are free to use what they own for their own purposes and in their own way. On the other hand, we know that owners are not generally entitled to cause harm to others. When the exercise of a property right causes harm, we are confronted with what we might call an *externality*; in such a case, the *environmental* conception looms large.

But now we reach the heart of the matter. How do we decide when property rights cause harm and in which direction the harm goes? Was Lamp harming his neighbors by flying the flag on his balcony or were they harming him when they made him take it down? Or was this a case of legitimate

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<sup>7</sup> See Singer, *Ownership Society*, *supra* note — at 322–325, 328–338.

<sup>8</sup> See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

<sup>9</sup> See Singer, *Ownership Society*, *supra* note — at 322–325, 328–338.

<sup>10</sup> See also *id. passim* (describing three models of property).

interests on both sides, which could only be resolved by choosing to avoid the more serious harm? How do we conceptualize the harms to which owners and the legal system must attend? When is an act of ownership within the scope of the owner's domain and when does it cross the boundary to invade the domain of others? Which externalities must we account for and which may we legitimately ignore? How do we distinguish the *inside* and the *outside* of property?

Libertarians answer these questions by adopting some version of the castle model of property. Because they seek to limit state interference with the powers of the owner, libertarians are almost always ready to view the exercise of a "property right" as a self-regarding act. Conversely, both economists and legal realists tend to identify almost all exercises of rights as imposing externalities on others; certainly, they find externalities in cases of competing interests. Most people however – including most judges – are in the muddled middle; both images have intuitive appeal, depending on the context. We make normative judgments about which interests are legitimate and which harms are cognizable in particular social contexts. We then reflect on the relevance, strength, and cogency of those interests and harms in particular contexts, based partly on implicit and explicit normative considerations and partly on our intuitions about the rights of "owners." Based on that normative reflection, we reach considered judgments about the legitimacy of claims and the significance of harms. Competing conceptions of property may influence our deliberations, but they may also help express our considered judgments about appropriate social relationships.

How do we evaluate the legitimacy of interests and the cognizability of harms? One possibility is *tradition*, embodied in the legal system of precedent; another is *cost-benefit analysis*, embodied in modern efficiency analysis; and a third is *rights theory*, embodied, for example, in libertarian theories of property rights. While each of these approaches has something to offer us in figuring out what the law should be, they fail to pay sufficient attention to the core role of *norms* in prescriptive argument. Norms do their work in all fields of law but play an especially powerful role in property law.

Property norms are standards that help allocate and define the legitimate interests of persons with respect to control of valued resources. More fundamentally, property norms shape our understanding of the *meaning* of property rights and the *legitimate contours of social relationships*. Neither law makers nor ordinary persons in their daily life view all interests as legitimate and worthy of defense. Nor do we value all interests equally. Rather, we judge certain interests to be illegitimate *per se* and other interests to be legitimate but unworthy of legal protection. Moreover, when legitimate interests conflict, we are not indifferent to *qualitative* distinctions among them. Built into our moral consciousness, our way of life, and our legal system, are judgments about the *appropriateness* of claims of entitlement.

Sometimes these moral judgments are well-known and accessible to us and, as such, may reflect what Charles Taylor has called “strong evaluations”<sup>11</sup> and Mark Timmons has called “evaluative assertions.”<sup>12</sup> These evaluative assertions may take the form of *moral demands* – claims we feel entitled to make on each other. As such, they express *human values*. They may, however, take the form of *narratives* that shape the way we view human relationships, interests, needs, and desires. Sometimes, however, norms may be so deeply embedded in our way of understanding the world that they serve as unconscious assumptions. Charles Taylor has called these fundamental assumptions “social imaginaries”<sup>13</sup> or “background understandings” that inform our understanding of social life. Importantly for law, they shape our understanding of the legal institutions of a free and democratic society – one of which institutions is the institution of private property.<sup>14</sup> As Taylor has suggested, we will not understand property law or the institution of property unless we *articulate* these background understandings and bring to consciousness the strong evaluations underlying them.<sup>15</sup>

These background understandings are both complex and contextually situated. Although, as Laura Underkuffler has argued, the *idea of property* is absolute, our working conception of property – what Underkuffler calls *the*

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<sup>11</sup> CHARLES TAYLOR, *SOURCES OF THE SELF* 4 (1989) (“moral issues [involve] what I have called elsewhere ‘strong evaluations,’ that is, they involve discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged”).

<sup>12</sup> MARK TIMMONS, *MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM* 129 (1999) (“Evaluative assertions, including moral assertions (in their primary usage), do not describe the world or purport to describe it, but play a fundamentally different sort of role in human discourse – broadly speaking, an action-guiding role. Since moral statements make genuine assertions, they are truth-apt; that is, truth and falsity are properly predicated of them.); *see id.* at 145-146 (“First, moral statements typically effect a *demand*, of those to whom the statement is addressed, to behave in ways that conform to the moral stance being asserted. Second, they typically signal the speaker’s readiness to back the moral stance being asserted with *non-subjective reasons*, in other words, reasons that do not appeal to matters of individual taste, personal preference, or the like. Third, they typically *challenge* the listener, insofar as he adopts some conflicting moral stance, to provide non-subjective reasons in support of that stance and against the speaker’s own stance.”)

<sup>13</sup> CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004).

<sup>14</sup> *See* Joseph William Singer, *Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL’Y REV. – (forthcoming, 2007).

<sup>15</sup> TAYLOR, *SOURCES OF THE SELF*, *supra* note — at 8-11; *see id.* at 34 (arguing that “articulation” involves “try[ing] to increase our understanding of what is implicit in our moral and evaluative language”); *see id.* at 41 (discussing the need to “explore the background pictures which underlies our moral intuitions”). *See also* Charles Taylor, *Leading a Life, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 170, (Ruth Chang, ed.) (1997).

*institution of property* – is complex, nuanced and differentiated by social context.<sup>16</sup> Different conceptions of property and different property norms govern different areas of social life. These property norms not only describe large conceptions of social order, as Gregory Alexander has taught us,<sup>17</sup> but shape the details of property law which both structure everyday interactions and define legal doctrine at the most detailed level.<sup>18</sup> We need to understand the norms that shape our understanding of property not only so we can better understand how property law functions but so that we can make better normative choices. Property can promote both freedom and justice only if we can debate openly and honestly what norms we think *should* govern property rights in a free and democratic society that treats each person with equal concern and respect.<sup>19</sup>

I have been speaking about norms as if they were a good thing. After all, property norms help adjudicate disputes and justify the existence and distribution of property rights by reference to widely shared values. For example, property provides us with the space we need to be ourselves, thereby providing us both security and autonomy. But property norms have a dark side; by justifying our control over the property we own, norms insulate us from having to see or think about the exclusionary effects of our property claims. *Property norms give us the luxury of indifference.* The right to exclude others from your property entails duties on others to stay off your land unless they get your consent to enter. And the right to exclude, by its nature, is most problematic when others *need* what we own. As Laura Underkuffler so powerfully reminds us: “The extension of property protection to one person *necessarily and inevitably* denies the same right to others.”<sup>20</sup> Moreover, the owner is empowered to withhold his property from others even if it is “necessary for the survival of life itself.”<sup>21</sup> When property norms allow us to consider an act of ownership as *per se* defensible, they protect owners from worrying about the effects of exclusion on non-owners. At the same time, property norms sometimes intrude on our consciousness and require us to draw back the curtains, look outside, and feel a sense of responsibility for the stranger at the gate. It is, after all, our exclusionary claims that create the vulnerability experienced by non-owners when we deprive them of things needed for human life.<sup>22</sup> We may need such spheres

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<sup>16</sup> LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

<sup>17</sup> GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997).

<sup>18</sup> See SINGER, *ENTITLEMENT*, *supra* note — .

<sup>19</sup> See Singer, *Things that We Would Like to Take for Granted*, *supra* note — .

<sup>20</sup> UNDERKUFFLER, *THE IDEA OF PROPERTY*, *supra* note — at 141.

<sup>21</sup> Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039 (1996).

<sup>22</sup> UNDERKUFFLER, *THE IDEA OF PROPERTY* *supra* note — at 141 (“If the enjoyment of a particular resource by one person is protected, then the enjoyment of that same resource by

of safe space to live our lives, but a free and democratic society that treats each person with equal concern and respect cannot ignore such concerns.<sup>23</sup>

If property is to be justified at all, we must hold two contradictory thoughts in our heads at the same time. We must remember the moral goods that property provides us, and in doing so we must suspend our recognition that exclusionary claims deny things that other people need and that their need is often desperate. Yet at the same time, we cannot be honest or congruent with our own humanity if we do not remember that all property, by its exclusionary nature, creates externalities of the kind that Underkuffler insists we remember. We could say that everyone is better off with a system of property than without, but, as Jeremy Waldron taught us, this answer is not acceptable unless our system *in fact* makes it possible for anyone to become an owner.<sup>24</sup> There is substantial evidence that this is not the case, and if that is so, we face a big problem.<sup>25</sup> The *right to keep* what you own must be rendered compatible with the *right to get* property in the first place; we cannot protect one without the other if we are not to collapse into self-contradiction.

In §2, I will explain how property norms influence our understanding of externalities. They shape the contours of appropriate social relationships by defining when there are externalities and in which direction they go. They do this by identifying *legitimate interests* and *cognizable harms* through methods of *orientation* and *evaluative assertion*. Both the concept of “ownership” and the plural values of ownership play central roles in the construction of externalities. In §3, I will argue that norms help decision makers resolve conflicts among property claims through various methods of *contextualization* and *prioritization*. I will conclude in § 4 by arguing for a form of normative argument which recognizes the constructed nature of moral argument while making sense of the human impetus to make moral demands. I will then apply that normative approach to reflect on the ways in which property norms function both to justify and to challenge existing patterns of distribution. Our goal should be to formulate and apply norms

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another is denied.”); Underkuffler-Freund, *Property: A Special Right*, *supra* note — at 1039 (“The extension of property protection to one person *necessarily and inevitably* denies the same right to others.... [¶] Property rights are also special because they alone deal with rights that—at their most basic level—are necessary for the survival of life itself.”).

<sup>23</sup> JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295 (1991). On the importance of speaking to the loser, see JOHAN VAN DER WALT, *LAW AND SACRIFICE: TOWARDS A POST-APARTHEID THEORY OF LAW* (2005).

<sup>24</sup> See WALDRON, *RIGHT TO PRIVATE PROPERTY*, *supra* note — . See also Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 *LOY. L. REV.* 243, 289–290 (2006).

<sup>25</sup> See Singer, *After the Flood*, *supra* note — .

appropriate to the legal framework of social relations in a free and democratic society.

## § 2.0 *How norms shape externalities*

### § 2.1 *The intellectual history of externalities*

Liberalism starts with the idea that that each individual is of infinite and equal importance and that a central aspect of human dignity is the power to live life as one chooses on one's own terms. This idea represented a radical break with the normative world that existed in ancient and medieval times.<sup>26</sup> The older view saw the world as possessing an inherent structure supported by nature and God with human beings occupying a particular place in that structure. Natural law shaped the obligations of individuals and fixed their place in the social world. If anything, this created a jurisprudence of obligation rather than one of right. Plato saw the good as timeless and believed that if human beings thought clearly we could learn what was good for us; once we knew what was good for us, we would know what to do and how to live.<sup>27</sup> Aristotle believed reason would tell us the nature of human beings and enable us to fulfill our potential by living virtuous lives through exercising appropriate judgment.<sup>28</sup> The Jewish tradition embodied in the Torah and the Talmud developed norms of conduct based on a covenant with God that ordered human life so as to follow God's commandments, to do what is good in God's eyes, and to participate in the creation and the healing of a broken world.<sup>29</sup> St. Augustine and St. Thomas Aquinas developed Christian notions of an orderly universe with inherent notions of right and wrong that would give guidance to human beings in how to live.<sup>30</sup> All these traditions see an inherent order in the universe, founded in nature or God, with knowable content to what constitutes a good human life.

Liberalism changed all that. Most clearly presented by Hobbes and Locke, liberalism put the individual at the center.<sup>31</sup> They developed the idea that individuals had the inherent natural right to act in a self-interested manner, as long as they did not harm others or interfere with the ability of

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<sup>26</sup> See generally, TAYLOR, SOURCES OF THE SELF, *supra* note — .

<sup>27</sup> But see PLATO, PROTAGORAS (showing respect to the Sophist Protagoras who believed that "man is the measure of all things").

<sup>28</sup> See ARISTOTLE, *supra* note — .

<sup>29</sup> JONATHAN SACKS, TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY (2005).

<sup>30</sup> AQUINAS: SELECTED POLITICAL WRITINGS (A.P. D'Entreèves, ed., J.G. Dawson trans.)(Oxford, 1974); THE POLITICAL WRITINGS OF ST. AUGUSTINE (Henry Paolucci, ed.)(Gateway ed. 1962).

<sup>31</sup> THOMAS HOBBS, LEVIATHAN (C.B. MacPherson ed.)(Penguin Books, 1976)(1651); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed.)(Bobbs-Merrill ed. 1952) (1690).

others to similarly pursue their own, freely-chosen ends. Of course, one must remember that belief in God was still strong at the time they wrote and this tempers the invitation to act in a self-interested manner. Hobbes, in particular, assumed that fear of Heaven would substantially constrain the monarch from acting in a tyrannical manner.<sup>32</sup> Religious obligation would necessarily limit harmful acts even if those acts were not illegal under civil law.

For this new theory to work, one had to believe that natural law gave human beings reason which made us capable of discerning the limits on freedom necessary to protect the rights of others. On one view, the culmination of this theory came with John Stuart Mill's theory of self-regarding acts. In his essay, *On Liberty*, Mill argued that individuals should be free to act as they please as long as their actions do not affect others.<sup>33</sup> Once their actions do affect others (especially when the effect is negative), then it becomes open to question whether to regulate (meaning limit or prohibit) the harmful, other-regarding conduct. Our freedom of action must be limited to protect the security of others. This theory nicely reconciles the invitation to act in a self-interested manner with the reality that we do not live alone and that our actions may interfere with the similar ability of others to seek their own ends in their own way. This view was adopted by analytical jurists like John Austin to justify both the rule of law in general and the common law in particular.<sup>34</sup>

Over time, however, this legitimating theory began to break down. If, as Morton Horwitz argues, the law became modernized over the course of the nineteenth century in the United States, it did so in ways that seemed to decrease common law regulations of land use that had previously been in effect. The abolition of the fee tail – although clearly a regulatory limitation on freedom of contract – was conceptualized as freeing current owners to control their property as they saw fit, allowing them to sell the land, to move elsewhere, to develop it without worry about the desires or wants of future generations. The move from monopolistic franchises to general incorporation statutes and from secure protection of prior investors to increased economic competition suggested a movement in the direction of freeing individuals to commit observable harms on others. Economic competition, in particular, was associated with dynamic property rather than static landed estates or monopolies, and it rested on the ability to put others out of business or entice their customers away.<sup>35</sup>

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<sup>32</sup> HOBBS, see *supra* note — at 409-626 (“Of a Christian Commonwealth”) and 627-715 (“Of the Kingdom of Darknesse”).

<sup>33</sup> MILL, ON LIBERTY, *supra* note — .

<sup>34</sup> Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1009–1012.

<sup>35</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

As both law and morals changed, it became more evident to jurists and scholars that the legal system allowed a great deal of *damnum absque injuria* – damage without legal redress. Indeed, Edward Weeks wrote a remarkable treatise on the subject in the tort field, explaining all the ways one was entitled to harm others without being subject to legal penalty – in effect, an “anti-torts” book.<sup>36</sup> This led the analytical jurists, such as Henry Terry, John Salmond and Wesley Newcomb Hohfeld, to redefine legal liberties. No longer was liberty the freedom to engage in self-regarding acts; rather, liberty entailed the freedom to impose harms on others.<sup>37</sup>

The legal realists, spurred on by the views of Oliver Wendell Holmes, Jr.,<sup>38</sup> adopted Hohfeld’s construction of the problem, by asserting that it was a policy question whether the law should or should not prevent one person from harming the interests of another.<sup>39</sup> The theory of self-regarding acts can only work to reconcile the interest in freedom of action with the interest in security if one can identify in an objective manner what acts affect others and what acts do not. Once the jurists began to eschew moral judgment about which effects on others are legitimate and which are not, they moved to the language of balancing interests. This had an especially profound effect in property law because Hohfeld defined property as a bundle of rights, none of which entailed the others; it was a policy question how the rights would get divided up. Before Hohfeld, we could define the exercise of a property right as a self-regarding act; any interference with the property rights of another is clearly an other-regarding act. After Hohfeld, we could no longer define self-regarding acts by reference to property rights; the fact that one owned property did not necessarily mean that a particular set of rights went along with ownership. Thus a claim that a property owner’s rights should be limited might not be a claim to invade the property rights of an owner, but a claim that the right never belonged to the owner in the first place.

Both the Progressives and the legal process theorists picked up on this change by arguing that the courts should let the legislatures balance interests. But this solution could not solve actual cases because judges still had to decide in common law cases which interest would prevail when both parties argued that an action affected their interests. Efficiency theorists responded in the 1960s by using their version of utilitarian normative theory, arguing that the courts should defer to consumer preferences, whatever they happen to be, measure the strength of those preferences by market measures (dollar

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<sup>36</sup> EDWARD WEEKS, *THE DOCTRINE OF DAMNUM ABSQUE INJURIA CONSIDERED IN ITS RELATION TO THE LAW OF TORTS* (1879), *discussed in* Singer, *Legal Rights Debate*, *supra* note — at 1026–1034.

<sup>37</sup> See Singer, *Legal Rights Debate*, *supra* note —.

<sup>38</sup> Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

<sup>39</sup> See Singer, *Legal Rights Debate*, *supra* note —.

amounts), and seek to maximize social wealth.<sup>40</sup> This skeptical approach to moral judgments makes it even harder to distinguish self-regarding from other-regarding acts. Any claim to interfere with an interest claimed by someone else appears as an externality to an economist like Ronald Coase.<sup>41</sup> The factory that is polluting the neighborhood may be causing externalities on home owners, but according to Coase, the home owners' claim that the factory is not free to harm their property by polluting imposes an externality on the factory by limiting the factory owner's freedom to use its own land. If each is imposing an externality on the other (or claiming a right to do so), then the distinction between self-regarding and other-regarding acts falls away.

Or does it? Try as the economists might to argue that the imposition of pollution on homeowners is morally and legally equivalent to the homeowners' desire to limit the factory's polluting activity, there is something in us that wants to rebel and not to see the actions as equivalent. It remains true, in other words, that many people do not view the home owners as imposing a harm on the factory when they ask the factory to stop hurting them and their property. If the exercise of the right of home ownership entails the right to live safely in one's home, then there is a tendency to judge the home owners as having a morally superior claim to that of the factory. Indeed, one might even view them as claiming that their exercise of their property rights is legitimately viewed as a self-regarding act.

In my own work, I have argued that although the legal realists and economists tried to make the claim that we should flatten all interests and view them as either equally valid or equally suspect, they could not remove the cultural power of ownership norms.<sup>42</sup> Our cultural norms support the idea that the exercise of a property right is a self-regarding act; indeed, *one might say this is the very meaning of property*. The social meaning of property, combined with our typical ("normal") property arrangements, creates strong assumptions on our part about who is the "owner," what rights the owner has, and which rights prevail when ownership rights clash with each other. A "norm" may be what is typical or it may describe what we believe we have a right to expect. Either way, our conceptualization of property rights powerfully effects our understanding of when an externality is present and when an action should be viewed as legitimately self-regarding. And those conceptions are powerfully influenced by both conscious and unconscious norms.

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<sup>40</sup> See generally STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

<sup>41</sup> Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>42</sup> See SINGER, ENTITLEMENT, *supra* note — .

## § 2.2 *How norms function*

Norms shape prescriptive analysis by fulfilling four functions. The first two functions shape our understanding and evaluation of legitimate interests and cognizable harms. Norms fulfill these functions by (1) *orienting* us in a moral universe; and (2) embodying *evaluative assertions* about the contours of defensible human relationships. In so doing, norms distinguish legitimate from illegitimate interests and thus identify cognizable harms. At the same time, such norms guide us in determining how important those interests are while making qualitative distinctions among kinds of harms. The next two functions help us to resolve conflicts among legitimate competing claims either (3) by *reconciling* conflicting values through techniques of *contextualization* or *narrative*; or (4) by *adjudicating irresolvable conflicts* among competing legitimate interests through various methods of *prioritization*, including balancing interests, contractualism, and reflective equilibrium. This section will introduce these four functions while the following section will apply them to show how norms shape our understanding and evaluation of both property rights and externalities.

### § 2.2.1 *Orientation*

The first function of norms is to *orient* us when we seek to understand and judge the world. Norms help us do this through *schemas* that tell us what we should expect to see; they orient us by defining our *justified expectations*. This raises a crucial ambiguity: Are norms descriptive or prescriptive? One edition of the Oxford American Dictionary defines norms ambiguously as “something that is usual, typical, or standard”; “a standard or pattern, esp. of social behavior, that is typical or expected of a group.” But the same source defines a norm as “a required standard; a level to be complied with or reached.”<sup>43</sup> Is a norm what is *usually* done or what *should* be done? Or is what *should* be done defined by what *is* normally done? Do norms reflect usual behavior or do they constitute standards that we wish people would normally meet? Merriam-Webster’s Collegiate Dictionary similarly straddles the descriptive/prescriptive line by explaining that a “norm” may be descriptive of “a pattern or trait taken to be typical in the behavior of a social group.” However, the first definition of “norm” it provides is prescriptive: a norm is “an authoritative standard” or “a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior.”<sup>44</sup>

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<sup>43</sup> OXFORD AMERICAN DICTIONARIES (version accompanying Macintosh OS 10.4.8).

<sup>44</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 846 (11th ed. 2004). One thesaurus repeats the ambiguity by suggesting that the core meaning of norm relates to the adjective “normative,” meaning what should be done; a norm is a “standard, criterion, yardstick,

Norms function by playing on the ambiguity inherent in the concept of the “normal.” They describe both how people behave and how we want them to behave. The ambiguity allows us to define how people *should* act sometimes by reference to how people *usually* act and sometimes by reference to how we think they *ideally* should act. Because of this ambiguity, norms shape our expectations in a variety of ways. At the deepest level, they function as *background assumptions* that underlie our understandings both of *what is* (how the world works, what human beings are like) and *what ought to be* (how the world should be, how people should treat each other).

One of the most fundamental forms of orientation is placement in a moral universe. Charles Taylor has emphasized that human beings cannot help but orient ourselves morally in the world. “It is a form of self-delusion to think that we do not speak from a moral orientation that we take to be right. That is a condition of being a functioning self, not a metaphysical view we can put on or off.”<sup>45</sup> Taylor suggests that we can gain traction on understanding our normative world by “articulating” both our “moral frameworks” and our “strong evaluations.”<sup>46</sup> Doing so helps us better understand our deep, and possibly unconscious, beliefs and assumptions which the ways we understand and evaluate human conduct.

### § 2.2.2 *Evaluative assertion*

The second function of norms is to make explicit assertions about how people should act. Norms of this form are *moral demands* we feel entitled to make of each other. Mark Timmons argues that normative claims justifying legal and moral principles are based on what he calls “*evaluative assertions*” – statements about the right way to act which contain built-in moral judgments. Timmons argues that moral claims are “assertions” in the sense that they can be right or wrong, true or false; they are more than mere “tastes.” Moral realists argue that such claims are based on “moral facts” that can be discovered by the use of introspection or reason or observation. Moral irrealists, like Timmons, argue that truth or falsity of moral claims does not rest on correspondence with moral facts out there in the world; rather than being descriptions of the way things are, moral assertions are *evaluative judgments* designed to guide conduct. We live in a world imbued with such evaluations. But value judgments are not descriptions of some ultimate reality. Timmons explains that “[t]he content of ‘Apartheid is wrong’ is

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benchmark, touchstone, rule, formula, pattern, guide, guideline, model, exemplar.” OXFORD AMERICAN DICTIONARIES (version accompanying Macintosh OS 10.4.8).

<sup>45</sup> TAYLOR, SOURCES OF THE SELF, *supra* note — at 99.

<sup>46</sup> TAYLOR, SOURCES OF THE SELF, *supra* note — at 8-11. See also Ruth Abbey, *Timely Meditations in an Untimely Mode—The Thought of Charles Taylor*, in CHARLES TAYLOR 1, 2-5 (Ruth Abbey, ed.) (2004).

apartheid is wrong.”<sup>47</sup> Values are claims we make on each other, and they are more than desires or preferences or tastes; they are *assertions* we take to have right answers. Someone who disagrees with a value judgment we hold dear does not merely have different tastes; we tend to say such a person is wrong to believe what she believes. Our inability to rest this assertion on incontrovertible foundations outside human will or judgment does not mean we cannot assert that someone else has made an incorrect moral or legal judgment. Evaluative assertions, Timmons further argues, are often context-bound, and, as such, they can provide *contextually basic foundations* for normative argument. They provide *reasons* for moral and legal principles partly because they appeal to things we in fact already believe. They may take the form of statements of *rights* – ways in which we are entitled to be treated by others or ways in which we are entitled to act. Alternatively, they may be statements of *obligations* – duties we have to others. Evaluative assertions necessarily rest on background assumptions about the character of the *relationships* between the parties, as well as some *social vision* about the kind of society we live in.

### § 2.2.3 Contextualization

The third way norms function is to resolve conflicts among legitimate competing interests by defining the appropriate social and relational *context* in which particular values are appropriate. Contextualization may take various forms. We may *frame* the question in a particular way or construct a *narrative* that elucidates the meaning of the facts, relationships, and interests at stake. These normative methods are designed to elicit or suggest their own moral message. Alternatively, we may try to *situate the case* in its historical or social context. All these methods are designed to make the conflict seem to go away; an *apparent* conflict is shown to be illusory by distinguishing the appropriate spheres of social life within which values are operative, interests are legitimate, and relationships meet the minimum standards of a free and democratic society.<sup>48</sup> Contextualization methods *reconcile* competing claims by distinguishing the situations to which they are valid from those in which they are invalid, thereby rendering competing values consistent with each other, at least for the time being.

### § 2.2.4 Prioritization

The fourth function of norms is to adjudicate conflicts that cannot be resolved by contextualization through some method of *prioritization* that

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<sup>47</sup> TIMMONS, MORALITY WITHOUT FOUNDATIONS, *SUPRA* note — at 147.

<sup>48</sup> See Singer, *Things that We Would Like to Take for Granted*, *supra* note —.

suggests why one legitimate interest should be preferred over the other in the context of the case at hand. Since the legal realists, the most common way lawyers do this by *balancing interests*. This does not merely entail comparisons between monetizable costs and benefits of alternative legal rules, as some law and economics scholars suggest. Many values we care about cannot be reduced to numbers – especially dollar amounts – and because value judgments must be made to assign those numbers even when dollars are an appropriate metric for the interests in question. Moreover, while some economists and utilitarians start from the premise that the goal of the legal system should be to defer to preferences, whatever they happen to be, normative argument based on notions of justice and fairness starts from the assumption that not all preferences are entitled to respect by the legal system, and that not all interests can be weighted equally or counted as relevant in determinations of what the law should be.<sup>49</sup> These normative balancing discussions identify human interests, needs, desires, and claims, determine when they are legitimate, and then seek to weigh (or assess) their relative strength, importance, cogency, legitimacy or relevance in particular social and legal contexts. Normative analysis need not convert interests to a common metric (like dollars) to balance competing interests. Rather, comparisons of interests can be made even if the values on both sides are incommensurable (not reducible to a “common currency”).

Priorities may also be set by what T. M. Scanlon calls *contractualism*, also known as *golden rule* or *role reversibility* arguments. This normative method has its origins in Biblical literature, but finds powerful expression in Kant’s idea that we can legitimately propose a course of action as moral only if we could make it into a universal law – making it a rule of action not only for others but for ourselves as well. Treating other people with dignity requires us to try to see the world from their point of view as well as our own; we should consider how we would want to be treated if we were in their shoes. What bargain would we favor if we did not know on which side of the bargaining table we would be sitting? Christine Korsgaard and T.M. Scanlon have both argued that morality is based on the idea that we must justify our actions by reasons that others could accept (or that they could not reasonably reject).<sup>50</sup> John Rawls extends this insight to liberal political theory by assuming that we live in a society with persistent diversity on the meaning of

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<sup>49</sup> See Singer, *Things that We Would Like to Take for Granted*, *supra* note —.

<sup>50</sup> CHRISTINE M. KORSGAARD, et al., *THE SOURCES OF NORMATIVITY* (1996); ; T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998). See also IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor trans., ed., Cambridge Univ., 1997) (1785); JOHN RAWLS, *JUSTICE AS FAIRNESS*, § 9.2 at 27-28 (noting the public justifications are “addressed to others who disagree with us” and “appeal[ ] to beliefs, grounds, and political values it is reasonable for others also to acknowledge”); *id.* § 9.2, at 28 (“For justice as fairness to succeed, it must be acceptable, not only to our own considered convictions, but also to those of others . . .”).

the good life. If we respect each person's dignity, we must consider what choices reasonable persons would make about the basic structure of society if they could not be sure that they would be the ones in charge of the government. What rules of the game would we favor if we did not know in advance what role we would play in society? What things do we hope to take for granted?<sup>51</sup> The method of *reversing roles* effectively attempts to defending an outcome to those on the losing side.

The most quintessentially lawyerlike method of prioritization is a form of what Rawls called *reflection equilibrium*. This is the process of moving back and forth from general principles to specific intuitions about how particular cases should be resolved. We reason from general principles down to specific cases, but we also use the system of precedent to establish fixed points that are at least temporarily if not permanently closed to revision. In moral theory, we do the same thing by starting with strong intuitions about how certain moral quandaries should be resolved and we relate those fixed cases to our general principles. When we consider a hard case, we reason back and forth between the cases and the principles with the goal of developing a *coherent* story of how they all fit together. This cannot be done by applying an algorithm or a disembodied decision procedure. Nor does it result in anything like a stable equilibrium. Indeed, we lawyers were experts at deconstruction before deconstruction was invented. We know how to challenge claims, to unsettle certainties, to find the incoherencies lurking behind coherent stories. Yet at some point, the judge writing the opinion or the lawyer writing the brief or making the oral argument is satisfied that she has created a story that fits available normative and legal resources together in a manner that does the best job possible, given the context in which we are acting. We do the best we can *for the time being*. The lack of a determinate, noncontroversial decision procedure is beside the point; when multiple normative arguments are relevant, competing and contested institutional roles are present, and values are conflicting but powerful, we simply have to do the best we can.

Reflective equilibrium does not operate wholly deductively or inductively and it does not follow a decision procedure. Analysis can begin from the top down by applying principles to particular cases. Or it can begin from the bottom up by characterizing the legal rules as applied in the past. The system of precedent allows lawyers to tentatively identify a few fixed points. We know in this situation, the plaintiff wins for these reasons and that in this different situation, the defendant wins for these other reasons. The case we are addressing is hard because it arguably fits within both categories. We use a combination of argument from analogy and policy arguments to help divide up the cases that are appropriately governed by one rule or

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<sup>51</sup> See Singer, *Things that We Would Like to Take for Granted*, *supra* note —.

another. We may wind up overruling a case, or narrowing its scope of application; alternatively, we may broaden its holding to this new situation. We use factual similarities among cases but combine those factual discussions with attention to principle and policy that can legitimately distinguish the cases where a rule applies and where it does not apply. The result may not be a set of principles that can be applied deductively; this is because attention to social context, and historical settlement of issues, as well as considerations of judicial role, all matter enormously. This method of reflective equilibrium also illustrates all the elements of working within a *tradition* (as Alasdair MacIntyre expresses it)<sup>52</sup> and undertaking a *craft* that involves expertise (as both MacIntyre and Karl Llewellyn express it).<sup>53</sup> It also is shaped by *practical reason* rather than deductive logic and requires the exercise of considered judgment.<sup>54</sup>

§ 2.3 *How norms define externalities by identifying legitimate interests & cognizable harms*

§ 2.3.1 *Ownership as an orienting norm*

How do property norms shape our understanding of externalities? The most important way they do this is by orienting us in the normative world by defining who is the *owner* of a particular entitlement. As Laura Underkuffler explains, the idea of property suggests that owners have full (and, I would add, *rightful*) powers over what they own. The identification of something as *property* and someone as the *owner* creates a strong presumption that, in any dispute about the property, the “owner” will prevail.<sup>55</sup> More than that, we

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<sup>52</sup> ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY AND TRADITION* 65 (1990) (“[J]ust because at any particular moment the rationality of a craft is justified by its history so far, which has made it what it is in that specific time, place, and set of historical circumstances, such rationality is inseparable from the tradition through which it was achieved.”).

<sup>53</sup> KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 213 (1960) (explaining law as a “*craft-tradition*”); MACINTYRE, *THREE RIVAL VERSIONS*, *supra* note — at 61 (“philosophy as a craft”).

<sup>54</sup> See CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* ix (1987) (“The two dominant traditions of modern moral philosophy, Kantianism and utilitarianism, have been at one in seeking a fully explicit decision procedure for settling moral questions. As a result, they have missed the central role of moral judgment, or the faculty of insight into how general rules are to be applied to particular situations. Rules are, undeniably, a necessary feature of morality, but morality does not consist merely in the conscientious adherence to rules.”). See also ARISTOTLE, *ARISTOTLE’S ETHICS* (John Warrington ed. 1963)(c. 340 B.C.E.); ROBERT AUDI, *PRACTICAL REASONING AND ETHICAL DECISION* (2006); MARGARET URBAN WALKER, *MORAL CONTEXTS* (2003); WALKER, *MORAL UNDERSTANDINGS*, *supra* note —; HILARY PUTNAM, *ETHICS WITHOUT ONTOLOGY* (2004); HILARY PUTNAM, *PRAGMATISM: AN OPEN QUESTION* (1995).

<sup>55</sup> *Id.*

may even presume that the owner is the only one with any *legitimate* claim to control the property. Any claims by “non-owners” are, by definition, claims to limit the rights of the owner, thereby causing harm. Conversely, the “owner” is, by definition, exercising her rights when she acts within the borders of her own property; however much others may seek to control what she does on her own land, they have no legitimate business in doing so. That means their interests in doing so will not count or be considered in determining the applicable rules of law governing the allocation or regulation of property rights. More abstractly, the ownership idea means that one is presumably engaged in a self-regarding act if she is *exercising her lawful property rights*; ownership of land furnishes a schema for this idea because it rests on the idea of boundaries surrounding a space devoted to one’s own control. The idea of ownership, therefore, is a powerful cultural tool that encompasses one of the most important ways that we, as a society, define when someone is and is not imposing an externality on someone else.

Recall the case of Donald Lamp discussed at the beginning of this article. His view of the matter was that he had bought a condominium and that, when condominiums were invented as a legal form in the 1960s, their innovative feature was that one could actually *own* and not merely *rent* an apartment in a building. This means that the “condo” is no different from a single family home; it is, in short, his castle. On this view, limitations on the rights of owners are encumbrances that should be presumptively invalid. Indeed, the legal idea of the “fee simple absolute” rests on the ways in which property ownership is different from feudal holdings. A fee simple owner has no lord, owes no periodic duties or fealty to a superior; the fee owner is the lord of his own castle. On this view of ownership, the neighbors were busybodies interfering with Lamp’s property rights. Seeing Lamp as the owner leads us to see the condominium rule as imposing externalities on him.

The neighbors, of course, see it differently: *they* were the owners here, not Lamp. Although Lamp was flying the flag physically on “his own” balcony, he did not “own” the right to do so.<sup>56</sup> On the contrary, his deed at the time he bought the unit was impressed with restrictive covenants under which he promised to comply with rules of the condominium association. For that reason, his neighbors *owned* the benefit of those covenants and had the right to impose restrictions on external decorations of the units. His act of flying the flag was an intrusion on the ownership rights of his neighbors.

We can see the implications of conceptions of ownership by looking at the *limits* of the rights created by Congress in the *Freedom to Display the American Flag Act*. Congress clearly did not believe it was interfering with

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<sup>56</sup> I say “arguably” because the *Restatement (Third) of Property (Servitudes)*, published in 2000, suggests that covenants should not run with the land if they violate fundamental interests in freedom of speech. See *Restatement (Third) of Property (Servitudes)* §3.1 cmt. h (2000).

property rights when it prohibited enforcement of covenants limiting display of the flag; rather, it viewed the right to fly an American flag on one's own property to be an *inalienable right*. But this right applies only to restrictions imposed by a “condominium association, cooperative association, or residential real estate management association” and, even then, only protects the interests of “members” of those “associations” who have “a separate ownership interest or a right to exclusive possession or use.”<sup>57</sup> Although there is some ambiguity in this language, it appears not to grant rights to residential tenants who are prevented from flying the American flag by a covenant in a lease. Why might this be so?

The answer is that Congress likely views *landlords* as the “owners” of the property; *tenants* are denied the rights granted to condo owners because they are seen as temporary guests – in other words, as *non-owners*. If this interpretation is correct, then the right to fly the flag belongs, not to the tenant, but to the landlord. A tenant who sought to violate a lease covenant against flying a flag would be viewed as infringing on the retained property rights of the landlord. This popular conception of tenants as less than “owners” is not shared by many property law professors who are steeped in the history of property law and know that leaseholds have technical names, such as “term of years” and “periodic tenancies” and that these were traditionally thought of as “estates in land.” It is thus not uncommon to hear property lawyers talk about “owning” a “lease.” And if this sounds odd, recall that in a number of states in the eastern part of the U.S., mortgages take the form of granting title to the land to the lending institution. Rather than an individual buying land and becoming the owner, while granting the bank a “lien” on the property, in states like Massachusetts, the bank takes “title” to the land while the so-called homeowner takes merely an “equity of redemption.” Yet despite this legal arrangement, we routinely talk about homeowners in Massachusetts, even when they are still paying off their mortgages to the bank which actually has title to their land.

The norms of ownership thus identify who is and who is not an “owner.” And as I tell my property students over and over, “ownership” is not a technical legal term. Rather, it is the colloquial, layperson’s term used in connection with property. Property lawyers focus on the bundle of rights that goes along with “ownership” and use more technical language, like fee simple, covenant, easement, and lease, to describe the bundles of rights owned by different persons in the same piece of land. Nonetheless, both law and custom identify particular persons as “owners” and this cultural practice is both a cause and an effect of our intuitive conceptions of who is entitled to control property and thus, who is and who is not causing harm to others. Someone who is exercising a “property right” (at least when acting within

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<sup>57</sup> 4 U.S.C. § 5 note.

the boundaries of that right) is presumably engaged in activity that legitimately concerns herself alone. Only when we exceed the scope of our property rights and even then only when we cause “harm” to the legitimate interests of others do we find that an externality is present. If this view is tenable, then it is possible to view ownership and externalities as opposite sides of the same coin.

Covenants serve an ambiguous role in property law. The older view was that they were encumbrances that limited the presumptively absolute rights of owners. They were thus viewed with suspicion. If it was ambiguous whether a seller intended to create a covenant, the law rule against finding the limitation. The older image is that of aggregated rights in the current owner. The common law limited the number of negative easements that could be created and prevented enforcement of covenants that did not “touch and concern” the land; under that test, because it is not clear how flying a flag “touches and concerns” the dominant estate, a covenant preventing flag flying might have been held not to run with the land, freeing Lamp from the restriction altogether. This construction of property rights had its origins in doctrines designed to concentrate powers over property in current owners as a way to avoid the re-creation of feudalism. Granting individuals full powers over their own land allows them to control their own lives, to move from one place to another, to sell their land and buy other land, and to develop it as they see fit.

The more modern view goes the other way. Current property law in the U.S. emphasizes freedom of contract. This is especially evident in the *Restatement (Third) of Property (Servitudes)*, adopted in 2000, and in the increasing number of states that have abolished the rule against perpetuities. Owners are *prima facie* allowed to create whatever servitudes they like. However, this increasing contractual freedom to disaggregate property rights and create new bundles of rights is limited by increasing regulation through both common law and statute. The *Restatement (Third)*, for example, provides that covenants will be void if they violate public policy; the *Restatement* grants wide discretion to courts to determine what that means, advising them only that a variety of fundamental values may be implicated by covenants. For the purpose of thinking about our case of the American flag, one of those values is freedom of speech.<sup>58</sup>

This means that we have a conflict between two images of ownership. The older view emphasizes the full powers of the owner while the modern view is based on the notion of freedom of contract whereby owners disaggregate property rights as they see fit, creating the packages of rights that please them.

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<sup>58</sup> *Restatement (Third) of Property (Servitudes)* §3.1 cmt. h (2000).

When I ask my students whether the *Freedom to Display the American Flag Act* protects property rights or attacks them, their answer depends on how they conceptualize real covenants. If they understand them as property rights, they are apt to find the law to be an attack on property; the law limits the freedom to create particular packages of rights and takes away vested rights created under prior conveyances. If they understand covenants as merely contract rights, they apply the theory of efficient breach they are taught in their contracts class; they remember that contracts are normally enforced by damages rather than injunctive relief, that there is a duty to mitigate damages, and that this often makes damages low. The law of contract enforcement thereby often encourages contracting parties to discard their contractual obligations, break their promises, pay damages if needed, and go on about their business.<sup>59</sup> If we couple this dim view of contract obligations to a capacious understanding of the rights of fee simple owners of land, then my students are apt to view the statute as a restoration of the rights of owners to control their own land without undue limitations imposed by busybody neighbors. If every person's house is his or her castle, then this federal law restores dignity, power, autonomy, and *property rights* to individuals. In contrast, if they see covenants as property interests, they are likely to see the statute as Congressional meddling in private property arrangements; after all, unlike the doctrine of "efficient breach," they have been taught that "efficient theft" is an oxymoron.

The distinction between efficient breach of contract and efficient theft shows that assumptions about the nature of property rights and the nature of a free and democratic society in which they are situated orients us in developing understandings of both property rights and regulatory laws and the relation between them. If the condo rule against flag flying is seen as an intrusion on the inherent rights of the owner, then the regulatory statute restores property rights and prevents the neighbors from imposing externalities on the individual owner who wants to fly the flag. If, on the other hand, the right to control neighboring property is a legitimate entitlement accompanying condominium ownership, then it is the dissident who seeks to fly the flag in violation of a collectively adopted rule who is imposing externalities on his neighbors. In that case, the federal statute redistributes property rights from covenant beneficiaries to scofflaws.

Consider a second example. In the famous case of *State v. Shack*,<sup>60</sup> the Supreme Court of New Jersey ruled that a farm owner could not keep a doctor and lawyer off his farm when they were entering to provide medical and legal services to migrant farmworkers who were living and working

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<sup>59</sup> But for a view of the compatibility of the idea of efficient breach with the moral basis of promising, see Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1 (2007).

<sup>60</sup> 277 A.2d 369 (N.J. 1971).

there. The farm owner argued that they were trespassing by entering land of another without the owner's consent. He argued that he was the owner of the land and that one of the central rights of ownership is the right to exclude nonowners from one's land and to condition rights of entry on terms chosen by the owner. Moreover, the workers' employment and housing contracts did not give them the right to receive such visitors. Since the owner had not waived his right to exclude by agreement either with his workers or the service providers, they had no legal right to enter his property against his will. If we go by background norms of ownership, the farmer should have won hands down; after all, he is the one we would identify as the "owner" of the land. The doctor and lawyer are intruding on his land; the farmer did nothing to them. As the owner, he has the right to exclude or admit others to his land and his exercise of that right, *one way or the other*, is the paradigm case of a self-regarding act. In contrast, trespass is a paradigm case of harm to an existing property right. Under this construction, we know who is asking to be left alone (and thus not causing any externalities) and who is causing harm (a negative externality).

But things are not so simple. The court ruled against the owner, accepting the argument of the doctor and lawyer that real property owners are not entitled to prevent service workers funded by the federal government from getting access to workers living on the owner's land. The right to receive government assistance may, for example, prevent the owner from excluding the police who enter property to help non-owners who happen to be on the land. The right to exclude is limited by public policy; ownership rights (even exclusionary rights) are not absolute. That is especially true when an owner has alienated some of his rights to others. It is a firm rule that tenants have the right to receive visitors in their apartments, regardless of what the lease contract may say. This right is so well accepted that few precedents establish it. It is assumed that the transfer of possessory rights gives the tenant the ability to create a home and that it is a necessary part of that right to form human relationships with friends and neighbors and to receive family members as guests. According to the New Jersey Supreme Court, migrant farm workers housed in barracks have the same rights – regardless of what the contract says. The farmer may be the owner of the land but by entering a contract that allows his workers to live on his land, he parts with some of his ownership rights, and it is the workers, not the farmer, who have the right to receive or turn away guests. This result may seem jarring only because the workers do not have the status of "tenants" but are merely licensees; but the fact that one has to work to understand the farm workers as possessing rights in the land proves the power of the ownership conception operating here. Reconceptualizing the case as akin to a landlord barring his tenants from receiving guests recasts the situation as one in which

the landlord is causing harm to the tenant, effectively depriving the tenant of bargained-for property rights.

§ 2.3.2 *Evaluative assertion of property norms: the plural values of ownership*

When ownership claims clash, normative argument proceeds by elucidating the *values* implicated in the case. If we consider the strong evaluations underlying competing claims, we may be able to make judgments about the *legitimacy* of the interests claimed by both sides. This, in turn, helps identify which harms we must pay attention to, as well as giving guidance on the nature, seriousness, and quality of the harms being experienced.

In our American flag case, one might say we have a conflict between freedom of speech and freedom of contract. Donald Lamp claims a right to fly the American flag from his home; a law imposed by the town preventing him from doing this would certainly violate the First Amendment.<sup>61</sup> But the neighbors can forcefully argue that the state has not taken away any of Lamp's rights; rather, he waived them himself. The "state action" doctrine defines constitutional rights as protections against public regulation, not private imposition. By buying property that was in the condominium form, Lamps agreed, explicitly or implicitly, to abide by the rules set forth in the declaration. He both benefits from and is burdened by reciprocal obligations that the condominium owners place on themselves. His neighbors purchased the right to control the external appearance of the units in the building and he agreed to abide by their wishes; if he did not want to be subject to such rules, he could have purchased a single family home that was not subject to regulation by a condominium association. The freedom to set up new forms of property allows individuals the ability to create the environment that best suits their needs and lets them live their lives in the way that seems best to them. In other words, we appear to have legitimate *autonomy* interests on both sides here.

That is not always the case; sometimes we may conclude that an asserted interest is illegitimate, at least in the context in which it is asserted. In *State v. Shack*, for example, the court argued in a famous sentence that "Property rights serve human values. They are recognized to that end, *and are limited by it.*"<sup>62</sup> Whether a claimed property entitlement can be recognized depends on the *values underlying the claim* and the *context* in which the claim is asserted. Here the farmer would assert a strong and legitimate interest in the ability to operate his business as he sees fit, to engage in mutually advantageous employment contracts, the freedom to exercise autonomy and

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<sup>61</sup> City of Ladue v. Gilleo, 512 U.S.43 (1994).

<sup>62</sup> 277 A.2d at 372 (emphasis added).

to choose the character of his associations with others. He will also assert interests in freedom of contract and social interests in economic efficiency. The farmer did not force the workers to work for him. They chose to do so and it would deny the farmer dignity if the court tried to control the terms on which he chooses to employ others on his own property. Protecting the owner's free control of his own land and his own business and freedom of all the parties to contract on mutually beneficial terms is the way to treat each person with equal concern and respect, while governmental regulation of property and contract fails to treat individuals as self-governing persons in charge of their own fates. As Prof. Alan Schwartz, argues, individuals have the right to "do the best they can for themselves, given their circumstances."<sup>63</sup> It is a fundamental assault both on freedom and on human dignity to dictate the course of someone's life or to impose the terms of one's associations with others by regulating contracts, thereby depriving individuals of the power to make their own choices, suffer from their own mistakes, and chart the course of their own destiny.

In contrast, the defendants in *Shack* focused on the reasons why people have the right to receive visitors in their homes. The farm workers have the same interests in freedom of association as their employer, and while he does have interests in excluding others from his land and running his business as he sees fit, they have strong interests in developing what the New Jersey Supreme Court called "associations customary among our citizens" as well as receiving government aid designed to respond to basic human needs.<sup>64</sup> And in a remarkable phrase, the court explains that, although the farmer is the acknowledged owner of the land, "we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."<sup>65</sup> Preventing individuals from receiving visitors in their homes or having their basic needs met denies them "dignity" and treats them as if they were not deserving of humane treatment.<sup>66</sup> Thus, the court concludes that the farmer's interests are *not legitimate* when they cause the *kinds of harms* implicated in this case. If that is so, then the farmer's simple act of ownership – excluding non-owners from his land – becomes the imposition of an externality – and thereby exceeds the rights of the owner. In effect, this ruling places the "ownership" interests on the other side; the workers have the right to receive visitors and the service providers have a right to enter the land.

Property norms therefore both reveal and obscure the presence of externalities. They do so, first, by distinguishing between "owners" and

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<sup>63</sup> Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J. L. & PUB. POL'Y REV. 110, 114–115 (1986).

<sup>64</sup> 277 A.2d at 374.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

“non-owners” and second, by defining particular entitlements (and/or exercises of entitlements) to be core aspects of “ownership” and thus properly viewed as self-regarding acts. Alternatively, those norms may define certain interests as illegitimate when they impose certain kinds of harms, thus exceeding the scope of legitimate entitlement. When norms function in these ways, externalities magically vanish. This not only helps settle the dispute but shapes our understanding both of social relationships and legal rules in a way that lets us experience a power relationship as benign. However, in both the American flag case and the farm workers case, we see ways to identify legitimate interests on both sides. If that is so, then the claims of each of the parties, *if realized*, would cause cognizable harm to the other party. Nor is the harm merely an invasion of an *interest*; when *values* are at stake, the harm is of a different order entirely. When conflicting values are at issue, we need to use other sorts of norms to help adjudicate the conflict. That is the subject of the next section.

### § 3.0 *How norms resolve conflicts among claims*

#### § 3.1 *Contextualization and property narratives*

When we have conflicts *among owners*, each owner appears to be imposing an externality on the other. How do norms help resolve such cases? When a case involves conflicts among owners, judges may react the same way they do to apparently conflicting precedents: they seek to render the conflicting precedents compatible by *re-interpreting* them to distinguish the two cases, making the contradiction appear to go away. How does this work?

Remember that we just saw that analysis of the values at stake in the case may cause us to reevaluate the legitimacy of the asserted interests or the cognizability of the claimed harms. This is an example of the method of *restrained interpretation*.<sup>67</sup> When each party asserts the right to have or exercise a property right, each owner experiences the exercise of the rights of the other as imposition of an externality. However, if we engage in restrained interpretation of the rights associated with “ownership,” we may convince ourselves that the bundle of rights associated with ownership never included the particular entitlement in question. If one never owned the right to begin

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<sup>67</sup> This concept comes from conflict of laws. Brainerd Currie, the inventor of *interest analysis*, argued that conflicts of law between two different states could be resolved by determining whether both states had a legitimate interest in applying their law to the case at hand. If they did, he suggested taking a second look at the state interests to see if it is possible to engage in a restrained interpretation of state interests to conclude that one of the state has no *real interest* in applying its law to the parties or the transaction or occurrence, either because the parties relationship is centered in another state or because the state has an affirmative interest in comity by allowing another state to regulate the events or relationships in the case.

with – if it never was part of the package of property rights an owner could legitimately claim – then a rule limiting the right will not be experienced as the imposition of an externality. In that case, one person is exercising her property rights and the other (the victim of the externality) has no legitimate claim. If we can do this, we may convince ourselves that exercise of the entitlement can be legitimately viewed as self-regarding in nature.

In addition to careful analysis of the *values* at stake in the case, two other prominent techniques function to reconcile the competing claims. First, we may *frame* the issue so as to limit a claimed entitlement to a particular *social context*. For example, Donald Lamp and the U.S. Congress believed that “you have the right to fly a flag from the balcony of your own home.” This way of stating what is involved here identifies a condominium with a single-family house and uses the house as the paradigm case of property. It also elides the difference between regulation of property by government regulation (such as a local ordinance) and by contract (through the condominium declaration), viewing both forms of regulation as government coercion.<sup>68</sup> But, as we have seen, the neighbors framed the inquiry differently: does a condominium owner who promised to abide by rules voted on by the association of owners have the right to change his mind and ignore those rules? This way of framing the question suggests its own answer; the context of the case (condominium ownership) distinguishes it from the case of the homeowner forced to take down the flag by a town ordinance. In this context, it may well *not* be the case that “you have the right to fly the flag on your own balcony.” Similarly, in *State v. Shack*, although owners generally have strong interests in controlling access to their property, those interests are substantially limited when the owner has invited others to live on his land. The process of contextualization is routinely followed in the common law system by *distinguishing cases*. We do this by identifying factual differences between cases and then giving reasons why the policies underlying the rule apply in one situation but not the other.

Second, a judge may construct a *narrative* that assigns ownership rights in a manner that limits cognizable property claims. The image of the raising of the American flag on the island of Iwo Jima is an iconic American image; moreover, schoolchildren are taught that Betsy Ross sewed the first American flag. These stories about the flag bolster its cultural importance. These stories can be combined with narratives about historical movement from feudalism to capitalism, from hierarchy to equality, from lord-tenant relations to individual ownership. In our minds are images of settlers on the

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<sup>68</sup> This was the insight of *Shelley v. Kraemer* that recognized the horizontal application of constitutional rights. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Western frontier, staking their claims and working the land.<sup>69</sup> This historical narrative bolsters the image of the homeowner as the lord of his own land, empowered to fly the flag or exclude intruders. Conversely, we can recite a narrative of free contract, whether a freely-negotiated agreement to abide by the condominium rules or a free transfer of rights to tenants who are thus put in control of who is allowed in and out of the land.

In *State v. Shack*, the farmer would argue that he does not possess unwarranted power over the workers; their freedom to refuse to work for him forced him to shape the terms in a manner that attended to their legitimate interests. His story is a freely negotiated contract between A and B, with state officials seeking to interfere in a mutually beneficial arrangement. Moreover, even if the farmer has too much power in the bargaining process because of his relative wealth, this can be remedied by a “tax-and-transfer” program that increases the workers’ bargaining power, leaving the parties arrangement to a free contract system that best respects individual autonomy and enlarges individual choice.<sup>70</sup> These reasons may support a finding that the social context in which the parties are related does not provide reasons to discount or ignore the farmer’s interests in excluding the service providers from his property or limiting the right of his workers to receive visitors. On the other hand, the workers would tell the story differently. Their view is that the farmer is acting like a feudal lord; he is denying them government services intended for their benefit; he is claiming a “right to isolate” them, treating them like servants, or serfs, rather than independent, equal human beings entitled to be treated with dignity.

Lawyers are taught to create a “core theory” that encapsulates the way they want the judge to see the case. That theory characterizes the facts by providing a story of what happened, unites law and facts, suggests a moral valence to the story presented, and frames the question to be decided in a manner that seems to suggest its own answer. In so doing, the attorneys shape the choice faced by the court. Does the case involve flying the flag on one's own balcony or abiding by one's promises to comply with duly-enacted rules? Does it involve the right to exclude intruders from one's land or the right to receive visitors in one's home? The techniques of framing, contextualization and narrative help decision makers find the meaning of the competing claims and thereby determine their normative significance,

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<sup>69</sup> Of course, these narratives either leave out the natives who inhabited the land or portray them as aggressive and warlike, thus depicting the settlers as acting in self-defense when they fought to protect the land they had stolen.

<sup>70</sup> SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note — at 654–655 (“Because society possesses the income tax system for attaining income distributional goals, legal rules do not need to be chosen with these goals in mind. In particular, if there is a reason to effect further redistribution from the rich to the poor, society can do this with an appropriate adjustment to the income tax, rather than through adoption of this or that legal rule.”).

weight, and relevance. These methods can therefore be used to distinguish legitimate from illegitimate interests and cognizable from noncognizable harms, thereby suggesting the presence or absence of externalities and the direction in which they flow.

### § 3.2 *How norms shape priorities among property claims*

#### § 3.2.1 *Balancing interests*

When neither context nor narrative can reframe the problem to render competing claims consistent, we move on to methods of choosing between incompatible interests, claims, wants, and needs. Since the legal realists, the most common method to do this is to “balance the interests of the parties.” As I noted earlier, economists “balance interests” by reducing interests to dollar amounts, measuring strength of individual preferences either by reference to the “fair market value” of particular entitlements or by offer prices (the amount one is “willing and able to pay” for an entitlement) or by asking prices (the amount one would have to offer an owner of an entitlement to induce her to sell it). But this is not the only way to balance interests. Once we realize that we do not always defer to existing preferences, no matter what they are,<sup>71</sup> we can begin to assess the *relevance* and the *strength* of the competing interests, wants, and needs of the parties, as well as their *appropriateness* in the situation at hand by reference to groundrules that are consistent with the norms governing a free and democratic society that treats each person with equal concern and respect.<sup>72</sup>

For example, Donald Lamp could argue that his interest in flying the American flag is of fundamental importance – so important, in the eyes of Congress, that it amounts to an inalienable right. From this perspective, the right to fly the flag outweighs mere esthetic interests by a landslide. But of course his neighbors might demur: after all, he did *wave* that right when he bought a condominium. What was fundamental to the neighbors was both property rights and freedom; by creating a condominium complex, they sought to create a certain environment within which their homes would be located and under the law at the time, they were free to do so. Lamp agreed to live in such an environment and he was free to decline to do so. The congressional statute limits freedom of contract (and hence autonomy), takes property rights, and deprives individuals of the power to live their lives

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<sup>71</sup> See Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002).

<sup>72</sup> Joseph William Singer, *Things That We Would Like to Take for Granted*, *supra* note —. One of the best examples of how to do this is in the opinion by Justice Albie Sachs of the South African Constitutional Court in the case of *Port Elizabeth Municipality v. Various Occupiers*, 2004 (12) BCLR 1268 (CC) (S.Afr.).

according to their own design. The balance of interests, in other words, depends on how we characterize and evaluate the values on both sides.

In *State v. Shack*, we have already noted that the court concluded that the interests asserted by the farmer, in the context in which they were asserted, were illegitimate. These conclusions were reached in the course of balancing the interests of the parties; those "interests" were sometimes described as "needs" and "rights." It is worthwhile reading the court's language in detail. As Chief Justice Weintraub wrote in the court's opinion:

[W]e find it unthinkable that the farmer-employer can assert a right to isolate the worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference.... So, too, the migrant worker must be allowed to receive visitors there of his own choice,... and members of the press may not be denied reasonable access to workers who do not object to seeing them....

[T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.<sup>73</sup>

Ownership of property, according to the court, does not include the "right to isolate" the workers by refusing to allow them to receive visitors in their homes. The workers are entitled to "associations customary among our citizens" and the farm owner is not entitled to act like a lord or a plantation owner controlling the lives of his workers by confining them to barracks under his absolute control. This argument is premised on the notion that the workers have a right to be treated with dignity. They do not and cannot be made to occupy a subordinate status. As human beings, they are entitled to certain fundamental rights which others have a duty to respect.

Note that this argument accepts the idea that there are strong values associated with the right to exclude others from one's property. However, it defines that right as limited by the legitimate interests of others, the relationship between the parties, and the social context in which it is asserted. When one invites others onto one's land, not merely as temporary guests, but as more permanent residents, they may acquire some of the rights of owners, such the right to receive visitors. Their interests in privacy, associational freedom, and the emotional benefits of having a safe place to stay and form attachments are what Professor Margaret Jane Radin would call personal interests of a strong sort that may override the mixed personal/fungible interests the farmer may have in running his business as he likes and making

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<sup>73</sup> 277 A.2d at 374-375.

money.<sup>74</sup> The relationship between the parties, therefore, provides a social context that may give us a reason to discount or ignore the claimed interests of the farmer. He may have a right to determine whom he invites to his home for dinner but the law imposes greater limits on his right to exclude from his business property, especially when he enters a relationship with employees that allows them to live on his land.

The New Jersey Supreme Court found it “unthinkable” that the farmer-owner could “assert a right to isolate” the workers or “deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens.” This language assesses the farmer’s interests and characterizes them in a manner that denies their relevance, legitimacy or strength in this social context. In a sense, this is an argument that the owner’s interests do not count at all in the balance. The workers have strong interests in receiving visitors and government services and living in dignity and the farmer-employer has “no legitimate need” to deny them these rights. This makes the “balance” one that is assessed, not by market measures or strength of preference, but by *appropriateness to the situation*. Alternatively, the court could have found the owner’s interests in freedom of contract, control of his business and property, to be legitimate ones but overridden by the legitimate interests or needs of the workers.

The Supreme Court of New Jersey started from the assumption that tenants have a right to receive visitors in their homes. While it did not say so, the implication is that someone living in your own house may not have such rights; when someone is living in your back bedroom, you (may) legitimately have much greater control over what they do in your house than you would if they were in a separate apartment. The migrant farmworkers were housed in barracks and one of the issues was whether this social context was closer to the individual living in the back bedroom (with no right to receive visitors) or to the tenant living in an apartment (with a right to receive visitors). The social context in which the right is being asserted matters because we find claims legitimate in one area of social life to be illegitimate when made in a different context. You are free to choose your friends on the basis of race if you wish but you are not free to choose your customers by race if you are operating a restaurant.

The “balance” of interests was therefore made on the basis of *assumptions about the proper contours of social relationships*. Those assumptions, in turn, were based on norms that help define our way of life. Those norms are developed not only through the assertion of values and their contextual application but by narrative constructions that tell the story in a way that makes the parties’ relationships appear consistent with the basic groundrules that define the legal framework of a free and democratic society.

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<sup>74</sup> MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993).

While the farmer told the story as a free and fair contract between A and B, the Supreme Court of New Jersey saw the farmer's claim as paternalistic. The workers were seeking to be treated like equal citizens; the farmer wants to keep them ignorant, isolated, and under his control, bereft of government services intended for their benefit. The farmer is acting like a feudal lord or a plantation owner, not like a property owner in a free and democratic society that treats each person with equal concern and respect. In such a society there are certain minimum standards for market relationships which must be respected in order to comply with the appropriate legal framework for a free society.<sup>75</sup> Insisting that the farmer-employer observe discussions between his workers and their lawyers and the medical care granted them is inconsistent with the form of social life we have developed that is based on human dignity and equality. The farmer's claimed interests are arguably not legitimate at least in the context of this case. And even if they are legitimate, they are "outweighed" by the legitimate interests, needs, and "rights" of the workers.

Property norms operate both consciously and unconsciously to help lawyers express and evaluate the legitimacy, relevance, strength, and weight of competing interests, wants, needs, and preferences of the parties. More fundamentally, we recognize that there are certain demands that we are not entitled to make of each other; some demands are out of line – they are inconsistent with the minimum standards governing a free and democratic society that treats each person with equal concern and respect.<sup>76</sup> The norms that determine these minimum standards help us assess what to do in the face of conflicting interests. They do this by helping us come to see what we really think by focusing our attention on what we value. The context in which we make these assessments is situations of conflicts of interest within human relationships.

### § 3.2.2 *Contractualism*

Underlying most normative methods is not only the assumption that human beings are entitled to be treated with dignity but the idea that the basic rules of the game should be ones that anyone could accept. What rules of the game would we favor if we did not know in advance what role we would play in society? What things do we hope to take for granted? The method of reversing roles, of defending an outcome to the losing side, of recognizing the costs as well as the benefits of any rule, is a staple of normative argument used by lawyers.

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<sup>75</sup> Singer, *Things that We Would Like to Take for Granted*, *supra* note — .

<sup>76</sup> *Id.*

The farmer may ask whether you would like it if the government told you that you must open your property to strangers or told you how to manage your own business. If the workers wanted a right to receive visitors, they should have bargained for it. If they did not have sufficient bargaining power to obtain this right, that is not the farmer's fault. We can best help the workers by increasing their bargaining power either by giving them skills or wealth or alternative employment. The one thing we should not do is limit the farmer's property rights or the workers' freedom. This prevents the workers from doing the best they can for themselves, given their circumstances.<sup>77</sup> These are arguments that might be suggested by Robert Nozick and Charles Fried, who seek to maximize the scope of individual freedom, interpreted in a libertarian manner.<sup>78</sup>

The opposing side could argue that the workers would have bargained for a right to receive visitors if they had equal or at least adequate bargaining power; indeed, almost all tenants who have sufficient bargaining power do seem to bargain for such a right or seem to expect it as a matter of course. The workers might ask what the contract would have said if the contracting parties did not know on which side of the bargaining table they would be sitting.<sup>79</sup> This Rawlsian question suggests that the farmer himself would not want to be deprived of the right to receive visitors as well as needed legal services and medical care if he were in the position of his workers. John Rawls suggested we consider what rules would be adopted by persons who did not know which social roles they would be occupying. These rules could be justified to anyone, including those who appear to be the losers in the situation.<sup>80</sup>

These conflicting arguments illustrate a basic point. The libertarian question is: what bargain did the parties make given their current entitlements? The egalitarian question is: what bargain would the parties have made if they had relatively equal bargaining power? Or perhaps: what bargain would the parties have made if they did not know on which side of the bargaining table they would be sitting?

How do we choose between these two ways of asking the question? The answer is that it is impossible to make this choice without using normative considerations to identify which choice situation is superior. If our goal is to figure out what the parties would have agreed to in a suitable bargaining setting, we need some other form of analysis to identify what that suitable

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<sup>77</sup> Schwartz, *supra* note — at 114–115.

<sup>78</sup> CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* (2006); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

<sup>79</sup> Singer, *Things that We Would Like to Take for Granted*, *supra* note — .

<sup>80</sup> See STEPHEN DARWALL: *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006); Singer, *After the Flood*, *supra* note — at 342; VAN DER WALT, *LAW AND SACRIFICE*, *supra* note — .

bargaining setting is; inevitably, this requires attention to the meaning of autonomy and equality and our views about how to understand those values will shape our understanding of appropriate initial conditions for bargaining. This kind of consideration requires normative argument for support and justification.

It is important to remember that we have constitutionally protected limits on the terms of employment contracts: the Thirteenth Amendment prohibits slavery. We also know that after the Civil War contracts were made in the South that sought to reinstate slavery by “freely-negotiated contract.” These contracts were voided by the courts. Jedediah Purdy has generalized from these cases to argue that the law defines the “terms of recruitment” that the employer may ask of employees; limitations on demands may go the other way as well. I have previously argued that all contracts, including employment contracts, are subject to minimum standards regulations. The question is then is what those minimum standards should be.<sup>81</sup> Role reversibility arguments are one way to engage in the normative work needed to answer this question.

### § 3.2.3 *Reflective equilibrium*

In *State v. Shack*, the court determined that it was not important to decide whether the migrant farm workers were or were not in the status of “tenants.” Either way, their situation was close enough to that of tenants (living apart from the owner but on the owner’s land) that the same values which lead us to protect the right of tenants to receive visitors applied here to the farmworkers. The farmer had argued that they were not similarly situated to tenants and that the owner had legitimate interests in controlling access to his land, which was used for business purposes and not merely housing, that did not exist in the situation of the ordinary residential tenant. He could have argued that tenants should be entitled to give up the right to receive visitors in return for lower rent or other favorable concessions by the landlord and that the same reasons for expanding the realm of free contract would apply in this case. He might have argued that the poorest persons are even more in need of free contract than richer persons because their choices are more limited to begin with.<sup>82</sup> The goal is to identify the basic principles animating rules of law (right to control your own property and make contracts freely versus rights to receive visitors, have privacy and associational rights in one’s home, and to receive government services intended for your benefit) and then to fit those principles with settled precedent, either rationalizing the

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<sup>81</sup> Singer, *Things that We Would Like to Take for Granted*, *supra* note — .

<sup>82</sup> Schwartz, *Justice and the Law of Contracts*, *supra* note — at 114–115.

existing precedents or altering either the precedents or the principles to make the most coherent package one can.

Similarly, in our American flag case, we may understand the case to involve a run-of-the-mill enforcement of voluntarily adopted restrictive covenants. Conversely, we view the covenant in question as a violation of public policy, much as we would if the covenant prohibited sale of the units to persons of a particular race, sex or religion. Consider how the case would look, for example, if, instead of an American flag, Lamp was Jewish and sought to affix a *mezuzah* to the doorpost of the front door to his condo unit, an obligation he believed to be based on a commandment from God in *D'varim* (Deuteronomy) 6:9.<sup>83</sup> In such a case, the federal Fair Housing Act may well prevent enforcement of the condominium rule.<sup>84</sup>

In a sense, the method of reflective equilibrium embodies or presupposes all the other normative methods. Lawyers use the case system to take into account everything that matters normatively, from policy to principle to situational contextualization, to historical and social accommodation. The attention to particular context, to particular results we decide to take for granted as fixed points in the normative analysis, coexists with discussion of principle, policy, and an impartial perspective that could justify the result to everyone affected by it – especially the loser.<sup>85</sup> This is, in the end, a *critical* method; it refuses to take either fundamental principles or particular intuitions for granted while suggesting that any equilibrium reached by reflection is a temporary one only. It rests on the recognition that property law, and the norms underlying control over value resources, are premised on human choices about the allowable and appropriate contours of human relationships. It assumes that property is not only an individual entitlement but a regime and that the questions of power, freedom, justice, and democracy that we use to judge political regimes are as relevant and important in judging property regimes as political ones.

#### § 4.0 *Distributive norms in a free and democratic society*

##### § 4.1 *Judging & justifying: the possibility of critical normativity*

We live in an age that bounces back and forth between profound skepticism and stalwart faith.<sup>86</sup> The skeptics seize on our fundamental disagreements and doubt that we can ever reach agreement on our most basic values.

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<sup>83</sup> "Inscribe [these words] on the doorposts of your house and on your gates."

<sup>84</sup> 42 U.S.C. §3604.

<sup>85</sup> DARWELL, *supra* note — ; Singer, *After the Flood*, *supra* note — at 342; VAN DER WALT, *supra* note — at 182–190.

<sup>86</sup> Joseph William Singer, *Normative Methods for Lawyers* (manuscript in possession of author, 2007).

Skeptics range from efficiency theorists who seek only to satisfy individual preferences, no matter what they are, to critical theorists who view all normative arguments as false claims that seek to legitimate what are in fact illegitimate power relations by pretending to ground preferred views of justice on objective grounds that do not exist, to practicing lawyers who know that the client's chances vary enormously depending on which judge is assigned the case. If the skeptics are right, then "normative reasoning" is an oxymoron: No amount of reasoning will induce us to agree on what is right, moral, or just; persuasion is either not possible or is a matter of propaganda.<sup>87</sup> We live in disparate normative worlds and whoever has the most power will impose their view on the rest of us. Judges who purport to justify rules of law on normative grounds are either imposing their personal values on everyone or they are choosing among moralities; either way, their opinions which justify the rules they choose merely pretend that all "reasonable" people would come out that way. If that is so, then judicial opinions – and normative arguments generally – are nothing more than ideological window dressing, an opiate of the masses.

Worse than that, skeptics may believe that normative arguments are insulting to the loser. They suggest that anyone who was thinking properly would agree with the result being reached and identify it with truth, justice, and the American way. On this construction, one who disagrees is either foolish, stupid, or selfish. Johan van der Walt argues that judicial claims to do justice founder on the shoals of a rocky shore; the loser is shipwrecked and the judge says it is all for the best.<sup>88</sup> Pangloss would be proud of such an argument. Justice, van der Walt teaches, inevitably involves sacrifice. Telling the loser that her interests are illegitimate denies the humanity of that person; it fails to treat her with equal concern and respect.<sup>89</sup> We can only approximate justice if judges do not paper over the inevitable sacrifices of individual interests which are required when we adjudicate disputes one way or the other. If we do this – if we acknowledge all interests as legitimate – then all normative claims are put in doubt. On this view, we cannot ever rest easy that we have done the right thing, that we have chosen correctly, that we have advanced the just rather than the unjust. Justice can be done – and can be seen to be done – only by acknowledging the legitimate interests of the loser, not only silently but openly and respectfully in the justificatory reasoning presented in judicial opinions themselves.

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<sup>87</sup> On the problems with normative argument, see Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Louis Michael Seidman, *This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 UCLA L. REV. 501 (1998).

<sup>88</sup> VAN DER WALT, *supra* note — .

<sup>89</sup> *Id.*

On the other hand are the true believers; they believe in right answers and have faith that such answers are forthcoming. Reason can guide us in finding those answers and determining what is just. This group includes some who are unreflective – who do not sufficiently appreciate other points of view or who do not realize the extent to which their own forms of reasoning are based on controversial and perhaps contestable premises. But it may also include those who are self-critical and who acknowledge the complexity of normative judgment. How can critical theorists acknowledge the complexity and inherent disputability of normative claims while still believing that justice is more than “just your opinion”? How can we respond to libertarians and economists who argue that respect for individual autonomy entails accepting (and not criticizing) the preferences of individuals no matter what they are? How can a critical theorist believe in normative claims? Isn’t “critical normativity” an oxymoron?

I don’t believe it is. The basis of *critical normativity* is the recognition that the *assertion of a preference is not a self-regarding act*. Suppose we define autonomy as the freedom to choose one’s own path. If we define autonomy this way, then it is an interference with autonomy to refuse to credit or count or defer to individual preferences. Yet there is no reason for us to define autonomy this way and good reason for us to reject this conception of autonomy. Many preferences impose externalities on others. The landlord’s preference to collect rent from the tenant for twelve months (and hence to disclaim any duty to mitigate damages) imposes a huge burden on a tenant who wants to move before the end of the lease term. *Holding a preference* may be a self-regarding act but *asserting* it against another is anything but a self-regarding act; for a tenant who cannot pay two rents, the insistence on exercising this preference may tie the tenant to the land by making it economically impossible for her to take a job in another city. Deferring to individual preferences, no matter what they are, gives individuals power not only over their own lives, but the lives of others. The claim that it is paternalistic to judge preferences rather than to simply defer to them is either (1) a claim that the assertion of those preferences is a self-regarding act, or (2) a claim that individuals are entitled to assert preferences that affect others. Either way, this supposedly antipaternalistic view assumes that individuals have the right to wield power over others, as well as themselves. *But this is a normative claim*. It is normative either because it denies the existence of externalities when they actually exist or because it defines those externalities as *per se* legitimate. Yet there is no reason to believe that we must bow down to individual claims merely because they are asserted. Indeed, refusing to judge the legitimacy, relevance, and strength of preferences when they affect others is incompatible with the choice to create a free and democratic society; that, by its nature, requires the creation of minimum standards for the legal framework of just social relationships.

In the end, we can go wrong no matter what we do. We can act unjustly by refusing to recognize the interests of the loser or by claiming the loser's interests are illegitimate when they are legitimate. Or we can act unjustly by deeming all preferences to be equally valid and then valuing them equally no matter what their content, thereby viewing those preferences as legitimate when they are illegitimate. Neither the skeptic nor the true believer has a ready recipe for a defensible normative argument; neither one can give adequate guidance to a judge who has no choice but to decide a case and who must give reasons for the decision. The skeptic says no reasons are adequate; but that counsels that the judge either remain silent or announce that she is simply exercising power in the way she deems best. The refusal to attempt to give reasons that might speak to the losing party fails to treat the loser as a human being. The true believer says that reason can discern the right answer; but that counsels the judge to deny that the losing party has legitimate interests that must be accounted for. Either approach requires the judge to treat the loser with a certain amount of contempt.<sup>90</sup> Neither one is an acceptable exercise of the judicial role in a free and democratic society that treats the parties with equal concern and respect.

Judges should acknowledge externalities imposed by the recognition and assertion of property rights. Only then can they treat the parties with the humanity they deserve. At the same time, judges must also *judge* whether an asserted externality is *one that should be of normative concern* or whether, on the contrary, the claim underlying the externality is a power grab that cannot be deemed legitimate for those living in a free and democratic society that treats each person with equal concern and respect. These normative choices are unavoidable, and it is not the case that nothing can be said about the choice we in fact wind up making. Normative argument may not operate in a deductive fashion through a noncontroversial decision procedure but that does not mean that the process of considering and giving reasons adopting one legal rule over the other is an empty exercise. This is especially true for the law of property when claims involve rights of access to the resources needed for human life.

#### § 4.2 *Windows, curtains, and the stranger at the gate*

Shortly after Hurricane Katrina struck New Orleans, a group of people crossed a bridge over the Mississippi River as they fled from the rising waters. They were stopped by the police force of the Town of Gretna and not allowed to pass. The townspeople of Gretna had heard news reports of looting in New Orleans and feared for their safety and that of their homes.

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<sup>90</sup> Martha Nussbaum criticized such moral reasoning in her wonderful book, *The Fragility of Goodness*. MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986).

They turned the evacuees around and forced them back to New Orleans.<sup>91</sup> Did they do anything wrong?

It is easy to sit in a comfortable office and judge people far away. One cannot easily know what it is like to be in a chaotic situation, in fear of your life, desirous of doing the right thing but determined to protect one's family and one's possessions. At the same time, it is important to consider what one would have to think to think that it was appropriate to block the bridge, bar the door to the city, and send desperate people back to a desperate situation. I imagine the epigram at the beginning of this article: Felix Cohen's fable about the man in his warm home, trying to enjoy a meal, disconcerted by seeing the stranger at his gate.<sup>92</sup> We can criticize him for being heartless, for not sharing what he had. *But if we are honest, we realize that he is all of us.* Those of us who have property – and that is most of us – consider that property to be “our own.” The very idea of property confers the notion that it is our business alone what we do with what is ours; others have no legitimate claim to take what we have. The economists and contract theorists may talk about efficient breach, but they do not talk about efficient theft. We start from a presumption of control and a right to exclude.

This means that we do not, in general, consider our withholding of our property from others to be an other-regarding act. Indeed, we do not imagine it to be an act at all; refusing to give appears as an omission – a failure to act – rather than an act that could plausibly harm others. Of course, those others (“non-owners”) may want what we have; but the very notion of ownership implies that they have no legitimate interest in taking it against our will. Conversely, withholding what we have from others cannot harm them because they have no legitimate claim on our attentions to begin with. What is missing here, of course, is the truth that our claim to possess a right to exclude others from the things that they need derives from a legal rule by which the state allocates the property to us and promises to back that promise up by sending in the police if others try to take what we have.<sup>93</sup> We can

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<sup>91</sup> See Ann M. Simmons, *Protesters Make A Stand on Bridge That Was Blocked*, Los Angeles Times, Nov. 8, 2005, at A-10 (describing an incident in which Gretna police refused evacuees from nearby New Orleans). See also Ellen Barry, *Katrina's Aftermath: After Blocking the Bridge, Gretna Circles the Wagons: Long Wary of Next-Door New Orleans, the Town Stands by Its Decision to Bar the City's Evacuees*, LOS ANGELES TIMES, Sept. 16, 2005, at A-1 (discussing the decision to exclude evacuees); Scott Gold, *Katrina's Aftermath: On the Edge Without an Exit: A Gretna, La. Social Worker Tries to Treat and Evacuate the Remaining Residents in His Housing Project, as Local Officials Say They Can't Do Much*, LOS ANGELES TIMES, Sept. 11, 2005, at A-17 (same); Gardiner Harris, *Storm and Crisis: Battling the Storm: Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES, Sept. 10, 2005 (same).

<sup>92</sup> On the importance of the image of the stranger, see Singer, *After the Flood*, *supra* note — at 311–324.

<sup>93</sup> Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

control others by merely threatening to call on those state officials to enforce our powers.

We all, at one point or another, chase away the stranger at the gate. Or perhaps we simply draw the curtain and avert our eyes. It may be a painful thing to realize but one of the most important things the institution of private property does for us is to protect us from the feelings of guilt we might experience when we withhold from other people the things that they desperately need.<sup>94</sup> The norms underlying property institutions protect us (owners) from having to feel responsible for the well-being of others (non-owners).

Yet our invulnerability from the claims of others breaks down. We have no national health insurance in the United States, but we do have a federal statute that requires most hospitals to provide life-saving emergency treatment to anyone who comes to their door, whether or not that person has medical insurance.<sup>95</sup> It seems that we are unwilling or unable to bar the door and watch the uninsured victim die in the street when experts located steps away could have saved her life.

Consider the famous case of *Shelley v. Kraemer*,<sup>96</sup> in which the Supreme Court held that it would violate the fourteenth amendment's guarantee of equal protection of the laws to enforce a racially-restrictive covenant that would have prevented the sale to or occupation of property by African Americans or Asians. The case obviously raises serious distributive issues: If racial discrimination and "tastes" for racial segregation are widespread, then such covenants will be common; enforcing them will deny access to housing on the basis of race, perhaps severely limiting the amounts of housing one has a chance to buy and the places one may live. Nor are those effects equally felt; given historical and cultural realities, the existence and enforcement of such covenants communicates a message of inferiority and will have a disparate impact on disempowered groups.

The question is whether to enforce or ignore such restrictions agreed to by prior owners of the burdened property. The covenant beneficiaries (aptly called the owners of the "dominant estates") argued that enforcement of the covenant would not deny equality because the state would enforce similar covenants restricting purchase of property by white persons. And because the discriminatory motivation was private (that of the owners) rather than public (this was not, after all, a publicly-enacted zoning law that required

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<sup>94</sup> UNDERKUFFLER, THE IDEA OF PROPERTY, *supra* note — at 141; Underkuffler-Freund, *Property: A Special Right*, *supra* note — at 1039.

<sup>95</sup> The Emergency Medical Treatment and Active Labor Act, or EMTALA, 42 U.S.C. § 1395d(d) (2000) (requiring hospitals receiving Medicare funds to provide appropriate emergency treatment); *see also* 42 U.S.C. § 1395c(c) (2000) (defining participating hospitals); 42 C.F.R. § 489.24 (2005) (delineating regulations enforcing EMTALA).

<sup>96</sup> 334 U.S. 1 (1948).

segregation), one could not view the state or the law as being responsible for the racially disparate impact of enforcement of such agreements. Of course, enforcement of such agreements would have distributive effects but the claim was that they could not be viewed as either mandated by the state or as the result of a government policy denying equal protection of the laws.

The Supreme Court disagreed. Chief Justice Vinson argued that the rights protected by the equal protection clause are “guaranteed to the individual”; they are “personal rights,” belonging to *each* person seeking to enter the housing market. “It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color,” Vinson wrote. “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”<sup>97</sup>

The meaning of this sentence is obscure. Why not take preferences for granted, count the preferences of all individuals equally, add up the costs and benefits of enforcing such contracts and promote the result that best maximizes social welfare so conceived? If one is unhappy with the resulting distribution of access to housing, this can always be corrected through the tax-and-transfer system. After all, if one has enough money, it is likely a buyer could offer all the owners of the covenant enough money to induce them to sell. And if one does not have enough money, or they refuse to sell their entitlement, isn’t that an indication that they value the entitlement more than does the potential purchaser and that a forced sale will decrease social welfare?

Putting the case in these terms shows (I hope) the obtuseness of treating the distributive issues in the cases as merely a matter of money – as a problem that can be remedied by a social welfare system that taxes everyone to transfer more resources to the “poor.” The problem is not just one of access to resources; the problem is that *certain preferences regarding access to property are illegitimate* – they are incompatible with the minimum standards that should govern market relations in a free and democratic society that treats each person with respect. The assertion of such preferences in the public world of the housing market is not a self-regarding act; treating the discriminatory preferences equally with the inclusionary ones is an insult to the victims of those preferences. Conversely, although the demand to have access to housing without regard to race clearly imposes externalities on racists, it is not at all clear that we want to justify fair housing laws on the ground that the interests of nonracists outweigh the interests of racists. Rather, we may want to say that the interests of racists are illegitimate when asserted as reasons to adopt exclusionary property rules; they are not demands that property owners are entitled to make – at least not if we seek to

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<sup>97</sup> *Id.* at 22.

live in a free and democratic society that treats each person with equal concern and respect.

Property norms give us the blessings of security, the possibility of control over our own lives, a setting for creating a family life, friendships, human relationships of abiding and fundamental significance, the possibility of altruism, and the power to shape a human life. But property norms also give us the privilege of indifference, the feeling that we can draw the curtains and focus only on what we can see in the mirrors of our homes or around us in our intimate relationships. Property norms often make the externalities of ownership go away; they render externalities invisible.

At the same time, property norms sometimes require us to draw back the curtains, let in the light, and turn our gaze to the stranger at the gate. The question for us is whether there is some way to reconcile these experiences, to see what is to be seen, without being drawn so far from ourselves that we cannot manage the resulting responsibilities. This tension is not one we can escape if we are to respond as human beings should. Owners have obligations as well as rights and the greater light we shed on the subject, the better we can manage this tension.