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The Modest Systemic Status of Property Rights*

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1 Introduction

Over the past few years academic authors associated with the progressive property group¹ have engaged in a

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¹ A group of theorists identified themselves with the notion of progressive property in GS Alexander, EM Peñalver, JW Singer & LS Underkuffler 'A statement of progressive property' (2009) 94 *Cornell LR* 743-744, but Gregory Alexander already used the term 'progressive property' a decade earlier in an overview of the contribution of the critical legal studies movement to property theory, see GS Alexander 'Critical land law' in S Bright & J Dewar (eds) *Land law: themes and perspectives* (1998) 52-78. JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 917 fn 1, 924 fn 12; JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062 1046-1047 regard Jedediah Purdy as one of the progressive property group although he did not sign the 2009 Statement. However, in a review of J Purdy *The meaning of property: freedom, community, and the legal imagination* (2010), ET

vigorous discussion about the content and social purpose of property.² Their comments are descriptive insofar as they identify and explain ways in which the supposedly absolute power of property owners is in fact subject to significant restrictions and exceptions³ and normative insofar as they justify the existence, extent and effect of restrictions and exceptions that limit the power of property owners with reference to what they present as progressive values, such as social obligations, structural pluralism,

Freyfogle 'Book reviews' (2011) 29 *Law & History Rev* 327-328 argues that Purdy, in this and in earlier works, advocates 'an argument in favor of a classic, liberal view of private property' and situates himself 'in the category of those who largely endorse atomistic, contractarian social views and who see individual freedom as the "single master value"', suggesting that Purdy might not fit into the group. JA Lovett 'Progressive property in action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818 743, who describes this group as 'progressive or social obligation theorists', does not mention Underkuffler but includes Purdy and Eric Freyfogle. E Rosser 'The ambition and transformative potential of progressive property' (2013) 101 *California LR* 107-171 110 includes Purdy but argues that Laura Underkuffler, who did sign the Statement, 'fits within the emerging progressive property school' although she 'never adopted the label'; but compare fn 4 below. A few scholars who did not sign the Statement more or less explicitly adopt the premises of the Statement; see e.g. JA Lovett 'Progressive property in action: the Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818; ET Freyfogle 'Private ownership and human flourishing: an exploratory overview' (2013) 24 *Stellenbosch LR* 430-454; R Dyal-Chand 'Useless property' (2011) 32 *Cardozo LR* 1369-1426; R Dyal-Chand 'Sharing the cathedral' (2013) 46 *Connecticut LR* 647-723; R Dyal-Chand 'Pragmatism and postcolonialism: protecting non-owners in property law' forthcoming (2014) 63 *American University LR* (available at SSRN <http://ssrn.com/abstract=2425897>); NM Davidson 'Property and relative status' (2009) 107 *Michigan LR* 757-818; NM Davidson 'Property's morale' (2011) *Michigan LR* 437-488. See further fn 5 below.

² For detail of the relevant publications see ffn 1 above; 13-23, 27-32 below.

³ Several publications discussed in text accompanying ffn 14-19 below illustrate the point, but JA Lovett 'Progressive property in action: the Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818 identifies a particularly striking example of a statutory exception, in the form of a statutory right to roam, that is carved out from landowners' right to exclude in Scots law, and explains the normative justification for that exception with reference to the values discussed in progressive property literature.

virtue ethics, freedom, human flourishing and democratic governance.⁴

For various reasons the debate between the progressive property scholars and their critics has tended to focus on property owners' right to exclude, although some commentators have proposed broader perspectives on trends in property theory. Jane Baron, for example,⁵ describing the current debate in the US in terms of diverging normative preferences regarding the optimal level of systemic complexity of property,⁶ distinguishes between two broad

⁴ See fn 14-19 below. LS Underkuffler 'When should rights "trump"? An examination of speech and property' (2000) 52 *Maine LR* 311-322 is an example of an earlier publication by one of the progressive property scholars who signed the 2009 Statement and that already exhibits these features in its main argument. See further LS Underkuffler 'The politics of property and need' (2010) 20 *Cornell J Law & Public Policy* 363-376; LS Underkuffler 'Property and change: the constitutional conundrum' (2013) 91 *Texas LR* 2015-2037. I return to the Underkuffler argument below.

⁵ For other descriptions and assessments of the progressive property literature see e.g. JA Lovett 'Progressive property in action: the Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818; E Rosser 'The ambition and transformative potential of progressive property' (2013) 101 *California LR* 107-171; JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062. JA Lovett 'Progressive property in action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818 743-753 echoes the Baron distinction between information theory and progressive property theorists referred to below, but adds a third group, which he describes as reciprocity theorists and exclusive use theorists. In this group he refers to Hanoch Dagan and Michael Heller (citing H Dagan & MA Heller 'The liberal commons' (2001) 110 *Yale LJ* 549-623; H Dagan 'The social responsibility of ownership' (2007) 92 *Cornell LR* 1255-1273; H Dagan 'Takings and distributive justice' (1999) 85 *Virginia LR* 741-804); Adam Mossoff (citing A Mossoff 'What is property? Putting the pieces back together' (2003) 45 *Arizona LR* 371-443), Eric Claeys (citing ER Claeys 'Property 101: is property a thing or a bundle?' (2009) 32 *Seattle University LR* 617-650; ER Claeys 'Virtue and rights in American property law' (2009) 94 *Cornell LR* 889-947) and Larissa Katz (citing L Katz 'Exclusion and exclusivity in property law' (2008) 58 *University Toronto LJ* 275-315).

⁶ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 945-952. Baron's perspective is nicely illustrated by EM Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888 828-829 (discussing 'land's complexity'), 832-860

theoretical approaches that she refers to as information theory and progressive property theory respectively.⁷ Theorists whose work

(explaining how 'land's complexity' generates 'significant problems for the simplifying project' of theorists whose work Baron describes as information theory. See further GS Alexander 'Property's ends: the publicness of private property' (2014) 99 *Iowa LR* 1257-1296 (describing human flourishing as a pluralist conception that takes a complex range of values into consideration). Dagan's argument concerning the structural or institutional pluralism of property could also be regarded as an example of the systemic complexity Baron refers to; see H Dagan *Property: values and institutions* (2011) ch 3; H Dagan 'Property's structural pluralism: on autonomy, the rule of law, and the role of Blackstonian ownership' forthcoming (2014) 3 Brigham-Kanner Property Rights Conference J (available at SSRN <http://ssrn.com/abstract=2378999>). However, as Dagan indicates in the latter publication (SSRN version at 14-15), 'objecting to the excesses' of the proposition that Blackstonian ownership or exclusion is the essence or the default of property does not mean that Blackstonian ownership does not have a significant role in property; it adds a crucial option to a pluralist perception of property institutions.

⁷ To some extent, Baron's analysis can find application outside of US law. The 'information theory' label might arguably be less fitting outside of the US, but the central tenets of the theoretical approach she identifies in the efficiency-inspired work of US scholars overlap to some extent with property doctrine in the Western European civilian tradition. Examples of civilian property theory that corresponds with the basic foundations of what Baron describes as information theory can be gleaned from the sources discussed in AJ van der Walt *Property in the margins* (2009) ch 2 (the rights paradigm); S van Erp 'From "classical" to modern European property law?' in (2009) *Essays in honour of Konstantinos D Kerameus / Festschrift für Konstantinos D Kerameus* vol I 1517-1533 (the classical model). Van Erp's analysis indicates that the 'classical model' (which primarily describes Western European civilian law, although he argues that some aspects also apply to the common law) also regards property law as a foundational legal framework that guarantees the stability and security of accumulated wealth; that focuses on long-term relations and thus on a limited number of relatively immutable, in rem rights circumscribed by the *numerus clausus* principle; and, especially that the second of its core principles (apart from *numerus clausus*) is transparency, which includes publicity and specificity and is intended to ensure that those who might be bound by a right in rem can acquire information of it. It is difficult to decide whether, and if so how closely, the progressive property theory Baron describes can also be identified in legal scholarship outside of the US, and particularly in the civilian tradition, but there are some indications of critical theory in the civilian literature. In US theory, EM Peñalver & SK Katyal 'Property outlaws' (2007) 155 *Univ Pennsylvania LR* 1095-1186 memorably described how 'property outlaws' contribute to the

Baron describes as information theory⁸ prefer, on normative grounds,⁹ that property should be systemically simple because they see property as a device that coordinates human interactions relating to things by providing clear and simple signals about how to behave

development of property law; the normative aspect of their analysis is echoed in the functionalism debate in Dutch property law during the 1980s. See further EM Peñalver & SK Katyal *Property outlaws; how squatters, pirates and protesters improve the law of ownership* (2010) part II; LA Fennell 'Efficient trespass: the case for "bad faith" adverse possession' (2006) 100 *Northwestern Univ LR* 1037-1039; AJ van der Walt *Property in the margins* (2009) chs 5, 6. On the Dutch literature of the 1980s see AJ van der Walt *Property in the margins* (2009) 137-141. Furthermore, there is a lively discussion of property reforms, especially in the context of European law (see the literature Van Erp refers to) and in young democracies dedicated to extensive property reforms, but a sustained normative debate along the lines of the literature produced by and around the US progressive property scholars does not currently exist in the Western European civilian tradition.

⁸ See JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 918: '... information theorists posit that property works as a social ordering system ... by clear signals recognizable to all the world about how to behave with respect to things owned by others. In order to be clear, property's signals must be simple and largely standardized.' JA Lovett 'Progressive property in action: the Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818 746 describes this group as 'information or formal exclusion theorists'. In this context Baron refers to the work of Henry E Smith and Thomas W Merrill; some of their most important publications are cited in the footnotes below.

⁹ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 950 points out that the functional description of property in terms of information is not simply descriptive - it is a normative claim: 'to coordinate social behavior effectively, property *should be* (on the whole) simple' (emphasis in the original). Although Richard Epstein probably does not fit into the group of information theorists as Baron describes them, LS Underkuffler 'When should rights "trump"? An examination of speech and property' (2000) 52 *Maine LR* 311-322 313-314, discussing his argument in RA Epstein 'Property, speech and the politics of distrust' (1992) 59 *Univ Chicago LR* 41-89, points out that he describes normative reasons why property should be a well-defined and presumptively strong, 'trump' right like free speech. This places Epstein quite close to the information theorists, at least as far as their views of the nature and status of property are concerned. See further RA Epstein 'Property as a fundamental civil right' (1992) 29 *California Western LR* 187-207.

with regard to others' property.¹⁰ To keep information costs low the property system¹¹ recognises just a small number of standardised property forms that constitute substantive, typically immutable, in rem rights according to formalistic, bright-line rules.¹² Progressive property theorists,¹³ on the other hand, prefer to emphasize the complexities of the property system,¹⁴ again on normative grounds,¹⁵ because it is only in its complexity that the property

¹⁰ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 918, citing TW Merrill & HE Smith 'The morality of property' (2007) 48 *William & Mary LR* 1849-1895 1850.

¹¹ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 938, citing TW Merrill & HE Smith 'What happened to property in Law and Economics?' (2001) 111 *Yale LJ* 357-398 386.

¹² JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 926-927, citing TW Merrill & HE Smith 'The property/contract interface' (2001) 101 *Columbia LR* 773-852 794, 802-803; HE Smith 'The language of property: form, context, and audience' (2003) 55 *Stanford LR* 1105-1191 1125.

¹³ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 917 fn 1, 924 fn 12. JA Lovett 'Progressive property in action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska LR* 739-818 743 describes this group as 'progressive or social obligation theorists'. See further E Rosser 'The ambition and transformative potential of progressive property' (2013) 101 *California LR* 107-171 110. Some of the most important publications of Alexander, Peñalver, Singer, and Purdy are cited in the footnotes below.

¹⁴ Progressive property theorists see property as a system, but then as a social system and not a more or less autonomous 'machine': JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 939, particularly citing JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062 1049. Compare further LS Underkuffler 'When should rights "trump"? An examination of speech and property' (2000) 52 *Maine LR* 311-322 315-316 (explaining why property is not a 'trump' right that mechanically overrides other interests, but involves a complex process of assessments); EM Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888 828-829 (discussing the complexity of property in land); GS Alexander 'Property's ends: the publicness of private property' (2014) 99 *Iowa LR* 1257-1296 1260 (presenting human flourishing as a moral foundation for property, constituted by a multitude of both private and public values).

¹⁵ The progressive property theorists ask contextual questions and conduct conversations about human flourishing, social values and democracy; consequently, they reject the notion of a simple property system characterised by

system properly reflects their concerns with human flourishing;¹⁶ respect for human dignity; virtue;¹⁷ freedom;¹⁸ and democratic governance.¹⁹ Instead of mechanical responses to bright-line rules, the progressive property theorists prefer to describe property in terms of open-ended conversations about the effect that contextual, social and other normative considerations have on the outcome of property disputes.²⁰

Baron argues that the distinction between the two approaches is not about the complexity of property rules as such, but ‘about how

a small number of formalised rights and redline rules on normative grounds. See JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 950: ‘property *should be* (on the whole) attentive to a wide array of factors and *should not* employ simplifying rules that are insufficiently attentive to the values at stake.’ GS Alexander ‘Property’s ends: the publicness of private property’ (2014) 99 *Iowa LR* 1257-1296 1260 describes human flourishing as the normative foundation of private property.

¹⁶ JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 927-928, citing GS Alexander ‘The social-obligation norm in American property law’ (2009) 94 *Cornell LR* 745-819. See further GS Alexander ‘Property’s ends: the publicness of private property’ (2014) 99 *Iowa LR* 1257-1296 (discussing human flourishing as a pluralist conception that features both private and public values).

¹⁷ JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 928-930, citing EM Peñalver ‘Land virtues’ (2009) 94 *Cornell LR* 821-888.

¹⁸ JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 930-931, citing J Purdy ‘A freedom-promoting approach to property: a renewed tradition for new debates’ (2005) 72 *Univ Chicago LR* 1237-1298; J Purdy ‘People as resources: recruitment and reciprocity in the freedom-promoting approach to property’ (2007) 56 *Duke LJ* 1047-1117.

¹⁹ JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 931-932, citing JW Singer ‘Democratic estates: property law in a free and democratic society’ (2009) 94 *Cornell LR* 1009-1062.

²⁰ JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 918-919, 920: the progressive property theorists are interested in the effects or outcomes produced by the property system, the social relations that it allows or constructs and the kind of society it helps build (or prevents from being built). Compare LS Underkuffler ‘When should rights “trump”? An examination of speech and property’ (2000) 52 *Maine LR* 311-322 315-316.

much we need to discuss [those rules] and their application.’²¹ The progressive property theorists deny that simple, bright-line rules can sufficiently express or give effect to values that they consider crucial and the conversations about the application of property rules that they deem necessary substantially complicate the property system. Consequently, they regard complexity itself as a value, whereas the information theorists think that ‘the beauty of the property system is that it shortcuts discussions.’²² Property is a simple system to the extent that a small number of bright-line rules regarding a small number of standardised property forms obviate the need for discussion about their application; it is a complex system to the extent that the interpretation and application of property rules are complicated by open-ended conversations about the normative and practical significance of multiple normative considerations and of contingent, contextual factors that affect the role and effect of property in a complex world.²³

²¹ JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 951. H Dagan ‘Property’s structural pluralism: on autonomy, the rule of law, and the role of Blackstonian ownership’ forthcoming (2014) 3 Brigham-Kanner Property Rights Conference J (available at SSRN <http://ssrn.com/abstract=2378999>) 2-3, 14-15 approaches the matter from a different angle, arguing that while it is true that Blackstonian ownership has an important role in property, conceptualising the right to exclude as the core of property marginalizes or perhaps even undermines two constitutive characteristics of property, namely governance and inclusion. A structural pluralist approach, on the other hand, takes the heterogeneity of property doctrines seriously and acknowledges that a thin, common denominator such as property is ‘not robust enough to illuminate the existing doctrines or determinative enough to provide significant guidance as per their evaluation or development’.

²² JB Baron ‘The contested commitments of property’ (2010) 61 *Hastings LJ* 917-968 945, 952.

²³ Compare EM Peñalver ‘Land virtues’ (2009) 94 *Cornell LR* 821-888 832: ‘... land’s complex relationship with virtually every arena of human endeavor means that, for many owners, the way in which land facilitates the direct enjoyment of a variety of non-fungible, and often social, human goods overshadows the

Even in Baron's complexity perspective the right to exclude still tends to dominate the theoretical discussion about property. According to the information theorists, the property system pivots on the right to exclude because and to the extent that exclusion consolidates a large number of powers in one property owner, which sends a simple message to non-owners, namely to keep off.²⁴ Such a simple and strong exclusion rule helps to preserve the simplicity of the property system and therefore information theorists argue that exclusion strategies rightly occupy the core of the property system, while governance strategies, insofar as they exist,²⁵ feature on its

motivating force of its investment value.' On the other hand, Peñalver argues at 861, agreeing to operate within the confines of economic theory 'radically simplifies the project of exploring and assessing the contentious and complex moral questions surrounding land-use decision making.' In the end, economic theory 'buys certainty at the decision-making stage at the cost of considerable uncertainty and arbitrariness at the stage of defining and measuring the values to be maximized' and therefore the determinacy of cost-benefit analysis is largely illusory (at 875). Since virtue theory is more forthright about the difficulties and limitations of its conclusions, its 'lack of an algorithm for social decision making, far from being a fatal weakness, is actually a point of strength' (at 876). See further at 887: virtue ethics responds to the complexities of the moral world with the concept of practical wisdom or prudence, the exercise of which allows for a plurality of values and does not involve the arithmetic application of a simple formula.

²⁴ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 936-940, citing HE Smith 'Exclusion and property rules in the law of nuisance' (2004) 90 *Virginia LR* 965-1049 984; HE Smith 'Property and property rules' 79 (2004) *New York Univ LR* 1719-1798 1754.

²⁵ Defined with reference to limitations that restrict the right to use property, including limitations imposed on the right to exclude. The reasons why these limitations exist coincide with the relational human-flourishing factors that the progressive property theorists consider central to the debate. See further TW Merrill & HE Smith 'The property/contract interface' (2001) 101 *Columbia LR* 773-852 791-792 (explaining the choice between exclusion and governance as strategies for regulating the use of resources), 793 (arguing the benefit of exclusion strategies for in rem rights on the basis that they reduce information costs).

periphery.²⁶ Progressive property theorists are unwilling to adopt the core-periphery metaphor²⁷ but insofar as they do, they might argue that human relationships²⁸ constitute the core of the property system²⁹ and that what the information theorists describe as governance strategies are central (or at least ubiquitous) to property because the physical and moral world is complex at its core and not just at its periphery.³⁰ 'This division of views about property's core',

²⁶ TW Merrill & HE Smith 'What happened to property in Law and Economics?' (2001) 111 *Yale LJ* 357-398 359; TW Merrill & HE Smith 'The morality of property' (2007) 48 *William & Mary LR* 1849-1895 1850; HE Smith 'Response: mind the gap: the indirect relation between ends and means in American property law' (2009) 94 *Cornell LR* 959-989 963-971. See JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 962.

²⁷ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 920 fn 6 notes that the progressive property theorists might not have used the core-periphery metaphor had the information theorists not emphasised it so heavily, citing GS Alexander 'The social-obligation norm in American property law' (2009) 94 *Cornell LR* 745-819; GS Alexander 'Reply: the complex core of property' (2009) 94 *Cornell LR* 1063-1071 (in response to criticism of the social-obligation article). In the social-obligation article (2009) 94 *Cornell LR* 1063-1071 at 747 fn 1 Alexander argues that the core-periphery metaphor owes a debt to Duncan Kennedy, citing D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard LR* 1685-1778 1737. See further L Katz 'Exclusion and exclusivity in property law' (2008) 58 *University of Toronto LJ* 275-315 277-78; JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062 1295.

²⁸ Including the significance of those relationships for the promotion of human flourishing, social values, freedom, or democratic participation.

²⁹ See e.g. GS Alexander 'The social-obligation norm in American property law' (2009) 94 *Cornell LR* 745-819 746-747, referring to the common law of nuisance and the ancient maxim *sic utere tuo ut alienum non laedas* (use your land in such a way as not to injure the land of others) as a restriction on the use of land that developed in recognition of the rights of others. Compare further JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062 1050, 1054; GS Alexander 'Property's ends: the publicness of private property' (2014) 99 *Iowa LR* 1257-1296 1284-1291. See JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 962.

³⁰ Most progressive property writings are relevant here, but see particularly GS Alexander 'Governance property' (2012) 160 *Univ Pennsylvania LR* 1853-1887; EM

Baron argues, 'has helped keep exclusion at the front and center of property theory'.³¹

Several progressive property scholars make the point that property refers to such a complex and diverse set of values, institutions and doctrines that it is often misleading to make broad statements about both its nature and its application or development. In fact, most progressive property scholars would argue vigorously that whether property, or ownership, or exclusion, is important or powerful is a completely contextual issue, depending on the type of question one asks regarding a specific owner's entitlements to a particular resource in a given situation. However, one does not need to subscribe to Baron's description of the differences between information theory and progressive property theory to agree that the progressive property theorists generally argue against a particular perception that over-simplifies, and therefore either over-inflates or misrepresents, the roles that property plays in the law and in society. The over-inflated perception of property these scholars target can be described in various ways, depending on whether they focus on the proposal that property is an absolute right; that ownership is the paradigmatic property right; or that exclusion is the core entitlement of property. For purposes of this article I associate this over-inflated perception of property with what Baron describes as an important tenet of information theory, namely that property is essentially a simple system that relies on bright-line rules regarding a small number of standardised property forms and that pivots on the right to exclude because exclusion consolidates a large number of powers

Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888; GS Alexander 'Property's ends: the publicness of private property' (2014) 99 *Iowa LR* 1257-1296.

³¹ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 920.

in one property owner, which sends a simple message to non-owners, namely to keep off.

In response to the over-inflated perception of property as a simple message to keep off, progressive property theorists advance normative arguments, often based on considerations related to human flourishing, in a social context, why property is in fact subject to a range of restrictions, limitations and qualifications that characterise it as a complex, pluralistic set of doctrines and institutions that cannot be explained in terms of a heuristic as simple as the keep-off message. What remains contested is the nature, content and extent of these limitations on or qualifications of property; whether they are inherent in or external to property; whether they should be seen as restrictions imposed upon property or as exceptions to the exclusion (or absolutism) rule; whether or not they (sometimes) translate into the conferral of competing property rights; whether they extend beyond the right to exclude to other entitlements of the property holder; and whether they are of a public- or a private-law character.³²

In this article, I propose to contribute to this debate by advancing the proposition that another way of countering the over-inflated perception of property as a simple message to keep off, in addition to the progressive arguments that highlight its normative features as a diverse and complex set of institutions, would be to argue that the

³² On the private-public divide see especially GS Alexander 'Property's ends: the publicness of private property' (2014) 99 *Iowa LR* 1257-1296 (arguing that human flourishing involves both public and private values). On the complexity of restrictions on the range of property entitlements see H Dagan 'Property's structural pluralism: on autonomy, the rule of law, and the role of Blackstonian ownership' forthcoming (2014) 3 *Brigham-Kanner Property Rights Conference J* (available at SSRN <http://ssrn.com/abstract=2378999>), explaining how inclusion is sometimes inherent to property institutions and how different property institutions offer different configurations of entitlements with respect to specific resources.

legal protection of property rights in fact plays – and should play – a surprisingly modest systemic role in the law. If property could indeed be explained in a simple rule such as the message that non-owners must keep off, most property disputes could indeed have been adjudicated simply on the basis of enforcing compliance with that rule. Stated differently, if the core of property were a simple keep-off rule, the adjudication of property disputes would have pivoted on the protection of property rights. However, progressive property literature that highlights the complexities and diversity of property doctrines and institutions indicates that the protection of property rights is in fact subject to a wide range of exceptions and qualifications. My aim in this article is to argue that case law illustrates the surprisingly modest systemic purpose that protection of property rights in fact plays, judged against the systemic significance of the exceptions and qualifications. My point is not to argue that property rights are unimportant, but to show that in the larger picture, systemically, the exceptions and qualifications sometimes overshadow the protection of property rights.

Time and space prevent me from discussing this proposition in full and from considering its implications for all the questions that remain open in the progressive property literature. Instead, for purposes of this article³³ I discuss the proposition that property rights in fact play a modest systemic role in just one narrow context, namely the right of landowners to exclude others who want to

³³ I address two further areas where this proposition applies in presentations currently in preparation; one ('Property and housing rights') for a conference entitled 'Understanding Southern welfare', to be presented under the auspices of the Center for Interdisciplinary Research (ZiF), Bielefeld University, 24-26 November 2014; and the second ('Sharing servitudes') for a keynote presentation at the annual meeting of the Ius Commune Research School to be hosted by the School of Law, Edinburgh University, 27-28 November 2014.

exercise non-commercial rights³⁴ such as free movement,³⁵ free speech, or assembly³⁶ on private land that is either quasi-public

³⁴ Although the argument I develop here might also apply in situations governed by something like a public accommodations doctrine, I do not consider public accommodations in any detail here. Public accommodations doctrine applies to private property on which particular services, such as meals and accommodation, are provided to the public who want access to the property for those very services. The doctrine generally prescribes that those services may not be withheld from any prospective customer on the basis of discriminatory grounds such as race. Since the doctrine involves a conflict between equality and property the argument I develop here applies to it, but I do not pursue the point here because the non-owners want to gain access to the property for the commercial purposes for which it is open to the public, whereas I focus on exclusion of those who want to use the property for other, non-commercial purposes. On public accommodations in US law see JW Singer 'No right to exclude: public accommodations and private property' (1996) 90 *Northwestern Univ LR* 1283-1497; for application in South African law compare JW Singer 'Property and equality: public accommodations and the constitution in South Africa and the United States' (1997) 12 *SA Public Law* 53-86.

³⁵ I rely on the analysis of LS Underkuffler 'When should rights "trump"? An examination of speech and property' (2000) 52 *Maine LR* 311-322 in later parts of this article, but my analysis overlaps with hers only in part. She explains that – and why – property is substantially different from what she describes as a non-allocative rights like free speech, but she does not consider direct conflicts between free speech and property. Most of the rest of this article focuses directly on conflicts of that kind.

³⁶ As appears from the discussion below I rely specifically on these rights (free movement, assembly, free speech, demonstration) to identify the cases I focus on, although I argue that some of the cases are eventually in fact decided with reference to other non-property rights like the right to life and human dignity.

property³⁷ or private property with restricted public access.³⁸ The descriptive part of my argument holds that a significant number of cases in this narrow sphere are in fact decided on the basis of upholding or securing non-property rights (life, dignity, equality, free movement, free speech or assembly), while protection of the property rights that might be involved or affected is often relegated to a secondary, modest or marginal status. The normative part of my

³⁷ On the notion of quasi-public space see K Gray & SF Gray 'Civil rights, civil wrongs and quasi-public space' [1999] *European Human Rights LR* 46-102. In the sense I am attaching to it for purposes of this article, quasi-public space is privately-owned land that is used more or less freely by the public for at least some public purposes. As appears from the discussion of the case law below, that means that the public must have more or less free access to the space (which could be just one part of the property involved) and it must be suitable for and actually used for public purposes such as assembly, free speech or demonstrations, even though its main function (and the primary reason for public access to it) might be something else (usually commercial). For purposes of this article, quasi-public land therefore mostly refer to (especially large) public shopping malls and similar spaces at airports etc. As I use the terminology here, the difference between quasi-public land and private land subject to restricted access is that the latter is not freely accessible to the public. For purposes of this article this category will mostly refer to private land that is not freely accessible to the public but where those who do have access to it, such as employees, might want to exercise the rights in question.

³⁸ For purposes of this article I do not consider situations where conflicting claims to the use of private property do not involve relatively free public access and the exercise of free movement, free speech or assembly rights. At least some of the cases in this category would involve 'purely private' property conflicts of the kind that Rashmi Dyal-Chand describes, from a progressive property perspective, as examples of sharing property; see R Dyal-Chand 'Sharing the cathedral' (2013) 46 *Connecticut LR* 647-723 (discussing nuisance and negative easements, adverse possession, trespass and implied easements). Other similar examples might be the rules that courts apply in conflicts arising from building encroachments and unilateral amendment of consensual servitudes. The argument I develop here probably applies in at least some of those instances but since they do not share crucial features with the examples I discuss (relatively free public access to the land and the wish to exercise free movement, free speech or assembly rights on it) a suitable analysis would be too extensive for present purposes; I intend to return to those issues in another publication based on the *Ius Commune* presentation mentioned in fn 33 above.

argument holds that in the context of these cases, there are sound and important systemic reasons why the non-property rights in question should often, if not always, be secured before property rights are even considered and that property rights justifiably enjoy no more than a modest status in these cases. On the basis of these arguments I conclude that the protection of property rights fulfils a modest, rather than central, purpose in the legal system, at least as far as this particular category of conflicts is concerned.

A central point of my argument is that these cases undermine not just the 'front and center' status of exclusion in property theory³⁹ but the 'front and center' status of the over-simplified, 'keep-off' perception of property rights in legal theory and practice generally. Stated differently, depending on the context, the fact that property rights are involved or affected in a dispute does not necessarily mean that it must be decided on the basis of protecting property rights. In certain contexts, such as the narrow one I discuss here, it is systemically important to at least consider whether conflicts should not be decided on the basis of non-property rights, even though property rights are affected. Furthermore, instead of just emphasising limitations or exceptions that restrict the owner's right to exclude, I also argue that progressive property theory should focus on the systemically modest role that property rights play, and should play, in the broader systemic context of at least certain legal disputes. Analysing property disputes from the perspective of the modest systemic status of property rights in a particular context supports the progressive property approach even when the discussion starts out from limitations on or exceptions to the right of exclusion, since the limitations and exceptions are not presented as

³⁹ JB Baron 'The contested commitments of property' (2010) 61 *Hastings LJ* 917-968 920 observes that a core-periphery metaphor dominates much of property theory because of the focus that is placed on exclusion.

counterpoint rules but as examples of a broader principle regarding the systemic status of property rights.

Certain disclaimers and provisos are in order before I proceed with the argument. In arguing that the systemic status of property rights is modest I am not saying that property is not important or that protecting property rights is not an important objective of the legal system. My argument is that protecting property rights is not always the most important objective and that the solution of at least some conflicts about the use of property will (and should) turn on non-property rights. Generally speaking, I am discussing the protection of property from a rights perspective here and not making any strong claims about the ethical or social value of property in general. Secondly, I am not saying that property owners will not or should not prevail when protecting property rights conflicts with other systemic objectives; my argument is that when property owners do prevail under the circumstances I describe, it will not necessarily be because protecting property rights guarantees other, non-property rights and values. A central part of my argument is that it is often possible, and necessary, to protect non-property rights and values in their own right and not on the back of property rights, even in instances where we are accustomed to think about those conflicts as property issues. Thirdly, at least in some instances where property owners do prevail in the conflicts I focus on, the protection of property rights is strategic rather than systemic; in other cases property rights are protected for purely property-related reasons, but then only as a secondary objective. Finally, for the most part my examples relate to property rights in the constitutional setting, but as appears from the discussion some of the claims for protection are based on purely private (as opposed to constitutional) rights and therefore I do not restrict my argument to constitutional property.

2 Property Does Not Have to be Protected as the Guardian of Other Rights

The first part of my argument addresses the claim that the protection of property rights is systemically important because it safeguards other, non-property rights.⁴⁰ In a constitutional setting, the notion that property is the guardian of other rights implies that a legal framework guarantees private property rights at least partly because doing so protects non-economic constitutional rights such as liberty and equality or serves other constitutional, democratic or republican values. This claim is important for my argument because it suggests that the protection of property rights play an overarching

⁴⁰ Various versions of this argument have surfaced in the literature; I consider some of them below. CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 241 indicates the difference between older and more recent republican versions of this argument: both describe property as an essential basis of personhood, but the older version focuses on the exclusion of the propertyless from politics, whereas the modern version emphasises that 'all citizens should be furnished the necessary modicum of property, so that they too can be sturdy, self-governing citizens.' CM Rose 'Property as wealth, property as propriety' in JW Chapman (ed) *Compensatory justice (Nomos XXXIII)* (1991) 223-247 235-237 describes the early origins of the republican view, according to which property is a necessary guarantee of the individual independence that allows for proper democratic participation. An updated version of the older republican argument was developed by FI Michelman 'Foreword: on protecting the poor through the Fourteenth Amendment' (1969) 83 *Harvard LR* 7-59; FI Michelman 'Property as a constitutional right' (1981) 38 *Washington and Lee LR* 1097-1114; FI Michelman 'Liberal constitutionalism, property rights, and the assault on poverty' (2011) 22 *Stellenbosch LR* 706-723. A later version of the modern argument, first described by MJ Radin 'Property and personhood' (1982) 34 *Stanford LR* 957-1015, informs some of the relational and human flourishing arguments of progressive property theory, although there are significant differences between the (Hegelian) personhood argument developed by Radin and the more complex, explicitly pluralist (neo-Aristotelian) human flourishing argument developed by the likes of Alexander and Peñalver; see GS Alexander 'Governance property' (2012) 160 *Univ Pennsylvania LR* 1853-1888 1875.

systemic role in the law. On its own, the notion that property is an overarching, central legal value is not necessarily problematic; as a general proposition it can be accommodated in a purely efficiency-driven, exclusive theory of property and in the human-flourishing theory of progressive property.⁴¹ However, if the notion that property is a systemically core right is taken to imply that a simple, keep-off exclusion rule is justified on the basis that it promotes something like personhood it would become problematic.⁴² An indication that the protection of property rights is perceived as a core systemic function because it acts as the guardian of other rights emerges when the protection of specific non-property rights is mediated through the construction of competing property rights on

⁴¹ GS Alexander & EM Peñalver 'Properties of community' (2009) 10 *Theoretical Inquiries in Law* 127-160 149-160; EM Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888 883-884 might seem to move in the direction of portraying property as a central right by construing the protection of the non-owner users in *State of New Jersey v Shack* 58 NJ 297 (1971) and in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) in terms of competing, human-flourishing promoting property rights that could be raised against the property (and eviction) claims of the landowners in question. In the *Modderklip* case such a doctrinal move would be problematic because the beneficiaries were unlawful occupiers of the land; as the Dutch doctrinal debate of the 1980s proved (compare fn 7 above, see AJ van der Walt *Property in the margins* (2009) 137-141), construing any kind of competing right in their favour involves the conceptually problematic notion of unlawful rights. However, to the extent that Alexander and Peñalver focus on property as a matter of value ethics rather than on property rights, I would be hesitant to ascribe such an argument to them. Part of the institutional or structural pluralism that progressive property authors such as Alexander, Peñalver and Dagan associate with the notion of property involves the diversity of functions that a range of property forms and institutions fulfil in different contexts.

⁴² See fn 9 above for examples of information theorists who defend a simple, keep-off exclusivity rule on normative grounds. TW Merrill & HE Smith 'The morality of property' (2007) 48 *William & Mary LR* 1850-1895 argue that the exclusive character of property must be regarded as a moral right of the same status as bodily security and integrity and other civil and human rights.

the basis of promoting human flourishing. I am not denying the potential of relying on the protection of property rights to promote non-property rights strategically, but a core aspect of my argument is that it is neither logically nor normatively necessary to protect or advance non-property constitutional rights or values via the medium of property rights, particularly when the normative and constitutional significance of the non-property rights and values systemically exceed the economic interests that can adequately be protected in the form of property. Stated differently, while it might be possible, and sometimes strategically useful, to promote non-property rights via the strong protection of property rights, it is not logically or normatively necessary to do so in the sense that the non-property rights systemically rely on property protection.

The notion of property as the guardian of other rights is problematic not least because it reinforces the perception that property rights, particularly in their function as economic interests, are self-evidently systemically central to the law or to social interaction. From a rhetorical point of view, it would be counterintuitive for progressive property theory to combat what is perceived as the over-inflated exclusive perception of property by relying on arguments that again present property rights as systemically or socially core rights. When progressive property theory relies on property arguments to bolster or promote non-property rights, it is therefore necessary to emphasize the strategic nature of those arguments. From a normative point of view, portraying the protection of property rights as a systemically central objective of the legal order or of social ordering is also problematic. The strongest, natural-rights based claim that property rights are

central to the very constitutional order⁴³ is nowadays generally rejected by relational rights theorists⁴⁴ because it effectively removes contested questions about the distribution of property and of power from the realm of normative debate and political contestation.⁴⁵ As a social institution property might well be central to a constitutional order in a very specific contextual setting, and as a social institution that embodies a set of ethical values property might well be said to promote human flourishing, but a generalization that would abstractly classify property rights as systemically central to the constitutional order is too broad to be meaningful. Progressive

⁴³ In its strongest form, the claim that property is the guardian of every other right entails that guaranteeing property is a core reason for adopting a constitution in the first place; an argument that fits well within *laissez faire*, defensive understandings of constitutionalism that place a high value on state minimalism. Compare the ‘philosophical preliminaries’ in RA Epstein *Takings: private property and the power of eminent domain* (1985) chapter 2 (‘Hobbesian man, Lockean world’) for an example of such a strong, natural-rights claim. J Nedelsky *Private property and the limits of American constitutionalism: the Madisonian framework and its legacy* (1990) chapter 3 explains that this kind of claim does have some historical traction in US law, but JW Ely *The guardian of every other right. A constitutional history of property rights* (2 ed 1998) chapter 3 shows that the historical claim has to be qualified and embroidered upon extensively to render it tenable. For present purposes I ignore this strong natural-rights claim that property is the very reason for having a constitution in the first place.

⁴⁴ Without entering into a debate about the architecture of property theory it can be assumed that the progressive property theorists as they are identified by Baron and others belong in the broader group that is sometimes referred to as relational theorists because they emphasise that property is constituted by or constitutes relationships between people. Compare particularly JW Singer ‘Democratic estates: property law in a free and democratic society’ (2009) 94 *Cornell LR* 1009-1062 1047-1048 (describing the importance of relations among persons as an analytical insight of democratic property theory).

⁴⁵ J Nedelsky ‘Should property be constitutionalized? A relational and comparative approach’ in GE van Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417-432 420 points out that natural rights justifications of this kind ‘serve to highlight rather than resolve the contested political questions that property rights entail’; see further J Nedelsky *Law’s relations: a relational theory of self, autonomy, and law* (2011) 93-99, 107-110.

property theory would thus do well to make the distance between itself and similar-looking positions clear on this point.

In constitutional law, the guardian-of-other-rights approach to property rights has probably run its course. Even without its natural-rights foundations and libertarian baggage, the radical republican version of the guardian-of-other-rights argument, according to which property is the most fundamental right even if it is not the very reason for having a constitutional order,⁴⁶ is logically unstable at best.⁴⁷ Carol Rose argues that the older, republican version of this argument has lost most of its strategic or pragmatic force now that it has become customary to include an increasing number of non-economic, social rights in the constitution.⁴⁸ Stated even more strongly, in Frank Michelman's terms, there is little 'concrete, legal work' that a constitutional property clause necessarily has to do to

⁴⁶ CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 240 indicates that JW Ely *The guardian of every other right. A constitutional history of property rights* (2 ed 1998) indirectly posits (without analysing in any detail) the radical argument that property, being the guardian of every other right, should in fact take precedence over all other constitutional rights but ultimately, despite the rhetoric implicit in the title of his book, makes the more modest argument that property should be treated as equal in status with other constitutional rights.

⁴⁷ CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 240-242 highlights some of the problems: the older, republican version (property gives the citizen the required security that allows him to form independent judgment and to participate in the public domain) is historically ambiguous because republicanism was in fact at least partly tolerant of redistribution, since republicans viewed great disparities of wealth as disruptive of the polity and did not consider commercial property that important for personal independence. Furthermore, there is no reason why specifically property should be so central to republican independence; the very lack of property might actually be more effective as a guarantee of political independence.

⁴⁸ CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 245.

safeguard non-property rights and values, since the work that is required to protect those rights can be accomplished more directly by an 'otherwise complete bill of rights'.⁴⁹ In other words, a liberal modern constitution can provide adequate grounds for the protection of core non-property rights on their own terms; they do not have to be protected under the rubric of property. For my purposes, both the natural-rights and the radical republican version of the claim that property, as 'the guardian of every other right', is central to the pursuit of non-property rights such as liberty and equality or other civic, democratic or social values can safely be ignored.

What remains is a weaker, modern version of the republican argument, according to which property must be protected as part of the constitutional foundation for securing personhood or, in progressive property language, because it promotes human flourishing. In this version, property is not necessarily the strongest or most important constitutional right, but it is at least as important as other fundamental rights because it secures personhood or human flourishing by safeguarding fundamental, personhood- or flourishing-entrenching rights like life, liberty, human dignity and equality. This is probably the analytical space where the guardian-of-other-rights argument is most easily conflated or confused with property-for-personhood positions and the progressive human-flourishing argument in current legal discourse. Here, the guardian-of-other-rights argument is easily mistaken as theoretical support for the notion that progressive property theory must logically subscribe to the view that the protection of property fulfils a central role in maintaining the social and legal order. However, my argument here

⁴⁹ FI Michelman 'Liberal constitutionalism, property rights, and the assault on property' (2011) 22 *Stellenbosch LR* 706-723 710.

is that progressive property theory does not have to subscribe to such a position.

Jennifer Nedelsky, Carol Rose and Benjamin Barros⁵⁰ identified a fatal fault line at the heart of the modest property-as-guardian-of-personhood argument:⁵¹ property can only act as the guardian of personhood, in the sense described above, if it guarantees a certain

⁵⁰ Carol Rose shows that a related argument, that property protects other rights because it diffuses power, is subject to the same fallacy. Apart from the fact that the property regime itself depends on a set of political choices, the fact that it diffuses power can just as well be seen as an argument in favour of redistribution rather than of strong protection of existing rights: CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 242. Rose at 242-243 notes that JW Ely *The guardian of every other right. A constitutional history of property rights* (2 ed 1998) 162 cites WW van Alstyne 'The recrudescence of property rights as the foremost principle of civil liberties: the first decade of the Burger Court' (1980) 43 *Law & Contemporary Problems* 66-82 for this argument, but points out that he could just as well have cited FA Hayek *The road to serfdom* (1944) 103-104 or M Friedman *Capitalism and freedom* (1962) 15-16. DB Barros 'Property and freedom' (2009) 4 *New York Univ J Law & Liberty* 36-69 50-51 accepts that property can play some role in securing freedom or autonomy by diffusing power, but acknowledges that this argument supports (rather than undercuts) an argument in favour of at least some degree of redistribution of property. Akhil Reed Amar 'Forty acres and a mule: a republican theory of minimal entitlements' (1990) 13 *Harvard J Law & Public Policy* 37-43 37 makes a related point: 'Private property is such a good thing that every citizen should have some. Indeed, a minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share.' This redistribution is not only constitutionally legitimate but obligatory.

⁵¹ J Nedelsky 'Should property be constitutionalized? A relational and comparative approach' in GE van Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417-432 425. I discuss some qualifications of Nedelsky's argument below. Compare to the same effect CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 240-242. DB Barros 'Property and freedom' (2009) 4 *New York Univ J Law & Liberty* 36-69 comes to a similar set of conclusions regarding the value of property for freedom: property does support freedom, but a strong relationship between property and freedom does not imply that property is immune from state interference, and in fact supports a degree of redistribution of property.

minimum of property (as may be required for personhood) for those who do not have property. Such a guarantee of minimum access to property might involve a range of rights such as access to shelter or housing, food and water, medical care and education, and the level of what is required may vary from one society to another and from time to time. However, providing a guarantee of such a minimum will almost always require redistributive state intervention that must necessarily threaten the security of existing property holdings, because logically speaking at least a significant portion of the property that is to be provided to the have-nots to secure their personhood will have to be taken away from the haves. Qualified by the obligation to redistribute property, the guardian-of-other-rights description of property loses any edge of strong, simple keep-off exclusivity it might have had. What remains, at best, is the argument as Barros describes it: property is important for freedom, but the close tie between property and freedom does not render property holdings immune from state redistributive (or other regulatory) intervention. At this point, the link between property and non-property rights or values is indeed attractive to progressive property theory, but in my view it would have lost its attractions for those who associate property with a strong, simple keep-off kind of exclusivity.

Nedelsky goes one step further in underlining the redistributive implications of the guardian-of-other rights argument, adding that it is unlikely that courts will rely on this logical inference to promote redistribution and more likely that they will simply use the liberty-enhancing argument to entrench existing property interests.⁵² To the

⁵² J Nedelsky 'Should property be constitutionalized? A relational and comparative approach' in GE van Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417-432 425-426; CM Rose 'Book review: *The*

extent that the legal system (or the constitution) guarantees property as a right it is to be expected that the property guarantee would be relied on to secure the existing property holdings of the haves against redistribution. The nature and efficacy of property guarantees might vary, but insofar as the legal system effectively guarantees the security of vested property interests it will tend to oppose distributive state intervention. Legal protection of existing property interests will thus resist redistributive efforts to expand access to a human-flourishing minimum of property and frustrate efforts to promote personhood.⁵³ In fact, Nedelsky argues, it is highly unlikely that judges will rely on a constitutional guarantee of property as authority for taking away property from those who have it and redistributing it to the poor, and much more likely that courts will rely on it to insulate vested property interests against

guardian of every other right: a constitutional history of property rights by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 240-242. DB Barros 'Property and freedom' (2009) 4 *New York Univ J Law & Liberty* 36-69 38, 69 agrees with the conclusion of Nedelsky and Rose that the freedom-supportive argument in favour of property necessarily implies that some form and some measure of redistribution of property is justified or even required, but he does not explicitly address the pessimistic inference that courts are likely to protect existing rights and not to use this argument in favour of redistribution. Crucial to his argument is that his version of the freedom-supportive argument in favour of property does not imply an unqualified right to exclude or immunity from regulatory state interference. In that regard, his argument approaches what I describe here as strategic use of property rights to support other values such as freedom (or equality or dignity etc).

⁵³ Another version of the guardian-of-every-right argument is that property protects all other rights because property symbolises all other rights; in effect, property is presented as the ultimate metaphor for all rights. The obvious problem with this version of the argument is that it casts all rights, including civil and political rights such as equality and free speech, in the boundaries-and-exclusion language that is traditionally associated with property. On that ground alone this version of the guardian-of-every-other-right argument must fail: CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 244-246; J Nedelsky *Law's relations: a relational theory of self, autonomy, and law* (2011) 93-110.

redistributive regulation. Ensuring personhood-promoting redistribution of property will therefore require regulatory state intervention that might be subjected to potentially debilitating constitutional scrutiny, depending on how strictly the property guarantee is interpreted. As a guarantee of vested property holdings, the protection of property will therefore tend to undermine its function as the guardian of other, personhood-promoting rights and, simultaneously, its own moral or normative foundation.

The aspect of this debate that specifically interests me is just the conclusion that non-economic rights do not necessarily have to be protected or promoted on the back of property rights. In my view, the promotion of non-economic rights that secure personhood or human flourishing for have-nots not only does *not* depend on the strong protection of property rights (to the extent that, in Michelman's words, the work can be done by an otherwise complete bill of rights) but in fact requires political deliberation concerning the necessary and permissible limitation of existing property interests (to the extent that the promotion of personhood might require regulatory redistributive intervention). Insofar as the strong protection of property rights (in the form of a constitutional property guarantee and other legal remedies that secure existing property holdings against state intervention) forecloses, reduces or bypasses the room for political deliberation aimed at regulatory redistribution of property, it may in fact frustrate rather than promote and secure personhood or human flourishing.

Even apart from normative objections, all versions of the claim that protecting property rights is a primary systemic objective because it ensures or strengthens the promotion of civic, political or social rights or values are therefore at least unstable and possibly untenable on logical grounds. On the one hand, the logical reasons for protecting life, liberty and equality along the scenic route of

protecting property rights seem to be weak, especially now that bills of rights increasingly tend to protect social rights directly and explicitly. On the other hand, strong property rights protection is more likely to insulate existing property holdings against redistribution than it is to promote redistribution, which undermines the very normative foundation of the original claim that property protects personhood. Consequently, protecting property rights is in fact systemically not as important as the guardian-of-other-rights claim suggests. In fact, there is no compelling reason why non-property legal objectives such as life, liberty, human dignity or equality have to be pursued through the protection of property rights and at least some ground for believing that the pursuit of property objectives might actually frustrate the pursuit of those personhood- or human-flourishing securing objectives.

In my view, this implies that it is important for progressive property theory to recognise the relatively modest systemic status of property rights in the broader scheme of fundamental rights protection; to acknowledge that the default position is to secure the protection and promotion of non-property rights on the basis of their relatively superior normative and systemic status and not via the protection of property; and to devise conceptual and analytical tools to facilitate a distinction between the two categories of rights. That does not mean that property arguments or remedies cannot be used to support non-property objectives such as the promotion of social rights or housing; my argument is that it is not systemically or normatively necessary to do so and that a decision to promote non-property objectives via the protection of property rights would be based on calculated, strategic rather than normative or systemic reasons. In addition, pursuing the promotion of broader systemic purposes through strong protection of property rights may have unintended counterproductive side-effects.

3 The Modest Systemic Status of Property Rights vs Non-Property Rights

3.1 Introduction

The second part of my argument is that even when property rights are apparently directly at stake, the pursuit of non-property objectives is sometimes systemically more important than protecting property rights. This observation is what I have in mind when I argue in this section that property rights enjoy a relatively modest systemic status compared to non-property rights. For the moment I propose to illustrate this argument with reference to case law in a fairly narrow area that is restricted in two ways and I do not make any claims regarding property conflicts outside of this area.

On the one hand I focus on access conflicts involving a very specific category of land, namely quasi-public land⁵⁴ and private land to which a small group of non-owners have been granted restricted access for specific purposes. On the other hand I limit my analysis to case law involving a very specific category of conflicts about access to this category of land, namely where the owner of the land wants to exclude or evict from the land persons who want to use it for a non-property purpose, such as exercise of their right of free movement, assembly, free speech, public demonstration or picketing. As appears from the discussion of the case law below, my focus means that the public must in fact already have enjoyed either more or less free or at least controlled access to the disputed space (which could be the whole or just one part of the property involved) and the property must be physically suitable for non-commercial

⁵⁴ I defined quasi-public land earlier as privately-owned land to which the public has more or less free access for at least some, mostly commercial, purposes: see fn 36 above.

uses such as assembly, free speech or demonstrations, even though its main function (and the primary reason for granting the public access to it) might be something entirely different (usually some kind of commercial use). For purposes of this article, the case law therefore mostly deals with clashes about access to (especially large) public shopping malls and similar spaces at other privately-owned facilities such as airports, where the owner wants to exclude or evict persons who want to use the land to demonstrate or picket or otherwise express their right to free movement, free speech or assembly. Some of the cases deal with private land that is not freely accessible to the public, but to which certain persons have restricted access for specific purposes (such as labour or accommodation), and some deal with non-demonstrative uses of the contested land (such as begging). The common denominator is that the land in these cases was not completely closed off from access by non-owners and that the non-owners involved wished to use it for other purposes than those for which the landowner had granted them access.

Even in the small area that I focus on in this section, the case law that I discuss does not provide consistently strong support for my argument that the pursuit of non-property objectives is sometimes systemically more important than protecting property rights and that the latter sometimes assumes a systemically modest role even when it seems to be a central issue. In what follows I suggest that inconsistencies in the jurisprudence should be explained with reference to the nature and origin of the non-property rights involved. Accordingly, I discuss the examples in three groups, depending on whether the protection of property rights (by way of excluding or evicting non-owners from the land) conflicts with life, human dignity and equality rights (3.2 below); with other constitutionally privileged non-property rights (3.3 below); or with privileged statutory rights (3.4 below). Finally, I consider cases

where none of these factors is present, where the inconsistencies are more apparent and where they are also more difficult to explain.

3.2 Property vs Life, Human Dignity and Equality Rights

Some of the most interesting cases involve a clash between landowners' right to exclude and non-owners' claims to gain access to land or to use their presence on land for purposes other than those for which they had been granted access, such as their right to life, human dignity or equality and non-discrimination.⁵⁵ These clashes are especially interesting when the non-owners want access to the land for life-supporting activities such as begging (involving their right to life or human dignity) or when they are excluded or evicted for reasons related to their race or other physical and personal features (implicating their right to non-discrimination and human dignity). The difference between these cases and the other cases discussed later is that the rights involved in this first category – life, human dignity and equality – are immutable in the sense that they are not generally subject to democratic deliberation, regulation and limitation. The life-dignity-equality rights obviously are limited in the sense that they do not allow beneficiaries freely to enter upon and use property belonging to another person at will, but they are normally not restricted and regulated in legislation because of the intractable political problems surrounding any democratic effort to

⁵⁵ As a ground for challenging exclusion from quasi-public spaces, the right to equality or non-discrimination mostly involves what is known as public accommodations law in the US literature; see fn 34 above. As I explain there, I do not consider public accommodations doctrine here because it would render the discussion too wide, but generally speaking public accommodations doctrine supports the point I am making. As appears from the discussion in 3.5 below, some of the English mall cases involved racial and cultural prejudice that might trigger an equality-based argument.

determine their outer limits. Stated simply, it is not customary for democratic legislatures or regulatory authorities to impose limitations on the right to life, human dignity or equality, particularly in the context of protecting competing economic rights.

It is therefore not surprising that the case law suggests that courts faced with a head-to-head clash between a private landowner's right to exclude others and non-owners' access claims based on non-property fundamental rights such as life, human dignity or equality tend to uphold the latter rights as far as possible, *as a matter of priority*. I am not suggesting that the landowner's property rights are ever ignored or that the landowner would never win a conflict of this nature; my point is the more modest one that the courts do not simply take protection of the landowner's property right as the self-evident starting point for deciding the case. If property were in fact always assigned the presumptive power, as is assumed in the approach that associates property with a simple, keep-off right to exclude, one would expect the courts to always take the protection of the property right to exclude as the starting point and expect justification for upholding any non-property right that implies a limitation on that property right, but the case law suggests that this is not what happens. In fact, and perhaps counterintuitively for lawyers steeped in the Blackstonian tradition, the case law indicates that courts in a significant number of instances tend to take the life-dignity-equality right as their methodological point of departure and work from there, rather than starting out from the property right and working from there. In the terminology made famous by Laura Underkuffler,⁵⁶ this would imply an inversion of the presumptive

⁵⁶ The notion of the presumptive power of property is used by LS Underkuffler *The idea of property: its meaning and power* (2003) 70ff to refer to the presumption that ownership rights trump lesser competing rights and public interests, unless

power, at least in the category of cases I discuss here. In Baron's description of information theory, the presumptive power is an important tool in upholding the simplicity of a property system that is supposed to lower information cost. If the case law indeed points to a significant inversion of the presumptive power, that would indicate that the role of protecting property rights is systemically more modest than we tend to think.

The general approach in the relevant cases seems to be to start out by recognising that the relevant non-property right (life-dignity-equality) must be upheld; to infer that doing so necessarily imposes restrictions on property owners' right to exclude non-owners; and to conclude that the affected property right (ownership, exclusion) is protected only to the extent that is allowed by the reasonable minimum requirements for adequate protection of the non-property right.⁵⁷ In practical terms, the life-dignity-equality right is upheld as

there is a specific right or authority that overrides this presumption. In the context of speech and property see further LS Underkuffler 'When should rights "trump"?' An examination of speech and property' (2000) 52 *Maine LR* 311-322 314-315 (explaining how property is assumed to always enjoy presumptive power). See further JW Singer *Entitlement: the paradoxes of property* (2000) 3, who also uses the phrase to refer to the evidentiary burdens that the ownership paradigm imposes on the regulatory state and on non-owners. Compare further AJ van der Walt *Property in the margins* (2009) 50-51, discussing the role of the presumptive power of property in upholding the ownership paradigm.

⁵⁷ An interesting German decision that illustrates a related point outside of the sphere of access to land was handed down by the Oberlandesgericht Koblenz on 20 May 2014: *Urteil vom 20. Mai 2014*, Az. 3 U 1288/13, see further <http://www.mjv.rlp.de/icc/justiz/nav/634/broker.jsp?uMen=634b82da-d698-11d4-a73d-0050045687ab&uCon=98c606e5-372d-1641-7c20-f6c3077fe9e3&uTem=aaaaaaaa-aaaa-aaaa-aaaa-000000000042>; <http://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling>.

The decision involved the right of one former partner in an intimate personal relationship to demand that the other should destroy intimate photos and videos made during the existence of the relationship. The court held that the right to demand destruction of such material is based on the right of personality, which clearly overrides any property right the other partner may have in the material. I am indebted to Gustav Muller for bringing the decision to my attention.

a point of departure, while the property right of the affected property owner is protected within the limits of what protection of the non-property right allows. In other words, the life-dignity-equality right is safeguarded as a systemically primary objective and the property right of the affected owner is protected in whatever space remains once the primary goal had been achieved. When I describe this as a systemic effect my aim is to indicate that the inversion of, or the exception to, what is usually assumed to be the presumptive burden occurs as a result of a choice that is made, on normative grounds, regarding the relative status of remedial options in the legal system as a whole.

The case law illustrates this point more or less directly and forcefully. In a few decisions the courts set out a strong version of it, suggesting that a landowner's property right simply does not reach to the point where it would support exclusion of persons whose life, dignity or equality depends on reasonable access to the land. Methodologically, these strong decisions proceed from a truncated description of the property right, assuming as a starting point that the systemic importance of protecting non-property rights imposes inherent restrictions on what counts as protected property rights. Depending on the route by which these cases reach the courts, the fact that property does not support exclusion in these circumstances is described as the lack of either a ground for an exclusionary rule or a proportionality-type defence against a claim that exclusion imposes a limitation on the right to life or human dignity. In other, more modestly argued decisions, courts have held that a bare ownership-based claim could never mechanically outweigh the right to life or human dignity, with the result that a property-based absolute limitation of the right to life, human dignity or equality would be very difficult to justify, whereas a reasonable life-, dignity- or equality-based limitation on the property right to exclude would

be relatively easy to justify. Methodologically, these modest decisions do not start out from a truncated definition of property rights but approach the matter as a question of balancing, but they do assume that the presumptive power favour the non-property rights during the balancing process.

In *Victoria & Alfred Waterfront (Pty) Ltd and another v Police Commissioner of the Western Cape and others* the Western Cape High Court, considering an application to ban the respondents permanently from begging on the commercial premises of the applicants, explained the strongly argued version and the definitional approach described above as follows:⁵⁸

The issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights we are required to value those rights above all others.

There is no formal hierarchy of fundamental rights in the South African Constitution of 1996, but the South African Constitutional Court has established as early as its decision in *S v Makwanyane*⁵⁹ that the rights to life and human dignity are the most important human rights and the source of all other rights in the Bill of Rights.⁶⁰ Together with equality, these rights are textually and qualitatively

⁵⁸ [2004] 1 All SA 579 (C) (23 December 2003) 582b-c.

⁵⁹ 1995 (3) SA 391 (CC) paras 144, 146, 214, 217.

⁶⁰ See S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2 ed OS 12-05) chapter 36 19-24 (distinguishing the various roles of dignity as a first order rule, second order rule, correlative right and value respectively); I Currie & J de Waal *The bill of rights handbook* (6 ed 2013) 250-253 (dignity), 258-259 (life).

different from other rights in the Bill of Rights, not least because they feature in the Constitution both as fundamental rights⁶¹ and as general constitutional values and aspirations.⁶² More particularly, life, human dignity and equality are qualitatively different from a largely economic right like property, which is why the court could state so confidently that 'property rights must give way [to them] to some extent'. In effect, the right to life (protected in the form of securing a reasonable opportunity to beg for a living in a quasi-public space) is protected 'above all other' rights, in this case specifically the right to exclude others from a privately owned quasi-public space that had already acquired the character of a city neighbourhood. By implication, the affected landowner's property interest will only be protected insofar as space for that protection remains once the right to life had been secured. In doctrinal terms, the particular landowner's property right is limited insofar as it simply does not extend to the point where she can permanently ban from her land others whose life, dignity or equality rights depend upon reasonable access to it. Clearly, this definitional approach does not imply that property rights or land rights are limited in general or across the board – the limitation is a very specific one imposed by the constitutional scheme. A landowner's property right is truncated only to the extent that it pertains to a quasi-public space and that

⁶¹ Sections 11 (life), 10 (human dignity) and 9 (equality) respectively.

⁶² E.g. sections 1 (the Republic of South Africa is a democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms); 7 (the Bill of Rights affirms the democratic values of human dignity, equality and freedom); 36 (the rights in the Bill of Rights may be limited by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors enumerated in the section); 39 (when interpreting the Bill of Rights a court, tribunal or forum must promote the values that underlie and open and democratic society based on human dignity, equality and freedom).

access to that space is reasonably necessary to secure the life, dignity or equality rights of non-owners (such as the beggars in this case). Consequently, the decision adopts the form of ascertaining how far the landowner's property right reasonably has to be restricted definitionally to secure the beggars' right to life.

Importantly for my argument in this article, this case demonstrates that determining the limits of the relevant property right involves a demarcation exercise and not a balancing of the relevant rights – the point is not to ascertain (in every case, based on the facts) which right weighs heavier but to determine (abstractly, as a matter of definition) where the limit of property rights inevitably has to be drawn to secure these non-property rights. For obvious political, social and above all moral reasons, a property right is not weighed against the right to life. Furthermore, the demarcation exercise involves determining the systemic limits of the right to exclude and not a proportionality-based justification of a limitation that is imposed on an otherwise unrestricted right. To that extent, at least the strong version of this approach clearly holds that property rights simply do not reach to the point where they could allow the relevant exclusion.

A comparable example is the Supreme Court of New Jersey decision in *State of New Jersey v Shack*.⁶³ This case is slightly different from *Victoria & Alfred Waterfront* in that it concerns the right of

⁶³ 58 NJ 297 (1971). GS Alexander & EM Peñalver 'Properties of community' (2009) 10 *Theoretical Inquiries in Law* 127-160 149-154 discuss the decision and set out a progressive, human flourishing or Aristotelian explanation of its justification. Compare EM Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888 883-884. For a critical analysis of the decision from the perspective of postcolonial theory see R Dyal-Chand 'Pragmatism and postcolonialism: protecting non-owners in property law' forthcoming (2014) 63 *American University LR* (available at SSRN <http://ssrn.com/abstract=2425897>).

private farm owners to exclude persons who want to visit temporary migrant labourers on the farm to inform them of government services such as health care and legal advice.⁶⁴ The land was therefore not quasi-public property but private property with restricted access; it was not freely accessible to the general public but only to a restricted category of persons (the migrant farm workers) who had been granted limited access for specific purposes (their employment as migrant labourers and employment-related accommodation on the land). Furthermore, the access issue involved third parties (aid workers) who wanted to visit the migrant workers for reasons related to their personal health and wellbeing, rather than the migrant workers' access to and use of the land as such. The case nevertheless compares well to *Victoria & Alfred Waterfront* because both involved access to private land for other purposes than the owner had in mind when granting access, and in both cases granting access supports the fundamental (life-dignity-equality) wellbeing of non-owners who have access to the land. Adopting the same definitional approach as the Western Cape High Court, the US court decided the matter on the basis that property rights are limited by human values:⁶⁵

⁶⁴ As R Dyal-Chand 'Pragmatism and postcolonialism: protecting non-owners in property law' forthcoming (2014) 63 *American University LR* (available at SSRN <http://ssrn.com/abstract=2425897>) shows, the implication is that the decision deals with the access rights of legal and health services aid workers and not the access rights of the actual migrant farm labourers. As the text below indicates, this consideration diminishes the illustrative value of the decision to a certain extent but does not deprive it of all value. See also *Folgueras v Hassle* 331 F Supp 615 (1971) 632-624, where the court also held that the property rights of the landowner do not include the right to deny access to guests or persons working for any government or private agency whose primary objective is the health, welfare or dignity of the workers as human beings. Compare K Gray & SF Gray 'Civil rights, civil wrongs and quasi-public space' (1999) 4 *European Human Rights LR* 46-102 67.

⁶⁵ *State of New Jersey v Shack* 58 NJ 297 (1971) 303.

'Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.'

The court considered it significant that the migrant workers were from a 'highly disadvantaged segment of our society' and that they were 'rootless and isolated', 'unorganized and without economic or political power.'⁶⁶ In response to their plight legislation had been enacted⁶⁷ to assist them, to improve their living conditions, to help them develop skills that are necessary for 'a productive and self-sufficient life in an increasingly complex and technological society',⁶⁸ and to provide for day care for children, education, health care, improved housing and sanitation, legal advice and representation, and consumer training and counselling.⁶⁹ The advisors who wanted

⁶⁶ *State of New Jersey v Shack* 58 NJ 297 (1971) 303. R Dyal-Chand 'Pragmatism and postcolonialism: protecting non-owners in property law' forthcoming (2014) 63 *American University LR* (available at SSRN <http://ssrn.com/abstract=2425897>) explains, from the perspective of postcolonial theory, that this characterisation was ascribed to the workers from outside and not derived from directly hearing their voices.

⁶⁷ Title III-B of the Economic Opportunity Act of 1964 (42 USCA § 2701 ff); see *State of New Jersey v Shack* 58 NJ 297 (1971) 304.

⁶⁸ Section 2861 of the Economic Opportunity Act of 1964, see *State of New Jersey v Shack* 58 NJ 297 (1971) 304. R Dyal-Chand 'Pragmatism and postcolonialism: protecting non-owners in property law' forthcoming (2014) 63 *American University LR* (available at SSRN <http://ssrn.com/abstract=2425897>) explains, from the perspective of postcolonial theory, that this development goal was formulated by outsiders acting on behalf of the migrant workers and not on the basis of their own wishes or concerns.

⁶⁹ Section 2862(b)(1) of the Economic Opportunity Act of 1964, see *State of New Jersey v Shack* 58 NJ 297 (1971) 304.

to visit the migrant workers and who had been refused entry and eventually charged with trespass worked in a programme funded under the relevant section of this legislation. The court held that the statutory ends would not be reached if the intended beneficiaries (the migrant workers) could be insulated from efforts to reach and counsel them and that the property rights of the landowner, not being absolute, cannot stand in the way of the legislation reaching its intended aims:

'Thus approaching the case, 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. The farmer, of course, is entitled to pursue his farming activities without interference, But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, ...'⁷⁰

This decision, the court emphasised, does not 'open the employer's premises to the general public if in fact the employer himself has not done so,' nor does it deny the owner's interest in security.⁷¹ But, the court concluded,

' ... the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our

⁷⁰ *State of New Jersey v Shack* 58 NJ 297 (1971) 307.

⁷¹ *State of New Jersey v Shack* 58 NJ 297 (1971) 307-308.

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.⁷²

In my reading of the decision, *Shack* confirms that non-economic rights such as life and human dignity are too fundamental to be denied on the basis of an absolute exercise of property rights (the right to exclude). The court saw the case as a direct conflict between the exercise of the landowner's property right (to exclude) and the migrant workers' right to life and human dignity and it treated the conflict as a matter of determining where the limits of the property right have to be drawn to secure the life and dignity rights. In other words, the two conflicting rights were not balanced against each other; instead, the one (life and dignity) was secured by accepting that the other (property) is restricted and determining where the limits of the property right have to be drawn so as to ensure that the life and dignity rights are protected. At the same time, the landowner's rights are not ignored: insofar as it is not necessary to limit his rights to secure the life and dignity rights of the migrant workers, the owner's rights remain unaffected. The life and dignity rights are secured by imposing reasonably necessary limits on property, and the affected property rights are protected in whatever space remains. Despite the different nature of the property and of the access rights involved, the aesthetic of the decision is therefore very similar to that of the South African *Victoria & Alfred Waterfront* case.

Alexander and Peñalver argue that the outcome in *Shack* is justified not only because it secures the human flourishing of the migrant workers, but also because the opposite outcome, in other

⁷² *State of New Jersey v Shack* 58 NJ 297 (1971) 308.

words allowing the farm owner to exclude the aid workers from access to the migrant workers, would not significantly have contributed to or promoted the owner's personal flourishing.⁷³ In their reading, the decision secures for the migrant workers some of the capabilities that are necessary for the well-lived life (freedom, practical reasoning and affiliation). Alexander and Peñalver do not make much of this feature, but their explanation seems to rely on the assumption that this flourishing-promoting outcome result from the court construing for the migrant workers a property right that competes with that of the landowner.⁷⁴ Although that is possibly not what the authors had in mind, this explanation might create the impression that *Shack* promotes human flourishing by setting up a competing property right in favour of the migrant workers. According to my reading, the decision recognises and protects the migrant workers' life and dignity rights on their own strength and upholds those rights against the landowner's property right by deciding that his property right does not extend to the point where it allows exclusion that would deny the non-property rights. The first quotation from *Shack* above seems to support this second reading of the decision. Alexander and Peñalver explain the flourishing-promoting outcome of the decision in terms of a weighing of the competing parties' flourishing interests: protecting the migrant

⁷³ GS Alexander & EM Peñalver 'Properties of community' (2009) 10 *Theoretical Inquiries in Law* 127-160 153. Alexander & Peñalver 149-154 argue that it is difficult to justify or explain the result in *Shack* in economic or utilitarian terms, but easy to do so in terms of human flourishing. Compare EM Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888 883-884.

⁷⁴ GS Alexander & EM Peñalver 'Properties of community' (2009) 10 *Theoretical Inquiries in Law* 127-160 151: 'The property right [of access to information about basic legal and healthcare services] promotes freedom in both a positive and a negative sense'; 152: 'The property right allocated to the farm workers in *Shack* directly promotes this capability [of practical reasoning]'; 153: 'The property right recognized in *Shack* directly promotes that capacity [to interact well with others]'.

workers' access to information about healthcare and legal services would secure their human flourishing, whereas allowing the landowner to enforce his property right would not advance his own flourishing, and therefore the former must prevail. In my reading of the decision, there is no weighing of interests (whether of competing property rights or of flourishing interests) involved; I argue that the migrant workers' life and dignity rights are systemically superior and therefore secured before property rights (of any party) are even considered. Insofar as the property rights (of the landowner) are protected, that is a secondary matter that occurs in the space that is left once the primary (non-property) rights (of the migrant workers) have been secured.

One should probably not read too much into these differences since Alexander and Peñalver discuss property in a theory of human flourishing based on virtue ethics, rather than competing rights to property. However, the differences are relevant to the extent that they highlight a conceptual reason why it makes sense for progressive property theory to explain *Shack* with reference to the migrant workers' non-property rights rather than what might seem to be a property right construed in their favour. That does not mean that the human-flourishing explanation of the outcome in *Shack* is wrong or irrelevant; I am merely arguing that a value-oriented explanation of the human-flourishing kind should not be interpreted as confirmation that a conflict of this nature can only be adjudicated on the basis of property rights.

This point can best be illustrated with reference to the South African *Modderklip* case⁷⁵ with which Alexander and Peñalver

⁷⁵ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources*

compare *Shack*. They argue that these decisions can be explained in terms of human flourishing, but not so easily according to utilitarian or liberal contractarian theory.⁷⁶ On the level of virtue ethics and the human-flourishing theory this comparison indeed makes perfect

Centre, Amici Curiae) 2004 (6) SA 40 (SCA); see GS Alexander & EM Peñalver 'Properties of community' (2009) 10 *Theoretical Inquiries in Law* 127-160 154-160; EM Peñalver 'Land virtues' (2009) 94 *Cornell LR* 821-888 883 fn 245. The decision of the Supreme Court of Appeal in *Modderklip* was confirmed, on other grounds, by the Constitutional Court: *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA 3 (CC). It bears mentioning that the background rule that informs the *Modderklip* decision, namely that a landowner is required to be patient while alternative accommodation is found for the unlawful occupiers to be evicted from her land, is a result of the anti-eviction provision in section 26(3) of the 1996 Constitution and in land reform legislation adopted in its wake; it is not special to the *Modderklip* case. In fact, what is special to that decision is the fact that the property right of the landowner was protected, in a highly unusual set of circumstances, by granting him constitutional damages for the unreasonable length of the delay in obtaining an eviction. The unusual nature of this remedy was confirmed subsequently in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA), confirmed in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). In the latter decision the court reiterated that a landowner has to be patient, within reasonable limits, until alternative accommodation has been found for the unlawful occupiers to be evicted from the land. It is only in the unusual circumstances that occurred in *Modderklip*, where this delay became unreasonably long because of the state's failure to act expeditiously, that the landowner could claim constitutional damages for the loss suffered because of the delay. In sum, delaying the eviction is not what makes the *Modderklip* decision unique because that aspect is regulated by legislation and occurs in dozens of eviction cases. What is unique about the decision is the compensation award to the landowner, which could (in my view mistakenly) even be construed as a departure from the human-flourishing argument.

⁷⁶ The one reason why *Shack* and *Modderklip* might actually be comparable, namely that both cases involved housing-type (or rather home-type) rights, is also rather thin, since the home-type interest involved in *Shack* is the right of lawful occupiers of residential property to receive visitors, whereas the home-type interest in *Modderklip* was the right temporarily not to be evicted while alternative accommodation is found (based not on the right of access to housing in section 26(1) of the South African Constitution, but on the section 26(3) right not to be evicted arbitrarily from one's home).

sense. However, in terms of competing property rights (which Alexander and Peñalver do not discuss) these two cases are too different for a meaningful comparison, and therefore their comparison of these decisions should not be read as construing a competing right for the beneficiaries of either decision. The occupiers in *Modderklip* were unlawful occupiers of the land, whereas the workers in *Shack* occupied the land lawfully in terms of their employment contracts. Construing a competing land right in favour of farm labourers in a case like *Shack* would have been unnecessary in the South African context since the applicable legislation provides farm workers with statutory rights that would prevent a *Modderklip*-type conflict from arising.⁷⁷ Construing a property right in favour of unlawful occupiers of land in the *Modderklip* context, on the other hand, would result in the unsatisfactory notion of an unlawful property right. Doctrinally, the right not to be evicted arbitrarily that is granted to unlawful occupiers by the applicable South African legislation cannot be described as a property right without a significant loss in conceptual clarity. The right to remain on the land until eviction procedures have been complied with and, in suitable instances, until alternative accommodation has been found for the evictees⁷⁸ secures non-property fundamental rights, such as the right

⁷⁷ In South African law, the status of the *Modderklip* occupiers was regulated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which is authorised and inspired by the anti-eviction provision in section 26(3) of the 1996 Constitution, whereas the status of workers like those in *Shack* would have been regulated by the Extension of Tenure Security Act 62 of 1997 (ESTA), which is authorised and inspired by the security of land rights provision in section 25(6) of the Constitution.

⁷⁸ This is the doctrinal point on which the Dutch debate concerning eviction of urban squatters during the 1980s also got stuck; see fn 7 above. Initially, some Dutch authors argued that legislation that ensured due process during the eviction of these squatters in effect created a 'reflective right' in their favour, but this

to life,⁷⁹ human dignity,⁸⁰ administrative justice⁸¹ and – in the South African context – access to housing,⁸² but there is little or no doctrinal or conceptual benefit in describing this statutory right as a property right. Somewhat like the conclusion in the previous section of the article, if one wants to discuss the cases as a matter of competing rights, one can reach the desired outcome in both *Shack* and *Modderklip* without starting out from the protection of property rights – the rights that feature most prominently in these decisions are non-property rights. The reason, according to my thesis, is that property rights in the context of these decisions are systemically of modest importance, compared to the non-property rights that probably inspired the outcomes. Again, that does not mean that discussing the morality of these decisions on the basis of human flourishing is wrong or irrelevant – that is a different discussion altogether.

On the level of competing rights, the decision in *Victoria & Alfred Waterfront* offers a more illuminating comparison, for purposes of my analysis, with the US decision in *Shack* even though the South African case did not involve housing- or home-type rights and the US case did not pertain to quasi-public land. The two cases are

doctrinal explanation was abandoned because it involved the unsatisfactory notion of an unlawful right.

⁷⁹ Section 11 of the 1996 Constitution.

⁸⁰ Section 10 of the 1996 Constitution. Several Constitutional Court decisions have underlined the link between enforcement of eviction procedures and the right to human dignity; compare *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 44; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 29.

⁸¹ Section 33 of the 1996 Constitution, further embodied in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

⁸² Section 26(1) of the 1996 Constitution. See further S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 271-281 (interpreting the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) in the light of section 26(3) of the Constitution); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 29.

comparable in the context of competing rights because both involved eviction or exclusion of persons who were on the land lawfully; both clearly turned on a conflict between the landowners' right to exclude and the other parties' right to life and human dignity; and both courts indicated that they would secure the life and dignity rights before considering the detrimental effect that doing so must necessarily have on the landowners' property rights. In comparison, these two decisions support my argument that it is unnecessary to protect life or dignity rights by way of balancing competing property rights if the same result could be reached by simply recognising the normative and systemic priority of the non-property rights and securing them on their own strength, before deciding how the property rights of the affected landowners can be protected as a secondary matter. In this perspective, these two decisions illustrate my point that – at least in this context – property rights enjoy a modest, rather than a central, systemic status compared to rights like life and human dignity. Again, on a different level these decisions can also be analysed and compared as examples of human-flourishing theory regarding the function of property as a social institution.

One rather troubling doctrinal issue remains unanswered on my analysis of the two cases above, namely whether the life-dignity-equality inspired determination of the limits of property rights (the right to exclude) amounts to an inherent limitation that affects the abstract definition of what property is. On the basis of the language and rhetoric used in the cases I concluded earlier that it does not involve proportionality-type justification for one right imposing a limitation on the other, which seems to exclude the kind of limitation analysis that is contemplated in section 36 of the South African Constitution. Considering the statements in the decisions referred to earlier, it would seem odd – both logically and normatively – to

conclude that life-dignity-equality rights place a limitation on property rights that requires justification. Purely on that basis, the kind of limitation that was at stake in these cases, in other words the judgment that property rights simply do not reach to the point where they allow a landowner to exclude others when their life-dignity-equality reasonably depends on access to the land, can perhaps be described as a limitation that is inherent to property. However, for present purposes I would hesitate to formulate a strong conclusion to that effect – a strong argument would require further consideration of doctrinal and theoretical issues that exceed the scope of this article.⁸³

3.3 Property Rights vs Other Constitutionally Stronger Non-Property Rights

The cases in the previous section can be explained with reference to the systemic and normative priority that rights to life, human dignity and equality enjoy over (at least partly economic) interests such as property. As was indicated earlier, these rights are normally not subject to democratic deliberation, limitation and regulation and therefore, when they conflict with a regulated and limited right like property it is to be expected that the latter would have to play a secondary role. However, the kind of cases I consider in this article only seldom involve life-dignity-equality issues; more often than not they involve other non-property rights like free movement, free speech or demonstration that are themselves subject to regulation and limitation and therefore more equal with and comparable to property rights than life or dignity. Normatively, one cannot and should not weigh up property rights against the right to life or human dignity, but weighing property rights against the right to free

⁸³ Compare fn 151 below.

movement or free speech is normatively more or less unproblematic. The reason for this distinction lies in the nature of the rights: when fundamental non-property rights that are themselves subject to regulatory definition and restriction compete or conflict with property rights there is no *ex ante* normative indication that or why the presumptive power should favour the non-property right. The framework within which conflict is adjudicated changes accordingly: instead of securing one right (life, human dignity) as a matter of priority and protecting the other (property) in whatever space remains, both are limited rights and they could therefore be weighed against each other in an attempt to find the point of equilibrium where each is protected as far as simultaneous recognition of the other allows. In these cases, one would expect that enforcement of either right could be construed as a limitation of the other that requires justification.

However, a small sample of cases suggest that even in cases where property rights conflict with other, generally speaking more or less equal, similarly regulated and limited non-property rights such as freedom of movement or free speech, there are instances where some kind of presumptive privilege attaches to the non-property right. Accordingly, the courts treat the non-property right as the primary and property as the secondary right, even though neither right is absolute and both are subject to statutory regulation and limitation.

The sample of cases that seem to illustrate this point is too small to support sweeping conclusions, but one reason why the courts appear to award a measure of presumptive privilege to the non-property right in some cases seems to be that a constitutional text sometimes identifies the non-property right as the primary right or awards it a higher constitutional status. The best example is

Committee for the Commonwealth of Canada v Canada,⁸⁴ in which the Canadian Supreme Court confirmed that an absolute prohibition on political communication in the public areas of (government-owned) airports⁸⁵ was contrary to the right of freedom of expression.⁸⁶ The majority of the court agreed that the state cannot rely purely on its ownership of the premises to impose a blanket ban on political speech⁸⁷ and that such a prohibition constitutes a limitation of free speech rights that has to be justified in terms of the general limitation provision in the Charter.⁸⁸ To the extent that an exercise of the property owner's right to exclude is seen as a limitation of free

⁸⁴ [1985] 2 FC 3, 25 DLR (4th) 460 (TD) (Federal Court, Trial Division); [1987] 2 PC 68, 36 DLR (4th) 501 (AD) (Federal Court of Appeal); [1991] 1 SCR 139 (SC) (Supreme Court). For a discussion of the Trial Division and the Federal Court of Appeal decisions see R Moon 'Access to public and private property under freedom of expression' (1988) 20 *Ottawa LR* 339-375 353-357.

⁸⁵ Imposed by section 7(1)-(b) of the Government Airport Concession Operations Regulations SOR/79-373.

⁸⁶ Guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms 1982, which is Part I of the Canadian Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK) clause 11 sections 1 and 2.

⁸⁷ By contrast, the US courts normally adopt the position that '[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject'; see *International Society for Krishna Consciousness Inc v Lee, Superintendent of Port Authority Police* 505 US 672 (1992) 678. The German Federal Constitutional Court declared quite unequivocally that 'a flight into private law' will not allow the state to rely on its ownership status to infringe upon fundamental rights of citizens: 1 BvR 699/06 para 48; see the discussion of the case below.

⁸⁸ R Moon 'Access to public and private property under freedom of expression' (1988) 20 *Ottawa LR* 339-375 356: 'The state, of course, is permitted to regulate access for communication in order to ensure that the streets can be used for transportation; but the state's power to regulate is limited, since any regulation of communication must meet the standards of section 1 of the *Charter*.' Section 1 of the Charter provides: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

speech rights and the property owner is required to justify the limitation, presumptive privilege is apparently awarded to free speech.

Moon indicates (with reference to the decision of the Federal Court of Appeal) that this decision involves a flexible approach to the conflict between free speech and property rights which differs from the categorical approach followed in the US public forum doctrine.⁸⁹ The justifiable-limitation approach seems to be required by the Canadian Charter, which guarantees free speech but not property, with the result that the adjudication of conflicts between free speech and property rights starts off from the privileged presumptive baseline of the free speech guarantee.⁹⁰ Insofar as the

⁸⁹ R Moon 'Access to public and private property under freedom of expression' (1988) 20 *Ottawa LR* 339-375 354: 'Before the state can justify the exclusion of communication on any of its properties, it must show that communication will interfere with its use of the property and that, in the circumstances, the restriction of communicative access is less serious than the impediment communication would cause to its use of the property'. In other contexts this is sometimes referred to as a proportionality approach. The US courts' approach turns on the classification of property as public or private; if it is public property, the question is whether the property is or has been declared a public forum. If not, a ban on expressive activity needs only be reasonable: *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983) 45-46; *International Society for Krishna Consciousness Inc v Lee, Superintendent of Port Authority Police* 505 US 672 (1992) 677-679.

⁹⁰ R Moon 'Access to public and private property under freedom of expression' (1988) 20 *Ottawa LR* 339-375 argues that there is a good reason why free speech should be favoured over property, namely the fact that people require the opportunity to exercise free speech; that they require a suitable space to do so; and that (in addition to the limited opportunities offered by one's own private property, see further R Moon 'Freedom of expression and property rights' (1988) 52 *Saskatchewan LR* 243-264) a just and equitable right of access to some public and private property is necessary for that purpose. Underlying the right of access to public and private property for free speech purposes, Moon argues, is a concern for a more equitable distribution of communicative power in the community. Furthermore, property interests can be protected against the potentially negative effects of such an access right by way of limitations placed on the free speech right.

owner imposes a ban on free speech activities on property that lends itself to or that has traditionally been used for public gatherings, such as the public areas of airports, that prohibition constitutes an infringement of the free speech right that must be justified in terms of section 1 of the Charter. This result is clearly influenced by the architecture of the Canadian constitutional text. Because of the privilege inherent in a constitutional instrument that guarantees free speech but not property, property rights assume a modest status in constitutional conflicts of this particular kind to the extent that the privileged right (free speech) is secured before property rights are even considered. That does not mean that the admittedly limited Canadian example cannot be the source of a more general observation about shifts in the presumptive baseline resulting from constitutional privilege.

The proportionality analysis involved in justifying a limitation of free speech in Canadian constitutional law includes consideration of the nature and use of the property,⁹¹ which indicates that the property owner's rights are considered. The difference that constitutional privilege makes is that free speech is taken as the baseline and property, in the form of exercises of the property owner's right to exclude, as a potentially justifiable limitation of that baseline right. In that regard this case resembles the life-dignity-equality cases to the extent that enforcement of property entitlements is relegated to a secondary status, at least presumptively – the presumptive baseline is the protection of a non-property right; enforcement of the property right is seen as a

⁹¹ R Moon 'Access to public and private property under freedom of expression' (1988) 20 *Ottawa LR* 339-375 355 argues that the limitation analysis must also take into account 'the need for communicative access' and the availability of communicative opportunities in the community, because the access issue involved in free speech cases is a matter of distributive justice.

limitation of the non-property right; and accordingly enforcement of the property right has to be justified. In effect, if the limitation of the non-property rights that will result from enforcing the property right can be justified, the property right will prevail; in all other instances the non-property right will prevail. The difference between the life-dignity-equality cases and the Canadian constitutional-privilege case is that justification of a property limitation imposed on life-dignity-equality rights would be difficult if not impossible in most cases, whereas justification of a property limitation on free speech is relatively easier and more flexible, because the former group of conflicting rights are unlimited in principle while free speech is itself regulated and limited. Doctrinally speaking, the life-dignity-equality rights are secured as a matter of priority, with the affected property right being protected in whatever space remains afterwards, while free speech is protected as a matter of presumptive privilege by requiring justification for the enforcement of the property right. Once a limitation is justified, the situation would resemble the 'standard' conflicts between property and free movement or free speech rights that I discuss in a later section of the article: as soon as the limitation of free speech that results from upholding property rights is justified, the conflict between them can be solved by a balancing process that features in the majority of constitutional rights cases. The presumptive power of free speech in this particular instance, resulting from the constitutional priority given to free speech in the Canadian Charter, stretches no further than the initial, baseline requirement for limitation analysis.

Moon paints the presumptive privilege of free speech in the Canadian Charter in much stronger terms than my analysis in the previous paragraphs suggests. He treats conflicts about free-speech access to privately owned land as a matter of distributive justice that must be seen against the backdrop of the state-created system of

property rights and the distribution of property inherent in it, which is seen as a potential constitutional wrong:⁹²

'This approach, of treating the distribution of property rights as a potential constitutional wrong, shifts the focus of judicial review from discrete state acts, and even discrete private acts, to the state created system of property rights. The injustice the courts are striking at when they grant an individual (or the general public) access to privately owned property is an imbalance in communicative power, an unfair distribution of communicative resources, and the consequent restriction on the individual's opportunity to communicate. Although the focus of an action may be on a claim of access to a particular private property, the issue for the court is whether property rights in the community are distributed so that all persons are given a fair opportunity to communicate, a matter of distributive justice. The private owner has acquired his/her property in the market and seeks only to exercise his/her right to exclude any or all forms of communication. The wrong at issue is not so much the exclusion of communicative access by the private owner, but rather the system of property rights which makes the exclusion of access from a particular property so significant. The wrong is systemic rather than the discrete act of a particular actor who invades or restricts an individual's freedom of expression.'

For purposes of my argument here it is not necessary to agree with Moon's treating the distribution of property rights as 'a potential constitutional wrong', or with his view that access for free speech is a matter of distributive justice. For my purposes, it is sufficient that the Canadian decision justifies a more modest

⁹² R Moon 'Access to public and private property under freedom of expression' (1988) 20 *Ottawa LR* 339-375 367.

conclusion, namely that access to both public and private property for free speech purposes is a systemic issue to the extent that it involves a normative constitutional choice to privilege free speech rights over property interests, at least presumptively. Although neither right is absolute and both are subject to democratic deliberation and legislative regulation, conflicts are solved by constitutionally assigning presumptive systemic priority to free speech and then considering the justification for limitations of that right resulting from enforcing property entitlements.

Although the example is less clear, a similar explanation could be attached to the US case of *PruneYard Shopping Center v Robins*.⁹³ In *PruneYard* the question was not whether a private owner of quasi-public can exclude members of the public who want to exercise free speech rights on the property, but whether a provision in a state constitution that explicitly requires owners of shopping centres to permit members of the public to exercise state-protected free speech and petition rights on the shopping centre premises was constitutional. The question in *PruneYard* was therefore whether the privileging of free speech in the state constitution was sufficient to shift the presumptive power from property to free speech and if so, whether that shift conflicted with the property guarantee in the federal Constitution. The Supreme Court held that although the free speech provision in the state constitution extends the right beyond its scope in the federal Constitution, this does not amount to an unconstitutional infringement of property rights under the federal takings clause.⁹⁴ The Supreme Court confirmed that the public right to regulate property in the common interest is as fundamental as

⁹³ 447 US 74 (1980). See JW Singer *Introduction to property* (2 ed 2005) 84.

⁹⁴ *PruneYard Shopping Center v Robins* 447 US 74 (1980) 83.

private property, which is not absolute.⁹⁵ Regulatory restrictions of property rights in favour of free speech are therefore not per se invalid. The free speech requirement in the state constitution does impose an additional restriction on property owners affected by it, but does not constitute a taking of property in conflict with the federal takings clause. The fact that neither right is absolute allows the legislature to regulate potential conflicts between them by pre-determining how conflicts between them are to be adjudicated. Property owners affected by such a shift in the presumptive power can still restrict expressive activity on their premises by adopting reasonable time, place and manner regulations that will minimise the effect that such actions may have on its commercial functions (in the *PruneYard* case those functions had not been affected). A state constitution that extends the federal free speech guarantee by requiring private owners of shopping malls to tolerate free speech activities on their premises is therefore valid in principle, even though it awards free speech presumptive power over property rights.⁹⁶

For purposes of my argument the effect would arguably be similar to the Canadian case, in the sense that the constitutional privileging of free speech might shift the presumptive power away from property rights. In cases where such a shift of the presumptive

⁹⁵ *PruneYard Shopping Center v Robins* 447 US 74 (1980) 84-85, citing *Nebbia v New York* 291 US 502 (1934) 523.

⁹⁶ The *PruneYard* decision that the state Constitution of California provides greater protection than the federal Constitution for free speech activity on certain categories of private property was confirmed in *Fashion Valley Mall, LLC v NLRB* 42 Cal 4th 850 (2007) 868-870. See J Golinger 'Shopping in the marketplace of ideas: why *Fashion Valley Mall* means Target and Trader Joe's are the new town squares' (2009) 39 *Golden Gate Univ LR* 261-289. For similar decisions from other states with similar constitutional provisions see *New Jersey Coalition Against the War in the Middle East v JMB Realty Corp* 650 A2d 757 (NJ 1994); *Wood v State* 2003 WL 1955433 (Fla Cir Ct 2003).

power is brought about by a constitutional choice, it can also be said that property rights fulfil a modest rather than a central systemic function.

3.4 Property vs Privileged Statutory Non-Property Rights

A somewhat larger sample of cases involve dedicated legislation (usually legislation that gives effect to constitutional rights or obligations) that presumptively favours non-property rights over property rights, much in the same way that the constitutional text did in the previous two examples. The clearest example from South African law is slightly different from the other cases I discuss here because the property involved was not open to the general public and the right to be exercised on the land was not free movement, free speech or assembly, but the case illustrates the point so powerfully that it is worth considering as a starting point.

In *Nhlabathi and others v Fick*⁹⁷ the South African Land Claims Court held that the limitation imposed on private farm owners' property right to exclude by legislation⁹⁸ that grants occupiers of agricultural land⁹⁹ the right to bury family members on the land

⁹⁷ [2003] 2 All SA 323 (LCC).

⁹⁸ The legislation in question, section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (ESTA), reads as follows:

'Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right (dA) to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists; ...'

⁹⁹ The definition of occupiers in section 1(1) of the Act indicates that the legislation is aimed at persons (and their families) who have or at some point had consent to live on the land, generally as part of a labour contract with the owner or manager

without the consent and against the will of the farm owner was not unconstitutional. In effect, the Act grants farm labourers (who reside on private agricultural land lawfully) the right to bury their family members on the land, without the owner's permission and against her will, if the deceased person had lived on the farm prior to her death; if burying her on the land is part of the religion or cultural belief of the family or group; if it is established practice to bury family members on the land; and if establishing a grave unilaterally establishes a fair balance of the owner's rights and the rights of the occupiers. The relevant section of the Act effectively suspends a private farm owner's right to exclude non-owners from using a part of her land for a burial site, and does not provide for compensation to a farm owner who has to accept such a burial on her land against her will. With reference to section 25(1) of the Constitution¹⁰⁰ the court decided that the deprivation of property that no doubt results from establishing a grave in terms of the legislation, without the farm owner's permission, was not arbitrary because the 'right to appropriate a grave' only accrues under the Act if doing so establishes a fair balance between the rights of the occupiers and the right of the landowner and if an established practice to do so had existed in the past. Furthermore, the court considered it significant

of the farm. See *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) paras 12-15. The Act was intended to stabilise the lawful occupation of farm labourers and to prevent large-scale eviction of labourers from farms.

¹⁰⁰ Section 25(1) provides:

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

The test for non-arbitrary deprivation was established in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); see *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) para 29 for a summary. The crux of the non-arbitrariness test is that there must be sufficient reason for the deprivation, considering all the circumstances.

that the establishment of a grave would in most instances constitute a minor intrusion upon the landowner's property rights. The fact that the right to establish a grave was granted by the legislation to give effect to the state's constitutional obligation to grant farm occupiers secure tenure and to protect their religious and cultural rights was also considered significant.¹⁰¹

With reference to section 25(2) of the Constitution¹⁰² the court held that, even if the legislation effectively allows for expropriation of a burial site without compensation, such a limitation of the section 25(2) right would be justifiable in terms of section 36(1)¹⁰³ for more or less the same reasons that render it non-arbitrary in terms of section 25(1).¹⁰⁴ In short, the Land Claims Court decision implies that a statutory restriction imposed on private property is not unconstitutional, even if it is interpreted as allowing for expropriation without compensation, if the restriction was imposed in the process of giving effect to a constitutional state obligation to promote non-property rights and provided that the legislation

¹⁰¹ *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) para 30.

¹⁰² Section 25(2) provides:

'Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

Section 25(3) deals with the calculation of the amount of compensation.

¹⁰³ Section 36(1) provides:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

¹⁰⁴ *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) para 34.

succeeds in establishing a fair balance between the affected private property interest and the public interest in promoting the non-economic rights involved.

The *Nhlabathi* example differs from the other cases discussed before because the right granted to occupiers involves a permanent intrusion on the land and not just fleeting, temporary or intermittent access to or use of the land. In that respect, it is easier (and perhaps more logical) in this instance to argue that the Act grants the occupiers a competing property right to the extent that they acquire the right permanently to occupy an (admittedly small) portion of the land physically. However, the Land Claims Court did not explicitly decide whether the beneficiaries acquire a property right in the grave (in South African law such a right would probably be a personal servitude); whether compulsory acquisition of that right in terms of the Act amounts to expropriation; and whether an affected landowner is entitled to compensation. The court did decide that the limitation imposed on the landowner was justified in view of its role in giving effect to the constitutional obligation to protect and promote religious and cultural rights; the relative impact that the limitation has on the landowner; and the strict requirements that would only allow the right to vest if the history of the land and its use and the contextual factors indicated that it was justified.

For my purposes, the *Nhlabathi* example shows how far the legislature can go in restricting property rights for the sake of promoting constitutionally recognised non-property rights. At the same time, the decision qualifies my argument to the extent that the court treats protection of the religious and cultural rights as a limitation of property rights, instead of the other way round, as would be expected in view of my thesis regarding the presumptive priority of non-property rights. This approach might be the result of the way in which the case was brought to and argued before the

court;¹⁰⁵ it might also be a result of the court's interpretation of the relevant legislation. In any event it is an indication that outside of the life-dignity-equality cases and the constitutional-privileging cases discussed previously, conflicts between the right to exclude and non-property rights might not necessarily involve allocation of the presumptive power to the non-property right, even when it is privileged in dedicated legislation. As the analysis of case law below indicates, the dedicated legislation involved here sometimes does shift the presumptive power to the non-property right, but the picture is inconsistent. In cases where the presumptive power is assigned to property rights, my argument regarding the modest status of property is reduced to a weaker statement, namely that property rights (the right to exclude) can sometimes be limited justifiably by non-property rights that are regarded as at least of equal constitutional or statutory importance and status. On the other hand the *Nhlabathi* decision can also be read as establishing that conflicts of this kind might be solved by assigning a competing property right to the holders of the non-property right, in which case the presumptive power becomes less of an issue than the balancing of competing property rights.

In a similar vein, examples from case law indicate that dedicated legislation sometimes privileges labour rights (especially labour actions such as assembly, demonstration, picketing, and free speech) over property rights in the process of giving effect to constitutional labour provisions. In these cases, the limits of reasonable exercise of the labour rights (and thus also the limits of access to and behaviour on quasi-public property like shopping malls and limited-access private property like factories and shopfloors) is set out in the

¹⁰⁵ I am indebted to Frank Michelman for pointing out that conclusions in this area are sometimes blurry because what might look like the presumptive power is simply a consequence of the way in which the matter comes before the court.

legislation, which determines the minimum content of the protected non-property rights. To the extent that these provisions indicate what would be necessary to protect the labour rights involved, the legislation assigns the presumptive power to the labour rights (including the right to assemble, picket and demonstrate), since the affected rights of property owners can only be protected in the space that remains. Although the effects of this kind of statutory privileging is not consistent or clear-cut, case law dealing with strikes, pickets and demonstrations that form part of labour action does indicate that the courts tend to start their proportionality analysis with reference to the content and limits of the labour rights set out in the legislation, and to determine the scope of property owners' right to exclude in whatever space remains.

The South African *Growthpoint*¹⁰⁶ case concerned excessive noise made by workers during a picket in a shopping mall, thereby disrupting business operations in adjoining and unrelated establishments to the extent that it intimidated visitors and shoppers. The applicants relied on the constitutional property clause¹⁰⁷ and the common law of nuisance¹⁰⁸ to protect their property rights by way of an interdict to terminate the noise.¹⁰⁹ The court

¹⁰⁶ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD).

¹⁰⁷ Section 25 of the 1996 Constitution.

¹⁰⁸ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) para 11, citing *East London Western Districts Farmers' Association v Minister of Education and Development* 1989 (2) SA 63 (A). The nuisance claim could probably have been dismissed outright since it is not clear that conduct in a shopping mall could establish nuisance in South African law; nuisance requires two neighbouring properties. The separate shops and open spaces in a mall would probably not qualify. See AJ van der Walt *The law of neighbours* (2010) 239-244.

¹⁰⁹ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) paras 7, 15; citing *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D); *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2)

viewed the issue as one of balancing two conflicting sets of constitutional rights, namely the workers' rights to picket and the property rights of owners of premises in the mall.¹¹⁰ Since neither right is absolute,¹¹¹ the court pointed out, non-parties to the labour dispute must tolerate the effects of lawful picketing, but the limits of their tolerance are exceeded when the mall owner and its tenants cannot conduct their normal business because of the effects of picketing.¹¹² Since it was possible to picket without interfering with the property rights of the landowner, the court ordered the picketers to reduce the noise to a level where the picket does not infringe upon the rights of property owners.¹¹³

The decision relies on balancing language, but the order was arguably not the product of judicial balancing of two competing constitutional rights. In fact, the required balancing had already been deliberated upon and decided by the legislature and therefore the solution, according to which both parties have to exercise their rights in a way that accommodates the other, is based on the statutory balance established in the Labour Relations Act 66 of 1995.¹¹⁴ The

SA 81 (SE); *Moskeeplein (Edms) Bpk en 'n ander v Die Vereniging van Advokate (TPA)* 1983 (3) SA 896 (T) for the nuisance claim and sections 25, 22 and 24 of the Constitution for the constitutional rights.

¹¹⁰ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) para 1.

¹¹¹ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) para 57. In *Phumelela Gaming and Leisure Ltd v Gründlingh* 2006 (8) BCLR 883 (CC) para 38 the Constitutional Court confirmed that property is not absolute: 'The constitutional property clause is not absolute and should not be employed in a manner that ignores other rights and values...'.
¹¹² *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) paras 58-59.

¹¹³ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) paras 60, 62.

¹¹⁴ The Labour Relations Act predates the 1996 Constitution but was drafted to give effect to the comparable labour rights provisions of the 1994 Constitution. The

statutory 'balancing' of the two rights reflects a presumptive privilege in that the regulating legislation is specifically aimed at the promotion of labour rights, while other rights such as property are accommodated as far as remains possible. This suggests that the solution was not based on an open-ended, judicial balancing of two equal and competing rights but on a statutorily pre-determined balancing process that took the labour rights as the presumptive baseline and protected the affected property rights in whatever space remained.

The same kind of statutory privileging of non-property rights is illustrated by the Frankfurt Airport case,¹¹⁵ in which the German Federal Constitutional Court set out the German approach to conflicts between assembly and free speech rights and property rights in the context of demonstrations at airports.¹¹⁶ The civil courts have previously confirmed the lawfulness of a permanent prohibition, imposed by the management firm of Frankfurt airport,¹¹⁷ against any use of the airport premises by the complainant¹¹⁸ for demonstrations or rallies. On appeal, the German

picketers contravened the picketing rules drafted in terms of the Act; see *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* 2011 (1) BCLR 81 (KZD) para 26.

¹¹⁵ 1 BvR 699/06. See further 1 BvR 1428/07, a case concerning an anti-globalisation demonstration at Rostock airport against the 2006 G8 meeting. In this case the Federal Constitutional Court decided that, since the planned demonstration was not completely banned, there was no reason why it should grant a temporary order because there was no proof that the complainants would suffer irreparable harm.

¹¹⁶ The case was brought on the basis of both free speech and assembly rights, and the court considered both extensively; I refer only to the assembly arguments below. The free speech argument follows roughly the same lines.

¹¹⁷ The firm that manages the airport, Fraport Aktiengesellschaft, is organised as a private company but the majority of shares in it are held by the state.

¹¹⁸ The complainant was an activist who, together with others, have staged several demonstrations on the airport premises to protest against deportations.

Federal Constitutional Court held that the decisions of the civil courts that upheld the ban infringed upon the complainant's constitutional right of free speech (article 5 of the German Basic Law) and assembly (article 8).¹¹⁹ Significantly, the Court confirmed explicitly that the state cannot justify its exclusion of prospective demonstrators from airport premises purely on the basis of its ownership of the land.¹²⁰ The state is not allowed to escape its obligations to protect the fundamental non-property rights by 'a flight into private law', relying on its ownership status to deny citizens who want to exercise their fundamental rights of assembly and free speech access to its land.¹²¹ However, that does not mean that the state cannot regulate access to and behaviour in public spaces like airports or that, in specific instances, it cannot rely on private-law instruments to enforce its access and behaviour regulations at an airport.¹²²

¹¹⁹ 1 BvR 699/06 para 44.

¹²⁰ Some of the cases I discuss here involve state or public land and others private land; public or private ownership obviously affects and complicates the issue of exclusion. However, for the moment I sometimes gloss over that aspect because the state often uses the private-ownership right of exclusion to justify its ban on access, demonstration or free speech at state-owned quasi-public spaces.

¹²¹ 1 BvR 699/06 para 48. The airport management, being a private company in which the state is the majority shareholder, cannot escape its state obligations regarding protection of the fundamental rights by adopting the civil-law appearance of a company: 1 BvR 699/06 paras 45-46. In terms of German constitutional doctrine, that also means that the airport management cannot rely on its ownership of the premises to deny anyone access, because the state is not entitled to the fundamental rights. There are exceptions to this general principle that do not affect the argument here; see J Dietlein 'Die Eigentumsfreiheit und das Erbrecht' in K Stern (with M Sachs & J Dietlein) *Das Staatsrecht der Bundesrepublik Deutschland* vol IV *Die einzelne Grundrechte* part I *Der Schutz und die freiheitliche Entfaltung des Individuums* (2006) § 113 (2114-2344) 2221-2222.

¹²² Although the state is directly bound by the fundamental rights and cannot rely on its ownership to deny citizens access to the land, it can participate in commercial activities (by owning the airport premises in the form of a private law company) and may make suitable use of private law instruments to regulate public

Thus having decided that the conflict cannot turn on a blunt appeal to the protection of property rights, the court decided the matter with reference to the constitutional rights of assembly and free speech, both of which are regulated in dedicated legislation.¹²³ The right of assembly is not unlimited and the airport management has the right, both on the basis of article 8 and relying on the private law relating to the landowner's right to regulate use of her property, to restrict and regulate demonstrative assemblies on its premises, but it must do so within the limits allowed by the fundamental right and the laws.¹²⁴ The Federal Constitutional Court explained how conflicts between assembly rights and property interests must be decided: the right of assembly (article 8), and with it the right to decide when and where to assemble, is fundamental to a free, democratic state.¹²⁵ Every regulation that restricts access to spaces

access to and use of those premises. At stake was the airport management's reliance on provisions of the German civil code that allow a landowner to impose house rules regarding access to and the use of her land, to regulate the public's access to and behaviour on the airport premises.

¹²³ The right of assembly is regulated by a federal law on assembly and marches (*Gesetz über Versammlungen und Aufzüge* – FNA 2180-4).

¹²⁴ 1 BvR 699/06 paras 74, 75, 79. However, a publicly owned or managed institution cannot rely exclusively on private law property entitlements to restrict the citizens' right of assembly; the law relating to assembly is the starting point: para 83. The airport management regulated the activities of passengers and other guests by way of a set of regulations that explicitly prohibits demonstrations, solicitation and pamphleteering without prior permission. To regulate the use of the premises, prohibit certain actions and impose a complete ban on the complainants the airport management relied on §§ 858ff, 903 and 1004 of the German Civil Code, which allow a landowner to impose house rules that regulate admission to her premises, to specify the purposes and uses for which admission is allowed, and to enforce compliance with the house rules by imposing a ban on defaulters.

¹²⁵ 1 BvR 699/06 para 63. The article 9 right of assembly first acquired this fundamental freedom- and democracy-confirming status in the *Brokdorf* decision BVerfGE 69, 315 (1985); see M Sachs 'Die Freiheit der Versammlung und der Vereinigung' in K Stern (with M Sachs & J Dietlein) *Das Staatsrecht der*

that are suitable for public demonstrations is a limitation of this right and has to be justified. Limitations imposed on the right of assembly must first of all serve a legitimate purpose, which must take the importance of the fundamental right of assembly in a free democratic state as its point of departure. In addition to serving a legitimate purpose, limitations of assembly rights must also be proportionate, which means that they must be suitable, necessary and appropriate for the circumstances. Furthermore, the proportionality requirement implies that the regulatory measure has to take into account the nature and use of the property. The legitimacy of access and behaviour regulations will also be informed by the importance of ensuring security at and proper functioning of specific-use properties such as airports.¹²⁶

Although the right of assembly is fundamental to a free and democratic society, it does not guarantee the public free access to just any place.¹²⁷ It applies primarily to the public streets and other spaces where the public has free access and where public communication normally takes place, but it also extends to suitable private spaces such as shopping malls and similar meeting places.¹²⁸ At least the freely accessible areas of Frankfurt airport that are not restricted to one specific use could be public meeting places of this

Bundesrepublik Deutschland vol IV *Die einzelne Grundrechte* part I *Der Schutz und die freiheitliche Entfaltung des Individuums* (2006) § 107 (1170-1370) 1193-1194. Aspects of the right of assembly are regulated by a federal law on assemblies and marches (*Gesetz über Versammlungen und Aufzüge* – FNA 2180-4).

¹²⁶ 1 BvR 699/06 paras 86-87.

¹²⁷ 1 BvR 699/06 para 65. For more detail and further references see M Sachs 'Die Freiheit der Versammlung und der Vereinigung' in K Stern (with M Sachs & J Dietlein) *Das Staatsrecht der Bundesrepublik Deutschland* vol IV *Die einzelne Grundrechte* part I *Der Schutz und die freiheitliche Entfaltung des Individuums* (2006) § 107 (1170-1370) 1224-1226.

¹²⁸ 1 BvR 699/06 para 68.

kind, but on the other hand the character of an airport and the normal business conducted there imply that it is reasonable to impose stricter regulations over assembly in those areas than might be customary or reasonable in the open streets of the city.¹²⁹ In this perspective, a flexibly applied requirement that demonstrators should acquire prior permission for demonstrations is generally not problematic, just as it may be legitimate to allow certain kinds or sizes of demonstration only in certain areas of an airport or at certain times. However, a general ban on a person or group who wants to use the property to demonstrate requires very strict scrutiny.¹³⁰ The ban imposed in this case could not withstand strict scrutiny and therefore the Court decided that it infringed upon the complainant's freedom of assembly.¹³¹ For similar reasons, the ban also infringed upon the complainant's right of free speech.¹³²

Since it is commonplace in many modern democracies to regulate the protection of non-property fundamental rights such as access to information, administrative justice and so forth in legislation, it might be expected that the adjudication of clashes between these constitutional rights and property rights could in some instances display the same architecture as appears from the Frankfurt Airport decision: analysis starts off by determining the content and limits of the protected non-property right from the regulating legislation,

¹²⁹ 1 BvR 699/06 para 88.

¹³⁰ 1 BvR 699/06 paras 90-91.

¹³¹ 1 BvR 699/06 para 72.

¹³² 1 BvR 699/06 paras 96-105. On free speech see K Stern 'Die Freiheit der Kommunikation und der Information' in K Stern (with M Sachs & J Dietlein) *Das Staatsrecht der Bundesrepublik Deutschland* vol IV *Die einzelne Grundrechte* part I *Der Schutz und die freiheitliche Entfaltung des Individuums* (2006) § 108 (1371-1506) 1380, citing the Federal Constitutional Court decision in BVerfGE 5, 85 (1956) 205: the fundamental right of free speech as a direct expression of the human personality in society is one of the most important human rights and for a free and democratic society it is simply fundamental because it makes it possible to engage in the free exchange of views that is its foundation.

whereas property rights are protected in whatever space remains. This observation is particularly significant in view of the fact that (perhaps even in continental European and other private-law systems based on a code) the right to property is generally never systematically embodied in dedicated legislation. When other constitutional rights are given effect to in dedicated legislation they might therefore enjoy a systematic presumptive edge over property as a constitutional right. It seems likely, judging from the cases discussed earlier, that the protection of property rights in cases of this kind generally adopts the format of first determining the limits of reasonable and legitimate action in exercising the non-property right and then protecting property rights, as a systemically secondary matter, in whatever space remains available. Legislation such as the Countryside and Rights of Way Act 2000 (England and Wales) and the Land Reform (Scotland) Act 2003 suggests that a similar procedure might even apply to statutory access rights that are not based on classic fundamental rights such as assembly or free speech.

When property rights clash with civic, political or social rights that are protected by dedicated legislation, it seems, protecting property rights will tend, at least in some instances, to be a modest systemic objective to the extent that the protection of property rights is restricted to the space that remains once the non-property right identified and regulated in the dedicated legislation had been secured. In instances where the presumptive power does not shift so clearly or inevitably to the non-property right, protecting property rights might still be a modest systemic objective to the extent that non-property rights are allowed to impose reasonably easily justifiable limitations on property owners' right to exclude non-owners.

Judging from case law, these conclusions concerning the relative systemic importance of protecting property rights, measured against the systemic importance of protecting non-property rights, would apply to public land, quasi-public land and private land to which public access is restricted.¹³³

3.5 Other Free Speech and Demonstration Cases

Of course property rights also conflict with free movement, free speech, assembly or demonstration rights that are not privileged by a constitutional or statutory inversion or strengthening of their presumptive power. The case law in this category is even less clear-cut than in the previous categories and even more inconsistent, but in this category property rights also seem to enjoy a relatively modest systemic status. In some cases property is seen as the primary right and taken as the point of departure, with the result that protection of non-property rights imposes a limitation on property rights that needs to be justified. In other cases, depending on the route by which cases reach the courts, protecting property rights is treated as a limitation of a non-property right that needs justification. Most importantly, in a number of instances neither right is assigned the presumptive power and instead, the two rights are weighed against each other in what has been described as a mutually optimising process.

The second part of the South African *Victoria & Alfred Waterfront* decision provides an interesting example. The court made the

¹³³ A set of cases that belong in this category and that deserve analysis from this perspective involve access to public and private land for housing purposes. I leave those cases aside for the moment because housing issues are uniquely problematic, but I intend to return to the housing cases in the Bielefeld paper mentioned in fn 33 above.

statement quoted earlier, according to which 'property rights must give way to some extent' when they conflict directly with the right to life,¹³⁴ in the context of denying an application for an order to prohibit the respondents from *begging* on the Waterfront premises. However, the case was eventually decided on the basis of a further application for an order to ban the respondents permanently from *entering* the premises.¹³⁵ From the language used by the court in deciding the second application it is apparent that a different issue is involved and that it requires a different approach and a different strategy. At stake in the second application was a conflict between the owner's right to exclude and the respondents' freedom of movement, which would be restricted severely by a blanket, permanent ban from entering the premises. The court made it clear that the tension between the right to exclude and the right of free movement has to be resolved 'in a manner which permits the rights of both parties to be vindicated to the greatest extent possible'.¹³⁶ This so-called 'optimising' approach does not allow a permanent ban of the respondents from the premises, because it would uphold the one right absolutely and deny the other completely. Instead of such a zero-sum-game solution, the court granted an order that allows the respondents to enter the premises but prohibits them from engaging in specific conduct that would invade the property rights of the applicants.¹³⁷ Such an order, the court argued, was preferable to

¹³⁴ [2004] 1 All SA 579 (C) (23 December 2003) 582b-c, see text accompanying fn 58 above.

¹³⁵ This application was founded upon proof of the respondents' prior conduct on the premises, including vulgar, abusive and violent behaviour towards employees and customers at shops and restaurants on the Waterfront premises.

¹³⁶ *Victoria & Alfred Waterfront (Pty) Ltd and another v Police Commissioner of the Western Cape and others* (4543/03) [2003] ZAWCHC 75; [2004] 1 All SA 579 (C) (23 December 2003) 585f.

¹³⁷ See fn 135 above.

either granting or denying a blunt banning order because it protects and upholds both rights optimally, instead of enforcing one of them (property) absolutely and denying the other (free movement) completely. The owner's right to exclude in this case was not absolute because it is qualified by the nature of the premises; its location, size and composition; and by the fact that exclusion from it would imply a limitation of the respondents' freedom of movement.¹³⁸ The Waterfront premises includes public amenities like a police station and a post office and in the court's view, its location, size and composition render it 'for all practical purposes a suburb of Cape Town',¹³⁹ which makes it extremely difficult to justify excluding any member of the public from it permanently.¹⁴⁰

¹³⁸ *Victoria & Alfred Waterfront (Pty) Ltd and another v Police Commissioner of the Western Cape and others* (4543/03) [2003] ZAWCHC 75; [2004] 1 All SA 579 (C) (23 December 2003) 585a-c. Compare the remarks of J Waldron 'Homelessness and the issue of freedom' (1991) 39 *UCLA LR* 295-324 300-301, pointing out that it would be catastrophic for the homeless if there were no public space for them to be, since everyone has to be somewhere and the homeless by definition have nowhere private to be, with the effect that 'wandering in public places is their only option'. Consequently, Waldron argues at 302, the freedom of the homeless depends on common property in a way that ours does not.

¹³⁹ *Victoria & Alfred Waterfront (Pty) Ltd and another v Police Commissioner of the Western Cape and others* (4543/03) [2003] ZAWCHC 75; [2004] 1 All SA 579 (C) (23 December 2003) 582g-h. Apart from its location, size and composition, the nature of the property was relevant to the extent that members of the public were invited to visit it, whether or not they intended to conduct business there, which distinguishes this property from a shop or a restaurant, where the right of admission is more limited. The public accommodations doctrine would therefore not apply in this case. I do not include a discussion of public accommodations doctrine in this article; see fn 34 above.

¹⁴⁰ A decision that illustrates the relevance of the relevant premises being a shop rather than a large shopping centre or complex is *Richardson and another v Director of Public Prosecutions* (2014 UKSC 8). The United Kingdom Supreme Court upheld a conviction for aggravated trespass, under section 68 of the Criminal Justice and Public Order Act 1994, of protesters who entered and refused to leave a shop selling products of an Israeli company located in an Israeli settlement in the West Bank. Interestingly, in para 3 the court described the 'ordinary civil law of

In addition to the factors already enumerated, the court pointed out that excluding the respondents from what is practically a suburb or Cape Town is even more repugnant 'in the light of the unfortunate recent history of this country where millions of people were denied access to towns, cities and other public places'.¹⁴¹ The normative reasons for upholding the right of free movement therefore do not depend only on the nature, size, composition and function of the property involved but also include considerations such as the social and historical context within which quasi-public property is used.

The most striking difference between this free-movement part of the decision and the right-to-life part discussed earlier is that in the free-movement part, both property and the right to free movement are presented as restricted, regulated rights that can and should be weighed up against each other when they come into conflict. Whereas the passages from *Victoria & Alfred Waterfront* and *Shack* discussed in a previous section above indicate that the right to life and human dignity will be secured as a matter of priority, whereafter the negative effect that this protection may have on the property right of the affected owner will be considered and ameliorated, the picture here is different. Both sets of conflicting rights are limited; both are regulated; and when they come into conflict the court's aim is to optimise both by looking for a solution that would give the best possible effect to both. In this case, the presumptive power is not assigned to either right, with the result that the court does not take the one right as the presumptive baseline and treat the other as

trespass', which protects landowners' right of exclusion, as 'a limitation on the exercise of this right [to protest, including the right of free expression conferred by article 10 of the European Convention on Human Rights] which is according to law and unchallengeably proportionate.'

¹⁴¹ *Victoria & Alfred Waterfront (Pty) Ltd and another v Police Commissioner of the Western Cape and others* (4543/03) [2003] ZAWCHC 75; [2004] 1 All SA 579 (C) (23 December 2003) 584f.

imposing a limitation that needs to be justified. Instead, the conflicting rights are weighed up against each other in what one could see either as a balancing or as a particular kind of proportionality analysis that is pointedly aimed at upholding both rights as far as possible in a mutually accommodating manner. Although this is not as dramatic as the shift in presumptive power demonstrated by the life-dignity-equality cases and the constitutional and statutory privileging cases discussed earlier, the result is nevertheless that property rights enjoy a more modest systemic status than a simple keep-off perception of property would have us believe.

However, this approach is not followed in all cases that fall into this category, at least as far as private property is concerned. In *Lloyd Corp v Tanner*¹⁴² the US Supreme Court rejected the argument that a large shopping centre that is open to the public serves the same purpose as a business district in a local municipality and that members of the public, whether they are invited onto the premises as customers or not, have the same right of free speech in the shopping centre as they would have on the public streets and areas of a city or town. In a decision that shows how widely property rights do enjoy presumptive power in US law, the Court held that property does not

‘lose its private character merely because the public is generally invited to use it for designated purposes. ... The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.’¹⁴³

¹⁴² 407 US 551 (1972).

¹⁴³ *Lloyd Corp v Tanner* 407 US 551 (1972) 569.

In other words, in the absence of convincing authority to the contrary, property rights do not lose their presumptive power when they come into conflict with other constitutional rights, not even if those other rights are First Amendment rights. The presumptive privilege normally favours property rights. Property is not absolute and property rights can be limited by the legitimate exercise of free speech rights, but to acquire the right to exercise free speech rights on private land more is required than the mere fact that the property consists of a large commercial area that is open to the public. In normal cases the presumptive power belongs to property rights, although legislation or other indicators such as the character and prior use of particular premises can shift the presumptive power in favour of free speech rights. In the absence of such indicators, the presumptive power remains with the property owner and the property right is the starting point. This approach directly and bluntly contradicts my argument, at least as far as there are no contrary indicators (such as the constitutional and statutory privileging I discussed earlier) that could shift the presumptive baseline.

Roughly the same applies to English law. According to Gray and Gray, the English common law tradition generally accepts that a private landowner enjoys an absolute right to determine who may enter or remain on his land, even though there is growing support for the view that the arbitrary powers of exclusion are now qualified by fundamental principles of human freedom and dignity¹⁴⁴ and some common law jurisdictions have moved away from the

¹⁴⁴ K Gray & SF Gray 'The idea of property in land' in S Bright & J Dewar (eds) *Land law: themes and perspectives* (1998) 15-51 37-38; K Gray 'Equitable property' (1994) 47 *Current Legal Problems* 157-214 172-181.

arbitrary exclusion rule towards a reasonable access rule.¹⁴⁵ Gray and Gray apparently supports the development of such a reasonable access rule in common-law jurisdictions. Wider adoption of a reasonable access rule would shift shopping mall cases closer to the life-dignity-equality cases discussed earlier, or at least to the constitutionally or statutorily privileged free movement or free speech cases, but for the moment it seems as if one must accept that there remains a significant category of instances where the presumptive power is assigned to property rights as a matter of fact, even in the face of strong constitutional non-property rights such as free speech, and where exercises of such non-property rights would either simply be unlawful or, if they were to be upheld or enforced, have to be justified in classic limitation analysis. This creates the impression that there is a part of the broad category of conflicts that I discuss in this article, albeit an arguably shrinking part, where property rights are still regarded as the strongest rights that enjoy presumptive power over free speech and similar constitutional rights unless that power relationship has been shifted explicitly.

In the next section of the article I consider theoretical and normative arguments against the notion that property rights are stronger than – or even as strong as – other, competing rights like free movement, free speech or the right to demonstrate. To the extent that it can be shown that these rights enjoy, or should enjoy, stronger protection than property rights, a general shift away from the

¹⁴⁵ K Gray & SF Gray 'The idea of property in land' in S Bright & J Dewar (eds) *Land law: themes and perspectives* (1998) 15-51 38; K Gray & SF Gray 'Civil rights, civil wrongs and quasi-public space' (1999) 4 *European Human Rights LR* 46-102 55-57. In *Uston v Resorts International Hotel Inc* 445 A2d 370 (NJ 1982) 373 the Supreme Court of New Jersey adopted the reasonable access doctrine and held that an owner of quasi-public premises is no longer entitled to the common law right to exclude others arbitrarily. See K Gray 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 291.

presumptive right to arbitrary exclusion and towards a reasonable access rule is justified in the 'standard' speech-versus-property conflicts.

4 Property's Normatively Modest Status

Common to all versions of the guardian-of-other-rights argument and to other arguments in terms of which the presumptive power of property, in the form of the right to exclude others arbitrarily in the face of competing rights of free movement or free speech on quasi-public property, is the proposal that property rights are either more powerful, more important or more fundamental than – or at least equal in status to – other constitutional rights such as equality, free speech or human dignity. However, there are convincing theoretical and normative arguments why property rights are not stronger or more fundamental than those other, non-property rights in the circumstances considered in this article, where non-owners seek access to quasi-public property (or private property with limited, restricted access) for exercises of their life, dignity, free movement, free speech or demonstration rights. These normative arguments suggest that property rights are or should not be as strong or fundamental as the non-property rights, at least not as a matter of course. In fact, I argue that the theoretical and normative arguments reviewed briefly in this section indicate that, at least in the circumstances considered here, the protection of property rights often is – and should be – of a relatively modest systemic status when compared to the non-property rights.

The much debated footnote 4 in *US v Carolene Products Co*¹⁴⁶ provides a good illustration of the idea that the protection of property rights might be systemically less important than the protection of other fundamental rights. The decision confirms that a higher level of scrutiny might apply to certain other rights (such as equality) than to alleged breaches of economic rights, suggesting that property rights might somehow be of lesser constitutional status and power than those other rights. The *Carolene Products* footnote supports my thesis that property rights enjoy a relatively modest status in the constitutional context: when compared to constitutional rights such as equality, free speech, and human dignity, property rights are not only different, but different in a way that might justify a lower level of judicial scrutiny when a breach of the right is alleged. *Carolene Products* turns the guardian-of-every-other-right argument on its head: far from being the guardian of the civil, political and social rights in the constitution, property rights are different from those rights in a way that implies that they enjoy a lesser constitutional status and possibly merit weaker protection than at least some non-property rights, at least in certain clearly

¹⁴⁶ 304 US 144 (1938). The sentence in the main text of the judgment to which footnote 4 refers reads as follows:

‘Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.’

The first sentence of footnote 4 reads as follows:

‘There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.’

circumscribed instances. This perspective is not foreign to constitutional property theory.

Jennifer Nedelsky argues that the straightforward argument against constitutionalisation of property is the fact that ‘property is really a second order value, ... a *means* to the higher values we should treat as constitutional rights – life, liberty and security of the person’.¹⁴⁷ Property, she continues, does not belong in the constitution together with those other rights as if it were of comparable value. One of Nedelsky’s main arguments against constitutionalisation is that property rights should be held accountable to equality, not the other way around (which is the expected result if property is protected in the constitution). In fact, Nedelsky argues, ‘property implicates the core issues of politics: distributive justice and the allocation of power’, which should be the subject of democratic debate – if property is entrenched in a constitutional right these issues will effectively be removed from political deliberation, which would be unacceptable.¹⁴⁸ From my perspective, Nedelsky’s argument implies that there are both constitutional reasons and normative arguments why property rights, when compared to non-property rights such as life, dignity and equality, are systemically relatively modest rights that merit a lower level of scrutiny when breaches of the right are alleged. This does not imply that property is an unimportant right. Theoretically it is possible to both claim that property supports freedom (Barros)

¹⁴⁷ J Nedelsky ‘Should property be constitutionalized? A relational and comparative approach’ in GE van Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417-432 424-425 (emphasis in the original). For an updated version of the argument see J Nedelsky *Law’s relations: a relational theory of self, autonomy, and law* (2011) 252-256.

¹⁴⁸ J Nedelsky ‘Should property be constitutionalized? A relational and comparative approach’ in GE van Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417-432 427. See further J Nedelsky *Law’s relations: a relational theory of self, autonomy, and law* (2011) 238-241.

or that it promotes human flourishing (Alexander and Peñalver) and accept that property rights are rightfully subjected to regulatory state interference and limitation (as these authors do), as may be required for systemic reasons inspired by the importance of promoting non-property rights. Consequently, it is also possible to both proclaim the freedom- and flourishing-promoting value of property and accept that property rights are justly restricted, in the various ways described earlier, for the sake of promoting non-property values and rights. The point of my argument is simply that this observation translates into the statement that property rights are sometimes awarded relatively modest systemic importance.

Nedelsky also indicates the principal normative reasons why the protection of property rights should enjoy lower constitutional priority than fundamental rights like equality: property rights should be accountable to equality (and other, similar fundamental rights) in the sense that property rights (unlike the other rights) implicate political issues of distributive justice and the allocation of power. To the extent that these political issues should not be removed from political deliberation (and state regulation), property rights cannot be allowed to function as a trump – their protection must always be subject to consideration of the justice of their distributive effects. This explanation highlights the fact that the distribution of property has the potential to bring about or entrench inequality and injustice. This point is echoed by several prominent property theorists.

Gregory Alexander, analysing US takings law, writes that property ‘occupies an uneasy position in the constellation of the constitutional interests of democratic societies’ because, in the context of fundamental rights, it is not only different from but also more controversial than classic rights such as free speech and

freedom of association.¹⁴⁹ This description of property as a constitutional right proves that it is possible to distinguish between property rights and other constitutional rights as a matter of competing constitutional rights and also to argue, as Alexander does, that as a matter of virtue ethics property is more than a purely economic commodity, amongst other things because it promotes human flourishing.¹⁵⁰

In his analysis of the German property clause, Johannes Dietlein similarly points out that the constitutional protection of property is controversial because the freedom of property simultaneously brings about and entrenches social inequalities that could threaten freedom.¹⁵¹ Directly contradicting the natural-rights version of the guardian-of-every-right argument, German constitutional theory accepts as its point of departure that the freedom protected by article 14 of the German Basic Law relates to an object and a right, both signified as property, that do not exist pre-constitutionally but are defined and circumscribed by democratically made law.¹⁵² Consequently, in the constitutional context property rights are different from fundamental rights such as human dignity, equality and personal liberty insofar as their content and nature are not pre-constitutionally determined; instead, property rights are

¹⁴⁹ GS Alexander *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 23.

¹⁵⁰ This is the gist of the argument in GS Alexander *Commodity and propriety – competing visions of property in American legal thought 1776-1970* (1997), see e.g. the opening paragraph on page 1.

¹⁵¹ J Dietlein 'Die Eigentumsfreiheit und das Erbrecht' in K Stern (with M Sachs & J Dietlein) *Das Staatsrecht der Bundesrepublik Deutschland* vol IV *Die einzelne Grundrechte* part I *Der Schutz und die freiheitliche Entfaltung des Individuums* (2006) § 113 (2114-2344) 2126-2127.

¹⁵² The last part of article 14.1 includes a significant qualification of the guarantee in the first part: '14.1 Property and the right of inheritance are guaranteed. Their substance and limits are determined by law.' ('14.1 *Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.*')

characterised by a political and democratic struggle to find the proper balance between individual entitlements and the social restriction of property. While constitutional recognition implies that property rights are – and should be – recognised and protected in a suitable manner, both the recognition and the protection of property rights are different from other fundamental rights to the extent that they take place in a regulatory framework formulated by the democratic legislature. Property rights are constitutionally protected, but the democratic lawmaker determines what is property and when and how it is protected – to that extent, property rights are very different from equality or dignity.¹⁵³ That does not mean that the lawmaker can do as it likes or that the protection of property rights can be eroded arbitrarily by legislation, though: statutory determination of the content and limits of property takes place within the constitutional framework and has to comply with institutional and proportionality requirements set out and implied in the constitutional guarantee.¹⁵⁴

In an analysis of the nature of both speech and property as fundamental rights, Laura Underkuffler also establishes that these two rights are fundamentally different, without considering the effect of her conclusion for direct conflicts between the two rights.¹⁵⁵

¹⁵³ This doctrinal argument possibly renders the question whether any limitation imposed on property should be seen as an inherent limitation moot; compare the final sentences in section 3.2 above. The result of the German constitutional doctrine is that property is inherently limited in general, but the exact nature, content and scope of any specific limitation depend on the laws (in German law that means mostly legislation) as they stand at a given point in time.

¹⁵⁴ See AJ van der Walt *Constitutional property clauses: a comparative analysis* (1999) 132-136 for an overview of the way in which the content and limits of property are determined by the laws in terms of the constitutional guarantee.

¹⁵⁵ LS Underkuffler 'When should rights "trump"? An examination of speech and property' (2000) 52 *Maine LR* 311-322.

In the context of her theory of property,¹⁵⁶ Underkuffler argues that speech and property are fundamentally different rights, not least because property conflicts often involve exactly the same values on the side of the property owner who wants to assert her rights and the public interest that seeks to limit that right, whereas shared values almost never feature on both sides of free speech conflicts. Accordingly, in terms of her theory, the presumptive power almost always favours free speech over whatever right it comes into conflict with, which makes it appear like a trump right, whereas the presumptive power favours the property owner less frequently. This, Underkuffler argues, reflects a fundamental difference in the nature of the two rights.¹⁵⁷ In a direct conflict between the two rights Underkuffler's theory suggests that free speech would generally claim the presumptive power. In my view, this question can only be answered on the basis of a normative judgment about the relative systemic importance of protecting either right.

Underkuffler's analysis highlights an aspect that is confirmed or at least hinted at in several of the other sources as well, namely that property rights are different from rights like equality or dignity because of their allocative nature – the protection of property rights causes or entrenches inequalities (and potential injustices) because it involves the allocation of (and concomitant exclusion from) limited resources.¹⁵⁸ There clearly is some value in that perspective.

¹⁵⁶ Worked out more extensively in LS Underkuffler *The idea of property: its meaning and power* (2003). The most significant aspect of the theory for my purposes is that the presumptive power only favours the property owner as a matter of fact when the values underlying the property right are not the same values that support the public interest seeking to limit the property right.

¹⁵⁷ LS Underkuffler 'When should rights "trump"? An examination of speech and property' (2000) 52 *Maine LR* 311-322 313, 316.

¹⁵⁸ I do not consider the point in detail here, but it is interesting to note the differences between the allocative nature of property rights (as opposed to

However, in my view the normative reasons for emphasising the difference between property (as an at least partly economic right) and fundamental non-property rights like life, dignity and equality extend beyond the problem of unequal distribution and the injustices caused by it. The most important normative difference between property rights and life-dignity-equality rights is the status of protecting property rights as a systemic objective, relative to the systemic function of upholding the non-property rights. Embroidering somewhat on Joe Singer's terminology, we uphold and protect fundamental rights like life, dignity or equality for the sake of preserving the democratic framework, the way we want to live.¹⁵⁹ Singer describes property as 'the law of democracy'¹⁶⁰ and points out that property reflects and enables our conception of what it means to live in a free and democratic society that treats each person with equal concern and respect,¹⁶¹ and that the norms associated with a free and democratic society imply structural constraints that inform the basic structure of property rights.¹⁶² In Nedelsky's terminology, property rights are accountable to equality

equality or dignity) and what is sometimes referred to as the rivalrousness of property objects (as opposed to the objects of intellectual property). The problem I refer to here is allocation and not rivalrousness, which does not mean that intellectual property (which is mostly non-rivalrous) does not cause distributive and power-distributive problems that should also be subject to political deliberation and state regulation. Interestingly, virtual property is different from intellectual property in that it is rivalrous, like physical property. See further C Blazer 'The five indicia of virtual property' (2006) 5 *Pierce LR* 137-161 143; W Erlank *Property in virtual worlds* (LLD dissertation Stellenbosch University 2012) 275ff.

¹⁵⁹ See JW Singer 'Property as the law of democracy' (2014) 63 *Duke LJ* 1287-1335. See also JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062.

¹⁶⁰ JW Singer 'Property as the law of democracy' (2014) 63 *Duke LJ* 1287-1335. See also JW Singer 'Democratic estates: property law in a free and democratic society' (2009) 94 *Cornell LR* 1009-1062.

¹⁶¹ JW Singer 'Property as the law of democracy' (2014) 63 *Duke LJ* 1287-1335 1299.

¹⁶² JW Singer 'Property as the law of democracy' (2014) 63 *Duke LJ* 1287-1335 1301.

(or dignity) and not the other way around. Property rights can only exist, and can only be protected, in the space allowed by the unavoidable limitations imposed by our primary choice for a society characterised by a certain kind of democracy. More specifically, it is not the idea of democracy as such that prescribes the framework and the limitations – some democracies have been and still are unequal and unjust – but a democracy that is characterised by and founded upon fundamental notions of life, dignity and equality. Inevitably, the choice for a democratic society with those characteristics implies that the property regime we can enjoy and the protection that is afforded to property rights in that regime are limited by unavoidable restrictions implied by the promotion and protection of the primary objectives, like a democratic order based on life, dignity and equality.

Property rights are therefore inherently, qualitatively different from the non-property fundamental and constitutional rights, at least to the extent that the content and limits of property rights are open to democratic deliberation and political determination. Carol Rose provides the central insight that explains why decisions like *Lloyd Corp v Tanner* and *CIN Properties Ltd v Rawlins* are questionable and why protecting property rights should on normative grounds be a relatively modest project when it conflicts with civic, political or social rights that secure the very democratic structure within which property rights exist and are protected. Reminding us that the guardian-of-every-other-right perspective has lost its force now that it has become customary to include an increasing number of non-economic social rights in the constitution,¹⁶³ Rose concludes:

¹⁶³ CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 245.

'This question once again goes to the significance of property as a *political* institution rather than as an *economic* one. Clearly there are independent and powerful economic arguments for property, since property rights are widely believed to enhance and encourage wealth-producing activity. But if property is *only* about economic well-being, and if property is no longer needed as the political guardian of other rights as well, then the regulation of property would seem to involve only issues of the levels and distribution of total wealth, without implicating fundamental issues of political self-rule.'¹⁶⁴

In that perspective, Rose concludes, it is dangerous to try and 'sort out the political from the economic aspects of property': including non-economic social rights in the constitution indicates that democratic deliberation about the status and limitations of property rights had already taken place, thereby not only obviating the need to guard the other rights under the umbrella of property but rendering further judicial balancing undesirable, at least insofar as it exceeds boundaries and guidelines set out in the legislation.¹⁶⁵ Moreover, it also implies that whenever the democratic legislature has deliberated about the relative systemic status of property rights and non-property rights, for example in establishing constitutional and statutory inversions of the presumptive power, courts should generally honour these shifts in balance brought about by legislation, especially when these shifts merely acknowledge or implement the relatively modest status of property rights as mostly economic

¹⁶⁴ CM Rose 'Book review: *The guardian of every other right: a constitutional history of property rights* by James W Ely (1992)' (1993) 10 *Constitutional Commentary* 238-246 245-246 (emphasis in the original).

¹⁶⁵ In the brief reference to democratic theory in the next section one reason for this conclusion is identified as unwillingness to allow judges to second-guess governance decisions already taken by the democratic legislature, presumably after having deliberated upon the pro's and cons of different policy options.

interests vis-à-vis the greater normative weight of non-property fundamental rights such as free movement, free speech or assembly. Finally, in cases where the legislature has not explicitly determined the balance that it wants to establish between economic and non-property fundamental rights, the courts are still obliged, in view of the normative arguments outlined above, to give effect to the fact that some rights are systemically relatively more important than others because they secure the very foundations of the way we have chosen to live together; that mostly economic rights should generally not be allowed to trump fundamental rights (life-dignity-equality) or civic rights (free movement, free speech, assembly); and that common law principles that entrench the presumptive power in favour of property rights in conflicts of that nature need to be critically analysed and, if necessary, reconsidered. In some cases, the presumptive power may already have been shifted towards non-economic rights by the legislature; the courts need to be aware of that and must acknowledge and follow those shifts. In others, the shift might be less conspicuous and the courts may have to consider long-established common law principles in view of new constitutional developments to decide whether they need to initiate such a shift on the basis of judicial initiative.

5 Conclusions

Joe Singer is the progressive property theorist who comes closest to providing a theoretical and normative explanation for my argument in this article when he describes property as ‘the law of democracy’.¹⁶⁶ I agree with his view that property rights must reflect,

¹⁶⁶ JW Singer ‘Property as the law of democracy’ (2014) 63 *Duke LJ* 1287-1335. See also JW Singer ‘Democratic estates: property law in a free and democratic society’ (2009) 94 *Cornell LR* 1009-1062.

and must be accountable to, the fundamental choices we have made in favour of living in a democracy characterised by dignity and equality. It implies that the protection of property rights must inevitably be a relatively modest systemic objective, given the fact that it operates within normatively pre-determined structural constraints that secure the democratic framework within which property rights are in fact protected. Singer states that 'property law is a constitutional problem because the norms and values of a free and democratic society limit the kinds of property rights that can be created'.¹⁶⁷ In other words, property rights are not the condition on which democracy depends; instead, they are circumscribed, defined, by the demands of living in a democratic society – the structure of our democracy is the condition for and the guarantee of property rights. Protecting property rights is a legitimate objective of the legal order, but relative to the primary norms that prescribe how we want to live in society it is a systemically modest one. In at least some instances (such as the narrow category of cases I discuss here), that status will show up and should be reflected in the way property conflicts are adjudicated.

Having said that, I am not implying that the protection of property rights is unimportant. My argument in this article does imply that property rights will sometimes be trumped by non-property fundamental rights, but my examples indicate that those are fairly exceptional instances. In other cases property rights will generally be protected; my point is that the space within which they are protected and the way in which they are protected will be affected by the relative modesty of the systemic function that their protection fulfils. If property rights are protected in the space left over once the fundamental democratic conditions have been

¹⁶⁷ JW Singer 'Property as the law of democracy' (2014) 63 *Duke LJ* 1287-1335 1304.

secured, that will not only affect the instances in which property rights will enjoy protection but also our methodology in determining and analysing their protection.¹⁶⁸ Instead of featuring front and centre in the solution of every conflict that involves property rights, either by providing primary, super-constitutional protection for a landowner whose established rights are affected or by lending primary, constitutional support to the beneficiaries of competing non-property rights, my conclusion in this article is that the protection of property rights often only features after the fact, once the primary constitutional goals of securing fundamental democratic objectives have been achieved. In that modest, secondary role the protection of property rights assumes the form of ensuring that the inevitable burden that is imposed on existing property rights by the achievement of non-property constitutional goals complies with constitutional requirements and, insofar as that is possible, other statutory and common law rules and principles. With reference to the shopping mall and airport cases discussed in this article, this means that the affected landowner might be prevented (on the basis of a primary objective such as the protection of equality or dignity) from excluding or evicting a certain person or group of persons from using its property for non-commercial reasons, but the landowner might nevertheless still be protected (after the fact, as it were) by way of a compensation award, or by allowing the property owner to regulate access to and use of its property within reason, or by establishing either a statutory or a judicial balance between protection of the primary (life-dignity-equality) right and the

¹⁶⁸ In AJ van der Walt 'Development of the common law of servitude' (2013) 130 *SALJ* 722-756 I provide a more detailed argument and example, in the context of South African servitude law, of what it means to protect property in the space that remains once the fundamental objectives have been secured.

interests of the affected property owner.¹⁶⁹ In any of these cases, the protection of property rights is a secondary event that takes place once the primary objective has been achieved, in the space that is left. However, given the moral importance of property as a social institution, this protection is nevertheless important.

I am not arguing that property rights are purely economic, 'commodity' rights that have no meaning for fundamental rights like life, freedom, equality or dignity either. Again, my argument is the more modest one that the protection of property rights is not a necessary requirement for the protection of these non-property rights, and that the protection of the non-property rights might often, in a direct conflict, enjoy some constitutional, statutory or moral privilege that gives them a presumptive edge over the protection of property rights. However, that does not imply that property has no value for freedom, life, equality or human dignity or that the protection of property rights cannot in some instances be relied on, in a considered, strategic manner, to promote or support the non-property rights. Although my argument extends beyond this simplistic structural consideration, the point can be illustrated with reference to the structure of the South African Constitution: the protection of property (in terms of section 25) is not systemically necessary to promote the right to housing, since that right is already explicitly protected in section 26. The housing right can and should therefore generally be promoted on its own terms, directly, but in some instances it is possible that section 25 property arguments could be relied on strategically to support the section 26 protection

¹⁶⁹ With reference to the previous fn this means that our choice for protection via a property rule (injunctive relief enforcing compliance with a property right), a liability rule (compensation for a forced transfer or loss of a property right), a non-alienability rule or a constitutional remedy (that might not fit any of the previous categories) will be determined by the space in which we protect the property interest.

of housing rights. In this article, I am making the first half of the parallel argument with reference to the protection of property rights and the protection of life-dignity-equality rights generally, and I am taking the second half for granted.

In general, therefore, when I argue that the protection of property rights is a relatively modest systemic purpose I am simply saying that the protection of property rights is not necessarily, always, the most obvious and the most powerful consideration in conflicts that involve property rights. In at least some instances, of which I attempt to describe one category in this article, other systemic goals might be more important or relatively more powerful in the adjudication of the conflict. As a response to the theoretical claim that the property system functions best in the form of a simple keep-off message, this observation is more than just an analytical truism.

My sense is that property is well suited to this modest, sweeping-up-afterwards role, rather than the leading, front-and-centre role that information theory and much of traditional private law doctrine assign to it. Borrowing from Baron's analysis of the metaphorical commitments of property theory, one could say that in this modest role, the property system can clearly not be an efficient, futuristic household machine that responds only to a small number of simple, bright-line impulses. The process of promoting and protecting fundamental civic, political and social rights is just too contextual and the property debris left in its wake too messy; to deal with the systemically modest role that property rights play, protecting property rights must necessarily involve sustained manual labour. For that reason, I feel more comfortable with Singer's democratically restrained progressive property theory than with property theories that present property as the saviour, the knight on the white steed, the guardian of every other right. I prefer to see property as a gaggle of cleaners who move in after everyone else has left, brandishing

buckets and mops, cleaning up the property debris once the real work of maintaining the democratic legal system has been completed.