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ARTICLES

UNCARING JUSTICE: WHY
JACQUE V. STEENBERG HOMES
WAS WRONGLY DECIDED

JOHN MAKDISI†

INTRODUCTION

On February 15, 1994, Steenberg Homes ("Steenberg") delivered a mobile home to a neighbor of Lois and Harvey Jacque.1 The Jacques were an elderly retired couple who owned about 170 acres in a town in Wisconsin.2 Their neighbor had bought the home with delivery included.3 Steenberg asked the Jacques if it could deliver the home to the neighbor across the Jacques' property but the Jacques repeatedly refused.4 On the day of delivery, the private road to the neighbor's house was "covered in up to seven feet of snow and contained a sharp curve which would require sets of 'rollers' to be used when maneuvering the home around the curve."5 So Steenberg decided to plow a path across the Jacques' snow-covered field in order to deliver the home to the neighbor despite the Jacques' refusal to give it permission.6 The Jacques successfully sued Steenberg for trespass, and the jury awarded them $1 in nominal damages.

† Professor of Law, St. Thomas University School of Law; Ph.D. Candidate in Moral Theology, The Catholic University of America. I would like to thank Dean Douglas Ray and the St. Thomas University School of Law for the award of a summer grant to complete this Article. I would also like to thank John Grabowski, June Mary Makdisi and Siegfried Wiessner for their helpful comments.

1 Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 156-57 (Wis. 1997).
2 Id. at 156.
3 Id.
4 Id. at 157.
5 Id. As one article notes, the company "faced considerable risk, and not a little time and effort, if it had to use rollers to wrestle the ungainly mobile home around a curved private road covered in seven feet of snow." Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 WM. & MARY L. REV. 1849, 1872 (2007).
6 Jacque, 563 N.W.2d at 156.
because the trespass did not cause any actual harm to the premises. What is surprising is that the jury also awarded $100,000 to the Jacques in punitive damages and that this award was upheld by the Wisconsin Supreme Court.

The Wisconsin Supreme Court essentially protected the Jacques' right to exclude Steenberg from their property, regardless of the fact that Steenberg was in a difficult position. If the need had been to save a life or the serious loss of property, and there was no other way to save it, Steenberg would have been able to claim necessity and justify its action. But here, where the loss was not life-threatening, the court took an opposite position. It found no justification for Steenberg's action and even condemned it as a serious infraction of the law protecting property. The court did not consider it important that no physical harm had been done to the Jacques' property or that the Jacques had been uncaring in refusing to grant permission for the temporary use of their land. Instead, the court felt that Steenberg's behavior needed a deterrent greater than the judgment of liability and so permitted the jury award of $100,000 in punitive damages to stand.

What was the court protecting?

Many commentators see the Jacques case as protecting human flourishing. Gregory Alexander makes one of the stronger cases to support this rationale for the $100,000 punitive damage award. His concept of human flourishing focuses on

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7 Id. at 158.
8 The circuit court set aside the punitive damage award; the Supreme Court of Wisconsin reinstated it. Id.
10 Id. at 163–64. According to the court, "[t]he Jacques were sensitive about allowing others on their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action in the mid-1980's." Id. at 157. Yet the action in this case posed no threat of adverse possession and was not detrimental in any way to their property interest. Steenberg had taken the time to ask for permission to use their land and had inquired about the money it would take to get their permission. The court was unimpressed.
enabling a person to live freely, and in many of his examples from legal cases, he successfully shows how the law promotes the capabilities of a person to live freely by either derogating from, or protecting, the right to exclude. The problem with his concept of human flourishing is that it stops short of an understanding of what it means to live freely. So while his analysis succeeds for most of his examples, it fails to interpret the Jacque case correctly.

The first part of this Article examines Alexander’s concept of human flourishing in light of the examples of legal cases that he uses to illustrate his argument. It should become clear in the course of this discussion that Alexander sees human autonomy as an end in itself. While he asks how the law enables a person to live freely, he does not ask what a person should do with this ability to live freely once one has it. But the law is not so shortsighted. It encourages the use of one’s freedom to care for one’s neighbor. So, following the discussion of Alexander’s examples, this Article produces further examples of legal cases to show that the purpose of the law is to care for one’s neighbor. In fact, two cases very similar to the Jacque case, in other jurisdictions, do allow a trespass over the property of another who has not given permission for that trespass. These cases derogate from the right to exclude in order to accommodate people in need even though the need is not life-threatening.

There is a significant difference between Alexander’s concept of human flourishing as living freely and the concept of human flourishing as living freely for a purpose. The former defines the good as the act of choosing and acting in an undirected way; the latter defines the good as the act of choosing and acting in a directed way. The second part of this Article examines how the former concept developed from the time of Grotius until today, when it is captured by the words of United States Supreme Court Justice Anthony Kennedy: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” “Right” in this sense does not permit an evaluation of the specific motivations, intentions, objectives, or consequences that are connected to actions that

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13 See infra notes 68–73 and accompanying text.
take place within the space of a right. The right stands apart from the purpose for which it is exercised. There is no good or bad in actions as long as they take place within the space of a right. This discussion helps show how Alexander's concept of right is really the space for freedom. It does not envision the function of law as promoting the use of one's freedom to care for one's neighbor.

The thesis of this Article is that law must do more than promote the capabilities that enable a person to live freely; it must promote the proper use of those capabilities if one is to achieve true human flourishing. In particular, the law should encourage one to care for one's neighbor. The Jacques turned a cold shoulder to Steenberg's plea for help. In the Parable of the Good Samaritan, the priest and the Levite also turned away when they saw a man beaten by bandits lying on the other side of the road. They refused to take the time and trouble to cross the road to help him out. Yet the Good Samaritan—the good neighbor—was moved by compassion to stop his journey and spend the time, money, and effort to care for the man. Which of these people promoted human flourishing? Christ tells us that it was the Good Samaritan. If the law is to promote human flourishing it should encourage such behavior. The emphasis here is on the word encourage; this Article does not argue that the law should force such behavior. True caring can only result

16 Id. at 10:30–32.
17 Id. at 10:33–37.
18 See Eduardo M. Peñalver, Land Virtues, 94 CORNELL L. REV. 821, 869–74 (2009) (arguing that an indirect "goal of enshrining certain obligations of virtuous conduct into law would be to constrain the behavior of nonvirtuous owners and, over time, to teach them to act virtuously of their own accord"). The merits of this approach are beyond the scope of this Article, but, if there is an objection to Peñalver's imposition of virtuous conduct, it involves the impact on the development of virtue as a freely chosen habit. It is not the skeptical objection voiced by Claey's. Claey's does not believe that a legal system can tolerate more than just a little virtue-centric regulation. Eric R. Claey's, Response, Virtue and Rights in American Property Law, 94 CORNELL L. REV. 889, 891 (2009). He says that "competing religious, ethnic, or partisan factions find it hard to resist the temptation to use virtue theory as an ideological tool, to establish hegemony over rival factions in their local communities." Id. at 892. Therefore, the government should not be able to compel citizens to follow any one contestable theory of virtue. Claey's condones the fact that where virtues do have a say, they are usually "the least controversial and most encompassing virtues: patriotism, civility, sexual restraint, or industry." Id. "Moreover, when they promote such virtues, liberal political orders generally refrain from promoting virtue for virtue's sake; instead, they claim that citizens' rights
from free choice. Yet this does not mean that the law has no role to play. At the very least, the law should not discourage caring. By awarding the $100,000 punitive damage award in the *Jacque* case, the court discouraged the Jacques from behaving as the Good Samaritan did; it actually rewarded the Jacques' total disregard of Steenberg's difficulty.

The third part of this Article examines the basis for an ethic of caring by looking to the work of Saint Thomas Aquinas. Aquinas starts with the notion that right is not a concept independent of direction. Right starts with a concept of what is due in a relationship between two persons; right is the correlative of duty. We are created for happiness, but happiness is not automatic nor is it something that we create for ourselves. It is something we attain by giving what is due, and what is due in a relationship gives the other a right. For Aquinas, then, not only must a person have the capabilities for human flourishing, but that person must act with those capabilities to achieve human flourishing. One does not have the space for freedom to act in ways that are devoid of moral direction. Every human act is directed to the good, and human autonomy, which exists in the capabilities for human flourishing, exists only so that one can choose the good in order to achieve human flourishing. Aquinas ultimately guides his reader to see that the good of human flourishing is the freely chosen giving of oneself in caring. When the Jacques turned away from Steenberg, they missed the chance to use their capabilities to achieve human flourishing. The law should not have encouraged this behavior. It should have rejected the jury award of $100,000.

I. GREGORY ALEXANDER'S SOCIAL-OBLIGATION NORM

Commentators on the *Jacque* case generally maintain that its protection of the right to exclude promotes the important value of dominion over property.19 They give various
cannot be secure unless citizens are virtuous enough to respect one another's rights freely." *Id.* So, according to Claeys, the real reason for promoting virtue, if any, is to ensure security—not to teach citizens how to care for others for their own sake.

explanations why this dominion is valuable. The owner enjoys a
dignity in such dominion.\textsuperscript{20} The owner has the power to set his or
her own subjectively valued price for the land and its use.\textsuperscript{21} The
owner enjoys security.\textsuperscript{22} The owner has the power to pursue a
"privacy-driven agenda."\textsuperscript{23} Ownership plays an "instrumental
role in the promotion of utility, welfare, or wealth,"\textsuperscript{24} and protects
the owner's "subjective perceptions of control, use, and
enjoyment."\textsuperscript{25} The courts are said to protect this dominion as a
right to exclude even without inquiry into the reasonableness of
its exercise or the benefits of the intruder's actions.\textsuperscript{26}
Furthermore, because of the uncertainty of measuring these
values, an award of compensatory—market-measurable—
damages is not sufficient to ensure that the owner receives an
equivalent award for the loss the owner endures at the hands of
the trespasser. Therefore, courts are justified, as in the\textit{Jacque}
case, in awarding punitive damages in order to ensure that
trespasses like that of Steenberg are deterred in the future.\textsuperscript{27}

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\begin{quote}
property); Merrill \& Smith, \textit{supra} note 5, at 1872–73 ("no attempt to consider
whether the trespass would have been cost-justified"). The latter two commentators
judge the behavior of the Jacques as unreasonable, the trespass as something more
valuable to Steenberg than the right to exclude was to the Jacques, and the judicial
decision as one that promoted inefficiency. These commentators reject the decision
on economic—not moral—grounds. In fact, they disparage the common morality of
property law that they think generated the decision. This Article is not concerned
with economic efficiency but rather with the proper moral ground on which to decide
the case. Nevertheless, it is interesting that the moral result that this Article
advocates in the\textit{Jacque} case is the same as that advocated by an argument for
efficiency—only for reasons that are diametrically opposed. The moral failure is that
the Jacques failed to exercise charity towards Steenberg, whereas the efficiency
failure is that Steenberg was the party with more to gain from the entitlement.

\textsuperscript{20} Hetcher, \textit{supra} note 19, at 1300–01.
1832.
\textsuperscript{22} Claeys, \textit{supra} note 21, at 640.
\textsuperscript{24} Hetcher, \textit{supra} note 19, at 1301.
\textsuperscript{26} Henry E. Smith, \textit{Exclusion and Property Rules in the Law of Nuisance}, 90 Va. L. Rev. 965, 983–84 (2004). This includes the possibility that the decision to exclude
may be based on "spite, opportunism, or mere caprice." Depoorter, \textit{supra} note 9, at
1098.
\end{quote}
Gregory Alexander agrees that the *Jacque* case protects the right to exclude in order to promote the important value of dominion over property in “the interests of home owners in protecting their privacy and associational autonomy.” But he takes the analysis to a deeper level than most commentators by explaining why these interests are valuable. The privacy of the home and its associational autonomy are not merely the possession of particular goods or the satisfaction of particular preferences; rather, they make it possible to develop and experience all, or nearly all, the capabilities that are necessary for human flourishing. Alexander takes the Aristotelian teleological view that each person is made for a distinctively human life that needs certain capabilities in order to be lived. These capabilities are the freedom or power to choose to function with such goods as life and good health, the freedom to make deliberate choices, practical reasoning, and sociality. The *Jacque* case promotes these capabilities, including, in particular, the capability of sociality. The security one has in the privacy and autonomy of one’s own home gives one the freedom or power to form healthy relationships with others. For this reason the law must protect this privacy and autonomy.

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29 Id. at 764, 816. Margaret Jane Radin makes a similar point when she states that the sanctity of the home protects liberty by giving a realm that is shut off from interference from others. The home is “the scene of one’s history and future, one’s life and growth. . . . One embodies or constitutes oneself there.” Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 992 (1982).
30 Alexander, *supra* note 12, at 761. For this approach, Alexander draws on the work of MARGARET C. NUSSBAUM, *Women and Human Development: The Capabilities Approach* (2008), and AMARTYA SEN, *Development as Freedom* (2009). “Importantly, Nussbaum and Sen distinguish between the first-order patterns that constitute well-lived human lives (‘functionings’) and the second-order freedom or power to choose to function in particular ways, which they call ‘capabilities.’” Alexander, *supra* note 12, at 764. Alexander argues for promoting the value of one’s life through the law’s assurance of one’s capabilities but avoids a discussion of promoting the value of one’s life through the law’s encouragement of the proper functionings that result from the proper use of one’s capabilities. He justifies this avoidance by advocating “a proper concern for human autonomy [which] requires looking beyond mere functionings to include the capabilities that various social matrices generate for their members.” Id. at 765.
32 Id. at 816.
One develops the necessary capabilities only in society and in dependence on other human beings. Alexander reasons from this fact that it is only rational that one who is dependent on others to foster one's own flourishing must commit to foster the flourishing of others. Thus, he derives a social-obligation norm whereby each person is "obligated to support and nurture the social structures without which those human capabilities cannot be developed." This norm is not merely an expression of an autonomous decision to act based on preference satisfaction. It is rooted objectively in a person's nature, which directs one to a distinctively human life for oneself and, because a person needs the help of others in this endeavor, requires one to enable a distinctively human life for others. In this way, a society of individuals helping others will redound to one's own advantage. It is important to note that Alexander's thesis is that one flourishes by the development of one's own capabilities as an objective good intrinsically valuable in itself. Furthermore, the use of these capabilities to satisfy the obligation to help others develop their capabilities is a means to one's own end of developing one's own capabilities—a type of debt that one owes to others in society in exchange for one's own dependence on others as a whole. Alexander does not maintain that helping others under the social-obligation norm is an end in itself. The act of

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33 Id. at 761. This truism brings to mind the famous saying of John Donne: No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee. John Donne, Devotions upon Emergent Occasions, in 3 THE WORKS OF JOHN DONNE, D.D., Dean of Saint Paul's 493, 575 (1839).

34 Alexander, supra note 12, at 769. Drawing on Gewirth's interpretation of Kant's Categorical Imperative for support, Alexander says that "to avoid contradicting ourselves we must acknowledge that all persons, as rational agents in the same relevant sense, have rights as well." Id. at 768–69.

35 Id. at 769.

36 Alexander maintains that the "well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction." Id. at 763; see id. at 763 n.70 (explaining this notion of objectivity).

37 Id. at 770–71, 773.

38 Id. at 767–68.

39 Id. at 770.
helping others does not help one flourish if it is not reciprocated at least generally. It is only a means to the end of helping oneself.\textsuperscript{40}

Given that the pursuit of one's own distinctively human life is not defined as caring for and helping others to pursue their own distinctively human lives but only uses the caring and helping as a means, it is inevitable that tensions will arise between pursuing one's own life and helping others to pursue theirs when there is a conflict. On the one hand, one achieves the capabilities to lead a distinctively human life in the privacy and autonomy of home ownership realized through the right to exclude. On the other hand, one helps others to achieve their capabilities to lead a distinctively human life by giving them access to certain property interests realized through a derogation from one's own right to exclude. How does one determine when one should exclude others and when one should not? Alexander maintains that "the multiple relevant components of human flourishing are incommensurable" and that one should eschew "any pretense of precise ex ante predictions."\textsuperscript{41} He provides a number of examples where he believes that the state acted properly in derogation of the right to exclude, such as in the cases of historic preservation laws, environmental laws, the public

\footnotesize{\textsuperscript{40} Alexander refers to virtue ethics and quotes Rosalind Hursthouse to say that a virtue ethicist, when addressing the issue of helping someone in need, will point to the fact that it would be charitable or benevolent. \textit{Id.} at 761 n.65. Charity involves the idea of caring for others as an end in itself, but there is no indication that Alexander adopts this point of view. He appears to make this reference in order to affirm that a substantive understanding of what it means to live a flourishing life might include being charitable or benevolent but need not. \textit{Id.} at 761. He is more concerned with promoting the norm of justice, which assures that one can live freely, regardless of the substantive content of living freely. He advocates that community should foster a society of just social relations, that is, one “in which individuals can interact with each other in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy.” \textit{Id.} at 767. In an earlier article, Alexander similarly avoids speaking to the substantive content of using one's capabilities, stating that:

\textit{W}e will not wade into the thicket surrounding questions such as whether the content of human flourishing is best understood as rooted (ultimately) in observations about human beings' essential nature or whether instead they are (ultimately) derived, as John Finnis and others have argued, from self-evident truths about what is good for human beings.


\textsuperscript{41} Alexander, \textit{supra} note 12, at 751.
trust doctrine, and access to vital services. He also provides a nuisance case to show that sometimes the answer is not clear. According to Alexander, these cases show the law's attempt fairly to resolve the different needs of individuals for the capabilities of human flourishing. A brief review of these cases will illustrate how Alexander sees this being done.

A. Historic Preservation Laws

These laws require property owners to respect the unique character of the neighborhood, as in *Penn Central Transportation Co. v. City of New York*, where Penn Central was not allowed to build on top of its Grand Central Terminal and was not compensated for this restriction. In justification of the decision, Alexander states that "because individuals can develop as free and fully rational moral agents only within a particular type of culture, all individuals owe their communities an obligation to support in appropriate ways the institutions and infrastructure that are part of the foundation of that culture." These laws support the capability of practical reasoning. Also, through the promotion of culture, they support the capability of freedom.

B. Environmental Laws

These laws similarly require respect for what contributes to essential human goods. In the case of wetlands regulations, the goods are human life and the health of various ecosystems, maintained by wetlands, on which human beings are dependent. Alexander reads the Florida Supreme Court in

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42 Id. at 791.
43 Id. at 755.
44 Id. at 773–75.
46 Alexander, supra note 12, at 791–93.
47 Id. at 794–95 (footnote omitted). Smith accepts the point of Alexander's emphasis on a social obligation to furnish others with the means to flourish if their property has a sufficient nexus to the need. This is what underlies Alexander's desire to see common culture preserved in historic buildings and recreational uses permitted to the public on privately owned beaches. But Smith raises the question why certain people should provide these benefits at personal expense. Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 960–61 (2009).
48 Alexander, supra note 12, at 766.
49 Id. at 796, 799.
Graham v. Estuary Properties, Inc.\textsuperscript{50} as possibly "trying to express the idea that if the mangrove forest at issue... was part of the infrastructure whose vitality is essential to support and nurture the human capabilities that are the foundation for a well-lived life, then its owner is obligated to contribute to the community’s health.”\textsuperscript{51} These laws support the capabilities of life and good health.

C. Public Trust Doctrine

Public access to beaches has been expanded under the public trust doctrine from fishing on a beach between the high and low tide lines—wet-sand areas—to recreation on privately-owned dry-sand portions of the beach.\textsuperscript{52} The New Jersey Supreme Court in Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.\textsuperscript{53} required that a private beach club provide the public with reasonable access to the dry-sand area of its beach. Alexander sees a justification in this decision on the basis of his social obligation theory. He points out that recreation is an important aspect of health, which is itself a vital dimension of the capability of life, and that providing all persons, including poor people, with reasonable access to basic modes of recreation and relaxation would materially contribute to the goal of being capable of living lives worth living.\textsuperscript{54}

Alexander adds that recreation also supports affiliation, which is an indispensable means to create just social relations.\textsuperscript{55} This doctrine supports the capabilities of good health and sociality.

D. Access to Vital Services

Health and affiliation also justify State v. Shack,\textsuperscript{56} in which workers for government-funded organizations that provided health-care and legal services were permitted to enter private property to aid migrant farm workers employed and housed on the property. Alexander points out that the court rejected the

\textsuperscript{50} 399 So. 2d 1374 (Fla. 1981).
\textsuperscript{51} Alexander, supra note 12, at 800.
\textsuperscript{52} Id. at 802.
\textsuperscript{53} 879 A.2d 112 (N.J. 2005).
\textsuperscript{54} Alexander, supra note 12, at 806.
\textsuperscript{55} Id. at 805.
\textsuperscript{56} 277 A.2d 369, 370, 375 (N.J. 1971).
trespass argument on grounds that the owner's property right must accommodate access to such basic necessities as medical care when it is the only effective means of providing it. 57 This access supports the capabilities of good health and sociality. 58

E. Nuisance

In the area of nuisance, Alexander finds that the tension between two sets of competing capabilities is less easily resolved. In _Boomer v. Atlantic Cement Co._, 59 a factory was polluting the area of surrounding residences with soot, smoke, and other pollutants. On the side of the factory, the argument is that the sacrifice of the residential owners is necessary to preserve a culture that nurtures those goods that are essential for a well-lived life—what promotes the capability of freedom. 60 On the side of the residential owners, the argument is that the preservation of culture is too attenuated an argument and that the capabilities of the residential owners developed through privacy and autonomy should be preserved. 61 This decision illustrates how the conflict between opposing capabilities is difficult to resolve when the concept of rights is one of marking off the domains of each side's capabilities. How is one really to weigh the different capabilities in cases such as these? Alexander can only leave the question open whether the _Boomer_ case should have been decided differently. 62

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57 Alexander, supra note 12, at 808–09.
58 In a more extended discussion of this case, Alexander points out that the _Shack_ decision also promotes the capabilities of freedom and practical reason. Alexander & Peñalver, supra note 40, at 149–54.
60 Alexander, supra note 12, at 780–81.
61 Id.
62 The nuisance area is particularly prone to difficult-to-resolve tensions between capabilities. Courts have ruled that the emission of noise is a nuisance. Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217, 218, 221 (Tex. Civ. App. 1973) (holding that the noise from air conditioning equipment serving an apartment complex was found to be a nuisance against the plaintiff's home and was enjoined). Fumes and dirt are also a nuisance. _Boomer_, 26 N.Y.2d at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315 (holding that the dirt, smoke, and vibrations emanating from a cement plant were found to be a nuisance against the land of neighboring owners, and the court approved the granting of an injunction unless the defendant paid plaintiffs permanent damages). On the other hand, courts have ruled that the emission of noise is not a nuisance. Beckman v. Marshall, 85 So. 2d 552, 555–56 (Fla. 1956) (holding that the noise from small children in a day nursery was found not to be a nuisance against the elderly plaintiffs' guest house). Also, fumes and dirt
In the process of describing how the law promotes important capabilities in each case and settles on a fair manner in which to promote them, Alexander arrives at the Jacque case and interprets it also as one in which the law protects important capabilities. He emphasizes the Jacques' need for privacy and autonomy and affirms the need for punitive damages to protect that need. Punitive damages help ensure that trespassers, like Steenberg, will not intrude on the right to exclude of owners, like the Jacques. But hold on now. Did the capabilities of the Jacques really need protection in this case? It is true that Steenberg did not show a need to develop or experience capabilities in this situation beyond those it already had, but the Jacques also did not show a need. There was no invasion of the private space of the Jacques. Steenberg rolled the mobile home over a vacant unused field owned by the Jacques as part of a 179-acre farm in the middle of winter without harming the property. There was no impingement on their lives or good health, nor on their freedom to make deliberate choices, nor on their practical reasoning. It was not a case where Steenberg prevented the Jacques in any way from enjoying an intended use of this field. As for the capability of sociality, whereby one is enabled to form healthy relationships with others because one has security in the privacy and autonomy of one's home, the Jacques appear to have rejected the advantage of this capability—the formation of healthy relationships—by turning away from Steenberg when Steenberg called on the Jacques for help. The Jacques enjoyed

are not a nuisance. Reed v. Cook Constr. Co., 336 So. 2d 724, 725–26 (Miss. 1976) (holding that the fumes, dirty dust, and clanking noises emanating from a cement plant were found not to be a nuisance against the land of neighboring owners). One interesting case that raises the issue of freedom of expression is Wernke v. Halas, 600 N.E.2d 117, 123 (Ind. Ct. App. 1992). The Indiana Court of Appeals addressed the case of two feuding neighbors where one had erected a five-foot high fence that was ugly and probably erected out of spite, had tastelessly decorated his yard with a toilet seat, and had allowed unattractive and vulgar graffiti scrawled by vandals to remain on the concrete fence posts. Id. at 119. The court found that these displeasing aesthetics did not constitute a nuisance, stating that "[a]esthetic values are inherently subjective," and the courts should not be arbiters of "proper aesthetics and good taste." Id. at 122. The court gave more importance to the expression of the tastes, mores, and attitudes of an individual as rights than to the use of those rights in an uncaring manner to disturb that individual's neighbor who was hurt in his property interest by the displeasing aesthetics.
the privacy and autonomy of their home, but they refused to exercise the capability of sociality that this privacy and autonomy engendered.

Alexander is quite right to advocate that the law should promote the capabilities that one needs to lead a distinctively human life, but there are times when both sides in a dispute have the proper capabilities. The question is rather one of the proper use of these capabilities. Alexander does not address this question in the *Jacque* case because his analysis does not include the concept that the substantive content of the Jacques' choice had value. Therefore, the only way he can evaluate the court's opinion is based on whether the parties' capabilities were properly protected. But does the law care only about ensuring capabilities and not about their proper use? Even though Alexander gives us that impression, there is a direction in the law, not mentioned by Alexander, that suggests that the *Jacque* case was wrongly decided and that the law really does promote the proper use of capabilities. This direction appears in cases that involve the doctrine of necessity, the recovery of property, and deviations from a public highway.

**F. Doctrine of Necessity**

In *Ploof v. Putnam*, the Supreme Court of Vermont held that the plaintiff, who was driven by a sudden and violent tempest to moor his sloop on the defendant's dock, could sue the defendant in trespass and negligence when the defendant's servant cast off the mooring, the sloop was lost, and the plaintiff's family was injured. The defendant had a duty "to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest."

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63 71 A. 188, 189 (Vt. 1908).
64 *Id.* The court in *Ploof* did not reach the issue of damages that might occur if the vessel had been moored to the dock. Two years later, however, the Supreme Court of Minnesota heard a similar case, *Vincent v. Lake Erie Transp. Co.*, in which the dock owner did not reject the vessel but claimed damages for the destruction caused by the striking and pounding of the vessel moored to the dock during the storm. 124 N.W. 221, 221 (Minn. 1910). The court found that the mooring of the vessel to the dock was prudent seamanship and that

[t]he situation was one in which the ordinary rules regulating properly [sic] rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged.
Here, the court required the defendant to preserve the life and property of his neighbor. The defendant had a duty to exercise his capabilities as a caring person. The doctrine of necessity demonstrates that caring for the need of others when they are in dire straits is a concern of the law.\textsuperscript{55}

G. Recovery of Property

In \textit{Wippert v. Burlington Northern Inc.},\textsuperscript{66} the federal district court found that the defendant railroad was not a trespasser when it entered the plaintiff's land to retrieve a train that had derailed due to a strong wind. It applied the Restatement (Second) of Torts as a source of law, which states that "[o]ne is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel to the immediate possession of which the actor is entitled."\textsuperscript{67} The chattel must not have come upon the land by the actor's consent, tortious conduct, or contributory negligence, but if the loss of the chattel was innocent, then there is no trespass in retrieving it.\textsuperscript{68} Here, the loss is neither one's life nor the use of one's home. The owner who seeks to retrieve his chattel is not in dire straits. Yet the court derogated from the general right of the landowner to exclude by requiring a caring attitude on the part of the landowner towards the one who sought to retrieve his property.

H. Deviations from a Public Highway

What is most interesting is that in cases very similar to the Jacque case, other jurisdictions have even allowed individuals to deviate from a public highway over the private land of others

\textsuperscript{55} Similar to the doctrine of necessity is the easement of necessity. In Florida, when a dwelling is hemmed in by other lands "so that no practicable route of egress or ingress is available" to enter or leave the land, the owner has a right to a statutory way of necessity over the lands that hem it in, and such use does not constitute a trespass, provided that the use is in an orderly and proper manner. FLA. STAT. ANN. § 704.01(2) (West 2005). Access to one's property is important in order to enjoy the privacy and autonomy of one's home ownership.

\textsuperscript{66} 397 F. Supp. 73, 74, 77 (D. Mont. 1975).

\textsuperscript{67} Id. at 77.

\textsuperscript{68} Id.
where an obstacle, such as heavy snowdrifts, caused an impassible obstruction on the highway. In *Campbell v. Race,* the Supreme Court of Massachusetts ruled that there was no trespass in such a case when a traveler could not pass by a highway with his team of horses. The court stated that "[t]o hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent." It added that "[s]uch a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject." In *Morey v. Fitzgerald,* the Supreme Court of Vermont approved the ruling in *Campbell* and added that the nature of the obstacles, such as ice or washouts, need not be unexpected, unforeseen, or of short duration to give rise to the right to pass over the neighboring land. Furthermore, "[i]f the obstruction is such that to remove it would materially delay the traveler in his journey, and impose upon him any considerable labor, no duty of removal is upon him." These cases are very much like the *Jacque* case on their facts, even to the point of finding an obstruction in snowdrifts. Alexander sides with the *Jacque* court in rejecting the application of a social-obligation norm in such cases. The courts of Vermont and Massachusetts disagree.

Alexander advocates that the law play the role of fair arbiter in determining who will enjoy the entitlement to capabilities when they are in conflict. If one side demonstrates a greater need for capabilities than the other, he maintains that the correct decision is to award the entitlement to the side with the greater need. He applauds the *Jacque* case because he thinks it accomplishes this objective, although, as demonstrated above, the facts that support his argument are weak. His analysis goes no

69 RESTATEMENT (SECOND) OF TORTS § 195(1) cmt. b (1965). These cases require payment for damages that result from harm to the property used, id. § 195(2), but again the payment appears to be only a way of allocating the loss caused by the necessity to the person who would otherwise have suffered a greater loss.

70 61 Mass. (7 Cush.) 408, 408 (1851).
71 Id. at 412.
72 Id.
73 56 Vt. 487, 489–90 (1884).
74 Id. at 490.
75 See Alexander, supra note 12, at 815–16.
further. Other cases, however, look beyond the distribution of capabilities and find a further need for the law to encourage people to help those in need. These cases promote human flourishing through a virtue of caring. Justice is not merely a fair distribution of capabilities but an encouragement to use them properly. Should the law be concerned with giving such encouragement? If the presumption is that each person will choose to promote human flourishing with the capabilities he or she possesses, the law need go no further. But this presumption is not justified. We see many instances where people choose to waste their resources and refuse to promote human flourishing. In such cases, the law should discourage such waste and selfishness, and it should encourage the type of caring that truly leads to human flourishing. The Jacque case appears to be just such a case in which the court should have done so. Alexander's focus on capabilities is misplaced. The Jacques had the capabilities; they misused them. Vermont and Massachusetts had no problem giving a right to those, such as Steenberg, who needed to use the other's property to avoid an obstacle on a public way. The Jacque court at the very least should have disallowed the punitive damage award.

II. A COMPARISON WITH GROTIIUS AND HOBBES

So why does Alexander limit his concept of the role of law to ensuring that people are capable of making free choices without further requiring the law to encourage the proper use of those capabilities? Why does his concept of right refuse to judge whether human actions have made proper use of their capabilities to make free and knowing choices about their lives? Alexander does not appear to concern himself with a person's specific motivations, intentions, objectives, and consequences as long as they do not detract from others' capabilities. This avoidance suggests that there is no good or bad in such actions as long as they take place within the space of a right. It is important then to explore just what is this notion of right as a space for amoral action.

76 See, e.g., Wippert v. Burlington N. Inc., 397 F. Supp. 73, 77 (D. Mont. 1975); Morey, 56 Vt. at 489; Campbell, 61 Mass. (7 Cush) at 412.
In the seventeenth century, Hugo Grotius (1583–1645) defined the concept of right (ius) as a quality of the person. It is “a moral Quality annexed to the Person, enabling him to have, or do, something justly.” In this definition, right enables a person to do something justly; it does not command or prohibit it. Grotius notes that the jurists call it a “Right which a Man has to his own.” Grotius’ sense of “own” refers to one’s own as a subjective inherent quality of the rights holder, and it is Grotius’ primary definition of right—“[r]ight properly, and strictly taken.”

Grotius divides this concept of right into (a) a power over ourselves or others, (b) property, and (c) the faculty of demanding what is due. Through this tripartite division, right is the area where God permits things that are not repugnant to the natural law. Thus, in the area of property, although initially one has a right to use all things in nature, natural law permits the creation of the institution of property, which then becomes subject to the natural law, as is evident in the case of theft. Grotius states that “being once admitted, this Law of Nature informs us, that it is a wicked Thing to take away from any Man, against his Will, what is properly his own.”

Property thus becomes a right within which one has the space to do as one wishes. This manner of conceiving of a right places the emphasis on what a person has the freedom to do, that is, on what he owns. Right is a function of ownership already inherent in man’s nature as a faculty. It is the starting point for a duty on the part of a

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78 Id. (footnote omitted).
79 Id. (emphasis omitted).
80 Id. at 138–39.
81 Id. at 153–54.
82 Id. at 154.
potential intruder to refrain from intruding upon that right.83 Right in this sense is a space for freedom to act without being restrained by an intruder.

Grotius develops this idea in his discussion of the right of the poor in need to take from the rich. When God created man he gave him dominion over all things in common so “that every Man converted what he would to his own Use, and consumed whatever was to be consumed.”84 This was the state before the Fall when property did not exist. With the Fall it was no longer possible to continue without property; so men consented to divide things among themselves as property and thus produce a new sort of right.85 Both the “right to common use” before the Fall and the “right to property” after the Fall were freedoms within the area permitted by the natural law.86 Grotius then explains that since the rights of proprietors were “designed to deviate as little as possible from the Rules of natural Equity,”87 they have to give way to the right of common use in the case of absolute necessity.88 In other words, the switch from common use to property bows to the natural law that requires equity. Thus, the permissive area for switching to a state of property does not include those things needed by the poor. When the poor in need come to take from the rich, they are not taking the property of the rich since the things the poor take are considered common property.

83 Before Grotius popularized this concept of right, it had already been adopted by the canonists of the twelfth century. The canonists note that among the multiple meanings for ius in Gratian’s Decretum, there is the meaning of “an area of permitted behavior where ‘nature does not command or forbid.’” BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150–1625, at 63 (Wm. B. Eerdmans Pub’g Co. 2001) (1997). They then define ius as “a certain ability by which man is able to discern between good and evil, and in this sense natural ius is a faculty . . . and this is free will.” Id. at 64 (quoting the English Summa, In nomine). The combination of an area of permitted conduct with the idea of a faculty to express free will suggests something that a person owns as inherent in himself apart from any pre-existing duty in others. This notion of right gives ius the idea of a quality defining a person and only after this quality is established does duty appear as a requirement in others to respect this quality.

84 GROTIUS, supra note 77, at 421.
85 Id.
86 See id. at 154, 465.
87 Id. at 434.
88 Id.
Grotius grounds the notion of right on the notion of a faculty in the rights holder that permits the rights holder to demand protection for what he owns on the basis that he owns it. People have a duty to respect this right as a result of the rights holder’s faculty. Grotius hedges this right within the constraints of the natural law, but within the area of freedom where a person can act without constraint, there is the possibility now of a freedom to do what one wills. While this area “enabl[es] him to have, or do, something justly,” it also enables him to serve his own needs and agenda without regard to any further concept of justice. This notion of right does not threaten existing ideas of right and virtue because it is constrained by the natural law. Whatever actions are contrary to the natural law do not fall within one’s space of freedom to do what one desires. However, what would happen if the natural law boundaries on human action were removed and replaced with other boundaries that define only what is necessary for human beings to survive in a world dominated by power-seekers?

In 1651, twenty-six years after Grotius’ work was published in Paris, Thomas Hobbes (1588–1679) defined the concept of right as freedom from any impediments to do as one would. The boundaries that confine this freedom are no longer a function of justice as they are for Grotius. Rather, they are a function of ensuring the security and safety of one’s presence in the community. The actual definition of right for Hobbes is unlimited freedom to do as one pleases, and the only reason for boundaries is to ensure the ability to enjoy one’s freedom against others who would take it away. Joan Lockwood O’Donovan describes Hobbes’ notion of right as “the full flowering of the proprietary paradigm of subjective right” defined as “each individual’s unrestrained liberty ‘to use his own power’ and to act for his self-preservation, so asserting both the radical priority of natural right to natural law and the radical separation of natural right from social obligation.”

90 Id. at 138 (emphasis omitted).
91 3 THOMAS HOBBES, Leviathan: or, the Matter, Form and Power of a Commonwealth Ecclesiastical and Civil, in THE ENGLISH WORKS OF THOMAS HOBBES OF MALMESBURY 116 (Sir William Molesworth ed., 1839) (1651).
92 O’Donovan’s description of Hobbes’ concept of right is a well-formulated, comprehensive
definition which includes three aspects of particular note. First, the concept of right is one of ownership ("proprietary") removed from justice ("natural law"). Second, it is a freedom of indifference ("unrestrained liberty") rather than a freedom for excellence (action directed towards one's proper end). Third, it is focused on self-preservation without any regard for the common good ("social obligation"). It is in the area of self-preservation that Hobbes finally has to accept restrictions on one's unrestrained liberty, not because there is any concern for the common good, but because he conceives the nature of people to be such that without the restrictions a person could not survive.

Hobbes' theory of human nature is that a man's worth is what others esteem it to be. Esteem is given in proportion to the power held by a man, whether it be just or unjust. The reason for the esteem given for power is that power is the only thing that assures one's living well because happiness does not consist in the greatest good but rather in the attainment of one's desires. The quest for power manifests itself in competition for gain, diffidence for safety, and glory for reputation, which, in a state of nature, leaves man constantly with a disposition towards war. Hence "the life of man [is] solitary, poor, nasty, brutish, and short." Since man cannot assure this power for himself in a state of nature because "the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others," men decide to restrict their rights with articles of peace, otherwise known as the laws of nature.

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93 Servais Pinckaers defines freedom of indifference as the freedom to choose between contraries such as good and evil. This freedom focuses on the means to the end. Freedom for excellence, on the other hand, is the freedom that one achieves by choosing God through the grace of Christ and the work of the Holy Spirit. This freedom focuses on the end itself. SERVAIS PINCKAERS, THE SOURCES OF CHRISTIAN ETHICS 374–76 (Mary Thomas Noble trans., 1995).

94 HOBBES, supra note 90, at 76.
95 Id. at 79–80.
96 Id. at 85.
97 Id. at 112.
98 Id. at 112–13.
99 Id. at 113.
100 Id. at 110.
101 Id. at 116.
Natural right (*jus naturale*) for Hobbes is the complete freedom one has to use his own power for self-preservation, even to the extent of using another's body. O'Donovan is correct that it is an "unrestrained liberty," at least in a state of nature. For Hobbes, there is no justice or injustice in the state of nature. However, once man agrees to the articles of peace (laws of nature), these laws put a restraint on his liberty (natural right) by forbidding him to do what is destructive of life or what fails to preserve it. This agreement limits his natural right of unrestrained liberty to a freedom to do as he will only within the bounds of these laws of nature, assuming, of course, that the laws themselves do not threaten his life. Through these laws, he gives up his liberty (natural right) to hinder another's liberty in order to benefit his own, and if he violates these laws it is then that he does an injustice. Thus, injustice consists wholly in violating one's agreement signified in the articles of peace (laws of nature).

Hobbes builds a whole system of laws on the basis of this social contract. These restraints on natural right look remarkably like what one would ordinarily call just: to seek peace, to act in self-defense, to keep one's covenants, to express one's gratitude for gifts, to strive to accommodate oneself to others, to pardon others' offences, to avoid revenge in punishment, to avoid hatred of others, to humbly acknowledge equality with others, to acknowledge the equal rights of all, and generally to follow the Golden Rule. Hobbes then asserts that these laws "oblige in foro interno" because they are the result of a desire that they should take place. In other words, these laws become a system of morality in which justice is the pursuit of self-preservation through conscience-binding laws that promote the cause of peace as good and avoid the cause of war as evil.

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102 *Id.* at 116–17.
103 O'Donovan, *supra* note 91, at 35.
104 *HOBSES, supra* note 90, at 115.
105 *Id.* at 116–17.
106 The right of self-defense remains inalienable so that covenants not to defend oneself are void, and man has the liberty to disobey the Sovereign's commands to kill himself, liberty to refuse to incriminate himself, and liberty to avoid killing himself or another. *Id.* at 204–05.
107 *Id.* at 119.
108 *Id.* at 117–45.
109 *Id.* at 145.
The premise for morality is self-centered and lawless but it produces laws that look very much like the laws that could operate in pursuance of a common good. Does Hobbes then maintain that moral direction can evolve from self-centered desires?

Hobbes does not harbor any thoughts that a person evolves towards self-perfection. A person is who a person is, and there is no such thing as moral direction toward the good except as Hobbes defines it, that is, as a mode of self-preservation. For Hobbes there is no sense of right as the pursuit of what perfects a man. Man is composed of desires and all that is important is that these desires be satisfied. The ideal legal system marks off the boundaries beyond which a person may not venture, but within those boundaries one is free to act in any way one desires. In effect, people own their own private spaces and they have a right to act within those spaces as owners. A person respects the private space of another because the other owns it and the law protects ownership, not because the respect is a way to self-perfection. Judgments are the prerogative of the sovereign power because the only way to ensure self-preservation is by a covenant made by the community to create an absolute sovereign who acts and judges to ensure that all live peaceably among themselves. The sovereign is a deputy of the people, not of God. Thus, for Hobbes, there is no motivation towards the common good. There is merely the compulsion of a sovereign power that one obeys, both because one wants it to continue existing in order to accomplish one's purpose of self-preservation and because the sovereign power compels.

As an example of this orientation in one of Hobbes' laws of nature, Hobbes gives the law that requires one to accommodate oneself to others. This law of nature requires that one not "strive to retain those things which to himself are superfluous, and to others necessary." The reason for this rule is not that of Grotius who finds that equity derived from the natural law of God requires one's surplus to remain common property in the presence of a poor person in need. Rather, it is because "he that

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110 Id. at 146–47.
111 Id. at 85.
112 Id. at 206.
113 Id. at 159–60.
114 Id. at 139.
shall oppose himself against it, for things superfluous, is guilty of
the war that thereupon is to follow."115 Hobbes focuses on
helping the poor person in need because of the bad consequences
that will follow for the rich person, not because the rich person
will advance in self-perfection by considering the good of others.
The difference between the two is manifest in the fact that a
Hobbesian rich person who thinks he can get away with it has
every reason to kill a poor person who is taking his surplus
property, whereas a Grotian rich person does not. Killing other
people is a right one has in Hobbes' state of nature because
nothing is unjust in that state and one has a right to another's
body.116 This right does not disappear when one creates a social
contract to protect oneself. It is merely restricted. But if one can
avoid the restrictions without detection, there is no other moral
reason to refrain from killing the poor person. Even in the rich
person's conscience (in foro interno), according to Hobbes, there is
no conflict because the only binding norm is the perpetuation of a
system that preserves oneself.117 Justice as the giving of another
his due is nonexistent.

Hobbes' philosophy produces a person engaged in
maximizing his freedom to act wholly by his own desires. It
helps to confirm O'Donovan's thesis that the philosophy of the
liberal contractarian political tradition of which Hobbes was a
part is a philosophy of "possessive individualism" wherein the
rights-bearing subject is a controlling, acquisitive, competitive
possessor who forms relationships through contract-based
calculations of self-interest.118 She claims that the emergence of
this philosophy is "one with the historical transformation of the
western Christian tradition of natural law and natural right into
a tradition of natural rights"119 and thus faults Hobbes, along
with other writers in the contractarian tradition, with the rise of
possessive individualism. It is certainly true that Hobbes
employs the concept of right as ownership, meaning a freedom to
do what one wills within the bounds of that ownership, with a
final end of self-preservation. He adopts the notion of right as a

115 Id.
116 Id. at 115–17.
117 See HOBSES, supra note 90, at 145.
119 Id. at 21.
faculty that, contrary to Grotius’ notion of right, operates in an area unconstrained by the commands and prohibitions of the natural law. The only constraints are the exigencies demanded by the self-concern of human nature to preserve itself. Once these exigencies are satisfied, the individual is free to do as he wishes, even to the point of totally ignoring one’s fellow man.

For Grotius, the space for freedom was constrained by the moral direction of the natural law. For Hobbes, the space for freedom was constrained by the appetitive direction of the desire for power. The contrast demonstrates the point that if one chooses to define the concept of right as a space for freedom, one separates human action within the space of freedom from moral direction, and one can lose the moral direction of the law completely if those spaces for freedom are not themselves restricted by the natural law. Grotius maintained the connectivity of human action with morality by confining the space for freedom within the moral dictates of the natural law, but even he had no qualms in asserting that certain actions within the space for freedom were properly amoral. Once the foot was in the door, so to speak, it did not take long for someone like Hobbes to remove the space for freedom from the strictures of the natural law and to find the space for freedom confined only by the strictures of a desire for power. When one accepts Hobbes’ view, the result is that all human action becomes amoral.

Alexander adopts a concept of freedom that is neither that of Grotius nor that of Hobbes. The parameters of right in Alexander’s world are determined by what is necessary to give a fair distribution of capabilities for human flourishing to human beings in society. The capabilities themselves are the end sought by the law. Since the concern is one that cares about the well-being of others and not merely about self-preservation, this concept of right does not advocate an amoral Hobbesian world. It does advocate a space for freedom reminiscent of Grotius’ world. However, it imposes no natural law limitations on what can be done within this space for freedom. It does not encourage the proper use of the capabilities for human flourishing. Rather, it

120 See GROTIIUS, supra note 77, at 154.
121 See HOBBES, supra note 90.
122 See GROTIIUS, supra note 77, at 154.
123 See HOBBES, supra note 90.
implicitly accepts the idea that each person could construct his or her own direction in life without regard to whether it produces any good in society beyond the ability to make choices freely.

The Jacque case demonstrates Alexander's position. Even though the Jacques enjoyed the security of their home, they chose to turn away from a neighbor in need, and the law endorsed their action. Alexander does not comment on this failure to care. For him, caring for one's neighbor's welfare is not important; it is only important to care that others have the proper capabilities to act freely. The spaces for freedom defined as rights by Alexander are sufficiently open-ended to allow one to pass by on one side of the road when one sees a person in difficult circumstances. The slogan for this approach is that we are not our brother's keeper except when his life and good health, freedom to make deliberate choices, practical reasoning, and sociality are at stake. In all other cases we have the freedom within our rights to ignore the other person's plight and go about our own business.

III. A COMPARISON WITH AQUINAS

Thomas Aquinas (1225–1274) approaches the whole area of right and duty from a different perspective. Rather than emphasizing right as a space for freedom within which one can do as one pleases, Aquinas emphasizes that right arises from the direction of the natural law within one's heart calling one to give to another what is due from a consideration of the common good.124 Aquinas defines right (ius) as the just.125 Justice is what directs one in one's relations with others.126 What is owed is to render to a person his due, and the habit of doing so "rectifies the deed and the will."127 Aquinas refers to right in this sense as a man's "own," but it is defined in terms of justice. Justice is "a habit whereby a man renders to each one his due by a constant and perpetual will."128 A person's due is what a "just man gives to another . . . through consideration of the common good."129

125 Id. at pt. II–II, Q. 57, art. 1, at 1431.
126 Id.
127 Id. at pt. II–II, Q. 58, art. 1, at 1435.
128 Id. (emphasis omitted).
129 Id. at pt. II–II, Q. 58, art. 12, at 1443.
were merely an entitlement based on ownership, then the rights holder could relieve the other person of his duty, but Aquinas does not allow for this type of relief. He states that if something is contrary to natural right, "the human will cannot make it just, for instance by decreeing that it is lawful to steal or to commit adultery." In other words, justice "directs man to the common good," and the common good determines what is ownership; ownership does not determine what is the common good.

It is important to distinguish here between the concept of human flourishing as understood by Alexander and by Aquinas. Alexander defines human flourishing as experiencing the functionings made possible by the capabilities of one's life and good health, freedom, practical reasoning, and sociality. In a world that defines human beings as determined to no particular end, the mere existence of these capabilities is what dictates the excellence of a human being. Whatever particular life a human being lives with these capabilities, the value of that life is dependent on having different types of life to choose from, having the freedom to choose any one of these different types of life, having the use of his own practical reasoning power to decide on this life, and having a supportive community within which to live one's life. According to Alexander, however, the value of life is not dependent on the specific way in which one uses these capabilities as functionings. Aquinas defines human flourishing in a different manner. The value of one's life is dependent on the end to which one directs one's life, which in turn guides the way in which one uses one's capabilities as functionings. One must strive to have, and the legal system

130 Id. at pt. II-II, Q. 57, art. 2, at 1432.
131 Id. at pt. II-II, Q. 58, art. 5, at 1438.
132 Likewise, injustice is contempt of the common good, id. at pt. II-II, Q. 59, art.1, at 1443, and gives rise to a claim of right calling for coercion to enforce that right. Since the right is founded on justice and not ownership, the coercion itself is not an inherent right of the rights holder. It belongs to God to judge, or it belongs to someone appointed as God's servant by some agreement among men to judge. Id. at pt. II-II, Q. 60, art. 2, at 1447, art. 6, at 1450. A judge with this authority "asserts the right (jus dicens)" as an "object of justice" that derives its authority from God's eternal law. Id. at pt. II-II, Q. 60, art. 1, at 1446. A judge without this authority judges unjustly and therefore without coercive force. Id. at pt. II-II, Q. 60, art. 6, at 1450–51.
133 See Alexander, supra note 12, at 765–66.
134 See supra note 30.
should work to ensure that one has, the capabilities to function in a well-ordered life, as Alexander maintains. But even if one's capabilities are deficient, it is the end that one chooses to have, regardless of the deficiencies in one's capabilities, that determines one's flourishing.

What is that end towards which a life of excellence is directed? It is charity. According to Aquinas, one who loves with the virtue of charity realizes the perfection of himself. Charity itself is what makes a person excellent. Charity is a gift from God that is offered to a person for his acceptance, and one accepts this gift through an exercise of one's powers of understanding and willing to make the free choice to love. But the fact that these powers exist in varying degrees in different human beings does not mean that human beings are more or less excellent depending on the degree to which they have these powers. Their excellence is determined by the degree to which they live in charity. Furthermore, charity is not a means to some further beneficial end for the person who loves; it is its own reward. The love of wine or a horse is the type of love that exists for the good from these things that we wish for ourselves; this is not charity. The love of a friend for the good of that friend is charity. The former type of love—of wine or a horse—arises in one's sensitive appetite as a matter of concupiscence, whereas the latter type of love—of a friend—arises in one's will as a matter of God's grace. It is true that one can love a person by reason of his own desire to get something from him, but this is the love of concupiscence. Charity rather is the love of one's neighbor that he may be in God, that is, that the neighbor may love God in charity. The love of charity is more than just wishing another

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136 Charity is the most excellent of the virtues, and no true virtue is possible without charity. Id. at pt. II–II, Q. 23, art. 6, at 1273, art. 7, at 1274. It is beyond the scope of this Article to consider all the virtues, but Aquinas does espouse the idea of a unity of the virtues, id. at pt. II–II, Q. 58, art. 4, at 1437, art. 5, at 1438, which opposes the idea of an indeterminate pluralistic evaluative framework (with sometimes conflicting values), which Peñalver attributes to virtue ethics. Peñalver, supra note 18, at 874–75. Nevertheless, Peñalver provides a helpful discussion of three virtues, which can be used effectively to promote human flourishing in decisions about land use: industry, justice, and humility. Id. at 876–86.

137 See SUMMA THEOLOGICA, supra note 124, at pt. II–II, Q. 23, art. 7, at 1274.

138 Id. at pt. II–II, Q. 23, art. 1, at 1269.

139 Id. at pt. II–II, Q. 24, art. 1, at 1276.

140 Id. at pt. II–II, Q. 23, art. 1, at 1269.

141 Id. at pt. II–II, Q. 25, art. 1, at 1286, art. 2, at 1287.
well; it is the communication of a certain mutual love between friend and friend whereby they share a union of affections that comes from the intellective, and not the sensitive, appetite. It is especially noteworthy that this love of charity extends even to our enemies when they find themselves in a case of urgent need. Thus, the love of charity is a reaching out, not a reaching in. To love is more important than to be loved because the act of charity is in loving, not in being loved—just as a mother seeks to love more than to be loved. One loves for the sake of loving itself, and it is in this type of love—the love that is charity—that we can see that virtue is practiced for its own sake.

Aquinas illustrates his notion of right—as one based on a claim of justice rather than on a claim of ownership—in his discussion of the duty to give one's surplus to the poor. Aquinas states that theft is contrary to justice because one secretly takes possession of that which belongs to another. Yet, four articles later in the Summa, Aquinas states that "it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly." In fact, "a man may also take secretly another's property in order to succor his neighbor in need." How does Aquinas reconcile these two apparently contradictory statements? Aquinas explains:

Things which are of human right cannot derogate from natural right or Divine right. Now according to the natural order established by Divine Providence, inferior things are ordained for the purpose of succoring man's needs by their

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142 Id. at pt. II–II, Q. 23, art. 1, at 1289; id. at pt. II–II, Q. 27, art. 2, at 1306.
143 Id. at pt. II–II, Q. 25, at 1292.
144 Id. at pt. II–II, Q. 27, art. 1, at 1305.
145 Id. at pt. II–II, Q. 27, art. 1, at 1305–06.
146 Id. at pt. II–II, Q. 66, art. 3, at 1478. Aquinas advocates the right to own property because it enables one to use the things of this earth in order to flourish. In fact, he speaks directly to the efficiency of such ownership when he says that: (1) one is more likely to care for what is his own than for what belongs to the community at large, (2) there is less confusion in dealing with property divided among the ownerships of several individuals than if everyone had an indeterminate role, and (3) there are fewer quarrels when each person has a stake. See id. at pt. II–II, Q. 66, art. 2, at 1477.
147 Id. at pt. II–II, Q. 66, art. 7, at 1481.
148 Id.
means. . . . Hence whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor.

Since, however, there are many who are in need, while it is impossible for all to be succored by means of the same thing, each one is entrusted with the stewardship of his own things, so that out of them he may come to the aid of those who are in need.  

Justice specifically determines the concept of ownership here. The owner of property has a duty—an obligation to give what is due—to give his surplus to the poor because God has ordained that property is meant to serve the purpose of succoring man in his need and the surplus is not needed by the owner but is needed by the poor. If the need does not reach the level of extreme need, the owner still has the duty to give, but the right on the part of the poor is only moral and not legal. It becomes a legal right when there is extreme need and then the poor can even effectuate their own taking. It is significant that Aquinas prefers to use the term "stewardship" of one's own things rather than "ownership" in this passage, because it conveys the idea that while one has ownership of one's own property, it is an ownership like that of a fiduciary who cares for the property on behalf of others, as well as himself. Property is owned privately but treated as if it were held in common with all.  

Aquinas and Grotius both reach the conclusion that the rich must give to the poor, but they differ significantly over the definition of the right that is involved. Grotius reaches the conclusion by maintaining that the natural law of equity limits the area of the natural law that permits the creation of property so that the poor have a right to property held in common. Aquinas reaches the conclusion by maintaining that the natural law of justice requires the rich to give what is due to the poor. For Grotius, the poor own the "right to common use" not because the rich have a duty towards the poor, but because the right is inherent in the poor as a faculty. For Aquinas, the poor have no inherent right, but do have a right stemming from the duty of the

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149 Id. at pt. II-II, Q. 66, art. 7, at 1480–81; see also id. at pt. II-II, Q. 32, art. 5, at 1327–28.
150 Id. at pt. II-II, Q. 66, art. 2, at 1477 (citing 1 Tim. 6:17–18).
rich. The duty—to give one his due—generates the right for Aquinas; the right generates the duty—to leave the poor alone in the exercise of their right—for Grotius. One sees this difference most clearly in the contrast of two texts from Aquinas and Grotius. Aquinas sees the right of the poor as founded on the duty to give alms as directed in Luke 11:41.151 Grotius, on the other hand, says "[t]hat Sentiment [the right to take from another what is absolutely necessary to preserve one's life] is not founded on what some alledge, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it."152 Thus, the manner of Grotius' conceiving of a right places emphasis on what a person has the freedom to do—i.e., on what he owns—and opposes the way in which duty is determined by Aquinas. Grotius notes that the jurists call it a "Right which a Man has to his own,"153 but Grotius' sense of "own" is no longer that of Aquinas. Rather than referring to one's own as what is due, Grotius refers to one's own as a subjective inherent quality of the rights holder. For Aquinas, duty—what is due—is a function of one's relationship to God, who directs man in his rational nature towards the common good. It is the starting point for what then becomes the recipient's right to what is due.

In specifying the concept of right as stemming from duty, Aquinas offers a wholly different approach to right than that stemming from Grotius and Hobbes and adopted by Alexander. Aquinas' concept of right gives a fully integrated theory that alleviates the danger that the concept of right may be used by a Hobbes proponent to advocate a system of amoral behavior. It also clarifies the role of law. Law is not merely an enabler; it is also an encourager of moral behavior. Since one has an end of the good, and the fulfillment of this end remains uncertain because one also has the freedom to choose or not to choose this end, the law's encouragement of moral behavior without imposing it supports one's efforts toward excellence.

151 Id. at pt. II–II, Q. 32, art. 5, at 1327.
152 GROTIUS, supra note 77, at 434–35.
153 Id. at 138 (emphasis omitted).
Behavior that is truly moral is done in freedom. The law cannot force a person to be moral, nor should it. Yet the law performs a beneficial role in society when it encourages moral behavior. It certainly is an important function of law to ensure the capabilities to function with such goods as life and good health, the freedom to make deliberate choices, practical reasoning, and sociality. It is also important to encourage the good use of these capabilities. Grotius, despite his care to restrict the concept of right within the bounds of the natural law, nevertheless formulated the concept in such a way as to permit its abuse. Right as a space for freedom became a space for license in the hands of Hobbes. Alexander rejects the anti-social leanings of Hobbes in order to advocate an integrated interdependent society, but he stops short of defining the role of law as encouraging moral behavior. The result is that when capabilities are fully accounted for, individuals such as the Jacques can turn away from a person in need and show an uncaring attitude. Such an uncaring attitude is a form of license. It does not follow the great commandment to love one's neighbor as illustrated so tellingly in the Parable of the Good Samaritan. It is not sufficient that one merely feed the poor; charity demands that one also succor those in need.\textsuperscript{154} If the law is truly the guardian of society, it should work to ensure the encouragement of such love of one's neighbor. Ultimately, as Aquinas so masterfully demonstrates, there is no space within the concept of right to do as one merely desires with no regard for the ultimate goal of excellence in our lives. Right gives one the freedom to choose, but it is a freedom to choose the good. If one fails to choose the good, one loses one's freedom by becoming enslaved by one's desires. Therefore, the law should support the freedom to choose the good—loving one's neighbor rather than turning away.

The Jacques court could have adopted the approach of Vermont and Massachusetts to find that there was no trespass by Steenberg on the Jacques' property due to the obstructed passage along the road. But even if it were to insist on finding a

\textsuperscript{154} \textit{CATECHISM OF THE CATHOLIC CHURCH para. 2446, at 588 (1994)} ("When we attend to the needs of those in want, we give them what is theirs, not ours. More than performing works of mercy, we are paying a debt of justice.") (quoting St. Gregory the Great, \textit{Regula Pastoralis}, 3, 21: PL 77, 87).
trespass, the court should not have encouraged the Jacques to turn away from their neighbor by rewarding them with $100,000 in punitive damages. The nominal compensatory damages of $1 is sufficient to recognize the freedom on the part of the Jacques to turn away if they so choose, but the law should not condone such behavior. The law has a role to guide and educate persons to make the choice for human flourishing in the form of caring—much as the Parable of the Good Samaritan guides us to love our neighbor.