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# THE SOCIAL FUNCTION OF PROPERTY AND THE HUMAN CAPACITY TO FLOURISH

*Colin Crawford\**

## INTRODUCTION

This Article offers suggestions about the appropriate definition of the five words “the social function of property”—so pregnant with meaning and promise, yet for many so ill defined. Although the Article does not address the development of the notion of the social function of property within a particular national tradition or experience, it makes reference to a wide range (with respect both to location and type of property) of examples from across Latin America and the Caribbean. In doing so, the Article seeks to do three things. First, it makes the normative case that “the social function of property” can usefully be understood as a notion that aims to secure the goal of human flourishing for all citizens within any state. This is important inasmuch as scholars, legislators and government officials, as well as activists and others for whom this notion matters, need constantly reexamine and clarify what is meant when we talk about property’s social function, remembering that while it may originally have been conceived—by Léon Duguit and others—to constitute a notional counterbalance to an uncritical affirmation of individual private property rights, it is not always so used exactly because the phrase is not self-defining and invites many interpretations. For example, one English language analysis of property’s social function, written by a Brazilian social scientist working in the United States, takes a distinctly neoliberal cast. The author argues, in no uncertain terms, that many interpretations of the concept have erred for their failure to acknowledge that property’s social function is best served by focusing on overall economic production and efficiency in a given society, allowing the market’s invisible hand to work its magic.<sup>1</sup>

By contrast, the goal of human flourishing helps clarify what is at stake when we make the case for property’s “social function” in the modern world. Arguably, ideas about property’s social function are now well

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1. Flavia Santinoni Vera, *The Social Function of Property Rights in Brazil* (Latin Am. & Caribbean Law. & Econ. Ass’n (ALACDE) Annual Papers, Berkeley Program in Law & Econ. 2006), available at <http://www.escholarship.org/uc/item/0tp371xs>.

developed (if not always applied) in the legal and regulatory traditions of many if not most nations, even in supposed strongholds of the classical liberal property rights tradition, like the United States. Amidst the social upheavals of the early 1970s, the New Jersey Supreme Court famously wrote in a landmark case involving the rights of migrant workers while on the land of their farmer-employer:

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 . . . . Indeed the needs of the occupants [of another's property] 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.<sup>2</sup>

Moreover, this recognition in U.S. law of what can rightly be called a social function of property is not unusual. Further expressions of this view may be identified in everything from contemporary U.S. nuisance and surface water law<sup>3</sup> to the civil rights revolution's impact on property law that runs from the rejection of racially restrictive covenants through to the Fair Housing Act of 1968 and its frequent amendments.<sup>4</sup> Importantly, too, these limitations on the rights of private property owners are not imposed only by public actors. The vigorous self-regulation of co-owners and co-renters in common interest communities, both freehold and leasehold,<sup>5</sup> provides ample evidence that the population accepts the need for social regulation of space in service of larger community interests. Even in U.S. society today, therefore, the classical liberal conception of property may well be but a faded memory.

This is not to say, however, that we do not still need to articulate clearly and insist upon application of the notion of the social function of property, in the U.S. and anywhere else. At least three features of our current historical moment make this so. First, as no less a figure than Adam Smith observed, "Wherever there is great property there is great inequality."<sup>6</sup> Smith's reflection reminds us that the social and economic inequality and

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2. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

3. See JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES* 378 (5th ed. 2010) (discussing social welfare considerations in U.S. nuisance law, and citing *RESTATEMENT (SECOND) OF TORTS* § 826(a) (1979)); see also *Armstrong v. Francis Corp.*, 120 A.2d 4, 10 (N.J. 1956) (changing rule for diffuse surface water in light of evolving social uses of land); *Prah v. Maretti*, 321 N.W.2d 182, 190–92 (Wis. 1982) (same with respect to the construction of buildings blocking sunlight). *But see, e.g., Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359–60 (Fla. Dist. Ct. App. 1959) (upholding traditional rule on light easements).

4. Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2006); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (finding state action sufficient to bring cause of action in case involving racially restrictive covenants).

5. See, e.g., *Woodside Vill. Condo. Ass'n v. Jähren*, 806 So.2d 452, 462–64 (Fla. 2002) (considering reasonableness of a leasehold restraint on alienation in light of changing social use of surrounding land); *Horse Pond Fish & Game Club, Inc. v. Cormier*, 581 A.2d 478, 481–82 (N.H. 1990) (same with respect to freehold restraints).

6. 2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 709–10 (R.H. Campbell & A.S. Skinner eds., Oxford University Press 1976) (1776).

attendant poverty typical of our moment in human history are consequences not of a *lack* of property, but functions of its abundance. In the era in which the raw wealth produced by intellectual and other intangible property rivals that of productive real property,<sup>7</sup> the reality of most people today resembles that of Hobbes's short and brutish life: poverty and want are the condition of the world's majority.<sup>8</sup>

Second, and furthermore, this is a propitious time to refine and redefine what we understand to be property's social function in light of the explosion of types of property. Not only are we living in a historical moment typified by escalating real property values in the urban centers where most of us now live,<sup>9</sup> but also we are now witnessing the creation of intangible (intellectual) property at exponential rates.<sup>10</sup> A consequence of this property creation is wealth creation on a correspondingly exponential scale.<sup>11</sup> Moreover, because much of this wealth is neither created in, nor tied to, the nation-state where the owner of that wealth has her legal domicile,<sup>12</sup> there is a need now more than ever to clarify what obligations attach to that property, and where. The goal of human flourishing for property's social function is therefore one attempt to breathe new life into

7. See, e.g., KAMIL IDRIS, *INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH* 54 (2d ed. 2003), available at [http://www.wipo.int/about-wipo/en/dgo/wipo\\_pub\\_888/index\\_wipo\\_pub\\_888.html](http://www.wipo.int/about-wipo/en/dgo/wipo_pub_888/index_wipo_pub_888.html) (showing the dramatic decline in tangible versus intangible assets in the corporate sector of more developed countries between 1982 and 2000).

8. *Poverty Brief*, WORLD BANK (last updated July 2011), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20040961~menuPK:34480~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (maintaining that while global poverty levels are generally on track to meet Millennium Development Goal of halving the number of people living on \$1.25 per day by 2015, the recent economic crisis shows that the number is increasing again).

9. See, e.g., U.N. Dep't of Econ. & Soc. Affairs, Population Div., *The World at Six Billion*, at 3, U.N. Doc. ESA/P/WP.154 (1999) (noting that in 1999, 46 percent of the world population was urban); U.N. Population Fund, *State of World Population 2007: Unleashing the Potential of Urban Growth*, at 1 (2007), [http://www.unfpa.org/swp/2007/presskit/pdf/sowp2007\\_eng.pdf](http://www.unfpa.org/swp/2007/presskit/pdf/sowp2007_eng.pdf) (stating that by 2008, for the first time in human history, a majority of the world's population would be urban and largely poor, with that number to nearly double by 2030). On the effects of this urbanization in specific countries, see David Barboza, *Skyrocketing Prices May Lead to a Real Estate Bubble in China*, N.Y. TIMES, Mar. 5, 2010, at A1; Rama Lakshmi, *In India, Urban Boom Poses Challenges*, WASH. POST, July 12, 2011, at A8. On global urbanization in general, see Barney Cohen, *Urban Growth in Developing Countries: A Review of Current Trends and a Caution Regarding Existing Forecasts*, 32 WORLD DEV. 23 (2004).

10. See, e.g., Editorial, *The Rich Get Richer: And the Argument Not to Tax Them Gets Smaller*, PITT. POST-GAZETTE, July 19, 2011, at B6 (reporting that despite the economic crisis, the median U.S. executive pay increased 23 percent from 2009 to 2010); Derrick Z. Jackson, Op-Ed., *Surprise, Surprise: Rich Get Richer*, BOSTON GLOBE, Apr. 12, 2011, at A11 (reporting an increase of 20 percent in executive pay).

11. See IDRIS, *supra* note 7, at 58 (discussing role of intangible assets in "invisible" new economy); see also Karl-Erik Sveiby, *Measuring Intangibles and Intellectual Capital—An Emerging First Standard* (1998), <http://www.sveiby.com/articles/EmergingStandard.html>.

12. See, e.g., Qian Yanfeng, Duan Yan & Li Yao, *Harsh Reality Behind Apple Scandal*, CHINA DAILY (Feb. 22, 2011, 7:15 PM), [http://www.chinadaily.com.cn/2011-02/22/content\\_12053611.htm](http://www.chinadaily.com.cn/2011-02/22/content_12053611.htm) (reporting on poor occupational and environmental health conditions at Apple factories in China, despite company's runaway financial success).

the notion of property's social function, and in the process to identify a solution for the poverty and inequality—social, economic, and environmental—that is characteristic of our era.

Third, as in much of the world, the region is preoccupied with questions of sustainability and environmental crises from uncontrolled human activity. To make the case that human flourishing provides a powerful justification for the concept of property's social function, this Article looks to numerous examples from across Latin America and the Caribbean. In particular, the Article draws upon cases throughout the region dealing with purported conflicts between environmental sustainability and economic and social development, with a heavy emphasis on instances involving the expansion of informal settlements in urban areas, with their attendant environmental costs. Analysis of these examples using a conception of the social function of property focused on human flourishing not only helps reveal what is at stake in such conflicts but also the degree to which these are false conflicts. The discussion will in this way illuminate how a focus on the goal of human flourishing can help ground and reorient such debates and thus secure the notional promise of property's social function. This is particularly important because, on an urbanized continent,<sup>13</sup> a notion like property's social function links the urban land use and environmental questions that, as Edésio Fernandes and others correctly remind us, are two sides of the same coin (but too rarely appreciated as such).<sup>14</sup>

To make these cases, this second portion of the Article also considers a range of examples from public debates in the Latin American and Caribbean region about property's social function, involving a wide variety of different kinds of property and actions that affect property rights. Many of these examples reflect the growing regional consciousness about what has come to be called in the region "socio-environmentalism" (or, *socioambientalismo*), an idea that has emerged in urban and environmental law and policy and discussions in both the Hispanophone and Lusophone Americas with particular force. This arguably represents a distinctively Latin American response to what in other parts of the world is known alternately as the struggle for environmental or land use justice. To some extent, it might be observed that this novelty is a product or heritage of Latin American debates about property's social function, where resource extraction activities have been especially important economically and their social and environmental consequences correspondingly severe.<sup>15</sup>

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13. See EDUARDO ROJAS, INTER-AM. DEV. BANK, THE CHALLENGE OF AN URBAN CONTINENT 3–12 (2004), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1481567>.

14. See Edésio Fernandes, *Desenvolvimento sustentável e política ambiental no Brasil: confrontando a questão urbana*, in O DIREITO PARA O BRASIL SOCIOAMBIENTAL 354 (André Lima ed., 2002) (Braz.).

15. Raul Silva Telles do Valle, *Mineração em território quilombola: uma análise jurídica do problema*, in O DIREITO PARA O BRASIL SOCIOAMBIENTAL, *supra* note 14, at 107, 107–32 (analyzing legal aspects of tensions between ethnically distinct communities of descendants of ex-slaves and mining operations); Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19

However, even though environmental and sustainability concerns constitute the unifying themes of the majority of this Article's examples, the examples also look far afield to a number of other areas including, for instance, intellectual property, family property, and questions implicating individual control of one's body as property. I do not pretend that these examples are comprehensive. On the contrary, the wide range of examples is by design a pastiche, meant to suggest what I believe to constitute an emerging trend in the Latin American and Caribbean region in the way people discuss property and its social function across the breadth and reach of property types. To be sure, little about these debates is settled and the collective articulation of property's social function advanced in them (that is, that property's social function is necessarily concerned with the goal of securing the human capacity to flourish) will not necessarily be the winning argument when all is said and done. Nonetheless, it is a contention of this Article that the examples that follow, taken together, demonstrate the growing appreciation of property's social function in different areas. That is, the examples show that the idea of property's social function is being taken seriously throughout the region, in a wide variety of contexts and with respect to many different kinds of property. In this, it may be argued that there is reason to be cautiously optimistic about progress towards a fairer distribution of property in a region long distinctive for the opposite condition.

#### I. THE RELATION OF PROPERTY'S SOCIAL FUNCTION TO HUMAN FLOURISHING

As indicated at the outset, a serious potential debility of the notion of the social function of property is that its meaning remains in dispute. It is essential, therefore, to define the term. The conception of the term advanced in this Article focuses on the *social* nature of human experience, and closely tracks that of Gregory Alexander and Eduardo Peñalver:

[A]ny adequate account of human flourishing must stress two characteristics. First, human beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent upon, other human beings. To put the point even more directly, living within a particular sort of society, a particular web of social relationships, is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish.<sup>16</sup>

In terms of giving content to the notion of property's social function, then, at the most basic level the goal of human flourishing thus understood usefully captures the sense of the term as one conceived to promote collective *and* individual goods as opposed to the mere individual ability to

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TUL. ENVTL. L.J. 69, 102–03 (2006) (tracing development of social function ideas in region, from agriculture to resource extraction to urbanization). To be clear, this Article does not mean to develop thoroughly the relation of socio-environmentalism and the social function of property.

16. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN LAW 127, 135 (2009).

acquire private property rights. Importantly, this notion does not commit to a particular strategy of social, economic, or political intervention. That is, the means to accomplish a goal in the service of property's social function—whether libertarian, utilitarian, welfarist, etc.—remains very much on the table. In this, the notion of human flourishing applied here contemplates, in the property rights sphere, the application of capacity development initiatives—ideas that have been advanced in programmatic fashion by Amartya Sen and Martha Nussbaum, to cite its two best-known advocates.<sup>17</sup> Thus, the concept of human flourishing as a goal for thinking about property's social function can help us focus on why we need a notion of property's social function that private property institutions alone cannot satisfy.

#### A. *What Is Human Flourishing?*

The theory advanced here, of human flourishing as the object of property's social function, is not meant to endorse a particular strategy for a more equitable distribution of resources, although if this notion were to be applied, resource redistribution is likely a consequence given the global reality of persistent poverty and inequality.<sup>18</sup> On the contrary, the notion has traction in the context of discussions about property's social function in the same way that the New Jersey Supreme Court advanced the idea that property interests serve human values.<sup>19</sup> In this way, to endorse the goal of human flourishing for property's social function is to do more than argue that government or some institutional actor provide X resources to Y members of a society in the service of social goal Z. Instead, the notion of human flourishing advanced here understands that property systems set the ground rules that make possible the ability of people (acting within both public and private spheres) to develop their individual capacities within larger social organizations.<sup>20</sup> Therefore, it is essential that such rules be established not only to protect individual interests, but also to contemplate and protect individuals in their roles as members of communities and larger societies.

In this sense, the notion of human flourishing is useful in the context of consideration of property's social function because, just as private property rights seek to do, it focuses on *individual* needs and wants but within a larger, *social* context. The notion does not say, for instance, that amorphous “markets” are undesirable because they are unpredictable and cruel to those who make bad economic judgments or do not have the tools (whether intellectual, financial, or educational) to compete. Instead, the

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17. See, e.g., MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); AMARTYA SEN, THE IDEA OF JUSTICE 225–90 (2009). For the website of the organization these two authors helped create, see *About Us*, HUM. DEV. & CAPABILITY ASS'N, <http://www.capabilityapproach.com/About.php> (last visited Nov. 16, 2011).

18. See *supra* note 8 and accompanying text.

19. See *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

20. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 87–90 (1999) (exploring poverty reduction as a strategy for incorporating individuals into a community).

notion asks us to focus on what tools—including property tools—will enable the greatest number of individual members of the collective to fulfill not only their subsistence needs but also to satisfy the mix of desires and aspirations that, if realized, would make them able and functioning members of society.<sup>21</sup> Furthermore, it is assumed that individual flourishing will in turn result in stronger social organizations, in both social and economic terms.<sup>22</sup> This is an important move because it responds directly to private property justifications, which tend to focus on the individual benefits in personal freedom and autonomy to be gained from property control.<sup>23</sup> Thus understood, the social function of property responds to individualist notions concluding that private property is the route for social and economic freedom.<sup>24</sup> That is, a focus on human flourishing as a means to understand the social function of property, regardless of what means are selected to secure the goal of human flourishing, gives clarity and helps us understand that private property acquired through arms-length, market-based transactions on its own is not sufficient because it does not (and arguably because it cannot<sup>25</sup>) address the fact of persistent poverty and inequality. Moreover, legal recognition of these principles will serve to formalize the de facto reality of property management since non-market-based transactions feature prominently in the functioning of the most affluent and capitalist societies.<sup>26</sup> This is to say that property transactions, like all market transactions, benefit from and are influenced, if not expressly, by social structures that depend on market and non-market interventions.

Alexander and Peñalver identify two powerful justifications for the phrase “any adequate account of human flourishing.” Any such account must, they argue, stress two characteristics. First, as already quoted above, they observe that “human beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent

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21. See SEN, *supra* note 17, at 230–34.

22. See *id.* at 346–47.

23. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 22–36 (40th anniversary ed. 2002) (asserting the idea that government’s role is to guarantee private property rights).

24. *Id.*

25. See, e.g., Alexander & Peñalver, *supra* note 16, at 155 (discussing need for South African land reform in order for impoverished majority to have a chance of a better life); see also JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 130–31 (2000) (examining the role of property rules in fostering interdependence as well as autonomy).

26. As Sen notes,

All affluent countries in the world—those in Europe, as well as the US, Canada, Japan, Singapore, South Korea, Australia, and others—have, for quite some time now, depended partly on transactions and other payments that occur largely outside markets. These include unemployment benefits, public pensions, other features of social security, and the provision of education, health care, and a variety of other services distributed through nonmarket arrangements. The economic entitlements connected with such services are not based on private ownership and property rights.

Amartya Sen, *Capitalism Beyond the Crisis*, N.Y. REV. BOOKS, Mar. 26, 2009, at 27, available at <http://www.nybooks.com/articles/archives/2009/mar/26/capitalism-beyond-the-crisis/>.



upon, other human beings.”<sup>27</sup> Second, they argue that “human flourishing must include at least the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternative choices.”<sup>28</sup> As they note, exactly what capacities are needed for individuals to flourish can differ greatly, depending on the analyst.<sup>29</sup> In an effort to minimize these controversies, however, they focus

on four capabilities that we hope will be relatively uncontroversial: (1) *life*, a good we take to include subsidiary goods such as health and security; (2) *freedom*, which includes identity and self-knowledge; (3) *practical reason*, which Aristotle defined as “the capacity of deliberating well about what is good and advantageous for oneself”; and (4) what Nussbaum calls “*affiliation*,” a good that encompasses subsidiary goods such as social participation, self-respect, and friendship.<sup>30</sup>

With regard to the implementation of these choices, of course, institutional mechanisms are needed to facilitate the creation of stable human communities and choices within those communities.<sup>31</sup> Property rules are one set of such institutional mechanisms. Even Alexander and Peñalver, despite their focus on “social structures” of human communities, an abstract formulation that considers the possibility for human flourishing not necessarily for people as citizens within states but in a wide range of social interactions and situations, acknowledge that

[a]t least within the modern capitalist economy, . . . a strong case can be made that guaranteeing to individuals the necessary access to many of the material and social prerequisites for the capabilities we are describing is beyond the abilities of private, voluntary communities, considered either individually or in cooperation with one another.<sup>32</sup>

In other words, the state (and its institutions) play a key role in assuring the social and material goods needed to enjoy a well-lived life—that is, to flourish. For Alexander and Peñalver, this means “human beings need access to the resources necessary for physical survival.”<sup>33</sup> They are, however, vague about what these resources are.<sup>34</sup> They do explain that, in post-industrial capitalism, societies must provide “a human right to a social safety net that guarantees a substantial basket of resources.”<sup>35</sup> To this end, they identify environmental health<sup>36</sup> and education,<sup>37</sup> two mainstays of

27. Alexander & Peñalver, *supra* note 16, at 135.

28. *Id.*

29. *Id.* at 137–38.

30. *Id.* at 138.

31. For Alexander and Peñalver, the focus is on any kind of community or, in their formulation, on “social structures.” *See, e.g., id.* at 142. For others similarly stressing human flourishing within human community, the focus is on the existence of individuals within nation-states. *See, e.g.,* NUSSBAUM, *supra* note 17, at 113–22.

32. Alexander & Peñalver, *supra* note 16, at 146.

33. *Id.* at 146.

34. *Id.*

35. *Id.* at 147.

36. *Id.* However, they do not indicate whether a healthy environment also presupposes the need for health care protection. Indeed, the formulation is rather ambiguous. Speaking

such lists.<sup>38</sup> As their reflections indicate, some degree of state intervention in resource distribution will be required so that the haves are compelled to share some resources with those that have far less.<sup>39</sup>

Curiously, Alexander and Peñalver's basic resource basket list does not include decent housing,<sup>40</sup> although surely the ability to live, physically, in dignity and in safe and clean conditions, is an essential part of any effort to create the minimum conditions necessary for human flourishing. In Latin America and the Caribbean, long the world's most income-unequal region<sup>41</sup> and one therefore cursed with gross deficits in decent shelter and disproportional housing inequality,<sup>42</sup> housing must figure at the top of the list of the basic needs required in order to provide the conditions for human flourishing. The housing example will therefore serve to demonstrate the ways in which the social function of property can be directed to promote human flourishing.

### B. Housing, Human Flourishing and Property's Social Function

Housing provision implicates at least three of Alexander and Peñalver's four capabilities. That is, housing is needed for security (and arguably good health), thus falling within the reach of their category of "subsidiary goods." In addition, where one lives usually constitutes an integral part of one's identity. Identity is, as they explain in the language cited above, central to their idea of what constitutes freedom, and so housing helps satisfy the second capability category.<sup>43</sup> Furthermore, housing is typically

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of an arguable state obligation to foster human flourishing, they write, "Similar arguments, founded in the protection of human health or the health of future generations, can justify the state's demand that individuals use their property in ways that do not permanently harm the environment." *Id.*

37. *Id.*; see also SEN, *supra* note 20, at 128–29 (discussing the importance of education for the individual and larger public).

38. See NUSSBAUM, *supra* note 17, at 152 ("At the heart of the Capabilities Approach since its inception has been the importance of education."). Even Sen, who routinely avoids engaging in discussions of substantive capabilities, preferring to leave this to group and individual choice, appears to acknowledge the importance of education if individuals are to develop their capacities. See SEN, *supra* note 17, at 112.

39. Alexander & Peñalver, *supra* note 16, at 147. Writing of education provision, they write: "Almost by definition, such an entitlement will demand that the state implement a degree of economic redistribution and regulation, either in cash or in kind." *Id.*

40. Implicitly, Alexander and Peñalver recognize the importance of housing with their concluding discussion of a South African land and housing rights controversy. *Id.* at 154–60.

41. INTER-AM. DEV. BANK, FACING UP TO INEQUALITY IN LATIN AMERICA: ECONOMICS AND SOCIAL PROGRESS IN LATIN AMERICA, 1998–1999 REPORT 1 (1998), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35129835> (observing that "[o]n average, the countries of the region suffer from the greatest income inequality in the world").

42. See, e.g., Edésio Fernandes & María Mercedes Maldonado Copello, *Law and Land Policy in Latin America: Shifting Paradigms and Possibilities for Action*, LAND LINES (Lincoln Inst. of Land Pol'y, Cambridge, Mass.), July 2009, at 16 (citing the Brazilian example where "the housing deficit has been estimated as 7.9 million units and people live in some 12 million precarious constructions, another 5.5 million units are empty or underutilized. An estimated 20 to 25 percent of serviced land is vacant in some cities").

43. Nomi Maya Stolzenberg, *Facts on the Ground, in* PROPERTY AND COMMUNITY 107, 123–24 (Gregory S. Alexander & Eduardo Peñalver eds., 2010) (reflecting on psychological and emotional attachments to place).

much more than having a place in which to sleep and conduct one's domestic activities. The places where we live play a central role in determining the kinds of communities of which we are a part and become the places in which we form important social and communal bonds, therefore implicating the last of the four capabilities that they conclude a well-functioning community should seek to develop for its members.

Similarly, if one consults a more ambitious (and controversial) capabilities list, like Nussbaum's, decent housing would clearly figure as an item required for persons to flourish. For instance, in her ten-point list of what she calls the "Central Capabilities," Nussbaum specifically mentions "adequate shelter" as required for the capability of bodily health.<sup>44</sup> In addition, recreational opportunities (what she calls "play") form part of her Central Capabilities.<sup>45</sup> Naturally enough, recreational opportunities, at least on a daily basis, are most commonly enjoyed in the company of friends and family and at locations close to one's home. Finally, and perhaps most pointedly, under the Central Capability "control over one's environment," Nussbaum explicitly refers to control over the "material" aspects of one's environment, so as to be able "to hold property (both land and moveable goods), and having property rights on an equal basis with others"<sup>46</sup> as concomitant features of "a dignified and minimally flourishing life" that, in her view, every government has an obligation to provide to its citizen members.<sup>47</sup>

In other words, it is hard to imagine that decent housing and related property rights cannot form a central part of any capability list conceived to promote human flourishing. By extension, any effort to provide content to the social function of property must focus—if not, indeed, begin—with the provision of decent housing and housing choice.

### *C. The Continuing Challenge of Housing Provision and Urban Reforms in Latin America*

In Latin America and the Caribbean, the struggle to provide decent housing and housing choice as part of the resource basket required to secure the conditions for human flourishing has deep historical roots and complicated causes, not least legal ones.<sup>48</sup> This is true even though the social function of property has been a part of the constitutional order in most countries in the region since the 1930s, at least "as a nominal principle."<sup>49</sup> Indeed, not only is the social function of property recognized in many of the region's legal orders, but also many constitutions in the region guarantee the right to housing specifically.<sup>50</sup> This suggests that the

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44. NUSSBAUM, *supra* note 17, at 33.

45. *Id.* at 34.

46. *Id.*

47. *Id.* at 32–33.

48. Fernandes & Maldonado, *supra* note 42, at 14–16.

49. *Id.* at 16.

50. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 23 (Braz.) (Official Senate translation); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 51 (Anna I. Vellvé

weakness is not a lack of legal tools. What is missing is respect for and application of the legal tools that would make possible the realization of these rights. Again, the reasons for this are complicated and vary considerably by country and national tradition. In brief, however, it may be said that concurrent private property rights and notions supporting the control over property by private individuals—also affirmed in national legal instruments—usually prevail.<sup>51</sup>

A question that therefore arises is how to correct this imbalance and to strengthen the respect for and implementation of the legal tools that support property's social function. To begin, there are two basic considerations. The first concerns the needs of the millions who lack decent housing and are driven to seek shelter in informal or semi formal settlements. The second concerns providing incentives and mechanisms for the state to support the inclusion of those excluded from decent formal housing markets.

With respect to the first concern, that of the under- and ill-housed millions throughout the region, a clear part of the answer is that there must be more effective democratic decision making. "Democratic" in this context does not refer only (or even primarily) to representative democracy<sup>52</sup> but to a more robust participatory process of a highly decentralized (and therefore by necessity more inclusive) form. In particular, the goal of any such effort should focus on "[t]he formulation and materialization of a new political contract of social citizenship, recognizing and legalizing the rights of citizens to participate fully and actively in political and civil society"<sup>53</sup> This will not be easy. It is a truism of Latin American studies that the history of the region has been marked, as in much of the post-colonial world, by entrenched clientelist patterns and practices.<sup>54</sup> No matter how much the clients far down on the receiving end

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Torras & Jefri J. Ruchti trans., 1991); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 19, § 13 (Org. of Am. States trans., 1981); CONSTITUCIÓN POLÍTICA DEL PERÚ art. 195 (Official translation). In Peru, the Constitution does not per se guarantee the right to housing but asserts the government's ability to regulate and develop services regarding housing.

51. See Edésio Fernandes, *Constructing the "Right to the City" in Brazil*, 16 SOC. & LEGAL STUD. 201, 204 (2007).

52. In some countries in the region, for example, voting is constitutionally mandated or provided for. See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 14(1) (Braz.) (Official Senate translation); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 93 (Official translation). As a result, these democracies are arguably more truly representative than in a country like the U.S., with famously low voter turnouts. This does not automatically translate, however, into civic engagement.

53. Fernandes, *supra* note 51, at 206 (focusing on the Brazilian case specifically).

54. See, e.g., JUAN BOSCH, TRUJILLO: CAUSAS DE UNA TIRANÍA SIN EJEMPLO (2003) (describing the essential caste nature of Dominican society); THOMAS E. SKIDMORE, BRAZIL: FIVE CENTURIES OF CHANGE 25 (1999) (explaining that in Brazil, "[t]he Portuguese, like the Spanish, appointed as administrators members of the nobility, who sought through their offices to enrich their personal coffers and their social status. . . . For this elite, as for others, family links were crucial in gaining favors from state power."); HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM 190 (1989) ("[T]he redistributive tradition has created in Peru a society where almost all the country's vital forces have

of these existing patterns of social and political behavior may resent their status as have-nots,<sup>55</sup> the reality is that they have defined patterns of behavior that are not easily broken. That is, especially for those who traditionally have been marginalized in terms of social and political voice and opportunity, the dominant expectation is that someone higher up will provide or solve the problem.<sup>56</sup> Thus, the creation of a “new political contract of social citizenship” will require concerted efforts to develop citizenship capacities widely and deeply throughout the region’s population. Although still incipient, this is beginning to happen, and in such a way as to strengthen the widespread recognition of and respect for property’s social function. Before turning to those examples, however, it is useful to sketch out some of the lineaments of a new conception of social citizenship, particularly as they relate to the consolidation of the notion of property’s social function.

Consider again the example of housing provision. What might it mean to develop democratic processes (the creation of this new compact of “social citizenship”) in order to broaden the discussion and expand popular participation in decision making about the rules of land use and availability of housing choice?<sup>57</sup> Fernandes, writing about resolution of the urban question in general (which includes housing provision and choice) argues that there are two central principles that, at a minimum, must guide any answer to this question: “The most important one is that of the socio-environmental function of property and of the city, which is an expression of the broader principle according to which the regulation of urban development is a public matter that cannot be reduced to either individual or state interests.”<sup>58</sup> For purposes of public participation, democratic choice and provision of decent housing, Fernandes’s second “structural principle of this new legal-urban order” is arguably even more important.<sup>59</sup> He posits that this structural principle is “the indivisibility of urban law and urban management,” a principle, he maintains, that “has been expressed through three integrated processes of legal-political reforms.”<sup>60</sup> They can be summed up as follows: (1) the renewal of representative democracy, with robust democratic participation; (2) decentralization of decision

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organized in political and economic groups, one of whose main aims is to influence government in order to obtain a redistribution which favors them or their members.”).

55. See JOSEPH PAGE, *THE BRAZILIANS* 177–200 (1999). As Sen notes, a consequence of a situation of extremes with haves and have-nots is that such inequality may also foster corruption. See SEN, *supra* note 20, at 276 (observing that “the temptation to be corrupt is strongest when the officers have a lot of power but are themselves relatively poor”).

56. See, e.g., INSTITUTO INTERUNIVERSITARIO DE IBEROAMÉRICA, *PERFIL DE GOBERNABILIDAD DE GUATEMALA* 124–25 (2005) (explaining that because of the absence of a strong central state, indigenous and peasant communities had to build local dependency networks).

57. In fact, Henri Lefebvre, who is first credited with articulating the “right to the city,” viewed the right to habitation and the right to participation as indivisible. See Fernandes, *supra* note 51, at 217.

58. *Id.* at 211.

59. *Id.*

60. *Id.*

making and strengthened local government; and (3) the creation of a new legal administrative framework that will mediate between various sectors, including “public-private partnerships and other forms of relations between the state and the community and voluntary sectors.”<sup>61</sup>

These process changes are ambitious and important and point to the centrality of law in resolving the region’s housing and urban issues. That said, there is a preliminary stage of the legal-political process that merits addressing, and with equal urgency. That preliminary stage is what might be called “citizen development.” For some, the phrase might have a slightly Orwellian ring.<sup>62</sup> But the phrase contemplates exactly the opposite; it imagines implementation of methods to strengthen citizens’ sense of themselves as agents in relation to the political society of which they are a part. To be sure, this effort also requires the provision of the conditions necessary to develop other capacities—through education and job choice, for example.

Citizen development can be thought of as a strategy that concentrates first on building programs at the base of the socioeconomic pyramid through popular education and information campaigns and then using the results of those efforts to inform and articulate laws, administrative regulations, and public policies designed to secure popular needs. What is being proposed here is, in other words, a strategy that begins by working through community-focused citizenship development and then proceeds to use the information obtained through such community-based programs to inform and shape law and regulation. In fact, there exist important examples of such community-driven efforts from the region, most notably the participatory budgeting processes that began in the southern Brazilian city of Porto Alegre in 1986 and have been copied throughout South America and internationally since then.<sup>63</sup> This is not the place to discuss participatory budgeting in detail. Suffice it to say that for purposes of this discussion, the notable features of such processes are three: (1) decisions

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61. *Id.*

62. See GEORGE ORWELL, *ANIMAL FARM* 24 (1945) (“All that year the animals worked like slaves. But they were happy in their work; they grudged no effort or sacrifice, well aware that everything that they did was for the benefit of themselves and those of their kind who would come after them, and not for a pack of idle, thieving human beings.”).

63. See, e.g., Leonardo Avritzer, *Modes of Democratic Deliberation: Participatory Budgeting in Brazil*, in *DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON* 377, 386–96 (Boaventura de Sousa Santos ed., 2007) (reporting on the genesis of participatory budgeting in southern Brazil); Patrick Heller & T.M. Thomas Isaac, *The Politics of Institutional Design of Participatory Democracy: Lessons from Kerala, India*, in *DEMOCRATIZING DEMOCRACY*, *supra*, at 405, 422–30 (describing the participatory budgeting process in a non-Brazilian context); Boaventura de Sousa Santos, *Participatory Budgeting in Porto Alegre: Toward a Redistributive Democracy*, in *DEMOCRATIZING DEMOCRACY*, *supra*, at 307, 307 (listing South American, European, Canadian, and Indian examples where participatory budgeting has taken root); see also Fernandes, *supra* note 51, at 212 (“Throughout the 1990s, several Brazilian municipalities have started to effect the constitutional provisions and principles in their own redefined legal-urban orders, and Brazil became a laboratory of sorts for new strategies of local governance and direct democracy; in particular, the ground-breaking experience of the participatory budgeting process was introduced in some cities.”).

begin at the most local level possible (“local” in this context referring to self-definition of that term at the neighborhood and community level); (2) non-integration into formal legal processes and frameworks, to allow for citizen independence;<sup>64</sup> and (3) aggressive publicity of such efforts and initiatives to recruit popular involvement. In other words, in addition to building the legal and administrative structures to address the urban question, and particularly to solve housing deficits, robust initiatives must be implemented in less formal ways so that individuals understand that they have legal social status, or the capability, to determine their destiny, specifically with respect to housing choice.

Sadly, there are too many examples in the region of the opposite. In Rio de Janeiro, for example, desperation about the lack of housing choice has led people literally to invade publicly owned buildings and refuse to leave until the state recognizes their housing needs.<sup>65</sup> Similar situations can be identified throughout the region, in Mexico,<sup>66</sup> Bolivia,<sup>67</sup> Peru,<sup>68</sup> and Argentina.<sup>69</sup> Although in the case of Rio de Janeiro, at least, the housing rights movement has had limited success,<sup>70</sup> this kind of adversarial process

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64. Sousa Santos describes the robust debate in Porto Alegre about whether to formalize the status of participatory budgeting after twenty years of its operation and the ultimate rejection of the idea on the grounds that to do so would imperil the independence of the process. See Sousa Santos, *supra* note 63, at 355–57.

65. This is the so-called “*Movimento Nacional de Luta pela Moradia*,” or National Movement in the Fight for Housing. “*Moradia*” is usually translated into English as “housing,” hence the usual characterization of the movement as a housing rights movement. The movement broadly copies the strategies and tactics of the much better known Brazilian Landless Workers’ Movement. See MOVIMENTO DOS TRABALHADORES RURAIS SEM TERRA, <http://www.mst.org.br/> (last visited Nov. 16, 2011). In fact, the translation of “*moradia*” as “housing” is a highly imperfect one because in Portuguese the word connotes more than mere habitation but also the basket of social services, for example roads, utilities, access to recreation and other services, that typically accompany planned communities. For a record of the activities and manifestos of two of the largest chapters in Brazil’s two largest cities, see MOVIMENTO NACIONAL DE LUTA PELA MORADIA, <http://mnlmrj.blogspot.com/> (last visited Nov. 16, 2011) (Rio de Janeiro) and UNIÃO DOS MOVIMENTOS DE MORADI, <http://www.sp.unmp.org.br/> (last visited Nov. 16, 2011) (São Paulo).

66. See generally Adrian Guillermo Aguilar, *Peri-urbanization, Illegal Settlements and Environmental Impact in Mexico City*, 25 CITIES 133 (2008) (concluding that the failure of effective government is a major cause in expansion of informal settlements in Mexico City).

67. Ida Hansson & Anna Olausson, *Spatial Planning for Cooperative Housing: A Case Study in Maria Auxiliadora, Cochabamba, Bolivia*, PROGRAMME OF SPATIAL PLANNING, BLEKINGE INST. OF TECH. 14 (2004), [http://www.bth.se/fou/cuppsats.nsf/all/2a9c1dfb58b9024dc1256f0200538de5/\\$file/introduction.pdf](http://www.bth.se/fou/cuppsats.nsf/all/2a9c1dfb58b9024dc1256f0200538de5/$file/introduction.pdf) (describing land use conflicts in Bolivia partially as a result of housing deficit).

68. See generally Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARV. INT’L L.J. 433 (2003) (evaluating the Peruvian situation).

69. See Alexei Barrionuevo, *Conflict over Squatters’ Encampments Is a Test for Argentina’s President*, N.Y. TIMES, Dec. 27, 2010, at A4; *Okupas y “contrakultura” en la Argentina de 2001*, <http://sites.google.com/site/lapaginadeismaelrimoldi/argentina-2001/okupas-y-la-contrakultura> (last visited Nov. 16, 2011) (describing an Argentine initiative comparable to the *Movimento pela Moradia* in Brazil).

70. One instance of success occurred in the case of a former office building next to the City Council (*Câmara Municipal de Vereadores*), which is now being remodeled into condominiums for the occupiers after a two-year standoff. Some of this story is recounted on the National Movement’s blog. See MOVIMENTA NACIONAL DE LUTA PELA MORADIA, <http://mnlmrj.blogspot.com/search?updated-min=2010-01-01T00%3A00%3A00-02%3A00>

is clearly not ideal, both because such self help invites violence on all sides, and because it evidently does not constitute an ordered, holistic solution to housing and urban problems. More deliberate, widely replicable solutions directed to assuring a dignified life for all citizens are needed. Moreover, such solutions should be implementable with respect for the rule of law. The proposal is to develop funded programs aimed to inform and educate citizens about what it means to be a citizen. Novel thinking is needed here: civics lessons for adults are unlikely to fit the bill. There is nothing wrong with night and weekend classes of continuing education, but that is not what is proposed here. Dynamic, problem-focused processes like participatory budgeting are promising in part because they educate while at the same time involving people in the exercise of capabilities like their identity, practical reason, and affiliations.<sup>71</sup>

Examples exist in the region. Importantly, they are both state and privately sponsored, and in the private sphere both by communities and by private interests expending their own funds for social improvement. Consider a couple of Colombian examples. In 2007, the Colombian Constitutional Court overturned the national forestry law on the grounds that it did not provide adequate opportunities for indigenous and Afro-Colombians dependent on forests to provide their views on forest management prior to the granting of concessions to logging interests.<sup>72</sup> This example is promising because it makes law that paves the way for the development of participatory processes in resource management. Crucially, too, such an example demonstrates that participation can come from those non-elites traditionally excluded from decisions of great political and social consequence. Although the factual context is different from the housing example considered here, the example could easily be applied in the housing and urban reform context, where decisions have historically been made with little effort to understand the causes and reality of informal settlements and the people who populate them.<sup>73</sup>

To take a second example, consider two instances from urban Colombia, one better established and one less so. Medellín, Colombia's second city and one long plagued by high levels of physical violence and public

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&updated-max=2011-01-01T00%3A00%3A00-02%3A00&max-results=7 (last visited Nov. 16, 2011). *But see* Jornal a Nova Democracia, *Transcarioca: Moradores da rua Domingos Lopes resistem à remoção*, YOUTUBE (May 25, 2011), <http://www.youtube.com/watch?v=b6VpG2Qx97s> (documenting a fight between low-income residents in Rio de Janeiro and the mayor's office, claiming that residents are being removed for highway construction without notice or indemnity in anticipation of the 2016 Olympic Games).

71. *See supra* notes 25–30 and accompanying text.

72. Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2008, M.P.: Rodrigo Escobar Gil, Sentencia C-030/08 (Colom.); *see also* JUSTICIA COLECTIVA, MEDIO AMBIENTE Y DEMOCRACIA PARTICIPATIVA (Daniel Bonilla Maldonado ed., 2010) (essay on and documents from the case); Colin Crawford, *Environmental Benefits and the Notion of Positive Environmental Justice*, 32 U. PA. J. INT'L L. 911, 917–28 (2011) (situating the case in environmental justice debates).

73. EDÉSIO FERNANDES, *Regularization of Informal Settlements in Latin America*, LINCOLN INST. OF LAND POL'Y 5, 18–19 (2011), [https://www.lincolninst.edu/pubs/dl/1906\\_1225\\_Regularization%20PFR%20Final.pdf](https://www.lincolninst.edu/pubs/dl/1906_1225_Regularization%20PFR%20Final.pdf).



insecurity because of the depredations of its notorious drug cartel in the 1970s and 1980s,<sup>74</sup> has transformed itself into a regional model of a megacity able to tackle serious urban infrastructure and social inequality problems, with innovations in transportation,<sup>75</sup> public education,<sup>76</sup> and public recreation and leisure initiatives.<sup>77</sup> Notably for purposes of this discussion, these efforts were achieved by atypical multilateral collaborations between private investors, both national and foreign, as well as among public entities and representatives from civil society.<sup>78</sup> In Bogotá, in one of the poorest sectors of the sprawling Andean capital, efforts are underway to recognize the rights of those who had occupied private land to stay, years after they established a de facto parallel social and political structure on private land they occupied in the absence of other possibilities within their means.<sup>79</sup>

Similar, and similarly varied, efforts can be identified in Brazil. In the state of São Paulo, the Secretariat for Justice and Citizenship Defense has developed, with extensive community involvement, a wide network of integrated social and economic service programs that understand citizenship in the widest possible context.<sup>80</sup> This can rightly be viewed as an effort to develop Central Capacities, the programmatic recognition of Nussbaum's view that the capabilities approach insists that political and civil rights have social and economic preconditions (unlike traditional human rights distinctions between first and second generation rights).<sup>81</sup> These activities include programs designed in an integrated fashion to address urban

74. This violence is most closely associated with the rule of drug kingpin Juan Pablo Escobar. See generally María Fernanda Lander, *La Voz Impenitente de la "Sicairesca" Colombiana*, 73 REVISTA IBEROAMERICANA 165 (2007) (analyzing the ways in which Escobar and his cartel shaped the life and culture of the city and its eponymous cartel).

75. Most notable is the integration of the city subway system, which now connects with the Metrocable, which in turn provides aerial transportation to slum communities in the hills. See METROCABLE, <http://www.medellininfo.com/metro/metrocable.html> (last visited Nov. 16, 2011); see also Fernandes & Maldonado, *supra* note 42, at 17; Kenneth Fletcher, *Colombia Dispatch 9: The Story of Medellín*, SMITHSONIAN.COM (Oct. 29, 2008), <http://www.smithsonianmag.com/travel/Colombia-Dispatch-9-The-Story-of-Medellin.html> (describing community development and public space intervention efforts); Travis Mannon, *Medellín Receives International Award for Public Transportation*, COLOMBIA REP. (July 1, 2011, 1:31 PM), <http://colombiareports.com/travel-in-colombia/medellin/17360-medellin-receives-international-award-for-public-transportation.html>.

76. Kenneth Fletcher, *Colombia Dispatch 10: Education for Demobilized Forces*, SMITHSONIAN.COM (Oct. 29, 2008), <http://www.smithsonianmag.com/travel/Colombia-Dispatch-10-Education-for-Demobilized-Forces.html>; *Medellín, The Most Educated*, MEDELLÍN: PORTAL OF THE CITY (Apr. 12, 2010), <http://www.medellin.gov.co/irj/portal/medellinIngles?NavigationTarget=navurl://bd795fda022db5f0b639a8a1c39fa847>.

77. See, e.g., INSTITUTO PARA EL DEPORTE Y LA RECREACIÓN EN MEDELLÍN, Inder MEDELLÍN, <http://inder.gov.co/> (last visited Nov. 16, 2011). See generally Francisco Iñigo P. Garde, *Bridging Development—The Medellín Experience*, THOLONS (2011), [http://www.tholons.com/nl\\_pdf/Tholons\\_Medellin\\_Whitepaper2011.pdf](http://www.tholons.com/nl_pdf/Tholons_Medellin_Whitepaper2011.pdf).

78. *Id.* at 9, 14.

79. Daniel Bonilla Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213, 232–33 (2009).

80. GOVERNO DO ESTADO DE SÃO PAULO, SECRETARIA DA JUSTIÇA E DA DEFESA DA CIDADANIA, [http://www.justica.sp.gov.br/novo\\_site/](http://www.justica.sp.gov.br/novo_site/) (last visited Nov. 16, 2011).

81. NUSSBAUM, *supra* note 17, at 67.

problems such as homelessness<sup>82</sup> and inadequate housing.<sup>83</sup> In this context, by “integrated” I mean two things, namely, assurance that the programs are designed (1) to be participatory for the affected populations from the start of the program design process, and (2) designing programs in such a way as to address housing or other social problems not as distinct from other challenges facing the community but as issues that need to be addressed along with education, health, hygiene, and related reforms.

In Rio de Janeiro, the Cantagalo Project<sup>84</sup> represents the first formal effort to give land titles to slum dwellers in one of the oldest *favelas* (the Brazilian Portuguese term for shantytowns) in Brazil’s second largest city. The effort, which required both geospatial mapping and changes in state law to allow the transfer of title, brought together what in that often-polarized city is a remarkable coalition, including elite private law firms donating their work pro bono,<sup>85</sup> resident associations from the slum and the adjacent “asphalted” neighborhood of Ipanema (one of Brazil’s most highly prized addresses), and the police.<sup>86</sup> Once again, what is notable is that the effort proceeds on several fronts, including a state- and city-led effort to reduce drug related violence, expand urban infrastructure services, and improve social services, while also upgrading the range and quality of housing.

Elsewhere in Central America, one can point to land management initiatives that, from different directions, demonstrate the possibility of conceiving and implementing efforts that make individuals better citizens by involving them in processes that affect their lives both socially and economically. The key is that these examples are becoming bridges that strengthen the relationship among citizen, community, and society. One such celebrated example is the generations-old and indigenous-led forestry management regime in Totonicapán, Guatemala.<sup>87</sup> The important feature of the Totonicapán example, in the context of this analysis, is that the forest

82. See, e.g., Marta Barros, *Políticas públicas para moradores de rua é tema de debate na Secretaria da Justiça* [Public Policies for Homeless People Is the Theme of Debate at the Secretariat of Justice], GOVERNO DO ESTADO DE SÃO PAULO, [http://www.justica.sp.gov.br/novo\\_site/Noticia.asp?Noticia=4495](http://www.justica.sp.gov.br/novo_site/Noticia.asp?Noticia=4495) (last visited Nov. 16, 2011).

83. See, e.g., Anésia J Mirabili, *Secretaria da Justiça promove ações do Programa Minha Terra em Sorocaba e Itu* [Justice Secretariat Promotes Actions to Regularize Illegal Settlements in My Land Program], [http://www.justica.sp.gov.br/novo\\_site/Noticia.asp?Noticia=4468](http://www.justica.sp.gov.br/novo_site/Noticia.asp?Noticia=4468) (last visited Nov. 16, 2011).

84. Adam Smith, *The Cantagalo Project: Judicial and Administrative Land Titling in the Favelas of Rio de Janeiro* (June 8, 2011) (unpublished manuscript) (on file with author).

85. To say the least, this is uncommon in Brazil.

86. See Smith, *supra* note 84, at 29.

87. See Krister P. Andersson et al., *The Politics of Decentralized Natural Resource Governance*, 37 PS: POL. SCI. & POL. 421, 423 (2004) (generally evaluating Latin American decentralized natural resource control); Romeo Tiu López, *Mayan Spirituality and Lands in Guatemala*, 21 ARIZ. J. INT’L & COMP. L. 223, 237–38 (2004) (describing the communal lands in Totonicapán, including discussion of the communal forests); Hannah Wittman & Charles Geisler, *Negotiating Locality: Decentralization & Communal Forest Management in the Guatemalan Highlands*, 64 HUM. ORG. 62, 67–68 (2005) (examining Totonicapán); see also Mark Camp, *Whose Woods These Are*, 32 CULTURAL SURVIVAL, no. 4, Winter 2008, available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/guatemala/whose-woods-these-are> (reporting activism in support of Totonicapán forests).

management practices were not imposed from above, but developed entirely from within the indigenous communities.

That is not to say that government-led efforts cannot also be effective at bringing in a broad spectrum of stakeholders. A strong example of one such initiative is the Costa Rican National Forestry Fund, which was created by Costa Rican law to capture ecosystem services and thus to protect the country's forest and biodiversity wealth. A notable feature of the Costa Rican example (FONAFIO in its Spanish acronym) is that its market-based mechanism, by which persons or groups buy Environmental Service Certificates for forest and other natural resource protection, is not only available to all, but also has a demonstrated record of participation by diverse sectors, groups, and individuals.<sup>88</sup> More important still, these Costa Rican government initiatives have prompted the implementation of celebrated efforts undertaken by civil society interests that clearly reflect the notion of property's social function. For example, the Foundation for the Development of the Central Volcanic Mountain Range (FUNDECOR in its Spanish acronym<sup>89</sup>) represents a robust expression of the socio-environmental ideas that can be observed with increasing frequency in the region, and reflects an understanding of property's social function.

FUNDECOR works with the government as follows: FONAFIO provides incentive payment schemes, not subsidies, for efforts to protect the nation's forest riches sustainably. The fact that they are incentives that require repayment upon completion of work, instead of subsidies, is of fundamental importance. In this way, the parties seek to avoid any kind of dependency relation typical of much traditional development work.<sup>90</sup> Using the limited government incentive payments and other minimal resources raised by FUNDECOR, the civil society entity works to preserve forests both on public and private lands.<sup>91</sup> The fact that FUNDECOR works with government funding on private land is of special interest because most of its clients are small farmers eking out a modest living within the forests. To be exact, FUNDECOR works with 594 client families with the aim of assuring that tropical forests remain while continuing to be farmed.<sup>92</sup> This unquestionably is a delicate balance—to permit sustainable tree harvesting in the forest while also recognizing the longstanding farming uses within forests facing other threats (urbanization, development projects) at their borders. In this way, however, FUNDECOR's projects constitute a fine example of socio-environmental ideas because they recognize the human part of the preservation equation. In addition, a notable feature of FUNDECOR's efforts is that they

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88. See FONDO NACIONAL DE FINANCIAMIENTO FORESTAL, [http://www.fonafifo.com/paginas\\_espanol/invierta\\_bosques/e\\_ib\\_que\\_es\\_csa.htm](http://www.fonafifo.com/paginas_espanol/invierta_bosques/e_ib_que_es_csa.htm) (last visited Nov. 16, 2011).

89. See FUNDECOR: HACIENDA SOSTENIBLE EL DESARROLLO, <http://www.fundecortechnology.org/fundecor/Inicio.html> (last visited Nov. 16, 2011).

90. See Pedro González, FUNDECOR Dir. of Operations, Address at FUNDECOR's Headquarters, Puerto Viejo de Sarapiquí (Nov. 16, 2011) (lecture notes on file with author).

91. See *Áreas de Acción*, FUNDECOR, [http://www.fundecortechnology.org/fundecor/Operaciones\\_Sarapiqui%C3%AD.html](http://www.fundecortechnology.org/fundecor/Operaciones_Sarapiqui%C3%AD.html) (last visited Nov. 16, 2011).

92. See *id.*

implicitly constitute a consensus between central governmental interests, more highly educated interests in civil society and modest agricultural families working towards the same goal, one that protects livelihoods but also long-term environmental resources and services. As with so many of the emerging expressions in the region of a recognition of property's social function, these integrated efforts demand attention because they demonstrate a promising break with historical patterns of oligarchic control of land and resources in the service of naked self-interest.<sup>93</sup>

To be sure, there are ample criticisms of each of the efforts mentioned above. For instance, in the case of the land regularization examples, concerns of gentrification are always present.<sup>94</sup> In the case of forest management, one always needs to be clear that those speaking for the local community are indeed committed members of that community and not shells for corporate interests. But these concerns are not limited to strengthening the institutional structures and mechanisms needed to guarantee property's social functioning. Rather, they are issues of transparency and neutrality typical in any regulatory context.<sup>95</sup>

However, citizen development education on the proper dimensions of the social function of property need not focus merely on the traditional have-nots, on those long excluded from a sociopolitical compact that would enable them to secure the conditions necessary for realizing basic capabilities, beginning with decent and secure housing. In addition, the private sector and civil society groups need to be positioned to acknowledge the *collective* interests at stake in providing the conditions necessary for *all* citizens to develop their capacities, and not for reasons of noblesse oblige. On the contrary, the citizen development argued for here must be broadly based, recognizing that clientelist sociopolitical relations are unsustainable.

The clientelist patterns long dominant in the region have created bilateral, vertical dependencies instead of multilateral social, political, and economic relations.<sup>96</sup> To move away from that model, initiatives are required, both public and private, to reduce dependency and encourage creative innovation for social inclusion. The Cantagalo Project described above<sup>97</sup> is striking for its integration of private interests, from the elite law firms that worked on the legal details to establish ownership rights, and conducted land transfers and titles, to the advocacy efforts of a well-heeled residents' association who came to understand that their members' personal safety (not to mention their real estate values) depended upon greater stability in housing for

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93. See *infra* note 195.

94. See, e.g., FERNANDES, *supra* note 73, at 41–42. See generally GENTRIFICATION IN A GLOBAL CONTEXT: THE NEW URBAN COLONIALISM (Rowland Atkinson & Gary Bridge eds., 2005).

95. See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 454–79 (3d ed. 1999).

96. See, e.g., Luis Reygadas, *Latin America: Persistent Inequality and Recent Transformations*, in LATIN AMERICA AFTER NEOLIBERALISM: TURNING THE TIDE IN THE 21ST CENTURY? 120, 131 (Eric Hershberg & Fred Rosen eds., 2006); see also Avritzer, *supra* note 63, at 383 (noting deep Brazilian tradition of clientelism).

97. See *supra* notes 84–86 and accompanying text.

adjoining slum dwellers.<sup>98</sup> Whatever one may think of the private property ambitions at the heart of the Cantagalo Project, it at least represents a model to be copied in which privileged members of the private sector agreed to devote time and effort to resolve social problems (and in that instance, urban problems) at no or reduced fees, recognizing mutual benefits across class and economic lines.

Throughout the region, civil society requires strengthening in this and similar ways. This can come, for example, by creating tax incentives for donations to civil society organizations and by otherwise encouraging efforts for non-governmental entities to grow and thrive.

## II. LATIN AMERICAN AND CARIBBEAN CASE STUDIES: THE GROWING REGIONAL AWARENESS OF PROPERTY'S SOCIAL FUNCTION

A common complaint from industry and sometimes government about much social, environmental and urban regulation is that it will raise costs without necessarily delivering a corresponding benefit.<sup>99</sup> This is true, at least in the short term and if benefits are defined merely in terms of financial reward. An equally common response to this complaint, however, is that such claims are shortsighted because a failure to enact and implement comprehensive land use and resource laws, regulations, and policies allows land and environmental problems to be postponed for another day, increasing the long term cost of correcting problems, to say nothing of their consequences for human and environmental health.<sup>100</sup> Each of the examples discussed below seeks to defend the latter view and in the process, presents an opportunity to invoke property's social function. As will be shown, the case becomes stronger when made in terms of the goal of human flourishing.

The discussion that follows will consider multiple disputes from across Latin America and the Caribbean. By design, they consider not only concrete expressions of the notion of the social function of real property, but also implicate property in some of its other manifestations: personal, intellectual, bodily, and marital, for example. In this way, I intend to emphasize the breadth of the notion of property's social function. At the same time, the discussion is not meant to be an exhaustive consideration of the different cases, which, as the examples below illustrate, are often hotly debated within their countries and sometimes beyond their borders. Instead, the aim is to use the cases to explore the myriad ways in which entities throughout the region are working, sometimes expressly and often not, to promote the goal of human flourishing deeply within and broadly across societies. Moreover, a goal here is to show how many of these

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98. See Iñez Barreto, Representative of the Projeto de Segurança de Ipanema, Address at Fundação Getúlio Vargas—Rio de Janeiro (FGV Direito-Rio) (July 7, 2011) (lecture notes on file with author).

99. See, e.g., JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 16 (3d ed. 2010).

100. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8–9 (2004); SEN, *supra* note 20, at 128.

efforts do so in a way that reifies a robust notion of property's social function.

The examples fall into three different categories. The first group of examples reflects the most promising steps toward deeper and wider recognition throughout the Latin American and Caribbean region of property's social function, because they involve robust debates within countries about the extent of individuals' rights as citizens to secure some aspect of their own flourishing. Each of the examples in this group involves, moreover, popular debate about *legal* rights that implicate property's social function. At their best and most promising, most of these examples go beyond the stage of mere discussion and demonstrate actual attempts to address social aspects of property, with broad stakeholder involvement in changing the life conditions of the poor, poorer, and often politically marginalized majority through the assertion of different kinds of property rights. Therefore, in support of my central argument, I emphasize that the examples were chosen because I believe they reflect growing popular recognition in the region that property rights and their attendant obligations exist not just to benefit social and economic elites, and that law plays a central role in securing this formulation of property's social function.

The second group of examples involves both litigation and statutory changes brought to assert rights, typically constitutional rights. These examples, largely Colombian, on the one hand reflect limited public involvement since such litigation is typically undertaken by economically privileged, educated elites.<sup>101</sup> At the same time, they also demonstrate the mobilization of civil society in that they reveal inclusive efforts on the part of such elites to extend themselves and work with a broad base of groups throughout civil society. In light of the region's top-down history of social control, such developments must be viewed positively as they indicate a growing recognition that property's social function relates not only to marginalized groups but also serves to benefit the social community generally.

Finally, the third group concerns law and policy decisions and debates at the highest levels of society that demonstrate a growing rejection of clientelist domination in the social-political situation. Although these debates largely occur between elites and are thus in some sense the least inclusive set of cases discussed here, they are nonetheless notable because they demonstrate the possibility that property's social function can penetrate even the region's elite stratum.

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101. See, e.g., David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1114–15 (2011) (describing “elite litigation” strategies of some U.S. civil rights groups); Emilie M. Hafner-Burton, *Mobilizing for Human Rights: International Law in Domestic Politics*, 104 AM. J. INT’L L. 538, 541 (2010) (book review) (suggesting relation between elite agendas and litigation as a strategy).

A. *Group I: Individual Awareness of Roles as Citizens*

What links the first group of examples is the high degree of citizen involvement in decisions for and actions on behalf of individuals and the communities in which they live. Notably, the types of property vary widely, confirming the extent to which property's social function touches all sorts of property, from the most tangible (e.g., real estate and chattel) to less tangible forms of property and property rights (e.g., bodily property, rights to quiet enjoyment, and rights to buy safe and problem-free goods).

1. The Dominican Republic: Of Beer and Bodies

The Dominican Republic has witnessed in recent years a number of fierce and very public debates about the role of the state in the lives of its citizens. In a country that suffered the iron hand of one of the region's most brutal dictators, Rafael Trujillo, for thirty-one years, to say nothing of a long and dolorous history of domination by other tyrants, foreign and homegrown,<sup>102</sup> it is no small matter that these debates are carried on in newspaper columns, radio and television talk shows, and on the streets. But such very public conversations are happening in the island nation, and this must be judged a success of the country's democratization. Two recent examples, one involving noise pollution from neighborhood bars<sup>103</sup> and the other about a woman's right to abort,<sup>104</sup> reveal the growing involvement of the population in debates about property and by implication its social function, and what it means for Dominicans to flourish.

The *colmado* is a Dominican institution. Just as the bodega is a central institution in the lives of Puerto Ricans in the U.S.,<sup>105</sup> so too the *colmado* is, on the Spanish-speaking two-thirds of Hispaniola, a central feature of community life. *Colmados* typically are mom and pop corner stores scattered throughout neighborhoods rich and poor. The *colmado* sells basic groceries and household supplies and, usually, beer and rum. Because they open early and close late, *colmados* commonly become a focus of community life and a gathering place for the neighborhood. More often than not, they are fundamentally gendered, masculine spaces.<sup>106</sup> With great

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102. BOSCH, *supra* note 54, at 72 ("Resulta más curioso todavía observar ahora, tres siglos después del día en que Francia tomó posesión de una parte de La Española, que esas luchas de ingleses, franceses y españoles, esa orgía histórica de cazadores de los bosques, pirata, esclavos europeos y esclavos africanos y funcionarios españoles venales, acabaría produciendo físicamente a un tirano de la categoría de Rafael Leonidas Trujillo.") ("It is even more curious now to observe that, three centuries after France acquired possession of a part of La Española, those battles between English, French and Spanish, that historic group of forest hunters, pirates, European and African slaves and Spanish government officials, would end up physically producing a tyrant of the level of magnitude of Rafael Leonidas Trujillo.")

103. *See infra* note 110 and accompanying text.

104. *See infra* notes 111–12 and accompanying text.

105. *See generally* Carol J. Kaufman & Sigfredo A. Hernandez, *The Role of the Bodega in a U.S. Puerto Rican Community*, 67 J. RETAILING 375 (1991).

106. Adam M. Pine, *The Bodega on the Corner: Neighborhoods, Transnationalism, and Redevelopment in Philadelphia* 247 (Oct. 2007) (unpublished Ph.D. dissertation, Rutgers University) (on file with author).

frequency, they are also noisy masculine spaces, with men spilling out into the street and drinking. And the drinking is accompanied, as often as not, by a store or nearby car radio blasting some of the distinctive music of the Spanish-speaking Caribbean, for example Dominican *meringue*, Puerto Rican *salsa*, or Colombian *cumbia*.

Santo Domingo, the nation's capital, now hosts just under a quarter of the nation's population of nine and a half million.<sup>107</sup> Like cities worldwide, the capital's growth has been explosive, typical of the urbanization trends throughout Latin America, the world's most urbanized region.<sup>108</sup> Density, of course, has its challenges, and noise pollution is one of them.<sup>109</sup> In Santo Domingo, this has ignited a debate about who has superior property rights. Is *meringue* blasting from a *colmado* an exuberant populist expression of Dominican national identity at the very roots of the community? Or are the ear-splitting, amplified sounds a violation of citizens' rights to what in the United States the law calls "quiet enjoyment"?<sup>110</sup>

The issue of the right to control over one's body, a very different kind of property right, erupted in the course of the drafting of the revised Dominican Constitution in 2010. The new Constitution prohibits abortion in any case, including abortion for threat to maternal health.<sup>111</sup> The substantive fairness of that result is not at issue here. What merits attention is the context of the very heated debates and public protests that led up to adoption of the abortion provision.<sup>112</sup>

This sort of public discussion about a kind of property right would have been unthinkable a generation earlier. Both instances are powerful examples of discussions about the conditions under which Dominicans can

107. *The World Factbook: Dominican Republic*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/dr.html> (last visited Nov. 16, 2011).

108. U.N. Dep't of Econ. & Soc. Affairs, Population Div., Urban and Rural Areas 2009 (2010), available at [http://esa.un.org/unpd/wup/Documents/WUP2009\\_Wallchart\\_Urban-Rural\\_Final.pdf](http://esa.un.org/unpd/wup/Documents/WUP2009_Wallchart_Urban-Rural_Final.pdf) (reporting that 79.3 percent of the Latin American population lived in urban areas as of 2009, with that figure expected to grow).

109. See generally Alexander Gillespie, *The No Longer Silent Problem: Confronting Noise Pollution in the 21st Century*, 20 VILL. ENVTL. L.J. 181 (2009); Luis Zambrano, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle over Noise*, 66 J. AIR L. & COM. 445 (2000).

110. *Los Ruidos encabezan las estadísticas por violaciones ambientales* [Noise Leads Statistics for Environmental Violations], DIARIO LIBRE (Jan. 14, 2011), available at [http://www.diariolibre.com/noticias\\_det.php?id=275722](http://www.diariolibre.com/noticias_det.php?id=275722); see also *Una ciudad "enferma" por los ruidos* [A City "Sick" Due to Noise], DIARIO LIBRE, Jan. 12, 2011, at 10.

111. Article 37 of the 2010 Dominican Constitution provides, in relevant part, as follows: "Derecho a la vida. El derecho a la vida es inviolable desde la concepción hasta la muerte." [Right to life. The right to life is inviolable from conception until death.]. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. XXXVII; see also Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion*, 86 IND. L.J. 713, 715 (2011); Sharon L. Camp, *A Dangerous Trend: Dominican Republic Adopts Draconian Abortion Restriction*, HUFFINGTON POST (May 14, 2009, 10:48 AM), [http://www.huffingtonpost.com/sharon-l-camp/a-dangerous-trend-dominic\\_b\\_203459.html](http://www.huffingtonpost.com/sharon-l-camp/a-dangerous-trend-dominic_b_203459.html).

112. Erick Montilla, *Mujeres y hombres marchan a favor del aborto*, DIARIO LIBRE (May 6, 2009, 2:00 PM), [http://www.diariolibre.com/noticias\\_det.php?id=198499](http://www.diariolibre.com/noticias_det.php?id=198499) (reporting on pro-abortion rights march by hundreds of people).



flourish, and in the context of disputed property rights. Each example in turn implicates each of the four capabilities identified by Alexander and Peñalver. They are discussions, first, about what constitutes a well-lived life, and directly implicate questions of health and security. Second, they reflect freedom in the sense used by Sen, Alexander and Peñalver, and others, in that the debates implicate questions of both community and individual identity (in the respective cases of the noise/*colmado* and abortion disputes). Third, they are both examples of engaged deliberation over the proper distribution of property rights and fourth, in the process, are expressions of what they call “affiliation,” necessary for purposes of engaging in those debates.<sup>113</sup>

## 2. Citizens as Consumers

One Brazilian example suggests, by contrast, the extent of the challenges in creating through law the possibility for citizens truly to enjoy the full promise of property’s social function to secure human flourishing. In 1999, just two years into its new democracy, Brazil enacted a comprehensive consumer protection law,<sup>114</sup> one that has received considerable attention both domestically and internationally.<sup>115</sup> Brazil’s consumer protection law provides strict liability for faulty products for all actors along the line of production and distribution. The law contains clear definitions of what constitutes a defective product.<sup>116</sup>

A consumer protection law like Brazil’s can be understood as an expression of property’s social function. That is, at its most basic, such a law aims, in a depersonalized market, to operationalize a social compact that says in effect that even though consumer, distributor, and producer may be strangers to one another, they each have responsibilities to care and protect the other. A principal aim of any such legislative scheme, of course, is that the rights it creates can and will be exercised by consumers.

However, while Brazilians appear to understand their rights as consumers—a right that implicates vindication of a property interest—they rarely exercise them.<sup>117</sup> The reasons for this are unclear, although appear to

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113. See *supra* notes 20–30 and accompanying text.

114. Lei No. 8.078, de 11 de Setembro de 1990 (Braz.).

115. See, e.g., LESLEY K. MCALLISTER, MAKING LAW MATTER: ENVIRONMENTAL PROTECTION AND LEGAL INSTITUTIONS IN BRAZIL 63 (2008) (noting the particular historical importance of the Consumer Defense Law); Raúl Anibal Etcheverry, *First Approach to Competition Law and Sanctioning of Disloyal Practices in Mercosur*, in NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL AND CONSUMER LAW 275, 286 (Jacob S. Ziegel & Shalom Lerner eds., 1998) (same); Renata Guidry, *The Need for Mercosul Harmonization: Brazil’s Consumer Protection Laws as the Focal Point*, 24 LOY. L.A. INT’L & COMP. L. REV. 361, 361–62 (2002); Stephen Mutoro, *Kenya Should Learn from Brazil’s Robust Consumer Protection System*, COFEK (July 9, 2011, 7:34 PM), [http://www.cofek.co.ke/index.php?option=com\\_content&view=article&id=306%3Akenya-should-learn-from-brazils-robust-consumer-protection-system&catid=1%3Alatest-news&Itemid=66](http://www.cofek.co.ke/index.php?option=com_content&view=article&id=306%3Akenya-should-learn-from-brazils-robust-consumer-protection-system&catid=1%3Alatest-news&Itemid=66).

116. See Etcheverry, *supra* note 115, at 286.

117. “O brasileiro conhece os seus direitos como consumidor, mas pouco os exerce de fato.” [“The Brazilian knows his rights as a consumer, but scarcely exercises them in fact.”].

have their source in the behaviors developed from the country's long tradition of clientelism and the resulting expectation that individuals are rarely stronger than more powerful economic interests and/or the State.<sup>118</sup> This sort of empirical fact must give pause to anyone interested in the solidification and acceptance of broader understandings of property rights, revealing the degree to which cultural factors may impede the widespread acceptance of the concept of property's social function. This is particularly true because, as previously noted, clientelism is a regional legacy and not merely a Brazilian curiosity.<sup>119</sup> The particular and detailed elaboration of property's social function, broadly and deeply applying it to all types of property and using the notion to help secure a wide range of property rights will only occur, preliminary evidence like this suggests, not just when the population is well educated and aware of its rights, but also when legal and regulatory systems demonstrate agility in efficient resolution of claimed rights' violations so that the rights are perceived to be real and capable of vindication.<sup>120</sup>

### 3. Individuals, Communities, and Real Property Rights

More encouraging examples can be identified with respect to real property in both Brazil and Colombia, two countries with some of the greatest income and social inequality in the world.<sup>121</sup> In both countries, major urban centers have grown exponentially in recent years as internal migrants from rural areas have flocked to cities for personal safety and economic security.<sup>122</sup> Since the 1960s, as a result, urban slums have also

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*O Brasileiro e o Código de Defesa do Consumidor*, CENTRO DE JUSTIÇA E SOCIEDADE DA ESCOLA DE DIREITO RIO DA FUNDAÇÃO GETULIO VARGAS—RIO DE JANEIRO 1 (2011), <http://diretorio.fgv.br/sites/diretorio.fgv.br/files/PesquisaCDCCJUS.pdf> (reporting on an empirical study of consumer complaints demonstrating that even though 82 percent of consumers over eighteen years of age knew that their rights had been violated, 62 percent of them never or rarely asserted them).

118. Luciana Casemiro & Nadja Sampaio, *Conscientes de seus direitos, mas calados* [Aware of Their Rights, but Silent], O GLOBO (Mar. 20, 2011), <http://www.mp.go.gov.br/portalweb/1/imprimir/noticia/7d1e4236ef07933547dcad4606a34ffa.html> (reporting further that the Brazilian desire for conflict avoidance was also a factor).

119. See *supra* notes 95–97 and accompanying text.

120. These were the conclusions of a senior appellate judge in Rio de Janeiro State when speculating on the reasons for that state's higher number of consumer complaints and resolution of them, upon release of an empirical study showing that the number of complaints in that state increased by 14 percent between 2009 and 2010. See Luciana Casemiro & Nadja Sampaio, *Cariocas vão à Justiça por seus direitos*, O GLOBO, Mar. 13, 2011, at 30.

121. U.N. Dev. Programme, Human Development Report 2009: Overcoming Barriers: Human Mobility and Development 196 (2009), available at [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf) (documenting Gini inequality coefficients of 55.0 and 58.5, respectively).

122. See, e.g., *Colombia: Government Response Improves but Still Fails to Meet Needs of Growing IDP Population*, NORWEGIAN REFUGEE COUNCIL INTERNAL DISPLACEMENT MONITORING CTR. 1 (2010), [http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/4BCA7DF31521CC16C12577F5002CED98/\\$file/Colombia\\_Overview\\_Dec2010.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/4BCA7DF31521CC16C12577F5002CED98/$file/Colombia_Overview_Dec2010.pdf) (evaluating Colombia's internal displacement record, affecting between 3.4 and 4.9 million people); Stefanie Engel & Ana María Ibáñez, *Displacement Due to Violence*

grown exponentially, with negative social consequences and multiple causes that are well known, including high levels of precarious urban settlements and violent, unhealthy communities.<sup>123</sup> Nonetheless, one can say with cautious optimism that both Brazil and Colombia may have turned a corner. That is, both countries have, in their largest cities (Rio de Janeiro and São Paulo in Brazil, and Bogotá and Medellín in Colombia) witnessed significant urban interventions to address the question of unlivable urban settlements, if still on a limited scale. In part, this has involved ambitious state-directed infrastructure improvement programs, such as Brazil's *favela-bairro* (slum-neighborhood) effort.<sup>124</sup> These can be valuable and important, but they do not necessarily transform expectations and obligations from the bottom up.<sup>125</sup> Consequently, efforts to do just that, to give people hope at the base by involving them in neighborhood transformation, must be celebrated.

One such example, the Cantagalo Project in Rio de Janeiro, has been discussed above and again merits attention for the manner in which it involved a large number of stakeholders in decisions about land titling.<sup>126</sup> Similarly, in Bogotá, starting in the early 1990s under the mayoral leadership of two visionary politicians, Antanas Mockus and Enrique Peñalosa, the city undertook a radical urban transformation. Famously, the transformation developed on many fronts, including urban interventions and improvements, efficiency reforms in public administration, and expansion of cultural opportunities for all Bogotanos.<sup>127</sup> In Medellín, comparable urban interventions have attracted worldwide attention.<sup>128</sup> What links all of these cases is not only the high level of public participation in decisions, but also the holistic, integrated nature of the responses. That is, unlike Brazil's *favela-bairro* program, which ultimately dealt almost entirely with urban infrastructure interventions,<sup>129</sup> these initiatives understood that the most effective interventions would be those that would permit human flourishing, not only by involving people in decisions about their housing, but by involving them in addressing unstable community conditions of every

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*in Colombia: A Household-Level Analysis*, 55 ECON. DEV. & CULTURAL CHANGE 335 (2007) (testing theories for internal migration); Alice Mesnard, *Migration, Violence and Welfare Programmes in Rural Colombia* (Inst. for Fiscal Studies, Working Paper No. W09/19, 2009) (examining conditions for rural migration among poor households).

123. See generally JANICE PERLMAN, *FAVELA: FOUR DECADES OF LIVING ON THE EDGE IN RIO DE JANEIRO* (2010).

124. See generally Jorge Fiori, Elizabeth Riley & Ronaldo Ramirez, *Physical Upgrading and Social Integration in of [sic] Rio de Janeiro: The Case of Favela Bairro*, 147 DISP—THE PLAN. REV. 48 (2001).

125. *Id.* at 58–59 (describing how, despite the participatory origins of the *favela-bairro* program, it became transformed by the somewhat rigid application of homogeneous solutions by municipal employees executing it).

126. See *supra* notes 84–86 and accompanying text.

127. See generally BOGOTÁ: EL RENACER DE UNA CIUDAD (Gerard Martin et al. eds., 2007) (official catalogue for the Colombian exhibition at the Venice Biennale, for which the city was awarded the Golden Lion Prize for architecture); Symposium, *Study Space Symposium Articles*, 40 U. MIAMI INTER-AM. L. REV. 197, 197–345 (2009).

128. See *supra* notes 74–78 and accompanying text.

129. See *supra* notes 124–25 and accompanying text.

type—including housing, health, educational, and social deficits—in a systematic and coordinated fashion.

*B. Group II: Citizen Assertion of Legal Property Interests*

The second group of examples that suggest the growing regional role of property's social function to secure human flourishing is less participatory than the first, consisting of legal initiatives including litigation and statutory reform. They do not represent the ideal sort of hands-on, highly participatory, community-based decision making celebrated by Sen, Nussbaum, Alexander and Peñalver, and others.<sup>130</sup> But they are evidence of growing trends in the region to assert property rights that are to be enjoyed broadly and deeply in society in such a way as to operationalize the property's social function. Moreover, although in each of these instances the initial claims were advanced by members of privileged elites, they also show elites reaching out to stakeholders in more humble social positions, building coalitions in pursuit of shared interests in property use and right allocation. As in the Group I cases discussed above, this alliance is a key component in the effort to secure human flourishing—confirmation of the recognition that communities, and not individuals, create property and property systems.<sup>131</sup>

Put another way, the examples endorse a socially situated conception of property—what Singer calls the “environmental” conception because it responds to the social, political, and physical environment in which the property is created and exists.<sup>132</sup> While not exaggerating what these isolated examples may suggest about the possibility of altering the massive inequality that has marked the region for centuries, they nonetheless represent encouraging regional trends, both about respect for law and a more egalitarian response to social inequality as well as about property's role in perpetuating inequality.<sup>133</sup> They also constitute important examples of a socially situated conception of property and property law that can be communicated to citizens throughout the region.

1. The GDIP Cases in Colombia

Since 2005, a remarkable civil law clinic based at the University of the Andes in Bogotá, the Public Interest Law Group (GDIP in its Spanish

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130. See *supra* notes 30–37 and accompanying text.

131. As Alexander and Peñalver observe, “Property stands so squarely at the intersection between the individual and community because systems of property are always the creation of some community.” Alexander & Peñalver, *supra* note 16, at 128.

132. Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in PROPERTY AND COMMUNITY, *supra* note 43, at 57, 60. Singer contrasts this with what he calls the “castle” conception, as in “every man's home is his castle.” *Id.* at 60.

133. As Diogo Coutinho has trenchantly observed, the persistent inequality in the region is much harder to address than poverty. He observes: “This is possibly because of tackling of inequality and the forms it takes often require more controversial justifications, political coalitions and, perhaps, legal challenges.” Diogo R. Coutinho, *Linking Promises to Policies: Law and Development in an Unequal Brazil*, 3 L. & DEV. REV. 2, 9 (2010).

language acronym),<sup>134</sup> has brought a series of high profile constitutional law cases before the Colombian Constitutional Court, a creation of the nation's 1991 Constitution.<sup>135</sup> This is notable not least because Colombia is a country with some of the region's most severe social and income inequalities,<sup>136</sup> with a comparatively weak central state unable to address the nation's challenges.<sup>137</sup>

Nonetheless, the clinic, housed in one of the country's most elite institutions that caters to the country's economically and politically privileged stratum, works systematically to defend the rights of all Colombians and specifically to defend their tangible property rights. In most instances, moreover, GDIP has done this in collaboration with civil society groups, thus providing a model of high impact litigation that may derive some of its intellectual and financial support from the social elite, but one that also looks deeply and broadly into the society for strategic partners in support of shared goals. As a result, the GDIP cases stand as a model for action, not just because the cases represent victories for the articulation of property's social functioning in the service of human flourishing, but also because, as a group, these cases have secured a wide range of constitutional property rights. Furthermore, the decisions reflect the fact that just as common law jurisdictions now share characteristics of code dependence more typical of civil law jurisdictions, the reverse is also true.<sup>138</sup> This is important because the decisions themselves constitute instructive records of legal thinking about property's social function.

#### *a. Same-Sex Property Rights*

In the U.S. as elsewhere, family law has in the past generation greatly expanded its potential reach to include first, unmarried heterosexual partners and, subsequently, the rights of same-sex partners.<sup>139</sup> At their foundation, these innovations implicate questions of property entitlements. In this vein, GDIP began work on a landmark case in August 2005 with a noteworthy effort to recognize a bundle of same-sex rights, in a successful case that made Colombia one of the first countries in the Americas to recognize same-sex rights.<sup>140</sup> In a pair of decisions, Colombia's

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134. See GRUPO DE DERECHO DE INTERÉS PÚBLICO, <http://gdip.uniandes.edu.co/> (last visited Nov. 16, 2011).

135. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241 (Anna I. Vellvé Torras & Jefri J. Ruchti trans., 1991).

136. See *supra* note 121 and accompanying text.

137. See, e.g., JO-MARIE BURT & PHILIP MAUCERI, *POLITICS IN THE ANDES: IDENTITY, CONFLICT, REFORM* 109–11 (2004) (putting the weakness of the state in historical context).

138. See Julian Hermida, *Convergence of Civil Law and Common Law in the Criminal Theory Realm*, 13 U. MIAMI INT'L & COMP. L. REV. 163, 165–76 (2005); Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34 HONG KONG L.J. 339, 340–43 (2004); Giacomo Rojas, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 12 U. PA. J. BUS. L. 517, 550–54 (2010) (discussing convergence in asset partitioning laws).

139. JOSEPH WILLIAM SINGER, *PROPERTY* 388 (3d ed. 2010).

140. In recent years, a number of countries in the region have recognized a range of different rights for same-sex couples, including Mexico, Argentina and, most recently,

Constitutional Court recognized a wide range of rights for same-sex couples, including a range of civil, penal, and migratory rights.<sup>141</sup> In sum, the decisions clearly represent an attempt to assure that sexual orientation minorities have the capacity to flourish in conditions equal to those of the heterosexual majority. For purposes of a discussion about property's social function, however, the decisions also secured various property rights, including rights to property acquired by one party during the union, property division upon dissolution of the relationship, and pension rights for gay, lesbian, and bisexual Colombians.<sup>142</sup>

The complaint challenged Law 54 of 1990, which recognized certain rights in Colombia of unmarried, committed heterosexual couples as equivalent to those of married couples. The complaint is infused with the language of human flourishing and capacity development opportunities, basing its claim upon constitutional rights of free association and also, most important in this context, on the rights of "human dignity and the fundamental right" to the minimum conditions for a "vital" life.<sup>143</sup> The human dignity of gay couples in Colombia was adversely affected, said the complaint, by the law's failure to recognize their rights, thereby limiting "the possibility for homosexual women and men in our society to design a life plan and live according to its terms, and in this way violating the constitutional principle that defines the right of all persons to live in dignity."<sup>144</sup>

Furthermore, the "second dimension" of this right to a dignified life "refers to the concrete material conditions that guarantee that all human beings can live well."<sup>145</sup> This minimum, the complaint averred, included "the vital minimum and the right to subsistence"—jurisprudential creations that recognize that "a person requires a minimum of material elements to subsist."<sup>146</sup> Because Law 54 of 1990 extended the legal recognition of the

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Brazil. See, e.g., Juan Forero, *Gay Marriage Passes Last Vote in Argentina*, WASH. POST, July 16, 2010, at A8 (reporting that Argentina was the first Latin American country to legalize same-sex marriage); *Gay Rights Victory in Brazil*, ADVOCATE.COM (Dec. 13, 2010, 5:55 PM), [http://www.advocate.com/News/Daily\\_News/2010/12/13/Gay\\_Rights\\_Victory\\_in\\_Brazil/](http://www.advocate.com/News/Daily_News/2010/12/13/Gay_Rights_Victory_in_Brazil/) (reporting that gay couples would be entitled to the same social security benefits as heterosexual couples); *Unión de hecho, opción para gays*, HOY.COM.EU (Mar. 28, 2010, 12:07 AM), <http://www.hoy.com.ec/noticias-ecuador/las-uniones-de-hecho-entre-gays-son-legales-en-el-ecuador-399735.htm>; *Uruguay Allows Same-Sex Adoption*, BBC NEWS (Sept. 9, 2009, 10:05 PM), <http://news.bbc.co.uk/2/hi/americas/8247540.stml>; David Osborne, *Victory for Gay Rights in Mexico's Catholic Stronghold: Legalisation of Same-Sex Marriages in Capital Is a First for Latin America*, INDEPENDENT (Dec. 23, 2009), <http://www.independent.co.uk/news/world/americas/victory-for-gay-rights-in-mexico-catholic-stronghold-1848123.html> (discussing the legalization of gay marriage in Mexico City).

141. Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, M.P.: Rodrigo Escobar Gil, Sentencia C-075/07 (Colom.).

142. *Id.* pt. VI.4.

143. Complaint at 2, Demanda de inconstitucionalidad contra de los artículos 1 y 2 de la Ley 54 de 1990.

144. *Id.* at 12.

145. *Id.*

146. *Id.* at 14 (quoting Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-824/92, M.P.: Eduardo Cifuentes Muñoz).

material rights to live in such a dignified fashion to unmarried, committed heterosexual couples, by implication, those same rights and conditions were not legally available to unmarried, homosexual persons.<sup>147</sup> The complaint makes what can be characterized as an argument based on citizen responsibility in favor of extending these property protections to homosexual Colombians. If the rights to inherit pensions, rights of property succession upon death, and property division upon dissolution of the relationship are not extended to gay persons, it will not be the responsibility of individuals in marital communities to protect and respect one another's role in the relationship. Instead, the duty to care for those with fewer resources will be left (in the clientelist tradition) to the State.<sup>148</sup> Implicitly the complaint endorses the view that property's social function is not a matter of state redistribution of resources. Rather, the complaint stands for the proposition that property's social function means creating the circumstances for people within communities, whether two-person marital communities or larger social groupings, to implement and respect property principles that acknowledge the benefits, material and others, that our social natures bring to our lives.<sup>149</sup> Finally, these views about the need for basic material and property security so that all Colombians may enjoy the conditions needed to flourish as respected and integrated members of Colombian society was affirmed by the Constitutional Court, which extended the terms of Law 54 of 1990 to homosexuals.<sup>150</sup>

*b. Location of Decision Making Rights About Public and Private Property*

A 2007 GDIP case tested the question of who can make decisions with macro-effects on people's lives at the community level. Specifically, the case challenged the government's National Development Plan that, pursuant to an authorizing statute, undertook "macro-projects in national social interest."<sup>151</sup> In terms of a discussion of property's social function, the subject could not have been more controversial, since the macro-projects in question were those directed to solve the country's significant housing deficit. Like other countries in the region, Colombia's cities have in recent decades seen explosive growth, much of it in disordered urban settlements. The National Development Plan advanced by the conservative (and exceedingly popular) president at the time, Álvaro Uribe,<sup>152</sup> gave

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147. *Id.*

148. *Id.*

149. *See supra* notes 16–17 and accompanying text.

150. *See* Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, M.P. Rodrigo Escobar Gil, Sentencia C-075/07 (pt. VII) (Colom.).

151. *See* Complaint, Demanda de inconstitucionalidad contra el artículo 79 de la Ley 1151 de 2007 [hereinafter National Development Law Complaint] (challenging specifically Article 79 of Law 1151 of 2007).

152. *See, e.g.*, Chris Kraul & Patrick J. McDonnell, *Uribe's Rising Popularity Raises Prospects of 3rd Term*, L.A. TIMES, July 9, 2008, at A4.

national ministries the power to begin to address this development with an ambitious and extensive plan to build new housing units.<sup>153</sup>

The GDIP complaint challenging this notion advanced an argument breathtaking in its simplicity and elegance. Colombia, pursuant to the 1991 Constitution, is a unitary but decentralized state, and also one that guarantees “autonomy to its territorial entities” and is “democratic, participatory and pluralistic.”<sup>154</sup> Moreover, pursuant to the Constitution, the municipality is the “fundamental entity in the political-administrative division of the State” and thus has the responsibility to deliver “the public services the law provides, to construct works as required for local progress, to plan territorial development, to promote community participation, the social and cultural improvement of its inhabitants and to satisfy the other functions assigned to it by the Constitutions and the laws.”<sup>155</sup> Furthermore, the complaint asserted, the Municipal Councils were those vested with the power to “regulate land use and, within the limits fixed by law, to monitor and control the activities related to the construction of and authority over real property destined for housing.”<sup>156</sup>

In a region where centralized decision making by political and economic elites has long been the norm,<sup>157</sup> the importance of the complaint’s searching exploration of the relationship between the national government and its subsidiary units is striking.<sup>158</sup> Indeed, the GDIP complainants faced a chorus of powerful interests, including the national federation of municipalities, the national ministries that would be responsible for executing the mega-projects to correct the housing deficits, the national planning department, private construction interests, and the deans and faculties of leading law schools, along with prominent urbanists.<sup>159</sup> Yet

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153. The Ministry of the Environment, Housing and Territorial Planning objected in part to the GDIP arguments on the grounds of the urgency of the housing deficit in Colombia, noting that the housing deficit in the country grew by 91,000 units per year, and that in the five largest cities this growth represented fully 50 percent of the new housing units. Corte Constitucional [C.C.] [Constitutional Court], marzo 4, 2010, M.P.: Jorge Iván Palacio Palacio, Sentencia C-149/2010 (pt. VI (4.5.1)) (Colom.). The housing deficit continues to be a major Colombian social problem. *See, e.g.*, MARÍA ANGÉLICA ARBELÁEZ ET AL., SOCIAL HOUSING FINANCE IN COLOMBIA 2 (2010) (using official data from 2003–08) (on file with author).

154. National Development Law Complaint, *supra* note 151, at 3.

155. *Id.*

156. *Id.*

157. *See, e.g.*, William I. Robinson, *Promoting Polyarchy in Latin America: The Oxymoron of “Market Democracy,”* in *LATIN AMERICA AFTER NEOLIBERALISM*, *supra* note 96, at 96, 98–99.

158. Corte Constitucional [C.C.] [Constitutional Court], marzo 4, 2010, M.P.: Jorge Iván Palacio Palacio, Sentencia C-149/2010 (pt. III (1.2–1.6)) (Colom.). In fact, devolution of power to municipalities and local power is a feature of many of the region’s constitutions in the postcolonial period. *Cf.* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 29–31 (Braz.) (outlining extensive municipal powers); *see also* Edésio Fernandes, *Uma homenagem a um livro fundamental*, in 10 FÓRUM DE DIREITO URBANO E AMBIENTAL 1, 3 (2011) (referencing “municipalization” of country following passage of new Constitution, in the tribute to a book by leading Brazilian urbanist).

159. The arguments of the various opponents to the GDIP arguments are synthesized in the National Development Law Decision. *See* Corte Constitucional [C.C.] [Constitutional



despite this unified front defending a more centralist, paternalistic vision of who defines the social interest and how, the GDIP advanced a case asking the Constitutional Court to consider the question of who has the power to make decisions about land (and thus property) use in a democracy. For the petitioners, the proper balance in Colombia was clear: the national government is responsible for macro questions like macroeconomic security and the national political order. But decisions about land use were firmly based in micro-entities within the national order, namely, municipalities.<sup>160</sup> Notably, the argument is not merely an instrumental and procedural one. On the contrary, the complaint considers not only the constitutional, statutory, and decisional basis for this conclusion under Colombian law, but also provides the philosophical justification for locating control over Territorial Land Use Plans at the local level, a justification deeply rooted in the notion of property's social function. The Territorial Land Use Plan (POT in its Spanish acronym),<sup>161</sup>

constitutes the principal tool that territorial entities have for the administration of the territory's *physical* development and *to define the uses that should be given to land*. In this way, the POTs permit the exercise of citizen participation in its [i.e., the territory's physical development and land use] formulation, discussion and execution, encouraging in this way the mixing between social, economic and urban interests that exist in the municipalities.<sup>162</sup>

To the North American observer accustomed to common law argumentation, the structure of GDIP's complaint strikes a familiar tone and chooses a rhetorical and analytical style well known to common law lawyers. This, however, is part of its novelty in the context of a traditionally formalistic and conservative civil law system like Colombia's.<sup>163</sup> Thus, the next rhetorical moves merit special attention. That is, not only is GDIP's example remarkable in this and the other cases discussed because it represents alliances between elite legal institutions and civil society organizations in a region where such entities are not well established. The example is also noteworthy because of the argumentative style, one that rejects formalist reasoning and instead asks the court to consider the various basis and justifications for legal rules, including statutes, past decisional law, and social realities. Citing a Colombian statute, for example, the complaint emphasizes that land use planning serves three central functions: (1) "the social and ecological function of

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Court], marzo 4, 2010, M.P.: Jorge Iván Palacio Palacio, Sentencia C-149/2010 (pt. IV) (Colom.).

160. National Development Law Complaint, *supra* note 151, at 7.

161. The acronym stands for "Plan de Ordenamiento Territorial."

162. National Development Law Complaint, *supra* note 151, at 17 (emphasis added).

163. See generally Helena Alviar, *The Classroom and the Clinic: The Relationship Between Clinical Legal Education, Economic Development and Social Transformation*, 13 UCLA J. INT'L L. & FOREIGN AFF. 197 (2008); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003); Daniel Bonilla, *Legal Education and the Professional Practice of Law in Latin America* (2011) (unpublished manuscript on file with author).

property,” (2) the primacy of the common good over private [interests], and (3) “the equitable distribution of duties and benefits.”<sup>164</sup> The complaint’s next move again might seem familiar to the common lawyer, but its audacity in the context of a formalistic legal tradition cannot be underestimated. The complaint then links this statutory provision with a case decided by the Constitutional Court. This power must be located at the smallest governmental level, says the complaint, precisely because it aids the formation of community. The cited decision of the Constitutional Court deserves to be quoted in full:

[Land use planning] includes a series of actions, decisions and regulations that define, in a democratic, participatory, rational and planned manner the use and development of an identified territorial physical space with attention to the parameters and characteristics of the demographic, urban, rural, ecological, bio-physical, sociological, economic and cultural order. . . . *It concerns, neither more nor less, the definition of one of the most transcendent aspects of community life as it is in its [physical] dimension and spatial projection. Few topics like this involve such a great number of relations and aspects between the members of society and [both] their cultural and natural surroundings.*<sup>165</sup>

Again, what deserves attention here is the deft coupling of this decision with a statutory provision and case law locating power at the local level. In a civil law system where laws are often abundant but unenforced,<sup>166</sup> this serves property’s social function by insisting that the state, one that had enacted a national plan for the development of micro-projects that ignored these legal authorities,<sup>167</sup> be true to itself and its own laws. This insistence can thus be understood as another step in the strategy to secure property’s social function.

In its consideration of the case, the Constitutional Court split the difference. It agreed with the GDIP complaint as to the proper division of powers for the exercise of the land use planning function, fully endorsing its reasoning with respect to the unconstitutionality of allowing the national government total control over the design of mega-projects related to solving the nation’s housing deficit. At the same time, it held that its decision applied only to future mega-projects, and not to those already “in process.”<sup>168</sup> Taken in sum, this must be judged an extraordinary victory for a democratic, inclusive, and participatory understanding of what is

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164. National Development Law Complaint, *supra* note 151, at 19. (citing L. 388/97, julio 18, 1997, DIARIO OFICIAL [D.O.] (Colom.)).

165. *Id.* (emphasis added) (citing Corte Constitucional [C.C.] [Constitutional Court], junio 29, 2000, M.P: Eduardo Cifuentes Muñoz, Sentencia C-795/00).

166. *See, e.g.*, Murillo de Aragão & Stephen Bunker, *Brazil: Regional Inequalities and Ecological Diversity in a Federal System*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* 475, 478–79 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) (discussing what they call the “environmental legislation paradox”).

167. The National Development Law Complaint makes this clear. *See* National Development Law Complaint, *supra* note 151, at 20–21.

168. Corte Constitucional [C.C.] [Constitutional Court], marzo 4, 2010, M.P: Jorge Iván Palacio Palacio, Sentencia C-149/2010 (pt. VI (6.8)) (Colom.).

understood as property's social function, because it endorsed the locus of decision making at the community level, thereby endorsing the view that communities know better how to solve their needs than does a one-size-fits-all government response.

*c. Participation, Inclusion, and Minority Property Interests*

This same strategy is evident in the final series of GDIP cases to be considered here, all dealing with social and economic minority rights to participation and a degree of self-determination. Importantly, all of the cases involve property use and the social function of that property. In each case, the idea tested is the 1991 Constitution's claim that the Colombian state is a "democratic, participatory, and pluralistic" one.<sup>169</sup> They were not all successful. Of the three, only a case challenging the national forestry law for its failure to include participation by minority populations dependent on the forests for their survival succeeded. Nonetheless, the three cases, originally brought in 2006 and 2007, remain of interest for the body of argument they constitute about the relation of public participation and citizen involvement in land use decisions to establish property's social function. Moreover, they do so using different legal tools in collaboration with civil society and social justice organizations both within and far from the nation's capital. All three implicated property uses.

One of them, the case challenging the national forestry law, was a standard judicial action, which successfully overturned the existing law for its failure to adequately include indigenous and Afro-Colombian groups resident in the forests early on in decisions about forest use, despite the fact that, numerically, such groups constituted a small portion of the Colombian population.<sup>170</sup> The other two cases were *tutela* actions<sup>171</sup>—roughly analogous to a mandamus writ in the common law tradition. In the earlier case, the rural community of Nemocón, in the Department of Cundinamarca, in the geographic center of the country (its capital is the national capital, Bogotá) objected to the location of a regional sanitary landfill within its borders. The proponents insisted that the local interests in land use should prevail over those of the region and an administrative process dictated from the state.<sup>172</sup> In the other, a broad coalition of public

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169. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1.

170. See Crawford, *supra* note 72, at 924–25 (stating that at the time the case commenced, Colombia's indigenous population was 1.75 percent and the Afro-descendent population 12 percent).

171. In most of the Spanish-speaking world, a *tutela* is a legal action for guardianship. In Colombia, it has a distinct form. Under Article 86 of the Constitution, any individual may bring a summary action, in principle, at any place or time, asserting the violation of a fundamental constitutional right and seeking "immediate protection" where the act or omission of any public authority resulted in leaving that individual "damaged or threatened." CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

172. In this case, the Department of Cundinamarca, which surrounds the nation's political and economic capital, Bogotá. See Guardianship Action at 1.1 to 2 (Acción de Tutela Contra la Corporación Autónoma Regional de Cundinamarca), July 2008, [hereinafter Nemocón

interest lawyers came to the defense of Afro-Colombian communities in the Rosario Islands, an archipelago located approximately thirty miles southeast off the Caribbean Colombian city of Cartagena, on the country's northern coast. This action sought a twofold declaration: (1) official recognition of the cultural identity and autonomy of the Afro-Colombian residents of the Rosario Islands, and (2) a declaration of their collective property interests.<sup>173</sup>

The three cases differ considerably in their aims and subject matter. They are linked, however, in two important respects. First, they reflect a deep commitment to securing the property rights of those most immediately connected to the land on the assumption that such populations are best positioned to manage the land and its environmental resources, whether they be semi-tropical forests, fragile coastal reefs, or prime pasture and agricultural land. In this respect, the cases taken together represent a strong statement not only for property's social function but also for its social-environmental function; that is, a recognition that individuals and communities have the most direct and immediate role in assuring the sustainable use of the physical as well as the built environment. Second, the cases demonstrate a firm rejection of a clientelist model, with a commitment to the view that public participation and assertion of legal rights is central to the successful guarantee of property's social function. The statement of the Nemocón *tutela* action neatly summarizes this view:

The public hearing in the Municipality of Nemocón ought to be proof that in the Colombian State there exist spaces for the free and full exercise of local democracy, consolidating the Colombian State as the guarantor of the public will with the power of self-determination and to make decisions freely, without pressures or illegitimate obstacles . . . .<sup>174</sup>

In sum, taken together, all of the GDIP cases, from same-sex property distribution rights to those seeking recognition of cultural identity and historical practices of collective property use, provide an invaluable archive of evolving understandings of the complexity of property's social function. The cases together stand for the proposition that property's social function is an idea integral to the defense of all property rights, and one deeply linked to a recognition of cultural and social diversity, as well as to an awareness of the human role in environmental preservation of sustainable natural resource use (in light of the equally powerful human role in environmental degradation).

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Action] (exploring the alleged constitutional violation by the state of citizens' rights to public participation in decisions of public consequence).

173. Complaint, *Acción de Tutela Contra la Nación*—Ministerio de Agricultura—Instituto Colombiano de Desarrollo Rural (INCODER) (Tribunal Superior de Bogotá Nov. 2007).

174. Nemocón Action, *supra* note 172, at 37.

## 2. Of Protected Areas and Protecting Communities

In Brazil, Law 9,985 of 2000 established the National System of Conservation Units (SNUC in its Portuguese acronym).<sup>175</sup> SNUC is distinctive for many reasons, not least the comprehensiveness of its scheme to protect different interests in land and permit some intrusions for certain kinds of lands and ban others where the land at stake is more sensitive.<sup>176</sup> Importantly, SNUC creates the possibility of protecting both public and private land.<sup>177</sup> These features of the statute reflect an awareness of property's social function, by virtue of the fact that the law fundamentally concerns itself with the interrelation of human beings and the physical and built environment. To be sure, the law is not without its weaknesses, including a labyrinthine procedure to establish one of the seventeen categories of conservation units.<sup>178</sup> However well intentioned, such procedures arguably privilege the better educated and socially more privileged members of society. That being said, SNUC notably contains special protections for "traditional populations" and provides for the participation of "affected communities."<sup>179</sup> Although the terms are not defined in the statute itself,<sup>180</sup> the fact that special legal rights were thus created constitutes a rejection of clientelist relations and establishes a mechanism of public participation. In this respect, SNUC's design is consistent with the aim of the GDIP cases; in both instances, the legal efforts work to broaden the base of popular participation in property use decisions.<sup>181</sup>

These Colombian and Brazilian legal reform initiatives reflect concerted efforts through law to create the conditions necessary to enjoy the second and third of Alexander and Peñalver's capabilities, identification, self-knowledge, and deliberation. They also demonstrate respect for the third of the four capabilities, the potential for affiliation. Once these

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175. CODIGO CIVIL [C.C.], Lei 9.985 de 18 de Julho de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.07.2000 (Braz.). The acronym stands for "Sistema Nacional das Unidades de Conservação."

176. See Colin Crawford & Guilherme Pignataro, *The Insistent (and Unrelenting) Challenges of Protecting Biodiversity in Brazil: Finding "The Law that Sticks,"* 39 U. MIAMI INTER-AM. L. REV. 1, 27–50 (2007).

177. *Id.* at 42.

178. *Id.* at 50–53.

179. For an example of the first phrase in the statute, see Lei 9.985 de 18 de Julho de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 4, § XIII, de 19.07.2000 (Braz.); for an example of the second phrase, see *id.* at art. 57.

180. *Id.* at art. 2 (I–IX) (containing SNUC's definitions).

181. To date, SNUC may be considered a moderate success. On the one hand, the use of the law to establish different types of conservation areas is growing. See Ana Flora Caminha, *Em 6 anos, Brasil responde por 74% das áreas destinadas à conservação no mundo*, ASSESSORIA DE COMUNICAÇÃO, MINISTÉRIO DO MEIO AMBIENTE (July 16, 2010), <http://www.mma.gov.br/sitio/index.php?ido=ascom.noticiaMMA&codigo=5969> (reporting that between 2003 and 2008, 74 percent of conservation areas occurred in Brazil, most of it in the Brazilian Amazon region). On the other hand, deforestation in the Amazon and other areas of the country continues at an alarming pace. See, e.g., *Perigo na Terra: Desmatamento do tamanho do Rio*, JORNAL DO BRASIL, Aug. 5, 2009, at A6 (describing a 370 percent increase in Amazonian deforestation from May to June 2009).

conditions are established, individuals in communities will be further positioned to enjoy the secure and healthy life that they argue is the first important capability needed for humans to flourish.<sup>182</sup>

*C. Regional Law and Policy Debates and Property's Social Function*

The third group of examples discussed here are the least concrete in legal terms, in the sense that they do not represent case decisions, statutory provisions, promulgated regulations, or other legal documents, but also are the most compelling in that they suggest engaged social debate about property's social function and, as will be seen, consideration of the content of the term. In sum, the examples, taken from across the region, represent growing and vigorous consideration about (and, in some instances, implementation of) the social function of property. They do not use this term or theoretical vocabulary, but constitute thinking about property's social function all the same. For purposes of documentation, careful readers will note that the citations come mostly from newspapers and popular magazines.<sup>183</sup> This is admittedly problematic in itself, because journals often represent opinions of elites with particular worldviews they wish to advance.<sup>184</sup> Nonetheless, the assumption of the discussion that follows is that despite this limitation, the fact that these debates are occurring in public reflects changing understandings about property in Latin America and in particular an appreciation of property's social function. Indeed, one might go so far as to observe that these views as expressed by members of social, economic, and political elites are a particularly significant development in a region where elites have not historically demonstrated a wish to address fundamental social and economic inequalities.<sup>185</sup> Moreover, given that much of the region was dominated by military and/or autocratic rule until the last twenty-five years or so, these exercises in democratic debate cannot be undervalued.

The examples can in turn be divided into three subgroups. One group is comprised of examples of public discussion about property's social function focusing on the need to change individual behaviors in the common interest. These examples involve no laws or legal resolutions of social issues per se but rather reflect maturing understandings of what it means to be a citizen in a democratic, participatory state. The second and largest group of examples consists of debates about laws or legal and policy strategies, including discussion of the always vexing question of enforcement in a region that has many admirable, well-crafted laws but

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182. See *supra* note 30 and accompanying text.

183. This is principally in order to comply with scholarship conventions. In almost all instances, the articles merely document popular debates that the author witnessed and participated in while visiting the countries mentioned.

184. An example that has received a great deal of scrutiny in this regard is Rupert Murdoch's media empire. See Ken Auletta, *Murdoch's Best Friend*, *NEW YORKER*, Apr. 11, 2011, at 24. See generally Noam Chomsky, *What Makes Mainstream Media Mainstream*, *Z MAGAZINE*, Oct. 1997, available at <http://www.zcommunications.org/what-makes-mainstream-media-mainstream-by-noam-chomsky>.

185. See *supra* notes 41–42, 118–19 and accompanying text.

often weak enforcement of them.<sup>186</sup> Once again, what is to be admired and noted here is the existence of public debate about the proper legal response to property issues in a fashion that considers property's social function. The third and final set of examples is comprised of public actions reflecting an official appreciation that property has a social function.

### 1. Don't Pee in the Street! Turning Individuals into Citizens

During the 2011 Carnival celebrations in Rio de Janeiro, a widespread media campaign using print, radio, and television urged people, in the direct and unabashed way of Brazilians with things corporeal, not to pee in the street.<sup>187</sup> The campaign, by turns comic and indignant, was, for longtime Brazil watchers, extraordinary, not least because it stressed that to urinate in public was not to be a good citizen. The campaign was extraordinary in context because urinating in public is a problem that has for centuries plagued Brazil, a powerful example of the lack of shared respect for public space.<sup>188</sup> Thus, one should take heart at a campaign like this, a concrete expression of a collective understanding of property's social function. This is equally true of Brazilian efforts to promote a sense of community with graffiti addressing the "social question,"<sup>189</sup> or efforts to promote ecological initiatives such as the installation of LED street lights, a community garden, and heat reducing "living" roofs in one of Rio's poorest shantytowns.<sup>190</sup> These examples are notable for multiple reasons. First, they consciously recognize a shared interest in creating more agreeable public spaces, and second, they do so through the use of real property. This also can be said of the Dominican debate over local noise pollution discussed above.<sup>191</sup> Third and most important, the role of such initiatives in educating citizens about what it means to respect local property and use it for the common good cannot be underestimated. For societies where the "social question" has not

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186. See, e.g., MCALLISTER, *supra* note 115, at 20–56.

187. See, e.g., O Globo Filmes, *Carnaval: Xixi na Rua NÃO*, YOUTUBE (Feb. 25, 2011), <http://www.youtube.com/watch?v=xbbe3u7W8FQ>. O Globo is one of the most widely watched television networks in Brazil and the country's largest media conglomerate. See Jorge Nobrega, *Integrated Media Strategy: Globo Approach*, ACCENTURE, [http://www.accenture.com/microsites/gcf-2011/Plenary/Pages/jorge\\_nobrega.aspx](http://www.accenture.com/microsites/gcf-2011/Plenary/Pages/jorge_nobrega.aspx) (last visited Nov. 16, 2011).

188. Antônio Werneck, *Xixi nas ruas do Rio já provocava polêmica entre cariocas em 1776*, O GLOBO (Mar. 12, 2011, 5:14 PM), <http://oglobo.globo.com/carnaval2011/blocos/mat/2011/03/12/xixi-nas-ruas-do-rio-ja-provocava-polemica-entre-cariocas-em-1776-923999474.asp> (referencing histories of eighteenth century Rio, "a dirty city, where there were no public bathrooms, and a lack of hygiene such that even nobles would interrupt their retinues to urinate in the streets").

189. Gustavo Goulart, *Arte em forma de grafite enche de cor Pavão-Pavãozinho e Cantagalo*, O GLOBO (Dec. 25, 2010, 7:53 PM), <http://oglobo.globo.com/rio/mat/2010/12/25/arte-em-forma-de-grafite-enche-de-cor-pavao-pavaozinho-cantagalo-923356682.asp>.

190. Liana Melo & Emanuel Alencar, *Um Rio mais verde para debater o clima: Reflorestamento e projeto para reduzir pobreza antecedem reunião da ONU*, O GLOBO, Mar. 20, 2011, at 42.

191. See *supra* notes 108–10 and accompanying text.

been part of the dominant social-political order for centuries,<sup>192</sup> such efforts, concentrated on changing popular views of property and its social and environmental role, represent important steps in solidifying the notion of citizenship.<sup>193</sup>

## 2. Debating Property's Social Function

Of equal significance is the fact that the region is today witness to vigorous debates about the proper interests to be served by possible redistributions of property rights. It is not my intention to suggest that the debates demonstrate conclusively that the social function of property is now securely fixed in the firmament of Latin American and Caribbean legal concepts. On the contrary, it is my sole claim here that the examples reflect a growing awareness of the notion of property's social function. Cautiously, one might conclude from the examples that follow that the social function of property may over time provide some of the theoretical and ideological justification needed to redress the region's characteristic inequitable property distribution and make it more possible for all of its citizens to flourish. However, as will be seen in these examples, the support for property's social function remains in flux. Still, the fact that the notion is implicitly part of the debate over property use and ownership in the region is itself cause for tentative optimism.

In essence, the debates described below implicate each of the four capabilities identified by Alexander and Peñalver because they seek to create conditions for people to live healthy, secure lives, and to do so freely with the potential to have a fully formed identity, with the ability to reflect and deliberate on the direction of one's life, and finally to do so in the company one wishes.<sup>194</sup> Significantly, a broad range of property rights are implicated, reminding us that property's social functioning, properly understood, must touch the wide range of human behaviors, needs, and experiences. These instances can, for purposes of the present discussion, be understood to address four different aspects of property's social function.

### *a. Public Resource Protection*

Throughout Latin America and the Caribbean, discussions are common about entitlement to what in the U.S. we call public resources. Following a raft of environmental and natural resource management legislation and regulation in the 1980s and 1990s,<sup>195</sup> these debates recognize, to some extent, the diffusion of knowledge and information about the need to

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192. See, e.g., SÉRGIO BUARQUE DE HOLANDA, *RAÍZES DO BRASIL [ROOTS OF BRAZIL]* 183 (2005) (observing that in Latin America, the politics of personality and preference for oligarchy in many cases renders democratic slogans "purely ornamental concepts").

193. See generally JOSÉ MURILO DE CARVALHO, *CIDADANIA NO BRASIL: O LONGO CAMINHO* (2008) (detailing and placing in historical context the challenges of making concrete legal guarantees of political, social, and civil rights in South America's largest democracy).

194. See *supra* notes 20–30 and accompanying text.

195. See MCALLISTER, *supra* note 115, at 22–31.



protect the environment for human and biological health and ecological stability. Thus, for example, in places as different from one another as Brazil, Nicaragua, and Panama, growing popular awareness of the risks of untreated sewage into fresh water is evident,<sup>196</sup> as is concern about the negative social and economic consequences of tropical deforestation.<sup>197</sup> Related debates involve the rights of non-indigenous people in indigenous territories,<sup>198</sup> or of the need to develop reforestation programs that are simultaneously poverty reduction efforts.<sup>199</sup> Debates in themselves do not, of course, solve problems or assure the protection of communities at risk of losing land, homes, or clean and safe environments. But recognition of these debates in the popular media, in the context of legal norms that have been violated, must nonetheless be recognized to constitute growing awareness of the fact that public resource protection is not a matter to be decided by a few to serve only their interests. This democratization of the debate about public resource protection thus can be understood as asserting that there are basic socio-environmental conditions necessary to secure the circumstances in which human capacities can flourish.<sup>200</sup>

*b. Property and Public Order*

In much of the less developed world, disorder is a characteristic feature of urban development.<sup>201</sup> Consequently, the growing recognition throughout the region of the importance of land use planning at the regional and local levels must be viewed as noteworthy, particularly when this recognition is coupled with an insistence on planning with significant

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196. See, e.g., Alcibiades Cortez, *Se agotan los ríos en la región de Azuero*, PRENSA.COM (Apr. 27, 2011), <http://mensual.prensa.com/mensual/contenido/2011/04/27/hoy/nacionales/2578544.asp> (describing river contamination problems in the interior of Panama, affecting 94,000 people); *Estudo mostra um Rio de águas poluídas*, O GLOBO, Dec. 30, 2010, at 25 (reporting study finding that half of Rio de Janeiro's sewage is not being collected and is discharged directly into the environment); Amalia Morales, *Los 360 grados de contaminación del Cocibolca*, LA PRENSA.COM.NI (MAY 26, 2011, 6:55 PM), [http://www.laprensa.com.ni/2011/05/26/nacionales/61637#.TnzF3Ry\\_iEs](http://www.laprensa.com.ni/2011/05/26/nacionales/61637#.TnzF3Ry_iEs) (surveying multiple sources of pollution threatening Central America's largest freshwater lake).

197. The best example of this is the extended debate in Brazil over the amendments to the national Forest Code, an extended and very public fight that has pitted environmentalists against the "rural lobby," meaning agricultural interests. See, e.g., Leonel Rocha, *Nem verde nem cinza*, ÉPOCA, Mar. 7, 2011, at 38.

198. Isabel Castro P. & José Quintero de León, *Aceptan diálogo, pero desalojos continuarán*, PRENSA.COM (Apr. 27, 2011), <http://mensual.prensa.com/mensual/contenido/2011/04/27/hoy/nacionales/2579060.asp> (reporting conflicts, sometimes violent, over occupancy in indigenous lands).

199. See, e.g., U.S. AGENCY FOR INT'L DEV., ISSUES IN POVERTY REDUCTION AND NATURAL RESOURCE MANAGEMENT 11–17 (2006), available at [http://www.usaid.gov/our\\_work/agriculture/landmanagement/poverty/pubs/poverty\\_nrm\\_report.pdf](http://www.usaid.gov/our_work/agriculture/landmanagement/poverty/pubs/poverty_nrm_report.pdf) (including case study of Guatemalan forest concessions); see also Rocha, *supra* note 197.

200. See *supra* notes 20–30 and accompanying text.

201. For Latin American discussion of this point, see FERNANDES, *supra* note 73, at 4–5. For examples from throughout the economically less developed world, see generally ENVIRONMENTAL STRATEGIES FOR SUSTAINABLE DEVELOPMENT IN URBAN AREAS: LESSONS FROM AFRICA AND LATIN AMERICA (Edésio Fernandes ed., 1998).

public participation and involvement from the outset.<sup>202</sup> To be sure, the mere fact of land use planning is not enough. It must be accompanied by a demonstrated commitment to advancing social inclusion goals through spatial planning, recognizing the role of spatial segregation and limited infrastructure in impeding individuals' capacity to flourish and enjoy life in the communities of which they are a part. As Fernandes observed about land use planning in less developed countries over a decade ago: "Many significant attempts at promoting land use planning and control, including the legal protection of the environment and historical-cultural heritage, have been undermined by a dominant judicial interpretation that significantly reduces the scope for state intervention in the domain of individual property rights."<sup>203</sup> If this and other routes to achieve property's social function are to have real effect, such continued deference, judicial and otherwise, to the primacy of private property rights at all times and for all purposes, cannot be permitted to continue.

Such concerns about rejection of social function ideas in favor of private property solutions alone apply in the context of discussions about other forms of property rights as well. They are no less true of concerns about unlicensed use of public space by mobile vendors,<sup>204</sup> or of the difficulty of incorporating small businesses, which are the livelihood and often principal form of property held by their owner-operators, into the formal sector.<sup>205</sup>

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202. See, e.g., Martha Lucía Ovalle Bracho, *Legislación y jurisprudencia acerca del ordenamiento territorial ambiental*, in PERSPECTIVAS DEL DERECHO AMBIENTAL EN COLOMBIA 132, 132–52 (Beatriz Londoño Toro, Gloria Amparo Rodríguez & Giovanni J. Herrera Carrascal eds., 2006) (describing Colombian advances in land use planning since the enactment of the 1991 Constitution); Fernandes & Maldonado, *supra* note 42, at 19 (observing that "[s]patial planning is a powerful process; if urban laws have long benefited certain economic groups and thus have contributed to the process of sociospatial segregation, then the promotion of urban law reform should contribute to creating the conditions for more inclusive and fairer cities."); Gastón Dormoi B., *Exigimos un verdadero reordenamiento territorial*, PRENSA.COM (Apr. 23, 2011), <http://mensual.prensa.com/mensual/contenido/2011/05/01/hoy/defensor.asp> (demanding a new land use plan that addresses social and economic inequalities).

203. Edésio Fernandes, *Redefining Property Rights in the Age of Liberalization and Privatization*, 11 LAND LINES, Nov. 1999, [http://www.lincolninst.edu/pubs/323\\_Redefining-Property-Rights-in-the-Age-of-Liberalization-and-Privatization-](http://www.lincolninst.edu/pubs/323_Redefining-Property-Rights-in-the-Age-of-Liberalization-and-Privatization-).

204. João Pequeno, *Prefeitura elimina camelôs sorteados para Lapa Legal*, JORNAL DO BRASIL, July 25, 2009, at A15; see also Primo Arámbulo III et al., *La venta de alimentos en la vía pública en América Latina*, 118 BOL OFICINA SANIT PANAM 97 (1995). This is a problem for populations in the U.S. as well, many if not most of them ethnic minorities. See, e.g., Juan Castillo, *Vendedores ambulantes de comida preocupados por nuevas normas municipales*, AHORASI.COM (May 5, 2010), <http://www.ahorasi.com/vendedores-ambulantes-de-comida-preocupados-por-nuevas-normas-municipales/>; Rebecca Winters Keegan, *The Great Taco Truck War*, TIME (Apr. 25, 2008), <http://www.time.com/time/nation/article/0,8599,1735104,00.html#ixzz1Wj95NI5V>.

205. INTER-AM. DEV. BANK, PRIVATE SECTOR DEVELOPMENT STRATEGY: FOSTERING DEVELOPMENT THROUGH THE PRIVATE SECTOR (2011), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36279300> (discussing high levels of informality as causal factor for limited private sector growth in Latin America and the Caribbean). For a country-specific example, see Mary Triny Zea, *Informalidad atrapa a microempresarios*, PRENSA.COM (Apr. 27, 2011), <http://mensual.prensa.com/mensual/contenido/2011/04/27/hoy/Negocios/2576454.asp> (describing challenges informality causes for small businesses in Panama).

Resolution of these debates could turn out unfavorably for those with the fewest resources; for some, the goal of integrating informal business networks into the formal sector is to capture business income and payroll taxes.<sup>206</sup> Conversely, however, such debates provide a platform to insist on less regressive, graduated tax structures, and expansion of the social service networks. Such innovations would help assure the ability of lower income people to achieve the financial security that is a precondition of human flourishing, in addition to solidifying truly democratic institutions and states.<sup>207</sup>

This is true as well for the widely popular but nonetheless controversial “pacification” of slums in Rio de Janeiro.<sup>208</sup> Such efforts can be understood as an expression of a desire to restore public order and security so that middle and upper income communities can sleep better at night. However, the efforts may prove as well to constitute actions that set the basic conditions for the expansion of social services and economic opportunities for the urban poor. Although it is far too early to predict whether these changes will endure over the long term, there are at least promising signs that efforts are underway to make the pacifications more than police occupations and also to provide services never before made available to the population.<sup>209</sup>

*c. Informal to Formal Settlements and the Housing Question*

In an ever more urbanized world, the Latin American and Caribbean region continues to be the world’s most urbanized and, as noted previously, the conditions in which millions of urban residents live is one of comparative misery and deprivation.<sup>210</sup> Resolution of the region’s urban challenge is a process that will be neither easy nor fast. Nonetheless, one must take heart from the fact that throughout the region there is awareness of the need to recognize the habitation rights of the millions of poor people

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206. See Zea, *supra* note 205.

207. Amyarta Sen explores related notions dedicated to promoting human flourishing. See, e.g., SEN, *supra* note 20, at 144–45.

208. See, e.g., Alexei Barrionuevo, *As Prosperity Rises in Brazil’s Northeast, So Does Drug Violence*, N.Y. TIMES, Aug. 30, 2011, at A4 (describing the practice of “pacifying” that started in the violent slums of Rio de Janeiro and was then duplicated elsewhere in Brazil); *Com Mangueira ocupada, só falta Maré para a Copa*, O GLOBO, June 20, 2011, at 1 (reporting on the eighteenth occupation of a Rio slum in the pacification process, specifically the Mangueira favela, with an operation of 750 men).

209. *Alemão tem primeiro cinema 3D em favela*, O GLOBO (Dec. 24, 2010, 1:01 PM), <http://extra.globo.com/noticias/rio/alemao-tem-primeiro-cinema-3d-em-favela-799826.html> (reporting on the first commercial cinema to open in a Rio de Janeiro slum); *Lula ‘inaugura’ teleférico três meses Antes*, O GLOBO (Dec. 22, 2010), <http://www.brasilnews.com.br/News3.php?CodReg=21927&edit=Pol%EDtica&Codnews=999> (describing the inauguration of a gondola public transport system in what until recently had been one of Rio de Janeiro’s most notorious slums).

210. See *supra* note 8 and accompanying text; see also Abhas K. Jha, *Low-Income Housing in Latin America and the Caribbean*, EN BREVE (World Bank, Wash., D.C.), Jan. 2007, at 1, 1–2, available at <http://siteresources.worldbank.org/INTLACREGTOPURBDEV/Resources/Jan07LowIncomeHousingEN101.pdf> (examining the causes of and possible solutions for the region’s housing deficits).

without adequate shelter, much less housing.<sup>211</sup> Efforts to regularize housing constitute one of the capabilities identified as central by Nussbaum for human flourishing, and help establish central physical conditions for a healthy and secure life.<sup>212</sup> Debate is not sufficient to correct the region's appalling housing deficits, but the increasingly robust public discussion of the deficit is at least a necessary condition for change.

*d. Intellectual Property and Property Rights to Information*

A striking recent debate in Brazil helps focus on the wide range of property involved in the definition of property's social functioning. The controversy pits prominent musicians and other artists against other equally notable artists. On one side are those who say that copyright must serve to protect the author, under the slogan, "Without artists, you don't have art."<sup>213</sup> On the other side are those who maintain that there is a democratic interest in access to art, inverting the slogan so that it states, "Without a public, you don't have art."<sup>214</sup> Without weighing in on the merits of either position,<sup>215</sup> what must be valued for purposes of this discussion is the fact of the debate and, in particular, the fact that there are voices seeking to defend widespread democratic interests.

Equally, one can identify within the region increased discussion of the "digital divide," a phrase that once referred to U.S. inequality of digital access but that has now taken on international dimensions.<sup>216</sup> For example, in Brazil only 20 percent of the population has access to the internet;<sup>217</sup> both regionally and globally, in the less developed world, the statistics are even more concerning. Specifically,

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211. See *supra* notes 65–70 and accompanying text; see also HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 165–68 (2000) (observing how the belief in property rights has been universalized, but noting the centuries-long struggle to realize those rights in Peru); Zuenir Ventura, *A invasão social*, O GLOBO, Dec. 29, 2010, at 7 (discussing the importance of addressing the "social question" as the second phase of Rio de Janeiro slum pacification).

212. See *supra* note 44 and accompanying text; see also *supra* note 30 and accompanying text.

213. Rosane Pavam, *A voz dos artistas*, CARTA CAPITAL, Mar. 16, 2011, at 56–58.

214. *Id.*; see also Opinião, *Visão maniqueísta sobre o direito autoral*, O GLOBO, Mar. 10, 2011, at 6 (stating an opinion strongly in favor of authors' rights and against "social" interests).

215. Indeed, there is now a "third way," led by yet more prominent artists, seeking creation of a government agency to monitor music use and determine the fair division of interests. See generally Pavam, *supra* note 213. This is a problem of international dimensions, however, and certainly not limited to less-developed countries. See, e.g., *The Copyright Rebellion*, 52 CHRON. HIGHER EDUC. 1 (May 29, 2011), available at <http://chronicle.com/article/The-Copyright-Rebellion/127719/> (describing the pushback on the recent unavailability of materials due to copyright restrictions); Larry Rohter, *Legislator Calls for Clarifying Copyright Law*, N.Y. TIMES, Aug. 29, 2011, at C1 (discussing a clarification of renewal rights).

216. See, e.g., Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185, 185–87 (2011).

217. Carlos Alberto Sardenberg, *A constituição para alguns, custos para todos*, O GLOBO, Mar. 11, 2011, at 6.

only 24.5, 15.9, and 3.8% of the populations in Latin America, the Middle East, and Sub-Saharan Africa, respectively, had access to the Internet. In total, Sub-Saharan Africa housed only 2% of all Internet users even though it accounted for 12% of the world's population. Meanwhile, 96% of the secure Internet servers in the world were located in high-income OECD countries, even though those countries comprised less than 15% of the world's population.<sup>218</sup>

Why is it important to expand access? In the modern world, as dependent as we have become on technology, the internet and related technologies are necessary to enable persons to flourish in the sense understood in this Article. As essential means of communication, these technological tools create the conditions for gaining self-knowledge and permitting the exercise of practical reason; internet-dependent social network technologies create new opportunities for affiliation.<sup>219</sup>

As indicated, the suggestion here is not that the examples above indicate an unqualified triumph for the advancement of a clearly defined concept of property's social function. On the contrary, as indicated, there are grave risks that the socially and economically disenfranchised can, as a result of greater formality, end up as the net losers. At the same time, as this discussion has endeavored to suggest, the fact of the debates, not to mention the breadth and variety of property situations involved, arguably represents a sea change that could redound positively to an embracing conception of property's social function.

### 3. Providing Public Works for All

The third and final set of examples stands as evidence that, in scattered cases throughout the region, public officials have implicitly taken seriously a conception of property's social function, delivering much-needed public services that seem likely to create the conditions necessary for individuals and communities to flourish. The discussion here will focus on two country examples.

The first is in the Dominican Republic, where the infrastructure-focused President, Leonel Fernández, spearheaded the construction of a metro in Santo Domingo. The Metro, with a single north-south line in operation running a length of 9.6 miles, and another, east-west line under construction,<sup>220</sup> generated no small amount of debate. In particular, criticisms came from economic elites who objected to the government's decision, in a country with pressing needs in many areas (and notably in basic education and health) to focus on transportation infrastructure.<sup>221</sup>

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218. See Hatem Ali, *supra* note 216, at 189–90 (footnotes omitted); see also *Internet Usage Statistics, Population and Telecom Reports for the Americas*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats2.htm> (last visited Nov. 16, 2011).

219. See *supra* notes 20–30 and accompanying text.

220. See *Santo Domingo Metro*, RAILWAY-TECH., <http://www.railway-technology.com/projects/santodomingo/> (last visited Nov. 16, 2011).

221. These are complaints that I have heard since the beginning of construction of the Metro. The criticisms, although often from people who never take public transportation,

Moreover, the costs were high, as is typically the case with public transit systems. Nonetheless, in its most positive light, the system, even if it does emanate something of the aura of a *grand projet* of the ego-serving type typically associated with Presidents of the French Republic, reflects an appreciation of property's social function. In a city where surface transportation is chaotic and disorganized, and the incidence of petty robbery and property crime is high, the experience is a pleasure: stations are gleaming, air conditioned, and well policed; the fare is reasonable even for the poorest Dominicans.<sup>222</sup> For those who live in Villa Mella and the poorer, northern areas of the city, the commuting experience is more comfortable and more dignified than would be the case by boarding a rickety, dirty, and often unsafe collective taxi or van, especially in the blistering tropical heat.

Similar observations can be offered about the much more extensive and celebrated examples of urban interventions in Colombia's two major cities, where gondolas have drastically and affordably reduced commute times for residents of some of those cities poorest slums. In Bogotá, architecturally dramatic public libraries figure prominently in the city's once "peripheral" and druglord-controlled slums. Those slum neighborhoods are now linked with award-winning transportation systems to business centers.<sup>223</sup> In Medellín, transportation infrastructure improvements have been accompanied by a focus on recreational and cultural activities, from a public sculpture garden celebrating the city's beloved native son, Francisco Botero, to a nature and science museum and a public aquarium.<sup>224</sup> For a city once dubbed the world's most dangerous,<sup>225</sup> and in a country and a region where attractions like a science museum or a public aquarium are few and far between, the significance of such improvements in terms of creating the conditions for human flourishing, to promote curiosity and diversion where people were once fearful, cannot be underestimated.

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have some merit in sheer statistical terms. With respect to health, for example, the Dominican Republic has much to do. The mortality rate for children under five years is nearly twice that of the regional rate and the maternal mortality rate is nearly 75 percent higher than the regional rate. HIV and tuberculosis prevalence, often positively correlated with poverty, are also well above regional rates. See *Dominican Republic: Health Profile*, WORLD HEALTH ORG., <http://www.who.int/gho/countries/dom.pdf> (last updated Apr. 4, 2011).

222. U.N. Comm'n for Sustainable Dev., *El Metro and the Impacts of Transportation System Integration in Santo Domingo, Dominican Republic* (May 2010), available at [http://www.un.org/esa/dsd/resources/res\\_pdfs/csd-18/13may/round-table-3/GFDD.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/csd-18/13may/round-table-3/GFDD.pdf). The fare upon opening, for example, was approximately \$0.55 USD. *Id.* at 9.

223. See BOGOTÁ: EL RENACER DE UNA CIUDAD, *supra* note 127, at 165–284.

224. Josh Case, *Parque Explora, Medellín Children's Science Museum*, COLOMBIA BEAT (Feb. 25, 2011, 2:30 AM), <http://colombiabeat.com/main/2011/02/25/parque-explora-medellins-childrensscience-museum/>; *The Cosmopolitan Life of Medellín*, PROEXPORT COLOMBIA, <http://www.colombia.travel/en/international-tourist/vacations-holidays-where-to-go/recommended-weekend-destinations/cosmopolitan-medellin> (last visited Nov. 16, 2011).

225. Grace Bastidas, *Medellín, a Former Drug Battleground, Is Reborn*, N.Y. TIMES (Aug. 16, 2007), <http://www.nytimes.com/2007/08/15/travel/15iht-tcolombia.1.7126872.html>.

## CONCLUSION

The preceding reflections have endeavored to show that there is reason to believe that the notion of property's social function continues to take root in Latin America and the Caribbean today, and that law and legal reform are central features of this process. At the same time, this Article has sought to illustrate that the notion of property's social function is also hotly disputed and that achieving its promise in the region cannot be assured. Nonetheless, in a wide range of areas, as has been demonstrated above, evidence exists that the notion of property's social function has traction as one that aims to secure the goal of human flourishing or, as the New Jersey Supreme Court so memorably put it, to promote human health, welfare, and dignity.<sup>226</sup> Going ahead, remembering that "property serves human values" for people not only as individual holders of private property but also as members of communities, there is hope that concrete recognition of this version of the notion of property's social function will help bring greater social and economic equality in the region, and thus increased social, economic, and political order and stability.

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226. *See supra* note 2 and accompanying text.