

Review Essay

The Future of Private Property

The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being

by Richard Wilkinson and Kate Pickett (2018)

Allen Lane, 352 pp, ISBN 9780525561224

Property and Human Flourishing by Gregory S Alexander (2018) Oxford University Press, 400 pp,

ISBN 9780190860745

Radical Markets: Uprooting Capitalism and Democracy for a Just Society by Eric A Posner and E Glen Weyl (2018)

Princeton University Press, 368 pp, ISBN 9780691177502

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Abstract

Using the theory of inequality developed by Wilkinson and Pickett in *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being*, this review essay canvasses two recent normative contributions that claim a way forward for the concept and law of private property: Alexander's defence of private property as fostering human flourishing through the living of a good life, as advanced in *Property and Human Flourishing*, and Posner and Weyl's radical liberal overhaul of the very content of property found in *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*. The essay assesses Alexander's focus on the role of obligation as a component of private property necessary to fostering the living of a good life, and Posner and Weyl's proposal that private property be replaced with a new ideal-typic form of property known as 'partial common ownership'. It concludes with a reflection on the ubiquity of inequality in any proposal one might adopt for either the overhaul or the replacement of private property.

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Society is impossible without inequality.¹

I Equality is Good for You

In their recent book, as the title suggests, Richard Wilkinson and Kate Pickett argue that more equal societies reduce stress, restore sanity and improve everyone's well-being.² Recounting how 'the world has changed [since 2008], rocked by economic crisis, political polarization and populism, ideological conflicts, and the mass movement of refugees and economic migrants worldwide', Wilkinson and Pickett conclude that '[i]nequality has made no small contribution to all of these'.³ More worryingly,

[t]here will always be people who, while claiming to deplore class and status divisions, nevertheless imagine that large income differences do not matter. ... [and] many continue to dismiss the popular demand to reduce income differences as just 'the politics of envy'.⁴

Why does inequality matter? Because it causes significant harm: worsened social gradients, decreased social mixing and cohesion, increased anxieties about status, and heightened consumerism and conspicuous consumption.⁵ For Wilkinson and Pickett, policies aimed at reducing or eliminating these harms can 'improv[e] the quality of life and well-being of the vast majority of the population'.⁶ They envisage four key improvements that will follow the implementation of policies aimed at reducing inequality: (i) 'a world where status matters less, where the awkward divisions of class begin to heal, where social anxieties are less inhibiting of social interaction and people are less plagued by issues of confidence, self-doubt and low self-esteem';⁷ (ii) 'a society that uses each increase in productivity to gain more leisure and reduce the demands of work';⁸ (iii) 'improvement in the quality of working life resulting from the extension of democracy into employment';⁹ and (iv) corresponding 'health and social benefits'.¹⁰

Yet, private property, one of the foundational building blocks of modern neoliberal society, remains inherently unequal. Both as a concept and as a means of allocating resources, private property presupposes inequality; it does not end, but *begins* with inequality. This has been known for quite a long time; Rousseau wrote that inequality 'derives its force and its growth from the development of our faculties and the progress of the human mind, and finally becomes fixed and legitimate

¹ Napoleon Bonaparte, Emperor of the French, cited in George Rudé, *Revolutionary Europe: 1783–1815* (Harper & Row, 1st ed, 1964) 237 citing Maurice Vitrac (ed), *Autour de Bonaparte: Journal du Comte P-L Roederer, Ministre et Conseiller d'État: Notes Intimes et Politiques d'un Familier des Tuileries* (H Daragon, 1909) 18.

² Richard Wilkinson and Kate Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being* (Allen Lane, 2018).

³ *Ibid* xxii.

⁴ *Ibid* 231.

⁵ *Ibid* 231–5.

⁶ *Ibid* 235.

⁷ *Ibid* 262–3.

⁸ *Ibid* 263.

⁹ *Ibid*.

¹⁰ *Ibid* 264.

through the institution of property and laws'.¹¹ Flannery and Marcus summarise Rousseau's insight this way:

[A]ll the unpleasant characteristics of the human condition derived ... from society itself as it developed. Self-respect, vital for self-preservation, was the rule at first. Unfortunately, as society grew, this attitude gave way to self-love, the desire to be superior to others and admired by them. Love of property replaced generosity. Eventually, a growing body of wealthy families imposed a social contract on the poor, a contract that institutionalized inequality by providing it with moral justification.¹²

Rousseau lacked evidence to support the conclusions about equality¹³ — the social sciences would not even come into existence until the work of Auguste Comte and Émile Durkheim in the mid- to late-19th century. And it would be another century again before Flannery and Marcus would fill this evidentiary vacuum with meticulous and detailed empirical research drawing upon archaeological and anthropological information.¹⁴

Put simply, property assumes scarcity of everything and, therefore, the necessity to allocate resources in such a way that some will win and some will lose. Inevitably, then, some end up with more of whatever the resource happens to be, and some with less. Both historical fact¹⁵ and contemporary reality,¹⁶ these assumptions led one prominent property theorist to conclude that '[p]roperty is [j]ust, to a [d]egree, [s]ometimes'.¹⁷ And given that it rests on private property as its principal means of resource allocation, it should come as no surprise that inequality in the contemporary neoliberal world is increasing. This is part of a historical trend — the only aberration in which followed, for a brief time, the end of the Second World War.¹⁸ This historical trend, too, was known long ago: Marx was the first to identify the truth that the inequality that follows from a capitalist world order predicated upon alienated labour produces unjust outcomes.¹⁹ Recently, no less a periodical than *The Economist* pronounced Marx's analysis, if not his solution, correct.²⁰

The question, then, is not whether inequality exists — it clearly does — but how to reconcile the need for greater economic equality with the inherent inequality in the way in which we allocate things. This review essay canvasses two recent normative contributions that claim a way forward for the concept and law of private

¹¹ Jean-Jacques Rousseau, *A Discourse on Inequality* (Maurice Cranston (trans), Penguin, 1984) 137 [trans of (first published 1755)].

¹² Kent Flannery and Joyce Marcus, *The Creation of Inequality: How Our Prehistoric Ancestors Set the Stage for Monarchy, Slavery, and Empire* (Harvard University Press, 2012) ix–x.

¹³ Ibid x.

¹⁴ Flannery and Marcus, above n 12.

¹⁵ Walter Scheidel, *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-First Century* (Princeton University Press, 2017).

¹⁶ Danny Dorling, *Inequality and the 1%* (Verso, 2015).

¹⁷ J W Harris, *Property and Justice* (Oxford University Press, 2002) ch 18.

¹⁸ Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans, Belknap Press, 2014) [trans of: *Le Capital au XXIe Siècle* (first published 2013)].

¹⁹ Karl Marx, *Capital (Vol 1: A Critique of Political Economy)* (Ben Fowkes trans, Penguin, 1992 [trans of: *Das Kapital. Erster Band. Buch I: Der Produktionsprozess des Kapitals*, 1867]).

²⁰ 'Rulers of the World: Read Karl Marx!', *The Economist* (online), 3 May 2018 <<https://www.economist.com/books-and-arts/2018/05/03/rulers-of-the-world-read-karl-marx>>.

property. Part II considers Gregory S Alexander's defence of private property as fostering human flourishing, the living of a good life, the key to which lies in the inherent obligation of private property.²¹ Part III assesses Eric A Posner and E Glen Weyl's radical liberal²² overhaul of the very content of property, which argues for a new ideal-typic form known as 'partial common ownership'.²³ Part IV offers some brief concluding reflections.

II Human Flourishing

Alexander defends the liberal institution of property on the grounds that it promotes human flourishing.²⁴ Joining a venerable intellectual tradition — Hegel connected private property and personality,²⁵ a foundation built upon by Radin,²⁶ Harris,²⁷ and Munzer,²⁸ among others,²⁹ Alexander makes contributions both conceptually — providing a means of unpacking the meaning of ownership — and normatively — developing a moral justification for property.³⁰ While not entirely rejecting them, Alexander differentiates the human flourishing theory from the 'utilitarian/information cost' and the 'Kantian rights' theories that dominate Anglo-American property theory, finding both 'radically incomplete'.³¹ Instead, Alexander incorporates parts of both theories to render a 'much richer and morally satisfying approach to explaining what private ownership means and what its limits are'.³² Thus, while accepting the importance of both information efficiency and personal autonomy and self-governance, Alexander rejects the suggestion that information alone should or does decide cases, and that individual autonomy alone is the value foundation of property. Rather, human flourishing is pluralistic, with information and autonomy merely two values among many constitutive components.³³

Alexander limits the scope of the human flourishing theory. While normative, the theory is one of private law. Thus, while applicable to a number of specific examples — public access to private beaches,³⁴ trespass and excludability,³⁵ the twin

²¹ Gregory S Alexander, *Property and Human Flourishing* (Oxford University Press, 2018).

²² 'Don't Shrink the Role of Markets — Expand It', *The Economist* (online), 10 May 2018 <<https://www.economist.com/books-and-arts/2018/05/10/dont-shrink-the-role-of-markets-expand-it>>.

²³ Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018) 20–5.

²⁴ Alexander, above n 21.

²⁵ G W F Hegel, *Outlines of the Philosophy of Right* (T M Knox trans, Oxford University Press, 2008) 57–83 (First Part: Abstract Right: (I) Property) [trans of: *Grundlinien der Philosophie des Rechts* (first published 1820)].

²⁶ Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957.

²⁷ Harris, above n 17, 231–43.

²⁸ Stephen R Munzer, 'Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers' (1997) 32(1) *Harvard Civil Rights-Civil Liberties Law Review* 1.

²⁹ Dudley Knowles, 'Hegel on Property and Personality' (1983) 33(130) *The Philosophical Quarterly* 45; Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(2) *Georgetown Law Journal* 287.

³⁰ Alexander, above n 21, xvi.

³¹ *Ibid* xi.

³² *Ibid*.

³³ *Ibid* xi–xii.

³⁴ *Ibid* 169–207.

³⁵ *Ibid* 103–68.

ubiquitous concerns in American constitutional jurisprudence of takings and segregation,³⁶ and the right to destroy³⁷ — Alexander is clear that it cannot, for instance, provide solutions to systemic and structural problems like homelessness.³⁸ Moreover, it is not a theory of resource redistribution; rather, Alexander seeks only to reveal duties already owed by owners as part of developing human capabilities.³⁹

Having set the boundaries of the theory, Alexander defines what is meant by ‘human flourishing’:⁴⁰ broadly Aristotelian, the theory insists ‘on the inherently social character of humans and the implications that each person’s dependence on other human beings have for the substantive content of ownership’.⁴¹ It follows that ‘private ownership is justified insofar as it facilitates the opportunity of individuals to live well-lived lives’.⁴² The theory, containing three components, explains how property facilitates human flourishing.⁴³ First, the core claim — which is plural and objective — is that property enables individuals to live a flourishing life, with ‘the well-lived life ... measured by a person’s capabilities rather than ... possession[s] or by the satisfaction of his subjective preferences’.⁴⁴

Second, to go well, a life requires certain essential capabilities — health, security, autonomy, and sociability — that exist only within communities, including the State, which act as ‘the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities’.⁴⁵ This means that we owe obligations to others, not because of reciprocity or some notion of contract, but on the basis of ‘the obligation each of us owes to ourselves to live well’.⁴⁶

Finally, the obligation to support the communities of which one is a part means that one

owe[s] certain duties, some of which are negative, others affirmative, to members of [one’s] communities to facilitate development of their necessary capabilities. These duties [are] not imposed externally by the state. Rather, they are inherent in what it means to own property ...⁴⁷

Duties are limited through ‘the same demands generated by the capabilities that facilitate human flourishing — health, personal security, sociability, and so forth’.⁴⁸

Yet, obligation implies the very inequality it seeks to redress. That is the true inherent quality of private property. Why the need for obligation if not to redress inequality? If true equality was achieved in the allocation of goods, there would be

³⁶ Ibid 209–29, 267–94.

³⁷ Ibid 231–66.

³⁸ Ibid xvii. See also 295–320.

³⁹ Ibid xix–xx.

⁴⁰ Ibid 3–35.

⁴¹ Ibid xii–xiii.

⁴² Ibid.

⁴³ Ibid 39–100.

⁴⁴ Ibid xiv.

⁴⁵ Ibid xv.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid xvi.

no need for obligation because equal access to a good or resource would obviate it. Even if Alexander's theory promotes human flourishing, then, does the good life lived by an individual who fulfils every obligation imposed by social context outweigh the loss of equality suffered by those protected by such obligation? In *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Posner and Weyl suggest not. Rather, they argue, more than inequality, private property creates monopoly. Let's consider their proposed solution.

III Partial Common Ownership

For Posner and Weyl, the mere existence of choice and markets fails to provide the best outcomes, either for market actors exercising that choice, or for others affected by the resulting consequences. While they claim that free, competitive, and open markets remain the best way to organise a society,⁴⁹ Posner and Weyl argue that the problem is that 'most important markets are monopolized or entirely missing'.⁵⁰ More than inequality, then, they argue that the real problem with private property involves the 'monopoly problem', which pertains when

private ownership [of any asset] ... hamper[s] allocative [and investment] efficiency. ... Because of the ubiquity of private property in our economy, empirical research suggests that the misallocation of resources due to monopoly and related problems ... may be reducing output by 25% or more annually...⁵¹

This misallocation due to monopoly can occur in at least four ways: (i) 'signaling' or 'adverse selection': essentially, tales told about an asset by a seller that inflate the price paid by a buyer;⁵² (ii) the 'endowment effect': the difference between what one is willing to pay for something as opposed to what one might accept to part with it;⁵³ (iii) barriers to borrowing;⁵⁴ and, (iv) simple laziness, incompetence, and malice: '[p]rivate property allows lazy or misanthropic owners to hoard assets and to do so not for gain, but out of sloth.'⁵⁵ Whatever form it takes, though, the monopoly problem allows private property holders to stand in the way of economically valuable projects.⁵⁶

Like Alexander, Posner and Weyl propose a normative theory to redress the monopoly problem. Using the concept of the auction, they claim that their theory *would* result in resource redistribution and that it *might just* have the answer to systemic problems like homelessness. The answer is a 'Radical Market', a form of 'auction [that] require[s] people to bid against each other, [where] the object on the block winds up in the hands of the person who wants it most — with the caveat that

⁴⁹ Posner and Weyl, above n 23, 20–5.

⁵⁰ *Ibid* xvi.

⁵¹ *Ibid* 38. See also 34–5.

⁵² *Ibid* 66–7, citing George A Akerlof, 'The Market for "Lemons": Quality, Uncertainty and the Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 488.

⁵³ Posner and Weyl, above n 23, 67, citing Richard Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) 1(1) *Journal of Economic Behavior and Organization* 39.

⁵⁴ Posner and Weyl, above n 23, 67–8.

⁵⁵ *Ibid* 68.

⁵⁶ *Ibid* 39.

differences in bids may represent differences in wealth as well as desire'.⁵⁷ In their proposal, Posner and Weyl attempt to combat failure of the assumption of perfect competition in markets — in most cases, one deals with 'highly idiosyncratic, one-of-a-kind assets'.⁵⁸ This Radical Market solution can be applied to private property,⁵⁹ democracy,⁶⁰ labour,⁶¹ corporations,⁶² and data.⁶³ I focus here only on the Radical Market solution as it applies to the concept and law of liberal private property.

Applied to private property, the Radical Market solution involves two components. On the one hand, to address allocative monopoly, the 'Vickery Commons' — so-called in honour of Nobel Laureate William S Vickery — involves using

an auction where all property — every factory, house, and car — is held in common and the right to rent and use it is constantly auctioned. The citizen who offers the highest bid (in the form of a rental payment) possesses the object until outbid by another citizen. Each factory, house, or car would have a standing highest bid placed on it, representing the rent that the current possessor agreed to pay to the government for using the asset. Anyone could beat this bid and claim the object. The money collected from rents is used to finance public goods ... and fund a social dividend.⁶⁴

And, on the other hand, to optimise both allocation and investment, 'partial common ownership' — an ideal-typic form of property somewhere between commons and private property — implements common ownership to 'deter monopoly power while private ownership [encourages] investment'.⁶⁵

Partial common ownership operates on the basis of 'liturgy', a concept known to the ancient Greeks, whereby the thousand wealthiest citizens funded public operations of the State through a process of exchange. Thus, a person could be challenged and would either have to assume the liturgical responsibility for the State or exchange all possessions with the challenger. This required self-assessment and honesty — one who claimed to be poor to avoid the liturgical burden could end up losing everything if challenged by someone poorer. It also incorporated the 'require[ment] to declare the value of [one's] possessions for the purpose of a transaction or public project...[thus] stand[ing] ready to "prove" that the declared value is correct'.⁶⁶ In addition to liturgy, then, partial common ownership also operates as a form of tax, making it 'costly to declare a high valuation and thus deter the purchase of assets. ... [and] penalizes any attempt to exercise monopoly power over an asset. The higher the price the possessor demands, the more tax she must pay.'⁶⁷

⁵⁷ Ibid xvii.

⁵⁸ Ibid 26.

⁵⁹ Ibid 30–79.

⁶⁰ Ibid 80–126.

⁶¹ Ibid 127–67.

⁶² Ibid 168–204.

⁶³ Ibid 205–49.

⁶⁴ Ibid 49.

⁶⁵ Ibid 52.

⁶⁶ Ibid 55.

⁶⁷ Ibid 57, citing Maurice Allais, *L'impôt sur le Capital et la Réforme Monétaire* (Hermann, 1988).

Partial common ownership, as conditioned by liturgy and tax, thus achieves efficiency of both allocation and investment. In the case of someone who holds an asset that they wish to retain, so long as they set their valuation or reserve price at the rate exactly equal to the tax rate, full allocative efficiency is achieved: only those buyers willing to pay more than the reserve price will in fact end up taking the asset, meaning that ‘every asset passes to the hands of the person best able to use it and invest in it’.⁶⁸ The optimal position in relation to any asset is a very small tax, which will ensure that allocative efficiency is achieved without distorting investment.⁶⁹

Partial common ownership, then, uses tax as a means of modifying traditional private property: ‘The two most important “sticks” in the bundle of rights that compose private property are the “right to use” and the “right to exclude.” With a [tax], both rights are partly transferred from the possessor to the public at large.’⁷⁰ In the case of the right to use, a fraction of it ‘is revealed and transferred to the public through the tax; the higher the tax, the greater the fraction of use value transferred.’⁷¹ The right to exclude is considered to be of far greater significance — what happens here is radical:

the “owner” does not enjoy this right to exclude vis-à-vis anyone who offers to buy at the self-assessed price. In fact, any member of the public may exclude the current owner in exchange for this price. The lower the price, therefore, the greater is the extent to which the exclusion right is held by the public at large rather than the “owner.” The price falls as the tax rises, so raising the COST also gradually shifts the exclusion right to the public at large, any member of whom can pay a price to claim the property.⁷²

So,

[w]e can conceptualize [partial common ownership] as sharing ownership between society and the possessor. Possessors become lessees from society. Their lease terminates when a higher-value user appears, whereupon the lease is automatically transferred to that user.⁷³

This, in turn, would ‘encourage attachment to communities and civic engagement, which have sometimes been damaged by capitalism’.⁷⁴ Where property as social relations theorists emphasise the role of the police power of the State through regulation as the means of fostering social relationships,⁷⁵ Posner and Weyl see partial common ownership, liberalism itself, as fulfilling this role.

Rather than rejecting the concept of property, Posner and Weyl radically redeploy two ideal-typic forms — common and private — in a novel hybrid partial common — to deal with problems presented by the neoliberal economic order. In doing so, they reconceive the nature of the rights to use and to exclude, two of the

⁶⁸ Posner and Weyl, above n 23, 58.

⁶⁹ Ibid 61.

⁷⁰ Ibid 61, citing Thomas W Merrill, ‘Property and the Right to Exclude’ (1998) 77(4) *Nebraska Law Review* 730.

⁷¹ Posner and Weyl, above n 23, 61.

⁷² Ibid 62.

⁷³ Ibid.

⁷⁴ Ibid 78.

⁷⁵ See, eg, Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000).

eleven standard incidents of ownership first identified by Honoré⁷⁶ and later narrowed by Radin to the ‘liberal triad’ of use, exclusivity, and alienability.⁷⁷ This is clearly a novel contribution to contemporary property theory scholarship. Still, merely to reconceptualise the liberal triad is not to change the nature of property itself. By retaining use and exclusivity, they retain the underlying reality of property: inequality. And no matter how radical, it is difficult to conceive of a world in which we could entirely do away with some form of allocating scarce resources among people. Whatever we might come up with, we still face the issue of inequality — some will win and some lose in the allocation effected by that system. In fact, whatever we can imagine tends to look a lot like property as we already know it; and that means facing the truth of inequality. And therein lies the difficulty.

IV The Last Word

The problem, as much as Posner and Weyl try to tell us their solution can overcome it, *is* inequality. The very need for a system of allocation is due to the scarcity of whatever it is one is trying to allocate. If there were no scarcity, there would be no need to allocate. Whatever system one uses to do that exists because of scarcity. And using any such allocative mechanism we can imagine — as Posner and Weyl do — involves, by its very nature and therefore of necessity, inequality. Similarly, however it may allow us to live a good life, to flourish, as Alexander suggests, private property is, in itself, inherently unequal. The truth is that few who write about property, and certainly not Alexander or Posner and Weyl, denies that property is inequality. Indeed, that is the very problem the authors reviewed here set out to redress.

The problem — both with Alexander’s suggestion that the obligation to others and to the community is already there, we just need to see it, and Posner and Weyl’s partial common ownership — is that both urge a change in the social imaginary of private property. Taylor defines a ‘social imaginary’ as

the ways in which [people] imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations.⁷⁸

He explicitly uses ‘social imaginary’ as a contrast to ‘social theory’. The latter, as its very name suggests, focuses on theory, and not on the way that ordinary people ‘imagine’ their social surroundings in images, stories, legends, and so on.⁷⁹ Moreover, theory is the province of a small minority elite, rather than large groups of people — perhaps the whole of society. When applied to law, an ‘idea’, for Taylor, means the legal forms, accepted norms and so forth that help make sense of

⁷⁶ A M Honoré, ‘Ownership’ in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107.

⁷⁷ Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 121.

⁷⁸ Charles Taylor, *A Secular Age* (Belknap Press, 2007) 171.

⁷⁹ *Ibid* 171–2.

collective life — in short, it means the way the broader society, rather than elites, see law.⁸⁰

But it is far from easy to change the social imaginary through elite theory. Theory, by its very normativity, is malleable and easily changed. The social imaginary is not so easily changed. Taylor identifies a very few epochal moments in human history where such shifts have occurred — the most notable being ‘the great founding revolutions of our contemporary world, the American and the French’.⁸¹ And, in the case of the French Revolution, the inability to translate the idealisation of theory into a stable and agreed upon set of practices led to conflict that lasted for over a century. Still, Taylor argues that:

in both these great events, there was some awareness of the historical primacy of theory, which is central to the modern idea of a ‘revolution’, whereby we set out to remake our political life according to agreed principles.⁸²

And the lesson of these two epochal moments is that a shift in social imaginary occurs where:

people take up, improvise, or are inducted into new practices. These are made sense of by the new outlook, the one first articulated in [a] theory; this outlook is the context that gives sense to the practices. And hence the new understanding comes to be accessible to the participants in a way it wasn’t before. It begins to define the contours of their world, and can eventually come to count as the taken-for-granted shape of things, too obvious to mention.⁸³

Private property as it exists now is part of the social imaginary. If the American and French Revolutions are the only two moments in the last three centuries of theory driving change in the social imaginary, then the likelihood that Alexander or Posner and Weyl might foretell change in the social imaginary of private property is vanishingly slim. Human flourishing and partial common ownership are elite theory. A real change requires that the social imaginary of private property become partial common ownership.

True enough, Posner and Weyl argue that we are subject to forced sales in many cases already without even realising it: mortgage foreclosures and sales; repossession for failure to pay a car loan; eviction for failure to pay rent under a lease of premises; self-assessment to determine how much our house or contents are worth in purchasing insurance in case they are lost; and the sharing economy.⁸⁴ Still, that is a long way from the sort of shift that Posner and Weyl propose, even if we accept that what they propose is already happening. Would people be any more inclined to accept it in every aspect of resource allocation? Notwithstanding the allocative and investment efficiency gains to the market, is the potential loss of an asset to an individual something that people are likely to countenance?

Among the many examples that could be chosen to demonstrate the problem, consider gentrification in the United States (‘US’). The popular perception of this

⁸⁰ Ibid 171–6.

⁸¹ Ibid 175.

⁸² Ibid.

⁸³ Ibid 175–6.

⁸⁴ Posner and Weyl, above n 23, 70.

process goes along these lines: ‘hordes of well-to-do whites are descending upon poor, minority neighbourhoods that were made to ensure decades of discrimination. ... these people snuff out local culture. As rents rise, lifelong residents are evicted and forced to leave.’⁸⁵ But might this be a myth? The available data might appear to suggest that what is really happening in gentrification is that

[l]ongtime residents reap the rewards of reduced crime and better amenities. Those lucky enough to own their homes come out richer. [Rather than a] lack of investment in historically non-white neighbourhoods, white flight from city centres and economic segregation[,] gentrification straightforwardly reverses each of those regrettable trends.⁸⁶

Seen in this way, gentrification might endorse, rather than challenge, the traditional social imaginary of private property; moreover, the potential for profit seems to provide little incentive to change. The traditional social imaginary of private property remains very strong; perhaps prohibitively so. People want to retain the property rights that they think secure to them the greatest benefit; the complex logic behind Posner and Weyl’s proposal means that it is unlikely to catalyse a shift in the social imaginary of private property, even if people could understand the benefits of that shift.

Still, it *might* be possible. Berger recounts the experience in the US State of Oregon where, between 2004 and 2007, Oregonians approved ballot Measure 37, which required ‘compensations for losses caused by most regulatory restrictions imposed after the acquisition of property’.⁸⁷ Measure 37 resulted in a drastic change in owners’ attitudes toward private property. During the time that it lasted, Oregonians seemed to understand, in some way, that regulation is in fact an important component of private property and that government and community are central to its existence.⁸⁸ Still, this demonstrates that while changing the social imaginary of private property may be possible, that change is likely to be incremental. And Wilkinson and Pickett write that:

[c]hange on the scale needed ... can only be achieved if large numbers of people commit themselves to achieving it. Sometime after the late 1970s, it seems, progressive politics either lost its conviction that a better form of society was possible or lost the ability to convince people that politics was the route to achieving it. The result was the almost uncontested rise of neoliberalism. Now, facing the evidence of global warming and calamitous climate change, the world is in need of a radical alternative, a clear vision of a future society which is not only environmentally sustainable, but in which the real quality of life is better for the vast majority. Only then will people commit themselves to the long task of bringing that society into being.⁸⁹

Even if Alexander’s assessment may hold some promise as a means of educating the general populace, that may result in little progress on the scale

⁸⁵ ‘In Praise of Gentrification’, *The Economist* (online), 23 June 2018 <<https://www.economist.com/united-states/2018/06/23/in-praise-of-gentrification>>.

⁸⁶ *Ibid.*

⁸⁷ Bethany R Berger, ‘What Owners Want and Governments Do: Evidence from the Oregon Experiment’ (2009) 78(3) *Fordham Law Review* 1281, 1283.

⁸⁸ *Ibid.* 1281–2, 1286–1303.

⁸⁹ Wilkinson and Pickett, above n 2, 265.

Wilkinson and Pickett suggest is necessary. To say nothing of the reforms advocated by Posner and Weyl, which, while ‘they may help jolt liberals out of their hand-wringing, and shape a new line of market-oriented thinking’, ‘are so radical that they are unlikely ever to be adopted.’⁹⁰ To put it simply, most ‘may view [Posner and Weyl] in the way radicals are often perceived: as somewhat eccentric’.⁹¹ Not a promising foundation on which to build the sort of epochal change witnessed in the American and French Revolutions, the scale of which Wilkinson and Pickett suggest is necessary to deal with the modern problem of inequality.

The truth is, as Rousseau wrote over 200 years ago, property and law fix and legitimate inequality.⁹² In our modern neoliberal world, the possibility that people would trade inequality away for something far more ephemeral (human flourishing) or egalitarian (partial common ownership) seems, therefore, remote at best. Sadly, as much as we might desire it, and as good as equality might be for us, Napoleon’s words may still be true: ‘society is impossible without inequality’.⁹³

⁹⁰ ‘Don’t Shrink the Role of Markets’, above n 22.

⁹¹ *Ibid.*

⁹² Rousseau, above n 11, 137.

⁹³ Bonaparte, above n 1, 18.