

PART I

A UNIFIED THEORY

This part develops a theory of social morality and property. Chapter 1 describes my project, outlines four propositions that constitute the core of the theory, and relates the theory to existing literature. Chapter 2 summarizes the four propositions and shows the relationship between them. Chapters 3 through 6 support the four propositions in greater detail; one proposition is discussed in each chapter.

The theory developed in this part is one of private law – the theory encompasses claims that one individual can justly make against other individuals. Part II then applies the theory to four central issues of the private law of property: exclusion, nuisance, concurrent decision making, and temporal coordination. Part III applies the theory to understand the justification for, and limits on, state regulation of property uses.

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1 Property's Values

A society is known by its property system because a society's property system expresses society's values about the distribution and use of its resources. Yet a theory of property that is also a social theory is difficult to develop because it requires a theory of social cooperation that understands rights and responsibilities over resources to reflect the values that support social cohesion. What is it about the concept of property that supplies the social glue necessary to ensure security to private owners while recognizing the legitimate interests of nonowners, and how does a society envision a property system that dissuades individuals from using lawlessness to get their way and yet allows the property system to evolve in response to technological and social changes?

This book offers such a theory. It differs from existing theory in its search for unity along the many dimensions that now create cleavages in property theory,¹ including the distinction between philosophical and economic justice,² between a private owner's rights and a private owner's responsibilities, between

¹ Unification theories are not new in law. See, e.g., Calabresi and Melamed (1972). A notable philosophical approach that examines the unity of private law is in Brudner (1995). Generally, however, unification theories tend to be advanced by scholars who take an economic approach to law, whereas classification theories – those that conquer by dividing – tend to be advanced by scholars who take a philosophical approach to law. The theory here attempts to unify these two methodologies. Beyond the legal literature, this work seeks to build on a growing body of work from the social sciences and philosophy that seeks to unify, across traditional divides, our understanding of the world. See, e.g., from the social sciences, Gintis (2009) and Binmore (2006), and from philosophy, Parfit (2011).

² The theory here is thus distinct from theories that seek unification in either welfare maximization or in unified legal or philosophical principles. In particular, the unification theory here is distinguished from the elegant unification thesis of Alan Brudner (1995) in two primary ways. The theory here distinguishes between the function of the law in mediating between individual interests and the goals of the law in maximizing something. The failure to make that distinction, and the associated conflation of goal-oriented and functional theories, creates an unnecessary dichotomy between philosophical approaches (which are fully consistent with the law's mediation function) and welfare-enhancing theories (if they are thought to assume

private and non-private property, between the individual and the state, between private and public law, and between obligations accepted voluntarily (as in contract law) and obligations undertaken as a member of a community (as in tort and property law). The demands of the unification project are stringent.

- The unification of philosophical and economic justice requires a theory that is attuned to the requirements of obligations and corrective justice while taking consequences seriously.
- The unification of rights and responsibilities requires a theory that justifies both the existence and the scope of rights, so that rights and their limitations can be understood to emanate from a single set of values.
- A unified view of the individual and the state requires a theory that situates each individual as a participant in forming the policies of the state, while protecting the individual from overreaching by the state.
- The unified view of various forms of private and non-private property (including property owned by the state) requires a unified concept of property that explains both property's essentialism and its diversity.³
- The unification of private and public law requires us to view the two by understanding the relationship between individuals acting as individuals and individuals acting as participants in a community.
- Finally, the unification of obligations taken on voluntarily and obligations imposed by law requires a theory of obligations that emanates from decisions individuals make, so that all obligations are in some sense self-imposed, even if their existence and scope depend on their legal recognition.

To unify property theory across these dimensions, I focus on the values that shape a system of property and that allow the law to claim to reflect a system of moral action. By identifying a structured framework for organizing our thought about the values used to resolve disparate interests and claims, we unify our understanding across what otherwise appear to be large chasms of

that the end to be achieved determines the content of the law). In fact, welfare enhancement may be the law's function without being the law's goal because the mediating function of the law can, as I describe here, be understood to mediate between the well-being of free and equal individuals. This allows philosophical and welfare-enhancing theories to be unified. A second distinction between Brudner's unification theory and the theory here is my insistence that theory reflect basic principles but also explain and justify the outcome of cases.

³ Most theories of property are, in fact, theories of private property and do not account for common property or the many mixed forms of property (see, e.g., Merrill 2012). This is a mistake. Common property employs a different concept of ownership but not a different concept of property, and the choice between various forms of private and common property is a social choice that seeks to align form and function. Only a theory that is unified across property forms provides a comprehensive theory.

conflicting ideas, while providing a structured basis for assessing the morality of the law.⁴

As has been recognized at least since the time of Hume, the concept of property (in any of its forms) addresses an inescapable issue every society faces: Who ought to make decisions about resources and how ought those decisions to be made? By focusing on ownership as a system by which a society allocates and recognizes decision-making authority, and by understanding how decisions about resources ought to be made, we can develop a unified view that sees the concept of property as a social response to society's need for an institutional framework for peaceably addressing disputes over resources.

The theory here displays several characteristics. It is unlike other theories of property because it seeks to understand how rights and responsibilities over resources flow from a single set of values. Many theories explain and justify the existence of private property, including theories of autonomy, personhood, incentives, and so forth.⁵ But those theories generally fail to explain the limitations on an owner's rights in the same terms that justify the rights in the first place. In other words, property theory justifies the existence, but not the scope, of various forms of property rights. I am interested not only in the values that give rise to property but in how those same values limit property rights. What is it about autonomy, personhood, or incentives that also justify the law in limiting property rights? Rights theories generally provide no basis for understanding the scope of rights in the same terms that justify the existence of the rights; a theory of responsibility does.

Under the presentation here, property rights arise when an individual has no responsibilities to look out for the well-being of other individuals, and it understands limitations on property rights to arise when an owner does have responsibilities to other individuals. The theory seeks to unify private law by focusing on the circumstances that require one individual to take into account the well-being of other individuals and that, because of that obligation, give the other a legal claim against the individual. In this view, property law, like tort and contract law, responds to the question of what we owe each other.

⁴ From one perspective, the theory builds on pluralist theories in that it accepts the assertion that various values underlie property law and that any account of property must take that plurality of values into account (*see generally* Dagan 2011). From another perspective, the theory developed here seeks to provide what pluralist theory denies: a unified way of thinking about the values that animate a property system. My claim is not that theory provides answers to issues raised by property law. My claim is that theory provides a unified way of thinking about the values underlying the property system so that analysis proceeds in an orderly, structured way and so that debates about the just resolution of property issues are about how best to implement a unified methodology rather than how to "balance" disparate values.

⁵ For a recent, excellent overview of existing theory, *see* Alexander and Peñalver (2012).

Although what property owners owe each other and nonowners may be less expansive than in torts and contracts (for reasons that will be discussed), the responsibility of an individual for the well-being of others is nonetheless the key to understanding the scope of property rights.

Natural law influences the theory here because it presupposes that the law arises from human interaction and from the need for humans to develop institutions, social and legal, that limit conflict and enhance cooperation. The theory is both descriptive and justificatory. It purports to describe the pattern of social and legal relationships that determine the forms and uses of property and also to understand those patterns in the context of a theory of the values that give the patterns their normative force. By proposing a theory that identifies the factors society uses, and ought to use, to institutionalize structured decisions about the society's resources, the theory provides a framework for understanding and comparing property systems in different societies.

Law and economics analysis intersects with the theory here because both understand property law to function to maximize individual well-being.⁶ Unlike most economic approaches, however, the theory does not assume that the maximizing process is either value-free or self-defining. Instead, the theory faces directly, as many economic theories do not, the question of whose well-being matters and how we determine whose well-being must be sacrificed so that another's well-being may increase. The theory can also be considered to be a philosophical approach in that it accepts the equal freedom of individuals, understands that individuals have categorical obligations toward one another, and posits that moral action can be articulated in a way that ensures that human behavior reflects those obligations. Unlike most philosophical approaches, however, the theory is not afraid to understand obligation by evaluating the consequences of not following the obligations, and it understands categorical imperatives in terms that are not hypothetical or conditional but that also take context into account. The theory integrates economic and philosophical approaches by understanding the maximization of well-being and the principle of equal respect for the freedom of individuals to be two ways of expressing the same thought.⁷

⁶ Economic theory has evolved from a focus on wealth maximization to a focus on welfare maximization, and then (in some quarters) to an emphasis on well-being maximization. I use the term "well-being" because it conveys the notion that an individual may determine what he or she values and because it focuses on emotional as well as material personal health.

⁷ The theory is resonant with Jedediah Purdy's claim that "visions of the economic order – particularly those derived from the Scottish Enlightenment – were attempts to integrate multiple dimensions of freedom within a legal regime," including negative freedom, a range of meaningful alternatives, and the capacity to choose among those alternatives. Purdy (2010) at 44.

The theory advances its unification goal by addressing four dichotomies that divide theorists into various camps: the dichotomy between essentialist and bundle-of-sticks approaches to property, the dichotomy between rights-based theories and assent-based theories, the dichotomy between individual interests and social interests, and the dichotomy between values as inputs and values as outputs. Each of these dichotomies is addressed by advancing a proposition that makes the dichotomy disappear. Collectively, the four propositions form a coherent and complete theory of property as an institution of social organization.

In this chapter, I present an overview of the theory and explain how readers might understand the theory in the context of contemporary ideas about property. Section 1.1 describes the kind of theory I am advancing, explaining the difference between a theory that focuses on outputs (what individuals can do with property) and a theory, such as the one here, that focuses on inputs (what values are relevant when society and individuals make decisions about property). Section 1.2 introduces the four propositions that make up the core of the theory. Section 1.3 then situates the theory in the context of contemporary theories of property.

1.1 VALUES AS INPUTS

Scholars use the term “values” in two quite distinct senses. We talk about the value of something, which uses the term “value” as a measure of output, a measure of what people get out of something. Property is valuable, of course. That is why we spend so much time debating about, and sometimes fighting over, property. We want a system of property to provide value to society and we want owners to get as much value out of the property as possible. We worry if the state takes away too much value from our property. Adding value to our resources makes us all better off because we all benefit from that value in some way; property values enhance one another. Each of these senses of the word “value” focuses on value as an output – a measure of what we get out of something.

But we also use the term “value” as a measure of the input into something – an aspect of our decision that impels the direction and content of our choice because it gives us satisfaction. The statement “I like ice cream” is a statement of values that are inputs into an individual’s decision about what to consume. The statement “You may not come on my property” is a statement about the values an owner uses when deciding whether to exercise her right to exclude.

The values we care about in developing a theory of property are not what we get out of a resource but what values a community expects an individual

to use in making decisions about resources. A system of law is a reflection of the values a society uses, and expects an individual to use, to make judgments about which of various positions the law might take on issues it confronts. A system of property law is a statement about what a society values when it must choose between various ways of shaping systems for making decisions about resources.

We can fruitfully explore the significance of the different meanings of the term “value” by reexamining the fundamental question: What is property? The conventional idea of property as a “thing” is obviously correct as far as it goes. Property consists of things external to people, over which one or more persons is allowed to claim dominion.⁸ But the view of property-as-thing does not reveal the relationship between the thing and an individual claiming dominion over the thing. It therefore gives no sense of the values that people use to determine which things to claim or what to do with the things they rightfully claim. As an object, the thing has no value in itself. The thing as an object is given social value because of the values individuals use to make decisions about the thing. Rather than thinking of property as a thing, we can think of property as a resource, which conveys some sense that the thing has value to a person. The thing that is property-as-a-resource forms the identity of the individual claiming dominion – the personhood theory of property of Hegel and Radin⁹ – and is an expression of individual purposive action – the Kantian theory of property.¹⁰ The thing that we call property is a resource that embodies core values that are worthy of recognition.

Others have broadened the property-as-thing idea by suggesting that property law is really about relationships between individuals over things.¹¹ What one individual values and owns privately another individual may not own, and ownership therefore excludes what another would value about the resource. This view does not deny the property-as-thing notion; it just highlights the fact that ownership is not a value-neutral word and that in any value-oriented approach the relationship between owner and nonowner is relevant. The relationship-between-people view, however, can be understood in two quite

⁸ Blackstone (1765–69), Book II at 2. Not surprisingly, this view is prominent among those who emphasize the right to exclude as property’s primary characteristic. Merrill (1998), Merrill and Smith (2010); Smith (2004), Penner (2006), Penner (1997).

⁹ Hegel (1942), Radin (1982).

¹⁰ Ripstein (2009) at 91.

¹¹ The notion that property is about relationships between individuals over things reflects the legal realist’s observation that ownership both empowers owners and excludes nonowners and therefore is about the relationship between them. *See, e.g.*, Cohen (1935).

distinct ways. It might focus on the relationship between individuals over things they value, or it might focus on the values that people bring to their relationships with others when making decision about resources.

The first, and conventional, way of understanding the relationship-over-things notion is to see a resource as defining the relationship between two or more individuals. A fox is subject to ownership and ownership is determined by the relative strength of two conflicting claimants, one of whom will get the value of the fox.¹² The disposition of the claims governs the relationship between the claimants with respect to that resource: one gets it and the other does not, and that determination governs the relationship between the claimants and the value of the fox. Or, we can think of the relationship between owner and nonowner with respect to a resource – say, a dock. The owner has certain rights – to exclude, for example – and the nonowner has certain rights – say, to take refuge at the dock from a dangerous storm.¹³ Again, the law is determining the relationship between individuals with respect to that thing. The law does not change the resource; it simply awards the resource's value (as an output) to one individual over another, determining who gets the value as an output.

The relationship-over-things view can be interpreted in another way, which is the one I endorse. We can understand property by the values that serve as inputs into determining the relationship between individuals. The award of the resource or access to the resource is itself value-based. If we understand the values that go into determining the relationship between individuals (the values we use to determine who gets the value of the thing), we understand property in a different way. That is, if we look at property not as a resource to be assigned but as society's expression of social values that are important in making the assignment, we begin to see the normative content of the notion of property – its ability to express values and its role as a device for mediating relationships between people. What is important is not that things have value; it is that things *express* value, particularly the values that determine how individuals ought to treat each other with respect to that resource and how the state ought to treat individuals. Accordingly, we can see property as the expression of social values, not as the award of value to one individual or another. Such a theory understands the law to be mediating between the diverse interests of owners and nonowners based on values that ought to be accounted for in making decisions about resources. And such a theory identifies the values that

¹² Pierson v. Post, 3 Cai R. 175 (1805).

¹³ Ploof v. Putnam, 71 A. 188 (1908).

owners and nonowners have in common, so that property relationships arise from shared, rather than opposing, values.¹⁴

With this perspective, the heart of the book's unification goal is to break methodological and justificatory ground by providing a new way of thinking about property relationships. Property theory is not lacking in ideas that depict the values (as inputs) that support theories of private property.¹⁵ Nor, for that matter, is property theory lacking in values that support the rights of nonowners or the rights of owners against other owners.¹⁶ Property theory is, however, significantly dichotomous; as Larry Lessig has said, "property is binary at its core."¹⁷ Whether we view property from the standpoint of clashing interests, clashing rights, or clashing values, property theory emphasizes competing, rather than unified, positions and therefore requires a balancing methodology. This book seeks to provide a corrective by developing a justification for the content of property law that sees the rights of owners and nonowners to grow from a set of shared values rather than from a set of conflicting interests. A theory of an owner's rights is a theory of property (by definition) but not a theory of property law because it does not account for an owner's responsibilities except by balancing. And a theory of an owner's social responsibility is a theory of access to property but not a theory of property law because it represents interests that are opposed to, rather than unified with, the rights of owners. The theory I seek accounts *simultaneously* for rights and their limitations based on shared values so that the law need not balance diverse interests.

¹⁴ The distinction between values as inputs and values as outputs can be captured as follows: individuals put a value on things in terms of what they are willing to give up to obtain those things; that is value as a measure of output. But the factors that determine how much a person is willing to give up depend on the strength of an individual's attachment to the thing, and that attachment may be deeper or more integral to that person's identity than his or her willingness to pay. That is value as an input. That is the sense of attachment that Margaret Jane Radin (1982) described in her theory of property as personhood. *See also* Madison (1961) ("The protection of the [diversity of faculties of men] if the first object of government."). The distinction between value as an input and value as an output partly reflects an individual's wealth, of course, but it also reflects the distinction between various measures of wants and needs. The factors that determine how much a person would give up to acquire something and how much a person would demand to give up something often differs. This is the endowment effect, which suggests that individuals value what they have more than what they do not have. Either way, what is important analytically is the value-determinants of a resource.

¹⁵ The tendency for theory to concentrate on rights rather than their limitations or the responsibilities of ownership is common to economic and philosophical approaches. Representative economic approaches are Shavell (2004) and Posner (2011). Representative philosophical approaches are Waldron (1988) and Penner (1997).

¹⁶ Alexander (2009), Dagan (2011), Rose (1986), Singer (1988).

¹⁷ Lessig (2006) at *81. For a historical review of the thought that has supported the dichotomy between the rights of owners and the rights of the community, see Alexander (1997).