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PROPERTY LAW AND SOCIAL MORALITY

Property Law and Social Morality develops a theory of property that highlights the social construction of obligations that individuals owe each other. By viewing property law through the lens of obligations rather than through the lens of rights, the author affirms the existence of important property rights (when no obligation to another exists) and defines the scope of those rights (when an obligation to another does exist). By describing the scope of the decisions that individuals are permitted to make and the requirements of other-regarding decisions, the author develops a single theory to explain the dynamics of private and common property, including exclusion, nuisance, shared decision making, and decision making over time. By developing a theory of social recognition, the author adds to our understanding of property evolution and the principle of equal freedom that helps us chart the scope of property rights and the limits on government interference with those rights.

Professor Peter M. Gerhart has been a dean; a legal scholar in antitrust, regulated industries, international trade, international transactions, international intellectual property law, torts, and property; and a scholar of globalization. A graduate of Columbia Law School, he has taught at the law schools of The Ohio State University and Case Western Reserve University, and, as a visiting professor, at the law schools of Georgetown and the University of Texas, the Central European University in Budapest, and the Weatherhead School of Business. He is the author of *Tort Law and Social Morality* (Cambridge University Press, 2010) and has published articles in a wide variety of fields.

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PETER M. GERHART

Case Western Reserve University School of Law



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Dr. Louise F. Westfall: great human being, inspiring leader, believer

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Preface

Property makes people's blood boil, although in different ways for people with property and people without it. Property law makes people's eyes glaze over, for property is encrusted with ancient formalities and arcane language. Property is at once a red-hot topic and a sleeper, a subject central to our political and social lives and Exhibit I in the pantheon of legal formalism.

When asked several years ago to teach the first-year Property Law course, I readily agreed. I wanted to see whether the ideas I had developed over a dozen years of teaching Tort Law would help remove property's political patina and the shroud of legal formalism. In the torts course, I had developed a way of thinking about one individual's responsibility for the well-being of others – a theory of private law that might be of value in understanding property law. Indeed, the more I read and taught, the more I realized that the way to defang and demystify property law was to reorient the field to understand it as one about how individuals ought to treat one another if they are to form an authentic community. Just as tort law is often (but not exclusively) about the rules of the road (and therefore about the rules governing open access property), property law concerns the rules governing the allocation and governance of resources in other ownership forms. I also realized that, unlike in tort law, I had to develop a theory of how individuals in a community, functioning as a group of individuals through their state, ought to think about their individual well-being in light of their collective well-being. Although tort law, drawn as it is from interpersonal relationships, rarely raises issues of collective well-being and collective will, property law must confront the relationship between the individual and the society in which individuals interact.

This book results from that exploration. Starting from the well-grounded notion that property law is about the relationship between individuals regarding things, whether owned privately or in common, I offer this account of how we might think about and justify what the law expects of individuals and a

community of individuals in property relationships. My account is based on a theory of social morality, by which I mean the way individuals interact when they would act morally, private owner to nonowner, private owner to private owner, among common owners, and between the community (represented by its state) and a private owner. It is a theory of ownership because it is a theory about which decisions of owners are worthy of respect by the community and which decisions by the community are worthy of respect by individuals. It is a theory of responsibility with respect to resources because it reveals how individuals ought to think about each other's well-being when they, and their community, have conflicts over resources.

The book has three parts. Part I presents a theory of private law as it pertains to property – a theory about what each individual can expect from other individuals when disputes arise over resources. I lay out four propositions that, taken together, provide a framework for addressing conflicts over property in private law and for determining when individuals are acting morally as they work out resource conflicts. In Part II, I apply that framework to suggest how we might think differently about the central areas of the private law of property: exclusion, nuisance, concurrent decision making, and temporal coordination.

The theory developed in Parts I and II is a theory of the obligations of one individual to other individuals. It is a theory of responsibility because it identifies the obligations that are categorical as between free and equal individuals. It is also a consequential theory because it acknowledges that individuals must take into account some (but not all) consequences when deciding how to fulfill their responsibilities. This integration of the deontic and the consequential relies on a distinction between the methodology an individual who would act morally would use to think about his or her relationships with other individuals (the deontic) and the kinds of considerations that are relevant when the individual employs that method (the consequential). The categorical obligation is the obligation to act as one would if one had used a method of making decisions that is agnostic as to the decision maker's ends. The method itself determines which consequences the ideal decision maker may not take into account and the weight to be given the factors the ideal decision maker must take into account. I also show how individuals ought to reconcile their responsibilities to others with the consequences of their decisions when the two appear to conflict.

Part III focuses on the relationship between the individual and the community of individuals as represented by their state. Property is a part of a complex and evolving social and political system that shapes the rights and limitations of ownership and the relationship between ownership and the well-being of

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the community. Whereas Parts I and II model the proper social relationship between individuals, Part III models the proper social relationship between the individual and the community of individuals acting through their state. Like its earlier counterparts, Part III is also a theory of bilateral relationships, for it models the relationship between the individual and the community as one of bilateral responsibility. It too is a theory of moral decision making, for it too describes the kind of considerations that govern decision making about resources when the individual and the community interact, including both limitations on owners (imposed by the state) and limitations on the state (imposed by the concept of property). Just as Parts I and II chart the content and limits of property rights in private law, Part III charts the content and limits of property rights when subjected to the will of the community through the state's legislative power.

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