



Introduction

The moral case for private property

This book makes a moral case for private property. Specifically, it argues that institutions of private ownership are justified, and in many communities are required, by a basic moral principle. That principle is equal respect for human beings as agents of practical reason. The principle gives rise to norms that require communities and their members to establish, honor, enforce, specify, and limit rights of exclusive use and disposition. Institutions of mediated dominion (private property ownership in the common law tradition) have significant instrumental value because they enable humans to exercise practical reason in such a way as to bring about desirable states of affairs consistent with the requirements of practical reasonableness, and thus to become practically reasonable people.

In summary, the argument runs this way: Human beings make plans for the use and management of those things that are under their dominion and control. And they make those plans not arbitrarily but for reasons. The human capacity to make plans for *reasons*, and not arbitrarily or merely to satisfy preferences or appetites, is what makes human beings unique and entitled to special moral respect. Respect for the reasoned plans of others gives rise to strong moral reasons to exclude oneself from things owned by others and not to interfere with any of those plans that do not cause unreasonable harm. From those duties are derived rights of exclusive use and management of things.

The moral norms underlying property are not all moral absolutes, like prohibitions against killing, raping, and maiming. Some of them, such as the duties not to enslave, are absolute while others are specified only in complex, context-dependent judgments. Nevertheless, the norms of property have moral foundations. They are grounded in human goods and requirements of practical reasonableness. Their authority is not derived entirely from positive law. We all have reasons to honor our duties to exclude ourselves from things that are not ours, not to cause

unreasonable harm with our things, not to commit waste, and so forth. And where we honor those duties, *someone* enjoys the liberty that corresponds to our self-exclusion and abstinence. The question for us is who will enjoy that freedom and responsibility under law. In a communist society, the state (and therefore the elite segment of society that controls the state) has all the freedom. In a society with private property, people have at least some of the freedom that correlates with property duties.

The demonstration of the moral force of property norms begins by observing how people use things. People use and manage things according to plans, which they adopt and execute for reasons. A philanthropist plans her financial expenditures in order to make the lives of her recipients better. A farmer makes a plan for the use of his fields to grow crops. A concert pianist makes plans to use her piano for practicing and memorizing concertos. Parents plan a schedule for use of the car to accommodate the activities of their children.

Some people consume things or exercise control over things mindlessly. But mindless use is a peripheral, non-focal instance of what we mean by “use.” The central case of use – what we generally mean when we speak of the use of things – is deliberate use, which is done purposefully in order to realize some good end. It is exercising dominion over things according to a plan of action. Plans of action for the use and management of things are adopted and executed for reasons, goals that are valuable.

When human beings adopt and execute plans of action, they exercise practical reason, which can be distinguished from theoretical reason. Theoretical (or speculative) reason is what one uses when inquiring whether there is a God, or considering the nature of an atom, or doing calculus, for the purpose of knowing the truth. One employs practical reason to attain knowledge of truth in order to solve practical problems and to achieve successes in life. Practical reason is what one brings to bear on the myriad choices one faces on a daily basis, which affect one’s short-term and long-term well-being, and the well-being of one’s family, friends, neighbors, associates, and fellow citizens. The capacity to exercise practical reason – to deliberate about what to do, to choose a goal for one’s action, and to formulate a plan to achieve that goal – makes human beings unique. It is the foundation of our inherent and equal dignity. Human beings are worthy of respect by virtue of being the kind of beings who are reasoning agents. And the plans that humans make are worthy of respect because they are made by reasoning agents.

When human beings make reasoned choices and adopt plans pursuant to those choices, they act as creators. They create new states of affairs and conditions of being, which would not have existed but for their choices, their formulations of plans, and their committed execution of those plans. The philanthropist makes poorer lives richer. The farmer makes food come into being where only weeds grew. The concert pianist replaces silence and noise with beautiful music. Parents raise healthy and well-rounded children. Humans who make plans for the use and management of things make particular instances of well-being come into existence. To interfere with those creative acts would be to risk destroying their fruits.

Yet, there is an even more fundamental, if often misunderstood, reason to exclude oneself from others' things. In the process of acting pursuant to plans, people make and remake themselves. The wealthy business woman makes herself into a philanthropist when she formulates plans to use her assets to enrich others' lives. The man on the tractor makes himself into a producer of food, a feeder of thousands. In an important sense, people constitute themselves while using and controlling things. And as they constitute themselves around their plans for things, those things become tied up in their plans of action, and therefore in the identity that owners create for themselves by executing their plans of action. The farmer's identity becomes tied up to his farm; the concert pianist's identity becomes tied up to her piano. To steal the piano therefore would constitute a wrong in a general and a specific sense. Generally, it would fail to respect the pianist as a being who made her plans, that is, as a human being. Specifically, to steal the thing is to steal a locus in which the person has constituted her identity by acting on her plans.

We can go farther. That humans make plans for the use and management of things is not only a reason for other members of the community not to interfere with their possession and use, but it is also a reason for those in authority not to interfere, and to secure possession and use with the force of law. Because the exercise of practical reason requires freedom and authority over things, political communities have reasons to extend legal protections around domains of private ownership.

Political authorities should protect the private property both of individuals and of communities of individuals. Plans of action have moral significance for both individuals and communities, such as families, universities, and religious associations. Indeed, the common

plan of action is what makes a group's identity. The moral value of those plans of action gives political authorities strong reasons to establish, respect, and enforce rights of exclusive use. These are not the only reasons; private property institutions promote many goods other than practical reasonableness. But the moral value of practical reasonableness is a reason to prefer private property to collective or state ownership – the former enables practical reason whereas the latter cuts it off.

The moral case for private property ownership is also an argument for the limitations on property rights that emerge in the common law tradition, primarily from institutions of private ordering and, when necessary and appropriate, from posited law. Just as the freedom to exercise practical reason with respect to things enables owners and their collaborators to realize good states of affairs, it also frees them to make unreasonable choices. Property in the common law tradition meets this challenge, though imperfectly. Property rights have limitations built into them as a result of centuries of experience and the practical judgment of those who have lived with them. Those limitations exert normative force on the deliberations and choices of those who interact with property and create incentives for people to act reasonably. For example, use rights are limited by the standards of reasonableness that inhere in common law doctrines governing nuisance, waste, and riparian water consumption. These and other doctrines create incentives for owners and their collaborators to act reasonably, and enable judgments on unreasonable uses by that great common law institution of practical judgment, the jury.

This case for private ordering entails that common law judges do not make property law in the first instance. Rather, property law emerges from judicial decisions as courts give juridical force to those private duties and rights that are not unreasonable, and refuse to give juridical force to those duties and rights that cannot be reconciled with the requirements of reason. Judicial authorities are expected to enforce the reasonable (or not-unreasonable) judgments of private institutions – owners, their families and collaborators, neighbors, commons and quasi-commons communities, juries, adverse possessors, etc. – and to decline to lend juridical force to those judgments that are unreasonable, such as abuses of rights, harmful nuisances, and violations of moral norms prohibiting slavery, racial discrimination, and other never-reasonable uses of property. Common law institutions of property enable moral agency without giving owners absolute rights to do as they please.

Definitions

This book is a principled defense of common law institutions of property, which produce what I will call the *mediated dominion* of private ownership. Mediated dominion consists of *domains*, within which owners exercise control over things both as individuals and as communities of individuals. Those domains are *mediated*, by which I mean that freedom to exercise dominion is limited according to standards of practical reasonableness.

Some additional working definitions might help. The conception of *property* that comprises the subject of this book is the common law notion of dominion over a thing, governed and protected by law. *Private property* on this view is dominion over a thing exercised by some person or group of persons other than the political community and its authorities. Private property can thus be exercised by an individual; spouses, siblings, or an entire family; a church, mosque, or synagogue; a university or charitable organization; or any other group, association, or intermediary institution.

This conception departs from many contemporary accounts, which view property as an individual right. That atomization of private property is both unnecessary and unhelpful. Common law institutions of private property enable people to own things both as individuals and in communities – in families, religious associations, civic associations, and in other cooperative forms. Within these institutions of private ordering, communities of people together deliberate and decide how to use and manage the resources available to them, and courts ratify those judgments, or not, according to reason. In well-formed institutions, the authority exercised within the family (or the church or synagogue, or the family business) is exercised for the common good – the set of conditions that enables each and all to realize good states of affairs – and therefore authoritative deliberations will take the well-being of each and all into consideration.¹

Of course, authority within private groups and institutions is sometimes abused. But the record of private property, the family, religious assemblies, and other intermediary institutions measures up well against the records of collectivist ownership systems, especially over the last century. Furthermore, collectivist strategies for managing resources cut off the deliberation and choices of private property's plural institutions

¹ See John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford: Oxford University Press 2011) [hereinafter NLNR], especially chapters VI and IX.

of ordering.² I mean private property to be ownership that allows individuals and private communities to plan the use and management of things insulated from collective decision-making. In other words, private property is simply property that is owned by private persons and groups of persons. I thus mean to contrast private property with systems of collective property governance and with systems of collective distribution.

This book avoids where possible the misleading term “common property.” Some of what is mistakenly called common property is really private property that is governed by a group of people. Much of it is in fact collective property, which is controlled by the state. True *common property* is owned by the entire political community but not controlled by political institutions. In light of how much attention the concept receives in scholarly literature, there is surprisingly little common property in the real world. The seas, navigable servitudes and, in some jurisdictions, beaches are common property, and both the state and private citizens have duties not to interfere with those resources in important ways. Intellectual property that has passed into the public domain is common in a different way. The idea of common property is theoretically interesting, but does not tell us much about how most resources are managed and used.

Practical reasonableness in mediated dominion

To sum up: As mediated dominion promotes human flourishing in its various aspects, it particularly serves one architectonic aspect of human well-being, namely the basic human good of practical reasonableness. Practical reasonableness both justifies domains of private ownership to enable its realization and specifies the boundaries of property rights and duties consistent with its basic requirements. The first part of this book explains and defends the claims that mediated dominion does this work better than alternatives, especially collective systems of resource management, because it supplies the preconditions that are required for the realization of practical reasonableness. It examines the way in which practical reason operates within the core of the owner’s domain, and explains how property can promote the practical reasonableness of all, even those who do not hold title to things.

Practical reasonableness is a complex good. It subsumes personal autonomy, reasoned choice, and integrity, among other aspects. It is an

² NLNR, 168–69; John Finnis, *Collected Essays of John Finnis, vol. III: Human Rights & the Common Good* (Oxford: Oxford University Press 2012), 79–80.

expensive good. It requires institutions and practices that produce a variety of valuable options and incentivize good choices over bad ones. And it requires laws that support those institutions and practices. So its realization depends on a number of conditions. We will focus on four. Because practical reasonableness is a reflexive good, it cannot be instantiated except (1) freely – insulated from coercion – and (2) in favor of good options. Also, because practical reasoning involves the making and carrying out of plans of action, it requires (3) stability of enforceable expectations and (4) commitment.

Private ownership in the common law secures these conditions. It insulates owners and their collaborators from coercion, thus securing freedom. It results in a greater number of good options and more expensive goods than collective property regimes have produced. It creates the stable conditions necessary for people to execute complex plans of actions with respect to things. And by internalizing the externalities of property use and management, private ownership generates motivations for owners to remain committed to their plans of action.

The second part proposes some limitations that must be placed on ownership if the law is not to endorse practically unreasonable choices and actions. Just property institutions refuse to enforce exercises of property liberties that are abusive or undertaken purely out of spite; they allow recovery for unreasonable harms; they ratify otherwise-unlawful adverse possessions against hoarders; they extinguish the title of those who commit waste against future interest holders. These ideals have not always been met in practice. What follows will reveal that the common law of property is quite good, though not perfect. Common law institutions, employing the standards of reasonableness that are embedded in maxims and doctrines, rule some uses of private property beyond the right of the owner.

It is commonly thought that the central concerns of property are efficiency and material prosperity and that, if morality and practical reason are concerns at all, they do their work only at the margins. One purpose of this book is to challenge that view. Though moral concerns appear most clearly in hard cases, they are nevertheless at work in property's core, silently and invisibly. This book does not challenge utilitarian insights about the efficiency of private property for promoting material prosperity. But it also does not accept the premise, so essential to utilitarian and other consequentialist theories, that basic human goods are commensurable with each other, or the claim derived from that premise that goods can be maximized on any single scale.

The argument here is neither deontological nor utilitarian. It understands deliberation and choice to be rationally directed to objectively knowable human goods. It also takes those goods to be incommensurable. Therefore, in this book, private property is understood as an institution that supports robust, but not infinite, pluralism. Mediated dominion can reasonably be used to pursue as many different life plans, projects, and collaborative endeavors as there are property owners, and the law has no reason to choose one of those pursuits over others, even, or especially, when collective institutions and lawmakers fail to perceive value in a chosen course of action. But the law need not secure to owners powers to use their property to cause harm without reason. Private property is reasonably limited by rules that are genuinely and transparently grounded in protection of the common good of a community.

The argument for mediated dominion does not rest on the claim that humans have natural rights in their own labor. This is neither an account of the origins of property nor a theory justifying initiation of property institutions where they did not exist before. As John Tomasi has observed with respect to economic liberties generally, the nature and dignity of human beings should determine what laws the state enacts and which economic liberties it secures. Because the political community has reasons to secure economic liberties, “the requirements of economic liberty help define the shape and limits of the state, even without being radically prior to it.”³

The subject of this book is the practical reasoning of those who live in a world that has institutions of property and law already up and running. In other words, this book is concerned with the world that we inhabit. On the other hand, the argument can also be abstracted, and the actual law removed from it, and the moral force of the argument would remain. The norms of property are normative because human beings are the types of being that they are: beings who exercise practical reason. Human beings would be that kind of being no matter what their political arrangements. Some political arrangements are more consistent with human nature, and therefore with the requirements of practical reason, than others.

An outline of the argument

First part: the case for domains of private ownership

Chapter 1 describes two conflicting intuitions about property. The first is that freedom to use property must be robustly protected against

³ John Tomasi, *Free Market Fairness* (Princeton: Princeton University Press 2012), 98.

outsiders, but especially against encroachment by political communities, such as large, public corporations and governments. The competing intuition is that property rights must not be exercised unreasonably or abusively. These intuitions correspond to the competing demands of practical reasonableness, a good that law reasonably promotes in order to help human beings live flourishing lives. The chapter then briefly explains the idea, skillfully developed in recent decades by perfectionist thinkers such as Joseph Raz, John Finnis, and Jeremy Waldron, that law can and should take into account moral concerns such as flourishing and moral duties.

Chapter 2 takes a cut at the common law's solution to the basic problem. Common law institutions and norms of property employ different mechanisms to support and direct the practical reasoning of people who encounter, use, and manage things because the basic principles and requirements of reason are irreducible. The architecture of property is therefore complex. But certain patterns emerge to view when one considers the various ways in which property norms show themselves to different audiences.

Because moral rights must be universalizable, just institutions of ownership must create opportunities for everyone to exercise reason with respect to things. A general *eligibility* to own property is precisely the sort of right that Jeremy Waldron argued could not be derived from an argument based on positive liberty or free choice. Waldron thought the argument from positive liberty is necessarily an argument for a general right to *possess* property, that this right entails redistribution of property, and thus undermines private ownership. Challenging Waldron's argument, Chapter 3 clarifies an important feature of mediated dominion that is often overlooked, namely its use cooperatively within groups and intermediary institutions such as families, for-profit and nonprofit businesses, religious assemblies, and quasi-commons. Mediated dominion enables cooperative deliberation and action among people who have various ownership interests in the domain.

Chapter 4 turns to developing more fully the argument that mediated dominion over things is justified on moral grounds. To explore the moral significance of exercising dominion over things, this chapter adopts the internal point of view of the practically reasonable person. This person acts for reasons, many of which she adopts as conclusive reasons for her future actions. From her perspective, we can discern one sense of Aquinas' insight about self-constitution in the order of the will: that as they deliberate and choose according to reasons, human beings

constitute themselves in a real, though incorporeal, order. To the extent that these projects of self-constitution involve dominion over things, those things become bound up in the projects. To trespass against or interfere with an owned thing is therefore to do violence to the user's plan of action, and to fail to respect that person as an agent of practical reason.

Second part: the case for limitations on owner dominion

If understood as a human good, practical reasonableness commends certain internal limitations on property rights and liberties. Because the good of practical reasonableness can be realized only if practical reason is exercised freely, property's features must, wherever possible, empower rather than coerce owners to act for right reasons. But it must rule out some reasons for action.

At least two sets of features within the common law of property cannot be understood apart from their operation on reasons for action. The first is property law's support for charitable choice and action. The second feature is the refusal of many common law courts to enforce abusive exercises of use rights. Charity and abuse of rights represent opposite postures that owners can adopt with respect to what we call "rights." At these extremes one can perceive the advantages of perfectionist jurisprudence over other theories that focus on the material consequences of property use. Without an account of practical reason – its internal operation and its moral implications – these features of mediated dominion might remain mysterious.

Property law's treatment of charity is best understood by considering charity as an action exercised for basic reasons for action, motivations that possess intelligible value as constituent aspects of human flourishing in and of themselves. Many of property law's provisions for charitable action are best explained in this light, and some cannot be explained otherwise. Chapter 5 explores this area of property law.

The idea of abuse of rights, which plays a poorly understood role in common law, originates in an understanding that an owner's reasons for action matter at least as much as the material consequences of his action. It requires judging some reasons for action to be legitimate justifications for the exercise of property rights and others to be illegitimate. One therefore cannot understand the operation of abuse of rights without a robust account of practical reason. Despite its long history of use in private law and substantial scholarly interest in it, the principle of abuse of rights has not been fully developed into a recognized doctrine