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Reflections an Property as a Social Good

Peter M. Gerhart

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REFLECTIONS ON PROPERTY AS A SOCIAL GOOD

By Peter M. Gerhart[†]

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ABSTRACT

In this reflection, Professor Gerhart relates the ideas of the symposium contributors to his goals in writing *Property Law and Social Morality*. In doing so, he reflects, in Part I, on his attempt to separate politics from private law property theory, and, in Part II, on how his framework theory provides a mechanism for integrating ideas about the content of legal doctrine from a wide variety of intellectual disciplines. In the first Part of his reflection, Professor Gerhart comments on the corrective justice/distributive justice distinction, related theories of human flourishing, and on rights theories. In the second Part of the reflection he comments on the theory of social recognition, the relationship between social values and the legal values, and the relationship between how we do act and how we should act. He concludes by reflecting on the attributes of a theory that draws different viewpoints together rather than pitting one against another.

How gratifying it is that scholars as distinguished as the panelists whom Texas A&M University Law School assembled for this symposium have taken the time to consider the ideas in my book, *Property Law and Social Morality*. Each contributor brings a unique viewpoint to the symposium, each had to make room in a busy schedule to grapple with my ideas, and each is both well-known and well-knowing in property law. By articulating their agreements and disagreements, each is willing to sharpen and shape the view of property theory that I present. Intellectual engagement of this kind is rare in our profession, where the norm is to note, but not engage, intellectual differences. Each essay is a little gem that fully justifies the effort that I put into writing the book. I am grateful to each of the panelists for their wisdom and willingness to exchange ideas.

And I am grateful to Texas A & M University Law School and the Journal of Real Property Law for providing this forum. Special thanks to the faculty advisors of the Journal, Professor Gabriel Eck-

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stein and Susan T. Phillips, to Professor Timothy Mulvaney, who carried the load in envisioning this symposium, and to the editorial staff of the journal, its leader, David Sarnacki, and, especially, to Kourtney Doman, the symposium planner and Sarah Burns, the symposium editor.

In these reflections, I situate the panelist's various perspectives and ideas about property law in the context of my goals in writing *Property Law and Social Morality*. Part I of the reflection discusses my effort to squeeze politics out of private law property theory by presenting a theory of private law that is value-laden but not interest-laden, one that does not start with a presumption for or against the institution of private property. Here, I discuss why I chose to pursue a theory of responsibility rather than a theory of rights—namely, because of my belief that a theory of duty and no duty identifies the boundary between rights and obligations. I also discuss my distinction between corrective and distributive justice, which helps the reader understand the distinction between the domain of private law (the book's domain) and issues about the distribution of wealth, and I show why blurring that distinction turns private law theory into a political rather than an analytical enterprise. This situates the theory of my book with respect to other property theories, including the theory of human flourishing, and rights theories in the form of the right to exclude (for owners) and to regulate (for the government). It also explains why the Due Process Clause is the appropriate source of restrictions on government land use regulation.

Part II of my reflection discusses the nature of my book's framework theory. My book revolves around the important distinction between thinking about a topic (for example, what is property) and thinking about how to think about a topic (for example, how we ought to think about what property is); the distinction is between methodology (how we might think about a topic) and content (the topic itself). My book presents a way of thinking about the private law of property, which distinguishes it from theories that seek to describe what property is. In the book, I harness a series of ideas about how owners, non-owners, legal officials, and citizens ought to think about the questions raised in private law and about questions raised when the government regulates decisions about land use. These ideas include the concept of the owner as decision maker, the constraints on decision making that come from social recognition, the obligation to be other-regarding, and the veil of ignorance as a way of thinking about how to be other-regarding. To that end, Part II of this reflection discusses the panelist's views on my theory of social recognition, the veil of ignorance as a thought experiment, and the relationship between moral psychology and moral philosophy.

I. POLITICS AND PROPERTY THEORY

There is an important distinction between thinking about property rights and thinking about how to think about property rights. The former focuses on what the rights are; the latter on how one identifies the determinants of the rights. The former focuses on concepts that constitute the field; the latter focuses on how we determine the normative content of those concepts.¹ The former focuses on property doctrine; the latter on the determinants of property doctrine.

The theory I strove to articulate is a theory about how to think about thinking about property rights. My objective was not to explore the concept of property, but to explore a way of thinking about the concept of property. My objective was not to explore property doctrine but to explore a way of thinking about the determinants of property doctrine and then to illustrate how those determinants provide a basis for settling disagreements about how the doctrine ought to be understood. Property is not, for me, exclusion or use, it is a way of thinking about exclusion or use. That is why I call my theory a framework theory. It is non-conceptual and non-doctrinal, although the framework, I hope, explains a way of thinking about property concepts and doctrine that allows one to understand the normative and descriptive foundations of the field.

I wrote *Property Law and Social Morality* to explore a view of the private law of property that emanates from the responsibility of owners (or its absence) rather than from an owner's rights, but that avoids the idea that rights and responsibilities arise from different normative sources.

Before my book, and even after, property theorists appear to be divided into two camps—the rights camp and the responsibility camp—that attack property's private law incarnations from different perspectives.² Rights theorists emphasize the right to exclude, the economic or labor origins of property, and limitations on government regulation;³ responsibility theorists emphasize limitations on the right to exclude, the state's role in creating property, and the government's

1. See Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. (2015) (distinguishing between a concept as a structural entity that helps organize legal thought and the normative content of a concept, which determines its application). My belief is that thinking about the structural meaning of concepts and thinking about their normative content are different forms of reasoning. My work seeks to understand the latter form of reasoning.

2. The two approaches are surveyed in a Special Issue of the Cornell Law Review: *The Social-Obligation Norm in American Property Law*, 94 CORN. L. REV. 745 (2009) (containing articles reflecting the rights view and the responsibility view).

3. See, e.g., Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

responsibility to shape and regulate property.⁴ For one side, property tastes great; for the other, it is less filling.

Both views are internally valid, of course, because the responsibility-view and the rights-view are opposite sides of the same coin. A property right emphasizes the absence of an obligation, while a limitation on a right emphasizes the existence of an obligation. Because property is a limited right, it is obviously driven by both a concept of rights and a concept of responsibility. Theorists write about the same thing, but they appear to be approaching the topic from irreconcilable perspectives, and the debate seems to require a participant to choose a perspective before the participant can say anything meaningful about property. This dichotomy risks making property theory a matter of politics rather than a neutral normative evaluation.

Now, clearly, property is political; by its nature, it pits the haves against the have-nots. I do not doubt that. But the question I address in my book is whether the private law of property—cases that arise when one individual makes a claim against another individual (exclusion, nuisance, and jointly owned property)—necessarily implicates political positions about rights and responsibilities, as if private law were just a form of legislative judgment about the relative weight of rights and responsibilities in various contexts. The answer I provide is that there is a way of thinking about private law that relies on non-ideological, non-political analysis, one that does not prejudge the outcome of any particular controversy by loading it with predetermined political starting points.⁵

A. *Distributive Justice and Human Flourishing*

The distinction between political and a-political analysis lies behind the way I distinguish corrective and distributive justice, a distinction that is important to the book, and, I think, to property theory in general. Whatever the diverse usages of those terms,⁶ I hope that property theorists draw a distinction between the obligations that we owe each other as individuals and the obligations that we, as a community owe (as Professor Claeys puts it) to “guarantee that property is dis-

4. See, e.g., Joseph W. Singer, *Property as the Law of Democracy*, 63 DUKE L. J. 1287 (2014).

5. I am trying, in other words, to answer a question posed by Joseph W. Singer almost thirty years ago: “How can we engage in normative legal argument without either reverting to the formalism of the past or reducing all claims to the raw demands of political interest groups?”; Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 468 (1988).

6. I accept Eric Claeys’ friendly amendment that one can appreciate my book as a theory of justice without labeling the theory in a way that may confuse readers who carry divergent meanings of the terms corrective and distributive justice. Eric R. Claeys, *On Corrective Justice and Rights in Property: A Comment on Property Law and Social Morality*, 2 TEX. A&M J. REAL PROP. L. 2, 218 (2015). Nonetheless, for reasons given in the text, I believe that differentiation between concepts of justice is important under some nomenclature.

tributed throughout the society so that everyone is supplied with a certain level of material means.”⁷ The first I call corrective justice; the second I call distributive justice.⁸ The distinction is between distributing rights to existing owners—determining what responsibility owners and non-owners owe each other—and distributing property itself—determining what responsibility the community has to individuals who lack sufficient property.

Although many property scholars, including some symposium contributors, use the term distributive justice to refer to both kinds of relationships, I assume they also understand that the distributive justice guiding the distribution of rights in interpersonal relationships is different from the distributive justice that guides the distribution of ownership from one person to another in the name of the community.⁹ The two kinds of distribution, because they involve different kinds of relationships, invoke different methodologies for thinking about justice. The distinction between what we owe others in our relationship with them and what the community owes less fortunate individuals reflects a distinction between subject matter domains and methodologies; my decision to distinguish them (by calling one corrective justice) reflects my belief that methodology ought to match appropriately the domain it is addressing. The obligations that we owe each other as individuals, the topic of my book, are methodologically and institutionally distinct from the obligations that we, collectively, owe to members of the community who have insufficient property or who have been unjustly deprived of property.

As I elaborate throughout this reflection, when a judge must respond to the claim that one individual makes against another individual over the division of rights and responsibilities, political judgments and values should not come into play. Those cases ought to be decided within a framework of neutral, non-political values that depend on evaluating the relations between the parties in light of values that shape how people ought to treat each other in relationships.¹⁰ On the

7. Claeys, *supra* note 6, at 215.

8. See, e.g., Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311 (2006) (discussing standard conceptions of different kinds of justice outside of property scholarship).

9. The law distributes rights and ownership in a number of settings, including adverse possession, nuisance, and the rights of co-owners. The use of the term distribution is literally accurate but does not invoke the kind of justice that one must implement when determining the community’s obligations to less fortunate individuals.

10. That is why I characterize *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) as a case of corrective justice. When a landowner sues a neighbor for proposing to build a tower that would block a landowner’s sunlight, the dispute is in the subject matter domain of corrective justice by virtue of it being a dispute between individuals that asks the court to justly divide their claims to use or block the sun. That is also why I characterize *State v. Shack*, 277 A.2d 369 (N.J. 1971) as a case of corrective, not distributing justice. The dispute was about the relationship between a landowner and workers living on the land, not about

other hand, when the community decides what duty it owes to those with insufficient property, the community makes an explicitly political decision about the impact of wealth disparities on social cohesion, raising questions that are inimical to the common law process. Importantly, the theory of equality underlying my theory does not track the theory of equality underlying decisions about how and when a community redistributes property. Distributive justice aims not for equality in treatment—equal respect for projects and preferences—but for equality in opportunity and capability.¹¹

The political, legislative process is, as Christopher Serkin reminds us,¹² one of aggregating private interests within an institutional framework that allows for both Madisonian public interest and self-serving political ends. Because the legislative process entails identifying interests and trading them off against countervailing interests, political analysis does not need a common currency based on values; the outcome is determined by political (interest-based) voting, rather than neutral, value-based assessments. Corrective, interpersonal justice, by contrast, starts only with the goal of correctly defining how individuals ought to treat each other as a way of determining whether one person has wronged another; it does not otherwise prejudice the law's goals or how individual interests ought to be aggregated.¹³

Accordingly, my belief is that private law is not political in the sense that legislative distributive decisions are, and that private law can be understood to flow from a common set of values: the values that people would share if they were thinking appropriately, from behind the veil of ignorance, about their relationships with others. This is an important institutional point. Courts have no business making political or ideological decisions about redistributing property rights to assist those in need because distributive justice is a political, not a judicial, decision, and decisions about distributive justice may properly be

the distribution of wealth among individuals. *See infra*, text accompanying and following notes 26-28.

11. Samuel Scheffler, *The Practice of Equality*, in *Social Equality: ESSAYS ON WHAT IT MEANS TO BE EQUAL* (C. Fourie, F. Schuppert, & I. Wallimann-Hellmer eds., Oxford Univ. Press 2015) (discussing the two concepts of equality that are mentioned in this paragraph).

12. Christopher Serkin, *From Social Recognition of Property to Political Recognition by the State: Peter Gerhart's Property Law and Social Morality and the Evolution of Positive Rights* 2 *TEX. A&M J. REAL PROP. L.* 2, 291 (2015); PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 253, 304 (Cambridge Univ. Press 2014). Indeed, it is the character of the legislative process that induces me to recommend that the Due Process Clause be invoked to limit legislation that treats owners unequally.

13. Eric Claeys correctly notes that some corrective justice theorists apply the term only to the correction of a wrong that is independently determined. Claeys, *supra* note 6, at 215. In this view, corrective justice does little work and requires little by way of theory. Readers of the book could not have mistaken the fact that I rejected this narrow view of corrective justice because the theory is clearly about how we define a wrong in interpersonal relationships; *see* GERHART, *supra* note 12, at 22-24.

made only by political branches.¹⁴ Courts interpret statutes and constitutions or do corrective justice through private law, but they ought to decide in a way that is a-political and that turns on social values, not individual interests.

The limited scope of my theory creates a disjunction between my book and the commentators who thought that I was pronouncing a general theory of justice in property.¹⁵ Moreover, the labels I used to distinguish our obligations as private citizens from our obligations as citizens of a community are not accepted by all the commentators.¹⁶ But I hope that my distinction between political and non-political questions becomes clear in these reflections.

We all agree that a system of private property, if its goal is social cohesion, must be embedded in an institutional framework that addresses both the powers that owners have and the question of who gets to be an owner, the distinction aptly articulated by Laura Underkuffler¹⁷ and impressively argued by Kristen Barnes.¹⁸ Accordingly, we cannot fully understand private property without understanding how the law embeds private property in a system of progressive income and estate taxes, social safety nets, monopoly regulation, and labor laws, all of which have to do with how the distribution of ownership affects social cohesion. A theory of human flourishing captures that institutional, distributive framework by recognizing the difficulty of flourishing without property and other social support systems that enable one to accumulate capital, address risks, and maximize effective choices. No doubt, something is lost by my choice to separate theories of justice in property, and to address only one of those theories, but something may also be gained.

If I am correct that the determinants of obligations between individuals are different from the determinants of community-based obligations, then I think there is something to be gained by addressing the

14. *Id.* Even within the shifting meanings of the idea of corrective justice, it surprises me to know that some people would attribute the term corrective justice to the main body of the writings of libertarians like Robert Nozick and Richard Epstein; *see e.g.*, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 54, 149 (Basic Books 1974). When these authors refer to rights of owners against other owners or non-owner they are engaged in an exercise of corrective justice; when they discuss the right of the collective to take property from some people and give it to others, they provide an account of distributive justice, even if it is anti-distribution.

15. Kristen Barnes has important insights about several important topics, including the centrality of starting points, inequalities that become replicated over time, unequal access to property, and siting decisions. Kristen Barnes, *Recognition and Reflection*, 2 TEX. A&M J. REAL PROP. L. 2, 187–192 (2015). These insights seek a theory of justice that is wider than the one I undertook to write.

16. *See, e.g.*, Serkin, *supra* note 12, at 291 (explaining that “the government allocation of burdens and benefits in society . . . cannot help but implicate distributive concerns.”).

17. Laura S. Underkuffler, *A Moral Theory of Property*, 2 TEX. A&M J. REAL PROP. L. 2, 311 (2015).

18. Barnes, *supra* note 15, at 187.

two forms of justice separately. The advantage is methodological—developing the correct way of thinking about social relationships that reflect the different nature of those relationships. As I hope to show in this reflection, I fear that too often property theory mixes political decisions with non-political decisions and thereby advances propositions that are true in one context but not another.¹⁹ For example, the theory of human flourishing invokes both corrective/interpersonal justice and redistributive justice, and the question I raise by the distinction I draw is whether theory ought to more finely distinguish these two aspects of justice.

Certainly, the theory espoused in my book ought to be considered a part of a theory of human flourishing because it deals with the important question of how individuals treat each other. Yet I do not start with a theory of flourishing because the key question in the domain I am addressing is how to make judgments about human flourishing when one person makes decisions that diminish the flourishing of another. To me, this requires the kind of comparison of flourishing (or well-being) that is derived from the application of the equality principle, which starts from the position that just interpersonal comparisons have a quality to them that maximizes human flourishing in interpersonal relations.²⁰ When a theory of human flourishing addresses redistributive questions, however, it is asking questions about comparing an individual's capabilities and resources, not her equal interpersonal treatment.

Separating the interpersonal and redistributive aspects of a flourishing community also has the advantage of allowing us to envision a time when they might merge. I do not claim that societies cannot hold redistributive values in their interpersonal relations; my claim is that

19. In a case like *State v. Shack*, 277 A 2d 369 (N.J. 1971), where social workers were granted access to a farm to serve migrant workers, it is easy to say that the case is about human flourishing, but it is not clear whether this case was decided on the basis of interpersonal values or redistributive values. See *infra*, text at, and following, notes 26–28 I agree with Laura Underkuffler, *supra* note 17, at 311 that an individual who hoards all the food is acting immorally, but I question the determinants and institutional setting of the additional idea that persons deprived of the food have a claim at common law; see *infra*, text accompanying note 21.

20. I fear that Professor Claeys' endorsement of the priority of human flourishing over the priority of equality, Claeys, *supra* note 6, at 222, reflects a bias for the productive uses of property, rather than for the right of owners to decide how to use their property on the basis of their own view of a life well-lived. Consider the difficult question of awarding an entitlement to one who wants to build a tower that will block a neighbor's sunlight, the question presented in *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959). Professor Claeys believes it is important that most people would privilege development over passive use, which seems to smuggle productivity and productive labor into the award of the entitlement. Moreover, that analysis misses an important point. The question is not whether the defendant may build the tower; the question is whether the defendant must compensate the owner deprived of the sun, which would mean that the cost of the harm would be built into the cost of the tower. I agree that the cost need not be built in, but not because we care about the productive uses of property.

thus far in the development of private law, those values have not matured to be legally enforceable. I do not doubt that it is wrong under an appropriate theory of justice for one person to hoard all the food, but I do not think that is a wrong toward any one person, nor that a court will entitle one person to sue the hoarder for disgorgement, nor grant standing to the community to claim a group wrong.²¹ And I think that a distributive basis for the legislature to require the hoarder to disgorge his wealth does not imply that there is a basis for doing so at the insistence of any particular member of the community. Perhaps the day will come when such hoarding violates social norms applied to interpersonal relationships, but we will only know when that is true by honoring the division I drew.

B. *Rights and Obligations*

Accordingly, I wanted to develop a theory with two characteristics. First, I wanted a theory of rights and responsibilities that flow from commonly held values rather than disparate interests.²² I did not want a theory that pitted rights against responsibility but one that charts the boundary between rights and responsibility, and does so on the basis of a single idea about how we ought to treat each other. Second, I wanted to develop a theory that avoids the kind of excessive generalizations that are useful in political arguments but not in making normative legal decisions, generalizations about the importance of private property and the right to exclude, on the one hand, or the importance of non-discriminatory access or avoiding injury to neighbors on the other. I wanted, in other words, to avoid analyzing particular problems using general statements about rights and obligations, and instead to analyze particular problems as contextual applications of a single idea about what obligations we owe other individuals. As my book says, the right of a storeowner to exclude an African-American customer from the store does not depend on general beliefs about the right to exclude and the right of access, or on general beliefs about discrimination and non-discrimination. It depends on implementing a way of appropriately thinking about the details of the exclusion that determine, in a particular context, whether the exclusion is based on neutral, normatively-appropriate grounds.²³

How, then, do we develop a theory that de-politicizes private property law and rests on values rather than interests, one that is open to

21. GERHART, *supra* note 12, at 116–22 (explaining that the common law developed no cause of action against monopoly; the laws against engrossing were legislative). See MILTON HANDLER ET AL., *TRADE REGULATION* (3d ed. 1990).

22. The relationship between interests and values is complex, of course, because values depend on, and arise from, the way that society and the law treat disparate interests. But values transcend interests because how a society treats the clash of interests requires members of the community to surrender their narrow self-regarding interests in order to achieve a measure of social cohesion.

23. GERHART, *supra* note 12, at 69.

contextual nuance, and that identifies with particularity the factors that are relevant when deciding individual cases? My book advances the view that values come from how we treat each other in interpersonal relationships (social morality) when we are at our best, and the view that identifying the determinants of particular judicial decisions requires a framework theory that provides the tools for making ideologically-free arguments and decisions. I did not purport to develop a theory that puts an end to disputes about the private law of property, but, instead, sought a theory that identifies, in particular contexts, the ideas and values around which we ought to organize and advance our disagreements.

One must, of course, start somewhere, which is difficult given the circularity of rights and responsibilities. When an owner has unlimited rights, it is because the owner has no responsibility to others, and if an owner has responsibility to others, the owner's rights are limited. That is why I address this question: Does it matter whether we start with rights and think about their limitations or whether we start with responsibility and reason about when an owner does not have responsibility? Should the causal arrow run from rights to responsibility or the other way around?

For several reasons, my book suggests that the arrow ought to run from responsibility to rights because a theory of responsibility has the advantage, which a rights theory does not have, of insulating property (in its private law incarnation) from politics.

The rights-view provides no internal limits on the scope of rights; it makes every private law decision about the scope of rights look like a political decision that either upholds the rights of owners or balances gains and losses between the parties. Accordingly, the rights view has no natural ending place—no principled way of determining limitations on rights. We can think in terms of a right to exclude, of course, but nobody believes that right to be unlimited.²⁴ And we can think in terms of the right to resist government regulation, but everyone understands that the government has the right to regulate land use, limited only in some poorly-defined way. The rights-view misses a coherent and organic sense of boundaries—a view of where and how we find an end to the owner's right to exclude or the government's right to regulate. Ironically, a rights-based property law is without a theory of boundaries.

Because a rights-theory contains no natural limitations on rights that arise from the source of the rights, a private law theory based on

24. I take it that the proponents of the right to exclude now admit this. *See, e.g.*, Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2060, 2067 (2012) (although exclusion is a necessary condition “framing the critical set of attributes in terms of exclusion obscures the intuitive understanding of what ownership entails,” which requires that we reframe the issue in terms of “residual management authority”).

rights creates a vacuum that makes property law a matter of politics rather than normative values. Under a rights-theory, any limits on the rights must come from some value that is opposed to the rights, and this requires a decision maker to take a political position. One must choose between a pro-property perspective, which holds that the owner's right to exclude generally trumps a non-owner's access, or an anti-property perspective, which holds that the right to exclude should, in every case, be balanced against a non-owner's right to access. These choices set up political, not principled, arguments—matters of political preference rather than neutral values.

Similarly, when looking for the boundaries of government regulation, the current focus on a multi-factor balancing test means that every case is a balancing case, with few known boundaries.²⁵ My claim, again, is that a theory of rights-in-property contains no identifiable basis from which limitations on government power can be derived. As I will argue below, courts would, in all cases, have to balance disparate and incommensurate values, leaving a basically lawless state of affairs. From a property-rights perspective, the fuzzy boundary gives owners negotiating advantage and the ability to make a wide variety of arguments. From an anti-property view, the doctrine limiting government regulation subjects the government to a hold-up whenever the government regulates land usage. But how do we know whether we should be pro-or anti-property?

Rather than viewing property as a right, my book starts with a theory of obligations—what we owe each other—and develops a theory of boundaries that depends on what obligations we do, and do not, owe each other. But obligations are a starting place not because they are important in themselves (as political markers) but because they define the boundary between rights and obligations. Rights are derived from, and depend on, the absence of obligations, while limitations on rights are derived from the existence of obligations. The right to exclude exists when an owner has no obligations to others; it is limited when an owner does have obligations. The government's right to regulate depends on what obligations the government, as representative of the collective, owes to citizens before it regulates. My theory starts with obligations, but is a theory of property rights because rights and their limitations flow from a common source—a theory of what we owe each other.

25. As my book argues, when the government engages in a permanent physical occupation of property, it has taken the right to exclude, which collapses regulatory takings into the Takings Clause itself. GERHART, *supra* note 12 at 286. Even the so-called *per se* tests that are thought to be a part of the regulatory takings doctrine leave boundaries blurred; *see, e.g.*, Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992) (establishing the idea that the government may not deprive the owner of the total economic value of the property, which leaves undetermined the question of what elements of value count as economic value).

In elaborating on these themes, let me show the attractiveness of a responsibility-based account of property law with respect to an owner's right to exclude and the government's right to regulate.

C. *The Right to Exclude*

The suggestion that the essence of property is the right to exclude makes a political statement about the importance of property in a political system, not a statement about legal doctrine. The reality is that sometimes the right to exclude is limited and if we are to avoid making property theory about political generalizations, we must explain why and when the right to exclude is limited. To advance a theory of rights limitations that is not a political theory, we must advance a theory that pays attention to values that shape the right to exclude rather than the outcomes that we find to be politically salient.

As I have already mentioned, the rights view feeds the political view of law because it provides no basis for understanding the way in which rights can give rise to their own limitations. If the right to exclude just exists, and does not arise from some other aspect of human relations, how are we to know when and why it is limited? Without a theory of where rights come from, the scope of rights must necessarily be based on a political decision about the importance of claimed rights compared to the claims made by those who would limit the rights—a disagreement like that between the haves and the have-nots.

That is why *State v. Shack*²⁶ serves as the Rorschach test for our understanding of property law. A farm owner who hired and housed migrant workers on his farm denied access to social workers who wanted to provide social services to the migrant workers; the court held the owner's denial of access to be an improper exercise of the right to exclude. As Eric Claeys maintains, on the surface, the court's limitation on the right to exclude might seem to be influenced by the poverty of the migrant workers, and it could be that the court created a right of access to recognize their poverty. That has led commentators to take two divergent perspectives on the decision. To some—those who would emphasize the limitations on an owner's rights—the decision reflects the importance of the balancing view—the idea that the right to exclude must be balanced against the importance of access by non-owners.²⁷ For others, the case was an aberrational limitation on the right to exclude, one influenced by the political ideology of the judges—a marginal case determined only by the special social needs of the migrant workers.²⁸ For both sides, *State v. Shack* is an exercise

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

27. See, e.g., Joseph W. Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 974 (2009).

28. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY 67 (“The New Jersey Supreme Court is somewhat of an outlier in this and other cases. . . .”). My book shows that this is incorrect; GERHART, *supra* note 12, at 170 (every court but one that

in distributive justice, although one side disparages the case and the other side embraces the case in the name of distributive justice.

Both perspectives are, in my view, mistaken. The outcome should be neither praised nor scorned on the ground that social workers seeking to help the poor won the right of access. Rather, the case is about the relationship between an owner and the workers whom the owner had invited on his property, a straightforward application of the idea that relationships give rise to obligations. It is a mainstream, not a marginal decision, and it turns on interpersonal relationships (and therefore corrective justice) rather than on distributive justice. One should not mistake the broad distributive language the court used in its opinion for the accurate analytical grounds of the decision, one that arises from a model of exclusion that recognizes obligations based on relationships.

Under the theory my book presents, one must first determine whether an owner has obligations to the person seeking access (that is, whether the court will adopt an exclusion regime). That is not a distributive question in terms of redistributing property to the less fortunate—because it is determined, in my view, not by the relative wealth of the parties but by their interpersonal relationship. Courts enforce the right to exclude when the owner has no obligations to non-owners, and they do not approach that decision by balancing the interests of owner and non-owner. In that decision, the poverty of the migrant workers ought to have no bearing; a poor person may not pick an apple from Bill Gates's orchard and claim it as his on the basis of their relative wealth. But when courts find a preexisting relationship between the parties that implies obligations between them (as in the case of landlord-tenant or employer-employee), they shift from an exclusion regime to a balancing regime. Then, the importance of a non-owner's access to the property becomes relevant, which explains why the court in *State v. Shack* referenced the plight of the migrant workers.

One might still think of the result as an implementation of distributive justice, for the court is clearly distributing entitlements between owner and non-owner. As my book points out, many property theorists use the term distributive justice in that literal way, but it is a different kind of distributive justice from the kind that leads to redistribution. The migrant workers got no ownership rights in property and property was not being distributed, so the case could not be about distributive justice in the classic sense. And, as I have already emphasized, if Bill Gates's yacht washes up on someone's property, Bill Gates is permitted to go on the property to retrieve it, even if the

has addressed the issue has sided with the plaintiffs who wanted to provide social services to the migrant workers; the only court that did not grant the right of access did so on the ground that the social workers could have access to the migrant workers outside the property).

owner is very poor and would benefit greatly from forcing Mr. Gates to pay for the privilege of access.

D. *The Right to Regulate*

The boundary problem in property law is most dramatic when it comes to limitations on government regulation of land use—the area of property law that generates public political debates. And, in few other areas is it as important to pay attention to methodology. The current doctrine suggests that if regulation has gone “too far,” the government must compensate owners as if the government had actually taken the property (as opposed to just regulating its use). I would replace the doctrine with an enhanced due process analysis. Christopher Serkin elegantly defends the current doctrine on the ground, among others, that the regulatory takings doctrine may actually enhance the potential of government regulation.²⁹ He has behind him the weight of current judicial and scholarly wisdom (and some logic). I have the weight of methodology.

My book seeks to identify the boundaries of our debate in two ways: by characterizing the nature of the problem that the regulatory takings doctrine addresses and by relocating the definition of what a regulatory taking is.

For me, the regulatory takings problem arises as a third category of property problems, taking its place beside the problems of interpersonal justice between individuals and the redistribution of resources. In the first category, individuals have claims against each other to be treated equally (corrective justice); in the second category, individuals have claims against the community (as represented by the government) to an adequate minimum level of property (distributive justice); and, in the third category, the community (as represented by its government) has regulatory claims against owners so that owners do not use their property in a way that harms collective interests. I likened this third category to corrective justice because the contest, like the contest between two individuals, can be modeled as a contest between government regulators and regulated landowners. In this arena, the government is not redistributing property in the distributive justice sense of providing minimal levels of property; when an owner is forbidden from developing her land, no land is redistributed. Rather the government is determining rights and obligations between owners and the community in order to address collective concerns. My notion is that modeling this as a kind of corrective justice problem correctly models the bilateral relationship that corrective justice was designed to address, with the legislature mediating between diverse collective interests and individual rights.

29. Serkin, *supra* note 12, at 292–93.

As for the domain of the regulatory takings doctrine, I would narrow the contested terrain as follows:

a. When the government takes the common law right to exclude, as it does when it requires apartment owners to allow cable companies to mount their cables on the apartment building, the government ought to be required to pay compensation because that regulation is a taking of property (it is not just tantamount to a taking).³⁰ That is now the law, and my modest suggesting (now endorsed by the Supreme Court) is that we call it what it is—a taking—rather than a regulatory taking.³¹

b. When the government grants the landowner a benefit to which the landowner is not entitled, but imposes a condition or exaction as the price of granting the benefit, the legality of the exaction ought to be addressed under the doctrine of unconstitutional conditions, not under regulatory takings doctrine. As Professor Serkin correctly notes, this excludes from the regulatory takings doctrine an enormous swath of modern land use controls, including not just exactions but also exclusionary zoning, special assessments, and other specific demands that the government makes of owners as a price of getting a benefit from the government.³² The justification for this position is methodological; we ought to think about how to think about a problem before we address it because our goal is to categorize social problems within boundaries that reflect the appropriate methodology for addressing them. We want to avoid putting a square peg into a round analytical hole. Exactions in land use regulation are unjustified, if at all, under the doctrine of unconstitutional conditions and ought to be subject to the same method of analysis that inhabits the idea of unconstitutional conditions.³³ Exactions and similar land use regulations may look like a taking, and are linguistically connected to the idea of an overreaching government, but the social problems that exactions raise are distinct from the problem of determining whether

30. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980) (holding that a shopping center may be denied the right to exclude people who would use the shopping center as a public forum and that the limitation on the right to exclude is not a taking because it is decided under the kind of relational doctrine that determines the boundaries of the common law right to exclude; it is only when the government takes a common law right to exclude that compensation is required).

31. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325–26 (2002).

32. Serkin, *supra* note 12, at 296.

33. See generally, Mitchell N. Berman, *Abuse of Property Right Without Political Foundations: A Response to Katz*, 124 *YALE L. J. F.* 42, 55 (2014) (articulating relationship between withholding welfare funds, offering zoning variances, or offering a plea bargain on the condition of giving up rights); see also Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: Study in the Doctrine of Unconstitutional Conditions*, 91 *TEX. L. REV.* 1283, 1316–33 (2013); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *GEO. L. J.* 1, 32–36 (2001).

government regulation is close enough to a taking to be called a taking.

c. All other government land use regulation ought to be analyzed under an enhanced Due Process Clause, not the regulatory takings doctrine.³⁴

Turning to the last category, which is the subject of controversy, my position turns on the argument that the regulatory takings doctrine imposes no discernable legal boundaries on government regulation; it is “muddled” because it misunderstands the problems generated by government regulation and looks in the wrong place to address the problems. Contrary to the regulatory takings doctrine, the Constitution, in my view, did not establish the government as the guarantor of property’s value because the concept of property does not include the right to any particular value; the owner takes property subject to risks and rewards of unpredictable origins. The regulatory takings doctrine also imposes large social costs because it is, in a sense, lawless; the law offers no discernible boundaries to determine the permissible scope of government regulation, and this lawlessness imposes a social cost in the form of uncertainty and wasted investments in fruitless litigation. Continuing with my law-as-politics theme, the regulatory takings doctrine interjects politics into what ought to be an apolitical determination of how private property rights and community rights should interact.

I will not develop the point that the regulatory takings doctrine is indeterminate; the literature supports me and defenders of the regulatory takings doctrine do not seem seriously to deny it.³⁵ I want to hone in on the issue of how we ought to think about limits of government regulation.

Professor Serkin has declined my invitation to rethink limitations on government regulation through the lens of the Due Process Clause rather than the (to me) hollow doctrine of regulatory takings. That is, in my view, unfortunate, because few are as qualified as Professor Serkin to rethink the limits that the Constitution places on land use regulation under the kind of due process analysis that I recommend. Perhaps Professor Serkin is unduly influenced by traditional and conventional views about the use of due process as a limit on government action—the idea that substantive due process puts few limits on economic regulation and that procedural due process simply requires the government to run the high hurdles; procedural due process might

34. In other words, regulations that reduce the value of property are not takings. Australia has the correct approach. *See, e.g., JT Int’l SA v. Commonwealth* [2012] HCA 43 (Austl.) (no taking when legislation banned the use of valuable trade dress in selling cigarettes).

35. *See GERHART, supra* note 12.

slow the government down, but it does not stop the government.³⁶ My book does not endorse either of those views.

Instead, I tried to sketch (and it is only a sketch) a view of due process that embodies an understanding that is neither substantive in the old (and forgiving) means-ends way, nor procedural in a high hurdles, jump-through-the-hoops way. Instead, I tried to exploit recent scholarship from outside the property area that would, adopting an older view of due process, evaluate government regulation against standards of equality, institutional competency, and separation of powers. The nub of the argument is that legislatures and administrators are restricted in non-exaction land use planning not because the Constitution protects the value of property against government action, but because owners are guaranteed equal treatment and protected against administrative and legislative failure. The idea that the legislature or its delegate may not take from A and give to B is not a takings concept. It is a due process concept because it embodies separation of power restrictions on the adjudicative power of the legislature and administrative agencies. Moreover, due process suggests that the government may not regulate an owner of wetlands without also regulating owners who are in a relevantly equal position. This is not about protecting value; it is a check on the legislature's political overreaching.

My proposal would, of course, threaten what we might call the "regulatory takings industry," the phalanx of land use lawyers inside and outside the government whose expertise lies in arguing about whether government regulation takes too much value. It became clear during our symposium discussions that there is a thriving business in which developers and the government negotiate over government compensation when the government regulates land use, and that these negotiations, by the arguments and settlements they entail, form a kind of "law" of regulatory takings. If I am right that the positive law of regulatory takings (as reconfigured above) is highly indeterminate, then the negotiators are not negotiating in the shadow of the law (by hypothesis there is none); they are negotiating the law itself by negotiating around a set of settlement norms that develop over time in response to changing perceptions of the cost of litigation and the value of alternative uses of property. In that event, it is not what courts say the law is that matters; what matters is what settlement negotiators say and the impact of what they say on the other negotiators. Only experts familiar with the negotiations know what the law is, and such lawless negotiations probably leave both developers and the government dissatisfied. But anyone who wants to know the law of regula-

36. Serkin, *supra* note 12, at 290 (noting that due process puts only "porous limits" on the police power and that the government is limited only "to those extreme cases where the government acts arbitrarily").

tory takings would have to sit in on those negotiations to determine the factors that influence the nature of eventual settlements.

II. A FRAMEWORK THEORY

A framework theory that articulates how we ought to think about property should leave room for growth and expansion, and it welcomes insights that illuminate, illustrate, or challenge parts of the framework. My particular framework suggests that property is about the allocation and control of decision making about resources. I also suggest that we can understand the allocation and control of resources by the way that society—individuals acting alone but interdependently—recognizes a resource as either private or common property, recognizes restrictions on the use of property, and recognizes how the burdens and benefits of ownership ought to be divided when interests conflict. My framework incorporates a theory about how a community comes to recognize the scope of rights in property—a theory of social recognition—and a theory about how one validates the normative force of values that a society uses when it confronts decisions about property. I harness the veil of ignorance as a thought experiment that allows the law to evaluate the moral value of social beliefs by comparing them to a model of the right way of making decisions about property in interpersonal affairs.

The theory of social recognition offers an evolutionary view of property that turns on the relationship between social attitudes toward property and the law's prescriptions, both of which change interdependently. Sometimes law and social beliefs are in equilibrium, such that legal rights and obligations seem to be in sync with social beliefs and values. Sometimes social beliefs and values shift from under law, which, as David Fagundes reminds us,³⁷ occurs because social beliefs and values are not homogeneous, but socially negotiated among heterogeneous people. When social beliefs and values change (for the entire group or for a subgroup), the disequilibrium between social beliefs and legal requirements must be mediated if the law is to be obeyed without heavy enforcement costs. The threat of resistance and disobedience vie with coerced compliance; the disequilibrium is mediated by changes in law or social beliefs. Several of the symposium speakers offered important insights and questions about the details of the framework theory: the theory of social recognition, the question of values, and the relationship between how people act and how they ought to act.

37. David Fagundes, *Property, Morality, and Moral Psychology: Comments on Gerhart's Property Law and Social Morality*, 2 TEX. A&M J. REAL PROP. L. 2, 234 (2015).

A. *Social Recognition*

In his contribution, Blake Hudson illustrates how the concept of social recognition helps us understand property as an evolutionary system that responds to social perceptions about values.³⁸ When trees were primarily valued for building material, fuel, beauty, or shade, it was logical that society would recognize trees as private property. Their value did not generally depend on collective or interdependent decisions about trees and individuals could decide for themselves what relative value to put on the various uses of trees.³⁹ As society develops new understanding about ecosystems, however, the social recognition of the value of trees can change, and that change can influence society's claims over rights in those trees. When society understands that the value of trees depends on interdependent decisions about the uses of trees, society's views about the appropriate institutional framework for making decisions about the use of trees will evolve.

Therefore, as Professor Hudson states, when trees have value in providing clean air or water, protecting fisheries, flood control, habitat preservation, or removing carbon from the air—services that have public goods characteristics—then decisions about privately owned trees are interdependent with the decisions of other tree owners. If this view of the value of trees gains wide recognition, social opinions about property rights in trees necessarily will change. This emphasizes the importance of allowing the government to recognize the changing social value of trees and to avoid freezing the government into socially outmoded views about the proper institutional framework for exercising rights in trees.

Professor Hudson understood perfectly the way in which the social recognition concept can explain, predict, and guide law reform efforts that reflect the changing social view of the way in which decisions about resources ought to be made. Property law is not disconnected from the society in which it operates, and the social recognition concept presents a framework for thinking about how social perceptions influence legal and institutional prescriptions. The law cannot afford to get too far away from the way that people normally make decisions when thinking about the rights of others and about the rights of the community. If trees justifiably come to be viewed by society as a common, rather than a private resource, the values that flow from that perception could be ignored only at the expense of distancing the law from society.

38. Blake Hudson, *Moral Obligations and Natural Capital Commons on Private Property: Perspectives on Peter Gerhart's Property Law and Social Morality*, 2 TEX. A&M J. REAL PROP. L. 2, 248–49 (2015).

39. Green space came to be understood as a public good to be provided collectively, either by governments or through conservation easements created through private philanthropy.

Kali Murray wrote in the same vein to suggest linkages between the theory in my book and intellectual property law.⁴⁰ Because I wanted my theory to break down barriers between our various doctrinal silos, I admire her impulse. Indeed, not only does the idea of social recognition validate the idea that the patent paradigm is widely accepted, but my guess is that issues the patent system faces from new technology, including issues arising from the human genome and patenting “life,” are shaped, in no small part, by public recognition of relevant distinctions between ideas and invention. Moreover, although the patent system’s obligations are now often statutory and find their source in the patent social bargain, I think her instinct is correct that the content and scope of the obligations depend on the process of thinking that my framework theory outlines.

Because the patent system is grounded on many obligations that require a patentee to be other-regarding—most prominently disclosure and non-misuse obligations—the method of thinking about one’s obligations that my book describes as a moral method of thinking also describes the method of thinking that the law uses to determine whether a patent holder has fulfilled her obligations.

B. *Social Morality*

My book claims that there is a moral way of thinking about rights in resources (property rights) when individuals contest entitlements, that the moral way of thinking about property is drawn from social practices (including social recognition), and that the law is both influenced by and influences moral reasoning about rights and obligations. Two of the symposium contributors helpfully pushed me to elaborate on the mechanisms that relate how people reason about their social interactions to how we reason about law.

Clearly, as Kristen Barnes and David Fagundes forcefully argue, not all ways of thinking about resources are moral; social thinking can be mean or wrongheaded. How can a theory of property rely on social practices, social reasoning, or social values when those values may in fact be immoral? Moreover, Professor Fagundes urges us to integrate moral psychology into the framework, which relies primarily on moral philosophy. Because not everything that humans do is rational, and because many social practices seem to be morally wrong, how is it that a social practice can influence a legal practice? How is the law, or any other discipline that evaluates social behavior, supposed to understand the relationship between facts and norms—between the way the world works and the way it ought to work?⁴¹

40. Kali Murray, *What is Owed: Obligation’s Relevance in Property and Intellectual Property Theory*, 2 TEX. A&M J. REAL PROP. L. 2, 275 (2015).

41. Notice that these questions do not raise the problem of the Holmesian “bad man”—the person who knowingly flaunts social norms without justification or reason. The law must deal with that person whatever the legal or moral norm. While those

The theory I advance seeks to reconcile what is with what ought to be by suggesting, again, the conceptual separation between how we reason about our obligations and the question of what we do as a result of that reasoning. The moral “ought” describes a way of thinking about the world—an attitude toward others who live in the community—that is universal. Moral reasoning is about the right way of thinking about appropriate behavior; if our method of reasoning is moral, the behavior governed by that reasoning is moral. However, the behavior generated by the right way of reasoning need not be the same in every context because the right thing to do can vary depending on context and the predicted impact on others. Although the method of reasoning is universal, moral reasoning is contextual and therefore capable of yielding behavior that is context-dependent.

This is not a novel observation. We have an obligation to reason in a moral way about which side of the road we will drive on, but that reasoning will not universally require that we drive on either the left side or the right. Indeed, moral reasoning requires that we follow the local practice. The implementation of the moral way of thinking depends on contextual factors that determine what practices other people adopt, and moral reasoning cannot be separated from those practices. Moreover, moral reasoning allows us to move to the other side of the road when that is necessary to avoid the risk of harm to others.

More generally, moral action depends on local practices because moral reasoning determines in what way those practices ought to guide our behavior. If the local practice is that non-owners habitually and without objection feel free to roam through land that has an owner but is unoccupied, then a right-thinking owner, when exercising her right to exclude, would have to account for the values and expectations reflected in that practice. Although the way of thinking morally is universal, the application of that way of thinking cannot be indifferent to the values reflected in well-formed expectations of citizens. That is why practices that are moral in one society cannot be translated to another society in the name of morality.

In other words, neither law nor morality can ignore local practices because the moral way of thinking necessarily is based on the values underlying local practices. The test of morality is whether reasoning about one’s conduct takes into account local practices in the appropriate way, not whether a person has adopted a practice or conduct that is universally prescribed. The moral way of thinking is not contextual, but the application of that way of thinking is, a point nicely made by Kwame Anthony Appiah:

deviants are of social concern, the law is formed to guide the behavior of those who would not flaunt social norms without a reason, and it is to them that we look to understand the relationship between social practices and legal norms.

Even if you couldn't derive an "ought" from an "is" facts would still be relevant to moral life. Morality is practical. In the end it is about what to do and how to feel; how to respond to our own and the world's demands. And to apply norms, we must understand the empirical contexts in which we are applying them. No one denies that, in applying norms, you will need to know what, as an empirical matter, the effects of what you do will be on others.⁴²

The conceptual separation of moral reasoning from moral behavior serves to unify the way the law reasons about its normative requirements with the way that the law expects individuals to reason about their moral requirements. When the method of reasoning used by the law and the method of reasoning used by society diverge, the law seeks to influence the method of reasoning used by society. The law labels divergent behavior as unreasonable. Moreover, as social practices evolve, the law must react to the method of thinking that determined the evolution; the law must either reject those practices or incorporate them into the law. Moral reasoning cleanses immoral social beliefs while allowing morally neutral social beliefs to be incorporated into the law. That is why the veil of ignorance stands at the center of my account of moral reasoning.

Professor Barnes, in her essay, captures perfectly how the mechanism of decision-making behind the veil of ignorance works.⁴³ And her questions about the veil of ignorance seem to be designed not only to test the contents of the theory but also to validate the idea behind the theory. The value of the veil of ignorance is that it forces the decision maker to be explicit about the factors the decision-maker takes into account and to justify the relevance and weight given to those factors. It is as much a value because of the questions and discussion it invites, as it is because of the answers that it provides. In fact, it barely screams the question: how should I think about this problem if I am directed to ignore all the factors that reflect my personal interest in its resolution? The method itself forces the decision maker to confront the kinds of questions that Professor Barnes raises, and, by raising those questions channels the analysis into the question of what is the moral way of thinking about the issue the decision-maker confronts.

In other words, the exercise of thinking from behind the veil of ignorance eliminates decisions that would be based on impermissible factors; this would include factors such as race, ethnicity, political affiliation, or any other consideration that is not relevant to the merits of the decision. Operationally, the veil of ignorance describes a thought process that requires the decision maker to articulate the factors that are relevant to the decision being made, the reason those factors are

42. KWAME ANTHONY APPIAH, *EXPERIMENTS IN ETHICS* 22 (Harvard Univ. Press 2008).

43. Barnes, *supra* note 15, at 197.

relevant, and how those factors ought to be weighed against each other or aggregated to make the necessary decision. The veil of ignorance thus requires the decision maker to think about how to think about the decision, and to justify the methodology before the decision is made. The decision maker must determine which consequences are relevant to the decision before knowing what conclusions will be implicated by those consequences. Consequences matter in determining the relevance and weight of various factors, but not in determining the appropriate way of thinking about the question that must be answered.

C. *The Is and The Ought*

I am grateful to Professor Fagundes for raising the thorny issue of how my theory accommodates psychological and behavioral experiments that show how people think and act when faced with various moral and decisional problems. I am also grateful that he recognizes that my theory is capacious enough to allow the insights from such experiments to be taken into account in thinking about which interpersonal decisions are moral. Experimental evidence reveals important information about beliefs and values, which form the centerpiece of the theory I presented. Moreover, because experimental evidence shows the importance of context and framing, it advances one of the primary goals of my book: to support a method of thinking that avoids excessive generality of concept or principle (such as the right to exclude) and to focus instead on the contextual and framing factors that define the boundaries of the concept or principle.

Psychological insights play several roles in our understanding of property. On the one hand, psychological motivations for particular decisions are irrelevant to the law because legality depends on the objective factors that an ideal decision maker would take into account. The law is not particularly worried about why a farmer will not let a mobile home company deliver a mobile home to a neighbor across his land,⁴⁴ nor why a farmer is motivated to bar social workers from his property.⁴⁵ This illustrates the point that the law expects behavior to conform to the decision-making method of the ideal decision maker. What matters are the reasons for action, not their motivations. On the other hand, as my book emphasizes, and no one doubts, because the property system is sustained by psychological reactions to the concept of property, it is important to understand property in terms of cooperation and non-cooperation, which depend on psychological states of trust and risk-taking.

Psychological insights also explain the value that people find in a property system. Carol Rose recently surveyed property theories

44. *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d 154 (1997).

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

founded on psychological beliefs.⁴⁶ Importantly, theorizing about the psychology of owners is more advanced than theorizing about the psychology of non-owners. Ownership is thought to contribute to one's identity, to the projection of how one wants to be thought of, to a sense of security and empowerment, to a sense of generosity, and to an incentive for economic activity. The psychology of non-ownership is not so well understood, and descriptions of the psychological state of non-owners that are based on fear or reciprocity seem unpersuasive.⁴⁷

But the larger issue is raised by the disjunction between how humans really act and how they ought to act. When behavior does not appear to follow rational thought, or when people's moral choices diverge from philosophical or legal conceptions of morality, how should the law, which purports to be founded on a model of behavior that is both reason-giving and moral, react? How are we to reconcile psychological studies of how people act with philosophical or legal ideas about how people ought to act?⁴⁸

As Professor Fagundes says, moral psychology builds from a series of experiments that reveal the decisions people make when they are presented with various kinds of moral choices. Experimenters ask: how do people make decisions when confronted with a moral dilemma and how do those decisions compare with standard accounts of rational or moral action? Moral psychology challenges moral philosophy by showing that decisions individuals make are contextual and

46. Carol M. Rose, *Psychologies of Property (And Why Property Is Not a Hawk-Dove Game)* in THE PHILOSOPHICAL FOUNDATIONS OF PROPERTY at 272 (J.C. Penner & Henry E. Smith, eds., Oxford Univ. Press 2013) [hereafter Rose, *Psychologies of Property*]; see also, J.A. Blumenthal, *To Be Human: A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609 (2009).

47. The question about non-owners is why they habitually respect property rights, even when there is little fear of reprisals or sanctions. As a number of symposium participants mentioned, it is difficult to distinguish recognition of the values that property represents and acceptance of the power of those with property or the lack of alternatives. Barnes, *supra* note 15, at 196; Fagundes, *supra* note 37, at 235. For her part, Carol Rose mentions the development of customary practices driven by cultural values and supported by the idea of reciprocity and (in some cultures) the prospect of future ownership. But she admits that theorizing about the psychological hold of property on the behavior of non-owners is incomplete. Rose, *Psychologies of Property*, *supra* note 46.

48. The conversation between moral philosophy and moral psychology can be understood by contrasting KWAME ANTHONY APPIAH, EXPERIMENTS IN ETHICS (2010) (an effort at conciliation and accommodation between moral philosophy and moral psychology) with J.M. DORIS & HARMON, LACK OF CHARACTER, PERSONALITY AND MORAL BEHAVIOR (2002) (skeptical about the idea of virtue ethics in the face of experimental evidence). Sides are being drawn; see, e.g., Liang Young & Rebecca Saxe, *It is Not Just What You Do, But What's On Your Mind: A Review of Kwame Anthony Appiah's Experiments in Ethics*, 3 NEUROSCIENCES 201 (2010) (offering support for Appiah's analysis); see also Eduardo Machery, *The Bleak Implications of Moral Psychology*, 3 NEUROETHICS 223 (2010) (questioning whether philosophers are justified in concentrating on what kind of a person we should strive to be).

contingent, which suggests that morality is also contextual and contingent. In the famous trolley experiments, many people will throw a switch to divert a trolley from one track (on which the trolley would kill five people) to another track (on which the trolley would kill only one person). Evidently, people believe that taking action that will result in the death of one individual to save five individuals is morally appropriate. These same people, however, would not push an individual in front of a trolley (to his death) in order to save five people. Apparently, an individual's ideas about causation, agency, and responsibility are different enough in these two situations to change people's sense of the right way to act, even though the consequences of action are the same in the two contexts. How do we reconcile how people say they would act with our moral intuitions about how they should act?

More generally, psychological experiments show the laboratory reactions that lead to either cooperation or non-cooperation, and the contextual features that distinguish the two kinds of reactions. Sometimes experiments show that individuals make instinctive decisions that, upon reflection behind the veil of ignorance, would not be considered moral or rational. Sometimes psychological decisions reveal the mechanisms or intuitions that support generosity or other-regarding behavior. People's decisions are products of their environment, and context matters.

Assuming that the thought process behind the veil of ignorance can cleanse the psychological reactions that are based on impermissible factors, like race or ethnicity, how can knowing how people say they would react in certain situations help decision makers determine what the right thing to do is? Do they help resolve the central issue behind the veil of ignorance, which is to identify the values that are relevant to making decisions? We address that issue by more deeply exploring the role of beliefs and values in the law.

Consider first the question of beliefs. Moral psychology has the potential to offer evidence about beliefs that might facilitate the decision of how to award entitlements. Although most societies accept the moral idea that individuals should not knowingly harm other members of their society, the idea of what constitutes harm varies with the type of social organization, the context, and even social class. A society believing that an owner who interferes with a neighbor's access to sunlight is causing harm is going to have a different nuisance law than a society believing that the loss of access to sunlight is not harmful enough to require the owner to compensate the neighbor. In this context, we might revisit *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*,⁴⁹ which provided a focal point for some discussion at the

49. See *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).

symposium. Our theory requires us to ask what mode of reasoning the judge ought to use when assigning an entitlement to one neighbor or the other (assuming that precedent does not govern the legal question). One can imagine a series of psychological experiments, like the trolley experiments, that seek to reveal psychological beliefs about harm and that might inform a judge's thinking about how to decide where the cost of harm falls. The experiments would allow us to construct a model of how humans reason about harm that would make the psychological response a reasoned response of the kind that meets the obligations of a moral thinker. Under this reasoning, moral philosophy tells us that people are responsible for the harms they cause; moral psychology tells us how a particular society has constructed the concept of harm that makes the moral principle operative.

As for values, experimental psychology shows that some means to permissible ends are psychologically unacceptable to individuals. Because the law correctly examines the means that people use to achieve their ends, experiments about the means/end relationship can provide the law with a basis of decision. For example, the concept of unfair competition, which creates a form of quasi-property, is built on the idea that although injuring a competitor by taking her customers is generally privileged, some means of taking away another's customers are met with psychological disapproval. Injuring a competitor by lowering prices is privileged; injuring a competitor by taking advantage of the technology of the telegraph is not.⁵⁰

More broadly, the law employs fairness norms that determine when a decision is deemed impermissible. Such fairness norms influence how people ought to act by influencing the institutions of law and the market. For example, psychological research shows a fair amount of social consensus about when people consider a firm's price increase or price decrease to be unfair.⁵¹ People make judgments about deviations from reference points (or settled expectations) that are contextual. On the one hand, increasing the price of snow shovels after a sudden, large snowfall is judged to be unfair, as is decreasing the wages of employees when widespread unemployment lowers the market wage of labor. On the other hand, decreasing the wages of labor in order to preserve the viability of an enterprise is not thought to be unfair. Sometimes these conceptions of fairness are incorporated into law, as when legislatures pass laws that forbid price increases in times of a sudden shortage.⁵² At other times, however, the market works to incorporate these concepts of unfairness. Merchants who increase

50. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

51. DANIEL KAHNEMAN, *THINKING FAST AND THINKING SLOW* 305–09 (Farrar, Straus, and Giroux 2011).

52. When the water system of Toledo, Ohio failed, local authorities quickly imposed a ban on increasing the price of bottled water as they worked to increase the supply of bottled water.

prices in response to a sudden increase in demand find that they lose sales. The moral psychological of unfairness becomes an input, but not controlling input, into the law's requirements.

As Professor Fagundes points out, experimental psychology shows that people's views about what is right and wrong are about more than just harm and fairness. Views about right and wrong include several classes of considerations—such as loyalty, authority, purity, and liberty.⁵³ These factors determine the basis on which people will cooperate or not with others, which means that they are relevant to a theory of law because they show the basis on which people can reach cooperative outcomes. These considerations therefore explain not only the kinds of psychological responses that the law can harness as it seeks to aid people in coordinating their activities, but also the psychological barriers that the law must overcome if it is to successfully advance social cohesion.

III. CONCLUSION

Property Law and Social Morality presents a theory of property that focuses on how we ought to think about the social dimensions of the private law of property if we are to understand what determines and justifies property law. By presenting a way of thinking about property that drives our understanding of what property is, the book models how lawmakers might think about the decisions they make as they give content to property doctrine, and also how ordinary citizens might think about their rights and responsibilities with respect to other citizens when property controversies arise. The essence of property is found by identifying who gets to make decisions about resources, what factors are relevant to their decisions, and how their decisions must account for the well-being of others when they have a duty to take that well-being into account.

The central issue of the private law of property is one of boundaries: the boundary between exclusion and access, between detrimental competing uses, between private and collective forms of property, between present and future owners, and between owners and the society in which the owners exercise their decision making discretion. *Property Law and Social Morality* presents a way of thinking about those boundaries that I hope will sharpen them and reduce the social costs of litigation that can be avoided if we think about the boundaries in the right way.

The participants in this symposium have paid the ideas in my book great respect by taking the time and care to affirm some and challenge others, and I greatly appreciate their contributions. One of the by-products of a symposium such as the one that Texas A&M has organized is that it creates a platform for additional intellectual conversa-

53. Fagundes, *supra* note 37, at 236.

tions, and the possibility of narrowing divergent approaches and integrating new ideas into a common framework from which we can identify our differences and advance our understanding of the concept we call property. I am grateful to the School of Law at Texas A&M University for making this possible.