2014

The Possibility of Private Rights and Duties

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Is it possible for us to know what we owe others, or do we need the state to tell us? To ask the question this way could be understood as a provocation. It might suggest that the possibility of private rights and duties — a possibility that common law takes for granted and which lawyers witness in their daily practice — threatens the foundations of the legal realist jurisprudential project and the liberal political project. But it is not my intention here to attack those projects. I simply want to consider the possibility that legal realism and liberalism might not be all there is to know about law.

Over the last century or so, much American legal scholarship has proceeded on the basis of O.W. Holmes' assertion that private legal obligations—rights, wrongs, and duties — are illusions. In his famous 1897 lecture, Holmes provocatively (and influentially) asserted,

> The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in

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> this or that way by judgment of the court; and so of a legal right.[1]

More than a century later, the idea that private rights and duties might have some existence apart from posited law (broadly understood to include judge-made law), or the sanctions for violation of posited law, retains a whiff of superstition, or perhaps discredited dogma. Even among those lawyers who think that private rights and duties might exist, one finds very little agreement about what they could be. Hohfeld's scheme of jural relations enabled a scientific approach to rights and duties as facts.[2] But in the laboratories of the legal realists, that scientific approach was reductionist. If rights and duties are merely coincidental facts then all one might usefully say about them is that they have been posited. And who posits laws other than lawmakers? And who are the lawmakers other than the three branches of government?

This reductionism is problematic for at least two reasons. First, private law is made by private lawmakers, and private lawmakers do most of the work of deliberating about norms and ordering our communities. The vast majority of wrongs, liabilities, duties, powers, and other legal norms that govern our interactions with each other are settled and specified by authorities other than the state — authorities such as parents, schools and universities, professional associations, athletic clubs, even our own choices and actions. If we are to understand law — and particularly if we are to understand rights — we cannot simply overlook these sources of rights and duties.

Second, private ordering and private right-specification are not merely social facts; they are activities that provide value to our political communities. It is a good thing that private authorities share responsibility with the state to settle legal questions if it is the case that legal judgments should, on balance, be made by authorities who are closest to those whom the judgments will govern, and if it is the case that rules posited by the state must be clear and general in their application and therefore must foreclose many plural and incommensurable pursuits, and if it is the case that "power

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[1] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

[2] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919).

corrupts." In fact, there are many important jurisprudential and political implications of the centrality and prevalence of private rights and duties.

So, to overlook private law and its moral foundations is to overlook something pervasive and really important. Fortunately, lawyers cannot ignore private law *entirely* because the black-letter law contains at least one very important feature that points to the possibility of private law and private ordering. That feature is the vested private *right*, which is foundational to nearly every other area of law: from bailment, contract, tort, and restitution to constitutional and administrative law.[3] Alas, even here the realists have taken their toll. Courts and commentators have been confounded by the necessity of recognizing vested rights and the supposed impossibility of defining them.[4] Yet the existence of vested private rights points to the possibility of private law, which points to the possibility of private ordering. This possibility is worth exploring.

The existence of private rights raises two salient questions. First, what is a private right? What is its nature? What is its function? What does it do? How does it operate within practical and legal reasoning? Second, is a private right law, or is it something else? Many private rights are settled informally in ways that do not much resemble legislation or regulation—by custom or tacit agreement, to take two examples. These methods of establishing private rights do not result in texts that we can interpret, nor in official pronouncements of governmental authorities. Does that prevent them from being considered as laws?

To help focus consideration of these questions, I will approach private law mostly through property. Some of what follows applies with equal force within tort, trusts and estates, contract, and restitution. But property is, in a sense, foundational to the other areas of private law and, one might argue, to law generally. It is the area of law in which vested rights are recognized and established. So it is close to the source of private rights and duties.

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[3] *See*, e.g., Fowler Prop., Inc. v. Dowland, 646 S.E.2d 197, 199–200 (Ga. 2007); Douglas Cnty v. Briggs, 593 P.2d 1115 (Or. 1979); Anderson v. Memphis Housing Authority, 534 S.W.2d 125, 127–28 (Tenn. Ct. App. 1975).

[4] *See*, e.g., Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126, 139–43 (Tex. 2010); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 231 (1927).

WHAT IS A PRIVATE RIGHT?

One finds among contemporary scholars two prevailing schools of thought about the nature of private rights. Because these perspectives are so prevalent and well-known, they can be described briefly. One school says that private rights are settled and vested prior to the exercise of political power. This is usually done by individual initiative in conditions of equality and common access, which are sometimes given the name the "state of nature." The job of law is to secure individuals in the enjoyment of the rights that vest in them in this state of nature. Usually in this school of thought, law is not concerned with how rights are exercised. That is up to the individual right holder. If an individual has a right then the law must allow him to exercise it to pursue his own interests, as long as he does not cause harm to the rights of others.

In this account, the most basic private right is a property right. This is a two-term relation between an owner and a thing: A has a right to resource *r*. This really means that A has a liberty to do with *r* what A would like to do, secured by A's right to exclude others from *r*. Note that *r* need not necessarily be Blackacre; it could be one's labor, one's person, or one's chattel or real property. This basic property right is absolute. Other rights are derived from the liberty secured by the right to exclude, and the individual right-holder is the agent who settles those legal incidents. The state's job is simply to prevent violence and meddling against right holders by those who would interfere with *r*. The most famous version of this view is attributed to Locke, but the strongest versions of it are found in contested interpretations of Locke, especially the writings of Richard Epstein.[5] Jeremy Waldron has also stated a very strong version of this account.[6]

The other prevailing school says that private rights are not really rights; they are privileges or entitlements. One has a privi-

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[5] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8(3) ECON. J. WATCH 223 (2011).

[6] JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); Jeremy Waldron, *COMMUNITY AND PROPERTY: Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQ. L. 161 (2009) (purpose was to *criticize* private property rights, unlike Epstein's work).

lege if the state says one has it, or perhaps as long as the state refrains from saying one does not have it. So, private privileges, like Bentham's constitutional privileges,[7] are contingent upon the decisions of sovereign powers. And entitlements are creations of law posited by the state. It is incorrect to say that one has natural rights or purely private rights. Every privilege or entitlement is a matter of public concern, and therefore political powers cannot avoid settling the question of who enjoys which privileges and who should receive which entitlements.

Privileges and entitlements come in bundles. Political powers distribute the bundles to individuals. They might take privileges and entitlements out of some bundles and add those rights to other bundles in order to ensure that the distribution of privileges and entitlements is fair, or perhaps to ensure that the collective good is maximized. The bundle conception of rights was developed by legal realists in the early twentieth century as they built on the insights of Wesley Hohfeld.[8] But this conception's political implications are not necessarily entailed in Hohfeld's schema.[9] These implications were appended to Hohfeld's account of jural relations by realists such as Felix Cohen and worked out detail by the progressive scholar Frank Michelman. In an influential article Michelman insisted that it is "a mistake to see property... as something categorically apart from... political action."[10] Today, the most sophisticated version of this account is found in the writings of progressive property scholars, especially Gregory Alexander,[11] Eduardo Peñalver,[12] and Joseph William Singer.[13]

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[7] JEREMY BENTHAM, OF LAWS IN GENERAL 46–48 (H.L.A. Hart ed., 1970).

[8] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 1919).

[9] James Penner & Henry E. Smith, *Introduction* to PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW xv, xvii (James Penner & Henry E. Smith eds., 2013); Henry E. Smith, *'Emergent Property' in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 324–25 (James Penner & Henry E. Smith eds., 2013).

[10] Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981).

[11] *See* Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

[12] Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

[13] JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

Obviously, these two schools are quite different in some ways, and they are generally viewed as being diametrically opposed to each other. The first school is called libertarian or classical liberal, and the second is called progressive or left liberal. These accounts have two features in common. First, both of these accounts assume that private rights must be settled and specified either by individual initiative or by state action. The Epstein account favors specification of rights by individuals. The progressive account favors specification by governments. But both of them share the presupposition that the individual and the state are the only two candidates for the office of private right maker.

Second, and related to the first, both accounts have a dichotomous understanding of the purposes of rights. Rights serve *either* individual interests *or* collective interests. If the former then we can't really say very much about the reasons for which rights might lawfully be exercised. Individual rights are opaque from the view of outsiders. We cannot say which of the owner's interests are selfish and which of them are worthwhile. People like Epstein tend to think that individual interests are generally defensible. People like Alexander and Singer tend to be suspicious of individual interests. But neither group of scholars distinguishes between interests that are grounded in reasons and those that are grounded in other human motivations.

Collective interests, on the other hand, can be examined and critiqued, and it is this ground where the battle between economists and progressives is joined. Many economic scholars tend to think that individuals should have autonomy to exercise their private rights because that is the most efficient way to produce the greatest prosperity or well-being for the greatest number. Progressives tend to think that equality or fair distribution is the most important collective interest, and that other interests do not weigh nearly as heavily. Both groups, however, tend to assume that there is such a thing as the "greatest collective good" — the greatest net good for the greatest number — and that someone, probably an expert, is in a position to calculate it and to tell us how to assign authority over private rights in order best to achieve that collective good.

James Penner has called this the "fetishized conception" of private rights.[14] On this conception, the role of a private property right, he says, "is to allow individuals the freedom to be selfish."[15] According to Penner, there is no idea of property serving a common good. Similarly, the role of contract is merely to serve purchaser choice, so that, Penner declaims, "any idea of contracts as relational, long-term, joint ventures under which people coordinate their behavior to mutual and joint advantage is obscured."[16] The fetishized conception of private rights produces a "warped individualism," Penner says, in which "the paradigmatic citizen owner is Ebenezer Scrooge (before his ghost-prompted enlightenment)."[17] The result is that "those on the left seek to undermine the justification of property rights and confine property rights with all sorts of limitations while those on the right seek to bolster them, treating any limitation on property rights as an attack on the very soul of the owner."[18]

Perhaps Penner overstates his critique a bit. Both the Lockean account and the progressive account tend to overlook the role of private lawmakers in specifying the norms of property, and neither has an explicit account of the ways in which property serves a truly common good, which is reducible neither to individual interests nor to some net, collective good. But both accounts say some things about private rights that *presuppose* a common good. The Lockean account points to the ways in which productive labor and appropriation shape many property norms, at least initially or prima facie in some cases, and can thus lead to prosperity and to virtue. Here we think of the doctrines of capture, copyright, and accession. Subscribers to the Lockean account, however, can go wrong if they try to use appropriation as a justificatory basis for *all* of property's norms, but surely productive labor upon natural goods has value and is rewarded in law for that reason.[19] For their part, the Progressives point to the important role

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[14] J.E. Penner, *COMMUNITY AND PROPERTY: Property, Community, and the Problem of Distributive Justice*, 10 THEORETICAL INQ. L. 193, 196 (2009).
[15] *Id.* at 195.
[16] *Id.* at 196.
[17] *Id.*
[18] *Id.* at 195–96.
[19] *See* ERIC R. CLAEYS, PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 13 (James Penner & Henry E. Smith eds., 2013).

that political authorities play in specifying rights and duties by their exercise of the police powers. However, Progressives can go wrong by assuming or asserting that, because private rights can be altered by the state's exercise of the police powers it is really the state that settles and specifies the boundaries of private rights.

A third idea about private rights is that private law is an autonomous body of norms. The purpose of private law is not to serve any goods or virtues external to it. The purpose of private law is to be private law. So, for example, Arthur Ripstein argues that property rights are not grounded in the interest each of us has in using and managing things. Rather, it is the other way around; our use is grounded in the right to exclude, which is grounded in the form that private property takes in fact. Property rights are not solutions to problems that are external to property. Property's 'doctrinal structure' is grounded neither in actual use nor the possibility of future use, but rather in relational independence — the right of the owner to determine use rather than other people — "which can only be characterized formally."[20] The formal right to exclude is the presupposition for the concept of use and the foundation for all rights of use.

Ernest Weinrib has done something similar in torts. Weinrib describes private law as "the locus of a special morality that has its own structure and its own repertoire of arguments."[21] In other words, private law governs or guides moral reasoning in some way, and it is distinct from both morality and public law. So where does private law get its concepts, structure, and arguments? Weinrib thinks private law "is the public repository of our most deeply embedded intuitions about justice and personal responsibility."[22] Yet it is a closed system, which is self-justifying and self-referential. The job of private law is not to vindicate any of our moral intuitions. In his aphorism, the purpose of private law is to be private law.[23]

Notice that Weinrib's idea of private law presupposes that we are responsible beings, and that we are responsible specifically

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[20] ARTHUR RIPSTEIN, PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 162 (James Penner & Henry E. Smith eds., 2013).

[21] ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 2 (2012).

[22] *Id.* at 1.

[23] Weinrib's theory has gained traction thanks in part to a landmark decision of the Supreme Court of Canada endorsing his ideas. Hall v. Hebert, [1993] 2 S.C.R. 159 (Can.).

for how we act toward each other. Furthermore, it presupposes that we have moral views about our responsibility toward each other, and that those views might be right or wrong. That a dispute between two parties can be submitted to a court and resolved on the basis of private rights entails that one or both of the parties was wrong in their understanding of what the right thing to do was. But if private law has no point outside of itself, how can it tell us which actions are right and which are wrong? Private rights seem to hang suspended in mid-air. But private rights could be otherwise than they are; and therefore some justification for them is needed.

Furthermore, if private law is autonomous from practical reasoning then there might be a private right to do a wrong. Ripstein says that there is in fact, and is willing to set a right against what is right to do (or not do) in at least some instances. He considers it uncontroversial "that, once someone has a right to do something, the right holder is thereby permitted to exercise the right foolishly, imprudently, and, at least within limits, immorally."[24] What are those limits? Ripstein does not say, but if he means to accept the limits placed upon the right to exclude in the common law — for example, by the doctrine of necessity —then the game is up. If the owner's right to exclude must in some cases yield to others' interest in using the owned thing then the right to exclude cannot be the only foundation for rights of use.

Here is another way to understand the possibility of private rights, which brings to the fore those considerations that the other theories presuppose (yet also elide). It appeals to a concept that we can safely call the common good. The common good is reducible neither to individual preferences nor to state interests. Its plural and incommensurable aspects are intelligible as basic reasons for action, whether action is conceived narrowly as actions of the individual and the state, or more broadly to encompass groups, associations, families, and all the other actors who participate in the common good in various and plural aspects.

Basic reasons can guide all moral agents — individuals, groups, and state actors — to the correct judgments about what is right and wrong to do and what not do in one's dealings with other people by picking out those motivations that have value in them-

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[24] *See* RIPSTEIN, *supra* note 20, at 158.

selves, and thus supply value to all instrumental goods. What is right to do is what is good to do, and what is wrong to do is that action which harms the good. This idea makes a private right neither an absolute liberty to pursue my individual interests nor merely a privilege that the state allows me to exercise contingent upon its forbearance. Rather, a private right is a shorthand description of a conclusion of practical reasoning.

The conclusion of practical reasoning always answers the question either, "What should I do?" or, "What must I not do?" To say that someone has a private right is generally to say that someone else is under an obligation to act or refrain from acting toward that person in a particular way. It is to say that someone bears a duty or a liability toward the right-holder, or not, as required by reason. That duty correlates with the right of the person to whom the duty is owed.

If this account is correct then we cannot understand private rights if we begin with abstract, individual right claims, *or* with state action. We cannot say whether anyone has a right until we have identified the person or agent who is responsible for acting or refraining from action and we have identified the action or restraint that is required of that person. So we can notice that a right correlates with a duty (or liability or disability or absence of duty in the right-holder herself...), which is borne (or not) by a particular person or moral agent, who is obligated to respect the right by fulfilling his or her duty. Then we can back up another step and notice that the duty represents a judgment about what the agent should or should not do. And that judgment is grounded in reasons. We can say what a particular right is when we can say what its correlative duty is, and we can identify the duty when someone has considered what is good and bad, right and wrong, to do or not to do, and has reached a reasonable judgment in answering those questions. Notice, we have not yet said anything about who is or should be responsible for making the judgment, but only that a reasoned judgment is the basis of the right.

This discussion itself is rather abstract, so perhaps an example might help. Imagine I am holding $5. Imagine that a person presents herself in front of me and asks that I spend the $5 buying food for her to consume. Does she have a right to the food? Or we could ask the same question from my perspective and inquire, "Do I have a duty to buy her food?" And the answer is: We do not know. None of us has an abstract right to have food bought for us.

We need more data so that we can engage our practical reasoning upon the problem.

Suppose I look closely and see that the person standing in front of me is one of my daughters. Now, we might say, it is clear that she has a claim-right to the $5. I have moral obligations to my children and those include keeping them fed and healthy. But suppose I then tell you that she just ate a massive breakfast minutes ago — far more food than anyone could expect such a little person to consume — and furthermore, I have been teaching her about the value of money and importance of thrift. Consider further that the food she wants me to buy for her is cotton-candy-flavored ice cream, it is only 9:00 in the morning, and she also needs to get to school. Do we still think that she has a right to demand that I spend the $5 buying her the food?

Once we have reasoned to the right answer to the question, What do I owe this person standing in front of me?, the answer is binding upon my present and future action. I have a duty or obligation to act or refrain from acting as the right dictates. All other reasons are ruled out of consideration. If this person has a right to expect me to feed her then it does not matter how else I might have spent the $5 or what other goods I might have achieved with it. If she does not have the right — if I am liberty not to buy the food or if, in common law terminology, it would be wrong to buy her the ice cream just after breakfast when she should be at school — then it does not matter how desperately she wants the ice cream, how adorable I think she is when she's eating ice cream, or that it is 110 degrees outside and I would really like an ice cream myself... the right is conclusive and binding.

So perhaps rights are not usefully considered as a priori premises, from which we reason to correct judgments. Rather, rights *are* the judgments — the conclusions of practical reasoning. Those judgments are derived from reasons — the basic human goods and basic requirements of practical reasonableness — and from factual premises that are relevant in light of those reasons. Basic reasons form the ultimate foundations of private rights, just as they do for other practical judgments. They guide deliberation and judgment about how we ought to act toward each other, and so they guide deliberation and judgment about what we owe to each other as a matter of right. In other words, the good is prior to the right.

But now we encounter a complication. If rights really are conclusions of practical deliberation, and if they function as rights by operating conclusively upon our present and future deliberations, then many of the reasons that we know as private rights, particularly property rights, might not actually be rights. In fact, when we refer to property rights as rights, perhaps we are cheating. By operation of the doctrines of necessity, waste, nuisance, and many other legal limitations, the right claims of owners do not always operate *conclusively* within practical deliberations. A claim of a property right is often overridden by countervailing reasons, which result in a judgment against the owner.

So perhaps when we speak of a property right we are appropriating the prestige and the normative force of real rights — absolute and conclusive reasons that are conclusions of correct judgment — for what is really a lesser, weaker reason for action. This is the view of two good scholars, Grégoire Webber and John Oberdiek,[25] who propose that a reason for action is not a right if it is not fully specified, binding, and conclusive; in short, if it is not absolute. If they are correct then it is not merely incorrect but actually misleading and perhaps dishonest to speak of private property rights as rights. It is to degrade discourse about rights and to cause muddle in the minds of lawyers. A right is a conclusive reason for action to act or refrain from acting in a particular, specified way toward a particular, identified person. Any reason that is not specified as a three-term relation and conclusive cannot be a right.

This is a powerful theoretical account of rights, particularly of the essential characteristics that supply the normative force of rights. It is neat, clean, and crisp in its explanatory power. And this account problematizes the idea of private rights. Unlike absolute rights, most norms of private law cannot be stated in any useful way conclusively in the abstract as two-term relations. This is a particular problem for usufructs, which must be settled and specified by some authority in particular contexts upon consideration of

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[25] GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009), chapters 2 & 3; Grégoire Webber, *On the Loss of Rights* in GRANT HUSCROFT, BRADLEY W. MILLER, GRÉGOIRE WEBBER, PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 123–54 (2014); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD JOURNAL OF LEGAL STUDIES 127 (2008); John Oberdiek, *What's Wrong With Infringements? (Insofar as Infringements Are Not Wrong): A Reply*, 27 LAW AND PHILOSOPHY 293 (2008).

particular facts and reasons. Do I have a right to use this room? We cannot answer that question until we know who lays claim to the room and on what authority, what the nature of the claim is, whether I have a relationship with the claimant and what the nature of that relationship is, what I plan to use the room for, how that use will affect others, whether I intend any of those effects, and many other considerations. Rights of use cannot be stated conclusively in the abstract; they must be specified in particular contexts. Until we know the full range of relevant considerations we cannot say whether I have a right to use this room or not.

In short, before we can say whether a right claimant has a right, we must know who, if anyone, has a duty to perform exactly what action, at what time and by what means, on her behalf or with respect to her. This is why abstract right claims to use or be provided with goods — so-called positive right claims such as the putative right to health, or education, or food and shelter — are meaningless. Absolute rights — the right not to be killed, enslaved, raped, or maimed — provide meaningful guidance for practical deliberation and choice even in their abstract, two-term forms because they impose upon duty-bearers a duty to *refrain from acting*, which can be understood and obeyed by all moral agents in all circumstances. So-called positive rights require action by someone, and are therefore highly context-contingent.

Yet perhaps the conception of rights as conclusions is a bit *too* neat, clean, and crisp as a description of rights. In the world of legal practice — the world that lawyers inhabit, in which they must advise clients about their rights and duties — we encounter exclusionary reasons that are not transparent for the primary reasons justifying them, which bind our deliberations in a less than fully-conclusive way, but nevertheless are conclusive and binding for many practical purposes. These include many property rights.

Indeed, many property rights require little specification. In between absolute rights and use rights on the spectrum of conclusiveness we find *in rem* rights, such as the right to exclude and the right to alienate resources. We call them *in rem* rights because they are for most practical purposes fully specified with respect to the thing. We can best see this by starting with the correlative duty. James Penner's classic examination of exclusion in property law explains the right to exclude by examining the duty of self-

exclusion.[26] Each of us has a duty to exclude ourselves from things we do not own. So, Penner imagines that walking through a parking garage I encounter a car that is not mine. I know that I have a duty not to enter or take the car. I do not need to know the owner's plans for the car, or whether those plans are reasonable or unreasonable. It does not matter that I could make a more reasonable use of the car. In fact, it does not even matter who the owner is. All I need to know is that I have encountered a car that does not belong to me. My duty is fully specified *in rem*, with respect to the thing, without any consideration of personal or context-specific facts or reasons.

So, in reality we do not reason all the way through every question in every private interaction from basic reasons to right judgment. We often rely upon — and often should be guided by — legal and moral rules and other secondary reasons for action, which might or might not be fully conclusive in every circumstance, but which nevertheless resolve practical questions in the vast majority of a class of circumstances. Joseph Raz calls these secondary reasons "exclusionary" reasons for action, because they exclude from consideration the primary reasons on the basis of which they are established and the primary reasons that might be counted against their establishment and enforcement.[27] Exclusionary reasons make it unnecessary to recreate the entire chain of reasoning every time. If I know that a rule prohibits me from stealing or trespassing then I need not consider all the primary reasons that make it unjust to steal, nor the primary reasons that I might otherwise invoke to justify taking the car out of the parking garage in this instance. I simply obey the rule.

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[26] Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON JOURNAL WATCH 255, 258 (2011).

[27] JOSEPH RAZ, THE MORALITY OF FREEDOM ch.7 (1986); JOSEPH RAZ, PRACTICAL REASON AND NORMS 73–89 (1999); JOSEPH RAZ, PRACTICAL REASONING 128–43 (1978). One might call a right an authoritative, content independent, or peremptory reason for action, H. L. A. HART, *Commands and Authoritative Reasons, in ESSAYS ON BENTHAM* ch.10 (1983), or an absolute or conclusive reason for action, GRÉGOIRE C. N. WEBBER THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS ch. 4 (2009). These different terms aim at the idea that a right forecloses further deliberation. It blocks out other reasons for action; it acts as the reason "for excluding normal free deliberation about the merits of" doing or not doing an action. HART, *supra* note 22, at 255. Yet the term "exclusionary reason" produces more clarity for present purposes, as should become apparent.

Of course, though the function of a right is to exclude primary reasons from *practical* deliberation, one can understand justifications for rights and limitations upon rights as a matter of *theoretical* reason. In fact, we do so rather easily. Consider the right each of us has not to be killed intentionally. Beginning with the basic good of human life, the basic requirement of reason that one must never intentionally harm a basic good, and our factual knowledge about the kind of beings humans are, we can judge that each human being owes an absolute duty to each human being not to murder. But once we have settled that question, we can simply assert a right on behalf of each of those persons whom it is wrong to murder. Because everyone has a duty not to murder, everyone has a right not to be murdered, or vice versa.

Now that we have arrived at that conclusion, it is unnecessary to reconsider the question every time we encounter a different person. We know that *every* person has a right not to be murdered, and therefore we know that *this* person has a right not to be murdered, and therefore we know that we must not kill her, without considering anything else. There are a few other absolute, exclusionary norms of course. Because one must not enslave, maim, or rape, each person has a right not to be enslaved, maimed, or raped. Where these apply, we do not need to consider any primary reasons in order to know what to do — no particular facts or circumstances of the case; no harms that killing, enslaving, maiming, or raping would cause; no goods that might be achieved by killing. The status of the being one encounters — the status as a *human* being — is enough conclusively to answer the question, "How should I act toward this being?"

The exclusionary function of rights within practical reasoning helps make sense of the similarity between the duty of self-exclusion from others' property and the duty not to murder or enslave. In a sense, absolute duties against murder and slavery are also fully specified *in rem*, with respect to a thing. I encounter a being. If that being is a human being then I have a duty not to kill that being and a duty not to treat that being as I would treat property. My duty is fully specified and conclusive simply by reference to the kind of being — the kind of thing — that I am encountering, without any personal or context-specific considerations. And obeying the duty is a way of demonstrating moral respect for other human beings as agents of practical reason, beings who are human by virtue of their capacity to plan and act for reasons. These simi-

larities between *in rem* rights and absolute rights are what make the Epstein conception of private rights plausible.

Yet there are important differences between the duties not to murder and enslave on one-hand and property duties on the other. For one, a duty to exclude oneself from an owned thing is not owed to the owned thing; it is owed to those who have rights to make plans for the use of the thing. The status of the owned thing — that it is owned by someone — is the only datum necessary to resolve the question whether it can be possessed or used. But the status of the thing is derived from the status of the owner as someone who owns it, and is therefore contingent upon law. The status of a human being who is owed absolute rights of life, bodily integrity, and so forth is inherent in the person, inalienable, and therefore not contingent.

Also, property rights are not fully conclusive, as absolute rights are. Because of the moral absolutes against murdering and enslaving, every human being has an absolute right not to be murdered and an absolute right not to be enslaved. Property rights and duties are not absolute. The doctrine of necessity, for example, teaches that my duty of self-exclusion gives way if it becomes necessary to enter and use a thing to save a human life. So, suppose that the parking brake is not set in one of the cars in Penner's parking garage. I see that the car is parked on a slope and that it is starting to roll toward a group of children playing on the sidewalk. The common law says that I have a defense against trespass if I enter the car for the purpose of setting the brake and saving the lives of the children from the imminent threat posed by the loose car.[28] This means that the owner's right to exclude me is not fully exclusionary. One countervailing reason — the value of human life — is sufficient justification to ignore what would otherwise be an exclusionary reason for action.

On the other hand, the doctrine of necessity is not a general license to ignore my duty of self-exclusion any time I judge that I can make a better use than the owner is making. Only a limited and discrete *category* of primary reasons — strict necessity to save a human life from imminent danger — can defeat my otherwise-

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[28] RESTATEMENT (SECOND) OF TORTS § 197 (1965).

conclusive duty not to possess the thing.[29] So, like the right not to be enslaved, the right to exclude from one's property is an exclusionary reason for action. It excludes from consideration nearly all primary reasons that might be invoked to justify possessing a thing that does not belong to me. But unlike the right not to be enslaved, the right to exclude from property does not rule out *all* categories of primary reasons. Whereas the right not to be enslaved is absolute, the right to exclude is categorical but not absolute.

Not absolute but categorically exclusionary; therefore property is not entirely contingent upon political action or public law. We can know, and *do* know, our duties with respect to others' things without being commanded by agencies of public lawmaking. We can respect those within the dominion of ownership as agents of practical reason, and they can likewise respect us, because our mutual duties of self-exclusion and non-interference are known to us as duties that we owe to our fellow human beings. Private rights and duties are possible because humans are the kind of beings that we are.

IS A PRIVATE RIGHT LAW?

Suppose we are convinced that there is such a thing as a private property right, that it is neither absolute nor contingent upon the exercise of political power, and it is justified on the basis of the common good. Fine, but you might object that it does not follow that these rights are legal in nature. Like the realists or progressives, you might insist that rights and duties are not *legal* rights and duties unless and until they are settled and specified by some government actor. So, that we owe each other moral duties of self-exclusion and non-interference does not entail that anyone has legal rights of exclusive use. We also have other moral duties — duties to share with those in need, to ensure fair and equal distribution of resources. Political authorities must be guided by these considerations as they decide which private right claims will be honored and which ones will not.

There are a number of problems with this argument. I want to focus on one, namely its emaciated conception of authority. If

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[29] Monsanto v. Tilly [2000] Env. LR 313; Southwark LBC v. Williams [1971] Ch. 734 at 743.

the progressives are correct that only branches of government are competent to settle and specify legal rights and duties then perhaps private rights are merely privileges that are held by people whom we call "owners," who hold those privileges only insofar as the government forbears from destroying or redistributing them. But progressives ignore the common law understanding of private law, in which private rights and duties are declared — not made — by courts, and annealed and adjusted by legislators, but they are settled and specified by authorities of private ordering — donors and testators, juries in civil actions, groups of riparian landowners and other quasi-common owners, and all of the institutions and associations that promote a truly common good.

Consider *State v. Shack*[30] in this light. That case is supposed to stand for the proposition that courts may and should excuse acts of trespass when those acts are performed for a noble purpose, such as delivering legal services to workers on a farm. But, as various scholars point out, there was no need for the court to abrogate the farmer's vested rights; private ordering had already accommodated the human values at stake.[31] The workers were either licensees or tenants of the farmer, and at common law a long-term license or lease entails the right to receive guests for the purposes of one's occupancy.[32] Therefore, the farmer had already conveyed away his right to exclude Shack and Tejeras. Adam Mossoff observes, "[t]o grasp this point, no one would have given the New Jersey Supreme Court's decision any notice if it dismissed Shack's trespass lawsuit against [a] pizza delivery m[a]n bringing lunch to the migrant farm workers toiling away on his farm."[33]

For this reason, the parties themselves had previously settled any issues regarding private rights and duties before their dispute ever reached the New Jersey Supreme Court. Now it is true that those rights were not given juridical enforcement, and therefore were not "law" in the sense of constituting a binding precedent, until the New Jersey Supreme Court ruled that the workers had the right to receive guests on the farm. However, the ruling

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[30] State v. Shack, 277 A.2d 369 (N.J. 1971).

[31] *See*, e.g., THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 67(2010).

[32] State v. DeCoster, 653 A.2d 891, 893–94 (Me. 1995).

[33] Adam Mossoff, *'The False Promise of the Right to Exclude,'* 8 ECON JOURNAL WATCH 255, 260 (2011).

was properly grounded not in an evaluation of the primary reasons pro and con. That understanding was a conceit of the New Jersey Supreme Court. A sounder basis of the ruling was the pre-existing, previously-specified right of the workers. This right existed and had a normative claim upon the practical reasoning of the farm owner before the New Jersey courts ever got involved, and which should have guided the deliberations of the New Jersey courts as well.

So, private law is law if those authorities that settle and specify private rights are in fact properly considered authorities — a concept that many libertarians and progressives deny or overlook. The zero-sum conflict between the individual and the state that many libertarians and progressives presuppose is not true to the character of private law in the common law tradition. Private rights and duties are possible because human friendship, community, and virtue are possible and because those human phenomena often result in authoritative reasons, which bind our practical deliberations.

The common good is most thoroughly realized in intermediary institutions within which families, associations, and other groups of people pursue plural and incommensurable goods in acts of communal and individual self-constitution. Specification of duties and other exclusionary reasons within these communities is best attuned to the requirements of practical reasonableness and to the good of all concerned. True, these communities sometimes fail to account for the good of outsiders, who are not part of their communities. However, private law has institutions of ordering to mediate those failures too.

You can think of many examples of this, no doubt. Families, religious groups, non-profit and for-profit corporations, fraternal organizations, and many other groups exercise their dominion as owners to settle and specify the rights and duties of people both within and without the group. Let us consider an example of immediate significance. Return to the question, "Do we have a right to meet in this room?" None of us bothered to inquire about this before we entered. We all assumed that the Faulkner Law Review has some sort of arrangement with Faulkner University, whether that is a license, leasehold, or some other legal right. If that is correct then the Faulkner Law Review enjoys a private right, which is derivative of Faulkner University's dominion as owner of this campus. Your right to be here is derivative of Faulkner Law Re-

view's right, which is derived from Faulkner University's authority.

Consider that neither the State of Alabama nor the United States government created the rights and duties of those who participate in the symposium in which I am delivering this paper. Faulkner University exercises its authority as owner of this private property to settle the rights and duties of various people who would like to participate in the life of the University, either to realize the goods of learning, artistic expression, and skillful athletic performance, or instrumentally to profit in some way from Faulkner University's pursuit of those goods. Property ownership frees a university to promote the intellectual and social life of its campus by restricting access to the campus, making use of the campus that serve the university's mission, and excluding those that are inimical to it.[34]

The university's freedom is constrained by reason, by common law doctrines that limit property rights, and by public law limitations. For example, Faulkner could not lawfully exercise its property rights to operate an oil refinery, because its usufruct is limited by the educational mission of the institution which requires that the campus be put to educational rather than industrial uses, by common law doctrines of nuisance and waste, by the public accommodation doctrine, and by the land use regulations promulgated by municipal authorities as an exercise of the state's police powers. However, subject to those conditions, the University may exclude from its property anyone it pleases, just like any other property owner, and may make any uses of its property that advance its plans and that does not cause unreasonable harm.

Property rights are not the only private rights that make this event possible. The speakers at this symposium are here under terms of contracts negotiated for the sake of academic prestige, or perhaps for the sake of friendship or out of love of knowledge for its own sake. Our conduct here is governed in part by unwritten customs governing when one speaks, when one is silent, when one sits, and when one stands. None of these rights and duties were promulgated by a legislature, yet we all think that one would be wrong — would breach one's duty to the group — by violating one

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[34] *See* Adam J. MacLeod, *Universities as Constitutional Lawmakers*, 17 U. PA. J. CONST. L. ONLINE 1 (2014).

of them. We are sharing in the realization of a truly common good as a result of truly private rights and duties.

Furthermore, these rights and duties are laws. If the police were summoned here to remove a heckler, trespasser, or some person who disregarded our customs or violated university policies governing entrance to its campus, then the police would have a legal obligation to remove the person. If the organizers of this conference failed to honor a contractual obligation to a speaker after the speaker discharged his duties then the speaker would have a right to obtain a remedy in a court of law. If the legislature decided to close our proceedings by taking title to the campus by eminent domain then it would owe Faulkner just compensation. Executive, judicial, and legislative actions are constrained by private rights and duties, just as private actions are. Private rights and duties are not merely possible; they are actual, and they deserve careful study.