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### Opus as the Core of Property

Adam J. MacLeod

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**OPUS AS THE CORE OF PROPERTY**

Adam J. MacLeod<sup>†</sup>

*Abstract*

*No account of property law can achieve a comprehensive understanding without factoring in natural rights. Professor Eric Claeys's new book offers a significant contribution to contemporary property theory by setting out the most comprehensive and defensible theory of natural property rights to appear in a long time. Claeys describes the function of property as productive work. Intentional planning, purposeful effort, and creative ordering enable people to achieve lives of flourishing. And, as Claeys demonstrates in careful detail, the various norms and institutions of property law make possible those exercises of practical reason and the flourishing that results from them. Natural property rights turn out to have both pragmatic utility and ethical value. They enable human beings to flourish both materially and as reasoning, choosing, moral agents.*

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I. INTRODUCTION

Professor Eric Claeys's ambitious book project invites us to reconsider an old account of property norms and institutions as specifications or determinations of natural rights.<sup>1</sup> Most people today are familiar with

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1. This term "determination" extends back in Western jurisprudence at least to the thirteenth century, when it played a significant role in Aquinas's account of the complex relationship between natural law and human law. A small number of human laws are derived directly from the natural law, Thomas taught, while most are matters of *determination*, in which natural law principles provide some guidance but most of the specific content of the law must be supplied by human choice and judgment in a process of specification. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, q. 91 a. 3 & q. 95 a. 2 (2006) (ebook). The concept was earlier captured by Aristotle's discussion of matters of indifference,

philosophical theories about natural rights, which suffer from well-known limitations and shortcomings. But memories have faded of the juristic tradition, running from Justinian to Hale and Blackstone to Abraham Lincoln to Robert Jackson, in which natural rights have performed their most important work, not as philosophical abstractions but instead as guidance for the practical reasoning of lawyers.<sup>2</sup> Claeys renews that juristic tradition for a contemporary audience.

This Article situates Claeys's project within the broad, philosophical tradition of natural rights theory, locating his book within one strand of that tradition: the juristic tradition. Like earlier jurists such as Justinian and Jackson, Claeys is concerned with understanding legal rights as we find them in the world rather than with explaining moral assumptions or justifying political ideologies. For example, he writes about riparian water rights rather than the putative right of political revolution.<sup>3</sup> And like those earlier jurists, Claeys does not limit himself to particular legal doctrines or modern research methods. For example, he draws heavily upon the insight that legal rights appear differently from the external perspective of law professors and social scientists than they do from the internal point of view of law-abiding persons who act or refrain from acting in certain ways because of legal rights, an insight used effectively by jurisprudential theorists as diverse as Aristotle and H.L.A. Hart to achieve a comprehensive understanding of how legal rights work together with other legal rights.<sup>4</sup> Because he focuses on law rather than political or moral philosophy, and because he draws upon jurisprudential tools such as the distinction between the internal and external points of view, Claeys is able to demonstrate that natural rights are neither mysterious abstractions nor fully-operational legal rules but rather

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which are not the same everywhere as matters of natural justice and which human law must settle conclusively by specifying precisely what action is required or forbidden. ARISTOTLE, *THE NICOMACHEAN ETHICS* V.7 92 (David Ross, trans., Oxford Uni. Press 2009) (1980).

2. See, e.g., 1 *THE DIGEST OF JUSTINIAN* 3–5 (Theodor Mommsen, ed., Charles Henry Monro, trans., Cambridge Univ. Press 1904); 2 *WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND* \*1–\*15 (1765) [hereinafter *Bl. Comm.*]; MATTHEW HALE, *OF THE LAW OF NATURE* 23–25 (David S. Sytsma, ed., 2015) (1670) [hereinafter *Law of Nature*]; James M. Ogden, *Lincoln's Early Impressions of the Law in Indiana*, 7 *Notre Dame Law Review* 325, 328 (1932); *Morissette v. United States*, 342 U.S. 246, 250–52 (1952). A nuanced account of this tradition is R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* (2015).

3. Eric Claeys, *Natural Property Rights* (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law); see also Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 *TEX. A&M J. PROP. L.* 415 (2023) [hereinafter "Claeys, *Introduction*"].

4. Claeys, *supra* note 3 at 24, 163.

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are reasons which perform important work in shaping the law and guiding legal reasoning.

Many of the insights and methods that Claeys employs are now seldom found in the pages of law review articles. So, this Article and Claeys's book will undoubtedly raise questions in the minds of readers. This Article will not attempt to provide a satisfying justification of natural property rights nor of the jurisprudential methods that reveal such rights to view. It will only describe those jurisprudential concepts and apply them to Claeys's project. Once one understands what natural rights theories do and do not claim about the relationship between natural and legal rights, it will appear that Claeys has written a plausible and philosophically defensible argument that natural property rights perform real work in the law and that understanding natural property rights enables one better to understand the law.

## II. PROPERTY FROM DIFFERENT POINTS OF VIEW

In framing his restatement of the natural rights account of property, Claeys employs terms and insights that jurisprudence has developed over the last century or so, especially analytical jurisprudence, the law and economics movement, and, more recently, the so-called "essentialist" approach to property theory.<sup>5</sup> These new theories differ from the classical approach and from each other in two respects. First, they differ in the points of view from which they observe property.<sup>6</sup> Some take what legal philosophers call the external point of view, while others view property from a perspective that is internal to its basic reasons and rights.<sup>7</sup> Second, they differ in respect of what they identify to be essential or central to property, either authority, exclusion, use, or alienability.<sup>8</sup>

Perspective matters. Or perhaps better: perspectives matter. The concept of property seems to have different meanings—it appears differently—from different theoretical perspectives.<sup>9</sup> Natural rights theory is a perspective on property one should not exclude from consideration. Claeys offers us "*a* concept for property, not *the* concept for property."<sup>10</sup> And he offers *an* explanation, not the only explanation, for why people

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5. *Id.* at 103.

6. *Id.* at 187.

7. *Id.* at 163.

8. *Id.* at 3.

9. Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 78–80 (1985); Thomas W. Merrill, *The Property Prism*, 8 Econ. J. Watch 247, 247–51 (2011).

10. Claeys, *supra* note 3, at 160.

think certain property rights are justifiable. Natural rights are “relevant to the structure of property rights,”<sup>11</sup> though they do not supply all that is needed. In Claeys’s words, natural rights theories are “good enough for government work.”<sup>12</sup> There remains a gap between natural law principles and correct legal judgments, which lawmakers must fill in.<sup>13</sup>

Nevertheless, natural law matters. People create and use property rights for reasons that are more basic than property itself, including assertions of natural rights and other first principles of natural law. A commitment to examine the essence of property from the internal perspective of those people enables one to understand why property endures: it enables communities of people to lead flourishing lives because it facilitates cooperation for common goods. Some of those goods—freedom from injury, stable means of exchange, clear notice of others’ claims and intentions—are instrumental but necessary. Other goods—acts of charity, the formation and acquisition of knowledge, the excellence achieved by musical ensembles and athletic teams, the mutual care found within a well-functioning family home—are more basic and are easier to realize when the groups who pursue them are able to retreat from the demands of public life within the plural domains of private ownership.<sup>14</sup>

Of course, scholars can view property from other points of view, such as the external perspectives of economics, sociology, and other social sciences.<sup>15</sup> Those studies pick out features of property and assess them against critical standards of theoretical rationality. The economic insight, for example, that property rights enable a person to “form those expectations which he can reasonably hold in his dealings with others,”<sup>16</sup> and the sociological insight that the cultural property of groups is analogous to individual property rights in important respects,<sup>17</sup> improve our understanding of property’s norms and institutions. Yet they leave questions unanswered. Why do discrete cultural groups value

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11. *Id.* at 4; *see also* Claeys, *Introduction*, *supra* note 3, at 419–20, 438–39.

12. Claeys, *supra* note 3, at 4.

13. *Id.* at 78, 82–86; Adam J. MacLeod, *Bridging the Gaps in Property Theory*, 77 *MOD. L. REV.* 1009 (2014); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 *CORNELL L. REV.* 959 (2009).

14. ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* 114–21 (Cambridge Univ. Press 2015) [hereinafter PPR]; HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 51–55 (Cambridge Univ. Press 2021).

15. *See* H.L.A. HART, *THE CONCEPT OF LAW* 88–91 (3d ed. 2012), for the difference between the internal and external perspectives on law.

16. Harold Demsetz, *Toward a Theory of Property Rights*, in *PERSPECTIVES ON PROPERTY LAW* 135, 136 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, eds., 3d ed. 2002).

17. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022 (2009).

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their unique practices and intellectual creations? Why do people tend to share the intuition that law should encourage charitable uses of property and sanction spiteful uses?<sup>18</sup>

A natural rights theory can help answer those questions. Natural rights alone do not account for everything there is to know about property law. But no account of property law can achieve a comprehensive understanding without factoring in natural rights. Claeys's book offers a significant contribution to contemporary property theory by setting out the most comprehensive and defensible theory of natural property rights to appear in a long time.

### III. A CLASSIC METHOD, A NEW PERSPECTIVE

The juristic tradition within which natural rights theories have historically been most at home and which most influenced lawyers views property primarily from the internal point of view of those who act reasonably within institutions of law. Matthew Hale insisted that to understand the rights of natural law, one must resist the temptation to abstract away from the common and civil law.<sup>19</sup> Hale took particular aim at Hobbes, who "shrunk up the Laws of Nature into a very narrow compass" and made "self preservation the only Cardinal Law of human Nature."<sup>20</sup> Even without government, some actions would be just and others unjust; Hale stated, "every thing would not be lawfull to every Man, and [Hobbes'] Imaginary state of warr, where in every Man might lawfully do what he thinks best without any Law or Controule is but a Phantasy."<sup>21</sup>

Hale's method was to discern natural rights inductively by close observation of the specifications of rights that one finds throughout the laws of civilized societies and to explain patterns within those particular specifications by reference to universal principles of reason.<sup>22</sup> To understand the many rights of natural law, it is necessary first to "make use of the Experience and Observation of the Usages of severall Nations in severall ages, & under severall Governments," especially those societies that honor the "Suffrage of reason and the Conclusions thereof," and then "by an induction there upon to collect those Common Sentiments,

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18. PPR, *supra* note 14, at 122–72.

19. Law of Nature, *supra* note 2, at xii–xiii.

20. *Id.* at 43.

21. *Id.* at 86.

22. MATTHEW HALE, HISTORY OF COMMON LAW AND AN ANALYSIS OF THE CIVIL PART OF THE LAW (6th ed. 1820).

which we have reason to believe are the Matter of those Natural Law's."<sup>23</sup>

In this respect, Claeys follows the juristic method of inquiry. He defies the stereotype which identifies natural rights with the philosophical abstractions of Robert Nozick and Jeremy Waldron.<sup>24</sup> As Claeys demonstrates, natural rights are most intelligible not as abstract concepts developed in state-of-nature thought experiments<sup>25</sup> nor deduced from universal axioms of theoretical rationality but rather as the first principles that guide practical reasoning about the use of things where more than one person is interested and where human well-being is at stake.

This methodological approach puts Claeys squarely in the center of the common law tradition of reasoning from particular observations to general maxims. But his focus differs from earlier common-law jurists who understand the core or essence of property to be a particular relation between persons and the natural world known as "dominion."<sup>26</sup> Contrary to the now-prevailing narrative that Claeys recites,<sup>27</sup> neither Hale, Coke, nor Blackstone characterized property as "sole and despotic" dominion, though all three had a lot to say about natural rights. Indeed, Blackstone insisted that the "despotic dominion" ideal which "so generally strikes the imagination" of political philosophers and other idealists is precisely *not* the true "original and foundation" of private property, and he mocked those who thought it was.<sup>28</sup> He called them "fanciful writers" espousing "airy metaphysical notions."<sup>29</sup> Blackstone was a jurist.

In contrast to the fanciful writers, Hale, Blackstone, and other common-law jurists described dominion as a legal position entailing certain liberties and bounded by certain duties, both inherent duties and those

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23. Law of Nature, *supra* note 2, at 44.

24. Compare ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) with Claeys, *supra* note 3, at 198–219; compare JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988) with Claeys, *supra* note 3, at 29, 115–56.

25. The theoretical arguments of Nozick and Waldron (and others) also abstracted away from the philosophical arguments of John Locke, whom they purported to interpret, who made an argument about the value of *productive* labor. STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 125–90 (1991); Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002); Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 429–37 (2017). Furthermore, Locke's argument was motivated by a practical purpose, namely a principled "defence of the property rights of individuals against the encroachments of arbitrary royal power." BUCKLE, *supra*, at 161.

26. See generally Claeys, *supra* note 3.

27. Claeys, *supra* note 3, at 108–09.

28. Bl. Comm., *supra* note 2, at \*2.

29. *Id.* at \*3.

specified by the *ius commune* and positive law.<sup>30</sup> For Christian jurists—i.e., nearly all jurists who taught and shaped the law during the fourteen centuries between Justinian and Holmes—dominion is not unfettered individual freedom.<sup>31</sup> It is instead a position of stewardship, a “gift” that God delegated to human beings to take care of the world and to order it well, to make it more fruitful and conducive to human well-being.<sup>32</sup> This stewardship begins with the governance of *oneself* according to the natural law.<sup>33</sup> So, Hale taught that the “Liberty and Dominion” of the will is first and foremost “the regent power in the human Nature . . . whereby a Man hath within himself a dominion over what he doth,” which is a dominion under the greater dominion of the laws of God and nature.<sup>34</sup>

Dominion receives its legal powers from a higher power. Therefore, its powers and liberties have inherent limitations. For example, because common law property rests on divine and natural law,<sup>35</sup> an owner’s dominion is subject to the Biblical right of the poor to glean after harvest and the customary rights of hunters to pursue dangerous beasts of prey.<sup>36</sup> The center of classical dominion, therefore, is neither isolation nor despotic power. Dominion is the responsibility and obligation to do what is good.<sup>37</sup>

Dominion is also a lot of work. The work fulfills human nature insofar as human beings are the kind of beings whose ultimate purpose or end is to have productive and creative work to do.<sup>38</sup> The work is also cooperative, and fulfills human nature insofar as we are inherently social creatures, made to live in society, as Hale, Blackstone, and the other jurists taught. Thus, the many different estates of property ownership include cooperative forms, such as joint tenancies, trusts, and corporate ownership.<sup>39</sup> And the powers and liberties of ownership are often exercised in communities for common ends, as when a charitable organization uses its property to serve the poor and marginalized.<sup>40</sup>

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30. See generally *id.* at \*4–\*15; Carol M. Rose, *Canons of Property Talk, or Blackstone’s Anxiety*, 108 *YALE L.J.* 601, 603–06 (1998); Adam J. MacLeod, *The Boundaries of Dominion*, in *CHRISTIANITY AND PRIVATE LAW* 109–25 (Robert Cochran and Michael Moreland, eds., Routledge 2020).

31. MacLeod, *supra* note 30, at 110.

32. Bl. Comm., *supra* note 2, at \*2–\*4; 1 JAMES WILSON, *On the History of Property*, in *COLLECTED WORKS OF JAMES WILSON* 387 (Kermit L. Hall & Mark David Hall, eds., 2007).

33. WILSON, *supra* note 32.

34. Law of Nature, *supra* note 2, at 14.

35. *Id.* at 7–8.

36. Bl. Comm., *supra* note 2, at \*212–15.

37. Law of Nature, *supra* note 2, at 40–41.

38. Compare Genesis 1:26–31, with Genesis 2:15–22.

39. PPR, *supra* note 14, at 74–87; DAGAN, *supra* note 14, at 79–113.

40. PPR, *supra* note 14, at 114–21.



In recent decades, property theories prioritized the right to exclude,<sup>41</sup> the *numerus clausus* principle,<sup>42</sup> and other unifying features of property.<sup>43</sup> This approach is understandable from a certain point of view, a perspective that is external to the reasoning of those who create property duties and use property rights within property's plural domains.<sup>44</sup> Externalist theories yield important insights about what unifies property's plural forms, the efficacy of property's simple features to reduce information costs, and to structure jural relations between persons who are not involved in long-standing or complex relationships of cooperation and mutual dependence.<sup>45</sup> Whereas classical theorists emphasized property's moral valence, contemporary theorists tend to emphasize more pragmatic concerns.<sup>46</sup>

Claeys offers a picture of property's core that, at first glance, seems neither classical nor externalist. But upon close inspection, his account offers new resources to understand both. He describes property rights from the external perspective as institutional artifacts, products of human action within human societies, and conventions that can be studied, understood, and employed independently of the subjective intentions of those who created them.<sup>47</sup> And he describes property rights as functional artifacts whose purposes are discernable from the internal point of view of persons who understand themselves to be obligated by property's rights and duties in virtue of the common good that property enables us to achieve in community with others.<sup>48</sup>

In Claeys's book, the central feature of property is neither dominion nor the right to exclude but rather property's facility to enable use of things. However, like the classical conception of dominion, Claeys's concept of use is teleological, directed to valuable goals. He writes that the interest that people have in using ownable resources is an interest in deploying such resources intelligently and purposefully in projects likely to help them survive or flourish.<sup>49</sup> "Use" in Claeys's account is a distinctly human activity, an exercise of practical reason. In its central

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41. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM & MARY L. REV. 1849 (2007).

42. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

43. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997).

44. PENNER, *supra* note 43, at 2.

45. *Id.*

46. *Id.*

47. Claeys, *supra* note 3, at 20.

48. *Id.* at 22.

49. *Id.* at 115.

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or core aspect, it is oriented toward ends that have intelligible value to enable human beings to live well. And it is done by beings who reason strategically and tactically to achieve those ends and form and execute plans to flourish.

Claeys's concept of use is also quite expansive. He says that use can cover any activity that seems intelligent, planned, and likely to produce moral value.<sup>50</sup> This makes sense in light of the teleological nature of property use by human beings. As Aristotle observed a long time ago, we find in human actions a diversity of ends.<sup>51</sup> So, it is not surprising that the plans of action in service of which people make use of property are plural. Neither the ends nor the means must fit into any central plan. Nor could they. The interests that use serves are almost as varied as the people whose interests they are. One is a musician, another a physician, another a stay-at-home parent. All of them are pursuing plans that have intelligible, moral value. And all of them must use resources in order to flourish in their chosen plans.

However, use is not infinitely expansive. Like the classical concept of dominion, Claeys's description of use explains the justification for limits on property rights because it enables us to perceive the difference between central and peripheral instances of use, activities for which the law secures property rights, and activities that are beyond the approbation and protection of the law. In its central or core aspect, use is neither mindless consumption nor the mere, instrumental satisfaction of passions and appetites.<sup>52</sup> It is oriented toward ends with intelligible value and done by beings who reason strategically and tactically to achieve those ends and form and execute plans in order to flourish.<sup>53</sup>

#### IV. PROPERTY AS *OPUS*

Claeys is describing a function of property that looks a lot like productive work. Intentional planning, purposeful effort, and creative ordering play significant roles in Claeys's concept of use, as they do in the common law concept of "use."<sup>54</sup> More than a century ago, F.W. Maitland taught us that the term "use" in common law is derived from the Old French word *oes*, which in turn is derived from the Latin *opus* (work), not the Roman *usus* (a particular property right in Roman law), with

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50. *Id.* at 112.

51. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 1 (H. Rackham ed.).

52. Compare Claeys, *supra* note 3, at 112, with PPR, *supra* note 14, at 1–4.

53. Compare Claeys, *supra* note 3, at 112, with PPR, *supra* note 14, at 91–121.

54. Claeys, *supra* note 3, at 112.

which it is now generally conflated.<sup>55</sup> Though he mentioned it almost in passing, Maitland thought this fact important enough that he mentioned it three times in writings primarily devoted other topics: once in his essay *The Unincorporate Body*,<sup>56</sup> again in *Trust and Corporation*,<sup>57</sup> and a third time in his magnum opus composed with Frederick Pollock, *The History of English Law Before the Time of Edward I*.<sup>58</sup>

To speak of Maitland's "magnum opus" is to articulate the significance of Maitland's finding. A work of human creation, such as Pollock and Maitland's *History of English Law*, is a work in two senses. "Opus" refers both to a purposeful human activity—Pollock and Maitland wrote the book—and to an artifact of such activity—we now have the book. The treatise is the labor that Pollock and Maitland put into it. And it is the product of that labor, an artifact that we can pick up and read. In the first sense, we understand the treatise as an act of research and writing, which is the culmination of two long careers devoted to sustained learning in historical research methods and doctrines of law. In the second sense, we understand the treatise as an expression of knowledge about the early history of the common law, which is useful to those who desire that knowledge.

The labor and the artifact are, of course, inseparable in one sense. Without the labor, there would be no artifact. Pollock and Maitland's *opus* exists simultaneously in what Aristotle identified as the order of acting and in what he called the order of making.<sup>59</sup> But the labor and artifact are separate in a different sense. The labor is long finished, and its authors are long deceased; the book still exists. There is this thing in the world—*The History of English Law Before the Time of Edward I*—that would not have existed but for their scholarly efforts and now can be pulled down off the bookshelf whenever anyone wants to know the origins of property estates.

We can understand the *opus* to have different values in different orders, though it is the same *opus*.<sup>60</sup> The book has moral significance for

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55. F.W. Maitland, *Origin of Uses*, 8 HARV. L. REV. 127, 127 (1894).

56. F.F.W. MAITLAND, *STATE, TRUST AND CORPORATION* 53 (David Runciman and Magnus Ryan, eds. 2003).

57. *Id.* at 85–86.

58. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 238 (2d ed. 1898).

59. ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, at 134 (J.M. Dent ed., D.P. Chase trans., 1911).

60. THOMAS AQUINAS, *COMMENTARY ON ARISTOTLE'S NICOMACHEAN ETHICS* 6–7 (C.I. Litzinger, trans. 1964) (discerning four orders in the relationship between order and reason, the third "that reason in deliberating establishes in the operations of the will" and the fourth "that reason in planning establishes in the external things which it causes,

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Pollock and Maitland, who devoted their careers to historical jurisprudence as an achievement of two lives well spent. This value is dependent upon the intentions and actions of the authors. We perceive the book's value to its authors as we look from their internal perspective *along* the plan of action that they carried out to bring the book to fruition, a plan that shaped their lives in important ways.

Viewing the book as *opus* in the sense of the labor that Pollock and Maitland put into it as they carried out their plan to write it, we can perceive the good end that they set before them as their motivation for action—knowledge of the common law's origins—and the various means they employed to bring that good into existence—study, research, analysis, and writing. The whole project was radically contingent on their choices and actions; they could have chosen not to write it or to write on a different topic or period of English history. To understand the work in the order of acting, we must view the work as they viewed it, as the carrying out of a plan of action to acquire and share knowledge of the common law.

In the order of artifacts, the book has a different value and status. For those of us who use the book, its value is its utility. It is useful to us as a product or artifact of the productive labors of two learned scholars of the history of the common law because it contains the knowledge they created, which now exists apart from the authors. (It might also be used as a door stop or to impress visitors to one's library.) Looking *at* the work, from a perspective that is external to the practical reasoning of Pollock and Maitland we perceive a thing, *in rem*, whose various uses are at least somewhat independent from the intentions of the authors who wrote it. In the order of a made artifact, we can understand the work to some extent without regard to the first-person, agent-relative perspective of its authors.

On the other hand, even to perceive and use the book as a book is not to be entirely free from the intentions of its creators. The book has the content and structure that it has because Pollock and Maitland chose and acted as they did. To use the work is first to understand it, which is to read and interpret the work as an expression by fellow human beings. To understand the work, one must ask several questions. *What were they trying to communicate here? What does this word mean in this context? Did they say so little about this topic because they weren't interested in it or because there was not much to say?* In short, we can understand the book better when we ask *why*.<sup>61</sup> To understand the work as an

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such as a chest and a house.”).

61. See generally, Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 AM.

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artifact, therefore, it is helpful to study the work by recreating in our own minds, to the extent that we are able, the intentions and motivations of its authors, both their theoretical and their practical reasoning.

Similarly, property as *opus* is intelligible when we view property *both* from the internal point of view of those who reason and act within property institutions *and* from the external point of view of the social sciences.<sup>62</sup> The order of acting is transparent when we look along the chain of reasoning of those who act. We can thus understand one aspect of property's rights and duties by viewing them as natural persons view them, as reasons for acting or refraining from acting in particular ways.<sup>63</sup> This perspective helps us to see property's motivations and moral valence for those who act within property institutions. Property as a product in the order of making is intelligible by the artifacts that are left behind by those reasons for action. So, we can understand the resulting rights and duties of property from the external perspective of the social scientist who wants faithfully to describe property norms and explain how they work.

Claeys's primary concern is with property as artifact.<sup>64</sup> As well-functioning social artifacts, property rights provide stability and facilitate just coordination and exchanges. Coordination and exchange are necessary to make good use of resources in any community. But Claeys's theory also leaves open to view property's moral valence in the order of acting. Natural property rights turn out to have both pragmatic utility and ethical value. They enable human beings to flourish both materially and as reasoning, choosing, moral agents.

Claeys describes property norms as part of a particular class of social concepts known in philosophy as "institutional artifacts."<sup>65</sup> As he explains, artifacts are "objects that are (somehow) associated with distinct goals and means for realizing those goals."<sup>66</sup> Artifacts are thus "intention-dependent objects."<sup>67</sup> Institutional artifacts differ from normal artifacts in that they are not necessarily tied to particular goals but rather give people "points of reference around which they can coordinate their behavior."<sup>68</sup> Claeys compares a chair, an ordinary artifact that enables people to sit, with a ticketed seat in a theater, an institutional artifact

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J. JURIS. 51 (2015).

62. Claeys, *supra* note 3, at 119, 163.

63. PPR, *supra* note 14, at 173-96.

64. Claeys, *supra* note 3, at 158.

65. *Id.*

66. *Id.*

67. *Id.* at 162.

68. *Id.* at 158-59.

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that marks an institutional status, which is intelligible in light of social conventions and the authority of social norms governing theater seating.<sup>69</sup>

Institutional artifacts must be somewhat complex to do this work. They are identifiable by their institutional status, subject matter, function, and form. Yet, in essence, they are not radically different from ordinary artifacts. They perform certain teleological functions. Claeys stated that of the four features of institutional artifacts, “the most important is the function.”<sup>70</sup> He explains:

Every institutional artifact also possesses a characteristic *function*. Institutional artifacts have functions simply in virtue of being artifacts. Every artifact helps people realize some good with objective moral value, and each does so through some distinct method for producing that value. The method by which an object produces value constitutes a function if people rely on the method because it produces the value, and also if that method seems characteristic of the artifact.<sup>71</sup>

Just as a chair is intelligible by the function it performs in holding a human body from falling on the floor, a theater ticket is intelligible in light of the function it performs in marking off exclusive use of a theater seat for the duration of a performance.

To understand the function of property rights is, therefore, to enter the internal perspective of those who formed or use the rights. Institutional artifacts play what Claeys calls a “social” role for those who need to coordinate their actions in pursuit of identifiable ends.<sup>72</sup> Claeys explains, “The function identifies the distinct normative goal that an institutional artifact is designed to produce.”<sup>73</sup> It is also to view property from the internal point of view of those who use others’ property rights to guide their own practical reasoning and who act in accordance with others’ rights. Institutional artifacts must have legitimate authority,<sup>74</sup> which is not always reducible to mere coercion or power<sup>75</sup> but is determined by the efficacy of the artifact for achieving the desired good ends. Claeys argues that “because the function identifies the goal an institutional artifact is supposed to perform, it gives people normative guidance. At a minimum, the function of an artifact gives people a standard

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69. *Id.* at 162–63.

70. *Id.* at 167.

71. *Id.* at 166.

72. *Id.* at 163.

73. *Id.* at 167.

74. *Id.* at 163.

75. *Id.* at 164.

to use to say whether particular objects seem superior or inferior instances of it.”<sup>76</sup>

To perceive function is also to begin to achieve external, conceptual clarity, as a property right’s function will largely determine its status, subject matter, and form.<sup>77</sup> Claeys observes, “Because the function identifies the normative goal, it is explanatorily prior to the other three features. The function explains why the artifact should cover the subject matter it covers, why it should have the form it possesses, and why people should be bound by the obligations it institutionalizes.”<sup>78</sup> Understanding *why* people have reasons to make and obey property rights can assist social scientists. Unless we are to assume that all property is arbitrary or mere power relations—that is, unless we are to overlook all the ways in which people cooperate in the world to achieve common goods—we may suppose that property rights have certain forms and associations for *reasons*.<sup>79</sup>

#### V. *OPUS*: USE AND DOMINION

Claeys argues that usufructs are the most essential features of property.<sup>80</sup> More precisely, neither authority nor exclusion nor alienability is more central than use. He defines a natural property right as “a right to the exclusive use of one or more resources, structured to serve interests that people have in using that resource.”<sup>81</sup> To serve such interests, legal property rights must have a “certain character and strength,” but they need not amount to ownership in the fullest sense.<sup>82</sup> They must be at least as strong as usufructs and, like usufructs, they must concern the right subject matter (separable resources) and exhibit the right function, institutional status, and form. Thus, Claeys places usufructs at the center of his account as the focal instances of property rights.<sup>83</sup>

As Claeys construes it, use seems not very different from the delegated dominion that classical common-law jurists taught was the origin and core of property, nor from the *opus* Maitland described as the origin of trust and the central concern of property ownership. All three entail

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76. *Id.* at 167.

77. *Id.*

78. *Id.*

79. Claeys prefers to write about interests rather than reasons, but he follows Joseph Raz in privileging interests that are reason-based. *Id.* at 54 n.32.

80. *Id.* at 172; Claeys, *Introduction*, *supra* note 3, at 440–41.

81. Claeys, *supra* note 3, at 10; Claeys, *Introduction*, *supra* note 3, at 420, 434–40.

82. Claeys, *supra* note 3, at 169–70.

83. *Id.* at 168–77.

in rem, immunized claim-rights. All three are justified on the basis of productive work. All are rights that facilitate expansive categories of actions with respect to things, including not only consumption but also purposeful management, cultivation, investment, and development. All may include planned inactivity that, from an outside perspective, sometimes resembles non-use. And all are bounded by inherent limitations and duties defined by the natural rights of others. None of them is sole and despotic.

If use and dominion are different, they seem not to differ in their substantive content nor in the activities that they make possible. They differ perhaps in their justificatory priority or perhaps merely in what they emphasize. Hale and Blackstone began with ownership; they took it for granted that ownership was subject to a prior obligation to make productive use.<sup>84</sup> Of course, they wrote at a time when belief in God and understanding of natural law were both ubiquitous when all but a few jurists took it for granted that duties precede rights.<sup>85</sup> Claeys begins with use rights and ends up with a picture of ownership that looks very similar to those that Hale and Blackstone painstakingly detailed in their commentaries.

Any difference seems to be (again) one of perspective. From what we can call the technical point of view, what matters is that part of our actions that transits out into the world and has measurable consequences there. That part includes our artifacts, including property rights and the goods that we make while exercising our property rights. Those artifacts are helpful insofar as they enable us to cooperate in the use of resources. Jurists such as Hale and Blackstone take this perspective in what we might call their legal mode.

From what we might call the ethical point of view, the chief concern about property is the way that human action within property institutions shapes the acting person. As Aristotle put it, the matter is that part of our actions that stays in us and determines our character.<sup>86</sup> From this perspective, the intentions behind the powers and liberties of ownership are most important.<sup>87</sup> The jurists take this perspective in what we might call their jurisprudential mode.<sup>88</sup>

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84. Hale, *Law of Nature*, *supra* note 2, at 90–94; 2 Bl. Comm., *supra* note 2, at \*2–\*4.

85. Frederick Pollock, *The History of the Law of Nature: A Preliminary Study*, 1 COLUMB. L. REV. 11, 17–18 (1901); HELMHOLZ, *supra* note 2, at 90–92, 132–36.

86. A.D. Smith, *Character and Intellect in Aristotle's Ethics*, 41 PHRONESIS 56 (1996).

87. Jeremy Waldron, *Property and Ownership*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Salta ed.) (Summer ed. 2020), <https://plato.stanford.edu/archives/sum2020/entries/property> [<https://perma.cc/6CL7-DN4Z>].

88. HELMHOLZ, *supra* note 2, at 2–5; *Barger v. Barringer*, 66 S.E. 439, 440–42



## VI. CONCLUSION

Professor Claeys operates largely in the legal mode. His project is to describe and explain the coherence of the law that we have, especially its utility for facilitating use and thus enabling people to live flourishing lives. To do so, he draws conceptual resources from the jurisprudential mode. Along the way, he avoids fanciful writing and airy metaphysical notions. And he ably addresses contemporary concerns. The book is a worthy contribution to the juristic tradition of thinking about property.