

DELIBERATING PROPERTY: A POLITICAL GRAMMAR OF PROPERTY LAW

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Some people understand property as a natural human right. Meant to depoliticize property it is perhaps one of the most political arguments one could take. This paper is starting from an opposite perspective, i.e. fundamental value pluralism. Starting from value pluralism, it is impossible to define a ‘universal’ core of property either on a conceptual or a normative (justificatory) level. To understand property as a clear ‘human right’ might still allow for a conceptual ‘structural’ pluralism,¹ but it accepts only private autonomy and subjective freedom as justificatory basis. For an economic perspective, the core function of property rights is the internalization of social cost.² So, it all depends on the perspective: ‘How one defines the core of property depends on what values one thinks property serves’.³

This paper attempts to sketch a more freestanding genuinely pluralistic property theory relying on a ‘deliberative’ discourse theory.⁴ The strategy of a ‘deliberative legal theory’ is pragmatic and idealistic at the same time.⁵ Considering law as a constitutive structure of social cooperation, it analyzes social practices of law and theory discourses (scholarship, legislation and judicial cases). It deconstructs or ‘liquefies’ monistic normative principles or policies and tries to reconstruct them as an integrative yet plural ‘political grammar’ for legal argumentation. The paper is perhaps best understood as a constructivist mapping of legal arguments and concepts with the aim to pluralize and democratize property discourse.

¹ Cf. Dagan 2015 and Dagan 2014

² Demsetz 1967

³ Alexander 2015, 27

⁴ Cf. ‘deliberative democracy’ theories: Habermas 1994; Benhabib 1994; substantially as well: Rawls 1993

⁵ Lomfeld 2013; Lomfeld 2010

1 Political Properties: What? Who? Why?

Despite or even due to the pluralistic lenses of a discourse theory, it is possible to outline certain initial predefinitions. The structure of any deliberative account on institutions is fundamentally relational (social), constructivist (conventional) and political.

Property as Social Relation. Property is not a relation between a person and a ‘thing’.⁶ Robinson may feel a special personal connection to some objects he likes, but there is no rational sense in saying he ‘owns’ them. Without another communicating subject there is just no non-metaphysical fundament for a property relation. Property always and only is a relation between potentially communicating persons. Of course property is a social relation attributing material or immaterial ‘objects’ or specific rights thereof to its owner. And yet, it is nothing other than an institutionalized social relation.

Open Intersubjectivity. The specific characteristic of the social relation of property is its generality. A contract for example, creates or forms a relationship between a clearly determined number of subjects. A contractual right addresses the other contractual party, or parties. Property potentially affects everybody. This ‘open intersubjectivity’ is the only practical reason for labeling property as an objective ‘thing-relation’. Yet, it remains a social relation with the particularity of an open range of persons involved. A property right has an undetermined amount of addressees. In demarcation to a ‘relative’ contractual right, it may be referred to as an ‘absolute’ right towards everybody. As the factual determinant of the respective addressees is always the attributed object, one might want to define this sort of relation as ‘three-dimensional’,⁷ but there is no further analytical gain from that label.

Objects of Property. Attributed objects to property relations could theoretically encompass all those subjective rights with the ability to enfold an ‘open intersubjectivity’, i.e. those that could potentially effect an indeterminable number of people. This definition allows for a wide range of legal and factual positions to be considered as ‘property’. Possible objects of property encompass land, natural resources and all tangible objects, but also firms, patents, copyrights, social insurance claims or access rights to public infrastructure.⁸

⁶ Cf. already Kant 1797; Georgiades 1977 (‘Eigentumsverhältnis’); Singer 2000; Underkuffler 2003

⁷ Sherwin 1997

⁸ Cf. Reich 1990; German constitutional court BVerfGE 83, 201 (208); 89, 1 (6)

Property as Social Structure. Property is neither a natural nor a pure technical legal institution. The forms of property in any given society imply a specific decision about social ordering. Property constructs a political economy. A strong system of private property coincides with a decision for some form of a market economy. Encompassing state property demands central economic planning. Other forms of collective property (commons, cooperatives) still need common economic management. Any idea of property always entails a political structure or a social property ‘system’⁹ of resource management.



F1. Possible Trilogy of Ownership

Trilogy of Ownership. The options for structuring social resource governance could be seen as three distinct categories of ownership: private property, state property and common property (the commons).¹⁰ Structurally, private property depends on the other two alternatives. The state not only administers its state property, but also enforces private property rights. Commons may rely on state management, but have the possibility of governing themselves and thereby may grant private entitlements. Private owners might of course theoretically defend their own property by use of force. But if violating private property is turning into a question of weapon power, its social ordering function and the idea of a property ‘rights’ fade away. Militant defense of possession does not need an underlying idea of property.

Property is Political. Not only because of the implied choice for a specific social structure, property is an eminent political institution. In regulating the access to resources, property is a form of sovereignty.¹¹ Any structure of property has fundamental effects on the social order and for any individual living within this society. Given all that, any member of the society may ask what justifies this order. At least if the state guarantees the enforcement of subjective property rights, the decision for private property turns into a general question of political legitimacy. Property discourse is genuinely political.

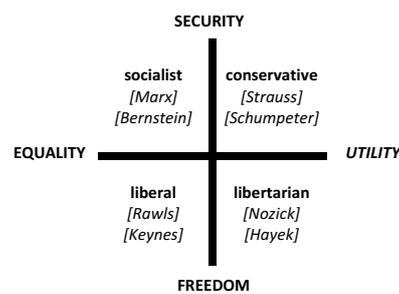
⁹ Alexander 1997; Singer 2009; Wielsch 2015

¹⁰ Heller 2008; Page 2017

¹¹ Weber 1922; Cohen 1927; Merrill 2015

Democratic Theory of Property Law. The political character of property discourse is reflected in the basic justificatory principles or reasons for property within property law. Here, a pluralism of principles is not a technical issue, but goes back to a fundamental (ethical) value pluralism. A democratic theory of property law takes this pluralism seriously. A democratic conception of property as well as property law could only be constructed with plural values.¹² One main task is the balancing between private and public interests.¹³

Political Grammar. This paper tries to reconstruct basic normative poles and structures of argumentation within this controversial legal discourse. Behind any technical or doctrinal legal argument lurks an implicit political battle on underlying principles and policies. To structure this balancing the paper suggest a basic 'political grammar' of fundamental values or reasons for political-legal discourse. This grammar could serve as a structure for mapping and comparing legal arguments on property.



F2. Basic Grammar of Political Values

Spectrum of Political Theories (Ideologies). The applied structural matrix of underlying values was developed for classifying contract theories¹⁴ but reflects more general typologies of political value (ideology) research and comparative political economy. Developed as a critique of 'bourgeois' philosophy the concept of 'ideology' was later used to describe basic social value environments.¹⁵ Contemporary political theory classifies three big ideologies: 'liberalism', 'socialism' and 'conservatism' accompanied with varying other more recent forms from 'nationalism' to 'feminism'.¹⁶ The same core typology underlies socio-economic social welfare theory and newer varieties of capitalism research which both differentiate a liberal, conservative and social democratic model.¹⁷

¹² Alexander 2009; Penalver 2009; Singer 2009; Purdy 2009

¹³ Cf. sec. 6: Lukas v South Carolina 1992; German Constitutional Court, Nassauskiesung 1981

¹⁴ Lomfeld 2015

¹⁵ This is the development from Marx & Engels 1845 to Mannheim 1929

¹⁶ Cf. f.ex. Freedon 1996; Heywood 2017

¹⁷ Esping-Andersen 1990; Schröder 2013

The structural matrix of political values echoes earlier psychological research on social attitudes.¹⁸ Based on broad quantitative value surveys and qualitative discourse analysis subsequent typologies of social values mostly classify along the two axis of freedom and equality.¹⁹ All popular political spectrum charts (cf. politicalcompass.org) are build upon this value typology which gives rise to further differentiation between 'liberal' and 'libertarian' positions.²⁰ Also the history of economic thought and the existing variety of economic theories today could be classified according to similar underlying value commitment.²¹

2 Justificatory Reasons for Property

Competing Monistic Justifications. Regarding property as a basic social and political structure its form, scope and limits are under constant need of justification. Different 'political' theories start their reasoning from different ethical values. Most normative theories of property are monistic starting their justification from one fundamental ethical value. A prominent historical example is Locke's labor theory of property which justifies property rights by the single value of individual effort.²² But throughout centuries very diverging values and interests were qualified as ultimate nucleus of property. Today even more, property theory splits up in divers property theories.²³ Most evident poles of the spectrum are liberal ethics of individual freedom competing with more communitarian and systemic ideas of social stability. Concurrently, economic theories of individual and collective (utilitarian) wealth maximization strive with egalitarian accounts of individual fairness and social justice. As monistic theories each claim an exclusive reconstruction under their normative stance, competing justifications open a political battle of property theories.

Pluralistic Justification. (Post)modern value pluralism dismisses any alleged normative or empirical predominance of any monistic justification of property. There is no single justification, but only plural potentially conflicting justificatory reasons of property. No specific values but only the argumentation process of giving and taking (deliberating)

¹⁸ Eysenck 1957

¹⁹ Rokeach 1973

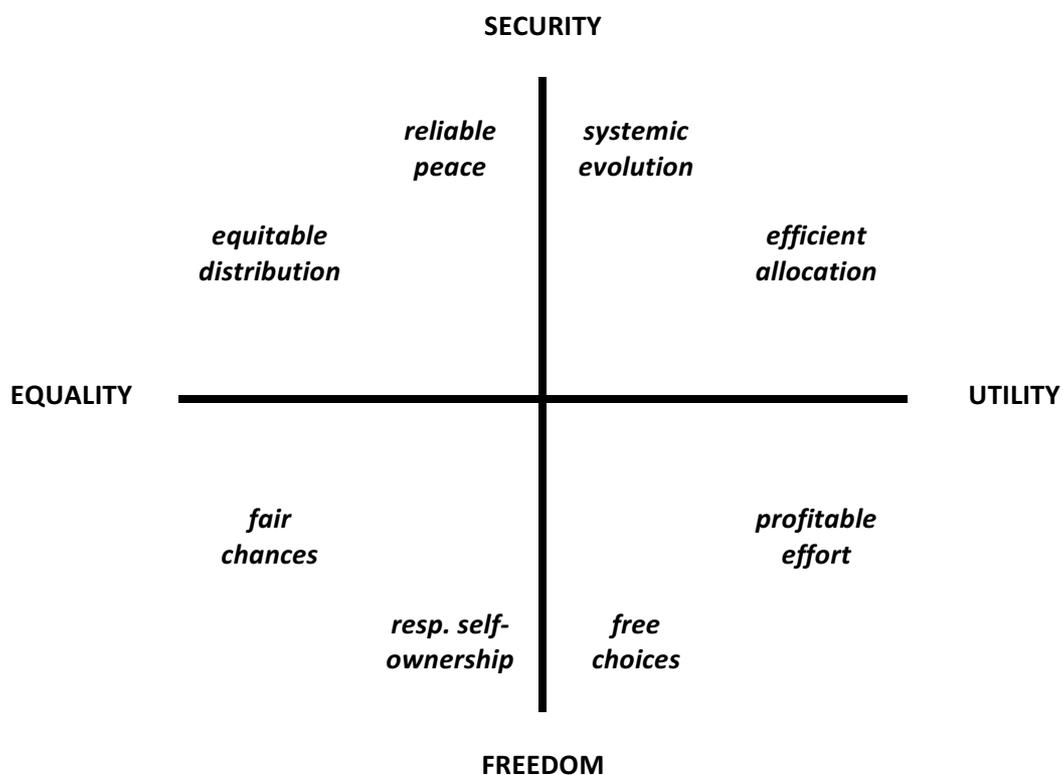
²⁰ Cf. Mitchell 2007

²¹ Clark 2016a

²² Locke 1690

²³ Cf. Alexander & Penalver 2012

reasons itself could justify legal norms and decisions.²⁴ Even if one rests skeptical about the ultimate possibility of deliberative consensus,²⁵ legal discourse translates or at least gives a voice to plural communicative rationalities and social perspectives.²⁶ And yet, within a historical development of property justifications, plurality does not mean arbitrariness. The divers property theories coin the 'discursive formations'²⁷ outlining the respective historical field of competing reasons of property. Thus, a deliberative account of property tries to integrate plural reasons as systematical arguments into one 'political grammar' of legal deliberation.



F3. Political Grammar of Property Theory

Property as Social Security.

The institution of property stabilizes interpersonal relations and the social system in general. The assignment of clear and enforceable property rights minimizes interpersonal and systemic conflicts. The absence of conflicts means social security. This security or stability function of property is the essential justification of

²⁴ Habermas 1996; cf. also Brandom 1994

²⁵ Like Lyotard 1983 and other poststructuralist thinkers

²⁶ Teubner 1996

²⁷ Foucault 1969

most occupation accounts of property. Even if mixed with some strategic motives, the straightforward assignment of property rights to the first occupying a resource guarantees some form of *reliable peace*.²⁸ Assuming a war of everybody against everybody, the state enhances personal and collective security by enforcing a system of private property.²⁹ From a more functional perspective property stabilizes a process of *systemic evolution*.³⁰ Only the distinction of property from possession allowed the economy to separate from politics as a genuine social system. The legal institution of property generates a dynamic stability that enables collective social innovation.

Property as Individual Freedom. Property enables freedom. An owner is free to realize options of his property or not. Most liberal reconstructions of property start with the highly influential labor theory of property, where ownership is justified with invested personal labor.³¹ Libertarians praise the idea of private appropriation by labor as independence from political influence of the state.³² This reading of property as pure privacy is not a necessary corollary of a justification of property with individual freedom. In fact, the Lockean justification of property might not even count as freedom conception (cf. next paragraph). An indispensable element of any purely subjective account of property is however the freedom to say 'it is mine', i.e. a *free choice* of an autonomous persons.³³ Owners realize the options of resources by engaging their free will. An even more demanding contextualized concept of subjective freedom forms the basis of *self-ownership*. Here, property constitutes the subjective sphere of freedom in the outer world.³⁴

Property as Wealth Maximization (Utility). Although Locke's labor theory of property is mostly used as liberal blueprint, its essential argument is not freedom but that the material effort made by individual work and merit in processing resources. Following this materialistic trace property also forms a core structure of economic markets. Any competitive market is based on the possibility of *personal profit*. Property incentivizes subjective economic performance. The utilitarian nucleus of welfare economics is that individual profit maximizes collective wealth. Resources will be traded as long as they reach their highest economic potential. In that respect, property and contract allow for an *efficient*

²⁸ Grotius 1625; ...

²⁹ Hobbes 1651; ...

³⁰ Luhmann 2004, 257

³¹ Locke 1690; ...

³² Nozick 1974; Epstein 1985

³³ Kant 1797

³⁴ Hegel 1821

*allocation of resources.*³⁵ An institutional economic justification of property often starts with the common pool dilemma of free usage of resources.³⁶ Property rights internalize social costs and advance an efficient use of resources. As long as transaction costs remain low, the initial distribution of property is not relevant from that perspective.³⁷

Property as Equality? Quite to the contrary, egalitarian theories focus on distribution. Private property counts as a primordial reason for social inequality.³⁸ As a consequence, radical egalitarian accounts in the Marxian tradition condemn all private property, whereas others demand social equality as necessary condition of any form of property.³⁹ A positive egalitarian justification of private property rights thus fundamentally depends on an *equitable distribution* of social wealth, which could be achieved with an accompanying redistributive tax system.⁴⁰ Less material accounts of liberal egalitarians stress the equal distribution of opportunities. The structure of property rights, then, has to provide a *fair chance* for everybody regardless of his background and capabilities and to benefit the least advantaged members of a society.⁴¹

3 A Bundle of Property Rights

Property as Legal Construction. Rights are the product of rules.⁴² Property rights are created by respective state regulations. Thus, property primarily is a ‘bundle of rights’.⁴³ This conventional position was and still is the starting point of passionate intellectual battles in American property theory. With another terminology, it is also a focus of controversy in German constitutional property theory. According to Art. 14 of the German constitution, ‘Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws’. Despite its formal insistence on a genuine (pre) constitutional concept, the German constitutional court defines the content of property as ‘sum of all statutory rules governing the position of ownership’.⁴⁴ The doctrine speaks of a

³⁵ Alchian 1965; Posner 1973

³⁶ Hardin 1968; Demsetz 1967

³⁷ Coase 1960

³⁸ Rousseau 1755

³⁹ Proudhon 1840

⁴⁰ Murphy & Nagel 2002

⁴¹ Rawls 1971; 2001; Sen 2009

⁴² Commons 1924; Schlager & Ostrom 1992

⁴³ Hohfeld 1913; 1917; Hale 1922; Demsetz 1967 cf. for Germany Oertmann 1892; Kelsen 1934; 1960

⁴⁴ German Constitutional Court 15.07.1981 - 1 BvL 77/78 (Nassauskiesung), NJW 1982, 745 (749)

‘rule-made fundamental right’ in the hands of the lawmaker⁴⁵ and an ‘artifact of the existing legal order’⁴⁶. The complete public regulation of the content of property necessary implies a bundle theory.⁴⁷ As the constructivist discourse theory account of property shares the conventional view, it will adopt some of its analytical structure.



F4. Hohfeld's Analytical Structure

Phenomenology of Rights & Duties. The nucleus of bundle theory in American tradition was of course Hohfeld's treatment of rights and duties.⁴⁸ Although, American readers will be quite familiar with his ideas, I shall reiterate the basic structure as the following deliberative reconstruction of property will integrate his demarcations: ‘A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative “control” over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or “control” of another as regards some legal relation’.⁴⁹ Concerning the correlatives and opposites he describes a ‘duty’ as ‘legal obligation [...] which one ought or ought not to do’ to another and ‘no-right’ just as non-existence of privileges. A ‘liability’ is concerned to be a general not yet determined obligation that could substantiate into a duty. Finally, a ‘disability’ is just the absence of the ‘legal ability’ (power) ‘to effect [...] legal relations’.

Bundled Rights. The differentiation into distinct property rights was said to ‘disintegrate property’.⁵⁰ Yet this reading is far from evident.⁵¹ It is also possible to understand rights as bundled or lumped together within one institution or different institutional substructure.⁵² Even if Honoré intended to describe the components of full ‘ownership’,⁵³ his list offers

⁴⁵ Maunz/Dürig/Papier 2015, 38

⁴⁶ Mangold/Klein/Depenheuer, 29, Brocker 1992, 400; Böhmer in Bauer 1988, 78

⁴⁷ Auer 2014

⁴⁸ For his structural presentation cf. Hohfeld 1913, 30; 1917, 710

⁴⁹ Hohfeld 1913, 55

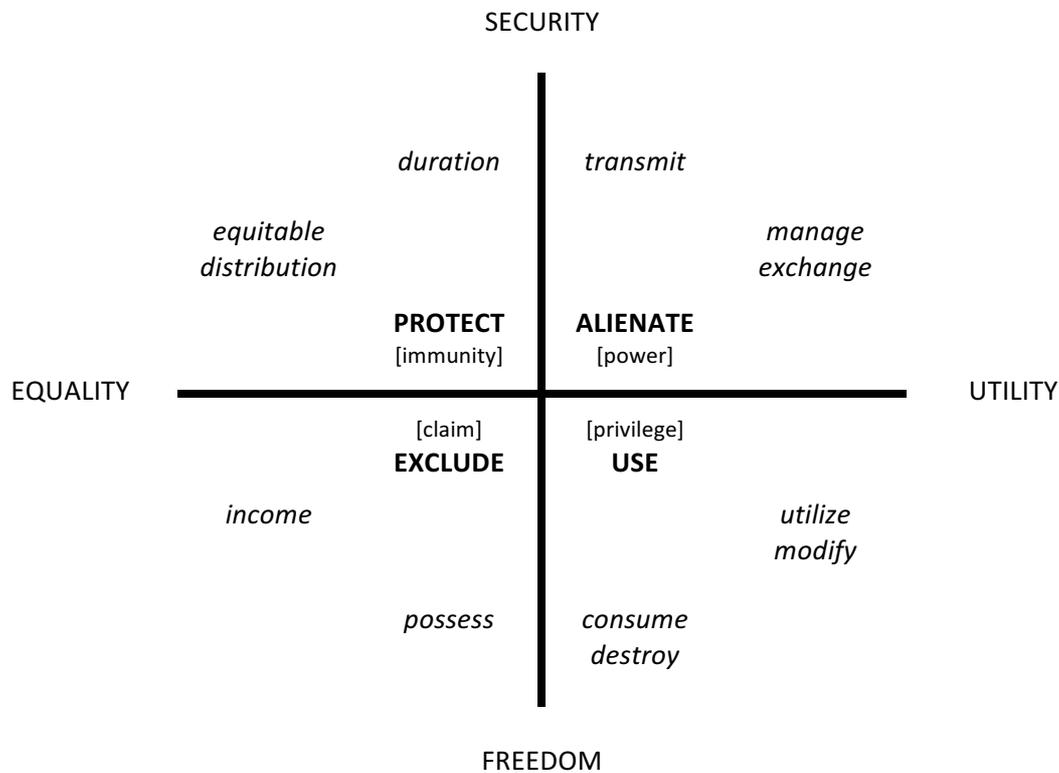
⁵⁰ Grey 1980; Xifaras 2015

⁵¹ Mossoff 2003; Di Robilant 2013

⁵² Singer 2009; Fennell 2012; cf. also Merrill & Smith 2001; Penner 1996

⁵³ Honoré 1961; Becker 1980; for Germany cf. already Windscheid/Kipp 1906

other interpretative options. The prominent descriptions of these 11 ‘standard incidents’⁵⁴ or 13 core ‘elements of ownership’⁵⁵ will serve as starting point for a deliberative classification of property rights.⁵⁶



F5. Bundle of Property Rights

Privilege (Liberty) to Use. The central privilege of ownership is to ‘use’ one’s own property as it means the freedom from claims of others. The parallel classification as ‘liberty’ already indicates the individualist (liberal or libertarian) background. Obvious components of this liberty are to consume or destroy, i.e. to ‘annihilate the thing’. The privilege to ‘utilize’ an object meaning the ‘personal enjoyment of the benefits’ also points to a liberal economic perspective. The privilege to use or utilize an object or legal position optimizes the individual utility of the owner. Its right to ‘modify’, i.e. to ‘effect changes less

⁵⁴ Honoré 1961: (1) Right to Possess, (2) Right to Use, (3) Right to Manage, (4) Right to Income, (5) Right to Capital, (6) Right to Security, (7) Incident of Transmissibility, (8) Incident of Absence of Term, (9) Prohibition of Harmful Use, (10) Liability to Execution, (11) Residuary Category.

⁵⁵ Becker 1980, 190: (1) Claim to possess, (2) Liberty to use, (3) Power to manage, (4) Claim to income, (5) Liberty to consume or destroy, (6) Liberty to modify, (7) Power to alienate, (8) Power to transmit, (9) Claim to security, (10) Absence of term, (11) Prohibition of harmful use, (12) Liability to execution, (13) Residuary rules

⁵⁶ The quotes in the following paragraphs are from Becker 1980, 190

extensive than annihilation’, underlines the close link to Locke’s account of property as labor performance.

Power to Alienate. The core power of ownership is to alienate property. This power to ‘carry out transfers by exchange or gift, and to abandon ownership’ together with the power to ‘manage’, i.e. to decide on usage (how and by whom) encapsulates the economic (utilitarian) heart of property. Only the exchange of property leads to an effective allocation of resources. The power to transmit, i.e. ‘to devise or bequeath’ allows for a systemic stability of the property system. The same is true for its ‘residuary’ power, ‘that is, the rules governing the reversion to another, if any, of ownership rights which have expired or been abandoned’.

Claim to Exclude. The claim to exclude others from possession, i.e. the ‘exclusive control of the thing’ is best understood within the normative background of self-ownership. If, as Hegel puts it, property is the externalization of freedom, then the right to exclude others seems a natural part of it. Leaving for a moment the question of a fair overall distribution of property aside, it could also be viewed as a fair opportunity if everybody could exclusively receive the income from his or her property, i.e. the ‘benefits derived from foregoing personal use of a thing, and allowing others to use it’.

Immunity from Intervention (Protect). The ‘claim to security’ translates into an ‘immunity from expropriation’ and protection against other interventions in one’s property. Taken together with the incidence of ‘absence of term’, i.e. ‘indeterminate length of one’s ownership rights’, both relate to a normative idea of stability. The collective body (i.e. the state) should protect the abstract and concrete institution and content of property.⁵⁷

4 A Bundle of Property Duties

Duties and obligations. Two ‘incidents’ were left out from the Honoré/Becker ‘elements of ownership’ described in the previous section: ‘prohibition of harmful use’ and ‘liability to execution’. In general duties, liabilities, no-rights and disabilities are not a big issue for the classical concept of property. So far, the bundled rights only poorly reflect the idea of property as a social structure. Instead, democratic theory of property discusses obligations,

⁵⁷ Cf. the German constitutional guarantee of the institution of property (‘Insitutsgarantie’) and the given state of property (‘Bestandsgarantie’): BVerfG 18.12.1968 - 1 BvR 200/56 (Deichordnung), NJW 1969, 309.

No-Right to Control Access (= Share). The social opposition to the claim for exclusion is a ‘no-right’ of the owner to block or even control access. Especially coming to intellectual property, ‘access’ to common resources is the central social issue.⁶² In a positive reformulation, the social ‘rules of access’ enfold a legitimate claim for public sharing, not only but especially in the case of knowledge.⁶³ If self-ownership needs to materialize in some external freedom, open access and the freedom to roam are a social opposition (in defense of other self-owners) to exclusionary possession (by one owner only). Fair use may equalize opportunities. The absence of the right (no-right) to control access translates into a social obligation to share the own property.

Disability to Allocate & Sustain. The main normative idea behind the power to alienate is the allocative function of private property. An opposition to this legal ability to alienate and manage derives from disabilities to efficiently allocate and sustain resources. Two prominent dilemmas of a social disability of efficient and stable resource allocation are the ‘tragedy of commons’⁶⁴ and the ‘tragedy of the anticommons’⁶⁵, i.e. the overuse and underuse of common resources. The first tragedy serves as a general economic justification of private property, which is said to internalize social costs.⁶⁶ Yet, the time delay of environmental costs practically suspends the allocative function of private property as ongoing pollution and exploitation of natural resources underscore. Even worse, the anticommons dilemma results from private ownership. Both social problems call for some adaptation of a social property structure to allow efficient and sustainable allocations. The same is true for an efficient competition. Without antitrust rules, monopolies would counterfeit the market mechanism and limit the allocative function of property.

Liability to Distribute. The originally enlisted incidence of a ‘liability to execution’, i.e. the ‘liability to having the thing taken away as payment for a debt’ is already in opposition to the immunity from intervention. This liability could be understood as an obligation in favor of normative stability of legal enforcement. A general liability to distribute is a completely different obligation. A material ‘social-obligation norm’⁶⁷ in property law is based on an egalitarian philosophy.⁶⁸ Distribution and sharing both reflect an egalitarian ideal. With

⁶² Benkler 2013

⁶³ Wielsch 2008; 2015

⁶⁴ Hardin 1968

⁶⁵ Heller 1998; 2008; 2013

⁶⁶ Demsetz 1967; but cf. Rose 1996

⁶⁷ Alexander 2009

⁶⁸ Cohen 1995; Harris 1996

sharing, however, the property remains with its owner; he or she only has to share its possession. Distribution is more far-reaching in demanding to give away part of the revenues (taxes) or even part of the property itself (takings). Sharing income possibilities might overlap with distribution. Another form of indirect distribution would be an extended strict liability for damages caused by property.

5 Property As Deliberation

Property Theory as Social Practice. Is there a ‘core’ of property? From the constructivist perspective of deliberative theory, the answer is: no, at least not a universal one. The legal institution of property is a social structure that changes. More generally speaking, there are always different readings and interpretations with respect to this institution. There is not one single idea of property, but a pluralistic range of ideas. Property rights and obligations are formed as a social practice.⁶⁹ And yet, the ongoing practical discourse is not totally arbitrary and alternating. Ideas carve their historical structures into the discourse and coin relative conceptual cores, like Hohfeld’s classification of property rights and Honoré’s elements of ownership. Legal practice shapes a discursive core of elements and good reasons attributed to property.

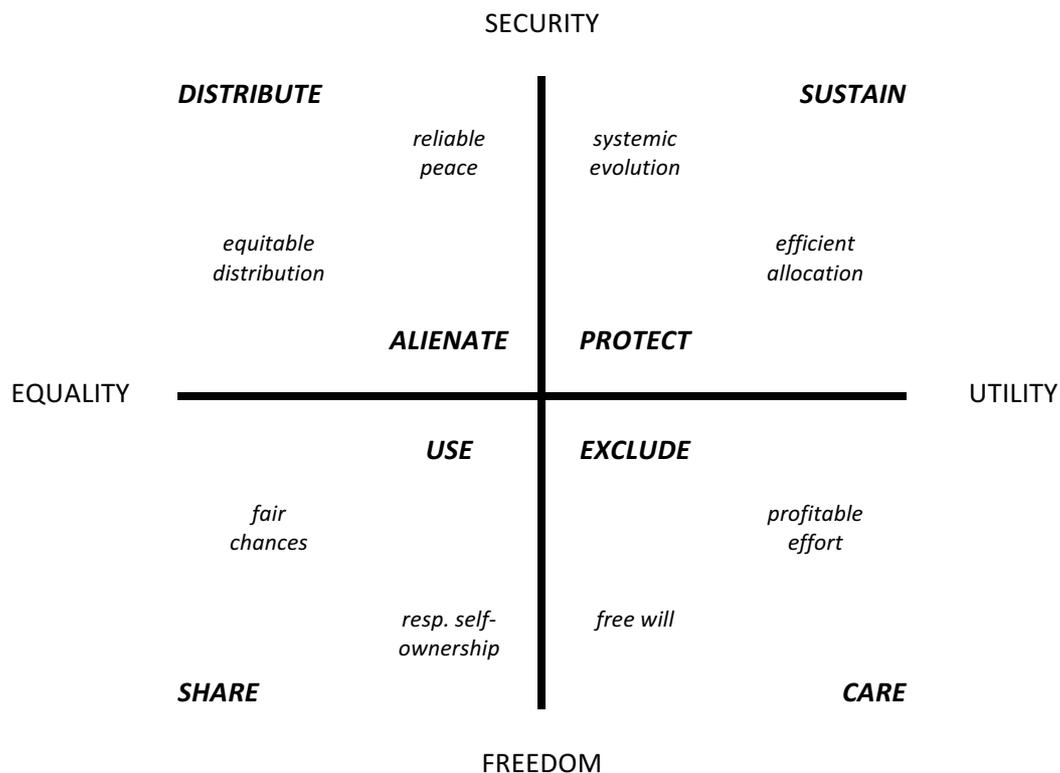
Battle of Rights & Duties. Obviously the conceptual ‘bundle of rights’ and the ‘bundle of duties’ conflicts on the shape and boundaries of property. Which rights? Which duties? Which balance? There is not one consistent practice of property theory either. And yet, Hohfeld’s scheme allows for an illustration of a certain social logic between the rights and duties discussed. Of course this analytical structure does not imply any strict logical relations, but rather tries to demonstrate a certain semantic lineage along which the property discourse evolves or might evolve.



F7. Analytical Legal Structure of Property Entitlements and Obligations

⁶⁹ Purdy 2009

Property (Law) as Deliberation. This paper attempted so far to map or reconstruct some of the normative language of property theory, revealing plural ideological roots of competing arguments. Expanding Hohfeld's scheme with a social dimension allows for a plural 'legal semantics' of basic property rights and duties, which might be used to explain different property institutions and to construct a normative framework for gradated forms of property.⁷⁰ Within a deliberative 'political grammar' the conceptual use of any element within the bundle of rights or duties could be attributed to underlying justificatory reasons.



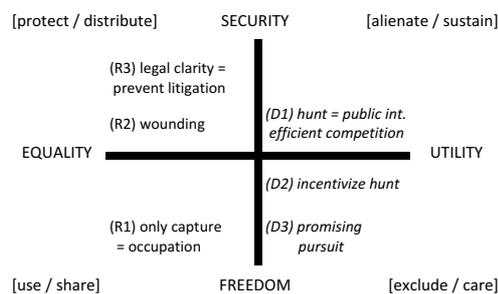
F8. Political Grammar of Property Law

The structure thus allows for a transparent reconstruction of the infinite political battle on entitlements and boundaries of resource access and distribution within the deliberative practice of property law. The following last section of the paper tries to apply the grammar to the reconstruction of the arguments within some prominent property cases on acquisition and regulatory taking.

⁷⁰ For a gradated scale of common property forms (,owner', ,proprietor', ,claimant', ,user') cf. Schlager & Ostrom 1992; 1996; Ostrom 1999

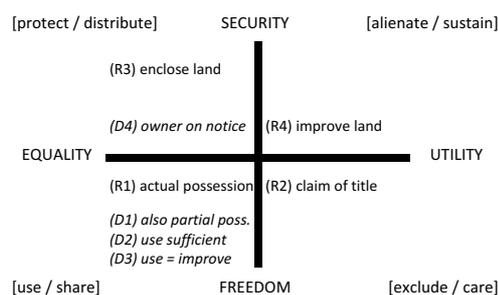
6 Applying the Grammar: Some Tentative Case Studies⁷¹

[US] *Pierson v Post* (1805).⁷² In that classic case even though Pierson did know that Post was hunting a fox with his dogs he killed the fox and took possession of it. Pierson prevailed. The decision (Tompkins) is based on the rationale of a (R1) factual occupation by capturing the fox, which might be already fulfilled if (R2) the hunter mortally wounds it; and that mere pursuit is not sufficient (R3) for the sake of legal clarity and prevention of litigation. The dissent (Livingston) argued that foxes are a public nuisance and that it would be (D1) in the public interest to set up (D2) subjective incentives for hunting them. As Post's pursuit was (D3) promising it was sufficient to acquire title. [...]



F9. Political Grammar of Property Acquisition
[R = Rationale of Decision; D = Dissent]

[US] *Van Valkenburgh v Lutz* (1952).⁷³ In this adverse possession case the Lutzes occupied a piece of a land later acquired by the Van Valkenburghs. The Lutzes used part of the land as garden to cultivate vegetables and mainly to store rubbish on it. When the Van Valkenburghs built a fence the Lutzes claimed a right of way across the land and prevailed before the court. Yet, in the actual case their claim for adverse possession was denied by the court. The decision (Dye) was framing the prerequisites of adverse possession as (R1) actual possession; and (R2) claim of title; and (R3) enclose land or (R4) improve land. All these elements were denied as the Lutzes used only part of the land, admitted that they were not owning it, did not enclose it and mainly stored rubbish on it. The dissenting opinion was arguing that (D1) land need not be completely occupied; (D2) intend to acquire and use the land as own is sufficient; (D3) the land was substantially improved by using it and most importantly (D4) that the behavior of the Lutzes was clearly enough to put the true owner on notice. [...]



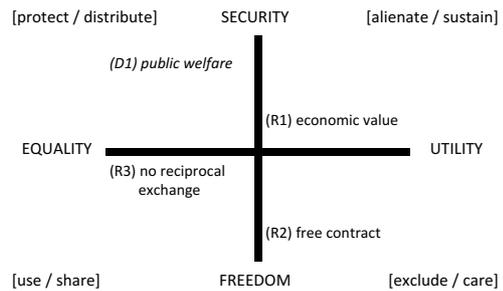
F10. Political Grammar of Adverse Possession
[R = Rationale of Decision; D = Dissent]

⁷¹ The discussion of US cases follows the casebooks of Dukeminier et al 2014 and Merrill & Smith 2007.

⁷² US Supreme Court, *Pierson v Post*, 3 Cai. R. 175, 2 Am.Dec. 264 (1805)

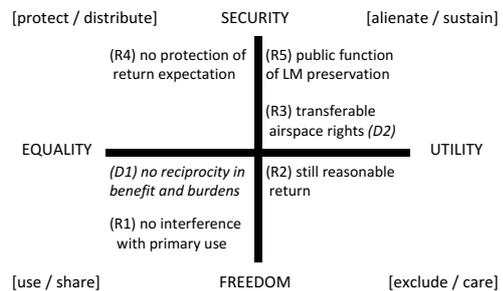
⁷³ New York Court of Appeals, *Van Valkenburgh v Lutz*, 304 N.Y 95, 106 N.E.2d 28 (1952)

[US] *Pennsylvania Coal v Mahon* (1922).⁷⁴ In that landmark case of regulatory taking, the coal mining company sold in 1878 surface rights of land to Mahon but retained the right to mine underneath. A regulatory act in 1921 prohibited any mining that would endanger any structure used for human habitation. Mahon who lives on the land claims for a prohibitive injunction. The decision (Holmes) considers the regulation as a uncompensated taking and denies an injunction out of the following reasons: (R1) it would diminish the economic value of the property (i.e. the mining rights); (R2) undermine the valid contract with Mahon who waived therein arbitrarily any rights for damages, which (R3) shows that there would be no reciprocity of advantage as Mahon paid only for a risky piece of land. The dissent (Brandeis) argues that property rights are never absolute especially when their use (D1) threatens public welfare, i.e. public health, safety or morals.



F11. Political Grammar of Regulatory Taking (*Pennsylvania Coal*)
[R = Rationale of Decision; D = Dissent]

[US] *Penn Central v NY* (1978).⁷⁵ In that next regulatory taking case the transportation company planned to construct an office building over Grand Central Terminal that falls under Landmarks Preservation Law of New York City. The landmark commission refused both submitted plans as 'an aesthetic joke' in the given architectural environment.



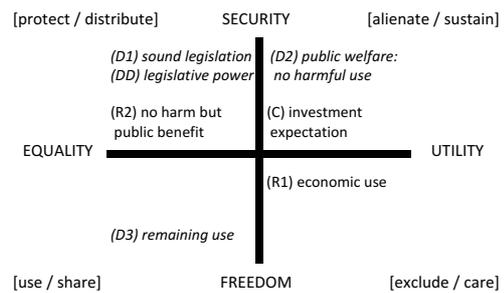
F12. Political Grammar of Regulatory Taking (*Penn Central*)
[R = Rationale of Decision; D = Dissent]

The decision denied a taking (Brennan) because the regulation (R1) does not interfere with the primary use of the property; (R2) the owner still obtains a 'reasonable return' on its investment; (R3) he could have transferred the airspace rights to nearby properties; (R4) there is no general protection of the expectation to enhance future returns that could balance the (R5) public function of the preservation of landmarks. The dissent (Rehnquist) criticizes that unlike typical zoning restrictions (D1) there is no reciprocity in benefits and burdens within the landmark law, although (D2) the transferable development rights might be sufficient compensation for a taking.

⁷⁴ US Supreme Court, *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922)

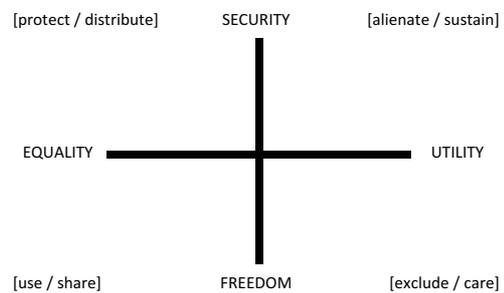
⁷⁵ US Supreme Court, *Penn Central Transportation Co. v New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978)

[US] *Lucas v South Carolina (1992)*.⁷⁶ In that last US regulatory taking case, Lucas claimed that a coastal zone management act of South Carolina barred him from building on his barrier island property. The decision (Scalia) approved a taking without just compensation because the regulation (R1) deprives the owner of all economically valuable use of its property; (R2) the prevention of public harm often results in public benefit, which has to be compensated. A concurrence (Kennedy) argues (C1) that the reasonable investment-backed expectations of the owner had been violated. To the contrary, the dissent (Blackmun) denies a taking because the coastal regulation (D1) was a sound piece of legislation (D2) protecting the common welfare from harmful use; and (D3) the owner still retains his regular using rights of the land like swimming and camping. Another dissent (Stevens) underlined that an arbitrarily broad taking rule would (DD) deprive legislature from the power to revise and develop law.



F13. Political Grammar of Regulatory Taking (Lucas)
[R = Rationale; C = Concurrence; D = Dissent; DD = 2nd Dissent]

[G] '*Nassauskiesung*' (1973).⁷⁷ The owner of a commercially used (under water) gravel pit was not longer allowed to extract the gravel due to a new water protection law. [...]



F14. Political Grammar of Regulatory Taking (Germany)
[R = Rationale of Decision; D = Dissent]

⁷⁶ US Supreme Court, *Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992)

⁷⁷ German Constitutional Court, 15 July 1981 (1 BvL 77/78 - *Nassauskiesung*), NJW 1982, 745

7 Conclusion

Within a 'democratic model of property law'⁷⁸ there is no single value which determines the interpretation of property rights or obligations. Foundational values become relative reasons which compete on guiding the legal interpretation of property law. A 'deliberative rationality'⁷⁹ allows to understand law as procedural framework for the exchange of competing reasons. A deliberative account of property law reconstructs judicial decisions as balancing procedures between conflicting legal principles or reasons of property law. Legislative and jurisprudential rules structure the legal argumentation as an ongoing democratic process of property law deliberation.

[...]

⁷⁸ Singer 2009

⁷⁹ Benhabib 1996