

# Property's Ends: The Publicness of Private Law Values

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*ABSTRACT: Property theorists commonly suppose that property has as its ends certain private values, such as individual autonomy and personal security. This Essay contends that property's real end is human flourishing, that is, living a life that is as fulfilling as possible. Human flourishing, although property's ultimate end, is neither monistic nor simple. Rather, it is inclusive and comprises multiple values. Those values, the content of human flourishing, derives, at least in part, from an understanding of the sorts of beings we are—social and political. A consequence of this conception of the human condition is that the values that constitute human flourishing—property's ends—are public as well as private. Further, the public and private values that serve as property's ends are mutually dependent for their realization. Hence, any account of property that assigns it solely to the private sphere, categorically removed from public values, is incoherent.*

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## INTRODUCTION

Donald Lamp was outraged. Every morning since 9/11, the eighty-nine year old World War II veteran had hung an American flag from the balcony of his Omaha, Nebraska apartment. But in May 2004, the management board of the retirement community in which he lives ordered him to remove his flag, citing a violation of one of the covenants in the master plan that governs the development. Lamp refused.

These sorts of disputes are not uncommon in homeowner associations. What made Donald Lamp's case noteworthy was the fact that he was the father-in-law of U.S. Supreme Court Justice Clarence Thomas, a fact apparently of little moment to the association's general manager. "We have a lot of important people here," she said. However true that may be, Lamp's case got national attention, much of it unfavorable for the homeowner association. A typical reaction was this posting on a blog site: "Donald Lamp fought for our right and *his* right to display our nation's flag anywhere and anytime."<sup>1</sup>

The question, of course, is, *does* Mr. Lamp have such a right? On one view, a view informed by the private law values of property law, the answer, quite clearly, is no. The covenant restricting the display of flags within the development was included in Mr. Lamp's deed. He had legal notice, either actual or record notice, of it at the time he entered into the purchase of his unit, and he agreed to be bound to it. The matter is strictly one of consent. So long as he had notice of the restrictive covenant at the time he entered into the agreement with the association, he is bound by it.<sup>2</sup>

Donald Lamp and his supporters did not see the matter this way. To them, some values cannot be contracted away. These are fundamental values—public values—and among them is the right to display the American flag. So the argument goes.

The dispute between Mr. Lamp and his homeowner association is not aberrational. There have been many such disputes, some litigated, some not, over conduct ranging from speech to religion to satellite antennas. Although not all of these disputes involve values that could plausibly be characterized as fundamental (the right to hang a clothesline outdoors?), many of them do. The question is whether such values have any traction in the realm of private ordering.

I want to approach this question in a somewhat unusual way. In the United States, the usual approach to the question is through public law, notably the American constitutional doctrine of state action. Under this doctrine, constitutional values do not apply unless there has been state

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1. Yoe, Comment to *Nebraska Retiree Fights to Hang American Flag*, FOX NEWS (May 28, 2004, 5:00 PM), <http://www.freerepublic.com/focus/f-news/1144102/posts>.

2. See Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1356–57 (1982).

action, i.e., unless the actor responsible for the restriction or other action in question is a government agency or otherwise acting under the authority of the government. Constitutional norms and their attending values do not apply to strictly private actions.

That approach has been singularly unhelpful. It asks under what circumstances it is appropriate for public law norms and their underlying values to intrude upon the domain of private volition, replacing that sphere's own distinctive set of values with its own. There are two related and contestable assumptions here. The first, and more familiar, assumption is that there is a categorical separation between the public and private spheres. The second assumption is perhaps less obvious—that a similar sort of distinction exists between the values which inhere in the norms regulating the two spheres, indeed that the differences between the two sets of values are such that there is, or at least may be, a basic level of incompatibility between them. It is this second assumption that I wish to challenge. I argue that not only are the values that inhere in public law norms compatible with the values that serve as the normative foundation of private property, but further that such public values may be necessary for realization of private property's ends.

This Essay operates at both a conceptual and a normative level. At a conceptual level it seeks to elucidate the normative basis of the private law of property. In particular, it explicates how, as a conceptual matter, the private values of property relate to and interact with property's public values so that the two dimensions cohere rather than conflict. At a normative level, I argue that even if one rejects the interpretation of property as resting on a moral foundation of human flourishing, understood as constituted by multiple values, both public and private, the human flourishing theory represents the best approach to develop a morally pluralistic theory of property that relates multiple public and private values, which are commonly seen as in conflict, as coherent and mutually supportive.

The normative foundation of private property, I argue, is human flourishing. I understand human flourishing to mean that a person has the opportunity to live a life as fulfilling as possible for him or her. This account of human flourishing is morally pluralistic; that is, it rejects the notion that there exists a single, irreducible, fundamental moral value to which all other moral values may be reduced. However, the theory is also objectivist, and does not claim that value determinations are simply matters of agent sovereignty. Thus, the theory conceives of human flourishing as including (but not limited to): individual autonomy, personal security/privacy, self-determination, self-expression, and responsibility (along with other virtues). The thesis of this Essay is that these values, the values that theorists take to be among the intended ends of private property, are not in conflict or incompatible with fundamental public values. Rather, these values, at times, require recognition of public values for property's own values to be realized.

Stated differently, human flourishing, understood as morally pluralistic, includes both private and public values. From this perspective, then, the relationship between private property and public values should be seen as symbiotic rather than antagonistic.

This insight has cash value. Most immediately, it enables a wide array of disputes like Donald Lamp's—disputes that appear to require the intervention of the state though its medium of public law, in either statutory or constitutional form—to be resolved solely on private law grounds without resorting to state involvement (other than as the facilitator for dispute resolution through its courts). Specifically, there is no need for the state to become directly involved in these private two-party disputes in order to operationalize the values that public law expresses. For example, as I shall later discuss, many of the public accommodation cases that were decided on constitutional or statutory grounds could have been resolved in favor of a right to public accommodation solely on private law grounds.<sup>3</sup> Private law is sufficiently capacious to include public law's values and to operationalize them itself.

Another, broader implication of the Essay's thesis is that it helps explain why property owners owe obligations to others, expressed by what I have elsewhere called the social obligation norm of property.<sup>4</sup> Further, it helps explain why this social obligation norm is internal to the concept of ownership itself rather than the obligations being externally imposed on owners by the state. What may at first blush appear extrinsic is in fact intrinsic to private law norms. Finally, this Essay's thesis helps explain the limits of those obligations. Property rights, the obligations that inhere in property ownership, and the limits of those obligations all derive from the same source—human flourishing. Both the rights and the obligations of property are necessary as means of realizing human flourishing.

To illustrate how public values advance the values underlying private property, the values that comprise human flourishing, I shall discuss two problems that have been the subjects of considerable discussion in American-property legal literature in recent years: the right to exclude and the enforceability of restrictive covenants in homeowner associations.

I begin in Part I with an account of human flourishing, which is the moral foundation of private property. The discussion of human flourishing paves the way for understanding property's ends—the private law values that undergird it. These values are what Part II undertakes to explain. Part III then shifts attention to the public values that are, at least at times, necessary for realization of human flourishing. Those values include, among others, equality, inclusiveness, community, participation, and self-constitution. Part

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3. See *infra* text accompanying notes 126–31.

4. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009).

IV is the core of the theory. It explains how the public values help realize the private values of which human flourishing is partly constituted. Under the theory, human flourishing comes to be seen as a project in which public and private cannot be categorically distinguished from each other but blend into each other and mutually support each other. Part V illustrates the theory by discussing two sets of property disputes in which asserted private property rights have been challenged on the basis of appeals to public values: controversies over servitudes that restrict certain personal freedoms in homeowner associations and limits on private land owners' right to exclude.

### I. HUMAN FLOURISHING: A PLURALIST CONCEPTION

The conception of human flourishing that I shall use here must be distinguished from welfare, as that term is used in modern legal and economic analysis. Welfare is a quite confusing and imprecise term. We often use it in such a way as to suggest that it refers to one single thing, i.e., one single value. But a moment's reflection should indicate that it does not. Welfare is a term that we commonly use to refer to several different values such as pleasure, health, safety, satisfaction, and so on. However, this is not the sense in which economists and law-and-economics scholars, who focus on welfare-maximization, apparently use the term.

To see this, consider a set of distinctions made famous by Derek Parfit a number of years ago. Parfit usefully distinguished among three types of theories of how a person's life can go maximally well: (1) hedonistic theories, which suppose that what makes a person's life go best for him is what makes him happiest; (2) desire-fulfillment theories, which provide that the good for a person is what fulfills his desires; and (3) objective-list theories, according to which "certain things are good or bad for us, whether or not we want to have the good things, or to avoid the bad things."<sup>5</sup> Welfarism, in the law-and-economics sense, trades on a version of the second of Parfit's three theories, a version that we can call the preference-satisfaction theory.<sup>6</sup> It supposes that there is one and only one value—maximization of preference satisfaction. All other values can be reduced to that single, irreducible value. In this respect, welfarism, as a moral theory, is a monistic value theory.<sup>7</sup>

Modern legal-welfare theory sometimes supposes that welfare and human flourishing concepts are synonymous. But they are not, at least not in the senses in which they use the term welfare and the way I shall use the concept human flourishing. The term human flourishing is, of course, a translation of Aristotle's term *eudaimonia*, which is often, but misleadingly,

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5. DEREK PARFIT, REASONS AND PERSONS 493 (1984).

6. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18–24 (2002).

7. I discuss value monism and pluralism in Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017 (2011).

translated as happiness. Human flourishing is a better translation for multiple reasons, not the least of which is that it is conducive to a pluralist understanding, whereas happiness is less so.

In contrast to welfare, as welfarists use that term, human flourishing, as I shall use the term, is a value-pluralist concept. The conception of flourishing upon which I shall rely denies that human flourishing is a genuinely unitary value. Indeed, the theory here denies that there are any genuinely unitary values at all. There are many ways for a person's life to flourish,<sup>8</sup> and there are many values that are constitutive of human flourishing, or the well-lived life.

In addition to being value-pluralist, the conception of human flourishing adopted here is also an objective theory. It rejects the view that what is good or valuable for a person is determined entirely by that person's own evaluation of the matter. Human flourishing is not purely a matter of agent sovereignty.<sup>9</sup> That is, the theory holds that claims about what is prudentially valuable for a person can be objectively right or wrong, rather than solely a matter of someone's evaluative perspective.<sup>10</sup> In this respect, the theory is an objective theory of the good.

Any list of values that are constitutive of human flourishing will necessarily be contestable.<sup>11</sup> I shall identify several values that I believe will be relatively less controversial than others though some may be more contestable than others. At any rate, for present purposes, let us stipulate to an acceptable, although incomplete list of values that are constitutive of human flourishing. Among the values that I shall discuss are *autonomy*, *self-realization*, *personhood*, *community*, and *equality*.

As these values indicate, the conception of human flourishing upon which I shall draw here is, broadly speaking, Aristotelian. It is based on Aristotle's understanding of human character as inherently social.<sup>12</sup> Life within a society and webs of social relationships are necessary conditions for

8. This is not to say that all forms of living are equally well-suited to flourishing, or that whatever life a person chooses to pursue is one that maximizes his well-being. That view of flourishing would collapse the very distinction that I wish to maintain here—the distinction between welfarism (as the maximization of preference satisfaction) and human flourishing. Some ways of living are better than others, objectively so, regardless of one's preferences. I cannot develop this point in this Essay.

9. See Richard J. Arneson, *Human Flourishing Versus Desire Satisfaction*, 16 SOC. PHIL. & POL'Y 113, 116–17 (1999).

10. *Id.* As Arneson points out, however, this does not mean that an individual's attitudes are irrelevant in evaluating what is good for her, i.e., what will make her life go well. *Id.* at 140–41. For example, one good for a person may be that her most important life aims, as she ranks them, be fulfilled.

11. The value-pluralist approach to human flourishing taken here is similar to Douglas Rasmussen's. See Douglas B. Rasmussen, *Human Flourishing and the Appeal to Human Nature*, in HUMAN FLOURISHING 1, 40–41 (Ellen Frankel Paul et al. eds., 1999).

12. See ARISTOTLE, NICOMACHEAN ETHICS 15, 263–67 (Martin Ostwald trans., 1962) (c. 384 B.C.E.); ARISTOTLE, THE POLITICS OF ARISTOTLE 7–9, 110–13 (Ernest Barker ed. & trans., 1976).

humans to flourish, i.e., for human lives to go maximally well. The conception adopted here rejects interpretations of human character—the sorts of beings we are—as what is often described as atomistic. The interpretation of human character upon which my conception of human flourishing is based sees humans as dependent upon each other literally from birth through death.<sup>13</sup> They depend upon each other in a wide range of matters, from health to education to practical reasoning to socialization. The core values that I have identified reflect humans' sociability and inherent and unavoidable interdependency.

## II. PROPERTY'S ENDS

Private property is instrumental; it serves particular ends. Precisely what those ends are is, of course, a highly contestable matter. I argue that the best instrumental account of property is one that expresses property's ends in terms of human flourishing. In this Part, I identify five private law values that are at the core of human flourishing and that are commonly considered to be among property's main ends—autonomy, personal security/privacy, self-determination, self-expression, and personal responsibility. Although this is by no means an exhaustive list, it captures those values that I take to be central to the instrumental fit between property and human flourishing.

### A. AUTONOMY

Autonomy will perhaps be the least controversial of the five values. Many, if not most, property theorists identify individual autonomy as an important value that property serves. Among property theorists, some, notably libertarians and Kantians, place autonomy at the core of property's *raison d'être*. But even those who do not view autonomy as the foundational end of property still view it as an important aspect of the justification for private property rights.<sup>14</sup> This is true even of utilitarianism and its latter-day cognate, welfarism.

It is sometimes said that utilitarianism is a collectivist theory (and so its justification of property).<sup>15</sup> On this view, autonomy would appear to play a little role as justification for property. The justification of property would be strictly confined to collectivist matters, namely, net social utility. But Jeremy Waldron convincingly argues that this is a mistaken view of utilitarianism.<sup>16</sup> What the utilitarian wants to maximize, Waldron reminds us,<sup>17</sup> is the individual's satisfaction (or, in welfarist terms, preferences). It is precisely

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13. See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (1999).

14. See Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345–48 (1996).

15. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 200 (1983).

16. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 73–79 (1988).

17. *Id.* at 74.



because the utilitarian takes the individual's own definition of his or her satisfaction as given that the utilitarian is committed to personal autonomy.<sup>18</sup>

Autonomy was the main justification for property in civic republican theory as well. From the republican perspective, the function of private ownership of property (land, in particular) was to remove the citizen's dependence on others so that he could practice virtuous citizenship.<sup>19</sup> Property ownership bestowed self-reliance on a person, which facilitated the practice of virtue in the civic realm by assuring that one's judgment was unencumbered by economic obligations to others. Property, then, provided autonomy, facilitating participation in the public sphere rather than security from it.

Variations of the republican version of the autonomy argument for property have appeared in recent years. Charles Reich's famous "New Property" theory, for example, developed a somewhat different strand of the argument.<sup>20</sup> More recently, Frank Michelman developed a version of the autonomy argument that had a distinctly redistributive twist.<sup>21</sup> All citizens should have a voice in the political order, he argued, and, following republican principles, political voice requires autonomy that can be provided only by property. In modern society, however, such political autonomy through property can be secured only through government redistribution of property.<sup>22</sup>

#### B. PERSONAL SECURITY/PRIVACY

Property, it has long been thought, provides a person a safe haven.<sup>23</sup> As Jeremy Waldron observed, "[h]umans need a refuge from the general society of mankind."<sup>24</sup> Property, especially landed property, supposedly provides that refuge to its owners.

Privacy is an important aspect of the security that is thought to result from private ownership of property. The connection between privacy and

18. My use of the concept of personal autonomy should be distinguished from individual freedom, at least in the sense in which Jedediah Purdy uses it. Purdy develops a sophisticated pluralistic conception of freedom that is constituted by three values—reciprocity, responsibility, and self-realization. See JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 112 (2010).

19. See generally GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

20. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

21. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319 (1987).

22. See *id.* at 1329–30.

23. See Carol M. Rose, Book Review, 10 *CONST. COMMENT.* 238, 240 (1993) (reviewing JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992)).

24. WALDRON, *supra* note 16, at 296.

property is familiar, of course. The home, for example, is perhaps the most familiar nexus between property and privacy. Indeed, the home is the *locus classicus* linking property, security, and privacy with autonomy (or freedom).<sup>25</sup> Waldron argues that individuals need not just “a house, a flat, or a room of one’s own” for “a place where they can be assured of being alone, if that is what they want, or assured of the conditions of intimacy with others, where intimacy is called for.”<sup>26</sup> What they specifically need is a “household”; moreover, it must be a “household of their own.”<sup>27</sup>

Personal security includes not only physical protection but protection from other forms of insecurity as well, such as financial insecurity and political insecurity. Charles Reich was worried about just these forms of insecurity when he attacked the reasoning of the U.S. Supreme Court in the notable case of *Flemming v. Nestor*<sup>28</sup> as “resembl[ing] the philosophy of feudal tenure.”<sup>29</sup> As Reich wrote, “Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty, so government largess binds man to the state.”<sup>30</sup> The difference between feudalism and government largess, according to Reich’s account, is that there is no mutuality in the relationship between the individual and the state with respect to government largess.<sup>31</sup> As the decision in *Flemming* makes abundantly clear, the recipient of government largess is utterly dependent on the state. Nestor’s insecurity, resulting from the Court’s refusal to treat his benefits as constitutional property, could hardly have been made clearer than by the facts that not only was his only regular source of income cut off, but the federal government saw fit to deport him to his native country because of his past affiliation with the Communist Party.<sup>32</sup>

The connection between property and individual security can be made in a more metaphysical sense as well. Nineteenth century Hegelian theorists considered the basic “rationale of property . . . [to be] that everyone should be secured by society in the power of getting and keeping the means of realising a will.”<sup>33</sup> The meaning of security here is less tangible perhaps than

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25. See MARGARET JANE RADIN, REINTERPRETING PROPERTY 56–57 (1993).

26. WALDRON, *supra* note 16, at 296.

27. *Id.*

28. *Flemming v. Nestor*, 363 U.S. 603 (1960). In *Flemming*, the Court held that a federal statute cutting off a retiree’s old-age benefits under the Social Security Act because the retiree used to be a member of the Communist Party was not an unconstitutional taking of property within the meaning of the Fifth Amendment of the U.S. Constitution. *Id.* at 612. Despite the fact that Nestor, the retiree, had paid into the Social Security system for years, the Court reasoned that his benefits did not constitute an “accrued property right.” *Id.* at 608.

29. Reich, *supra* note 20, at 769.

30. *Id.* at 769–770.

31. See *id.* at 770.

32. See *Flemming*, 363 U.S. at 621 (Black, J., dissenting).

33. THOMAS HILL GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 220 (The Lawbook Exch. Ltd. 2005) (1895).

earlier senses of security, but it shares the same ideas that property performs a kind of protective function and that this protection enables individuals to do certain things.

### C. SELF-DETERMINATION

The link between property and self-determination is established most clearly perhaps in Hegel, but it is evident in other theories as well, such as the civic republican tradition. In Hegelian theory, self-determination is closely related to freedom.<sup>34</sup> Indeed, for Hegel, freedom is self-determination. Hegel's own conception of self-determination is rather metaphysical, but Alan Brudner offers a more accessible version of it in these terms: Self-determination is, Brudner argues, "a power to act from determinate ends that are themselves coherent expressions of freedom because they are neither adopted unreflectively nor imposed by an external will."<sup>35</sup> Here is another take on the Hegelian notion of self-determination: "When we . . . view[] our desires as material to be regulated and ordered in line with desires of a higher order still (for example the desire not to be the kind of person we see ourselves being or becoming) we reach a clearer understanding of the slippery concept of self-determination."<sup>36</sup>

The connection between this understanding of self-determination and property comes through in the notion of ordering our desires. Because we live in communities with others, we will use our property in pursuing our considered goals, but we do so "in full recognition" of others' legitimate claims to respect.<sup>37</sup> Ordering our desires also means that in pursuing our goals through property, we will develop and rely on a system of norms regulating the scope of property rights.<sup>38</sup>

The point to emphasize about this approach to self-determination is how social it is. Self-determination cannot occur atomistically or in isolation from society. Self-determination is a process that is deeply dependent upon community for its higher and higher realization.

### D. SELF-EXPRESSION

Self-expression is perhaps not a value that is obviously associated with private ownership of property, but it is nevertheless one of property's important ends. By "self-expression," I mean to include a capacious range of forms and senses in which people assert themselves. At property law's most basic level, for example, possession constitutes, as Carol Rose reminds us, a

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34. See ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 97–98 (1995).

35. *Id.* at 98.

36. Dudley Knowles, *Hegel on Property and Personality*, 33 *PHIL. Q.* 45, 54 (1983).

37. *Id.* at 57.

38. *Id.*

mode of communication.<sup>39</sup> “Possession as the basis of property ownership,” Rose suggests, “seems to amount to something like yelling loudly enough to all who may be interested.”<sup>40</sup> It is a matter of communicating a claim in a particular sort of way, a mode of expression that carries a great deal of meaning regarding the claimant’s psychological attachment to the object in question.

Possession is hardly the only nexus between property and self-expression. Jeremy Waldron argues that there are three larger connections between self-expression and property.<sup>41</sup> First, we can understand the connection between property and self-expression in terms of a person’s assertion against nature. It is not only Hegel who viewed nature as, to borrow Alan Ryan’s phrase, “blankly material,” “hav[ing] no point or purpose of [its] own.”<sup>42</sup> This was Locke’s attitude toward nature as well, and many moderns share it. From this point of view, people give purpose to nature by asserting themselves over it. Self-expression in this context involves participation in projects through which individuals plan and exercise control over some aspect of the general endeavor.<sup>43</sup>

A second mode of connection between self-expression and property is a person’s assertion of herself against others.<sup>44</sup> This mode of the connection is most evident perhaps in the market, where “forces of competition” is another term for networks of conflicting yet coordinated acts of self-assertion. By asserting oneself against others in market transactions, a person may or may not be seeking domination over the other. Self-assertion may, but need not, result in domination where both parties are engaged in acts of self-assertion for mutual gain. Whether domination results depends upon the circumstances of their interaction, in particular, the power relationship between them.

The third mode of connection between self-expression and property that Waldron identifies is slightly more nuanced than the first two. Waldron states the connection this way: “Since ownership rights impose constraints on the behaviour of others, my having these rights involves others’ recognizing me as a source of moral constraint and thus as a locus of respect.”<sup>45</sup> The idea here is that the fact that others are willing to restrict their pursuit of their own desire in the interest of my freedom gives me a greater appreciation of my freedom.<sup>46</sup> In particular, it permits me to see and

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39. See CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 14 (1994).

40. *Id.* at 16.

41. See WALDRON, *supra* note 16, at 302–03.

42. ALAN RYAN, PROPERTY AND POLITICAL THEORY 122 (1984).

43. See WALDRON, *supra* note 16, at 302.

44. *Id.*

45. *Id.* at 303.

46. *Id.*

gives me confidence in the social dimension of my freedom.<sup>47</sup> As Waldron points out, however, systems of private property are not unique in this respect.<sup>48</sup> Successful common property regimes must do so as well in order to enable cooperative behavior.<sup>49</sup> Still, the social coordinating benefits of private property are well-known.

#### E. RESPONSIBILITY

Private property can be seen as serving and promoting different virtues.<sup>50</sup> Here, I want to focus on one virtue in particular—responsibility. The connection between property ownership and personal responsibility can be developed on the basis of diverse strands of thought. One is the tradition of positive liberty.<sup>51</sup> From this perspective, a person is not truly free until his desires, plans, and goals are stabilized so that there is continuity between the plans and actions of his past and those of his future.<sup>52</sup> The person who acts on the basis of whim, who flits from one impulse to another, is not truly free but instead is a hostage to such unstable urges. Such a person has no real sense of enduring identity. Even his moral agency is subject to doubt.

Private ownership of property, the argument goes, fosters a deeper sense of freedom by stabilizing a person in particular ways. The idea is that a regime of private ownership inculcates in individuals a sense of personal responsibility because they realize that they must effectively manage their own property if they are to satisfy their own needs. Through ownership, individuals acquire not only certain skills but, more important, particular habits of thought—forward-looking, calculating, and mindful of alternatives—that free them from caprice and whim and give them an understanding of what T.H. Green called the “permanent good.”<sup>53</sup>

Another strand of thought connecting property with responsibility focuses less on responsibility to oneself than responsibility to others. There is a very old tradition of property theory that is concerned with the responsibilities that individual owners owe to their societies. Connected with ideas of ownership (especially of land) as stewardship, the tradition dates

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47. *Id.*

48. *Id.* at 303–04.

49. *Id.*

50. See generally Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) (discussing both economic and Aristotelian analyses of land use and ownership).

51. See WALDRON, *supra* note 16, at 310–13; see also PURDY, *supra* note 18, at 112–13 (analyzing responsibility as constitutive of freedom and connected to property through freedom).

52. See WALDRON, *supra* note 16, at 307–08.

53. GREEN, *supra* note 33, at 7.

back at least to Biblical texts.<sup>54</sup> In modern versions of this tradition, some theorists have argued that a social obligation is inherent in the concept of ownership itself.<sup>55</sup> Other recent theorists have similarly argued that “[o]wnership entails not only the granting of rights but also the adoption of obligations.”<sup>56</sup> Moreover, these theorists have argued, “[s]ome obligations on owners of property toward nonowners are morally justified even when this entails some measure of sacrifice of self-interest.”<sup>57</sup>

The idea that owners owe responsibilities to their societies is a major theme in property theory in many legal systems. In Latin America, for example, there is an important tradition in property legal theory emphasizing the “social function of property.”<sup>58</sup> This tradition, whose origins are usually traced to the French legal theorist Léon Duguit,<sup>59</sup> views property not in terms of a right but rather as a social function.<sup>60</sup> Not only does the owner owe responsibilities to put the property to the service of the community, but also the state should protect property only to the extent that the owner fulfills this social responsibility.<sup>61</sup> This version of the social-responsibility theory goes considerably beyond that articulated by recent American property theorists, whose theory remains within the scope of liberalism.

### III. THE PUBLIC VALUES OF HUMAN FLOURISHING

This Part discusses some of the values that constitute the public dimension of human flourishing. Living a life that goes maximally well for each of us is not a strictly private or solitary endeavor. Part of the reason lies in our character as social beings. Another part lies in our inherent dependency on others for nurturing those capabilities that are essential to human flourishing. This dependency embeds each of us in various overlapping and sometimes shifting communities, including obvious ones such as families, co-workers, and friends, but also less obvious, more attenuated communities, such as neighborhoods, municipal communities, political communities, spiritual communities, and the like. Our

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54. See Peter W. Salsich, Jr., *Toward a Property Ethic of Stewardship: A Religious Perspective*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 21 (Charles Geisler & Gail Daneker eds., 2000).

55. See, e.g., HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 44 (2011); Alexander, *supra* note 4, at 748.

56. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 17 (2000).

57. *Id.* For a contrary view, see DAGAN, *supra* note 55, at 143.

58. See generally M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191, 207 (2010).

59. See UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 20, 31–33 (2000).

60. See Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003, 1004 (2011).

61. *Id.* at 1004–05.

embeddedness within, and dependency upon, these multiple and various communities means that human flourishing implicates another set of values, values that are usually considered public rather than private in character. This Part identifies five such public values. Part IV will then explain why these nominally public values are in fact internal to the private law of property and thus are constitutive of property's ends.

#### A. EQUALITY

Equality is, of course, a notoriously ambiguous term. I am using it here not in the sense of equality of resources or any material respect but in the Kantian sense of equal dignity. By virtue of our humanity alone, we are all entitled to being treated as moral agents of equal dignity and worthy of equal respect. A life characterized by degrading treatment and disrespect by others is not a life that can be said to go maximally well. A flourishing life means, if anything, one that is marked by those forms of treatment given to people whom others regard as ends rather than means.

There is a close relationship between the conception of equality that I am using here and community. Specifically, the idea of equality used here views the whole point of equality as living within a community in which everyone is treated with equal respect. Even more specifically, the community of equals is one that seeks to realize the political and moral ideal of non-subordination. It is a community that has no truck with social hierarchies or social stigmas that mark some individuals as inherently inferior to others. There are no social relations based on perceptions of inherent superiority and inferiority among people.

By contrast, the inegalitarian society, the society based on principles of subordination, is one in which the proper social order is regarded as a hierarchy of human beings, based on their intrinsic worth. From such a perspective, inequality refers, as Elizabeth Anderson puts it, "not so much to distributions of goods as to relations between superior and inferior persons."<sup>62</sup> In modern societies social ranking has many bases, including vestiges of slavery and imperialism, race, gender, caste, class, disability, ethnicity, and others. Equality-as-non-subordination means simply that all such bases of social ranking, in the sense of evaluating some human beings as inherently inferior to others, are illegitimate. The egalitarian community, then, is one in which all persons are treated as equals in this sense.

#### B. INCLUSIVENESS

Closely related to equality but distinct from it is inclusiveness. It means the opportunity to join with others in groups or communities for various reasons. If sociality characterizes the sorts of beings we are, then

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62. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 312 (1999).

inclusiveness—the opportunity to join and to belong—must be available to individuals in order for their lives to go maximally well.

The antithesis of this value is exclusion. There are, of course, many varieties of exclusion. I will mention only three here—social, political, and physical. Others are relevant to inclusiveness, but these three varieties of exclusion best illustrate my point.

Social exclusion occurs when individuals or groups are denied rights or opportunities that are normally available to all other members of society. Here we see the close relationship between inclusiveness and equality, for the grounds of social exclusion commonly coincide with bases of subordination, including race, ethnicity, religion, caste, and gender.

Social exclusionary practices may be formal or informal. Some are legally sanctioned, while others persist despite formal legal condemnation. Some are direct; others are more subtle. Lior Strahilevitz provides illuminating examples of these more subtle exclusionary practices in his study of what he calls “exclusionary amenities.”<sup>63</sup> Consider, Strahilevitz says, the effect of golf courses as an amenity offered in common interest communities during the 1990s. At the time, very few African Americans played golf,<sup>64</sup> so the golf course is a proxy for race. This has enabled developers of common interest communities to offer housing that effectively satisfies a preference for residential racial homogeneity. Similarly, real estate brokers continue to use a practice known as “red-lining” to steer African Americans away from certain urban neighborhoods to keep them exclusive or predominately in racial composition, even though federal statutory law has long since declared that practice illegal.<sup>65</sup>

By political exclusion, I mean the inability to participate fully in the political community as a result of barriers established, formally or informally, by the polity’s leadership or by its political culture. Many societies have practiced political exclusion through a variety of tactics, some straightforward, others quite subtle. Some forms of political exclusion have been tied to property ownership itself—and even where property ownership is not a condition of political inclusion, for example, it is not a condition of citizenship—non-ownership may still frustrate or impede effective political inclusion.

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63. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006).

64. During the period from 1994 to 1995, only 3.1% of all Americans who played golf were African Americans. See R. Jeff Teasley et al., *Recreation and Wilderness in the United States* 22 (Univ. of Ga. Dept. of Agric. & Applied Econ., Working Paper No. FS 97-13, 1997), available at <http://ageconsearch.umn.edu/bitstream/16643/1/fs9713.pdf>.

65. See generally Richard R.W. Brooks, *Covenants & Conventions* (Nw. Law & Econ. Research Paper Series, Research Paper No. 02-8, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=353723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=353723).



Physical exclusion refers to all forms of interference or obstruction that deny individuals or groups physical access to facilities or areas otherwise open or available to the public. Forms of interference or obstruction may be (indeed, commonly are) indirect, such as stairs for a person in a wheelchair. There may be no intent to exclude persons who are physically disabled or incapacitated in such cases, but the result is the same. Such persons are effectively excluded from fully participating as members of the broader community. They cannot experience the same sense of belonging that others experience. Even simple activities that fully abled persons take for granted, such as going to the movies, may be denied to someone lacking the capacity to walk or to climb stairs.

As I discuss in Part V, the relationship between inclusiveness and property is complex. In practice, private ownership has been ambivalent between inclusion and exclusion, in the three senses in which I am using the term exclusion here. Historically, of course, and indeed, still today, the reality is that private ownership has been used as a keenly effective mechanism for social, political, and physical exclusion. At the same time, however, property can be equally effective as a mechanism for inclusion, particularly social inclusion. As Eduardo Peñalver importantly observes, “private ownership can serve as a powerful vehicle for tying individuals more closely to their respective social groups.”<sup>66</sup> In this respect, the relationship between property and inclusiveness overlaps with the next public value that contributes to human flourishing—community.

### C. COMMUNITY

Like inclusiveness, community as an aspect of human flourishing grows out of our inherent sociality. The understanding of the socially rooted self means, among other things, that “the identity of the autonomous, self-determining individual requires a social matrix.”<sup>67</sup> Humans are inevitably dependent upon social groups, some chosen, some not, not only for their health and even survival, but also their very status as free and rational agents.<sup>68</sup> Communities are the mediating vehicles through which humans acquire the requisite capabilities to become free and rational agents. Moreover, as free and rational agents, humans never cease to operate within the matrices of multiple communities in which they find themselves throughout their lives.<sup>69</sup>

Unlike the utilitarian conception of community, which regards community in strictly instrumental terms, i.e., as a means to satisfy individual

66. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1940 (2005).

67. CHARLES TAYLOR, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 2, at 187, 209 (1985).

68. See Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 138–41 (2009).

69. *Id.* at 138–39, 143–44.

preferences, the Aristotelian conception views community as constitutive of the self. Community is necessary for the well-lived life because the self's very identity requires participation in social groups. Asked who we are, we invariably talk about the communities into which we were born and in which we were raised. We discuss our nation, our family, our friends, where we attended school, our religious community or similar groups, and social clubs. Indeed, individuals and their various and multiple communities interpenetrate each other to such an extent that they cannot be entirely separated from each other.<sup>70</sup>

The connection between property and community is probably clearest in Hegel, in whose work property stands squarely at the intersection between the individual and the state.<sup>71</sup> Hegel's theory established a constitutive relationship among private property, personal identity, and community. Hegel's greatest contribution to our understanding of property was to show not only how property anchors our free will in the actual world of objects but, more fundamentally, to explain how property does the work of establishing social relationships. The whole point of his theory of personality and freedom was to show how a person develops into a member of an ethical community in the actual world. Hegel believed that the will that is free for itself was intelligible only in the context of concrete human existence. As J.E. Penner states, "[f]reedom is situated in human society."<sup>72</sup>

The connection between property and community is hardly limited to Hegel. Utilitarianism, for example, recognizes the connection, albeit through a rather thin conception of community. According to utilitarianism's strictly instrumentalist account, community is valuable just insofar as it contributes to maximizing aggregate utility. It is never an end or value itself.

Hanoch Dagan provides a much richer account of community as one of property's important values. Dagan's conception of community is at once constitutive and liberal.<sup>73</sup> It is constitutive in the sense that "communities are important human goods exactly because they are so significant to the *identity* of individual people."<sup>74</sup> It is liberal insofar as it retains the right of members to exit from their communities and so preserves individual autonomy.<sup>75</sup>

As Part V discusses, community is a problematic value for property because of community's exclusionary character. "Communities by their very

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70. *Id.* at 138–39.

71. See Gregory S. Alexander & Eduardo M. Peñalver, *Introduction* to PROPERTY AND COMMUNITY, at xvii, xvii (Gregory S. Alexander and Eduardo M. Peñalver eds., 2010).

72. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 172 (1997).

73. See DAGAN, *supra* note 55, at 142–44.

74. *Id.* at 143.

75. *Id.* at 66–69.

nature exclude.”<sup>76</sup> This is the core dilemma that community poses for liberal property. Because of its inherently exclusionary character, community threatens to undermine other values that property serves, most conspicuously, inclusiveness. As I further discuss in Part V, human flourishing requires some means of mediating the tension between these values.

#### D. PARTICIPATION

The claim that participation is essential to the well-lived life is most commonly associated with Aristotle and with the republican tradition.<sup>77</sup> Within this theoretical tradition, participation means public participation—the *vita activa*. Participation as a public value need not be so narrowly defined, however. We can understand participation more broadly as an aspect of inclusion. In this sense participation means belonging or membership, in a robust respect. Whether or not one actively participates in the formal affairs of the polity, one nevertheless participates in the life of the community if one experiences a sense of belonging as a member of that community.

Formal citizenship alone is insufficient to confer on a person a sense of belonging. Citizenship rings hollow when one can legally be excluded from places that are generally open to the public or when one has no meaningful opportunity to express one’s opinion about issues that affect one’s daily life practices or when one is legally disempowered from participating in all of the society’s legal and social institutions (e.g., marriage). It was precisely to cover such situations that the term “second-class citizenship” was coined.<sup>78</sup> And it was precisely to eliminate such badges of second-class citizenship in the United States that statutes such as Title II of the Civil Rights Act of 1964,<sup>79</sup> the main federal public accommodations statute, were enacted.

Arguably, citizenship not only is not a sufficient condition of belonging; it is not a necessary condition either. In some cases, resident aliens, although legally barred from certain formal acts of participation, notably by voting, may experience a greater sense of belonging than some citizens. Resident aliens who are members of groups that historically have not experienced domination or oppression may feel more welcome in places open to the public and may be more robustly enabled to participate in the community’s

76. Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 52 (1989); see Jeremy Waldron, *Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQUIRIES L. 161, 188–92 (2009).

77. See, e.g., ARISTOTLE, *THE POLITICS OF ARISTOTLE*, *supra* note 12; POCOCK, *supra* note 19.

78. See generally Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267 (2011).

79. See 42 U.S.C. §§ 2000a, 2000a-6 (2006). On public accommodation laws and their relationship to property, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1450–77 (1996).

social practices. For example, in many respects life in the United States has been and to a considerable extent remains far easier for a Green Card-holding white citizen of the U.K. than for an African American. Aside from formal methods of political participation, more forms of participation in the life of the community may be open to such resident aliens than to African American citizens, especially in certain parts of the U.S.

#### E. SELF-CONSTITUTION

By self-constitution, I mean the identity and sense of purpose that a person constructs for his life. Another term that might be used is "self-interpretation." Self-constitution is closely related to the modern concept of personhood. It is not simply a psychological phenomenon but a moral value as well, for there are better and worse ways in which to develop and to interpret the self. This is why personhood is a moral concept, and in the same sense, so is self-constitution.

Self-constitution is not only a moral value but also a public value. This is so because, as Margaret Jane Radin observes, "self-constitution takes place in relation to an environment, both of things and of other people."<sup>80</sup> Radin continues, "This contextuality means that . . . social contexts are integral to the construction of personhood."<sup>81</sup> Charles Taylor puts the point somewhat differently. He states: "[L]iving in society is a necessary condition of . . . becoming a moral agent in the full sense of the term, or of becoming a fully responsible, autonomous being."<sup>82</sup> Self-constitution occurs in part through interactions with others; it is not solely an act of self-will. More specifically, it occurs as a dialogic process between the self and society.

Taylor has offered a nuanced account of this dialogical process. He contends that self-constitution is, in the first instance, a matter of self-interpretation, offering a conception of humans as "self-interpreting animals."<sup>83</sup> By that he means that the self is "[a] being who exists only in self-interpretation."<sup>84</sup> Individual selves, that is, are constituted, at least in part, by their own self-interpretations. Taylor adds, however, that these self-interpretations are not entirely a matter of our own doing. They are conducted in what Taylor calls "webs of locution." He explains: "The community is also constitutive of the individual, in the sense that the self-interpretations which define him are drawn from the interchange which the community carries on. A human being alone is an impossibility, not just *de facto*, but as it were *de jure*."<sup>85</sup>

80. RADIN, *supra* note 25, at 138.

81. *Id.*

82. TAYLOR, *supra* note 67, at 191.

83. CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS I, at 45 (1985).

84. *Id.* at 3.

85. *Id.* at 8.

The dialogical character of self-constitution explains why it is a public (or social) value as well as a private value. Indeed, self-constitution clarifies why a strong opposition between public and private is so misleading. The self is both constituting and constituted: Both the private and the public realms are necessary for the constitution of the self.

#### IV. WHY, WHICH, AND WHEN PUBLIC VALUES ARE AMONG PROPERTY'S ENDS

We live in multiple worlds. We inhabit worlds of the family, the home, the workplace, the market, the political arena, and other realms of human activity, and each of these realms may have multiple sub-realms. The world of politics, for example, for some people may include sub-realms ranging from the blogosphere to the union hall to a neighborhood civic association. These multiple worlds are not always distinct—commonly, they overlap with each other. The worlds of the home and politics, for example, may overlap with each other if, for example, a person lives in a condominium that is regulated by an owners association. The worlds of the family and the market sometimes overlap; think of family-owned businesses, for example. Our multiple worlds of activity commonly overlap with and blend into each other such that we cannot realistically isolate one from the other, each with its own discrete set of values.

The overlapping and blending of our multiple worlds means that there is no separating, in any sort of categorical fashion, the public and private spheres, with their attending sets of values, from each other. When the different sets of values that attend different realms of human existence, public and private, encounter each other, conflicts between or among private and public values will sometimes occur. We cannot always avoid such conflicts between or among multiple relevant values by simply assigning values to separate “spheres of justice”<sup>86</sup> or separate institutions.<sup>87</sup> We do not live our lives so neatly compartmentalized as to permit that.

Encounters between public and private values are not bound to produce conflicts, however. This is the point on which I wish to focus in this section: how human flourishing depends upon both public and private values. More specifically, the discussion in this Part focuses on how the private values that are property's ends require values that are usually regarded as public for their realization. Hence, encounters between private and public values, far from producing conflicts, involve mutually supportive engagements such that the relationships between private and public values are symbiotic.

The upshot of this symbiotic relationship is that many nominally public values, including the values discussed in Part III, are internal to private law

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86. See generally MICHAEL WALZER, SPHERES OF JUSTICE (1983).

87. See DAGAN, *supra* note 55, at 72–74.

and are constitutive of its ends.<sup>88</sup> Because of our overlapping social spheres, which implicate both the public and private, values such as equality and community have a Janus-faced character. They operate in both realms, being neither exclusively public nor private. When they work in tandem with more strictly private values, such as personal autonomy, they properly belong among private law's ends. When courts draw upon these values in adjudicating disputes between private parties, they draw upon private law's internal resources rather than impose values that are exogenous to private law.

At the same time, values that are usually considered to be public in character do not always function in this way. Values such as equality and community are internal to private law and are among property's ends just insofar as they are necessary to enable other, conventional private law values to be realized. To the extent that conventional public values are not needed to enable fulfillment of one or more traditional private law ends, then those values remain exogenous to private law.

Just what does it mean to say that fulfillment of a traditional private law end requires one or more conventional public values? Consider first the private law value of individual autonomy. Every major liberal theory of property gives special place to autonomy as a justification for private property rights. Two theories—Kantianism and libertarianism—identify it as property's foundational end. Even utilitarianism and its modern variant, welfarism, indirectly recognize the special contribution of personal autonomy to overall social well-being, whether defined in terms of utility or wealth. No one would dispute that autonomy is at least *a* component of property's ends.

But autonomy is not self-realizing. We are not born as autonomous agents. We depend upon others to help us develop those capabilities that enable us to function as independent practical reasoners. As Alasdair MacIntyre states, "To become an effective independent practical reasoner is an achievement, but it is always one to which others have made essential contributions."<sup>89</sup> We enter the world utterly dependent on others for our physical survival, but our dependence on others doesn't end with infancy or even with childhood. Even upon reaching adulthood, we continue to place at least partial physical dependence (and even emotional or psychological dependence) on others as we move through a dangerous world. Often, little more than dumb luck separates the independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence once again looms ever larger.

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88. See Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809 (2008); Hanoch Dagan, *The Public Dimension of Private Property* (Apr. 20, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2045487>.

89. MACINTYRE, *supra* note 13, at 82.

Our dependence on others to develop autonomy goes beyond sheer physical dependence. MacIntyre observes:

What we need from others, if we are . . . to develop the capacities of independent practical reasoners, are those relationships necessary for fostering the ability to evaluate, modify, or reject our own practical judgments, to ask, that is, whether what we take to be good reasons for action really are sufficiently good reasons, *and* the ability to imagine realistically alternative possible futures, so as to be able to make rational choices between them, *and* the ability to stand back from our desires, so as to be able to enquire rationally what the pursuit of our good here and now requires and how our desires must be directed and, if necessary, reeducated, if we are to attain it.<sup>90</sup>

This kind of nurturing and this sort of capability development is carried out through communities, through networks of family members, friends, teachers, and others who constitute the multiple social spheres of our lives. Individual autonomy can be acquired only within a vital matrix of social structures and practices. Its continued existence and exercise depends upon a richly social, cultural, and institutional context, and the free and autonomous individual must rely upon others to provide this context.

Communities are the mediating vehicles through which we come to acquire the capabilities we need to flourish and to become fully socialized into the exercise of those capabilities. As free, rational persons, we never cease to operate within and depend upon the matrices of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense to others with whom we are connected as members of one or typically more communities. Our identities are literally constituted by the communities of which we are members. Asked who we are, we inevitably talk about the communities where we were born and raised, our nation, our family, where we attended school, our friends, our religious communities, and clubs. Indeed, individuals and communities interpenetrate one another so completely that they can never be fully separated.

If autonomy depends upon community for its realization, the opposite is true as well. That is, community requires personal autonomy as well. Hanoch Dagan has written persuasively about the important role that individual autonomy plays in realizing a conception of community that avoids oppression. "This conception [of community]," Dagan writes, "is premised on the insight that communities are important human goods exactly because they are so significant to the *identity* of individual people."<sup>91</sup>

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90. *Id.* at 83.

91. DAGAN, *supra* note 55, at 143.

Dagan points out that for community and autonomy to work together in this mutually supportive fashion, “members’ identification with [their] communit[ies] and their commitment to [the communities’] goals should never erase their individual identity.”<sup>92</sup> When community denies personal autonomy by erasing individual identity it inhibits rather than promotes human flourishing. A person whose community denies her personal autonomy cannot develop the capability for independent practical reasoning, which is essential to a well-lived life.

Consider another private value commonly given prominent place in property theory—personal security. One reason why the right to exclude looms so large in discussions of what private ownership involves is the intuition that private ownership of property protects people insofar as they have the right to exclude others out from their personal dwelling. “A man’s home is his castle” expresses an aspiration of security, among other values. The connection between property and personal security applies not only to land, but also to money and intangible forms of property as well. For personal security includes financial security as well as physical security.

Like autonomy, personal security cannot be fully realized in isolation from other values, including public values. Consider the relationship between personal security and equality. Though hardly apparent at first glance, the relationship between the two values is in fact mutually dependent, as the relationship between autonomy and community is. If we understand equality in terms of non-domination or non-subordination, then the relationship between personal security and equality is perhaps more readily perceived.

To illustrate the relationship, imagine a married woman whose husband routinely beats her after returning home from a night of drinking. This is, unfortunately, not just a story but the all-too-real existence of many women around the world. Why do they not leave their husbands, people often ask. Especially with respect to women in the advanced countries of the West, where unmarried women are ostensibly less encumbered by cultural taboos and other restrictions, people often find it difficult to understand why married women in such circumstances remain with abusive men. The answer, or at least part of the answer, I think, lies in the link between personal security and equality, or in this context, between personal insecurity and inequality. Women in abusive marriages often do not leave their husbands because they feel unable to do so; they feel trapped and tied to their abusers, unable to free themselves.<sup>93</sup>

Such women are paradigmatic examples of what I mean by having unequal status, or living unequally. Their marriages are characterized by

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92. *Id.*

93. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61–63 (1991).



domination.<sup>94</sup> Their husbands have effectively subordinated them in a deep and profound sense that bears some resemblance to a master–slave relationship. In such a relationship, the woman can hardly feel physically secure. Part of what personal security means in a relationship is the knowledge that one’s partner will treat one with respect in a physical sense. Personal security is meaningless within a relationship in which one is dominated in multiple respects, including physically, by the other.

Relationally, security requires equality among the parties to the relationship. It may also require equality in a financial sense as well, depending upon the relationship. Consider marriage again. Hanoch Dagan insightfully analyzes marriage as an “egalitarian liberal community” that brings together three values—community, autonomy, and equality.<sup>95</sup> Dagan’s conception of equality reflects the same notion of non-subordination that I have used here,<sup>96</sup> but he also uses an equality-of-goods conception when he analyzes marital property law. Regarding that law, he argues, “[t]he core of the[] background rules [should be] the rule of equal sharing of the marital estate broadly defined.”<sup>97</sup> The reason he gives for this core rule reveals the connection between equality-of-resources and security. Dagan states, “[t]his rule aims to ameliorate the intrinsic vulnerability that is an inextricable part of long-term relationships of trust and cooperation.”<sup>98</sup> What Dagan refers to as “the inevitable vulnerability” is what I have been discussing in terms of personal insecurity. Dagan seems correct in arguing that vulnerability goes with the territory in any relationship of trust and cooperation. But vulnerability—personal insecurity—is a matter of degree, and in relationships of inequality, in the sense of power subordination or resource imbalance (or both), there is a good deal more vulnerability than where the parties deal with each other as equals operating at arms-length from each other, as in a long-term contract between two merchants. Vulnerability and inequality go together, hand-in-glove. This is why equality, a public value, is necessary for the realization of personal security, one of property’s important private ends.

The dependency of security on equality is empirical, not conceptual. It is conceivable that there are or have been unequal relationships in which the subordinated party enjoys personal security. Hierarchical social relationships do inherently create vulnerability, but the dominant party may not exploit that vulnerability. If it is not, personal security is possible. To be sure, this is a somewhat tenuous form of personal security insofar as there remains a risk that the dominant party will take advantage of the

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94. See *id.* at 53–60; see also James Ptacek, *Why Do Men Batter Their Wives?*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 133, 155 (Kersti Yllö & Michele Bograd eds., 1988).

95. DAGAN, *supra* note 55, at 200.

96. See *id.* at 206.

97. *Id.* at 208.

98. *Id.*

opportunity to exploit. But some degree of vulnerability is always irreducible, even under conditions of equality. I may become the victim of a bad person or a tragic accident. A standard of no vulnerability for personal security is too demanding to be realistic or workable. As an empirical matter, however, it seems plausible to suppose that the degree of vulnerability increases substantially for subordinated or dominated persons.

Facilitation between security and equality works the other way around as well. That is, personal security promotes equality (again, as non-domination). Equality between persons in which one party is subject to ongoing harm or degradation of some sort (or the threat thereof), such as through physical or emotional abuse or massive financial loss, seems false. A relationship between two equals is one that is between two individuals each of whom can, speaking metaphorically, stand on her own two feet.<sup>99</sup>

In general terms, the public values contribute to, indeed are part of, property's ends because of the kind of beings we are. If we understand, as Aristotle does, our character as social animals, then any conception of human flourishing that draws upon an interpretation of human character, as mine does, must likewise emphasize the social dimension of human flourishing. This means that human flourishing cannot be strictly a private matter, a matter of becoming an autonomous agent who enjoys personal security and is self-determining in isolation from particular communities and from society more broadly. From the neo- (or quasi-) Aristotelian perspective, human flourishing, affected as it is by the social character of human beings, must itself be a social as well as an individual matter. Moreover, human flourishing is not a matter of simply the two dimensions—the social and the individual—together; rather, it is a matter of those two dimensions inevitably working together in mutually supportive ways. This is why the public values, which are the values that attend the social dimension, must be part of property's ends along with the private values. Let me unpack this theory a bit with some preliminary observations and assumptions that I need to acknowledge but cannot defend here.

First, in arguing that what human flourishing involves is affected by human character, the neo-Aristotelian approach taken here should not be understood as reductive or essentialist. It is important to emphasize that the approach does not adopt an essentialist theory of human nature. It does not assume that there is some inner "me" that is waiting to be "discovered." Nor is it premised on a physicalist version of natural law. Rather, it is premised on an interpretive rendering of the human condition, a hermeneutic approach to understanding what makes us human. This account at once

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99. One might imagine a relationship between two individuals who both are insecure in some relevant sense, say, between two battered women who seek each other's company for solace. Wouldn't such a relationship be one between equals? This is a false sense of equality, it seems to me. It is a relationship between comparables, but not between equals.

emphasizes our individuality and our position within a society. These two characteristics of the human condition—autonomy and membership—are not opposed to each other but mutually constitutive. They are so through a process that is best termed “dialogical.” We need dialogue and interaction with others in order to constitute and to understand ourselves. There is no end to this dialogue, no final self that, once constituted or discovered, remains unchanged.

Although what human flourishing involves is based on an understanding of the human condition, that understanding does not dictate the terms of human flourishing. That is, it does not specify what values must be included on any list of human flourishing. Still, although an interpretation of the human condition does not dictate the specific content of human flourishing, it does set the boundaries of the contents and limits of human flourishing.<sup>100</sup>

The neo-Aristotelian understanding of the human condition adopted in this Essay emphasizes the social character of human beings. This view contrasts sharply with the conception of the human condition that lies at the heart of the classical social contract tradition. The basic premise of social contractarianism is the idea that, at least in theory, there exists a pre-social, rational human agent who is capable of entering into a contract.<sup>101</sup> When Aristotle said, “The man who is isolated—who is unable to share in the benefits of political association, or has no need to share because he is already self-sufficient—is no part of the polis, and must therefore be either a beast or a god,”<sup>102</sup> he was expressing the fundamentally opposed view that we are always-already socially situated.<sup>103</sup>

Our lived experience and our own observations give us good reasons to think that Aristotle was right and to reject the social contractarian view of the human condition. As I have already indicated, autonomy is not self-realizing. In our own lives, we do not possess from infancy the capabilities that are part of what it means to be an autonomous agent. We *learn* those

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100. See Rasmussen, *supra* note 11, at 32.

101. The social contractarian view of the human condition is one that emphasizes the isolated character of each person. This latter interpretation of the human condition was perhaps most evident in the doctrines of some of the classical social contract theorists (e.g., Hobbes) and their successors, a conception that often goes today under the infelicitous term “atomist.” Atomism presents a view of human nature that stresses the self-sufficiency of individuals. See TAYLOR, *supra* note 67, at 189. In this context, self-sufficiency refers not to the ability of a person to survive alone in the Great Wilderness, but to the question whether living in society is a necessary condition for the development of rationality and of becoming a morally responsible, autonomous agent. Atomists deny that it is. See *id.* at 190–91. On this view, society logically succeeds the individual; that is, society is a creation of the individual, who created it for the sake of his convenience and self-interest.

102. ARISTOTLE, *THE POLITICS OF ARISTOTLE*, *supra* note 12, at 7.

103. See Josh Chafetz, *The Political Animal and the Ethics of Constitutional Commitment*, 124 HARV. L. REV. F. 1, 6–7 (2011).

abilities from others, not only in the home, but in school, at play, and, as we grow older, in continually widening social circles.

In all of these experiences, it is not only private values that are at work. Because we are socially situated, human flourishing must include values which themselves are social or public in character. The measure of a well-lived life cannot be taken in terms of the individual in isolation from others. The values of the private sphere are not sufficient to provide a complete account of what exactly it means and what exactly is required for each member of this most social of species to flourish in its characteristic way. A full account requires inclusion of the public sphere as well. Indeed, as I have already suggested, the two, being mutually supportive, can hardly be separated when discussing human flourishing.

## V. PUBLIC AND PRIVATE TOGETHER: TWO EXAMPLES

To illustrate the ways in which public and private values that constitute human flourishing are symbiotic, this Part discusses two topics that have prompted considerable controversy in property legal literature within the past several years: the right of owners to exclude others and the enforceability of homeowner association rules.

### A. THE RIGHT TO EXCLUDE: AUTONOMY AND SELF-CONSTITUTION

One of the more vibrant debates among property legal theorists in recent years has been the role and scope of the right to exclude.<sup>104</sup> Some scholars have argued that the right to exclude is essential to the concept of ownership.<sup>105</sup> Some have even contended that it is the *sine qua non* of ownership.<sup>106</sup> Other scholars have argued that although the right to exclude is important, it is only part of the complex core of ownership.<sup>107</sup>

Regardless of the centrality of the right to exclude to ownership, the right to exclude illustrates how property law's private ends require public values to be realized. Virtually all property theorists agree that chief among the private values that support the right to exclude is individual autonomy, specifically personal autonomy.<sup>108</sup> As Joseph Raz puts it, "the ruling idea behind the ideal of personal autonomy is that people should make their own

104. See, e.g., Alexander, *supra* note 4, at 747, 801-10; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

105. See, e.g., PENNER, *supra* note 72, at 68; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278-79 (2008); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454-55 (2002).

106. See Merrill, *supra* note 104, at 752.

107. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 130-55 (2012); SINGER, *supra* note 56, at 39-44; LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 85-87, 89-90 (2003); Alexander, *supra* note 4, at 801-10.

108. On the distinction between personal autonomy and moral autonomy, see DAVID JOHNSTON, THE IDEA OF A LIBERAL THEORY: A CRITIQUE AND RECONSTRUCTION 72-79 (1994).

lives.”<sup>109</sup> The autonomous person is the creator, at least partly, of the course of her own life, controlling it by making a series of decisions about how her life should go. On this view, these decisions all need to cohere with a comprehensive life plan. People change their minds, develop different tastes, and even entertain conflicting preferences. The point of personal autonomy is that all of these ideas, tastes, and preferences are the creations of the person who holds them.

The close relationship between private ownership and the right to exclude more specifically is easy to see.<sup>110</sup> As James Penner puts it, “the freedom to determine the use of things is an interest of ours in part because of the freedom it provides to shape our lives.”<sup>111</sup> Penner provides one way of linking the right to exclude with personal autonomy.<sup>112</sup> In Penner’s analysis, the link between freedom to use and freedom to shape our lives further establishes the link between the right to exclude and autonomy, or individual freedom. The right to use and right to exclude are, in his terms, two sides of the same coin. As Penner explains, “[T]he natural link of the right to exclude with use is simply that rightful exclusion of someone from a thing will always be purposeful, i.e. having some purpose in respect of the use to which the thing will be put.”<sup>113</sup> At a minimum, it seems safe to say that if we are able to use things exclusively, those things can be valuable tools with which we can shape our lives, which is the very meaning of personal autonomy. To the extent, then, that a “simple robust morality supporting exclusion rights”<sup>114</sup> exists, personal autonomy is surely part of that morality.

The familiar Tragedy of the Commons scenario<sup>115</sup> illustrates the connection between personal autonomy and the right to exclude. Here is the scenario:

Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . .

109. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

110. On the relationship between property and liberty in classical liberalism, see ALAN RYAN, *PROPERTY* 35–49 (1987). On the relationship between autonomy, or liberty, and the right to exclude, see PENNER, *supra* note 72, at 49–59.

111. PENNER, *supra* note 72, at 49.

112. I neither endorse nor reject Penner’s argument here. My purpose is simply to illustrate one, albeit quite interesting, path to establishing the link between personal autonomy and the right to exclude.

113. PENNER, *supra* note 72, at 70.

114. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1852 (2007).

115. The *locus classicus* citation is, of course, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). See also H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954) (applying common-property theory to the fishing industry).

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility *to me* of adding one more animal to my herd?" This utility has one negative and one positive component.

- 1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.
- 2) The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsman, the negative utility for any particular decision-making herdsman is only a fraction of -1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy.<sup>116</sup>

Hardin depicts the tragedy in utilitarian terms, but it is also a tragedy in terms of personal autonomy, as he implicitly acknowledges. For not only does aggregate society lose, but each individual herdsman suffers a loss of personal autonomy with respect to the use of his cattle. True, in a superficial sense he is free to choose whether to add another animal to the common for grazing or desist from doing so in order to avoid overgrazing. But in a deeper sense he does not have robust autonomy over this choice because the inexorable logic of rational self-interest compels him to add another animal. The right to exclude would free each herdsman from that logic and provide him with robust autonomy. For then each herdsman would be free to decide what use of every animal he owns and what use of his portion of the pasture best fulfill the goals he has set for himself, without any interference from others.<sup>117</sup>

This scenario of complete personal autonomy secured solely through the right to exclude is radically incomplete, however. The right to exclude alone does not enable individuals to realize their own autonomy. What connects the right to exclude with personal autonomy are certain social arrangements, arrangements over which the individual does not have sole control. For example, as other property theorists have pointed out, neither Hardin nor any of the other early theorists of the Tragedy of the Commons explained how a group would change its ownership from a commons to

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116. Hardin, *supra* note 115, at 1244.

117. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354-58 (1967).

individual ownership with a right to exclude.<sup>118</sup> Such a shift is a social endeavor, requiring the consent of all members of the group. To be fully realized, autonomy requires cooperation, a social, or public, value. The shift from the commons to exclusive individual ownership cannot get off the ground without social cooperation.

The same holds true of enforcement of the right to exclude. Suppose that herdsman *A* owns, and owns exclusively, a parcel of grazing land. He also owns, exclusively, a herd of cattle. What prevents other herdsmen from grazing their cattle on *A*'s land or stealing his cattle? How can *A* enforce his right to exclude them from his land? *A* might use self-help measures, of course, but self-help can be costly. Not only must *A* erect fencing completely around his land to keep his cattle in and others out, but he must police that fencing periodically. It would be far cheaper for *A* if he could rely on a collective system of enforceable rules, either as a supplement to self-help or as a replacement for it, perhaps where the risk of a breach of the peace is substantial. Such an enforcement system, like the creation of exclusion rules, requires cooperation, a social value.

We can broaden this point about the right to exclude: The right to exclude is meaningless, that is, it is conceptually incoherent in social isolation. It acquires meaning only in the context of social relationships.<sup>119</sup> The right to exclude is the hole in the doughnut. It exists only when placed in the context of a society whose members are potential users of scarce resources that others wish not to share for various reasons.<sup>120</sup> Remove those members and the need for the right to exclude, indeed, the very intelligibility of such a right, disappears. In this sense, the right to exclude conceptually depends upon society.

The point can be pushed more deeply. For the private law value that is commonly thought to support the right to exclude—personal autonomy—itsself depends upon social and public values for conceptual coherence. Specifically, personal autonomy, if we understand it as the capacity to shape our own lives, requires and rests upon self-constitution as a public value. The remainder of this section explains and defends this claim.

Recall that personal autonomy means that a person is able to shape his own goals and to make his own decisions about which available options will make his life go best for him. No one makes such choices in complete isolation from others from birth through death. Everyone to varying degrees depends on others for help in shaping those goals and making those choices. The forms that such help take and the people from whom it comes

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118. See James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 336–38 (1992).

119. Cf. Demsetz, *supra* note 117, at 347 (“In the world of Robinson Crusoe property rights play no role.”).

120. Cf. PENNER, *supra* note 72, at 70 (“The right to use something so long as no one else was using it or wanted to use it is equivalent to having no right of exclusion whatsoever.”).

vary widely from person to person. Moreover, for each person, the forms and sources of such help also vary over the course of our lives. We are not always aware of this help, so it sometimes comes not only unrequested but so subtly that we scarcely, if at all, notice. The sorts of help that I have in mind range from the obvious, such as sustenance, care, training, companionship, and other assistance from parents, teachers, friends, and neighbors, to educational and career advice that parents and mentors give us, to less conspicuous examples, such as political leaders who support legislation that enables us to receive education or job training and others who make decisions that present us with options otherwise unavailable to us, whether we take advantage of those options or not. It is hard to imagine any single choice or decision made during our lives that has not been influenced, if not directly aided, by someone. Autonomous choices are always nested in webs of social relationships. Truly individual choices do not exist.

Autonomy depends upon a richly social, cultural, and institutional context for the presence of which the autonomous individual must rely on others. From this perspective, another public value that both complements and supports personal autonomy is membership. Individuals become autonomous agents through membership in various social groups throughout the course of their lives. The identity of the groups to which individuals belong changes over time, but at no point in a person's life is he not a member of some group, usually many groups. Individuals are inevitably dependent upon membership in groups, both chosen and not chosen, to develop as free and rational agents. Personal autonomy is not inherited; it is learned. We are not born as autonomous agents; rather, we develop as autonomous beings through help from fellow group members.

At this point we can see how autonomy, a private value, draws support from self-constitution, a public, or social, value. Earlier I defined self-constitution as the identity and sense of purpose that a person constructs for his life.<sup>121</sup> Self-constitution is the process of interpreting oneself within a social context. Because self-constitution always occurs within a social context, it is dialogical in character.<sup>122</sup> This is why autonomy cannot be adequately understood apart from self-constitution.

So, how does this conception of personal autonomy as acquired through dialogical self-constitution rather than inherited in isolation of others relate to the right to exclude? There is always a tension in the process of developing as an autonomous person: On the one hand, autonomy depends upon being nested within various social groups; on the other hand, the very fact of being so situated, i.e., within groups of other individuals, itself creates a risk that our choices, or at least some of them, will be

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121. See *supra* Part III.E.

122. See *supra* Part III.E.



coerced, negating autonomy.<sup>123</sup> The right to exclude mitigates this risk. As James Penner has explained, the right to exclude is best understood in negative terms, i.e., in terms of the in rem duties of others not to interfere with one's property.<sup>124</sup> This way of thinking about the exclusion right has the salutary effect of forcing attention on others rather than viewing the right to exclude in social isolation. The right to exclude places duties on our fellow members of the various groups to which we belong, however loosely, not to interfere with the choices we make about the use of our property. It reflects a conception of self-constitution that assures that the dialogic process of self-constitution supports rather than undermines personal autonomy. It does so by defining limits, vis-à-vis our property, on our fellow members' interactions with us to assure that those interactions only contribute to or enable the development of our autonomy, or at least that their interactions with us do not undermine our autonomous development. When asking, then, whether another person who has had some interaction with an owner in the use of her property, the relevant question to ask is always, does that person's interaction promote the owner's autonomous development or does it undermine it (or at least pose a significant risk of doing so)?

To see the effect of asking that question in different contexts, consider first a simple hypothetical based on ordinary trespass law. Suppose that you walk to work every day. The quickest and easiest route is to walk across a back section of the lot on which my house, which is my only residence, is located. There is another route you could take, one that involves no trespassing, but it adds ten minutes to your walk. Besides, you think, the section of my lot that you cross is apparently unused, and your walk would be, as far as you can tell, unobtrusive. Should I, as the owner, nevertheless, be able to exclude you from walking across my property? The law of trespass says yes, and this is plainly the correct answer. Your use of my land, however seemingly minimal, poses a non-trivial risk of undermining my development as a person who is able to make and carry out his own options. Even putting aside the risk that your continued use of my land as a right-of-way might ripen into an easement of way, your use removes certain options that would otherwise be open to me. If I cannot exclude you, I no longer have the freedom, as the owner, to use that portion of my land as a garden or for other development purposes. Your use has reduced my personal autonomy.

The right to exclude operates as a means of establishing a limit on the social dimension of self-constitution such that self-constitution promotes rather than impedes personal autonomy. It is particularly strong in circumstances like my example where the property upon which the trespass has occurred is the owner's home. This situation involves another private value, closely related to personal autonomy—personal security—and the

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123. See RAZ, *supra* note 109, at 371.

124. PENNER, *supra* note 72, at 72–73.

need to assure that self-constitution promotes rather than impedes personal security is especially strong.

The same concern explains the result in the well-known right-to-exclude case, *Jacque v. Steenberg Homes, Inc.*<sup>125</sup> In that case, home owners, Lois and Harvey Jacque, sued Steenberg Homes for damages for intentional trespass to the Jacques' land.<sup>126</sup> Steenberg delivered a mobile home by plowing a path across the Jacques' snow-covered field despite strenuous protests from the Jacques.<sup>127</sup> Although other means of accessing the delivery location were available, Steenberg used the path across the Jacques' land because that was the easiest route for it. The jury awarded the Jacques \$1 in nominal damages and \$100,000 in punitive damages. On appeal, the Wisconsin Supreme Court held that if a jury awards nominal damages for intentional trespass, the jury may also award punitive damages. The Jacques had good autonomy-based reasons for excluding Steenberg Homes. If home-dwellers are to feel secure in their own homes and to be uncoerced in making decisions regarding what uses of their land will make their lives go best for them, they must be free of intentional trespass. There are exceptional situations, of course, such as the need for police or fire fighters to access a person's home in case of emergency, but the owner is not likely to object to entrance upon her property under such circumstances.

Contrast *Jacque* with the famous Civil Rights Era "Lunch Counter" cases.<sup>128</sup> In those cases, young African Americans were arrested for and convicted of criminal trespass when they refused to leave restaurants after being requested to do so solely because of their race. The alleged trespassers, who were protesting "whites-only" practices at lunch counters in Southern retail stores, had asked to be served lunch but were refused and were asked to leave. The defendants appealed their convictions arguing that the convictions violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The cases raised the question whether state action was involved or whether the discrimination was strictly private. In each case the Court found state action.<sup>129</sup>

Would such cases be decided differently under the common law? Would they be viewed the same as *Jacque*, with the restaurant owner having the right to exclude anyone for whatever reason? Although there certainly are older decisions that indicate otherwise,<sup>130</sup> I suggest that it would be possible for a

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

126. *Id.* at 156.

127. *Id.*

128. See *Bell v. Maryland*, 378 U.S. 226 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

129. Racial discrimination in restaurants is prohibited today under federal public accommodation statutes. See 42 U.S.C. § 2000a (2006).

130. See Singer, *supra* note 79, at 1351-52.

court to hold that a restaurant owner does not have the right to exclude for racially discriminatory reasons (or other reasons based on grounds of invidious discrimination) under the private law of property. The public values that nurture property's private values push against the freedom of owners of restaurants that are otherwise open to the public to exclude members of the owners' communities because of their race. Because the owners have otherwise opened their restaurants to the general public, the owner's personal security is not at stake in this situation. Admitting African American patrons in no way adds to the risk of the owners' security beyond the level of risk that the owners have already voluntarily accepted.

More fundamentally, the public value of self-constitution, which is necessary for personal autonomy, resists recognition of the owners' right to exclude under these circumstances. I said earlier that self-constitution—the process of interpreting oneself within a social context—is always dialogical in character. I also said that self-constitution's social dimension poses a risk of undermining rather than promoting personal autonomy and that the purpose of the right to exclude is to mitigate that risk. Where the interaction between the owner and others is already in a social and public setting, one that the owner has created, the owner has already assumed that risk by creating the setting. In that situation, the right to exclude cannot perform its risk-mitigation function. Requiring that the owner admit to his restaurant patrons who he would otherwise admit but for their race does not undermine his personal autonomy in any meaningful sense. He has already made choices about his goals with respect to the use of his property, choices that are immediately relevant to his right to exclude in this circumstance. Hence, it is quite arguable that the public accommodation cases such as these could have been decided the same way as they were on private law grounds as by relying on constitutional or statutory provisions.<sup>131</sup>

#### B. THE ENFORCEABILITY OF HOMEOWNER ASSOCIATION RULES

Let us return to the case with which we began in the Introduction—Donald Lamp and his American flag. What private and public values are at stake in this dispute? Mr. Lamp expressly contracted not to display any flags outside his apartment. He freely accepted a restriction on his freedom as a homeowner that imposed on him certain obligations to members of his residential community. Such a contractual obligation implicates a private value that is central to property, namely, personal responsibility. This value subsumes the legal principles surrounding freedom of contract and contractual obligations, for, as the earlier discussion of this value indicated,<sup>132</sup> personal responsibility includes specific obligations that

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131. Cf. Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993 (1989).

132. See *supra* Part II.E.

individuals owe to others. Personal responsibility, then, obviously plays a prominent role in disputes of this kind.

At one level, disputes such as Donald Lamp's seem easily resolved by looking at the matter through the lens of personal responsibility with its concomitant legal principle of contractual obligation. Lamp signed an agreement expressly restricting his freedom to display flags publicly, and he is responsible for that contractual commitment. Yet if we examine the matter a bit more deeply, it becomes apparent that personal responsibility does not exhaust the list of private law values that are at stake in Lamp's dispute. For personal autonomy seems just as obviously involved in the controversy. As I have already discussed, personal autonomy means being the creator of one's own ideas and preferences. To be sure, it does not mean being immune from all involvement by others in one's affairs; that is an impossible situation. But it does mean that one's plans, ideas, beliefs, and so on, are one's own, and not coerced by others.

One can certainly point out that, by signing the deed that included the restrictive covenant, Mr. Lamp freely chose to restrict his own autonomy with respect to displaying flags outside his apartment. From that perspective, personal responsibility trumps any view of personal autonomy that suggests tension between the two values in this case. Yet closely related to personal autonomy in this situation is yet another value—self-expression. Sometimes it is not enough simply to hold views that are the creations of one's own making; one feels compelled to express those views. On these occasions self-expression supports, and even extends, personal autonomy. Lamp held deeply personal beliefs and chose to use his position as homeowner to express those beliefs publicly. The American flag symbolized beliefs that Lamp considered expressive of his identity, and he wished to communicate those beliefs with his neighbors in a particularly prominent and effective way. Self-expression is an important value that does not merely augment autonomy, but also enables the exercise of autonomy. From that perspective, autonomy alone cannot justify Lamp's waiver of self-expression.

One possible basis for justifying waiver is freedom of association. Homeowner associations, like other voluntary associations, rely on freedom of association for their integrity and, ultimately, their existence. If we lack the freedom not only to choose the persons with whom we associate, but also the ground rules by which our association abides, we cannot truly realize our social character.

The connection between freedom of association and human sociability suggests that freedom of association implicates a deeper value—community. Conceptually, community is relevant here as a value, a regulative ideal, and as a sociological phenomenon.<sup>133</sup> As a regulative ideal, community operates as a norm by which relationships may be regulated and something that we

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133. See Alexander & Peñalver, *supra* note 71, at xvii, xxviii–xxix.

experience in our actual lives. Community is also a sociological concept. In this sense it describes a group mode of living and social interaction with others with whom we share particular interests and values. Homeowner associations are frequently identified as communities in this latter, sociological sense. Common interest developments often stress the club-like quality of their living experience, explicitly emphasizing their group-like character.<sup>134</sup>

As a value, community is essential to human flourishing, intimately connected with our inherent sociality. As I indicated earlier,<sup>135</sup> community is constitutive of the self. It is necessary for the well-lived life because the self's very identity requires participation in social groups. In its relationship to freedom of association, community seemingly serves a private function, but community has two dimensions, public as well as private. Community expresses relationships among humans that are at once individual and social: *individual* because one does not sacrifice personal autonomy or self-identity by entering into relationships, and *social* because self-identity requires participation in social groups. Such relationships are relationships that are voluntarily created by free and equal moral agents who wish to enter into sharing experiences with others to enable their own lives to go well, i.e., to flourish.

At the same time, community, both as a value and as a social institution, has a second dimension, one that is public in nature. As a social institution, communities are nested, one within the other, including the state. Recognition that the state is a community illuminates the fact that, in its role as a social institution, community is both public and private. The same holds true for community as a value. In this respect, community, as a value, is like self-constitution, which, as we saw earlier,<sup>136</sup> also has both an individual and a social dimension. Community's public side regulates the external relations of communities as institutions, that is, their relations with each other, especially the larger communities of which it is a part. The most important of these larger communities is the state, for the state facilitates these smaller communities through its rules of private ordering and fundamental norms respecting rights of association, assembly, and the like.

The general point is that the categories of public and private are unhelpful with respect to community. The line between them is as porous as it is with respect to all of the values underlying property. Both institutionally and normatively, community operates in a Janus-faced fashion, always looking inward to itself and yet outward to the increasingly larger spheres of social life with which it is inextricably enmeshed.

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134. See Alexander, *supra* note 76, at 9–12.

135. See *supra* notes 67–72 and accompanying text.

136. See *supra* Part III.E.

This double life of community is essential to a proper understanding of community's role as a value, or end, of property. It means that community's normative valence is not always clear. When other substantive values of small institutional communities conflict with those of one or more of the larger institutional communities within which the smaller communities are nested, the normative implication of community does not unambiguously favor one substantive value or the other. There is no trumping effect of community as a value. What matters in these situations of nested communities with conflicting substantive values is the nature of the relationship between the institutional communities. What precisely does it mean to say, that is, that the communities are nested, other than the facts that one is larger than the other and that the smaller community is located in some relevant sense within the larger one?

The previous discussion of self-constitution noted that self-constitution's social dimension poses a risk of undermining rather than promoting personal autonomy.<sup>137</sup> In the case of community, it is its private side that poses this risk. The core of community's private side is autonomy, the value that supports the power of communities, as institutions, to exclude those who do not share the constituent values and interests of particular communities. That value—autonomy—confers upon communities power to set the terms and conditions of membership in voluntary communities, requiring members to subordinate their own personal autonomy for the good of the larger institution's values.

The public side of community, as a private law value, places a limit on this subordination of personal autonomy and supports autonomy as one of property's ends by striking a balance between personal and institutional autonomy. The basis for this limit is the fact that the state, as the community that enables the creation of voluntary communities through its private legal rules of contract and constitutional rights of assembly and free association, and facilitates the operation of those communities through its legal system, is literally constitutive of them. As the foundational community that makes the existence of smaller, nested communities possible, the state sets the basic parameters for their membership within the foundational, constitutive community. Those parameters are set by the state's own foundational values, the values of which it is normatively constituted. Among these foundational values is personal autonomy, augmented by its ancillary value of self-expression. These values are constitutive of the state as a political community. Self-expression, which is manifested, among other ways, in the right of freedom of speech, is essential to the existence of a particular kind of political community, and for that reason the state treats it as fundamental. Because self-expression is so existential, it cannot be subordinated to conflicting values of smaller voluntary communities. This is not a matter of

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137. See *supra* Part III.E.

state action or public law. The priority of the state's fundamental values, values such as personal autonomy and self-expression, over the values of nested voluntary communities, is established by private law, through its values.

In cases such as Mr. Lamp's, the public side of community as a private law value resists recognition of the right of voluntary groups, including those created by private agreement, to subordinate values that are existential to the particular kind of political community that the state represents to the group's own conflicting values. Hence, the question whether Lamp waived his right to display the American flag in front of his condominium unit is moot because, properly understood, the private law of property makes the value of self-expression non-waivable as applied to such forms of self-expression as political speech.<sup>138</sup>

Of course, there are limits to this principle of subordination. It applies only to those values that are truly existential to the particular kind of political community that the state represents. Hence, in the case of homeowner associations, not all instances of self-expression or other acts of personal autonomy are or should be beyond the group's power to regulate. So, for example, a homeowner association covenant prohibiting outdoor displays of plastic pink flamingoes is valid.<sup>139</sup> Such an aesthetic regulation, although restricting self-expression, in no way implicates values that are existential to the substantive character of the larger political community. The same will be true of the vast majority of homeowner association rules. Group autonomy, which promotes the integrally related values of free association and sociability, should normally prevail because it is supported by community's private aspect and does not interfere with its public dimension.

#### CONCLUSION

Property's ultimate end is human flourishing. Because human flourishing is itself comprised of multiple ends, property's ends are multiple and varied. These ends, values of private law, have both private and public dimensions, and private law itself negotiates the relationship between these two aspects of its values. The relationship between the public and private often turns out to be supportive rather than in conflict. The values that are part of property's public dimension in many instances are necessary to

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138. This is essentially the position adopted in the *Restatement (Third) of Property*. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (2000). As to the specific issue of the American flag, the primacy of the individual's autonomy is now codified by federal statute. See 4 U.S.C. § 5 (2012) ("A condominium association . . . may not adopt or enforce any policy . . . that would restrict or prevent a member of the association from displaying the flag of the United States on residential property . . .").

139. Such a restrictive covenant doubtless would be valid under section 3.1 of the *Restatement (Third) of Property*.

support, facilitate, and enable property's private ends. Hence, any account of public and private values that depicts them as categorically separate is grossly misleading. One important consequence of this insight is that many legal disputes that appear to pose a conflict between the private and public spheres or that seemingly require the involvement of public law can and should, in fact, be resolved on the basis of private law—the law of property—alone. Private law turns out to be much richer than conventional wisdom recognizes.