A Concept of Property

By Gene Wunderlich

"...The concept of property never has been, is not, and never can be of definite content. The paradigm of a Sanskrit verb of a thousand forms could not approach in diversities the phases of that concept in any time and place. ... Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolescence others."¹

CHARLES REICH took the ancient, venerated term “property” and included new relationships, to appeal for a concept of “new property.” He adapted earlier concepts to include the rights of persons in government-created wealth—the “government largess” as he colorfully named it.² It is this process of adding on new meaning and sloughing off old meaning that Philbrick described in his classic article “Changing Conceptions of Property in Law.”³

Philbrick wrote his article in 1938. If we recall the ideological ferment of this Keynesian era, we see that it was quite natural for him to write “...it becomes manifest that the justification of property can be rested on no apriorism. It is a creature of law, only justifiable ... by utilitarian considerations ... social interests must control our choices; the individual interests only so far as they advance the general interest.”⁴ Recent penetrations of formal social science into the lexicon of law have further embellished our bounteous concepts of property.⁵ Concepts are a product of time and purpose. We have an environment of ideas just as we have an environment of climate, buildings, or people. This environment of ideas represents a state of the arts in concepts, and explains why semanticists will date a word. New concepts stem from novel combinations of available ideas.⁶ What may be new about our concept of property, then, is a new combination of inherited ideas. Our concept of property presumably will reflect what we now know about it and what we intend to do with it.

We employ a concept because it serves some purpose. Two broad classes of purposes are (1) models for explanation or understanding, and (2) guides or criteria for action. To scientists, the concept may be useful for relating an abstract, explanatory model to experience. To courts or legislators, a concept of property may be useful for making laws to guide actions.

The concept of property proposed below is for explanation and model building. As such, it does not evaluate the performance of all or a part of the property system, nor does it prescribe statutes or decisions to improve the property system. It is analysis rather than policy oriented, and it is intended mainly to encourage social science inquiry into an important area of law. One rationale for giving priority to explanation over prescription is that, if we first understand the phenomena we are seeking to control, we will increase the likelihood of effective and enduring choices.

² C. Reich. The New Property, Yale Law Rev. 73: 733-787, April 1964. Reich’s interpretation of largess as property is conditional. At one point (p. 739) he states that largess is not necessarily property, at another point (p. 779) that all property could be described as government largess. Then he states that government largess has eroded the usefulness of property as a protector of the individual from the State, and concludes that what is needed is a new property.
³ Philbrick, op. cit., p. 691.
⁴ Ibid., p. 730.
Complexity and the Property System

The general issue, of which the property problem in this paper is regarded as a part, is complexity. Any system of rules of behavior requires that the rulers and the ruled clearly perceive who is affected, under what circumstances, and how. If the rules are too broad or too narrow, geographically, topically, or functionally, there will be error. If the rules are inconsistent, there will be error. If the rules have differing meanings among individuals, there will be error. These errors become the source of legal action. Failure to know a boundary, for example, may cause trespass. Failure to draft a lease properly may cause disputes between landlord and tenant. Failure of a segment of the population to understand by property what the rest of the population understands by it can result in rebellion and social upheaval.

It would seem that the first requirement of a property system is that it be understood by all persons affected by it. To this end, legal scholars have labored with varying but only limited degrees of success for centuries. So complex had law become that the American Law Institute began its monumental Restatement of the Law "to present an orderly statement of the general common law...the law that has grown from the application by the courts of statutes and of the law, now known as the common law...the law that has been generally enacted and been in force for many years."

The Institute recognized the sources of complexity as (1) the increasing volume of the decisions of the court, many of which were irreconcilable, and (2) the "growing complications of economic and other conditions of modern life." These forces, said the Institute, "are increasing the law's uncertainty and lack of clarity." 7

Despite the work of the Institute and many others, theories of the law of property contain ambiguities. These theories result in rules of social interaction that may be mysterious to most of those affected by them.

Many people and many possible relations with respect to many property objects provide a basis for the complexity of property. 8 Complexity may be reduced by classifying individuals ("freeholder," "lessee," "bailor," etc.); classifying property objects (real estate, chattels, etc.); and classifying relationships (easement, covenant, lease, etc.). Problems arise when new property objects appear, such as clear air and water, continental shelf oil, a satellite, or an unsurveyed plot of land. Problems arise when a person either feels that a rule does not apply to him or that the probability of a negative action against him is very small. Problems may arise when the semantics of the court or legislature are incorrectly understood by the man on the street. These are but a few of the problems associated with the property system. In general, the more complex a system, the greater the chance for error and confusion.

The concept of property toward which this paper is directed sees "the social (hence legal) problem" as one of complexity. Complexity impinges on the individual in the form of so many roles, so many acts, so many choices, and so many consequences that decisive rules of behavior are obscure. 9 The objective of a property system envisioned here is the clear understanding by all participants of the rules of behavior with respect to all property objects and of the consequences of alternative actions in relation to the rules.


"A right...is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act" (p. 4).

"A privilege...is a legal freedom on the part of one person against another to do a given act or a legal freedom not to do a given act" (p. 5).

8 The arithmetic of property is suggested by the formula for combinations, C = n! / r!(n-r)! where n = number of things, such as individuals capable of contracting and r = number of things taken at a time, such as number of individuals involved with each contract. Recalling that the factorials (n!, r!) are the product of a series, we can see that astronomical combinations can be obtained from a relatively small n and r. In other words, a system of property based on sets of rules between individuals with respect to each right or duty on each property object is impossible. Therefore, general rules must be developed.

9 Legal processes may well generate rather than reduce complexity. The advocacy system, for example, rewards wins and penalizes losses. The semantic extension of justice, then, is prescribed by a "win" set. But the win set expands, and future wins depend on an increasing number of precedent wins. Justice becomes a consequence or summation of decisions rather than an a priori standard, and its meaning becomes ambiguous in proportion to the number of precedents.
Property as Communication

Many characteristics of the institution of property resemble a communication system. The relationship among people concerning property could be expressed (perhaps measured) as interactions in much the same way that we view messages. The logical structure of the property system is its syntax. The connotations and denotations of property terms are its semantics. The instruments of expression are its media.

Systematic attention to the rules of exclusion or inclusion permits an understanding of the relationship among people about things not possible through vague intuition or even some relatively well-constructed legal documents. Layman Allen has effectively illustrated the usefulness of modern logic with a direct application to section 48(a) of the Internal Revenue Code which deals with the definition of property. In analysis he reduced more than 500 words to 56 symbolic representations, and prepared a revised text with 10 percent fewer words in far more precise, readable form. Another exercise in logical construction demonstrated how, in a single paragraph, a proposed international instrument contained provisions that included and provisions that excluded some of the same classes of tenants from the scope of its standards.

The formal rules of classification or, more generally speaking, syntax, are useful either for the most comprehensive view of property such as the classification of estates or for a specific contract provision such as the responsibility for maintenance of improvements in a lease.

The semantic dimension of communication is meaning. In one sense, the meaning of property is the idea of property. More specifically, however, the semantics of property is the relation of a sign or symbol to a particular property object or action. “Trespass” is an eight-letter noun or verb that conjures up a whole set of experiences for judges, owners, and intruders. When an event gets classified as a “trespass” by a judge it leaves the “real world” and enters the legal world of semantic manipulation. The trespass eventually returns from the semantic world of the judge to impinge on the traveler as a fine, admonishment, or acquittal.

The semantic terms, in their syntactic arrangements, are carried by some communication media. A message is extruded through the die of some medium, hence is affected by it. Because it is the medium, and not the intent of the sender, to which the receiver is exposed, McLuhan and his followers have argued the extreme that the medium is the message. The legal difference between a written and an oral contract to convey land might illustrate the importance of the medium. Titles could be transferred by magnetic tape or by sealed and notarized scroll; court-interpreted laws will specify which may be used, and behavior of the parties to the conveyance will be influenced by the medium.

Structure, Function, and Measures of Property

The concept of property rests upon a relationship between or among people with reference to some object—tangible or intangible. In grammatical terms, property might be stated as subjects (people), verbs (behaving), and objects (in relation to things). Metaphorically, property is a sentence.

When all such property relationships are aggregated, they comprise what might be called a property system. The formal requirement of a “system” is “anything capable of existing in one or more states” and the institution of property seems to fill that apparently nominal requirement. For some purposes it may be useful to distinguish changes in a particular property (say, the transfer of an object from one person to another) from changes in the property system (say, changes in the way in which transfers take place). Most of our concern is with the property system, that is, the entire body of rules for relationships among people about property objects. These rules, as they are understood by those affected, are a communication system.

The property system may be looked at in two ways: What it is and what it does. The first we call structure, and the second we call function. The structure of a system implies components and their relation to one another. Molecules, governments, and buildings each have structures. Their respective components may be expressed as atoms, agencies, and bricks. The units used to describe structures are defined in terms of their function in the system.


Structure of Property

The structure of property as a communication system implies senders, receivers, and channels. This structure permits the examination of property at any level of aggregation. For example, two persons signing a purchase contract comprise sender, receiver, and medium for transmitting the terms of the transaction. Similarly, a group petitioning a court for access to a public body of water across private land comprise sender, receiver, and medium for the exercise of an access right.

Virtually no actual communication system is closed, because it is subject to influences other than those attributable to senders, receivers, and channels. There are influences on senders and receivers. There are noises in the channels. Therefore, an adequate concept of a property system should also account for influences outside the system being examined.13

The use of communication to describe property extends considerably beyond mere analogy. The substantial body of knowledge accumulated on the nature and process of communication has much potential both for articulating the qualities of property relationships and for measuring some important dimensions of property. Of course, communication theory is not the only, or perhaps not even the best, way of looking at property. Communication theory does have some features, however, that recommend it. One of these features is the way uncertainty is absorbed into the meaning of formal information models. With the metric of information theory it may be possible to express the degree of success of a property system in attaining ownership and control objectives.

Functions of Property

Property as a communication system implies two distinct functions—ownership and control. Ownership in this case means the claims people place on the stream of expected benefits flowing from a property object. Control means the influence people have on the use of a property object.14

In a formal logic sense, ownership and control specify operations of owners and decision-makers with property objects. Ownership distributes the bounties or burdens of property objects among owners. Owner, in this case, means one with claims to the bounties or burdens of property. These ownership claims, viewed ex ante, are the stuff of which expectations and interests are built. Expected bounties or burdens are not necessarily realized, of course, but they do form the basis of value. Ownership values, then, are really claims based on operations which will yield hoped-for benefits or anticipated burdens.

Control, as an operation, may be defined as a decision. The selection among possible uses, possible places for use, and possible times for use, of a property object is the decision. Possession of the complete decision-making authority, or some lesser influence, represents a claim to decide. The claim to decide is often closely related to the claim to bounty or burden. They are, in the simplest of classical economic systems, two sides of the same coin. Under theories of behavior more complex than the simplest economic system, the claim to decide (influence) and the claim to benefit are not coterminous.

The decision process15 consists of identifying outcomes with specified actions under specified conditions. When outcomes, actions, and conditions are known with complete certainty, the process of “choice” or “decision-making”16 is mechanical. When degrees of certainty are introduced, decisions are improved by the addition of more information. If all necessary information is available, decisions become mechanical. Control is, therefore, a matter of information.

Ownership, on the other hand, represents claims on the benefits (or burdens) of property objects which can be used in various ways, places, and times. Ownership represents the interest of persons in outcomes of the decision process. The value of that ownership is influenced by information on the likelihood of possible outcomes. Ownership, too, is a matter of information. Both ownership and control, then, if rigorously defined as special forms of information, can be treated as operations in a property system. Only empirical research

13 Formally this is called “closure.” The degree of closure in an information system is measured as a proportion of messages within a defined network of all messages among the network units and all sources and destinations during the observation period. See Osborn and Wilson, op. cit. p. 35.


16 In quotes because the metaphysical assumption of free will is not necessary to describe the process. It doesn’t matter whether people decide, or act as if they are “deciding.”
can establish whether such concepts are useful in explaining behavior of people with respect to property.

Units of Rights

At the root of a useful empirical theory of property is the search for a unit of measure. Legal theories directed at providing consistent standards of how people ought to behave can avoid precise measures. Greater justice may be done, in fact, if some flexible fuzziness is attached to behavior can avoid precise measures. Greater justice may be done, in fact, if some flexible fuzziness is attached to property relationships.\textsuperscript{17} If social scientists are to test their theories of how people do behave, however, they cannot apply elastic criteria.

But the idea of property is basically a legal concept. No useful social science theory can be isolated from the legally articulated rules of behavior. Somewhere between the terms of a legal theory—a semantically flexible, logically consistent, rule of behavior—and the empirical units of a social science theory—a prediction model suitable for test—should be found some concepts to which law and social science can relate.

Constructs or concepts must be definable in terms of other constructs or concepts in a theory.\textsuperscript{18} In addition to such a constitutive definition, a construct must also be related to observable data. A logical model is not a scientific theory unless its terms are related to observable units. The properties of an object are the characteristics regarded important by the describer. The properties in an object are the claims of ownership and control made by a claimant.\textsuperscript{19}

Are properties in an object finite? Yes, because they can be collected into general classes of people’s behavior with respect to property objects. Classes prescribe limits. No two objects, actions, or people are exactly the same so we can be satisfied that things are enough alike to be treated alike. For analytical purposes classes may be broad, like Hohfeld’s famous eight categories of duties and rights,\textsuperscript{20} or somewhat more detailed such as Ely’s “kinds of property.”\textsuperscript{21}

A classification requires a scale. This is not to say that there must be one scale for all times for all purposes. General use of an agreed set of scales does improve discourse, however. Scales may be convertible, in one direction at least. For example, six classes may be reduced to two such as “I” and “all others.” Ranks can be converted into “greater than” or “less than” a standard. In general, standard units of measure should be developed to meet the most detailed scale likely to be used. Classes can be developed from collections of scales but disaggregation may not be possible.

A property in an object may be stated as a set of rights. Each element in a set of rights may be reduced to a claim which a person either has or does not have with respect to a given object. For a system of property to be analyzed it would be necessary to state all possible rights in all objects for all persons in a community. Lacking complete knowledge, some way of expressing probable claims of broad categories of people and objects might be developed. Such probabilistic models, in fact, would be closer to the real world of uncertainty about property.

The term “quality” is sometimes used to avoid, or substitute for, the term quantity. Expressions of quality, although they may be no more than extensions of quantities, are used in both everyday and technical communications not only about property but in almost every aspect of life. Water, for example, may be “clean” when it has no less than 6 parts per million of oxygen, or has no more than so many specified bacteria per volume unit. Other characteristics can be added or deleted to make up a synthesis of characteristics for water quality. The number or precision of quantities need not be exhaustive to be adequate for specifying a quality. Likewise, the properties in objects may be expressed as quantities, even though the units might best be measured as 1 or 0.

Very likely a universal unit of property, say, some “element of right,” would not be as useful as some more specialized forms. No such term can be ventured here at least. Such a unit of right, however, should be (1) uniform across all property being considered, (2) binary in the sense that any person either has or has not the right, and (3) summable so that properties in objects can be expressed as combinations of units of rights.

\textsuperscript{17} “The language of the law has never been generally precise, and it is neither possible nor desirable that it become completely so.” D. Mellinkoff. Language of the Law. Little, Brown Co., Boston, p. 388, 1963. The context of the quote was the operation of law, not scientific analysis and test of law behavior.


\textsuperscript{19} Transformation of the term “property” from “property in” is explained by Hamilton and Till: “In time, by dint of repeated use, a ‘property in’ became simply a property; and, with metaphorical significance worn away, it came to denote an object reality.” W. Hamilton and I. Till. Property. Encyclopedia of Soc. Sci., vol. 6, p. 528, 1933.

\textsuperscript{20} W. Hohfeld, op. cit., p. 36.

Property and Policy

For the cold-souled practical ones who are unable to warm up to a semantic exercise on an abstraction, a word may be said on policy. In short, so what?

All this measurement of the property system, if we could do it, might be useful. We might wish to ask the question: How well does the property system in the United States perform? The question connotes both function and some standards or measures by which to evaluate the functions. Overall, we have said that the function of the property system is to inform—and this is its sole function. By informing, it lets everybody know what everybody else's rights, duties, and responsibilities are. It allows changes in these rights, duties, etc., to come about smoothly and easily with full knowledge and appropriate sanctions. By informing, the property system minimizes uncertainty and maximizes flexibility.

In the United States, for example, how fully aware are potential buyers and sellers of possible transactions in real estate? Even the identification of marketable real estate is local and specialized—so much so that this information is marketed by an elaborate brokerage profession.

How fully do owners understand the bundle of rights, and the uncertainties attached thereto, to which they lay claim when they receive title? Apparently, there is sufficient failure in the property system to call for a system of title insurance. Title insurance seems to exist because the property system is unable to inform a buyer.

How does society express its interests in a unit of territory held by a private owner? Apparently the interest is so obscure that, for example, a system of elaborate, costly judicial procedures in eminent domain is needed to find out. (Note: this has nothing to do with compensation—only to find out if the interest is compensable.)

What rights do individuals have in the public domain? How are public interests best represented by public agencies? Apparently the five-thousand-plus laws relating to public lands are sufficiently obscure and contradictory that they are under intensive investigation by a Public Land Law Review Commission—and the outcome of the investigation is under at least some doubt.

It would seem unnecessary to suggest that a property system for a populated, urbanized, and automated United States might differ from one for a United States involved with the problems of conquering and settling a new territory. In essence, however, how different is it? Is our property system performing at its best? We will be hard put to say without concepts, definitions, and measures. It is toward such concepts, definitions, and answers that we began with the abstraction of property as a communication system. But the pudding's proof is implied, but not confirmed, by its recipe.