Chapter 2

AN INTRODUCTION TO THE MODERN PHILOSOPHY OF PROPERTY

Section 1. HOHFELDIAN ANALYSIS

W. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING

23 YALE L.J. 16, 28–59 (1913)

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems, frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties," and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions. . . .

The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

Jural	rights	privilege	power	immunity
Opposites	no-rights	duty	disability	liability
Jural	right	privilege	power	immunity
Correlatives	duty	no-right	liability	disability

Rights and Duties. As already intimated, the term "rights" tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities. . . .

Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who

use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative. . . .

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best. . . .

Privileges and "No-Rights." As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no-right." In the example last put, whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point, for, always, when it is said that a given privilege is the mere negation of a duty, what is meant, of course, is a duty having a content or tenor precisely opposite to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering. The privilege is perfectly consistent with this sort of duty,—for the latter is of the same content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty to stay off. Similarly, if A has not contracted with B to perform certain work for the latter, A's privilege of not doing so is the very negation of a duty of doing so. Here again the duty contrasted is of a content or tenor exactly opposite to that of the privilege.

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter.

In view of the considerations thus far emphasized, the importance of keeping the conception of a right (or claim) and the conception of a privilege quite distinct from each other seems evident; and more than that, it is equally clear that there should be a separate term to represent the latter relation. No doubt, as already indicated, it is very common to use the term "right" indiscriminately, even when the relation designated is really that of privilege; and only too often this identity of terms has involved for the particular speaker or writer a confusion or blurring of ideas. . . .

A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege . . . . It is equally clear, as already indicated, that . . . a privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against "third parties" as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits. The only correlative logically implied by the privileges or liberties in question are the "no-rights" of "third parties." It would therefore be a non sequitur to conclude from the mere existence of such liberties that "third parties," are under a duty not to interfere, etc. . . . [1]

Powers and Liabilities. As indicated in the preliminary scheme of jural relations, a legal power (as distinguished, of course, from a mental or physical power) is the opposite of legal

[1] [Query: When you were told in the first grade that going out to recess was a "privilege" not a "right," was the teacher using these words in their Hohfeldian sense? Ed.]

disability, and the correlative of legal liability. But what is the intrinsic nature of a legal power as such? Is it possible to analyze the conception represented by this constantly employed and very important term of legal discourse? . . .

A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power co effect the particular change of legal relations that is involved in the problem.

The second class of cases—powers in the technical sense—must now be further considered. The nearest synonym for any ordinary case seems to be (legal) "ability,"—the latter being obviously the opposite of "inability," or "disability." The term "right," so frequently and loosely used in the present connection, is an unfortunate term for the purpose,—a not unusual result being confusion of thought as well as ambiguity of expression. . . .

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object,—*e.g.*, the power to acquire title to the lat[t]er by appropriating it. *Similarly*, X has the power to transfer his interest to Y,—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds. Agency cases are likewise instructive. . . . The creation of an agency relation involves, inter alia, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party P has the power to create agency powers in another party A,—for example, the power to convey X's property, the power to impose (so-called) contractual obligations on P, the power to discharge a debt, owing to P, the power to "receive" title to property so that it shall vest in P, and so forth. . . .

As regards all the "legal powers" thus far considered, possibly some caution is necessary. If, for example, we consider the ordinary property owner's power of alienation, it is necessary to distinguish carefully between the *legal* power, the *physical* power to do the things necessary for the "exercise" of the legal power, and, finally, the privilege of doing these things—that is, if such privilege does really exist. It may or may not. Thus, if X, a landowner, has contracted with Y that the former will not alienate to Z, the acts of X necessary to exercise the power of alienating to Z are privileged as between X and every party other than Y; but, obviously, as between X and Y, the former has no privilege of doing the necessary acts; or conversely, he is under a duty to Y not to do what is necessary to exercise the power.

In view of what has already been said, very little may suffice concerning a *liability* as such. The latter, as we have seen, is the correlative of power, and the opposite of immunity (or exemption). While no doubt the term "liability" is often loosely used as a synonym for "duty," or "obligation," it is believed, from an extensive survey of judicial precedents, that the connotation already adopted as most appropriate to the word in question is fully justified. . . .

[Consider, for example, an 1861] Virginia statute providing "that all free white male persons who are twenty-one years of age and not over sixty, shall be *liable* to serve as jurors, except as hereinafter provided." It is plain that this enactment imposed only a liability and not a duty. It is a liability to have a duty created. The latter would arise only when, in exercise of their powers, the parties litigant and the court officers, had done what was necessary to impose a specific duty to perform the functions of a juror. . . .

Immunities and Disabilities. As already brought out, immunity is the correlative of disability ("no-power"), and the opposite, or negation, of liability. Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (*i.e.*, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property. If, indeed, a sheriff has been duly empowered by a writ of execution to sell X's interest, that is a very different matter: correlative to such sheriff's power would be the liability of X,—the very opposite of immunity (or exemption). It is elementary, too, that as against the sheriff, X might be immune or exempt in relation to certain parcels of property, and be liable as to others. Similarly, if an agent has been duly appointed by X to sell a given piece of property, then, as to the latter, X has, in relation to such agent, a liability rather than an immunity. . . .

In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation. Before concluding this branch of the discussion a general suggestion may be ventured as to the great practical importance of a clear appreciation of the distinctions and discriminations set forth. If a homely metaphor be permitted, these eight conceptions,—rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities,—seem to be what may be called "the lowest common denominators of the law." Ten fractions (1–3, 2–5, etc.) may, superficially, seem so different from one another as to defy comparison. If, however, they are expressed in terms of their lowest common denominators 5–15, 6–15, etc.), comparison becomes easy, and fundamental similarity may be discovered. The same thing is of course true as regards the lowest generic conceptions to which any and all "legal quantities" may be reduced.

. . . In short, the deeper the analysis, the great[er] become one's perception of fundamental unity and harmony in the law.

Section 2. MODERN ECLECTICISM

J. WALDRON, PROPERTY AND OWNERSHIP

in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (website)[1]

Property is a general term for rules governing access to and control of land and other material resources. Because these rules are disputed, both in regard to their general shape and in regard to their particular application, there are interesting philosophical issues about the justification of property. Modern philosophical discussions focus mostly on the issue of the justification of *private* property rights (as opposed to common or collective property). 'Private property' refers to a kind of system that allocates particular objects like pieces of land to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society. Though these exclusions make the idea of private property seem problematic, philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents.

1. Issues of Analysis and Definition

More than most policy areas dealt with by political philosophers, the discussion of property is beset with definitional difficulties. The first issue is to distinguish between property and private property.

Strictly speaking, 'property' is a general term for the rules that govern people's access to and control of things like land, natural resources, the means of production, manufactured goods, and also (on some accounts) texts, ideas, inventions, and other intellectual products. Disagreements about their use are likely to be serious because resource-use matters to people. They are particularly serious where the objects in question are both scarce and necessary. Some have suggested that property relations only make sense under conditions of scarcity (Hume [1739] 1888, pp. 484–98). But other grounds of conflict are possible: there may be disagreements about how a given piece of land should be used, which stem from the history or symbolic significance *of that piece of land*, whether land in general is scarce or not. (Intellectual property provides an example of property rules that do not respond directly to scarcity; moreover unlike material

[1] . First published Mon Sep 6, 2004; substantive revision Sat Mar 21, 2020. https://plato.stanford.edu/entries/property/. In addition to the article, bibliography, and notes, which are reproduced in full here, the website conatins sections labelled 'Academic Tools', 'Other Internet Resources', and 'Related Entries', which are omitted here.

objects, the objects of intellectual property are not crowdable, for their use by any one person does not preclude their use by any number of others.)[2]

Any society with an interest in avoiding conflict needs such a system of rules. Their importance can hardly be overestimated, for without them cooperation, production, and exchange are virtually impossible, or possible only in the fearful and truncated forms we see in 'black markets.' This necessity is sometimes cited as an argument in favor of *private* property (Benn and Peters 1959, p. 155). In fact, all it establishes is that there ought to be property rules of *some* kind: private property rules are one variety. Some human societies have existed for millennia, satisfying the needs and wants of all their members, without private property or anything like it in land or the other major resources of economic life. So the first step in sound argumentation about property is distinguishing those arguments which support the existence of property in general from arguments which support the existence of a system of a specific kind (Waldron 1988).

There are three species of property arrangement: common property, collective property, and private property. In a *common property* system, resources are governed by rules whose point is to make them available for use by all or any members of the society. A tract of common land, for example, may be used by everyone in a community for grazing cattle or gathering food. A park may be open to all for picnics, sports or recreation. The aim of any restrictions on use is simply to secure fair access for all and to prevent anyone from using the common resource in a way that would preclude its use by others. *Collective property* is a different idea: here the community as a whole determines how important resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making—anything from a leisurely debate among the elders of a tribe to the forming and implementing of a Soviet-style 'Five-Year Plan'.

Private property is an alternative to both collective and common property. In a private property system, property rules are organized around the idea that various contested resources are assigned to the decisional authority of particular individuals (or families or firms). Thomas Merrill (2012) calls this 'the property strategy' and contrasts it with bureaucratic governance or the management of resources through group consensus. In a system of private property, the person to whom a given object is assigned (e.g., the person who found it or made it) has control over the object: it is for her to decide what should be done with it. In exercising this authority, she is not understood to be acting as an agent or official of the society. She may act on her own initiative without giving anyone else an explanation, or she may enter into cooperative arrangements with others, just as she likes. She may even transfer this right of decision to someone else, in which case that person acquires the same rights she had. In general the right of a proprietor to decide as she pleases about the resource that she owns applies whether or not others are affected by her decision. If Jennifer owns a steel factory, it is *for her* to decide (in her own interest) whether to close it or to keep the plant operating, even though a decision to close may have the gravest impact on her employees and on the prosperity of the local community.

Though private property is a system of individual decision-making, it is still a system of social rules. The owner is not required to rely on her own strength to vindicate her right to make self-interested decisions about the object assigned to her: if Jennifer's employees occupy the steel factory to keep it operating despite her wishes, she can call the police and have them evicted; she does not have to do this herself or even pay for it herself. So private property is continually in need of public justification—first, because it empowers individuals to make decisions about the

[2] Of course, B's use of A's intellectual product may interfere with A's ability to profit from it. But that begs the question of property—for A's profiting is simply her exploitation of a right that her property in the product would confer, viz., the right to exclude others from the using the product if they will not pay her for the privilege.

use of scarce resource in a way that is not necessarily sensitive to others' needs or the public good; and second, because it does not merely permit that but deploys public force at public expense to uphold it.

It may be thought that the justificatory issue is nowadays moot, with the collapse of socialist systems in Eastern Europe and the former Soviet Union, and the triumph of market economies all over the world. It is tempting to conclude that since economic collectivism has been thoroughly discredited, the problem of justifying *private* property has been solved by default: there is simply no alternative. But the point of discussing the justification of an institution is not only to defend it against is competitors. Often we justify in order to understand and also to operate the institution intelligently. In thinking about property, there are a number of issues that make little sense unless debated with an awareness of what the point of *private* property might be. Some of these issues are technical. Consider, for example, the rule against perpetuities, the registration of land titles, or the limits on testamentary freedom; all these would be like an arcane and unintelligible code, to be learned at best by rote, unless we connect them with the point of throwing social authority behind individual control (or behind the individual disposition of control) over material resources. (See Ackerman 1977, p. 116.)

The same is true of some grander issues. The Fifth Amendment to the U.S. Constitution requires that private property not be taken for public use without compensation. Clearly this prohibits the simple seizure of someone's land for use, say, as a firing range or an airport. But what if the state places a restriction on the use of a person's land, telling the owner that she may not erect a modern skyscraper because it will compromise the historical aesthetics of the neighborhood? Does this amount to a taking? Certainly the owner has suffered a loss (she may have bought the land with the intention of developing it). On the other hand, we should not pretend that there is a taking whenever any restriction is imposed: I may not drive my car at 100 m.p.h. but I am still the owner of the car. Such questions cannot be answered intelligently without revisiting the reasons (if any) that there are for giving private property this sort of constitutional protection. Is it protected because we distrust the state's ability to make intelligent decisions about resource use? Or is it protected because we want to place limits on the burdens that any individual may be expected to bear for the sake of the public good? Our sense of the ultimate values that private ownership is supposed to serve may make a considerable difference to our interpretation of the takings clause and other doctrines.

Plainly private property and collective control are not all-or-nothing alternatives. In every modern society, some resources are governed by common property rules (e.g., streets and parks), some are governed by collective property rules (e.g., military bases and artillery pieces), and some are governed by private property rules (toothbrushes and bicycles). Also, there are variations in the degree of freedom that a private owner has over the resources assigned to him. Obviously, an owner's freedom is limited by background rules of conduct: I may not use my gun to kill another person. These are not strictly property rules. More to the point are things like zoning restrictions, which amount in effect to the imposition of a collective decision about certain aspects of the use of a given resource. The owner of a building in an historic district may be told, for example, that she can use it as a shop, a home, or a hotel but she may not knock it down and replace it with a skyscraper. In this case, we may still say that the historic building counts as private property; but if too many other areas of decision about its use were also controlled by public agencies, we would be more inclined to say that it was really subject to a collective property rule (with the 'owner' functioning as steward of society's decisions).

It is probably a mistake therefore to insist on any definition of private property that implies a proprietor has absolute control over his resource.[3] Some jurists have even argued that the terms 'property' and 'ownership' should be eliminated from the technical discourse of the law (see Grey 1980). They say that calling someone the 'owner' of a resource conveys no exact information about her rights in relation to that resource: a corporate owner is not the same as an individual owner; the owner of intellectual property has a different array of rights than the owner of an automobile; and even with regard to one and the same resource, the rights (and duties) of a landlord who owes nothing on his property might be quite different from those of a mortgagor.

The eliminative proposal makes sense to this extent: the position of a private owner is best understood not as a single right to the exclusive use and control of the object in question, but as a bundle of rights, which may vary from case to case (Honore 1961).

In recent literature, the 'bundle of rights' conception has encountered resistance. Some theorists want to insist that property is better conceived, as it is in colloquial usage, as a substantial relation between a person and a thing (Penner 2000 and Smith 2012). This can be put forward on analytic grounds or for ideological reasons; on the latter approach it is said that the importance of property for a free society is obscured when the ownership relation is treated as a divisible bundle of rights (Attas 2006).

Theorists who persevere with the 'bundle of rights' analysis nevertheless present some sticks in the bundle as more important than others: the right to exclude is usually seen as the key to ownership, even if it is one among many other rights and legal relations that property comprises. It is the aspect of ownership that has the greatest impact on others (Waldron 1993). Other theorists are more skeptical about this. Katz 2008 and Dagan 2011 suggest that in our analysis of private property we should place less emphasis on the right to exclude and more on the owner's power of agenda-setting so far as the use of a given resource is concerned. On any account, 'exclusive use' is a complex idea. Its implications vary from context to context and from object to object: we actually have a plurality of property arrangements, striking different balances between owners' and others' interests (Dagan 2013). In its most abstract terms, the right to exclude implies, first, that the owner is at liberty to use the object as he pleases (within a range of generally acceptable uses) without interference from others. Secondly, it implies that others have an obligation to refrain from using the object without the owner's permission. The point about permission implies in turn that the owner has the power to license others to use her property. She may lend her automobile, rent her house, or grant a right of way over her land. The effect of this may be to create other property interests in the object, so that the various liberties, rights and powers of ownership are divided among several individuals.

More strikingly, the owner is legally empowered to transfer the whole bundle of rights in the object she owns to somebody else—as a gift or by sale or as a legacy after death. With this power, a private property system becomes self-perpetuating. After an initial assignment of objects to owners, there is no further need for the community or the state to concern itself with distributive questions. Objects will circulate as the whims and decisions of individual owners and their successive transferees dictate. The result may be that wealth is widely distributed or it may be that wealth is concentrated in a very few hands. It is part of the logic of private property that no-one has the responsibility to concern themselves with the big picture, so far as the distribution of resources is concerned. Society simply pledges itself to enforce the rights of exclusion that ownership involves wherever those rights happen to be. Any concern about the balance between rich and poor must be brought in as a separate matter of public policy (as tax and welfare policy

[3] Cf. Blackstone's (2001 [1763], Vol. II, p. 3) definition of property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'

or *in extremis* large scale redistribution). As we shall see, philosophers disagree as to whether this is an advantage or an indictment of private property systems.

At the furthest reaches of analysis, the concept of private property becomes quite contestable. Many people believe that ownership implies inheritance. But Mill once observed (Mill 1994 [1848], p. 28) that the private property idea implied only 'the right of each to his (or her) own faculties, to what he can produce by them, and to whatever he can get for them in a fair market; together with his right to give this to any other person if he chooses.' He said that passing the property of individuals who made no disposition of it during their lifetime to their children 'may be a proper arrangement or not, but it is no consequence of the principle of private property' (ibid.). Definitive resolution of such controversies is probably impossible. Some philosophers have suggested that certain concepts should be regarded as 'essentially contested concepts' (see Gallie 1956); if there is anything to this suggestion, private property might be one of them (see Waldron 1988, pp. 51–2).

2. Historical Overview

There are extensive discussions of property in the writings of Plato, Aristotle, Aquinas, Hegel, Hobbes, Locke, Hume, Kant, Marx, and Mill. The range of justificatory themes they consider is very broad, and I shall begin with a summary.

The ancient authors speculated about the relation between property and virtue, a natural subject for discussion since justifying private property raises serious questions about the legitimacy of self-interested activity. Plato (*Republic*, 462b-c) argued that collective ownership was necessary to promote common pursuit of the common interest, and to avoid the social divisiveness that would occur 'when some grieve exceedingly and others rejoice at the same happenings.' Aristotle responded by arguing that private ownership promotes virtues like prudence and responsibility: '[W]hen everyone has a distinct interest, men will not complain of one another, and they will make more progress, because every one will be attending to his own business' (Aristotle, *Politics*, 1263a). Even altruism, said Aristotle, might be better promoted by focusing ethical attention on the way a person *exercises* his rights of private property rather than questioning the institution itself (ibid.). Aristotle also reflected on the relation between property and freedom, and the contribution that ownership makes to a person's being a free man and thus suitable for citizenship. The Greeks took liberty to be a status defined by contrast with slavery, and for Aristotle, to be free was to belong to oneself, to be one's own man, whereas the slave was by nature the property of another. Self-possession was connected with having sufficient distance from one's desires to enable the practice of virtuous self-control. On this account, the natural slave was unfree because his reason could not prescribe a rule to his bodily appetites. Aristotle had no hesitation in extending this point beyond slavery to the conditions of 'the meaner sort of workman.' Obsessed with need, the poor are 'too degraded' to participate in politics like free men. 'You could no more make a city out of paupers,' wrote Aristotle, 'than out of slaves' (ibid., 1278a). They must be ruled like slaves, for otherwise their pressing and immediate needs will issue in envy and violence. Some of these themes have emerged more recently in civic republican theories, though modern theories of citizenship tend to begin with a sense of who should be citizens (all adult residents) and then proceed to argue that they should all have property, rather than using existing wealth as an independent criterion for the franchise (King and Waldron 1988).

In the medieval period, Thomas Aquinas continued discussion of the Aristotlean idea that virtue might be expressed in the use that one makes of one's property. But Aquinas gave it a sharper edge. Not only do the rich have moral obligations to act generously, but the poor also have rights against the rich. Beginning from the premise that '[a]ccording to the natural order established by Divine Providence, inferior things are ordained for the purpose of succoring man's needs…' (Aquinas *ST*, p. 72), Aquinas argued that no division of resources based on human law can prevail over the necessities associated with destitution. This is a theme which recurs

throughout our tradition—most notably in Locke's *First Treatise on Government*, (Locke 1988 [1689], I, para. 42)—as an essential qualification of whatever else is said about the legitimacy of private property (Horne 1990).

In the early modern period, philosophers turned their attention to the way in which property might have been instituted, with Hobbes and Hume arguing that there is no natural 'mine' or 'thine,' and that property must be understood as the creation of the sovereign state (Hobbes 1983 [1647]) or at the very least the artificial product of a convention 'enter'd into by all the members of the society to bestow stability on the possession of…external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry' (Hume 1978 [1739], p. 489). John Locke (1988 [1689]), on the other hand, was adamant that property could have been instituted in a state of nature without any special conventions or political decisions.

Locke's theory is widely regarded as the most interesting of the canonical discussions of property. In part this is a result of how he began his account; because he took as his starting point that God gave the world to men in common, he had to acknowledge from the outset that private entitlements pose a moral problem. How do we move from a common endowment to the 'disproportionate and unequal Possession of the Earth' that seems to go along with private property? Unlike some of his predecessors, Locke did not base his resolution of this difficulty on any theory of universal (even tacit) consent. Instead, in the most famous passage of his chapter on property, he gave a moral defense of the legitimacy of unilateral appropriation.

> Though the Earth…be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. (Locke 1988 [1689], II, para. 27)

The interest of Locke's account lies in the way he combines the structure of a theory of first occupancy with an account of the substantive moral significance of labor. In the hands of writers like Samuel Pufendorf (1991 [1673], p. 84), First Occupancy theory proceeded on the basis that the first human user of a natural resource—a piece of land, for example—is distinguished from all others in that he did not have to displace anyone else in order to take possession. It did not particularly matter *how* he took possession of it, or what sort of use he made of it: what mattered was that he began acting as its owner without dispossessing anyone else. Now although Locke used the logic of this account, it *did* matter for him that the land was cultivated or in some other way used productively. (For this reason, he expressed doubts whether indigenous hunters or nomadic peoples could properly be regarded as owners of the land over which they roamed.) This is partly because Locke identified the ownership of labor as something connected substantially to the primal ownership of self. But it was also because he thought the productivity of labor would help answer some of the difficulties which he saw in First Occupancy theory. Though the first occupier does not actually dispossess anyone, still his acquisition may prejudice other's interests if there is not, in Locke's words, 'enough and as good left in common' for them to enjoy (Locke 1988 [1689], II, para. 27). Locke's answer to this difficulty was to emphasize that appropriation by *productive* labor actually increased the amount of goods available in society for others (ibid., II, para. 37). There is also something like a strand of moral desert in Locke's theory: if one person fails to take advantage of an opportunity of resource-use or resource development, can that person really complain or demand compensation when the opportunity is taken up by someone else (de Jasay 2004)?

Immanuel Kant's work on property is more formal and abstract than Locke's and—at least until recently-it was less well-known. (But now see Byrd and Hruschka 2006 and Ripstein 2009.)

Kant began by emphasizing a general connection between property and agency, maintaining that there would be an affront to agency and thus to human personality, if some system were not arrived at which could permit useful objects to be used. He inferred from this that 'it is a duty of right to act towards others so that what is external (usable) could also become someone's' (Kant 1991 [1797], p. 74) Though this legitimated unilateral appropriation, it did so only in a provisional way. Since the appropriation of a resource as private property affects everyone else's position (imposing duties on them that they would otherwise not have), it cannot acquire full legitimacy by unilateral action: it must be ratified by an arrangement which respects everyone's interests in this matter. So the force of the principle requiring people to act so that external objects can be used as property also requires them to enter into a civil constitution, which will actually settle who is to be the owner of what on a basis that is fair to all.

G.W.F. Hegel's account of property centers on the contribution property makes to the development of the self, 'superseding and replacing the subjective phase of personality' (1967 [1821], para. 41a) and giving some sort of external reality to what would otherwise be the mere idea of individual freedom. These rather obscure formulations were taken up also by the English idealists, most notably by T.H. Green (1941 [1895]), who emphasized the contribution that ownership makes to ethical development, to the growth of the will and a sense of responsibility. But neither of these writers thought of the development of the individual person as the be-all and end-all of property. In both cases it was thought of as a stage in the growth of social responsibility. Both saw the freedom embodied in property as ultimately *positive* freedom—freedom to choose rationally and responsibly for the wider social good. In Karl Marx's philosophy, Hegel's sense of there being several stages in the growth of positive freedom is framed in terms of stages of social development rather than stages of the growth of individuals (Marx 1972 [1862]). And for Marx, as for Plato, social responsibility in the exercise of private property rights is never enough. The whole trajectory of the development of modern society, says Marx, is towards large-scale cooperative labor. This may be masked by forms of property that treat vast corporations as private owners, but eventually this carapace will be abandoned and collectivist economic relations will emerge and be celebrated as such.

The general merits of private property versus socialism thus became a subject of genuine debate in the nineteenth and twentieth centuries. John Stuart Mill, with his characteristic open-mindedness treated communism as a genuine option, and he confronted objections to the collectivist ideal with the suggestion that the inequitable distribution of property in actually existing capitalist societies already partakes of many of these difficulties. He insisted however, that private property be given a fair hearing as well:

If…the choice were to be made between Communism…and the present state of society with all its sufferings and injustices,…all the difficulties, great or small, of Communism would be but as dust in the balance. But to make the comparison applicable, we must compare Communism at its best, with the regime of individual property, not as it is, but as it might be made…The laws of property have never yet conformed to the principles on which the justification of private property rests. (Mill 1994[1848], pp. 14–15)

Mill is surely right, at least so far as the aims of a philosophical discussion of property are concerned. Indeed, one way of looking at the history we have just briefly surveyed is that it is the history of successive attempts to tease out, from the mess of actually-existing maldistribution and exploitation, some sense of the true principles on which the justification of an ideal system of private property would rest, and a sense too of other aspects of moral enterprise which such an institution might serve.

3. Is Property a Philosophical Issue?

What is it about property that engages the interest of philosophers? Why should philosophers be interested in property?

Some have suggested that they need not be. John Rawls argued that questions about the system of ownership are secondary or derivative questions, to be dealt with pragmatically rather than as issues in political philosophy (Rawls 1999, pp. 235–42). Although every society has to decide whether the economy will be organized on the basis of markets and private ownership or on the basis of central collective control, there was little that philosophers could contribute to these debates. Philosophers, Rawls said, are better off discussing the abstract principles of justice that should constrain the establishment of *any* social institutions, than trying to settle *a priori* questions of social and economic strategy. His own suggestions favoring the institutions of 'a property-owning democracy' are put forward more as intermediate principles than as fundamentals of justice.

On the other hand, with the growing attention that is being paid in the discipline to public policy generally, it is difficult to deny that questions about property can be posed in terms that are abstract enough for philosophers to address. Though Rawls counsels us to talk about justice rather than property, in fact issues about property are inevitably implicated in some of the issues about justice that have preoccupied political philosophers in recent years. Certain property institutions may be better than others for justice. A system of markets and private property covering all or most of the resources in society will make it very difficult to ensure the steady application of principles like equality, distribution according to need, or even as some have argued—see e.g., Hayek 1976—distribution according to desert. Some have argued that property rights in a market economy ought to be treated as resistant to redistribution and perhaps as insensitive to distributive justice generally except possibly at the moment of their initial allocation (see Nozick, 1974). If we take this view and if we also take distributive issues seriously, we may have to commit ourselves to a compromised or eclectic system rather than a pure market system of private property.

What about the ownership relation itself? Is there any inherent philosophical interest in the nature of a person's relation to material resources? When someone says '*X* is mine' and *X* is an action, we see interesting questions about intentionality, free-will, and responsibility, which philosophers will want to pursue. Or when someone says '*X* belongs to person *P*,' and *X* is an event, memory, or experience, there are interesting questions about personal identity. But when *X* is an apple or a piece of land or an automobile, there does not appear to be any question of an *inherent* relation between *X* and *P* which might arouse our interest.

This was one of David Hume's conclusions. There is nothing natural about private property, wrote Hume. The 'contrariety' of our passions and the 'looseness and easy transition [of material objects] from one person to another' mean that any situation in which I hold or use a resource is always vulnerable to disruption (Hume 1978 [1739], p. 488). Until possession is stabilized by social rules, there is no secure relation between person and thing. We may think that there ought to be: we may think, for example, that a person has a moral right to something that he has made and that society has an obligation to give legal backing to this moral right. But according to Hume, we have to ask what it is in general for society to set up and enforce rules of this kind, before we can reach any conclusions about the normative significance of the relation between any particular person and any particular thing.

Our property is nothing but those goods, whose constant possession is establish'd by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explain'd the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man's property is some object related to him. This relation is not natural, but moral, and founded on justice. Tis very preposterous, therefore, to imagine, that we can have any

idea of property, without fully comprehending the nature of justice, and shewing its origin in the artifice and contrivance of man. The origin of justice explains that of property. The same artifice gives rise to both. (ibid., p. 491)

The Humean view of property as a convention has been taken up by Murphy and Nagel (2004) as a basis for resisting the view, associated with Nozick 1974, that property rights can pose any moral obstacle to programs of tax and transfer or other forms of redistribution and social control. But the fact that something is conventional doesn't mean it can safely be treated as malleable or as something that can be overridden without cost. There is always a further question about the moral reasons that there are for holding conventions steady; and these reasons may actually echo other themes in the property debate.

Before Hume, the view that the issue of property begged questions about the general basis of social organization was already foreshadowed in the political philosophy of Thomas Hobbes. Indeed Hobbes regarded property as the key to political philosophy: '[M]y first enquiry was to be from whence it proceeded, that any man should call any thing rather his *Owne*, th[a]n another mans' (Hobbes 1983 [1647], pp. 26–7). For Hobbes, property rules were the product of authority—the acknowledged authority of a sovereign, whose commands could guarantee the peace and make it safe for men to embark on social and economic activities that outstripped their ability to protect themselves using their own individual strength. Hume, by contrast, was interested in the possibility that the relevant settlement might emerge as conventions from ordinary human interactions rather than as impositions by an acknowledged figure in authority (Hume 1978 [1739], p. 490).[4]

Still even if we concede that property is the product of social rules, and that normative thinking about the former must be preceded by normative thinking about the latter, there might be facts about the human condition or our agency as embodied beings that provide philosophical premises for an argument that property relations should be established in one way rather than another. Clearly, there is at least one material object with which a person does seem to have an intimate pre-legal relation that would bear some philosophical analysis—namely, that person's body. We are embodied beings and to a certain extent the use and control of our limbs, sensory organs etc. is indispensable for our agency. Were a person to be deprived of this control—were others to have the right to block or manipulate the movements of his physical body—then his agency would be truncated, and he would be incapable of using his powers of intention and action to make something he (and others) could regard as a life for himself. Some modern authors, following John Locke, have tried to think about this in terms of an idea of self-ownership. According to G.A. Cohen (1995) a person owns himself when he has all the control over his own body that a master would have over him were he a slave. Now since a master is entitled to make comprehensive use of his slave for his own profit without owing any account or any contribution to anyone else, it seems to follow from the idea of self-ownership that a person must be allowed to profit equally comprehensively from the control of his own mental and bodily resources. Taking his cue from Nozick (1974) that taxation on earnings is a form of coerced labor (for others or for the state), Cohen concludes that various egalitarian arrangements (like welfare paid for out of taxation) are incompatible with the self-ownership of the rich. It looks like we have to choose between principles of equality and principles of self-ownership. Debate on this issue continues (Otsuka 1998, Vrousalis 2011, and Sobel 2012): some argue that what we owe to others must be figured out first before there can be any question of owning either our selves, our bodies, or other material resources; while others say that any attempt to make the argument in that order will lead to counter-intuitive results (Nozick 1974, p. 234). Some recent discussions have called into

[4] Indeed the account that Hume gave of the emergence of property conventions is often used as a paradigm for the understanding of conventions generally in social philosophy: see Lewis 1969.

question the very idea of self-ownership (Rasmussen 2008 and Phillips 2013), denying that this concept is necessary in order to capture the inviolability of the human person.

There is a further question whether self-ownership affords a basis for thinking about property in external objects other than my body? John Locke thought that it did (Locke 1988 [1689], II, para. 27). He suggested that when I work on an object or cultivate a piece of land, I project something of my self-owned self into the thing. That something I have worked on embodies a part of me is a common enough sentiment, but it is difficult to give it a analytically precise sense. That an object is shaped the way it is may be an effect of my actions; but actions don't seem to have the trans-temporal endurance to enable us to say that *they* remain present in the object after the time of their performance. The idea of mixing one's labor seems to be a piece of rhetoric which enhances other arguments for private property rather than an argument in its own right.

Others have speculated about an effect in the opposite direction—not so much the incorporation of the self into the object as the incorporation of the thing into the self (Radin 1982). This was a theme in Hegel's work, where there was a suggestion that owning property helped the individual to 'supersede the mere subjectivity of personality' (Hegel [1821] 1991, 73); in plain English, it gave them the opportunity to make concrete the plans and schemes that would otherwise just buzz around inside their heads, and to take responsibility for their intentions as the material they were working on—a home or an sculptor's block of marble—registered the impact of the decisions they had made (see Waldron 1988, pp. 343–89). Even the utilitarian Jeremy Bentham toyed with a version this idea. Though property, he said, depended on positive law, the law of property had an effect on the self that makes redistribution particularly objectionable. Law provided security for our expectations, and when that security came to be focused on a particular object, that object formed part of the structure of one's agency: 'It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a whole' (Bentham 1931 [1802], p. 111).

4. Genealogies of Property

In our philosophical tradition, arguments about the justification of property have often been presented as genealogies: as stories about the way in which private property might have emerged in a world that was hitherto unacquainted with the institution.

The best known are Lockean stories (Locke 1988 [1689] and Nozick 1974). One begins with a description of a state of nature and an initial premise about land belonging to nobody in particular. And then one tells a story about why it would be sensible for individuals to appropriate land and other resources for their personal use and about the conditions under which such appropriations would be justified. Individuals have needs and they find themselves surrounded with objects capable of satisfying those needs. But each person, *X*, is vaguely aware that the objects have not been furnished by God or nature for *X*'s use alone; others have a need for them as well. So what is *X* to do? One thing is clear: if *X* has to wait for some general meeting of everyone who might be affected by his use of the resources in his vicinity before he is allowed to use them then, as Locke put it, 'man had starved, notwithstanding the plenty God had given him' (Locke 1988 [1689], II, para. 28). So the individual goes ahead and takes what he needs (ibid., I, para. 86). He 'mixes his labor' with the object he needs, and by doing so he fulfills his fundamental duty of self-preservation, while also increasing the value of the resources he works on for the indirect benefit of others. The first phase of Locke's story involves individuals satisfying their needs out of the common largesse in this virtuous and self-reliant way. The second phase of the story involves their exchanging surplus goods that they have appropriated with one another; rather than saying that such surpluses lapse back into the common heritage, Locke allows individuals to acquire, grow, or make more than they can use so that markets become possible and prosperity general (ibid., II, paras. 46–51). With markets and prosperity,

however, comes inequality, avarice and envy, and the third and last stage of Locke's account is the institution of government to protect the property rights that have grown up in this way (ibid., II, paras. 123 ff.) The story assumes that individuals are able to reason through these issues of who is entitled to appropriate and use and exchange goods without the tutelage of government, and that at neither the first stage nor the second stage is any social or political decision-making about property required.

In its most basic aspect, Locke's genealogy has the character of a First Occupancy story. In the first instance, the legitimacy of an individual's appropriation stems largely from the fact that it does not involve the direct expropriation of anyone else: by definition the 'first occupancy' is peaceful. There are, of course, strong elements of utilitarian and virtue theory in Locke's account too—the productivity of labor and the privileging of what Locke calls 'the Industrious and the Rational' over the 'Covetousness of the Quarrelsom and Contentious' (ibid., II, para. 34). But the issue of historical priority is indispensable. Whose use of a given resource came first is crucial, and the order in which goods were subsequently transferred from hand to hand is indispensable for understanding the legitimacy of current entitlements. Robert Nozick (1974) has done more than anyone else to elucidate the form of this kind of 'historical entitlement' theory.

Not all genealogies of property have this shape. David Hume tells a completely different sort of story. On his approach, we begin by assuming that since time immemorial, people have been fighting over resources, so that the distribution of *de facto* possession at any given time is arbitrary, being driven by force, cunning, and luck. Now it is possible that such fighting will continue indefinitely. But it is also possible that it may settle down into a sort of stable equilibrium in which those in possession of significant resources and those tempted to grab resources from others find that the marginal costs of further predatory activity are equal to their marginal gains. Under these conditions, something like a 'peace dividend' may be available. Maybe everyone can gain, in terms of the diminution of conflict, the stabilizing of social relations, and the prospects for market exchange, by an agreement not to fight any more over possessions.

> I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour… (Hume 1978 [1739], p. 490).

Such a resolution, if it lasts, may amount over time to a ratification of *de facto* holdings as *de jure* property. As with Locke's account, the state comes into the picture much later to reinforce conventions of property that emerge informally in this way (ibid., pp. 534 ff.). But notice how much more modest Hume's story is than the Lockean account in the moral claims that it makes (see Waldron 1994). The stability of the emergent distribution has nothing to do with its justice, nor with the moral quality of the actions by which goods were appropriated. It may be fair or unfair, equal or unequal, but the parties already know that they cannot hope for a much better distribution by pitching their own strength yet again against that of others. (See also Buchanan 1975 for a modern version of this approach.)

As an account of the genesis of property, Hume's theory has the advantage over its main rivals of acknowledging that the early eras of human history are eras of conflict largely unregulated by principle and opaque to later moral enquiry. It does not require us to delve into history to ascertain who did what to whom, and what would have happened if they had not. Once a settled pattern of possession emerges, we simply draw an arbitrary line and say, 'Property entitlements start from *here*.' The model has important normative consequences for the present as well. Those who are tempted to question or disrupt an existing distribution of property must recognize that far from ushering in a new era of justice, their best efforts are likely to inaugurate an era of conflict in which all bets are off and in which virtually no planning or cooperation is possible. The

weakness of the Humean approach is the obverse of its strength. The moral considerations that it marginalizes actually do matter to us. For example, we would not be happy with a Humean convention ratifying slavery or cannibalism, but for all that Hume shows it may well be a feature of the equilibrium emerging from the age of conflict that some people are in possession of others' bodies. The point is that even if Hume is right that the sentiment of justice is built up out of a convention to respect one another's *de facto* possessions, that sentiment once established can take on a life of its own, so that it can subsequently be turned against the very equilibrium that engendered it (Waldron 1994).

A third variety of property-story makes the state and the social contract more fundamental than it is in either Locke's or Hume's approach. We are to imagine a period where people try and rely on their own physical and moral initiative to take possession of the resources which they need or want, but in which it become increasingly apparent that institution of reliable property arrangements is going to have to involve a social decision. Eventually property must be based on consent—the consent of everyone affected by decisions about the use and control of a given set of resources. This theory is associated with the normative political philosophy of Jean-Jacques Rousseau (1968 [1762]) and Immanuel Kant (1991 [1797]). As we have seen, the Lockean critique of this sort of approach was always that urgency of material need left no time for social consent. In fact the Rousseau/Kant approach has little difficulty with this point. There can be provisional appropriations made unilaterally (Ryan 1984, p. 80). But every such appropriation is subject in principle to the consent of all and must be offered up for social ratification. In other words, the urgency of immediate need is not taken as a basis of discrediting the review and redistribution of possession by society as a whole if serious distributive anomalies are emerging.

What all this actually yields in the way of a legitimate assignment of resources to individuals is a matter of the distributive principles that survive the test of ratification by the general will. Rawlsian, egalitarian and utilitarian approaches are all imaginable under the auspices of this account. The essence of the Rousseau/Kant approach is that society's deployment of principles like these to evaluate existing distributions is never trumped by the history of entitlements and it is never excluded by the Humean conventions that may have emerged as a cosy equilibrium among those who are actually in possession.

What claims are being made in and about these stories? Are we to assume that one of them is literally true? Or what are we to infer from their falsity (if they are historically inaccurate)? Does it follow that property is illegitimate? A number of philosophers have suggested recently that a genealogy can make an important contribution to our understanding of a phenomenon even when it is not literally true: Bernard Williams (2002) has suggested this about language and the emergence of truth-telling, following Edward Craig (1990)'s genealogical account of our possession of the concept of knowledge. Robert Nozick has also discussed the value of what he calls 'potential explanations'—stories that would explain how something happened if certain things were the case (some of which in fact are not the case): 'To see how in principle, a whole realm could fundamentally be explained greatly increases our understanding of the realm…We learn much by seeing how the state could have arisen, even if it didn't arise that way' (Nozick 1974, pp. 8–9).

The genealogies we have considered may differ in this regard. The Rousseau/Kant approach helps us understand why private property is inherently a matter of social concern and the Humean approach helps us see the value of property in providing people with a fixed and mutually acknowledged basis on which the rest of social life can be built, whether or not it answers to our independent intuitions of justice. But the Lockean genealogy may explain little or nothing about property entitlements unless it is actually true. As Nozick acknowledges (1974, pp. 151–2), a modern state should not feel morally constrained by property holdings which might have had a Lockean pedigree but in fact do not. In this regard it is interesting that one of the main uses of

Lockean theory these days is in defending the property rights of indigenous people—where a literal claim is being made about who had first possession of a set of resources and about the need to rectify the injustices that accompanied their subsequent expropriation (see Waldron 1992).

Finally, we should not forget that not all genealogies set out to flatter the practices or institutions they purport to explain. Karl Marx's account of primitive accumulation (1976 [1867]) and Jean-Jacques Rousseau's non-normative description of the invention of property in the *Discourse on the Origins of Inequality* (Rousseau 1994 [1755]) are genealogies written more in a Nietzschean spirit of pathology than as part of any quest for justification. Such negative genealogies reminds us of the importance of Mill's observation that in approaching the justification of private property we must remember that, 'we must leave out of consideration its actual origin in any of the existing nations of Europe' (Mill 1994 [1848], p. 7).

5. Justification: Liberty and Consequences

The justificatory issue might therefore be confronted directly, without invoking any sort of history or genealogical narrative.

In dealing with the pros and cons of private property as an institution, it has sometimes been suggested that the general justification of private property and the distribution of particular property rights can be treated as separate issues, rather in the way that some philosophers suggested that the general justification of punishment can be separated from the principles governing its distribution (Hart 1968, p. 4; see also Ryan 1984, p. 82 and Waldron 1988, p. 330). In neither case, though, is the separation complete: it holds for some general justifications and not for others. In the theory of punishment, a retributivist will believe that the principles governing punishment in general necessarily also regulate its particular distribution. And there are analogues in the theory of property. Robert Nozick (1974) argued that a theory of historical entitlement, along Lockean lines, provides both a complete justification of the institution and a set of strict criteria that govern its legitimate distribution. Property rights, according to Nozick, constrain the extent to which we are entitled to act on our intuitions and theories about distributive justice. Consequentialist theories, however, may be able to separate the institutional and distributive issues in this way, and some theories of liberty may be able to do this also (though the distribution of liberty is itself something about which most libertarians have firm—and egalitarian!—views). As we assess various distributive arguments, then, it is a good idea to keep in mind the question of whether or not they have direct or indirect distributive implications.

On the other hand, it is surely important to keep in view the 'big picture' that a system of property presents (Singer 2000 and Purdy 2011). What overall model of community is generated by a given system of property rights and by the way they circulate in society? What kinds of inter-personal relations does a given system of property foster? What ethos of economic interaction does it give rise to: an obsession with efficiency, an ethic of competitiveness, or a shared concern for those who are less well-off? These questions are not distinct from questions about distribution, but they look at them in a different light, not just asking about their moral justification one by one.

The most common form of justificatory argument is consequentialist: people in general are better off when a given class of resources is governed by a private property regime than by any alternative system. Under private property, it is said, the resources will be more wisely used, or used to satisfy a wider (and perhaps more varied) set of wants than under any alternative system, so that the overall enjoyment that humans derive from a given stock of resources will be increased. The most persuasive argument of this kind is sometimes referred to as 'the tragedy of the commons' (Hardin 1968). If everyone is entitled to use a given piece of land, then no one has an incentive to see that crops are planted or that the land is not over-used. Or if anyone does take on this responsibility, they themselves are likely to bear all the costs of doing so (the costs of

planting or the costs of their own self-restraint), while any benefits of their prudence will accrue to all subsequent users. And in many cases there will be no benefits, since one individual's planning or restraint will be futile unless others cooperate. So, under a system of common property, each commoner has an incentive to get as much as possible from the land as quickly as possible, since the benefits of doing this are in the short-term concentrated and assured, while the long-term benefits of self-restraint are uncertain and diffused. However, if a piece of hitherto common land is divided into parcels and each parcel is assigned to a particular individual who can control what happens there, then planning and self-restraint will have an opportunity to assert themselves. For now the person who bears the cost of restraint is in a position to reap all the benefits; so that if people are rational and if restraint (or some other form of forward-looking activity) is in fact cost-effective, there will be an overall increase in the amount of utility derived.

Arguments of this sort are familiar and important, but like all consequentialist arguments, they need to be treated with caution. In most private property systems, there are some individuals who own little or nothing, and who are entirely at the mercy of others. So when it is said that 'people in general' are better off under private property arrangements, we have to ask 'Which people? Everyone? The majority? Or just a small class of owners whose prosperity is so great as to offset the consequent immiseration of the others in an aggregative utilitarian calculus?' (Wenar 1998). John Locke hazarded the suggestion that everyone would be better off. Comparing England, whose commons were swiftly being enclosed by private owners, to pre-colonial America, where the natives continued to enjoy universal common access to land, Locke speculated that 'a King of a large and fruitful Territory there [i.e. in America] feeds, lodges, and is clad worse than a day Labourer in England.' (Locke 1988 [1689], II, para. 41) The laborer may not own anything, but his standard of living is higher on account of the employment prospects that are offered in a prosperous privatized economy. Alternatively, the more optimistic of the consequentialists cast their justifications in the language of what we would now call 'Pareto-improvement'. Maybe the privatization of previously common land does not benefit everybody: but it benefits some and it leaves others no worse off than they were before. The homelessness and immiseration of the poor, on this account, is not a result of private property; it is simply the natural predicament of mankind from which a few energetic appropriators have managed to extricate themselves.

So far we have considered the consequentialist case for private property over common property. The consequentialist case for private property over collective property has more to do with markets than with the need for responsibility and self-restraint in resource use. The argument for markets is that in a complex society there are innumerable decisions to be made about the allocation of particular resources to particular production processes. Is a given ton of coal better used to generate electricity which will in turn be used to refine aluminum for manufacturing cooking pots or aircraft, or to produce steel which can be used to build railway trucks, which may in turn be used to transport either cattle feed or bauxite from one place to another? In most economies there are hundreds of thousands of distinct factors of production, and it has proved impossible for efficient decisions about their allocation to be made by central agencies acting in the name of the community and charged with overseeing the economy as a whole. In actually existing socialist societies, central planning turned out to be a way of ensuring economic paralysis, inefficiency and waste (Mises 1951). In market economies, decisions like these are made on a decentralized basis by thousands of individuals and firms responding to price signals, each seeking to maximize profits from the use of the productive resources under its control, and such a system often works efficiently. Some have speculated that there could be markets without private property (Rawls, 1971, p. 273), but this seems hopeless. Unless individual managers in a market economy are motivated directly or indirectly by considerations of personal profit in their investment and allocation decisions, they cannot be expected to respond efficiently to prices. Such motivation will occur only if the resources are privately owned, so that the loss is theirs (or

their employer's) when a market signal is missed and the gain is theirs (or their employer's) when a profitable allocation is secured.

I said earlier that a consequentialist defense is in trouble unless it can show that everyone is better off under a private property system, or at least that no-one is worse off. Now, a society in which all citizens derive significant advantages from the privatization of the economy is perhaps not an impossible ideal. But in every existing private property system there is a class of people who own little or nothing and who are arguably much worse off under that system than they would be under a socialist alternative. A justificatory theory cannot ignore their predicament, if only because it is their predicament that poses the justificatory issue in the first place (Waldron 1993). A hard-line consequentialist may insist that the advantages to those who profit from private ownership outweigh the costs to the underclass. Philosophically, however, this sort of hard line is quite disreputable (Rawls 1971, pp. 22–33; Nozick 1974, pp. 32–3). If we take the individual rather than a notional entity like 'the social good' as the focal point of moral justification, then there ought to be something we can say to *each* individual why the institution we are defending is worthy of her support. Otherwise it is not at all clear why *she* should be expected to observe its rules (except when we have the power and the numbers to compel her to do so).

Maybe the consequentialist argument can be supplemented with an argument about desert in order to show that there is justice in some people's enjoying the fruits of private property while others languish in poverty. If private property involves the wiser and more efficient use of resources, it is because someone has exercised virtues of prudence, industry, and self-restraint. People who languish in poverty, on this account, do so largely because of their idleness, profligacy or want of initiative. Now, theories like this are easily discredited if they purport to justify the actual distribution of wealth under an existing private property economy (Nozick 1974, pp. 158–9; Hayek 1976). But there is a more modest position which desert theorists can adopt: namely, that private property alone offers a system in which idleness is not rewarded at the expense of industry, a system in which those who take on the burdens of prudence and productivity can expect to reap some reward for their virtue which distinguishes them from those who did not make any such effort (Munzer 1990, pp. 285 ff.).

Many of the alleged market-advantages accrue only if private property is distributed in certain ways. Monopolistic control of the main factors of production by a few individuals or corporations can play havoc with market efficiency; and it can also lead to such great concentrations of private power as to offset any argument for property based on freedom, dissent or democracy. Distributive equity may be crucial also for non-consequentialist arguments. The idea that property-owning promotes virtue is, as we have seen, as old as Aristotle; and even today it is used by civic republicans as an argument against economic collectivism. According to this argument, if most economic resources are owned in common or controlled collectively for everyone's benefit, there is no guarantee that citizen's conditions of life will be such as to promote republican virtue. In a communist or collectivist society, citizens may behave either as passive beneficiaries of the state or irresponsible participants in a tragedy of the commons. If a generation or two grow up with that character then the integrity of the whole society is in danger. These arguments are interesting, but it is worth noting how sensitive they are to the distribution of property (Waldron 1986, pp. 323–42). As T.H. Green observed, a person who owns nothing in a capitalist society 'might as well, in respect of the ethical purposes which the possession of property should serve, be denied rights of property altogether' (Green 1941 [1895], p. 219).

We must also consider justificatory arguments that connect property with liberty. Societies with private property are often described as free societies. Part of what this means is surely that owners are free to use their property as they please; they are not bound by social or political decisions. (And correlatively, the role of government in economic decision-making is

minimized.) But that cannot be all that is meant, for it would be equally apposite to describe private property as a system of *unfreedom*, since it necessarily involves the social exclusion of people from resources that others own. All property systems distribute freedoms and unfreedoms; no system of property can be described without qualification as a system of liberty. Someone may respond that the liberty to use what belongs to another is license not liberty, and so its exclusion should not really count against a private property system in the libertarian calculus. But the price of this maneuver is very high: not only does it commit the libertarian to a moralized conception of freedom of the sort that he usually shies away from (as in case of positive liberty), but it also means that liberty, so defined, can no longer be invoked to support property except in a question-begging way (Cohen 1982).

Two other things might be implied by the libertarian characterization. The first is a point about independence: a person who owns a significant amount of private property—a home, say, and a source of income—has less to fear from the opinion and coercion of others than the citizen of a society in which some other form of property predominates. The former inhabits, in a fairly literal sense, the 'private sphere' that liberals have always treasured for individuals—a realm of action in which he need answer to no-one but himself. But like the virtue argument, this version of the libertarian case is also sensitive to distribution: for those who own nothing in a private property economy would seem to be as unfree—by this argument—as anyone would be in a socialist society.

That last point may be too quick, however, for there are other indirect ways in which private property contributes to freedom (Purdy 2005). Milton Friedman (1962) argues that political liberty is enhanced in a society where the means of intellectual and political production (printing presses, photocopying machines, computers) are controlled by a number of private individuals, firms, and corporations—even if that number is not very large. In a capitalist society, a dissident has the choice of dealing with several people (other than state officials) if he wants to get his message across, and many of them are prepared to make their media available simply on the basis of money, without regard to the message. In a socialist society, by contrast, those who are politically active either have to persuade state agencies to disseminate their views, or risk underground publication. More generally, Friedman argues, a private property society offers those who own nothing a greater variety of ways in which they earn a living—a larger menu of masters, if you like—than they would be offered in a socialist society. In these ways, private property for some may make a positive contribution to freedom—or at least an enhancement of choice—for everyone.

Finally, in this review of direct normative arguments about property, we should consider the moral importance property might have in respect of what it is, rather than what it does or brings about. Property rights in and of themselves give people a certain status and recognition in society: a property owner is respected in his or her control of a resource (Dorfman 2012). This is surely important; it was, as we saw, one of the themes of the approach taken in Hegel 1967 and in Kant 1991 (see Byrd and Hruschka 2006). But it can have critical implications for property too, for if property is unevenly distributed, if inequality is radical and some are more or less comprehensively bereft of property rights, then acute issues have to be faced about the uneven distribution of the bases of respect. We cannot take seriously the good that property rights do in regard to moral recognition without also considering the inherent harm of absence of such recognition in the case of those who own nothing.

Bibliography

- Ackerman, Bruce (1977), *Private Property and the Constitution*, New Haven: Yale University Press.

- Alexander, Gregory and Peñalver, Eduardo (eds.) (2010), *Property and Community*, New York: Oxford University Press.
- Alexander, Gregory and Peñalver, Eduardo (2012), *An Introduction to Property Theory*, Cambridge: Cambridge University Press.
- Aquinas, Thomas, [*ST*] *Summa Theologiae* [1272], in Paul E. Sigmund (ed.) *St. Thomas Aquinas on Politics and Ethics*, New York: W.W. Norton, 1988.
- Aristotle, *The Politics* [c. 330 BCE], Stephen Everson (ed.), Cambridge: Cambridge University Press, 1988.
- Attas, Daniel (2006), 'Fragmenting Property,' *Law and Philosophy*, 25: 119–49.
- Bell, Abraham and Parchomovsky, Gideon (2003), 'Of Property and Antiproperty,' *Michigan Law Review*, 102: 1–70.
- Bell, Abraham and Parchomovsky, Gideon (2008), 'Reconfiguring Property in Three Dimensions,' *University of Chicago Law Review*, 75: 1015–70.
- Benn, S.I., and Peters, R.S. (1959), *Social Principles and the Democratic State*, London: George Allen and Unwin.
- Bentham, Jeremy (1931), *The Theory of Legislation* [1802], C.K. Ogden (ed.), London: Kegan Paul, Trench, Trubner & Co.
- Blackstone, William (2001), *Blackstone's commentaries on the Laws of England* [1763], Wayne Morrison (ed.), London: Cavendish Publishing.
- Brubaker, Stanley C. (2012), 'Coming into One's Own: John Locke's Theory of Property, God, and Politics,' *Review of Politics*, 74: 207–32.
- Buchanan, James M. (1975), *The Limits of Liberty: Between Anarchy and Leviathan*, Chicago: University of Chicago Press.
- Byrd, Sharon and Hruschka, Joachim (2006), 'The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right,' *University of Toronto Law Journal*, 56: 217–82.
- Carpenter, Kristen, Katyal, Sonia, and Riley, Angela (2009), 'In Defense of Property,' *Yale Law Journal*, 118:1022–1125.
- Cohen, G.A. (1979) 'Capitalism, Freedom and the Proletariat,' in Alan Ryan (ed.) *The Idea of Freedom: Essays in Honor of Isaiah Berlin*, Oxford: Oxford University Press.
- Cohen, G.A. (1995), *Self-ownership, Freedom and Equality*, Cambridge: Cambridge University Press.
- Craig, E.J. (1990), *Knowledge and the State of Nature*, Oxford: Clarendon Press.
- Dagan, Hanoch (2011), *Property: Values and Institutions*, Oxford: Oxford University Press.
- ——, (2013), 'Inside Property,' *University of Toronto Law Journal*, 63: 1–21.
- De Jasay, Anthony (2004), 'Property and Its Enemies,' *Philosophy*, 79: 57–66.

- Dorfman, Avihay (2012), 'The Society of Property,' *University of Toronto Law Journal*, 62: 563–607.
- Essert, Christopher (2013), 'The Office of Ownership,' *University of Toronto Law Journal*, 63: 418–461.
- Friedman, Milton (1962), *Capitalism and Freedom*, Chicago: University of Chicago Press.
- Gallie,W.B. (1956) 'Essentially Contested Concepts,' *Proceedings of the Aristotlean Society*, 56: 167–188.
- Green, T.H. (1941), *Lectures on the Principles of Political Obligation* [1895], London: Longmans Green & Co.
- Grey, T.C. (1980), 'The Disintegration of Property,' in J.R. Pennock and J.W. Chapman (eds.) *Nomos XXII: Property* (New York: New York University Press.
- Hardin, Garrett (1968), 'The Tragedy of the Commons,' *Science*, 162: 1243–8.
- Harris, J.W. (1996), *Property and Justice*, Oxford: Oxford University Press.
- Hart, H.L.A. (1968), *Punishment and Responsibility*, Oxford: Clarendon Press.
- Hayek, F.A. (1976), *The Mirage of Social Justice Law,* Volume II of *Law, Legislation and Liberty*, London: Routledge and Kegan Paul.
- Hegel, G.W. F. (1967), *The Philosophy of Right* [1821], T.M. Knox (trans.), Cambridge: Cambridge University Press.
- Heller, Michael (2001), *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, New York: Basic Books.
- Heller, Michael and Dagan, Hanoch (2001), 'The Liberal Commons,' *Yale Law Journal*, 110: 549–624.
- Hobbes,Thomas (1983), *De Cive: The English Version* [1647], Howard Warrender (ed.), Oxford: Clarendon Press.
- Honore, A.M. (1961), 'Ownership' in A.G. Guest (ed.) *Oxford Essays in Jurisprudence*, Oxford: Oxford University Press.
- Horne, Thomas A. (1990), *Property Rights and Poverty: Political Argument in Britain, 1605–1834*, Chapel Hill: University of North Carolina Press.
- Hull, Gordon (2009), 'Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property,' *Public Affairs Quarterly*, 23: 67–93.
- Hume, David (1978), *A Treatise of Human Nature* [1739] L.A. Selby–Bigge and P. H. Nidditch (eds.), Oxford: Clarendon Press.
- Kant, Immanuel (1991) *The Metaphysics of Morals* [1797], Mary Gregor (trans.) Cambridge: Cambridge University Press.
- Katz, Larissa (2008), 'Exclusion and Exclusivity in Property Law,' *University of Toronto Law Journal*, 58: 275–315.
- King, Desmond and Waldron, Jeremy (1988) 'Citizenship, Social Citizenship and the Defence of Welfare Rights,' *British Journal of Political Science*, 18: 415–43.

- Lever, Annabelle (2012), 'Privacy, Private Property, and Collective Property,' *The Good Society*, 21: 47–60.
- Lewis, David K. (1969), *Convention: A Philosophical Study*, Cambridge: Harvard University Press.
- Locke, John (1988), *Two Treatises of Government* [1689] Peter Laslett (ed.), Cambridge: Cambridge University Press.
- Marx, Karl (1972), *Theories of Surplus Value* [1862], London: Lawrence and Wishart.
- —— (1976), *Capital*, Volume I [1867], Ben Fowkes (trans.), Harmondsworth: Penguin Books.
- McElwee, Brian (2010), 'The Appeal of Self-Ownership,' *Social Theory and Practice*, 36: 213–232.
- Merrill, Thomas (2012), 'The Property Strategy,' *University of Pennsylvania Law Review*, 160: 2061–2095.
- Mill, John Stuart (1994), *Principles of Political Economy* [1848], Jonathan Riley (ed.), Oxford: Oxford University Press.
- Mises, Ludwig von (1951) *Socialism*, New Haven: Yale University Press.
- Munzer, Stephen R. (1990), *A Theory of Property*, Cambridge: Cambridge University Press.
- Murphy, Liam and Nagel, Thomas (2002), *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press).
- Nozick, Robert (1974), *Anarchy, State and Utopia*, Oxford: Basil Blackwell.
- Otsuka, Michael (1998), 'Self-Ownership and Equality: A Lockean Reconciliation,' *Philosophy and Public Affairs*, 27: 65–92.
- —— (2003), *Libertarianism without Inequality*, New York: Oxford University Press.
- Penner, J. E. (2000), *The Idea of Property in Law*, New York: Oxford University Press.
- Phillips, Anne (2013), *Our Bodies, Whose Property?* (Princeton: Princeton University Press).
- Pipes, Richard (1999), *Property and Freedom*, New York: Knopf.
- Plato, *Republic* [c. 370 BCE], Robin Waterfield (trans.), Oxford: Oxford University Press, 1993.
- Pufendorf, Samuel (1991), *On the Duty of Man and Citizen According to Natural Law* [1673], James Tully (ed.), Cambridge: Cambridge University Press.
- Purdy, Jedidiah (2005), 'A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates,' *University of Chicago Law Review*, 72: 1237–1298.

- —— (2011), *The Meaning of Property: Freedom, Community, and the Legal Imagination*, New Haven: Yale University Press.
- Radin, Margaret Jane (1982) 'Property and Personhood,' *Stanford Law Review*, 34: 957–1014.
- Rasmussen, Kasper-Lippert (2008), 'Against Self-Ownership,' *Philosophy and Public Affairs*, 36: 86–118.
- Rawls, John (1999), *A Theory of Justice*, Revised edition, Cambridge: Harvard University Press.
- Ripstein, Arthur (2009), *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge: Harvard University Press.
- Rousseau, Jean Jacques (1994), *Discourse on the Origin of Inequality* [1755], Franklin Philip (trans.) Oxford: Oxford University Press.
- —— (1968), *The Social Contract* [1762], Maurice Cranston (trans.) Harmondsworth: Penguin Books.
- Ryan, Alan (1984), *Property and Political Theory*, Oxford: Basil Blackwell.
- Singer, Joseph (2000), *The Edges of the Field: Lessons on the Obligations of Ownership*, Cambridge: Harvard University Press.
- Smith, Henry (2003), 'The Language of Property: Form, Context, and Audience,' *Stanford Law Review*, 55: 1105–91.
- —— (2012) 'Property as the Law of Things,' *Harvard Law Review*, 125: 1691–1726.
- Sobel, David (2012), 'Backing away from Libertarian Self-Ownership,' *Ethics*, 123: 32–60.
- Underkuffler, Laura (2003), *The Idea of Property: Its Meaning and Power*, Oxford: Oxford University Press.
- Vrousalis, Nicholas, 'Libertarian Socialism: A Better Reconciliation between Equality and Self-Ownership,' *Social Theory and Practice* 37: 211–226.
- Waldron, Jeremy (1988), *The Right to Private Property*, Oxford: Clarendon Press.
- —— (1992), 'Superseding Historic Injustice,' *Ethics*, 103: 4–28.
- —— (1993), 'Property, Justification and Need,' *Canadian Journal of Law and Jurisprudence*, 6: 185–215.
- —— (1994), 'The Advantages and Difficulties of the Humean Theory of Property,' *Social Philosophy and Policy*, 11: 85–123.
- —— (2001), 'Property, Honesty, and Normative Resilience,' in Stephen Munzer (ed.), *New Essays in the Legal and Political Theory of Property*, Cambridge: Cambridge University Press.
- —— (2002), *God, Locke, and Equality: Christian Foundations of Locke's Political Thought*, Cambridge: Cambridge University Press.

- —— (2006), 'Mr. Morgan's Yacht' in Christine Sypnowich (ed.) *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, (Oxford: Oxford University Press).
- —— (2009), 'Community and Property—for those who have neither,' *Theoretical Inquiries in Law*, 10: 161–92.
- Wenar, Leif (1998), 'Original Acquisition of Private Property,' *Mind*, 97: 799–819.
- Williams, Bernard (2002), *Truth and Truthfulness*, Princeton: Princeton University Press.

Section 3. LEGAL DEBATES

H. BREAKEY, PROPERTY

in INTERNET ENCYCLOPEDIA OF PHILOSOPHY (website)[1]

Concepts of property are used to describe the legal and ethical entitlements that particular people or groups have to use to manage particular resources. Beyond that most general definition of 'property' however, philosophical controversy reigns.

Political and legal philosophers disagree on what types of entitlements are essential elements of property, and on the shape and nature of the resultant property entitlements. Indeed, philosophers even disagree on whether it makes sense to talk, in abstraction from a specific legal context, of concepts of property at all. These theoretical controversies are mirrored in practice and law. Cases are determined and conflicts are resolved – or fomented, as the case may be – by the different ideas of property that claimants, judges, legislators and ordinary people recognise and deploy. These controversies are compounded when property concepts are used in application not only to the obvious cases of land and chattels (that is, movable items of property like chairs and cars), but to airspace, airwaves, inventions, information, corporate stock, reputations, fishing rights, brand names, labour, works of art and literature, and more.

Over the last century of political and legal thought, there have been two major – and very different –property-concepts: Bundle Theory and Full Liberal Ownership. Bundle Theory holds that property is a disparate 'bundle' of legal entitlements, or 'sticks' as they are metaphorically termed. What property a person holds in any given case is determined by the specific entitlements granted by the law to that person. According to Bundle Theory there is no *prior* idea of property that the law reflects, or that guides the adjudication of cases. The central reason supporting Bundle Theory is the dizzying diversity of property entitlements in law: applying to myriad sorts of resources, regulated in innumerable ways, subject to different sorts of taxation and differing across jurisdictions.

Other theorists, however, have argued that despite the complexity of certain cases of property in law, the idea of property carries genuine content across many contexts and jurisdictions – especially in application to land and chattels. Far from having no substance, the idea of Full

[1] © Copyright Internet Encyclopedia of Philosophy and its Authors, in this case Hugh Breakey <h.breakey@griffith.edu.au>. https://iep.utm.edu/prop-con/.

Liberal Ownership gave property a detailed and comprehensive meaning: property includes the full gamut of rights to: (a) use the owned resource, (b) exclude others from entering it, and, (c)alienate it (that is, to sell it to someone else).

Yet if Bundle Theory can be faulted as being too nebulous to be correct, some property theorists have argued that Full Liberal Ownership falls into the opposite error, and is too simple and stringent to explain the lived detail of property entitlements. Rejecting both these theories, these theorists have developed diverging accounts of property, arguing that one feature or other – exclusion, use, power, immunity or remedy – is the essential hallmark of property.

This article surveys the major types of contemporary property theories, and the philosophical arguments offered in support of them. The nature of such property concepts carries consequences for the ethical justifications of various property regimes. Several of the more important consequences will be noted in this article, but not pursued in any detail. Readers interested in ethical justifications for property rights should consult the IEP article The Right to Private Property.[2]

Table of Contents

1. Preliminaries

With his characteristic shrewdness, Nietzsche once observed that it is hard to define concepts that have a history. Whatever else may be said of it, property has a history; forms of private property in land date back at least ten millennia, and private property in chattels (movable objects of property like tools and clothes) was present in the Stone Age. With Nietzsche's point in mind, then, three general remarks on property's conceptual ambiguities are worth making.

First, the term 'property' may refer to the proprietorial entitlements of an owner (Bob has property in that car) or it may refer to the *thing* that is owned itself (That car is Bob's property).

[2] Both the Stanford Encyclopedia and this artilcle cite such an article in the IEP. The link does not work and an article on this topic is listed among those that IEP wants to have someone write. https://iep.utm.edu/submit/100-most/

Lawyers and philosophers tend to be wary of the latter use, primarily because it can distract attention from the significance of the entitlements involved. That is, if we speak about Bob's car as being his property, then we might be inclined to think that property is all about Bob's relation to his car, rather than being about the duties everyone owes Bob with respect to his car. If we say that Bob has property in his car, then it is a little clearer that property is about legal and ethical entitlements, and not merely about a physical thing. That said however, using 'property' to refer only to entitlements and not to things carries the danger of forgetting that ordinary people and sometimes even lawmakers may be using the term in its second application (Wenar 1997). With this in mind, this article will use the term in both its meanings; context should at any point make clear which is intended.

Second, property comes in at least three different basic forms: private, collective and common. Private property grants entitlements to a resource to particular individuals, collective property vests them in the state, and common property enfranchises all members of a community. Most contemporary debate on the nature of property surrounds the concept of private property, and this will be the focus of the article. Reflecting this, the term 'property' typically will stand for private property, except in the specific sections dealing with common property and collective property (§ 6.1 and §11). Reference to one of these three types of property is often used to characterise types of economic and political regimes. For instance, liberalism may be characterised by private property, socialism by collective property, and certain forms of anarchism and communitarianism by the use of common property. However, it is important to be aware that such characterisations are made on the basis of the *predominant* form of property in the regime, as no regime relies exclusively on just one form of property. Certain resources seem to be more amenable to one type of property entitlement than another: air as common property, toothbrushes as private property, and artillery as collective property, for example.

Third, actual property entitlements – in law and custom alike – tend to be highly complex, so caution is advisable when philosophical (armchair) theories of property are used to characterise actual property entitlements. The effort to categorize and clarify can distort important features of property that lie within its complexities.

2. Bundle Theory

Bundle Theory is not so much a property-concept as it is the idea that 'property' is not really a proper concept at all. Bundle Theory states that there is no pre-existing, well-defined and integrated concept of property that guides – or should guide – our understanding of property-entitlements, or the creation or interpretation of property-entitlements in law. Instead, the law grants specific entitlements of people to things. The property that a person holds in any given instance is simply the sum total of the particular entitlements the law grants to her in that situation. These particular entitlements are metaphorically termed 'sticks', and the property that a person holds is thus the particular bundle of sticks the law grants to them in the given instance. Changes to law can alter property entitlements by adding or removing particular sticks from the bundle. Also, several people may have property-entitlements in one resource, as the sticks are spread amongst them, each person with his own bundle. In such cases, Bundle Theory says, it is meaningless to try to determine who the *real* owner is; each person simply has the entitlements the law grants to them.

There are three main arguments for Bundle Theory. The first argument is conceptual and dates back to Wesley Hohfeld's path-breaking analysis of rights. Hohfeld (1913) argued that entitlements in law could be broken down into their constituent parts – the basic building-blocks of which more complex legal entitlements are constructed. He termed these basic entitlements 'jural relations'. In all, Hohfeld described eight jural relations, four of which are important for our purposes here:

Liberty/Privilege: Person A has a liberty to do X with respect to another person B when A has no duty to B not to do X. For example, in an ordinary case Annie will have a liberty (with respect to some other beach-goer Bob) to swim at a public beach if she is not under any duty to Bob not to swim at the beach.

Claim-right: Person A has a claim on another person B to do X when B is under a duty owed to A to perform X. For instance, Annie has a claim-right that Bob not hit her – a claim that correlates with Bob's duty to refrain from hitting Annie.

Power: Person A has a power over person B with respect to X when A can alter B's liberties and claim-rights with respect to X. For instance, when Annie alters Bob's liberties by waiving her claim-right that he not kiss her, she exercises her power to dissolve Bob's prior duty and so to grant him a liberty. Promising, waiving and selling are all examples of using powers because they all involve the agent in question altering in some way the duties of other people.

Immunity: Person A has an immunity against a person B with respect to X if B cannot alter A's claims or liberties with respect to X. For instance, if Annie has an immunity against Bob with respect to her freedom of association, then Bob cannot impose new duties on her to refrain from associating (with Charles, say).

Powers and immunities are sometimes called 'second-order' jural relations, because they modify or protect first-order jural relations like liberties and claims-rights. For example, when Annie waives (that is, gives up or relinquishes) Bob's duties not to kiss her, she uses a second-order jural relation (a power) to create in Bob a first-order jural relation (a liberty). As Hohfeld argued, any given right may be broken down into these common denominators – these liberties, claims, immunities and powers. In particular, upon analysis, *property* may be so divided. Property usually contains some liberties (e.g. to use and possess), some claim-rights (e.g. that others not trespass), some immunities (e.g. that others cannot simply dissolve their duties not to trespass) and some powers (e.g. to sell the owned object). Hohfeld's analysis demonstrated that property was not as simple an idea as it might first appear. Contrary to popular opinion, property was not a relationship with a thing, but a myriad of jural relations with an indefinite number of other people with respect to a thing. It was not itself a simple entitlement, but rather a consolidated entitlement made up of more simple constituents.

Hohfeld's analysis did not require adopting the Bundle Theory thesis that there was no integrity or determinate content to the concept of property. One could, as many have since done, hold that property was a specific group of certain sorts of Hohfeldian jural relations. However, Hohfeld's system laid the conceptual groundwork for Bundle Theory's stance. Once property could be conceptually dissected into its constituent parts, the door was open for the disintegration of the concept itself. The positive reason for performing such disintegration was supplied by the second argument for Bundle Theory: the complexity of actual proprietorial entitlements in law.

At least by the arrival of the twentieth century, if not much earlier, property entitlements had become enormously complex. Property entitlements were applied to myriad different entities: to airspace, airwaves, inventions, information, fugacious resources (flowing resources like water and oil), riparian land (land bordering rivers), fisheries, wild animals, broadcast rights, mining rights, brand names, labour, works of art and literature, corporate stock, options, reputations, and so on and on. It was difficult to believe that the same cluster of Hohfeldian jural relations were enjoyed by holders of property over all these diverse resources. Furthermore, all of these sorts of property were subject to a wide variety of regulation and taxation measures, all of which might change from country to country, if not state to state. Worse still, many types of property had multiple persons with separate proprietorial entitlements in them; trusts, easements, and common property entitlements all allowed many people to have property in the one resource. While there may have been sense in using a determinate, integrated idea of property in the eighteenth century, it was

argued, such a simplistic notion was outmoded (Grey 1980). Faced with the breathtaking variety of existing proprietorial entitlements, the sensible response was to abandon talk of 'property' altogether and refer directly to the specific Hohfeldian jural relations – the particular bundle of sticks – held by a given person in a given instance.

The third argument for Bundle Theory's proposed disintegration of property is an explicitly normative one: that is, it derives from political and ethical theory. Those advocating an integrated idea of property tended to be drawn toward a very strong notion of property: Full Liberal Ownership (see §3 below). This concept of property appeared to leave precious little space for taxation or rates, and so seemed to present a potentially powerful obstacle to the usual schemes for funding basic state institutions, developing public goods, or alleviating poverty. Similarly, Full Liberal Ownership conflicted with state regulation of property, and so opposed environmental limitations on the use of land. With such concerns in mind, some property theorists concluded that any defensible proprietorial entitlements must be fashioned in accord with social justice and environmental commitments, rather than determined by a prior declaration of the essential nature of property (Singer 2000; Freyfogle 2003). Property entitlements are a *product* of policy and legislation, it was argued, not a conceptual or normative force *guiding it*. If this is right, then Bundle Theory is a more accurate depiction of the proper nature of property.

For conceptual, descriptive and normative reasons, then, Bundle Theory aimed to disintegrate the concept of property. In its thinking, the state should decide which entitlements to confer on an individual in any given case; that bundle of sticks thereafter constitutes the property that individual holds. There is no *prior* concept of property determining its bounds.

3. Full Liberal Ownership

If Bundle Theorists had expected the idea of property to fall into disuse however, they were mistaken; the idea of property continued to be invoked in lay, legal and theoretical discourse. Indeed, ordinary people seemed to be able to use their rough-and-ready ideas of property to workably navigate their way through the complex legal world around them. With such considerations as these in mind, philosophers and legal commentators increasingly began to question Bundle Theory's disintegration of the concept. While the complexity and flexibility of property in some exotic applications could not be questioned, in other more familiar applications it appeared to have an adequate consistency. This was particularly true with respect to chattels like umbrellas, toothbrushes and cars. Far from having no content, it was observed, property entitlements to such objects displayed a profound homogeneity across jurisdictions and political regimes.

Emerging out of this literature, but with countless historical forebears, was a comprehensive concept of property: Full Liberal Ownership. The ringing tones of legal theorist William Blackstone in his 1776 *Commentaries on the Laws of England* are often used to encapsulate Full Liberal Ownership. In the opening lines of the second book Blackstone declares property to be:

> that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Less poetically, but rather more informatively, in 1961 the legal scholar A. M. Honoré set down what he viewed as the eleven 'standard incidents' of ownership:

1. The right to possess: to have exclusive physical control of a thing;
2. The right to use: to have an exclusive and open-ended capacity to personally use the thing;
3. The right to manage: to be able to decide who is allowed to use the thing and how they may do so;

4. The right to the income: to the fruits, rents and profits arising from one's possession, use and management of the thing;
5. The right to the capital: to consume, waste or destroy the thing, or parts of it;
6. The right to security: to have immunity from others being able to take ownership of (expropriating) the thing;
7. The incident of transmissibility: to transfer the entitlements of ownership to another person (that is, to alienate or sell the thing);
8. The incident of absence of term: to be entitled to the endurance of the entitlement over time;
9. The prohibition on harmful use: requiring that the thing may not be used in ways that cause harm to others;
10. Liability to execution: allowing that the ownership of the thing may be dissolved or transferred in case of debt or insolvency; and,
11. Residuary character: ensuring that after everyone else's entitlements to the thing finish (when a lease runs out, for example), the ownership returns to vest in the owner.

With one modification, this list conveys the now popular idea of Full Liberal Ownership. The modification is the rejection by later property theorists of Incident Nine, the prohibition on harmful use. While it is of course agreed that an owner may not use her property in ways that harm others, most theorists see this constraint as a reflection of a prior and ongoing duty all people have not to harm others, and so as not a feature of property *per se*.

Honoré's comprehensive listing of these incidents does not in itself confute Bundle Theory. Indeed, as it turned out, Honoré's list proved a helpful resource for Bundle Theorists; it usefully described the types of sticks that may or may not be present in a proprietor's bundle. A proprietor may have the incident of income, but not the incident of management, for example, or vice versa. Yet two points can be made about Honoré's list that do challenge Bundle Theory.

The first point is conceptual: while modifications in many cases may occur, Honoré's list showed it was possible for there to be a 'standard case' of property. His list of incidents was not asserted to be a strict definition of property, demarcating its necessary-and-sufficient conditions. Rather, it outlined the basic features of the concept of property in a manner evocative of Wittgenstein's idea of 'family resemblance'. Even if Bundle Theory was right that there was no strict essence of property, the concept nevertheless displayed an array of central characteristics by which it could be recognized and utilized. Furthermore, with this standard set down, other more esoteric types of property could be modeled upon it by analogy.

The second point is the actual existence, in law and custom, of the full complement of Honoré's property-incidents, in chattels at least, in many places across the globe. As Honoré argued with respect to umbrellas; and others did similarly with respect to automobiles and other moveables, property in such items very often amounts to Full Liberal Ownership. In application to chattels at least, there is – contrary to the claims of Bundle Theory – a striking consistency in the meaning of property.

Even with these two points acknowledged, however, Full Liberal Ownership has seemed to many theorists an overly comprehensive account of private property. While it may be difficult to deny the consistency in proprietorial entitlements over chattels, the problem cases put forward by Bundle Theory remain. Indeed, recent work on common property rights (such as the shared right to hunt a local wood, or fish a local stream) has expanded the array of property cases that struggle to fit the individualist Full Liberal Ownership mould. Likewise, the tension between the requirements of Full Liberal Ownership and political commitments to social justice and

environmental sustainability are as relevant as ever. Indeed, the oft-cited declaration of Blackstone above – when set in the context of his famous *Commentaries* themselves – draws our attention to both the intuitive appeal of Full Liberal Ownership and its surprisingly limited application in the real world in the face of environmental problems and issues of social justice. For as any reader of the *Commentaries* quickly discovers, Blackstone's book on property teems with all manner of exotic and overlapping proprietorial rights – in fishing, hunting, travel, foraging, pasturing, recreation and digging for turf or peat. Full Liberal Ownership hardly makes an appearance in the *Commentaries* even as an ideal type. In the last analysis, then, Full Liberal Ownership seems to be honored more in the breach than in the observance.

Much of the recent work in property theory can be seen as an attempt to navigate between the two poles of Full Liberal Ownership and Bundle Theory, aiming to provide an account that preserves the conceptual integrity of the former while allowing some of the descriptive and normative flexibility of the latter.

There are a variety of theoretical options open to the property theorist attempting such navigation. They may adopt a broader concept of property and then envisage Full Liberal Ownership as one conceptualization (that is, specification) of that larger idea (Waldron 1985). They may adopt a continuum concept of property, where ownership sits as the limit case at the very top of a spectrum of property entitlements, with lesser entitlements located further down the spectrum (Harris 1996). Or they may advance additional concepts of property that sit alongside ownership and aim to cover the cases it is perceived to miss (Breakey 2011). Perhaps the commonest response, however, is simply to relax a strict necessary-and-sufficient-conditions reading of Honoré's incidents, and consider the usual elements located within the general idea of property.

4. The General Idea of Private Property: The Integrated Theory

Taking a broader perspective than Honoré, many contemporary property theorists accept a three-part approach to property. The general idea of private property, it is held, consists of the following three elements:

Exclusion: others may not enter or use the resource;

Use: the owner is free to use and consume the resource;

Management and Alienation: the owner is free to manage, sell, gift, bequeath or abandon the resource.

On this account, property owners are expected to have some level of each of these three types of entitlements. Full Liberal Ownership will emerge as the limit case of private property, arising when a property-holder has the maximum possible entitlement on the three dimensions of exclusion, use and alienation. Lesser types of property are still possible, provided they contain some threshold amount of these three elements.

This view is thus less absolutist and less comprehensive than Full Liberal Ownership; private property may be regulated or taxed, yet it still displays the signature properties of exclusion, use and alienability—it remains property. Equally though, this concept of property – Integrated Theory, as some have called it – departs from Bundle Theory by viewing property as a consolidated concept (Mossoff 2003). Whether we express property's entitlements under the three categories of exclusion, use and alienation, or through Hohfeld's jural relations or Honoré's incidents, the thought is that its components integrate together to create a united sum that is larger than its parts. Contrary to the claims of Bundle Theory, it is argued, property is a larger, organic whole; the elements of property are not easily detached one from another, and a legal regime cannot simply pick and choose from them at will. Use, exclusion and alienation fit together like three pieces of a puzzle.

In what ways does Integrated Theory hold the elements of property to be conceptually linked? Expressing these conceptual links in terms of Honoré's incidents, it seems reasonable to think that use includes and requires possession, and that management includes both of these. After all, one cannot manage a property without being able to use it, and one cannot use it without being able to enter it or hold it. Furthermore, income in the form of fruits, rents and profits seems to be a natural result of a property-holder gaining the benefits of possession, use and management respectively (Attas 2007). Likewise, immunities from expropriation are linked to all these incidents. One can't manage or gain income from a resource if others can simply dissolve all one's entitlements to it and use it for free.

As such, it is no easy matter for a property bundle on the one hand to include management and on the other to exclude income or immunity. The point may be argued similarly with respect to Hohfeld's jural relations. While it is, strictly speaking, conceptually possible to distinguish between claim-rights against other's trespass, liberties of use, and powers of management, it seems fair to say that such relations nevertheless sit very naturally alongside one another. It is difficult to understand what the point would be of having just one of these entitlements without having one or both of the others (Merrill 1998). (This inter-linkage explains, after all, why Hohfeld's analysis was so groundbreaking, and why law students often struggle to grasp it: ordinary language naturally bunches together the elements that Hohfeld carefully distinguished.) As such, the disintegrated notion of property conjured up by Bundle Theory appears misleading. Analogizing to physics, while it might be true that atoms are made up of protons, neutrons and electrons, this does not mean that it is advisable to try splitting them into these component parts, or that it is possible to reconfigure them in any given alternative arrangement.

Even if it is accepted that there are deep conceptual and practical ties between the elements of property, however, the question may still arise: Which, if any, of the three elements above is the quintessential mark – the essential feature – of property? As the next several sections explain, many property theorists have departed from the Integrated Theory in holding that the essence of property is one or other of the three elements of exclusion, use and alienability – and some property theorists have looked even further afield. The question is not merely a theoretical one. The law often needs to determine whether a given regulation is or is not a violation of the property right – whether it is, for instance, a *taking* in respect of the Fifth Amendment of the United States Constitution. For such purposes, the question of the essence of property is pivotal. Is it found within exclusion, use, powers of alienation, or some further element?

5. Exclusion: Trespass-Based Theories

As Blackstone's talk of 'total exclusion' suggests, perhaps the most intuitive answer to the question of property's essence is the right to exclude.

Without question, the notion of exclusion captures an important aspect of most property entitlements: namely, the privileged relationship that one person has (or sometimes a group of people have) to a resource, as compared to other non-property-holders. It is not only the case that the property-holder can prohibit others from engaging with the owned resource, but also that the property-holder is themselves entitled to engage with that resource without requiring the say-so of any other person. The idea of one person excluding others helpfully captures this one-rule-for-me/one-rule-for-everyone-else feature of property entitlements.

Even so, it is important to clarify what is meant by the 'right to exclude'. In the context of property theory, 'exclude' is ambiguous. In the literature it is possible to find the idea of exclusion being applied willy-nilly to very different entities—to resources, activities, values, interests and even to the property right itself (Merrill 1998). Predictably, the term shifts somewhat in meaning in each of these different applications, at times meaning little more than 'prohibit', while at others meaning protection from harm, or protection from interference, or protection from

trespass or loss in value. These are all distinct notions, and many of them are applicable not only to property rights, but also to many ordinary rights that are not usually spoken of in either proprietorial or exclusionary terms. (Many rights protect a person from harm, for example, but that does not make them property rights.) In shifting from one use of 'exclude' to another, it is possible to create a misleading impression that property-entitlements are more consistent across contexts than in fact they are.

The plainest meaning of a 'right to exclude', and the one adopted by most Exclusion Theorists, refers to the physical crossing by a person of a physical boundary – it refers, that is, to the idea of trespass. On this footing, it is the essence of property to have a right to exclude others from entering one's land or possessing one's chattels – or, to put the point more precisely and technically, it is the essence of property to have a Hohfeldian claim-right constituted by others' duties to exclude themselves from the resource (Penner 1997). Put more simply, property implies that there is a boundary around the border of the owned entity that non-owners may not cross without the consent of the property-holder.

This does not mean non-owners cannot use or impact upon the resource if they are able to do so without actually entering or possessing it. For instance, the duty to exclude oneself from a garden does not mean that one cannot enjoy looking upon it on one's way to work. Nor does it mean that one cannot pick up some tips for one's own gardening endeavours from appreciation of its arrangement. In this respect Exclusion Theory's focus on physical border-crossing parallels closely the way property-cases are often decided in law. As Lord Camden put it in the eighteenth century, 'the eye cannot by the laws of England be guilty of a trespass'; that is, one can trespass with one's feet or with one's hands, but not merely by looking and listening. Equally however, the focus on border-crossing allows the possibility that a person can impact *negatively* on another's property provided one does not enter onto it. For instance, Annie's pumping out the groundwater on her property may cause Bob's land to collapse, but Annie has not breached any duty to exclude herself from physically entering Bob's property. The law on such questions tends to be more equivocal—in some jurisdictions it will determine that Annie's action violated Bob's property-right, but in other jurisdictions it will not. Even still, it is unquestionably true that harms which involve physical trespass are treated in law very differently, and usually more harshly, than harms which do not. As such, Exclusion Theory rightly directs attention to property's allocation of specific resources to specific individuals, and the usefulness of physical encroachment as a trigger for legal action.

Several critiques may be made of Exclusion Theory. On a theoretical and normative level, some have argued that the focus on exclusion deflects attention from the way exclusion integrates with the more fundamental idea of use (Mossoff 2003). In a sense, Exclusion Theory can be thought of as a theory of *non*-ownership: it focuses on what property means for those who do not have it, rather than for those who do (Katz 2008). Equally though, a defender of the theory may argue that Exclusion Theory rightly places attention on the element of property that most cries out for justification—its imposition of constraining duties on everyone but the property-holder. In this respect, it is arguable that Exclusion Theory helpfully expresses a widespread and important moral norm of inviolability – the idea that some things are off-limits to people (Balgandesh 2008).

On a descriptive level, the question may be raised whether the right to exclude accurately captures the idea of property at work in applications outside the simple cases of land and chattels. This is particularly true with respect to property over intangibles, including intellectual property rights like copyright and patent, which grant entitlements over created artistic works and inventions. In such cases, Exclusion Theory's usual reliance on the natural boundaries of the thing (the physical borders of the chattel or the land) and the notion of physical crossing apply less straightforwardly, and much controversy surrounds whether the theory manages to account

for these sorts of intellectual properties. Even in application to real property, however, there are entitlements that Exclusion Theory can struggle to explain. For instance, exclusion does not seem to be a primary element of property in cases where multiple persons have overlapping properties in the one resource. Plainly, none of them can exclude each other, yet they all seem to have property.

6. Use: Harm-Based Theories

Rather than focusing on exclusion, attention may be directed at property's capacity to protect particular uses of, and activities performed upon, a given resource. On this perspective – which might be termed Harm Theory – the essence of a property-right in some resource is not to prohibit others from trespassing across the resource's boundaries, but instead to prohibit others from harming certain of the property-holder's uses of the resource. These protected uses may in some cases be very specific, as occurs with fishing rights or mining rights. Or the protected uses may include a wide cluster of activities—for instance as may be gathered under the idea of protecting an owner's quiet enjoyment of his land. The ancient property law of *sic utere tuo* (use your own so as to do no harm to others) may be invoked here: rather than Annie simply respecting the boundaries of Bob's land by not crossing them, she is required to ensure that her use of her property does not harm Bob's use of his (Freyfogle 2003). Rather than trespass, the focus shifts to notions of harm, nuisance, interference and worsening. To be sure, these concepts will often overlap with trespass, but they are not identical. There are many cases where protection of an activity from harm or interference will not require – or will require more than – rules against crossing a physical boundary.

In this respect, Harm Theory differs on practical matters from Exclusion Theory in two sets of cases. First, it will not consider boundary-crossing to be a necessary violation of the property right. The question, rather, will be whether the boundary crossing was in some sense harmful to the property-holder, given the use or set of uses to which that property holder is putting the property. If the boundary-crossing was not detrimental to the property-holder's project, then there is 'no-harm, no-foul'. In this first case, the duties imposed by Harm Theory are less extensive than Exclusion Theory, as some cases of boundary-crossing will not be violations of the right. Second, however, the Harm Approach will protect the earmarked uses even from the harmful actions of others who do not cross the property-boundary. As such, Annie pumping out groundwater that causes Bob's property to collapse, or Annie building structures that block sunlight from Bob's solar array, or Annie blocking access-ways to Bob's property, or Annie flooding Bob's property by damming the creek on Annie's property, may all be violations of Bob's property rights. In this second set of cases, the duties imposed by Harm Theory are more extensive than those created by Exclusion Theory, as they reach out to affect others operating outside the property's borders.

Descriptively, Harm Theory can account for the many cases of apparent trespass – boundary-crossing even against the explicit will of the property-holder – that are not held to be legal violations of the property right because they were not deemed to be harmful to the property-holder's activities (Katz 2008). In response however, the Exclusion Theorist can marshal example cases in law where trespass was prioritized over harm, and it is not easy to perceive a clear victor in this debate. However, the Harm Theorist does have one, perhaps not-so-minor, area where their account is clearly descriptively superior; this is in respect of overlapping property rights.

a. Overlapping Property: Common and Resource Property Rights

Rights to a common resource – where everyone in a given community can use the resource – come in a variety of different forms. Two are worth considering here. First, there are open access regimes, where all persons can access the resource and either: a) there are no constraints on what they may do on or with that resource, or, b) there are constraints, but these constraints allow space

for people to worsen the resource in respect of the uses they and others put the resource to. Fisheries are often examples of open access regimes; everyone in the community may have the right to access and to fish in the local lake, but their unrestrained fishing ultimately impacts detrimentally on the capacity of the lake to provide fish. As Garret Hardin famously showed in The Tragedy of the Commons, in such a situation rational agents may be expected to exploit the resource to the detriment of everyone (Hardin 1968).

In at least some cases, however, communities are able to develop constraints on each person's uses of the resource so as to ensure the resource sustains its capacity for the specified uses over long periods of time (Ostrom 1990). Sometimes these systems may be quite simple, such as the rules that determine how parks, beaches and wildlife-reserves operate, allowing all citizens access and enjoyment without destroying the resource for others. When a common resource factors in production, however, a heavier toll is taken on the resource, and more sophisticated systems are usually required to ensure its sustainability. For instance, a community may adopt a 'wintering rule' with respect to pasturing their cows on a commons, such that no member can pasture more cows during the summer than they can feed off their own supplies through the winter. By capping herd-numbers in this way, the commons can be protected from over-exploitation. These sort of constraints may be thought of as protecting certain uses from the harmful acts of others, and so as a species of harm-based property entitlements. One recent account of such entitlements understands common property as 'property-protected activities' occurring on specific tethered resources. Such property-protection includes four types of property incidents: (i) the entitlement of the property-holder to access the resource, (ii) the entitlement to use the resource for the specific activity in question (e.g. fishing, foraging), (iii) the ownership of the fruits or profits of that activity, and (iv) the claim-rights over other users that they do not worsen (harm) the resource in respect of the specific property-protected activity (Breakey 2011).

Such harm-based accounts also aim to explain the many cases of multiple property entitlements in a single resource where such overlapping entitlements are not spread across the entire community. For example, one family in a community may have foraging rights for fruit in a local common, several families may have hunting rights, and everyone in the community may have the right to gather firewood. So long as there are effective constraints on each activity ensuring that it does not harm the others, the regime is not one of open-access, but a species of property. Again, Harm Theory can make sense of these properties by focusing not on trespass over physical boundaries (as Exclusion Theory does) but rather on the ongoing protection of certain specific uses of the tethered resource.

Normatively, one of the advantages of Harm Theory is that it tightly links the concept of property to some of the more popular ethical justifications for property rights. For instance, if property is intended to be justified because it allows people to do things—to perform ongoing productive or preserving projects over time, and to more generally reap the consequences of their actions, then one might think that the primary focus should be on protecting those projects from harm. As such, protecting people's labour (with John Locke) or their expectations about the fruits of their labour (with Jeremy Bentham) brings *harm*, and not *exclusion*, to the foreground.

Inevitably however, Harm Theory invites its own particular critiques. First, the legal protection of some uses and not others makes Harm Theories of property explicitly political in a way that Exclusion Theory for the most part avoids. On the Harm Theory, property is not neutral among the different acts property-holders might want to perform, but necessarily selects amongst them. Exclusion Theory, on the other hand, merely sets up boundaries and lets owners decide what to do within them. Second, this privileging of use threatens to derail the idea (and enormous practical utility, in terms of information costs) of property as an integrated concept consistent across contexts; a 'bundle of uses' may be little improvement on a 'bundle of entitlements' (Merrill and Smith 2001). Third, and perhaps most seriously, the fixed and specific uses (or sets

of uses) that property-holders are entitled to engage in seems to depart from a very basic and intuitive thought about private property, which is that it is for the owner to decide what will happen on their property, and that their choices on this matter are to some extent genuinely open-ended. Harm Theory delimits which acts will be property-protected, and so constrains – in some cases very considerably – a property-holder's capacity to determine what will happen on the property. As such, it may be that Harm Theory can only augment, but cannot hope to replace, rival theories of property like Exclusion Theory.

Ultimately it may be that property should be best understood as a mix of the Exclusion and Harm Theories, whereby both trespass and harm should be factored into our larger concept of property. One obvious reason for adopting this sort of mixed theory is that protecting against trespass often will be the most effective way of protecting against harm; it is far easier to detect trespassers than harmers (Ellickson 1993). This mixed view is also reflected in much legal case-law, where notions of trespass and boundary (from Exclusion Theory) interweave amongst notions of nuisance, quiet enjoyment and do-no-harm (from Harm Theory). If this combination of the two theories is correct, however, this would be an important conceptual result, because it introduces a tension into the very heart of property (Singer 2000; Freyfogle 2003). It means that in at least some cases we cannot know *a priori* (that is, simply from application of the concept of property) whether a property-holder or a non-property holder is entitled to perform a particular act until we settle the question of what uses are being protected from harm, what happens when two protected uses clash, and whether harm will trump trespass in this particular case.

7. Power-Based Theories: The Question of Alienation

The two theories just covered – Exclusion and Harm – share a common focus on what are called 'first-order Hohfeldian jural relations' (see §2 above). In particular, their dispute surrounds which types of claim-rights are held by property-owners, where the choice is between claim-rights prohibiting others from trespassing, or claim-rights prohibiting others from harming. But it is arguable that this dispute misplaces altogether the unique nature of property in terms of its *second-order* Hohfeldian jural relations, especially 'powers' (the capacity to alter others' claim-rights with respect to the owned resource).

It has long been held by political philosophers of very different stripes that it is the quintessential mark of property that it can be traded in a marketplace. Courts of law have made similar judgments, recognizing an entitlement as property once it is established that the entitlement is tradable. Such rights of trade – as well as associated powers of waiver, management and abandonment – are second-order Hohfeldian powers, allowing an owner to alter the normative standing of others with respect to the resource. On the Power Theory, as it might be termed, to know whether a particular right is property, the decisive question to ask is whether it can be traded for money; Annie's property essentially involves Annie having the power to altogether transfer (alienate) her rights over the resource to Bob, so that Bob becomes the property-holder, and Annie loses her property-rights with respect to that resource. Moreover, Annie can perform this alienation on condition of a like alienation by Bob, such that they trade property, or exchange property for money. On this view, an item of property is necessarily tradable, and so necessarily a commodity. As such, if a society has property rights then it necessarily has to some extent a market economy (at least with respect to those objects over which property is held).

While many theorists and laypeople view the relationship between property and commodity as simply intuitive, others mount arguments aiming to tie the two together theoretically. For instance, it may be argued that accounts of property need to pay heed to the fact that Bob's duties with respect to Annie's property are owed *to* Annie and not to society at large, and that allowing Annie to alienate those duties as she sees fit is a necessary implication of the fact that the duties are owed to her (Dorfman 2010). This line of thought on property rights may be bolstered by

appeal to the 'will/choice theory of rights,' which holds that it is of the essence of rights more generally to be waivable and transferable (Steiner 1994). If the power to make choices over the duties others owe to us is an essential feature of rights in general, then it is plausible to think that it will also be a feature of property rights more particularly.

Against this proposed assimilation of property with commodity, however, many property theorists have argued that the essence of property need not include full powers of alienation and that there are attractive, integrated concepts of property without this element. Examples of property concepts explicitly avoiding alienation include the idea of personal property—familiar from both socialist theory and practice. Personal property may be characterized as property that cannot be sold, but which can be licensed out (Radin 1982). Other subtle variations are possible, allowing some forms of alienation and waiver, but not others. For instance, it has been argued that the concept of property necessarily allows for bequeathal and gift but does not necessarily include the power of sale. On this view, a property-holder can always give away her property or leave it to her children; to sell the property, however, requires the additional concept of contract (Penner 1997). Another variation holds that the concept of property includes the capacity for certain types of trade, but not the entitlement to receive income from managing the property (Christman 1991). A further variation again – one common in both law and custom – is the 'classic usufruct', where the property is held until the death of the property-holder, but cannot be transferred during their lifetime (Ellickson 1993).

One challenge arising for such accounts is that it is hard to draw a conceptual line in the sand between the types of Hohfeldian powers a property-holder does and does not have. Almost everyone will agree, for instance, that property-rights include the power of waiver – that is, that Annie is able to consent to Bob entering her land by waiving Bob's duties of non-trespass. But it can be difficult to see how Annie can have a power of waiver without thereby having the power to manage; the capacity to consent to another person's entry onto the property under stipulated conditions effectively allows the property-holder to manage what happens on the property. But from there, it is difficult to see how Annie can have the power of management without also having rights to income, as she can make one of the stipulated conditions for Bob's entry onto the property that she receives some of what Bob produces. Similarly, it can be difficult to draw a strong distinction between Annie being able to give away her property at her discretion, and her being able to transfer it for money.

To be sure, this difficulty in specifying exactly which Hohfeldian powers of transfer are essential incidents of property is not impossible to overcome—and certainly neither law nor custom has any problem allowing some powers of transfer and prohibiting others (Ellickson 1993). But the existence of the difficulty does suggest that all these powers sit on a continuum, and that when crafting an integrated, coherent property-concept, the absence of a clear distinction between these powers at any given point has led different theorists to draw the line in quite different – and sometimes enormously subtle – places. Perhaps all this difficulty implies is that when seeking integrated property concepts, the conceptual linkages between Honoré's incidents and between Hohfeld's jural relations mean that such categories should not be relied upon to provide the desired boundaries. With this in mind, §10 below describes two theories of property that cut across the dimensions described by Honoré's and Hohfeld's systems. Alternatively, another response is to make property's powers a continuum concept. An example of this idea is J. W. Harris' theory of property (Harris 1996). For Harris, property has two necessary elements: trespassory rules (familiar from the Exclusion Theory described above in §5) and the ownership spectrum. The ownership spectrum is a continuum ranging from personal use-privileges to control-powers allowing management and – at the very top of the spectrum – full alienation. Harris is then able to specify distinct types of property – half property, mere-property, and full-blooded ownership – as residing at distinct points on this ownership spectrum.

8. Immunity-Based Theories

An additional type of second-order Hohfelidan jural relation is implicated in property. Rather than focusing concern on how Annie can alter others' duties with respect to the property (the question of powers), attention may be turned to the manner in which Annie is protected from having her standing with respect to the property altered by others (the question of immunity).

Some degree of immunity is an essential element of property. If Annie has an entitlement to a resource that can be dissolved merely by Bob's say-so, then it seems fair to say that Annie does not have property in that resource, but only some lesser entitlement. More specifically, if Annie holds property over Blackacre, then her neighbor Bob cannot, without Annie's consent, transfer the ownership of Blackacre to himself; Bob cannot *expropriate* Blackacre. As such, some degree of immunity from the non-consensual dissolution of a property-holder's entitlements over her owned resource appears to be a necessary condition of property.

Interestingly, the seventeenth century political philosopher John Locke took seriously the possibility that an immunity from expropriation was a sufficient condition for property. He thought that any entitlement that could not be removed by others counted as property, defining property as 'that without a man's own consent it cannot be taken from him.' Such a position accounts for the very wide concept of property that Locke used at various points throughout his famous *Two Treatises on Government*. Since many ordinary rights (such as to free speech and bodily security) are immunized from others' dissolution, advancing such an immunity as a sufficient condition of property means that property encompasses all natural or human rights. This perhaps seems to a modern eye to explode rather than inform the concept of property.

Even making an immunity from expropriation only a necessary condition of property is controversial however, as it seems to imply that much (perhaps all) takings or taxation by the government necessarily impinges on property. Clearly, there are significant consequences at stake here for distributive justice, as taxation in market economies is the primary source of funds for state welfare, education and healthcare. For this reason, various attempts have been made to define integrated property concepts so as to leave space for taxation. For instance, one approach grants immunity against expropriation so long as the property-holder is engaging purely with their own property, but weakens that immunity when the property-holder starts to derive market income through management or sale of the property (Christman 1991). Such an approach ties the question of immunity to the question of transfer and alienation discussed in the previous section (§7). Against such attempts, it has been argued that all concepts of property allowing the possibility of non-consensual expropriation necessarily have a strained sense about them, as they artificially try to make the concept of property compatible with its own extinction (Attas 2007). On this view, while various regulations of property may be consistent with the idea of property, expropriation itself cannot be a part of the concept. If we are committed to taxation, it is argued, property's essential tie to immunity from expropriation means we must entirely forgo property as an organizing idea for our economic and political systems.

9. Remedy-Based Theories

Previous sections have located the essence of property in first-order Hohfeldian claim-rights (claim-rights prohibiting exclusion and harm) and second-order Hohfeldian jural relations (powers of transfer and immunity from expropriation). But there is one further dimension on which property may be characterized: *remedies*—the question of what is done when the rules of property are broken.

An influential theory developed by legal scholars Calabresi and Melamed distinguishes property-rules from liability-rules and inalienability-rules (Calabresi and Melamed 1972). Property-rules are those entitlements that may only be removed with the consent of the rights-holder; the rights-holder gets to name the conditions under which they consent to extinguish the

entitlements that would otherwise apply. Liability-rules, on the other hand, allow entitlements to be removed by a party so long as that party pays a specific cost. This cost is objectively determined by the state, and not by the subjective choice of the entitlement-holder. Inalienability-rules prevent entitlements being removed or transferred at all; if an entitlement is inalienable then even the right-holder herself cannot waive or alienate the entitlement. Different rules can apply to the same resource in different contexts. For instance, a person's home is usually protected by property-rules with respect to other citizens (who, if they want to buy, must meet the owner's asking price) but is only protected by liability-rules with respect to the state (as the state can use its powers of eminent domain to remove the entitlements in return for an objectively determined payment to the homeowner). Calabresi and Melamed's distinction has relevance to the issues of immunities and powers discussed in the last two sections (§7-8). With respect to powers it implies that entitlements protected by inalienability-rules are not property, and thus that property implies alienability; and that entitlements protected only by a liability-rule are not property. With respect to immunities, the use of property-rules rather than liability-rules implies that property includes an immunity from forced transfer (by ordinary citizens, at least) through payment of an objectively determined sum.

Additionally though, Calabresi and Melamed's analysis applies to remedies: the question of what happens when the initial rules (whatever they are) are broken. Imagine Bob illicitly breaches Annie's property rights in X by taking X. However, upon being caught Bob gets to keep X, and only has to pay Annie a (non-punitive) objectively determined estimation of the cost of X. While the letter of the law may say that Bob has a duty to exclude himself from taking Annie's property, in reality Bob can take what he wants from Annie and then simply pay the cost for that item as determined by the state. In such a case it may be doubted whether Annie really has a property right at all. Similarly, if Bob is found to be engaged in an ongoing breach of Annie's property rights, it may seem obvious that a court will order Bob to stop his ongoing violation (this is called ordering an injunction or injunctive relief), rather than merely imposing an objectively-determined cost of damages upon Bob and letting him continue the violation. But appearances can be deceiving. If Bob accidentally built his house on some of Annie's land, the court may award damages to Annie but not force Bob to remove his transgressing building—and there are other cases where property-violations are not automatically granted injunctive relief (Balgandesh 2008). Ultimately, then, while there is clearly some conceptual relationship between property rights and the types of remedies that are to be applied if and when those rights are violated, precisely what that relationship amounts to is controversial. Perhaps the most that can be said with confidence is that property remedies, reflective of the fact that property's duties are owed to the property-holder, must be a part of private law as well as public law, and so must in principle allow owners to seek damages over violations of their property rights, as well as allowing the state to perform criminal sanctions on the person who violated those rights (Dorfman 2010).

10. Examples of Cross-Cutting Theories

The foregoing five sections have described theories focusing in turn on one particular dimension of property: claim-rights, powers, immunities or remedies. It may be, however, that the best theory of property will be one that cuts across these dimensions and carries implications for all of them. Two examples of such cross-cutting theories follow.

a. Radin and Property for Personhood

In her influential 1982 article *Property and Personhood* Margaret Radin does not aim to provide a general theory of property, but seeks instead to explore one specific type of property relationship: the personality theory of property. This theory describes the specific cases where property comes to be, in a deep philosophical sense, a part of the person who owns it. Arising through the significance of things in constituting our memories, our actions, our individuality and our continuing plans and expectations, this type of deep attachment between person and thing

(consider wedding rings and other items with sentimental value) gives rise to a theory of property-for-personhood with implications for each of the dimensions listed above.

In terms of claim-rights, the inviolability and sanctity of property-for-personhood implies the centrality of rights of exclusion from the object itself. It is important that nameless others do not access and use the personal object, rather than merely prohibiting their harming it in some fashion. Turning to powers, as part of the owner's person, personal property is not a commodity; it is precisely the definition of personal property that it is not freely exchangeable for functional equivalents or for its market price. While this does not automatically mean alienation should be legally prohibited for such items (an object can shift over time from one category to another, so implementing such a rule would be difficult), it is at least clear that powers of alienation are not an essential part of the entitlements of property-for-personhood. In terms of immunities and remedies, property-for-personhood warrants the stronger protection of Calabresi and Melamed's property-rule rather than the lesser protection afforded by a mere liability-rule. Other citizens – and perhaps even the state – should not be able to expropriate parts of a property-holder's very person. Reflective of this, courts would be expected to utilize injunctive relief (that is, they would order the defendant cease the violating behaviour) as remedies in the case of a continuing violation of property-for-personhood, rather than merely awarding damages. In this way, the implications of a specific concept of property can be traced as they cut across the several dimensions described above.

b. Katz and Ownership as Agenda-Setting

Recently, Larissa Katz has advanced an agenda-setting theory of property in land, whereby the property-owner has the supreme power to set the agenda for the property (Katz 2008). This theory can be viewed as a sophisticated combination of a Harm Theory and a Power Theory. The theory says that a property owner can exclusively choose what particular type of act they will perform on the property – for instance, they may adopt residential, agricultural, or various sorts of industrial uses of their land. This is no mere liberty of action however—with the performance of these different activities, the owner sets the agenda for the property, shaping the duties of others with respect to that property. Non-owners have different clusters of duties imposed upon them depending upon the activity that has been undertaken by the owner; they must accord their behaviour, vis-à-vis the resource, with the agenda that has been set. As such, the agenda-setting capacity is a Hohfeldian power that alters the duties of non-owners with respect to the resource. Once the agenda is set through the owner's chosen activities, the ensuing entitlements are thereafter modeled by the Harm Theory; others may be allowed to cross the boundaries of the property in a variety of contexts, but in doing so they must ensure their actions do not impact upon the specific activity that the owner is performing. The agenda, but not the thing, shapes the duties of others, and harm, but not exclusion, is prioritized.

11. Socialist and Egalitarian Property

Much of the foregoing has considered different theories of private property—with the exception being the universal endowments of common property discussed in §6.1. But it may be enquired what sort of property concepts arise from socialist theory and practice. Naturally, there are many different answers to this question, particularly if its scope is expanded to include, say, contemporary theories of market socialism (which aim to assimilate socialist theories of justice with elements of market-based economies), the types of property relationships that were expected to emerge during the transition from capitalism to socialism, and the various types of property existing in law and de facto in particular socialist regimes throughout recent history. In the main, however, two answers predominate.

At least since the beginning of the twentieth century, socialism has been identified with the public ownership of the means of production. This directly implies the collective ownership of

those assets playing a role in production. Equally though, it leaves room for each person to hold property – even private property – in particular resources, provided these entitlements do not allow for private production to occur. With this restriction in mind, concepts of private property available for use in socialist regimes will exclude market transfers, with the intention of facilitating the elements of property that allow personal use, and prohibiting those that allow control over other persons. Individual citizens thus will be entitled to personal property (§7) and to property-for-personhood as Radin defined that term (§10.1), and they may also have common property in certain public amenities.

As well as the non-productive property entitlements of individual persons, the defining feature of a socialist economy is that productive resources are collectively owned. There are three features of such ownership. First, the group as a whole, or some subset understood to be representative of that whole, determines the use to which a resource will be put and manages the resource. Second, decisions on how the resource will be used are made through reference to the collective interest; the property is to be managed in order to produce what the collective requires. Third, the property's management must also instantiate the proper empowerment of those citizens who labour upon it; workers must not be alienated from their labour even for the sake of public benefit elsewhere.

Naturally, this general characterization may be filled out in very different ways, depending upon who represents the collective, how centralized their decision-making is, how the collective's interests are defined, what counts as proper empowerment, how the relationship between collective and personal property is managed, and so on (Kulikov 1988). Cooperative property and to an extent some of the property systems of communes may be understood as collective property writ on a smaller scale—being held by small communities and working groups rather than entire nation-states. More decentralized socialist regimes have made extensive use of this form of productive arrangement.

There is one further property-concept worth noting here: joint ownership. A resource is jointly-owned when each member of a community has a veto-right over what may be done or produced on the resource; no production is allowed without the prior agreement of every member. This concept of property is rarely found in law or custom. Its most common use is as a theoretical device for modeling an initial normative relation between people and land (Cohen 1995). In this way joint ownership sets down an imagined initial situation where no productive action can occur without the agreement of every joint owner. This standpoint then serves as a conceptual point of departure from which further contracting can occur. There are good reasons for thinking that the property-entitlements arising from such contracting will be highly egalitarian, as the veto-power joint ownership gives each member of the society will allow them to bargain for a share of whatever is produced.

12. References and Further Reading

Bundle Theory and the Disintegration of Property

- Hohfeld, W. "Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23 (1913): 16-59; (Contined in YLJ 26, 1917: 710-69.)
    - Landmark pair of articles analysing rights (including property rights) into constituent parts.
- Cohen, Felix. "Transcendental Nonsense and the Functional Approach." *Columbia Law Review* 35.6 (1935): 809-49.
    - Advocates a scientific and functional approach to law; argues the concept of property (among others) to be an unwanted supernatural entity.

- Grey, Thomas. "The Disintegration of Property." *Property: Nomos XXII*. Eds. Pennock, J. Roland and J. W. Chapman. New York: New York University Press, 1980. 69-86.
    - Influential argument against integrated concepts of property.
- Merrill, Thomas, and Henry Smith. "What Happened to Property in Law and Economics?" *Yale Law Journal* 111 (2001): 357-98.
    - Illustrates why Coase-inspired property theorists gravitated toward the Bundle (and also use/harm) approach; argues this approach obscures crucial features of property.

Full Liberal Ownership

- Honoré, A. "Ownership." *Oxford Essays in Jurisprudence*. Ed. Guest, A. London: Oxford University Press, 1961. 107-47.
    - Seminal article listing eleven incidents of Full Liberal Ownership (often used as a comprehensive list of the potential sticks in property's bundle).
- Epstein, Richard. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, Mass.: Harvard University Press, 1985.
    - Influential libertarian reading of the US Takings Clause through the Hohfeldian lens; argues the dissolution of any incident of property is a taking of property.

Integrated Theory

- Mossoff, Adam. "What Is Property?" *Arizona Law Review* 45 (2003): 371-443.
    - Sustained argument for Integrated Theory, including its historical pedigree from the early modern period in Grotius and Locke.

Exclusion Theories

- Balgandesh, Shyamkrishna. "Demystifying the Right to Exclude: Of Property, Inviolability and Automatic Injunctions." *Harvard Journal of Law and Public Policy* 31 (2008): 593-661.
    - Argues that property is based on a principle of inviolability, and so constituted by claim-rights that others exclude themselves. Argues against remedy-based property theories like Calabresi and Melamed's.
- Merrill, Thomas. "Property and the Right to Exclude." *Nebraska Law Review* 77 (1998): 730-55.
    - Argues the essence of property is the right to exclude, from which the other aspects of property can be derived.
- Penner, J. *The Idea of Property in Law*. Oxford: Clarendon, 1997.
    - Classic statement of exclusion theory; property includes powers of abandonment and gift, but not alienation, which requires the addition of the concept of contract in law.

Harm-Based Theories, including Common Property

- Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Action*. New York: Cambridge University Press, 1990.
    - Influential study of common property, describing its diversity, nature, history and variable capacity to resist tragedy.

- Breakey, Hugh. "Two Concepts of Property: Ownership of Things and Property in Activities." *The Philosophical Forum* 42.3 (2011): 239-65.
    - Argues that a (Harm-based) concept of property-protected activities solves problem cases (common property, resource property, property in labour, etc.) encountered by Exclusion Theory.
- Hardin, Garrett. "The Tragedy of the Commons." *Science* 162 (1968): 1243-48.
    - Landmark article describing how rational actors degrade common (read open-access) resources.

Environmental and Community-Based Conceptions of Property

- Freyfogle, Eric. *The Land We Share*. London: Shearwater Books, 2003.
    - Describes the fluidty and diversity of property-entitlements through US history, and their responsiveness to community and ecological needs; emphasizes internal tensions within property entitlements.
- Singer, Joseph. *Entitlement*. London: Yale University Press, 2000.
    - Argues control over a property should be delineated by individuals' protected interests in that property, rather than by abstract notions of ownership; marshals an array of tensions within ownership.

Power-Based Theory

- Dorfman, Avihay. "Private Ownership." *Legal Theory* 16 (2010): 1-35.
    - Identifies property with the capacity to alter others' normative standing with respect to the resource. Links this feature with property's status in private law.
- Christman, John. "Self-Ownership, Equality, and the Structure of Property Rights." *Political Theory* 19.1 (1991): 28-46.
    - Distinguishes property's 'use' rights (including alienation) from its 'control' rights (especially income), and argues for the ethical priority of the former.
- Steiner, Hillel. *An Essay on Rights*. Oxford: Blackwell, 1994.
    - Links Will/Choice theory of rights to property entitlements in developing a left-libertarian position.

Immunity-Based Theory

- Attas, Daniel. "Fragmenting Property." *Law and Philosophy* 25.1 (2007): 119-49.
    - Describes structural relations between Honore's property-incidents; argues immunity from expropriation is a necessary incident of property.

Remedy-Based Theory

- Calabresi, G., and D. Melamed. "Property Rule, Liability Rules and Inalienability: One View of the Cathedral." *Harvard Law Review* 85 (1972): 1089-1128.
    - Focusing on remedies and immunities, distinguishes property-rules, inalienability-rules and liability-rules.

Cross-Cutting Theories

- Katz, Larissa. "Exclusion and Exclusivity in Property Law." *University of Toronto Law Journal* 58.3 (2008): 275-315.

  - ‘Agenda-setting’ theory of property: property’s duties are not set by exclusion from the resource, but rather shaped to conform with the agenda the owner has set for the resource.

- Radin, Margaret. “Property and Personhood.” *Stanford Law Review* 34 (1982): 957-1015.
  - Definitive account of the personhood theory of property; investigates the special case where property forms part of the person of the property-holder.

Socialist Property

- Kulikov, V. V. “The Structure and Forms of Socialist Property.” *Problems of Economics* 31.1 (1988): 14-29.
  - Details the two major forms of property applicable to socialist regimes (collective and personal property) and their inter-relation. Considers the use of personal private production in Soviet socialism.
- Cohen, Gerald. *Self-Ownership, Freedom and Equality*. Cambridge: Cambridge University Press, 1995.
  - Searching investigation of normative implications of different property regimes. Chapter 4 describes ‘Joint Ownership’.

General Literature

- Ellickson, Robert. “Property in Land.” *Yale Law Journal* 102 (1993): 1315-400.
  - Detailed analysis of the complexities of property in land, combining historical cases and rational-actor theory, and considering private, common, and communal property-arrangements.
- Wenar, Leif. “The Concept of Property and the Takings Clause.” *Columbia Law Review* 97 (1997): 1923-46.
  - Argues, with special reference to the US takings clause, that property should be viewed as the thing that is the object of (Hohfeldian) property rights.
- Harris, James. *Property and Justice*. Oxford: Oxford University Press, 1996.
  - Property based on twin notions of trespassory rules and the ‘ownership spectrum’, a continuum ranging from mere use-privileges through to control-powers and alienation.
- Waldron, Jeremy. “What Is Private Property?” *Oxford Journal of Legal Studies* 5 (1985): 313-49.
  - Sustained argument against property skepticism; private property is a broad concept (that resources are allocated to particular individuals, who determine their use) of which particular conceptions are possible. Considers common and collective property.
- Locke, John. *Two Treatises of Government*. New York: Hafner, 1947 (1689).
  - Perhaps the most influential treatise on property ever penned, though subject to divergent interpretations. As well as the famous Chapter Five of the *Second Treatise*, see *First Treatise* sections 39-41, 86-92 and *Second Treatise* sections 135-40, 159, 172-74.
- Macpherson, C. B., ed. *Property: Mainstream and Critical Positions*. Toronto: University of Toronto, 1978.

- Useful anthology of major property theorists throughout history, and more recent critical arguments.