Philosophy of Property Law, Three Ways

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Property is a foundation for our social and economic lives: many of our basic interactions, in the family, among neighbours and in the market place, involve property. Is property just as basic to our moral lives? Many have thought so. For Aristotle, basic moral virtues, like charity, presuppose some idea of property: for one can act charitably only with respect to what is one's own. For Kant, property is a requirement of freedom in the context of the external world. For Locke, property allocated according to principles of labour and desert is basic to the very idea of justice that our political institutions are meant to secure. Others have denied that property is basic to moral life in this way, suggesting rather that property is one strategy available to us in meeting the demands of our general theories of justice but is not itself morally basic.[1]

To investigate the moral salience of the idea of property is to engage in a philosophical inquiry about property on three levels. On the first level, we ask what property is, as a conceptual matter. Property relations, we will see, are relations that are *mediated* by particular things.[2] A mediated relation is not *just* a relation between a person and a thing, which we might describe as a relation of belonging.[3] Property relations are

[1] Rawls for instance was non-committal about property's place in the basic structure. See John Rawls, A Theory of Justice (1971).

[2] Thus, property rights cannot exist in the air, as it were, but exist only with respect to specifically identified things (per Lord Mustill in *In Re Goldcorp Exchange Ltd*, [1995] 1 AC 74; [1994 3 WLR 199; [1994 2 All ER 806, PC.)

[3] Adolf Reinach, '*The Apriori Foundations of the Civil Law'*, John F. Crosby (trans.), *Aletheia: An International Journal of Philosophy* Volume III (1983), 56 ("property is itself no right over a thing but rather a relation [of belonging] to the thing, a relation in which all rights over it are grounded").

always relations among people *with respect to* a specific thing. Among the relations mediated by things, ownership is conceptually the most basic.

The conceptual core to the idea of property, then, is the idea of ownership itself. And the conceptual core to the idea of ownership is the idea that a thing is mine, not yours. What it is for a thing to be mine, not yours, is that *I* am in charge in relation to others with respect to that thing.[4] This connotes at least exclusivity and the separability of things from persons. Fugitive resources, like air or water or ideas, cannot be owned because we cannot relate to others through them in the way that is characteristic of ownership: these are resources over which no one is capable of exclusive control. Body-parts cannot be owned because as part of us, they are not separable things outside of ourselves.

Much beyond this basic core is a matter of political choice about how to shape the office of ownership and the normative powers, privileges and responsibilities associated with it. This introduces a second level of philosophical inquiry in which we inquire into the place property has in our general moral and political theories. Property is so often at the centre of revolutionary thinking about the social order because it organizes a basic mode of relation among people.[5] There is always a need for political philosophy to think and rethink the way that people can relate with respect to things, in the tradition of Grotius, Locke, Hume, Kant, Rousseau, etc., leaving it to legal theorists to fill in the details of general theories of justice set out elsewhere. We can imagine a society that for reasons of freedom or utility leaves owners plenary power to profit and to advance their

[4] More needs to be said about what it means to be in charge.
[5] For instance, Proudhon's famous statement that "property is theft." Pierre-Joseph Proudhon, *What is Property?,* B R Tucker trans., (New York: Dover Publications Inc., 1996).

plans for life any way they can through their position. A utility-maximizing system of property might grant owners wide latitude to use their position as owner just as a bargaining chip, to draw others into utility-enhancing transactions. A freedom-focused view might resist any normative constraint on the power of owners that is not itself just a product of the rights of others. We can equally imagine a society that has theological or ideological commitments that lead to other-regarding restrictions on the agendas owners can set with respect to a thing and that attach extensive duties to ownership.

The idea of property invites foundational thinking about how such relations among people might be justified and how differently we might arrange property relations in society. But this is not the only way to proceed in thinking philosophically about property. There is a third level of philosophical inquiry in which we ask what theory of property best fits our existing practices and institutions of property and the normative commitments these express. Of course, property theory, in identifying the concepts and normative principles at work in law, does not itself establish that property is a justified institution. For that, we must hold up the normative commitments within property law and evaluate them against our general theories of justice. We begin this third mode of inquiry by looking inward, at the internal structure of property in law in a particular time and place, its nature and the normative ideals it expresses. We then look outward, at how *this* idea of property in law fits in the basic structure of a just society, in order, finally to look inward again, at what adjustments our more general theories of justice require of property law as an institution. Property theorists ask how property law, given the conception of property it sets down, fits within our institutional arrangements more generally.

This chapter has aspects of all three modes of philosophical inquiry. In the first part, I consider how contemporary property theorists make sense of property as a conceptual matter. In part two, I analyse three dominant approaches to how property might fit within our institutional arrangements generally, each generating somewhat different conceptions of property. In part three, I analyse certain doctrinal features of property law that reveal something about the conception of property law we actually have and about the political choices that our institutions reveal.

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I. **What is Property?**

Conceptual analysis of property begins with the idea of ownership.[6] Ownership connotes exclusivity: the idea that something is exclusively mine (or ours), not yours. It also implies the separability of the owned thing. The object of a property right is always and only a thing, never a person: something, then, that is outside of ourselves or, as some have put it, separable from us.[7] The person-thing distinction in property is in no way disproved by the fact that some societies treat people *as though they were things* by enslaving them. Slavery does not prove that property is possible with respect to persons. It just establishes that those who enslave people commit themselves to a category mistake that is at the same time a moral wrong in the highest degree.

Let's start with a closer look at this idea of separability inherent in the idea of the property. Property norms clearly apply to material things, like a computer, a car, a piece of fruit, which we have no trouble understanding as separable from us. Tangibility is not,

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[6] The terms property and ownership are often used interchangeably, but property concerns more than ownership relations, as I mentioned above.

[7] G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995).

however, a necessary feature of property, even on this basic view of property. Some intangibles meet the criterion of separability, too, and so may properly be treated as "things" in the world. Take, for instance, a creditor's right to recover a debt obligation. This is a right of action, a right to sue for the repayment of monies owing. In fact, debt actions are treated as a kind of intangible property and the basic view of property explains why that is properly so. A debt action is separable from me, the original creditor, in just the same way that an apple is separable from me: both are resources that, if mine, allow me greater scope for action, but neither resource forms part of me (at least not until I eat the apple). On the basic view of property, we can say that a debt action is a "thing" assignable as property to others because it is separable.

Now, contrast a debt action with an action in tort to recover compensation for a negligently inflicted injury. Say you were driving at a recklessly high speed and ran me over in an intersection, breaking my leg. I have a right of action against you for negligence. Can I assign this right to sue to recover damages for that injury to someone else? Again, the separability requirement on the basic view of property tells us why tort actions ought not to be assignable like debt actions are: there is a special connection between my personhood and an action the purpose of which is to make me whole again. I ought not to be able to sell that right of action to some third party in just the same way as I ought not to be able to sell my leg (or the privilege to injure it). The law has generally frowned on the commodification of tort as opposed to debt actions precisely because the point of a tort action is to vindicate my continuing right to bodily integrity, an aspect of

my personhood.[8] Others cannot occupy my person in the way that anyone might occupy the office of ownership.

Those who think we ought to be able to extend the idea of property to parts of ourselves sometimes invoke ideas of freedom of contract in support of these arrangements.[9] Thus some have argued that we ought to be free to decide what aspects of ourselves are "property" and so transferable to others. Perhaps my leg means less to me than the teacup my grandma left me. Why then does property law resist my attempts to commodify my leg, in that case, while allowing me to sell off my teacup in my hour of need? The answer is over-determined: we cannot appeal to ideas of freedom and autonomy in support of a power to undermine the very possibility of freedom and autonomy. The very possibility of free moral agency means we cannot appeal to ideas of freedom of contract to sell ourselves into a condition that denies moral agency (slavery). The point though can be put conceptually: we just are our bodies, therefore we cannot enter into the external relation of owner-owned thing with ourselves.

But in addition to this, it is clear that a principle of choice cannot resolve the question of what counts as property (rather than our person) because the determination of what counts as property applies to involuntary interactions with others (as in the case of bankruptcy) as well as to voluntary interactions (as in the case of contract.) If my leg and my right to receive compensation for injuries to my leg are properly the objects of property, then we would have to allow that they are also property in circumstances in which the things that belong to me are made available, like it or not, to satisfy the claims

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[8] Rule against maintenance and champerty never applied to debt.

[9] See discussion in Margaret Radin, *Contested Commodities* (Harvard Univ. Press 1996)

of my creditors.[10] Even if we credit our intuitions that "choice" justifies treating parts of ourselves as property, these intuitions clearly falter when confronted with the logic of property: that logic would require those same parts be available as property to satisfy the claims of others in circumstance where we have not chosen it.

The basic view of property, as a right to exclude others from separable things, also allows us to identify as property only those things from which it is *possible* to exclude others. Take an idea, like the idea for a story. An idea, once it is shared publicly is of course separable from me: it does not exist just in my mind anymore and others can access it without interfering with my person. And yet ideas cannot be owned because once they meet the requirement of separability they are at once no longer capable of exclusivity: we cannot exclude another from thinking something that we have expressed publicly. Just try it. If I tell you my idea for a story, at best all I can do is ask you not to repeat it or to use it for profit. I cannot very well dislodge it from your thoughts.[11] Ideas then are not "things" that can be property, as in fact our system of intellectual property recognizes.

Other resources are separable from us but incapable of exclusivity because they lack boundaries along which another might be excluded. I can exclude you from a space that is filled with air. But can I exclude you from the air itself, which moves around and is not contained? Air is one of the things Blackstone called "fugitive resources," which defies containment within fixed boundaries. Similarly, I cannot exclude you from running

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[10] J.E. Penner, Idea of Property.

[11] Arrows' paradox. Discussed in Larissa Katz, 'A Powers-based Approach to the Protection of Ideas', Cardozo Arts and Entertainment Law Journal 23 (2006), 687.

water, although I might be able to exclude you from a vessel that contains water or a column of space above submerged land, across which water flows.

Is there anything more to the basic concept of ownership than the exclusivity of the right and the separability of the thing? I think so. Take the case of land. Of course, we can all agree that land is among the resources that can be subject to a right to exclude. While we must always stand somewhere, we can yet see how any particular spaces on earth might be separable from us: there is no reason of personhood why a particular tract of land might not just as well be yours as mine. I can own land and exclude others insofar as they have somewhere to move upon being excluded. But to make sense of what it is to *own* land, we need to be able to say something further about the nature of the position I occupy when I have a right to exclude others from a particular tract of land. A sovereign, a private owner, a squatter, a tenant and a licensee all have rights to exclude with respect to the same tract of land. In exercising their rights of exclusion, they might *act* in very similar ways, e.g., building fences, refusing entry, etc. Yet, we invoke different positions when we describe one holder of a right to exclude as an owner, another as a state, and yet another as a mere licensee. While owners and states both assert some right to exclude along boundaries of land, we invoke different concepts today when we talk about owners and states:[12] owners are in charge of regulating private activity with respect to things for reasons of their own; states are in charge of governing their territory publicly on behalf of everyone in it and so make decisions subject to public justification requirements.[13] We

[12] This does not rule out the possibility that a ruler simply assumed ownership of his territory, as in Tsarist Russia and elsewhere.

[13] See Larissa Katz, *'Property's Sovereignty'* (forthcoming, Theoretical Inquiries in Law), and Arthur Ripstein, *'Property and Sovereignty: How to Tell the Difference'* (forthcoming, Theoretical Inquries in Law) on differences in the kinds of authority

can also distinguish between owners and others who have *private* rights to exclude with respect to a thing, like the guest for the night or the finder of a thing. Owners are in charge in a way that a licensee, or a finder, is not. A licence is by its very nature a limited jurisdiction to make some particular use of a thing. We understand a person licensed to occupy a house for the night to have a right to exclude all comers for that night but she does not have the power to determine more generally the mode of occupation of that property or to vacate her position and appoint a successor or to carve out other lesser property rights for others, like a right of way for the neighbour or a mortgage for the bank. Similarly, someone who finds my necklace has a right to exclude others from it, but what we mean by a finder—so long as she remains a finder and not a thief— is someone who takes possession of a thing just in order to reunite the thing with its owner, not someone who sets out to usurp the owner's position (which describes the position of the thief).

We can distinguish the position of the owner on conceptual grounds from the position of the licencee or the finder or even the political sovereign, all of whom might have rights to exclude with respect to that same thing. The position of owner is defined by the kind of authority she has to set the agenda for the thing. What it is for a thing to be *mine*, in the sense that I own it, is that I, as the owner, am in charge of private activity with respect to that thing. This sense in which a thing is *mine* comes through in the famous parable of the vineyard-owner in the Gospel of Matthew. In that story, the owner of a vineyard agreed to pay a group of labourers a certain number of coins to work his fields. More labourers arrived later, and the landlord gave them work too, agreeing to pay

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that states and owners have. See Jeremy Waldron, *'Settlement, Return, and the Supersession Thesis Theoretical Inquiries In Law* 5 (2004), questioning the state's right to exclude outsiders. [or Jeremy Waldron, *'Immigration: A Lockean Approach'*, NYU School of Law, Public Law Research Paper No. 15-37 (2015)]

these later-comers "whatever is right." At the end of the day, he paid all the workers the same amount. Those who had started earlier, and so had worked longer hours, complained that this decision was unfair as between the workers. In response, the landlord invoked the distinction between mine and thine as the basis for his authority to set the agenda for it: "Don't I have the right to do what I want with my own money?" Because the coins were his, he was free to act on his own judgment about what was right and good about how others ought to stand in relation to one another with respect to his pot of coins. The right to exclude really has no explanatory power here, in making sense of the position that the vineyard owner occupies in relation to the labourers with respect to his money. For that, we need to account for the normative power that ownership entails.

II. Property's place in the legal order

The idea of ownership at the core of property law is generally understood to be a way of attaching exclusive rights to separable things. Considerations of political justifiability yield different views of how property might operate within our legal order and lead theorists to develop subtly different conceptions of property. Property theory today falls roughly into three ways of thinking about how to arrange property within the legal order. The first, as we will see, places property as liminal to contract, in which the rights of ownership are just the bargaining chips we each start with as we contemplate contracting with one another.[14] This arrangement reflects broadly utilitarian considerations. A second view is of property as liminal to tort: here it is claimed that the

[14] See Henry E. Smith and Thomas W. Merrill, *'What Happened to Property in Law and Economics?'*, *Yale Law Journal* 111 (2001), 357, for an overview of conventional act-utilitarian accounts of property. Guido Calabresi and A. D. Melamed, *'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral'*, *Harvard Law Review* 85 (1972), 1089.

rights of ownership are plenary with respect to the thing, yielding an absolute right to exclude for any reason at all, reined in at a later stage by public law considerations. Thus, it is always a wrong for others to use or damage a thing in any way without the owner's consent. This view is motivated by an understanding of individual freedom that is conceptually basic: each person should be entitled to do as she likes with her thing, limited only by overriding public law considerations.[15] On either of these two views, property law itself has a very small footprint in private law, concerned as they see it just with rights waived through contract or by consent.

A third view takes property relations to concern a broader slice of human interaction than our consensual or contractual relations. On this view, property is not liminal to these other modes of interaction but is itself the foundation for a kind of human interactions regulated by the exercise of owners' normative power to set agendas for things. On this view, ownership is defined by the exercise of a normative power, and it is in the exercise of this power that property does its primary work within our legal order. I have explained this in terms of the power to set the agenda for a thing.[16] There are other, much older accounts of the normative position of owners in terms of responsibility for caring for things.[17] Let's take each view in turn with an eye to explaining the political motivations for each.

(i) Property as liminal to Contract

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[15] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009)

[16] Larissa Katz, 'Property's Sovereignty' (forthcoming, Theoretical Inquiries in Law), Larissa Katz, 'Exclusion and Exclusivity in Property Law', University of Toronto Law Journal 58 (2008), 275.

[17] John Finnis, *Natural Law and Natural Rights,* 2nd edition*,* (Oxford: Oxford University Press 2011), Thomas Aquinas, *Summa Theologica*.

For some, property just sets the stage for contract law. Private ordering, on this view, is a matter of small-scale cooperation, or voluntary agreement between private actors, and property is simply the initial (and so provisional, if the market is working properly) allocation of veto-rights about which we then bargain toward an optimally efficient allocation of rights.[18] Many economists do not think there is a general principle that would establish who ought to have the right to exclude, prior to any conflict about use. In a world of no transaction costs, the right could be allocated on either side of a conflict and we would still arrive at efficient outcomes. Take a conflict between factory-owner A who discharges pollution that drifts downstream onto the land of farmer B over the right to pollute or to repel pollution. While a pollution-generating factory owner and a neighbouring farmer might themselves care very much who starts with the right to exclude, from the vantage point of efficiency it does not matter at all so long as there is no obstacle to bargaining. Through contract, the right moves to the highest value user.[19] This view is plainly motivated by utilitarian considerations, the idea that the rights of owners should be whatever bargaining chips we think it would be socially useful to allocate to owners, to minimize the number of costly transactions required for non-owners to acquire such rights. On this view, the conception of property that fits best is that of a bundle of rights, tailored to meet the demands of social utility. Each stick in the bundle represents a right to use or to exclude another from use with respect to some thing, but there is no ex ante or general right to exclude others.

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[18] For Coase and others, private ordering is primarily about transactions, of which property is but one input. Calabresi and A. D. Melamed, *'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral.'* See also, H.E. Smith and T. W. Merrill, *'What Happened to Property in Law and Economics'*.

[19] We will see that a right to exclude refers to a collection of rights to exclude from particular activities or uses of that thing.

(ii) Property as liminal to Tort

A second view is that property sets the stage for tort. Property sets out a general right to exclude others such that it is always a wrong for a person to enter another's property without her consent. Those who position property at the threshold of tort insist that the right to exclude is a fixed input to judicial reasoning about property. This view matches persons to things prior to particular conflicts over their use. So, the farmer who has a general right to exclude others from entering would, in virtue of that, be within his right in repelling polluting substances sent his way by the factory-owner. The right to exclude, on the view of property as liminal to tort, presupposes some idea of ownership; however, ownership is not defined by a normative power. Instead, it is defined by a general right to exclude, waivable by consent. The idea of ownership as a right to exclude directs us to think about property in relation to a particular dimension of human interaction concerned with wrongdoing through the use or damage of things.

The "liminal to tort" view of property, in its most prominent form, takes freedom to be conceptually basic. Kantian exemplars of this approach start with an idea of freedom as non-domination, in which no one is subject to the choices of another. It extends this idea to the external world through this idea of property. The institution of private property as an absolute right to exclude is seen as a necessary condition for individual freedom. Through property, we are in charge of things in just the same way that we are in charge of ourselves more generally.

Among accounts of property-as-liminal-to-tort, some explain this structure in terms of our valuable interest in exclusive use[20] and others through a rule-utilitarian strategy.[21] A Razian interest-theory approach suggests that property protects our valuable interests in using things. A *general* right to exclude waivable by consent is justified then on consequentialist grounds: it is a contingent but stable feature of human lives that we cannot effectively use things without excluding others. The rule-utilitarian approach is offered as a corrective to conventional economic accounts that take the "liminal to contract" approach and so deny a general right to exclude. On this approach, the function of property is to enable small-scale cooperation at optimally low social costs, but a commitment to a *general* right to exclude is cast as the best way overall to enable property to do that job within the private law order. The idea is that the more rigorously we uphold the idea of property as a right to exclude, the more we bring about efficiencies overall (primarily by lowering information costs associated with a more contextual and flexible approach to property rights).[22]

(iii) The Internal Domain of Property

This brings me to a third cluster of property theories that explain property in terms of the normative power owners have and not merely in terms of the right to exclude, over which *other* normative powers, such as power to contract or consent, can be exercised.

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[20] See e.g., James Penner, *The Idea of Property in Law* (Oxford: Oxford University Press,1997).

[21] Henry Smith and Thomas Merrill adopt the latter approach in a series of articles on property as a right to exclude.

[22] Henry E. Smith and Thomas W. Merrill, *'The Property/Contract Interface'*, *Columbia Law Review* 101 (2001), 773, and Henry Smith and Thomas W. Merrill, *'The Morality of Property'*, *The William and Mary Law Review* 48 (2007), 1849. The audience for this information is broader than market participants, including also potential tortfeasors and judges).

Stewardship accounts of property offer the most ambitious and extensive claims for ownership as a normative position defined in terms of its own internal mandate or purpose. Many such accounts of private property emerge from the biblical idea that the earth is given to us in common.[23] Owners have private authority over particular resources as stewards for humankind. The basic justification of private property is its value in coordinating our care of the earth: we are better able to care for things through highly individualized positions of stewardship. There are, relatedly, virtue-theories of property, in which requirements of virtue generally constrain the kinds of decisions that owners can legitimately make.[24]

How else might we conceive of property as a purposive institution? There is a great distance between stewardship accounts of property, which claim a rich internal purpose for property, and accounts of property as just a right to exclude others, that tell us *what* property does (i.e., setting up gatekeepers with rights of exclusion) but that deny that property law aims at anything else in doing so. In this space, I have found room for a conception of property as a highly individualized office charged with setting the agenda for things in relation to others. Property, on my account, solves a basic moral problem about the standing to determine what ought to be done with things. None of us have the moral imprimatur to impose our own views on others about what ought to be done just in

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[23] John Finnis, *Natural Law and Natural Rights* , and Thomas Aquinas, *Summa Theologica*. Some readings of Locke suggest that through the sufficiency provision and the constraint on waste, we arrive at stewardship constraints on the normative powers of owners. See e.g. Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford: Oxford University Press,1995).

[24] Eduardo Penalver and Greg Alexander, *'Properties of Community', Theoretical Inquiries in Law* 10 (2008) on virtue theory of property.

virtue of our expertise or desert.[25] To see why that is so, consider our moral positions in relation to one another prior to *anyone's* having charge of things. The very first move—to take something up as my own—encounters a problem of standing: why me? I cannot justify taking charge of things just on the grounds that I thereby carve out a sphere for myself in which *I* am not subject to the choices of another (i.e., free!). Nor can I take charge on the grounds that I know best about what ought to be done. That is because, in taking charge of that thing, I displace a state of affairs in which others are not subject to my choices and in which others' views about what ought to be done with that thing have the *same* moral weight as my own.[26] We don't encounter this problem of standing with respect to our rights to our person: your views and my views about what ought to be done with my body are not on equal footing from the get-go.

Ownership solves the problem of standing by designating impersonal, individualized private offices, through people are authorized to take charge of things. Seen as a solution to one kind of moral problem, ownership does not entail a much larger authority to govern other kinds of human relations or to require that others do anything in support of our agendas. For this reason, ownership regulates the activities of others only negatively, by enabling owners to establish the terms on which others may use her thing but not to conscript them to advance her agenda. And ownership powers are limited to avoid putting owners in a position to regulate human affairs generally—subject of course

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[25] And certainly we can never claim ownership on the basis of *need*: a lesser right to use or consume adequately responds to basic human needs for things (food, shelter, etc.) Ownership, recall, gives us greater normative power than just to use or consume the thing itself.

[26] See Larissa Katz, 'Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right', Yale Law Journal 122 (2013), 1444.

to institutional limits on capacity of judges to supervise oppressive and domineering exercises of power.[27]

Exclusivity is a feature of this view: the holder of the office of ownership has the exclusive authority to do the task. Separability is too: qua owner, we can only be in charge of specifically identifiable things in the world that are separate from us as persons. But neither exclusivity nor separability account fully for this view of ownership. While all separable things might be the objects of property, ownership also implies a normative power to resolve complex human interactions.

By focusing on the normative power of owners, we also focus on the sense in which ownership concerns our dealings with others, with respect to a thing. E.M. Forster made this point, tongue-in-cheek, when he described his attempts to find solitude and seclusion within "his woods." He found instead that ownership meant constant and complex dealings with others: stone throwing boys, neighbours, ramblers, even birds presented themselves and required him to make more, rather than fewer, social decisions.[28]

What the late J.W. Harris once called full-blooded ownership is less obviously important (and less intuitively at work) with respect to things that don't invite the same intensity of dealings by others—my single use Kleenex, my apple, my pen.[29] Property with respect to these sorts of things is important if at all to work out a problem of scarce

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[27] See generally restrictions on *in terrorem* conditions on grants (those aiming just at the domination of others, rather than on the orderly devolution of property rights). See Katz, Abuse of Right, supra note __.

[28] E.M Forster, 'My Wood' The New Leader (1926).

[29] Very little attempt has been made in our system of law to get to the bottom of ownership of such things: to match person to Kleenex, in the same way we match person to land through extensive registry and land title systems.

resources, or competing interests in use: one Kleenex, two runny noses, all that we could do is allocate a right to exclude to one or the other person. Of course exclusion sometimes matter to sort out rival claims to use things in the context of scarce goods. But we can see how that concern is ably resolved simply by assigning rights to consume or use, protected by exclusion. We don't need full-blown ownership to coordinate mere consumption or use rights. Full-blown ownership, enabling owners to regulate private activity with respect to a thing, matters where there are many possible uses of things over time for owners to harmonize by setting the agenda for the thing and establishing a framework of lesser property rights and privileges.

It is not then, as Hume thought, *scarcity* that makes ownership so important – mere rights to possess can deal with the allocation of scarce resources as among competitors—but the *complexity* of human activity with respect to a thing over a period of time or space that requires someone in charge to draw up plans for that thing. This turn from scarcity to complexity as the motivator for ownership fits our everyday intuitions about the nature of ownership and its attractions today: an exclusive right to possess some space with a roof overhead is responsive to my need for shelter in conditions of scarcity. Full-blown ownership however puts me into a position to do a great deal more than just to satisfy my personhood interest in shelter or even my individual interest in possessing more than I need. It allows me to determine the relations others might have with respect to that thing on a much broader scale.

C.B. Macpherson drew our attention to the appetites of the possessive individual, whose interest in property was based on consumption. I mean to draw attention to how ownership gratifies a very different human appetite, the appetite for control over the

activities of others. Ownership introduces a new capacity for self-seeking activity, not limited to consumptions or marked by possessive individualism. There is obviously a limit to our lives as consumers: there comes a point in my lifetime when I could not put on another garment, wear another pair of shoes, occupy another bed in yet another of my houses. I simply cannot stretch myself over that much stuff. And yet there is always scope for setting larger and more ambitious agendas for the activity of *others* with respect to the things we own.[30]

This view of ownership as we will see has implications for property's place within the social order more generally. A confederation of owners brings about a state of affairs in which there are no agenda-less things: all ownable things are subject to human agency if not to actual human use. Property law thus enables a large-scale form of cooperation. Having someone in charge of making decisions that regulate private uses of things seems to be a basic requirement of civil society in much the same way that having law at all is.[31] Property relations, seen this way, are thus aspects of our more general constitutional ordering, the "master plan" that allocates authority in society to private and public decision-makers.[32] Owners, on this account, are in charge of regulating private activities with respect to a particular thing and at the same time are bound to leave it to others, whether private actors or public officials, to make those decisions charged to

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[30] I think of this appetite for being in charge as the Bill Gates phenomenon. For a great illustration, see Andrew Ross Sorkin, 'So Bill Gates has this idea for a history class…' New York Times (September 5, 2015.)

[31] Larissa Katz, *'Spite and Extortion',* op. cit. note pp. 1478-9; John Finnis, *Natural Law and Natural Rights*), ch. IX.; Avihay Dorfman, op. cit. note pp. 419-20, 439-40.

[32] Larissa Katz, *'Property's Sovereignty'*; Scott J. Shapiro, *Legality* (Cambridge, Mass.: Harvard University Press, 2011), ch. 6.

them.[33] As Barara Wooton once said in a different context, it is never a question of whether to plan but only a question of *who* plans.[34] We should make that determination with a full understanding of just how ownership functions and what place it claims for itself within our constitutional order.

III. Property in Contemporary Society

The idea of ownership that is at the core of property law is a way of attaching highly individualized and exclusive rights to separable things. We can attach rights to exclude globally, as the "liminal to tort" theorists suggest; we can do this selectively, based on our preferred moral theories (as the liminal-to-contract theorists suggest); or we can attach rights to exclude in terms of a further and constitutive normative power, as the idea of ownership as an office suggests. There is nothing in the idea of property itself that requires one arrangement rather than another. The difference among these ideas is based on larger considerations of political justifiability of the institution and fit with existing practices. Considerations of fit with our actual practices do not in the end tell us which arrangement we ought to prefer but do tell us about the arrangement we in fact have and might yield further insight as to why that arrangement is appropriate today.

How might considerations of fit figure in normative analysis? I will proceed on the basis that we have *pro tanto* reasons to favour explanatory accounts of property that take in more rather than less property law.[35] By property law, I mean the body of law that sets out how we relate with respect to things. We can distinguish between property law

[33] Katz, Moral Parodox of Adverse Possession: should owners fail to exercise that authority in fact, they are vulnerable to the usurpation of authority by others.
[34] See Barbara Wootton, *Freedom Under Planning* (Chapel Hill: University of North Carolina Press, 1945), in response to F.A. Hayek, *The Road to Serfdom* (London: IEA, 2001).
[35] The criterion of greater explanatory power is at work.

and laws that merely *concern* property and so do not shape our theories of property. A great deal of law on the books concerns property, directly or indirectly. It is prohibited to steal your bicycle. It is prohibited to use my knife to kill you. I cannot drive my car faster than the posted speed limit. I must stop my car at a red light. These laws, we likely all agree, are not aspects of property law, although they concern my use of car or my knife, and they protect your property rights in your bicycle.

Is *all* property law appropriately the subject-matter of philosophical inquiry—does all of it suggest morally weighty political choices?[36] Oliver W. Holmes, for instance, noted that 90% of property law is made up of rules of conveyancing, which for Holmes then, as for many now, meant that 90% of property law is technical and philosophically uninteresting.[37] There is no fixed doctrinal content that every theory of property must account for. And yet we might expect an account of property to explain some bedrock features of property law itself, such as the idea of ownership manifest in law,[38] and principles that concern the systematicity of the institution, such as the idea that property law abhors the *absence* of ownership or its proxy (possession).

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[36] For some, property law is where justice goes to die. Lord Millett wrote: "property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is fair, just and reasonable. Such concepts, which in reality, mask decisions of legal policy, have no place in the law of property." Foskett v McKeown, [2001] 1 AC 102 a p.127. It is hard to say about what Lord Millett was more mistaken: the idea of property or the idea of justice.

[37] O.W. Holmes, *The Common Law* (Boston: Little, Brown, and Company, 1881)

[38] Ownership is basic to property law but differences in ideas of ownership manifest different normative commitments in law. A.M. Honore, for instance, lifted his canonical description of the incidents of ownership in liberal society from the civil code of 1950's U.S.S.R A. G., Guest ed., '*On Ownership'* in *Oxford Essays on Jurisrpudence* (Oxford: Clarendon University Press, 1961)(pointing out that a basic idea of ownership is a feature of all legal systems).

Stewardship accounts of property do deliver an idea of ownership and give us a fairly obvious rationale for why ownership of all things is important: things require stewards! The problem is one of doctrinal fit: owners are not generally bound in law to act for other-regarding reasons or to conform to the demands of virtue in making decisions about things. Nor is there any evidence that property law is tailored to the needs of things for masters, rather than the needs of people for things (or orderly relations with respect to things.) Indeed, there are some exceptional forms of ownership in common law that are exceptional precisely because they import some requirements to maintain land for future generations, to steward them.[39]

Those who think of property as a *general* right to exclude also have a view about the ownership; however, the position of ownership is not positively defined through law. Ownership just is the position you are left to enjoy once others have been excluded from the thing. What we call ownership then is just the liberty to apply our natural (physical or moral) powers to determine the use of things, preserved by the right to exclude.[40] For Oliver Wendell Holmes, the right to exclude others releases us to exercise our physical powers. For others, the right to exclude releases us to assert our will in the world or to constitute us as free (not subject to the purposes of others.)[41] The difference between all kinds of possessors and owners is if anything just a matter of degree. Possessors have the same position, just enforceable against fewer people. Indeed, so small is the difference

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[39] I have in mind here the view in Canada of aboriginal title to land cognizable in common law as a form of ownership but sui generis in virtue of the distinctive restrictions on current holders of title to manage the property in ways that preserve it for future generations.

[40] Holmes, etc. following Bentham's empirical idea of the person.

[41] See e.g.,Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press 1960)

between possessors and owners that it comes down to a choice of article to distinguish among them: we call someone "*the* owner" just if she has the right to exclude all other persons. Everyone else is *an* owner in virtue of their right to exclude everyone but those with prior and better rights.[42] This view does not explain what is distinctive about the normative position of the owner By contrast, for those who see property as liminal to contract, property law does without an idea of ownership as an organizing idea that might tell us who has the right to exclude prior to judicial decision-making. Or if there is an idea of ownership, it is defined reflexively, describing the person with the largest control over uses (the most sticks in his bundle) or the person who has residual rights with respect to a thing (the person entitled to whatever is left after all the (identifiable?) sticks in the bundle have been allocated (Barzel)).

Those who treat property as liminal to tort or contract thus fail in one of two ways to bring the idea of ownership fully into view: some fail simply by denying that ownership is a concept in law. The allocation of rights to exclude others from particular uses follows some principle other than ownership, external to property law (e.g., efficiency, welfare, etc). Others fail to bring ownership fully into view not because they deny the idea of ownership but because in effect they cannot recognize when rights to exclude are *not* ownership rights. If ownership is just reflexively defined as what is left once we exclude others, we treat all possessors as owners whatever the basis of their possession.

Views of property as liminal to tort or contract also run into problems of doctrinal fit with the basic legal principle that, as Holmes put it, "the general tendency of our law is

[42] Ben McFarlane, discussed in Katz, Relativity of Title.

to favour appropriation, to abhor the absence of proprietary or possessory rights as a kind of vacuum."[43] If we take property to refer to rights to exclude, and take this to underpin our interest in using scarce things free from the choices of others, we might expect this to refer simply to our right to appropriate what is unowned. And so, as James Penner has shown, we would expect this principle to operate just in support of a power to appropriate on the grounds that we should never be tied to things we don't want. If we could not get rid of things when they no longer serve our interest in using them, we would be slaves to our things, rather than masters of them. This view might explain our power to appropriate without constraints until we run into the property rights of another. But by the same token, it suggests strongly that we should not be, forced to continue on in the role of owner long after we want to be free of it.

And yet as it is manifest in our actual system of law, the idea that the law abhors a vacuum grounds generates significant restrictions on abandonment and also requirements that the law match ownable things to owners, even if in the absence of actual demand for the position. Thus, most Anglo-American jurisdictions allow for the abandonment of land only when there is someone else who has assumed the position of owner.[44] Thus, the law refuses to suffer a vacuum in ownership even where the prior owner has done her very best to divest herself of the position; thus, a resulting trust forces the property back into

[43] The Common Law at 237.
[44] *Johnstone and Wilmot Pty Ltd v Kaine*, (1928) 23 Tas LR 43 at p. 56But see *Arrow Shipping Co Ltd v Tyne Improvement Commissioners (The Crystal)*, [1891-94] All ER Rep 804; [1984] AC 508; 63 LJP 146.

the hands of the would-be transferor,[45] or assigns it to the crown, through doctrines of escheat or bona vacantia, should no potential owner be found.

My own view is that the idea of ownership as an office, defined in terms of the normative power of owners, accounts for what is distinctive about ownership and also accounts for how other subordinate relations with respect to a thing are possible as property, derived from the office of ownership.[46] Ownership is the foundation for the many other forms of property relations that we find in modern liberal societies–where owners can mortgage their interest, sever and convey rights to profit or to fish, lease it, settle it on trust for others.[47] But all this is itself possible only within the framework that ownership sets down.[48] The idea of ownership as an office also enables us to pick out the moral salience and coherence of principles like the idea the law abhors the absence of ownership like a vacuum, in terms of the political justifiability of property as a planning mechanism.

Take for instance, the rules of conveyancing that Holmes (as do others who view property as liminal to tort or contract) treats as ancillary to the major moral content of property, the right to exclude. And yet rules of conveyancing relate very much to the nature of ownership as an office.[49] All of these other property interests are just so many

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[45] *Air Jamaica v Charlton,* 1999 UKPC 20 (a resulting trust kicks in whether or not there was an intent to abandon or refuse any reversion); *Vandervell v Inland Revenue Commissioners,*1966 UKHL 3 (resulting trust thrusts property back at its prior owner even if that owner objects to its return –and the tax bill that comes with it.)

[46] Note __

[47] See China's experiment with the trust.

[48] How ownership relates to these subordinate property relations is something I discuss in more detail below at __.

[49] Note: discussion of offices generally in a treatise on conveyancing.

ways of burdening, fragmenting or transmitting aspects of ownership.[50] Property in modern liberal societies concerns almost exclusively derivative modes of acquisition --we derive our claims of right from others' exercises of a legal power to appoint us their successors, rather than from original acts of acquisition. Even those political philosophers like Locke who wanted to think about property of rights as a system of appropriation or original acquisition took great pains to say that they were theorizing about property *outside* of political community. That is not property in law as we know it. In a system of derivative property rights, rules of conveyancing taken as a whole actually point to something important about property. As HLA Hart noticed, the transmissibility of ownership from one person to a next, without any normative shock to the jural relations of others, makes sense when we think about ownership as a kind of office.[51] Rules of conveyancing actually suggest that what we have is a conception of property organized around the idea of ownership as an office. What is it about the very nature of ownership that commands a presence in law even in the absence of actual demand for those rights? On my own account of ownership, the principle that the law abhors a vacuum of property rights makes sense even on the terms in which it is presented in law. That is because, on a

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[50] This is a conceptual point but one with very practical implications. Hernando de Soto's work shows how modern property interests, like security interests, depend on a foundation of formal ownership. See , Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books,2000).

[51] H.L.A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory 208 (1982) (describing Bentham's view of conveyance, namely that "[t]he old owner . . . appoints the transferee to the 'office' of owner of the property"). I develop the idea of ownership as an office in Larissa Katz, *'Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power' University of Pennsylvania Law Review* 160 (2012), 2030.

. For a conceptual analysis of ownership as an office, see Christopher Essert, *'The Office of Ownership' University ofToronto Law Journal* 63 (2013), 418.

planning theory of ownership, agendaless things are like stateless people: each presents moral problems that we collectively overcome in parallel ways, by subjecting ownable things to ownership authority and by entering and remaining in civil society together.

Conclusion

So is property morally salient in itself? This chapter suggests ways that through our political choices we might make it so. Property is a flexible institution that history has shown capable of insinuating itself into more or less of our moral, social, economic and political lives. The work of the philosopher is just to expose the ways in which it is possible and the terms on which it might be justified for property to organize our relations to one another with respect to things in the world.