Chapter 1

What Is “Property”?

Synopsis

§1.01 An “Unanswerable” Question?

What is “property”?[1] The term is extraordinarily difficult to define. One of America's foremost property law scholars even asserts that “[t]he question is unanswerable.”[2] The problem arises because the legal meaning of “property” is quite different from the common meaning of the term. The ordinary person defines property as *things*, while the attorney views property as *rights.*

Most people share an understanding that property means: “*things* that are *owned* by persons.”[3] For example, consider the book you are now reading. The book is a “thing.” And if you acquired the book by purchase or gift, you presumably consider it to be “owned” by you. If not, it is probably “owned” by someone else. Under this common usage, the book is “property.”

In general, the law defines property as rights[4] among people[5] that concern things. In other words, property consists of a package of legally-recognized rights held by one person in relationship to others with respect to some thing or other object. If you purchased this book, you might reasonably believe that you own “the book.” But a law professor would explain that technically you own legally-enforceable rights concerning the book.[6] For example, the law will protect your right to prevent others from reading this particular copy of the book.

Notice that the legal definition of “property” above has two parts: (1) *rights* among people (2) that concern *things.* The difficulty of defining “property” in a short, pithy sentence is now more apparent. Both parts of the definition are quite vague. What are the possible *rights* that might arise concerning things? Suppose, for example, that A “owns” a 100-acre tract of forest land. What does it mean to say that A “owns” this land? Exactly what are A's rights with respect to the land? The second part of the definition is equally troublesome. What are the *things* that rights may permissibly concern? For example, could A own legal rights in the airspace above the land, in the wild animals roaming across the land, or in the particular genetic code of the rare trees growing on the land? Indeed, can A own rights in an idea, in a graduate degree, in a job, or in a human kidney? In a sense, this entire book is devoted to answering these and similar questions.

§1.02 Property and Law

[A] Legal Positivism

Law is the foundation of property rights in the United States. Property rights exist only if and to the extent they are recognized by our legal system. As Jeremy Bentham observed: “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”[7] Professor Felix Cohen expressed the same thought more directly: “That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state.”[8] This view that rights, including property rights, arise only through government is known as *legal positivism.*

[B] An Illustration: *Johnson v. M'Intosh*

The Supreme Court's 1823 decision in *Johnson v. M'Intosh*[9] reflects this approach. Two Native American tribes sold a huge parcel of wilderness land to a group of private buyers for $55,000. The federal government later conveyed part of this property to one M'Intosh, who took possession of the land. Representatives of the first buyer group leased the tract to tenants, and the tenants sued in federal court to eject M'Intosh from the land. The case revolved around a single issue: did Native Americans have the power to convey title that would be recognized by the federal courts? The Court held the tribes lacked this power and ruled in favor of M'Intosh.

Writing for the Court, Chief Justice Marshall stressed that under the laws of the United States, only the federal government held title to the land before the conveyance to M'Intosh, while the Native Americans merely held a “right of occupancy” that the federal government could extinguish. The title to lands, he explained, “must be admitted to depend entirely on the law of the nation in which they lie.”[10] The Court's decision could not rely merely on “principles of abstract justice” or on Native American law, but rather must rest upon the principles “which our own government has adopted in the particular case, and given us as the rule for our decision.”[11] In short, under the laws established by the United States, must a United States court hold

that the United States owned the land? For Marshall, the answer was easy: "Conquest gives a title which the Courts of the conqueror cannot deny."[12] Property rights, in short, are defined by law.[13]

[C] Natural Law Theory

In contrast to legal positivism, *natural law theory* posits that rights arise in nature as a matter of fundamental justice, independent of government. As John Locke observed, "[t]he Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others."[14] The role of government, Locke argued, was to enforce natural law, not to invent new law. Natural law was a central strand in European philosophy for millennia, linking together Aristotle, Christian theorists, and ultimately Locke, and heavily influencing American political thought during the eighteenth century. As the Declaration of Independence recited, the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness" were endowed upon humans "by their Creator"; governments exist merely "to secure these rights."

The Declaration of Independence was the high-water mark of natural law theory in the United States. The Constitution firmly directed the young American legal system toward legal positivism, subject only to the Ninth Amendment's vague assurance that certain rights are "retained by the people." The influence of natural law theory steadily diminished thereafter. By 1823, when deciding *Johnson v. M'Intosh*,[15] the Supreme Court could easily dismiss the natural law argument that "abstract justice" required recognition of Native American land titles.

§1.03 Defining Property: What Types of "Rights" Among People?

[A] Scope of Property Rights

Suppose that O "owns" a house commonly known as Redacre. If we asked an ordinary person what O can legally do with Redacre, the response might be something like this: "O can do anything he wants. After all, it's *his* property. A person's home is his castle." This simplistic view that property rights are *absolute*—that an owner can do "anything he wants" with "his" property—is fundamentally incorrect. Suppose O wants to use his backyard to practice playing the trumpet, while N wants to sleep in her adjacent house. O does not have an absolute right to play his trumpet as loudly as he wishes; nor does N have an absolute right to be free from noise produced by neighbors. Inevitably, property rights sometimes conflict.[16]

Under our legal system, property rights are the product of human invention. As one court explained: "Property rights serve human values. They are recognized to that end, and are limited by it."[17] Thus, property rights are inherently *limited* in our system. They exist *only to the extent* that they serve a socially-acceptable justification.

As discussed in Chapter 2, the existence of private property rights is supported by a diverse blend of justifications. These justifications share two key characteristics. Each recognizes the value of granting broad decision-making authority to the owner. Under our system, a high degree of owner autonomy is both desirable and inevitable. But none of these justifications supports unfettered, absolute property rights. On the contrary, each requires clear limits on the scope of owner autonomy. Indeed, in a sense we can view property law as a process for reconciling the competing goals of individual owners and society in general. Society's concerns for free alienation of land, stability of land title, productive use of land, and related policy themes sometimes outweigh the owner's personal desires.

[B] Property as a "Bundle of Rights"

[1] Overview

It is common to describe property as a "bundle of rights"[18] in relation to things. But which "sticks" make up the metaphorical bundle? We traditionally label these sticks according to the *nature* of the right involved. Under this approach, the most important sticks in the bundle are:

(1) the right to exclude;

(2) the right to transfer;

(3) the right to possess and use; and

(4) the right to destroy.

The rights in the bundle can also be divided in other ways, notably by *time* and by *person.* For example, consider how we could subdivide the right to possess and use based on time (*see* Chapters 8–9, 12–14). Tenant T might have the right to use and possess Greenacre for one year, while landlord L is entitled to use and possession when the year ends. Or we could split up the same right based on the identity of the holders (*see* Chapters 10–11). Co-owners A, B, and C might each hold an equal right to simultaneously use and possess all of Blueacre.

[2] Right to Exclude

One stick in the metaphorical bundle is the right to exclude others from the use or occupancy of the particular "thing."[19] If O "owns" Redacre, O is generally entitled to prevent neighbors or strangers from trespassing (*see* Chapter 30).[20] In the same manner, if you "own" an apple, you can preclude others from eating it. Of course, the right to exclude is not absolute. For example, police officers may enter Redacre in pursuit of fleeing criminals; and O probably cannot bar entry to medical or legal personnel who provide services to farm workers who reside on Redacre.[21]

Is the right to exclude a necessary component of property? Not at all. O might own title to Redacre subject to an easement that gives others the legal right to cross or otherwise use the land (*see* Chapter 32). Or O might lease Redacre to a tenant for a term of years (*see* Chapter 15), thus surrendering the right to exclude. Similarly, a local rent control law might prevent O from ever evicting his tenant from Redacre, absent good cause (*see* §16.03[B][2], *infra*).

[3] Right to Transfer

A second stick in the “bundle of rights” is the right to transfer the holder's property rights to others. O, our hypothetical owner of Redacre, has broad power to transfer his rights either during his lifetime or at death. For example, O might sell his rights in Redacre to a buyer, donate them to a charity, or devise them to his family upon his death. In our market economy, it is crucial that owners like O can transfer their rights freely (*see* §9.08[A], *infra*).

But the law imposes various restrictions on this right. For example, O cannot transfer title to Redacre for the purpose of avoiding creditors' claims. Nor is O free to impose any condition he wishes incident to the transfer; thus, a conveyance “to my daughter D on condition that she never sell the land” imposes an invalid condition (*see* §9.08[B], *infra*). Similarly, for example, O cannot refuse to sell his rights in Redacre because of the buyer's race, color, national origin, religion, or gender (*see* §34.06, *infra*).[22] Some types of property are *market-inalienable*,[23] essentially meaning that they cannot be sold at all (e.g., human body organs),[24] while other types of property cannot be transferred at death (e.g., a life estate).

Is the right to transfer essential? No. For example, although certain pension rights and spendthrift trust interests cannot be transferred, they are still property.[25]

[4] Right to Possess and Use

A third stick is the right to possess and use.[26] As owner of Redacre, O has broad discretion to determine how the land will be used. For example, he might live in the house, plant a garden in the backyard, play tag on the front lawn, install a satellite dish on the roof, and host weekly parties for his friends, all without any intervention by the law. Similarly, if you “own” an apple, you can eat it fresh, bake it in a pie, or simply let it rot.

Traditional English common law generally recognized the right of an owner to use his land in any way he wished, as long as (a) the use was not a nuisance (*see* Chapter 29) and (b) no other person held an interest in the land (*see* Chapters 8–19, 32–34). Today, however, virtually all land in the United States is subject to statutes, ordinances, and other laws that substantially restrict its use (*see* Chapter 36). For example, local ordinances typically provide that only certain uses are permitted on a particular parcel; if Redacre is located in a residential zone, O cannot operate a store or factory there.

Similarly, Redacre might be subject to private restrictions that dramatically curtail permitted uses; for example, such restrictions might ban gardens, satellite dishes, or even noisy games of tag (*see* Chapter 35).

The right to possess and use is a common—but not a necessary—component of property. If O leases Redacre to tenant T for a 20-year term, O temporarily surrenders his right to possess and use the land; but O still holds property rights in Redacre.

[5] Right to Destroy

A fourth stick in the metaphorical bundle is the right to destroy.[27] Inevitably, most property will be destroyed. For example, suppose you buy a sandwich for lunch; by eating the sandwich, you have effectively destroyed it—which you had the right to do. But are there any limits on this right? When an owner wants to destroy property that is particularly valuable—like a French Impressionist painting or a historic mansion—problems may arise. Suppose that the fair market value of Redacre is $2,000,000; O now plans to destroy Redacre on a whim, even though this will impoverish his family. Or suppose O plans to destroy a famous Manet painting, wasting a socially-valuable resource and preventing future art lovers from ever viewing it.

The precise scope of the right to destroy remains unclear. In general, the law is reluctant to interfere with an owner's freedom to abuse, or even destroy, her property.[28] But there is a discernable trend toward limiting this right. For example, some courts have refused to enforce provisions in wills that direct the killing of animals[29] or the destruction of houses.[30]

Is the right to destroy an essential component of property? No. For example, if O's home Redacre is a historic structure, the local preservation ordinance may bar O from destroying it. Or Redacre might be subject to private restrictions that similarly curtail O's right to destroy.

[C] From “Rights” to “Relationships”

Attorneys, judges, and even law professors customarily define property in terms of *rights.* But what about *duties*? Suppose landowner L is required by law to preserve the habitat of endangered species, even though this limits her ability to use the land. We might explain this requirement either as a restriction on L's rights or as a duty that L owes. In recent decades, the law has increasingly recognized that property owners both hold rights and owe

duties.[31] Perhaps it is more accurate to define property as *relationships* among people that concern things.

Professor Wesley Newcomb Hohfeld revolutionized property law theory in the early twentieth century by envisioning property as a complex web of legally-enforceable relationships.[32] He developed an analytical framework for precisely classifying these relationships. Under this view, a property owner may hold four distinct entitlements: rights, privileges, powers, and immunities. Each entitlement is linked to a "correlative" counterpart: right-duty; privilege-no right; power-liability; and immunity-disability. Although Hohfeld's system was partially adopted by the first Restatement of Property in 1936, it enjoys less influence today. His insight that property consists of relationships among people, however, remains important.

§1.04 Defining Property: Rights in What "Things"?

[A] The Problem

What can permissibly be the subject of property rights? In other words, if "property" consists of legal rights or relationships among people that concern "things," what is the universe of "things"?

The concepts of *value* and *scarcity* are useful tools in thinking about these questions, but do not go far enough. An ordinary person might define property as "things worth money"—land, jewels, cars, and so forth.[33] Yet property rights can exist in things that have no monetary value (e.g., letters from a loved one) or even a negative value (e.g., land heavily contaminated with toxic wastes). Scarcity is a more promising theme. Indeed, one scholar defines property as "a system of rules governing access to and control of scarce material resources."[34] Certainly, property rights are more likely to develop in things that are scarce (e.g., paintings by Leonardo da Vinci) than in things that are common (e.g., mosquitoes).[35] Yet scarce things may remain unowned (e.g., an idea for a new television series), while property rights might exist in ubiquitous things (e.g., air space).

So what "things" can be the subject of property rights? The law's traditional reply to this question is simple: all property is divided into two categories, *real property* (rights in land) and *personal property* (rights in things other than land). Yet this reply is remarkably unhelpful. The universe of "things" in which property rights can exist does not extend to all "land" or to all "things other than land."

[B] Real Property

Real property consists of rights in land and anything attached to land (e.g., buildings, signs, fences, or trees).[36] It includes certain rights in the land surface, the subsurface (including minerals and groundwater), and the airspace above the surface (*see* Chapter 31).

But how extensive are these rights? If F owns exclusive property rights in 100 acres of land known as Greenacre, does he also own rights in all the

airspace 1,000 miles above the land? Or in the soil 1,000 miles below Greenacre? If the wind blows across Greenacre, does F own rights in the wind? Or in the wild bee hive in a Greenacre tree?

Historically, property law was almost exclusively concerned with real property. In feudal England—the birthplace of our property law system—land was the source of political, social, and economic power (*see* Chapter 8). Control over land provided the basis for political sovereignty, the foundation of social status, and the principal form of wealth; accordingly, disputes concerning real property were resolved in the king's courts. Personal property, in contrast, was relatively unimportant in the feudal era; when a person died, the distribution of his personal property was supervised by church courts. Under these conditions, two distinct branches of property law evolved. Real property law, the dominant branch, became complex and often arcane; in contrast, personal property law remained relatively simple and straightforward. Thus, the property law that the new United States inherited from England mainly consisted of real property law.

Even today, the standard first-year law school course on "property" mainly examines real property law. This focus may appear anachronistic in our technological age; stocks, bonds, patents, copyrights, and other forms of intangible personal property are increasingly valuable. Yet land remains the single most important resource for human existence. All human activities must occur somewhere. As our population increases and environmental concerns continue, disputes about property rights in our finite land supply will escalate.

[C] Personal Property

[1] Chattels

Items of tangible, visible personal property—such as jewelry, livestock, airplanes, coins, rings, cars, and books—are called *chattels.* Virtually all of the personal property in feudal England fell into this category. Today, property rights can exist in almost any tangible, visible "thing." Thus, almost every moveable thing around you now is a chattel owned by someone. There are two particularly prominent exceptions to this general observation. Even though human kidneys, fingers, ova, sperm, blood cells, and other body parts might be characterized as "tangible, visible things," many courts and legislatures have proven reluctant to extend property rights this far (*see*

Chapter 7). Similarly, deer, foxes, whales, and other wild animals in their natural habitats are deemed unowned (*see* Chapter 3).

[2] Intangible Personal Property

Rights in intangible, invisible "things" are classified as intangible personal property. Stocks, bonds, patents,[37] trademarks, copyrights, trade secrets, debts, franchises, licenses, and other contract rights are all examples of this form of property.[38] The importance of intangible personal property skyrocketed during the twentieth century, posing new challenges that our property law system was poorly equipped to handle.[39]

What are the other intangible "things" in which property rights may exist? The answer to this question is changing quickly. Consider the example of a person's name. Traditionally, property rights could not exist in a name, unless it was used in a special manner (e.g., as a trademark). Today, however, the law protects a celebrity's "right of publicity"—the right to the exclusive use of the celebrity's name and likeness for commercial gain (*see* Chapter 6).[40] But the answers to other questions are less clear. If spouse A works to finance spouse B's law school education, is B's law degree deemed marital "property" such that A is entitled to a share if he and B divorce? If A works for C for 30 years, does A have a property right in his job?[41] Upon retirement, does A have a property right in Social Security benefits?[42] The universe of intangible things is seemingly endless, and the law in this area will continue to evolve rapidly.

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1. *See generally* John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1; Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L. Rev. 481 (1983); Jeremy Waldron, *What Is Private Property*?, 5 Oxford J. Legal Stud. 313 (1985). *See also* John G. Sprankling, The International Law of Property 21–38 (2014).

2. John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1, 1.

3. Thomas C. Grey, *The Disintegration of Property*, *in* Nomos XXII 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980).

4. While property is commonly discussed in terms of "rights," perhaps "relationships" would be a better term. *See* §1.03[C], *infra.*

5. "People" is used here in a broad sense to include business and governmental entities as well as individuals.

6. Still, even attorneys and legal scholars loosely refer to someone "owning" a particular parcel of land or other thing if the person owns all the legal rights to it. While convenient, this shorthand adds to the semantic confusion.

7. Jeremy Bentham, The Theory of Legislation 69 (Oceana Publications, Inc. 1975) (1802).

8. Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

9. 21 U.S. (8 Wheat.) 543 (1823). *See also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding federal government was not obligated to pay for removal of timber from lands claimed by Native Americans).

10. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823). Cf. Kingman Reef Atoll Dev., LLC v. United States, 116 Fed. Cl. 708 (2014) (person who discovered uninhabited island outside the territory of any nation could only acquire title to it by a conveyance from his nation).

11. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

12. *Id.* at 588.

13. As the Supreme Court explains, "[g]enerally speaking, state law defines property interests." Stop the Beach Renourishment, Inc. v. Florida Dep't Envtl. Protection, 130 S. Ct. 2592, 2597 (2010). Property rights arise under federal law only in specialized contexts, such as copyrights and patents (*see* Chapter 6).

14. John Locke, Two Treatises of Government 358 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

15. 21 U.S. (8 Wheat.) 543 (1823).

16. As one scholar summarizes: "[T]he property rights of one person impinge on, and interfere with, both the property and personal rights of others. Absolute property rights are self-defeating." Joseph William Singer, *Rent*, 39 B.C. L. Rev. 1, 34 (1997).

17. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

18. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to the "bundle of rights that are commonly characterized as property"). The bundle of rights metaphor has been criticized by some scholars. *See, e.g.*, Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 Harv. Envtl. L. Rev. 281 (2002); Hanoch Dagan, *The Craft of Property*, 91 Cal. L. Rev. 1517 (2003). *But see* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. Cin. L. Rev. 57 (2013).

19. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998).

20. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

21. State v. Shack, 277 A.2d 369 (N.J. 1971).

22. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding constitutionality of statute prohibiting racial discrimination in sale or other transfer of property).

23. *See* Margaret J. Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

24. *See also* Andrus v. Allard, 444 U.S. 51 (1979) (upholding constitutionality of statute prohibiting sale of endangered species).

25. *See, e.g.*, Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (holding beneficiary's interest in spendthrift trust was not transferable).

26. *See, e.g.*, Henderson v. United States, 135 S. Ct. 1780 (2015) (discussing the difference between the right to possess and the right to transfer).

27. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781 (2005).

28. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995) (owner of sculpture could destroy it, despite objections of sculptors).

29. *See, e.g.*, In Re Capers Estate, 34 Pa. D. & C.2d 121 (Pa. Ct. Com. Plea 1964) (dogs).

30. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975).

31. *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745 (2009). *See also* Joseph William Singer, Entitlement 18 (2000) ("Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.").

32. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

33. *Cf.* Sekhar v. United States, 133 S. Ct. 2720 (2013) (suggesting that any right which has "value" constitutes "property").

34. Jeremy Waldron, *What Is Private Property*?, 5 Oxford J. Legal Stud. 313, 318 (1985).

35. *See generally* Harold Demsetz, *Toward A Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

36. An item of personal property which becomes physically attached to real property—such as a bookshelf or a sink—is called a *fixture.* A fixture is usually treated as real property.

37. *See, e.g.*, Hughes Aircraft Co. v. United States, 717 F.2d 1351 (Fed. Cir. 1983).

38. The fact that intangible personal property is sometimes evidenced by a document (e.g., a stock certificate or promissory note) does not convert it into a chattel.

39. For example, can property rights exist in computer time? *See* Lund v. Commonwealth, 232 S.E.2d 745 (Va. 1977) (overturning defendant's conviction for larceny on the basis that computer time is not a "good" or "chattel").

40. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

41. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980); *see generally* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 614 (1988).

42. *See* Flemming v. Nestor, 363 U.S. 603 (1960) (finding no property right in social security benefits for purposes of Due Process Clause).

Chapter 2

Jurisprudential Foundations of Property Law

Synopsis

§2.01 Why Recognize Private Property?

Consider a 100-acre tract of prairie grassland in the American Midwest known as Goldacre, the perfect site for a wheat field. What alternative models of ownership might apply to this land? One option might be called *no property*: no one has any rights in the parcel. Another possibility is *common property*: every person holds equal rights in the land. A third model is *state property*: the state owns all rights in the tract. The final option is *private property*: one or more persons hold rights in the land. Under our legal system, Goldacre is probably governed by the private property model.

Why does American law recognize private property?[1] We view property as a cluster of legally enforceable rights among people concerning things.[2] But why should government enforce those rights in the first place? In other words, what is the *justification* for private property? The answer to this question is crucial because the *justification* for private property will necessarily affect the *substance* of property law. For example, suppose that we recognize private property solely in order to reward useful labor; if so, all property law rules will be devoted toward implementing this end. In short, the scope and extent of property rights logically turn on the underlying justification for private property.[3]

In reality, American property law is based on a subtle blend of different—and somewhat conflicting—theories. No single approach is accepted as the complete justification for private property. The dominant theory is undoubtedly traditional utilitarianism (*see* §2.04). However, other major theories—including first occupancy (*see* §2.02), labor-desert theory (*see* §2.03), the law and economics variant of utilitarianism (*see* §2.05), civic republican theory (*see* §2.06), and personhood theory (*see* §2.07)—also influence the evolution of property law. Of course, this is far from a complete list. A variety of other perspectives—including such diverse examples as libertarian theory,[4] Immanuel Kant's categorical imperative approach,[5] natural law theory,[6] the “green property” movement,[7] the critical legal studies approach,[8] and John Rawls' theory of distributive justice[9]—are also important.

Rather than a uniform theory of property, these diverse approaches form a

kind of jigsaw puzzle whose pieces do not fit neatly together. As Lawrence Becker laments, each approach is "typically embedded in a general moral theory which makes it difficult to use one argument to support, augment, or restrict another."[10] Accordingly, while these theories all support the existence of private property in the abstract, they differ widely on how property rights should be defined and allocated.

§2.02 First Occupancy (aka First Possession)

[A] Nature of Theory

Who was first? The first occupancy theory reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it.[11] Suppose fisherman A uses his fishing gear to catch a wild fish. Under this approach, A owns property rights in the fish simply because he was the first person to capture it. Or suppose F, a farmer in the nineteenth-century West, diverts irrigation water to her land from a nearby river; over time, F acquires water rights under the prior appropriation doctrine merely because she used the water first.

First occupancy theory seeks to explain how rights of private property arise in unowned natural resources. William Blackstone—whose *Commentaries on the Laws of England* quickly became the most popular legal treatise in the young United States—described the process as follows. When the world was in a state of nature, blessed with abundant food and other natural resources but only a small human population, everything was held "in common" by the inhabitants as "the immediate gift of the creator"; thus, any person could take "from the public stock to his own use such things as his immediate necessities required."[12] If early inhabitant A was hungry, for example, he could simply eat a wild nut from any tree. In a second phase, Blackstone argued, "by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer."[13] Thus, if A picked nuts off the tree, and sat down to eat them, he acquired property rights in the nuts for as long as he continued eating them. Blackstone concluded that as the human population increased, this custom of first occupancy ripened into permanent property rights. Now, if A labored to pick nuts off the tree, he owned the nuts, whether he ate them immediately or stored them for future use. The same principle applies to property rights in land. Person P acquires ownership rights in the 100-acre prairie tract known as Goldacre simply by occupying it first.

The principle of first occupancy is a fundamental part of American property law today, though in practice it is often blended together with other

theories, particularly utilitarianism and the labor theory. First occupancy theory was particularly influential during the nineteenth century, when it was used to allocate property rights in such diverse resources as wild animals and fish (*see* §3.02), oil and gas (*see* §31.06[B]) and surface water (*see* §31.02[A]). Even today, the first-in-time principle is still the basic rule for determining the respective priority of competing title claims to real property (*see* §24.02).

[B] Critique of Theory

Most legal scholars hold the same opinion of first occupancy theory: while it helps to *explain* how property rights evolved, it does not adequately *justify* the existence of private property. Suppose vagrant V accidentally kicks over a rock and discovers a gold mine. V's claim is first in time, but why should this make a difference? Why should V own the gold, rather than, for example, the residents of the region or the parents of handicapped children?

Further, the first occupancy approach is counterproductive because it encourages the waste of natural resources. Consider hunting. If property rights in wild animals are allocated to the first successful hunter, then long-term conservation is impossible. Because no hunter can control the conduct of other hunters, each hunter has an incentive to protect his or her individual self-interest by killing as many animals as possible as quickly as possible. What about oil? If property rights in subsurface oil are acquired by the first person to pump it out of the ground, then no one has an incentive to preserve oil resources for future use. Suppose A, B, and C all own parcels of land overlying an underground oil deposit. If A begins to pump out oil, B and C will rationally do the same; otherwise, A will pump out all the oil, leaving B and C with no rights at all.

Richard Epstein offers at least a lukewarm defense. Assuming that some system of property rights is necessary, “if only to organize the world in ways that all individuals know the boundaries of their own conduct,”[14] he argues that first occupancy is superior to a system that recognizes original common ownership in all citizens. First, it places wealth in private hands, which leads to more efficient utilization of resources. Second, the first occupancy rule has become a well-established custom for centuries; whatever its original merits may have been, any attempt to abandon the rule now would upset the stability of private property ownership.

The first occupancy approach is a valuable tool in one setting: it serves as a low-cost "tie breaker." All other things being equal, it offers a quick, clear, and inexpensive method to resolve competing claims to property rights and thereby avoid conflict.[15] In other words, if the positions of two competing claimants are otherwise identical, the law usually breaks the tie by recognizing the rights of the first-in-time claimant.

§2.03 Labor-Desert Theory

[A] Nature of Theory

The labor-desert theory posits that people are entitled to the property that is produced by their labor. Under this approach, fisherman A owns property rights in the fish he caught because the catch resulted from his labor; A baited the hook, waited patiently, and reeled in the fish. Or suppose sculptor B utilizes her creative powers to transform unowned clay into a valuable statue; again, B owns rights in the statue because of her labor. The respective property rights of A and B arise as a matter of natural justice because they mixed their labor with unowned raw materials, not simply because they were first in time.

As developed by its foremost exponent, the seventeenth-century philosopher John Locke, the labor theory assumes a world in a state of nature, without private property ownership.[16] It seeks to explain how unowned natural resources (e.g., wild nuts, game, or unoccupied land) are transformed into private property owned by one person. The theory proceeds in four basic steps:

(1) every person owns his body;

(2) thus, each person owns the labor that his body performs;

(3) so, when a person labors to change something in nature for his benefit, he "mixes" his labor with the thing; and

(4) by this mixing process, he thereby acquires rights in the thing.

Consider an example. P owns his body, and thus owns his own labor. When P picks wild nuts from a tree and places them in his sack, he mixes his labor (which he owns) with the nuts (which are unowned), and thereby obtains property rights in the resulting mixture (nuts in the sack). In the same fashion, Locke concludes: "*As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, enclose it from the Common."[17] Thus, P can acquire ownership rights in our hypothetical prairie tract, Goldacre, simply by cultivating and harvesting wheat on the land.

Strong traces of the labor theory linger in American property law today,

often intermixed with first occupancy theory.[18] Perhaps the clearest example is accession: one who in good faith applies labor to another's chattel receives title to the resulting product if, for example, the labor greatly increases the value of the original item (*see* §7.01). Other examples include adverse possession (*see* Chapter 27), the good faith improver doctrine (*see* §30.07), and various intellectual property rules (*see* Chapter 6).

[B] Critique of Theory

Legal scholars are almost uniformly critical of Lockean labor theory as a justification for private property rights.[19] At best, critics observe, the theory should permit a person to receive the value that his or her labor adds to a thing, not title to the thing itself. If P's labor adds only 1% to the value of a thing, why should P receive 100% of the thing? Similarly, if P plants, nurtures, and harvests wheat on unowned land commonly known as Goldacre, at most P should hold rights to the resulting wheat, not to the land itself.

Another line of attack focuses on time. Suppose P acquires title to Goldacre through his labor. P then hires farm workers F and G to grow the next wheat crop on the land. Even though F and G mix their labor with the land, they cannot acquire ownership, because the land is already owned by P. Thus, the labor theory honors only first labor, not all labor. In this sense, it seems to suffer from the same defects as first occupancy theory.

Finally, the labor theory assumes an unlimited supply of land and other natural resources. Thus, if P appropriates Goldacre through his labor, he theoretically causes no harm to other people. Assuming an infinite supply of natural resources, F, G, and others could freely occupy unowned land. However, the twentieth century has taught us that the world is finite. Thus, if the law recognizes P's title to Goldacre, F, G, and others do suffer harm.

§2.04 Utilitarianism: Traditional Theory

[A] Nature of Theory

Utilitarian theory views property "as a means to an end."[20] This is—by far—the dominant theory underlying American property law. Under this approach, private property exists in order to maximize the overall happiness or "utility" of all citizens. Accordingly, property rights are allocated and defined in the manner that best promotes the general welfare of society. As the New Jersey Supreme Court observed in *State v. Shack*: "Property rights serve human values. They are recognized to that end, and are limited by it."[21]

The modern father of utilitarianism was Jeremy Bentham, an eighteenth-century English philosopher. For Bentham, property rights stemmed not from morality or natural justice, but rather from human invention. Mankind recognizes the existence of private property, he suggested, simply as a convention that promotes social utility. He observed: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[22] In crafting property law, the role of the legislator was to do "what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil."[23]

Suppose fisherman A catches a wild fish. According to utilitarian theory, society recognizes that A owns rights in the fish because this result promotes overall public happiness. In general, fishermen derive pleasure from catching fish, and obtain sustenance from eating the fish they catch. Accordingly, society recognizes the ownership rights of all fishermen who successfully catch fish. Perhaps catching the fish made A grumpy or even mad. But the facts relating to A's personal situation are irrelevant. A's property rights stem from a general rule applicable to all citizens. Conversely, human happiness might require that society restrict or ban fishing, in order to allow an endangered species to recover from over-fishing and thus be available for future generations of fishermen.

The same analysis applies to our hypothetical wheat field, Goldacre. The

law recognizes farmer P as the owner of property rights in Goldacre because this result best promotes overall societal happiness, not because P has any natural or moral entitlement. How so? In general, recognizing private property rights in land produces public benefits. Without private property rights, farmers in general could not bar trespassers from removing their crops; under these conditions, farmers would not invest the time, money, and energy needed to supply society with wheat. Property rights thus provide farmers with the investment security that induces them to grow wheat to help feed the public. And—as a general matter—farmers presumably derive personal satisfaction and pleasure from owning and farming their lands.

[B] Critique of Theory

How can human happiness be measured? Are the appropriate yardsticks love, wealth, respect, intelligence, leisure time, dignity, self-esteem, health, or other factors? Critics charge that utilitarian theory is effectively meaningless because it is impossible to assess happiness. For example, a particular law might bring more wealth to one group of citizens, but lessen the self-esteem of another equal-sized group. Alternatively, a law might increase the dignity, but impair the health, of all citizens. Although there is widespread agreement that utilitarian theory supports the existence of private property as a general matter, critics argue that it offers no guidance about how property rights should be allocated or defined.

One important implication of utilitarian theory is that property rights are not "written in stone," but rather are subject to change. If property is merely a tool used to engineer maximum human happiness, then new social, economic, or political conditions may require that property rights be reallocated or redefined. Even assuming that happiness can be measured, are courts and other governmental institutions competent to decide what changes in traditional property rights are necessary or appropriate for the welfare of society?

§2.05 Utilitarianism: Law and Economics Approach

[A] Nature of Theory

The law and economics approach incorporates economic principles into utilitarian theory.[24] While traditional utilitarianism defines human happiness in rather vague terms, the law and economics view essentially assumes that happiness may be measured in dollars. Under this view, private property exists in order to maximize the overall wealth of society.

Richard Posner, the preeminent law and economics scholar, begins by defining property as "rights to the exclusive use of valuable resources."[25] The law enforces property rights in order to motivate individuals to utilize resources "efficiently." In this sense, an "efficient" allocation of resources is one in which "value"—defined as an individual's willingness to pay—is maximized. For example, if A is willing to pay $100 for a particular widget, while B is willing to pay only $30, value is maximized if A obtains the widget. For Posner, the key to efficient allocation is a truly free market in goods and services. Accordingly, the principal role of property law is to foster voluntary commercial transactions among private parties.

Posner postulates a world filled with economically-rational actors, all constantly seeking to maximize their self-interests. In this setting, an efficient property law system must have three central components: universality, exclusivity, and transferability. *Universality* simply means that all property is owned by someone. The second component, *exclusivity*, denotes that the law recognizes the absolute right of an owner to exclude all members of society from the use or enjoyment of the owned resource. Finally, *transferability* means that property rights are freely transferable, so that a resource can be devoted to the most highly-valued use. Of course, even if these components are present, the free exchange of property rights may be impaired by *transaction costs* (e.g., the costs of investigating a potential purchase, negotiating a purchase contract, or dealing with the *free rider* (the group member who receives benefit but refuses to pay)). The Coase Theorem holds that property will eventually be devoted to its highest value use,

regardless of how property rights are initially allocated, if no transaction costs exist.

Consider again our hypothetical prairie tract Goldacre. Farmer P is deciding whether to plant wheat on Goldacre. Society will gain wheat—and thus added wealth—if P and similarly-situated farmers have adequate incentive to invest the time, energy, and money necessary to raise crops. In a world without property law, P will worry: strangers might appropriate the harvest, or P might fall ill and be unable to tend the crop. How can property law encourage P to grow wheat? Posner would answer the question in three steps. First, recognize that P holds property rights in Goldacre. Second, define P's rights so that P has the exclusive right to the use and enjoyment of Goldacre; in this manner, the law will enforce P's exclusive rights to the wheat he grows. Third, allow P to freely transfer his rights in Goldacre to others, so that illness or other calamity does not impair wheat production.

The law and economics approach to utilitarian theory has been quite influential in recent decades, affecting academic debate (and, to a lesser extent, case law) in areas ranging from tenants' rights to land use law.[26] In particular, the concept of *externalities*—that is, economic costs or benefits caused by a person's failure to consider the full impacts of his use of resources—has offered important insights into nuisance law (*see* Chapter 29).

[B] Critique of Theory

The law and economics approach is, to put it mildly, controversial.[27] One major concern is its assumption that social utility or value is appropriately measured by willingness to pay. Not all human desires or satisfactions can be quantified in dollar terms. Such basic human needs as dignity, love, self-esteem, respect, and honor carry no price tag.

Even if all human happiness could be reduced to dollars, the “willingness to pay” standard is still fundamentally flawed. Why? The existing distribution of wealth in our society is unequal. Posner tells a parable of two families, each interested in purchasing a very expensive type of pituitary extract that increases the height of children. The poor family is unable to afford the extract, even though without it their son will be a dwarf forever. Conversely, the rich family can afford to purchase the extract, so that their son—a boy of otherwise normal height—can grow a few inches above

normal. For Posner, the rich family places more “value” on the extract because it is willing to pay more than the poor family. Thus, value is maximized by allowing the rich family to receive the extract.

Implicit in the law and economics approach is an assumption that increasing overall social wealth will benefit all members of society, a view characterized by some critics as “trickle-down economics.” In other words, if the size of the “pie” increases, the size of each piece of the pie will also increase. However, critics charge that the minimal government intervention championed by law and economics advocates tends to perpetuate the existing unequal distribution of wealth.

Even Posner acknowledges that law and economics theory presents profound moral questions. He concedes that economic analysis cannot answer “the ultimate question of whether an efficient allocation of resources would be socially or ethically desirable.”[28] Still, Posner insists that efficiency should be considered an important factor in legal decision making.

§2.06 Liberty or Civic Republican Theory

[A] Nature of Theory

Liberty theory argues that the ownership of private property is necessary for democratic self-government.[29] As it developed before the American Revolution, this approach posited that property rights provided citizens with the economic security that allowed independent political judgment. Citizen C1, owning 1,000 acres of land, could support his family by farming his own land, without any external assistance. He was accordingly free to serve the common good through voting, political discussion, holding office, and so forth. In contrast, landless citizen C2 would be dependent on the good will of others for sustenance, somewhat like the feudal serf; C2 was thus subject to manipulation, bribery, or other economic pressure. If offered a bribe to vote for a particular candidate, for example, C2 might well prefer his private self-interest over the common good.

For this reason, Thomas Jefferson advocated the distribution of federally-owned public lands to landless citizens.[30] Jefferson envisioned a nation of yeoman farmers, virtuous and independent enough to pursue the public good. His dreams contributed to the generous federal land distribution policies of the eighteenth and nineteenth centuries—notably the Homestead Act of 1862—by which most of the lands now comprising the United States were transferred into private ownership.[31]

[B] Critique of Theory

The influence of liberty theory waned during the nineteenth century in the face of changing economic, political, and social conditions. Modern scholars are skeptical of the original assumption that property ownership is essential to political freedom. Developments over the last 50 years—notably the civil rights movement—demonstrate that even our poorest citizens have the political courage to fight for the common good. Moreover, even assuming that economic security is vital for political independence, today most citizens derive that security not from “property” in the traditional sense, but rather from wages earned through relatively secure employment.

Further, taken to its logical conclusion, liberty theory seems to support a

redistribution of property from the rich to the poor. If property exists only to ensure democratic government, then each citizen must be allocated a share of society's wealth.[32] Yet the Takings Clause of the Fifth Amendment—included in the Constitution partly in response to Madison's concerns about potential wealth redistribution (*see* §39.02[B])—bars this outcome.

§2.07 Personhood Theory

[A] Nature of Theory

Personhood theory justifies private property as essential to the full development of the individual. Under this approach, certain things—for example, a wedding ring—are seen as so closely connected to a person's emotional and psychological well-being that they virtually become part of that person.[33] Thus, a person should have broad property rights over such things.

More than two centuries ago, the German philosopher Georg Hegel argued that a "person has as his substantive end the right of putting his will into any and every thing and thereby making it his."[34] More recently, Margaret Radin addressed the same theme; she observed that most people "possess certain objects they feel are almost part of themselves," objects that are "closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."[35] In short, people define their selves through objects. The emotional and psychological link between a person and certain "things"—for example, a love letter or a family home—is so great, Radin suggests, that a person should be able to control the thing through enhanced property rights.

[B] Critique of Theory

Personhood theory might be classified as a variant on utilitarian theory. It seeks to maximize utility by protecting a person's emotional or psychological happiness. Yet, at best, it explains the existence of private property rights only in those "things" seen as central to personhood. It does not seek to justify the existence of what Radin terms "fungible property," that is, rights in money, stocks, bonds, commercial real estate, and other "things" that are less connected to personhood.

Like traditional utilitarian theory, the personhood approach also offers little guidance on the allocation or definition of property rights. Radin argues that when a property right is personal, a prima facie case exists that it should be protected to some extent against conflicting fungible property rights held by others. To what extent? Suppose landlord A leases one of the apartments

in his 10-unit building to tenant B on a month-to-month basis. Two years later, A seeks to evict B in order to sell the land to a computer manufacturing company, which will build a factory on the site and provide jobs for 400 neighborhood residents. Assuming the apartment unit is “personhood” property, is B entitled to reside there for as long as she pays rent and otherwise performs the lease terms? In other words, will B's personhood interest override A's “fungible” interest?

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1. *See generally* Gregory S. Alexander & Eduardo M. Peñalver, An Introduction to Property Theory (2012); Lawrence C. Becker, Property Rights: Philosophic Foundations (1977); Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315 (1993); Carol M. Rose, *Property as the Keystone Right*?, 71 Notre Dame L. Rev. 329 (1996).

2. *See generally* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531 (2005).

3. Jurisprudential approaches to property divide into two groups: (a) teleological (or consequentialist) theories and (b) deontological theories. *Teleological* theories (e.g., utilitarianism) support private property because of the beneficial results that property provides. *Deontological* theories (e.g., natural law theory), in contrast, endorse private property because it is inherently right or just, regardless of the results it produces.

4. *See generally* Robert Nozick, Anarchy, State, and Utopia (1974).

5. *See, e.g.*, Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 Iowa L. Rev. 1331, 1350–57 (1996).

6. *See* §1.02[C], *supra*.

7. *See, e.g.*, J. Peter Byrne, *Green Property*, 7 Const. Commentary 239 (1990); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972); *see also* Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting) (arguing that concern for environmental protection should lead to the conferral of standing upon “environmental objects” such as trees, rivers, and valleys to sue for their own preservation).

8. *See, e.g.*, Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

9. *See generally* John Rawls, A Theory of Justice (1971).

10. Lawrence C. Becker, Property Rights: Philosophic Foundations 3 (1977).

11. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (discussing rights in wild fox); *cf.* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing rights as among European nations to conquer lands occupied by non-Europeans). *But see* Kingman Reef Atoll Dev., LLC v. United States, 116 Fed. Cl. 708 (2014) (person who discovered uninhabited island outside the territory of any nation could only acquire title to it by a conveyance from his nation).

12. 2 William Blackstone, Commentaries on the Laws of England *3 (Bell ed., 1771).

13. *Id.*

14. Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221, 1238 (1979).

15. *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

16. *See generally* Walton H. Hamilton, *Property—According to Locke*, 41 Yale L.J. 864 (1932).

17. John Locke, Two Treatises of Government 290–91 (Peter Laslett ed., student ed. 1988) (3rd ed. 1698).

18. *Cf.* Haslem v. Lockwood, 37 Conn. 500, 507 (1871) (holding that plaintiff, who raked abandoned horse manure into piles and thus “greatly increase[d] its value by his labor,” could recover the value of the manure from the defendant who carried away the piles).

19. *See generally* Lawrence C. Becker, Property Rights: Philosophic Foundations 36–56 (1977).

20. Lawrence C. Becker, Property Rights: Philosophic Foundations 57 (1977).

21. 277 A.2d 369, 372 (N.J. 1971).

22. Jeremy Bentham, The Theory of Legislation 69 (Oceana Publications, Inc. 1975) (1802).

23. *Id.*

24. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

25. Richard A. Posner, Economic Analysis of Law 39 (9th ed. 2014).

26. *See, e.g.*, Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987) (Posner, J., concurring).

27. *See, e.g.*, Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821 (2009); Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 Or. L. Rev. 147 (2000).

28. Richard A. Posner, *Economic Analysis of Law* 14 (6th ed. 2003).

29. *See generally* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273 (1991); William H. Simon, *Social-Republican Property*, 38 UCLA L. Rev. 1335 (1991). *See also* Joseph William Singer, *Property as the Law of Democracy*, 63 Duke L.J. 1287 (2014).

30. *See* Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & Econ. 467 (1976).

31. *Cf.* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (holding tenant in quasi-public housing had property right to continue occupancy there even after termination of lease absent good cause for eviction).

32. *Cf.* Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097 (1981); Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

33. *Cf.* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 614 (1988) (stressing the importance of individual reliance as a basis for recognizing property rights).

34. Georg W. F. Hegel, The Philosophy of Right 23 (T. Knox ed., 1952) (1821).

35. Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 959 (1982). *See also* Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 Wake Forest J.L. & Pol'y 93 (2011).

Chapter 3

Property Rights in Wild Animals

Synopsis

§3.01 The Origin of Property Rights

Property courses often begin with a surprising topic—ownership of wild animals. In a sense, the topic seems almost irrelevant. Modern disputes about who owns a particular squirrel or fish, for example, are uncommon. And it is simply too expensive to litigate the rare dispute that does arise. So why study the topic?

The law governing ownership of wild animals helps answer a key question—how do property rights originate?[1] Today, virtually everything around us is owned by someone. But because wild animals in nature are considered unowned, they occupy a unique niche in property law. The legal principles governing acquisition of title to wild animals shed light on the policies that influenced the development of American property law. More directly, the principles governing ownership of wild animals were ultimately extended by analogy to the ownership of other resources.

§3.02 The Capture Rule In General

[A] Basic Rule

As a general principle, no one owns wild animals—in Latin, *ferae naturae*—in their natural habitat.[2] Under the common law "capture rule," property rights in wild birds, fish, and other animals are obtained only through physical possession. The first person to capture or kill a wild animal acquires title to it.[3] For example, suppose that F finds and pursues a deer, only to have it escape; F has no rights to the deer. If G now traps the deer in a net, he "owns" the deer. But even G's ownership rights are limited. If the deer escapes from the net, G loses his rights and another hunter may acquire title through capture.

Understandably, this rule does not apply to domesticated or tame animals (*domitae naturae*). Suppose that F's cow strays onto G's land, where G captures it. Because the cow is considered a domestic animal, the capture is irrelevant. The rules concerning domestic animals are grounded in policies quite different from those relevant to wild animals. F still owns the cow, absent adverse possession by G.[4]

[B] *Pierson v. Post*

[1] Facts

The landmark case illustrating the capture rule—and much more—is *Pierson v. Post*.[5] It is still celebrated as one of the most famous decisions in American law. The facts of the case are deceptively simple. One day in the early 1800s, Post was hunting in the New York wilderness with his dogs. On a patch of "unpossessed" land, he found and pursued a fox. Pierson, fully aware that Post was chasing the fox, killed it himself to prevent Post from catching it. Although not clear from the case, this incident sparked or worsened a feud between the Post and Pierson families. The ensuing litigation was more about offended honor than the monetary value of the fox carcass.

Post sued Pierson for the value of the fox, claiming trespass on the case. Post won at the trial level, and Pierson appealed to the New York Supreme

Court. Both parties agreed that property rights in wild animals were obtained only by "occupancy," that is, by first possession. Thus, as the court phrased it, the issue was "what acts amount to occupancy" of a wild animal?[6] Pierson maintained that only killing or other *actual capture* of the animal constituted possession. Post argued for what might be called a *probable capture* standard: a pursuing hunter with a reasonable chance of success has sufficient "possession" to create ownership. No prior English or American decision had addressed the issue.

[2] Majority Opinion

The majority adopted the actual capture test in a somewhat mechanical opinion. Writing for the court, Justice Tompkins examined ancient treatises on Roman, European, and English law to locate an applicable rule. Finding that these authorities uniformly endorsed the actual capture standard, he concluded that the fox "became the property of Pierson, who intercepted and killed him."[7] To a lesser degree, Tompkins also relied on public policy factors. He suggested that the actual capture standard rewarded successful hunters, ensured certainty in property rights, and minimized quarrels.

[3] Dissent

In his sometimes facetious dissent, Justice Livingston criticized the majority's blind application of ancient rules to the fundamentally different conditions prevailing in the United States: "[I]f men themselves change with the times, why should not laws also undergo an alteration?"[8] He observed that the fox was a "noxious beast," akin to a pirate, that caused damage to farmers. Viewing the law as an instrument of social change, he argued that the court should select the standard that provided "the greatest possible encouragement"[9] for the destruction of foxes. He reasoned that the better rule required only continued pursuit together with a "reasonable prospect ... of taking" the fox (i.e., a probable capture standard).

[4] Pierson *in Context*

Pierson is important at several levels. It established the actual capture rule as the American standard for acquiring title to wild animals. As a prominent decision in a legal system with little case law, it also provided a bridge for extending the capture rule by analogy to other natural resources—including water, oil, natural gas and, most recently, baseballs.[10] More fundamentally,

Pierson symbolizes the struggle between two theories of jurisprudence—formalism and instrumentalism. The majority opinion reflects the older, formalistic approach to judging; the judge mechanically derives the appropriate rule from existing authorities, however remote. The dissent represents the then-emerging view of the American judiciary that the law should serve as an instrument of social change. The dissent's insistence that law must "change with the times" still resonates today.

[C] Defining "Capture"

[1] The Actual Capture Standard

Pierson recognizes that a hunter who actually kills or captures a wild animal, and immediately takes possession of it, acquires title. It also suggests that the mortal wounding of an animal "by one not abandoning his pursuit"[11] may constitute capture.[12] Later decisions have somewhat relaxed the *Pierson* standard. For example, if F sets a trap that catches a wild muskrat in his absence, the muskrat still belongs to F. Similarly, if G begins chopping down a tree housing a wild bee hive, he has acquired sufficient title to the hive to prevail over H, a stranger who drives him away.[13]

[2] Two Fish Stories

A well-known pair of decisions involving ownership of fish illustrates the capture standard. In *State v. Shaw*,[14] a long funnel-shaped net directed fish into a holding net about 28 feet square; the narrow end of the funnel entering the holding net was less than 3 feet wide. Although fish could both enter and exit the holding net through this opening, under normal conditions few, if any, fish actually escaped. Finding that it was "practically ... impossible" for fish to escape, the *Shaw* court held that the net owners had captured the fish.

Conversely, in *Young v. Hichens*,[15] the court held that plaintiff did not possess a school of fish that was virtually surrounded by his net. The lengthy net was drawn around the fish in almost a complete circle, leaving a gap of only about 40 feet. Before plaintiff's employees could close the gap with a second net, defendant's boat sailed through the gap into the circle and captured the fish. Lord Denman concluded that even though it was "almost certain" plaintiff *would have* obtained possession but for defendant's intervention, it was "quite certain" that plaintiff *did not* actually obtain

possession.[16]

Both decisions turn on the likelihood that fish might escape from the net. In *Shaw*, the facts established that fish rarely escaped from the trap. But the net circle in *Young* was incomplete, creating a small risk that fish could escape before the gap was plugged.

[3] Role of Custom

Custom may also help define capture, as reflected in a series of decisions concerning property rights in whales, notably *Ghen v. Rich*.[17] There, Ghen shot a bomb lance into a fin-back whale off the Cape Cod coast, killing it instantly. The whale immediately sank below the surface of the ocean. Three days later a beachcomber found the carcass stranded on a beach 17 miles away, and sold it to Rich who extracted its valuable oil. *Pierson* might suggest that Ghen had no rights in the whale. Although he killed it, he failed to take immediate possession of the carcass and in fact left the area, thus arguably "abandoning his pursuit."

The custom in the Cape Cod region, however, was that a whale killed in this manner belonged to the fisherman, while the finder of the carcass received a small reward for his help. Judicial acceptance of this custom was critical to the survival of the local whaling industry.[18] The court awarded the value of the whale to Ghen under the custom, noting that if a fisherman does "all that it is possible to do to make the animal his own, that would seem to be sufficient."[19]

[D] Release or Escape After Capture

In general, ownership rights end when a wild animal escapes or is released into the wild.[20] Suppose K captures a wild rabbit; one week later, the rabbit escapes back into the forest, where it is instantly killed by L. L owns the rabbit. Once K's property rights lapsed, the rabbit was again unowned and subject to capture by another. If the law were otherwise, hunters like L might be deterred from hunting at all. How could they distinguish an "owned" rabbit from an "unowned" rabbit?

But suppose a wild animal escapes onto land that is far from its native habitat. If O's giraffe flees into the Colorado mountains, for example, P cannot acquire title by capturing it. The exotic nature of the animal

effectively puts P on notice that it is already owned by another.[21] O's investment in the giraffe is protected.

An interesting problem arises when a captured wild animal is tamed and then released back into nature. For example, suppose that K allows his captured rabbit to roam the forest during the daytime, knowing that it will faithfully return each night. L cannot shoot the rabbit. A captured animal that has the habit of occasionally returning to its captor (*animus revertendi*) is still considered property. In this instance, the law's interest in motivating owners to tame wild animals for productive use outweighs the concern for certainty.

§3.03 Evaluation of the Capture Rule

[A] Rationale for the Rule

American law has traditionally viewed wild animals in nature as either dangerous or worthless. The primary policy underlying the capture rule is to encourage the killing or capture of wild animals for the benefit of society, consistent with utilitarian theory. For example, if H is aware that he can acquire title to any deer he can kill, he has an incentive to invest his money and time in deer hunting. As a result, society will obtain additional venison and skins. But if title could be obtained merely by chasing deer, H might not be willing to devote his time to hunting. Any wild deer H finds might be already owned by someone else who had pursued it unsuccessfully. If H killed the deer, the prior pursuer might claim it as his property. Thus, the capture rule rewards success, not mere effort.

In addition, the rule creates a clear, “bright line” standard for determining ownership which provides several benefits. Possession provides notice to the world of the owner's rights. Consider the example of property rights in a wild duck. Under the capture rule, it is simple to determine who has possession of —and thus owns—the duck. Accordingly, the rule tends to avoid disagreement and thus prevent quarrels which may erupt into violence. Further, from the perspective of law and economics, the rule is an efficient mechanism for resolving any disputes that do occur; ownership can be established with minimal expenditure of society's resources (e.g., attorney's fees, judicial time). Finally, the certainty of title stemming from the rule encourages an owner to invest time and energy in making the captured animal more useful to society (e.g., training a wild parrot to perform tricks).

[B] Criticism of the Rule

Today the capture rule is uniformly condemned by legal scholars for the very reason that once supported it: the rule encourages the destruction of wild animals. It is seen as an anachronism from the era when the United States was a vast wilderness.[22]

Advocates of the law and economics movement observe that the capture rule results in over-intensive hunting.[23] Because no person can control

hunting by others, each person has an incentive to protect his or her individual self interest by killing animals as rapidly as possible. As Harold Demsetz observed in a landmark article, “it is in no person's interest to invest in increasing or maintaining the stock of game.”[24] Under such a system, conservation of wild animals for prudent, long-term human use is impossible.

Environmental law scholars view the capture rule—and the ethic it reflects—as an unmitigated tragedy that devastates natural ecosystems.[25] They observe that the modern capture rule threatens the continued existence of uncounted species, just as unregulated nineteenth-century hunting eradicated the American passenger pigeon.

§3.04 Rights of Landowners

[A] No Ownership of Animals

Does the owner of land also own the wild animals on the land? Under the English doctrine of *ratione soli*, wild animals were considered to be in the "constructive possession" of the landowner. But the landowner did not acquire title to such an animal until and unless it was captured, whether by the landowner or by someone else. Thus, if poacher P killed a deer on O's land, O now owned the deer.[26] Yet attempts to transplant the *ratione soli* principle to the United States were ineffective. Early American courts viewed the rule as both undemocratic and inconsistent with the policies underlying the capture rule.

Accordingly, in the United States a landowner generally owns no rights in wild animals on the land. For example, in one case[27] a group of Wyoming landowners asserted that the state's refusal to grant them licenses to hunt elk and other wild animals on their own lands was an unconstitutional "taking" of property. The court reasoned, however, that mere ownership of the animals' habitat did not confer property rights in the animals: "[N]o one 'owns' wild animals, in the proprietary sense, when they are in their natural habitat unless and until the animals are reduced to something akin to possession."[28] The relatively narrow exception to this rule involves immobile animals such as clams, mussels, and oysters. Permanently affixed to the land (much like trees and other vegetation), these immobile animals are usually deemed the property of the landowner.[29]

[B] Right to Exclude Hunters

The trespass doctrine provides an American landowner with protection similar to *ratione soli.* A landowner may bar hunters and others from trespassing on his land.[30] As a practical matter, to the extent consistent with hunting laws, this doctrine gives the landowner the exclusive opportunity to capture wild animals on the property.[31]

§3.05 Regulation by Government

[A] State and Federal Restrictions

Modern game laws and other government restrictions have substantially eroded—though not erased—the capture rule. States routinely regulate hunting and fishing within their borders to protect wild animals on behalf of the public in general. For example, under the police power, states may ban hunting altogether, or regulate its frequency, duration, and manner.[32] Federal law similarly protects wild animals to some extent; for example, the Endangered Species Act[33] prohibits the killing of certain protected species. When hunting is permitted, government regulations are usually consistent with the capture rule—the first successful captor acquires title to the wild animal.

[B] No Proprietary Ownership of Animals

Despite the breadth of these regulatory powers, state and federal governments do not "own" wild animals in a proprietary sense. During the nineteenth century, states uniformly declared ownership over the wild animals within their territories, usually by enacting statutes to the effect that the state held wildlife in trust for its residents. A substantial body of case law embraced this state ownership theory. With its 1977 decision in *Douglas v. Seacoast Products, Inc.*,[34] however, the Supreme Court rejected this claim as "no more than a 19th-century legal fiction."[35] Writing for the Court, Justice Brennan restated the capture rule: "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[36] Thus, most courts hold that government entities are not liable for damage to private property caused by wild animals.[37] For example, if wild turkeys eat O's corn crop, O cannot obtain damages from the government.

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1. *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

2. Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977).

3. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805); Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of

ownership.").

4. *See, e.g.*, Conti v. ASPCA, 353 N.Y.S.2d 288 (City Civ. Ct. 1974) (owner still held title to trained parrot after its escape, because parrot was a domesticated animal). *See also* Stacy A. Nowicki, *You Don't Own Me: Feral Dogs and the Question of Ownership*, 21 Animal L. 1 (2014).

5. 3 Cai. R. 175 (N.Y. 1805). For background information on *Pierson*, see Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 Duke L.J. 1089 (2006).

6. *Id*. at 177.

7. *Id*. at 178.

8. *Id*. at 181 (Livingston, J., dissenting).

9. *Id*. at 180 (Livingston, J., dissenting).

10. *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. Ct. App. 1934); Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948). Indeed, one modern decision extended the *Pierson* standard to a new situation: ownership of a baseball used to set a home-run record. In Popov v. Hayashi, 2002 WL 31833731, the trial court held that the capture rule would apply ("A person who catches a baseball that enters the stands is its owner."), but found on the facts that the plaintiff had not "achieved complete control of the ball." *See generally* Patrick Stoklas, Comment, Popov v. Hayashi, *A Modern Day* Pierson v. Post*: A Comment on What the Court Should Have Done with the Seventy-third Home Run Baseball Hit by Barry Bonds*, 34 Loy. U. Chi. L.J. 901 (2003). *See also* John William Nelson, *Fiber Optic Foxes: Virtual Objects and Virtual Worlds Through the Lens of* Pierson v. Post *and the Law of Capture*, 14 J. Tech. L. & Pol'y 5 (2009).

11. Pierson v. Post, 3 Cai. R. 175, 178 (N.Y. 1805).

12. *See also* Dapson v. Daly, 153 N.E. 454 (Mass. 1926) (hunter who merely wounded and pursued deer did not obtain ownership); Buster v. Newkirk, 20 Johns. 75 (N.Y. Sup. Ct. 1822) (where first hunter wounded deer but abandoned pursuit, and deer ran six miles before second hunter killed it, second hunter owned deer).

13. Adams v. Burton, 43 Vt. 36 (1870).

14. 65 N.E. 875 (Ohio 1902).

15. 115 Eng. Rep. 228 (Q.B. 1844).

16. *Id*. at 230.

17. 8 F. 159 (D. Mass. 1881).

18. *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. Econ. & Org. 83 (1989).

19. Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881). *See* Robert C. Deal, *Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the British Property Law of Whaling*, 37 Ecology L.Q. 199 (2010).

20. *See, e.g.*, *In re* Oriental Republic Uruguay, 821 F. Supp. 950 (D. Del. 1993) (owner who released wild ducks into marshland could not obtain damages when they were later killed by an oil spill); Mullett v. Bradley, 53 N.Y.S. 781 (App. Div. 1898) (owner's rights ended when undomesticated sea lion escaped).

21. The classic illustration is E.A. Stephens & Co. v. Albers, 256 P. 15 (Colo. 1927), where the court held that the escape of a non-native silver fox in Colorado did not end the owner's rights.

22. *See generally* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. 673 (2005); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519 (1996).

23. A related law and economics theme is that the capture rule encourages overinvestment, which wastes societal resources.

24. Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 351 (1967); *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968); Richard A. Posner, Economic

Analysis of Law (9th ed. 2014).

25. *See, e.g.*, Eric T. Freyfogle, *Ownership and Ecology*, 43 Case W. Res. L. Rev. 1269 (1993); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 Envtl. L. 1 (1994); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471 (1996).

26. Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Q.B. 1707), was cited by the *Pierson* court as illustrating the *ratione soli* principle. In *Keeble*, the plaintiff owned a "decoy pond"—a pond specially constructed to lure wild ducks so that plaintiff could capture them. On three occasions, the defendant discharged guns near the pond for the purpose of frightening away the wild ducks that had landed there. Yet the *ratione soli* principle does not satisfactorily explain why plaintiff prevailed in his later damages action. Although the ducks were in his constructive possession, he had not yet captured them and thus did not own them. *Keeble* is best explained under tort law, not property law: defendant maliciously interfered with the plaintiff's business.

27. Clajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994).

28. *Id*. at 852. Accordingly, an owner is generally not liable when wild animals that exist on her land as a natural occurrence cause injury to others. *See, e.g.*, Christmas v. Exxon Mobil Corp., 138 So. 3d 123 (Miss. 2014) (alligators); Belhumeur v. Zilm. 949 A.2d 162 (N.H. 2008) (bees).

29. *See, e.g.*, McKee v. Gratz, 260 U.S. 127, 135 (1922) (mussels in stream bed with "a practically fixed habitat" were held possessed by landowner).

30. In order to bar hunting on undeveloped land, statutes in most states require that the owner "post" appropriate "no hunting" signs on his land. The lack of such posting may imply permission from the owner to use his land for hunting. McKee v. Gratz, 260 U.S. 127 (1922). *See also* Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549 (2004).

31. Some decisions suggest that a landowner is entitled to wild animals killed on his land by a trespasser. *See, e.g.*, State v. Repp, 73 N.W. 829 (Iowa 1898).

32. *See also* Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000) (person who illegally possessed wild raccoon could not maintain due process challenge to government's seizure of animal because she did not own it).

33. 16 U.S.C. §§1531–1544.

34. 431 U.S. 265 (1977).

35. *Id*. at 284.

36. *Id. See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (Oklahoma statute barring transportation of lawfully-caught wild minnows out of state violated the Commerce Clause; because Oklahoma had never owned the minnows, it did not have a special right to the property within its jurisdiction); North Dakota v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972) (North Dakota did not have a sufficient property interest in wild fish to recover damages from polluter who killed fish).

37. *See, e.g.*, Moerman v. State, 21 Cal. Rptr. 2d 329 (Ct. App. 1993) (elk).