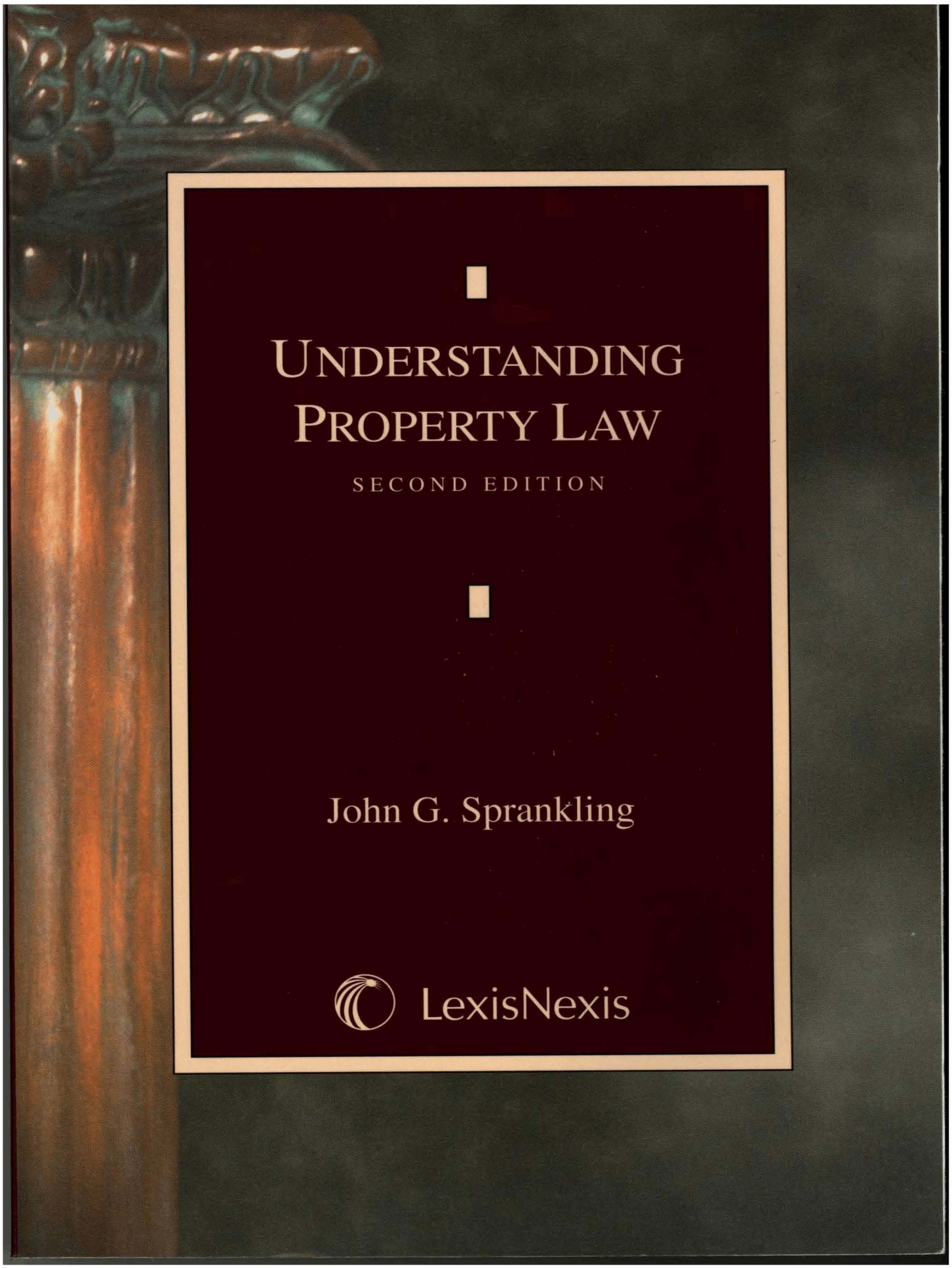

UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

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

[1] *See generally* John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1; Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. Pa. L. Rev. 691 (1938); 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).

[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).

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. For example, 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*.

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[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) (1690).

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

[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.

[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."[13] 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

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[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).

[11] *Id.*

[12] *Id.* at 588.

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

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*,[14] 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.

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."[15] 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"[16] in relation to things. But which "sticks" make up the metaphorical bundle? We

[14] 21 U.S. (8 Wheat.) 543 (1823).

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

[16] *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"). However, 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).

traditionally label these sticks according to the *nature* of the right involved. Under this approach, the most important sticks[17] in the bundle are:

(1) the right to exclude;

(2) the right to transfer; and

(3) the right to possess and use.

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." If O "owns" Redacre, O is generally entitled to prevent neighbors or strangers from trespassing (*see* Chapter 30).[18] 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.[19]

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*).

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[17] The right to destroy may also be part of the metaphorical bundle of sticks. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781 (2005); *see also* Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995) (owner of sculpture could modify or destroy it, despite objections by sculptors).

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

[19] State v. Shack, 277 A.2d 369 (N.J. 1971).

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*).[20] Some types of property are *market-inalienable*,[21] essentially meaning that they cannot be sold at all (e.g., human body organs),[22] 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.[23]

[4] Right to Possess and Use

A third stick is the right to possess and use. 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. If the Redacre home is a historic structure, the local historic preservation ordinance may bar O from destroying the building or even altering its appearance.[24] 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,

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[20] *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).

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

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

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

[24] *See also* Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975) (refusing to enforce instructions in decedent's will that her home be destroyed).

O temporarily surrenders his right to possess and use the land; but O still holds property rights in Redacre.

[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. 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.[25] 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. 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."[26] 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., mosquitos).[27] Yet scarce things may remain

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

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

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

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).[28] 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.

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[28] *But see* Wood v. Wood, 183 P.2d 889 (Colo. 1947) (holding that mature corn crop was personal property).

[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,[29] trademarks, copyrights, trade secrets, debts, franchises, licenses, and other contract rights are all examples of this form of property.[30] The importance of intangible personal property skyrocketed during the twentieth century, posing new challenges that our property law system was poorly equipped to handle.[31]

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).[32] 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?[33] Upon retirement, does A have a property right in social security benefits?[34] The universe of intangible things is seemingly endless, and the law in this area will continue to evolve rapidly.

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

[30] 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.

[31] 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").

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

[33] *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).

[34] *See* Flemming v. Nestor, 363 U.S. 603 (1960) (finding no property right in social security benefits for purposes of Due Process Clause). *But cf.* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (holding tenant in federally-subsidized apartment had property right to continue occupancy, absent good cause for eviction, 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

[1] *See generally* 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).

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.

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[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).

§ 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).

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[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).

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

[13] *Id.*

[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 be, 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

[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).

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

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[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).

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

[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.*

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

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[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 31 (6th ed. 2003).

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

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[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.*, Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 Or. L. Rev. 147 (2000).

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 40 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.

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[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).

[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).

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.

Over 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

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[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).

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?