Introduction

Disputes over rights of private ownership of property constitute some of the most contentious political issues of our day. Can the government legitimately take property from those with more solely in order to give it to those with less? Can it take someone's land in order to help a private developer build a large shopping center that will bring badly needed jobs and tax revenue to a decaying downtown? To what extent can a business owner control who can come onto her property? Should neighbors have a say in how an owner uses property? Should an owner be allowed, without anyone's input, to tear down an important historic building in order to build a more profitable modern office tower? Should she have the right to fill sensitive wetlands in order to build a home?

Property disputes raise passions, at both personal and political levels, like few other topics can. It is not surprising, then, that some of the most important thinkers in history have focused sustained attention on the nature of and justifications for ownership. In this book, we will provide an introduction to the answers these theorists have proposed.

WHAT IS PROPERTY?

Before we turn to the various theories of property on which this book will focus, it is important to address a few preliminary definitional questions. Most fundamentally, we need to define the boundaries of the category at the heart of those theories: property. Defining *property* turns out to be a very challenging task. Indeed, as Jeremy Waldron has observed, some commentators have argued that the concept of property defies definition.[1] As Thomas Grey put it in an influential 1980 essay:

> How do property rights differ from rights generally – from human rights or personal rights or rights to life or liberty, say? Our specialists and theoreticians have

[1] See Jeremy Waldron, *The Right to Private Property* (1988), 26.

> no answer; or rather, they have a multiplicity of widely different answers, related only in that they bear some association or analogy, more or less remote, to the common notion of property as ownership of things.... It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term "property" at all.[2]

Grey's repeated references to "specialists" suggests that at least part of the difficulty in defining property results from the arguably different ways that lay people and lawyers approach the question.[3] Lay people tend to think of property as a relatively uncomplicated relationship between a person (the owner) and a thing (the owned property). Because of the specific context in which they interact with property law questions, however, lawyers have a tendency to think of property differently.[4] They usually view it as the collection of the individual rights people have as against one another with respect to owned resources, a point of view that makes a great deal of sense when considering conflicts between litigants over what the specific content of property law is with regard to some narrow question.

The lawyer's view of property, commonly referred to as the "bundle of sticks" conception, captures a valuable insight about the substantial flexibility in the design of property institutions. But it can also get in the way of efforts to step back and think about property more broadly as a legal institution or concept. As numerous theorists have observed, the layperson's conception of property as "things" latches onto an equally important truth about the institution.[5] One of the distinctive features of property rights is their in rem quality. Property rights, unlike (say) contractual rights, are good against the entire world. They impose duties on everyone else to respect those rights. As a result, the creation of property rights has an impact on people who did not take part in the transaction concerning the property in question. Because the boundaries of the "thing" play a vital role in defining the scope of people's in rem duties to owners, the layperson is right to think that the "thing" that is the subject of the property forms a crucial component of a workable definition

[2] Thomas C. Grey, "The Disintegration of Property," in *Nomos XXII: Property*, ed. J. Roland Pennock and John W. Chapman (1980), 69, 71–3.

[3] See ibid; see also Waldron, *Private Property*, 26; Bruce A. Ackerman, *Private Property and the Constitution* (1977); Stephen R. Munzer, A *Theory of Property* (1990), 16. For a different view about the lay person's and lawyer's conceptions of ownership and property, see Gregory S. Alexander, "The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis," COLUM. L. REV. 82 (1982): 1545 (doubting that the lay person's and lawyer's conceptions are very different from each other).

[4] But see Alexander, "The Concept of Property in Private and Constitutional Law."

[5] See Munzer, *Theory of Property*, 72; Thomas W. Merrill and Henry E. Smith, "What Happened to Property in Law and Economics?" YALE L.J. 111 (2001): 357, 360–83; Michael A. Heller, "The Boundaries of Private Property," YALE L.J. 108 (1999): 1163, 1193.

of property.[6] Taking the lawyer's conception too far risks turning property into a disaggregated collection of narrowly defined rights, causing us to lose sight of the connection of those rights to things. Michael Heller is therefore correct when he says that:

> [W]hile the modern bundle-of-legal-relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the "thingness" of private property. Conflating the economic language of entitlements with the language of property rights causes theorists to collapse inadvertently the boundaries of private property. As long as theorists and the Court rely on the bundle-of-legal-relations metaphor, they need some analytical tool to distinguish things from fragments, bundles from rights, and private from nonprivate property.[7]

If we focus too narrowly on any given right with respect to a thing, and conceive of that right independently from other rights in the thing, our conception of property as a distinctive institution begins to fall apart, replaced by disaggregated strands of rights and duties among particular people. As James Penner has observed, "on the 'bundle of rights' picture, 'property' is not really a useful concept of any kind. It doesn't help judges understand what they're doing when they decide cases, because it doesn't effectively characterize any particular sort of legal relation."[8]

To combat the centrifugal tendency of the bundle of sticks metaphor, some contemporary property scholars have attempted to discern a single essential feature of ownership that distinguishes it from other legal concepts. They have, in effect, seized on specific sticks in the bundle, singling them out as uniquely important. The most commonly nominated candidate to serve this property defining role is the right to exclude.[9] Thomas Merrill puts the point very starkly:

> [T]he right to exclude others is more than just "one of the most essential" constituents of property – it is the sine qua non. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.[10]

[6] See Munzer, *Theory of Property*, 72; Waldron, *Private Property*, 33–4; Abraham Bell and Gideon Parchomovsky, "A Theory of Property," *Cornell L. Rev.* 90 (2005): 531, 576–7.

[7] Heller, "Boundaries of Private Property," 1193.

[8] J. E. Penner, *The Idea of Property in Law* (1997), 1.

[9] See ibid., 71; Merrill and Smith, "What Happened to Property?"; Thomas W. Merrill, "Property and the Right to Exclude," *Neb. L. Rev.* 77 (1998): 730; Adam Mossoff, "What is Property? Putting the Pieces Back Together," *Ariz. L. Rev.* 45 (2003): 371. Arguably, Richard Epstein might fall into this category as well, though he would treat all the rights associated with ownership at common law – and not just the right to exclude – as all in some sense essential to our legal concept of private property. See Richard A. Epstein, *Takings* (1985), 35–6.

[10] Merrill, "Right to Exclude," 730.

The problem with privileging one strand in the bundle in this way is that it is a relatively easy task to come up with examples of private property systems in which the right is almost entirely absent or, at best, subordinated to other rights. In Sweden, for example, landowners do not enjoy any overriding right to exclude others from their property. Nonowners enjoy the right to roam where they wish provided they do not interfere with the use the landowner has chosen to make of her land. The Swedish right to roam, known as the *allemansrätt*, is deeply embedded in Swedish culture and is mirrored to varying degrees in other Scandinavian countries. Thus, in Sweden, the owner's privileged position is not created through recognition of a right to exclude in the first instance, but rather by a privileged right to determine the use of the land she owns, to make decisions around which others must navigate when exercising their own rights of access. A similar norm of access has prevailed as a matter of custom in Scotland for centuries, and was recently recognized formally in the Land Reform (Scotland) Act 2003.[11] And yet Scotland and Sweden's systems of ownership are nonetheless easily recognizable as private property.[12]

There are alternatives to treating property as, on the one hand, merely an endlessly complex bundle of discrete rights between people with respect to things and, on the other, searching for one single, essential stick in the bundle of rights that is definitive of the concept of property. Tony Honoré, for example, has identified a limited menu of rights (or incidents, as he puts it) of ownership that are characteristic of most, though not all, systems of property. These include the right to possess (which includes the right to exclude), the right to use, the right to manage, the right to the income a thing generates, the right to the capital (i.e., the thing itself), the right to security, the right to transmissibility and the absence of term (potentially infinite duration), the duty to prevent harm, the liability to execution (e.g., to satisfy a debt), and the incident of *residuarity* (the idea that, when lesser interests come to an end, the full interest in the property reverts to the owner).[13] Collectively, Honoré says, these incidents are essential features of the full concept of property. But "the listed incidents," Honoré says, "though they may together be sufficient, are not individually necessary conditions for the person of inherence to be designated the owner of a particular thing."[14] On this approach, systems of property are something like one of Ludwig Wittgenstein's "family resemblance concepts."[15] They all

[11] See John A. Lovett, "Progressive Property in Action: The Land Reform (Scotland) Act 2003," *Neb. L. Rev.* 89 (2011): 301. A similar, though less ambitious, legal recognition of the right to roam was codified in England and Wales in the Countryside and Rights of Way Act of 2000.

[12] See Larissa Katz, "Exclusion and Exclusivity in Property Law," *U. Toronto L.J.* 58 (2008): 275.

[13] A. M. Honoré, "Ownership," in *Readings in the Philosophy of Law*, ed. Jules L. Coleman (1999), 557, 563–74.

[14] Ibid., 562–3.

[15] See Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (1953), § 198, at 80. ("[W]hat has the expression of a rule – say a sign-post – got to do with my actions? What sort of

share a great deal with one another, but there is no definitive set of characteristics that they invariably have. Nevertheless, someone familiar with the concept will still be able to recognize systems of property with sufficient accuracy that the concept is not devoid of meaning.[16]

A somewhat different definitional approach would look not just to the various features or rights within systems of property, trying to determine which ones are essential. Instead, it might start by looking for an interest served by the body of law going under the label "property." James Penner, for example, adopts this kind of definitional strategy (at least in part) when he defines property as the area of law that is descriptively characterized by exclusion rights and normatively grounded in "the interest we have in the use of things, an interest that he in turn grounds largely in the value of individual autonomy."[17] In a sense, though, attempting to shift the focus toward the interest served by property risks producing the bundle versus essence debate. The question simply becomes whether the institution of property serves one interest or several. Penner stakes out the position that property is the area of law narrowly "grounded by the interest we have in the use of things."[18] In contrast to the position advocated by Penner, Hanoch Dagan and others have argued that property simultaneously serves a variety of human values. Dagan "perceives the values of property in an antifoundationalist spirit, as 'pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative.'"[19] Although this disagreement about the interests or values served by property is an important and fruitful one, as a definitional matter it ought to be possible (and it is arguably necessary) to understand what property is in the first instance without taking a position on this normative question.

Perhaps the way out of this definitional muddle is to attempt to define property neither in terms of essential substantive rights that a property system must include nor in terms of the human interests it serves. Instead, we might look to a specific *function* that property performs. Jeremy Waldron takes this approach when he defines the law of property as that area of law concerned with the function of *allocating* material resources.[20] Allocation is the process of "determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when." More specifically, a system of *private* property (as opposed to

connexion is there here? – Well, perhaps this one: I have been trained to react to this sign in a particular way, and now I do so react to it.")

16 See ibid.

17 Penner, *Idea of Property in Law*, 71.

18 Ibid.

19 Hanoch Dagan, "The Craft of Property," *Cal. L. Rev.* 91 (2003): 1517, 1561–2 (quoting Hessel E. Yntema, "Jurisprudence on Parade," *Mich. L. Rev.* 39 (1941): 1154, 1169); see also Gregory S. Alexander, "Pluralism and Property," *Fordham L. Rev.* 90 (2011): 101.

20 See Waldron, *Private Property*, 34–5.

communal or collective property) provides a set of "rules governing access to and control of material resources" that are "organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual."[21] But such a system of private ownership is simply one possible specification of the broader concept of a system for allocating material resources. Such a functional definition of property helps to differentiate a domain of legal or social institutions as "property," but it is neutral as to exactly how rights are allocated (in customized bundles or standard blocks with essential features) and as to the normative foundations for structuring the institution in one way rather than another.

From within this view of property as an institution for allocating rights to material things, not all legal doctrines addressing what people can do with material things would count as "property." Waldron gives the example of laws against using knives to stab people, which he classifies as the kind of law that we should not count as "property." Rather, he views these sorts of laws as side constraints that incidentally affect property but that are rooted in broader norms about – for example – respect for bodily integrity.[22] On the other hand, a doctrine like nuisance, which aims to define the boundary between owners' rights to quiet enjoyment and other owners' rights to do what they want with their land, has an allocative function that allows us to correctly treat it as part of the law of property. Closer to the boundary, but arguably still "property," are doctrines that define (and allocate) rights of access and exclusion between owners and nonowners. On this view, then, civil rights statutes prohibiting exclusion from certain categories of property on certain restricted grounds would arguably constitute "property laws."

WHAT IS A THEORY OF PROPERTY?

If we define property as the category of legal doctrines concerned with allocating rights to material resources, we can understand a theory of property as an attempt to provide a normative justification for allocating those rights in a particular way. At the most basic level, a theory of property would answer the question of which human interests are relevant to the project of allocating property rights. Those interests might be human autonomy, self-realization, aggregate well-being, or some combination of these (and perhaps others).

Armed with a conception of the interests served by a system of property, a theory of property would then aim to provide reasons for allocating rights in a particular way. By extension, such a theory would also seek to supply those affected by the property allocation with reasons for respecting it, even when refusing to do so might

[21] See ibid., 38.
[22] See ibid.

in some sense make them better off. Depending on the content of the theory, the primary bearer of property rights might be individual human beings or institutions of various sorts, such as families, states, or corporations, among others.

In addition, a theory of property would attempt to specify the content of property rights at various levels of generality – for example, the contours of the owner's right to exclude others from various kinds of property. Related to this process of specification, a theory of property would likely have something to say about whether the law should treat those rights as disaggregated sticks in a bundle of rights that can be individually parceled out among different stakeholders or whether, instead, they should go together in standardized clusters. After all, at first glance, it seems likely that the bundle-of-sticks conception of property might serve various interests – such as individual autonomy or aggregate well-being – differently than, say, a conception that views property as coming in rigid standard-issue clusters.

Our goal in this book is to provide readers with an introduction to the theories of property that have had the most influence on discussions of American property law. In Part I, we provide broad overviews of the contours of these theories. We begin with the two theories that have arguably dominated academic property thought in recent years: utilitarianism (Chapter 1), which is closely aligned – though not identical – with the movement known as "law and economics," and the property theory developed by John Locke (Chapter 2), which has been extremely influential on those who identify themselves as property rights libertarians. In Chapter 3, we describe the elaborate property theory developed by German philosopher Georg W. F. Hegel, as well as the work of more recent theorists who have built on Hegel's *Philosophy of Right*. In Chapter 4, we discuss the property theory articulated by Hegel's fellow countryman, Immanuel Kant. Although less influential in contemporary property circles, Kantian property theory has begun to gain adherents in recent years, particularly among a group of scholars at the University of Toronto. Finally, in Chapter 5, we explore a theory of property rooted in Aristotle's conception of human flourishing. We will discuss the strengths of each of these theories, as well as some of the most trenchant criticisms that have been leveled against them. Our goal is not to provide comprehensive arguments on behalf of (or against) any of these theories, but rather to introduce readers to their broad outlines and, hopefully, to foster a deeper interest in property theory that will spark the reader to pursue these questions in greater depth than a book of this length permits.

Having introduced readers to the principal contending theories, we shift focus in Part II to a series of contemporary debates over issues relating to the nature of property ownership. In Chapter 6, we discuss the problem of redistribution. When, if ever, is the state permitted to take property from one person in order to give it to another? When it does so, should it redistribute property "in kind" by tinkering with the system of property law or should it define property without regard to distributive

goals and rely on other mechanisms (e.g., a system of progressive taxation and transfer payments) to pursue distributive justice?

In Chapter 7, we explore the nature of the right to exclude and rights of access as they relate to private property. Should owners enjoy an unqualified right to exclude others from their land or should they be required to permit access under certain circumstances? What if owners choose to open up their property to others in order to do business? Does that change the nature of their rights to exclude or do they retain nearly absolute discretion to control access to their property? Are civil rights statutes that prohibit discrimination in "places of public accommodation" merely a codification of owners' limited rights to exclude or are they a violation of those rights?

In Chapter 8, we discuss the related problems of eminent domain and so-called regulatory takings. Under what circumstances can the state rightfully exercise the awesome power of eminent domain? Can the state legitimately condemn an owner's property to encourage economic development? And when does the state's restriction of an owner's use of property amount to a taking of property that triggers an obligation to compensate the owner for her losses?

Finally, in Chapter 9, we explore the extension of ownership to the domain of ideas, or *intellectual property*. What are the various possible theoretical justifications for giving creators and inventors (and, perhaps, their employers) ownership rights over ideas? Can the theories of property that justify private ownership of tangible property extend unproblematically to a new antibiotic or a musical composition? How robust should rights of intellectual property be in light of the dependence of new creations on prior intellectual achievements?

Our aim in these chapters is not to provide definitive answers to, or comprehensive discussions of, any of these fascinating and important questions. Indeed, each of them could sustain (and have sustained) their own book-length treatments. Instead, our goal in Part II is to deepen readers' understandings of the theories of property by exploring how the theories we have introduced in Part I might approach the various topics.

PART I