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THE NATURE OF PROPERTY

Oh dear me,
The warld's ill-divided.
Them that work the hardest
Are aye wi' least provided.

Mary Brooksbank[1]

1. INTRODUCTION

This chapter introduces the idea of property as a legal concept. The discussion is devoted mainly to questions of definition and to a consideration of the philosophical foundations that are said to support that institution. Coming to terms with the ideologies behind private ownership rights is of some significance, given the place of property in our culture. It has been offered that "[o]ne of the major themes of Western political theory during the past 2,500 years has been controversy over the benefits and drawbacks of private ownership".[2] Just as grand is the suggestion that "[p]roperty has been at the core of most social upheavals in human history, including those of the recent past".[3]

What emerges from the examination of these fundamental ideas is, perhaps predictably, a collage of different perspectives about the meaning of private property and its *raison d'être*. The discussion that follows is of an introductory nature, and will certainly not add up to tidy solutions to the questions that are posed. It would be misleading to suggest that solving the central puzzles of property law can be easily accomplished. Instead, my objective here is to air some central issues that can then resonate throughout the remainder of the text. In the succeeding chapters I hope to show how the justifications considered here influence the composition of Canadian property law. The theoretical grounds for conferring ownership form threads that bind (or at least that might serve to bind) together the myriad property rules covered in this textbook.

2. THE 'PROPERTIES' OF PROPERTY

(a) an introductory foray[4]

What is property? The derivation of the word is simple enough, arising from the Latin *proprietas* or "ownership," in turn stemming from *proprius*, meaning "own" or "proper." But, this ety-

1 See N. Buchan & P. Hall, *The Scottish Folksinger* (Glasgow: Collins, 1978) at 33-4.

2 R. Pipes, *Property and Freedom* (New York: A.A. Knopf, 1999) at xi-xii.

3 R. Vogt, *Whose Property? The Deepening Conflict Between Private Property and Democracy in Canada* (Toronto: U.T.P., 1999) at 3.

4 See further T.C. Grey, "The Disintegration of Property" in J.R. Pennock & J.W. Chapman, eds.,

> mology reveals little. Philosophers such as Aristotle, Cicero, Seneca, Grotius, Pufendorf and Locke each, in turn, have debated the meaning of this term, as later did legal luminaries such as Blackstone, Madison and Holmes, and even economists such as Coase.[5]

From an intuitive perspective the idea of property is perfectly straightforward: the term refers to those things one can own. Although it is both sensible and common to use such language, the law offers a different slant, one that tends to dwell more on the owning element. Property is sometimes referred to as a bundle of rights.[6] That characterization means that property is not in fact a thing, but rather a right, or better, a collection of rights (over things) enforceable against others.[7] Likewise, it has been said that "[t]he concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things".[8] Explained another way, the term property signifies a set of relationships among people that concern claims to tangible and intangible items.

The reference to *rights* reveals that property, to a legal positivist, means entitlements created by law. In Jeremy Bentham's words, "[p]roperty and law are born and die together. Before laws were made there was no property; take away laws and property ceases."[9] Under that conception, property is necessarily a legal construct, born and bred under law. However, there is no complete catalogue of the objects that are regarded as property. Likewise, the *subjects* of property, that is, those who may acquire ownership, are also part of a fluctuating class. We look to the juridical definition of property to tell us not only what may be owned, but who among the citizenry can qualify to be an owner.

Take a closer look at these ideas: first, at the notion of a bundle. This imagery suggests that property is a collection of incidents. Professor A.M. Honoré, in a classic treatment of the nature of ownership, identified eleven elements that he claimed provided the most ample conception of property to be found within a mature legal system. He said this:

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of

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Property: Nomos XXII (New York: N.Y.U.Pr., 1980) 69; J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Pr., 1997); A. Bell & G. Parchomovsky, "A Theory of Property", 90 Cornell L.Rev. 531 (2005); A. Mossoff, "What is Property? Putting the Pieces Back Together", 45 Ariz.L.Rev. 371 (2003); D. Lametti, "The Concept of Property: Relations Through Objects of Social Wealth" (2003) 53 U.T.L.J. 325; L.S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: O.U.P., 2003).

5 *Klamath Irrigation Dist. v. U.S.*, 2005 W.L. 2100579 (Fed.Cl.) at 1 (*per* Allegra J.).

6 *Cf.* Penner, *supra*, note 4. It has been argued that the bundle of rights description is a phallic metaphor: see J.L. Schroeder, "Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property", 93 Mich.L.Rev. 239 (1994).

7 See C.B. Macpherson, "The Meaning of Property" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: U.T.P., 1978) at 2.

8 *Yearworth v. North Bristol N.H.S. Trust*, [2009] EWCA Civ 37, at para. 28 (*per* Lord Judge C.J.).

9 J. Bentham, *The Theory of Legislation* (Bristol: Thoemmes Pr., 2004 ed., 1802) vol. 1, at 113. Moreover, "[l]aw alone is able to create a fixed and durable possession which merits the name of property": *ibid.* at 110.

> transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuarity.[10]

I see this list as describing rights to: (i) possession, management and control; (ii) income and capital; (iii) transfer *inter vivos*[11] and on death; and (iv) protection under law. The "absence of [a] term", found in Honoré's list, means that rights might last forever. Furthermore, Honoré saw property in its most complete sense as involving two additional features: (v) liability to seizure (which he calls liability to execution); and (vi) prohibitions on harmful use.

The Honoré bundle contains a wide range of entitlements. Included are *claims* against others: the owner of a plot of land (which will be called Blackacre, following a tradition in writings about land law that dates back at least 400 years[12]) has the right to ask a trespasser to leave, and the interloper has a reciprocal duty to comply. An owner holds *powers* of disposal. Some entitlements are *privileges* or *liberties*, in that the owner's use cannot be abridged by others. The right to destroy property is a privilege in the sense used here. The owner of Blackacre also enjoys *immunities*, including exemptions from certain acts of expropriation.[13]

The prohibition against harmful use as a component of a plenary description of property is a controversial move.[14] This is certainly not a *right* enjoyed by an owner: instead it appears to be a subtraction from, not an element of, the largest notion of ownership imaginable. That is also true of the liability to seizure. We learn at least two things from Honoré's decision to include these features.

First, ownership usually entails duties as well as rights: the bitter accompanies the sweet.[15] Responsibilities to the public are sometimes assumed by a property owner: a person owning firearms is duty-bound to take certain precautions; a landowner is typically required to keep noxious weeds under control, *etc.* Under property law regimes it is common to find a large number of ownership-based duties scattered throughout the law.

Occasionally the obligations aspect of ownership can overwhelm the rights-based side of the ledger. In the Ontario decision of *Abeziz v. Harris Estate*, a question arose about the disposal of a corpse by an executor (*i.e.*, the person responsible for dealing with a deceased person's estate). The Court stated that

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10 A.M. Honoré, "Ownership" in *Making Law Bind* (Oxford: Clarendon Pr., 1987) at 165.

11 An *inter vivos* transfer is one made between living persons.

12 See, *e.g.*, *Butt's Case* (1600) 7 Co.Rep. 23a, 77 E.R. 445.

13 These labels are taken from W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 Yale L.J. 16 (1913). An analysis of the interrelationship between the work of Hohfeld and Honoré can be found in L.C. Becker, "The Moral Basis of Property Rights" in *Nomos XXII*, *supra*, note 4, 187, at 190-1. *Cf.* S.R. Munzer, *A Theory of Property* (Cambridge: C.U.P., 1990) at 18.

14 See also A. Carter, *The Philosophical Foundations of Property Rights* (London: Harvester, Wheatsheaf, 1989) at 5-6; A. Ryan, *Property* (Minneapolis: U. of Minn.Pr., 1987) at 54-5.

15 See further D. Lametti, "The (Virtue) Ethics of Private Property: A Framework and Implications" in A Hudson, ed., *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish, 2004) 39; G.S. Alexander, "The Social Obligation Norm in American Property Law", 94 Cornell L.Rev. 745 (2009); H. Dagan, "The Social Responsibility of Ownership", 92 Cornell L.Rev. 1255 (2007).

"there is no legal right in a corpse. *Rather than rights there are only obligations.* . . . The fundamental obligation is that the body be appropriately dealt with – that is, disposed of in a dignified fashion."[16] That view goes slightly too far. To carry out this duty the executor must surely have a right of possession over the corpse that is enforceable against a wrongdoer, for otherwise the executor would be unable to seek the law's aid to prevent or recover possession. Nevertheless, it is safe to say that such a possessory right is a derivative of the burial obligation, which is the primary aspect of the executor's legal connection to the body.

Second, Honoré's suggestion that the duty to prevent harm[17] is actually to be found *inside* the definition of property reminds us that not all rights of ownership are absolute. The influential English jurist William Blackstone famously described property as "that sole and despotic dominion which one man [sic] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe".[18] That language conjures up some impressive images about property entitlements. However, few of the components that make up the bundle are totally unfettered by some qualification or limitation. Blackstone knew this perfectly well, for in his *Commentaries on the Laws of England* it is acknowledged that individual rights may be restrained by positive laws enacted in furtherance of public policy.[19] In other words, plenary property rights are resisted when they might produce unacceptable harm, defined broadly.[20]

Consider the following examples of restricted property rights. A homeowner knows that the right of privacy may be curtailed in many ways, including through a lawful search and seizure of the premises. English law now confers extensive rights to wander over designated areas of the countryside even if these are in private hands.[21] Human rights legislation prevents owners from engaging in discriminatory practices in renting, selling, as well as in the provision of services.[22] The right to destroy one's own property may generally exist during the owner's life, though a testamentary direction (*i.e.*, one contained in a will) to destroy property may not be enforceable.[23] In general, pressing societal needs and countervailing values may result in the imposition of limits on ownership rights. One

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16 *Abeziz v. Harris Estate*, 1992 CarswellOnt 3803 (Gen.Div.) at para. 28 (*per* Farley J.) (emphasis added). See generally D. Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: C.U.P., 2008).

17 *Supra*, note 10, at 165.

18 W. Blackstone, *Commentaries on the Laws of England* (Chicago: U. of Chi. ed. 1979, 1765-9) vol. 2, at 2.

19 *Ibid.* at 411.

20 See further A.J. van der Walt, *Property in the Margins* (Oxford: Hart, 2009).

21 *Countryside and Rights of Way Act, 2000*, c. 37, discussed in J.L. Anderson, "Britain's Right to Roam: Dedefining the Landowner's Bundle of Sticks", 19 Geo.Int'l Envtl.L.Rev. 375 (2007).

22 For an argument that this common law obligation extended to others who offered services to the public, see J.W. Singer, "No Right to Exclude: Public Accommodations and Private Property", 90 Nw.U.L.Rev. 1283 (1996) especially (for our present purposes) at 1304*ff*. See also Part 5, Chapter 10.

23 See further *Re Wishart* (1992) 46 E.T.R. 311, 1992 CarswellNB 69 (Q.B.); L.J. Strahelevitz, "The Right to Destroy", 114 Yale L.J. 781 (2005). See also K. Mackie, "Testamentary Conditions" (1998) 20 U.Q.L.J. 38, at 50-1.

might go even further: so ubiquitous are the qualifications on the owner's right of exclusion, that it may be more faithful to the idea of property to say that rights of *inclusion* by others are integral to the concept. These rights of non-owners can sometimes be justified on the same grounds that support private property rights in the first place.[24]

A thread runs through the examples mentioned above. In each instance, the imposed limitation results from some prior ownership decision. So, if I choose to purchase a gun, I am constrained as to when and how I can use it. If I choose to operate a retail business, I surrender some rights to control who may enter on my premises. I cannot discriminate on specified prohibited grounds such as race. Certain restrictions will come with the territory (literally and figuratively).[25]

Property rights can be aggregated in a host of ways. There are a variety of different bundles that the law might construct. Parliament and the courts can augment or reduce the number of incidents that apply to any particular kind of property interest. That being so, to say that something is regarded in law as property does not give us complete information as to what an owner can do. Going further, an object may be property for some purposes in the law but not for others: for example, confidential information may not be susceptible to theft according to the criminal law, even if it might be treated as property in the sphere of the private law of obligations.[26]

As well, it is sometimes fruitless to try to single out one person as *the* owner of a particular thing. The law accepts that two or more persons may co-own Blackacre; a tract of land belonging to A may be encumbered with a right of use held by B; both a landlord and a tenant have a proprietary interest in land that is held under a lease; and one person may have title to Blackacre for life, with others being entitled to possession once the life estate ends. Ownership is divisible, indeed infinitely so.[27]

Pausing here, one sees that Honoré's list does not identify an irreducible core element. It talks about the idea of property in its most robust sense, not its essential minimum element(s). Some suggest that no single attribute is required. On this account, it is all a matter of nominalism[28] – property is that which the law

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24 See further H. Dagan, "Exclusion and Inclusion in Property", online: <http://ssrn.com/abstract=1416580>. The justifications for private property are discussed in Part 3, *infra*.

25 The analysis in this paragraph is, I believe, consistent with Larissa Katz's thesis that the exclusivity associated with ownership means the exclusive right to set the agenda as to how property is to be used, and the law therefore should enforce only the actions of others that interfere with that agenda: L. Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 U.T.L.J. 275. My point here is that the agenda once set triggers certain fetters, applicable even if the owner may wish to define the agenda without such limitations.

26 *R. v. Stewart*, [1988] 1 S.C.R. 963, 1988 CarswellOnt 110. Even in a non-criminal law setting, "the ... characterization of confidential information as property is controversial": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 1999 CarswellBC 77, at 169 S.C.R. (*per* Binnie J.). See further the analysis at 169 S.C.R.*ff*. Note also that title to property may pass under contract law, but not for the purposes of the criminal law: *R. v. Milne*, [1992] 1 S.C.R. 697, 1992 CarswellAlta 225.

27 See further J.W. Singer, "The Reliance Interest in Property", 40 Stan.L.Rev. 614 (1988) at 637*ff*.

28 See further T.W. Merrill, "Property and the Right to Exclude", 77 Neb.L.Rev. 730 (1998).

decides should bear that label.[29] By contrast, some judicial decisions have suggested that certain features are essential. Hence, it has been said that a right cannot subsist as property unless it is "definable, identifiable by third parties, capable in its nature of assumption by third parties, and [has] some degree of permanence or stability".[30] A more stripped down version of the same basic idea provides that to be property, the rights must be binding on third parties and capable of being assigned. That kind of approach, called multi-variable essentialism,[31] is sound enough as a normative ideal, though it is not accurate as the law now stands.[32] The power to transfer need not always form part of the bundle,[33] and is only truly essential in the case of money or money-like holdings.[34]

It has been said that property refers to a state-enforced right of exclusion over things, good (generally) against the world. Felix Cohen concluded that the term private property describes a relationship among people that allows an owner to exclude or include others from certain activities, and that in either case the law would back up that decision.[35] Such a formulation (a form of single-variable essentialism[36]) goes a long way toward providing a helpful functional definition of property, one that emphasizes the right of *exclusion* as the essential part of the bundle. However, the power to exclude means more than the right of physical expulsion. The overarching idea is that of exclusivity: the owner holds a *monopoly* over whatever rights of use, transfer, income, *etc.*, are recognized as part of a given proprietary package. The owner gets to make these decisions; others must respect them.[37] It has been said that property law constructs not a wall but rather a gate, which an owner may open or shut according to his or her preferences.[38] This metaphor also reminds us that property creates power relationships among

29 The majority judgment in *Yanner v. Eaton* (1999) 201 C.L.R. 351 (H.C.) exemplifies a nominalist approach.

30 *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175, [1965] 2 All E.R. 472 (H.L.) at 1248 A.C. (*per* Lord Wilberforce). See also *Halwood Corp. Ltd. v. Chief Commissioner of Stamp Duties* (1992) 33 N.S.W.L.R. 395 (S.C.).

31 Merrill, *supra*, note 28.

32 "An interest may qualify as 'property' for some purposes even though it lacks some attributes. For example, an individual can have a 'property' right in his job yet the job is not assignable, transferable, descendible, or devisable. The 'right to publicity' is transferable during life but may not be devisable": *First Victoria National Bank v. United States*, 620 F.2d 1096 (5th Cir., 1980) at 1104 (*per* Goldberg J.).

33 See *The Queen v. Toohey* (1982) 158 C.L.R. 327 (H.C.) at 342; *Dorman v. Rodgers* (1982) 148 C.L.R. 365 (H.C.) at 374.

34 J.W. Harris, *Property and Justice* (Oxford: Clarendon Pr., 1996) at 48.

35 F. Cohen, "Dialogue on Private Property", 9 Rutgers L.Rev. 357 (1954) at 373. "Suppose we say, 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.": *ibid.* at 374. See also K.J. Gray, "Property in Thin Air", [1991] C.L.J. 252, especially at 292*ff*; T.W. Merrill & H.E. Smith, "The Morality of Property", 48 Wm. & Mary L.Rev. 1849 (2007).

36 Merrill, *supra*, note 28.

37 See further Katz, *supra*, note 25.

38 J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Pr., 1997) at 74.

people, a feature of ownership that surfaces again below[39] and in various places throughout the text.[40]

Helpful as Cohen's boilerplate definition is, its shortcomings should be recognized. If the right of exclusion is at the centre of property, we have already seen that property rights are not always absolute. Moreover, there is an element of relativity built into the law of property. A finder of goods has rights against the whole world except the true owner or others with a superior right. That finder does have a property right even if those with an antecedent claim cannot be excluded.[41] In addition, it is hard to imagine a property entitlement that, in fact, included only the right to exclude or include others (and not oneself) in the absolute strictest sense of that term, and nothing else. Almost all (perhaps all) property rights confer more than this bare power.

The Cohen definition, as with the others presented, is only *descriptive* of what is regarded as property, not *prescriptive*, naming those rights that should (or should not) be placed within its embrace. Nor does it easily allow property to be distinguished from other entitlements. For example, we could say that I have a right not to be harmed by the tortious conduct of others, a 'right' that I may enforce by precluding (excluding) certain actions by others. One might also say that I have a right to work and that others may not stop me from doing so. Are these property rights? Certainly these examples represent rights against the world and the sole question is whether they can be said to convey the notion of exclusion of others in a meaningful way. Is the concept of property that all-consuming?

(b) public and common property

Private property is often contrasted with public and common property. For public property, it is the state that possesses the power of exclusion. Is that the only difference? Arguably, the rights of enjoyment for public holdings may not be fully equivalent to those held by a private owner. There are a number of legal rules that pertain only to public holdings. Principal among these is the *Canadian Charter of Rights and Freedoms*.[42] The *Charter* applies only to state action, and can function to limit the way that the state's right of exclusion can be exercised.[43] In addition, at a normative level, the allocation of public goods should be predicated on an assessment of collective interests, which should mean that the obligations of good governance affect the way that the property is used. By and large private owners are not constrained in that way. Individuals are entitled to act in a self-seeking way when exercising their property rights.

On that view, property owned by the state is burdened with unique public obligations.[44] However, the public/private distinction is not necessarily that clear. Even within the private realm, different kinds of owners and property forms can

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39 See Part 3(d)(ii), *infra*.

40 The notion of property as a power base is a prominent theme in Chapter 7.

41 See the discussion of the law of finders in Part 4, Chapter 4.

42 *Constitution Act, 1982*, Schedule B, Part I.

43 See further Part 5, Chapter 10.

44 See further J. Waldron, *The Right to Private Property* (Oxford: Clarendon Pr., 1988) at 40-1.

attract different sets of rules. And the obligation of the state to deploy its property in the public interest is not justiciable. In other words, a transaction involving public property is not invalid merely because it is ill-conceived or a flagrant breach of a political imperative of good governance. A dreadfully poor use of public resources is, generally speaking, just one factor affecting voter preferences at election time.

The label common property is frequently used to refer to interests for which there is a shared right of use conferred on all. The term 'open-access' provides another way to describe that state of affairs. If there is absolutely no element of exclusivity, then the property right appears to be outside of the Cohen definition noted earlier.[45] Indeed, common property in its purest form is the right *not* to be excluded. As a result, it seems possible to say that in these instances, there is not common property, but rather that there are no property rights at all. Whether something is common property or is seen simply as the property of no one may be inconsequential; no more than a matter of semantics. The ambiguity inherent in these different analyses is sometimes reflected in the way the concepts are discussed. The air we breathe may be thought of as the common property of all, but it is equally sensible to think of it as the antithesis of property.[46]

The public domain of intellectual property is an open-access commons of considerable significance. Within this domain are social goods that are not amenable to protection under intellectual property law, together with those creations for which legal protection has expired. Hence, for example, it is commonly understood that one cannot copyright an idea *per se* (*e.g.*, a mathematical theorem). Likewise, because the copyright for Tom Thomson's paintings are now at an end, his beautiful landscapes may be reproduced by anyone.

The size of the public domain changes moment by moment. New works emerge; as I type these words the public domain may be undergoing microscopic expansion and contraction. Copyrights, patents and other protections expire as each day passes. Moreover, as new kinds of intellectual property rights are recognized or terms of protection are extended, the field of the domain shrinks. The balance between intellectual property rights and the public domain commons is of great significance. The recognition of private property rights is designed to encourage creativity. Yet by the same token, the public domain can facilitate the creation of new works that draw upon past contributions. Most cultural creations are derivative of prior art to some extent, and allowing resort to the source of inspiration via the public domain aids the creative process.[47]

Not all common property is fully open-access (as is the pubic domain). Some societies or cultures speak of *communal* or *collective* ownership. Even in main-

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45 See the text accompanying note 35, *supra*.

46 *Colls v. Home & Colonial Stores Ltd.*, [1904] A.C. 179, [1904-07] All E.R.Rep. 5 (H.L.) at 182-3 A.C. (*per* Lord Halsbury L.C.) speaking of light and air. Light, air, and water "unavoidably remain in common": W. Blackstone, *Commentaries on the Laws of England* (Chicago: U. of Chi. ed. 1979, 1765-9) vol. 2, at 14. "'Common property' means no property": Harris, *supra*, note 34, at 110.

47 See further J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale U.P., 2008). *Cf.* D. Fagundes, "Crystals in the Public Domain", 50 B.C.L.Rev. 139 (2009).

stream English[48] and Canadian law we see examples of communal holdings. For example, in 1785 property was granted by the Crown to the Trustees of Lunenburg Common Lands in Nova Scotia to be held "in Special Trust for the special public uses ... of the inhabitants ... as [a] public common for pasturage or otherwise according to the Laws, Rules, and Regulations of our said Province ... but to or for no other or private use".[49] Given that grant, the land is to be held in trust for the town's inhabitants as they change from time to time over the generations.

However, just what is entailed by describing property as held in common is not always clear. Something more restrictive than pure open-access is usually being described. Often what are contemplated are rights that enure to those who fit within a certain class: one is entitled simply by being a member of that class, as in the Lunenburg example just quoted.[50] Similarly, a right might be regarded as collective because allocations must be made by the entire group (or a majority or super-majority), or because once one leaves the group, that person's right to share is lost. Beware of the ambiguity that attends the use of the commons as a property term.

The difference between collective ownership forms (that is, those that are not open-access) and private property can be slight. As we have already seen, private property does not always mean *individual* ownership: the law allows two or more people to share property as joint tenants or as tenants in common.[51] In either of these arrangements the co-owners are entitled to possession of the whole (unless they agree otherwise). Therefore, at the edges it might be fairly hard to distinguish between (say) a tenancy in common (*i.e.*, shared private ownership) and communal property. A community might decide that all of their holdings will be communally owned. Yet if the rights created apply only to those who are members of that community, then how, if at all, does this differ from a widely held tenancy in common? Once collective or communal title is used to describe a form of ownership in which some people are in and some out, the rights of those on the inside start to look very much like a version of shared private property.[52]

What I hope this analysis illustrates, in part, is that private and common property seem to overlap. Likewise, public and common property rights tend to merge in our consciousness. It is tempting to see public parks and roads, and so on, as common property, given that we are all presumptively allowed access; we seem to have the right not to be excluded from these places. But title to these lands is typically placed in public authorities, so therefore these areas are technically under public ownership. Even the private-public dividing line is rather

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48 See further G. Gadsen, *The Law of Commons* (London: Sweet & Maxwell, 1988).

49 Quoted in *Board of Trustees of Common Lands v. Tanner* (2005) 36 R.P.R. (4th) 105, 2005 CarswellNS 399 (S.C.) at para. 2.

50 Likewise, it has been said that "Canada's fisheries are a 'common property resource', belonging to all the people of Canada": *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12, 1997 CarswellNat 10, at para. 37 (*per* Major J.).

51 These two types of concurrent ownership are described at length in Chapter 9.

52 Harris uses the term "communitarian property" to describe widely held private ownership under which internal rules dictate the relations of the people who hold title, as would be the case for Aboriginal title. Harris, *supra*, note 34, at 103-4.

more obscure than appears to be the case at first glance. A private landowner may hold title to Blackacre, but the ultimate or radical title remains in the Crown (a metonymic term meaning the state).[53] In public parks, informal private property-like rules sprout up to order rights of use for such things as water fountains, swings, and basketball courts.[54] Moreover, the mixture of the three main property regimes (private, public and common) in any given locale is in a constant state of flux.[55]

3. THE CASE FOR PRIVATE PROPERTY[56]

(a) introduction

Laws about property reflect important social values. To illustrate, consider the well-known hypothetical referred to as the Heinz dilemma, invented by Lawrence Kohlberg to test levels of moral development among children. Heinz's wife is ill, but the couple cannot afford the drug required for treatment of the malady; without this, the wife will die. In Kohlberg's work, the children-respondents were asked whether Heinz should steal the drug. Carol Gilligan used this test to demonstrate that young girls and boys reason through such problems differently, thereby undermining Kohlberg's research design and data.[57]

My reason for raising it here is different again. For present purposes, what is important is that Kohlberg, Gilligan, and at least some of the respondents in the studies, accepted that the law would place the pharmacist's rights to the property above the needs of Heinz's wife. (It probably would unless Heinz could successfully raise the defence of necessity in response to a charge of theft. That would be a long shot.) Why, then, do we value property so highly?

Much has been written about the right to property as a human value, and naturally so: in the realm of political philosophy the search for acceptable social, legal, and political institutions inevitably requires an assessment of the value of property and the role of the state in the creation and preservation of ownership rights. These questions are extremely important, because the main upshot of

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53 See further Part 2(a), Chapter 2.

54 See further R.C. Ellickson, "Property in Land", 102 Yale L.J. 1315 (1993) at 1386-7.

55 See further A. Lehavi, "Mixing Property", 38 Seton Hall L.Rev. 137 (2008).

56 A very select number of Western theorists are canvassed here, and only in an introductory way. For further reading, see J.W. Harris, *Property and Justice* (Oxford: Clarendon Pr., 1996); L.C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977); A. Carter, *The Philosophical Foundations of Property Rights* (London: Harvester, Wheatsheaf, 1989); S.R. Munzer, *A Theory of Property* (Cambridge: C.U.P., 1990); J. Waldron, *The Right to Private Property* (Oxford: Clarendon Pr., 1988); A. Reeve, *Property* (London: MacMillan, 1986). The discussion in this Part is intentionally ahistorical. It does not describe the emergence of modern concepts of property ownership through stages of development. Rather it seeks to present an array of arguments that are capable of being invoked to support the status quo in Canada. A historical treatment can be found in R. Schlatter, *Private Property: The History of an Idea* (New York: Russell & Russell, 1973); P. Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge: C.U.P., 2007).

57 C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: H.U.P., 1982).

accepting a right of private ownership is that property that might otherwise fall under the direct control of the community is given over to private interests. Privatizing the decision-making power over resources inevitably means that some will do quite well (in material terms) and others not. There had better be good reasons for allowing that to happen.

While private property might seem as natural as the morning sun to most of us, that is just an illusion; in fact, it is a thoroughly contestable notion. I find it intriguing that thought-experiments about how to construct utopian societies often produce model communities that eschew private ownership, usually in the cause of advancing substantive equality.[58] That approach is evident in Thomas More's *Utopia*, one of the best-known examples of this type of study. Another is Edward Bellamy's novel *Looking Backward*, released in 1888, but set in the year 2000.[59] In Bellamy's world, private property has been demoted to a subordinate role. Productive capital, profit, and land are all communally owned. By 2000, market dealings are disdained:

> People nowadays interchange gifts and favors out of friendship, but buying and selling is considered absolutely inconsistent with the mutual benevolence and disinterestedness which should prevail between citizens and the sense of community of interest which supports our social system. According to our ideas, buying and selling is essentially anti-social in all its tendencies. It is an education in self-seeking at the expense of others, and no society whose citizens are trained in such a school can possibly rise above a very low grade of civilization.[60]

We know how little that imaginary place resembles the world in which we live. Nevertheless, that sobering fact does not detract from the idea that utopian worlds such as Bellamy's often promote sharing and co-operation, suggesting that what we settle for in the real world is built on a moral compromise.

All of the justifications that are outlined here – there are seven main categories of argument that will be considered – reflect the conviction that property provides a basis for enhancing the human condition. Private property has been hailed as a vital ingredient in the process of human flourishing, and as Western culture's noblest triumph.[61] Among its many "blessings" is the capacity of property rights to promote justice, peace, prosperity and liberty.[62] Of course, such assertions about the goodness of property do not take us very far. An interesting feature of the various arguments relating to the need for private property is that they try to substantiate that conclusion in quite diverse ways. Still, some of the lines of reasoning intersect. Indeed, the extent to which each justification of property actually adds to the others is something that you might consider. So too is the question of whether or not the case for private property is convincing.

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58 Accord J. Cahir, "The Withering Away of Property: The Rise of the Internet Information Commons" (2004) 24 O.J.L.S. 619, at 621*ff*.

59 E. Bellamy, *Looking Backward 2000-1887* (Chicago: Packard & Co. ed., n.d.).

60 *Ibid.* at 60.

61 T. Bethell, *The Noblest Triumph: Property and Prosperity Through the Ages* (New York: St. Martin's Griffin, 1999).

62 *Ibid.* at 8.

Asking about the rationales of private ownership engages three discrete issues. The first relates to whether, as a general matter, private property should ever be recognized in preference over other possible regimes (such as public or common property). On the assumption that private property can at least sometimes be justified, a second-order issue arises concerning those occasions when private property should prevail over the other forms; to seek a solution here involves a right-by-right or item-by-item inquiry. For example, questions might arise as to whether or not the law should protect private property rights over airspace, genetic material, or ancient folklore practices.[63] Furthermore, in framing the law it is possible that we might decide that a select number of incidents of ownership might be granted, leaving some property holders with far less than all of the sticks in the bundle.

A third-order question focuses on the persons to whom privately ownable property should be allocated. That is still a general matter, because it goes only so far as to set the rules for ownership. This third question – who gets what? – becomes important only once we have determined that some form of private ownership should exist.

We will see that there are a variety of rationales that promote private ownership. In answering the first two questions these theories tend to complement each other. This is because they all advance the idea of private property, and the cogency of any one of them will tend to expand the things that should be capable of being held as private property. When one turns to rules for assigning rights (the third order), conflicts can more readily emerge, because the theories may point to different criteria as the proper bases of specific allocational rules.

(b) the promise of economic prosperity

(i) *the basic law and economics stand*[64]

The promotion of economic efficiency is commonly advanced as a justification for private property. 'Look around you', a Canadian entrepreneur might say, 'the wealth and abundance that you see is the product of the right of private property that encourages us to produce more and reap the rewards. That benefits everyone. Compare the deprivation found in the states of the former Soviet Union if you want to appreciate the importance of private property to our material well-being.' Indeed, land reforms in nations from the former Soviet bloc and elsewhere in the developing world are largely premised on the theory that creating a market in land is economically sound. Agencies such as the World Bank have made this faith in market forces part of the received gospel of development.[65]

Economists working in this field are apt to treat the law, in its essence, as something akin to a colossal pricing mechanism[66] within which property and

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63 See Part 4(b), *infra*.

64 See further Part 2(d), Chapter 3.

65 See World Bank, *Doing Business in 2006: Creating Jobs* (Washington, DC: World Bank & International Finance Corp., 2006).

66 See, *e.g.*, C. Veljanovski, *The Economics of Law: An Introductory Text* (London: Institute of

labour serve as the chief commodities of exchange. And according to the conventional economic position the principles governing property will tend toward efficiency and wealth maximization if several features are in place.[67] First, the law should protect *exclusivity* of ownership, that is, it should enforce my ownership rights and ensure that these exclusive rights cannot be infringed or exploited by anyone else without my say-so. It is here that the related ideas of incentives and expectations come into the picture. There would be little reason for a farmer to tend to a carrot patch if, just prior to harvest, anyone else could abscond with the crop with impunity.

The work of the Peruvian economist Hernando de Soto illuminates an important aspect of the value of exclusivity. Developing countries, de Soto has argued, fail to exploit a good deal of their existing capital because many people in those nations live on land for which no formal title has been issued. Property trapped in this juridical limbo cannot (easily) be used as security to raise capital for improvement or enterprise. Likewise, the sale of the *de facto* ownership rights yields low returns; buying a squatter's plot is a risky affair. These suboptimal circumstances would be reduced, de Soto maintains, by validating the informal titles, thereby enshrining durable rights in favour of the extra-legal owners.[68] The law needs to protect exclusivity to spur productivity.

Second, the law should allow entitlements to be *transferable*, so that they can circulate in the market. If exchange is facilitated, property interests should eventually gravitate to those people who value them most. So, the law should seek to inhibit restraints on alienation (transfer), and strive to reduce the transaction costs inherent in buying and selling goods of all kinds. As will be seen, these goals are in fact pursued within the law of property.[69]

Third, the law should make a broad array of items available for exchange. Property should be as *universal* as is feasible. In addition, the idea of universality suggests that ownership rights should be tenable by as many people as possible. The more players the better. With these three elements (exclusivity, transferability, and universality) in place, the market can work to shift resources efficiently, each trader being assumed to be a rational wealth maximizer – *homo economicus*. The operating assumption here is that value is determined by ascertaining who is prepared to pay the most for a specific good. It is the 'almighty buck' (as my mother often called it) that controls the measure of value; not need, and not some other measure of desire.

Economic Affairs, 1990) at 15. See also R.A. Posner, *The Economics of Justice* (Cambridge, MA: H.U.P., 1981) at 75: "The basic function of law from an economic and wealth-maximization perspective is to alter incentives".

67 R.A. Posner, *Economic Analysis of Law*, 7th ed. (New York: Aspen Law, 2007) at 33*ff*.

68 H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). *Cf.* M. Trebilcock & P.E. Veel, "Property Rights Development: The Contingent Case for Formalization" 30 U.Pa.J.Int'l L. 397 (2008); S.J. Shackelford, "The Promise and Peril of Property Rights Formalization", online: <http://ssrn.com/abstract=1395958>.

69 The significance of transaction costs is explained in Part 2(d), Chapter 3; the general law governing restraints on alienation is described in Part 3(e), Chapter 7; and the role of land registration systems in facilitating transfers is seen in Chapter 12, *passim*.

This outline, of course, is merely a rough-hewn depiction of the rudiments of a market economy. What is crude about this portrayal is that, in this unvarnished form, it reflects a faith in the market that many modern economists do not appear to hold. But typically the economic argument in favour of private property is clothed with a recognition that the market can sometimes work rather imperfectly, and this means that a measure of legal regulation is occasionally needed to establish efficient allocations when bargaining in the marketplace is hampered or stifled.

(ii) *the tragedy of the commons*

The economic case for individual ownership is sometimes[70] made by reference to a parable known as the tragedy of the commons.[71] Consider a situation in which herders share a pasture on which each may place as many cattle as they wish (or own). Under these circumstances, a given farmer, A, will be motivated to graze as many cattle as possible. The advantage to that farmer of adding each additional cow is its ultimate market value. The cost of doing so is the loss of the grazing space needed to sustain one cow. Yet, that loss will be borne by all of those using the commons, so only a fraction of the extra burden affects A directly. Since the benefits of the extra cow are captured fully by A, but the costs spread widely, A must certainly come out ahead.

But there's a catch. Every farmer should see the sense of spreading the cost in the same way as A; each should follow the logic that suggests more grazing. Given that the commons is finite, the inevitable result will be over-grazing and a degradation of the pasture lands, leading in the end to calamitous economic losses for all. The pattern of events described in the tragedy of the commons has been shown to occur in a range of commercial activities.[72]

One lesson of the story of the commons is that the use of private pastures would not lead to the same tragic result because the land would be conserved. Private property can operate to reduce the ability of one owner to shunt off costs onto others. In the language of economics, private ownership can reduce social costs, or negative externalities. Likewise, by protecting the exclusivity of the owner, private property tries to limit the misappropriation of positive externalities by others. When a sports event is viewed by spectators from a vantage point

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70 For a different kind of analysis see H. Demsetz, "Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership" in F. Parisi & C.K. Rowley, eds., *The Origins of Law and Economics* (Cheltenham, UK: Edward Elgar, 2005) 241.

71 G. Hardin, "The Tragedy of the Commons", 162 Science 1243 (1968). "The 'Tragedy of the Commons' provides a powerful argument for the assignment of property rights": J.L. Harrison, *Law and Economics* (St. Paul: West, 1995) at 43. Michael Taylor does not share this enthusiasm. He claims that "in almost every detail Hardin goes wrong": M. Taylor, "The Economics and Politics of Property Rights and Common Pool Resources", 32 Nat. Resources J. 633 (1992) at 634.

72 See L. De Alessi, "Gains from Private Property" in T.L. Anderson & F.S. McChesney, eds., *Property Rights: Cooperation, Conflict and Law* (Princeton: Princeton U.P., 2003) 90. See also D.R. Mathews, *Controlling Common Property: Regulating Canada's East Coast Fishery* (Toronto: U. of T.Pr., 1993); R. Hannesson, *The Privatization of the Oceans* (Cambridge, MA: M.I.T.Pr., 2006).

outside the stadium at no cost, positive externalities are being taken.[73] Private property tries to prevent these results. In short, "the main allocative function of property rights is the internalization of beneficial and harmful effects".[74] Put in other terms, private ownership is supposed to control (or capture) the benefits and burdens of exploitation.

However, the claim that communal lands are destined to suffer a tragic fate is not borne out by the evidence. A review of styles of pasture management on the Swiss Alps showed that privately held lands were in fact more productive than those held under various types of communal arrangements. However, highly revealing, I think, is that some of the pasture lands had been run as commons for centuries without succumbing to the destruction through over-exploitation that the parable warns will inevitably ensue.[75] Given this and similar experiences elsewhere,[76] it would seem that the tragedy of the commons story is not so much an argument in favour of private property as it is a manifestation of the perils of unregulated – that is, fully open-access – common property. To avoid the ruination of the shared pasture one could establish rules for commons use that would promote proper management. Returning to the parable, the law might allow grazing of a limited number of cattle.

Indeed, one sees just that kind of response in relation to the ancient law governing shared English pastoral lands. Common pastures were once found throughout England; even now some 4% of the land in England and Wales can be described as ancient common lands.[77] At common law, one could place on these pastures the number of animals that were maintained on one's private lands during the winter months. By virtue of this principle, poetically called levant and couchant (getting up and lying down), the law sought to inhibit overgrazing by allowing no more usage than the privately owned lands could support.[78]

Implementing a regulatory system, even one as simple as the doctrine of levant and couchant entails costs. Transforming property from communal to private and must be undertaken thoughtfully.[79] Among other things, one needs to establish appropriate standards, and enforcement mechanisms would have to be put in place. However, bear in mind that all systems of property, even those involving private ownership, generate costs, a reality that became painfully clear

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73 For a discussion of externalities, see H. Demsetz, "Ownership and the Externality Problem" in Anderson & McChesney, *supra*, note 72, 282.

74 H. Demsetz, "Towards a Theory of Property Rights", 57 Am.Econ.Rev. 347 (1967) at 347.

75 G.G. Stevenson, *Common Property Economics: A General Theory of Land Use Applications* (New York: C.U.P., 1991).

76 See further D.E. Cole, *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (Cambridge: C.U.P., 2002) at 16, and 95*ff*; N. Dolaksak & E. Ostrom, eds., *The Commons in the New Millennium* (Cambridge: M.I.T.Pr., 2003); R. Axelby, "'It Takes Two Hands to Clap': How Gaddi Shepherds in the Indian Himalayas Negotiate Access to Grazing", 7 J. Agrarian Change 35 (2007).

77 See the discussion in *Bettison v. Langton*, [2002] 1 A.C. 27, [2001] UKHL 24, at 30-1 A.C.

78 See *Carr v. Lambert* (1866) 1 Ex. 168.

79 See E. Mwangi, "Subdividing the Commons: Distributional Conflict in the Transition from Collective to Individual Property Rights in Kenya's Maasailand", 35 World Development 815 (2007).

when Eastern bloc countries confronted the difficulties inherent in establishing vibrant market economies.

Even states with well-oiled market economies need to devote enormous resources to protect property. In Alberta alone, the cost of the land registration system is about $15 million *per annum*.[80] The costs involve more than administrative assistance. Without criminal law responses to theft and fraud, rules for the enforcement of contracts, laws allowing for bankruptcy protections and so forth, the efficacy of the market would be severely compromised This textbook just scratches the surface of all the pertinent legal rules, which are, in effect, state supported social programs that facilitate market exchanges. One can add to this the precautions we all take, as well as the time and money we spend, to guard our possessions.

In sum, the market is not natural, self-regulating, or free of charge.[81] Even if we accept that the commons may be destroyed in a husbandry free-for-all, the problem then becomes determining *which* regulatory system should be adopted instead. Robert Ellickson has maintained that private property rules will normally be cheaper than a communal property regime in at least one area, namely, boundary protection. For private property, methods have to be established to monitor wrongful entry. That may be difficult. Still, with common property the monitoring process is far more complex, because under a communal regime each user would be permitted to enter the shared lands, but would be required to refrain from overconsumption (to avoid the tragedy).[82]

Ellickson's argument seems to be sound (even ingenious) at a theoretical level. However, the creation of private allotments creates more fences and boundaries, and that will increase the costs of fixing the boundaries and monitoring the borders (a point that Ellickson makes). Plus, problems of private property rights violations can be acute if it turns out that a society gives too much property to too few (a factor that he does not address). The more people who are left out, the greater the danger of a breach of the boundaries. The number of B-and-Es each year in Canada (about 630 for every 100,000 people during 2008[83]) and the prevalence of assorted other property crimes surely underscores the potential for private property systems to generate mammoth enforcement costs.

Moreover, the tragedy of the commons does not, despite first appearances, concern a pure form of shared ownership. What the parable describes is a mixed system in which common lands are combined with privately held livestock. What the tragedy suggests at first glance is that this hybrid system will not work, so the land, like the cattle, should be privatized. By the same token, the tragedy would not likely occur in a community in which the herds of cattle were also shared

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80 *Service Alberta 2007-8 Annual Report* (Edmonton: Queen's Printer, 2008) at 70.

81 See further J. Heath, *Filthy Lucre: Economics for People Who Hate Capitalism* (Toronto: HarperCollins, 2009) ch. 1, *passim*.

82 R.C. Ellickson, "Property in Land", 102 Yale L.J. 1315 (1993) at 1327-9. "Monitoring boundary crossings is easier than monitoring the behavior of persons situated inside boundaries. For this reason, managers are paid more than night [guards]": *ibid.* at 1327-8.

83 Statistics Canada, CANSIM table 252-0013. Based on this figure the total number of home invasions in that year was just under 200,000.

amongst all members.[84] The incentive to overgraze would (*ex hypothesi*) then be absent. Now, other problems, such as diminished production, might then arise; that is another matter altogether. At least there would be no tragedy of the commons. In addition, the adoption of private property will not invariably prevent new tragedies from occurring. The foisting of burdens (described above as negative externalities) onto others can occur whenever more than one person has a legitimate claim to a share of property. As we will see throughout this book, there are many areas of the law where this is so.[85]

The case of oil and gas exploration demonstrates how resources can suffer the fate of premature development through the pursuit of individual gain. Oil and natural gas are fugacious materials, that is, they have a natural migratory capacity. Under the minimalist approach taken by the common law, where there are oil and gas deposits below the lands of several people, the benefits of exploitation will be enjoyed by those who first capture (or win) the resource. This is an example of what will later be referred to as a principle of first occupancy.[86] As a result, the owners of the common pool can become engaged in a frantic race, for the failure to capture now may well mean that it will be too late later on.[87] To avoid such outcomes, a complex web of regulations over private property rights concerning mineral exploitation has become necessary. Again, privatization is not a foolproof cure for the dangers of common pool dissipation.

Individualizing parcels can also undermine a positive feature of the sharing of burdens in commons arrangements. Consider what would happen if part of the pasture lands were affected by natural degradation caused by something like blight or severe weather. If the lands were divided up into private lands, it is possible that some would suffer serious damage while others would experience little or none. Private owners would, by definition, have to shoulder their losses alone. Neighbours might take pity, or decide to help in the hope of reciprocity in the future, but none of that is an inherent feature of private property relations. By contrast, within the commons the loss is spread, diffused, to all users, who automatically assume some of the burden of the reduced pasture. In other words, there is a built-in social safety net; a form of disaster insurance in commons holding.[88]

The strategy of internalizing burdens is supposed to promote conservation; it can avoid the tragedy of the commons. On that view, private property is environmentally friendly. Indeed, some environmental economists believe that both our overall quality of life, and the health of the planet, have never been

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84 See A. Carter, *The Philosophical Foundations of Property Rights* (London: Harvester, Wheatsheaf, 1989) at 68.

85 Such as when land is shared sequentially or simultaneously. Problems of commons management are considered below in Chapters 5 and 9, respectively.

86 See Part 3(g), *infra*.

87 J. Richards & L. Pratt, *Prairie Capitalism: Power and Influence in the West* (Toronto: McClelland & Stewart, 1979) at 48. See also *Borys v. Canadian Pacific Railway*, [1953] A.C. 217, 1953 CarswellAlta 25 (P.C.) where the Privy Council warned that the only safeguard against the loss of gas, oil, or water under the common law rule of capture is to take occupancy first.

88 G.D. Thompson & P.N. Wilson, "Common Property as a Response to Environmental Variability", 12 Contemp.Econ.Pol. 10 (1994).

better.[89] Moreover, it has been asserted that "higher income in general is correlated with *higher* environmental sustainability".[90] In other words, material well-being (read: private property) is consistent with environmental protection.

Yet, the internalization of environmental burdens is rarely, if ever, perfect. That is because the boundaries of privately owned lands cannot track perfectly all of the ecosystems within that physical space. A given landowner might wish to clear land for cultivation; all of the neighbouring owners might choose to do the same. Everyone might be perfectly entitled to do so, even though the upshot may be the destruction of a rich wildlife habitat, parcel-by-parcel. Without a co-ordinated approach, the natural environment is at the mercy of a large number of individual, self-interested, wealth-maximizing preference-seekers.[91]

Private property can also thwart actions that might well be in an owner's self-interest. Such was the case when farmers faced threat from a common natural enemy – the enduring drought of the 1930s that turned fertile lands into dust bowls. On the small farms created via homestead laws, there was little individual action taken to combat the threat of wind erosion. In particular, individuals farmers were less likely to adopt strip-fallowing practices that could have served to reduce wind flow. They did not do because such measures would have required that too much land be left fallow, which would itself reduce annual yields. At the same time, the large number of farms made co-ordinating some kind of collective response – such as building windbreaks or facilitating strip fallowing – difficult to orchestrate.[92]

In general, action based on personal gain is often myopic. In the end, "we are all brief tenants on this planet".[93] When people die their property passes to someone else; until then, there exists an incentive to exploit it to the hilt, spreading part of the costs over to the next generation. Some owners will still be induced to use their property wisely, improving its worth with a view to enhancing its market value.[94]

Yet that sanguine position does not account for the hundreds of properties in Canada that have been spoiled through the dumping of heavy metals and other toxic waste by owners.[95] How could private owners have allowed their properties to deteriorate into what are now euphemistically called brownfields?[96] The answer to this question may perhaps be found in the tragedy of the commons itself: a

89 See generally T.L. Anderson, ed., *You Have to Admit it's Getting Better: From Economic Prosperity to Environmental Quality* (Stanford: Hoover Inst.Pr., 2004).

90 B. Lomberg, *The Skeptical Environmentalist* (Cambridge: C.U.P., 2001) at 32.

91 E.T. Freyfogle, *The Land We Share* (Washington, DC: Shearwater Books, 2003) at 157*ff.*

92 G.D. Libecap, "The Assignment of Property Rights on the Western Frontier: Lessons for Contemporary Environmental and Resources Policy", 67 J.Econ.Hist. 257 (2007) at 278-9.

93 S.L. Udall, *The Quiet Crisis and the Next Generation* (Salt Lake City: Gibbs Smith, 1988) at xviii.

94 See further Ellickson, *supra*, note 82, at 1368-70.

95 R. Matas, "Waste Site Cleanup in Limbo", *Globe & Mail*, December 28, 1995, A4.

96 See further A. Abdel-Aziz & N. Chalifour, eds., *The Canadian Brownfields Manual* (Markham, ON: LexisNexis Canada, 2004); J. Siikamäki & K. Wernstedt, "Turning Brownfields into Greenspaces: Examining Incentives and Barriers to Revitalization", 33 J. Health Pol. Pol'y & L. 559 (2008).

pivotal premise of the parable is that each farmer acts on the basis of a present self-interest. That implies that there is an unhealthy tendency to look only to the short-term.[97]

(iii) *the tragedy of the anticommons*

Moreover, economic development can be inhibited by too much private property. The fracturing of private property entitlements into small bits can wind up paralyzing resource use, producing what has been termed a tragedy of the *anticommons*. That tragedy occurs when too many people have a right of exclusion (the converse of a commons), with no one person holding effective control. What transpires is transactional gridlock, with the result that efficient use is thwarted and goods are underutilized.

It has been suggested that the diffusion or splintering of property rights explains a curious development in post-communist Moscow: storefronts remain empty while street-side kiosks are found everywhere. It has been argued, persuasively, that the excessive parsing of control in relation to store-ownership (the right to sell being controlled by one set of stakeholders; the right to mortgage by another; the right to determine usage by a third, *etc.*) has bogged down development because it is difficult to mount a co-operative effort.[98] And as we have already noted, excessive fragmentation hinders environmental protection of precarious ecosystems that span many private holdings.[99]

Anticommons concerns affect the contours of intellectual property rights. For instance, under the law, a creator is given various monopoly control-rights over an artistic work. This internalizes the benefits of the work by inhibiting free-riding by others. But copyright protections are time-limited. The Supreme Court of Canada has described that balance as being sound from an *efficiency* standpoint: "Excessive control by holders of copyrights ... may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization".[100] So, "[i]n crassly economic terms it would be as inefficient to overcompensate artists and authors for the rights of reproduction as it would be self-defeating to undercompensate them".[101]

However, it is difficult to accept that the balance is perfect. Attempts to re-issue or re-use works, such as long-forgotten films, have often foundered because of the numerous copyright permissions that are or may be involved. Licences must be obtained for all extant copyrights or the legal cloud hanging over any new venture will likely be debilitating. If that were not enough, as there is no

97 See further A. Sinden, "The Tragedy of the Commons and the Myth of the Private Property Solution", 78 U.Colo.L.Rev. 533 (2007).

98 See M.A. Heller, *Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books, 2008) and the reference cited there.

99 See text accompanying note 91, *supra*.

100 *Théberge c. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 2002 CarswellQue 306, at para. 32 (*per* Binnie J.).

101 *Ibid.* at para. 31.

registry of copyrights it is often far too daunting a task to determine with confidence who owns a given copyright and whether it has in fact already expired. In this case, therefore, an anticommons problem is compounded by barriers to transferability resulting from the inability to locate who has copyright or even if it is still on foot. The result of these twin barricades is the accumulation of an enormous mass of unusable orphan works.

Concerns over the impasses produced by the anticommons phenomenon have also emerged in relation to science-based patents. Where patents concern elements of basic science (such as genes), the fear is that new research and discovery might be stifled, since researchers must acquire an array of expensive patent licences before undertaking research. Unless everything that is needed is obtained, the research initiative may well be impeded. Note that more is involved here than merely an escalation in the costs of research. Many major undertakings require large front-end expenditures. To build the laboratory itself requires considerable outlay. However, there are plenty of outfits that are willing to sell bricks, mortar, and test tubes. In the case of patent assembly, the required permissions may be held by a commercial rival, and the availability of alternative products may be severely limited.[102] Yet, the extent to which these fears are borne out remains unclear.[103]

Try to picture a world in which all roads, highways, rivers and so on were in private hands. It is hard to visualize how an economy could function when the capricious acts of an owner of some important thoroughfare might bring the commercial sector to its knees. The touchstone of universality suggests that every single road (not just the occasional toll-road) should be placed into individual ownership. Interestingly, in no market economy is that idea taken seriously. Even the ardent libertarian theorist Robert Nozick conceded that privatization of public roads could prove to be ruinous.[104] The danger of anticommons problems arising can sometimes prompt the removal of goods, especially those that serve infrastructure functions, from the private sphere. Some public or common holdings seem necessary to keep free enterprise on track.[105]

It has been offered that the welfare effects of anticommons problems can be as acute as those associated with commons systems.[106] Indeed, one may understand the commons and anticommons phenomena not as mirror images, but rather

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102 See further Heller, *supra*, note 98; S.R. Munzer, "Common, Anticommons and Community in Biotechnical Assets", 10 Theoretical Inquiries L. 271 (2009). Note that under Canadian law there are remedies for abuse of a patent by its holder, that is, for unreasonably refusing to make the invention available: see *Patent Act*, R.S.C. 1985, c. P-4, s. 65 (concerning compulsory licences).

103 Heller, *supra*, note 98, at 77.

104 R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 55.

105 See further C.M. Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property" in *Property and Persuasion*, *infra*, note 108, ch. 5. See also B.M. Frischmann, "An Economic Theory of Infrastructure and Commons Management", 89 Minn.L.Rev. 916 (2005); S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, MA: Belknap Pr., 2004) at 110-23; L.A. Fennell, "Adjusting Alienability", 122 Harv.L.Rev. 1403 (2009).

106 S. Vanneste *et al.*, "From 'Tragedy' to 'Disaster': Welfare Effects of Commons and Anticommons Dilemmas", 26 Int'l Rev.L. & Econ. 104 (2006).

opposite sides of a coin. We might regard unbridled air pollution as a classic commons problem, for everyone has an incentive to expose others to the negative externality of foul air. Yet one can just as easily see the problem as involving an anticommons: those wanting clean air can attempt to buy off all polluters. But one can imagine that such an assembly project might be plagued with enormous holdout problems. The desired clean air zone may well wind up as a mere pipe-dream. There are too many 'pollution' property rights here – it is an anticommons.[107]

(iv) *other critiques of the economic efficiency argument*

The economic justification lacks persuasiveness to the extent that there is no benchmark with which to determine if the efficiency that results is actually better than that produced by other forms of ownership. That problem plagues all arguments that are consequentialist in nature, and which accordingly set out to show that private property works best by pointing to its demonstrable superiority. I concede that comparisons with other polities that have endured command economies for decades seem to support efficiency-based claims.

Still, the implosion of the communist regimes in Eastern Europe is hardly proof of the virtues of the market, because the events that transpired there are integrally tied to the erosion of non-democratic institutions that have no necessary connection with public property and communist economies. Such factors, the pre-existing economic regimes that the command systems supplanted, taken with all that happened in Europe in the twentieth century, hardly create laboratory conditions for the testing of alternative modes of distribution.

The economic theories about ownership also seem heavily reliant on the belief that most people are rational wealth maximizers at heart. If enough of us don't fit that description then this starting premise breaks down. It is quite possibly the case that such assumptions are misguided.[108] Those engaged in what is now described as behavioural law and economics research have begun to investigate assumptions about rational economic mannerisms. Work in that field has revealed that actual conduct does not always square with what one might expect from the utility calculations that are attributed to the hypothetical wealth maximizers who inhabit the world of economic models.[109]

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107 L.A. Fennell, "Common Interest Tragedies", 98 Nw.U.L.Rev. 907 (2004). But see the narrower definition of anticommons adopted in L. Katz, "Red Tape and Gridlock: Explaining Flight to the Informal Sphere", online: <http://ssrn.com/abstract=1418033>.

108 C.M. Rose, "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory" in *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Pr., 1994) ch. 2, at 39.

109 See further D.A. Kysar, "Feminism and Eutrophic Methodologies" in M.A. Fineman & T. Dougherty, eds., *Feminism Confronts Homo Economicus* (Ithaca, NY: Cornell U.P., 2005) 94, at 101*ff*; J. Clippenger & D. Bollier, "A Renaissance of the Commons: How the New Sciences and Internet are Framing a New Global Identity and Order" in R.A. Ghosh, ed., *CODE: Collaborative Ownership and the Digital Economy* (Cambridge, MA: M.I.T.Pr., 2005) 259; A.A. Akerlof & R.J. Shiller, *Animal Spirits: How Human Psychology Drives the Economy and Why it Matters for Global Capitalism* (Princeton NJ: Princeton U.P., 2009). See also Part 3(e), *infra*, where the psychological undercurrents of ownership are examined.

In any event, an economic theory cannot serve as a comprehensive guide for answering the second-order question (what should count as property?). Although universality is a precondition of high efficiency (*i.e.*, as many goods as possible ought to be available for exchange) that goal must sometimes take a back seat to other values. For example, it has been mooted that the market should serve as the basis for determining who should receive babies for adoption.[110] More realistically, it has been argued that the law should recognize a market-alienable right over human organs.[111] And we have not yet descended to the level of allowing political, judicial offices, or law school admissions to be overtly bought and sold. Such proposals are of course objectionable on moral grounds, even though they might well accord with principles of wealth maximization.[112] The drive for prosperity is not the only concern to which the law, including the law of property, should respond.

The final point about efficiency and property is perhaps an obvious one: private property rights that are built on an economic efficiency model produce inequalities of condition. Ralph Waldo Emerson said it well: "property ... has been ... compared to snow, – 'if it fall level to-day, it will be blown into drifts to-morrow'".[113] Even if all property were gathered in and equitably redistributed, and even if every transaction could improve one party without making the other worse off, the ability to bargain and trade would likely produce differences in wealth. Even in a mixed economy with high rates of taxation (such as Canada), there will always be winners and losers, determined as a result of skill, capacity and Providence.[114]

In a society that allocates ownership in pursuit of economic efficiency there is also likely to be, as in fact there is, abject poverty at one end of the wealth

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110 See E.M. Landes & R.A. Posner, "The Economics of the Baby Shortage", 7 J.Leg.Stud. 323 (1978); R.A. Posner, "The Regulation of the Market in Adoptions", 67 B.U.L.Rev. 59 (1987) (the lead article in a symposium contained in vol. 67(1)); J.R.S. Prichard, "A Market for Babies?" (1984) 34 U.T.L.J. 341.

111 B.G. Hanneman, "Body Parts and Property Rights: A New Commodity for the 1990's", 22 Sw.U.L. Rev. 399 (1993). See also P. Halewood, "On Commodification and Self-Ownership", 20 Yale J.L. & Human. 131 (2008); R. Hardcastle, *Law and the Human Body: Rights, Ownership and Control* (Oxford: Hart, 2007).

112 See generally M.J. Radin, *Contested Commodities* (Cambridge, MA: H.U.P., 1996). See also M. Sandel, "What Money Can't Buy", in G.B. Peterson, ed., *The Tanner Lectures on Human Values* (Salt Lake City: U. of Utah Pr., 2000) vol. 21, 87.

113 R.W. Emerson, *Nature* (Boston: James Munroe & Co., 1836) at 48. Compare the words of heiress Brooke Astor of New York City: "Money is like manure, it should be spread around": L.M. Friedman, *Dead Hands: A Social History of Wills, Trusts and Inheritance Law* (Stanford: Stanford Law Books, 2009) at 1.

114 What is more, the *labour* market relies heavily on the fact that some people will have few assets (apart from their 'human capital'). "Belying its pompous declarations about the sanctity of property, the market glorified in this ideology has always rested on the propertylessness of the direct producers. Until the working poor were divested of any significant means of production of their own, there could be no truly 'free' market in labour. The original market ideologists from early advocates of enclosure to hard-nosed opponents of poor relief understood this": D. McNally, *Against* the *Market: Political Economy, Marxist Socialism and the Marxist Critique* (New York: Verso, 1993) at 218.

continuum and abundance at the other.[115] Highly unequal property holdings are contemplated as integral to the system. There is no ceiling on the amount of wealth one can amass under the efficiency rationale; nor is there one imposed under Canadian law.[116]

(c) utilitarian and related approaches

The economic argument is sometimes seen as a sub-category of utilitarianism.[117] Jeremy Bentham's vision of utility involves an evaluation of all human activity with a view to deciding whether or not actions or events augment the happiness of the person(s) in question. One attempts to determine the tendency of given human behaviour either to promote or undermine happiness.[118]

For Bentham, utility was determined through a calculation of pleasure and pain. The process of computation was influenced by the ability of a society to promote equality, security, subsistence, and abundance.[119] These four goals are all bound up with material well-being. That being so, the logical next step, which Bentham took, was to argue that wealth was a measure of happiness. People have acquisitive needs that must be satisfied to achieve happiness, and those needs can best be achieved in a society that provides a measure of security for property holdings. That, in turn, means that the legal protection of property is imperative.

The claim that there is a need for security is reminiscent of efficiency arguments that stressed the importance of protecting exclusivity of ownership.[120] Additionally, Bentham seems to have regarded people as being roughly akin to those rational wealth maximizers who would ruin the commons and who trade entitlements in the marketplace. Some modern utilitarian thinkers have increasingly drawn on efficiency as a measure of utility largely because of the precision it can yield, thereby moving away from the hedonic approach so evident in Bentham. In that way, efficiency and utility claims shade into each other.

However, one should appreciate that old-style utilitarianism and the economic arguments mentioned above are not identical.[121] The computation of pain and pleasure made under early versions of utilitarianism will take account of economic concerns, probably to a very high degree, but they would also import much more into the equation. Social utilitarians such as John Stuart Mill use societal betterment as a whole as the measure of utility, beyond a consideration

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115 See the brief review of income disparities in Canada, in Part 5, Chapter 2.

116 For a brief account of the alleged benefits of inequality, see D.P. Levine, *Wealth and Freedom: An Introduction to Political Economy* (Cambridge: C.U.P., 1995) at 83-5.

117 There are many forms of utilitarian thought. For a general treatment, see R.G. Frey, ed., *Utility and Rights* (Minneapolis: U. of Minn.Pr., 1984). See also D. Braybrooke, *Utilitarianism: Restorations; Repairs; Renovations* (Toronto: U.T.P., 2004). For a modern utilitarian spin on property rights, see L. Kaplow & S. Shavell, *Fairness Versus Welfare* (Cambridge, MA: H.U.P., 2002).

118 J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Darien, CT: Hafner Pub.Co. ed., 1970, 1789) at 2.

119 J. Bentham, *The Theory of Legislation* (Bristol: Thoemmes Pr., 2004 ed., 1802) at 96*ff*.

120 See Part 3(b), *supra*.

121 See further R.A. Posner, *The Economics of Justice* (Cambridge, MA: H.U.P., 1981) ch. 3.

of hedonic factors. This, too, requires one to take account of far more than just economic factors.

According to Bentham's rather uncompromising form of utilitarianism,[122] any given rule or course of conduct could potentially prove beneficial, even if it might lead to extreme suffering for some. To fall back on a standard example, we might wish to tolerate the imposition of lawful slavery on a few unfortunate individuals if society was the better for it. Public condemnation would undoubtedly count against such action in the calculus, and could turn the tide. But it might not. Nothing is necessarily ruled out no matter how much fundamental freedoms might be eroded under a strict utilitarian-based legal regime.

By the same token, a utilitarian *might* be agreeable to the idea of forced redistributions, for if taking property from the rich increases overall utility, then so be it. A utilitarian might want to know, for example, if taking a million dollars from the very wealthiest people in Canada and handing it to the poorest among us would produce a net gain in happiness. If it would, then the hardcore utilitarian should be in favour of such action. This raises a key point – applied utilitarianism can just as easily found an argument against, rather than in support of, private property.[123] Individual ownership should prevail *if* this produces optimal happiness; but other approaches might produce even more. (By contrast, a pure economic approach would tolerate forced redistribution only in cases in which the market has broken down. When that happens the imposition of a different distributive system should then be based on a guess as to the result the market might produce if it could operate properly.)

Bentham acknowledged that those who are well-off obtain less marginal happiness from additional gains in wealth than would be enjoyed by the desperately poor to whom money was transferred. And he also regarded equality as a measure of a healthy society. The obvious conclusion to be drawn ought to be that this type of redistribution would mark an improvement in total societal happiness. Yet Bentham resisted this conclusion because he thought that it would undermine the security necessary for property.[124] The idea of satisfying expectations is a central feature of Bentham's version of utility; and this is linked, of course, with the need for security of property holdings.[125] He was convinced that an extensive confiscation of property would deaden industry. Moreover, he appears to have assumed that modern prosperous societies would move towards equality in the long term.[126] Even if one can accept this assessment of the impor-

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122 There are versions of utilitarianism that are more moderate than Bentham's. Some utilitarians would place side constraints on what a political regime could do, where, for example, an analysis based on utility would produce an erosion of human rights. See generally A.K. Sen & B. Williams, eds., *Utilitarianism and Beyond* (Cambridge: C.U.P., 1982).

123 See A. Ryan, *Property* (Minneapolis: U. of Minn.Pr., 1987) at 59.

124 *The Theory of Legislation*, *supra*, note 119, at 99, and 102*ff*.

125 *Ibid*. at 159. See further A. Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984) at 99.

126 *The Theory of Legislation*, *supra*, note 119, at 123: "It is worthy of remark that, in a nation prosperous in its agriculture, its manufactures, and its commerce, there is a continual progress towards equality".

tance of security of tenure, the second hunch (as to the emergence of egalitarian societies) seems too sanguine given the world in which we live.[127]

Resort to the language of utility is fairly common, at least in the sense that policy-makers speak of weighing factors and taking into account the overall benefits to society in arriving at decisions. However, in my view the vagueness of the formula for measuring pros and cons, especially in its hedonic form, exposes the weakness of the utilitarian project as a basis for explaining why we have systems of private property. Preference satisfaction or emotional happiness as measures of welfare or utility pose at least as many questions as they answer. One can convincingly argue, for example, that the pain of exposing fair-minded citizens to the distress of others advances a social good and so becomes relevant in calculating total social utility.[128] Furthermore, reducing all human emotional reactions to a facet of happiness or utility seems thoroughly simplistic.[129]

Furthermore, all types of utilitarianism speak of a computation and implies that there can be a level of precision that can serve to influence the decision-making process in a cogent way. However, it provides no real basis for computing, weighing, measuring or testing a given policy. Recent utilitarian works, which tie utility to demonstrated preferences, or scientific measures of subjective happiness do attempt to respond to this problem of incommensurability, though I am not yet convinced that they provide viable guidance for policymaking. And crude proxies, such as those that seek to compute utility or welfare based on, say, market choices, do not seem to add meaningfully to the efficiency arguments considered above.[130]

In sum, whether we are seeking to compute pleasure, desire, preferences, the enhancement of personal capacities, or myriad other factors, I have always felt unable to do the math necessary to measure one form of property regime against others. The single metric we need to measure utility in all its diverse forms eludes us still.[131] In consequence, I feel that theories built on notions of utility are the least persuasive and illuminating of those advanced to justify individual ownership, except to the extent that they identify values worth caring about.

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127 See the data on the distribution of income in Part 5, Chapter 2.

128 See J. Waldron, "Homelessness and Community" (2000) 50 U.T.L.J. 371, at 381*ff*.

129 R.A. Epstein, "Happiness and Revealed Preferences in Evolutionary Perspective", 33 Vermont L.Rev. 559 (2009) at 570-1.

130 See further A. Sen, *Development as Freedom* (New York: A.A. Knopf, 1999) at ch. 2, *passim*.

131 See further "Law and Incommensurability", 146(5) U.Penn.L.Rev. (1998) (Symposium). But see the ambitious attempt to develop a well-being index in M. Anielski, *The Economics of Happiness* (Gabriola Island, BC: New Society, 2007). See also M.D. Adler & E.A. Posner, *New Foundations of Cost-Benfit Analysis* (Cambridge, MA: H.U.P., 2006); and J. Bronsteen *et al.*, "Welfare as Happiness", online: <http://papers. ssrn.com/abstract=1397843>.

(d) the flourishing of freedom[132]

(i) *freedom from . . .*

Those who watch Canadian television know that lottery tickets are sometimes promoted through commercials that convey a gleeful message about what your winning ticket can buy: freedom. When you win it seems that one of the first things that can now be done is to insult your boss. These ads, annoying as they may be, nonetheless make an important statement about property and wealth: private property is supposed to promote autonomy. Indeed, some have argued that property is (or should be) the guarantor of every other basic freedom. Without property, one might argue, the ability to participate in democracy, to exercise free speech, and so forth, is diminished.

The accomplished economist Amartya Sen has argued that the true measure of the success of markets in promoting development is the extent that freedom is enhanced in the process, not the degree to which material wealth is generated. As he put it, "[t]he usefulness of wealth lies in the things that it allows us to do – the substantive freedoms it helps us to achieve".[133] Moreover, Sen identified a symbiosis between development and freedom. The expansion of freedom should be seen as both the primary *end* of development and the principal *means* of attaining development.[134]

Another advocate of the view that property enhances freedom, Charles Reich, has maintained that one of the functions of property "is to draw a boundary around public and private power".[135] Inside that line the owner enjoys greater freedom than outside, since within it the state must justify and explain any interference. Likewise, "the owner may do what all or most of [the] neighbors decry"[136] even if it is based on whim or caprice. In sum, property performs the function of promoting independence, dignity, and pluralism.[137]

The absence of government regulation as to how one may use property describes a classic kind of *negative* liberty. However, that type of freedom is not the *result* of property. In fact, the reverse is true: a desire to enhance negative liberty is a condition required for the deployment of private property. A line is drawn, to use Reich's metaphor, because the state chooses to allow it to be drawn, and not because the concept of property produces it. There is nothing in the notion of property itself that prevents the state from abolishing all rights of ownership. A protection against that would have to be introduced by some other means, such as through a constitutional guarantee.

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132 See J.W. Harris, *Property and Justice* (Oxford: Clarendon Pr., 1996) especially at ch. 13; M. Friedman, *Capitalism and Freedom* (Chicago: U. of Chi.Pr., 1962); R. Pipes, *Property and Freedom* (New York: A.A. Knopf, 1999).

133 Sen, *supra*, note 130, at 14.

134 Showing that nexus is the principal aim of his book: see, *e.g.*, the discussion, *ibid.* at 36*ff.*

135 C.A. Reich, "The New Property", 73 Yale L.J. 733 (1964) at 771.

136 *Ibid.*

137 *Ibid.*

Let me restate that point in another way: the recognition of the value of negative freedom gives rise to the need to use certain tools to implement that freedom, such as the institution of property. Property is merely the agency used by the state to allow the enjoyment of negative freedom. For those who value freedom from governmental interference property is ideal. Private property rights keep the prying eyes of the state away. The private property holder enjoys extensive (if not complete) protection from unwanted intrusions. Property allows for privacy to be enjoyed.

(ii) *property and power*

Reich also spoke of another species of freedom that property can confer: the right to control one's destiny; the right not to be reliant on the state (except to the extent needed to ensure the enforcement of property rights). It also involves the right "to be a subject, not an object".[138] In short, property can be empowering, enabling. It can confer on owners a power to control their own lives; to pursue their conceptions of the good life; to chart their own course. In theory, it can also support democratic institutions because private property works to disperse power widely. This, then, can serve as a check on totalitarian tendencies that might be harboured by those holding political office.[139]

Even so, this analysis reveals a dark side to the notion of property as a form of decentralized private power.[140] For one thing, while private wealth can serve as a counterbalance against government, democratic values may nevertheless be diminished if property is not distributed evenly. We know that propertied interests can have an enormous impact on government through lobbying practices and election financing. Moreover, property confers on some citizens an enormous power to control others on a day in and day out basis through the instrumentality of large and wealthy firms.[141] The ability of a shopping mall owner to prevent otherwise lawful picketing[142] also reveals how property creates a power dynamic and how the freedom of owners can be used to limit that of others. Yes, private property decentralizes power, but it can also promote the emergence of an economic oligarchy. Private property, far from enhancing democratic institutions, can skew them in favour of the wealthy, thereby undermining equal participation in the political process. Put bluntly, "[t]he right to control, govern, and exploit things entails the power to influence, govern, and exploit people".[143]

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138 I. Berlin, *Four Essays on Liberty* (London: O.U.P., 1969) at 131. But the idea of positive freedom is more complex than first appears: see *ibid.* at 131*ff.*

139 See generally A.O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (Princeton, NJ: Princeton U.P., 1977).

140 See also M. Cohen, "Property and Sovereignty", reproduced in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: U.T.P., 1978).

141 As to which, see J. Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004); H.J. Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002).

142 See *Harrison v. Carswell*, [1976] 2 S.C.R. 200, 1975 CarswellMan 58. That issue is raised again in Part 5, Chapter 10.

143 B.G. Carruthers & L. Ariovich, "The Sociology of Property Rights" (2004) 30 Ann.Rev.Soc. 23, at 23.

Some subtle manifestations of the use of property as a means of exercising power and control can arise within family relationships. As we will see in Chapter 7, it is possible for property to be transferred conditionally. Such a transfer might be constructed so as to allow the original owner (or that person's estate) to reclaim the property if the condition is broken. In the reported case law one can find examples of testamentary gifts of land, money or goods which are made subject to the requirement that the recipient, say, abstain from such vices as card playing,[144] excessive drinking,[145] and smoking.[146] Gifts of property have also been made on the condition that the recipient remain a member of,[147] or marry within, a stated religious faith.[148]

Arguably the most perverse (and pathetic) Canadian example of how property can be used as a tool of manipulation is to be found in the story surrounding the will of Charles Millar. He was a wealthy man who died in 1926 with no dependants. His will provided that the bulk of his estate was to be left to accumulate for ten years, after which it would go to "the Mother who has since my death given birth in Toronto to the greatest number of children as shown by the Registrations under the Vital Statistics Act".[149] As the Depression engulfed the country, a number of families were actively seeking the bequest. The press played up the contest, calling it a baby race or stork derby. One reporter's melancholy assessment sums up the scene behind the stories: "Looking back, the things I remember most are the smell of many children ... [and] the unnatural talk of big money by tired women living on relief".[150] If that were not enough, it was estimated that the mortality rate among the Millar-will babies was three to four times greater than the national average at the time.[151]

Transfers such as these are attempts (albeit not always successful ones) to harness the power of property in order to make the donee of a gift do the bidding of the donor. Indeed, it has been claimed that "[t]he control which the law still gives to a man over the disposal of his property is one of the most efficient means

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144 *Jordan v. Dunn* (1888) 15 O.A.R. 744 (C.A.).

145 *Re Kennedy Estate*, [1950] 1 W.W.R. 151, 1949 CarswellMan 72 (K.B.); *Jordan v. Dunn*, *supra*, note 144. See also *Re Fox* (1884) 8 O.R. 489 (Ch.D. *en banc*); *Re O'Grady* (1921) 19 O.W.N. 389 (H.C.).

146 *Re Kennedy Estate*, *supra*, note 145.

147 *Re Murley Estate* (1995) 130 Nfld. & P.E.I.R. 271, 1995 CarswellNfld 143 (T.D.).

148 *Re Kennedy Estate*, *supra*, note 145; *Re Tepper's Will Trusts*, [1987] Ch. 358, [1987] 1 All E.R. 970. But see *Fox v. Fox Estate* (1996) 28 O.R. (3d) 496, 1996 CarswellOnt 317 (C.A.) leave to appeal to S.C.C. refused (1996) 207 N.R. 80 (note).

149 See M.M. Orkin, *The Great Stork Derby* (Don Mills: General Pub.Co., 1981) at 57-8, where the clause is set out.

150 *Ibid.* at 103. The reporter is not identified. In the end, four families shared in the residue, which was worth $750,000.00. The winning total was nine babies. Illegitimate and stillborn children, unregistered births, and a birth occurring just outside the city limits of Toronto, were not counted. The will provoked a good deal of litigation: see, *e.g.*, *Re Millar*, [1938] S.C.R. 1, 1937 CarswellOnt 108, a leading case on the doctrine of public policy.

151 Orkin, *supra*, note 149, at 193.

which he has in protracted life to command the attentions due to his infirmities".[152] In short, under Canadian property law all testators can become King Lear for a day!

These examples also suggest that the labels private power and private property are perhaps misleading. This language assumes a clear public/private dichotomy. The power enjoyed by a testator is one with a public dimension, because it depends on state enforcement. When a homeowner succeeds in having a trespasser removed from the property by the police, state power is being invoked. Property is a delegation of that power, and only with this severe qualification in place is it helpful to speak of it as something private and not public.

Occasionally the state quite deliberately and overtly harnesses the power of property as a way of pursuing public policy. For example, that type of use has been evident throughout the course of non-indigenous settlement in Canada. Grants of land from the Crown were sometimes made on the condition that the property would be settled and cultivated. Hence, in 1765 a transfer of lands to several persons in and around Annapolis, Nova Scotia contained the stipulation that "if each and every of the said grantees shall not settle either themselves or a family on each of their respective shares or rights, with proper stock and materials for the improvement of the said lands, on or before the last day of November, 1767, then the grant shall be void".[153] About one hundred years later the same strategy was adopted to promote migration to the Prairies. The promise by the federal government of land for a pittance, conditioned on minimum periods of occupation and development, was the backbone of the policy of western settlement through homesteading (a policy that is dealt with again below[154]).

Property promotes freedom, I agree. Yet the extent to which private property assists in pursuing such a goal is severely abridged if ownership rights are not widely dispersed.[155] If property yields freedom and power, then many Canadians are effectively powerless and lack a viable sense of freedom because of differentials in wealth. If "the paramount argument for private property is that it best protects the rights of the individual",[156] then there are many for whom the consummate protective device of private property is of limited worth. This powerlessness is compounded by the fact that the poor often lack a sense of political efficacy and tend to abstain from participation in democratic processes.

The law of property does not just deprive some people of positive freedom. Negative freedom is lost as well, because to the extent that owners may expel

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152 *Van Alst v. Hunter*, 5 Johns.Ch. 148 (N.Y., 1821) at 159 (*per* Chancellor Kent), quoted with approval in *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549, at 564, where Cockburn C.J. added that "for these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it".

153 *Wheelock v. McKown* (1835) 1 N.S.R. 41 (S.C.) at 43.

154 See Part 3(g), *infra*.

155 See also J.W. Singer, *The Edges of the Field* (Boston: Beacon Pr., 2000) at 76.

156 J.E. Cribbet & C.W. Johnson, *Principles of the Law of Property*, 3rd ed. (Westbury, NY: Foundation Pr., 1989) at 7.

non-owners, these others are not free (in the negative sense) to go where they like. The protective fence of property law keeps them out. It is small wonder, then, that the homeless congregate in parks and on other sites of public property from which they are not so readily excluded. There they are 'free' to do whatever they wish, provided it is not something that the law has reserved for the privacy of one's home, or prohibited altogether.[157]

(e) theories based on personhood, moral development, and human nature[158]

(i) *core concepts*

A claim is sometimes made that private property is connected with human and moral development. This is a basis of justification often associated with Hegel,[159] though it has, in some formulations, Marxist overtones. The opening premise is that "to achieve proper self-development – to be a person – an individual needs some control over resources in the external environment".[160] Property allows the human will to develop and thrive, bestowing on people the capacity to demonstrate individuality and full self-expression. Hegel saw property as a dominant factor in the transformation of people from abstract entities into moral and political beings distinct from others. A liberation, a transcendental shift, results from projecting one's will into an external object. Such an object, having no end in itself, then becomes subservient to the will of the claimant.[161]

Hegel's thesis concerns highly abstract conceptions of freedom and self-development. His view was that property was essential to the moulding of each human will (though his work was not directed at making the case for a system of private property). Modern personhood theory[162] posits a less ethereal nexus between property and the way people feel about where they live, how they dress, and, more generally, how they regard their belongings. We treat some items as representing facets of ourselves or our character: clothes, cars, homes and now personal homepages[163] serve such ends. People often view objects as special

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157 See further J. Waldron, "Homelessness and the Issue of Freedom", 39 U.C.L.A.L.Rev. 295 (1991); J. Waldron, "Community and Property – For Those Who Have Neither", 10 Theoretical Inquiries L. 161 (2009).

158 See generally J.A. Blumenthal, "'To Be Human: A Psychological Perpsective on Property Law", 83 Tul.L.Rev. 609 (2009) and the studies referred to there.

159 The heart of his theory is presented in G.W.F. Hegel, *Philosophy of Right*, T.M. Knox, trans. (Oxford: Clarendon Pr. ed., 1952, 1821) at paras. 34 to 71. For a comparison of Marx and Hegel in relation to property, see L. Brace, *The Politics of Property: Labour, Freedom and Belonging* (New York: Palgrave Macmillan, 2004) ch. 4.

160 M.J. Radin, "Property and Personhood", 34 Stan.L.Rev. 957 (1982) at 957.

161 *Philosophy of Right*, *supra*, note 159, at para. 44.

162 See especially Radin, *supra*, note 160. This essay and others that develop and apply the personhood theory can be found in M.J. Radin, *Reinterpreting Property* (Chicago: U. of Chi. Pr., 1993). See also M. Sunder, "Property in Personhood" in M.M. Ertman & J.C. Williams, eds., *Rethinking Commodification: Cases and Readings in Law and Culture* (New York: N.Y.U. Pr., 2005) 164.

163 K.L.Schmitt *et al.*, "Personal Homepage Construction as an Expression of Social Development", 44 Developmental Psychol. 496 (2008).

because they are spiritual, memory-laden, rare, mysterious, or for some other reason worth treasuring.[164]

The disappointment felt by those who suffer the loss or theft of an object holding sentimental value is another demonstration of the personhood aspect of ownership. These notions about personhood are important, though one should understand that they differ from the Hegelian concept. The happiness derived from owning certain objects, or the inner calm that ownership can confer, is far removed from Hegel's view of property as a *sine qua non* of human growth and individuality.

The supposition that property satisfies a basic need for personal growth and maturation finds support in some psychological writing. It has been offered that the roots of psychological ownership can be traced in part to three motivations: the need for (i) efficacy; (ii) self-identity; and (iii) a sense of place.[165] But what gives birth to these feelings?

One view is that acquisitiveness is an innate human quality. In fact, our natural disposition for such things as sustenance, self-defence, and self-worth can be seen as supporting a primordial need for some type of institution of property (though this may not mean that *private* property is required).[166] We see in animals some evidence of territoriality and loss aversion: animals are more likely to be more vigourous in defending resources than in seeking to acquire them from a competitor.[167] A child's desire for possessions (a security blanket or a favourite stuffy) may arise from some impulse for comfort or reassurance, or as a result of an intuitive need to possess. Furthermore, analyses of the possessory habits of children show that these traits develop early in life.

However, whether these characteristics exist primarily by virtue of hard-wired genetic features, or, in contrast, from the prompting of parents and the processes of acculturation generally, remains a deeply contested issue.[168] Our craving for material goods may be socially induced. One does see variations both within and across cultures.[169] And changes in desires for property are apparent

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164 See further R.W. Belk, "The Ineluctable Mysteries of Possessions", 6 J.Soc. Behavior & Personality 17 (1991) where the reasons for this conduct are explored. See also J. Kroger & V. Adair, "Symbolic Meanings of Valued Personal Objects in Identity Transitions of Late Adulthood", 8 Identity 5 (2008).

165 See J.L. Pierce *et al.*, "The State of Psychological Ownership: Integrating and Extending a Century of Research", 7(1) Rev. of Gen.Pysch. 84 (2003) and the studies reviewed there. But see S.M. Stern, "Residential Protectionism and the Legal Mythology of the Home", 107 Mich.L.Rev. (2009).

166 G. Trasler, "The Psychology of Ownership and Possessiveness" in P. Hollowell, ed., *Property and Social Relations* (London: Heinemann Educational, 1982) 32. See further L. Bloom, "People and Property: A Psychoanalytic View", 6 J.Soc. Behavior & Personality 427 (1991).

167 H. Gintis, "The Evolution of Private Property", 64 Econ.Behav. & Org. 1 (2007) at 15.

168 Pierce *et al.*, *supra*, note 165.

169 Trasler, *supra*, note 166, at 43. One study found that the practice of collecting items, such as stamps or rare coins, was more commonly found in families of higher socio-economic status: *ibid.* at 42. See further A.D. Olmsted, "Collecting: Leisure, Investment or Obsession?", 6 J.Soc. Behavior & Personality 287 (1991).

over time as well. The needs and wants of today differ greatly from those of earlier eras.

Attitudes about property may correlate with gender. An English study found that "men were mainly concerned with the self-referring, activity-related and instrumental aspects"[170] of their property, while women stressed the symbolic and other-oriented features of their belongings.[171] They tended to emphasize connections with others in their property dealings. Research into the attitudes of adolescent males and females also found some salient gender differences. Motor vehicles, music, and sports equipment were the most valued possessions among the males, while for the females it was motor vehicles, jewellery, and stuffed animals. (This study pre-dates ipods, cellphones and so forth.) The chosen objects were seen by the researchers as signifying different values: motor vehicles, music, and sports equipment represent enjoyment; jewellery and stuffed animals reflect a *social* dimension.[172]

The personhood theory stresses the importance, however derived, that people seem to place on security and privacy. It also suggests that moral virtues are in some hard to define way associated with ownership. Property, one might contend, allows for and promotes diligence, acts of generosity and philanthropy,[173] the development of self-esteem,[174] co-operation, the development of moral standards, and, more generally, virtuous behaviour.[175]

Several important theorists have advanced arguments that property, at the very least, inhibits bad behaviour. Aristotle thought that private property was preferable to shared ownership, in part, because the former led to less dissension.[176] As late as 1936, John Maynard Keynes, echoing an argument that had currency in the eighteenth century, claimed that commerce (and with it private property) served to divert attention away from more objectionable pursuits. The opportunity to make money allows "[d]angerous human proclivities to be cana-

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170 H. Dittmar, "Meanings of Material Possessions as Reflections of Identity: Gender and Social-Material Position in Society", 6 J.Soc. Behavior & Personality 165 (1991) at 182.

171 *Ibid.* The study also considered the impact of class. See also F.W. Rudmin, "Gender Differences in the Semantics of Ownership: A Quantitative Phenomenological Survey Study", 15 J.Econ.Psych. 487 (1994). See also J. Dyl & S. Wapner, "Age and Gender Differences in the Nature, Meaning and Function of Cherished Possessions for Children and Adolescents", 62 J. Experimental Child Psychol. 340 (1996).

172 L.N. Kamptner, "Treasured Possessions and Their Meanings in Adolescent Males and Females", 30 Adolescence 301 (1995).

173 See further T.H. Irwin, "Aristotle's Defence of Private Property" in D. Keyt & F.D. Miller, eds., *Aristotle's Politics: A Critical Reader* (Oxford: Basil Blackwell, 1991) at 200, where this rationale is critiqued.

174 See D.P. Levine, *Wealth and Freedom: An Introduction to Political Economy* (Cambridge: C.U.P., 1995) at 22, drawing on Thorstein Veblen's *The Theory of the Leisure Class* (London: MacMillan, 1899) at 26.

175 W.D. Casebeer, "The Stories Markets Tell: Affordances for Ethical Behaviour in Free Exchange" in P.J. Zak, ed., *Moral Markets: The Critical Role of Values in the Economy* (Princeton, NJ: Princeton U.P., 2008) 3, at 11-2. See also J. Henrich *et al.*, eds., *Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-Scale Societies* (Oxford: O.U.P., 2004).

176 Aristotle, *The Politics* (Chicago: U. of Chi.Pr. ed., 1984) at 60 (Book II, ch. 5, 1263a1).

lized into comparatively harmless channels". Therefore, the tendency of some to pursue power over others takes a more benign form: the lesser of two evils. After all, "[i]t is better that a man should tyrannize over his bank balance than over his fellow citizens".[177] Similarly, Freud saw private ownership as a useful instrument for the expression of aggressive behaviour. Aggressive action, he argued, was not created by property, but property serves as a means of channeling power and influence that accompany aggressiveness in people.[178]

(ii) *key concerns*

The improvement of the self as a product of owning is an alluring notion that is closely associated with the idea that property is connected with freedom.[179] Property allows us to be ourselves, one might say. But the drawbacks of ownership should also be apparent. Studies suggest that there is a surprisingly weak correlation between objective measures of wealth and subjective perceptions of happiness.[180] It is not just that there are human needs that property cannot satisfy. There are some things that money can't buy, of course, but that limitation applies to all property systems.

Owning property may not always be an enriching experience. It seems as likely to foster traits of avarice, selfishness, or quests for power as any countervailing virtues. Christian theology places a special burden on the rich to demonstrate virtue in view of their riches. Matthew, Luke, and Mark all declared that it was harder for a rich man to enter heaven than for a camel to pass through the eye of a needle.[181] In the secular domain, our seemingly insatiable need for stuff can produce an unhealthy state of mind sometimes glibly but astutely called affluenza.[182] At times a penchant for acquisition seems more a prescription, than a panacea, for immorality. Greed, one should bear in mind, is one of the seven deadly sins; *the* deadliest it has been argued.[183]

Envy is also on that list of sins. One seemingly inescapable feature of property is that it invites comparisons with others. Status races abound. The propensity of people to engage in conspicuous consumption is well known. Property is used to signal or announce status. That provides one reason why the increase in the cost of some commodities, such as clothes, cars, art, sometimes works to increase, not diminish demand. The more expensive a luxury item, the more an

177 J.M. Keynes, *The General Theory of Employment Interest and Money* (London: MacMillan, 1936) at 374, quoted in A.O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (Princeton, NJ: Princeton U.P., 1977) at 134.

178 S. Freud, *Civilization and Its Discontents* (New York: W.W. Norton ed., 1961, 1930) at 60.

179 It would also be relevant to utilitarian calculations.

180 See further L. Van Boven, "Experimentalism, Materialism, and the Pursuit of Happiness", 9 Rev.Gen.Psychol. 132 (2005).

181 *New Testament*, Luke 18:25; Mark 10:25; Matthew 19:24. See generally R. Haan, *The Economics of Honor: Biblical Reflections on Money and Property* (Cambridge: Willam B. Eerdmans Pub. Co., 2009, trans., B. Hielema).

182 J. de Graaf *et al.*, *Affluenza: The All-Consuming Epidemic*, 2nd ed. (San Francisco: Berrett-Koehler Pub., Inc., 2005).

183 See J. Ogilvy, "Greed" in R.C. Solomon, ed., *Wicked Pleasures: Meditations on the Seven Deadly Sins* (Lanham, MD: Rowman & Littlefield, 1999) 87.

owner can be seen as holding an elite social standing of a certain type, to be winning the status race. Some durable forms of property, such as houses (together with the neighbourhoods in which they are found), are especially effective as positional markers. It is hard to make the case that this is a thoroughly healthy by-product of ownership. But it certainly *is* a by-product.[184]

Although we live in a hyper-material world, the use of property as a means of expressing social standing is longstanding. It was under feudal law that the idea of an estate in land was born, derived from the term status. English law also went so far as to establish what are termed sumptuary laws, which had Roman antecedents, designed to regulate who may eat certain foods and wear specified forms of clothing. Some of these measures were aimed at curbing extravagance, preventing famines, protecting industries, or reducing the demand for imported goods. But some responded to, or sought to reinforce, certain class distinctions.

Here are two examples. In an early sumptuary statute (1336), which regulated food consumption, it was explained that "the lesser people who only endeavour to imitate the great ones in [eating certain kinds of] meats are much impoverished".[185] Some people were eating above their station. A statute enacted during the first year of the reign of Henry VIII (1510) prescribed who was entitled to wear designated materials and colours, determined by social rank, and defined in detail. For instance, certain kinds of woolen cloth were not to be worn by persons below the rank of knight, on pain of forfeiture.[186] Alan Hunt has argued that we cannot understand these and other measures unless we appreciate the "almost religious significance attached to clothing as the expression of power".[187] As suggested above, we are not yet beyond that: just ask any blue- or white-collar worker while they chat over beer and caviar.

The claim that property can have detrimental psychological effects goes further still. The angst generated by ownership, the fears and anxieties that owners develop about the chance of theft, and the expensive precautions that are taken in response, arise because people have valued possessions in the first place. Furthermore, it has been suggested that a life of privilege can be psychologically damaging, especially for those who inherit wealth.[188] Also, theories premised on the development of personhood help to explain the feelings of alienation sometimes experienced by workers. The extent to which wage-labourers lack a proprietary connection to their employment can have a detrimental effect on how such people view themselves and their work. And the various personality-based theories speak volumes about poverty and homelessness as causes of unhappiness.[189]

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184 See further N.M. Davidson, "Property and Relative Status", 107 Mich.L.Rev. 757 (2009) and the references cited there.

185 *Statutum de Cibariis Utendis*, 10 Edw. III, c. 3 (trans.).

186 *An Act Against Wearing of Costly Apparell*, 1510, 1 Hen. VIII, c. 14.

187 A. Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (Basingstoke, UK: Macmillan, 1996) at 307.

188 J. Bronfman, *The Experience of Wealth: A Social-Psychological Perspective*, Ph.D. Dissertation, Brandeis University (Ann Arbor, MI: University Microfilms Int., 1987).

189 See R.P. Hill, "Homeless Women, Special Possessions, and the Meaning of 'Home': An

(iii) *juristic traction*

Personhood theories influence the design of specific allocation rules (a third-order event)[190] when, let us say, an economic analysis might suggest a different approach. For example, the movement to protect residential tenants (such as by providing greater security of tenure) can be seen as a recognition of the special status of the home.[191] Similarly, on marriage breakdown spouses may seek a division of their property. In such cases, a court may order a distribution of assets, after which an award can be made to allocate the present holdings. At this stage the judge can consider the degree of attachment to a given item in determining to whom it should be given.

Copyright law has come to embrace these ideas, protecting not just the financial interests of authors and other creators, but also "moral rights". That term refers to protections against modifications to the artistic work that prejudice the honour or reputation of the creator.[192] As the Supreme Court of Canada has observed, moral rights involve a "less dollars and cents view of the relationship between an artist and his or her work. *They treat the artist's oeuvre as an extension of his or her personality*, possessing a dignity which is deserving of protection".[193]

Theories about attachment and ownership also provide insights into the significance of Aboriginal land claims. In this context, instead of referring to personhood values it might be better to speak of grouphood[194] or peoplehood[195] interests being taken into account. A study conducted in Australia sought to draw a link between the recognition (or non-recognition) of Aboriginal land rights and the general learning that exists on the psychological dimensions of property ownership. It was argued that because Aboriginal communities possess a strong spiritual relationship with the land, the loss of traditional lands can contribute to community strife and personal unhappiness. That analysis is consistent with research that demonstrates the "diminished sense of self after the loss of cherished possessions".[196] Such a line of reasoning should have implications for the ways in which courts conceive of and resolve Aboriginal property disputes. The Royal

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Ethnographic Case Study", 18 J. Consumer Res. 298 (1991); R.P. Hill & M. Stamey, "The Homeless in America: An Examination of Possessions and Consumption Behaviors", 17 J. Consumer Res. 303 (1990).

190 See Part 3(a), *supra*.

191 See further D.B. Barros, "Legal Questions for the Psychology of Home", 83 Tul.L.Rev. 645 (2009).

192 *Théberge c. Galerie d'art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 CarswellQue 306, at para. 17, summarizing subsection 28.2(1) of the *Copyright Act*, R.S.C. 1985, c. C-42 [as am.].

193 *Ibid.* at para. 15 (*per* Binnie J.)(emphasis added).

194 J. Moustakas in "Group Rights in Cultural Property: Justifying Strict Inalienability", 74 Cornell L.Rev. 1179 (1989).

195 K.A. Carpenter, "Real Property and Peoplehood", 27 Stan.Envtl.L.J. 313 (2008). See also A. Ledgerwood *et al.*, "Group-Identity Completion and the Symbolic Value of Property", 18 Psychol.Sci. 873 (2007).

196 R.P. Hill, "Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* Decision, and the Meaning of Land", 17 Human Rights Q. 303 (1995) at 320, referring *inter alia* to R.W. Belk, "Possessions and the Extended Self", 15 J. Consumer Res. 139 (1988).

Commission on Aboriginal Peoples seems to have understood that point. As the Commission acknowledged, "Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood but of community and indeed of the continuity of their cultures and societies."[197]

(f) natural law, labour, desert, and consent

(i) *natural law and labour*

Arguments in favour of private property are sometimes based on the assertion that individuals are entitled to those things over which they have laboured. John Locke,[198] the person most commonly associated with this theory in modern times, spoke of a natural right to property, a right that existed, precariously, in the state of nature.[199] Unlike the Benthamite view, for Locke the law was not regarded as the source of property rights. Rather, a primary function of a legal system and of civil society is to recognize and protect the pre-political right to private property.

Although the baseline idea of labour as a predicate to ownership is straightforward enough, Locke's argumentation is nevertheless intricate. That results from at least three hurdles that Locke assumes he must surmount. First, in Locke's state of nature we find that property was held in common. His view is sometimes described as one of positive commonality: each person starts off as an owner-in-common. Other writers assumed a baseline of no-ownership (or in other words, negative commonality).

Second, Locke assumed that the initial distribution of land and goods was sanctioned, indeed created, by God. Theorists writing within the natural law tradition believed that communal holding was the creator's original dispensation.[200] Moreover, one school of thought within that tradition connected the emergence of private property with the fall of humankind from a Golden Age. On that view, the privatization of the material world was a regressive step. Locke sought to demonstrate that the transformation to private ownership was a positive development, and one that was consonant with God's will.

Third, Locke's self-assigned task was to demonstrate how ownership of land and goods came to be placed in private hands, despite the absence of universal agreement. He assumed (unlike some other early natural law thinkers who theo-

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197 *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996) vol. 2(2) at 448.

198 See generally A.J. Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton U.P., 1992) and the references to other works on Locke mentioned there. Matthew Kramer argues that John Locke was concerned with advancing collective interests and that "Locke's theses are communitarian through and through *because* they are individualistic through and through": M.H. Kramer, *John Locke and the Origins of Private Property* (Cambridge: C.U.P., 1997) at 93.

199 See further S. Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Pr., 1991).

200 P. Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge: C.U.P., 2007) at 235.

rized about the origins of ownership[201]) that reaching a consensus was not possible. Taking these three premises together, it can be seen that there has to be much more to his theory than that we are entitled to property by virtue of our labour.

Locke's analysis starts with the assumption that each of us owns our own bodies (or persons) and therefore our labour. Moreover, he took it as faith that God had "commanded Man to labour".[202] Locke reasoned that through the mixing of our labour with material objects we are, in essence, putting something of ourselves into the material world. That action extends ourselves and hence our rights of ownership into those worldly goods. This is the Lockean 'mixing metaphor' on which a great deal of his theory depends.

The inherent difficulty with this line of argument, if it were to stop there, is that it fails to resolve doubts as to how this unilateral action of the labourer can serve as an acceptable justification for depriving others of the rights of common ownership conceded at the outset. Appreciating that problem, Locke placed two qualifications on the mixing metaphor and its transformative effects. First, the taking could be permitted only as long as there is "enough, and as good"[203] material worth left in common for others. Second, one should not take so much as would spoil.[204]

Through a grand leap in logic[205] Locke tried to show how these qualifications survived the progression from the acorn-gathering society with which he starts to the modern era. With the acceptance of exchange currency (he spoke of gold and silver), the concern about wastage was satisfied; money does not spoil. The productive use of land, he argued, increased wealth.[206] Even if all land were appropriated by some to the exclusion of others, he seemed confident that there would not be a reduction in the quality of life for those without land. What remains for them is the right to contract for one's labour as a means of obtaining sustenance and prosperity.

Some of the problems with this analysis should be apparent. The acceptance of money as a substitute for goods was said to be based on a tacit social consensus,[207] though he denied that such was possible in relation to the primary issue of whether to break up the common lands and allow private ownership. Additionally, an appropriation is justified only so long as there is enough and as good left for the rest; Locke does not abandon that starting premise. But he describes a world – in its state of nature – in which there is no scarcity and therefore for which there

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201 Hugo Grotius and Samuel Pufendorf developed consent-based natural law theories of property rights: see Buckle, *supra*, note 199, chs. 1 and 2.

202 J. Locke, *Two Treatises of Government* (New York: New American Library, Mentor ed., 1963, 1690) Second Treatise, at para. 32. All further references are to the Second Treatise.

203 *Ibid.* at para. 27.

204 *Ibid.* at para. 31. Spoilage offends the law of nature and is deserving of punishment: *ibid.* at para. 37.

205 M.J. Radin, "Property and Personhood", 34 Stan.L.Rev. 957 (1982) at 979. See also C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Clarendon Pr., 1962) at 203*ff*.

206 See, *e.g.*, Locke, *supra*, note 202, at para. 37.

207 *Ibid.* at para. 36.

is no compelling need for enforceable rights of property at all. And only if it can be shown that modern levels of production actually do leave society with "enough, and as good" can it be accepted that the proviso is not offended. Of course, we have no way of knowing whether or not that is the case.

It is important to appreciate that the Lockean hypothesis is not undermined merely because societies are rife with inequality. Although it is rooted in a conception of natural rights, this theory does not mandate, bare subsistence aside, that every person hold some sort of natural endowment. Each person is merely a candidate for property rights. After performing the necessary legal alchemy on some item by mixing it with our labour, we can acquire entitlements. One can see, therefore, that Locke's theory establishes what may be termed a *special* right. That differs from the arguments based on universal or *general* needs that underlie the theories derived from personhood and liberty.[208] Moreover, the Lockean ownership-candidacy is severely restricted. Since some tangibles are finite, the acquisitions of earlier generations necessarily limit the opportunities of later ones.[209] The early bird catches the worm in the Lockean world.

Additionally, the right to property based on labour reduces equality of opportunity if the law allows gift-giving, especially on death. One would think that an advocate of labour theory needs to show that inheritance is acceptable, because it tends to perpetuate inequalities that are produced by the initial wave of labour-based acquisitions.[210] Locke considered inheritance to be a natural right of children, but made no concerted effort to connect a general power of bequest to his views on labour. We might assume however that the right to give away property on death was regarded as part and parcel of the labourer's right of use flowing from ownership.

The conclusion that the mixing of labour produces a gain for the labourer has been questioned: one could treat such mixing as resulting in a donation of that labour to the community.[211] Why does the labourer deserve anything? The move from the proposition of self-ownership,[212] all the way to the right to own goods that have been infused with labour, is not self-evident, especially when labour has been applied to an existing entity (such as by making paper from wood), rather than in the creation of some new item (such as through the writing of a book).[213] The Lockean mixing metaphor is, after all, only a metaphor and does not lead to any inescapable conclusion about the moral basis of ownership.

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208 The distinction between specific and general claim-rights is explained in J. Waldron, *The Right to Private Property* (Oxford: Clarendon Pr., 1988).

209 See also H. Rashdall, "The Philosophical Theory of Property" in L.T. Hobhouse *et al.*, *Property: Its Duties and Rights* (London: MacMillan, 1915) at 45-6.

210 The justifications for inheritance are examined in M.L. Ascher, "Curtailing Inherited Wealth", 89 Mich.L.Rev. 69 (1990). See also J.W. Harris, "Inheritance and the Justice Tribunal" in S.R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: C.U.P., 2001) 106.

211 R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 174-5.

212 The argument based on self-ownership is doubted in J.W. Harris, *Property and Justice* (Oxford: Clarendon Pr., 1996) at 184*ff* (especially at 196-7).

213 See also F.G. Whelan, "Property as Artifice: Hume and Blackstone", in J.R. Pennock & J.W. Chapman, eds., *Property: Nomos XXII* (New York: N.Y.U.Pr., 1980) 101, at 103-4.

A possible explanation for granting a proprietary interest may be that if people are not rewarded in this way they will not labour. If the answer goes no further than this, then Locke has merely anticipated (or influenced) the economic theorists. Presented in that way, Locke teaches us little more than those incentives are essential if productivity is to be promoted, or, put another way, that the failure to prevent the taking of positive externalities is economically unsound.

There is no question that Locke believed that a move to privatization would prompt a more productive use of land, especially with regard to agricultural yields. One strategic advantage of speaking of a theory of natural rights is that this type of characterization has a more attractive ring when the right to private property is considered in a political context. Locke wrote within the political environment of his day, his aim being to challenge monarchical absolutism.[214] His theory can be (and has been) paraded out when the question of providing constitutional protection for property is raised. It is shrewder to seek an entrenchment for property ownership when this position is premised on the law of nature rather than on the banal notion that it is economically efficient to do so. That hortatory punch may explain why Locke has been regarded as affecting the design of the American *Bill of Rights*.[215] In addition, it has been argued that Locke's work "legitimated the appropriation of the American wilderness as a right, and even as an imperative, under natural law".[216] In contrast, his impact on Canadian liberalism has been less apparent,[217] and pressures for the inclusion of an embracing property protection in Canada's constitution have so far not prevailed.[218]

(ii) *desert and consent*

The labour justification is sometimes married with the idea of *desert*.[219] The gist of the claim is that even if we were to put aside the mixing metaphor we might still wish to grant ownership to the deserving labourer. Don't worry about the fact that certain rights must flow from the infusion of your own person into an object; rather, look at the benefit that emerges from that work, and reward the person who has brought it about. In short, the element of desert arises from the

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214 K.F. Minogue, "The Concept of Property and Its Contemporary Significance", in *Nomos XXII*, *supra*, note 213, 3, at 18.

215 See J.W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed. (New York: O.U.P., 1998). But see J.G.A. Pocock, *Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton U.P., 1975).

216 R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: O.U.P., 1990) at 248. See also J. Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground" in E.F. Paul *et al.*, eds., *Property Rights* (New York: C.U.P., 1994) 153.

217 See D. Schneiderman, *Constitutional Limits and Economic Interests: A Search for the Purposes of Canadian Constitutionalism* (LL.M. Thesis, Queen's University, 1993) [copy on file at the University of Alberta].

218 Note, however, that some protections for property are found in Canadian law: see further Part 6(b), Chapter 2.

219 See further L.C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge, Chapman & Hall, Inc., 1977) at 32*ff*. For a different slant on the idea of property and justice (or propriety) see G.S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago: U. of Chi.Pr., 1997).

added value that labour contributes to our well-being. Fairness and justice demand that there be compensation.

Certainly, the adding of value through the investment of labour might provide a sufficient basis for allocating property to a particular individual over other claimants. Still, I do not think that desert is any more compelling than the pure labour theory as a way of justifying the carving out of private rights from the prior communal ownership. In other words, if we first assume that a system of private ownership exists, then it is easy to see why we might want to create a given property right and to confer property on someone who deserves it for one reason or other. I have called these second- and third-order concerns: once we have conceded that private property is justifiable (the first-order question), it is plausible to assert that the collective would resolve that distributions should be based on merit considerations including rewarding a person who, in all fairness, deserves some item. It might even be possible to allow labour and desert to determine if some new object should be treated as the property of the creator instead of being added to the common property (a second-order concern).

However, when addressing the first-order question, the theory of desert based on contributions of labour is not so obviously the correct approach. I believe that most people would think that those who appropriate items from an otherwise shared pool of goods would normally be accused of selfishness, not rewarded for their initiative. Consider this simple situation: Three people are sharing an island containing a stand of trees and some scrubland. Without the consent of the others, one of the owners fells most of the trees and hews them into lumber. Part of that wood is then used in some worthwhile way, say to build animal shelters. Most of the rest of the lumber is used to build a beautiful new home for the cutter on the scrub portion of the lot. A fence around the house is also built. On one plank is written 'no trespassers'. Despite these appropriations, the cutter continues to share the remainder of the commons with the other two occupants.

Let us accept for the sake of argument that the lumber has been put to good use, and that the scrubland has been improved. Would we really say that this person deserves to have the sole entitlement to the home, to the land around it, and to all of the other objects that have been produced? Isn't it more likely that we would condemn this self-centred act and demand some compensation for the other two? If I am right in predicting that there would be censure not praise, then how does a natural-law right predicated on *deserving* come into play?

One reply might be as follows: that is acceptable because we want to encourage the improvement of property and the productive use of resources.[220] Of course, the other two inhabitants might not, on balance, benefit from the cutter's unilateral action. And as we will see, under the modern law of co-ownership it is highly probable that the sawyer would be called upon to account for these acts.[221] It would be ironic in the extreme if a grand theory of desert could be used to explain the virtues of property as a whole for actions that the law, writ small, would *not* regard as proper.

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220 *Cf.* Locke, *supra*, note 202, at paras. 40-44.

221 See Part 5(b), Chapter 9.

If we are supposed to approve of the cutter's actions because of some implicit understanding among the group, for instance, about the need to improve conditions on the island, then the basis of property rights is not really the desert theory at all. Rather it is the pre-existing consensus or edict that supports the claim that the sawyer is entitled to keep everything that has been acquired.[222] As James Harris observed "[a]ll desert claims are hostage to convention".[223] Labour might be rewarded with a payment, or even a hearty round of applause, if that is the accepted practice, or if it has been so decreed in some authoritative way. Harris felt that there is no true natural right to property based on desert. In the absence of a convention, he saw a property award as especially problematic owing to the distributional implications that would arise. Allocating property to some will limit the wealth available to others. Plus, property, as a reward for meritorious labour, competes with other justice claims, such as need, as the paramount criterion.[224]

(iii) *labour and desert applied?*

Labour and desert justifications for private property, whatever their theoretical weaknesses, appear to have an impact on the recognition of property types and the development of specific allocational rules. Again, these are second- and third-order questions. In fact, the rhetoric of the labour theory is sometimes present in the jurisprudence. Consider, for example, the American case of *International News Service v. Associated Press*.[225] The dispute there centred around the appropriate legal response when news published by one wire service is later copied and republished by another. In particular, the concern was that reports published by the plaintiff on the east coast could be then relayed by the defendant to the west, in advance of the plaintiff's efforts to do the same.

Based on such facts, the United States Supreme Court held that the defendant's actions amounted to unfair competition. A majority accepted that it would be appropriate for a court to impose a restriction on the use of the stories by the defendant, to last for several hours after publication by the plaintiff. This embargo would allow the plaintiff that time to exploit the commercial value of its work. The defendant was enjoined because it was "endeavoring to reap where it has not sown" and was, as a result, "appropriating to itself the harvest of those who have sown".[226]

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222 As to consent-based theories of ownership, see S. Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Pr., 1991).

223 Harris, *supra*, note 212, at 207.

224 *Ibid.* at 208. The moral warrant of desert claims to income generated by property is challenged in J. Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (New York: O.U.P., 1994) at ch. 5.

225 248 U.S. 215 (1918). For the story behind this case, see D.G. Baird, "Property, Natural Monopoly, and the Uneasy Legacy of *INS v. AP*", online: <http://ssrn.com/abstract=730024>.

226 *Ibid.*, at 239-40 (*per* Pitney J.). Apart from this, news was regarded as common property: *ibid.* at 235. The modern version of the doctrine created in *I.N.S. v. A.P.* is considered in *N.B.A. v. Motorola, Inc.*, 105 F.3d 841 (2d Cir., 1997). See also *X17, Inc. v. Lavandeira*, 563 F.Supp.2d 1102 (C.D.Cal., 2007); R.A. Posner, "Misappropriation: A Dirge", 40 Houston L.Rev. 621 (2003); *Archibold v. C.F.A.O.*, [1966] Ghana L.R. 79 (H.C.).

This resolution seems to have the fingerprints of the labour or desert theories all over it. But look again. The concept of reward for effort has already been seen as an element of economic efficiency and utilitarianism. Under those theories it is claimed that the failure to protect claims would lessen productivity. In the *I.N.S.* case it was the impact on enterprise that was stressed: the plaintiff had expended considerable time and money to establish its news-collection apparatus, only to have some of the benefits of these investments siphoned off by the defendant.[227]

There is no suggestion in *I.N.S.* that there is an inherent right to enjoy the fruits of one's labour. If there is, that right is honoured as much in breach as in observance. There are many circumstances in which (i) the law allows some people to reap blatantly where they have not sown; or conversely (ii) work is left unrewarded. For example, the reluctance of the law to reward labour evenly has been a source of grievance for those who engage in unpaid work in the home. In Canada this work is mainly done by women. Until relatively recently, engaging in the Sisyphean chores of housework had not given rise to rights to the property over which one laboured or, for that matter, over other accumulations of the marriage partnership. Such claims tended to fail because there was no identifiable cash-nexus between the work and some tangible object. The lesson to be learned is obvious – it is economically irrational or perhaps contrary to the 'natural law' tenet of the labour theory to continue doing these household tasks if nothing is received in return.[228]

The problem of undervalued domestic labour has been dealt with, in part, through the introduction of matrimonial property laws that allow for the sharing of property on family breakdown, and which seek to recognize the contributions that both spouses make to the economic well-being of their household.[229] The doctrine of unjust enrichment, to be studied more fully later in the text,[230] has also emerged as a way of responding to this issue. Arguably, it provides a further instructive example of how notions of labour and desert can be seen in the development of legal doctrine. As a general principle, an unjust enrichment will be found when (i) one person has enjoyed an enrichment in circumstances in which (ii) another has experienced a corresponding deprivation, provided there is (iii) no juristic reason to deny relief.

The undervaluation of housework was once the most pronounced contemporary example of how the law fails to reward some kinds of labour. But the concern is a general one, often nowadays involving the use of information in various forms. The general nature of the problem can be shown by returning to *International News Service*. Plot that case in the middle of a time continuum. While the plaintiff may have developed its news collecting and distributing operation, it was not the first to conceive of doing so. That happened at some prior time and these earlier developments can be used, for free, by other news

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227 See further R.A. Epstein, "*International News Service v. Associated Press*: Custom and Law as Sources of Property Rights in News", 78 Va.L.Rev. 85 (1992).

228 See also J.W. Singer, "Re-Reading Property", 26 New England L.Rev. 711 (1992) at 715.

229 See further Part 7, Chapter 9.

230 See further Part 4(d)(ii), Chapter 6.

agencies. Nor did the plaintiff generate the news itself; it merely reported the events of the day. In both of these ways it was allowed to free-ride on the prior efforts of others.[231] Looking ahead, the injunction against the defendant was to last for only a few hours and no more. Afterwards, commercial use of the gathered news could be made by anyone. The plaintiff was not awarded a perpetual monopoly. It was allowed to draw on the earlier labours of others at no cost; in due course its work could be exploited in the same way.

Patent and copyright statutes strike a similar balance. These laws are designed to protect a creator from poaching or free-riding, but these laws do not protect all works for all time. Pure ideas, clever thoughts, no matter how brilliant they may be, are not amenable to copyright or patent protections. In other words, the use of ideas contained in this book is not governed by the law of intellectual property, though the form in which they are presented is protected by copyright. Moreover, these property law rights do not last forever. At a future point, we are all allowed to reap where others have sown.

(g) entitlements derived from occupancy

First occupancy – first in time is first in right – reflects an approach similar to the labour theory.[232] In this context, the act of taking possession is treated as the labour that merits the granting of a reward. This occupancy rule refers not only to original acquisitions in a state of nature; it has also been marshalled to justify the retention of profits, that is, the added value brought about through commercial dealings. On this view, profits are the discovered value that belong to the occupier.[233]

However, occupancy on its own cannot serve as a basis for the first-order inquiry of whether we should have private property at all. We cannot justify a right of property simply because it encourages first occupancy; that is not a value that is comparable to the others that I have outlined so far (such as efficiency, liberty, self-development, or justice).[234] There is a common acceptance of the aphorism 'first come, first served'. Empirical evidence suggests that both young children and adults regard it as an appropriate norm of entitlement.[235] However, there is no normative foundation for it, except perhaps that it fosters diligence, or that it would be wrong to disturb the first occupier. In fact, as a basic principle of fairness, which is how we sometimes seem to view first possession rules, it seems

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231 See further A.S. Weinrib, "Information and Property" (1988) 38 U.T.L.J. 117, especially at 122*ff*.

232 See R.A. Epstein, "Possession as the Root of Title", 13 Ga.L.J. 1221 (1979); L. Berger, "An Analysis of the Doctrine That 'First in Time is First in Right' ", 64 Neb.L.Rev. 349 (1985); C.M. Rose, "Possession as the Origin of Property", 52 U.Chi.L.Rev. 73 (1985); "Symposium: The Rule of Capture and Its Consequences", 35 Envt'l L. 647*ff* (2005).

233 See G. Pincione, "Can Capitalism Be Grounded on a Finders-Keepers Ethic?", 5 Ratio Juris 202 (1992).

234 *Cf.* P. Benson, "Philosophy of Property Law" in J. Coleman & S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: O.U.P., 2002) ch. 19.

235 O. Friedman & K.R. Neary, "First Possession Beyond the Law: Adults' and Young Children's Intuitions About Ownership", 83 Tul.L.Rev. 1 (2009).

almost counter-intuitive. How on earth could we justify a rule that gives everything to the first occupier if this leaves everyone else destitute?[236]

As in the case of labour and desert, the idea of first occupancy can serve as a way of resolving third-order issues (that is, in designating to whom privately ownable property should be distributed). The classic example is the law governing the capture of wild animals: the common law grants title to the first possessor.[237] Mining claims are also sometimes allocated on that basis,[238] sometimes even when the right is allocated simply based on who is first in a line to acquire mineral claims from a government office.[239]

Occupancy has also served as the basis for justifying the assertion of sovereignty under international law. It is a pivotal feature of the law affecting Aboriginal claims. For instance, until 1992 there was authority for the view that when the English First Fleet reached Australia it found a country that was *terra nullius* (the land of no one). As a result, it was decided that English sovereignty was recognized from that point on, to the exclusion of Aboriginal title claims.[240] That same ethnocentric notion of possession is reflected in Beamish Murdoch's *Epitome of the Laws of Nova Scotia*, published in the 1830s. His language is replete with racist sentiment:

> [O]ur nation and that of France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the cariboo, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternatively destroying each other or attacking the beasts of the forest. I do not think that they themselves had any idea of property (of an exclusive nature) in the soil, before their intercourse with Europeans.[241]

Fortunately, this characterization has not prevailed. Indeed, the application of the maxim 'first in time is first in right' can work to the advantage of indigenous groups (including Canada's First Nations). As will be seen, the basis of Aboriginal land rights under the common law is premised, in large part, on prior occupancy.[242]

As with the ideas of Locke, the recognition of occupancy seems to do little more than smuggle in an argument based on economic benefits and incentives. If so, it is fair to question whether a system that promotes and rewards first occupancy is always the most prudent one, from an economic point of view. A recurring

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236 E. de Laveleye, "The Theory of Property" in J.H. Wigmore & A. Kocourek, eds., *The Rational Basis of Legal Institutions* (New York: MacMillan, 1923) 167, at 169.

237 See the brief discussion of the common law of capture, which governs the ownership of wild animals, in Part 2(a), Chapter 4.

238 See further A.G.. McDowell, "From Commons to Claims: Property Rights in the California Gold Rush", 14 Yale J. of Law & Humanities 1 (2002); A.P. Morriss *et al.*, "Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872", 34 Envt'l L. 745 (2004). See also "Environmental Groups Stake Claims", *Globe & Mail*, September 24, 1996, A4; *Mining Act*, R.S.O. 1990, c. M.14, ss. 27-8.

239 *Shore Gold Inc. v. Walker*, 2008 SKCA 90, 2008 CarswellSask 442.

240 See *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 (H.C.) overruling *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141 (N.T.S.C.).

241 B. Murdoch, *Epitome of the Laws of Nova Scotia* (Halifax: Joseph Howe, 1832-3) vol. 2, at 57.

242 See Part 7(b)(i), Chapter 5.

problem with rules based on occupancy is that they can work to impose costs on a party who seeks, but fails, to be the first taker.[243] Winner-take-all first possession doctrine can promote the premature exploitation of resources and impose barriers to collective action.[244]

The federal settlement policy for Western Canada raises questions about the economic efficiency of first occupancy as a means of allocation. The Canadian homesteading policy that was in force from 1872 until 1930 was designed to promote settlement in the Canadian hinterland. (This area served, of course, as the ancestral home of a number of Aboriginal communities.) The *Dominion Lands Act*[245] allowed homesteaders to acquire 160 acres of land (a quarter-section) on the payment of a nominal fee. A further quarter-section of nearby land could also be acquired at a fixed price per acre. To retain title, homesteaders were required to reside on and develop their plots.

There is little doubt that the availability of land for homesteading generated the desired rush to settle in the west. About half of Prairie lands that passed into private hands were granted under the policy.[246] However, there is an ongoing debate as to whether this method of distribution made economic sense. One view is that the establishment of settlements beyond the reach of ready markets was ill-conceived and imposed hardships on the isolated homesteaders: "Since homesteads were allocated on a first-come, first-served basis, settlers were forced to claim them before they were economically viable."[247] And, in the prime locations, particularly those near railway lines, the land was doled out at prices that were undoubtedly below market value.[248]

The allotment of parcels to first-comers was a common means of populating the frontiers throughout the British Empire and elsewhere. Quite often it was accompanied by extra-legal first-occupancy acquisition. In other words, settlers often set out ahead of the governmental settlement processes, squatting on land and asserting *de facto* claims. Inevitably, this posed problems for officialdom: should the squatters be permitted to jump the queue, or should the practice be met with a heavy-handed response? The latter option was rarely effective. Typically, the *de facto* holdings were transformed into *de jure* ones by conferring a right of pre-emption on those squatters that had improved their ill-gotten lands.

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243 Epstein, *supra*, note 227, at 114.

244 See further T.W. Merrill, "Accession and Original Ownership", online: <http://ssrn.com/abstract=1400902> at 31*ff*.

245 *An Act Respecting the Public Lands of the Dominion*, S.C. 1872, c. 23.

246 K. Norrie *et al.*, *A History of the Canadian Economy*, 4th ed. (Toronto: Thomson Nelson, 2008) at 197.

247 *Ibid.* at 198. The authors regard the theory of premature settlement as having a certain appeal, but treat the matter as still open to debate.

248 See T.L. Anderson & P.J. Hill, "The Race for Property Rights", 33 J. Law & Econ. 177 (1990). Support for the American homesteading policy can be found in D.W. Allen, "Homesteading and Property Rights; Or, How the West was Really Won", 34 J. Law & Econ. 1 (1991). For an economic defense of first occupancy as a means of property allocation, see D. Lueck, "The Rule of First Possession and the Design of the Law", 38 J. Law & Econ. 393 (1995). *Cf.* L. Hotte, "Conflicts Over Property Rights and Natural-Resource Exploitation at the Frontier", 66 J. Developmental Econ. 1 (2001).

Under that response, the squatters were given the right of first purchase over these lands before the property would be distributed in accordance with the general scheme.[249]

Developments on the Internet demonstrate further problems occasionally associated with the use of first occupancy as a distributional mechanism. In general, domain names go to the fleet-of-finger, that is, the first to register. And there is no limit on the number of domain names that one might acquire. It is hard to imagine a better general means of allocation. However, so-called cybersquatters seek to obtain domain names that are likely to be viewed as valuable, with the goal of selling these off to the highest bidder. Occasionally, the market is small: the name of a famous person might be taken in the hope of selling it to that person. An ardent capitalist might applaud this kind of enterprise; after all, the market should produce a transfer of these rights to those that value them most. In fact, while that sometimes happens, cybersquatters (the loaded name says it all) face various legal constraints, the violation of which can lead to an uncompensated transfer of domain-name rights.[250]

(h) a pluralist account

A principled system of property need not rely on a single strand of argument. Property law in Canada can be justified on a variety of different bases. I suggested above that the rationales supporting a right of private property tend to reinforce each other. In a way, utilitarianism might be seen as a kind of pluralist defence of private property. When one defines the concept of utility broadly, one might claim that on balance, and taking into account all of the reasons set out above, private property is the optimal way to generate and allocate resources.

Stephen Munzer's theory of property rights also demonstrates linkages among existing property justifications.[251] He argues for a pluralist account, one based on principles of (i) utility and efficiency; (ii) justice and equality; and (iii) labour and desert. Munzer recognizes the cogency of preference-satisfaction models built on utilitarian and efficiency notions. These are blunted by the need to appreciate the equal moral worth of people, which would impede the operation of a hard-line kind of utilitarianism. Moreover, Munzer believes that material inequality is to be tolerated only if everyone possesses a minimum amount of property, and (more stringently) if the scale of inequality does not prevent full human development. At the same time, differences in merit demand rules of

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249 See further J.C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queen's, 2003), especially ch. 7.

250 See *Saskatoon Star Phoenix Group Inc. v. Noton*, [2001] 9 W.W.R. 63, 2001 CarswellSask 325 (Q.B.). *Cf. Canada v. Bedford* (2003) 27 C.P.R. (4th) 522, 2003 CarswellNat 4194 (C.I.R.A.); *Black v. Molson Canada* (2002) 60 O.R. (3d) 457, 2002 CarswellOnt 2414 (S.C.J.). See also A. Chander, "The New, New Property", 81 Tex.L.Rev. 715 (2003); R.D. Ryder & A. Madhavan, "The Menace of Cybersquatting", online: <http://ssrn.com/abstract=1410502>. And watch out for typosquatters: D.B. Gilwit, "The Latest Cybersquatting Trend: Typosquatters, Their Changing Tactics, and How to Prevent Public Deception and Trademark Infringement", 11 Wash.U.J.L.& Pol'y 267 (2003).

251 S.R. Munzer, *A Theory of Property* (New York: C.U.P., 1990).

ownership that calibrate entitlements based on levels of desert flowing from labour. What emerges from Munzer's blend is a temperate system of private property.[252] The Canadian version of a mixed economy, at least that version which contains a meaningful social safety net, seems close to Munzer's model.

4. THE FUNCTIONS OF MODERN PROPERTY LAW

(a) generally

The law of property performs a host of duties, either in furtherance of the property-related values outlined above or policy considerations external to these. These manifold functions will be the focus of most of the remaining chapters. However, it may prove useful to adumbrate the key work at the outset.

Property law allocates entitlements and regulates the means by which those initial rights can be exchanged. The law balances the conflicting claims of owners: disputes that can arise, for example, between neighbours, concurrent or successive owners of the same property, or surface and subsurface owners. The law provides protection, through the criminal and civil law, against wrongful action by others. It also serves as a mechanism to ascertain and facilitate the dispositional preferences of owners.[253]

These main duties are largely manifestations of attempts to promote economic efficiency through the reduction of transaction costs. As such, to a very high degree they draw on the economic arguments for private ownership canvassed above.[254] The term transaction costs is used here to include expenses associated with market dealings, such as those that result from gathering information, bargaining, and resolving disputes. When these costs are low (or nil), market transactions are facilitated. When the reverse is true, bargaining and efficient allocations may be impeded, sometimes completely. One way of reducing transaction costs is to strive for clear ownership rules. All in all, crystal rules are preferred to mud rules because the former tend to reduce the costs of market dealings, though mud rules are sometimes needed to allow for flexibility in the pursuit of fairness.[255]

Land registration systems serve as a good illustration of an attempt to reduce transaction costs. Under the Torrens system of land registration (in use in a number of provinces in Canada) the government attempts to compile a record of all (or nearly all) interests that pertain to a given tract. Reliance on that title means that a historical search of the root of the vendor's title is normally not required when the land is sold. Absent fraud on the part of the purchaser, earlier defects in title are generally of no consequence to the present owner. Moreover, in a perfect Torrens system the register is a mirror of all interests affecting that tract. Ensuring entitlements (to a degree), and making the information about land ownership

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252 *Ibid.* at 7.

253 Issues relating to this function are broached in Part 2(a), Chapter 5.

254 See Part 3(b), *supra.*

255 C.M. Rose, "Crystals and Mud in Property Law", in *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Pr., 1994) ch. 7.

easily accessible, should facilitate the bargaining process and reduce the costs of sales.

As we have already seen, not all property law is, or should be, based on an efficiency rationale; other justifications and principles also vie for attention.[256] Some policies promote other interests and may have only an incidental connection with property. That is, non-property based factors can inform the law of property. Included here, for instance, are concerns about racial discrimination. Hence, the law no longer tolerates certain discriminatory practices in the renting of privately held premises.

The lure of property can serve as a vehicle for social engineering in a variety of ways. The example of promoting settlement on the Prairies through homesteading incentives, which was considered above, serves also to illustrate that general point.[257] In a similar way, tax law is sometimes used to create incentives for investment, even though this deployment may actually reduce tax revenues in the short-term. Hence, property law can be used as a way of giving effect to any number of public initiatives. Perhaps that is why understanding the law of property is so challenging: property rules can be affected by a wide spectrum of social goals.

(b) resolving novel claims

We saw earlier in the chapter that there is no exhaustive list of what counts as property and no indisputably settled core of what must be contained within the bundle. Additionally, since property depends on whether the law will recognize and enforce entitlements (and non-property on the refusal to do so), it follows that novel claims of property may be validated or rejected by the courts and the legislatures. That is so: property is not a static concept, but rather is in a constant state of flux. This fluidity is apparent when disputes over new forms of property erupt. Here, on the cutting edge of developments, issues have arisen over such things as 'know how',[258] a government-issued licence to fish,[259] the distinctive sound of a singer's voice,[260] an entertainment spectacle,[261] frozen sperm,[262] human

256 See Part 3(a), *supra*.

257 See Part 3(g), *supra*.

258 Not recognized as property within the meaning of income tax legislation in *Roth v. R.*, 2007 FCA 38, 2007 CarswellNat 305.

259 Recognized in *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58, 2008 CarswellNS 569. See further A. Duggan, "In the Wake of the Bingo Queen: Are Licences Property?" (2009) 47 C.B.L.J. 225.

260 Recognized in the American case of *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir., 1988). See generally S.L. Dogan, "An Exclusive Right to Evoke", 44 B.C.L.Rev. 291 (2003) and the cases cited there. See also H.M. Abromson, "Comment: The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick?", 14 Marq. Sports L.Rev. 571 (2004).

261 Not recognized in *Victoria Park Racing & Recreation Grounds Ltd. v. Taylor* (1937) 58 C.L.R. 479 (H.C.).

262 *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275 (C.A. 2nd Dist., 1993); *Yearworth v. North Bristol N.H.S. Trust*, [2009] EWCA Civ 37.

pre-embryos,[263] cells extracted from a spleen,[264] domain names,[265] patents over mice,[266] genetically modified plant cells,[267] the right of next-of-kin to a human brain preserved in paraffin,[268] one's personality or celebrity.[269]

Two factors seem to have prompted developments in the juridical meaning(s) of property. One relates to the rejection of the concept of property as thing-ownership in favour of the idea of property as a bundle of rights in which a broad array of abstractions are acknowledged as being amenable to protection as property. The other involves advances in science and technology that have forced new issues into the legal arena. In consequence, intellectual property claims have risen exponentially in recent years. Here, the new rights being asserted quite frequently raise questions that cause the idea of property to totter on a legal and normative precipice.[270]

In the assessment of innovative claims, two distinct styles of judicial analysis seem to exist. Some courts adopt an *attributes* approach. Here, the inquiry hinges on whether the right being asserted looks like property: one searches for a strong family resemblance.[271] The quest is to find a normative basis for recognition

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263 *Davis v. Davis*, 842 S.W.2d 588 (Tenn.S.C., 1992) cert. denied (*sub nom. Stowe v. Davis*) 507 U.S. 911 (S.C., 1993). *Cf. Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz.App.Div. 1, 2005).

264 Not recognized in *Moore v. Regents of the University of California*, 271 Cal.Rep. 146 (S.C., 1990). See also *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, 264 F.Supp.2d 1064 (S.D.Fla., 2003). *Cf. United States v. Arora*, 860 F.Supp. 1091 (U.S. Dist.Ct. MD, 1994).

265 See, *e.g.*, *Emke v. Compana*, L.L.C., 2007 WL 2781661 (N.D.Tex.).

266 Not recognized in *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, 2002 CarswellNat 3434.

267 Recognized in *Monsanto Inc. v. Schmeiser*, [2004] 1 S.C.R. 902, 2004 CarswellNat 1391. See further J. De Beer, "Reconciling Property Rights in Plants" (2005) 8 J.W.I.P. 5; B. Ziff, "Travels With My Plant: *Monsanto v. Schmeiser* Revisited" (2005) 2 U.O.J.L. & T. 493.

268 Not recognized in *Dobson v. North Tyneside Authority*, [1997] 1 W.L.R. 596, [1996] 4 All E.R. 474 (C.A.). *Cf. Newman v. Sathyavaglswaran*, 287 F.3d 786 (C.A.9, 2002) cert. denied 537 U.S. 1029 (S.C., 2002).

269 See *Athans v. Canadian Adventure Camps Ltd.* (1977) 17 O.R. (2d) 425, 1977 CarswellOnt 453 (H.C.) which draws on *Krouse v. Chrysler Canada Ltd.* (1973) 1 O.R. (2d) 225, 1973 CarswellOnt 884 (C.A.). See further E.M. Singer, "The Development of the Common Law Tort of Appropriation of Personality in Canada" (1998) 15 C.I.P.R. 65. *Cf. Gould Estate v. Stoddart Publishing Co.* (1996) 15 E.T.R. (2d) 167, 1996 CarswellOnt 3537 (Gen.Div.) affirmed on different grounds (1998) 39 O.R. (3d) 545, 1998 CarswellOnt 1901 (C.A.) leave to appeal to S.C.C. refused (1999) 236 N.R. 396 (note). The right to one's image was protected under Quebec law in *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591, 1998 CarswellQue 4806. An argument that Canadian courts should reject the American approach is advanced in M.A. Flagg, "Star Crazy: Keeping the Right of Publicity Out of Canadian Law" (1999) 13 I.P.J. 179. See generally H. Beverley-Smith, *Commercial Appropriation of Personality* (Cambridge: C.U.P., 2002). A review of the abundant American developments can be found in M.P. McKenna, "The Right of Publicity and Autonomous Self-Definition", 67 U.Pitt.L.Rev. 225 (2005). See also S.L. Dogan & M.A. Lemley, "What the Right of Publicity Can Learn from Trademark Law", 58 Stan.L.Rev. 1161 (2006); S. Semeraro, "Distinguishing the Right of Publicity: Property Rights, Free Speech Privilege, and Competition Policy", online: < http://ssrn.com/abstract=1374110>.

270 See further M.M. Ertman & J.C. Williams, eds., *Rethinking Commodification: Cases and Readings in Law and Culture* (New York: N.Y.U.Pr., 2005).

271 A. Carter, *The Philosophical Foundations of Property Rights* (London: Harvester, Wheatsheaf, 1989) at 5, drawing on the work of Ludwig Wittgenstein.

internal to (immanent in) the law of property, thereby expanding the field of ownership in a way that preserves the coherence of the law of property.[272] That is a sensible enough goal. However, a difficulty with that kind of judicial strategy has already been identified: it requires us to develop a firm conception of the necessary traits of property. It can also be circular, because the recognition of a right as proprietary can serve to endow it with features (such as transferability) that were not previously treated as being integral to that item or right.

A *functional* approach, by contrast, looks first at the policy factors at play. It takes account of how property, as a tool of social life, should be used. This approach recognizes that property is not an acontextual entity that demands conceptual purity, but a purposive concept, to be used to meet social needs.[273] Here one sees that property is inseparably tied to social values. It is perhaps a truism that those things that are regarded as property – slaves,[274] trees, ideas, a patent for 4-Cyano-4-deformylsordarin derivatives,[275] and on and on – provide us with an insight into the society in which we live. Of course, treating property as a tool to be used when appropriate can undermine the idea that the term has any defined content whatsoever. An approach driven by policy to this extent often is aligned with a nominalist view of property, mentioned above.[276] If, under this analysis, property is that which the law chooses to call property, the effect of such a declaration is not always easy to comprehend fully.

(i) *the university degree example*

The controversy over whether university degrees are property, a hot-button topic in the 1980s but now seemingly passé, has yielded helpful examples of the attributes and functional styles of judicial reasoning. This issue arose in cases concerning the division of marital property on divorce. In marriages of short duration a university degree might be the only thing of value, and so its divisibility under the marital property could be quite important to the divorcing parties. Typically, the term property is not comprehensively defined in the governing legislation. Therefore, the task of determining whether an item (such as a university degree) counts as marital property falls to the courts.

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272 C. Rotherham, "Conceptions of Property in Common Law Discourse" (1998) 18 Leg.Stud. 41, at 48.

273 See also K.J. Gray, "Property in Thin Air", [1991] C.L.J. 252, where it is argued that the question of whether or not a resource should be treated as private property (and therefore not held in common) depends on whether it should be thought of as 'excludable', from practical, legal, and moral points of view.

274 As to the history of slavery in Canada, see W.R. Riddell, "The Slave in Canada", 5 J. Negro History 261 (1920); E.A. Bryce, *Slavery: United States and Canada*, M.A. Thesis, University of Pittsburgh (1932) [copy on file at the University of Alberta]; B. Cahill, "Slavery and the Judges of Loyalist Nova Scotia" (1994) 43 U.N.B.L.J. 73. James Ridgeway asserts that "[m]ore slaves exist in the world today than ever before in history": J. Ridgeway, *It's All for Sale: The Control of Global Resources* (Durham, NC: Duke U.P., 2004) at 167. The horrid details to support that claim are found at 167-76. See also K. Bales & Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (Berkeley: U. of Calif.Pr., 2009); R. Piotrowicz, "Slavery in the 21st Century: Whose Fault is It?" (2009) 83 Aust.L.J. 516.

275 Patent CA 2300407, issued Jan. 26, 2010.

276 See Part 2(a), *supra*.

When this issue was considered in the Colorado case of *Graham v. Graham*[277] (in relation to an M.B.A.) the Court rejected a property-based claim. The degree was said to hold no resemblance to conventional forms of property: it has no market value; it is personal to the holder and so cannot be sold, inherited, or given as security; it can be earned but it cannot be bought; it represents an intellectual achievement that may assist in the future acquisition of property, but "it has none of the attributes of property in the usual sense of that term".[278] This conclusion, it should be noted, is the prevailing view in Canadian family law.[279] University degrees are not regarded as property; other means have been found to recognize the contributions of those who assist their spouse through the travails of higher education.

The counterpoint is found in the Michigan case of *Woodworth v. Woodworth*,[280] which involved a claim for the division of the husband's law degree. The Court held that the recognition of the degree as property was an acceptable means of rectifying the enrichment enjoyed by the husband. The Court expressly rejected the attributes approach employed in *Graham*: whether the degree was property in a physical or metaphysical sense was said to be beside the point. It was held that the recognition of the degree as property (thereby bringing it within the purview of the marital property statute) was the only satisfactory means of providing compensation for the efforts of the non-student spouse. Alternatives, including the awarding of support, were regarded as imperfect mechanisms for responding to this form of entitlement. While the degree could not be transferred to that spouse, it could nevertheless be given a monetary value, and part of that value could be allocated to the non-student spouse.

(ii) *the challenge of cultural appropriation*[281]

The ongoing debate over what is loosely called cultural appropriation provides another example of the processes afoot in the creation of property in law. According to one definition, this term means "the taking – from a culture that is not one's own – of intellectual property, cultural expressions or artefacts, history and ways of knowledge".[282] Concerns about misappropriation have underscored the complaints of some Aboriginal writers that non-Aboriginal novelists were, in effect, stealing their stories. In some instances, concerns have been raised about the publishing of ancient stories that had previously been part of an oral tradition. In other instances the claims have centred around novelists such as W.P. Kinsella,

277 574 P.2d 75 (Colo.S.C., 1978).

278 *Ibid.* at 77 (*per* Lee J.).

279 See *Caratun v. Caratun* (1992) 10 O.R. (3d) 385, 1992 CarswellOnt 287 (C.A.) leave to appeal to S.C.C. refused (1993) 46 R.F.L. (3d) 314 (note). See further M. McCallum, "*Caratun v. Caratun*: It Seems That We Are Not All Realists Yet" (1994) 7 C.J.W.L. 197.

280 337 N.W.2d 332 (Mich.App., 1983). See also *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y.C.A., 1985).

281 See generally B. Ziff & P.V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, NJ: Rutgers U.P., 1997); M.F. Brown, *Who Owns Native Culture?* (Cambridge, MA: H.U.P., 2003).

282 Resolution of the Writers' Union of Canada, approved June, 1992.

who has written fictional accounts using native characters,[283] or sports teams that adopt Aboriginal names or mascots.[284] But the debate about cultural appropriation extends beyond the literary arts, and involves, among other things, recordings of traditional music,[285] works of visual art that use motifs, symbols or designs,[286] and the use of traditional medicines as the basis of pharmaceutical patents.[287]

Some critics have decried concerns about cultural appropriation as specious, at least when applied to the creation of fundamentally new works by authors and other artists. Robert Fulford's stern rebuke reflects contempt for the whole idea:

> The word 'appropriation' has lately become a rhetorical weapon in the hands of intellectuals claiming to speak for minority rights. Its power derives, oddly, from its very irrationality. In my experience, people hearing of it for the first time cannot believe that anyone would put forward so ludicrous an idea: even the most modest education in cultural history teaches us that art of all kinds has depended on the mixing of cultures.[288]

That cynical attitude fails to appreciate the values that support the critique of misappropriation; some of those values are reflected in the mainstream law of property. For example, it has been argued that cultural appropriation affects the development of cultural identity. That view is based on a version personhood theory as applied to communities not individuals, and so reflects a type of group-hood analysis (a term that was used earlier in this chapter).[289] Others have invoked both labour theory and economic arguments, suggesting that the wrong people are benefiting from the cultural creations of the past. That position is often coupled with notions of communal ownership and collective rights. Another line of argument stresses the importance of the proper maintenance of cultural forms; that is an argument based on stewardship. Finally, some protagonists in the cultural appropriation debate have demonstrated that what is involved here is a conflict of *sovereignties*.[290] What should govern: customary Aboriginal law, generic intellectual property legislation, or something altogether new?

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283 See further R. Wiebe, "Proud Cree nation deserves much more than 'funny' stories", *Globe & Mail*, February 17, 1990, C3.

284 See further C.R. King & C. Fruehling Springwood, eds., *Team Spirits: The Native American Mascots Controversy* (Lincoln : U. of Neb.Pr., 2001).

285 A. Seeger, "Ethnomusicology and Music Law", in Ziff & Rao, *supra*, note 281, 52.

286 See further *Bulun Bulun v. R. & T. Textiles Pty. Ltd.* (1998) 157 A.L.R. 193 (F.C.) and the literature and case law referred to there. See further A.P. Matlon, "Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting", 27 Colum. J.L. & Arts 211 (2004).

287 See further S. von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, 2nd ed. (Austin: Kluwer, 2009); S.R. Munzer & K. Raustiala, "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge", 27 Cardozo Arts & Ent.L.J. 37 (2009); E. Mackay, "Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach" (2009) 32 U.N.S.W.L.J. 1.

288 R. Fulford, "The Trouble with Emily", Canadian Art (Winter, 1993) 33, at 38.

289 See the text accompanying notes 194 to 197, *supra*.

290 L. Keeshig-Tobias, in "The Public Face of the Cultural Appropriation Debate: Who Speaks for Whom?" Morningside (C.B.C. Radio), April 1, 1992, transcribed in (1992) 2 *Textual Studies in Canada* 30, at 42.

Even if the values underlying the cultural appropriation debate are made out, finding an effective legal response remains problematic. The concerns that have been voiced about cultural appropriation focus on forms of taking that tend to fall outside of the realm of the current law of property, or more specifically, the laws governing intellectual property law (the law of patents, trade-marks, and so forth). Consider, for example, the case of the recording of a traditional Aboriginal song. The law of copyright provides a limited protection for works of art: usually the right lasts for the life of the creator plus 50 years. After that, the work falls within the public domain. Moreover, to be amenable to protection most creative works must be recorded or 'fixed' in some way. And it must be possible to identify the creator(s) of the object, on whom the copyright can be conferred. A traditional song, for example, would probably fall well outside of the ambit of the present law of copyright.

One wonders whether the law should be reformed, a question now being considered around the globe, by both national governments and international bodies.[291] The problems of fashioning a workable regime should not be underestimated. The ability of current artists to draw on the work of others raises questions about free speech and expression. Some artists might be silenced by rules that limit their creative fields of vision. Even if a balance can somehow be struck, attempting to create group rights means that definitional questions (who is in? who is out?) must be answered. Similarly, the potential forms of taking are numerous: how are these to be defined? Creative practices inherently involve the synthesis of old and new, so that attempts to fence off certain cultural goods are bound to be artificial.[292] Indeed, this may be an area in which the law of property simply fails to mediate conflicting claims adequately.

(iii) *the numerus clausus principle*

The recognition of novel claims, while important, is also fairly rare. Courts have adopted the cautious view that the categories of property rights should be carefully controlled. So, in the 1834 English case of *Keppell v. Bailey*[293] it was said that courts should not permit the creation of various sorts of fancy interests in land. Allowing contractual rights of all shapes and sizes was not seen as probelmatic. However, "great detriment would arise and much confusion of rights [would ensue] if parties were allowed to invent new modes of holding and enjoying real property".[294] In an accordant way, it was suggested that 1853 was "rather a modern time to alter the law of real property"![295] The recognition of a limited number and carefully regulated kinds of interests – a *numerus clausus*

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291 See generally M. Riley, ed., *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (Walnut Creek, CA: Altamira Pr., 2004); M. Batiste & J.S. Henderson, *Protecting Indigenous Knowledge and Heritage: A Critical Challenge* (Saskatoon: Purich, 2000). See also K.A. Carpenter *et al.*, "In Defense of Property", 118 Yale L.J. 1022 (2009).

292 See further A. Schneider, "On 'Appropriation.' A Critical Reappraisal of the Concept and its Application in Global Art Practices" (2003) 11 Social Anthropology 215.

293 (1834) 2 My. & K. 517, 39 E.R. 1042 (Ch.D.).

294 *Ibid.* at 1049 E.R. (*per* Brougham L.C.).

295 *In re Macleay* (1875) L.R. 20 Eq. 186, at 191 (*per* Jessel M.R.).

policy[296] – has slowed down (but not completely halted) the process of judicial reform of property law in Canada.

Various reasons have been advanced to explain the emergence of *numerus clausus*.[297] Two of these relate to the promotion of transferability; these are therefore efficiency-based arguments. One suggests that limiting the possible kinds of rights reduces information costs, including those associated with acquisition of property. It is easier to determine what interests encumber a given parcel of land if the range of rights is restricted.[298] The second view is that the doctrine helps to minimize anticommons problems.[299] The recognition of too many kinds of rights can fracture property holdings so significantly that efficient exchanges are prevented by holdouts.[300] Another line of reasoning suggests that allowing for a concept of property that is too open-ended destabilizes the core meaning of property in law by rendering that concept imprecise.

I believe that *numerus clausus* has another, perhaps even more important function. Property rights are difficult to abolish. Not only does the doctrine of precedent[301] inhibit the ability of courts to de-list previously recognized rights, but even legislative abolition may generate costly claims for compensation by the adversely affected owners.[302] There is a hesitancy to alter the law in a way that undermines investment-backed expectations. Consequently, *numerus clausus* can be understood as serving a precautionary function: one should be careful about the *introduction* of new property rights because it is difficult to reverse that process. Even legislatures, though not as affected by *numerus clausus* as are courts, need to be cognisant of these reversibility barriers when creating new forms of property.

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296 The term *numerus clausus* is borrowed from civilian legal systems, where it is quite rigourously applied. For a Canadian example of the doctrine in operation, see *Fairhill Developments Ltd. v. Aberdeen Properties Ltd.*, [1969] 2 O.R. 267, 1969 CarswellOnt 164 (H.C.); *Durham Condominium Corp. No. 123 v. Amberwood Investments Ltd.* (2002) 58 O.R. (3rd) 481, 2002 CarswellOnt 850 (C.A.). However, for a departure from these strictures, see *Freeborn v. Goodman*, [1969] S.C.R. 923, 1969 CarswellOnt 136, discussed in Part 8(c), Chapter 9, and *Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146, 2002 CarswellAlta 54.

297 See B. Ziff, "The Irreversibility of Commodification", (2005) 16 Stellenbosch L.Rev. 283, and the references cited there. See also B. Edgeworth, "The *Numerus Clausus* Principle in Australian Property Law" (2006) 32 Monash L.Rev. 387; N.M. Davidson, "Standardization and Pluralism in Property Law", 61 Vand.L.Rev. 1597 (2008).

298 T. Merrill & H. Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle", 110 Yale L.J. 1 (2000). The authors also note that other dealings with property, beyond acquisition, are rendered easier if the range of rights is circumscribed.

299 The tragedy of the anticommons is discussed in Part 3(b)(iii), *supra*.

300 M. Heller, "The Boundaries of Private Property", 108 Yale L.J. 1163 (1999) at 1176-8.

301 "[S]urely nothing can be of greater importance to the peace of society than that rules which govern the disposition of property should be settled, and not fluctuating": *Doe d. Evans v. Doyle* (1860) 4 Nfld.R. 432, at 436 (*per* Robinson J.). See also *Re Hazell*, [1925] 3 D.L.R. 661, 57 O.L.R. 290 (C.A.) at 294 O.L.R.

302 See further Part 6(b), Chapter 2.

(c) rights of property

Some interests have not significantly affected the composition of the law of property in the past. When I say this I am thinking specifically of the importance of preserving our environment. All of the rationales of property reviewed above tend to promote the exploitation of resources. Even if private property regimes are less destructive of resources than common ownership systems (as the tragedy of the commons would have us believe[303]), the driving force of economic theory is still efficient resource use. As a consequence, in the history of the development of private property one finds that other values have been subordinated.[304] Two cases provide graphic (if extreme) illustrations of what I mean.

In the 1881 case of *Ghen v. Rich*[305] a dispute arose over the ownership of a dead fin-back whale. The party who had lance bombed the whale prevailed over the person first taking physical possession. The Court concluded, in part, that if the whaler was not allowed to claim ownership "this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder".[306] The view that whales should not be harvested or commodified was not considered.

A few years later the Newfoundland Supreme Court was faced with a question of ownership rights to seals killed on the ice floes. In *Power v. Kennedy*[307] it was held that the indiscriminate killing of seals by a hunting party did not give rise to ownership of the carcasses left strewn behind. It was said that the killing must be accompanied by possession and that if someone discovers a body that contains no *indicia* of property, the person committing the killing "must be in a position then and there to assert his right of property, to point to the specific seals as his own or those of his fellows, and to exercise corporal control over them, unless he is resisted by force or deterred by threats of violence".[308] While this might seem to imply a conservationist posture notably absent in *Ghen v. Rich*, the rationale of the holding was efficiency-driven. The Court was concerned that this mode of hunting would prevent competition and pre-empt others from taking the "fruits of the ice-fields".[309]

These cases remind us of a point made at the outset, namely, that property is concerned with the allocation of rights as among individuals *over* objects. As matters now stand, it is rarely the function of the private law of property to protect

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303 See Part 3(b)(ii), *supra*.

304 See further J. Sprankling, "The Antiwilderness Bias in American Property Law", 63 U.Chi.L.Rev. 519 (1996).

305 8 Fed. 159 (Mass.Dist.Ct., 1881).

306 *Ibid.* at 162 (*per* Nelson D.J.). The rules governing the capture of wild animals are discussed briefly in Part 2, Chapter 4. For more on the law of whaling, see R.C. Deal, *Laws of Honour: The Laws and Customs of Anglo-American Whaling, 1780-1880*, Ph.D. Dissertation, Temple University, 2010 [copy on file at the University of Alberta].

307 (1884) 7 Nfld.R.34 (S.C.).

308 *Ibid.* at 36 (*per* Pinsent J.).

309 *Ibid.* at 35. See further the discussion of sealing law in Part 2(a), Chapter 4.

property for its own sake.[310] That things cannot seek the law's protection comes to the surface in cases involving the right to sue (or have 'standing') in environmental litigation. Take, for instance, the case of *Sierra Club v. Morton*,[311] where an action was launched by an environmental organization seeking to prevent development in a wilderness area in California. No special interest beyond that of the community at large having been pleaded, the group's attempt to be given standing was rejected by the United States Supreme Court. In dissent, Douglas J. took the unorthodox position that the natural environment *itself* should have standing and could speak through a human instrumentality. If this seems remarkable, remember that some artificial and inanimate entities, such as corporations, have legal and constitutional rights both in Canada and the United States. If that is the case,

> [s]o it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all life it sustains or nourishes – fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents. The voice of the inanimate object, therefore, should not be stilled.[312]

Canadian law has not moved that far, though some success has been achieved by environmental groups seeking standing in comparable circumstances.[313] Generally, property law has now drifted away from the resource-utilization credo that is so marked in the common law. By and large these changes have not been based on private law responses to pollution and other threats to the environment, but instead have taken the form of regulatory regimes involving licensing and criminal (including *quasi*-criminal) sanctions.

Perhaps the next stage will entail the introduction of a potent and general obligation of stewardship, that is, a duty that compels owners to respect the environ-

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310 In *Anderson v. Skender* (1991) 61 B.C.L.R. (2d) 292, 1991 CarswellBC 293 (S.C.) reversed in part [1994] 1 W.W.R. 186, 1993 CarswellBC 272 (C.A.) leave to appeal to S.C.C. refused [1994] 2 W.W.R. lxiv (note), McKenzie J. (at 297 B.C.L.R. of the trial judgment) made a valiant attempt to resolve a dispute over the destruction of trees along a boundary line by assessing the problem "from the tree's point of view". As to animal rights, see D. Favre, "A New Property Status for Animals" in C.R. Sunstein & M.C. Nussbaum, eds., *Animal Rights: Current Debates and New Directions* (New York: O.U.P., 2004) 234. See also C.R Sunstein, "Can Animals Sue?" in the same collection at 251 and G.L. Francione, *Animals as Persons* (New York: Colum.U.P., 2008).

311 405 U.S. 727 (1972).

312 *Ibid.* at 752. See further C. Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects", 45 S.Cal.L.Rev. 450 (1972).

313 See, *e.g.*, *Sierra Club of Canada v. Canada (Minister of Finance)* (1998) 157 F.T.R. 123, 1998 CarswellNat 2384 (T.D.); *West Kootenay Comm. EcoSociety v. British Columbia* (2005) 14 C.E.L.R. (3d) 233, 2005 CarswellBC 1195 (S.C.). *Cf. Society for the Preservation of the Englishman River Estuary v. Nanaimo (Regional District)* (1999) 28 C.E.L.R. (N.S.) 253, 1999 CarswellBC 324 (S.C.). See further M. Murtha, "Giving Salmon Standing: Modernising Public Nuisance to Serve the Public Interest in Environmental Protection" (2009) 17 Tort L.Rev. 45.

ment. That strategy can be pursued not only by imposing restrictions on the way that the land can be exploited (there are now many laws that do this), but also through the introduction of a broadly cast *positive* duty of environmental care.[314] Bear in mind that such a development is entirely consistent with the complementary notions that ownership rights are always subject to restrictions, and that property is a legal construct that is composed of both rights and obligations.

314 See further C.S. Elmendorf, "Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective", 2003 U.Ill.L.Rev. 423.