Philosophy of Property Law, Three Ways

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Is property in some way basic to our moral lives? Many have thought so. For Aristotle, moral virtues, like liberality, presuppose some idea of property, for one can display liberality only with respect to what is one's own. For Kant, property is a requirement of freedom in the external world. For Locke, property, allocated according to principles of labour and desert, is basic to the very idea of justice that our political institutions are meant to secure. Others have denied that property is foundational in this way, suggesting rather that property is one strategy available to us in meeting the demands of our general theories of justice but is not itself morally basic.[1]

In this chapter, I want to unpack what contemporary writers have to say about property's moral salience. Philosophical inquiry of this sort, I will suggest, proceeds on three levels. On the *first* level, we ask what property is, as a conceptual matter. Property relations, we will see, are relations mediated by particular things.[2] A mediated relation is not just a relation between a person and a thing; rather, it is a relation among people with respect to specific things. Of the many ways that people might relate with respect to things, the idea of ownership is conceptually basic. Ownership is the foundation for the many other forms of property relations that we find in modern liberal societies, where owners can carve out subordinate interests in things for others: easements, security interests, profits, fisheries, leases, bailments, trusts, licences, etc. But all this is itself possible only within the framework that ownership sets down.

The conceptual core of property, then, is ownership, and the conceptual core of ownership is the idea that someone is in charge with respect to that thing in relation to others. This kind of "in charge of" position connotes at least exclusivity and the

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

[2] It is a "bedrock" idea in law that property rights exist not "in the air" but only with respect to specifically identified things. See Lord Mustill in *In Re Goldcorp Exchange Ltd*, [1995] 1 AC 74.

separability of thing from the owner. So fugitive resources, like air or flowing water or ideas, cannot be owned because we cannot relate to others through them in the way that is characteristic of ownership: these are resources over which no one is capable of exclusive control. Parts of our bodies, even parts that might be valuable to others, like our kidneys, cannot be owned because ownership is possible only with respect to things that are independent of us.

Much beyond this basic core is a matter of political choice about how to shape the position of ownership and the normative powers, privileges and responsibilities associated with it. There is, then, a *second* level of philosophical inquiry, concerning the place of property in our general theories of justice. Property is so often at the centre of revolutionary thinking about the social order because it organizes a basic and unavoidable mode of human interaction: how we relate with respect to things. There is always a need for political philosophy to think and rethink the ways that people could possibly relate with respect to things. We can imagine a society that for reasons of freedom or utility leaves owners plenary power to profit and to advance their plans for life any way they can through their position. A utility-maximizing system of property might grant owners wide latitude to use their position as owner just as a bargaining chip, to draw others into utility-enhancing transactions. We can also imagine a society that has theological or ideological commitments that lead to other-regarding restrictions on the agendas owners can set with respect to a thing and that attach extensive duties to ownership.

There is yet a third level of philosophical thinking about property that concerns the distribution of rights to hold property. At this level of inquiry, we engage a much larger set of questions about how justly to distribute basic goods in society. It is in this context, in resolving questions of distributive justice, that we might say with Rawls that property is not itself an organizing moral idea. We can be concerned with a just distribution of the basic goods that people require, whatever their purposes in life, without being concerned to bring about this distribution *as* property. We might agree on the value of equal access to basic goods without being on board with the idea that these basic goods take the form of property. Many have argued plausibly enough that other levers of social justice, such as tax and transfer schemes or a system of public

accommodations or use-rights, are better suited to redressing this kind of distributive injustice.

This chapter focuses on the first two modes of philosophical inquiry, those most directly concerned with the conceptual and normative contours of property in law. I will begin with some basic agreements and disagreements among contemporary property theorists about how to make sense of property as a conceptual matter. I will go on to frame the dominant accounts of property today in terms of what each has to say about the place of property within our larger institutional arrangements.

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I. **What is Property?**

Conceptual analysis of property begins with the idea of ownership. Ownership is structured as a position of authority in relation to others: what it means for me to own something is that I, not you, am in charge of setting the agenda for it. We need not invoke the idea of ownership to explain our being in charge of ourselves: ideas of personhood, rather than ownership, do the work there.[3] Ownership describes the kind of "in charge" relation we might have with respect to things that have no necessary connection to any one of us. We can assume ownership only of things that are separable from us such that anyone at all could stand as owner in our stead without any normative change to the position itself.[4] We should understand this point formally: of course it might make all the difference in the world to my well-being, my sense of self, etc, that I, not you, own my beloved house. Nonetheless, the formal structure of ownership is the same whether it is you or I that stands as owner. It is in this sense then that houses are separable things. The position of ownership has the same normative components to it—the same exclusive authority to make decisions about the thing with respect to others—no matter who holds that position. By contrast, a person cannot take charge of another person in quite the same way as a person can be in charge of herself simply in virtue of being herself. As a moral

[3] Lockean property theorists, who derive justifiability of property from self-ownership, do not see things this way.

[4] See J.E. Penner, *The Idea of Property in Law* (1997). We find the idea of separability in Aristotle's treatment of property (in the Politics).

and a legal matter, people can of course assume positions of trust and responsibility in relation to others, who lack the capacity to care for themselves. Think of parents or guardians of mentally incapacitated people. But when we move from a situation where one person is in charge of herself to a situation where another is in charge of her, there is a conceptual and normative difference too in the normative position of the person in charge.

The separability criterion sorts the world into *things*, which can be the object of property, and *persons*, who cannot. The person-thing distinction establishes the outer limits of property. The point I make here is a basic one: we, as embodied beings, cannot enter into the external relation of owner-owned thing with ourselves. The person-thing distinction leaves no room to consult other considerations, like our preferences or utility, for treating body-parts as property so long as they remain part of us.[5] Body parts while they remain part of the person fall outside the limits of property. Even if my leg means less to me than the teacup my grandma left me, I may transfer property in my teacup, but not my leg, in my hour of need. By contrast, body parts already severed from the person are at least candidates for inclusion within our system of property. The conceptual obstacles to property are not present with respect to already severed body-parts (e.g. my shorn hair). Whether body parts are ownable after severance is decided on public policy grounds, beyond anything the idea of property itself can sort out for us in conceptual terms.

Even if we believe on grounds of freedom that we are justified in treating body-parts as property in the context of voluntary interactions, these intuitions surely falter when we consider how property in body-parts would play out in other contexts. It is a mistake to think that property is defined with an eye just to its role in our voluntary transactions with others. Property by its very nature allows for many forms of succession, some voluntary as when we sell things or leave to others by will but some involuntarily too as when someone else adversely possesses our thing or is appointed owner by operation of law, as in a bankruptcy or a forfeiture.[6] If my leg could be an object of

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[5] See Margaret Radin, Contested Commodities (1996).

[6] We may have public law reasons to allow debtors' to shield some assets from creditors notwithstanding the logic of property.

property, then we would have to allow that it could also work as property in circumstances in which the things that belong to me are made available, like it or not, to satisfy the claims of my creditors.[7] The person-thing distinction, which the separability requirement preserves, is important to guard against involuntary losses of our very persons.

The separability criterion offers a modest conceptual supplement to the ethical case against: slavery is abhorrent as an ethical matter; slave-holding is also defective as a form of property.[8] The conceptual point is this: the master-slave relation is a status relationship that might be occupied without normative change by a great number of people, but not by anyone at all. The normative position of a master with respect to the slave is not a position that the slave herself could occupy. There is always someone for whom *A* is always and only a person and never a thing: *A* herself. Even those who find the idea of self-ownership compelling surely do not assert a normative equivalence between self-ownership and another's dominion over oneself.[9] The practice of slavery does not establish the possibility of property in persons.[10] Those who enslave people commit themselves to a category mistake –treating people as things—that is at the same time deeply unethical.

Property concerns things not persons. But does separability fully account for the thingness of property? Is there something else, like materiality, that is in play when it comes to allowing that some things are objects of property, others not? As we will see later, some of the normative reasons to have property at all are particularly compelling with respect to material resources, like land, that unavoidably form the setting for human

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[7] Think here of Shylock's claim to a pound of flesh from Antonio, in the Merchant of Venice.

[8] Cf Jeremy Waldron, The Right to Private Property at 33 n. 15 (making the case that there are ethical, not conceptual, problems with slavery. See Aristotle, in Politics, 1253b1 (concerning slave as "an instrument of action, separable from the possessor.")

[9] Cf Alan Ryan, Property (1987) at 58-59.

[10] Slavery is conceptually intelligible not as property in human form but as a claim to dominion over another's *liberty*. In the natural law tradition, liberty and property were both thought to be capable of human dominion, in contrast to life, which was thought not to be as a matter of natural law. See e.g. Suarez, Disp XIII, On War in Selections from Three Works of Suarez (trans. 1944) at 845. Slavery is obviously ethically abhorrent whatever conceptual form it takes.

life and activity. Materiality is not, however, conceptually required for property. What is crucial is that a thing, material or otherwise, is independent of persons such that anyone at all could take ownership without any normative change to the position itself. Take, for instance, a creditor's right to recover a debt obligation. This is a right to sue for the repayment of a sum of money. In fact, debt actions are treated in law as a kind of intangible property. On the basic view of property as an exclusive right to a separable thing, we can see why that is properly so. A debt action is separable from me, the original creditor, in just the same way that an apple is separable from me: neither resource constitutes me as a person (at least not until I eat the apple), and anyone else could stand in my place as owner of the apple or the debt without any normative alteration to the position. Because a debt action is separable, it can be a "thing" assignable as property to others.

Now, contrast a debt action with an action in tort to recover compensation for a negligently inflicted injury. Say you were driving at a recklessly high speed and ran me over in an intersection, breaking my leg. I have a right of action against you for negligence. The separability requirement explains why personal tort actions are not assignable like debt actions can be: there is a special connection between my personhood and an action the purpose of which is to make me whole again. The inalienability of a right of action, the purpose of which is to make me whole again, can be understood as analogous to the inalienability of my leg or the licence to injure it.[11]

Exclusivity

Ownership, as a position of being in charge of things in the world, also implies the *exclusivity* of the position itself. Most property theorists today take exclusivity to refer to a right to exclude others from a thing. Clearly, there are some things that defy exclusivity in this basic sense. Take an idea, like the idea for a story. An idea, once it is shared publicly, is separable from me: it does not exist just in my mind anymore and others may think on it without interfering with my person. And yet ideas cannot be owned because, upon meeting the requirement of separability, they are at once no longer

[11] We see precisely this reluctance to allow the propertization of legal actions in historic legal rules against champerty and maintenance.

capable of exclusivity. If I tell you my idea for a story, at best all I can do is ask you not to repeat it or to use it for profit or copy the particular way I have expressed it. I cannot very well dislodge the idea itself from your thoughts so as to hold it exclusively for myself. So there are conceptual problems with thinking about ideas as ownable "things."

Other resources are separable from us but incapable of exclusivity because they lack boundaries along which another might be excluded. I can exclude you from a column of space filled with air. But I cannot exclude you from the air itself, which moves around and is not contained. Air is one of the things Blackstone called "fugitive resources," which defies containment within fixed boundaries. Similarly, I cannot exclude you from running water, although I might be able to exclude you from a vessel that contains water or a column of space above submerged land, across which water flows.

Ownership as an Office

Is there anything more to the basic concept of ownership than the right to exclude and the separability of the thing? I think so: there is the normative power with respect to that separable thing, to which the idea of exclusivity refers. We cannot make sense of the idea of ownership without making sense of the nature and structure of the position owners exclusively occupy *within* the boundaries of the thing.[12] Take the case of land. Land clearly admits both of separability and excludability. While we must always stand somewhere, we can yet see how a particular space on earth is separable from any one of us: there is no reason of personhood why a particular tract of land might not just as well be yours as mine. I can own land and exclude others insofar as they have somewhere to move upon being excluded.

But ownership of land seems to imply something more about the nature of the position I exclusively occupy as owner, something that does not cash out just in terms of exclusion. A sovereign, a private owner, a squatter, a tenant and a licensee may all have rights to exclude with respect to the same tract of land. In exercising their rights of exclusion, they might act in very similar ways, e.g., building fences, refusing entry, etc.

[12] See Larissa Katz, 'Exclusion and Exclusivity in Property Law." (2008) 8 U.T.L.J 275.

Yet, we invoke different kinds of decision-making power when we describe one holder of a right to exclude as an owner, another as a state, and yet another as a mere licensee. Owners are in charge of regulating private activity with respect to things for reasons of their own; states exercising territorial authority over that same land are in charge of making decisions on behalf of everyone subject to public justification requirements.[13] We can similarly distinguish between owners and others who have private rights to exclude with respect to a thing, like the guest for the night or the finder of a thing. Owners are in charge in a way that a licensee, or a finder, is not. A licence is by its very nature a limited jurisdiction to make some particular use of a thing. A person licensed to occupy a house for the night has a right to exclude all comers for that night but she does not have the power to determine more generally the mode of occupation of that property or to vacate her position and appoint a successor or to carve out other lesser property rights for others, like a right of way for the neighbour or a mortgage for the bank. Similarly, someone who finds my necklace has a right to exclude other non-owners. But what we mean by a finder, in contrast to a thief, is someone who takes possession of a thing with the intention to return it to its owner, not someone who sets out to usurp the owner's role.

What then distinguishes the position of the owner from the position of the licencee or the finder or even the political sovereign, all of whom might have rights to exclude with respect to that same thing? It is the distinctive nature of the normative power that each has. The position of owner is defined by the kind of authority she has to set the agenda for the thing. What it is for a thing to be mine, in the sense that I own it, is that my decision-making authority is supreme among private actors. Seen in terms of its exclusive authority and the role it carves out for owners, ownership is perhaps best thought of as a kind of office: an impersonal, stable and enduring position of authority

[13] See Larissa Katz, 'Property's Sovereignty' (forthcoming, Theoretical Inq. in Law), and Arthur Ripstein, 'Property and Sovereignty: How to Tell the Difference' (forthcoming, Theoretical Inq. in Law) on differences in the kinds of authority that states and owners have. See Jeremy Waldron, 'Settlement, Return, and the Supersession Thesis' (2004) Theoretical Inq. In Law 5, questioning the state's right to exclude outsiders.

tasked at least with agenda-setting for things, allowing for a succession of officeholders by grant, usurpation or appointment by the state.[14]

Thinking about ownership as an office also accounts for another feature of ownership: the variety of ways we can conceive of *holding* ownership without changing the way ownership as an office functions in relation to third parties, i.e., non-owners. The office of ownership may be highly individualized, as in the case of private property, or it may be collectively held, as in the case of communal ownership, according to which a group of people share in the decision-making. We can make the same basic point about the variety of ways that owners can arrange for the distribution of the benefits and burdens that accede to the office of ownership, e.g., among present and future interest-holders, corporations and shareholders, trustees and beneficiaries. The basic idea of ownership as an office allows owners to make a variety of distributive choices within the office without any normative change to the basic "in charge" relation of owners vis-à-vis others. The office of ownership sets out the framework for the kinds of things the rest of us can do as private actors with respect to that thing and from this standpoint it does not matter what internal governance structure is in place to run that office or who stands to receive whatever value happens to flows from it.

Even public ownership, as when the state owns things, makes use of the same basic idea of ownership as an office. The possibility of public ownership does not undermine the distinction I drew above between ownership and state sovereignty. When the state acts qua owner, it makes decisions that are attributable not to its distinctive public authority but to its ownership authority. There is a distinction then between ownership authority and other kinds of public authority, notwithstanding that a state, like a trustee, will have super-added constraints to exercise its ownership authority in the public interest. A state might fail to observe the distinction, of course. In failing to observe the distinction between ownership and public authority, the state simply acts ultra vires. I take it that this was Lord Mance's concern in a case against the British

[14] Larissa Katz, 'Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law,' (2010) 55 McGill L. J. 47; Larissa Katz, 'Governing Through Owners,' 160 U. Penn. L Rev. 2029 (2012); Chris Essert, 'The Office of Ownership,' (2013) 63 U.T.LJ. 418.

Secretary of State, following the forced removal of the Chagos Islanders, prior to the leasing of their island to the United States military.[15] In that case, the government claimed to be exercising its prerogative power in relation to the British Indian Ocean Territory but acted, according to Lord Mance, as though it were exercising a power to make decisions about the bare land. From that standpoint, as agenda-setter for the land, the state viewed the inhabitants as a mere inconvenience. That, it turned out, was the wrong standpoint to take.

One way to distinguish between public ownership and territorial authority is by applying the separability thesis in the context of public ownership. A state cannot act as owner with respect to things that are wrapped up in its very identity, such as its territory. It must be the kind of decision-making authority that the state in principle could convey to someone else without making that person, or entity, the state in its stead. Those things that a state owns it may transfer to another without undermining its status as a state. Those things that make the state a state, for instance, its territory, cannot be severed and transferred to another in the same way.[16]

II. Property's place in the legal order

The idea of ownership at the core of property law is generally understood to be a way of attaching exclusive rights to scarce resources. Considerations of political justifiability yield different views of how property might operate within our legal order and lead theorists to develop subtly different conceptions of property.

Property theory today falls roughly into three ways of thinking about how to arrange property within the legal order. The first sees property as incidental to contract: property rights are just the bargaining chips we each start with as we contemplate contracting with one another.[17] This arrangement, according to which we go through

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[15] *Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61.

[16] When the state grants private property rights, it is not giving up its political authority over lands privately owned. It is merely yielding private agenda-setting authority for those lands to owners, subject always to its public authority to regulate and even to expropriate for public purposes.

[17] See Henry E. Smith and Thomas W. Merrill, 'What Happened to Property in Law and Economics?,' Yale Law Journal 111 (2001) at 357.

property to get to contract, reflects broadly utilitarian considerations. A second view sees property primarily through the lens of tort*:* here it is claimed that the rights of ownership are plenary with respect to the thing, yielding an absolute right to exclude for any reason at all, reined in at a later stage by public law considerations. Thus, it is always a wrong for others to use or damage a thing in any way without the owner's consent. This view typically is motivated by an understanding of individual freedom that its proponents take to be conceptually basic to the idea of property: each person should be entitled to do as she likes with her thing, limited only by overriding public law considerations.[18] Property is important insofar as it sets out additional ways in which others might wrong us. Here too property seems to occupy a place within our legal order that is on the way to somewhere else, viz., the law of torts. On these views, property law is liminal to the law of contract or torts, and itself has a very small normative footprint within the legal order.

A third view takes property relations to concern a broader slice of human interaction than our consensual or contractual relations. On this view, property is not liminal to these other modes of interaction; rather, it makes possible a distinctive kind of human interaction shaped by ownership authority itself. [19] I have characterized this normative power in terms of the owner's authority to set the agenda for a thing. There are other, much older accounts of the normative position of owners in terms of stewardship, the power and the responsibility to care for things.[20] On this third view, it is in setting out a purposive idea of ownership that property law stakes out a distinctive place in our legal order.

Now let's take each view in turn, with an eye to explaining the political motivations for each.

(i) Property as liminal to Contract

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[18] Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (2009)

[19] This view lies somewhere between O.W. Holmes' view of property law as mostly technical and philosophically uninteresting, and Maitland's, who wrote that our whole legal order seems at times to be just an appendage to the law of real property. See Maitland, The Constitutional History of England (1920) at 538; O.W. Holmes, The Common Law (1881).

[20] For a contemporary treatment, see John Finnis, Natural Law and Natural Rights, 2nd edition (2011).

I will start with the idea that property just sets the stage for contract law, the idea that property is liminal to contract. Private ordering, on this view, is a matter of small-scale cooperation, or voluntary agreement between private actors. Property is simply the initial (and so provisional, if the market is working properly) allocation of veto-rights with respect to the use of scarce resources about which we then bargain toward an optimally efficient allocation of rights.[21] Many economists do not think there is a general principle that would establish who ought to have the right to exclude, prior to any conflict about use. In a world of no transaction costs, the right could be allocated on either side of a conflict and we would still arrive at efficient outcomes. Take a conflict between factory-owner A who discharges pollution that drifts downstream onto the land of farmer B over the right to pollute or to repel pollution. While a pollution-generating factory owner and a neighbouring farmer might themselves care very much who starts with the right to exclude, from the vantage point of efficiency it does not matter at all so long as there is no obstacle to bargaining. Through contract, the right moves to the highest value user.

The corollary to the idea of property liminal to contract is a view of property as a bundle of rights: where transaction costs inhibit free market exchange, we (that is, judges) ought to arrange entitlements as between A and B so as to bring about our preferred outcomes, typically enhanced social utility or efficiency. From this standpoint, ownership does not take any particular form, such as a general right to exclude, but rather is a malleable bundle of rights. Each stick in the bundle represents a right to use or to exclude another from use with respect to some thing. The bundle itself may be tailored to meet the demands of social utility or efficiency in individual cases.

(ii) Property as liminal to Tort

Recall now the second idea, that property sets the stage for tort. Property, on this view, sets out a category of wrongdoing characterized by unauthorized boundary-crossings. From this viewpoint, owners have a plenary power to exclude others with

[21] For R. Coase and his followers, private ordering is primarily about voluntary transactions. See Calabresi and A. D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral.'

respect to a thing, such that it is always a wrong for a person to enter another's property without her consent. Ownership is simply what results from a general right against unauthorized boundary-crossings, waivable by consent.

Those who position property at the threshold of tort insist that the right to exclude is a fixed input to judicial reasoning about property. In the dispute between the farmer and the factory-owner, the farmer's right to exclude structures the analysis of tort liability: it is prima facie wrongful, on this account, to send substances over the boundary-line of another's property without her consent.

Kantian exemplars of this approach start with the idea of freedom as non-domination, according to which no one is subject to the choices of another. Property is an extension of this idea of freedom to things in the world. Through property, we are in charge of things in just the same way that we are in charge of ourselves more generally. The institution of private property as a plenary right with respect to things is taken to be a necessary condition for individual freedom.

More recently, others have developed instrumental accounts of property-as-liminal-to-tort. On these accounts, too, property is a right to exclude concerned primarily with the wrong of unauthorized boundary-crossings. One such account is an application of Joseph Raz's concept of authority to property as a discrete area of law, individuated by our valuable interest in using things.[22] Our interest in use thus justifies a duty on the part of others to exclude themselves and so yields the idea of property as a right against unauthorized boundary-crossings. At its core, this interest-based view of property rests on an empirical claim, that it is a contingent but stable feature of human lives that we cannot effectively use scarce resources without excluding others.

Other instrumentalist accounts place property on the threshold of tort as a part of an indirect strategy to enhance the efficiency of the system.[23] The aim is to enable small-scale cooperation at optimally low social cost, and a commitment to a general right to exclude is cast as the best way overall to enable property to do that job within the private law order. By employing bright-line rules, such as "keep off things belonging to others," we achieve greater efficiency: unauthorized boundary-crossings sets out a wrong that

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[22] See Penner, The Idea of Property in Law.
[23] Henry Smith and Thomas Merrill are prominent exponents of this view.

imposes lower information costs than defining rights and their correlating duties case by case. This indirect utilitarian approach is offered as a corrective to conventional economic accounts that take the "liminal to contract" approach, according to which property is a bundle of rights assembled ad hoc.

(iii) The Internal Domain of Property

This brings me to a third cluster of property theories that explain property in terms of the normative power owners have and not merely in terms of the right to exclude, over which *other* normative powers, such as power to contract or consent, can be exercised. Stewardship accounts of property offer the most ambitious and extensive claims for ownership as a normative position defined in terms of its own internal mandate or purpose. Many such accounts of private property emerge from the biblical idea that the earth is given to us in common.[24] Owners have private authority over particular resources as stewards for humankind. The basic justification of private property is its value in coordinating our care of the earth: we are better able to care for things through highly individualized positions of stewardship. There are, relatedly, virtue-theories of property, according to which ownership decisions are meant to aim at and foster virtues such as humility, industry and justice.[25]

How else might we conceive of property as a purposive institution? There is a great distance between stewardship accounts of property, which claim a rich internal purpose for property, and accounts of property as just a right to exclude others, that tell us what property does (i.e., setting up gatekeepers with rights of exclusion) but that deny that property law aims at anything else in doing so. In this space, I have found room for a conception of property as a private office charged with setting the agenda for things in relation to others.

Ownership as an office of agenda-setting authority solves a basic moral problem about the standing to determine what ought to be done with things we all have an interest

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[24] Some readings of Locke suggest that through the sufficiency provision and the constraint on waste, we arrive at stewardship constraints on the normative powers of owners. See e.g. Gopal Sreenivasan, The Limits of Lockean Rights in Property (1995).
[25] Eduardo Penalver and Greg Alexander, 'Properties of Community,' (2008) Theoretical Inq. in Law 10; Eduardo Penalver, 'Land Virtues,' (2009) 94 Cornell L. Rev. 821.

in using productively and without conflict. There is a problem of standing because none of us has the inherent moral imprimatur to impose our own views on others about what ought to be done with a thing (as we do with our bodies). Nor do we have standing to make decisions about things just in virtue of something like expertise or desert. Need, as we have seen, may justify a lesser right to use or consume something but not the greater power to set the agenda in relation to others. To see why that is so, consider our moral positions in relation to one another prior to anyone's having charge of things. The very first move— to take something up as my own—encounters a problem of standing: why me? I cannot justify taking charge of things just on the grounds that I thereby carve out a sphere for myself in which I am not subject to the choices of another. Nor can I take charge on the grounds that I know best about what ought to be done. That is because, in taking charge of that thing, I displace a state of affairs in which others are not subject to my choices and in which others' views about what ought to be done with that thing have the same moral weight as my own.[26] We do not encounter this problem of standing with respect to our rights to our person: your views and my views about what ought to be done with my body are not on equal footing from the get-go.

Ownership solves the problem of standing by designating impersonal, individualized private offices, through which people have authority to take charge of things. Seen as a solution to one kind of moral problem, ownership does not entail a much larger authority to govern other aspects of human affairs or to conscript others in service of our agendas. For this reason, ownership regulates the activities of others only negatively, by enabling owners to establish the terms on which others may use her thing but not to conscript them to advance her agenda.

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

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

presented themselves and required him to make more, rather than fewer, social decisions.[27]

The idea of ownership is less obviously important (and less intuitively at work) with respect to things that don't invite the same intensity of dealings by others—my single use Kleenex, my apple, my disposable pen. Property with respect to these sorts of things is important if at all to work out a problem of scarce resources, or competing interests in use: one Kleenex, two runny noses, all that we could do is allocate a right to exclude to one or the other person. Of course exclusion sometimes matters to sort out rival claims to consume things in the context of scarce goods. But we can see how that concern is ably resolved simply by assigning rights to consume or use, protected by mere rights to exclude. Full-blown ownership matters where owners have work to do in harmonizing the many ways that people might use things over time. Owners do this by setting the agenda for the thing and establishing a framework of lesser property rights and privileges.

It is not then, as Hume thought, scarcity that makes ownership so important –mere rights to possess can deal with the allocation of scarce resources as among competitors—but the complexity of human activity with respect to a thing over a period of time or space that requires someone in charge to draw up plans for that thing.

This turn from scarcity to complexity as the motivator for ownership fits our everyday intuitions about what is both attractive— and dangerous – about property today: an exclusive right to possess some space with a roof overhead is responsive to my need for shelter in conditions of scarcity. Full-blown ownership however puts me into a position to do a great deal more than just to satisfy my personhood interest in shelter or even my individual interest in possessing more than I need. It allows me to determine the relations others might have with respect to that thing on a much broader scale.

C.B. Macpherson famously drew our attention to the possessive individual, whose interest in property was based on consumption. I mean to draw attention to how ownership gratifies a very different human interest, our interest in being in charge. Ownership introduces a new capacity for self-seeking activity, not limited to

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

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

This view of ownership as a private office carves out a constitutionally basic role for private actors without, however, eliminating a role for the state acting through public officials.[28] The office of ownership is charged with regulating one aspect of our shared lives while public offices are charged with regulating other arenas of human interaction. Being in charge of one aspect of a plan means not only making the decisions you are charged with but also leaving it to others to make those decisions charged to them. To do away with this aspect of private office-holding—to allow that property is merely a right to exclude, rather than a normative power of agenda-setting— would be, perhaps counter-intuitively, to relegate private actors to a much more trivially private sphere, one in which they are taken to concern themselves just with their own ends-setting, free to act strategically at every turn, to "blow hot and cold" as their private interests dictate.

Property, seen this way, forms part of the constitutional order, the "master plan" that allocates authority in society to private and public decision-makers.[29] (To quote Barbara Wooton out of context, it is never a question of whether to plan but only a question of who plans.[30]) A confederation of owners brings about a state of affairs in which there are no agenda-less things: all ownable things are subject to human agency if not to actual human use. What Holmes calls "the general tendency of our law … to favour appropriation, to abhor the absence of proprietary or possessory rights as a kind of

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[28] But note that a network of private offices is liable to be repurposed to perform other tasks of public administration, too, a phenomenon I call "governing through owners." See Larissa Katz, 'Governing Through Owners', 160 U. Penn. L Rev. 2029 (2012). See Robert Elllickson, 'The Affirmative Duties of Owners' (Yale Law & Economics Research Paper No. 499, July 10, 2014).

[29] Scott J. Shapiro, Legality (2011), ch. 6.

[30] See Barbara Wootton, Freedom Under Planning (1945) (responding to Hayek).

vacuum" reflects I think a concern with vacancy in the office of ownership.[31] So too does a general restriction on abandonment that make it very hard to vacate the office without having first someone ready to stand in your stead.[32] From the standpoint of property's internal mandate, we can see why the law abhors a vacancy: the office of ownership is *responsible* for agenda-setting for things. We can similarly make sense of other basic and otherwise puzzling aspects of property law, like adverse possession, from the standpoint of property's mandate. A person's hold on the office of ownership cannot survive a loss of de facto authority to another simply because de facto authority is essential to the fulfillment of the most basic role of owners actually to make plans for things.

Conclusion

So is property law morally salient? This chapter suggests ways that through our political choices we might make it so. Property is a flexible institution that history has shown capable of insinuating itself into more or less of our moral, social, economic and political lives. The work of the legal theorist is just to expose what property is in law, and how and on what terms it might be justified in organizing our relations as they concern things in the world.

[31] Oliver Holmes, The Common Law (1991) at 237. This idea is, I think, a modern descendant of what Maitland called the ancient common law doctrine entitling the Crown to the service of its subjects.

[32] See Eduardo Penalver, 'The Illusory Right to Abandon,' Mich. L. Rev. (2010)