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EDITORIAL ADVISORS

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In memory of John Copeland Nagle (1960-2019), a remarkable co-author, scholar, teacher, and friend

John Copeland Nagle

Summary of Contents

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Preface

Our casebook takes a fresh approach to teaching property, one that combines a thorough overview of the traditional property law topics with an integrated approach to such subjects of current interest as intellectual property, rights in a person's persona, and property rights in living things. We are committed to giving our students a firm foundation in land-based property law, including such topics as present estates, future interests, concurrent ownership, private and public land-use regulation, takings, and landlord/tenant law, but recognize that people conceive of property more broadly than simply in terms of real property. Intellectual property offers a case in point: Information has economic value and may be protected by a property rights system. We believe that an in-depth and integrated treatment of intellectual property law promotes a broad understanding of the scope of property and exposes students to an area of law that is undergoing rapid changes. Similarly, we have added a unit on the public trust doctrine, which has emerged as a critical tool for environmental protection in many states.

Further, the pervasive role of race and exclusion in property law has rightfully received substantially more attention in recent years. This edition explores in a new chapter how status and power have fundamentally shaped rights in property. As it has in prior editions, it also considers this theme in various other modules of the casebook.

Our pedagogical tools include principal cases, text, notes, problems, and excerpts from books, law review articles, and interdisciplinary sources. Where appropriate, we have included statutes, regulations, and maps. We have used problems sparingly, where it strikes us as the best way to teach a particular topic. We have provided transitional and expository notes to facilitate student understanding and foster analysis of cases and materials. However, we have been careful to leave enough unsaid to preserve that "eureka!" moment when a student experiences an intellectual epiphany. To that end, we have edited many of our principal cases with a light hand.

As teachers, we believe that the selection of cases is critical to the success of our instructional materials. If the facts aren't interesting and provocative, the case won't engage students and fuel class discussion. We have chosen cases that represent good facts and good law. We offer a mix of recent cases, for example Marshall v. ESPN Inc. (student athletes' publicity rights), Bonnichsen v. United States (Native American human remains), Glass v. Goeckel (public trust doctrine), and Friends of Danny DeVito v. Wolf (COVID-19 takings dispute); and classic cases, for example Armory v. Delamarie, Dred Scott v. Sandford, and Village of Euclid v. Ambler Realty Co.. We favor cases with concurring and dissenting opinions and usually include a short excerpt from each dissent, believing that exposing students to contrasting points of view enhances class discussion.

We have created this book to be modular by design so that those teachers who have only three or four credit hours with which to teach Property can omit chapters without confounding their students with chapters that no longer make sense. Each of our chapters can stand alone. (To use the holiday lights analogy, our book is wired in parallel, not in a series, so that if one light goes off, the others will still shine.) We have tried to be as concise and succinct as possible, keeping chapters to a manageable length so that teachers can cover as much terrain as they need to without having to spend an inordinate amount of time pruning and splicing our book to fit their syllabus.

This fifth edition of our book retains a modular approach and continues our commitment to keeping the book concise, while offering coverage of all major topics in approximately 900 pages. We have included twenty-one new principal cases and three substantially new chapters.

We acknowledge the substantial contributions of our co-author John Copeland Nagle, the late John N. Matthews Professor of Law at the University of Notre Dame, on the first four editions of this book. He was a remarkable scholar, teacher, and friend, and much of what he contributed remains in this fifth edition.

Throughout the experience of writing and editing, we have kept our focus on the broad question, "What is property, and why does that label matter?" We take up this theme in the first chapter and develop it throughout the book. We hope to provoke students to consider this fundamental question from multiple perspectives, seeing that property may be tangible (e.g., as land) or intangible (e.g., as information), and how property law intersects with other bodies of law, (e.g., contracts). We take a broad view of property and pay substantial attention to new developments in property law. At the same time, our book provides a balance. We have furnished ample materials dealing with the major areas of land law and traditional personal property.

It is our goal that our students come away from our class with a clear and deep understanding of what encompasses property, and how and why the law has developed, and continues to develop, to delineate the rights and obligations of property holders. We hope that you enjoy these materials as much as we have in our teaching, and that your students, like ours, find them deeply rewarding.

James Charles Smith
Edward J. Larson
Alejandro E. Camacho

November 2021

Credits

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Property

Chapter 1

The Emergence of Property Rights

This chapter introduces the idea of property by exploring how it has developed in two discrete modern contexts, the right of publicity and cultural property. First, we offer a few observations about the meaning of the term *property*. The next section of this chapter contains perspectives on property, which are useful to consider in connection with the materials in this chapter and throughout this entire book.

In the popular lay sense, property usually refers to tangible things. A person's property, we say, consists of one's car, furniture, clothing, tools, and the like. Land ownership and intangible property, such as bank deposits, stocks, and bonds, are also often imagined as the ownership of *things*. In the study of law, the term *property* often is used in a legal sense different from the popular image as referring to a thing.

Property is often defined as a "bundle of rights" or, more vividly, as a "bundle of sticks." Some writers credit Justice Cardozo with developing the "bundle of sticks" metaphor in his 1928 book *Paradoxes of Legal Science*, while others emphasize the writings of Yale law professor Wesley Hohfeld in the prior decade. Indeed, the "bundle of sticks" metaphor can be traced to *Aesop's Fables*, albeit in a rather different context than property law.

The imagery of a bundle of sticks is meant to suggest that there are many distinct rights associated with property. Each right constitutes a single "stick" that is contained in the bundle. A property owner may hold all of those rights, or just some of them. Likewise, some of the sticks may be owned by one person, while other sticks are owned by another person. Or the government may own some of the sticks so that the private owner's rights to the property are less than absolute.

So which sticks comprise the total bundle of "property"? No definitive list exists, but many would accept most of the following aspects of property ownership:

- The right to possess
- The right to use
- The right to exclude
- The right to include
- The right to consume
- The right to destroy
- The right to sell
- The right to give
- The right to transfer by inheritance or will

As we shall see throughout this book, property law often recognizes other aspects, and sometimes does not include all of the above rights.

A. SEVERAL PERSPECTIVES ON PROPERTY

The idea of private property, in some form or another, is universal in all societies since the advent of recorded history. Yet is the institution of private property justifiable? If so, why? Since antiquity scholars have grappled with the broad questions of jurisprudence and moral philosophy raised by the attempt to support the institution of property and explain its limits. While it would be possible (and conceivably enlightening) to read hundreds of pages on this vast topic (easily lasting an entire law school course), for the time being we'll consider a thumbnail sketch of several classic and contemporary perspectives or theories. These perspectives are, in some instances, cumulative rather than contradictory; they don't necessarily represent competing rationales. Later in the course we will consider some other ideas.

1. Occupation

This rationale, typically considered to be the earliest theory of private property, derives from Roman law. In the following excerpt, Sir Henry Maine describes the contours of the occupation theory and critiques it. A leading statesman and jurist of Victorian England, Maine served as a professor at Trinity College in Cambridge. He became prominent as a scholar of early legal systems, using comparative methods and integrating insights from the emerging social sciences of anthropology and economics. He spent most of the 1860s and '70s in India (then a British colony), where he organized the Indian legislature and designed the general plan for the Indian legal code.

Henry Maine

Ancient Law

237-39, 243-44, 249-51 (Univ. of Ariz. Press 1986) (1861)

The Early History of Property

The Roman Institutional Treatises, after giving their definition of the various forms and modifications of ownership, proceed to discuss the Natural Modes of Acquiring Property. Those who are unfamiliar with the history of jurisprudence are not likely to look upon these "natural modes" of acquisition as possessing, at first sight, either much speculative or much practical interest. The wild animal which is snared or killed by the hunter, the soil which is added to our field by the imperceptible deposits of a river, the tree which strikes its roots into our ground, are each said by the Roman lawyers to be acquired by us *naturally*. . . .

It will be necessary for us to attend to one only among these "natural modes of acquisition," Occupation or Occupancy. Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called *res nullius*—things which have not or have never had an owner—can only be ascertained by enumerating them. Among things which *never had* an owner are wild animals, fishes, wild fowl, jewels disinterred for the first time, and land newly discovered or never before cultivated. Among things which *have not* an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the *Occupant*, who first took possession of them with the intention of keeping them as his own—an intention which, in certain cases, had to be manifested by specific acts. . . . The Roman principle of Occupancy, and the rules into which the jurisconsults expanded it, are the source of all modern International Law on the subject of Capture in War and of the acquisition of sovereign rights in newly discovered countries. They have also supplied a theory of the Origin of Property, which is at once the popular theory, and the theory which, in one form or another, is acquiesced in by the great majority of speculative jurists. . . .

. . . Occupancy is pre-eminently interesting on the score of the service it has been made to perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in Occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of Natural Law. The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once *res nullius*, and since its peculiar view of Nature led it to assume without hesitation that the human race had actually practised the Occupancy of *res nullius* long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the "no man's goods" of the primitive world became the private property of individuals in the world of history. . . .

Even were there no other objection to the descriptions of mankind in their natural state which we have been discussing, there is one particular in which they are fatally at variance with the authentic evidence possessed by us. It will be observed, that the acts and motives which these theories suppose are the acts and motives of Individuals. It is each Individual who for himself subscribes the

Social Compact. It is some shifting sandbank in which the grains are Individual men, that according to the theory of Hobbes is hardened into the social rock by the wholesale discipline of force. It is an Individual who, in the picture drawn by Blackstone, "is in the occupation of a determined spot of ground for rest, for shade, or the like." The vice is one which necessarily afflicts all the theories descended from the Natural Law of the Romans, which differed principally from their Civil Law in the account which it took of Individuals, and which has rendered precisely its greatest service to civilisation in enfranchising the individual from the authority of archaic society. But Ancient Law, it must again be repeated, knows next to nothing of Individuals. It is concerned not with Individuals, but with Families, not with single human beings, but groups. Even when the law of the State has succeeded in permeating the small circles of kindred into which it had originally no means of penetrating, the view it takes of Individuals is curiously different from that taken by jurisprudence in its maturest stage. The life of each citizen is not regarded as limited by birth and death; it is but a continuation of the existence of his forefathers, and it will be prolonged in the existence of his descendants.

The Roman distinction between the Law of Persons and the Law of Things, which though extremely convenient is entirely artificial, has evidently done much to divert inquiry on the subject before us from the true direction. The lessons learned in discussing the Jus Personarum have been forgotten where the Jus Rerum is reached, and Property, Contract, and Delict, have been considered as if no hints concerning their original nature were to be gained from the facts ascertained respecting the original condition of Persons. The futility of this method would be manifest if a system of pure archaic law could be brought before us, and if the experiment could be tried of applying to it the Roman classifications. It would soon be seen that the separation of the Law of Persons from that of Things has no meaning in the infancy of law, that the rules belonging to the two departments are inextricably mingled together, and that the distinctions of the later jurists are appropriate only to the later jurisprudence. From what has been said in the earlier portions of this treatise, it will be gathered that there is a strong a priori improbability of our obtaining any clue to the early history of property, if we confine our notice to the proprietary rights of individuals. It is more than likely that joint ownership, and not separate ownership, is the really archaic institution, and that the forms of property which will afford us instruction will be those which are associated with the rights of families and of groups of kindred.

QUESTION

Can you think of any modern situations in which a new claim to a property right could be rationalized as arising by virtue of occupation?

2. Natural Law

Many believe that private property is a natural right, immutable for all societies at all times. As is indicated by Maine, title by occupation can be justified by

resort to natural law. Saint Thomas Aquinas occupies a central position in the history of natural law thinking. Living in Italy during the thirteenth century, he joined the Dominican Order and became highly prominent as a Christian theologian. His writings include Biblical commentaries, sermons, and philosophical works, the latter drawing extensively on Aristotle. His crowning achievement, the treatise *Summa Theologica*, is divided into three parts. Part 1 (God) argues that God is the universal first mover and first cause. Part 3 (Christ) explores the divine and human nature of Jesus. The following excerpt is from Part 2 (Ethics), in which Aquinas develops his system of ethics, whereby a person strives for the highest end, using the human abilities to reason and to act.

Thomas Aquinas

Summa Theologica

Ch. 2, Arts. 1 & 2 (Dominican trans. 1948) (1273)

. . . External things can be considered in two ways. First, as regards their nature, and this is not subject to the power of man but only to the power of God, Whose mere will all things obey. Secondly, as regards their use, and in this way man has a natural dominion over external things because, by his reason and will, he is able to use them for his own profit, as they were made on his account, for the imperfect is always for the sake of the perfect, as stated above. It is by this argument that the Philosopher [Aristotle] proves that the possession of external things is natural to man. Moreover, this natural dominion of man over other creatures, which is competent to man in respect to his reason, wherein God's image resides, is shown forth in man's creation by words: "Let us make man in Our image and likeness, and let him have dominion over the fishes of the sea," etc. Gen. 1:26. . . .

Two things are competent to man in respect of exterior things. One is the power to procure and dispense them, and in this regard it is lawful for man to possess property. Moreover, this is necessary to human life for three reasons. First, because every man is more careful to procure what is for himself alone than that which is common to many or to all, since each one would shirk the labor and leave to another that which concerns the community, as happens where there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed.

The second thing that is competent to man with regard to external things is their use. In this respect man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need. Hence the Apostle says, "Charge the rich of this world . . . to give easily, to share," etc. 1 Tim. 6:17, 18. . . .

QUESTIONS

Is this justification for property inconsistent with the occupation theory? Does Aquinas offer a theological rationale for property rights?

3. Labor

Another perspective seeks to justify private property on the basis of the labor that produces it. John Locke, an English political philosopher who wrote at the end of the seventeenth century, is widely identified with the labor theory. He was not the first writer to advance the idea, but he succeeded in popularizing the theory. In his *Two Treatises of Government*, Locke attacks the doctrine of divine monarchy, arguing for a government founded on the contract or consent of the governed. He advocated limited government based on both the contract theory and citizens' property rights. Locke lived in Oxford for much of his life. Although he was trained in medicine, he never practiced on a regular basis, instead devoting himself to business, politics, government office, and writing. His publications heavily influenced the intellectual leaders of the American Revolution. Notice the natural law overtones in Locke's work.

Black Hawk, born *Ma-ka-tai-me-she-kia-kiak* in 1767, was a leader of the Sauk Native American tribe in what is now the American Midwest. During the War of 1812, he fought on the side of the British in the hope of pushing white settlers away from Sauk territory. He saw these white settlers as taking land rightfully occupied and cultivated by native peoples. In 1832, Black Hawk led a band of Sauk and Fox warriors against white settlers in Illinois and Michigan territory in what became known as the Black Hawk War. Captured by American forces after the war, he told his story to an interpreter, Antoine LeClair. Appearing in 1833, *Life of Ma-Ka-Tai-Me-She-Kia-Kiak, or Black Hawk*, was the first Native American autobiography published in the United States and an immediate bestseller. In it, he presents a Native American theory of land ownership based on occupancy and labor.

John Locke

Two Treatises of Government

31-32 (Peter Laslett 2d ed. 1967) (4th ed. 1713)

§27. Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *labour* of his Body, and the *work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men: for this *labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

§28. He that is nourished by the acorns he picked up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself. No Body can deny but the nourishment is his. I ask then, when did they begin to be his? When he digested? Or when he ate? Or when he boiled? Or when he brought them home? Or when he picked them up? And 'tis plain, if the first gathering made them not his, nothing else could. That *labour* put a distinction between them and common. That added something to them more than Nature, the common Mother of all, had done; and so they became his private right. And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? Was it a Robbery thus to assume to himself what belonged to all in Common? If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him. We see in *Commons*, which remain so by Compact, that 'tis the taking any part of what is common, and removing it out of the state *Nature* leaves it in, which *begins the Property*; without which the Common is of no use. And the taking of this or that part, does not depend on the express consent of all the Commoners. Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digged in any place where I have a right to them in common with others, become my *Property*, without the assignation or consent of any body. The *labour* that was mine, removing them out of that common state they were in, hath *fixed* my *Property* in them. . . .

§31. It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth, &c. makes a right to them, then any one may *ingross* as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also *bound* that *Property* too. "God has given us all things richly," 1 Tim. vi.12 is the Voice of Reason confirmed by Inspiration. But how far has he given it us? *To enjoy*. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy. And thus considering the plenty of natural Provisions there was a long time in the World, and the few spenders, and to how small a part of that provision the industry of one Man could extend itself, and ingross it to the prejudice of others; especially keeping within the *bounds*, set by reason of what might serve for his *use*; there could be then little room for Quarrels or Contentions about Property so established.

§32. But the *chief matter of Property* being now not the Fruits of the Earth, and the Beasts that subsist on it, but the *Earth itself*; as that which takes in and carries with it all the rest: I think it is plain, that *Property* in that too is acquired as the former. *As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his *Labour* does, as it were, inclose it from the common. Nor will it invalidate his right to say, Every body else has an equal Title to it; and therefore he cannot appropriate, he cannot inclose, without the Consent of all his Fellow-Commoners, all Mankind. God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the Earth, *i.e.* improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour. He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his *Property*, which another had no Title to, nor could without injury take from him.

Black Hawk

Life of Ma-Ka-Tai-Me-She-Kia-Kiak or Black Hawk

89-91 (Dictated by Himself in Rock Island, Illinois, Published in Cincinnati, 1833)

My reason teaches me that *land cannot be sold.* The Great Spirit gave it to his children to live upon, and cultivate, as far as necessary for their subsistence; and so long as they occupy and cultivate it they have the right to the soil—but if they voluntarily leave it, then any other people have a right to settle upon it. Nothing can be sold, but such things as can be carried away.

In consequence of the improvements of the [white] intruders on our fields, we found considerable difficulty to get ground to plant a little corn. Some of the whites permitted us to plant small patches in the fields they had fenced, keeping all the best ground for themselves. Our women had great difficulty in climbing their fences, being unaccustomed to the kind, and were ill-treated if they left a rail down.

One of my old friends thought he was safe. His cornfield was on a small island of Rock river. He planted his corn; it came up well—but the white man saw it—he wanted the island, and took his team over, ploughed up the crop, and replanted it for himself. The old man shed tears; not for himself, but the distress his family would be in if they raised no corn. . . .

We acquainted our agent daily with our situation, and through him the great chief at St. Louis*—and hoped that something would be done for us. The whites were *complaining* at the same time that *we* were *intruding* upon *their rights. They* made themselves out the *injured party,* and *we* the *intruders.* They called loudly to the great war chief to protect *their* property.

How smooth must be the language of the whites, when they can make right look like wrong, and wrong like right.

QUESTIONS

How does Black Hawk distinguish between property in movable things and land? How does his approach differ from the way Locke distinguishes these forms of property? Which approach makes more sense? Which seems fairer? Should invaders be able to impose a new theory of land ownership on prior occupants and if so, on what grounds?

4. Utilitarianism

Private property can be justified because it serves the function of maximizing the utility, or wealth, of individuals. Jeremy Bentham, an English philosopher, was a leading founder of utilitarianism—a theory seeking to posit the underlying

* [General William Clark, who after the Lewis and Clark Expedition served in St. Louis as Superintendent for Indian Affairs for territory west of the Mississippi River.—Eds.]

structure of moral norms (ethics). Under his principle of utility, the rightness of every action depends solely upon its consequences: Does it produce pleasure or prevent pain? Not only was Bentham a prolific writer, he also campaigned tirelessly for legal, political, and social reforms. When he died in 1832, he left his large estate to University College, London, where pursuant to his instructions his mummified cadaver still resides. In the following excerpt, Bentham explains how the institution of property depends upon society's law.

Jeremy Bentham

Theory of Legislation

68-69 (Oceana ed. 1975) (Richard Hildreth trans. 1864)

The better to understand the advantages of law, let us endeavor to form a clear idea of *property*. We shall see that there is no such thing as natural property, and that it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else, to use it—none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The aliment* which is incorporated into my very body may belong to another, to whom I am bound to account for it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

But it may be asked, What is it that serves as a basis to law, upon which to begin operations, when it adopts objects which, under the name of property, it promises to protect? Have not men, in the primitive state, a *natural* expectation of enjoying certain things—an expectation drawn from sources anterior to law?

Yes. There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered, so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement

* [Food or nourishment.—Eds.]

among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable.

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation, founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

QUESTIONS

What is utilitarian in Bentham's view of private property? Is property simply an expectation rooted in changeable human law rather than immutable natural right?

5. Constitutional Theory

Given the number of modern American constitutional law cases that involve issues of individual property rights, it should not be surprising that delegates to the federal Constitutional Convention frequently discussed the government's role in creating or safeguarding property. Presumably, because the delegates shared a common understanding of real property, much of this discussion involved then controversial types of personal property such as intellectual property and human slavery, resulting in constitutional recognition of both (the former in Art. I, §8, the latter in Art. IV, §2 and elsewhere).

At the Constitutional Convention, the fundamental relationship between government and property was explored in the context of fixing the allocation of representatives among the states in the lower legislative body, the future House of Representatives. Some delegates favored allocating representation strictly on the basis of the relative population of the states. Others preferred an allocation based on some combination of the number of people and the value of property within the states. Both approaches necessarily raised the issue of whether to count slaves along with free persons in the population. The second approach raised the issue of whether slaves, the primary form of property wealth in the Southern states, should count as property. Ultimately, the delegates compromised between these two positions by allocating representation based on each state's free population plus three-fifths of its slave population. Art. I, §2, cl. 3.

Among the delegates actively participating in this particular debate were two of the Convention's most brilliant and influential members, Gouverneur Morris, a future U.S. Senator, and James Wilson, a future U.S. Supreme Court justice. Others included William Johnson, a future U.S. Senator and president of what is now Columbia University; John Rutledge, a future U.S. Supreme Court justice; Pierce Butler, a future U.S. Senator; and George Mason, an early patriot leader who had

written Virginia's bill of rights. The first except below comes from James Madison's notes of the Constitutional Convention covering the debate over a proposal to consider population and wealth in the allocation of representation.

Two other leading delegates to the Constitution Convention, Pennsylvania's Benjamin Franklin and Robert Morris, had also served in key leadership roles during the American Revolution. Both men signed the Declaration of Independence as members of the Second Continental Congress, with Franklin then serving as the rebel nation's ambassador to France and Morris as its Superintendent of Finance. In those capacities as the new nation struggled to obtain sufficient funds to carry on the war, Franklin and Morris exchanged the views on private and public property contained in the second excerpt below.

The Records of the Federal Convention of 1787

Vol. 1, 533-34, 580-81, 593-94, 603-06 (Max Farrand ed., Yale Univ. Press 1937)

Mr. Govr. Morris [of Pennsylvania] . . . thought property ought to be taken into the estimate as well as the number of inhabitants. Life and liberty were generally said to be of more value than property. An accurate view of the matter would nevertheless prove that property was the main object of society. The savage state was more favorable to liberty than the civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property, which could only be secured by the restraints of regular government. . . .

Mr. Rutledge [of South Carolina]. The gentleman last up had spoken some of his sentiments precisely. Property was certainly the principal object of society. If numbers should be made the rule of representation, the Atlantic states will be subjected to the [new states soon to be formed in the West]. . . .

Mr. Butler [of South Carolina] insisted that the labor of a slave in South Carolina was as productive and valuable as that of a freeman in Massachusetts . . . and that consequently an equal representation ought to be allowed for them in a government which was instituted principally for the protection of property, and was itself to be supported by property.

Mr. Mason [of Virginia] could not agree to the motion [to count slaves and freemen equally], notwithstanding it was favorable to Virginia, because he thought it unjust. It was certain that the slaves were valuable. . . . He could not, however, regard them as equal to freemen and could not vote for them as such. He added as worthy of remark, that the southern states have this peculiar species of property, over and above the other species of property common to all the states. . . .

Dr. Johnson [of Connecticut] thought that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth. . . .

Mr. Govr. Morris [of Pennsylvania] . . . verily believed that the people of Pennsylvania will never agree to a representation of [slaves]. What can be desired by these [southern] states more than has been already proposed: That the legislature shall from time to time regulate representation according to population and wealth? . . . [Morris] opposed the [motion to strike wealth] as leaving still an incoherence. If [slaves] were to be viewed as inhabitants and the revision was to proceed on the principle of numbers of inhabitants, they ought to be added in their

entire number and not in the proportion of three to five. If as property, the word "wealth" was right, and striking it out would produce the very inconsistency which it was meant to get rid of. . . .

Mr. Wilson [of Pennsylvania] . . . could not agree that property was the sole or the primary object of government and society. The cultivation and improvement of the human mind was the most noble object. With respect to this object, as well as other personal rights, numbers were surely the natural and precise measure of representation. And with respect to property, they could not vary much from the precise measure.

Benjamin Franklin

Letter to Robert Morris, Dec. 25, 1783

Vol. 41, The Papers of Benjamin Franklin, 347–48 (Yale Univ. Press 2014)

. . . All Property indeed, except the Savage's temporary Cabin, his Bow, his Matchcoat, and other little Acquisitions absolutely necessary for his Subsistence, seems to me to be the Creature of public Convention. Hence the Public has the Right of Regulating Descents & all other Conveyances of Property, and even of limiting the Quantity & the Uses of it. All the Property that is necessary to a Man for the Conservation of the Individual & the Propagation of the Species, is his natural Right which none can justly deprive him of: But all Property superfluous to such purposes is the Property of the Publick, who by their Laws have created it, and who may therefore by other Laws dispose of it, whenever the Welfare of the Publick shall demand such Disposition. He that does not like civil Society on these Terms, let him retire & live among Savages.—He can have no right to the Benefits of Society who will not pay his Club towards the Support of it.

QUESTIONS

In presenting their respective views of private property, both Gouverneur Morris and Benjamin Franklin contrast the so-called savage state with settled society. How do their views of property rights in civilized society compare? Which view prevails in twenty-first century America, or is it a pragmatic mix of both?

6. Economics

Economic theories seek to explain, justify, and criticize rules of property law by using the methods and vocabulary of economics. In general, economics is an empirical social science, but it is strongly influenced by the ethical theory of utilitarianism. Thus, many people use economics in an attempt to achieve an objective or empirical approach to law and legal disputes. Like other disciplines, however, economics embraces a number of different schools of thought, all of which can be applied to the study of law. One can argue that economics is a methodology, rather than a substantive theory. The labor theory justifying property rights, in this sense, is an economic theory of property rights. Thus, there is no single "economic theory"

of law. Rather, there are multiple approaches, some of which we'll consider later in this casebook. For right now, we'll just consider excerpts from classic books by Adam Smith, an eighteenth-century Scottish academician, and Karl Marx, a nineteenth-century German economist and revolutionary socialist. Smith became well known for his book, *The Theory of Moral Sentiments* (1759), but he became immortalized as the founder of capitalist economics when he published *The Wealth of Nations* in 1776, at the beginning of the American Revolution and the outset of the Industrial Revolution. Marx, in contrast, became famous for the book that he wrote with fellow revolutionary Friedrich Engels, *The Communist Manifest* (1848), which denounced capitalism as a tool of the wealthy classes for the exploitation of labor.

Both Smith and Marx believed in a labor theory, but differed in its application and implications. *The Wealth of Nations* established Smith as the first important political economist and the founder of what we now call "classical economics." He argued that labor is the source of a nation's wealth and that the specialization of labor promotes the expansion of wealth. His advocacy of the "invisible hand" (people who pursue their self-interest unconsciously promote the public interest) continues to be a cornerstone in modern arguments in favor of free trade and limited government. While Smith promoted the idea of free and open markets, he was not an advocate of laissez-faire. *The Theory of Moral Sentiments* calls for a moral and ethical framework as a foundation for worthy market operations, necessarily provided for by government. In general, Smith believed in a natural right to property rooted in his labor theory of value. Protecting the fruits of one's labor as property served the instrumental ends of stabilizing civil society, creating incentives for work, and advancing the formation of capital. Marx believed that, by his time, capitalism had been captured by the owners of capital for their own benefit to the detriment of labor. This situation, he argued, produced internal tensions that would inevitably lead to the replacement of the capitalistic "dictatorship of the bourgeoisie" by a socialistic "dictatorship of the proletariat," or workers' state, that in turn would evolve into a classless society that he called communism.

Adam Smith

The Wealth of Nations

8, 276-77, 400 (Univ. of Chicago Press 1976) (1776)

[The] division of labour, from which so many advantages are derived, is not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion. It is the necessary, though very slow and gradual consequence of a certain propensity in human nature which has in view no such extensive utility; the propensity to truck, barter, and exchange one thing for another.

. . . It is common to all men, and to be found in no other race of animals, which seem to know neither this nor any other species of contracts. . . . [M]an has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. . . . It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. . . .

The whole annual produce of the land and labour of every country . . . naturally divides itself . . . into three parts; the rent of land, the wages of labour, and the profits of stock; and constitutes a revenue to three different orders of people; to those who live by rent, to those who live by wages, and to those who live by profit. These are the three great, original, and constituent orders of every civilised society, from whose revenue that of every other order is ultimately derived.

The interest of the first of those three great orders, it appears from what has been just now said, is strictly and inseparably connected with the general interest of the society. Whatever either promotes or obstructs the one, necessarily promotes or obstructs the other. When the public deliberates concerning any regulation of commerce or police, the proprietors of land never can mislead it, with a view to promote the interest of their own particular order; at least, if they have any tolerable knowledge of that interest. They are, indeed, too often defective in this tolerable knowledge. They are the only one of the three orders whose revenue costs them neither labour nor care, but comes to them, as it were, of its own accord, and independent of any plan or project of their own. . . .

The interest of the second order, that of those who live by wages, is as strictly connected with the interest of the society as that of the first. The wages of the labourer, it has already been shown, are never so high as when the demand for labour is continually rising, or when the quantity employed is every year increasing considerably. When this real wealth of the society becomes stationary, his wages are soon reduced to what is barely enough to enable him to bring up a family. . . .

His employers constitute the third order, that of those who live by profit. It is the stock that is employed for the sake of profit which puts into motion the greater part of the useful labour of every society. The plans and projects of the employers of stock regulate and direct all the most important operations of labour, and profit is the end proposed by all those plans and projects. But the rate of profit does not, like rent and wages, rise with the prosperity and fall with the declension of the society. On the contrary, it is naturally low in rich and high in poor countries, and it is always highest in the countries which are going fastest to ruin. The interest of this third order, therefore, has not the same connection with the general interest of the society as that of the other two. . . .

[The] annual revenue of every society is always precisely equal to the exchangeable value of the whole annual produce of its industry. . . . As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. . . .

Karl Marx & Friedrich Engels

The Communist Manifesto

98-99 (Progress Publishers 1969) (1848)

The theoretical conclusions of the Communists are in no way based on ideas or principles that have been invented, or discovered, by this or that would-be universal reformer. They merely express, in general terms, actual relations springing from an existing class struggle, from a historical movement going on under our very eyes. The abolition of existing property relations is not at all a distinctive feature of communism. All property relations in the past have continually been subject to historical change consequent upon the change in historical conditions. The French Revolution, for example, abolished feudal property in favour of bourgeois property. The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few. In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.

We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence. Hard-won, self-acquired, self-earned property! Do you mean the property of petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily. Or do you mean the modern bourgeois private property? But does wage-labour create any property for the labourer? Not a bit. It creates capital, *i.e.*, that kind of property which exploits wage-labour, and which cannot increase except upon condition of begetting a new supply of wage-labour for fresh exploitation. Property, in its present form, is based on the antagonism of capital and wage labour. Let us examine both sides of this antagonism.

To be a capitalist, is to have not only a purely personal, but a social *status* in production. Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion. Capital is therefore not only personal; it is a social power. When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property. It is only the social character of the property that is changed. It loses its class character.

QUESTIONS

Both Adam Smith and Karl Marx evaluate private property from the perspective of economic theory. How do their perspectives differ? Why do those differing perspectives lead to such dramatically different conclusions with respect to the protection or abolition of private property?

7. Critical Race Theory

An increasingly influential approach to understanding property builds on the broader field of critical race theory (CRT). CRT acknowledges and tackles a number of cultural norms regarding dominating power structures of race in the United States. Common features of the diverse critical race movement are:

- An assumption that racism is endemic in American life, deeply ingrained legally, culturally, and even psychologically.
- A call to reinterpret civil-rights law "in light of its ineffectuality, showing that laws to remedy racial injustices are often undermined before they can fulfill their promise."
- A challenge to the "traditional claims of legal neutrality, objectivity, color-blindness, and meritocracy as camouflages for the self-interest of dominant groups in American society."
- An insistence on subjectivity and the reformulation of legal doctrine to reflect the perspectives of those who have experienced and are victimized by racism firsthand.
- The use of stories and first-person accounts.

Richard Delgado, in Monaghan, *Critical Race Theory* A7 (1995). Critical race theorists have applied these insights to assess the role of property rights in subordinating people of color in the United States. An early fundamental instantiation of domination is the appropriation by European settlers of real property already occupied by indigenous communities. "When the Pilgrims came to New England they too were coming not to vacant land but to territory inhabited by tribes of Indians. The governor of the Massachusetts Bay Colony, John Winthrop, created the excuse to take Indian land by declaring the area legally a 'vacuum.' The Indians, he said, had not 'subdued' the land, and therefore had only a 'natural' right to it, but not a 'civil right.' A 'natural right' did not have legal standing." Howard Zinn, *A Peoples History of the United States* 13 (1980).

The other foundational property law pillar that institutionalized racial subordination in the United States is slavery. Derrick Bell, a founding scholar of critical race theory, exposes a tension between property rights and human rights in the development of the U.S. Constitution. He asserts that the chief objective of the constitutionally established government was to protect property. Of course, the slave status of most African Americans resulted in their being objectified as property. Because the government was constructed to protect the rights of property owners, it lacked the incentive to secure human rights for African Americans. "[T]he concept of individual rights, unconnected to property rights, was totally foreign to these men of property; and thus, despite two decades of civil rights gains, most Blacks remain disadvantaged and deprived because of their race." Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 239 (1987).

Other examples of the use of property law to subordinate abound. These include internment and confiscation of the property of Japanese Americans during World War II, as well as military conquest and expropriation of the property of Mexican landowners. Ronald Takaki, *A Different Mirror: A History of Multicultural America* (1993). A wave of legal scholarship emphasizes how "the ability to define,

possess, and own property has been a central feature of power in America." Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 *Teachers College Record* (1995). For a more detailed introduction to the role of race and exclusion in the United States property system, see Chapter 3.

QUESTIONS

What new perspectives and tools does CRT offer about property? How does it decenter the economic justifications and logics of "classical" private property justifications? How are narrative accounts, mentioned by Delgado, useful to understand the life and work of the law in practice?

8. Property, Gender, and Feminist Theory

Another critical perspective emphasizes the longstanding historical persistence of gender inequality in rights to property, such as patrilineal inheritance. A key critique of the women's rights movement that emerged in the mid-nineteenth century targeted *coverture*, an English common-law doctrine adopted by many American colonies, which upon marriage subordinates and consolidates a woman's legal rights and obligations into those of her husband. *See* Joan Hoff, *American women and the lingering implications of coverture*, 44 Social Science Journal 41, 41 (2007). Although a series of Married Women's Property Acts formally abolished coverture from the 1830s through the 1870s, the legal disabilities associated with it persisted well into the twentieth century. Moreover, gender inequality in the exercise of fundamental property rights endures throughout the globe. *See, e.g.*, Carol S. Rabenhorst & Anjali Bean, *Gender and Property Rights: A Critical Issue in Urban Economic Development* (2011); World Bank, *Women in Half the World Still Denied Land, Property Rights Despite Laws* (March 25, 2019) (finding that women in half of the countries in the world are unable to assert equal land and property rights, despite the existence of formal legal protections). A cross-disciplinary literature links feminist theory and property, as well as its intersection with race. *See, e.g.*, Hilary Lim & Anne Bottomley, eds., *Feminist Perspectives on Land Law* (2007); Adrien K. Wing, ed., *Critical Race Feminism: A Reader* (2d ed. 2003). These scholars seek to explain the fundamental role played by the law in the historical subordination of women and to change such status by reforming the law and its approach to gender.

B. RIGHT OF PUBLICITY

We begin our study of particular forms of property by exploring what some believe to be a new form of private property, the right of publicity. There are several reasons we believe this is a useful starting point. First, a focal point of this book is the *creation* of property. Although the institution of private property is older than all records of human history, we should not see creation of property as a distant historical fact. It's a dynamic process, happening all the time, as communities adjust their property laws to respond to changing social, cultural, and technological circumstances.

It's easy to see this by studying the right of publicity, a recently created type of property. You should realize that the direction of movement isn't always the creation of more property, even though that's the theme of the right of publicity. Sometimes claims previously recognized as property are taken away. Slavery as a form of property was widely recognized throughout the world prior to the twentieth century.

Second, the study of law includes not only learning rules, but also evaluation. This means examining the policies underlying those rules, and those that might underlie alternative rules. The publicity materials naturally invite focus on policy choices. It's easier to see this for a newer type of property, where we can readily imagine what differences it would make to refuse to recognize what we call a right of publicity.

Last, the *definition* of property matters a great deal. The question of the first magnitude is whether to recognize a claim as property. Even if a right is recognized, it isn't inevitable that it will be classed as property. It might, for example, be seen as a "personal" right protected by the law of torts. Although the answer, "yes" or "no," is highly important, it is not the ending point. How property is legally defined can be as important as the question of whether person X owns the property. Once we recognize a property right of publicity, we will see that there are a number of important subsidiary questions bearing on the definition of that right, that we must consider. Resolution of those subsidiary questions will be necessary to resolve disputes between competing claimants, thereby determining the "strength" of the property interest compared to the competing interests of other members of society.

State of Tennessee ex rel. Elvis Presley International Memorial Foundation v. Crowell

Court of Appeals of Tennessee, 1987
733 S.W.2d 89

Koch, Judge. This appeal involves a dispute between two not-for-profit corporations concerning their respective rights to use Elvis Presley's name as part of their corporate names. The case began when one corporation filed an unfair competition action . . . to dissolve the other corporation [Elvis Presley Memorial Foundation, Inc.] and to prevent it from using Elvis Presley's name. Elvis Presley's estate intervened on behalf of the defendant corporation. It asserted that it had given the defendant corporation permission to use Elvis Presley's name and that it had not given similar permission to the plaintiff corporation.

The trial court determined that Elvis Presley's right to control his name and image descended to his estate at his death and that the Presley estate had the right to control the commercial exploitation of Elvis Presley's name and image. Thus, the trial court granted the defendant corporation's motion for summary judgment and dismissed the complaint.

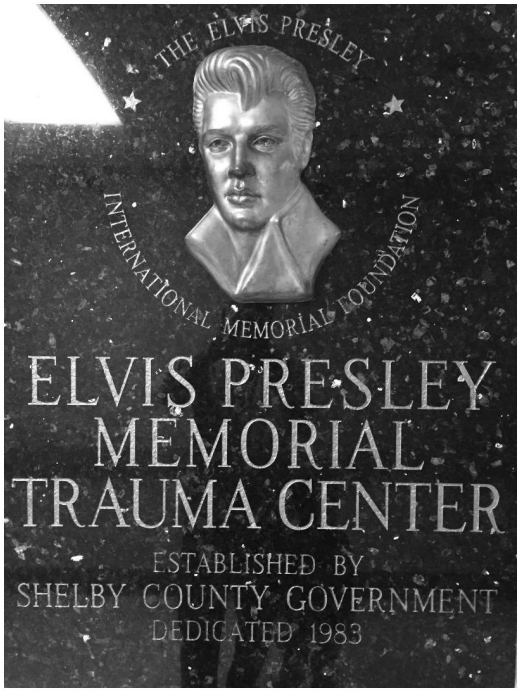
The plaintiff corporation has appealed. . . .

Elvis Presley's career is without parallel in the entertainment industry. From his first hit record in 1954 until his death in 1977, he scaled the heights of fame and success that only a few have attained. His twenty-three year career as a recording star, concert entertainer and motion picture idol brought him international recognition and a devoted following in all parts of the nation and the world.

Elvis Presley was aware of this recognition and sought to capitalize on it during his lifetime. He and his business advisors entered into agreements granting exclusive commercial licenses throughout the world to use his name and likeness in connection with the marketing and sale of numerous consumer items. As early as 1956, Elvis Presley's name and likeness could be found on bubble gum cards, clothing, jewelry and numerous other items. The sale of Elvis Presley memorabilia has been described as the greatest barrage of merchandise ever aimed at the teenage set. It earned millions of dollars for Elvis Presley, his licensees and business associates.

Elvis Presley's death on August 16, 1977 did not decrease his popularity. If anything it preserved it. Now Elvis Presley is an entertainment legend, somewhat larger than life, whose memory is carefully preserved by his fans, the media and his estate.

The demand for Elvis Presley merchandise was likewise not diminished by his death. The older memorabilia are now collectors' items. New consumer items have been authorized and are now being sold. Elvis Presley Enterprises, Inc., a corporation formed by the Presley estate, has licensed seventy-six products bearing his name and likeness and still controls numerous trademark registrations and copyrights. Graceland, Elvis Presley's home in Memphis, is now a museum that attracts approximately 500,000 paying visitors a year. Elvis Presley Enterprises, Inc. also sells the right to use portions of Elvis Presley's filmed or televised performances. These marketing activities presently bring in approximately fifty million dollars each year and provide the Presley estate with approximately $4.6 million in annual revenue. The commercial exploitation of Elvis Presley's name and likeness continues to be a profitable enterprise. It is against this backdrop that this dispute between these two corporations arose.



Wall of Honor at Elvis Presley Memorial Trauma Center

A group of Elvis Presley fans . . . , calling themselves the Elvis Presley International Memorial Foundation, sought a charter as a Tennessee not-for-profit corporation. . . .

. . . [O]n February 26, 1981, the Secretary of State . . . issued a corporate charter to the Elvis Presley International Memorial Foundation (International Foundation). The International Foundation raises funds by charging membership fees and dues and by sponsoring an annual banquet in Memphis. It uses its funds to support the trauma center of the new City of Memphis Hospital, which was named after Elvis Presley, and to provide an annual award of merit.

The Presley estate and Elvis Presley Enterprises, Inc. incorporated the Elvis Presley Memorial Foundation, Inc. (Foundation) as a Tennessee not-for-profit

corporation on May 14, 1985. The Foundation is soliciting funds from the public to construct a fountain in the shopping center across the street from Elvis Presley's home. . . .

III. Elvis Presley's Right of Publicity

We are dealing in this case with an individual's right to capitalize upon the commercial exploitation of his name and likeness and to prevent others from doing so without his consent. This right, now commonly referred to as the right of publicity, is still evolving and is only now beginning to step out of the shadow of its more well known cousin, the right of privacy. . . .

A.

The right of privacy owes its origin to Samuel Warren's and Louis Brandeis' now famous 1890 law review article, Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The authors were concerned with the media's intrusion into the affairs of private citizens and wrote this article to vindicate each individual's "right to be left alone." The privacy interest they sought to protect was far different from a celebrity's interest in controlling and exploiting the economic value of his name and likeness.

Writing in 1890, Warren and Brandeis could not have foreseen today's commercial exploitation of celebrities. They did not anticipate the changes that would be brought about by the growth of the advertising, motion picture, television and radio industries. American culture outgrew their concept of the right of privacy and soon began to push the common law to recognize and protect new and different rights and interests.

It would be difficult for any court today, especially one sitting in Music City U.S.A. practically in the shadow of the Grand Ole Opry, to be unaware of the manner in which celebrities exploit the public's recognition of their name and image. The stores selling Elvis Presley tee shirts, Hank Williams, Jr. bandannas or Barbara Mandrell satin jackets are not selling clothing as much as they are selling the celebrities themselves. We are asked to buy the shortening that makes Loretta Lynn's pie crusts flakier or to buy the same insurance that Tennessee Ernie Ford has or to eat the sausage that Jimmy Dean makes.

There are few everyday activities that have not been touched by celebrity merchandising. This, of course, should come as no surprise. Celebrity endorsements are extremely valuable in the promotion of goods and services. They increase audience appeal and thus make the commodity or service more sellable. These endorsements are of great economic value to celebrities and are now economic reality.

The first decision to recognize the right of publicity as a right independent from the right of privacy was Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). The United States Court of Appeals for the Second Circuit stated:

> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from

> having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

The legal experts have consistently called for the recognition of the right of publicity as a separate and independent right. In 1977, the United States Supreme Court recognized that the right of publicity was distinct from the right of privacy. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 571-74 (1977). Now, courts in other jurisdictions uniformly hold that the right of publicity should be considered as a freestanding right independent from the right of privacy. . . .

C.

The appellate courts of this State have had little experience with the right of publicity. The Tennessee Supreme Court has never recognized it as part of our common law or has never undertaken to define its scope. However, the recognition of individual property rights is deeply embedded in our jurisprudence. These rights are recognized in Article I, Section 8 of the Tennessee Constitution and have been called "absolute" by the Tennessee Supreme Court. Stratton Claimants v. Morris Claimants, 15 S.W. 87, 90 (Tenn. 1891). This Court has noted that the right of property "has taken deep root in this country and there is now no substantial dissent from it." Davis v. Mitchell, 178 S.W.2d 889, 910 (Tenn. App. 1943).

The concept of the right of property is multifaceted. It has been described as a bundle of rights or legally protected interests. These rights or interests include: (1) the right of possession, enjoyment and use; (2) the unrestricted right of disposition; and (3) the power of testimonial disposition.

In its broadest sense, property includes all rights that have value. It embodies all the interests a person has in land and chattels that are capable of being possessed and controlled to the exclusion of others. . . .

Our courts have recognized that a person's "business," a corporate name, a trade name and the good will of a business are species of intangible personal property.

Tennessee's common law thus embodies an expansive view of property. Unquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property.

D.

Today there is little dispute that a celebrity's right of publicity has economic value. Courts now agree that while a celebrity is alive, the right of publicity takes on many of the attributes of personal property. It can be possessed and controlled to

the exclusion of others. Its economic benefits can be realized and enjoyed. It can also be the subject of a contract and can be assigned to others.

What remains to be decided by the courts in Tennessee is whether a celebrity's right of publicity is descendible at death under Tennessee law. Only the law of this State controls this question. The only reported opinion holding that Tennessee law does not recognize a *postmortem* right of publicity is Memphis Development Foundation v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). We have carefully reviewed this opinion and have determined that it is based upon an incorrect construction of Tennessee law and is inconsistent with the better reasoned decisions in this field.

The United States Court of Appeals for the Sixth Circuit appears to believe that there is something inherently wrong with recognizing that the right of publicity is descendible. We do not share this bias. Like the Supreme Court of Georgia, we recognize that the "trend since the early common law has been to recognize survivability, notwithstanding the legal problems which may thereby arise." Martin Luther King Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697, 705 (Ga. 1982).

We have also concluded that recognizing that the right of publicity is descendible promotes several important policies that are deeply ingrained in Tennessee's jurisprudence. First, it is consistent with our recognition that an individual's right of testamentary distribution is an essential right. If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death.

Second, it recognizes one of the basic principles of Anglo-American jurisprudence that "one may not reap where another has sown nor gather where another has strewn." M.M. Newcomer Co. v. Newcomer's New Store, 217 S.W. 822, 825 (Tenn. 1919). This unjust enrichment principle argues against granting a windfall to an advertiser who has no colorable claim to a celebrity's interest in the right of publicity.

Third, recognizing that the right of publicity is descendible is consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death. It is now common for celebrities to include their interest in the exploitation of their right of publicity in their estate. While a celebrity's expectation that his heirs will benefit from his right of publicity might not, by itself, provide a basis to recognize that the right of publicity is descendible, it does recognize the effort and financial commitment celebrities make in their careers. This investment deserves no less recognition and protection than investments celebrities might make in the stock market or in other tangible assets.

Fourth, concluding that the right of publicity is descendible recognizes the value of the contract rights of persons who have acquired the right to use a celebrity's name and likeness. The value of this interest stems from its duration and its exclusivity. If a celebrity's name and likeness were to enter the public domain at death, the value of any existing contract made while the celebrity was alive would be greatly diminished.

Fifth, recognizing that the right of publicity can be descendible will further the public's interest in being free from deception with regard to the sponsorship,

approval or certification of goods and services. Falsely claiming that a living celebrity endorses a product or service violates Tenn. Code Ann. §47-18-104(b)(2), (3) and (5). It should likewise be discouraged after a celebrity has died.

Finally, recognizing that the right of publicity can be descendible is consistent with the policy against unfair competition through the use of deceptively similar corporate names.

The legal literature has consistently argued that the right of publicity should be descendible. A majority of the courts considering this question agree. We find this authority convincing and consistent with Tennessee's common law and, therefore, conclude that Elvis Presley's right of publicity survived his death and remains enforceable by his estate and those holding licenses from the estate. . . .

IV. The Propriety of Granting a Summary Judgment

[Plaintiff claimed that even if Presley's right of publicity was descendible, the estate had unreasonably delayed in asserting its rights, and thus was barred from relief under the doctrine of laches. Holding there were material issues of fact bearing on laches, the court vacated the summary judgment and remanded for further proceedings.]

NOTES AND QUESTIONS

1. Does the right of publicity fit within any of the definitions of property in the first section of this chapter? Which if any of the theories of property discussed above justify the recognition of publicity as property?

2. The court in *Presley* emphasizes the economic value of the right to exploit a celebrity's fame. You should not conclude, however, that all valuable economic claims are property in our legal system. For example, in United States v. Willow River Power Co., 324 U.S. 499, 502 (1945), the government built a dam, raising the water level in a river and thereby reducing the value of a hydroelectric plant located upriver. The Court rejected the utility company's claim of a property right in the water level. "It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."

3. Over four decades after his death at age 42, how much is Presley still worth? In 2013, the intellectual property rights associated with Elvis Presley, including his right of publicity, were sold to the aptly named Authentic Brands Group for a reported $125 million. Authentic Brands owns the rights of publicity of various dead celebrities. *Forbes* magazine, which annually computes such things, reported that the intellectual property associated with Presley generated $35 million in 2017 from endorsements, themed products, and other uses. Coming in behind Presley at $23 million was the reggae icon Bob Marley, who died in Miami from cancer in 1981. Marley's estate, which was complicated because Marley died

at age 36 without a will, profits from lucrative deals to put his picture or name on legal cannabis products, headphones, clothing, cigarette papers, children's dolls, and a range of Marley's Mellow Mood beverages. You may have a T-shirt or poster with his picture. If not Marley, you may have one with the image of the celebrated scientist Albert Einstein, whose estate generated over $10 million in 2017 from branded products and other sources. Among the many dead celebrities who have reappeared over the past few years in new advertising campaigns are John Wayne for Coors beer, Audrey Hepburn for Galaxy chocolates, Marilyn Monroe for Chanel No. 5 perfume, Steve McQueen for Porsche, and Gene Kelly singing in the rain for Volkswagen. One advantage of endorsements from dead celebrities is that, unlike, say, Tiger Woods for Gatorade or O.J. Simpson for Hertz Rental Car, they cannot do anything further to diminish their marketability.

Court decisions like *Presley* matter. If the law did not recognize a celebrity's right of publicity as descendible, any marijuana grower could put Marley's or Presley's name on its product without liability to the celebrity's estate. Due to cases like *Presley* and statutes in various states, growers must license the right to use Marley's famous name and recognizable image from Marley's descendants or, in the case of Presley, from Authentic Brands. How does society benefit from this? Presumably it raises the cost of the product, but could it improve quality? Does it more justly reward celebrities for their labor and creativity? Misattribution of credit can be a real problem, such as the fact that many mellow listeners believe Bob Marley wrote and sang the mega-hit "Don't Worry, Be Happy," even though the song was actually written and first performed by Bobby McFerrin seven years after Marley's death. Dead celebrities may be able to endorse products, but they cannot write new songs. Confusion on this point may explain why presidential candidate George H.W. Bush adopted "Don't Worry, Be Happy" as his official campaign song in 1988 without seeking permission or making payment, perhaps thinking that its dead composer would not care. McFerrin, the song's very-much-alive composer, did care, and forced Bush to drop the song. For the record, Marley wrote a lesser but still popular song with the refrain and opening line, "Don't worry about a thing."

4. Could the court have recognized publicity as a property right but held it was not descendible? Should the right of publicity be descendible? Most states have recognized postmortem rights of publicity, sometimes by judicial decision (as in *Presley*) or by statute. Many states recognize postmortem rights of publicity by statute for a certain time period. For example, Tennessee limits the right to ten years after death or for so long as it is in continued use, whichever is longer; and California limits it to 70 years. New York is one of the states refusing to recognize a postmortem right of publicity.

5. Elvis Presley created a positive personality that has immense market value. Would the result of *Presley* be different if it involved someone who had created a notorious, but still marketable, personality? In 1970, the Illinois Supreme Court ruled that the infamous teenage thrill killer Nathan Leopold did not have a right of publicity (or privacy) against the author, publisher, producer, or distributor of the novel, play, and movie, *Compulsion*, based on his murder of Bobby Franks. That 1924 killing, committed by Leopold and his wealthy lover Richard Loeb, shocked

the nation. "No right to privacy attached to matters associated with his participation in that completely publicized crime," the court wrote. Leopold v. Levin, 259 N.E.2d 250 (Ill. 1970). Earlier, a federal court reached a similar result under Illinois law in a case brought by descendants of Chicago mob boss Al Capone against the producers of *The Untouchables*, a television program that attributed fictional gangland crimes to Capone. Maritote v. Desilu Productions, Inc., 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965). Although these rulings can be seen as denying a right of publicity for criminal acts so as not to reward antisocial behavior, they both also involved the artistic use of a public personality, which raises issues of free expression discussed more fully below in *ETW Corporation*.

Margaret Jane Radin

Property and Personhood

34 Stanford Law Review 957 (1982)

. . . [T]o achieve proper self-development — to be a person — an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property right. Although explicit elaboration of this perspective is wanting in modern writing on property, the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty. . . .

Almost any theory of private property rights can be referred to some notion of personhood. . . . Conservatives rely on an absolute conception of property as sacred to personal autonomy. Communitarians believe that changing conceptions of property reflect and shape the changing nature of persons and communities. Welfare rights liberals find entitlement to a minimal level of resources necessary to the dignity of persons even when the entitlement must curtail the property rights of others. This article does not emphasize how the notion of personhood might figure in the most prevalent traditional lines of liberal property theory: the Lockean labor-desert theory, which focuses on individual autonomy, or the utilitarian theory, which focuses on welfare maximization.[3] It rather attempts to clarify a third strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of "things.". . .

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may

3. The personality theory, the labor theory, and the utilitarian theory are respectively associated with Hegel, Locke, and Bentham. *See* G. Hegel, *Philosophy of Right* (T. Knox trans. 1821); J. Locke, *Second Treatise of Government* (New York 1952) (6th ed. London 1764); J. Bentham, *Theory of Legislation* (R. Hildreth trans. 1840) (1st ed. 1802). The sociobiological/psychological "territorial imperative" theory may be a fourth type stemming roughly from Darwin and Freud. . . .

be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder. For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so.

The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons. The archetype of such a good is, of course, money, which is almost always held only to buy other things. A dollar is worth no more than what one chooses to buy with it, and one dollar bill is as good as another. Other examples are the wedding ring in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord. I shall call these theoretical opposites—property that is bound up with a person and property that is held purely instrumentally—personal property and fungible property respectively. . . .

Once we admit that a person can be bound up with an external "thing" in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that "thing." But here liberty follows from property for personhood; personhood is the basic concept, not liberty. Of course, if liberty is viewed not as freedom from interference, or "negative freedom," but rather as some positive will that by acting on the external world is constitutive of the person, then liberty comes closer to capturing the idea of the self being intimately bound up with things in the external world.

It intuitively appears that there is such a thing as property for personhood because people become bound up with "things." But this intuitive view does not compel the conclusion that property for personhood deserves moral recognition or legal protection, because arguably there is bad as well as good in being bound up with external objects. If there is a traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself in the wrong way or to too great an extent in external objects. Property is damnation as well as salvation, object-fetishism as well as moral groundwork. In this view, the relationship between the shoe fetishist and his shoe will not be respected like that between the spouse and her wedding ring. At the extreme, anyone who lives only for material objects is considered not to be a well-developed person, but rather to be lacking some important attribute of humanity. . . .

. . . Locke says that "every Man has a Property in his own Person," from which it immediately follows that "[t]he Labour of his Body, and the Work of his hands . . . are properly his." If it makes sense to say that one owns one's body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one's personhood. If the body is property, then objectively it is property for personhood. This line of thinking leads to a property

theory for the tort of assault and battery: Interference with my body is interference with my personal property. Certain external things, for example, the shirt off my back, may also be considered personal property if they are closely enough connected with the body.

The idea of property in one's body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner: Blood can be withdrawn and used in a transfusion; hair can be cut off and used by a wigmaker; organs can be transplanted. On the other hand, bodily parts may be too "personal" to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system. . . .

This view of personhood also gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations. This turn to expectations might seem to send property theory back toward Bentham, who declared that "the idea of property consists in an established expectation." But this justification for honoring expectations is far from Benthamite, because it applies only to personal property. In order to conclude that an object figuring into someone's expectations is personal, we must conclude both that the person is bound up with the object to a great enough extent, and that the relationship belongs to the class of "good" rather than "bad" object-relations. Hence we are forced to face the problem of fetishism, or "bad" object-relations. . . .

The personhood dichotomy comes about in the following way: A general justification of property entitlements in terms of their relationship to personhood could hold that the rights that come within the general justification form a continuum from fungible to personal. It then might hold that those rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.

Does it make sense to speak of two levels of property, personal and fungible? I think the answer is yes in many situations, no in many others. Since the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum. Perhaps the entrepreneur factory owner has ownership of a particular factory and its machines bound up with her being to some degree.

If a dichotomy telescoping this continuum to two end points is to be useful, it must be because within a given social context certain types of person-thing relationships are understood to fall close to one end or the other of the continuum, so that decision makers within that social context can use the dichotomy as a guide to determine which property is worthier of protection. For example, in our social context a house that is owned by someone who resides there is generally understood to be toward the personal end of the continuum. There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic.

Just as Warren and Brandeis argued long ago that there was a right to privacy that had not yet been named, this article may be understood to argue that there is a right to personal property that should be recognized. Concomitantly, I have preliminarily argued that property rights that are not personal should not necessarily take precedence over stronger claims related to personhood. Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society. Where other kinds of object relations attain qualitatively similar individual and social importance, they should be treated similarly. . . .

Midler v. Ford Motor Company

United States Court of Appeals for the Ninth Circuit, 1988
849 F.2d 460

Noonan, Circuit Judge. This case centers on the protectibility of the voice of a celebrated chanteuse from commercial exploitation without her consent. Ford Motor Company and its advertising agency, Young & Rubicam, Inc., in 1985 advertised the Ford Lincoln Mercury with a series of nineteen 30 or 60 second television commercials in what the agency called "The Yuppie Campaign." The aim was to make an emotional connection with Yuppies, bringing back memories of when they were in college. Different popular songs of the seventies were sung on each commercial. The agency tried to get "the original people," that is, the singers who had popularized the songs, to sing them. Failing in that endeavor in ten cases the agency had the songs sung by "sound alikes." Bette Midler, the plaintiff and appellant here, was done by a sound-alike.

Midler is a nationally known actress and singer. She won a Grammy as early as 1973 as the Best New Artist of that year. Records made by her since then have gone Platinum and Gold. She was nominated in 1979 for an Academy award for Best Female Actress in *The Rose*, in which she portrayed a pop singer. *Newsweek* in its June 30, 1986 issue described her as an "outrageously original singer/comedian." *Time* hailed her in its March 2, 1987 issue as "a legend" and "the most dynamic and poignant singer-actress of her time." When Young & Rubicam was preparing the Yuppie Campaign it presented the commercial to its client by playing an edited version of Midler singing "Do You Want To Dance," taken from the 1973 Midler album, "The Divine Miss M." After the client accepted the idea and form of the commercial, the agency contacted Midler's manager, Jerry Edelstein. The conversation went as follows: "Hello, I am Craig Hazen from Young and Rubicam. I am calling you to find out if Bette Midler would be interested in doing . . . ?" Edelstein: