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THE PROPERTY PLATFORM IN ANGLO-AMERICAN LAW AND THE PRIMACY OF THE PROPERTY CONCEPT

Donald J. Kochan*

ABSTRACT

This Article proposes that the property concept, when reduced to its basic principles, is a foundational element and a useful lens for evaluating and understanding the whole of Anglo-American private law even though the discrete disciplines—property, tort, and contract—have their own separate and distinct existence.

In this Article, a broad property concept is not focused just on things or on sticks related to things but instead is defined as relating to all things owned. These things may include one's self and all the key elements associated with this broader set of things owned—including the right to exclude, ownership, dominion, authority, and the *sic utere* maxim—normally segregated to our discussions of property law, but that should be considered equally necessary to contract and tort law.

In examining these property concepts, this Article goes further to contend that ownership in the self has a vital place in the property discussion. Every legal system must decide the level of protection or recognition of property in the self before it can make any decision on what rules to create in relation to real property, tort or contract. The rules in all three develop on their own but each can be measured from their consistency or deviation from a starting base of absolute property ownership in the self. Once we understand that the platform for each of these areas of law is based in the property concept, so too can we then have a metric for discussion to evaluate deviations from pure property principles that develop in each doctrine (or separate

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discipline) thereby allowing us to also isolate the most unique characteristics attributable only to a discrete subject like contract or tort. But understanding that the property concept is at the base of all three legal species—property, contract and tort—is nonetheless the necessary starting point for an understanding of any of them.

INTRODUCTION

The purpose of this Article is to propose and defend one simple proposition: In the Anglo-American legal system, if we do not at a minimum understand the legal concept of property, we cannot know the law. Certainly, some will say this opening statement is bold or incorrect. Others will just as certainly say that it is a broad statement but hardly bold, shocking, or worth devoting the time to read further. Whether bold or broad, it is a proposition worth a few pages of attention precisely because it is a statement not sufficiently examined in explicit terms.

What this Article terms the "property concept" focuses on the principal components of ownership, dominion, and the right to exclude. Its primary focus is on the property concept's influence on the Anglo-American private law triumvirate—the law of property, contracts, and torts. This Article discusses the interconnectedness of property, torts, and contracts based on fundamental parts of this "property concept." This property concept includes ownership not just in things but also in the self and all things that result from the use of the self. As such, the property concept and its right to exclude form the platform for far more than just property law. The concept also functions in the recognition of contracts, which require ownership and authority to transfer that are based in property, and for the identification of torts or wrongs, which necessarily require an interference with broadly defined property. The property concept is a primary and necessary precondition for the existence of and understanding of contract and tort law.

This Article proposes that the property concept, when reduced to its basic principles, forms the foundational elements of, and provides

a useful lens for, evaluating the purposes of Anglo-American private law. It has didactic utility to understanding the whole of Anglo-American private law even though the discrete disciplines—property, tort, and contract—have their own separate and distinct existences. At a conceptual, embryonic level, each is dependent on the principles of ownership, dominion, and the right to exclude, which are uniquely grounded in the property concept.

These principles become particularly useful for explanatory purposes when the concept of property is given a broad definition. This Article defines the property concept as encompassing ownership principles over things or sticks related to things and to all other things owned, including one's self and all of the sticks associated with this broader set of things owned. This broader concept adopts the conception of property embraced by James Madison in his 1789 essay, *Property*, which takes an expansive view of the meaning of that term to include the self.[1]

This Article contends that every legal system faces a decision on what property means, what ownership means, and the level of protection of one's ownership of the self. As such, the level of protection or recognition of property in the self becomes a necessary part of that system's legal foundation. This property concept then forms a platform upon which many other doctrines grow, including property, contract, and tort.[2] Each species of law has and will develop

1. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).

2. Interestingly, Professor Henry Smith used the word "platform" and made a *seemingly* similar statement in a very recent article. *See* Henry E. Smith, *Property as a Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012) ("Property is a platform for the rest of private law."). As I began to read Smith's piece, after having completed the accepted draft of this Article, I became worried that perhaps I was witnessing what Steven Johnson describes as "the multiple." STEVEN JOHNSON, WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION 34 (2010) (describing as more common than one might think, near simultaneity in scientific or other discovery by multiple persons who discover their "multiple" only after the fact). Upon completing my reading of Smith's work, however, I was relieved to find that we mean quite different things. Unlike here, Smith does not claim that property concepts are necessary components to each area of private law, nor does he focus on fundamental features of property as a concept, nor its supply of critical, required parts to private law. Additionally, Smith's work does not address the fundamental role of self-ownership in the interconnection that is the subject of this Article. It is not entirely clear how Smith defines platform or why its usage fits with his overall conclusions. Instead, his work is focused on why a modular theory of property law—contained in its own discipline—has lessons or "implications for the rest of private law" and in some way "feeds into"

and evolve on its own. As they develop, however, the rules in each of the categories can be judged by or measured against property metrics.

By understanding the property concept as the platform for each of these areas of law, it becomes possible to evaluate how each one deviates from pure property principles. With that information, we can then identify the unique evolutionary characteristics that are generated in one area of law yet do not develop in others. If we accept that the property concept is at the base of all three legal species—property, contract, and tort—then understanding the law of property, and the property concept, becomes a prerequisite for understanding any of these subjects.

Part I of this Article briefly cautions the reader on the importance of the subject at hand.[3] The fact that something might seem obvious or intuitive counsels in favor of reading on. Part II explains the general importance of learning property law and about the property concepts discussed in this Article, drawing on various perspectives on the influence of property law within our legal system and on the reason for its focus in law school curricula.[4] Part III explores the near endless struggle to define property in any precise or concise definition.[5] The fact that property defies such a definitive definition, I contend, is in part because of its complexity and breadth.

Part IV surveys the definitional debate and defends the proposition that there are certain key elements involved in any vision of the Anglo-American property concept—principally the right to exclude, dominion, and ownership.[6] Part V draws Madison and Locke into the definitional struggle, describing various contentions in favor of a broad definition of property that includes persons, the self, and the products of the self.[7] This discussion defends the idea that property

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the rest of private law. Smith, *supra*, at 1723. Smith does not analyze property in the way this Article will—as a concept or as a necessary foundation or base upon which the rest of private law is built and depends. Regardless of these differences, Smith's article does make some very important contributions to the property discussion; they are just different than those contained in this Article.

3. *See* discussion *infra* Part I.
4. *See* discussion *infra* Part II.
5. *See* discussion *infra* Part III.
6. *See* discussion *infra* Part IV.
7. *See* discussion *infra* Part V.

begins with the individual. Then, when you combine the essential elements of property discussed in Part IV together with the broad definition of property discussed in Part V, the conclusion should follow that those essential property concept elements also are at the bases of contract and tort law. Thus, Part VI closes out the substantive analysis explaining why property must be considered at the forefront as a platform for law, upon which contract and tort depend.[8]

In the end, this Article may not say anything extraordinary. In fact, it may seem to only say that which is obvious. Nonetheless, it provides an analysis and synthesis of a few simple points that, oddly enough, are not widely covered in the literature. It is first about the primacy of property,[9] and then about the undeniable interconnections that occur between the bases of property, contract, and tort.

I. TAKE A MOMENT: THE UTILITY OF OBSERVING THE SEEMINGLY "OBVIOUS"

One may dismiss the subject of this Article as too basic to deserve serious attention. It should not be approached with that bias. A discussion here of the basic property concept and its relationship with other species of law is worthwhile for several reasons.[10]

First, a standalone article on one way to see how property necessarily interconnects with contract and tort (not to mention many other topics of law) is justified because it is a proposition that does

8. *See* discussion *infra* Part VI.

9. The self-interested, self-perpetuating, or self-preservation-oriented law professor—whose principal vocation is in the teaching of the subject of property law and whose market value consequently is directly proportional with the level of importance recognized for the sustained necessity of his subject—should, of course, provide the reader with a disclaimer of such predisposition and ask her to read cautiously with an eye toward the possible biases attendant thereto. Now in my ninth year teaching the traditional first year course in property, I incorporate that disclaimer here but hope that the analysis presented herein will stand on its own, and any perception of bias will be overcome.

10. There is a credible claim that if ecosystem analysis can metaphorically apply to law, *see* J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996), the property concept defined herein may claim to be a keystone species to the legal ecosystem. On keystone species generally, see R.T. Paine, *A Note on Trophic Complexity and Community Stability*, AM. NATURALIST, Jan.–Feb. 1969, at 91.

not appear to be succinctly stated and defended in the existing literature. The coverage of the property concept as a foundational element in multiple species of legal doctrine has received limited coverage in the literature. And, where there exists some discussion on the nature and extent of the interrelationship involving property and other disciplines, there is disagreement. This Article will explain why, amidst this discussion, there is still more to add to the literature on the topic.

Second, even if this Article's principle thesis seems elementary to some, we must remember that, in teaching the law, many students are in an elementary position never having occasion before to think about such legal concepts and systemic effects.[11] First year law students are yet still lambs amidst the wolves in the legal brush. Thus, the lessons herein should have utility to that student audience along with those educators seeking ways to reach that audience in the traditional law school curriculum.[12] The lessons of the property concept and the web it weaves throughout the core law school courses may indeed be especially important because it is not obvious to the entering law student or the person first seriously introduced to the law.

It should also have broad appeal beyond law schools and to a general understanding of the law for other scholars, policymakers, and really each individual who is confronted with these pervasive principles that govern our everyday lives. Understanding that property components exist in other areas of law can help one better understand those areas, understand the broader foundations of those doctrines, and develop arguments within them. If a lawyer is not thinking of the property concepts in a torts case, for example, he may fail to fully present the underlying nature of the wrong or the reason

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11. The authors of one property textbook caution students that they may be entering undiscovered territory when it comes to understanding the meaning or justification of property, stating: "Most people take property for granted, without questioning why it exists. In fact, if someone had asked you last week why our society recognizes private property, you might have had trouble coming up with a convincing answer." JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 2 (2009).

12. EDWARD E. CHASE & JULIA PATTERSON FORRESTER, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS, at xxi (2d ed. 2010) (noting a need in teaching property to be sensitive to "the complexity of the topic to the newcomer and the changed aptitudes of the newcomers themselves").

for recognition of a wrong and may fail to tap into all of the available arguments of persuasion available to win the case.

Finally, there is a high risk for all of us when we take too many things for granted without giving the time or attention to subjects, which at first blush may seem prosaic, unremarkable, simple, ordinary, or obvious.[13] As social psychologist Gustav Ichheiser warns, "The fact . . . that something is obvious need not mean that it is explicitly noticed, registered, and scientifically taken into account. Instead, something of the opposite is true. Obvious facts tend to remain invisible."[14] Dukeminier et al. explain this in relation to understanding the origins of property law: "How does property come to be, and why, and so what? Most of us most of the time take these questions for granted, which is to say that we take property for granted. But taking something for granted is not exactly the best path to understanding it."[15] Admittedly, this Article specifically avoids the debate on origins of property referenced in this quotation. Putting aside the issues and debates—about how and why property rights or regimes emerged,[16] or even how property rights are obtained or acquired,[17] or the chicken and egg problem whether property preceded law or law preceded property—the point made by Dukeminier et al. is equally instructive to an understanding of the basic property concept at issue here. The property concept and its

13. Merrill had a similar thought when he wrote about the right to exclude. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 754 (1998) (also noting that his idea that "property means the right to exclude others from valued resources," was not a novel topic but one that needed to be written nonetheless to clarify the literature); *see also id.* at 730 ("[F]or those who have devoted themselves to teaching the law of property, the question is one of intrinsic interest, whether or not it has any payoff in resolving more immediate concerns.").

14. GUSTAV ICHHEISER, APPEARANCES AND REALITIES: MISUNDERSTANDING IN HUMAN RELATIONS 8 (William E. Henry & Nevitt Sanford eds., 1970).

15. JESSE DUKEMINIER ET AL., PROPERTY 3 (7th ed. 2010).

16. *See, e.g.*, Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV., Winter 1985, at 73 (describing the origins debate); s*ee also* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) (demonstrating that this exclusion from analysis is often necessary in the property literature to proceed to more focus points, stating, "We do not attempt here to outline any theory of the origins of property").

17. *See, e.g.*, Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 460 (2009) ("Perhaps the most enduring question in property is how these various chains of title . . . get started. How do objects that are not recognized as property or are thought to have no owner enter the universe of owned objects?").

role in the whole of the law is worthy of our exploration and a test of our understanding precisely because, as Ichheiser further warns, "Nothing evades our attention as persistently as that which is taken for granted."[18]

We become inattentive to understanding when we reject exploration of a subject because it seems too familiar or simple.[19] In fact, dismissal of such things as "too obvious" is dangerous to true understanding, as we may in fact fall into a complacent *belief of* understanding rather than an *enriched* understanding accomplished through consumption of argument and observation of premises.[20] As such and if nothing else, it is worthwhile to take a moment to examine the analysis in this Article because "the ordinary may appear as a fresh discovery even though there is nothing in it we did not already know. The ordinary unwrapped can surprise us."[21]

II. THE IMPORTANCE OF LEARNING PROPERTY LAW GENERALLY

The importance of studying the law of property cannot be overstated. The legal protection and regulation of people and things and the divisible rights within them—and all that they touch or that

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18. ICHHEISER, *supra* note 14, at 7–8 (criticizing "the tendency to neglect, or even to ignore, certain very important facts and problems because those facts and problems appear to be quite obvious"); *see also* ALDOUS HUXLEY, THEMES AND VARIATIONS 66 (1950) ("Most human beings have an almost infinite capacity for taking things for granted.").

19. Wittgenstein's words are relevant here:

> The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one's eyes.) The real foundations of his enquiry do not strike a man at all. Unless *that* fact has at some time struck him.—[sic] And this means: we fail to be struck by what, once seen, is most striking and most powerful.

LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 129 (G. E. M. Anscombe trans., 3d ed. 2001).

20. Drawing again from Ichheiser, "the contention that certain facts are 'quite obvious' must be considered not only as meaningless but even far worse than that: as a device for blocking the analysis of basic phenomena and preventing the incorporation of these phenomena into a theory of human relations." ICHHEISER, *supra* note 14, at 11. To quote Sherlock Holmes: "The world is full of obvious things which nobody by any chance ever observes." 1 SIR ARTHUR CONAN DOYLE, *The Hound of the Baskervilles*, *in* THE COMPLETE SHERLOCK HOLMES 571, 592 (George Stade ed., Barnes & Noble Books 2003) (1902).

21. Thomas F. Green, *Unwrapping the Ordinary: Philosophical Projects*, AM. J. EDUC., Nov. 1991, at 84, 86–87.

touches them—requires at the most basic level an understanding of the ubiquitous property concept that usually begins (in law school at least) with the core course on property. On the importance of learning property law, my syllabus always begins with the following excerpt from Blackstone:

> *There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property*; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. *And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right.* Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.[22]

This quotation from Blackstone serves as an inspiring reminder to students of the law that they stand in a special position. By enrolling in law school and taking the required first year property course, students can consider themselves among those few—a privileged few—who take the trouble to explore the subject in relative detail and examine the reasons and authority involved in the system.

The basic course in property obviously introduces "core" substantive material necessary in the law school curriculum. It also serves as a well-suited subject for a traditional introduction to the law and the thinking processes associated with the lawyering task. Property's pervasive influence in our lives makes for a fascinating transformative lens introducing law students to another way to look at the world and our relations within it.

By becoming part of such few, students of the law (whether formally "students" or not) can understand that they are, indeed,

22. 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (emphasis added).

embarking on a journey of engagement with a subject so pervasive in not only our reality but also in the imaginative, affective, and intellectual exploration of mankind from either our very point of existence or at least our first points of becoming subjects of legal governance. I prefer using this excerpt at the start of the property course because it encapsulates the importance of understanding property without necessarily requiring adherence to any preference for a particular system of rights. It is impossible to escape that Blackstone later takes certain positions on how a legal system should look.[23] It is also undeniable that there are certain presumptions or rules favoring one type of property system over another inherent in the teaching of our law.[24] The Anglo-American system has generally set certain preferences toward private property rights in the creation and interpretation of its applicable rules.[25] But, again, leaving aside the parts of the quoted material on the absolute nature of property rights and the right to exclude or the biases inherent in our system, the well-known quotation from Blackstone can be used to underscore the unique educative experience involved in the study of property law.

A survey of leading textbooks on property reveals similar claims of importance or spurs to enthusiasm for the property subject.[26] Students are instructed from the start that the history, prevalence, and pervasive nature of property make the course uniquely meaningful. A few examples are instructive. Sprankling and Coletta exclaim that "life as we know it would be impossible without property."[27] Dukeminier et al. advise that:

> As an institution for allocating resources and distributing wealth

23. *Id.*

24. *See, e.g.*, Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993) ("Blackstone's paean to private property comports with the mainstream Anglo-American exaltation of decentralized ownership of land. This vision underlies [much of the history of the development of American property law].").

25. *Id.*

26. For example, one textbook shamelessly begins: "Welcome to the most exciting course you will take in law school." ROGER BERNHARDT, PROPERTY: CASES AND STATUTES, at v (1999).

27. SPRANKLING & COLETTA, *supra* note 11, at 1 ("Look around you. Almost everything you see is owned by someone. In fact, life as we know it would be impossible without property.").

> and power, property bears in fundamentally important ways on central issues in contemporary life; as a body of doctrine, it discharges these modern-day tasks with rules and concepts drawn from age-old ways of looking at social relations in an ordered society.[28]

Nelson et al. focus on the storied history of property, explaining:

> Property law is, to be sure, ancient in civilization; it is the oldest branch of Anglo-American law, whose writ of novel disseisin began our system in the 12th century. But property will be with us as long as we have a civilization. The uses of property change; needs change; governing legal principles change. At any given time and place, there will always be fundamental legal principles governing rights and duties with respect to land and goods, and there will always be contemporary applications of those principles, to make property serve human needs of the time.[29]

Casner et al. make the introductory claim: "Protection of our property is vital to our sense of security and is a core function of our legal system."[30]

Moving away from the relative neutrality of the textbooks emphasizing the importance of understanding a property system generally, many examples in the literature emphasize the critical nature of the choice of property law to the development of legal

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28. DUKEMINIER ET AL., *supra* note 15, at xxxi.

29. GRANT S. NELSON, WILLIAM B. STOEBUCK & DALE A. WHITMAN, CONTEMPORARY PROPERTY, at vii (3d ed. 2008).

30. A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 1 (5th ed. 2004). Casner et al. explain that:

> Property plays a fundamental role in our society, providing us with material things we need to sustain life and a base from which we can participate in civic life. For most of us it does much more. We use our clothes, automobiles, and personal possessions to differentiate ourselves from one another; we use our property to shelter and nurture our families; and we use our wealth to support causes we want to promote. Protection of our property is vital to our sense of security and is a core function of our legal system.

Id.

systems. For example, Andrew Carnegie's exhortation that "[u]pon the sacredness of property civilization itself depends"[31] is emblematic of deeply held beliefs about the importance of the protection of a capitalistic private property system.

Conversely, examples can be found indicating the importance of choosing a system *against* private property. For instance, Marx and Engels propose the abolition of private property and all its dehumanizing effects as one of the countervailing struggles in our treatment of this thing called property:

> *Communism* as the *positive* transcendence of *private property* as *human self-estrangement,* and therefore as the real *appropriation* of the *human* essence by and for man; communism therefore as the complete return of man to himself as a *social* (i.e., human) being—a return accomplished consciously and embracing the entire wealth of previous development. This communism, as fully developed naturalism, equals humanism, and as fully developed humanism equals naturalism; it is the genuine resolution of the conflict between man and nature and between man and man—the true resolution of the strife between existence and essence, between objectification and self-confirmation, between freedom and necessity, between the individual and the species. Communism is the riddle of history solved, and it knows itself to be this solution.[32]

Such anti-property beliefs are often just as deeply felt and vigilantly defended as the claims for private property.

The point being that regardless of your preferred system of property, the choice of a type of property system (including a choice

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31. ANDREW CARNEGIE, *The Gospel of Wealth*, *in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 18 (Edward Kirkland ed., 1965) (1889); *see also, e.g.*, DAVID HUME, A TREATISE OF HUMAN NATURE 363 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1740) ("Where possession has no stability, there must be perpetual war. Where property is not transferr'd [sic] by consent, there can be no commerce. Where promises are not observ'd [sic], there can be no leagues nor alliances.").

32. KARL MARX, *Private Property and Communism*, *in* ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 132, 135 (Dirk J. Struik ed., Martin Milligan trans., Int'l Publishers 1964) (1844).

against recognizing private property at all within a system) and the rules established within it must be made in a civilized world, and that choice will undoubtedly have far-reaching implications for man and society.[33] The stakes are high, and the importance of understanding the property subject is proportionate.

For law students, lawyers, and academics alike, property law must be understood for its importance both as a traditional introduction to the law but also as a subject with a pervasive presence in life and across multiple subject matters that students of the law will encounter on a regular basis—often without knowing unless they are told to make the connection or are made acutely aware of the connection early in their legal studies and develop a discipline to actively look for it.

III. BASIC DEFINITIONS OF PROPERTY IN AN ANGLO-AMERICAN SYSTEM

The definition of property can help to start an understanding about how property is a necessary predicate to the law of contracts, the law of torts, and a variety of other seemingly distinct disciplines. To understand the basic "property concept," we could first look to some generally accepted definitions of "property" itself. The problem is that most theorists agree that there is no easy way to answer the question, "What is property?"[34]

Although dictionaries have their limitations,[35] they can serve as a useful point of departure. *Black's Law Dictionary* defines "property," in part, as follows:

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33. EDWARD H. RABIN, ROBERTA ROSENTHAL KWALL & JEFFREY L. KWALL, FUNDAMENTALS OF MODERN PROPERTY LAW 1 (5th ed. 2006) (explaining that "[e]very human society has a property system").

34. *See, e.g.*, THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1 (2007) (asking and responding: "What is property? There is a surprisingly wide range of answers to this basic question" and then proceeding to describe the two conceptions of property as either things or bundles.); JOHN G. SPRANKLNG, UNDERSTANDING PROPERTY LAW 1 (2000) ("What is 'property?' The term is extraordinarily difficult to define. One of America's foremost property law scholars even asserts that '[t]he question is unanswerable.'").

35. *See* Donald J. Kochan, *While Effusive, "Conclusory" is Still Quite Elusive: The Story of a Word,* Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. (forthcoming

> Property. That which is peculiar or proper to any person; that which belongs exclusively to one; in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. *The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects.* The exclusive right of possessing, enjoying, and disposing of a thing. *The highest right a man can have to anything*; being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy.[36]

Exclusion, disposal, possession, usage, ownership, dominion, and exclusivity become key components of the meaning of property. And, although not specifically used in the definition, there is an underlying theme of "authority" involved as well in the meaning of ownership that confers the authority to use and dispose of property. The *Black's* definition continues in part:

> *The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments, and includes every invasion of one's property rights by actionable wrong.*[37]

2012).

36. BLACK'S LAW DICTIONARY 1095 (5th ed. 1979) (emphasis added) (citations omitted).
37. *Id.* (emphasis added).

This list of ancillary characteristics of property helps further underscore the authority theme and importantly introduces the flavors of transfers and wrongs.

The *Black's Law Dictionary* definition is packed with a broad and powerful definition of property. The *Black's* definition has expanded since Bryan Garner took over as editor with the Seventh Edition of *Black's* (which is now in its Ninth Edition). As one observer notes, Garner's definition is broad enough so that we can see the concept of property and its variations rather than providing any precise definition.[38] The *Black's* definition looks at property more in line with it being a concept than an easily definable term. Furthermore, it is clear from reading the *Black's* definition that there is not a *concise* dictionary definition of the term property. In fact, given the richness of the concepts involved, it is difficult to create or conceive of one.

Nonetheless, the definitional debate has been prevalent in the literature. One thing we know is that there exists a now longstanding debate on whether property should be defined as related to "things" or whether it relates to a "bundle of rights."[39] Still today even these camps have split into factions, have detractors, and have scholars searching for new concepts, such as a "property prism" to define

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38. Roy M. Mersky & Jeanne Price, *The Dictionary and the Man: The Eighth Edition of Black's Law Dictionary, Edited by Bryan Garner*, 63 WASH. & LEE L. REV. 719, 723–24 (2006). Mersky and Price explain that:

> Multivolume treatises have been written on property; because we understand Garner's definition does not mean that we can fathom all of its implications. But the definition of "property," and the definitions of related terms that follow, enable us to "see" property in a legal context and to witness the development of related concepts that have grown out of the idea of property itself.

Id. at 724.

39. As Sprankling describes it:

> The problem arises because the legal meaning of "property" is quite different from the common meaning of the term. The ordinary person defines property as *things*, while the attorney views property as *rights*. Most people share an understanding that property means: "*things* that are *owned* by persons.". . . In general, the law defines property as rights among people that concern things. In other words, property consists of a package of legally-recognized rights held by one person in relationship to others with respect to some thing or other object.

SPRANKLNG, *supra* note 34, at 1–2; *see also, e.g.*, RABIN, KWALL & KWALL, *supra* note 33, at 1 (contending that "[i]n law . . . the institution of property refers not to the thing that is owned, but to the legal relations among people with respect to a particular item of wealth").

property.[40] The *Black's* definition has room for many of the adherents in multiple definitional camps. This things–bundle–prism–etc. debate exists on a rich, dense, and complicated tapestry,[41] and this Article will neither attempt to fully summarize it nor stitch any new lines into it.

It is not really necessary to do so for this Article's purposes. Rather than focus on the things–bundle debate, this Article will rest on the assumption that the right to exclude and its related characteristics must be included in any definition of property. Most theorists recognize the existence of the right to exclude as either essential to the very concept of property or at least that it is normally included in the concept of property, even if not necessary for the existence of property (and at the very least that our current conception of private property in the American system is based in a recognition of the existence and dominance of exclusion theories).[42] And it is that right to exclude, and its corresponding components, that forms the basis for the conclusion that property provides a platform for understanding all areas of Anglo-American private law.

In essence, I argue that the right to exclude and the corresponding concepts of ownership and dominion (along with a related concept of authority) not only lie at the heart of any theory or definition of property but also that these are essential components to the law of contract and tort, among others. Thus, the terms right to exclude, dominion, and ownership that have been used almost exclusively in

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40. A recent symposium published in the September 2011 Econ Journal Watch is enlightening on the richness and complexity of the debate. *See Symposium: Property: A Bundle of Rights? Prologue to the Property Symposium*, 8 ECON J. WATCH 193–291 (2011) (including articles authored by Daniel B. Klein and John Robinson, Eric R. Claeys, Robert C. Ellickson, Richard A. Epstein, Larissa Katz, Thomas W. Merrill, Adam Mossoff, Stephen R. Munzer, J.E. Penner, and Henry E. Smith).

41. Grey's formulation of the things–bundles debate is illuminative:

> Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned* by *persons*. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership. By contrast, the theory of property rights held by the modern specialist . . . fragments the robust unitary conception of ownership into a more shadowy "bundle of rights."

Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980).

42. Merrill, *supra* note 13, at 734.

the parlance of property deserve equal usage in the other common law doctrines. Analyzing these terms helps explain why the concept of property is a vital component in these other areas of Anglo-American private law.

IV. PROPERTY AND ITS CHARACTER (SPECIFICALLY OWNERSHIP, DOMINION, AND THE RIGHT TO EXCLUDE)

As one group of scholars wisely noted, "Regardless of the philosophical perspective through which one views the concept of property, the concept of property does have one unifying or necessary characteristic—the right to exclude."[43] Most scholars agree that the right to exclude is the principal component in the private property concept.[44] Because the right to exclude is universally present across theories of property,[45] one need not subscribe to an absolutist view or a natural rights view to apply the right to exclude principles across all forms of property. Thomas Merrill has extensively and effectively discussed the right to exclude and its place in property law. He concludes that the right to exclude "is the *sin qua non*. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property."[46] The right to exclude means that individuals may grant or withhold permission to property—in other words, the right to include is a necessary extension of the right to exclude.[47]

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43. H. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 7 (2d ed. 2006).

44. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES, at xxxix (5th ed. 2010) ("[M]ost scholars agree that the right to exclude is either the most important, or one of the most important, rights associated with ownership."); J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 3 (3d ed. 2007) ("Since Blackstone's time, the Anglo-American legal tradition has honored this view, but the boundaries of the right of property have not always been easy to define.").

45. RABIN ET AL., *supra* note 33, at 2 ("All theories of property recognize that the right to exclude others is an important attribute of property.").

46. Merrill, *supra* note 13, at 730.

47. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) ("[T]hat is property to which the following label can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen[.] Endorsed: The state[.]");

The American system of private property is grounded in beliefs in its equalizing nature and reciprocity—in benefits and burdens—among equals. Much of that law draws from the insights of David Hume in that regard. Hume posited, "It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules."[48] Hume continues to explain that self-interested individuals will "leave another in the possession of his goods, *provided* he will act in the same manner with regard to me."[49] James Madison also similarly explained this concept of reciprocity when he described the necessity that one may use their property in such a manner only as to leave every other man the "like advantage."[50]

The right to exclude operates within this concept of dominion with reciprocal rights and obligations of ownership. The right to exclude is "[a]t the very heart of property" and is property's "singular conceptual core."[51] Under almost any "bundle" conception of property, each of the sticks is dependent on recognition of the right to exclude.[52] The Supreme Court has described the "right to exclude" recognition as fundamental to property on several occasions.[53]

DUKEMINIER ET AL., *supra* note 15, at 88–89 ("Felix Cohen's notion of property [is] a relationship among people that entitles so-called owners to *include* (that is, permit) or *exclude* (that is, deny) use or possession of the owned property by other people. . . . [T]he right to include—to sell, for example, to another . . . does not of itself result in a fully effective power to transfer. The right to exclude is needed as well. The two rights are the necessary and sufficient conditions of transferability."); *see also* Hanoch Dagan, *Exclusion and Inclusion in Property Law* (June 9, 2009) (unpublished manuscript) (on file with author), *available at* http://ssrn.com/abstract=1416580.

48. HUME, *supra* note 31, at 314–15; *see also* Madison, *supra* note 1, at 266 (explaining the concept of "equal advantage").

49. HUME, *supra* note 31, at 315; *see also* Madison, *supra* note 1, at 266.

50. Madison, *supra* note 1, at 266.

51. O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J. 459, 487–88 (2004) ("If having 'property' means anything, historically and legally, it is that the owner can exclude others from the resource owned and that others have a duty not to infringe this right.").

52. *Id.* at 488–89 ("[T]he positive 'bundle' of rights like possession, use, and alienation can all be derived from the negative exclusionary right. . . . [I]f an owner can legally exclude others from interfering with the resources of her land, she can possess the land, use it in a myriad of ways that leave an equal right in others to use their resources, or transfer it through sale, lease, or gift to others.").

53. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) ("Property depends upon exclusion by law from interference."); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as

The right to exclude is the basis for the controlling axiom in American property law that "each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—[which] is the rule by which every member or society must possess and enjoy his property."[54] Stated differently, one may act as they wish so long as they internalize the costs of their actions, thereby respecting others by not imposing negative externalities—costs imposed on another as a result of one's use of his property.[55] This freedom from negative externalities is simply a consequence of a respect for the right to exclude, and the effective control of externalities is a fundamental basis of property law.[56] Demsetz describes this concept well when he explains that "[a] primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."[57]

Indeed, the U.S. Supreme Court has explained that "the very essence of government" is the social compact's authorization for "the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another,"[58] as expressed in this *sic utere* maxim. Related adages include that "your right to swing your arm ends at the tip of my

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property—the right to exclude others."); Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

54. Munn v. Illinois, 94 U.S. 113, 145 (1876); *see also* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

55. Demsetz, *supra* note 54, at 347 ("It is important to note that property rights convey the right to benefit or harm oneself or others. . . . [P]roperty rights specify how persons may be benefited or harmed, and, therefore, who must pay whom to modify the actions taken by persons. The recognition of this leads easily to the close relationship between property rights and externalities."). *See generally* Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 CHAP. L. REV. 409 (2006).

56. Demsetz, *supra* note 54, at 348; *see also* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 486 (2002) ("A number of patterns in property rights can be explained as variation along the methods of delineation, reflecting their respective costs and benefits."); DUKEMINIER ET AL., *supra* note 15, at 46 ("'Externality,' Demsetz says, 'is an ambiguous concept.' It is also an important one that you will be confronting more than occasionally [in the study of property law].").

57. Demsetz, *supra* note 54, at 348. *See generally* Fred S. McChesney, *What'd I Say?: Coase, Demsetz and the Unending Externality Debate* (Nw. Univ. Sch. of Law Law & Econ. Research Paper Series, Paper No. 04-01, 2004), *available at* http://papers.ssrn.com/abstract=491182.

58. *Munn*, 94 U.S. at 124.

nose,"[59] or alternatively, "[m]y property rights in my knife allow me to leave it where I will, but not in your chest."[60] The *sic utere* maxim and reciprocal rights have long been recognized as foundational and natural regulations of one's liberty.[61] When one looks at the *sic utere* maxim in a broad sense, it need not be limited to property law. Although it involves the basic exclusion rights understood as grounded in property, it is equally applicable to understand the rationale for identifying most of the wrongs we call torts. Moreover, it is the inverse of the exclusion right and the use of one's property so as not to harm—that is, the bargained for inclusion right—that forms the basis for contract. By first identifying what each individual owns and has the right to control and to exclude, we can then understand what individuals have the authority to trade or contract for or against. The concept of *nemo dat quod non habet*—"[n]o one gives what he does not have"—follows as based in the basics of ownership yet a necessary starting position to trade or alter rights for any transaction as well.[62]

One need not accept the absolutist notions of Blackstone's view of private property rights nor his beliefs in their origin to regard it as having an enduring value as to the basic right to exclude. The right to exclude is susceptible to limits and always has been so. The fact that it is susceptible to limits is not debilitating in any way to its use as a starting point for identifying the underlying bases for property, tort, and contract law. It simply means that the scope of the right to exclude can be defined and limited by law. Recognizing property as an exclusionary right does not require that it be an absolute and unlimited one—it is subject to legitimate controls and functions of

59. Boissonneault v. Mason, 221 N.W.2d 393, 393 (Mich. 1974).

60. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171 (1974).

61. John Trenchard & Thomas Gordon, *An Enquiry into the Nature and Extent of Liberty; with its Loveliness and Advantages, and the Vile Effects of Slavery*, *in* 1 CATO'S LETTERS 244, 245 (Leonard W. Levy ed., Da Capo Press, Da Capo Press Reprint Ed. 1971) (1733) ("By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys.").

62. BLACK'S LAW DICTIONARY 1849 (9th ed. 2009).

the government aimed at regulation of the use of property and the protection of reciprocal rights of others.[63]

The existence of state limits does not relieve us of the necessity of asking about the right to exclude. The right to exclude need not be cast in absolute terms to serve its utility. Even Blackstone's own work does not portray the right to exclude as absolutely absolute.[64] Yet, the absolutist vision, even if only as a rhetorical device,[65] has value. It can at least be seen as a point of departure for property law and other species of law that rely on the right to exclude. Consider the following from Goldstein and Thompson:

> True to Blackstone's image of property, the most basic and defining right remains a landowner's right to exclude other people and things from his or her land. Yet there have always been limits, and the exceptions to a property owner's right to exclude are growing in response to humanitarian, equitable, and political concerns over the "despotic" character of exclusive rights. The common law also constrains how property owners use their lands. One landowner's right to use his land as he sees fit can clash with the right of a neighbor to do the same, as when one landowner's desire to build a factory impinges on a neighbor's air quality. Land uses can also impact society's interests in the environment and other amenities and values. For these reasons, the law limits how each property owner uses her land.[66]

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63. Reed, *supra* note 51, at 491–93.

64. FORREST MCDONALD, NOVUS ORDO SECLORUM 13 (1985) ("Blackstone's sweeping definition of the right of property overstated the case; indeed, he devoted the succeeding 518 pages of Book 2 of his *Commentaries* . . . to qualifying and specifying the exceptions to his definition."). *See generally* Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985) (explaining that Blackstone did not believe exclusion was absolutely absolute).

65. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–04 (1998) (calling Blackstone's usage an "Exclusivity Axiom" that is "a rhetorical figure describing an extreme or ideal type rather than reality").

66. PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 2–3 (2006).

This is true for its application to property, torts, and contracts without consequence to the conclusions in this Article. We have to ask what the right to exclude entails *in light of surrounding and developed law*, but we nonetheless must at least ask about the right to exclude in the first instance.

Merrill does an excellent job describing the right to exclude and its importance in understanding the principles of property,[67] but he does not expressly extend the right to exclude to encompass contract and tort. In fact, elsewhere, Merrill and Smith focus on why the law of property must be considered distinct from the law of contracts or the law of torts.[68] I believe that at its most fundamental level, however, the right to exclude is indeed integral to an understanding of contracts, torts, and some other areas of Anglo-American law.

Moreover, Merrill and Smith, though focusing on the right to exclude,[69] fail to direct their attention to a broad property concept that includes ownership in the person. Ellickson aptly describes the limitations of their work in this regard, explaining that "because Merrill and Smith define 'property' as an entitlement in a 'thing' as opposed to a 'person', they are unwilling to refer to a person's rights in his own body, labor, and reputation as property."[70] The next Part illustrates that a broader definition of the property concept—focused not just on things or on sticks related to things but instead on all things owned, such as one's self and all the sticks associated with this broader set of things owned—is a useful exercise to understand the role of property principles as they apply more broadly in the development of Anglo-American law, including in the otherwise separate categories of property, contract, and tort.

Ellickson also commented on the analytical power of property concepts to clarify "momentous legal issues" outside of the core subject of real property and things—"it is not apparent why property

67. *See generally* Merrill, *supra* note 13.

68. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 378–79 (2001) (emphasizing their belief that the property focus must be on in rem).

69. *Id.*

70. Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON. J. WATCH 215, 219 (2011) (citation omitted).

scholars should cede, on the altar of definitional purity, this entire territory to other legal specialists."[71] The next Parts elaborate on that idea (where Ellickson did not) and explain that the broader property concept has a strong basis in factual connection with these other areas and is a platform, upon which much of the law is based.

V. THE BROAD PROPERTY CONCEPT: THE LOCKEAN–MADISONIAN DEFINITION OF PROPERTY

From an understanding of the preeminence of the right to exclude within property law, it is useful to think broadly about what is or is not property, to which the right to exclude attaches. One useful lens comes through the Lockean–Madisonian conception of property as including all things to which we have ownership or dominion, including our bodies, ourselves, and the fruits of the labor generated from the use of the property in ourselves. If we take this broad meaning of property, we can begin to see the paramount need to understand the property concept in relation to all legal doctrines that affect not just things, like land, houses, or our personal possessions, but also the property that we hold so dear in our very lives, including the freedom to use our person in any way we wish.

This concept of property is well-embedded in our constitutional traditions and in the role of limited government envisioned by John Locke, James Madison, and others.[72] John Locke emphatically proclaimed, "The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*. To which in the state of nature there are many things wanting."[73] In the state of nature, there are no neutral

71. *Id.*

72. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985) ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights."); James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y, Winter 2012, at 27, 29–30 ("John Locke and the Whig emphasis on the rights of property owners profoundly influenced the founding generation."). For a discussion of the role that the protection of property rights has played in U.S. history, see generally Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991).

73. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 124, at 66 (C.B. Macpherson ed., Hackett

third party protections for man's right to exclude—meaning that an individual's belongings, including his person, could face intrusion without recourse. At the very least then, a limited government is necessary to provide the requisite protections so that the general attributes inherent in the very nature of private property and ownership of self and things could manifest without chaos. Critical to these necessary functions of government are the recognition of rules governing property, contracts, and torts.

James Madison observed this essential correlation between property and the state when he wrote, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[74] Madison's conception of property within this statement on the proper role of government was broad. In his rather under-recognized essay from 1789,[75] Madison expounded on a broad meaning of property that defines what this Article is calling the "property concept." Madison explained the breadth of the property concept and its inverse relationship with the scope of exerted governmental power as follows:

> [A]s a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of

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Publ'g Co. 1980) (1690). Locke describes the importance of liberty underlying this protection of property:

> [*F*]*reedom of men under government* is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man. . . . This *freedom* from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together.

Id. § 22–23, at 17.

74. Madison, *supra* note 1, at 266.

75. Madison's essay is strikingly under-discussed in the literature of American property law. If one searches Westlaw's JLR database, for example, she will find less than two dozen citations to this essay and only a few articles giving anything more than a passing reference to it. Perhaps the absence of much analysis is because of the resistance to a natural law perspective on the law. But, although presented in part from a natural law perspective, the concept of property in the person should not be dismissed when it serves as a useful optic for explaining the interrelationship between property and contract or tort (along with some other species of law). That explanatory value alone is sufficient, and one need not adhere to any natural law perspective to recognize that independent utility.

> power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.[76]

Property and liberty are intertwined and the excessive growth of the state's power to control any type of property—including real property, personal property, or the property one has in his person (and in its attendant characteristics and manifestations)—has vital implications for liberty to conduct affairs in general.[77]

Similarly focused on property and the person, Locke explains that the incentive to work is directly correlated with the confidence in one's ability to keep the fruits of his labor.[78] Thus, strong private property rights encourage investment in production and respect for them "protects private expectations to ensure private investment."[79] Second, delineation of ownership facilitates exchange. Contracting would be impossible if parties were unable to trade rights.[80] Contracting would also be undesirable if one could obtain something through less costly means, such as through plunder or through exploitation of a commons when the state fails to protect against these activities.[81] In other words, property must be protected from aggression in order for civil society to flourish.[82] At a minimum,

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76. *Id.*

77. "'The right of property,' Arthur Lee of Virginia declared, 'is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.'" JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992) (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* THE PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775)).

78. *See* LOCKE, *supra* note 73, § 30, at 20.

79. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

80. *See* G. WARREN NUTTER, POLITICAL ECONOMY AND FREEDOM 102 (Jane Couch Nutter ed., 1983) ("Markets without divisible and transferable property rights are a sheer illusion. There can be no competitive behavior, real or simulated, without dispersed power and responsibility.").

81. On man's self-interested nature, see THOMAS HOBBES, LEVIATHAN 60–63 (Liberal Arts Press 1958) (1651). On that nature's relation to property and contract, see EPSTEIN, *supra* note 72, at 7–18.

82. This is in many ways consistent with Hume's concept of property and the role of the state. As Hume explained: "Where possession has no stability, there must be perpetual war. Where property is not transferr'd [sic] by consent, there can be no commerce. Where promises are not observ'd [sic], there can be no leagues nor alliances." HUME, *supra* note 31, at 363. Hume reiterates:

> We have now run over the three fundamental laws of nature, *that of the stability of possession*, *of its transference by consent*, and *of the performance of promises*. 'Tis [sic] on the strict observance of these three laws, that the peace and security of human society

therefore, government must have the power to protect these institutions of property and free exchange.[83] As recognized in *Federalist No. 10*, "the protection of different and unequal faculties of acquiring property" is "the first object of [g]overnment."[84]

The property concept is essential to our legal system.[85] Everything we touch implicates the basic idea of property. Everything we can or cannot do is, at its core, dictated by it. If one adopts a broad view of the meaning of "property," any and all of our legal relations have the concept of property at their core. Madison explains this view, in his essay, *Property*:

> This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing [sic] to which a man may attach a value and have a right; and *which leaves to every one* [sic] *else the like advantage*. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.[86]

If one takes the broad view of property like Madison, then property is ever-present in our lives (and indeed life itself is property). It is the

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> entirely depend; nor is there any possibility of establishing a good correspondence among men, where these are neglected.

Id. at 337; *see also* LOCKE, *supra* note 73, § 7.

83. THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

84. *Id.*

85. JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 1 (6th ed. 2007) ("Property law forms an essential component of our common law legal system . . . .").

86. Madison, *supra* note 1, at 266.

constant that fuses together seemingly distinct areas of law in the complex legal world. A unifying foundation exists between seemingly distinct species of law based on principles of property, ownership in the self, and all that extends from the self.

Madison also claims that property, understood broadly, explains the reciprocal rights and reciprocal obligations that exist between persons in society vis-à-vis each other's property (whether that is toward the property in land or the self or otherwise).[87] These reciprocal relationships form the bases for defining wrongs (torts), altering default exclusion rules (contracts), and otherwise defining ownership (property).

Based in the Madisonian conception of property in this broad context, the Founders understood the constitutional concern for property to be based in this broad concept, including these facultative resources of the person.[88] The Founders were not concerned with what has become the modern debate over a stricter definition of property—property broadly understood was the lodestar in the relationship between the individual and the state.[89]

Judge Loren Smith is one of the very few to discuss Madison's *Property* in the legal literature. In his work, Judge Smith has focused on the importance of the Madisonian conception, arguing that the "conception that property includes all of the fundamental aspects of

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87. *Id.*

88. Reed, *supra* note 51, at 477. Reed posits:

> The Framers of the United States Constitution, with James Madison at the helm, assumed the existence of property as a constitutional institution and, further, had a very broad view of the resources that the term "property" protected. It certainly protected those resources such as land and goods that traded in the marketplace, but it also protected facultative resources, that is, the personal resources comprising one's talents, efforts, expressions, and practices.

Id.

89. *Id.* at 477–78. Reed explains the fundamentals:

> Importantly, neither Madison nor many other American colonists considered the "larger and juster meaning" of property to be merely a rhetorical device. Today, it is fashionable to separate the facultative resources of the person from the nonfacultative resources externalized and traded in the marketplace and to think of the right to the former as liberty and as somehow different from, separate from, and superior to the right to the latter, which is property, but it was not so to the Constitutional Framers who appreciated property as an institution that legally specified their desired relationship to the state with regard to all kinds of limited resources, including those of the person.

Id.

the integrity of the human person, life, liberty and property, the whole preamble [to the Constitution] is about protecting the citizen's rights in property and property in rights."[90] Madison's unique role in the creation of the constitutional republic should give his conception of property special significance.[91] The broadest conception of property equates with giving constitutional liberty protections their broadest interpretation.[92] This broad conception of property dominated the discussion of its meaning in the jurisprudential discussions preceding the formation of the U.S. Constitution.[93]

In this Lockean–Madisonian concept of property, a sound protection of property rights is fundamental to all other liberties.[94] And, importantly, it is vital to the ability to labor and exchange, a process of using property in one's self, and to retain the fruits of those efforts—in other words, to maintain ownership and dominion over the products of the use of one's self, including through

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90. Hon. Loren A. Smith, *Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056 (1996).

91. Hon. Loren A. Smith, *Introduction*, 46 S.C. L. REV. 525, 526 (1995) ("Madison's venerable role in our republic—author of much in the Constitution and a large share of The Federalist; member of the First Congress, where he was the driving force behind the Bill of Rights; and, of course, our fourth President—should give much weight to his definition."). *See also* William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 772 (1995) ("Madison's essay, published one year after adoption of the Bill of Rights, provides helpful guidance when considering the Constitution's protection of a sphere of personal autonomy."); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV., Winter 1996, at 49, 56–68 (discussing Madison's definition of property as the basis for protection of First Amendment concerns).

92. Justice Bradley stated, for example, that:

> The words "life," "liberty," and "property" are constitutional terms, and are to be taken in their broadest sense. . . . The term "property," in this clause, embraces all valuable interests which a man may possess . . . . It is not confined to mere tangible property, but extends to every species of vested right. . . . [A] very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself.

Campbell v. Holt, 115 U.S. 620, 630 (1885) (Bradley, J., dissenting).

93. Heffernan, *supra* note 91, at 771 ("Perhaps the most intriguing feature of seventeenth and eighteenth century discussions of property is the extent to which they involved a broad definition of their subject.").

94. The Supreme Court has even stated:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth, a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

contracts. These are primary conditions for the type of autonomy that is protected when one has the right to exclude (and the corresponding right to include or contract away rights to the self or one's labor), ownership of the self, and overall dominion over the self against all others.[95] Every alteration of or infringement on property rights necessarily changes our understanding of the proper role of law vis-à-vis all things owned, including one's self and his liberty, which in the Madisonian conception are part of the property each individual owns.[96]

Any system must decide what ownership in the self means. Every legal system must decide the level of protection or recognition of property in the self before it can make any decision on what rules to create in relation to real property, tort or contract. For these reasons, the property concept forms a platform upon which many other doctrines grow, including property, contract, and tort. The rules in all three develop on their own, but each can be measured from their consistency or deviation from a starting base of absolute property ownership in the self. Once we understand that the platform for each of these areas of law is based in the property concept, we can then have a metric for discussion to evaluate deviations from pure property principles that develop in each doctrine (or separate discipline) thereby allowing us to also isolate the most unique characteristics attributable only to a discrete subject, like contract or tort. But understanding that the property concept is at the base of all three legal species—property, contract, and tort—is nonetheless the necessary starting point for an understanding of any of them.

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95. Justice Joseph Story has stated:

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred.

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

96. As the Supreme Court posited in one case, "Individual freedom finds tangible expression in property rights." United States v. James Daniel Good Real Prop., 510 U.S. 43, 61 (1993).

VI. A REQUIRED UNDERSTANDING: WHY THE "PROPERTY CONCEPT" HAS A PRIVILEGED STATION IN THE WHOLE OF ANGLO-AMERICAN PRIVATE LAW

Throughout history, "property has been the most important subdivision of the field of law."[97] This Article posits that property exists as the platform of law, upon which other fields rely and launch their own doctrines from. The literature is filled with passing references to interconnectivity of law. Some, for example, have described the law as a seamless web, although that view has its degrees of criticism.[98]

Some discuss specifically the link between property and other areas of law. A few examples are worth noting. William Howard Taft described "indissoluble" links between property, contract, and liberty.[99] Friedrich Hayek proclaimed, "Law, liberty, and property are an inseparable trinity."[100] Richard Epstein describes an "abiding intellectual unity" between property, contract, and tort.[101] Epstein succinctly describes the relationship: "Property law governs acquisition of the rights persons have in external things and even in themselves. Torts governs protection of the things reduced to private ownership. Contracts governs transfer of the rights so acquired and protected."[102] Freedom of contract indeed is dependent on the right of property.[103] And the overlap between the features of property and the features of torts or wrongs is evident throughout the law.[104]

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97. TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 20 (1998) (arguing property has had primacy in law "[si]nce Roman times").

98. F.W. Maitland, *A Prologue to a History of English Law,* 14 L.Q.R. 13, 13 (1898) (discussing law as forming an organic unity, while stating that "[s]uch is the unity of all history that any one [sic] who endeavours to tell a piece of it must feel that his first sentence tears a seamless web").

99. William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 218 (1894) ("[W]e inherited from our English ancestors the deep seated conviction that security of property and contract and liberty of the individual are indissolubly linked, as the main props of higher and progressive civilization . . . .").

100. F.A. HAYEK, 1 LAW, LEGISLATION AND LIBERTY 107 (1973).

101. EPSTEIN, *supra* note 72, at vii.

102. *Id.*

103. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 280 (5th London ed. 1864) ("The right of property includes, then, the freedom of acquiring by contract.").

104. "We . . . find that many of the most fundamental constitutive features of the law of property are actually found in the law of wrongs, both civil and criminal." J.E. PENNER, THE IDEA OF PROPERTY IN LAW 74 (1997).

The major areas of private law admittedly have grown into distinct disciplines, but from the embryonic level, they rely on the basic principle of property to mature. At their conception, each was dependent, in whole or in part, on the property concept defined by the right to exclude or include, ownership, and dominion.

Although many scholars note the connections, they do not go as far as to describe a property platform, upon which most of the other areas of law must emerge. Under the accepted, limited definitions of property, many see correlations and overlaps between property, contracts, and torts,[105] but few defend the proposition that contracts and torts are dependent on the definition of property.

Some scholars recognize similarities between property, torts, and contracts but are stuck on the idea that property relates only to "things" as a reason to limit their discussion of property's place in contract and tort law. This Article has already discussed this limitation of the work of Merrill and Smith.[106] Stoebuck and Whitman provide an example of such "things"-based thinking that prevents some from pursuing the property concept in contracts and torts when describing the Second Restatement of Property approach:

> What distinguishes "property" from "personal" interests is that "property" interests (1) relate to "things"—land, chattels, and intangible "things"—and (2) are usually protected by law against an indefinitely large number of persons ("the world"). Some "personal" interests are protected against an indefinitely large number of persons but do not relate to "things"—e.g., the interest in freedom from personal injury caused by the

105. For example, although not focusing on a theoretical property concept, the ALI Restatement effort recognized some level of property's connection with many other subjects:

> At this moment in history Property seems a far less coherent intellectual subject than Contracts or Torts. There is much greater variation in what is included in introductory law-school courses. Most Property cases are also Contracts or Torts cases, and some—for example, enforcement of landlord-tenant regulations—are criminal cases. Real property as an independent field has become comparatively less important over time, and an introductory course in Property now considers principles applicable to corporation law, to environmental law, and to intellectual-property law.

LANCE LIEBMAN, AM. LAW INST., A CONCISE RESTATEMENT OF PROPERTY, at IV (2001).

106. *See supra* notes 67–68 and accompanying text.

> intentional or negligent acts of others. Other "personal" interests relate to "things" but are generally enforceable against only one or a few persons—e.g., the interest in performance of promises made by the other party to a contract.[107]

But this "thing"-based distinction would disappear if we work from an understanding of property as including the person and the Madisonian broad definition.[108]

Because the right to exclude is at the essence of property's definition,[109] it is often discussed in property law and by property scholars. But it has vital application in torts and contracts too. As Merrill and Smith explain, "Together these rights to exclude and governance rules collectively make up the law of property and connect property to adjacent areas of contracts, torts, regulation, and public law,"[110] yet their work only references this connection rather than directly applying the property analysis in these other areas of law. Moreover, they ultimately focus on a things-based definition that excludes the broader property concept and its considerations of the ownership of the self.

O. Lee Reed is one of the few writers to make an explicit case for property as a fundamental and organizing concept for all of law, describing the law as a wheel with property as its hub:

> In both the theoretical and practical sense, however, "property" is an enormously significant word. . . . Property and liberty are intertwined in theory and history, and most of the subjects of law—contract, tort, criminal prohibition, regulation, and even much constitutional interpretation—fan out like spokes from the conceptual hub of property. The implications of these sweeping assertions both for the private market and those who

107. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 4 (3d ed. 2000) (describing the Second Restatement of Property view).

108. For the same reasons, we can look past any distinction based on the in rem versus in personam nature of property and contract laws and remedies as irrelevant.

109. Reed, *supra* note 51, at 473 ("From this essence, it is possible to define property as a single negative right, the right of exclusion as applied to limited resources.").

110. MERRILL & SMITH, *supra* note 34, at v.

> study it, combined with the divergent views of property, suggest why the meaning of property requires a commonly grasped definition along with its appropriate development.[111]

Reed makes this statement briefly and understates its importance by only explaining his meaning in a short footnote:

> As for the common law, fanning out like radial spokes from the hub of property are the other divisions of law. Thus, contract concerns the rules for transferring resources that people own, and tort establishes duties not to trespass on and to render compensation for wrongful harm done to such resources. Many criminal laws punish offenses against an owner's resources, and the law of business organizations establishes rules for the joint private holding of resources. Even much constitutional interpretation focuses on property.[112]

This reality of property's position is more than rhetorical, and the failure to appreciate this hub-like relationship results only because we choose to define property institutions and specific property rules as distinct from other fields of law.[113]

Coval, Smith, and Coval state in a similar manner the same basic conclusion, describing property as a means for action and for setting parameters of wrongful interference:

> With property viewed as the protection of means we can more easily see the underlying unity of the entire civil side of the law: how property, contract, *and* tort may be seen as related to the

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111. Reed, *supra* note 51, at 462–64.
112. *Id.* at 464 n.20.
113. As Reed defends the hub analogy:

> The rejection of property as an organizational hub or the tentativeness of support for it relate to a misunderstanding of the meaning of "property" and confusion between the definition of the term and certain distributional effects and conditions that likely relate not to the right of property but to abuses arising from weak and poorly administered property systems.

Id.

> underlying theme of provision of protection and extension (c.p.) of (the freedom of) action. If property is a device used to protect means for action, whether it be the body, physical objects, or relationships with other people, then the concern of tort law may be seen to determine when wrongful interference has occurred . . . . The remainder of the civil side of the law is constituted by legal practices by which we are able to create means such as contracts, wills, trusts, estates in land, etc. which allow persons to extend their agency. These themselves, since they are means, are also protected from wrongful interference, and consequently are property.[114]

This "protection" theory comes closer to an understanding of property's role as a critical element in contract and tort. Yet, neither Reed, nor Coval, Smith, and Coval, relate the identified connection to the right to exclude, ownership, dominion, and the related characteristics of the property concept herein described.

Randy E. Barnett's explanation of the three areas (property, contract, and tort) accepts that the property concept is vital to each, even if the doctrine develops separately:

> The law of contracts, property, and torts can be viewed as defining boundaries within which each person may make her own choices in pursuit of her own happiness. You are allowed to do what you wish with what is yours (as defined by property law), provided that you do not infringe (as defined by tort law) on the property of others—including the inalienable property rights one has in one's own body. Contract law provides the means by which a person can transfer her property to another by her consent (although wholly gratuitous transfers are considered

114. S. Coval, J.C. Smith & Simon Coval, *The Foundations of Property and Property Law*, 45 C.L.J. 361, 474 (1986). "[T]he integration of these three areas of the law around the protections and furtherance (c.p.) of actions gives us another reason why we cannot separate the right to property from any of our other basic rights."). *Id.* at 475.

> to be an aspect of property law, not contracts).[115]

Thus, Barnett's explanation better captures the idea of self-ownership as helping define the property concept broadly, and he ultimately comes close to explicitly indicating that the connection between the three—property, contract, and tort—is based on traits like exclusion, ownership, and dominion. In that regard, Barnett proceeds to explain that each discipline deals with "rightful domain":

> So contract, property, and torts—along with other subjects such as restitution—can be viewed as providing the legal boundaries that define the scope of individual liberty and distinguish rightful from wrongful conduct. To act rightfully is to remain within one's boundaries; wrongful conduct is when one crosses over into another's rightful domain. . . . Contract, property, and torts . . . distinguish[] those actions that are nevertheless permissible from those that are not.[116]

Referencing in part similar conclusions by Charles Fried,[117] Barnett's discussion of "rightful domain" is closely related to the ideas commonly accepted in property associated with the right to exclude, ownership, dominion, authority, and the *sic utere* maxim.

So, we return to consider the three species of Anglo-American law most at issue in this Article—property, contracts and torts. Each is architecturally and operationally distinct and does have its own enclave with different causes of action, different coverage, different aims, different enforcement, different remedies, and so on. But the fact that they are distinct does not negate the fact that the concept of

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115. Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, SUFFOLK U. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1792586, at 12.

116. *Id.*

117. As Barnett explains, Charles Fried has made very similar statements regarding this interrelationship. For example, Fried has explained that:

> "The law of property defines the boundaries of our rightful possessions, while the law of torts seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person. . . . [T]he law of contracts facilitates our disposing of these rights on terms that seem best to us."

Id. at 13 (quoting CHARLES FRIED, CONTRACT AS PROMISE 1-2 (1981)).

property permeates and is critical to the foundation of each. At the very least there is theoretical–rhetorical weight for property principles in the formation and evolution of all three species of law—even if the property concept is not the accepted, proffered justification for them.

The enforcement of consensual transactions is dependent on a determination that one has ownership, dominion, and authority to transfer the good or service involved in that transaction. A court must necessarily look at those property concepts whenever it is enforcing a contract. A court must also evaluate in some of those instances whether someone has exercised his right to include a person on his property or to use his property in labor for the benefit of another. The same is true when a court must provide a remedy for nonconsensual or objectionable acts or for transactions that rise to the level of a breach of contract or of an actionable tort. The nonconsensual or objectionable nature will be tested by whether there has been an intrusion against someone's right to exclude or an otherwise unauthorized act on the property or (property in the) person of another.

A tort is an injury or wrong, but to what is it an injury or wrong? The injury must be inflicted upon something (property in the self or sometimes real or personal property), and it must be a wrong for some reason—because it violates a fundamental right to exclude others.

A contract is an exchange, but for what is it an exchange? Services are made by persons who have a choice whether to extend their labor precisely because they own themselves and the extension of themselves through labor. Goods are things—property owned by someone—which can only be lawfully exchanged if the person holding them and offering them for transfer has the authority to do so—i.e., property rights and dominion in them. One cannot trade something in contract unless and until she owns it. Again, the currency and objects of contract must first be made valid by property before accepting it as governed by the law of contract.

I am not contending that the species of private law are entirely linked, as they have developed over time. Each has developed its own constituencies, language, and vehicles and is invested in its separateness. Each is imbued with separate characteristics that have been manipulated to achieve different social ends. I am contending, however, that they share a common foundational base—the property concept and its platform—from which adherence or deviations can be measured.

Take the example of your fist. If one owns his fist, when he implants his fist in un-owned ground and improves it, he reduces it into his dominion, and ownership of that land is recognized in real property as a result of first possession and labor theory. The ownership of the land is an extension of the ownership in the self. Now consider tort law. I cannot implant my fist in another's face because it violates that person's ownership in himself and the reciprocal right of that person to exclude my fist. Implanting my fist in pre-owned property constitutes a trespass on real property. Implanting my fist in another's face constitutes what looks like a "trespass" on a person in tort because my ownership of my fist ends at the tip of another's ownership in his nose. Yet, because X owns his fist and Y owns his face, each with reciprocal rights to exclude the other in the first instance, each also has the right to include the other so long as the property each owns is alienable. This is the foundation of contract law and the right of exchange. Contract law governs the ability to alienate and adjust all or part of the property rights. Hence, we have the sport of boxing—a legalization of what would otherwise be a violation of another's property in the self (or a tort) because of the exchange of property rights after an alteration of the initial assignment of those property rights through the contractual adjustment of the rights to exclude and include.

Of course, none of this requires that we recognize implanting the fist in land as enforceable real property rights, the implantation of the fist in the face as a tort, or an agreement to implant fists on each other's person a legally sanctioned activity. A legal system could decide to prohibit such exchanges or not to recognize certain of these

things as wrongs, and so on. However, in order to make these decisions about recognizing or not recognizing such rights or obligations, the level of legal characterization of each of these activities does require any system to start with a decision on the contours of property and ownership and what those things mean. The development of property, contract, and tort rules require a decision on the level of recognition of the property concept that any system desires or will tolerate.

Accepting this platform contention as true, an alteration in our treatment of property principles has rippling effects on the whole of legal doctrine. As goes property, so goes the rest of the law—because the substance and character of our principles in property law will inform the starting assumptions and elements in each of the major substantive areas of legal doctrine. Property is a species of law that weaves its way all throughout the legal ecosystem, at least in terms of its underlying concepts.

The critical terms—the right to exclude, ownership, dominion, authority, and the *sic utere* maxim—normally segregated to our discussions of property law are transferable to the foundations of contract and tort law and deserve greater application in those disciplines. Within property law literature, scholars should also recognize that property scholarship does not have a monopoly on these terms. It is telling to recognize that contracts and torts scholars far more often recognize the applicability of property concepts to their fields than do property scholars recognize the broader application of their property concepts to other fields. Property scholarship needs a greater recognition of its place as the platform of much broader application than what has emerged as the property discipline. The development of our seemingly atomized property law can, by altering the base upon which others depend, have substantial consequences for the stability of the base of other artificially "distinct" species of law.

CONCLUSION

The property concept is uniquely fundamental to other areas of substantive law—particularly other Anglo-American private law subjects like torts and contracts. These other species of law play on the property concept field, creating the uniqueness and primacy of the concept of property in the broader playground of private law. Understanding the property concept will not mean that one will understand all the intricacies of contract law or tort law, but you cannot begin to study effectively the bases for contract law or tort law without having a grounding in the property concept that forms an integral part of the foundations of property, tort, and contract law. Understanding that the property concept is the platform from which other species of Anglo-American law evolve should aid in developing a consistent, harmonizing, singular justification for many of the doctrines that emerge in all three categories and for creating a baseline for the identification of where these doctrines develop away from core property principles.