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## PROPERTY'S BOUNDARIES

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*Property law has a boundary problem. Courts are routinely called upon to decide whether certain kinds of things can be owned—cells, genes, organs, gametes, embryos, corpses, personal data and more. Under prevailing contemporary theories of property law, questions like these have no justiciable answers. Because property has no conceptual essence, they maintain, its boundaries are arbitrary—a flexible normative choice more properly legislative than judicial.*

*This Article instead offers a straightforward descriptive theory of property's boundaries. The common law of property is legitimated by its basis in the concept of ownership, a descriptive relationship of absolute control that exists outside of the law. Ownership's limits thus lie at the limits of absolute control—that which cannot in principle be the subject of human dominion cannot be owned. In short, the Article offers a comprehensive explanation for why a conceptual theory of property's limits matters and how one can be possible, and defends a substantive theory of the concept of ownership as control.*

*Under this theory, cells, organs, gametes, embryos and corpses can be owned. But information—like genes and personal data—that cannot be controlled cannot be owned. Viewed through this lens, intellectual property—a challenge for any theory of property and which appears to entail ownership in information—can be understood either as a statutory analogy or a rough approximation of the real but temporary control of information exercised by those who create or discover it.*

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INTRODUCTION

In October 2021, the estate of Henrietta Lacks sued ThermoFisher Scientific.<sup>1</sup> The underlying facts are by now well-known.<sup>2</sup> On February 5, 1951, Ms. Lacks sought treatment for cervical cancer at Johns Hopkins Hospital.<sup>3</sup> In the course of her treatment, physicians removed without her consent a portion of her tumor for research.<sup>4</sup> The cells were found to have a stunning quality—they reproduced indefinitely outside the human body.<sup>5</sup> For the first time, scientists could conduct research on mass-produced human cells.<sup>6</sup> This cell-line, known as “HeLa” after its source, underwrote the biotechnology revolution and the immeasurable profits of companies—including ThermoFisher—that have intellectual property in HeLa cells.<sup>7</sup> But Ms. Lacks, who died shortly after the operation, never knew any of this, and her family has never legally owned any part of the HeLa cell line. This, the Lacks-family’s complaint alleges, was “theft”—“this genetic material was stolen from Ms. Lacks.”<sup>8</sup>

The plaintiffs face an uphill battle convincing the court that Lacks’s doctors *stole* her cells. In the famous case *Moore v. Regents of University of California*, the Supreme Court of California rejected a similar claim for conversion by a plaintiff whose spleen was used for research without his consent—the law, the court observed “deal[s] with human biological materials as objects sui generis,” not subject to the “general law of personal property.”<sup>9</sup> Human biological materials, the court suggested—organs, cells, gametes, and more—cannot *be* owned.<sup>10</sup>

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<sup>1</sup> Lacks v. Thermo Fisher Scientific, Inc., Case 1:21-cv-02524, Complaint (D. Md. Oct. 4, 2021) [hereinafter “Lacks Complaint”].

<sup>2</sup> See generally REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2011) (summarizing the Henrietta Lacks story).

<sup>3</sup> Lacks Complaint at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 12. Although rhetorically describing the incident as “theft,” the complaint sounds in unjust enrichment. *Id.* at 12–13. Unjust enrichment is an equitable remedy whereby a plaintiff is entitled to the gains of a defendant “enriched by misconduct and who acts [] with knowledge of the underlying wrong.” Restatement (Third) of Restitution and Unjust Enrichment § 51(3) (2011). It seems that the plaintiffs have three distinct theories of the underlying “wrong”—(1) “theft,” Lacks Complaint at 12; (2) “assault,” *id.* at 5; and (3) violation of privacy, *id.* at 4. This Article only touches on the legal plausibility of the first—whether or not a claim for unjust enrichment on the basis of conversion is plausible. Lacks’s claim based on assault or violation of privacy remains independently plausible.

<sup>9</sup> 793 P.2d 479, 489 (Cal. 1990).

<sup>10</sup> *Id.* (“[T]he laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological

But why? After all, many people (maybe most) feel that they own their cells and genetic material, and that Henrietta Lacks owned hers.<sup>11</sup> Others disagree.<sup>12</sup> Debates in the public sphere like this—about the boundaries of property law, about whether a kind of thing can be owned—are hardly limited to Henrietta Lacks and immortal cell lines. Indeed, we debate and litigate the ownership of organs,<sup>13</sup> tissue samples,<sup>14</sup> genetic information,<sup>15</sup> gametes and embryos,<sup>16</sup> corpses,<sup>17</sup> digital data,<sup>18</sup> and much more. Such debates arise whenever value is discovered within—or technology makes it

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materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property.”).

<sup>11</sup> See, e.g., Barbara J. Evans, *Barbarians at the Gate: Consumer-Driven Health Data Commons and the Transformation of Citizen Science*, 42 AM. J. L. & MED. 651, 658 (2016) (revealing that in a 2014 survey on personal health data, only 13% of respondents were agnostic to the question of ownership).

<sup>12</sup> See, e.g., Henry H. Heng, *HeLa genome versus donor’s genome*, 501 NATURE 167 (2013) (“I contend that the continual divergence of chromosomal features (‘karyotype’) and DNA sequence in dynamic cancer-cell populations undermines debate over ownership of the HeLa cancer-cell line derived from Henrietta Lacks six decades ago.”)

<sup>13</sup> See, e.g., B. Björkman & S.O. Hansson, *Bodily rights and property rights*, 32 J. MED. ETHICS. 209, 209 (2006) (“An underlying issue in these discussions is whether various types of biological matter can be owned.”).

<sup>14</sup> See, e.g., Shannon Cunningham, et al., *Public concerns regarding the storage and secondary uses of residual newborn bloodspots: an analysis of print media, legal cases, and public engagement activities*, 6 J. COMMUNITY GENETICS 117, 124 (2015) (“Across the public engagement activities we reviewed, numerous participants stated that parents have a right to retain ownership of their child’s blood samples and control over who has access to the specimens.”).

<sup>15</sup> See, e.g., Jon F. Merz & Mildred K. Cho, *What Are Gene Patents and Why Are People Worried About Them?*, 8 COMMUNITY GENETICS 203 (2005) (noting that “[n]umerous ethical concerns have been raised about the effects of [gene] patents on clinical medical practice as well as on research and development,” although “[n]early 30,000 human genes have been patented in the US”).

<sup>16</sup> See, e.g., Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 414 (2000) (“Courts appear utterly confused as to how to classify these objects, characterizing sperm and embryos variously as property, quasi-property, or not the subject of property rights at all but governed instead by precepts of privacy.”); see also *See HECHT V. SUPERIOR COURT*, 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993) (holding that a decedent “had an interest, in the nature of ownership” permitting sperm to be bequeathed); David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 581 (2014) (discussing the extent to which *Hecht* supports the existence of property rights in sperm).

<sup>17</sup> See, e.g., RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 16–17 (2010).

<sup>18</sup> See, e.g., David A. Dana & Nadav Shoked, *Property’s Edges*, 60 B.C. L. REV. 753, 760–61 (2019) (“[O]ver the past few months, disputes over privacy on the Internet and the allocation of rights to information between users, websites, and providers have likewise extensively employed—somewhat thoughtlessly—the boundary-focused terms supposedly derived from traditional property law.”).

possible to capture value in—something new.<sup>19</sup>

Courts presented with these kinds of questions need a theory of property’s boundaries. But they would search largely in vain for one in contemporary property theory. Indeed, conventional legal wisdom has it that there *are no* conceptual answers to what can be owned.<sup>20</sup> Instead, the law of property is widely understood to be an arbitrary “bundle of sticks;” a collection of rights and responsibilities designed to achieve exogenous social goals, not a coherent concept with determinable boundaries.<sup>21</sup> From this perspective, the question of what *can* be owned is a *normative* one. It is necessarily coterminous with questions about what *should* be owned, *who* should own what, and *how* ownership ought to be regulated.<sup>22</sup> In our system of popular sovereignty and separation of powers, these questions are inappropriate for judicial resolution.<sup>23</sup> If the conventional legal wisdom is correct, we would need to adopt by statute a code of property’s boundaries.<sup>24</sup>

This Article, in contrast, argues that the concept of ownership—which exists outside the law and from which the common law of property derives its legitimacy—offers a descriptive, properly judicial theory of the boundaries of property law. Ownership is a relationship characterized by absolute control, and it cannot exist where a person could not in principle exercise absolute control over something.<sup>25</sup> This means that ownership can

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<sup>19</sup> See, e.g., Meredith Render, *The Law of the Body*, 62 EMORY L. J. 549, 569 (2013) (noting that “when conditions are ripe—when we discover something new (or something that is useful in a new way) that is also ‘ownable’—our concept of property bends to accommodate the new entity”); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 563 (2005) (“As society changes, the value derived from different assets is transformed, and therefore the objects of property law will change over time.”).

<sup>20</sup> See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (arguing that society chooses to protect entitlements with “property rules” or “liability rules” in order to maximize welfare); Jessica L. Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105 (2018) (arguing that the state should recognize individual ownership of genetic information because doing so would maximize human flourishing under Roberts’s pluralistic theory of human flourishing).

<sup>21</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1015 (2008) (“As every first-year student knows, modern theorists have savaged the idea of ‘absolute dominion’ and tend, instead, to view property as a ‘bundle of rights.’”).

<sup>22</sup> Cf. JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW*, 106 (1997) (“For most philosophers, the actual objects of property are uninteresting, and the real meat of the question about property is how we can justify unequal holdings.”).

<sup>23</sup> See *infra* Section II.A.

<sup>24</sup> *Id.*

<sup>25</sup> See *infra* Section III.A.

properly apply to anything over which control can in principle be exercised, but not to those things that it cannot be.<sup>26</sup>

This distinction illuminates many public and legal controversies about ownership. On the one hand, because it can be subject to absolute control, human biological matter—from organs and corpses to cells and embryos—can be owned.<sup>27</sup> We control, and therefore own, our bodies and their constituents. On the other hand, information that is in principle accessible to anyone and cannot be manipulated cannot be owned.<sup>28</sup> This means that human genetic *information* and personal data are not ownable. In cases such as Lacks’s, this theory tells us that when Ms. Lacks walked into the clinic for treatment, she owned the cells of her tumor.<sup>29</sup> But that is of course not really what her claim of theft is about.<sup>30</sup> It’s the HeLa cell line—not Lacks’s cancer cells—from which the biotechnology companies have profited. HeLa is not metaphysically identical to Lacks’s cancer cells—what they share is genetic *information*.<sup>31</sup> Because information, genetic or otherwise, cannot be owned, Lacks’s estate has never owned the HeLa line.

The theory of property’s boundaries offered in this Article is descriptive, not normative. It is a theory of the entailments of ownership as the concept actually exists outside the law, not a claim about whether the outcomes it suggests are good or bad or whether we ought to have a common law of property organized around the concept of ownership in the first place. As such, the theory is entirely compatible with the possibility that people like Ms. Lacks have remedies in other areas of law—privacy, informed consent, or intentional torts, most prominently.<sup>32</sup> Indeed, it is also entirely legitimate for legislatures to codify structures analogous to ownership by statute (as discussed below, this is one way to understand intellectual property).<sup>33</sup> But this theory tells us the boundaries of the judge-made law of property—so long as judges ground their decisions on the concept of ownership, they might get it *wrong*, but they do not act *illegitimately*. And *this* matters because, for better or worse, courts *are* in

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<sup>26</sup> See *infra* Part IV.

<sup>27</sup> See *infra* Section IV.A.

<sup>28</sup> See *infra* Section IV.B.

<sup>29</sup> See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 57 (3d ed. 2010) (“[A]mong the ways that ownership can get started is for someone to possess a thing for the first time with the requisite intent.”).

<sup>30</sup> At least, it’s not what the *rhetoric* of the lawsuit is about. It is in fact possible to have a claim for unjust enrichment even if the only thing Lacks owned were her cells *ab initio*, as the derivation of the metaphysically distinct HeLa cell line may have been premised on the underlying wrong.

<sup>31</sup> See generally Heng, *supra* note 12.

<sup>32</sup> Indeed, in *Moore*, the court held that Moore had stated a claim for breach of informed consent after dismissing Moore’s claim for conversion. See 793 P.2d at 147.

<sup>33</sup> See *infra* Section IV.C.

fact regularly called upon to adjudicate whether something can be owned.<sup>34</sup>

This Article builds on growing scholarly criticism of the bundle model of property.<sup>35</sup> Indeed, although it remains predominate,<sup>36</sup> the view of property law as essentially arbitrary and normative has come under sustained attack over the past several decades.<sup>37</sup> Moreover, some scholars have also outlined conceptual theories of property's boundaries, analogous to this one, although they offer different views of the concept's substance.<sup>38</sup> Building within this intellectual movement, this Article offers a comprehensive explanation for why a conceptual theory of property's boundaries matters and how it is possible,<sup>39</sup> and defends a substantive theory of the concept of ownership as control—and ownership's boundaries at the boundaries of control—as opposed to the alternatives.<sup>40</sup>

The argument proceeds in four parts. In Part I, I canvass the development of contemporary property theory and illustrate the extent to

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<sup>34</sup> See, e.g., Lacks Complaint; MOORE, 793 P.2d 479; WASHINGTON UNIVERSITY V. CATALONA, 490 F.3d 667 (8th Cir. 2007); GREENBERG V. MIAMI CHILDREN'S HOSPITAL RES. INST., INC., 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (holding that individuals with Canavan disease did not have an ownership interest in the gene causes Canavan disease isolated from their tissue samples); SZAFRANSKI V. DUNSTON, 933 N.E. 2d 502 (Ill. 2013) (resolving a dispute of ownership between ex-boyfriend and ex-girlfriend over embryos they had jointly created);

<sup>35</sup> See, e.g., Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1695 (2012) (criticizing the bundle theory); JAMES E. PENNER, PROPERTY RIGHTS: A RE-EXAMINATION 3–5 (2020) (same).

<sup>36</sup> See, e.g., Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1, 8 (2019) (“Bundle views probably remain dominant both in legal scholarship and in analytical-philosophy scholarship.”).

<sup>37</sup> See, e.g., Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH. L. REV. 367, 384 (2012) (noting that “the bundle-of-rights metaphor” “has been under particularly heavy weather recently”); see also Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 LEGAL THEORY 1, 1 (2014) (“My aim in this paper may, at first glance, strike the reader as somewhat odd. It is a defense of a theory of property rights that after all has been prevalent among legal theorists for most of the last century and that is taught as a matter of routine in most undergraduate property-law courses to disabuse entering law students of their primitive lay notions regarding ownership.”).

<sup>38</sup> See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (arguing that the essence of property is exclusion); Arthur Ripstein, *Possession and Use*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156 (James E. Penner & Henry E. Smith, eds., 2013) (same for “exclusive use”); Penner, *supra* note 22, at 111 (arguing that “separability” delimits the boundaries of the concept of property); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, Chap. 5 Sec. 27 (arguing that labor is the essence of property); BART J. WILSON, THE PROPERTY SPECIES: MINE, YOURS, AND THE HUMAN MIND (2020) (arguing that an irreducible concept of “mine” organizes property law).

<sup>39</sup> See *infra* Part II.

<sup>40</sup> See *infra* Part III.

which still-prevailing theories conflate theories about what *can* be owned with what *should* be, rendering questions about the boundaries of property fundamentally legislative.

In Part II, I lay the groundwork for a conceptual theory of property's boundaries by explaining why such a theory matters and how it could be possible. In short, the extra-legal existence of concepts relied on by the common law legitimates common law law-making consistent with democratic theory, and the concept of ownership could exist metaphysically, psychologically, or socially.

In Part III, I outline a theory of property law as grounded in an extra-legal concept of ownership understood as absolute control. I argue that ownership—absolute control—is a determinate category. And I situate ownership as control in relation to other conceptual theories of property and show how it fares better at explaining the concept.

Finally, in Part IV, I apply this theory to some contemporary boundary challenges in property law, bioethics, and law and technology. I find that, under the theory, such things as organs, gametes, tissue samples, organisms and corpses fall within property's conceptual domain. In contrast, genetic information, gene sequences, information derived from tissue samples and personal data cannot conceptually be subject to property law. Moreover, I apply the theory to the most challenging case recognized in positive law at the boundaries of ownership—intellectual property—and find that it fares plausibly, if roughly.

## I. PROPERTY'S BOUNDARIES AND CONTEMPORARY THEORY

Any thorough property regime must answer at least four distinct questions: (1) what *can* be owned; (2) what *should* be owned; (3) *who* should own what; and (4) *how* ownership ought to be governed. The latter three questions are normative—straightforwardly policy questions that legislatures can and do decide on in the main.<sup>41</sup> The first question is different. It at least purports to be descriptive, analytical, conceptual, and answerable *a priori*. It is a question upon which we regularly call courts, employing common law reasoning, to answer.<sup>42</sup> Most contemporary

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<sup>41</sup> The prohibition on owning land in Antarctica, for example, established by international treaty, is an example of legislation on what *should* be owned. See Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 3 (2001) (observing that “no private entity ‘owns’ Antarctica,” while acknowledging that it is conceptually possible). The so-called law of find and property taxes are examples of the final two normative questions of property governance. See e.g., 1 AM. JUR. 2D ABANDONED, LOST, AND UNCLAIMED PROPERTY § 16 (2021) (describing the law of find).

<sup>42</sup> See *supra* note 34.



theories of property, however, hold that the apparently descriptive nature of the question of what can be owned is a façade. Instead, they conflate the question of what can be owned with questions about what should be owned, by whom, and how.

This Part situates contemporary property theory and illustrates the extent to which it predominately does not take seriously the possibility that the boundaries of ownership might exist as something other than a policy judgment, by discussing the intellectual origins of current theories in the Legal Realist response to the natural law theories of the 19th century. As discussed in the next Part, if these theories are right, the question of property's boundaries is fundamentally legislative.

The story of contemporary property theories begins, like many others, in the natural law theories of the nineteenth century. Under these theories, law and legal concepts were thought to be an essential moral feature of the universe, and basic legal categories such as “intent,” “malice,” or “meeting of the minds” were thought both to exist outside of our minds and be of inherent normative significance; typically understood to have been ordained by a benevolent God.<sup>43</sup> In deciding cases and laying down legal rules, judges were thought to be discovering profound ethical truths, not making up positive law; if a judge could deduce from reason the boundaries of a basic legal concept, he would have come upon a deep moral truth about the universe.<sup>44</sup> Nineteenth century natural law theory, then, makes two distinct claims—(1) basic legal concepts exist; and (2) those basic legal concepts are normatively significant.<sup>45</sup>

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<sup>43</sup> See, e.g., HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880S* 367 (1950) (“According to the philosophy of natural law, laws are discovered, not made. They are deduced from the nature of things rather than patterned on the needs of man.”); see also MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 17 (1995) (“Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena.”).

<sup>44</sup> See *id.*; see also Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 *PERSPECTIVES AM. HIST.* 287, 297–98 (1971) (summarizing Founding era treatises arguing that law is discovered rather than made); see also WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 187* (1988) (“Formalist judges . . . assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics.”).

<sup>45</sup> See, e.g., IAN MCLEOD, *LEGAL THEORY* 41 (4th ed. 2007) (“In the context of legal theory . . . *natural law* theories may be labelled normative, because they deal with what law ought to be . . . .”); cf. also Michael S. Moore, *Moral Reality Revisited*, 90 *MICH. L. REV.* 2424, 2425 (1992) (defining natural law theory as having two theses: “(1) there are objective moral truths; and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s).”).

The Legal Realist movement of the early twentieth century positioned itself directly in opposition to the metaphysical and ethical confidence of natural law. Though a controversial and heterogeneous theoretical movement, the Legal Realists were united by a thoroughgoing skepticism of the reality and moral relevance of legal concepts—they were philosophical nominalists about the law.<sup>46</sup> From this perspective, judges deciding cases have a panoply of rules from which to choose, their choice of which is subject to criticism on normative, but not conceptual, grounds.<sup>47</sup>

As for property, the Realists drew from Jeremy Bentham’s view that “[p]roperty and law are born together and die together”<sup>48</sup> to argue that “property” did not refer to a relationship that existed outside of the law, but was an arbitrary “bundle of rights” the law recognized “owners” had against others and that was designed by judges to achieve other social ends.<sup>49</sup> Having “de-naturalized” property, progressive Legal Realists were able to argue that the legal regime of property that the common law had designed was not appropriately maximizing welfare as it ought to be, and that legal reforms, primarily in the legislature, should therefore re-organize the bundle to better achieve those goals.<sup>50</sup>

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<sup>46</sup> See generally, e.g., Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984) (summarizing prominent Legal Realists and outlining their view that determinate legal categories did not exist or were not of ethical significance); see also Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (discussing the project of Legal Realism); JEROME FRANK, *LAW AND THE MODERN MIND* (6th ed. 1949); but see Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 735-38 (2009) (describing controversies within Legal Realism and contemporaneous resistance to its theoretical unity); see also MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 170 (1995) (“Perhaps the most significant difference between Realism and its pre-war reformist predecessors can be expressed in terms of skepticism about reason and morality.”).

<sup>47</sup> See, e.g., Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L. J. 201, 216 (1931).

<sup>48</sup> JEREMY BENTHAM, *THEORY OF LEGISLATION* 111–13 (R. Hildreth, ed., 1864).

<sup>49</sup> See, e.g., WESLEY NEWCOMB HOHFELD, *A VITAL SCHOOL OF JURISPRUDENCE AND LAW: HAVE AMERICAN UNIVERSITIES AWAKENED TO THE ENLARGED OPPORTUNITIES AND RESPONSIBILITIES OF THE PRESENT DAY?* (1914); see also Dana & Shoked, *supra* note 18, at 763–64 (“The precise origins of the ‘bundle of rights’ metaphor are unclear, but it nicely conveys the core realist tenet: ‘property’ is a hollow, formalistic concept of no practical usefulness”).

<sup>50</sup> See WESLEY NEWCOMB HOHFELD, *A VITAL SCHOOL OF JURISPRUDENCE AND LAW: HAVE AMERICAN UNIVERSITIES AWAKENED TO THE ENLARGED OPPORTUNITIES AND RESPONSIBILITIES OF THE PRESENT DAY?* (1914) (situating the Legal Realist project in Woodrow Wilson’s call for a “radical reconstruction” of American society); see also HORWITZ, *supra* note 43, at 152 (discussing the role of Hohfeld’s normative commitments in his critique of the conceptual analysis of property law); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L. J. 357, 375 (2001)

Thus, Legal Realist theories of property make two essential and distinct claims—the flipside of the basic claims of natural law. The first is the descriptive claim that there is no extra-legal reality to legal concepts; property is an arbitrary bundle of rights in positive law.<sup>51</sup> This move conflates the question of what *can* be owned with its analytically subsequent normative questions—if there is no concept of ownership outside the law, reasoning about property law is just normative reasoning. The second essential claim of Legal Realism is that the particular bundle of property rights designed by common-law judges happened to be normatively suboptimal.<sup>52</sup>

The heyday of classical Legal Realism has long since come and past, but we still live in the theoretical world Realism built.<sup>53</sup> As Professor William Singer has observed, “[a]ll major current schools of [legal] thought are, in significant ways, products of legal realism.”<sup>54</sup> It is by now a well-worn cliché to remark that “we are all legal realists now.”<sup>55</sup> And although there are proliferating contemporary theories of property, they for the most part accept the first, descriptive thesis of Realism—that ownership is not an extra-legal concept with determinable boundaries and entailments.<sup>56</sup> Thus,

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(“[T]he motivation behind the realists’ fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property.”).

<sup>51</sup> A.M. Honoré, *Ownership* in MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL (1987) (delineating the rights in the bundle that constitute property).

<sup>52</sup> See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1642–43 (2003) (discussing the conceptual relationship between utilitarianism and legal realism in the Supreme Court’s jurisprudence in the 1920s); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 316 (2003) (describing Legal Realism as “emerg[ing] from the British school of utilitarianism and the American philosophy of pragmatism”).

<sup>53</sup> Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988); see also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997) (observing “the enormous influence Legal Realism has exercised upon American law and legal education over the last sixty years, and considering, too, as the cliché has it, that ‘we are all realists now’”).

<sup>54</sup> Singer, *supra* note 53, at 467.

<sup>55</sup> Meredith M. Render, *The Concept of Property*, 78 UNIV. PITTSBURGH L. REV. 437, 472 (2017) (citing Singer, *supra* note 53, at 467 and Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 131 (2002)).

<sup>56</sup> See, e.g., Render, *The Law of the Body*, *supra* note 19, at 560 (describing as “relatively uncontroversial” the notion that “‘ownership’ is not a single thing but is instead a collection of severable incidents (or powers) that can be divided between and among several ‘owners’”); Baron, *supra* note 37, at 384, 417 (describing the principle, derived from the bundle theory, that property is ultimately arbitrary “not particularly controversial” because “[n]o legal category can define itself”); Merrill, *supra* note 38, at 738 (“Today, the nominalist conception is more-or-less the orthodox understanding of property within the

these theories similarly conflate questions about what can be owned with what should be, who should own it, and how. The variation in contemporary theories is largely limited to disagreement on the Realism’s second thesis—the extent to which the property law we have has maximized the good and how to measure it.

For instance, law and economics theories of property—the most influential set of theories in the legal academy since the decline of Realism—accept that property is a conceptually arbitrary bundle of rights granted by the state to maximize exogenous social goals.<sup>57</sup> Where law and economics theories depart from classical Legal Realism is in the extent to which they argue that the common law of property has more or less already optimized welfare.<sup>58</sup> Similarly, another prevailing contemporary theory of property law—the Progressive Property school championed by Gregory Alexander, Eduardo Peñalver and others—agrees with Legal Realism and law and economics that the boundaries of property are arbitrary, but disagrees about the appropriate normative framework property law is designed to optimize, offering instead a “pluralistic,” more communitarian theory of the good.<sup>59</sup>

Property theory is, however, in flux, and the metaphor of property as an arbitrary bundle of sticks has come under sustained criticism.<sup>60</sup> But for the

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American legal community.”).

<sup>57</sup> See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 44 (1960); Render, *The Concept of Property*, *supra* note 55, at 439 (acknowledging the argument from law and economics that “property (or ‘ownership’) is nothing more than a series of in personam legal obligations—in other words, a subset of contracts.”).

<sup>58</sup> See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 774 (2009) (critiquing traditional law-and-economics property theories for reliance on a narrow and inadequate utilitarianism); see also Roberts, *supra* note 20, at 1113 (“[N]eoclassical law and economics, like all utilitarian theories, evaluates particular outcomes in terms of a single metric: ‘welfare.’”); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 95–97 (2007) (arguing that law and economics is a continuation of the basic project of Legal Realism).

<sup>59</sup> See Alexander, *supra* note 58, at 750; Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 822 (2009).

<sup>60</sup> See, e.g., Dana & Shoked, *supra* note 18, at 753 (“The past few decades have witnessed an explosion of sophisticated work on property law theory.”); Smith, *supra* note 35, at 1695 (criticizing the bundle theory for embracing “a basic ambiguity: it is both an analytical device and a family of theories of property that elevate that analytical device to a central place”); Baron, *supra* note 37, at 384 (observing that “the bundle-of-rights metaphor” “has been under particularly heavy weather recently”); see also Glackin, *supra* note 37, at 2 (“Among contemporary theorists, the previous orthodoxy is under siege, with a substantial faction now holding that the so-called ‘bundle theory’ of property rights is no longer tenable and that a robust relation of ownership of things can and should be established.”).

most part these newer theories are limited to arguing that the arrangement of the sticks in the bundle is not *arbitrary* from a policy perspective, rather than that there is an extra-legal reality to the concept of ownership.<sup>61</sup> (A cluster of *bona fide*-ly conceptual recent theories of property are discussed at greater length below).<sup>62</sup> For instance, Thomas Merrill and Henry Smith and seek to return theorizing about property to our basic relationship with “things,” characterizing property as the “law of things.”<sup>63</sup> But Merrill and Smith accept with Realism that property’s *boundaries* are arbitrary in pursuit of exogenous normative goals—in their view, property law *defines* what “things” are in the first place to which extending property protections is socially beneficial.<sup>64</sup> Indeed, ultimately, they view the *in rem* nature of property law as a shortcut designed to maximize social utility while minimizing information costs, making the boundaries of property a policy question as it is under Realist theories.<sup>65</sup>

In short, contemporary property theory predominately accept the Realist thesis that the question of what can be owned is coterminous with questions about what should be owned, by whom and how. Judges looking for answers to questions before them about what can be owned are re-directed to their own moral views. If correct, then, these theories pose a profound challenge to the legitimacy of the common law.

## II. EXTRA-LEGAL CONCEPTS

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<sup>61</sup> See, e.g., Ripstein, *supra* note 38, at 163–169 (noting that, under Merrill and Smith’s theory, “if there were no information costs, the law of property would work pretty much the way that the realists say that it does”); see also Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 623 (2009) (“Merrill and Smith aim not at the ‘bundle metaphor’ pure and simple, but rather the ‘ad hoc bundle’ conception of property.”). But see Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007) (“[I]f the core of property law must rest on a simple foundation of everyday morality, property is unlikely to be wholly the creature of law. If we are right about the necessary connection between property and morality, then Bentham is almost certainly wrong that property arises wholly from law.”).

<sup>62</sup> See *infra* Section III.B.

<sup>63</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

<sup>64</sup> See Smith, *supra* note 35, at 1703, 1725 (“A fundamental question is how to classify ‘things,’ and, hence, which aspects of ‘things’ are the most basic units of property law. . . . Property law is a modular system. It helps define what a thing is in the first place and why we should care.”) see also Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1791–93 (2004) (discussing how the culture and law and define the creation of a thing).

<sup>65</sup> Smith, *supra* note 35, at 1693.

Property law is the law of ownership.<sup>66</sup> The boundaries of the concept of ownership thus delimit its domain—or at least the domain of adjudicative law. As I hope to show in the next Part, the essence of the concept of ownership is descriptive *control*, or absolute decision-making authority; and its limits lie at the limits of control. But before getting there, we must lay some essential groundwork establishing the significance of this claim and its plausibility.

To lay this groundwork, this Part does two things. First, I explain why legal concepts *matter*—why there are real stakes to whether a determinable concept of ownership exists, or the prevailing view is correct that it does not. In short, the extra-legal existence of basic legal concepts—including ownership—makes the project of judge-made private law compatible with democratic political theory. Next, I discuss how extra-legal concepts are *possible*. I suggest that there are three ways in which concepts can exist analytically prior to their incorporation into the law, each of which is equivalent from the perspective of legitimating the project of the common law—the concepts might be metaphysically real; they might be evolved heuristics of the human mind, or they might be extra-legal social constructions.

### A. *Concepts and the Common Law*

Why does anyone listen to judges? This can be owned, they say from time to time, and this other thing can't be.<sup>67</sup> At stake may be billions of dollars.<sup>68</sup> Who is a judge to decide? We didn't vote for them, at least not in the same way what we voted for our legislators. They didn't hear everyone's perspectives on what the answer *should* be; usually they've just heard from two people with a financial interest in the outcome. Perhaps "*why does*" anyone listen to judges is too sharp. After all, their decisions are backed by the state's monopoly on violence. But why *should* anyone listen to judges in a democracy, where normative questions ought to be resolved

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<sup>66</sup> See, e.g., Benjamin C. Zipursky & John C. Goldberg, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917 (2010) ("Property is about the relationship of persons to things that can be owned and alienated."); Dana & Shoked, *supra* note 18, at 757 ("The continuum [of property law] starts at a core of private ownership . . ."); Olivier Massin, *The Metaphysics of Ownership: A Reinachian Account*, 27 AXIOMATHES 577, 586 (2017) (arguing that property rights are "grounded in ownership"); see also Björkman & Hansson, *supra* note 13, at 209 ("For the purposes of the present article the words 'property' and 'ownership' will be treated as synonyms."); O. Lee Reed, *What is 'Property'*, 41 AM. BUS. L. J. 459, 459 (2005) (describing a common view of "property" as coterminous with ownership).

<sup>67</sup> See, e.g., MOORE, 793 P.2d at 142–147.

<sup>68</sup> See *id.* at 516 (Mosk, J. dissenting) (noting that the plaintiff claimed that an immortal cell line derived from his cancer cells was worth \$3 billion)

by democratic processes, not aristocratic contemplation?<sup>69</sup>

In the federal system, where there is no general common law,<sup>70</sup> this question by now has a straightforward answer—courts are to serve as the “faithful agents” of the legislature.<sup>71</sup> The theory is that unelected federal courts don’t *make* law; they *interpret* and *apply* it.<sup>72</sup> Thus, the ultimate lawmaker is Congress, the democratically-elected representatives of the people, who within constitutional parameters may legislate anything they would like to.<sup>73</sup> The same basic idea obtains for federal constitutional interpretation—“we the people” agreed upon a written constitution (metaphorically, at least), and in exercising judicial review judges are supposed to police its boundaries.<sup>74</sup>

This basic commitment to popular sovereignty is constitutionalized and enforced through the doctrines of separation of powers and legislative supremacy.<sup>75</sup> Throughout American government, we distinguish

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<sup>69</sup> In political theory, this is referred to as the question of “normative legitimacy”—how a state or legal system is *morally* justified—as opposed to “descriptive legitimacy”—the extent to which people subjectively feel that they ought to follow a state’s pronouncements. See, e.g., Richard E. Flathman, *Legitimacy* in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 678 (Robert E. Goodin, Philip Pettit & Thomas Pogge, eds., 1993).

<sup>70</sup> See generally *ERIE RAILROAD CO. V. TOMPKINS*, 304 U.S. 64 (1938).

<sup>71</sup> See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) (“In our constitutional system, it is widely assumed that federal judges must act as Congress’s faithful agents.” (citing Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1983) and Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990)); Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) (“The view that federal courts function as the faithful agents of Congress is a conventional one.”).

<sup>72</sup> See, e.g., Manning, *supra* note 71, at 5 (“[I]f Congress legislates within constitutional boundaries, the federal judge’s constitutional duty is to decode and follow its commands, particularly when they are clear.”).

<sup>73</sup> See, e.g., Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1575 (2010) (“[F]aithful agent interpretation is necessary in order to preserve the bedrock principle of our constitutional government—popular sovereignty.”).

<sup>74</sup> See, e.g., *MARBURY V. MADISON*, 5 U.S. 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.”);

<sup>75</sup> See, e.g., Michael Sant’Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1891 (2015) (“The primary institutional mechanism of American popular sovereignty was separation of powers.”); see also Christiane C. Wendehorst, *The State as the Foundation of Private Law Reasoning*, 56 AM. J. COMP. L. 567, 577 (2008) (“Political consensus about law, which should, at least in Western countries, be rooted in

“legislative” and “judicial” powers from one another, the former of which makes law and the latter interprets and applies it, and situate these powers in distinct institutions—legislatures and judiciaries respectively.<sup>76</sup> And indeed, regardless of the normative commitments to democracy that underlie our particular understanding of separation of powers, it’s plausible that as a conceptual, definitional matter, the “legislative power” refers to the power to make law, and the “judicial power” to applying it in particular cases.<sup>77</sup>

But this theory of the relationships between popular sovereignty and separation of powers cannot neatly be applied to state courts when they exercise their general common law powers.<sup>78</sup> Nor to federal courts building the common law in the limited domains—such as maritime law—where they have that authority.<sup>79</sup> In these domains—where most of the private law in the United States originates<sup>80</sup>—judges are not interpreting any positive enactment agreed-upon by a democratically-elected body.<sup>81</sup> Indeed, they are not interpreting any positive enactment—any textual source backed by a claim of popular sovereignty—at all.<sup>82</sup> To our post-Realist eyes, it looks a

democratic legitimization, is indispensable for a functioning set of rules of recognition.”).

<sup>76</sup> See, e.g., *PATCHAK V. ZINKE*, 138 S. Ct. 897, 904 (2018) (“To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.” (quoting *MASSACHUSETTS V. MELLON*, 262 U.S. 447, 488 (1923))).

<sup>77</sup> See, e.g., *WAYMAN V. SOUTHARD*, 10 Wheat. 1, 46 (1825) (“[T]he legislature makes, the executive executes, and the judiciary construes the law.”); see also, e.g., *PATCHAK*, 138 S. Ct. at 905 (“[T]he legislative power is the power to make law . . . .”); William Baude, 133 *HARV. L. REV.* 1511, 1522 (2020) (“[T]he judicial power is the power to apply existing law to the parties before it.”).

<sup>78</sup> See, e.g., Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 *TEX. L. REV.* 479, 487 (2013) (“Even in the age of statutes, state courts, unlike federal courts of limited jurisdiction, retain general common law powers.”); see also Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 12 (Amy Guttmann, ed., 1997) (“Today, generally speaking, the old private-law fields . . . remain firmly within the control of state common-law courts.”).

<sup>79</sup> See Pojanowski, *supra* note 78, at 538 (“Residual pockets of common law, like admiralty law, resemble state court realities more than the post-*Erie* federal universe of limited jurisdiction.”).

<sup>80</sup> See Scalia, *supra* note 78, at 12.

<sup>81</sup> See, e.g., Pojanowski, *supra* note 78, at 500 (“[T]he fact remains that state courts still have inherent lawmaking power that extends beyond filing gaps and resolving ambiguities in statutes—they can fashion common law in the absence of statutes.”).

<sup>82</sup> See, e.g., Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 *VA. L. REV.* 1, 30 (2015) (observing that, while some states have passed written statutes adopting the English common law in state courts, others “lack statutes adopting the common law, and yet the common law is still thought to be in force in those states”).



hell-of-a-lot like judges adjudicating common law cases are, at bottom, making it up.<sup>83</sup> And if they *are*, and the faithful agent theories of the judiciary are right that judicial decision-making is compatible with democracy only insofar as judges enforce or interpret democratically agreed-upon laws, common-law adjudication is an illegitimate enterprise.<sup>84</sup> We would need to codify property, or decide to be comfortable with a crypto-aristocratic private law.<sup>85</sup>

To be sure, state courts have several salient differences from federal courts that some have suggested mitigate this essential legitimacy problem in the common law. For one thing, most state judges are elected, at least to some extent.<sup>86</sup> But this could not, on its own, legitimate judicial lawmaking. Indeed, separation of powers is as clear and as strict at the state level as it is at the federal level, if not more so—many states have explicit guarantees of the separation of powers in their constitutions, unlike the federal system.<sup>87</sup> To the extent, then, that making law is “legislative” while resolving disputes about what it means is “judicial,” it is not clear why the method of appointment of judicial actors matters.

Moreover, state judges are almost nowhere elected *like* legislators are—in a plurality of states judges are appointed by the governor and elected in unopposed retention elections.<sup>88</sup> *In some sense* federal judges are democratically accountable too—they are appointed by elected branches

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<sup>83</sup> See, e.g., Scalia, *supra* note 78, at 10 “I . . . suggest . . . that once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy . . . becomes apparent.”)

<sup>84</sup> See *id.* at 12 (“An argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them) is a desirable limitation upon popular democracy.”); see also DAVID O. BRINK, OBJECTIVITY IN LAW AND MORALS 19 (2000) (noting “[a] democratic worry” in judicial discretion entailed by legal indeterminacy that “judge-made law . . . violates the separation of powers doctrine that requires lawmakers to be politically accountable as, in principle, legislators are and many judges are not.”).

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 849 (2011) (“[I]t strikes me that the problem that has engendered the legitimacy debate—the fact that federal judges are not elected—simply does not apply to most state courts engaging in judicial review under their state constitutions.”).

<sup>87</sup> See Pojanowski, *supra* note 78, at 524 (noting that state courts “embrac[e] structural norms of separation of powers and legislative supremacy that are stricter than those contemplated by Madison”); Nelson, *supra* note 82, at 25 (“American-style separation of powers is not confined to the federal government; state constitutions also separate judicial power from legislative power.”).

<sup>88</sup> Brennan Center for Justice, *Judicial Selection: Significant Figures* (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>.

and accountable to them by impeachment<sup>89</sup>—but nobody seems to think this is sufficient to avoid the legitimacy problem of federal judicial lawmaking.<sup>90</sup> And indeed in ten states judges are appointed by the executive just as they are in the federal system.<sup>91</sup> At least for them and for the federal courts crafting maritime law, we need a theory for why anyone ought to pay attention.

My theory is that some of what appears to be judicial lawmaking in traditional private law fields can be understood as the application of the entailments of extra-legal concepts that we have implicitly decided we want to govern the private law and delegated to judges to adjudicate. Thus understood, these domains of private law adjudication avoid both challenges based in democratic legitimacy and separation of powers. It is democratically legitimate because the relevant normative decision—whether to have a system of law that acknowledges private ownership, say—is made by the people, at least abstractly. And it is not a conceptual violation of the separation of powers because adjudication of the boundaries of these extra-legal concepts *is* meaningfully adjudicative as opposed to legislative.<sup>92</sup>

In writing statutory law, legislatures can import extra-legal concepts—concepts that exist elsewhere in our social world and are analytically distinct from law—into the law. In these circumstances, courts are directed to interpret the boundaries of the concept outside of the law. And indeed, this is routine—it is what justifies the interpretive banality that terms not defined in the statute are given their ordinary meaning (read: when a concept is not created or refined by the law, look to its existence outside of it).<sup>93</sup> When a criminal statute prescribes sentences in “years,” courts look to the concept of a year in its extra-legal sense; when the tax code prescribes mathematical procedures for calculating liability, courts rely on the generally extant concepts of numbers, multiplication and division.

Much—far from all, but much—of the common law can be understood

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<sup>89</sup> U.S. Const. Art. II, sec. 1; sec. 4.

<sup>90</sup> See, e.g., John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 562–63 (2008) (“When it comes to making the policy decision that lies at the end of any consideration of ‘technical’ data an agency marshals in its decisionmaking process, the court will face the ‘political accountability’ issue. Congress and the President are democratically elected. Federal judges are appointed, essentially for life.”).

<sup>91</sup> *Id.*

<sup>92</sup> See Nelson, *supra* note 82, at 13 (noting that to the extent that the common law adjudicates the boundaries of concepts external to the law “perhaps common-law decisionmaking is less analogous to *legislation* than a species of *interpretation*”).

<sup>93</sup> See, e.g., *ENCINO MOTORCARS, LLC V. NAVARRO*, 138 S. CT. 1134, 1140 (2018) (noting that where a term is not defined in a statute it is given its ordinary meaning and looking to an English dictionary).

and justified in a similar way. The basic common law fields are built on extra-legal concepts—ownership, agreement, obligation—that we have implicitly agreed to build a private law upon.<sup>94</sup> In adjudicating the entailments of these concepts courts act legitimately, judicially, and in accord with the general notion of popular sovereignty.<sup>95</sup> It is, of course, true that no legislature has passed a statute explicitly saying “we will have a private law of property based on the concept of private ownership,” nor to my knowledge has there ever been a plebiscite on that question. But popular endorsement of the basic normative principle that we ought to have a law of private property can be seen in a number of ways. For instance, all states have imported the English common law, which *is* based on the concept of private ownership.<sup>96</sup> Moreover, the federal constitution—ratified at least metaphorically by the people—explicitly incorporates a concept of property that it procedurally shields from government intervention.<sup>97</sup>

Obviously, it isn’t the case that every principle of property law can be extrapolated as entailed in the concept of ownership. Indeed, probably the overwhelming bulk of it cannot be. But some of it can be, and that portion is within the legitimate domain of the judicial power, properly resolved by judges applying the common-law method. Consider the distinction between, the legal principle that if you waive a claim you may no longer enforce it and the Rule Against Perpetuities.<sup>98</sup> The former everyone understands whether or not they have gone to law school.<sup>99</sup> It simply inheres in the

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<sup>94</sup> See, e.g., Zipursky & Goldberg, *supra* note 66, at 917; 972 (discussing the concepts underlying private common-law legal fields; “[W]e . . . recognize[e] that the concepts of wrong, duty, obligation, and right employed within tort law have roughly the same kind of normative force as they do when used outside of law.”); see also Tomasz Bekrycht, *The Question of Legitimizing Law in Adolf Reinach’s Phenomenology*, 90 FOLIA IURIDICA 63, 64–65 (2020) (observing that “the philosophical process of legitimizing law has two characteristic cores,” one legitimating law on the basis of its reference to something “spatially and temporally outside” the law, and the other by virtue of the “law-giver” themselves).

<sup>95</sup> See Kimberly Baltzer-Jaray, *Reinach and Kantorowicz: Justice, Phenomenological Realism and the Free Law Movement*, 90 FOLIA IURIDICA 91, 99 (2020) (observing that a theory of determinate extra-legal concepts can justify judges extrapolating law on the entailments of those concepts in the absence of positive law).

<sup>96</sup> See Nelson, *supra* note 82, at 28–30.

<sup>97</sup> See U.S. CONST. AMEND. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

<sup>98</sup> See ADOLF REINACH, *THE A PRIORI FOUNDATIONS OF THE CIVIL LAW* 131 (trans. John F. Crosby, 1983); see also Merrill & Smith, *The Morality of Property*, *supra* note 61, at 1852 (2007) (“Beyond the core of property, the simple robust morality gives way to more pragmatic situational morality.”).

<sup>99</sup> *Id.* (“But whoever promises to make a loan, whoever waives a claim, whoever appoints a representative, cannot expect anything else except that he acquires an obligation,

concept of a claim *as it exists in the world* that if you waive it, it no longer exists.<sup>100</sup> In contrast, the Rule Against Perpetuities is an obviously-arbitrary, crude policy judgment.<sup>101</sup> It was crafted by late-Medieval English judges in a power struggle with the landed aristocracy on the policy grounds that a society with alienable land not tied up in fee-tail-male forever would be a better one.<sup>102</sup> Whether or not that judgment was right, this is not the kind of thing we want contemporary judges in our system of separation of powers and popular sovereignty doing.<sup>103</sup> And indeed, the debate about the future of the Rule Against Perpetuities has shifted—properly—largely into state legislatures.<sup>104</sup>

Finally, my account of the legitimacy of the common law may bear passing resemblance to two more traditional theories—natural law and the theory of the common law as the judicial implementation of custom. It is, however, importantly distinct from both. As discussed above, natural law theories hold that the law both normatively and descriptively inheres in a discoverable way in the structure of the universe.<sup>105</sup> Like natural law theories, my claim is that some concepts that the private law relies upon exist outside of the law. But unlike natural law theories, I do not infer anything normative about the extra-legal existence of concepts—it is still a normative *choice* to have a private law of property based in private ownership (as opposed to, say, based in something else, or nothing at all), and this choice is only legitimate insofar as it is ultimately situated in the

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that his claim is extinguished, and that he becomes entitled and obliged through the as of the representative.”).

<sup>100</sup> *See id.* (“That a claim lapses through being waived, is grounded in the essence of a claim as such and holds therefore necessarily and universally.”).

<sup>101</sup> *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS & ESTATES* (10th ed. 2017) (summarizing the development of the Rule Against Perpetuities).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (“The Uniform Statutory Rule Against Perpetuities . . . prescribes a fixed wait-and-see period of 90 years. Under USRAP, all interests are valid for 90 years after creation. At the end of 90 years, any interest that has not vested is reformed by the court so as to best carry out the intention of the long-dead settlor. A variant of USRAP is in force in roughly half the states.”).

<sup>105</sup> *See, e.g.,* Moore, *Moral Reality Revisited*, *supra* note 45, at 2425 (defining natural law theory as accepting “two essential theses: (1) there are objective moral truths; and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s).”); COMMAGER, *supra* note 43, at 367 (1950) (“According to the philosophy of natural law, laws are discovered, not made. They are deduced from the nature of things rather than patterned on the needs of man.”); *see also* HORWITZ, *supra* note 43, at 17 (“Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena.”).

people.<sup>106</sup> That is, judges can legitimately litigate the boundaries of the concept of ownership, but they can't decide that *we ought* to have a law of property based in ownership in the first place.

Another primary historical justification of the legitimacy of the common law is that common law judges implement extra-legal customs.<sup>107</sup> This account is similar to mine in that it grounds the democratic legitimacy of the common law in its correspondence with widely accessible realities outside the law, and in popular acquiescence to legal application of those practices.<sup>108</sup> But the precise locus that serves this legitimating function is importantly different—*customs* versus *concepts*. Customs are behavioral practices, and claims about them are sociological.<sup>109</sup> Concepts, in contrast, are *ideas*.<sup>110</sup> Reasoning about them is abstract and unempirical.<sup>111</sup>

This distinction has two important implications for the plausibility of my theory as compared to the custom theory. The first is that to the extent that the democratic legitimacy of the common law is derived from sociological claims rather than conceptual ones, it would be institutionally odd to situate it in the courts rather than in legislatures.<sup>112</sup> And indeed, one

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<sup>106</sup> Cf., e.g., IAN MCLEOD, *LEGAL THEORY* 41 (4th ed. 2007) (“In the context of legal theory . . . *natural law* theories may be labelled normative, because they deal with what law *ought* to be . . . .”); see also Maria Golebiewska, *Normativity of Prescriptions in Adolf Reinach's Aprioristic Theory of Right*, 09 *FOLIA IURIDICA* 41, 55 (2020); Krzysztof Gozdziński, *Phenomenological Concept of Law From the Perspective of Carlos Cossio*, 90 *FOLIA IURIDICA* 119, 139 (2020); and Manuela Massa, *Property and Nuda Potestas As Constitutions of Reinach's Philosophy of Law*, 90 *FOLIA IURIDICA* 75, 76 (2020) (distinguishing Reinach's legal theory from natural law theories on the ground that “Reinach's a priori law has nothing to do with prescription in the sense of norms or principles to follow”).

<sup>107</sup> See Nelson, *supra* note 82, at 10 (“From at least the seventeenth century on, though, many authors associated the common law with customs followed by people in the real world.” (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*63-64; MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* (1713)); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 130 *YALE L. J.* 1651, 1655 (1994).

<sup>108</sup> See *id.* at 10 (“To the extent that the rules applied by courts derived from the customs of the people, those rules enjoyed a species of democratic legitimacy.”).

<sup>109</sup> See generally, e.g., Sophie Legros & Beniamino Cislighi, *Mapping the Social-Norms Literature: An Overview of Reviews*, 15 *PERSP. PSYCH. SCI.* 62 (2019); JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT* (1986)

<sup>110</sup> See, e.g., Henry E. Smith, *On the Economy of Concepts in Property*, 160 *U. PA. L. REV.* 2097, 2100 (2012) (“In philosophy and psychology, concepts are far from an obstacle to thought: they allow for prediction, communication, and abstract thought, when a mass of particulars is not useful. Concepts organize particulars into useful sets—or, to borrow the terminology of psychology, concepts pick out categories.”).

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., Howard Gillman, *The Collapse of Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building*, 11 *STUD. AM. POL.*

of the primary criticisms of the theory of the common law as custom is that courts are bad at or disingenuous about finding customs and that much of what they claimed was custom was not.<sup>113</sup> Surely if the normative goal were to legalize custom, legislatures would be better at it.<sup>114</sup>

Second, reasoning from concepts permits courts to answer legal questions where there is no obvious behavioral practice that answers the question, or where looking to behavior is an odd fit. For instance, if the question in a case is whether waiver of a claim discharges it, it is not clear how a court could go about deciding the case on the basis of custom.<sup>115</sup> Hear from experts who can tell us that in most instances of waiver, the person waiving no longer thinks they have a claim? Conduct an opinion poll and conclude that most people seem to think that if you say “don’t worry about it,” the other person is off the hook? It’s not entirely clear that there *is* a custom here at all that we *could* reference in answering this question, or what that means.<sup>116</sup>

In short, the extra-legal existence of the concepts that ground our basic legal categories matters because the construction of a common-law on those foundations is only legitimate in our democracy characterized by separation of powers insofar as it litigates the boundaries and entailments of extra-legal concepts. And this understanding shows us why we should care about what

DEV. 191, 220 (1997) (“One of the tenets of ‘sociological jurisprudence’ was that legislatures were in the best position to collect the social data that was necessary to ensure that law would be adjusted so that it might contribute to developing social needs.”); *see also* Pojanowski, *supra* note 78, at 512 (“State courts share many of the institutional infirmities that lead textualists to disfavor courts’ interpretive policy making. Like federal courts, state courts lack expert staff and fact-finding abilities. State courts must take concrete cases as they come, rather than investigating and initiating general proceedings.”).

<sup>113</sup> *See, e.g.,* Nelson, *supra* note 82, at 10 (“Proponents of [the custom] view tended to be vague about whether real-world customs always *preceded* the rules of decision that judges and juries applied in court, or whether judicial decisions and custom sometimes had a more symbiotic relationship; perhaps some rules of decision that were recognized as part of the common law had originated in one or more court cases, but customs had grown up around those rules in such a way as to validate them and to dictate the use of the same rules in later cases.”); Scalia, *supra* note 78, at 4 (“[F]rom an early time—as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of the sixteenth, any equivalence between custom and common law had cease to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions ‘custom.’”).

<sup>114</sup> *See* Gillman, *supra* note 112, at 220.

<sup>115</sup> *Cf., e.g.,* Reinach, *supra* note 98, at 80 (“The fact that we have such a clear and indubitable insight into the absolute impossibility of performing a qualified transfer of a claim without any cooperation from the one against whom the claim exists, shows that it is not ‘custom’, as psychological dilettantism says so glibly, which guides us in putting forth supposedly apriori laws.”).

<sup>116</sup> *See id.* at 80.

the boundaries of the concept of ownership are—because to the extent we would like to extend property-like protections to things beyond the conceptual boundaries of ownership (or not recognize legal ownership in things that conceptually can be owned), we must act through legislatures rather than the courts.

### B. *The Ontological Status of Concepts*

Much of the post-Realist skepticism of descriptive boundaries of property is grounded in skepticism of the possibility of the existence of the concepts on which the law relies.<sup>117</sup> We think we know by now that “the common law is not a brooding omnipresence in the sky.”<sup>118</sup> We wonder, then, how the concepts on which it relies *could* exist.

Concepts like ownership could conceivably exist in any of three relevant ways. First, it might be that, as natural law theories more or less have it, the concept of ownership metaphysically exists. But, to serve the legitimating function described in the preceding section, ownership *need not* exist in some immaterial way in the fabric of the universe. It could instead be that the concept of ownership is biologically embedded in our evolved minds—a category that, whether or not it would exist without us, is something human beings innately understand. Finally, it might be that “ownership” as a word in English is simply *socially* determinate—it denotes a determinable concept to speakers of English and exists within our social and linguistic community. This is indeed the only kind of existence a concept need have to legitimately underlie common-law reasoning about its boundaries.

#### 1. Ownership as Metaphysically Real

Metaphysical realism is the philosophical view that entities—whether we’re talking about atoms, persons, stars, justice, intent, real numbers, or anything else—exist independent of human minds.<sup>119</sup> In contrast,

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<sup>117</sup> See, e.g., Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 872, 872 (1989) (“[T]he Legal Realists have so thoroughly applied their brand of philosophical antirealism to legal entities and quantities that it is difficult for us post-Realist generations even to understand what a metaphysical realist about law could believe.”).

<sup>118</sup> SOUTHERN PAC. CO. V. JENSEN, 244 U.S. 205 (1917) (Holmes, J., dissenting).

<sup>119</sup> See, e.g., Moore, *The Interpretive Turn*, *supra* note 117, at 878 (“A metaphysical realist . . . maintains both (1) that the entities in question exist, and (2) that their existence is independent of any individual’s mind or any community conventions.”); see also Alexander Miller, *The Significance of Semantic Realism*, 136 SYNTHESE 191, 192 (2003) (“There . . . are two dimensions to realism about the external world: the *existence*

antirealism holds either that a proffered category either does not exist at all or does not exist outside of our perception and cognition of it.<sup>120</sup>

Metaphysical realism is not an all or nothing proposition, that either everything exists or nothing does. That is, you can be a metaphysical realist about certain things but not others.<sup>121</sup> For instance, it is not uncommon to be a metaphysical realist about, say, numbers—believing that the concepts of numbers exist in the fabric of our universe—but not about ethics.<sup>122</sup> Indeed, the most common lay metaphysics would probably accept that “matter” and “energy” are metaphysically real and exist outside of our minds, but deny the metaphysical existence of social conventions like “dating.” And between those poles you might find a diversity of views on whether concepts like “tables,” “green,” “the good,” or “human beings” *really* exist or are merely the words we use to describe certain collections of atoms with “no there there.” In contemporary philosophy, you’ll find a full spectrum of arguments, from denying the existence of anything outside of our minds to holding that a great deal of even apparent social conventions in fact exist.<sup>123</sup>

The existence of fundamental legal concepts like ownership is a live front in this debate. Michael Moore, the most prominent defender of metaphysical realism in the legal academy, has argued that many fundamental concepts in law—including cause, intention, or culpability—are, like mathematical concepts, metaphysically real.<sup>124</sup> In contrast, Legal Realism (confusingly) is perhaps best understood as a movement by its antirealist stance on legal categories—indeed, it was directly targeted

dimension and the *independence* dimension. The realist asserts that tables, chairs, cats, the moons of Jupiter, and so on, exist; and that these entities exist objectively and independent of the mental.”)

<sup>120</sup> See Moore, *The Interpretive Turn*, *supra* note 117, at 880 (“Corresponding to the two essential tenets of realist ontology are two kinds of antirealists: (1) those who deny the existence of some class of entities, and (2) those who grant the existence of such entities but deny their independent from our minds or our conventions. The first kind of antirealist is a skeptic; the second is an idealist.”).

<sup>121</sup> See, e.g., Moore, *Moral Reality Revisited*, *supra* note 45, at 2432 (1992) (“[T]he metaphysical realist about some class of entities need not be a realist about all other classes.”); William P. Alston, *Introduction* in REALISM AND ANTIREALISM (William P. Alston, ed., 2018) (“[T]here . . . are also views of a realist or nonrealist sort about particular stretches of reality: perceivable physical objects, abstract objects, universals, propositions, the objects of pure mathematics, moral obligation, meanings, God, and so on.”).

<sup>122</sup> See, e.g., Gilbert Harman, *Metaphysical Realism and Moral Relativism: Reflections on Hilary Putnam’s Reason, Truth and History*, 79 J. PHILOSOPHY 568, 569 (1982) (“I . . . still feel the attraction of metaphysical realism. . . . I don’t see that there is anything problematic about moral relativism.”); see also Moore, *Moral Reality*, *supra* note 45, at 2432 (“[S]taunch realists about the physical world are often antirealists about morality.”).

<sup>123</sup> See generally Alexander Miller, *Realism*, STAN. ENCYC. PHIL. (ed. Edward N. Zalta 2021).

<sup>124</sup> Moore, *supra* note 117, at 884.



against nineteenth century natural law theory, which is a species of metaphysical realism.<sup>125</sup>

Importantly, however, the metaphysical reality of intangible concepts such as numbers is, in principle, entirely unrelated to the metaphysical reality of a divine creator.<sup>126</sup> One can just as well be a metaphysical realist about numbers and an atheist as otherwise.<sup>127</sup> Why there is something rather than nothing is always one of the primary questions, but it is in principle no easier with respect to matter than intangible concepts (nor, I might add, are we any closer to resolving the former rather than the latter).<sup>128</sup>

The most intractable difficulty of debates about metaphysical realism is a lack of agreed-upon methodology, and discussions in metaphysics have a way of going in circles.<sup>129</sup> For example, in arguing for the metaphysical reality of certain ethical concepts, Moore relies on an “explanationist” methodology that holds that “to discover whether some particular entity or quality exists is to determine whether that thing has a necessary place in the best explanation of some features of the natural world that we take (for these purposes) to exist.”<sup>130</sup> To which antirealists reply, not implausibly, something along the lines of “but surely that is not what you meant by the

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<sup>125</sup> See Moore, *supra* note 117, at 880 (“Corresponding to the two essential tenets of realist ontology are two kinds of antirealists: (1) those who deny the existence of some class of entities, and (2) those who grant the existence of such entities but deny their independent from our minds or our conventions. The first kind of antirealist is a skeptic; the second is an idealist.”).

<sup>126</sup> See, e.g., John Bishop, *On J.J.C. Smart and J.J. Haldane’s Atheism and Theism*, 36 SOPHIA 38, 38 (1997) (“[W]hether God exists or not is independent of any beliefs or attitudes anyone has on the question” of metaphysical realism); see also Baltzer-Jaray, *Reinach and Kantorowicz*, *supra* note 95, at 101 (noting that Reinach’s phenomenological realism “describes a metaphysical footing for justice . . . with no need for God as the source”).

<sup>127</sup> See, e.g., Stephen Law, *Naturalism Versus Theism Is a False Dilemma*, 19 THINK 103, 105 (2020) (noting that many atheistic philosophers “suspect that . . . mathematical Platonism might be true”).

<sup>128</sup> See, e.g., MARTIN HEIDEGGER, INTRODUCTION TO METAPHYSICS 7–8 (1959) (describing the question of why there is something rather than nothing “the fundamental question of metaphysics”); see also, James Ladyman, *The Foundations of Structuralism and the Metaphysics of Relations* in THE METAPHYSICS OF RELATIONS 177, 180 (Anna Marmodoro & David Yates, eds., 2016) (arguing that potential differences and phase differences are fundamental physical examples of intangible relations that metaphysically exist).

<sup>129</sup> See, e.g., Daniel Nolan, *Method in Analytic Metaphysics*, in THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY (Herman Cappelen, Tamar Szabo Gendler & John Hawthorne, eds. 2016) (“There is no one agreed method in contemporary metaphysics. Methodological disputes in contemporary metaphysics run deep: each of the main methods discussed in this article will be denounced as worthless or pernicious by at least some writers.”).

<sup>130</sup> See Moore, *Moral Reality Revisited*, *supra* note 45, at 2492.

existence of *moral principles!*”<sup>131</sup>

Most directly to our point here, the turn-of-the-twentieth-century legal philosopher Adolf Reinach offered an account of the metaphysical realism (which he referred to in terms of “apriori” realism) of the concept of ownership,<sup>132</sup> that has been recently resuscitated by the philosopher Olivier Massin<sup>133</sup> and others.<sup>134</sup> Reinach’s methodology was particularly idiosyncratic (and interpretation of it is complicated by the fact that his philosophical career was cut short on the battlefields of the First World War).<sup>135</sup> Reinach was what is called a phenomenological realist and an early follower of Edmund Husserl, and through Husserl a follower of Kant’s understanding of intuition and pure reason.<sup>136</sup> In contrast to how phenomenology came to be understood in late-Husserl, Heidegger, and those following, “phenomenology for early members like Reinach was primarily about a universal philosophy of essences, not merely the essence of consciousness.”<sup>137</sup> For Reinach and other phenomenological realists, states-of-affairs have a distinct kind of existence.<sup>138</sup> In the words of the

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<sup>131</sup> See, e.g., LEITER, *supra* note 58, at 212 (“Those who make the charge of ‘irrelevance’ claim that the explanatory potency of properties simply does nothing to show whether the properties are moral: for moral properties ‘justify’ or ‘guide action,’ rather than ‘explain.’” (citing David Copp, *Explanation and Justification in Ethics*, 100 ETHICS 237 (1990))).

<sup>132</sup> See Reinach, *supra* note 98, at 55 (“The relation between a person and a thing which is called owning or property is an ultimate, irreducible relation which cannot be further resolved into elements.”).

<sup>133</sup> See generally Massin, *supra* note 66.

<sup>134</sup> See generally Massa, *supra* note 106, at 75.

<sup>135</sup> Kimberly Baltzer-Jaray, *Phenomenological Jurisprudence: A Reinterpretation of Adolf Reinach’s Jahrbuch Essay*, in PHENOMENOLOGY FOR THE TWENTY-FIRST CENTURY 118, 130 (J.A. Simmons & J.E. Hackett, eds., 2016) (arguing that the fact that Reinach’s ontology “has the potential to go beyond the real/ideal dichotomy to which philosophers are accustomed” is “perhaps a central reason why Reinach’s account of ‘Recht’ has been so mistreated and misunderstood by philosophers”).

<sup>136</sup> See Kimberly Baltzer-Jaray, *Bogged Down in Ontologism and Realism. Reinach’s Phenomenological Realist Response to Husserl*, in THE IDEALISM-REALISM DEBATE AMONG EDMUND HUSSERL’S EARLY FOLLOWERS AND CRITICS 151, 151 (Rodney K.B. Parker, ed., 2021); see also Maria Golebiewska, *Normativity of Prescriptions in Adolf Reinach’s Aprioristic Theory of Right*, 90 FOLIA IURIDICA 41, 42 (2020) (noting that Reinach’s theory owed much to the “Husserlian grasp of ideas, with its source being not Platonism but Kantianism—the Kantian concept of regulative ideas”).

<sup>137</sup> *Id.* at 154 (citing HERBERT SPEIGELBERG, THE PHENOMENOLOGICAL MOVEMENT: A HISTORICAL INTRODUCTION 168 (3d ed. 1994)); see also Baltzer-Jaray, *Phenomenological Jurisprudence*, *supra* note 135, at 118 (arguing that “Reinach was trying his hand as a phenomenology of justice”).

<sup>138</sup> *Id.* at 157 (“[P]henomenological realists—taking ontological cues from Meinong (alluding specifically to absistence and, more importantly, Aristotle—describe a third kind of being, that which states of affairs, essences, and ‘forms’ have.”)

philosopher Kimberly Baltzer-Jaray:

These entities do not require consciousness to constitute them, implying that their being cannot be reduced solely to the operations of consciousness and, more importantly, the consciousness is not required for their presence in the world. When I look at a red rose in my garden, I perceive the physical rose, and I apprehend (employing insight . . .) that the state of affairs . . . *being-red* obtains. The physical rose exists, and the state of affairs obtains or subsists, regardless of my experience with them: they are “there,” and not because I think them into being.<sup>139</sup>

So understood, insight or intuition is the fundamental method by which we understand the existence and boundaries of states of affairs,<sup>140</sup> “[a]ccording to the phenomenological analysis, we must reduce our knowledge to original phenomena and to the original moment at which we start perceiving law, for whose nature we intuitively search.”<sup>141</sup> This approach commits Reinach to doing metaphysics at the same time as epistemology,<sup>142</sup> an approach shared by a wide range of contemporary analytical realists.<sup>143</sup>

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<sup>139</sup> *Id.* Note the similarity of this move to Moore’s argument that moral or categorical properties can supervene on material states of affairs. See Moore, *Moral Reality*, *supra* note 45, at 2522 (“Not only are moral properties token-identical to natural properties (and, accordingly, not only is each sub-type of a moral property on each sort of situation type-identical to a finite disjunction of natural properties. Then it is not at all mysterious why there must be a variation in the physical world if there is a change in moral status, for moral properties just are one or other of a set of physical properties.”); see also Baltzer-Jaray, *Bogged Down*, *supra* note 136, at 165–66 (“For Reinach essences do not inhabit some separate realm as timeless, immutable, disembodied entities; rather, they subsist in the relations that obtains between the form and matter of objects.”).

<sup>140</sup> See *id.* at 158 ([P]henomenological realism is an investigation of necessary states of affairs, and we come to apprehend these by way of insight.” (citing Fritz Wenisch, *Insight and Objective Necessity: A Demonstration of the Existence of Propositions Which Are Simultaneously Informative and Necessarily True. Epistemology and Logic*, IV ALETHEIA: AN INT’L J. PHIL. 107 (1988)).

<sup>141</sup> Tomasz Bekrycht, *The Question of Legitimizing Law in Adolf Reinach’s Phenomenology*, 90 FOLIA IURIDICA 63, 66 (2020).

<sup>142</sup> *Id.* at 158-59 (“Reinach does metaphysics and epistemology simultaneously, or more precisely, he specifies that we must regard all epistemological and logical terms as primarily ontological.”); Lorenzo Passerini Glazel, *Grasping an Ought. Adolf Reinach’s Ontology and Epistemology of Legal and Moral Oughts*, 90 FOLIA IURIDICA 29, 30 (2020) (“The way in which an ought or norm can be ‘perceived’ or ‘grasped’ is indeed strictly related to the specific ontological status of norms and oughts, that is to say to their specific mode of existence.”).

<sup>143</sup> See, e.g., RUTH GARRETT MILLIKAN, LANGUAGE, THOUGHT AND OTHER BIOLOGICAL CATEGORIES: NEW FOUNDATIONS FOR REALISM 14 (1984) (“Epistemology, ontology, philosophy of mind, and philosophy of language cannot ultimately be separated from one another.”). Indeed, Moore’s explanationist account of the reality of moral

Armed with this methodology, Reinach argued that ownership is a state of affairs that exists not only outside of the law but inheres in the nature of things:<sup>144</sup>

The relation between a person and thing which is called owning or property is an ultimate, irreducible relation which cannot be further resolved into elements. It can come into being even where there is no positive law. When Robinson Crusoe produces for himself all kinds of things on his island, these things belong to him. Just as there are claims and obligations which arise from social and similar promises completely apart from any positive law, so it is easily conceivable that property relations could come into being in a realm devoid of positive norms. . . . It lies in the essence of owning that the owner has the absolute right to deal in any way he likes with the thing which belongs to him.<sup>145</sup>

Reinach reaches this conclusion based on the nature of ownership as a state of affairs, and argues that we would all reach the same conclusion if we were to engage in similar reasoning.<sup>146</sup> Indeed, because these conclusions inhere in the nature of things, Reinach presses that “angels, devils and gods” would reach these conclusions about the nature of ownership if they were to reflect on it as well.<sup>147</sup>

Now, whether all this—and the more general account of ontology and epistemology on which it is based—is *right* is somewhat beside the point. The point here is that the question of whether the concept of ownership exists in the metaphysical sense is fairly a live one, and indeed follows directly under certain at-least-not-insane-and-thoroughly-secular theories of ontology generally.<sup>148</sup>

Perhaps more importantly, Reinach’s general conclusion that the concept of property exists and has certain determinable entailments can be right even if its metaphysical foundation is unconvincing—indeed, Reinach can still be right about the *implications* of the existence of the concept of

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concepts makes a similar move. See Moore, *Moral Reality*, *supra* note 45, at 2494 (“The view is nonetheless empiricist in a nontraditional sense, because it holds our ontological beliefs hostage to there being some connection, no matter how indirect, between what we think to exist and what we experience.”); see also Moore, *supra* note 117, at 874–75 (“I use the word ‘metaphysics’ in a broader sense, to include not just ontology but also (2) a theory of truth, (3) a theory of logic, (4) a theory about the meaning of sentences, and (5) a theory about the meaning of the words used in sentences.”).

<sup>144</sup> See Massin, *supra* note 66, at 577.

<sup>145</sup> REINACH, *supra* note 98, at 55.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 47.

<sup>148</sup> See Massin, *supra* note 66, at 580 (“[T]he ordinary view of property has largely disappeared from the discussions of property in contemporary literature, with some rare exceptions.”).

ownership even if he is wrong about its nature. If the concept of property exists either in human psychology or by way of social convention, it still may be right that “[i]t lies in the essence of owning that the owner has the absolute right to deal in any way he likes with the thing which belongs to him,”<sup>149</sup> and that conceptual reasoning is a valid way to reach that conclusion.<sup>150</sup>

Indeed, perhaps Reinach’s strongest argument for the extra-legal existence of certain core legal concepts (like ownership), would seem to hold regardless of whether ownership is metaphysically real, a feature of human psychology, or a universally-recognized social or linguistic construction:

[I]t would have been enough to consider the judgment of legally untrained laymen in order to have noticed the apriori sphere of right. How can one explain the fact that many who do not know the positive law or who hardly know it find so many enactments “self-evident”? How can we explain the fundamental difference between enactments about which one has to be informed, and those about which one needs no information? Whoever orally enters into a contract to rent a piece of land for three years may be surprised to find that according to our law this contract is considered “as made for an indefinite length of time.” But whoever promises to make a loan, whoever waives a claim, whoever appoints a representative, cannot expect anything except that he acquires an obligation, that his claim is extinguished, and that he becomes entitled and obliged through the acts of the representative. Will one say that all men usually somehow learn about enactments such as these latter, whereas they usually do not know about enactments such as the first-mentioned? But even if one were to venture to construct such an ungrounded theory, how does one propose to explain why the first-mentioned enactment, even if one has learned of it, can be *forgotten*, whereas in the case of the latter enactments it makes simply no sense to speak of really forgetting.<sup>151</sup>

Reinach’s point is that there are some things that inhere in the nature of some legal concepts that can be determined by reflection on the nature of the concept alone. *My* point is that the common law is a democratically-legitimate enterprise, consistent with the separation of powers, insofar as is

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<sup>149</sup> *Id.* at 55.

<sup>150</sup> *Id.* at 579; *see also id.* at 590 (“In their influential works Penner (1995) as well as Merrill and Smith (2001) rehabilitate absolute rights over things—albeit without citing Reinach, accusing Hohfeld for muddying the distinction between rights *in rem* (here, property rights) and rights *in personam* (here, relative rights). The convergence between Reinach and these authors does not end here. Although Penner as well as Merrill and Smith officially identify property as being a right, they are all led surreptitiously to reintroduce the distinction between property and property rights in order to characterize the opposition between rights over things and rights *in personam*.”).

<sup>151</sup> REINACH, *supra* note 98, at 131.

limited to adjudication of the boundaries of concepts we have adopted into law. The next two sections discuss two alternative ways that, *contra* Reinach, the concept of ownership could exist outside of the law without committing oneself thoroughly to his admittedly controversial metaphysics.

## 2. Ownership as a Human Cognitive Category

As many have argued, it may be that metaphysical categories—at least the kind of complex, emergent metaphysical categories with which the law purports to be concerned—do not exist.<sup>152</sup> But it may be that, as human beings developing laws, the concept of ownership may as well exist *for us*. For example, ownership could be a basic concept that that inheres in human psychology.<sup>153</sup>

Psychology and evolutionary biology have by now demonstrated that human minds share certain universal cognitive features.<sup>154</sup> Our minds are not blank slates from birth onto which experience shapes personhood in infinitely plastic ways.<sup>155</sup> Perhaps the paradigmatic example is our capacity for language.<sup>156</sup> “All infants come into the world with linguistic skills.”<sup>157</sup>

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<sup>152</sup> See, e.g., RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* xxviii (1982) (arguing that the notion of “there being—out there” is unintelligible); Stanley Fish, *Interpretation and the Pluralist Vision*, 60 *TEX. L. REV.* 495, 497 (1982) (“[T]he very notion of a supra-contextual fact makes no sense since something that had no relation to the concerns of a particular human situation would not be a fact.”); see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 14 (1987) (“The search for ‘objective truth’ is misguided; consensus within a viable community is all we mean by the truth of ethical propositions, just as it is all we mean when we say that a reading of a literary text is a true or sensible one.”).

<sup>153</sup> See, e.g., Shamik Dasgupta, *Realism and the Absence of Value*, 127 *PHIL. REV.* 279, 282 (2018) (observing that some “anti-realists . . . focus on universal facts about humans such as deep features of our shared psychological make-up,” giving rise to an ontologically anti-realist view that nevertheless rejects “the cultural relativism of Goodman and Rorty”).

<sup>154</sup> See e.g., Vivian Kostrubiec, Pier-Giorgio Zanone, Armin Fuchs & J.A. Scott Kelso, *Beyond the blank slate: routes to learning new coordination patterns depend on the intrinsic dynamics of the learner—experimental evidence and theoretical model*, 6 *FRONTIERS IN HUMAN NEUROSCIENCE* 1, 11 (2012) (“It is a truism in psychology—hearkening back at least to Watson (1909)—that we do not come into the world as a *tabula rasa* but with a repertoire of existing dispositions, capacities and basic abilities.” (citing J.B. Watson, *Some experiments bearing upon color vision in monkeys*, 19 *J. COMP. NEUROL. PSYCH.* 1 (1909)); see also generally Pasko Rakic, *Specification of Cerebral Cortical Areas*, 241 *SCIENCE* 170 (1988) (summarizing universals in human brain development).

<sup>155</sup> See generally, e.g., STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (summarizing research in a variety of fields that the human brain is not a blank slate but has certain inherent cognitive features).

<sup>156</sup> See, e.g., STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* 4 (1994) (“Language is not a cultural artifact that we learn the way we learn to

And those skills involve basic parameters of language acquisition and function—people learn, in certain times and ways, words in nouns and verbs that they relate to one another with universal grammatical mechanisms.<sup>158</sup> These basic characteristics of language are innate, not learned. They are a fundamental structural feature of the way in which we've evolved to think about and understand the world.<sup>159</sup>

Indeed, our cognitive similarities are not limited to abstract capacities such as that for language—they include consistent, determinable categories through which we organize and perceive information.<sup>160</sup> Colors are often thought to be an example of this. The spectrum of wavelengths of visible light from what we call “blue” to what we call “red” is physically continuous, not clustered.<sup>161</sup> There are no ontologically obvious points to “carve nature at its joints”<sup>162</sup> and cleave this smooth spectrum into categories that correspond to our colors—perhaps this suggests that colors are not metaphysically real.<sup>163</sup> But although there is variation from culture

tell time or how the federal government works. Instead, it is a distinct piece of the biological makeup of our brains.”).

<sup>157</sup> *Id.* at 266 (citing J. Werker, *The ontogeny of speech perception*, in MICHAEL STUDDERT-KENNEDY & IGNATIUS G. MATTINGLY, MODULARITY AND THE MOTOR THEORY OF SPEECH PERCEPTION: PROCEEDINGS OF A CONFERENCE TO HONOR ALVIN M. LIBERMAN (1991) and Peter D. Eimas, et al., *Speech Perception in Infants*, 171 SCIENCE 303 (1971)).

<sup>158</sup> *See id.* at 74–118 (describing the universal structure of grammar); *id.* at 265–301 (describing language acquisition in children); *see also generally* NOAM CHOMPSKY, LANGUAGE AND MIND (1972) (outlining a universal theory of grammar).

<sup>159</sup> *See* RAY JACKENDOFF, LANGUAGES OF THE MIND (1992) (describing the quasi-linguistic processes of thought); STEVEN PINKER, LEARNABILITY AND COGNITION: THE ACQUISITION OF ARGUMENT AND STRUCTURE (1989) (describing the “mentalese” in which we think).

<sup>160</sup> *See, e.g.*, Ara Norenzayan & Steven J. Heine, *Psychological Universals: What Are They and How Can We Know?*, 131 PSYCH. BULLETIN 763, (2005) (“The most extensive recent effort to catalogue human universals was that by Donald Brown (1991), who constructed a list of hundreds of characteristics, incorporating both categories (e.g., marriage, rituals, language) and content (e.g., fear of snakes, coyness displays, having color terms for ‘black’ and ‘white’) that are common to people everywhere.” (citing DONALD E. BROWN, HUMAN UNIVERSALS (1991))).

<sup>161</sup> *See, e.g.*, D.H. Sliney, *What is light? The visible spectrum and beyond*, 30 EYE 222 (2016).

<sup>162</sup> *See* Plato, *Phaedrus* (trans. Hugh Tredennick) in PLATO: THE COLLECTED DIALOGUES 511 (ed. Edith Hamilton & Huntington Cairns 1961).

<sup>163</sup> *See, e.g.*, C.L. Hardin, *A Spectral Reflectance Doth Not a Color Make*, 100 J. PHIL. 191 (2003) (arguing against the metaphysical reality of color on grounds that they are fundamentally arbitrary). To be sure, there are plenty of people who are “color realists” and maintain that color categories (or at least some of them) are ontologically real to differing degrees. *See id.* at 191 (“It is a curious sociological fact that many philosophers, but very few visual scientists, are color realists.”); *see also, e.g.*, Keith Allen, *The Mind-Independence of Colour*, 15 EUROPEAN J. PHIL. 137 (2007).

to culture and language to language on the specifics of color categories, all cultures have differentiable concepts of color, and this variation is *far* less random than we would expect if languages were drawing arbitrary lines across the spectrum.<sup>164</sup> Indeed, anthropologists and cognitive scientists have noted basic patterns in the existence of color words across languages—all languages have words for black and white;<sup>165</sup> if a language has three color words they are for black, white, and red; the fourth is always yellow or green and the fifth the other; the sixth color word is blue.<sup>166</sup> Indeed, “the evidence suggests that the qualitative color boundaries along the visible spectrum are a result of inborn feature detectors, rather than learning to sort and name colors in particular ways.”<sup>167</sup>

Research in psychology, anthropology and evolutionary biology suggest that the concept of ownership might be such a universal cognitive category.<sup>168</sup> Indeed, anthropologists have found that all cultures have a basic understanding of personal property and understandings of ownership.<sup>169</sup> Further, developmental psychology has shown that “[a]wareness of ownership . . . emerges during early childhood,”<sup>170</sup> and that children as young as 2 understand the basic relationship of ownership as dominion over a thing.<sup>171</sup> Recent research suggests that these

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<sup>164</sup> See PINKER, *THE LANGUAGE INSTINCT*, *supra* note 156, at 52 (“[W]here languages do differ in their color words, they differ predictably, not according to the idiosyncratic taste of some word-coiner.”).

<sup>165</sup> See BROWN, *supra* note 160, at 10–14.

<sup>166</sup> See Richard S. Cook, Paul Kay & Terry Regier, *The World Color Survey Database*, in *HANDBOOK OF CATEGORIZATION IN COGNITIVE SCIENCE* 224, 234 (Henri Cohen & Claire Lefebvre, eds., 2005); BRENT BERLIN & PAUL KAY, *BASIC COLOR TERMS: THEIR UNIVERSALITY AND EVOLUTION* (1969). This classic story of color category acquisition has been complicated substantially by subsequent research, but the essential observation that color terms develop in non-random and universal ways remains widely accepted. See, e.g., James S. Boster, *Categories and Cognitive Anthropology* in *HANDBOOK OF CATEGORIZATION IN COGNITIVE SCIENCE* 75, 92–95 (Henri Cohen & Claire Lefebvre, eds., 2005).

<sup>167</sup> Stevan Harnad, *To Cognize is to Categorize: Cognition is Categorization*, in *HANDBOOK OF CATEGORIZATION IN COGNITIVE SCIENCE* 20, 34 (Henri Cohen & Claire Lefebvre, eds., 2005).

<sup>168</sup> See generally WILSON, *supra* note 38; see also Lee Anne Fennell, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 524, 536 (noting that “[b]ecause territoriality is found in nonhuman animals as well as in human populations, it might seem to be innate”).

<sup>169</sup> See, e.g., BROWN, *supra* note 160, at 132 (1991) (synthesizing research on human universals to conclude that personal property and ownerships are human universals).

<sup>170</sup> See, e.g., Julia W. Van de Vondervoort, Paul Meinz & Ori Friedman, *Children’s judgments about ownership rights and body rights: Evidence for a common basis*, J. EXPERIMENTAL CHILD PSYCH. 155, 157 (2017).

<sup>171</sup> See, e.g., Federico Rossano, Hannes Rakoczy & Michael Tomasello, *Young children’s understanding of violations of property rights*, 121 COGNITION 219 (2011) (showing that two-year-olds understand the rights of control over and exclusion of others



understandings are not socially taught and arise in children “without being explicitly taught . . . or without facing limitations about when and how they are permitted to use others’ property.”<sup>172</sup>

Indeed, research in linguistics and psychology appears to vindicate Reinach’s metaphysical claim that “[t]he relation between a person and thing which is called owning or property is an ultimate, irreducible relation which cannot be further resolved into elements.”<sup>173</sup> As Bart Wilson recently pointed out, linguists have found that the concept “mine” (which he argues is the conceptual core of property rather than ownership, about which more below)<sup>174</sup> is a “semantic prime, [an] atomic concept[] . . . found in every human language and thus presumed to be universally innate.”<sup>175</sup> Indeed, Wilson argues:

*Mine* means just what mine means, just like *do* means what do means, *say* means what say means, and *good* means what good means. Attempting to define these words in terms of simpler concepts fails because these words symbolize atomic conceptual units. And yet in every language every human being knows what *mine*, *do*, *say*, and *good* mean. . . .<sup>176</sup>

It may be, in sum, that a basic understanding of ownership as a concept—one with at least partially determinate and determinable boundaries—is an evolved feature of the human mind. If this is right, ownership may not be metaphysically real and would not necessarily be a feature of all conceivable rational or sufficiently intelligent minds—it could be that space aliens evolved in very different circumstances, though

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from their property); Hildy S. Ross, *Negotiating Principles of Entitlement in Sibling Property Disputes*, 32 DEVELOPMENT PSYCH. 90 (1996) (same); Nancy Eisenberg-Berg, et al., *Effects of instructions concerning ownership of a toy on preschoolers’ sharing and defensive behaviors*, 15 DEVELOPMENT PSYCH. 460 (1979) (same); see also Madison L. Pesowski & Ori Friedman, *Preschoolers and Toddlers Use Ownership to Predict Basic Emotions*, 15 EMOTION 104 (2015) (showing that two-year-olds understand that others will be upset if their things are used without their permission).

<sup>172</sup> See Van de Vondervoort, Mainz & Friedman, *supra* note 170, at 157; see also Julia Van de Vondervoort & Ori Friedman, *Parallels in Preschoolers’ and Adults’ Judgments About Ownership Rights and Bodily Rights*, 39 COGNITIVE SCI. 184 (2015) (suggesting that conceptions of ownership arise from an inherent understanding of ownership in the body); NICHOLAS HUMPHREY, *A HISTORY OF THE MIND* (1992) (discussing the inherent emergence of ownership as a cognitive category incident to our consciousness); see also WILSON, *supra* note 38, at 9 (“[N]o human parents in any community have to teach their child to resist attempts to take things securely within their grasp. Children are natural-born possessors.”).

<sup>173</sup> REINACH, *supra* note 98, at 155.

<sup>174</sup> See *infra* Section III.B.5.

<sup>175</sup> WILSON, *supra* note 38, at 50.

<sup>176</sup> *Id.* at 55–56.

intelligent persons, would not understand ownership as we do. But so long as ownership means something to humans, the concept in our law may still justify common law adjudication of its boundaries.

### 3. Ownership as an Extra-Legal Social Practice

Not every word in English corresponds to ontology or universal features of human minds. Some words—“nation,” “dating,” “adjusted gross domestic product”—facially derive their meaning from wholly socially contingent structures and organizations. But it does not follow from the possibility that “ownership” may not be a metaphysically real or innate concept that it does not exist outside of the law; that there is no descriptive answer to the question of what can be owned.

It might be that our language—presumably all languages—effectively carves up our social world into concepts with determinate boundaries, as understood by a confederate speaker of the language, regardless of the ontological status of those concepts.<sup>177</sup> Consider a social *practice* like dating. People in the world of love engage in all sorts of behavior and relationships—unrequited love, friends with benefits, one-night stands, marriage, living together, committed non-marital relationships, being exes, polyamory. Only one class of these relationships we call “dating,” in the sense that “X and Y are dating”—a class of relationships characterized by non-committed social, romantic, and usually sexual meet-ups.<sup>178</sup> The concept of dating is largely contingent on our social practice. In many societies, indeed, in most, nothing remotely resembling modern dating takes place.<sup>179</sup> But it does in ours, and we have a word for it.<sup>180</sup> The concept of “dating” entails certain things. For example, if X and Y are “dating” they cannot, conceptually, be “married.”

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<sup>177</sup> See, e.g., Delia Belleri, *You can say what you think: vindicating the effability of our thoughts*, 191 *SYNTHESE* 4431, 4449 (2014) (“I propose the following: If I successfully express my thought that *p* by uttering *S*, this means that, if I share the right background with the hearer and all goes well, my hearer will come to understand *p* as well.”).

<sup>178</sup> See, e.g., Erica Owens, *The Sociology of Love, Courtship, and Dating*, in *21ST CENTURY SOCIOLOGY: A REFERENCE HANDBOOK* 269 (Clifton D. Bryant & Dennis L. Peck, eds., 2007) (“[T]he goal and seriousness of the relationship is often the basis for market whether the couple is ‘dating’ or ‘courting,’ with dating evolving into courtship when the couple becomes both serious and sexually exclusive.”).

<sup>179</sup> See generally, e.g., ZOE STRIMPEL, *SEEKING LOVE IN MODERN BRITAIN: GENDER, DATING AND THE RISE OF ‘THE SINGLE’* (2020).

<sup>180</sup> See, e.g., Elaine Hirsch, *The History of Dating and Communication*, *COMMUNICATION STUDIES* (Nov. 1, 2011), <http://www.communicationstudies.com/the-history-of-dating-and-communication> (noting that “[e]tymologically speaking, the word ‘dating’ (as it pertains to the romantic pursuit of an intimate liaison between two people) probably entered the American vernacular during the Roaring Twenties”).

“Ownership” could be like dating in this regard—a word referring to a circumscribed social practice that, while contingent on the construction of the social practice, determinately refers to it in the understanding of Anglophone listeners.<sup>181</sup> Surely even if we are skeptical that ownership exists as a metaphysical matter, and are skeptical of the extent to which it is built into the human mind, we must concede that ownership exists as a *social* concept in the United States—people feel as though they own things, act as though they own things, act as though other people own things, and recognize other people’s ownership when they, in fact, own them.<sup>182</sup> At the end of the day,<sup>183</sup> maybe this is all Reinach’s “insight” and “intuitions,”<sup>184</sup> are really getting at—“we,” as socially-and-historically-contingent Anglo-American readers, call a relationship characterized by descriptive dominion “ownership” because that is what we recognize it as. Maybe things don’t have to be this way, and maybe we could change them over time, but to the extent that these are facts about the social and linguistic world we inhabit, we can say that, for our purposes, ownership exists as a concept outside the law, that it is real in perhaps the only sense that *matters for us*.

### III. THE CONCEPT OF OWNERSHIP AND ITS BOUNDARIES

Whether as a metaphysical category, evolved feature of human psychology, or a social construct, ownership is a concept that exists outside of the law with certain determinable entailments that underlie the legitimacy of at least some of the common law of property.<sup>185</sup> In this Part, I discuss one

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<sup>181</sup> Cf. Simon Deakin, *Juridical Ontology: The Evolution of Legal Form*, 40 HIST. SOC. RES. 170, 170 (2015) (arguing that “juridical concepts should . . . be understood as part of social reality,” and that their “objective existence can be verified using procedures which are appropriate for validating empirical claims about the social world”); Merrill & Smith, *The Morality of Property*, *supra* note 61, at 1851 (arguing that because property “must rest on a simple foundation of everyday morality” to function, “property is unlikely to be wholly the creature of law”).

<sup>182</sup> See, e.g., CAROL ROSE, PROPERTY AND PERSUASION 1 (1994) (“Picture property. Use your mind’s eye: what do you see? Perhaps a bank vault full of money or a house or maybe a fence—all common images in musings about property.”).

<sup>183</sup> See *supra* Section II.B.1.

<sup>184</sup> See REINACH, *supra* note 98, at 55 (“When Robinson Crusoe produces for himself all kinds of things on his island, these things belong to him.”).

<sup>185</sup> See, e.g., Dana & Shoked, *supra* note 18, at 783 (“From Blackstone’s oft-repeated catchphrase on the popular cachet of the right of property, to more recent scholarly explorations, commentators have long noted how deeply ingrained in laypeople’s minds the concept of private property is.”); Render, *The Concept of Property*, *supra* note 55, at 439 (“Property is basically about the ownership of things.”); Merrill & Smith, *supra* note 61, at 1850 (“Property can function as property only if the vast preponderance of persons recognize that property is a moral right, and this requirement has important consequences for the study of property.”).

of the essential entailments of the concept of ownership, indeed perhaps *the* essential entailment—ownership is, at its core, a descriptive relationship of *control*. Therefore, as a conceptual matter, the limits of property law lie at the limits of control, and that which cannot in principle be controlled cannot be owned.

Further, I situate this theory in relation to five prevailing alternative theories of the conceptual essence of property law that could offer explanation of its boundaries—Merrill’s Exclusion Theory, the Kantians’ Exclusive Use Theory, Penner’s Separability Thesis, Locke’s Labor Theory, and Wilson’s Theory of “Mine”—and show that the theory of ownership as control is either analytically prior to, resolves ambiguities within, or makes better sense of our general understanding of the concept than these alternatives.

### A. *Ownership as Control*

It is widely recognized that the lay understanding of the concept of ownership is rooted in a descriptive relationship of control—of actual, unreviewable decision-making sovereignty over a thing.<sup>186</sup> Indeed, even many contemporary scholars skeptical of the extra-legal existence of the concept of ownership recognize that factual control—absolute decision-making authority—lies at the heart of the concept in the lay imagination.<sup>187</sup> And importantly, in seeking to understand the extra-legal concept of ownership from which some part of property law derives its legitimacy, *it is the lay understanding* (or at least the reflective lay understanding) of the concept we are seeking. After all, in the absence of a statutorily-constructed legal concept, common law adjudication based on a concept is compatible

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<sup>186</sup> See Render, *The Law of the Body*, *supra* note 19, at 576 (observing a “strong intuitive sense that we ‘own’ our bodies—that is, that we enjoy a unique dominion in our corporeal selves and that a set of *a priori* rights attend this dominion”); Thomas C. Grey, *The Disintegration of Property*, in 22 NOMOS: PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) (“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.”); see also Joan C. Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 283 (1998) (describing an “intuitive image of” property as “absoluteness”); Claeys, *Property 101*, *supra* note 61, at 631 (arguing that in Blackstone’s definition, “the core of property is the owner’s ‘dominion’ or ‘indefinite right of use and disposition.’ ‘Dominion’ connotes a zone of policy control (if one is a social scientist), or a domain of practical discretion (if one stays closer to case law and everyday language”).

<sup>187</sup> See, e.g., Williams, *supra* note 186, at 291 (describing the “intuitive image of property” as “‘naturally’ involving absolute dominion”); Grey, *supra* note 186, at 69; see also Rao, *supra* note 16, at 418 (2000) (“Privacy, like property, encompasses the right to exclude others from that protected space and the corollary right to exercise control within one’s territory.”).

with democracy only to the extent that the concept exists outside of the law and is endorsed by the people—which is only possible if they too have access to the concept.

This understanding of the essence of property law was of course what Blackstone meant (or has been taken to mean)<sup>188</sup> when he defined property as “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.”<sup>189</sup> And Reinach too, when he wrote that “it lies in the essence of owning that the owner has the absolute right to deal in any way he likes with the thing which belongs to him.”<sup>190</sup> Ownership, in this understanding, is a concept that, at its heart, refers to a *descriptive state of facts about the world*, not merely a legal status.<sup>191</sup> It is a factual relationship of control over a thing.

Indeed, the notion of ownership as a descriptive state of control—irrespective of anything about the law—is how the term is used in ordinary English (to which judges would look, of course, if legislatures *had* passed a statute saying “we shall have private ownership” and didn’t otherwise specify an idiosyncratic legal construction of “ownership”).<sup>192</sup> Take, for instance, the Merriam-Webster dictionary, which defines “ownership” as “the *state, relation, or fact* of being an owner.”<sup>193</sup> The verb “to own,” in turn, means “to have power or mastery over” or “to have or hold as property.”<sup>194</sup> Moreover, our verb “to own” derives from the Middle English “ounen” or “ahnen” which meant “to possess, have; rule, be in command of,

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<sup>188</sup> See David Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 103 (2009) (arguing that Blackstone himself did not understand ownership as requiring absolute dominion); cf. Claeys, *Property 101*, *supra* note 61, at 633 (arguing that “Blackstone makes the operative noun ‘dominion.’”).

<sup>189</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2; see also Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L. J. 601, 601 (1998) (“Since Blackstone’s time, his definition of property as exclusive dominion has been cited again and again.”).

<sup>190</sup> *Id.* at 55; see also Massin, *supra* note 66, at 591 (“[T]he owner of a thing has the absolute right to behave towards the owned thing *in the manner he wants.*”).

<sup>191</sup> See, e.g., Merriam-Webster Dictionary, Ownership (last visited Apr. 22, 2021), <https://www.merriam-webster.com/dictionary/ownership> (“the state, relation, or fact of being an owner”); see also REINACH, *supra* note 98, at 53 (noting that possession “is clearly no right but rather a factual relation, if one will, a fact”).

<sup>192</sup> See, e.g., ENCINO MOTORCARS, LLC v. NAVARRO, 138 S. Ct. 1134, 1140 (2018).

<sup>193</sup> Merriam-Webster Dictionary, Ownership (last visited Apr. 22, 2021), <https://www.merriam-webster.com/dictionary/ownership> (emphasis added).

<sup>194</sup> Merriam-Webster Dictionary, Own (verb) (last visited Apr. 22, 2021), <https://www.merriam-webster.com/dictionary/own#:~:text=1%20%3A%20to%20have%20or%20hold,He%20owned%20to%20being%20scared.>

have authority over,”<sup>195</sup> further derived from the Proto-Indo-European root \*aik-, “to be master of, possess.”<sup>196</sup>

Moreover, control, the relationship at the core of the concept of ownership, entails at least the majority of the familiar bundle of rights with which we have come to understand the legal relationship of property. If you descriptively control something, you may choose to simply possess it—hold it with you or (if it happens to be a plot of land) patrol its boundaries.<sup>197</sup> But you can also use it.<sup>198</sup> Maybe you gaze longingly at your widget or cultivate the field that you own. Alternatively, maybe you don’t want to use it yourself, but exercise your absolute control over what happens with the thing to rent it out to others for a certain amount of income paid to you.<sup>199</sup> This will temporarily give up your possession, but as the controller this can, conceptually, only take place on terms you agree to. Ditto for your choice to destroy or consume that which you control, pledge it as security, transmit it after your death,<sup>200</sup> and do any of these things for an indefinite duration.<sup>201</sup>

It is true, as mentioned above, that it is impossible to derive everything about property law from this understanding of ownership as control. There is certainly no amount of reflection on the nature of control as a relationship

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<sup>195</sup> Online Etymology Dictionary, Own (v.) (last visited Apr. 22, 2021), [https://www.etymonline.com/word/own#:~:text=Emphatic%20use%20after%20a%20posse%20sive,is%20from%20late%20Old%20English.&text=1200%2C%20ounen%2C%20ahnen%2C%20%22,the%20adjective%20own%20\(q.v.\)](https://www.etymonline.com/word/own#:~:text=Emphatic%20use%20after%20a%20posse%20sive,is%20from%20late%20Old%20English.&text=1200%2C%20ounen%2C%20ahnen%2C%20%22,the%20adjective%20own%20(q.v.)).

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g.,* Honoré, *supra* note 51 (listing possession, use, management, income, capital, security, transmissibility and absence of term as incidents of ownership under a view of property law as a bundle of rights).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> That this “stick in the bundle” is entailed by the concept of ownership itself is debatable and may well be wrong—after you are dead, it seems plausible that you cannot exercise control anything and cannot make sure that it goes to your preferred heirs. *Cf.* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568 (2003) (observing that under natural law theory the right to bequeath property was not considered “inherent” in the property right). If this is so, and bequest is not descriptively entailed by control, then permitting testamentary dispositions *is* a policy choice that ought to be made by legislatures, not courts, and the Supreme Court’s claim that “the right to pass on property” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property” in *HODEL V. IRVING*, 481 U.S. 704, 716 (1987) (quotation omitted) is simply wrong. That is hardly a radical position, having indeed been the position of the Supreme Court prior to *Hodel*, which has since been confined nearly to its facts, and of prior centuries of common law. *See, e.g.,* Reid Kress Weisbord & David Horton, *The Future of Testamentary Capacity*, 79 WASH. & LEE L. REV. \_\_\_\_ (2022) (summarizing the history of the relationship between bequest and property and noting that “[f]or centuries, there was consensus that the right to make a will is in no sense a property right and thus is not protected by any of the constitutional provisions whereby property is protected”).

<sup>201</sup> *Id.*

that could produce the Rule Against Perpetuities, or the distinction between tenancy-by-the-entireties and joint tenancy, what an easement requires, or how long the adverse possession clock is. And indeed, I think a great deal of confusion about the concept of ownership in the scholarly literature results from attempting to theorize about the concept of *everything related to property* in the law, rather than its *core*. It is compatible with my theory that large portions of property law concerning arbitrary normative decisions about *how* to own things and *who should own* what—that is, normative decisions *related to* ownership—were made by judges acting outside the modern dictates of democracy and separation of powers.<sup>202</sup> But to the extent that many of these decisions were made by English judges prior to Founding and the advent of democracy, it is kind of a wash.

In short, the incidents of property law are coherently derived from an essential conceptual core based in the nature of ownership. They all follow from a descriptive relationship of dominion over a thing. And that descriptive relationship of dominion we call ownership.

### *B. Control and Other Theories of Property*

As discussed above, most contemporary theories of property reject the proposition that it has an extra-legal conceptual core. But there are several exceptions, and there are a handful of theories that agree that ownership is an extra-legal concept, but disagree that a descriptive relationship of control is its essential characteristic. In particular, Thomas Merrill argues that “exclusion” is the essence of ownership; Kantians qualify that it is really about “exclusive use;” James Penner argues that “separability” determines what property can be; theorists who follow John Locke ground the essence of ownership in labor; and Bart Wilson argues that the concept of “mine,” rather than ownership, is the core of property law. This Section discusses the relationship between the theory of ownership as control to each of these alternatives in turn, and argues either that control is analytically prior to them or better captures what the concept of ownership is all about.

#### 1. Merrill’s Theory of Property as Exclusion

Thomas Merrill argues that the “right to exclude” is the “*sine qua non* of property”—“[g]ive someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right

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<sup>202</sup> Cf. Scalia, *supra* note 78, at 9 (observing that judicial lawmaking “would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy”)

and they do not have property.”<sup>203</sup> From this perspective, the *possibility of exclusion* presumably delimits the concept of ownership—“the line between ‘property’ and ‘nonproperty’—or ‘unowned things’ (like the air in the upper atmosphere or the resources of the ocean beyond a certain distance from shore)—the right to exclude others is a necessary and sufficient condition of identifying the existence of property.”<sup>204</sup>

This theory is not *wrong* so much as *incomplete*—exclusion is conceptually entailed by ownership and essential to our understanding of the concept. But control is analytically prior to exclusion and better captures the nature of ownership.<sup>205</sup> One way to test this claim is whether there are situations in which exclusion is present but not control in which we would confidently say that there is no ownership. And there are—a landmine may be able to keep you off a plot of land, but the landmine does not own the land. The landmine can exclude, but it cannot exercise control. The *person* who placed it there, exercising his *control* over the land, is the owner. This is because control, not exclusion, is the essence of ownership.

In contrast, there are *no* circumstances of absolute control in which there is no possibility of exclusion, because control *entails* the ability to exclude. Thus, in every instance of clear ownership in which we find exclusion, we also inevitably find control—if you have absolute control over something, part of what that means is that you can exclude others from it. Since the same is not true in the other direction, control and not exclusion is the essence of ownership.

## 2. Property as “Exclusive Use”

Of contemporary conceptual property theories, the theory of ownership as a relationship of control is most similar to the theory of property as an

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<sup>203</sup> Merrill, *Property and the Right to Exclude*, *supra* note 38, at 730. Merrill was not the first, and no doubt will not be the last, to argue that exclusion—the right to exclude others—is at the conceptual heart of property, but I am here using his work as a stand-in for the claim. *See also, e.g.*, Morris R. Cohen, *Property & Sovereignty*, 13 CORNELL L. REV. 9, 12 (1927) (“[T]he essence of private property is always the right to exclude others.”); *see also* Render, *supra* note 19, at 578 (noting that “those who reject the bundle-of-rights model generally coalesce around a substantive model of the content of property rights that has as its core the concept of exclusive use”).

<sup>204</sup> *Id.* at 731.

<sup>205</sup> Notably, this argument meets Merrill’s argument on his own terms, as one of his core arguments in favor of exclusion as the essence of property is its perceived conceptual anteriority to emergent incidents of property. *See id.* at 740 (“The first argument in support of an essentialist definition of property centered on the right to exclude is basically a logical one. It does like this: if one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right.”).



interest in the “exclusive use” of things, espoused by the Kantian theorists Arthur Ripstein<sup>206</sup> and Larissa Katz,<sup>207</sup> as well as Eric Claeys.<sup>208</sup> Indeed, they’ve criticized the exclusivity thesis as missing the point that use or dominion also matters.<sup>209</sup> Under these theories, the essence of an ownership relationship is one in which a person has the exclusive right to determine the use of a thing,<sup>210</sup> or to “set its agenda.”<sup>211</sup>

There is a way of reading the theory of ownership as “exclusive use” as a theory of the boundaries of property that is conceptually the same as the theory of ownership as control, though couched in less parsimonious language.<sup>212</sup> Presumably, if exclusive use is the essence of ownership, then its limits lie at the limits of exclusive use—where a person could not possibly exercise decision-making authority about exclusive use. This has two pieces: (1) exclusion, and (2) use. As discussed above, control is conceptually prior to (and better captures the essence of ownership) than exclusion.<sup>213</sup> Moreover, control is conceptually prior to use—you cannot use something that you do not control, and in order to put something to use, you must be in control of it. Perhaps importantly (at least as a matter of semantics), “control” is somewhat broader than “use,” because control entails the ability to *not* use something in any meaningful sense, and surely we can own things that we don’t use, so long as we control that decision. Finally, it’s not clear that there are other conceptual entailments of “control” beyond “exclusion” and “use” (in this broadest sense of also not using) that are not within the concept of ownership. If this is right, then ownership as control is just a more parsimonious way of describing the idea of ownership as exclusive use (while avoiding the insinuation that you might have to *actually* “use” something).

But the problem of thinking of the theory of exclusive use as a theory of the boundaries of property law is that it is not articulated in these terms, and the foregoing has indeed required some inferential work. The essential issue

<sup>206</sup> See generally, e.g., Ripstein, *supra* note 38.

<sup>207</sup> See generally, e.g., Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

<sup>208</sup> See generally, e.g., Claeys, *Property 101*, *supra* note 61.

<sup>209</sup> See Ripstein, *supra* note 38, at 156 (“Rather than having the right to exclude others so that you may use your property, your property is useful to you because it is exclusively yours.”); Claeys, *Property 101*, *supra* note 61, at 14 (“I disagree with Merrill and Smith that ‘thing-ownership’ can be reduced to an owner’s right to exclude others from his thing. I prefer to say instead that ‘property’ refers to a right to determine exclusively how a thing may be used.”).

<sup>210</sup> See Ripstein, *supra* note 38; Claeys, *supra* note 61.

<sup>211</sup> See Katz, *supra* note 207.

<sup>212</sup> See Claeys, *Property 101*, *supra* note 61, at 14 (discussing the importance of the idea of “dominion” as decision-making authority to the “exclusive use” theory).

<sup>213</sup> See *supra* Section III.B.1.

is that the exclusive use theory is presented as a normative theory of our *interest in* property, not a descriptive theory of its boundaries.<sup>214</sup> That is, it justifies property law on the grounds that we have an interest in the exclusive use of things, but it doesn't explicitly tell us that, say, this means that the laws of mathematics cannot be owned<sup>215</sup> (and surely, on its face, we can imagine that individuals *would* have an *interest* in the exclusive use of mathematics). And indeed, some proponents of this theory do not see it as a conceptual theory of property's boundaries and have imported Penner's separability thesis instead to resolve those questions (a less-than-parsimonious move if, as I'll argue, control entails separability).<sup>216</sup>

In short, although I ultimately think that this group of theorists and I have similar views about what ownership is all about, their theory hasn't been understood as offering a descriptive account of the limits of ownership. And in any event, the theory of ownership as control is preferable as a more parsimonious theory that entails their concerns without overinclusion.

### 3. Penner's Separability Thesis

James Penner's sophisticated general theory of property explicitly includes a theory of its conceptual boundaries, which he calls the "separability thesis"—"[o]nly those 'things' in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another."<sup>217</sup> In other words, that which is *separable*—distinct from, contingently associated with, removable from—particular individuals is ownable; "[a] necessary criterion of treating something as property . . . is that it . . . might well not have been [ours]."<sup>218</sup> From this, Penner concludes that organs, especially those the removal of which would cause death, "cannot be regarded as property" because they are not separable from ourselves.<sup>219</sup> Likewise our interests in our ideas or expression cannot really be property, because they too cannot meaningfully be separated from our selfhood.<sup>220</sup>

<sup>214</sup> See Ripstein, *supra* note 38; Katz, *supra* note 207.

<sup>215</sup> *Id.*

<sup>216</sup> See Claeys, *Property, Concepts, and Functions*, *supra* note [CLAYES2019], at 46.

<sup>217</sup> PENNER, *The Idea of Property*, *supra* note 22, at 111.

<sup>218</sup> *Id.* at 111.

<sup>219</sup> *Id.* at 121.

<sup>220</sup> *Id.* at 119 ("Whatever rights the inventor or artist has, when we start speaking of property rights in ideas and artistic works, things begin to lose sense. A true property right in an idea or expression would constitute a right or exclusion from that idea or that

The problem with this thesis as a theory of what can be owned is two-fold. First, it appears underdeveloped on its own terms—it’s a theory of what we *own* as opposed to *who we are*, but it is not clear it functions as a theory of what can be owned *simpliciter*.<sup>221</sup> It’s not clear, for instance, how the separability criterion might apply to information or concepts, which is essential for a theory of the boundaries of property because much of what we talk about the limits of ownership in bioethics is about ownership of truths—genetic sequences or the biological implications of those sequences.

Consider Einstein’s theory of relativity. Einstein was the first to discover an essential truth about the universe. It *is* associated with him (“Einstein’s theory,” after all). And it is *contingently* associated with him, because surely someone else could have discovered it; it could have been someone else’s. This seems to suggest that the theory of relativity can be owned, but that makes little sense. On the other hand, in some sense Einstein’s articulation of the theory is like “an idea or expression,” too tied up in personality to be separable.<sup>222</sup> This would suggest—apparently correctly—that the theory of relativity cannot be owned, but on the odd ground that it *is Einstein*. In short, although the theory is helpful in distinguishing that which *is* us from that which *we own*, it applies less clearly in telling us what can be owned as an abstract matter.<sup>223</sup>

Second, the separability thesis runs into much the same challenge as the exclusion criterion—control is conceptually prior. If you can control something, you can separate it and alienate it—that’s part of what it means to absolutely control it. In contrast, there are things that are separable that you do not control, and that you do not own, maybe like Einstein and his theory of relativity. The blueness of the sky is separable (indeed, entirely separated from) any individual persons, but it cannot be owned because it cannot be controlled. Thus, although it is on to something important about the nature of ownership and can be helpful in some circumstances in adjudicating its boundaries, the separability criterion is entailed by and less general than a criterion of control.

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expression itself.”).

<sup>221</sup> See, e.g., Claeys, *Property, Concepts, and Functions*, *supra* note 36, (noting that the essence of the separability theory is a “fundamental distinction between persons who are capable of exercising and claiming rights and objects separate from those persons”).

<sup>222</sup> *Id.* at 119. Although Penner himself does not characterize intellectual property as ownership of information (instead that it is a government-backed monopoly), he suggests some sympathy to the notion that Einstein’s theory is non-contingently and ineluctably his. See *id.* (“The light bulb is Edison’s invention whoever makes use of it, and *Bleak House* is Dickens’s whoever reads it.”).

<sup>223</sup> See Claeys, *Property, Concepts, and Functions*, *supra* note 36, (“Separability keeps the field of property away from the persons and focused on non-personal resources.”).

#### 4. The Labor Theory

Perhaps the most famous theory of property in history is John Locke's, which holds that ownership arises from "mix[ing]" labor with anything an "individual removes out of the state that nature hath provided."<sup>224</sup> Although Locke's was primarily a normative theory about who ought to own what,<sup>225</sup> it relies on an implicit theory of what can be owned—that with which it is possible to mix labor.<sup>226</sup>

The challenge with this theory is that it rests on a crucial ambiguity about what it means to mix one's labor with something—and how literally to take that imagery. Indeed, Locke's examples of extracting, say, fruits and berries from the state of nature certainly involve labor, but it's not clear what work the "mixing" metaphor is doing here, as the physical berries are after all unmixed, just moved. Such instances appear more straightforwardly to be the exercise of *control* over the berries. Since control entails agency, and agency some exertion of energy, it's not clear whether the idea of "mixing" one's energy with the item adds anything beyond a criterion that the thing be subject to human dominion, which is what the control criterion is all about.

And indeed, the imagery of mixing has led to substantial confusion in the philosophical literature. For instance, Robert Nozick, relying quite literally on Locke's "mixing" imagery, famously criticized the labor theory as indeterminate:

[W]hy isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to

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<sup>224</sup> See LOCKE, *supra* note 38, at Chap. 5 Sec. 27.

<sup>225</sup> See, e.g., JEFFERY FRIEDMAN, INTRODUCTION TO JOHN LOCKE, TWO TREATISES OF GOVERNMENT 17–18 (1994) ("Locke's purpose is, evidently, not so much to propose the correct theory of property rights as to deny the political authority Filmer derived from his incorrect theory [that the King's ownership over the land gave him political sovereignty]. Absent Filmer's claim that God gave the world to Adam and hence unlimited authority to kings, one may doubt whether Locke would have needed to discuss property at all in a political tract aimed at establishing a right of revolution."); see also Walton H. Hamilton, *Property—According to Locke*, 41 YALE L. J. 864, 867 (1932) ("The fragment on property is not a detached essay, but a chapter in a purposive disquisition upon civil government. It is a skillful bit of dialectic aimed, not at the analysis of an institution, but to help along an argument against the divine pretensions of kings.").

<sup>226</sup> See LOCKE, *supra* note 38, at Chap. 5 Sec. 27; see also Björkman & Hansson, *supra* note 13, at 210 ("Locke's natural rights theory has the distinct advantage of providing a general account of property that gives some guidance to when legitimate ownership is present or not.").

own the sea, or have I foolishly dissipated my tomato juice?<sup>227</sup>

In other words, one way of reading Locke's theory is as requiring the conclusion that mixing one's tomato juice with the sea makes one the owner of the sea. This is absurd, and would be grounds for rejecting the theory. And it is absurd precisely because of the control criterion—by dumping one's tomato juice, one *loses control* of the tomato juice rather than *gains control* of the sea, and one no longer owns the tomato juice rather than now owns the sea. Many scholars have argued that taking the “mixing” metaphor this literally is a misreading of Locke,<sup>228</sup> but to the extent that it is a fair reading of the labor theory, the control criterion better captures our understanding of the concept of ownership.

But if instead Locke's theory is read as something more like a criterion of *manipulability*—that something can be owned to the extent it can be moved and changed—that is indeed what the control criterion captures. It is impossible to control that which you cannot change, and therefore that which you cannot change cannot be owned. In short, depending on how one reads Locke's theory (which, to be fair, is implicit rather than fully-articulated in his discussion of property), the control criterion either avoids the absurd conclusions that the “mixing” theory requires, or is largely getting at the same thing while avoiding a confusing metaphor.

##### 5. Wilson's “Mine-ness”

The final alternative theory of what can be owned is a new one, outlined by Bart Wilson in a recent book.<sup>229</sup> Wilson disputes that ownership is in fact the conceptual core of property law and instead argues that property is rooted in the atomistic concept “mine.”<sup>230</sup> The universal semantic prime MINE cannot, Wilson argues, be subdivided or defined except in terms of itself,<sup>231</sup> and is conceptually prior to control or dominion:

<sup>227</sup> ROBERT NOZICK ANARCHY, STATE AND UTOPIA 174–75 (1974).

<sup>228</sup> See, e.g., Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 437 (2017) (noting that Nozick's hypothetical simply illustrates that the concept of *labor* does not “cover[] activity that exerts positive effort of no or negative moral value”).

<sup>229</sup> See generally WILSON, *supra* note 38.

<sup>230</sup> See WILSON, *supra* note 38, at 103–116 (discussing the origins of the word “ownership” in English and noting that it plays a unique role as a transitive verb; “[Honoré] is compelled to put the word *own* in quotation marks for the obvious reason that the English transitive verb *own* doesn't directly translate one to one into many (if any) languages.”).

<sup>231</sup> *Id.* at 55 (“*Mine* means just what mine means . . .”).

Mine . . . is not *dominium*. Mine is not absolute, nor is mine the right to exclude. Mine is mine like I is I and you is you. Mine is singular, atomic, reflexive, the core of property. . . Sole and despotic dominion and the right to exclude are consequences that follow from the customs of time and place and thing by which someone can say, “This is mine.”<sup>232</sup>

Although I do not dispute the idea that there may be some irreducible conceptual singularity to the concept of mine-ness, as linguists have argued, *that* concept does not ground the law of property—or at least the concept of ownership as control is (even if itself derived) more parsimonious and less over-inclusive as a theory of *property*. Indeed, while it is true that we can assert “this is mine” about everything that can be property, the problem is that—precisely as Penner points with the separability criterion—we use the concept “mine”-ness in relation to all kinds of things that plainly are not property and have nowhere been understood as property—“it’s always been a dream of mine,” “he was a friend of mine,” “you are the best thing that’s ever been mine.”<sup>233</sup> Indeed it seems possible to say “this is mine” about nearly everything with which one is connected or identified no matter how ephemeral and abstract, including “our talents, our personalities, our friendships, or our eyesight,”<sup>234</sup> things that no one thinks anywhere of as property.

Property is of course not about dreams, friends, and lovers. Nor, importantly, does Wilson point to any cultural or historical examples where the kind of mine-ness we feel in our essential personality has been conceptualized as property. Wilson’s theory thus suffers an inverted conceptual problem to the separability thesis—it correctly tells us that we cannot own truths about the universe (while you *can* say “the blueness of the sky is mine,” it is meaningless), the theory fails to cleanly distinguish between that which we understand to be *ourselves* and that which is *our property*.<sup>235</sup>

The reason that property is not about dreams, friends, or lovers is because we do not *own* these things. And we do not own these things because we cannot control them—friends and lovers because they have their own agency and dreams because they simply arise in our consciousness. Indeed, one way to think of property is that it is not merely that about which

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<sup>232</sup> WILSON, *supra* note 38, at 119.

<sup>233</sup> Taylor Swift, *Mine* (Big Machine 2009); *cf.* Render, *supra* note 19, at 577 (“Linguistically, I lay claim to the right to use ‘my’ body in the manner that I see fit (short of harming the body of another), reserving no linguistic possibility of a more democratic management of this unique resource.”).

<sup>234</sup> Penner, *The Idea of Property*, *supra* note 22, at 112.

<sup>235</sup> *Cf.* Bjorkman & Hansson, *supra* note 13, at 212 (“It is common to say that a person ‘owns’ her body (but not that she ‘owns’ her freedom of expression or her right to vote).”).

we can assert “this is mine,” but that about which we can assert “this is mine” *and* exercise absolute control over. In short, the theory of property as rooted in ownership as control precisely narrows the concept of mine-ness to its application in property, as opposed to its more general role in personal identity.

### III. THE THEORY APPLIED

Understanding property law as grounded in a concept of ownership as dominion offers a straightforwardly litigable line of property’s boundaries. *Ownable things* include anything over which it is conceptually possible to exercise absolute dominion. *Unownable things* cover anything over which it is impossible in principle for a human being to exercise absolute decision-making authority. This Part discusses some of the paradigmatic examples of things that can be owned under this theory—including organs, corpses, and labor—and unownable things—such as genetic information and personal data.

Finally, this Part addresses an essential challenge case for the theory of property law organized around the concept of ownership-as-dominion—intellectual property. Inventions—applications of facts about the world—can no more really be subject to dominion than the facts themselves. But our law has always recognized something resembling an ownership interest in invention or composition, a powerful challenge for a theory of property law as delimited by the concept of ownership. Below, I offer two responses from the theory of ownership as dominion to the challenge of intellectual property.

#### A. *Ownable Things*

The philosophical and legal debate over whether we *own* our bodies and their parts is centuries old—John Locke found it self-evident that we do;<sup>236</sup> Kant that it was metaphysically impossible.<sup>237</sup> The question continues to be debated in the law reviews today.<sup>238</sup> The common law has weighed in *after* death, long holding that we have no ownership interest in our own

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<sup>236</sup> LOCKE, *supra* note 38, at Chap. 5 Sec. 27 (“Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself.”).

<sup>237</sup> See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 40 (trans. James W. Ellington, 3d ed. 1993) (distinguishing between the “price” value of things persons can own and the “dignity” value of persons themselves).

<sup>238</sup> See, e.g., Render, *supra* note 19, at 549.

corpses—and indeed that no one *can* own a corpse.<sup>239</sup> But the desire to exercise control over our mortal remains is so intuitive that most states have created a statutory “quasi-property” right to control the disposition of our bodies after our death, qualified by states’ prerogative of autopsy and ensuring burial.<sup>240</sup>

During life the question whether we owned our bodies was largely academic until the advent of modern organ transplantation techniques.<sup>241</sup> But since the 1950s, when organ transplantation became feasible, a lively debate has sprung up over ownership interests in organs—during life and after death. In many ways, this debate parallels older questions of whether individuals own their bodies—pitting those that argue that we own our bodies, and follow Locke in asserting largely intuitive grounds,<sup>242</sup> and those following Kant who argue that one cannot own one’s organs because one *is* a collection of one’s organs.<sup>243</sup> Very similar controversies concern ownership in tissue samples<sup>244</sup> or blood spots.<sup>245</sup> And many philosophers have argued that human reproductive materials—sperm cells, egg cells, and embryos made during IVF—cannot be owned.<sup>246</sup>

From the theory of ownership as a descriptive relationship of dominion, the conceptual resolution is clear. We *can* exercise control over our bodies.<sup>247</sup> In a state of nature—or with enough firepower—we can do

<sup>239</sup> See, e.g., MADOFF, *supra* note 17, at 16–17 (2010).

<sup>240</sup> See *id.* at 16–19.

<sup>241</sup> See DAVID HAMILTON, *A HISTORY OF ORGAN TRANSPLANTATION* xiv (2012) (noting that “it was not until the early 1950s that surgeons embarked with growing success on what was widely considered to be an unreachable mission, namely to successfully graft an organ from one person to another”); see also Björkman & Hansson, *supra* note 13, at 211 (“[D]ue to transplantation surgery healthy organs can now be parted with for much better reason than in Kant’s time.”).

<sup>242</sup> See, e.g., Render, *supra* note 19, at 576 (arguing that we “own” our bodies in part by observing that “our intuitive sense that we ‘own’ our bodies is deeply ingrained from an early age” and that sense “seems only to accelerate as we pass into adulthood”).

<sup>243</sup> See, e.g., David Hersenov, *Self-ownership, relational dignity, and organ sales*, 32 *BIOETHICS* 430, 430 (2018) (“Material property has traditionally been conceived of as separable and thus external from its owner, otherwise it could not be something alienable and transferable. Combine this conceptual claim with the metaphysical claim that we are each identical to a living human animal and the result will be that self-ownership is impossible, for self-separation cannot be accomplished.”).

<sup>244</sup> See, e.g., Deleso A. Alford, *HeLa Cells and Unjust Enrichment in the Human Body*, 21 *ANNALS HEALTH L.* 223, 224 (2012) (“discuss[ing] the ongoing debate as to whether the ownership of cells is a legally protected interest”); Madison Jennings, *Protected Genetics: A Case for Property and Privacy Interests in One’s Own Genetic Material*, 23 *RICH. J. L. & TECH.* 10, 10 (2017); see also Alexander, *supra* note 58, at 1016 (arguing that Henrietta Lacks ought to have had an ownership interest in her cells on human flourishing grounds).

<sup>245</sup> See *supra* note 14.

<sup>246</sup> See *supra* note 16.

<sup>247</sup> Cf. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 53 (1995)



whatever we want with our bodies, and no one can stop us. The fact that, in contemporary society, most of us could not *in fact* prevent *all* others from interference with our bodies is beside the point. The test is *conceptual*, not factual. After all, by virtue of living in a sovereign state equipped with a descriptive monopoly on violence, none of us *in fact* exercise dominion over *anything*. But people *could* control their bodies, and they are therefore the proper conceptual subjects of a property law grounded in ownership.

So too with corpses, organs, and tissue samples. Organs that have been removed from our bodies can clearly be the subject of dominion as any other personal property—if I have my kidney on my desk, I can smash it, preserve it in formaldehyde, or trade it for someone else’s and no one can stop me. The question of organ ownership is more contested while organs are a part of our bodies, but here the same logic applies as with bodies themselves. While my kidney is in my body, I can do whatever I want with it. I can keep it from you; with enough local anesthesia and a steady hand I could take it out;<sup>248</sup> or (perhaps more prudently) I can pay someone to take it out for me, but only on my terms. Organs and tissue samples, then, are ownable.<sup>249</sup> With corpses the case is straightforward, and indeed, the only serious objection to the ownership of corpses has ever been normative—a question of what *should* be owned—rather than conceptual—what *can* be owned.<sup>250</sup>

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(suggesting that self-ownership and autonomy are equivalent concepts); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1981) (“Interference with my body is interference with my personal property.”).

<sup>248</sup> See, e.g., *After Hours*, HOUSE (Fox; 2011).

<sup>249</sup> On the conceptually-distinct question of *who* owns organs, it is an uncontroversial principle of substantive property law that our organs are owned by *each of us* as the first possessor. See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 57 (3d ed., 2010) (“[A]mong the ways that ownership can get started is for someone to possess a thing for the first time with the requisite intent.”). This is distinct from the question of what we might do with that ownership—perhaps we can deed a kidney to a research organization and reserve a life estate for ourselves. Alternatively, we might, for normative reasons, object to the alienability of human organs. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

<sup>250</sup> See, e.g., Andrew Campbell-Tiech, *A corpse in law*, 117 BRITISH J. HAEMATOLOGY 809, 811 (2002) (“Legislators and Courts have assumed for at least two centuries that no matter how little regard the populace pays to the welfare of its members whilst alive, in death the body of the citizen must be accorded a dignity which its erstwhile occupant might well have preferred to enjoyed somewhat earlier.”). Alternatively, the common law rule was justified on erroneous descriptive assumptions. See, e.g., Timothy Craig Allen, *The Evolution of Decedent Ownership*, 143 ARCHIVES OF PATHOLOGY & LAB. MED. 1048, 1049 (2019) (“In the 17th century, the human body was considered philosophically to be the temple of the Holy Ghost, and thus, although men left their bodies for a short time at death, it was understood that they would require their bodies when they returned on Resurrection Day.”).

### B. Unownable Things

In what would go on to become a classic casebook chestnut, John Moore began treatment for hairy-cell leukemia at the UCLA Medical Center in 1976.<sup>251</sup> In the course of Moore’s treatment, his physicians learned that his cancerous cells could potentially be lucrative for research.<sup>252</sup> The doctors recommended that Moore have his spleen removed, as “necessary to slow down the progress of his disease,” but had already decided to use portions of the spleen for research.<sup>253</sup> They did not disclose to Moore their intended use of the spleen, but otherwise obtained his consent, informed as to the health risks and benefits, to the procedure.<sup>254</sup> After extracting the spleen—and additional tissue samples on follow-up visits—the doctors isolated (and patented) an immortal cell line that Moore, in his complaint, alleged could be worth \$3 billion.<sup>255</sup> Moore sued for, *inter alia*, conversion.<sup>256</sup>

Similarly, as discussed above, Henrietta Lacks sought treatment for cancer in 1951, during which doctors took a sample of her cancerous cells without her knowledge or consent (but following standard practice at the time).<sup>257</sup> They found that they were genetically unique and would continue to divide and generate new cells, and used the cells to create the first immortal cell line—HeLa—still routinely used in biomedical research and of nearly inestimable monetary value.<sup>258</sup> Her estate has now sued biotechnology companies for unjust enrichment premised on, among other things, the “theft” of her cells.<sup>259</sup> Similar cases in which human biological material is legitimately taken for some medical purpose and then information learned from those cells is used for some other purpose—leading to a property claim by the people from whom the material had been taken as to the products of that information—arise with some frequency.<sup>260</sup>

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<sup>251</sup> MOORE, 793 P.2d at 481.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 482. To be fair, Moore’s lawyers conceded that “the true clinical potential of each of the [cell lines] . . . [is] difficult to predict.” *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See Interview with Rebecca Skloot, Fresh Air (Feb. 2, 2010), <https://www.npr.org/transcripts/123232331> (“They were taking cervical cancer tissues from any woman who walked into Hopkins with cervical cancer, and this was absolutely the standard treatment. And, in fact, it was considered the sort of top of the line.”).

<sup>258</sup> See SKLOOT, *supra* note 2.

<sup>259</sup> Lacks Complaint at 12.

<sup>260</sup> See, e.g., WASHINGTON UNIVERSITY V. CATALONA, 490 F.3d 667 (8th Cir. 2007); GREENBERG V. MIAMI CHILDREN’S HOSPITAL RESEARCH INSTITUTE, 264 F. Supp. 1064,

The theory of ownership as dominion explains the appropriate analytical process for these kinds of cases. John Moore and Henrietta Lacks owned their spleen and tumor cells, respectively, when they walked into the hospital—such things are ownable, and Moore and Lacks owned them under substantive property law as the first possessor.<sup>261</sup> But this alone does not mean they have stated a claim for conversion in the doctors' appropriation of their biological materials—we must analyze under substantive property law whether they deeded that property interest to the doctors or abandoned their ownership by consenting to the medical procedures.<sup>262</sup> Indeed, that is how the court may have ultimately ruled in *Moore*—although it made suggestive noises that spleens, in principle, cannot be owned,<sup>263</sup> Meredith Render has persuasively argued that the opinion is best read as *assuming* Moore owned his spleen, but that he abandoned it when he consented to a splenectomy with no indication that he wanted the organ back.<sup>264</sup>

But these cases, of course, are not really about the conversion of the *physical tissue*. John Moore did not actually want his spleen back; the tissue sample taken from Lacks's cervical tumor is long-since gone.<sup>265</sup> These cases are about a claim of ownership in the *genetic information contained in the cells*, which information was used to derive profitable immortal cell lines. This is a question of the boundaries of property with which the theory of ownership as dominion can help us.

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1066-67 (S.D. Fla. 2003); Michelle M. Mello & Leslie E. Wolf, *The Havasupai Indian Tribe Case—Lessons for Research Involving Stored Biologic Samples*, 363 NEW ENGL. J. MED. 204, 204 (2010).

<sup>261</sup> See *supra* note 249 & accompanying text.

<sup>262</sup> See, e.g., *FORD V. BAERG*, 532 S.W.3d 638, 641 n. 2 (Ky. 2017) (summarizing elements of common-law conversion).

<sup>263</sup> See 793 P.2d at 489 (noting that “the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*”).

<sup>264</sup> See Render, *supra* note 19, at 573 (“[T]he central holding of *Moore* is merely an articulation of the standard for abandonment in the context of bodily material: we abandon our bodily material when we consent to its removal and make not provision for its disposition or return. . . . So rather than denying the possibility that we own our bodies, the holding in *Moore* actually *relies* upon the assumption that we own our bodies. If Moore had no interest in his spleen prior to the splenectomy, the decision would be rendered incoherent.”); see also 793 P.2d at 488–89 (noting that “Moore clearly did not expect to retain possession of his cells following their removal”).

<sup>265</sup> 793 P.2d at 489 n. 20. Indeed, the court in *Moore* held that the cell line he was claiming ownership in was “both factually and legally distinct from the cells taken from Moore’s body.” *Id.* at 492–93; see also Heng, *supra* note 12, at 167 (“I contend that the continual divergence of chromosomal features (‘karyotype’) and DNA sequence in dynamic cancer-cell populations undermines debate over ownership of the HeLa cancer-cell line derived from Henrietta Lacks six decades ago.”).

Information is not something over which dominion can be exercised by human agents. This is because we cannot, conceptually, do whatever we want with it—others (in conjunction with physical laws) can prevent us. I cannot prevent you from knowing the sky is blue, you can look up; I cannot sell the blueness of the sky, you wouldn't want it; I cannot destroy that the sky is blue. The blueness of the sky is a *fact about the universe* subject to no human dominion—subject, indeed, to no dominion at all. The same is true of genetic information. We cannot exercise dominion over our genes or genomes. For one thing, we share 99.9% of the nucleotides in our genome with every other *homo sapien*—I cannot control HOXA1 because if I refuse to give you a sample, you can get it from anyone else (or almost *anything* else alive).<sup>266</sup> This basic intuition about the nature of ownership as dominion appeared to do some work in *Moore*, where the court noted that “the particular genetic material which is responsible for the natural production of lymphokines,” the product of the immortal cell line, “is . . . the same in every person.”<sup>267</sup> Moore can't own it if we all could too.

Even, however, the idiosyncratic 0.1% of our genomes that makes us different from other people is not something over which we can exercise dominion, even in principle. Much of it is shared by our closest relatives—we cannot own it if *they* can give it up.<sup>268</sup> Even to the extent that we have idiosyncratic single-nucleotide polymorphisms that cannot be interpolated from other people's genetic information, we leave a trail of our unique genetic information everywhere we go, with everything we do.<sup>269</sup> It is not something that we could conceptually prevent other people from accessing. It is not something that can be owned. Thus, *Moore*—and federal cases that followed it—correctly rejected claims for conversion in genetic *information*, consistent with the boundaries of the concept of ownership at the heart of property law.<sup>270</sup> If genetic information cannot be owned, it cannot be stolen.

This discussion complements the Supreme Court's analysis in the

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<sup>266</sup> See, e.g., NATIONAL INSTITUTE OF HEALTH, GENETICS VS. GENOMICS FACT SHEET (last visited May 6, 2021), <https://www.genome.gov/about-genomics/fact-sheets/Genetics-vs-Genomics#:~:text=All%20human%20beings%20are%2099.9,about%20the%20causes%20of%20diseases.>

<sup>267</sup> 793 P.2d at 490.

<sup>268</sup> See, e.g., Natalie Ram, *DNA by the Entirety*, 115 COLUM. L. REV. 873, 877 (2015) (“Genetic information is shared, and it is shared immutably and nonvolitionally.”).

<sup>269</sup> See, e.g., Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. UNIV. L. REV. 857, 885 (2006) (“We leave traces—skin, saliva, hair, and blood—of our genetic identity nearly everywhere we go.”).

<sup>270</sup> 793 P.2d at 490; CATALONA, 490 F.3d 667; GREENBERG V, 264 F. Supp. 1064, 1066–67.

landmark 2013 case *Association for Molecular Pathology v. Myriad Genetics, Inc.*<sup>271</sup> There's some tension in the foregoing. I argued that Moore did not own his genetic information used to derive the immortal cell line because he could not possibly have exercised dominion over it—it is simply information in principle accessible to anyone. But the doctors in *Moore* patented the immortal cell line, worth potentially billions of dollars.<sup>272</sup> How can researchers own genetic information that individuals do not own, if, indeed, such things cannot in principle be owned?

They cannot. No one can own genetic information—not the individuals in whom the information was first found, and not the scientists who found it. *Myriad* makes this clear. Before *Myriad*, human genes were legally patentable, but this had always been controversial.<sup>273</sup> In *Myriad*, the Supreme Court agreed with the critics and held that naturally-occurring human genes cannot be patented.<sup>274</sup> And it did so precisely on an “implicit exception” to patentability that “Laws of nature, natural phenomena, and abstract ideas are not patentable.”<sup>275</sup> That which cannot be subject to human dominion, in other words, cannot be owned.

To be clear, the fact that as a *conceptual* matter, information cannot be owned does not preclude the *legislatures* from granting people rights to control information that resemble ownership, which may even operate by explicit analogy to the concept of ownership.<sup>276</sup> In other words, there is nothing about the fact that genetic information or browsing data cannot conceptually be owned that precludes legislatures from passing statutes that extend something like property protections to those kinds of things—nor does it even suggest anything about whether this would be a good idea. But it does suggest that those decisions must be made by citizens collectively

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<sup>271</sup> 569 U.S. 576, 591 (2013).

<sup>272</sup> 793 P.2d at 482.

<sup>273</sup> See, e.g., Amanda S. Pitcher, *Contrary to First Impression, Genes are Patentable: Should There Be Limitations?*, 6 J. HEALTH CARE L. & POL'Y 284, 284 (2003) (arguing that “the benefits arising from gene patents overcome objections to their patenting”); Hubert Curien, *The Human Genome Project and Patents*, 254 SCIENCE 1710, 1710 (1991) (“A patent should not be granted for something that is part of our universal heritage.”).

<sup>274</sup> 569 U.S. at 589.

<sup>275</sup> 569 U.S. at 589 (quoting *MAYO COLLABORATIVE SERVS. V. PROMETHEUS LABS., INC.*, 566 U.S. 66, 70 (2012)).

<sup>276</sup> See, e.g., Reinach, *supra* note 98, at 5 (“The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures . . . .”); Baron, *supra* note 37, at 370 (2012) (“It is likely that, at the end of the day, individuals will as a matter of policy be granted some rights to control some of their personal information, but those rights will not follow from anything in property’s ‘nature.’”); Baltzer-Jaray, *Bogged Down*, *supra* note 136, at 167 (“Codified law can enact rules about promises, it can incorporate or not incorporate elements of justice, but regardless, it cannot touch the being and objective truth these entities have.”).

through their legislative representatives, not by judges adjudicating the conceptual limits of ownership.

### C. Intellectual Property

*Myriad* is an intellectual property case, and it must be squared with an earlier intellectual property case—*Diamond v. Chakrabarty*, which held that organisms that are genetically engineered by scientists are patentable.<sup>277</sup> The court reasoned there that biological inventions are comparable to any other patentable invention—“a new bacterium with markedly different characteristics from any found in nature” that was “not nature’s handiwork, but [the inventor’s] own.”<sup>278</sup> Today there are many patents for living organisms outstanding.<sup>279</sup> In deciding *Diamond*, the Court straightforwardly applied principles of intellectual property law—“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.”<sup>280</sup>

Intellectual property is a challenge for the theory of ownership as dominion. After all, it appears to be ownership in *information*, which I’ve argued is conceptually impossible. And it *is* conceptually impossible, at least in the strongest sense. Chakrabarty’s oil-eating bacteria are just a particular sequence of nucleotides that in principle anyone could understand and arrange; *Hamlet* just an arrangement of words that anyone could have *in principle* put together on their own; the steam engine follows straightforwardly from universally-discoverable laws of thermodynamics.<sup>281</sup>

Intellectual property is a challenge for any theory of property.<sup>282</sup> Indeed, there is a great deal of controversy as to whether it is properly thought of as property at all.<sup>283</sup> This is perhaps the cleanest response the theory of

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<sup>277</sup> 447 U.S. 303 (1980).

<sup>278</sup> *Id.* at 310.

<sup>279</sup> See, e.g., Wen Zhou, *The Patent Landscape of Genetically Modified Organisms*, SITN (Aug. 10, 2015), <https://sitn.hms.harvard.edu/flash/2015/the-patent-landscape-of-genetically-modified-organisms/>. (“The documentary and other social media reactions have caused a backlash directed towards the GMO industry, and Monsanto has since become notorious for allegedly abusing legal rights.”).

<sup>280</sup> 35 U.S.C. § 101.

<sup>281</sup> Cf., e.g., Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L. J. 1742, 1744 (2007) (“From the consumer’s point of view, information is nonrival and nonexcludable: one person’s enjoyment of the plot of *Hamlet* does not diminish another’s (if anything, the opposite), and preventing people from using data is difficult.”)

<sup>282</sup> See, e.g., *id.* at 1744 (“At the core of controversies over the correct scope of intellectual property lie grave doubts about whether intellectual property *is* property.”).

<sup>283</sup> *Id.*

ownership as dominion has to the challenge of intellectual property—it is not *really* property at all but that it is entirely a creature of statute built for policy reasons. Legislatures, of course, can pursue any normative goals they want however they want, not limited by concepts and their entailments<sup>284</sup>—and one way in which legislatures can accomplish their normative prerogatives is by looking to the doctrines that courts have developed in common law and finding pieces that might apply by analogy.

We might think of intellectual property in this way. It might not *really* something that can be owned. But it's possible that Congress looked at the substantive common law of property and decided that it was a good fit for what it was trying to accomplish with intellectual property—presumably pursuing normative ends involving incentivizing innovation and encouraging art. This is perfectly coherent and legitimate and would explain intellectual property's complicated role as both *not* real ownership,<sup>285</sup> but related to and drawing on general principles of property law.<sup>286</sup>

This response, however, may not be entirely satisfactory. And there is an alternative. In short, it might be that intellectual property is a rough approximation of a real kind of ownership—the *temporary* relationship of absolute control an inventor or artist in fact retains with respect to her creations.

There are two essential, ubiquitous forms of intellectual property—copyrights and patents.<sup>287</sup> Copyrights resemble an ownership interest in creative works, “such as poems, novels, music, paintings, films, computer software, etc.”<sup>288</sup> In order to be copyrightable, a work must be “original,” “the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>289</sup> In contrast, “[n]o author may copyright his ideas or the facts he narrates.”<sup>290</sup> Copyrights are limited in duration, subsisting “for a term of

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<sup>284</sup> See, e.g., REINACH, *supra* note 98, at 5 (“The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures.”).

<sup>285</sup> For instance, it is temporally limited, while most conceptions of ownership see it as necessarily temporally *unlimited*. See, e.g., Honoré, *supra* note 51 (listing the absence of term limitation as an essential incident of ownership).

<sup>286</sup> See generally, e.g., Smith, *Intellectual Property*, *supra* note 281, at 1742 (describing intellectual property law's close relationship to the substantive common law of property).

<sup>287</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE 8–15 (2d ed. 2017). This simplification sets aside trademarks, but trademarks are more bear no relation to the basic concept of ownership. *Id.* at 15–20.

<sup>288</sup> *Id.* at 8.

<sup>289</sup> FEIST PUBLICATIONS, INC. V. RURAL TELEPHONE SERV. CO., INC., 499 U.S. 340, 345 (1991) (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)).

<sup>290</sup> HARPER & ROW, PUBLISHERS, INC. V. NATION ENTERPRISES, 471 U.S. 539, 556

the life of the author and 70 years after the author's death."<sup>291</sup> Patents resemble an ownership interest in inventions.<sup>292</sup> In order to be patentable, an invention must be (1) new, (2) useful and (3) non-obvious.<sup>293</sup> As discussed above, "[l]aws of nature, natural phenomena, and abstract ideas are not patentable."<sup>294</sup> Once granted, a patent endures for 20 years.<sup>295</sup>

Each of these basic features of intellectual property law can be understood as constricting the reach of IP law—in a rough and stylized way—to those things over which dominion could, in principle, be exercised on some reasonable assumptions. From this perspective, ownership of IP can be seen as an *approximation* of conceptual ownership.

Of course, as mathematicians and philosophers never cease to remind us, it is *possible* that monkeys randomly typing could produce *Hamlet*.<sup>296</sup> But it is *vanishingly* unlikely.<sup>297</sup> As a matter of probability, people are not coincidentally churning out identical works of art at the same time. *In fact* William Shakespeare *could have* exercised dominion over *Hamlet*. He could have kept it to himself; he could have burned it; he could have made Rosenkrantz and Guildenstern the heroes; or he could have handed over the text on the condition that the director give him a part. The director could respond "Well, I'll just write my own," but it almost certainly would not have been *Hamlet*. Shakespeare could have acted like an owner of *Hamlet* and would have been justified in feeling that he really did own it in an important sense.

So too with inventions, but not quite so strongly. Inventions take work, ingenuity, and luck. It is often surely true that an inventor can, in fact, exercise this same kind of dominion over inventions—hide them, destroy them, offer access to them under certain conditions, etc. But practically speaking, this exercise of dominion is much less secure because it is much *more* probable that someone else can or will create that same invention relatively soon. Take the use of CRISPR-Cas9 as a human gene editing technology, the subject now of vicious patent battles between the scientists Jennifer Doudna and Feng Zheng who each developed the technology

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(1985).

<sup>291</sup> 17 U.S.C. § 302(a).

<sup>292</sup> *Id.* at 11.

<sup>293</sup> 35 U.S.C. §§ 101–103.

<sup>294</sup> 569 U.S. at 589 (quoting *MAYO COLLABORATIVE SERVS. V. PROMETHEUS LABS., INC.*, 566 U.S. 66, 70 (2012)).

<sup>295</sup> 35 U.S.C. § 154(a).

<sup>296</sup> *See, e.g.*, RICHARD DAWKINS, *THE BLIND WATCHMAKER* 46–50 (1996).

<sup>297</sup> *Cf. Monkeys Don't Write Shakespeare*, WIRED (May 9, 2003), <https://www.wired.com/2003/05/monkeys-dont-write-shakespeare/> ("Researchers at Plymouth University in England reported this week that primates left alone with a computer attacked the machine and failed to produce a single word.").



within months of each other.<sup>298</sup> Indeed, stories of near-simultaneous invention are ubiquitous in history, and perhaps becoming more common.<sup>299</sup> But still, an inventor can often and for some time control her invention absolutely.

From this perspective, the basic structure of intellectual property law is roughly consonant with the practical realities that inventors and artists could in fact exercise dominion over their creations for at least some period of time. In order for this dominion to be possible, of course, the invention or work of art must not be a copy, it must be new, it must not be obvious. If it were, even temporary dominion would be conceptually impossible—if an invention is *obvious*, as a matter of definition its purported creator cannot decide what other people will do with it. The dominion of inventors and artists is, moreover, time-limited as a practical matter. Perhaps *Hamlet* is a singular achievement, but maybe we can imagine people randomly throwing paint at a canvas might produce works functionally identical to Jackson Pollack's *Mural* every 150 years or so. The temporal protection for copyright is lengthy—the life of the author plus 70 years.<sup>300</sup> The temporal protection for patents is much shorter, a mere 20 years, perhaps a rough approximation for how long, on average, it would take from an invention for another person to invent the same thing.

Of course, these rough approximations might be otherwise. We might think it so improbable that *any* creative work could really be created twice by coincidence that copyright is *bona fide* ownership. Similarly, we might think that the pace of invention has sped up so much that a 20-year patent protection no longer makes sense as an approximation of actual dominion. But the point is that the basic contours of our intellectual property regime—originality requirements, strong temporal protections for things that are improbably replicated and weaker temporal protections for things more easily replicated—roughly track the ways in which we would realistically expect creators or inventors could exercise dominion over their creations. From this perspective, intellectual property need not be seen as fundamentally inconsistent with the theory of ownership as control nor a statutory chimera. There is a real and important sense in which we own the

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<sup>298</sup> See, e.g., WALTER ISAACSON, *THE CODE BREAKER: JENNIFER DOUDNA, GENE EDITING, AND THE FUTURE OF THE HUMAN RACE* 231–241 (2021).

<sup>299</sup> See James H. Lubowitz, Jefferson C. Brand & Michael J. Rossi, *Two of a Kind: Multiple Discovery AKA simultaneous Invention is the Rule*, 34 *ARTHOSCOPY* 2257 (2018).

<sup>300</sup> Indeed, to the extent that the Rule Against Perpetuities can be seen as a common law limit on posthumous property ownership (which is also conceptually impossible; the dead cannot actually exercise dominion), copyright closely mirrors the rule, though tied to the life of the author rather than all lives in being. See MERRILL & SMITH, *supra* note 29, at 567 (3d ed., 2017). The point is that, given the effective dominion that artists could exercise over artistic creations in perpetuity, copyright is nearly that.

creative works we make or the inventions we develop.

#### CONCLUSION

Legal theory has long maintained that the boundaries of property are a conceptually arbitrary policy question. This, I've argued, is wrong, and arises from a misconception about the importance and possibility of extra-legal concepts. If the concept of ownership did not exist outside of the law, common law adjudication of its boundaries would be an illegitimate enterprise. But ownership *does* exist outside of the law—whether a metaphysical category, a concept evolved into our thought, or a social construction. The concept carries with it certain descriptive entailments, most importantly for understanding its boundaries that it cannot exist where absolute control is impossible. This observation cuts through the morass of debates at the boundaries of property—organs, embryos, corpses, and other human biological matter can, conceptually, be owned; genetic and other information, no matter how personal, cannot be.

This is not to say, of course, that there *are* no policy questions that must be answered in designing a substantive positive law of property to govern the new things we can own, and in designing remedies for the real harms involved in the appropriation and publication of genetic information or personal data outside of it. Indeed, an understanding of the conceptual entailments of ownership is merely a descriptive first step, and we must still answer the more challenging normative questions of whether there are things that we can own but should not, who ought to own those things we can, and how we ought to govern ownership in particular kinds of things. But with this conceptual understanding, we can enter those debates with clarity and an agreed-upon understanding of the descriptive questions in the background. At the end of the day, conceptually, there are some things we can own, and some things that we can't.