Canons of Property Talk, or, Blackstone's Anxiety

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How do legal scholars talk about property? Here is one set of lines they are quite likely to quote:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.¹

The author of this statement, of course, was William Blackstone, who made it early in the second volume of his weighty and influential *Commentaries on the Laws of England*, at the point where he turned his attention to the subject “Of the Rights of Things”—that is to say, property.²

Since Blackstone's time, his definition of property as exclusive dominion has been cited again and again. Even James Madison used a slightly garbled version of the famous definition (without attribution) in a

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1. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765-69). Subsequent citations will cite to the star edition, the pages of which are the same as those in the facsimile edition. For discussion of some of the citation issues on the *Commentaries*, including confusion over the star edition, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 3 n.4 (1996).

2. 2 WILLIAM BLACKSTONE, COMMENTARIES *1. On Blackstone's influence in the United States, see Alschuler, *supra* note 1, at 5-8, which stresses Blackstone's influence in America through the 19th century; and Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 767 (1976), which concludes that Blackstone's influence was diffuse but very significant. Alschuler claims that Blackstone is now largely treated as a historical figure, generally somewhat negatively. See Alschuler, *supra* note 1, at 16-17. On the other hand, negative treatment implies a continuing influence, in the sense that it signals a necessity to refute Blackstone or to distance oneself from his views.

short essay on property.³ For their part, modern legal scholars refer to it often, whether they do so with approbation or disapproval.⁴

But perhaps it is the fate of canonical texts to be cited rather than read, because it seems that if property lawyers and scholars have read Blackstone, they have not read *much* Blackstone. If those who quote Blackstone's definition read further, they might come to think that Blackstone posed his definition more as a metaphor than as a literal description—and as a slightly anxiety-provoking metaphor at that. They might well notice too that the famous definition was only a point of departure, an occasion for a discussion that has become “canonical” in a much broader sense. That is to say, beyond the well-known opening lines, Blackstone set out a range of argumentative moves that can be recognized even today as the canonical strategies for scholarly property-talk.

Those canonical strategies of property-talk—and their ultimate relationship to the idea of property as exclusive dominion—are the subject of this Essay. By “canonical” I mean that despite some ebbs and flows, each of these strategies has enjoyed a certain constancy over time; they are also canonical in the sense that the adherents to each seem confident of the foundations of their own respective perspectives, regarding them as the more or less unproblematically proper stance for discussing property. But whereas modern scholars take sides in choosing one or another strategy, the capacious Blackstone managed to give each its due.

Hence this Essay begins with Blackstone and his treatment of property in the *Commentaries*, describing how he took up the various argumentative modes that now reappear in modern property scholarship. His discussion proceeded through three stages. First—a point that is very seldom noticed—immediately after those famous remarks on exclusivity, Blackstone cast into doubt the patterns of existing ownership. Next, he answered his own doubts with a utilitarian story to show the social usefulness of property. Finally, he ducked the whole messy business, diving instead into a mass of descriptive doctrine.

In our own age, Blackstone's moves have ripened into three classic strategies for modern property scholarship: the posing of doubts, the utilitarian justification, and the doctrinalist deflection, with the latter two moves answering the doubts raised by the first, just as they did for Blackstone. In discussing the more recent incarnation of these strategies in legal scholarship, I will reverse Blackstone's order to match the actual

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

4. For modern scholars' citation of this passage as illustrative of Blackstonian property, see, for example, GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 87 (1997); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 131 (1993); and Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993).

chronological pattern of modern property scholarship—doctrinalism first, followed by utilitarianism, followed by still newer doubts.

Of course, the modern echoes of Blackstone's strategies raise another question: Have modern scholars taken their strategies from Blackstone? It would be hard to say they have in any direct sense, since so few actually appear to read Blackstone on property in modern times, at least beyond the first few pages, or indeed beyond the first few lines. No doubt there remains some lingering inheritance from Blackstone's work across the generations. Perhaps the greatest part of that inheritance is simply the ringing words defining property as exclusive dominion. It may be that this very definition somehow constantly elicits similar argumentative strategies—raising worrisome doubts about existing entitlements or eliciting soothing appeals to usefulness on the one hand or to tradition on the other. Be that as it may, I will conclude by arguing that within this tripartite division of canonical strategies in legal property talk, none has sufficiently explored the *metaphoric* quality of Blackstone's opening definition of property as exclusive dominion, because it is as metaphor, as trope, that this idea still molds our thinking about property.

I. BLACKSTONE SETS THE STAGE

A. *Axiom and Anxiety*

When Blackstone described property as exclusive dominion, he may have had little idea of the resonance his words would have for later writers on property. Indeed, the notion of property as exclusive dominion—a notion to which I will refer as the Exclusivity Axiom—is far from self-evident, and it was even less self-evident when Blackstone wrote these lines. The axiom put aside the earlier medieval traditions in which property ownership had been hemmed in by intricate webs of military and other obligations; it ignored the family ties encapsulated in such devices as the entailed fee; and it ignored as well the general neighborly responsibilities of riparian and nuisance law. Blackstone himself was thoroughly aware of these pervasive and serious qualifications on exclusive dominion. Indeed, he discussed them at great length, particularly with respect to the feudal system and its later permutations.⁵ Moreover, as at least one modern commentator has observed,⁶ Blackstone asserted that the law properly recognizes claims by the destitute to some minimal assistance from those

5. See 2 BLACKSTONE, *supra* note 2, at *44-119; see also Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1308-10 (1996) (discussing Blackstone's treatment of merchants' duty to serve the public).

6. See Alschuler, *supra* note 1, at 34.

who are more prosperous.⁷ This position links Blackstone to a traditional view tying property to social and political obligation—a view that clearly creates some tension with the idea of property as absolute or exclusive dominion.⁸ Hence it might be best to conclude that for Blackstone, the Exclusivity Axiom was in a sense a trope, a rhetorical figure describing an extreme or ideal type rather than reality.⁹

Taken as a trope, however, the Exclusivity Axiom is powerfully suggestive.¹⁰ A right to exclude would not necessarily mean that property owners *do* exclude others; it would mean only that they can *decide* whether to exclude or not. This decisionmaking authority is what makes property a central libertarian value: The property owner has a small domain of complete mastery, complete self-direction, and complete protection from the whims of others. This authority is also what makes property so important in utilitarian thinking. The right to exclude means that an owner is solely responsible for the fate of her assets. Thus, whether she chooses to hold, share, or trade those assets, she has good reason to make her decisions prudently. In identifying property with the right to exclude, then, Blackstone struck a central nerve in modern discussions of property, and meditations, transmutations, and fulminations on the theme of exclusivity continue to run through modern cases and commentaries.¹¹

Perhaps the power of the trope explains the pattern in which modern scholars quote only those first few confident lines of Blackstone's observations on property.¹² But what they fail to notice are the extremely nervous sentences that follow immediately thereafter:

And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title.¹³

7. See 1 BLACKSTONE, *supra* note 2, at *127.

8. See CAROL M. ROSE, PROPERTY AND PERSUASION 58, 62 (1994) (describing the medieval and early modern view of property as "propriety," a tradition in which property ownership was expected to carry a number of responsibilities, including caring for the impoverished).

9. Early American commentators evidently so understood Blackstone. See ALEXANDER, *supra* note 4, at 87 (noting that Daniel Webster and American lawyers regarded the "Blackstonian conception" as a "myth" with respect to its English context).

10. For some of the symbolic freight of the exclusivity trope, see Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31, 57-58 (1996).

11. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (concerning the right to exclude); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (same); Halper, *supra* note 10, at 57-58 (describing the "anxiety of boundaries"); see also *infra* notes 53-55, 85-86, 104-17 and accompanying text.

12. See *supra* note 4; see also Alschuler, *supra* note 1, at 30 n.175 (complaining that the passage is generally cited out of context).

13. 2 BLACKSTONE, *supra* note 2, at *2.

We do not really want to learn too much about such matters, Blackstone continues, because we do not

car[e] to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land . . . or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.¹⁴

The hidden skeleton in property's closet is what I shall call the Ownership Anxiety—that is, anxiety over the foundations for existing distributions. Notice that this anxiety does not directly target the Exclusivity Axiom. Exclusive dominion, of course, is indeed related to distribution in a general way, because the right to exclude in itself implies that there will be *some* distribution of property rights. If Ann can exclude Bart (and all the world) from X, then Ann has X and Bart (and the rest of the world) does not; this is clearly a distribution of rights. Yet the principle of exclusive dominion on its face is indifferent as between Ann and Bart; Bart might have owned X instead, and Ann might have owned Y, or Z, or nothing at all. Thus, even though the Exclusivity Axiom entails *some* distribution, no particular distribution can be gleaned from the Exclusivity Axiom itself.

As I shall argue later, there is more to be said on the relationship of axiom to anxiety,¹⁵ but on the face of things, it is the axiom's very indifference toward specific distributions that triggers the Ownership Anxiety. Granting that property in general entails some set of exclusive dominions, why does Ann have exclusive dominion over X? Why does Bart not have X instead? That is the focus of the anxiety—not so much that the world of property is divided into exclusive rights, as that rights come to be distributed in one way rather than another. What justifies any particular distribution of rights? And, most importantly, do current claimants really have any solid foundation for the things they claim?

That was the question that Blackstone raised, but it seemed to make the gentlemanly author very uncomfortable indeed. Such close questioning of entitlements, he remarked, would only be “useless and even troublesome in common life.” Better, he said, that “the mass of mankind . . . obey the laws

14. *Id.* One of the few analyses to go on to quote the nervous later lines is Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 75 (1985). Without quoting these lines, however, some other scholars have observed that Blackstone did not think property was strictly founded on natural law. See Alschuler, *supra* note 1, at 28-36; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 311-16 (1979).

15. See *infra* text accompanying notes 117-121.

when made, without scrutinizing too nicely into the reasons of making them.”¹⁶

No wonder, then, that Blackstone no sooner had created this enormous ripple than he followed with two efforts to smooth the waters and steer the great ship of the common law back on course. One of these efforts was short in the telling but rather long on theory: He told a story that provided both a pseudo-history of the origins of property and a theoretical justification for the existence of the institution. The second effort, on the other hand, was very long in the telling but vanishingly small in theory: He deflected the reader from all such concerns, drowning doubts in an ocean of doctrine. And in making all three moves, Blackstone prefigured the directions of modern legal scholarship across the entire domain of property. One direction casts doubts on the natural justice of property; a second direction justifies property on utilitarian grounds; and a third direction deflects the entire issue by moving to a seemingly neutral, positive description of property's legal structures. Given these modern echoes, Blackstone's versions deserve closer attention.

B. *Righting the Ship Theoretically: The Utilitarian Just-So Story*

The Ownership Anxiety arises because property rights come to rest permanently in some hands rather than others. But why should this be so? As soon as he raised this question, Blackstone set out to answer it through “rational science.”¹⁷ To that end, Blackstone turned to a kind of concocted history of property, very like the one that John Locke had told almost a century earlier. It is a story that begins by placing human beings in a primitive state that Blackstone (like Locke) likened to that of pre-Columbian America, where, he said, the bounties of nature were a great commons given to all by their creator.¹⁸ In that condition, human beings created property through “occupancy”: First they took temporary use of natural products like plants for foodstuffs and fibers; then later, as they “increased in number, craft, and ambition” and as resources became correspondingly scarce, they began to claim more permanent rights in chattels and ultimately in land. Permanent claims allowed the “occupiers” to avoid conflicts with one another and encouraged them to labor on the things to which they now claimed a durable right.¹⁹ That, of course, is the

16. 2 BLACKSTONE, *supra* note 2, at *2; see also Herbert J. Storing, *William Blackstone*, in *HISTORY OF POLITICAL PHILOSOPHY* 622, 624-31 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (stressing that Blackstone wrote for an audience of practical gentlemen rather than philosophers and that he therefore emphasized stability and practice over first principles and theoretical extremes).

17. 2 BLACKSTONE, *supra* note 2, at *2.

18. See *id.* at *2-3.

19. *Id.* at *2-5.

great utilitarian claim for the exclusive character of property: Exclusive dominion is useful because it reduces conflicts and induces productive incentives. As Blackstone observed, no one would bother working and cultivating if someone else could "seize upon and enjoy the product of his industry, art, and labour."²⁰ But given exclusive rights, presumably people would avoid conflicts, work hard, trade, and grow collectively wealthier. Thus, he concluded, "[n]ecessity beget property," and to preserve property "recourse was had to civil society" and to government.²¹

This justificatory story leaves rather ambiguous the status of property as a natural right, at least insofar as property means anything beyond that early temporary "occupancy."²² Nevertheless, more enduring rights are clearly essential to the creation and protection of wealth; and if lasting property is not based directly on nature, then perhaps it is semi-natural in the indirect or social sense that David Hume had discussed a few years earlier. That is, it is a part of human nature to invent useful things. In that sense, a common institution as useful as property is at least indirectly "natural."²³

But notice how little this just-so story actually does to placate the Ownership Anxiety. First, the story is not a very convincing tale on its own terms about the emergence of the institution of property. Even if it is true that exclusive property does induce people to work and to treat resources conscientiously (and in fact, there is very considerable evidence that it does²⁴), that happy possibility in itself scarcely means that people will

20. *Id.* at *7.

21. *Id.* at *8.

22. In Blackstone's presentation, property has a place as a natural right, but it is at best incomplete, applying to current occupancy but evidently not to more permanent claims, and especially not to claims based on inheritance. *See id.* at *11; Kennedy, *supra* note 14, at 313-15 (arguing that only occupancy or use rights were natural for Blackstone in primitive society); *see also* Alschuler, *supra* note 1, at 28-36 (discussing Blackstone's distinction between "absolute" rights, which were derived from nature, and "relative" rights, which were derived from society); Burns, *supra* note 14, at 71-72 (same); *cf.* Storing, *supra* note 16, at 631 (noting Blackstone's interest in blurring conventional systems with nature, especially with respect to property). David Hume had also argued that lasting property was not a direct product of human nature because it was based on convention and the "artificial" or learned respect for the rights of others. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 488-91 (L.A. Selby-Bigge ed., Oxford Univ. Press, 2d ed. 1978) (1739-40).

23. As Hume argued,

Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflexion. . . . Nor is the expression improper to call them *Laws of Nature* [principles of justice]; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.

HUME, *supra* note 22, at 484; *see also* Burns, *supra* note 14, at 85 (arguing that civil institutions as well as property are in a sense "providential").

24. *See*, for example, reports on the greater productivity of private farming over collective farming in socialist or formerly socialist states, such as Richard Critchfield, *Why Soviet Breadbasket Is Never Full*, CHRISTIAN SCI. MONITOR, Apr. 22, 1980, at 12, which describes the

introduce this useful institution. In general, the fact that some institution would be *nice* does not mean that people will invent it and enforce its precepts.²⁵ After all, the person who introduces the idea of permanent entitlements is rather like the cultivator who lacks property in his crop: He may do all the organizing to get people to stop brawling and accept the institution of property, but then the fruits of his labors are effectively appropriated by everyone else, with no special reward for himself. Later on, there is the problem of policing. This too is a thankless chore, and why should anyone undertake it? Perhaps the neighbors would pay a night watchman to keep an eye on things, but who will get them organized to hire an appropriate person? Who will monitor them later to make sure that none is shirking on the dues? Who will watch the watchman, to be sure that he is not stealing from his charges? Inventing property to solve the problems of conflict and free riding, in short, only introduces the need to invent other institutions to solve still other problems of conflict and free riding.²⁶ At the end of Blackstone's short story, the institution of property is as mysterious as it was at the beginning.

Quite aside from all that, the story really has precious little to do with the anxiety that ownership provokes. However useful property may be as an institution, that anxiety focuses on another question: Why do *I* have what I am fond of saying is *mine*? The problem is this: Suppose you were to accept as true the proposition that durable exclusive dominion gives people incentives to invest their labor in the things they own; suppose that this labor does indeed enhance the value of things; suppose that those enhanced values aggregate into vastly greater total social wealth; and suppose that this greater social total makes everyone better off, so that both rich and poor are wealthier with a property regime than they would be without one.²⁷ Suppose all those general points about property regimes to be true, and you still have the question: What justifies any *specific* claims to portions of that

disastrous Chinese collectivization of agriculture and the greater productivity caused by the reintroduction of private farming; and Gail DeGeorge & Gail Reed, *Private Farming: Ten Acres and a Loan*, BUS. WK. (Int'l Editions), Mar. 17, 1997, at 37, which describes the greater agricultural productivity caused by the introduction of private farms in Cuba.

25. See, e.g., GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 19-26 (1989) (describing impediments to productive changes in property institutions); cf. MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 77-79 (1982) (describing the decline of growth-producing governmental policies in stable democracies such as Great Britain due to the increasing power of rent-seeking special interest groups).

26. See ROSE, *supra* note 8, at 37-38; James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 335-39 (1992).

27. See, e.g., Geoffrey P. Miller, *Comment: Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401 (1987) (arguing that the Lockean proviso—that first possessors leave “enough, and as good” for later claimants—may be satisfied by the greater wealth that first possessors produce simply by introducing a wealth-enhancing property regime).

wealth? Why is the *specific* distribution of "exclusive dominions" a just one?

Blackstone did glance at this question in his just-so story, but he left it rather hurriedly. Title to resources does come to vest permanently in individuals, he observed, but whether this was justified simply by occupancy or by the universal consent of mankind was a question, he said, "that savours too much of nice and scholastic refinement!"²⁸ Occupancy was the simple original fact of the matter, according to all the schools, and that, in a sense, is that.

But with a moment's thought, that is not that after all. Quite aside from begging the normative question of how occupancy turns into particular permanent entitlements (by the consent of all?), there is a practical problem with occupancy itself. The problem is that a first-occupancy principle invites everyone to grab at everything, and everyone winds up fighting with everyone else. At some point, to become a set of permanent claims in which people can fruitfully invest, property needs not more grabbing via occupancy but rather more mutual forbearance.²⁹

Hence the claim to exclusive title is not really entirely exclusive after all. Each such claim depends on everyone else going along with the program in the form of mutual respect and forbearance. While Blackstone's account shows how useful it would be if everyone behaved in this way, the account does not say why people do, or why they *should* forbear with respect to any specific distribution of property.

C. *Sailing out of Anxiety: The Doctrinal Deflection*

The utilitarian story did not take Blackstone long to tell, and he quickly moved on to the actual details of property law, which constitute the bulk of his text. With these details, he swamped the Ownership Anxiety in a veritable flood of doctrine. His opening doctrinal gambit itself is revealing: Did he begin with some relatively simple device like conveyancing or wills? Not at all. He opened with the crushingly arcane subject of "hereditaments,"³⁰ and indeed with "incorporeal hereditaments," themselves subdivided into the "ten sorts" of "advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents."³¹ Thereafter, Blackstone navigated a maze of detail,

28. 2 BLACKSTONE, *supra* note 2, at *8.

29. See Carol M. Rose, "Enough, and as Good" of What?, 81 NW. U. L. REV. 417, 438-39 (1987) (describing a private property regime as a large-scale agreement not to succumb to the "prisoners' dilemma"); see also Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 531-33 (1995) and sources cited therein (discussing similar difficulties of mutual forbearance in various contexts).

30. 2 BLACKSTONE, *supra* note 2, at *16-17.

31. *Id.* at *21.

describing a very formidable array of rights within rights, including those of the feudal system and its later permutations.

Even Blackstone seemed embarrassed about the wealth of detail of his subject, observing that it may well have “afforded the student less amusement and pleasure” than his discussions of other areas of the law, due to the complications that had “been heaped one upon another for a course of seven centuries, without any order or method, . . . [making] the study of this branch of our national jurisprudence a little perplexed and intricate.”³²

Still, at least two features of Blackstone’s doctrinalism indirectly give comfort to the anxious property holder. The first is simply forgetfulness. One can quickly lose one’s fears and gain confidence in this massive layering of rights wrinkled within rights. One can quickly forget those embarrassing questions that one might have about *one’s own* entitlements and snuggle up in this luxurious doctrinal blanket. As David Lieberman has observed, Blackstone was aware of his own gargantuan detail, and in another discussion he even explained it in an only slightly apologetic paragraph that itself suggests the comforts of a well-known abode.³³ The British law, Blackstone said, resembles

an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience, are chearful and commodious, though their approaches are winding and difficult.³⁴

Ultimately, the doctrinal deflection rests on an unspoken but underlying justification of convention or prescription—the supposedly universal, though tacit, acquiescence to whatever has come to be known for long enough that “the memory of man runneth not to the contrary,”³⁵ a usage that was papered over with the pretense of a “lost grant.”³⁶ In that prescriptive sense, Blackstone’s doctrinalism once again brings to mind

32. *Id.* at *382-83.

33. See David Lieberman, *Property, Commerce, and the Common Law: Attitudes to Legal Change in the Eighteenth Century*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 144, 148 (John Brewer & Susan Staves eds., 1995).

34. 3 BLACKSTONE, *supra* note 2, at *268; see also Storing, *supra* note 16, at 630 (analogizing this passage to Blackstone’s larger effort to reform while preserving the old). This passage is one of the many singled out for attack in Jeremy Bentham’s venomous critique of the *Commentaries*. Bentham criticized Blackstone for failing to recognize the darker forces that might live in old structures. See JEREMY BENTHAM, *A Fragment on Government*, in *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 1, 19 & n.1 (Wilfrid Harrison ed., Basil Blackwell 1948) (1776).

35. 1 BLACKSTONE, *supra* note 2, at *76; see also Storing, *supra* note 16, at 628-29 (arguing that Blackstone consistently rested law on custom).

36. See 2 BLACKSTONE, *supra* note 2, at *265.

David Hume's defense of convention and custom.³⁷ On such an account, particular entitlements may originate in some indifferent manner, but, once begun, custom and expectancy render their continuation non-arbitrary and indeed just (at least in the eighteenth-century sense of the word).³⁸ The nooks and crannies of comfortable doctrine supplement the sheer passage of time, reinforcing people's tendency to settle in and think that their "rights" must have always been there.

Aside from the comforts of custom, there is a second subtly soothing feature in Blackstone's doctrinal description of property. This feature derives from his choice of subjects. In his whole discussion "Of the Rights of Things," *land* clearly takes the predominant role. There were undoubtedly good reasons for this: Land had been and continued to be a major source of wealth in Blackstone's time. He did devote a few chapters to personal property, where he described some commercial instruments such as bills of exchange and even the arcana of "bottomry" (a mortgage on a ship).³⁹ But on the whole, non-landed sources of wealth took a distinctly secondary role to traditional landed property in the *Commentaries*.⁴⁰ He may have understood the growing use of water power for new industrial mills, for example, but he had only a few scattered and somewhat misleading remarks on this rather unsettling form of property, so full of portent for the future.⁴¹

Whether intended or not, Blackstone's concentration on land strikes a particularly calming note about property. Land is fixed, enduring, stable. It stands still when you put a fence around it to solidify your claims. And whatever the importance of "occupancy" for his *theory* of property, Blackstone's massive doctrinal sections disclosed very little to remind readers of the self-seeking, possibly violent and certainly problematic initial grabs of initial occupancy. Once past his opening utilitarian just-so story, Blackstone's examples of first possession are not drawn at all from land, which is largely stable and well-owned in his discussions; his examples

37. See HUME, *supra* note 22, at 489-91 (arguing that property and justice arise not from human nature but from convention).

38. See *id.* at 490-91 (associating justice with stability of possession); see also ADAM SMITH, LECTURES ON JURISPRUDENCE 5 (R.L. Meek et al. eds., 1978) (1762) (asserting that the chief aim of government is to "maintain justice; to prevent the members of a society from inroaching on one another's property The design here is to give each one the secure and peaceable possession of his own property. {The end proposed by justice is the maintaining [of] men in what are called their perfect rights.}").

39. See 2 BLACKSTONE, *supra* note 2, at *458-59, *466.

40. See Lieberman, *supra* note 33, at 147-49 (arguing that, while Blackstone may have had more interest in commerce than is apparent from his text, he ultimately had less familiarity with a commercial society).

41. See ROSE, *supra* note 8, at 172-73 (arguing that Blackstone's brief remarks on water use ignored the existing doctrine, although they may have encouraged the development of mills).

come instead from the acquisition of wild animals and moving resources like air, water, and—more figuratively—literary products.⁴²

Notice, however, how the doctrinal elaboration of rights within rights undermines the idea of property as exclusive possession. Exclusivity of dominion is rescued only by the casuistic division of larger properties into vanishingly small mini-claims, each supposedly “exclusive.” This classic doctrinal maneuver continues in the modern notion of property as a “bundle of sticks,” but the maneuver also suggests how artificial is the description of property as exclusive dominion.⁴³

I have gone on at length about Blackstone’s discussion of property law, because his account is a wonderful capsule version of the three canonical *topoi* that define the plane on which so much of the discussion of property takes place. The anxious doubts, the confident utilitarian riposte, the seemingly neutral but covertly comforting detail of doctrine—those features continue to define the basic strategies for talking about property. The next Part will describe the ways in which these three poles have turned into the modern canonical strategies for discussing property. In keeping with the chronology of the late twentieth century’s trends in property scholarship, the next Part reverses the order of the strategies, taking Blackstone’s progression through the looking glass to a modern arena where neutral doctrine leads off, utilitarian theory gives a rationale, and critical questioning revives anxious doubts.

II. THE MODERN MIRROR OF BLACKSTONE’S STRATEGIES: DOCTRINALIST, UTILITARIAN, PROBLEMATIZING

How do aspiring lawyers learn to talk about property now, at the end of the twentieth century? By looking at the three best-selling property casebooks of the mid-1990s, one can see the very strategies that Blackstone’s discussion introduced. The oldest entry, and now the second most popular, is John E. Cribbet’s *Property*,⁴⁴ a standby that has certainly changed with the times (and with new editions and co-authors) but whose basic intellectual energy is devoted to laying out the black letter about

42. See 2 BLACKSTONE, *supra* note 2, at *402-06.

43. See Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 8-21 (1982) (arguing that property requires a principle of “composition”). Thomas Grey argues that the modern “bundle of sticks” metaphor undermines the commonsense and moral understanding of property. See Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 76-77 (1980). But the complexities of 18th-century property that Blackstone described suggest an even less integrated view of property in that era.

44. JOHN E. CRIBBET ET AL., *PROPERTY: CASES AND MATERIALS* (7th ed. 1996). This text was adopted by 57 law schools in 1994-95, according to an informal survey by Foundation Press. See Foundation Press, *Subject Area: Property* (1995) (unpublished informal survey of textbook adoptions distributed to the Board of Editors of Foundation Press, on file with author and cited with permission of Foundation Press).

Blackacre. A newer entry, and now by far the leader of the pack, is Jesse Dukeminier and James Krier's *Property*.⁴⁵ This book also includes a good deal of doctrine, but it is a favorite of those who favor economic approaches, and indeed its popularity suggests the degree to which a utilitarian strategy has become the predominant way to discuss property law. A still newer entry, however, is gaining ground on both its rivals. This is Joseph W. Singer's *Property Law*,⁴⁶ and it too has a goodly dose of doctrine. But it also stirs up the old Ownership Anxiety at every plausible turn, undermining the comfortable notion that existing distributions of property are *justified* simply because they are intricately detailed and interrelated, or because the general institution of property may happen to be a useful one. Despite the considerable overlap in these textbooks, their central tendencies suggest not only the dominant ways of talking about property today, but also the relative academic satisfactions over each of these three discursive modes.⁴⁷

A. *The Modern Conventional Strategy: Doctrinalism*

The doctrinal strategy dominated academic property discussions through the nineteenth century and up to the blossoming of law and economics scholarship a generation ago. One need only look at the nineteenth century treatises on property—Angell on Tidelands,⁴⁸ Wood on Nuisance⁴⁹—to get a sense of the overwhelming importance that those property scholars placed on the elaboration of doctrinal nuance.⁵⁰

45. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (4th ed. 1998). The third edition was adopted by 110 law schools, according to the Foundation Press survey. See Foundation Press, *supra* note 44.

46. JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (1993). There were 27 law school adoptions in 1994-95, an increase from 18 in 1993-94. See Foundation Press, *supra* note 44.

47. It is instructive to compare these casebooks' treatment of one of the chestnuts of property law, *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), an early 19th-century New York case concerning the conditions for reducing a wild animal to possession. Cribbet treats it as a footnote in the doctrine of the law of "finds." CRIBBET, *supra* note 44, at 105. Dukeminier and Krier use it as the opening case in a sequence that ends with a discussion of the economic concept of "externality." DUKEMINIER & KRIER, *supra* note 45, at 19. Singer sandwiches the case between materials illustrating the indeterminate and political character of legal definitions of property. See SINGER, *supra* note 46, at 56.

48. JOSEPH K. ANGELL, *A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF* (1847).

49. H.G. WOOD, *A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY* (3d ed. 1893). The title page notes that the author is also "Author of 'The Law of Master and Servant,' 'Fire Insurance,' 'Landlord and Tenant,' 'The Limitation of Actions,' etc., etc., etc."

50. Duncan Kennedy suggests that property was a particularly retrograde academic area after the later 19th century, one left behind by the Langdellian revolution in "scientific" legal thinking. See Kennedy, *supra* note 14, at 349.

Treatises of this sort have fallen out of fashion in modern property scholarship, as indeed they have in most other areas of the law. Still, doctrinalist elements maintain a robust existence in modern property law. One continuing doctrinalist pattern is the treatment of land as the central subject of property. There are, of course, many other forms of property—securities, for example, or intellectual property, or even what is called “human capital,” notably education—and these forms of property now constitute a very substantial proportion of the modern representations of wealth. Moreover, land itself certainly need not be discussed in purely doctrinalist modes, as is amply illustrated in Robert Ellickson’s wide-ranging utilitarian and sociological presentations.⁵¹

Nevertheless, “property unmodified” still means land, and land has a peculiar affinity to doctrinalism. By virtue of its durability, land invites an intricate layering of rights over time. Lawyers have never bothered to create an elaborate doctrine of, say “estates in automobiles” or “covenants running with automobiles”; nor have they done so with any other non-landed property. That is because after only a limited number of years, any given automobile will end in the junk heap. This finite lifespan keeps encumbrances on automobiles relatively simple and few in number.⁵²

Land, on the other hand, sticks around indefinitely, while claims against land can go on and on, in layer after layer, to be lost, found, banished, restored, relished, then lost again to longstanding practice and prescription. This enduring quality is one reason why claim-clearing doctrines like “adverse possession” and prescription are essential with respect to land. But land’s durability is also the reason why land is so central to doctrinalism: Land offers a goldmine of doctrinal variation, a subject on which taxonomic exactitude—rather like Blackstone’s—is the central effort.

The very fact that “property unmodified” still means land is a strong hint that doctrinalism is alive and well as a canonical strategy. Aspiring lawyers still face queries on bar exams about many arcane interests in land, no doubt because bar examiners are sure that law schools teach them, and of course law schools continue to teach these doctrines because they are on the bar exam. Putting to one side that exasperatingly circular pattern, there are some other payoffs to doctrinalism for lawyers: the confidence that

51. See, e.g., ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (deriving a theory of norms from the behavior of a community of landowners); Ellickson, *supra* note 4 (using social theory to analyze a broad spectrum of landownership practices).

52. Similarly, it is relatively easy to establish a simple registration system for automobiles, since any secured claims die with the vehicle. Landed claims, because they can last so long, can more easily get lost in the records, or refer to non-record events, fouling up simple systems—including the Torrens system, which was borrowed from the registration of vessels. See ROSE, *supra* note 8, at 205-08.

comes with mastery of a set of complex conceptions, the aesthetic enjoyment of identifying the rooms of the old house, and the pleasure of finding the corridors that run between them with a kind of hidden logic. There is also, of course, the satisfaction of deflecting the Ownership Anxiety and instead treating property as a subject that requires detailed positive explication rather than normative justification.

All these doctrinalist satisfactions entail and in a way illuminate one of the chief functions of the Exclusivity Axiom, which continues to serve as an unspoken heuristic for doctrinalism. Here the trope of exclusivity serves (as it did for Blackstone) an essentially linguistic function: The conceit of exclusivity allows the lawyer to divide and subdivide interests into separate and exclusive "things," each analyzable on its own terms. Indeed, in modern cases even the right to exclude itself is treated as one of several separately identifiable interests.⁵³

At the same time, modern doctrinalism also illustrates some of the more problematic aspects of the linguistic trope of exclusivity. For one thing, doctrinalist separations of mutually "exclusive" property interests may obfuscate commonsense notions of property.⁵⁴ More seriously, they may place subtle intellectual barriers in the way of understanding normal practices like sharing and neighborly give-and-take, where exclusivity melts into the more fluid pattern of keeping reciprocal favors on a roughly even basis.⁵⁵

Politically, a certain conservatism inheres in doctrinalism. Conceptual explication itself can easily shade into a defense of existing property categories, if for no other reason than for protection of one's own intellectual capital.⁵⁶ A more subtly conservative aspect of doctrinalism is the way in which its underlying presumption—that rights can be fully identified, specified, and labeled—implicitly nourishes a libertarian justification for existing property rights, a justification that is at once historical and oddly ahistorical. As Robert Nozick put it, the libertarian justification of existing holdings is "historical" insofar as any given entitlement derives from a series of just transfers, linking all the way back

53. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982).

54. For example, the scholarly division of a right of "use" from a right of "income" may obscure the fact that these are in a sense *alternatives*, rather than rights simultaneously held. A person's decision whether to use property herself is influenced by the amount another might pay her for it. See ROSE, *supra* note 8, at 281.

55. For a description of the preference for informality in neighborly give-and-take, see ELLICKSON, *supra* note 51, at 76-81.

56. Tocqueville's famous commentary on the conservatism of American lawyers argues that this conservatism derives in part from the lawyers' knowledge of an arcane system of precedents. See ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 276 (Phillips Bradley ed., Alfred A. Knopf 1945) (1834).

to its original just acquisition.⁵⁷ But the justification is ahistorical too, in its supposition that property rights never really change over time in meaning or content. It is no accident that Richard Epstein, whose work has strong though not exclusively libertarian currents,⁵⁸ frequently refers to the categories of the common law and even Roman law. Implicit in his work is the view that these venerable legal systems generate categories of rights that are unchanging over time and fully specifiable—and, of course, just the ticket as a basis for modern property rights.⁵⁹

This is a way of thinking that can create some practical problems: Doctrinal “rights talk” can run wild. An unfortunate example is given by the radical right-wing groups who hearken back to a home-cooked and half-baked version of the “common law” in order to justify what is basically a revolutionary disregard of ordinary legal duties and neighborly behavior.⁶⁰ Even at considerably higher theoretical levels, the doctrinal presumption that rights can be justly acquired and then justly transferred usually lies either insufficiently examined⁶¹ or is left to rest on pragmatic considerations.⁶² As Blackstone was well aware, too close an inquiry into such matters can be troublesome and awkward.

Doctrinalism is by no means all conservative. At war with the view of doctrine as a set of philosophical “natural kinds” is a whole set of evolutionary views and reformist impulses that also abide in American doctrinal explication. Indeed, the playing out of doctrine in the past absorbed the energies of very capable reformist commentators, while within the last thirty years, perhaps one of the most noticeable changes in modern property law has derived primarily from the analysis of doctrine. Indeed, this legal sea-change technically revolves around the doctrine of estates in land. This is the so-called “revolution” in landlord-tenant law, whose

57. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 150-53 (1974).

58. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 334-38 (1985) (admiring but criticizing Nozick).

59. See, e.g., Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1222-23, 1226 n.6, 1241 (1979) (arguing for the advantages of common law sources, describing Roman law sources, and arguing that the first possession doctrine persists through all time). For somewhat similar identifications of fundamental rights with common law practices, see Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 383-84 (1991), which argues that the natural rights tradition foresees the prevention of harms, as in the common law doctrine of nuisance; and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 567-68 (1823), in which the defendants argued that Indians had no property under American positive law because they had none either in the law of nature or in the common law of former British colonies. For a critique of Epstein's “conceptualism” and presupposition of a single unchanging concept of property, see Margaret Jane Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239 (1986).

60. See Michael Janofsky, *Home-Grown Courts Spring up as Judicial Arm of the Far Right*, N.Y. TIMES, Apr. 17, 1996, at A1.

61. See the rather inconclusive discussion in NOZICK, *supra* note 57, at 150-82.

62. See Epstein, *supra* note 59, at 1241-43 (defending the first possession principle on the basis of longstanding practice and social need, not philosophy).

subject is the estate for years, known to normal people as a lease.⁶³ Since the 1960s, courts led by the District of Columbia Circuit (and egged on by scholarly commentators) have largely split the doctrine of residential leases away from commercial leases, and in the former they have substituted large elements of contract for the prior property approaches. Residential leases are now generally regarded as in large part contracts for residential services, and they include remedies like warranties of quality and rules requiring mitigation of damages—rules that have been drawn from contract law.⁶⁴ Despite a nod or two to economic analysis,⁶⁵ this important legal change has been largely driven by a modernizing analysis of doctrine.⁶⁶

Such developments suggest a rather pragmatic version of doctrinalism, a version that would cast in a different light the luxuriantly complex elaboration of doctrinal distinctions. As in Blackstone, that pragmatic drift would bring doctrinalism back to Humean convention, which itself supposes a human psychology that gets attached to things as they are—or, perhaps, as they have become over time, after their provenance is largely forgotten.⁶⁷ Understood in this way, as an explicator of gradual legal change, doctrinalism is linked to modern property scholars' interest in cognitive psychology, especially to the exploration of what is now called the "endowment effect"—that is, roughly speaking, people's widespread tendency to place a higher value on the things that they actually have (their current "endowments") than on things they do not possess.⁶⁸ Doctrinalism

63. See, e.g., Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982) (assessing the transformation of American landlord-tenant law); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) (describing the causes, history, and effects of the "revolution" in landlord-tenant law).

64. See Glendon, *supra* note 63, at 521-28.

65. See, e.g., *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 860 (D.C. Cir. 1972) (citing Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971) (arguing that market forces prevent landlords from passing on the increased costs of code enforcement to tenants through rent increases)).

66. In fact, this doctrinal change has been treated with great skepticism by economic theorists. See, e.g., Charles Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975) (criticizing the *Restatement* draft position supporting the landlord's duty of habitability); see also *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 741-42 (7th Cir. 1987) (Posner & Easterbrook, JJ., concurring) (criticizing a variety of landlord-tenant "reforms").

67. Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897) (referring to the law of prescription and remarking on the way that something one has "enjoyed and used" for a long time "takes root in [one's] being").

68. See, e.g., Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277-83 (1989) (describing the endowment effect and the original literature giving rise to the idea). Interestingly enough, Hume also noticed the endowment effect. See HUME, *supra* note 22, at 482 ("Men generally fix their affections more on what they are possess'd of, than on what they never enjoy'd: For this reason, it wou'd be greater cruelty to dispossess a man of any thing, than not to give it him.").

would explore the legal causes and consequences of changing endowment effects.

The passage of time and the lapses of human memory, however, cannot fully paper over the Ownership Anxiety about current distributions. Fancy psychological talk about endowment effects does not help any more than the earlier doctrinal talk about prescription, with its ridiculous conceit of a “lost grant.”⁶⁹ Quite the contrary, the Ownership Anxiety fixes on the possibility that some essential flaw occurred in times *beyond* current memory—that is, the fear that current endowments ultimately have no firm foundation. A shifting conception of entitlements only allows the uncomfortable Ownership Anxiety to come back to the surface, in full view.

Moreover, an evolving and pragmatic version of endowments challenges the doctrinalist deployment of the trope of exclusivity itself, in which each entitlement is an exclusive and lasting nugget. Like Zeno’s Arrow, this intellectual technique is hard-put to explicate dynamic change. Yet if there is current life in doctrinalism, it is in doctrinalism as process and change, which entails some loosening of the exclusivity axiom and some recognition of the porosity of property categories.⁷⁰

If doctrinalist deflection still leaves the Ownership Anxiety in view and even begins to shake the Exclusivity Axiom, what about the modern updating of Blackstone’s chief normative answer to that anxiety, namely the utilitarian strategy? Does it do a better job at soothing anxieties directly than doctrinalism does indirectly? The answer, briefly, is “no,” although as in modern doctrinalism, there are plenty of new angles.

B. *The Utilitarian Just-So Story Updated: Law and Economics*

Blackstone’s utilitarian maneuver finds its modern counterpart in the law and economics approach, an intellectual movement that must count as one of the most important success stories in the history of American legal scholarship, legal education, and even to some degree in practice as well, since judges and lawyers now at least occasionally talk the talk of “transaction costs” and “externalities.”⁷¹ If the movement is now graying at the temples, it is still a vital and changing theoretical force—in property

69. See 2 BLACKSTONE, *supra* note 2, at *265.

70. This reality is not lost on modern doctrinalists. See, e.g., John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1 (describing burgeoning special cases, and exceptions to rules that collectively show a “social side” of property).

71. See, e.g., *Westfarm Assocs. v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 679 (4th Cir. 1995) (discussing “externalities”); *Gail v. United States*, 58 F.3d 580, 585 n.7 (10th Cir. 1995) (discussing “transaction costs”).

as in other legal areas. Indeed, so vital is it that I can illustrate its modern canonical stature through only a few central examples.

The original theorist of utilitarianism, Jeremy Bentham, was a great disparager of Blackstone's doctrinalism.⁷² Like Bentham, the modern law and economics scholars often barely hide their disdain for doctrinal hair-splitting. But if Bentham generally blasted Blackstone's *Commentaries*, Bentham's modern successors found just the right brief section of Blackstone to cite: the utilitarian just-so story.⁷³ This is the very text that Richard Posner's law and economics text cites for the proposition that it has been known "for hundreds of years" that property rights encourage labor and investment.⁷⁴ Indeed, the economist Harold Demsetz retells Blackstone's just-so story in a modern version, a version that incidentally appears early in the most popular American property law textbook.⁷⁵ Like Blackstone's story, this version describes the invention of property as a response to scarcity. Demsetz illustrates his version through an account of Native American hunters in the Hudson Bay area during the early colonial period, when the Europeans' ardent demand for furs created unprecedented pressures to capture fur-bearing animals. Under those new circumstances, the native hunters began to overhunt the common grounds, each hunter imposing "external" costs on all the others, as all needed to expend more hunting effort to catch the increasingly scarce animals. But according to Demsetz, these indigenous hunters realized they could prevent overhunting by turning their formerly common hunting grounds into private property. Once they had done so, the story goes, the individual owners husbanded wildlife resources on their respective territories, and the now-private hunting grounds became productive again. In Demsetz's more technical economic terms, property rights enabled people to "internalize externalities."⁷⁶ As in Blackstone's story, property is justified by its utility and particularly by the way in which it promotes peaceable and productive labor, investment, planning, and resource management.

The trouble with this story is that it can be told without the happy ending. Indeed, it *has* been told without the happy ending, most notably by the biologist Garrett Hardin, and earlier, if less flamboyantly, by the economist Scott Gordon.⁷⁷ Their story too, or at least Hardin's version, is

72. See BENTHAM, *supra* note 34, at 3-4, 8-9, 15-22 (accusing Blackstone of impeding criticism and reform and describing passages of particular complacency).

73. See *supra* Section I.B.

74. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1, at 30 n.1 (3d ed. 1986).

75. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347-59 (1967), reprinted in part in DUKEMINIER & KRIER, *supra* note 45, at 40. Demsetz gives no indication that he read Blackstone's story.

76. Demsetz, *supra* note 75, at 350.

77. See H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

now a staple item in law and economics property law teaching materials. In the story as told by Gordon and Hardin—the former using the example of fishing, the latter of grazing—nobody organizes a property regime when a common resource comes under pressure. Instead, the resource is simply used to exhaustion (or something near exhaustion), at which point all economic rents are dissipated. This is the well-known phenomenon of the “tragedy of the commons”—the very catchy title of Hardin’s article—and it is actually a variant on another modern economic story, the so-called “prisoners’ dilemma.” In the prisoners’ dilemma, the parties would be better off collectively if they could come to agreement, but they have individual motivations to cheat instead.⁷⁸

The tragedy of the commons, of course, directly confronts Blackstone’s optimistic utilitarian just-so story as retold by Demsetz and others.⁷⁹ Indeed, the tragic version shows what was the matter with that optimism: However wealthy and happy the institution of property might make us, there is nothing in the logic of the story that means we actually *will* invent it.

So will we or won’t we? Which story about the institution of property is correct? Do we get happy property or the gloomy tragedy of the commons? Law and economics writers may occasionally be faulted for telling both stories without much attention to the contradiction between them, but those scholars do have ways to answer the question. They focus on “transactions costs,” an idea derived from Ronald Coase’s pivotal article *The Problem of Social Cost*⁸⁰ and worked out in enormous detail by law and economics scholars thereafter. In brief, on this analysis, a system of property rights depends on implicit or explicit agreement—as it did in Blackstone’s story and in Demsetz’s too, though neither made much of the point. If agreement is easy and the costs of definition are low, property rights are likely to be sharply defined; if not, they will be mushier or nonexistent.⁸¹

Transactions costs analysis is a central enterprise in the law and economics movement, in property law as elsewhere. As Guido Calabresi and Douglas Melamed famously pointed out, transactions costs analysis can help to explain both why property normally is transferred only with the consent of the owner and why, when consent is difficult to organize, it may be transferred by forced sales.⁸² Transactions costs analysis also yields a

78. For an explanation of this classic game theory problem in the context of similar problems, see Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 RES. IN LAW & ECON. 1, 17 (1982).

79. For some other variations on the optimistic creation-of-property stories, see ROSE, *supra* note 8, at 287, and the authorities cited therein.

80. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

81. See, e.g., LIBECAP, *supra* note 25, at 12-26 (describing factors that impel and impede “contracting for property rights”).

82. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1972) (describing the use of liability rules instead of property rules where transactions costs would defeat value-

way to make sense of some old doctrinal distinctions, for example, between trespass and nuisance.⁸³ It suggests reasons to decide some property arrangements by majority votes rather than unanimous decisions, as in condominium associations or indeed governments, and it suggests reasons for some public intervention in property use, as in the case of environmental damage, where the large numbers of affected parties cannot easily cut a deal.

In general, the very concept of transactions costs *means* an absence of clearly defined property rights,⁸⁴ and hence the concept subtly suggests that all other things being equal, it is better that property rights be defined firmly rather than mushily. That is because firmly defined rights reduce externalities and transactions costs, allowing the free flow of goods and services among producers and consumers.⁸⁵

In this way, of course, transactions costs analysis adopts the Blackstonian axiom of exclusivity as a normative goal. Exclusive control over entitlements concentrates appropriate incentives entirely on the individual owner, encouraging this owner to plan and deal carefully. At the same time, exclusivity enables trades to proceed smoothly, relieving the parties from worrying about vague objections from other unknown stakeholders.

Notice, however, that in taking this positive stance toward exclusivity, law and economics scholarship in effect reveals another trope-like characteristic of the Exclusivity Axiom: Exclusivity is a metaphor for the incentive power of self-interest, the self-interest that drives individual investment and social wealth.

The embarrassing fact, of course, is that property rights are not thoroughly exclusive in any commonsense way, and the even more embarrassing fact is that an insistence on the Exclusivity Axiom would only obscure matters that are of great interest to the production of social wealth. Law and economics scholarship borrows from the doctrinalists the move to divide and subdivide rights into conceptually separable and exclusive "sticks" in a bundle, but a person's use of any of those sticks depends powerfully on what other people do. Landlords and tenants have widely

enhancing transfers). For a modern reconsideration, see Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

83. See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

84. See Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49 (1970).

85. See Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321 (1985); see also Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12 (1984) (arguing that the Supreme Court is increasingly likely to consider cases from an "ex ante" perspective of defined rights, in order to ease transactions, rather than from the blurred "ex post" perspective of fairness).

shared but sometimes conflicting interests. So do neighbors, co-op owners, and shareholders.

To deal with such interdependencies, some modern institutional economists, instead of subdividing individual rights into smaller and smaller shards, take the opposite and interesting tack of *enlarging the rightsholder*. That is, they describe whole communities as joint owners of common property regimes, which are the exclusive property of the community vis-à-vis other communities.⁸⁶

An interest in groups is creeping into law and economics approaches from another angle as well. As Robert Cooter has shown, even low transactions costs scenarios give opportunities for strategic bargaining, suspicion, and betrayal.⁸⁷ Potentially beneficial deals may go begging because the parties fritter them away in endless jockeying for position, each wanting to take the lion's share of the gains from trade. In effect, each trade potentially presents a new version of the prisoners' dilemma. In short, it is not enough that trading partners have low transactions costs. They must also have some reason to trust each other, and in Robert Ellickson's terms, it helps if they are in a "close-knit" community.⁸⁸

Game theory identifies and analyzes such issues, and it is no surprise that game theory is moving very rapidly into a prominent position in the economic analysis of property law (and other areas of law as well).⁸⁹ But that is not all. Game-theoretic analysis opens the door to a much broader study of psychology and culture, and of the social contexts and patterns that make property and commerce possible.⁹⁰ In effect, there is a kind of mystery of "niceness"⁹¹ and trust at the center of economic transactions, and understanding the conditions for such niceness and trust involves moving out into many other disciplines—anthropology, social psychology, the study of different kinds of communities. That is why, for example, in reworking a 1976 essay collection, my co-authors and I changed the title

86. See, e.g., BONNIE MCCAY & JAMES ACHESON, *THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES* (1987); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

87. See Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 17-18 (1982).

88. ELLICKSON, *supra* note 51, at 177-82.

89. See, e.g., Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997) (giving a game-theoretic account of norm change through social learning that has implications for a wide variety of legal issues).

90. See, e.g., ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989). For a popular presentation of the social organizations of commerce, see FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995).

91. In Robert Axelrod's much-cited study of the "tit for tat" strategy that he regards as a prototype of successful cooperation, the players must begin with a "nice" move or the relationship will not get off the ground. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

from *The Economic Foundations of Property Law* to the more general *Perspectives on Property Law* and included already-canonical insights from other disciplines.⁹² That is also why the modern utilitarian strategy may yet extend a hand back to the basic impulses behind doctrinalism—to the sociology of custom and convention, to the psychological comfort of things well-known.

The graying of law and economics, then, may mean a certain mellowing and a growing consciousness of the importance of social context. But what is interesting is that these very mellowing trends implicitly cast doubt on the Exclusivity Axiom. As it turns out, a fixation on exclusive dominion could obscure the social interactions that are now emerging as an important new interest in law and economic thinking.

Finally, all the economic offshoots still never completely answer the Ownership Anxiety. The fundamental utilitarian move is to argue that human beings are better off with the institution of property than without it. But the benevolence of the institution of property, taken as a whole, is not much of an excuse for *existing distributions* of property. Indeed, the celebrated Coase Theorem itself is well-known for its once-scandalous position that, from the perspective of society as a whole, it really does not matter which of two competing claimants has a property right as long as transactions costs are low and the parties can trade.⁹³ Indeed, law-and-economics approaches are quite explicit in pointing out that different starting points can lead to quite different distributions, and that any one of those distributions can be efficient.⁹⁴

This clearly is no answer to the Ownership Anxiety, and it is that very anxiety that is stirred up by the third modern canonical strategy.

C. *The Problematizing Strategy: Angst and Critical Prodding*

The third canonical strategy in property law I will call critical, largely because problematizing is such an awkward word. In this critical strategy, I certainly include the adherents of the modern Critical Legal Studies (CLS), but I will include some other writers as well.

92. ROBERT C. ELLICKSON ET AL., *PERSPECTIVES ON PROPERTY LAW* at xii (1995) (revising BRUCE A. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* (1975)).

93. See generally Coase, *supra* note 80. But see, e.g., Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 672-73, 678-79, 681-82, 688-91 (1979) (giving examples of the ways in which individuals value existing endowments more highly than opportunities and criticizing the Coase Theorem for neglecting these differences' effects on trading outcomes).

94. See, e.g., Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949, 968 (1990) (describing a multiplicity of Pareto optimal distributions that depend on initial entitlements).

Like the doctrinal and utilitarian strategies, the critical strategy also echoes a part of Blackstone—but a different part. By critical, I refer to the scholars whose work recalls Blackstone's opening nervousness about entitlements. Rather than salve that anxiety, however, the critical strategy pokes at it, stirs it up, stokes it, all in an attempt to show that existing distributions of property have no special claim on justice.

All this troublemaking has a venerable ancestral line. The list of antecedents includes such well-known tracts as Proudhon's *What Is Property?*,⁹⁵ in which the author responds that property is theft. It also includes Marx's chapter in *Capital* on "The So-Called Primitive Accumulation," where he fulminates about the force and fraud that he claims lie at the basis of feudal and bourgeois property.⁹⁶

The modern CLS scholars are heirs not only to this destabilizing tradition, but also to some degree to the historic Left's egalitarian and utopian aspirations. These aspirations can act as a platform from which to criticize current legal structures, a point seen in its most visionary form in the work of Roberto Unger. Putting it very briefly, Unger argues that individual human liberation and flourishing occurs only in self-creating communities of affection and mutual assistance, whereas the fetishization of rights generally—and property rights in particular—divides people from community and entrenches patterns of domination and subordination that further poison communal life.⁹⁷ Hence our current thinking about property, like our other legal discourse, must be disrupted and dramatically reconceived so that claims can be based on social sharing and responsibility.⁹⁸

In any such project of disruption and reconception, the obvious targets in existing property law discourse are doctrinalism on the one hand and utilitarianism on the other—the one because it deflects anxieties about distribution, the other because it purports to answer those anxieties. Indeed, for critical destabilizers, the doctrinalist and utilitarian strategies are linked by a profound conservatism, by their replication of an intellectual technology of hierarchy, and by their ideological service to an inequalitarian, anomic, and unjust status quo.

95. PIERRE JOSEPH PROUDHON, *WHAT IS PROPERTY?* (Benjamin R. Tucker trans., Howard Fertig 1966) (1840).

96. 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 713-74 (Frederick Engels ed., Int'l Publishers 1967) (1887).

97. See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 36-38 (1986) [hereinafter UNGER, CLS]; ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 163-64 (1996) [hereinafter UNGER, *LEGAL ANALYSIS*]; see also Thomas F. McInerney III, *Common Ground: Reconciling Rights and Communal Concerns in Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 831, 846-50 (1998) (discussing Unger's views of property).

98. See UNGER, CLS, *supra* note 97, at 38-40; UNGER, *LEGAL ANALYSIS*, *supra* note 97, at 157-60.

First, the critical attack on doctrinalism. The doctrinal maneuver tries to bury ownership anxieties in the cake of custom and implicitly justifies property by convention. But a chief claim of CLS scholars is that doctrine itself is indeterminate, since in virtually any case mutually contradictory doctrines could lead any given legal decision in quite different directions.⁹⁹ Hence a doctrinal mode of analysis is likely to mask choices made for conscious or subconscious reasons that are quite independent of doctrine itself.¹⁰⁰

Indeed, CLS scholars have become famous for peeling away the temporal layers of received doctrine, refuting earlier accounts of natural progress, and instead suggesting darker influences in the directions in which dominant legal doctrine has drifted over time.¹⁰¹ On such accounts, far from stabilizing expectations, property doctrine may actually add up to a shifting set of apologia that has subtly furthered the cause of hegemonic interests at the expense of the less powerful. A now-classic exposition is Morton Horwitz's description of water rights doctrine in the nineteenth century. According to Horwitz, fixed rights in riparian property were modified to accommodate industrial development and then rehardened around the rights that industrialists came to claim for themselves.¹⁰² Joseph Singer recounts a similar thesis with respect to the solemn legal refutations of Native American claims.¹⁰³ In these as in other instances, say such critics, doctrine may appear to be neutral, but this appearance itself allows doctrine to disarm the less fortunate and render complacent the more fortunate, all the while reinforcing a culture of hierarchy and persuading everyone that all is for the best in this best of all possible worlds.¹⁰⁴

Even sharper is the critique of the utilitarian strategy in its modern incarnation as law and economics. Particularly interesting in this critique is

99. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 258 (1987) (observing that while ordinary outcomes may be predictable, contrary doctrines are always available).

100. See *id.* at 294-95 (giving examples of instances where the supposed principle of neutrality can misdescribe legal outcomes and mask bias).

101. For various strands of critical historiography, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 71-100 (1984).

102. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 32-42, 101-102 (1977). But see ROSE, *supra* note 8, at 165-88 (offering a different account); Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 UCLA L. REV. 1187 (1978) (book review) (criticizing Horwitz's thesis).

103. See Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5-6 (1991).

104. See Gordon, *supra* note 101, at 98-100, 109-12; see also KELMAN, *supra* note 99, at 270-71 (noting that critical thinkers believe property-law categories block the reimagination of existing distributions); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 399-401, 451, 476-77 (1982) (describing the process by which nineteenth-century legal elites shifted the concept of rights from "vested" to "substantive," leading to the reification of the laissez-faire principle of "freedom of contract"); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-84 (1984) (criticizing the "reification" of rights). Kelman appears to think that legal doctrine's flaw is less its bias (though it may indeed be biased) than its tendency to deny contradictions and promote complacency. See KELMAN, *supra* note 99, at 286.

the implicit link that the critics draw between Blackstone's Exclusivity Axiom and his Ownership Anxiety. While the principle of exclusive dominion may imply no particular distribution of entitlements, after a given distribution is in place any unconsented alteration runs contrary to the principle of exclusive dominion. In this way, the Exclusivity Axiom becomes a bulwark to protect existing distributions. Thus, to cast doubt on the justice of existing distributions—to stir up the old Ownership Anxiety—is to confront the Exclusivity Axiom as well. A comment by Jeremy Bentham, the original utilitarian, illustrates the point strikingly. Bentham exhorted his readers that even blatantly unequal distributions of property, including serfdom, should not excuse disturbance of property rights, lest society's aggregate welfare suffer.¹⁰⁵

On the other hand, one might look at this picture differently. That is to say, normatively, if existing distributions are unjust, then the principle of exclusive dominion must yield in order to rectify them; and positively, if the wealth-producing function of exclusive dominion is itself weak, then the case for redistribution is much greater. As a part of a general program of dismantling hierarchy, the modern CLS scholars have mounted both types of attack on the Exclusivity Axiom.

On the normative side, Duncan Kennedy has made what is now a classic distinction between "rules" and "standards" in approaches to law. In so doing, he attacked a central idea in the utilitarian idea of property—bright-line rules. In property law, the most central incarnation of such rules is the axiomatic and awesome Blackstonian power to exclude: What is inside the line is all mine, what is outside I must trade to get. Under the utilitarian argument, bright-line rules create the security that allows autonomous individuals to plan, invest, and trade; the presence of such rules is the essential reason why property works to produce wealth. But Kennedy strongly suggested that bright-line rules are morally inferior to looser "standards."¹⁰⁶ Clearly demarcated and property-like rules, he said, may protect the autonomous individual, but they also permit the clever and unscrupulous to dupe the rest of us. The Holmesian "bad man" will closely study the limits of bright-line rules, and he will use his knowledge to skate as closely as possible to the line, to the detriment of more trusting folk. On the other hand, flexible and porous "standards" (such as principles of fairness and reasonableness, which assess actions and outcomes after the fact) protect the good person because they rectify injustice *ex post*, vindicating those who acted with trust and goodwill rather than those who

105. See JEREMY BENTHAM, *Principles of the Civil Code*, in *THE THEORY OF LEGISLATION* 88, 119-20 (C.K. Ogden ed. & Richard Hildreth trans., Kegan Paul, Trench, Trubner & Co. 1931) (1802).

106. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976).

took advantage of their fellows.¹⁰⁷ Thus, while law and economics scholars eschew mushy standards in favor of the bright-line rules that, they say, encourage foresight and chastise sloppiness, critical scholars see the general legal preference for bright-line rules—such as the Exclusivity Axiom—as a bias subtly causing entitlements to gravitate toward the canny, the endowed, and the grasping.¹⁰⁸

Quite aside from this normative attack, Frank Michelman, individually and together with Duncan Kennedy, mounted a controversial challenge on the positive logic of the utilitarian defense of property—that is, on the argument that private property and freedom of contract promote social wealth and well-being. Not so, said these destabilizers; compared with a rule of force on the one hand or with obligatory sharing of wealth on the other hand, private property does not necessarily induce more labor or its consequence, greater social wealth.¹⁰⁹ Whether a property regime does or does not induce labor is simply a matter of empirical fact, they said.¹¹⁰ The implication is that the utilitarian privileging of private property, like the doctrinal pretense of parsing cases, represents not a logical conclusion but rather a political choice, an ideology that favors the status quo even when clothed as liberalism.¹¹¹

Needless to say, utilitarians do not take this attack argument lying down. Richard Posner has argued somewhat cryptically that the Kennedy-Michelman argument simply misunderstands the character of economic incentives.¹¹² Undeterred by such counterattacks, critical strategists are inventive in developing new versions of property—versions that effectively call for some level of redistribution from the rich to the poor, implicitly undermining the idea of ownership's exclusive claims. A generation ago, Charles Reich argued that no one can really take part in politics without some minimum level of assets—and hence democracy necessitates

107. See *id.* at 1742-45, 1773-74.

108. A reprise of this argument appeared in Laurence Tribe's critique of an influential article by Frank Easterbrook. See Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 600-01 (1985) (critiquing Easterbrook, *supra* note 85). But see Frank H. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 624-26 (1985) (acknowledging that *ex ante* approaches are not always dispositive but reasserting that they are informative, productive of social wealth, and more appropriate for judges than Tribe's constitutive approach).

109. See Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Frank I. Michelman, *supra* note 43, at 25.

110. Cf. KELMAN, *supra* note 99, at 159 (noting instances where forced sharing overcomes inefficiencies).

111. See Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 465, 471-73 (1998).

112. See, e.g., POSNER, *supra* note 74, § 3.1, at 30-31 n.1 (responding to Michelman). But see KELMAN, *supra* note 99, at 329 n.4 (criticizing Posner's response).

redistribution.¹¹³ Frank Michelman and Greg Alexander have developed Reich's idea, building on J.G.A. Pocock's rediscovery of the historical "civic republican" tradition in early American political thought¹¹⁴—a tradition, they say, that supports a modern redistributionist state.¹¹⁵ Margaret Radin has argued that property is an essential vehicle for the development of the personality—and hence that the property that is especially close to people's self-definition (e.g., their homes) deserves special protections from the law and precedence over other property rights.¹¹⁶

Numerous other scholars have cast doubt on existing distributions while attacking the Exclusivity Axiom as an impediment to justice. A particularly well-known way to do so is to pose the question that John Rawls asked: What distribution of property would sensible people choose if they could make their choices without knowing where they would wind up on the social pecking order? Behind that "veil of ignorance," according to Rawls, they would choose a modicum of free enterprise along with a social safety net—that is, some private holdings along with a lot of sharing of resources, including the sharing of "natural talents."¹¹⁷ So long, exclusion! Hello, redistribution!

Notice how sharply all this stirs up Blackstone's anxiety. The Blackstonian anxiety stemmed from the fear that when one traces back one's title, it would be found to rest on nothing at all; hence, one's current property might be the fruits of larceny. Larceny from whom? In older times, the answer was from all mankind, to whom God gave the earth in the first place, and who may or may not have "consented" to particular "occupancies" by particular individuals.

The critical strategists pursue this anxious logic. They point out that the doctrinalist and utilitarian strategies fail to solve the question of entitlement and instead simply drag red herrings across the trail.¹¹⁸ Hence, any particular property right has no firm foundation and is still subject to the claims of all humankind. In turn, all humankind may have something to say about the way you use your property—an idea that has a practical

113. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785-86 (1964); see also STEPHEN R. MUNZER, A THEORY OF PROPERTY 241-47 (1990) (discussing the minimum entitlements necessary for "a decent human life in society").

114. J.G.A. POCKOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 506-52 (1975).

115. See Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259, 275 (1992); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329-30 (1987).

116. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

117. JOHN RAWLS, A THEORY OF JUSTICE 101 (1971).

118. See, e.g., KELMAN, *supra* note 99, at 142-44, 165 (arguing that efficiency concerns cannot justify property rules because supposedly efficient outcomes vary depending on the distribution of initial entitlements).

embodiment, for example, in the developing world's calls for technology transfers from more developed nations.¹¹⁹ When all is said and done, on the critical view, property is a social construction and a product of law, a way to get at some larger social goals, of which, of course, redistribution may be one¹²⁰—a position, incidentally, that is not entirely foreign to Blackstone's own.¹²¹

Critical arguments about the socially constructed and socially malleable nature of property have met some vociferous and very serious rejoinders, both from the doctrinalist camp's defense of justly acquired rights¹²² and even more extensively from the utilitarian position that overly enthusiastic redistribution may discourage productive work, leaving less wealth to redistribute.¹²³ But perhaps less predictably, the pure-social-construction approach has also raised some internal problems, as well as warning flags from the Left. Insofar as critical strategists claim that existing property distributions are unjust, they themselves often seem to imply that some exclusive property was once justly held and only later unjustly removed—as in the case of Native American peoples.¹²⁴ In a closely related development, feminist and critical race theory scholars have argued that the talk of rights (possibly including property rights) is not to be so lightly eschewed, because rights-talk holds considerable attraction for the powerless.¹²⁵ Indeed, the rhetoric of rights may be all the more revealing and all the more powerful when applied to unexpected persons and areas—

119. For an exploration of some of the conflicting demands, see Klaus Bosselmann, *Plants and Politics: The International Legal Regime Concerning Biotechnology and Biodiversity*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 111 (1996).

120. See, e.g., KELMAN, *supra* note 99, at 260; see also Singer, *supra* note 5, at 1450-51 (concluding, after an extensive discussion of public accommodations law, that property incorporates "built-in distributive principles" reflecting wider social organization and changing social values).

121. See Alschuler, *supra* note 1, at 34.

122. See, e.g., EPSTEIN, *supra* note 58, at 334-36; NOZICK, *supra* note 57, at 155-64.

123. See, e.g., Thomas W. Merrill, *Wealth and Property*, 38 UCLA L. REV. 489, 495 (1990) (book review). Richard Epstein, wearing his utilitarian hat, makes this point as well. See EPSTEIN, *supra* note 58, at 336-37.

124. See, e.g., SINGER, *supra* note 46, at 23-24; Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 687-89; see also Michael J. Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405, 1415 (1984) (arguing that the critique of "rights-talk" gives no better alternative to those in need).

125. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364-65 (1988). For a review of the differences that emerged between critical race theorists and the Critical Legal Studies movement, see KIMBERLÉ WILLIAMS CRENSHAW ET AL., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* at xiii, xxii-xxvii (1995). Among the critics themselves, Duncan Kennedy has been interested in the ways that legal forms interplay with autonomy. Interestingly enough, Kennedy's most explicit discussion is in *The Structure of Blackstone's Commentaries*, in which he describes the "fundamental contradiction" in the belief that the protection of individual freedom entails legal coercion. Kennedy, *supra* note 14, at 211-13.

the rights of children, the rights of mentally disabled persons, the distribution of rights within intimate settings like the family.¹²⁶ In this vein, the exclusivity axiom is a particularly potent metaphor for dignity and personal efficacy, which may explain why ordinary working people are loath to give up a Blackstonian notion of property as their own exclusive dominion.¹²⁷ Simply as rhetoric, something like the axiom—e.g., in the exclusive right to one's own body—rings powerful chords for the very once-disdained groups whose interests the CLS writers wish to vindicate.¹²⁸

Hence, there may be some muting of the critical prodding of the Ownership Anxiety insofar as it entails an attack on the Exclusivity Axiom. The axiom is a very forceful species of rights-talk,¹²⁹ and the critics' own critics suggest why that kind of talk, for all its frailties, carries important symbolic freight in the very kind of distributional and liberationist projects that so engage the critics.

III. CONCLUSION

Immediately after he made his sweeping and highly quotable assertion equating property with exclusive dominion, Blackstone professed anxiety about the distributional foundations of existing property rights. There are indeed many important questions about the distributional aspects of property, but as this Essay has suggested, Blackstone might have done well to expend some of his anxiety on his first assertion, the purported Exclusivity Axiom. The delicate nature of the axiom appears in Blackstone's own discussion of property, and it unfolds even more dramatically in the modern permutations on Blackstone's three canonical

126. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1866-67, 1892-93, 1907-08, 1910-11 (1987) (arguing that the language of rights can invite serious consideration of unconventional claims); Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1111 (1994) (arguing that feminists' early property claims in marriage opened up at least a partial challenge to the then-current "gendered aspects of the market ideology").

127. On the importance that working-class people place on property, see SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 44-47 (1990). See also Maria Newman, *Housing Plan: From Projects into Co-ops*, N.Y. TIMES, Sept. 27, 1992, at 33 (describing public housing tenants' "almost obsessive" wish to be included in conversions to privately owned units because owners can control their environment and exclude persons they do not want as neighbors). An especially interesting example of property's relation to personal efficacy is seen in ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 18-21 (1961), which describes inmates' tremendous efforts to reestablish property-like claims in personal spaces, personal effects, and "stashes" following institutional divestment of their property.

128. See Alschuler, *supra* note 1, at 49 n.266, 51 n.269 (criticizing critical scholars for failing to pay attention to their own wishes to maintain a zone of autonomy from the community).

129. See Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 348-49 (1996) (describing both the argument that property symbolizes other rights and critiques of that position).

strategies. Each one of these permutations suggests in its own way that while there is something to be gained from the Exclusivity Axiom, property may be much more porous and changeable than is suggested by the assertion of simple exclusive dominion.

The axiom itself exercises a powerful hold on all three canonical strategies, although for different reasons. For doctrinalists, the Exclusivity Axiom is a necessary linguistic device, permitting ever more refined statements of just who has what. For utilitarians, the axiom is a normative background principle, a goal to be attained in order to drive down the dreaded costs of transactions. For critical strategists (or at least many of them), the axiom is a target to be attacked because it constitutes an obstacle to a more just and less hierarchical distribution of property.

At the same time, however, the Exclusivity Axiom poses problems for all three canonical strategies. For doctrinalists, the division of ever more nuanced "exclusive" rights is an artifice that disguises the interactions among entitlements and that ill describes transformations of entitlements over time. For utilitarians, the drive to create exclusive rights may mask more sociable, non-rights-based ways that people overcome transaction costs and prisoners' dilemmas. The problem for critics is different: They may eschew the principle of exclusive dominion, yet the principle still retains a *sub rosa* attraction—not only for securing entitlements when they come into the hands of the previously powerless, but also for the dignitary metaphoric force that the Exclusivity Axiom shares with rights-talk generally.

Indeed, metaphor is the heart of the matter. The very notion of property as exclusive dominion is at most a cartoon or trope, as Blackstone himself must have known—a trope to make complex systems of rights intelligible by the Cartesian practice of division and separate analysis; a trope to suggest the unique motivating power of self-interest (and correspondingly, as the critics have acerbically insisted, a trope to insinuate the pretended pitfalls of sharing or redistribution); and finally, as the critiques of the critics have suggested, a trope that can extend personal dignity and efficacy even to the powerless.

But as a practical matter, property rights have always overlapped social claims with individual ones, just as they have always mixed stability with change over time. Property regimes always consist of some individual rights, mixed with some rights shared with nearby associates or neighbors, mixed with still more rights shared with a larger community, all held in relatively stable but nevertheless changing and subtly renegotiated relationships.¹³⁰

130. See Ellickson, *supra* note 4, at 1322-26 (classifying land regimes according to the number who may enter and use the land and discussing the ramifications thereof); Laura S.

There are profound reasons why property rights have never been held in an exclusive vacuum. People only need property because there are other people who might contest their control of scarce resources. The institution of property mediates among property owners and would-be interlopers. But property regimes quickly fall apart when people do not understand, respect, and tolerate the property claims of others.¹³¹ In its own way, the trope of exclusive dominion can encourage respect for the claims of others. But at the same time, if the trope of exclusivity does any major disservice, it is to overstate the case, concealing the interactive character of property and giving an inappropriately individualistic patina to this most profoundly sociable of human institutions. That is one reason why, when scholars read Blackstone's ringing words about property as exclusion, they should read the rest of the paragraph too—to appreciate Blackstone's anxiety and to consider how much of that anxiety redounds back to the seemingly mighty axiom of exclusive dominion.

Underkuffler, *The Perfidy of Property*, 70 TEX. L. REV. 293, 311 (1991) (book review) (arguing that the concept of property contains both individual and collective elements).

131. See Rose, *supra* note 129, at 363-64.