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INNATE PROPERTY: THE DANGER OF INCONGRUENCY BETWEEN LAW AND THE BIOLOGICAL AND BEHAVIORAL ROOTS OF PROPERTY AND POSSESSIVENESS

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INTRODUCTION

Property law is, in some areas, dangerously out of step with property expectations. Property—the idea that a place, object, or idea can belong

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to a person—is at the root of the world's economies and thus also at the root of much of its laws. Property is neither solely a creature of positive law, nor of some abstract natural law with a moral underpinning, but rather may be biologically determined, much as Noam Chomsky proposed for languages in *Aspects of the Theory of Syntax*.[1] The idea that ownership is at least behaviorally, and perhaps to some extent instinctively, determined has been extensively explored in academic literature[2] and in popular works including Michael Heller's and James Saltzman's recent bestseller *Mine!*[3] This Article takes a broad look at the possible biologically or behaviorally determined origins of personal, real, and intellectual property, as well as property in one's person and reputation.

The legal system's treatment of these four categories of property spans a spectrum. The treatment of property in chattels is most congruent with behavioral norms. The treatment of real property is still mostly congruent, while the treatment of intellectual property is sporadically congruent and the treatment of property in one's person and reputation are not congruent at all. This lack of congruence inevitably creates tension. Where there is high congruence, as with personal and real property, discontent focuses on the allocation of property rather than on its fundamental nature. Where there is less congruence, as in the cases of intellectual property and especially one's person and reputation, the underlying legitimacy of the legal regime is called into question. Part I of this Article looks at the right to exclude, and Parts II through V look at the nature of the innate urge to exclude for each of these four categories of property in turn.

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1 NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965). On the idea that property is instinctive, see Jeffrey Evans Stake, *The Property "Instinct,"* 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B: BIOLOGICAL SCIS. 1763 (2004).

2 *See, e.g.*, Paul T. Babie, Peter D. Burdon, Francesca da Rimini, Cherie Metcalf, & Geir Stenseth, *The Idea of Property: A Comparative Review of Recent Empirical Research Methods*, 26 IND. J. GLOB. LEGAL STUD. 401 (2019); Paul T. Babie, Peter D. Burdon & Francesca da Rimini, *The Idea of Property An Introductory Empirical Assessment*, 40 HOUS. J. INT'L L. 797 (2018); ERNEST BEAGLEHOLE, PROPERTY: A STUDY IN SOCIAL PSYCHOLOGY (NY: MacMillan, 1932); Jeremy A. Blumenthal, *"To Be Human": A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609 (2009); Lita Furby, *Understanding the Psychology of Possession and Ownership: A Personal Memoir and an Appraisal of Our Progress*, *in* TO HAVE POSSESSIONS: A HANDBOOK ON OWNERSHIP AND PROPERTY 457 (Floyd W. Rudmin ed., 1991); Jon L. Pierce, Tatiana Kostova & Kurt T. Dirks, *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCH. 84 (2003); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Jennifer W. Scangos, *Instinct and Rationality: An Evolutionary Approach to Intellectual Property Law*, 15 INTELL. PROP. L. BULL. 65 (2010); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033 (1996).

3 MICHAEL HELLER & JAMES SALZMAN, MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES (NY: Doubleday, 2021).

I. THE RIGHT TO EXCLUDE: A CORE VALUE OF POSSESSION

The bundle of rights that is "property" includes sticks that vary according to the type of property involved and cultural matrix within which it is embedded.[4] One stick that is always present, in some degree, is the right to exclude,[5] which is fundamental to the proprietary instinct: There is an innate urge to say "this thing is mine, and no one can use it unless I let them." This is not to suggest that the right to exclude cannot be lost, given away, or limited in various ways, or that it is equivalent across all cultures. For instance, the Scandinavian *Allemansrätten*, found in the laws of Sweden and several other Scandinavian countries, gives the public a right to engage in what in the United States would be considered trespass on private lands.[6] In far more limited instances in the United States, the right of landowners to exclude is limited by beach access laws in states including California[7] and Florida[8] and by open range laws in some Western states.[9] As a practical matter we all recognize that our right will be subject to societally and legally imposed limitations on the right to exclude; these limitations are almost always poorly received by the property owners.

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4 The debates about the meaning and appropriateness of the "bundle" concept are beyond the scope of this Article, *but see generally, e.g.*, J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) ("The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a 'bundle of rights.'"). This is in contrast to both the earlier absolutist approach stated (but perhaps not actually subscribed to) by Blackstone as well as more recent critiques and rejections of the concept on a variety of grounds. *See* 2 William Blackstone, Commentaries on the Laws of England *2 ("the right of property [is] "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."). *See also generally*, Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 243 (1994).

5 *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[the right to exclude others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'").

6 *See, e.g.*, Matthias Brinkmann, *Freedom to Roam*, 21 J. ETHICS & SOC. PHIL. 209 (2022); REGERINGSFORMEN [RF] [CONSTITUTION] 2:15 (Swed.) ("Alla ska ha tillgång till naturen[.]" ["Everyone has a right of access to nature."]).

7 Paul Balmer, *Martin's Beach Litigation and Eroding Public Access Rights to the California Coast*, 45 ECOLOGY L.Q. 427, 429–30 (2018) ("Combined with Article X of the California Constitution and the Coastal Act, the public trust doctrine also provides a general right of beach access to the public, even if the land above the high-tide line is privately owned.").

8 A recent law restricting public beach access in some parts of Florida has caused considerable controversy. See Alyson Flournoy, Thomas T. Ankersen & Sasha Alvarenga, *Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy*, 25 OCEAN & COASTAL L.J. 1 (2020).

9 *See* Coby Dolan, *Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147 (1999).

What it means to exclude varies with the type of property under discussion. With real property—land—the meaning of exclusion is obvious: The owner can fence off the property, notionally or with an actual fence, and prevent others from entering upon it without implicit or explicit permission—that is, without license or invitation. Those who enter without such permission are trespassers and subject to civil and possibly criminal legal actions.[10] (Against these actions the trespasser may, of course, assert affirmative defenses such as necessity.)

With a chattel, the bounds are nearly as clear: No one may use another's car, bicycle, phone, clothing, or other chattels without permission. But while some chattels have a high personal value, others have much less; an owner is likely to be fairly upset with someone who wears their clothing or goes through their phone without permission, while being indifferent to someone who, even without prior permission, "borrows" a pen from their desk.

With intellectual property, the right to exclude takes the form of the right to make copies of a work[11] or mark[12] or the right to manufacture or make use of an invention.[13] Property in one's person and reputation presents perhaps the greatest dissonance between property law and innate assumptions, with courts and legislatures routinely refusing to acknowledge these interests in a property context, even if they do in other contexts.

II. THE INNATE NATURE OF PERSONAL PROPERTY: A NATURAL AND PERHAPS INEVITABLE CONSEQUENCE OF HAVING OPPOSABLE THUMBS

Small children demonstrate possessiveness over objects at a very young age.[14] Possession of objects is not an instinct limited to humans. Squirrels and birds, among others, store food and other objects for future

10 *See* RESTATEMENT (FOURTH) OF PROP.: INTERFERENCES WITH, AND LIMITS ON, OWNERSHIP AND POSSESSION div. I, ch. 1, topic 1, topic note, *Trespass to Land, Generally* (AM. L. INST., Tentative Draft No. 2, 2021) ("At its core, the tort of trespass to land protects and vindicates a possessor' right to exclusive possession[.]").

11 Copyright Act of 1976, 17 U.S.C. § 106.

12 Lanham Trademark Act, 15 U.S.C. § 1125.

13 Patent Act, 35 U.S.C. § 271.

14 *See* RICHARD PIPES, PROPERTY AND FREEDOM 65 (1999) (proposing that the proprietary instinct is ameliorated and attenuated as children develop and become socialized). *But see* Jay Hook, *Judgments About the Right to Property from Preschool to Adulthood*, 17 LAW & HUM. BEHAV. 135 (1993). *See also* Ori Friedman & Karen R. Neary, *First Possession Beyond the Law: Adults' and Young Children's Intuitions About Ownership*, 83 TUL. L. REV. 679 (2009); HELLER & SALZMAN, *supra* note 3, at 274–76 ("The Toddler's Rules of Ownership").

use.[15] Even insects exhibit behavior that can be interpreted as claiming ownership of objects.[16] As anyone with pets knows, dogs, cats, and parakeets, among others, all have favorite play objects, chew toys, and the like that they will share only with certain people or other pets, if at all. Cats will dedicate minutes or hours to disputing the ownership of a cardboard box. But humans, even more than corvids, raccoons, and other acquisitive animals,[17] stand out for the sheer number of things they take possession of.

This urge to possess things exists independently from, and even in the absence of, any rights arising from the law of chattels. Heller and Salzman use the example of goods placed in a shopping cart at a store: "Imagine a stranger had come up, peered into your cart, taken out the cereal box, then looked again and grabbed the carton of milk."[18]

At that point, the goods do not belong to the shopper; they belong to the store. Yet most people would be at the very least taken aback by such an act, although Heller and Salzman may be overstating the case when they say "You would probably shout at the person, 'What the—what are you doing? That's mine!'"[19] A more common reaction might be mild confusion accompanied by a polite correction, as when an absent-minded stranger starts to wheel off one's cart: "Excuse me, that's my cart."

In all likelihood, every shopper (other than those in the habit of taking items from carts) would agree that deliberately taking items from someone else's grocery cart is unacceptable, at least socially. At the same time, all lawyers would most likely agree that the chattels in the cart are still the property of the store: the shopper who put them there has manifested an intent to purchase them (and thus to acquire legal ownership) by placing them there but has not yet performed the second step of taking the items to the register and paying for them.

Prior possession of a chattel does confer a legal and equitable interest superior to that of subsequent possessors, absent a voluntary transfer of possession.[20] The development of this interest through first possession and attachment, though, seems to follow from something

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15 *See* Sara J. Shettleworth, *Spatial Behavior, Food Sharing, and the Modular Mind, in The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* 123, 125 (Marc Bekoff et al. eds., 2002).

16 *See* BEAGLEHOLE, *supra* note 2, at 31–63.

17 *See, e.g.*, *Fox found with impressive shoe collection in Berlin*, BBC (July 31, 2020), https://www.bbc.com/news/world-europe-53612856 [https://perma.cc/5GXX-49XV].

18 HELLER & SALZMAN, *supra* note 3, at 48.

19 HELLER & SALZMAN, *supra* note 3, at 48. *See also id.* at 240–41 ("the [] ownership toolkit . . . contains six contested pathways to claiming ownership: *first-in-time*, *possession*, *labor*, *attachment*, *self-ownership*, and *family*. And it contains a small handful of design tools including: *ex poste–ex ante*, *rules–standards*, *exclusion–governance*, *baseline setting*, and *liberal commons*. This same toolkit controls both the trivial and the epic.").

20 *See, e.g.*, Armory v. Delamirie (1722) 93 Eng. Rep. 664.

encoded in human behavior, rather than from a positivist attempt to guide behavior through law.[21]

III. THE INNATE NATURE OF REAL PROPERTY: THE TERRITORIAL INSTINCT

Possibly even more basic than the urge to assert a possessory interest in chattels is the urge to assert a possessory interest in land. A similar territorial instinct can be found across an enormous range of species, most of them without a primate's or avian's ability to admire or create gadgets, gizmos, and glittery geegaws.[22] Wolf packs' ranges do not overlap with the ranges of other wolf packs.[23] The collision of this instinct—"the land I occupy and use is mine, and my family's" with increasingly complex economic structures permitting and in some cases requiring that ownership be separated from actual physical occupancy—has created numerous remarkably baroque structures of property law, from the steampunk extravaganza that is Anglo-American property law through the clockwork of civil law property codes[24] to the fascinatingly intricate systems created by Pacific Island nations before being thrown into ongoing disarray by the invasions of the colonialist nations.[25]

While the urge to assert a proprietary interest in land may be to some extent instinctive, it bears a considerable cultural element as well, which blossomed after the development of agriculture.[26] Land ownership

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21 *See* HELLER & SALZMAN, *supra* note 3, at 240–41. *But see* Underkuffler-Freund, *supra* note 2, at 1042 (proposing that property is necessarily a positive allocative right).

22 *See* JOHN ALCOCK, ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH (12th ed. 2022); *see also* Stake, *supra* note 1.

23 *See* Todd K. Fuller & Lloyd B. Keith, *Non-Overlapping Ranges of Coyotes and Wolves in Northeastern Alberta*, 62 J. MAMMALOGY 403 (1981); VOYAGEURS WOLF PROJECT, UNIVERSITY OF MINNESOTA, 2020-2021 GREATER VOYAGEURS ECOSYSTEM WOLF PACK AND POPULATION SIZE REPORT 1 (2021).

24 For an interesting examination of convergence between the Anglo-American system and a system based on both civil law and Islamic law concepts, see Aaron Schwabach, *Convergence and Divergence: The Treatment of Certain Aspects of Real Property Under the Civil Codes of Qatar and California*, 2015 INT'L REV. L. 7 (2015).

25 *See, e.g.*, Melanie Haiken, *Hawaii's Ancient Land Management System*, BBC (Aug. 18, 2022), https://www.bbc.com/travel/article/20220818-ahupuaa-hawaiis-ancient-land-management-system [https://perma.cc/ZRL5-8WH2].

26 *See* Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 L. & SOC. INQUIRY 807 (1999); Floyd Webster Rudmin, *Cross-Cultural Correlates of the Ownership of Private Property*, 21 SOC. SCI. RSCH. 57, 78–79 (1992); Johnson v. M'Intosh, 21 U.S. 543 (1823); *see also* Laura Tuck & Wael Zakout, *7 Reasons for Land and Property Rights to be at the Top of the Global Agenda*, WORLD BANK BLOGS (Mar. 25, 2019), https://blogs.worldbank.org/voices/7-reasons-land-and-property-rights-be-top-global-agenda [https://perma.cc/C346-LQEP] (placing "Secure land rights are an important pillar for agriculture" at the head of a list of reasons for registering legal land ownership).

became important once individual pieces of land became important to specific humans for their ability to be cultivated.[27] As the majority of earth's population has now been agricultural or post-agricultural for millennia, the behavior patterns formed and socially reinforced over thousands of years have either supplemented or supplanted that instinct. And, because land is worth a lot of money and has historically been linked to social status and political influence, a great deal of effort has been expended to ensure some degree of conformity between law and normative expectations. The cracks show up mostly around the edges, with legal oddities like adverse possession or overreaching homeowners' associations exposing the occasional incongruity between those expectations and the law.[28]

IV. THE INNATE NATURE OF INTELLECTUAL PROPERTY: "STOP COPYING ME!"

Shortly after acquiring language, and not too long after first asserting possession of a physical object, children will play the copying game. Language acquisition itself comes through copying; humans' gift for mimicry may be one of the things that makes our complex languages possible.[29] Babies copying words are cute; young children copying entire sentences can irritate each other, and soon one will exclaim "Stop copying me!" The other will then respond, predictably "Stop copying me!"

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27 *See, e.g.*, June Carbone, *Cultural Conflict and the Revival of Class Warfare*, 16 WASH. & LEE J. CIV. RTS. & SOC. JUST. 369, 375 n.21 (2010) (citing FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 57–58 (4th ed. 1964) (1891)). An earlier translation includes Engels' statement that "Along with the production of marketable commodities came the tilling of the soil by individual cultivators for their own account, soon followed by individual ownership of the land." FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE: IN THE LIGHT OF THE RESEARCHES OF LEWIS H. MORGAN 136 (Ernest Untermann trans., 1909) (1884), available at https://archive.org/details/originoffamilypr00enge/page/136/mode/2up?q=ownership [https://perma.cc/WA9N-CDRD]. Politics aside, this seems fairly reasonable.

28 On this disconnect between law and most people's normative expectations, see, for example, EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 35–40 (1936). *See generally* Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 KAN. L. REV. 91 (2009); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 623–27 (1988); Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: J. LEGAL LEFT 79, 112 (2011).

29 *See, e.g.*, Brian Handwerk, *Human Ancestors May Have Evolved the Physical Ability to Speak More Than 25 Million Years Ago*, SMITHSONIAN MAG. (Dec. 11, 2019), https://www.smithsonianmag.com/science-nature/human-ancestors-may-have-evolved-physical-ability-speak-more-25-million-years-ago-180973759 [https://perma.cc/B3DW-QEVK]; Mark Pagel, *Q&A: What is Human Language, When Did it Evolve and Why Should We Care?*, 15 BMC BIOLOGY no. 64 (2017).

This idea—that the expression of an idea belongs, in some way, to the person expressing it—may be uniquely human.[30] Birds copy each other's calls without any apparent raised tempers or hurt feelings—or less, anthropomorphically, without the bird being copied taking any action against or making any threats toward the bird doing the copying.[31]

Problems arise, though, when most people live in a world of owned content. Toddlers can identify more brand logos than they can species of flowers or birds.[32] People who want to write stories of known characters are less likely to be working with a world of shared gods and heroes than poets of earlier millennia were, from Homer through Virgil to Dante. Instead, the shared characters are the superheroes of the Marvel Cinematic Universe, the crews of the various iterations of the starship Enterprise, and assorted Star Wars rebels, droids, Jedi, and Sith. The assertion of the "stop copying me" behavior runs into and, in the current state of most intellectual property regimes, often completely over the "storytelling" behavior.[33]

The advent of near universal internet access has thrown copyright law, in particular, into crisis; copyright law intended to deal with the information technology of the early eighteenth century is poorly suited to the problem.[34] In the absence of effective law, communities tend to self-regulate.[35] The regulations that many online communities have imposed on themselves, as reflected in the disclaimers used by many authors of fan works, for these uses of copyrighted content seem well-suited to the

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30 *See generally, e.g.*, Sharon E. Foster, *Invitation to a Discourse Regarding the History, Philosophy and Social Psychology of a Property Right in Copyright*, 21 FLA. J. INT'L L. 171 (2009).

31 *See, e.g.*, *Why Do Some Birds Mimic the Sounds of Other Species?*, CORNELL LAB (Apr. 1, 2009), https://www.allaboutbirds.org/news/why-do-some-birds-mimic-the-sounds-of-other-species [https://perma.cc/6GKG-JZD6]; Jeffery Boswall, *Birds That Imitate Birdsong*, BRIT. LIBR. (undated), https://www.bl.uk/the-language-of-birds/articles/birds-that-imitate-birdsong [https://perma.cc/A22V-QXQH].

32 Kevin Armitage, *What Studying Nature Has Taught Us*, SOLUTIONS (Feb. 22, 2016), https://thesolutionsjournal.com/2016/02/22/what-studying-nature-has-taught-us [https://perma.cc/4J4Z-AKBX]; *see also Fewer Children Than Ever Know the Names for Plants and Animals*, WORLD ECON. F. (Sept. 10, 2019), https://www.weforum.org/agenda/2019/09/children-are-forgetting-the-names-for-plants-and-animals [https://perma.cc/T63M-EN3B].

33 On this problem generally, see, for example, Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387 (2009); AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION (2011); Aaron Schwabach, *Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFF. INTELL. PROP. L.J. 1 (2012); Aaron Schwabach, *Bringing the News from Ghent to Axanar: Fan Works and Copyright after Deckmyn and Subsequent Developments*, 22 TEX. REV. ENT. & SPORTS L. 37 (2021).

34 On this problem and some possible approaches, see Aaron Schwabach, *Fan Works and the Environmental Law of Copyright*, 24 TUL. J. TECH. & INTELL. PROP. __ (forthcoming 2022).

35 *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 29–57 (Cambridge, UK: Cambridge University Press 1990).

reality of the mass internet, as existing copyright law is not. Typically they restrict use of the copyrighted elements to non-commercial works, require acknowledgment of the author (the moral right of attribution recognized in most systems of copyright law, although not U.S. law),[36] and willingness to take down the work at the content owner's request. Only the last of these comports with current U.S. copyright law; the fact that the others "feel right" to the online communities using them suggests that emerging rules are not mere wishful thinking but that there is a behavioral basis to them, further supported by the fact that the right of attribution is found in civil law copyright codes[37] and the special protection of commercial uses is a feature of a related area of intellectual property, trademark law.[38]

The conflict between personal autonomy—the right to tell stories as one wishes—and hierarchy—the concentrated ownership of story elements—is exacerbated by the fact that the tellers of stories based on proprietary characters are disproportionately likely to be women, nonbinary, trans, genderqueer, or otherwise disempowered by traditional structures of intellectual property ownership.[39] There is a difference

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36 Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [the author's] honor or reputation.").

37 *See, e.g.*, CODE DE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code] art. L121-1 (Fr.) (reading in relevant part: "L'auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre." ["The author enjoys the right to respect for their name, their quality (or capacity) and their work."]).

38 Trademark infringement, as opposed to trademark dilution, applies to the use in commerce of any protected mark.

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

39 *See, e.g.*, Narisa Bandali, *I Wrote This, I Swear!: Protecting the "Copyright" of Fanfiction Writers from the Thievery of Other Fanfiction Writers*, 101 J. PAT. & TRADEMARK OFF. SOC'Y 274 (2019); Casey Fiesler, *The Plight of the Former Fanfiction Author*, SLATE (Aug. 27, 2022, 9:01

between the oppressive inequalities in distribution of real and personal property, which are fundamentally economic, and the inequalities in the distribution of intellectual property, which are fundamentally legal: that is, they result from law's recognition of certain forms of intellectual property to the exclusion of others. This fundamental inequity in recognizing not only who has a right to property, but what property is, occurs even more drastically and destructively in the case of property in one's person.

V. THE INNATE NATURE OF PROPERTY IN ONE'S PERSON AND REPUTATION: WHY IS THIS SO HARD TO RESPECT?

At first glance, it might seem that the case for a right of property in one's person and reputation should be the easiest to make. What, after all, could be more instinctive than that one has an inalienable right to exclusive possession and control of one's own body? Metaphysical issues aside, the body is the self, and the reputation is its presentation to the outside world. More than a piece of land, a set of silverware, or the expression of an idea, one's body is the thing one holds most inviolate. An attack on one's body is a far greater affront than the burglary of a house, the theft of a chattel, or the copying of an idea or expression.

Here is where Locke's famous dictum that "every individual Man has a Property in his own Person"[40] becomes problematic. First, the gendered nature of the statement: Modern readers may assume Locke was using "Man" and "his" as default terms without gender implications, and it is possible that he may have thought of them in that way. He and his contemporary Anglophone readers, however, spent their entire lives embedded in a cultural and legal context in which basic property rights

AM), https://slate.com/technology/2022/08/queer-fanfiction-privacy-ethics.html [https://perma.cc/CY77-5SJW]. *See also* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997); *Sonia K. Katyal, Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 461 (2006); Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433 (2003); Mollie E. Nolan, Comment, *Search for Original Expression: Fan Fiction and the Fair Use Defence*, 30 S. ILL. U. L.J. 533, 549–50, 562 (2006); Christina Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 447–48 (2006); Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387 (2009); Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1581 (2005); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER, SOC. POL'Y & L. 273 (2007); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135 (2007).

40 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. V, § 27 (New York 1952) (6th ed. London 1764).

were partially or totally denied to everyone other than cisgender men, especially cisgender white Christian men. Chattel slavery based on race was not abolished in England until nearly seventy years after Locke's death.[41] The civil rights of Catholics—those who were cisgender men—were not restored until nearly 1830;[42] perhaps inspiring, throughout the nineteenth century, a series of similar reforms that gradually lessened restrictions on the rights of Jews.[43]

It would be more than a century after the abolition of slavery in England that married women gained the full right to own and dispose of property, rather than being treated in law as a *feme covert* whose property and legal personality were in effect transferred to her husband by the marriage.[44] Another century and more would pass before a married woman gained the exclusive right to her own body, when (in 1991) the House of Lords held marital rape to be a crime.[45] In Locke's day, the bar for being hailed as a prophet of liberty was rather low.

It seems self-evident that everyone should have a right of property in their own person. Yet our system of property gives us less ownership of our bodies than it does of any of these other things—chattels, land, or intellectual property. For thousands of years, law did not even guarantee basic ownership of the body by the person whose body it was; a person's body could be owned outright by another and could be bought and sold and traded as a commodity.[46] While the law of property has enabled, and continues to enable, horrifying injustices of all sorts, this—the use of law to create and enforce a system of slavery—is law's grimmest chapter and the greatest argument against the idea that law is inherently a tool for

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41 Slavery was abolished within England itself in Somerset v. Stewart, (1772) 98 Eng. Rep. 499. Locke died in 1704. Stanford Encyclopedia of Philosophy, *John Locke*, STAN. ENCYCLOPEDIA PHIL. (July 7, 2022), https://plato.stanford.edu/entries/locke [https://perma.cc/XT2Z-SR5L].

42 *See* Roman Catholic Relief Act 1829, 10 Geo. 4 c. 7 (Eng.).

43 *See, e.g.*, Jews Relief Act 1858, 21 & 22 Vict c. 49 (Eng.). An earlier attempt to enact a Jewish emancipation bill along the lines of the Catholic Relief Act, *supra* note 42, had been unsuccessful. Bill for Removal of Jewish Disabilities 1830, HC Deb. (17 May 1830) (24) cols. 784–814. *See also* Representation of the People Act 1867, 30 & 31 Vict. c. 102 (Eng.) (extending the vote to all male heads of household in England and Wales); Universities Tests Act 1871, 34 & 35 Vict. c. 26 (Eng.) (removing religious requirements and tests for study, fellowships, and professorships at the universities of Oxford, Cambridge, and Durham).

44 Married Women's Property Act of 1882, 45 & 46 Vict. c. 75 (Eng.).

45 Regina v. R. [1991] UKHL 12, [1992] 1 AC 599, https://www.bailii.org/uk/cases/UKHL/1991/12.html [https://perma.cc/DU4F-FJ75].

46 For some truly horrific statutory reading on humans as property, see, for example, the Virginia Slave Code. THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 447 (William Waller Hening, ed., New York: R. & W. & G. Bartow, vol.3 1823), available at https://encyclopediavirginia.org/3434hpr-5fea62ac533350f [https://perma.cc/FUA6-YEN2]; *see also* Le Code Noir: Recueil d'édits, Déclarations et Arrêts Concernant Les Esclaves Nègres de l'Amérique (1685), available at https://www.axl.cefan.ulaval.ca/amsudant/guyanefr1685.htm [https://perma.cc/4LAL-46Z9].

good. Law has been demonstrated to be just as capable of serving and perpetuating evil.

Slavery, the ugliest chapter in the denial of the right to ownership of one's body and one's self, is not innate. While for obvious reasons available data is sparse, slavery does not appear to exist in early pre-agricultural societies, or appears to be very rare, as it requires a degree of social stratification to exist.[47] It took agricultural and post-agricultural civilization thousands of years to address the injustice of slavery, a work that is still in progress. While legal chattel slavery and its close relative, indentured servitude, are no longer creations of law in most of the world, they continue to exist in conditions of weak enforcement of existing law, and near-analogs—debt peonage, prison labor, and contract labor among them—remain widespread.[48]

Ownership of one's own body in the sense of freedom from slavery does not necessarily include ownership of the physical body itself. In some parts of the world, while the entire person cannot be sold, body parts such as kidneys can be.[49] In the United States, at least, organs from human bodies cannot be sold, even by the person from whose body the parts are taken.[50] The reasons for this may be good: It prevents the poor from being transformed into reservoirs of spare parts for the rich by the inequities of an untrammeled market-based economy in conditions of high economic inequality. Renewable parts of the body, such as blood plasma, can be sold, but the general reluctance to recognize the body as property leads to absurd and tragic results in some cases, when patients whose genomes have made them valuable to medical researchers are unable to profit from the results of that research. Without a property right in their own bodies and genetic information, John Moore[51] and Henrietta Lacks[52] had no legal basis on which to assert a claim for compensation for the immense profits made from their cell lines.

More recently, the United States Supreme Court has chosen to deny basic bodily autonomy to half of the people in the United States. In *Dobbs*

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47 *See* Eric Alden Smith et al., *Wealth Transmission and Inequality Among Hunter-Gatherers*, 51 CURRENT ANTHROPOLOGY 19 (2010).

48 *See, e.g.*, *Amnesty Int'l, Mauritania: Amnesty International Calls for an End to Slavery and Torture and Ill-treatment in Mauritania*, AI Index AFR 38/3691/2016 (Mar. 16, 2016).

49 *See* Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, 85 BULLETIN OF THE WORLD HEALTH ORGANIZATION [WHO] 955 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636295/pdf/06-039370.pdf [https://perma.cc/4CWD-65QC].

50 *See* National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified at 42 U.S.C. §§ 273–274).

51 *See* Moore v. Regents of the Univ. of California, 793 P.2d 479 (1990).

52 *See* REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2010); RON LACKS, HENRIETTA LACKS: THE UNTOLD STORY (2020).

v. Jackson Women's Health Organization,[53] the Court held that *Roe v. Wade*[54] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[55] were incorrectly decided and that the constitutional right to privacy could not be extended to include the right to obtain an abortion—in other words, that any person with a uterus had no rights in their body superior to the state's interest in regulating it. This denial of basic personhood amounts to another judicial affirmation that no one owns their own bodies; our ability to control them is at the mercy of the Supreme Court and state legislatures.

This disregard of property rights in one's own body is in stark contrast to the treatment of bodily autonomy in areas of law other than property. As a rational person might expect, crimes against the person are generally treated more seriously than crimes against other property and are punished more harshly. The person of the criminal defendant is protected as well. The Fourth Amendment places protection of the person first among the categories of property that shall be protected from unreasonable searches and seizures, before both real and personal property: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [.]"[56]

While invasions of a person's reputation are less violent than invasions of bodily autonomy, they can nonetheless do enormous harm to the victim's employment, education, housing, and familial and social relationships. Humans are social, and innately recognize reputation as a thing of value. It has become, and in all likelihood has been for centuries, a cliché for discussions of defamation claims to quote Iago's recognition of reputation as a form of property.[57] Iago may be the villain, but his

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53 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

54 Roe v. Wade, 410 U.S. 113 (1973).

55 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). *Dobbs* also abrogated Doe v. Bolton, 410 U.S. 179 (1973), Colautti v. Franklin, 439 U.S. 379 (1979), Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103 (2020), and other related cases.

56 U.S. CONST. amend. IV.

57 Good name in man and woman, dear my lord,

Is the immediate jewel of their souls:

Who steals my purse steals trash; 'tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands:

But he that filches from me my good name

Robs me of that which not enriches him

And makes me poor indeed.

WILLIAM SHAKESPEARE, OTHELLO, act 3, sc. 3, l. 155–161.

words convey what all of us innately feel: reputational harm is harm to a property interest.

Yet aside from defamation—a tort—the right of property in one's reputation has been given only limited recognition. In *Plessy v. Ferguson*, Plessy's ultimately unsuccessful claim was in part founded on the theory that reputation—in this case, "the reputation of belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance is property."[58] (The lone dissenter in Plessy correctly predicted that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."[59] The Court rejected not so much the underlying property right but Plessy's ownership of it.)

A property right in reputation, going beyond a mere tort right to be free from harm, is recognized for some people: celebrities. The right of publicity clearly divides the world into reputational haves and have-nots. Only the famous—those whose reputation is sufficient to allow them to profit directly from it—are protected. [60] This raises questions as to the worth of the value of other workers' names and likenesses. If a company places its employees' pictures, qualifications, and brief biographies on the company website, that suggests the company believes the information has value, even though the employees are not famous. In other words, if the marketplace assigns value to these non-celebrity public personae, perhaps it is time for the legal system to recognize a universal property right in the public presentation of self. Such a property right might also solve the problem of exploitation of consumers' web browsing data and social media information,[61] more effectively than a top-down control structure.[62]

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[58] Plessy v. Ferguson, 163 U.S. 537 (1896).

[59] *Id.* (Harlan, J., dissenting).

[60] Courts have addressed the rights of publicity of, among others, Dr. Martin Luther King Jr. (Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674, 676 (11th Cir. 1983)), Bette Midler (Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988)), Elvis Presley (Estate of Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981)), and Vanna White (White v. Samsung Elecs. Am., Inc., No. 90-55840, 1992 U.S. App. LEXIS 19253, at *13 (9th Cir. Aug. 19, 1992)). Note that King and Presley were no longer alive at the time of the decisions. In contrast, ordinary persons have fared less well. *See* Caitlyn Slater, *The "Sad Michigan Fan": What Accidentally Becoming an Internet Celebrity Means in Terms of Right of Publicity and Copyright*, 2017 MICH. ST. L. REV. 865, 916 (2017).

[61] Michael A. Geist et al., *Copyright & Privacy—Through the Technology Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 242, 256 (2005) (Presentation of Doris Estelle Long: solutions: "Among the potential solutions . . . [is] 'propertization' of personal information").

[62] See, for example, the European Union's General Data Protection Regulation. Commission Regulation 2016/679, 2016 O.J. (L 119) (EU).

CONCLUSION

We make a mistake in treating property as a positive legal construct created to shape behavior. Rather, it is behavior that shapes property law. Possessive behavior, whether instinctive or learned, has created differing but ultimately equivalent structures for management of land and chattels across a wide range of countries and cultures. While economic injustice and maldistribution of real and personal property—wealth—are severe problems causing widespread suffering, they come about not from a failure of law to incorporate its behavioral roots, but from the hierarchical nature of human societies and the natural human tendency to abuse power for self-enrichment.

With intellectual property and property in one's person and reputation, the congruence between law and behavioral norms is less evident. Some similarities in the management of intellectual property, also ultimately dictated by behavior or instinct, are beginning to become apparent, but there is still significant progress to be made. The outlook for the ownership of one's own person is less encouraging. There persists a widespread divergence between behavioral and perhaps instinctive expectations concerning the respect that should be granted to one's right to control one's own body and reputation or image, and the rights actually protected by law. While laws regarding real and personal property tend to be facially compliant with underlying behavioral norms and produce injustice because they are abused, laws regarding property in one's person and reputation make no pretense of facial fairness or even of compliance to what the majority of humanity innately believes is right. Here, more than anywhere else, the law is deformed by the hierarchical nature of society and rule-making structures, representing the interest that those at the top of the pyramid have in controlling the bodies and selves of those less powerful.