

## ATROCITY, ENTITLEMENT, AND PERSONHOOD IN PROPERTY

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\* Associate Professor of Law, Vanderbilt University Law School. This Article was selected as the winner of the Association of American Law Schools 2011 Scholarly Papers Competition. I thank Mark Brandon, Lisa Bressman, Jim Ely, Eric Kades, Terry Maroney, Ann Mikkelsen, Claire Priest, Jedediah Purdy, Carol Rose, Kevin Stack, and Michael Vandenberg for their excellent comments, and Whitney Gage, Genet Berhane, Jacob Neu, Daniel Widboom, Kate Gilchrist, Melissa Hurter, Drew Austria, and Nora Schneider for their terrific research assistance. I am very grateful for the support of Chris Guthrie and the Vanderbilt University Law School. I am also grateful for comments I received at the American Society for Legal History conference, the 2012 AALS annual meeting, and at faculty workshops at Vanderbilt and the University of Maryland.

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Our fathers wrung their bread from stocks and stones  
 And fenced their gardens with the Redman’s bones  
 —Robert Lowell, “Children of Light”

#### INTRODUCTION

ON March 27, 1963, a pair of reporters from the *New York Times* and *Newsweek*, Claude Sitton and Karl Fleming, arrived in Greenwood, Mississippi,<sup>1</sup> a small town on the banks of the Yazoo River that was becoming the front line in the Student Non-violent Coordinating Committee’s campaign to register black voters. Sitton and Fleming reached Greenwood shortly after police with shotguns and a German shepherd had attacked 150 nonviolent protesters in front of the Leflore County courthouse.<sup>2</sup> In the hours that followed, groups of whites roamed the streets, openly contemplating lynching and murder.<sup>3</sup> The reporters had traveled as a pair and dressed in Brooks Brothers suits on the theory that a mob would not attack men who looked like FBI agents,<sup>4</sup> but no one was

<sup>1</sup> Taylor Branch, *Parting the Waters: America in the King Years, 1954–63*, at 719–20 (1988); Oral History Interview by Leslie Jack with Karl Fleming, *Civil Rights and the Press Symposium*, at 4, <http://civilrightsandthepress.syr.edu/pdfs/Karl%20Fleming.pdf> (last visited Dec. 4, 2011) [hereinafter Fleming Oral History]; see also Karl Fleming, *Son of the Rough South: An Uncivil Memoir* 290, 295–96 (2005) [hereinafter Fleming, *Son of the Rough South*].

<sup>2</sup> Branch, *supra* note 1, at 719–20.

<sup>3</sup> *Id.* at 720; Claude Sitton, *Police Break Up Negroes’ Rally*, *N.Y. Times*, Mar. 28, 1963, at 4.

<sup>4</sup> Fleming Oral History, *supra* note 1, at 3.

fooled that day. When Fleming began snapping pictures for *Newsweek*, they were immediately surrounded by some twenty “roughly-dressed, sullen men on the court house side walk.”<sup>5</sup> “You nigger-loving son-of-a-bitch,” one said to Fleming, “I could use that camera strap to hang your ass.”<sup>6</sup> Another man looked at Sitton, the *Times* reporter, and uttered one of the most haunting lines ever committed to paper during the civil rights era: “We killed two-months old Indian babies to take this country and now they want us to give it away to the Niggers.”<sup>7</sup>

Histories and memoirs have described the comment as “menacing” and “chilling,” like something out of Faulkner.<sup>8</sup> Taylor Branch was so struck by the line that he quoted it in two of the three volumes of his classic account of the civil rights movement.<sup>9</sup> For words spoken on the spur of the moment by a member of an angry, ignorant mob, they are remarkably complex. What does it mean, “We killed two-months old Indian babies to take this country and now they want us to give it away to the Niggers”? While at least one scholar has quoted the line as a reflection on the South’s violent past,<sup>10</sup> at its core it is a statement rooted in the present-day language of entitlement. By the speaker’s reasoning, “this country”—Greenwood, Leflore County, the Delta, all of Mississippi, and the

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<sup>5</sup> Sitton, *supra* note 3.

<sup>6</sup> Fleming Oral History, *supra* note 1, at 4. In Fleming’s memoir, the threat is, “We could use that goddamned camera strap to hang you with. You better git out of Greenwood.” Fleming, *Son of the Rough South*, *supra* note 1, at 295. Claude Sitton reported it as, “that a camera strap would make a dammed good noose to hang you with.” Sitton, *supra* note 3.

<sup>7</sup> Sitton, *supra* note 3. Karl Fleming would remember the encounter slightly differently: “And then this guy says to Claude, ‘Our grandparents killed Indian babies to take this country, and now they’re trying to make us give it to the niggers.’” Fleming Oral History, *supra* note 1, at 4. In Fleming’s memoir, the quote is, “Our grandfathers killed two-month-old Indian babies to take this country, and now they want us to give it away to the niggers.” Fleming, *Son of the Rough South*, *supra* note 1, at 295.

<sup>8</sup> Seth Cagin & Philip Dray, *We Are Not Afraid: The Story of Goodman, Schwerner, and Chaney, and the Civil Rights Campaign for Mississippi* 193 (1988); Mae Miller Claxton, *Outlaws and Indians: Eudora Welty’s “Border” Characters in Delta Wedding*, in Eudora Welty’s *Delta Wedding* 123, 130–31 (Reine Dugas Bouton ed., 2008); James C. Cobb, *The Most Southern Place on Earth: The Mississippi Delta and the Roots of Regional Identity* 237 (1992); see also John Lewis with Michael D’Orso, *Walking with the Wind: A Memoir of the Movement* 248 (1998).

<sup>9</sup> Branch, *supra* note 1, at 718; Taylor Branch, *Pillar of Fire: America in the King Years, 1963–65*, at 68 (1998).

<sup>10</sup> Claxton, *supra* note 8, at 131.

South—belongs to the mob. While his comments carry the heavy threat of violent resistance to any attempt at redistribution, they also imply that redistribution would be unfair, even absurd.

What is the basis for this sense of entitlement? It is not adequately explained by conventional accounts of property rights. The speaker admits that the people he describes as “we”—the Greenwood mob or, more generally, Mississippi whites opposed to African American voting rights—were not the first people to claim ownership of the area.<sup>11</sup> Nor does the claim derive from labor in the land;<sup>12</sup> the entitlement hinges on a far more suspect kind of effort. The speaker’s words are too specific to suggest acquisition from the original Native American owners through conquest or “discovery”; the Delta did not belong to the lynch mob because a tribe was defeated, bought out, or removed by the federal government.<sup>13</sup> The mob was not tracing title to the early nineteenth-century speculators who, legitimately or not, bought the “Yazoo lands” that constituted Alabama and Mississippi from the State of Georgia.<sup>14</sup> Rather, the mob looked to ancestors who acquired the land by killing “two-months old Indian babies.” The mob’s claim is rooted in atrocity.

As a reflexive matter, it may be tempting to regard this notion as unworthy of discussion—the ravings of a violent racist. The law

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<sup>11</sup> See Joseph William Singer, *Original Acquisition of Property: From Conquests & Possession to Democracy & Equal Opportunity*, 86 *Ind. L.J.* 763, 766 (2011) (“[T]itle to land in the United States rests on the forced taking of land from first possessors—the very opposite of respect for first possession.”).

<sup>12</sup> The supposed inability or unwillingness of Native Americans to exploit the land was a traditional, if erroneous, basis for justifying its taking. See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823) (“[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.”); Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* 41–42 (2010) (discussing Locke’s understanding of aboriginal versus settler claims); see also Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 46–48, 187 (2005) (describing Locke’s views as inconsistent with early settlers’ acknowledgment of Indian agriculture, and Marshall’s account of colonial land acquisition in *Johnson v. M’Intosh* as “wildly inaccurate”).

<sup>13</sup> The statement implies that the original owners were in possession at the time their land was taken from them, and it ignores the niceties of whether the Native Americans were using the land in a permanently settled way or whether the federal government had extinguished the original Indian title.

<sup>14</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 87–89 (1810); Banner, *supra* note 12, at 171.

would never recognize murder as the basis for property.<sup>15</sup> But the idea that terrible crimes could create claims of entitlement—the sense, however implausible, that the worst wrongs give rise to the most enduring rights—has an undeniable, if unexplained, place in American law. On one level, it is widely understood that property owners will use violence to protect the rights they already have. Judges routinely anticipate that people will resort to deadly force over even the most picayune trespasses.<sup>16</sup> This possibility of violence suggests to some courts that tough, unambiguous penalties against trespassers are necessary to avoid a rash of vigilantism.<sup>17</sup> At the same time, most states allow people in their homes to kill intruders under circumstances that traditionally would have been murder. The logic behind “castle doctrine” assumes that so many otherwise law-abiding men and women would use deadly force in such circumstances that excusing these homicides is necessary to keep the law legitimately in line with social practice.<sup>18</sup> People commit these acts of violence, we postulate, because they have such a strong investment, material and emotional, in their property. They will die for their property, so they will kill for it.<sup>19</sup>

A related, but very different kind of question emerges from the notion that murdering “Indian babies” could form a basis for entitlement. The view from Greenwood, Mississippi, suggests that while a connection to property may well drive violence over it, the

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<sup>15</sup> Cf. Tracey B. Cobb, Comment, Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law, 39 Hous. L. Rev. 1483, 1485 (2003) (describing how more than forty states and the federal government have enacted “Son of Sam” statutes forbidding convicted criminals from profiting from the notoriety of their crimes).

<sup>16</sup> See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 161 (Wis. 1997) (“Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.”).

<sup>17</sup> *Id.* at 160–61.

<sup>18</sup> See D. Benjamin Barros, Home as a Legal Concept, 46 Santa Clara L. Rev. 255, 259–61 (2006) [hereinafter Barros, Home]; D. Benjamin Barros, Legal Questions for the Psychology of Home, 83 Tul. L. Rev. 645, 648–51 (2009).

<sup>19</sup> Compare Barros, Home, *supra* note 18, at 259–76 (describing the strong protections from invasion given to homeowners, as well as the deep psychological connection between homeowners and their property), with Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 991–92, 996–1000 (1982) (describing the home as a “moral nexus between liberty, privacy, and freedom of association,” thereby making it “an insult for the state to invade one’s home because it is the scene of one’s history and future, one’s life and growth”).

converse can also be true: killing fosters a connection to property. The mob's ancestors killed for the land, so now the mob will die for it.

This Article explores how people identify with their property when they have committed hurtful and harmful acts in its acquisition and use. The inverted correlation between ownership and violence complicates a dominant view in legal scholarship that property creates or reinforces “personhood,” a “value” in property law that has long been equated with autonomy, dignity, and basic civil rights. Rooted in Hegel’s *Philosophy of Right*,<sup>20</sup> given concrete form by a century of psychological literature,<sup>21</sup> and canonized in legal thought in a classic 1982 article by Professor Margaret Jane Radin,<sup>22</sup> personhood theory views property as necessary for an individual “to achieve proper self-development—to be a *person*.”<sup>23</sup> Because people are “bound up” in their property, it has a crucial “human flourishing” function<sup>24</sup> as well as a central role in the progression “from abstract autonomy to full development of the individual in the context of the family and the state.”<sup>25</sup> As a result, personhood presents what Radin calls a “moral basis” for resolving legal questions across a broad range of property-related doctrines, separate and apart from categorical defenses of the right to exclude or utilitarian justifications for particular allocations of rights and uses.<sup>26</sup> For thirty years, scholars have viewed Radin’s insights as an alternative from the left to traditional, more utilitarian and economically focused property theories.<sup>27</sup>

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<sup>20</sup> Radin, *supra* note 19, at 971–78.

<sup>21</sup> See Nestor M. Davidson, Property and Relative Status, 107 Mich. L. Rev. 757, 770 (2009).

<sup>22</sup> Radin, *supra* note 19, at 971–78.

<sup>23</sup> *Id.* at 957.

<sup>24</sup> Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 748 (2009) (equating “human flourishing” with “enabl[ing] individuals to live lives worthy of human dignity”).

<sup>25</sup> Radin, *supra* note 19, at 972.

<sup>26</sup> *Id.* at 959, 991–1013. For a brief discussion of the property doctrines engaged in Radin’s article, see *infra* notes 47–51 and accompanying text.

<sup>27</sup> See, e.g., David L. Rosendorf, Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights, 45 U. Miami L. Rev. 701, 708–12 (1990–1991); Jeanne Schroeder, Three’s A Crowd: A Feminist Critique of Calabresi and Melamed’s *One View of the Cathedral*, 84 Cornell L. Rev. 394, 404 n.31 (1999).

It is undoubtedly true that many people derive great satisfaction and a sense of personhood from exercising their property rights in socially and environmentally responsible ways and from contributing to the interests and aspirations of a broader community.<sup>28</sup> At the same time, this Article suggests that when conflicts over ownership and use arise, even harmful conduct can become conflated with the rights of ownership and with people's identities as owners. These moments when violence and pain intensify the bond between people and their property reveal how personhood does not always have a progressive valence. It presents itself less as a value that should be recognized—a basis for decision making—than as a set of challenges for property law to navigate as it seeks to define and protect individual rights and obligations in a peaceful, prosperous, and democratic society.

The connection between violence and personhood has deep roots in the American experience, extending back to the earliest colonial encounters between Europeans and Native Americans, and it continues today at a less cataclysmic level in everyday conflicts involving property owners, their neighbors, and the government. If colonial violence played a role in establishing a cultural value that encouraged personal identification with property,<sup>29</sup> today's conflicts show how personhood remains a complicated product of ownership that can defy easy categorization as good or bad.

In writing about the connection between violence and personhood, I discuss a broad spectrum of conduct, from historical massacres to the most commonplace unneighborly acts. To reflect this conceptual range, I call the personhood that arises from nasty conduct the "atrocity value" in property. It is a phrase that encompasses the worst acts imaginable—what the Oxford English Dictionary terms "horrible or heinous wickedness"—as well as acts that are merely "atrocious," or "violations of taste or good manners."<sup>30</sup> If "atrocity" appears to be a hyperbolic way to describe, say, unsightly landscaping that dismays the neighbors, it captures

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<sup>28</sup> See Alexander, *supra* note 24, at 748.

<sup>29</sup> The link between violence and a national property tradition is not limited to the United States. Analogies are readily available to the South African, Australian and New Zealand, and Israeli experiences. See Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 *Theoretical Inq. L.* 237, 260–61 (2004).

<sup>30</sup> *Atrocity Definition*, 1 *Oxford English Dictionary* 757 (2d ed. 1989).

the vehemence with which people fight over such matters and the significance that keeping a ratty couch in the yard can attain with regard to how owners see their property and themselves.

In questioning personhood's progressive valence, this Article develops three insights about personhood and the American property tradition. First, I argue that personhood is more pervasive and deeply rooted in American property law than most scholars have realized because it is not limited to doctrinal areas associated with progressive goals for property. If personhood is fostered by bad conduct, in cases where "human flourishing" and "the freedom to live one's life on one's own terms" through property ownership is a function of mistreating others, it becomes much more difficult to resolve property disputes on the basis of personhood.<sup>31</sup> There will always be winners, and there will always be losers—and in some cases the winners will value their property precisely because there are losers.<sup>32</sup> Progressive theorists have declared that "[p]roperty law can render relationships within communities either exploitative and humiliating or liberating and ennobling."<sup>33</sup> In cases in which the humiliating and ennobling aspects of property are two sides of the same coin, the absence of a stated goal of promoting personhood—related to what Professor Henry Smith describes as the indirect connection between ends and means in property law—has allowed property law to domesticate and resolve even the most inflamed conflicts within an institution that promotes order, predictability, and cooperation.<sup>34</sup>

Second, this Article seeks to refine one sense of how property works in American society. It is often said that property is a social institution.<sup>35</sup> But so is a pogrom. Social institutions do not have to

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<sup>31</sup> Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 *Cornell L. Rev.* 743, 743 (2009).

<sup>32</sup> This is not just a question of how attention to relative status causes people to "invest the individual relationship with the material things of the world with a potentially dysfunctional regard for other people's property," as Professor Nestor Davidson has perceptively reasoned. See Davidson, *supra* note 21, at 798–99. In Part I, *infra*, I suggest additional reasons why personhood may spring from hurting others.

<sup>33</sup> Alexander et al., *supra* note 31, at 744.

<sup>34</sup> Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 *Cornell L. Rev.* 959, 959, 971–74 (2009).

<sup>35</sup> See Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* 3 (2000); Carol M. Rose, *Possession as the Origin of Property*, 52 *U. Chi. L. Rev.* 73, 81–88 (1985) [hereinafter *Rose, Possession*]; Carol M. Rose, *The Comedy*



be sociable; violence can also be constitutive of communities.<sup>36</sup> But property regimes are not violent. They often reveal human behavior at its most inspiring. They require, as Professor Carol Rose observed, a great deal of cooperation, enough in fact to call into question classical assumptions of rational utility-maximizing.<sup>37</sup> Property is a sociable institution despite the high stakes of conflicts over it—not just economic stakes, but deeply personal stakes on both sides of an issue. One of the achievements of property law is the way that it contains personhood, turning threats to the regime into occasions that strengthen it.<sup>38</sup> While property law tends to check much of the most atrocious behavior, the decisions often turn on questions that are independent of whether the litigants' conduct is good or bad or whether they are deriving the right kind of personhood from their property. Not basing decisions on personhood can mean that some people succeed in getting a right to be hurtful, unneighborly, or worse. But more often, it means that property law can guide and govern people who are invested in atrocious exercises of ownership without directly attacking their personhood or otherwise defining them as outsiders to the regime.

Third, acknowledging the atrocity value in property may help explain some of the deep-seated resistance of many Americans to particular reforms that privilege social obligation or, more broadly,

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of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 711–12 (1986) [hereinafter Rose, Comedy].

<sup>36</sup> In a groundbreaking study of the relationships of Jews, Christians, and Muslims in fourteenth-century Aragon, the historian David Nirenberg advocated normalizing and contextualizing the study of violence, of recognizing “a constructive relationship between conflict and coexistence.” David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* 9 (1996). “[V]iolence and aggression are forms of association,” Nirenberg wrote. “Even wars . . . are forms of interaction that seek to establish relations, not destroy them. As Georg Simmel put it: ‘In contrast to . . . pure negativity, conflict contains something positive. Its positive and negative aspects, however, are integrated; they can be separated conceptually, but not empirically.’” *Id.* at 9–10.

<sup>37</sup> Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *Yale J.L. & Human.* 37, 51 (1990).

<sup>38</sup> While other areas of law also succeed in cabining threats to their legitimacy—most notably criminal law's establishment of a “monopoly of violence,” Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1614 (1986)—one of the keys to property's success is that it often resolves personally fraught conflicts without addressing personhood directly. See *infra* Part III.

eliminate externalities.<sup>39</sup> There are many ways to account for the widespread hostility to environmental measures and other forms of regulation. We often presume it is because regulation prompts people to imagine that the government will come for their property next.<sup>40</sup> There is widespread denial that certain problems such as global warming exist, and, for a variety of reasons, many see the government as an outside entity that will never represent or consider their interests.<sup>41</sup> But individuals are also capable of contemplating externalities and collective responsibility. The atrocity value that shadows personhood suggests how polluting uses can become indistinguishable from the meaning of a property right and of ownership itself. Property law's success in realizing certain progressive "human flourishing" goals will turn on how it acknowledges and works with manifestations of personhood that run contrary to those goals.<sup>42</sup>

This Article proceeds in three parts. Part I examines the centrality and progressive valence of personhood as a conception of property and sketches out a case for why atrocity might foster beliefs of entitlement, gesturing towards Radin's own "intuitive account" of personhood. However, instead of rooting my discussion in Hegel as Radin did, I turn to social psychology and accounts of law and violence to show how bad acts committed in the course of acquiring and owning property can create a deep connection between owner and land.<sup>43</sup> In Part II, I attempt to historicize personhood in the

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<sup>39</sup> See, e.g., Ilya Somin, *The Politics of Economic Development Takings*, 58 *Case W. Res. L. Rev.* 1185, 1190–91 (2008). For a classic example of judicial hostility to environmental regulation, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031–32 (1992).

<sup>40</sup> See *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) ("The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.").

<sup>41</sup> Cf. Amitai Etzioni, *The Socio-Economics of Property*, in *To Have Possessions: A Handbook on Ownership and Property* 465, 467 (Floyd W. Rudmin ed., 1991) ("When I ask Americans which is a more serious crime: stealing the car of a neighbor, a corporation, or the government, they typically rank the government car last . . . . They treat the government as if it were that of a foreign occupying force rather than an instrument of the community.").

<sup>42</sup> See Smith, *supra* note 34, at 973–74.

<sup>43</sup> This is not to say that personhood is always a product of violence and pain. Property ownership is often ennobling for individuals and communities. But it is very diffi-

American property tradition. I focus on the Puritan settlement of Massachusetts and the origins of a peculiarly American identification with property: what made it possible for English settlers to embrace the land rather than resist the wilderness. I suggest that personhood was a feature of ownership without moral valence: the product of cooperation and community-building with Native Americans, but also of genocidal conflict with them. As a primary case study, I examine King Philip's War, a conflict in 1675–76 that echoed for hundreds of years in the Indian wars that moved westward across the continent.<sup>44</sup> In Part III, I survey how atrocity continues to foster personhood in an array of contexts involving common ownership, exclusion, and use. I argue that property law is often successful in promoting “human flourishing” and cooperation when it does not attempt to decide cases on the basis of a personhood value in property.

#### I. INTUITIONS OF PERSONHOOD: MAKING SENSE OF THE ATROCITY VALUE

In the three decades since Margaret Jane Radin published *Property and Personhood*, personhood has emerged as an essential lens for viewing property.<sup>45</sup> Some of the most compelling recent works of property scholarship have built on Radin's insights to explore the American property tradition and progressive property theory.<sup>46</sup> But the connection between atrocity and personhood challenges at a basic level how personhood has been commonly understood and applied. This Part examines the assumption that personhood is a progressive value in property, considers the legacy of Radin's work in contemporary scholarship, and then draws on psychological lit-

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cult to distinguish innocent from atrocious personhood, and the cultural importance that Americans attach to personhood in property is rooted in violence.

<sup>44</sup> Jill Lepore, *The Name of War: King Philip's War and the Origins of American Identity*, at xiii (1998); Richard Slotkin, *Regeneration Through Violence: The Mythology of the American Frontier, 1600–1860*, at 79 (1973).

<sup>45</sup> See, e.g., Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 *Duke L.J.* 1047, 1054–56 & accompanying notes (2007) (describing personhood as a “leading approach to property”).

<sup>46</sup> As a general matter, I share the aspirations of *A Statement of Progressive Property*, supra note 31, at 743, and believe that understanding why such a vision is bound to be resisted is crucial to moving the law in a progressive direction.

erature and cultural and legal theory to explain the link between atrocity and personhood.

*A. The Progressive Valence and Legacy of Personhood*

The connection between atrocity and personhood—what I call the “atrocity value” in property—is not obvious. Although Radin’s article does not assign an overt political valence to personhood, the piece implicitly suggests one when it discusses how personhood manifests itself in and can be applied to legal issues. According to Radin, personhood buttresses the right to privacy and the sanctity of the home,<sup>47</sup> supports residential tenants’ rights relating to termination and warranties of habitability,<sup>48</sup> privileges physical takings over regulatory takings,<sup>49</sup> justifies free speech claims on commercial private property,<sup>50</sup> and protects dissenters from land use decisions that represent “mainstream majority moral attitudes.”<sup>51</sup> Although personhood theory has encountered some cogent critiques in recent years, the pushback has focused more on the extent to which people constitute themselves through their property than on the normative valence of the theory.<sup>52</sup> Personhood, as Radin and a generation of scholars have assumed, protects “Native American group claims to their ancestral territory.”<sup>53</sup> It seems perverse to suggest that the idea has anything to do with property claims of the people who massacred them.

For understandable reasons, then, scholars have overlooked how people become “bound up” in their property—in what personhood

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<sup>47</sup> Radin, *supra* note 19, at 991–92, 997–1001.

<sup>48</sup> *Id.* at 992–96.

<sup>49</sup> *Id.* at 1004.

<sup>50</sup> *Id.* at 1008–09.

<sup>51</sup> *Id.* at 1012–13.

<sup>52</sup> See, e.g., Davidson, *supra* note 21, at 798–800; Stephanie M. Stern, Residential Protectionism and the Legal Mythology of the Home, 107 Mich. L. Rev. 1093, 1095–97 (2009) [hereinafter Stern, Residential]; Stephanie M. Stern, The Inviolable Home: Housing Exceptionalism in the Fourth Amendment, 95 Cornell L. Rev. 905, 926–29 (2010). While Stern questions the emotional investment people make in their homes, Davidson notes that personhood theories are complicated by pervasive status-signaling in property culture that has “as much potential to warp identity as to embody or foster it.” Davidson, *supra* note 21, at 798.

<sup>53</sup> Radin, *supra* note 19, at 1006.

theory would deem the best and most morally defensible ways<sup>54</sup>—when they have committed hurtful and harmful acts for it. In the generation following the publication of Radin’s article and the emergence of personhood theory, two major related areas of property scholarship have taken shape. First, there has been a revived interest in what scholars have called the “American property tradition.” Complicating the classical utilitarian “preference-satisfying conception of property,”<sup>55</sup> scholars such as Professors Carol Rose and Gregory Alexander have noted a competing emphasis in American property law on civic virtue and the public good. Rooted in Aristotle and famously articulated by Thomas Jefferson, the American property tradition links the autonomy of ownership to the desire and ability to participate as an independent, virtuous citizen in a republic.<sup>56</sup> Property and American nationhood are intuitively linked to property and personhood. In his classic 1782 collection, *Letters from an American Farmer*, J. Hector St. John de Crevecoeur described the distinctly American effect of ownership of land: “It feeds, it clothes us, from it we draw even a great exuberancy . . . . [N]o wonder that so many Europeans . . . cross the Atlantic to realize that happiness.”<sup>57</sup> “[T]he bright idea of property,” in Crevecoeur’s timeless phrasing, forms the heart of the American republic, but also of a more personal American dream.<sup>58</sup>

In a related development, some of the same scholars have created theories of “progressive property” that seek to push the doctrine towards “establish[ing] the framework for a kind of social life

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<sup>54</sup> To use Radin’s examples, such owners would not engage in unhealthy “object fetishism” or “fetishism of commodities.” *Id.* at 969–70.

<sup>55</sup> Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776–1970*, at 1 (1997); see Carol M. Rose, “Takings” and the Practices of Property: Property as Wealth, Property as “Propriety,” *in* *Property and Persuasion* 49, 51 (1994).

<sup>56</sup> Alexander, *supra* note 55, at 29–31; Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 *S. Cal. L. Rev.* 561, 588–93 (1984); Rose, *supra* note 55, at 58–62.

<sup>57</sup> Beyond the emotional effect of property, Crevecoeur also discussed the political rights that ownership brings. J. Hector St. John de Crevecoeur, *Letters from an American Farmer* 27 (Fox, Duffield & Co. 1904) (1782).

<sup>58</sup> See Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 *Cornell L. Rev.* 1009, 1010 (2009) (“The family home is the core of the American Dream, and that means that property is central to the way we Americans define ourselves as a people.”).

appropriate to a free and democratic society”<sup>59</sup>—a law of property that promotes values that include “life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one’s life on one’s own terms.”<sup>60</sup> In what they see as an optimistic and personhood-affirming rejoinder to classical utilitarian and contemporary Law and Economics approaches, progressive scholars focus on property’s “inherently relational” nature.<sup>61</sup> “[O]wners,” Gregory Alexander recently wrote, “necessarily owe obligations to others. . . . That which is socially cognizable as property is only that form of access to resources that is consistent with human flourishing and community itself.”<sup>62</sup> Progressive notions of property share much of the same orientation as personhood theory in their valorization of individual autonomy and critique of commodified market relations.<sup>63</sup> But neither theory fully accounts for the multiple valences of personhood and how property law manages personhood claims that conflate atrocious conduct with what constitutes an ownership right and with what makes ownership sweet. The next Section considers why violence and pain might foster personhood, drawing on social psychology and cultural and legal theory.

### *B. Understanding the Atrocity Value in Property*

#### *1. Initial Intuitions*

In *Property and Personhood*, Margaret Jane Radin began her argument with an intuitive case that “there is such a thing as property for personhood because people become bound up with ‘things,’” the loss of which “cannot be relieved by the object’s replacement.”<sup>64</sup> The primary example she gives involves a wedding ring: “[I]f a wedding ring is stolen from a jeweler, insurance pro-

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<sup>59</sup> Alexander et al., *supra* note 31, at 744.

<sup>60</sup> *Id.* at 743.

<sup>61</sup> Alexander, *supra* note 24, at 747 & n.2; see also Purdy, *supra* note 12, at 2, 4–5, 135; Joseph William Singer, *Entitlement: The Paradoxes of Property* 130–39 (2000); Singer, *supra* note 35, at 3; Eduardo M. Peñalver, *Property as Entrance*, 91 *Va. L. Rev.* 1889, 1907, 1911, 1917–18 (2005); Singer, *supra* note 58, at 1045–46.

<sup>62</sup> Alexander, *supra* note 24, at 747–49.

<sup>63</sup> See, e.g., Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* 26–27 (2010).

<sup>64</sup> Radin, *supra* note 19, at 961, 959.

ceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so.”<sup>65</sup> A ring in a Tiffany display window is a fungible commodity, but on a bride’s finger it is something much more.<sup>66</sup>

One can begin to understand the personhood that inheres in atrocity with another example involving a jewel based on the canonical eighteenth-century English case, *Armory v. Delamirie*.<sup>67</sup> In *Armory*, a chimney sweep’s boy found a jewel and showed it to a goldsmith’s apprentice who then took it and refused to give it back. While neither party had a particularly strong claim on the ring, the court resolved the case in favor of the chimney sweep’s boy, who could sue to get the jewel back because he had a superior property claim to “all but the rightful owner.”<sup>68</sup> The court made no comment on the personal stakes of the case. Personhood had nothing to do with the decision, and its resolution in favor of the first possessor has applied equally in cases involving two innocent finders or two converters.<sup>69</sup> As a result, *Armory* provides a useful starting point to consider the notion that personhood can have competing valences: how each side of the conflict derives personhood from the jewel.

What is the value of the jewel to the chimney sweep’s boy? It is a fungible commodity—he brought it to the goldsmith to get an appraisal—but also much more. Chimney sweepers lived brief, tragic lives “lock[e]d up in coffins of black,” heads shorn, gasping for breath.<sup>70</sup> Many chimney sweeps’ boys never lived to adulthood. A

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<sup>65</sup> Id. at 959.

<sup>66</sup> Radin might be overestimating the sentimental value of a wedding ring in a society where half of all marriages end in a divorce. Over the course of a marriage, as fashions change and people get wealthier, many trade their rings in for something nicer. See Joan Y. Dickinson, *The Book of Diamonds* 169 (Dover ed. 2001). In *Great Expectations* by Charles Dickens, Wemmick famously viewed rings as “portable property.” Charles Dickens, *Great Expectations* 158 (Bizarro Press 2009) (1861).

<sup>67</sup> 1 Strange 505 (K.B. 1722). The case is reprinted in at least two widely taught casebooks. See Jesse Dukeminier et al., *Property* 96 (6th ed. 2006); Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 220–21 (2007).

<sup>68</sup> *Armory*, 1 Strange at 505.

<sup>69</sup> See, e.g., *Clark v. Maloney*, 3 Del. (3 Harr.) 68, 69 (1840); *Anderson v. Gouldberg*, 53 N.W. 636, 637 (Minn. 1892). Both cases are reprinted in Merrill & Smith, supra note 67, at 222–25.

<sup>70</sup> William Blake, *The Chimney Sweeper*, in *Songs of Innocence*, in *The Complete Poetry & Prose of William Blake* 10 (David V. Erdman ed., Univ. of Cal. Press 1981) (1789) (“When my mother died I was very young, / And my father sold me while yet

valuable jewel could be the start of a new life. It could represent the difference between life and death.

What does the jewel mean to the person who steals it from the chimney sweep? It is certainly a fungible commodity for him, too; after all, the goldsmith's apprentice was appraising the piece and attaching a monetary figure to it. The jewel could also be a path out of a grueling apprenticeship, although a goldsmith's apprentice presumably had far better prospects than a chimney sweep's boy. Or, taking the jewel could be an expression of professionalism, the proper action of a trained appraiser who suspects that the chimney sweep stole it or believes the true owner may be more likely to be reunited with the piece if it were kept by a goldsmith's shop. Finally, taking the jewel could be status-affirming: inflicting harm on the chimney sweep's boy—belittling him, ignoring his plight—might elevate the relative importance of the goldsmith's apprenticeship.<sup>71</sup> Not being swayed by sympathy—insisting that his actions were right and justified—could be closely linked to the apprentice's identity. While Radin intuits that “one should not invest oneself *in the wrong way* or *to too great an extent* in external objects,”<sup>72</sup> the goldsmith's apprentice is not engaged in what Radin has deemed unacceptable manifestations of personhood. His interest in the jewel is not “object fetishism,”<sup>73</sup> for example, nor is he the “caricature capitalist” who seeks “control over a vast quantity of things and other people.”<sup>74</sup> The apprentice's relationship to the jewel may be entirely proper and personal, to the same extent that it is cruel and selfish.

## 2. *The Social Psychology of Atrocity and Personhood*

Despite the arguably abhorrent nature of the act of the goldsmith's apprentice—stealing from and all but dooming a poor, defenseless boy—it is unlikely to prompt much soul-searching, even if the apprentice has a normal conscience. Social psychology research of the last half-century has revealed the great lengths to which

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my tongue, / Could scarcely cry weep weep weep weep, / So your chimneys I sweep & in soot I sleep.”). I thank Ann Mikkelsen for suggesting this source.

<sup>71</sup> Cf. Davidson, *supra* note 21, at 798–99.

<sup>72</sup> Radin, *supra* note 19, at 961.

<sup>73</sup> *Id.* at 969–70.

<sup>74</sup> *Id.* at 970.



most people will go to rationalize their harmful acts.<sup>75</sup> They might think of the victim as a wrongdoer: the chimney sweep was a thief.<sup>76</sup> They might think of the victim as an outsider: a lowly chimney sweep's boy is not entitled to be treated as an equal.<sup>77</sup> They might minimize the harm done by their acts: the jewel was not worth that much anyway.<sup>78</sup> And they might view their acts as an affirmation of who they are and how dedicated they may be to someone or something: this is what a good goldsmith's apprentice must do to fulfill his duty to act on suspicious appraisals, and being a good goldsmith's apprentice is an honorable position in life.<sup>79</sup> In one way or another, they double down and commit all the more to their harmful conduct.<sup>80</sup>

The real property context is fraught with occasion for self-justifying behavior. People take property that others claim as their

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<sup>75</sup> See generally Elliot Aronson, *The Social Animal* 175–246 (7th ed. 1995) [hereinafter Aronson, *The Social Animal*]. Discussions of self-justification in social psychology are rooted in theories of “cognitive dissonance.” See, e.g., Leon Festinger, *A Theory of Cognitive Dissonance* 3 (1957). Festinger's work has inspired a half-century of theoretical and experimental work probing when and why people engage in self-justifying behavior, what kinds of behavior they exhibit, and whether such behavior can be modified, reduced, or eliminated. See, e.g., Elliot Aronson, *The Return of the Repressed: Dissonance Theory Makes a Comeback*, 3 *Psychol. Inquiry* 303, 303 (1992); Joel Cooper & Russell H. Fazio, *A New Look at Dissonance Theory*, 17 *Advances in Experimental Soc. Psychol.* 229, 229–32 (1984); Rob W. Holland et al., *Dissonance on the Road: Self-Esteem as a Moderator of Internal and External Self-Justification Strategies*, 28 *Personality & Soc. Psychol. Bull.* 1713, 1713–15 (2002); Jeff Stone et al., *When Exemplification Fails: Hypocrisy and the Motive for Self-Integrity*, 72 *J. Personality & Soc. Psychol.* 54, 55, 63–64 (1997). For psychoanalytical explanations of similar conduct under the rubric of reaction formation, sublimation, and projection, see generally Anna Freud, *The Ego and the Mechanisms of Defense* (rev. ed. 1979); George E. Vaillant, *Ego Mechanisms of Defense: A Guide for Clinicians and Researchers* (1992). I rely primarily on the social psychological literature, as opposed to psychoanalysis, because the concepts of self-justification and cognitive dissonance derive more naturally from situations analogous to the property cases I discuss throughout this Article.

<sup>76</sup> See, e.g., Aronson, *The Social Animal*, supra note 75, at 217–23.

<sup>77</sup> *Id.* On the practice of “othering” the victims of expropriation, see Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 *Utah L. Rev.* 1, 24–25, 28.

<sup>78</sup> See, e.g., Linda Simon et al., *Trivialization: The Forgotten Mode of Dissonance Reduction*, 68 *J. Personality & Soc. Psychol.* 247, 247–48, 257–58 (1995).

<sup>79</sup> See, e.g., Claude M. Steele & Thomas J. Liu, *Dissonance Processes as Self-Affirmation*, 45 *J. Personality & Soc. Psychol.* 5, 16–18 (1981).

<sup>80</sup> Cf. Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 *Acad. Mgmt. Rev.* 577, 578–80 (1981).

own. Incompatible uses are common. Regardless of whether we think of such situations in terms of reciprocity of fault, in a world beset with transaction costs they produce winners and losers.<sup>81</sup> As neighborhoods evolve over time, there is always friction between old and new users and old and new uses.<sup>82</sup> Neighbors, for good reasons and bad, get on each other's nerves. There is a reason, grounded in experience, that the Tenth Commandment includes the specific prohibition, "Thou shalt not covet thy neighbor's house."<sup>83</sup>

In many property conflicts (as in many other contexts), people justify their behavior by blaming or "othering" the victim and "trivializing" the harms. But they also justify themselves through their property.<sup>84</sup> They love their land and are good owners, so whatever harm they do in the course of acquiring or owning it must be worth the pain that they caused. Just as severe initiation rituals for a club produce members who overestimate the club's desirability,<sup>85</sup> the trials of property ownership can create more committed owners. As owners justify hurting others, the way they conceive of the land and its attendant ownership rights attains a crucial function in enabling people to live with themselves. They conflate their conduct with their ownership rights, which in turn reinforces who they are as people.

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<sup>81</sup> See generally Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 *Geo. L.J.* 863, 865–66 (2010).

<sup>82</sup> Property casebooks are packed with such cases. See, e.g., Merrill & Smith, *supra* note 67, at 50–55 (building encroachment cases).

<sup>83</sup> Exodus 20:17. This prohibition precedes those against coveting wives, servants, and livestock, all of which the verse seems to regard as personal property. Deuteronomy 5:21, by contrast, begins with the prohibition against coveting wives and then adds, "neither shalt thou covet thy neighbour's house, his field, or his manservant, or his maidservant, his ox, or his ass, or any [thing] that [is] thy neighbour's." Today the prohibition seems to exist more as aspiration than law. See, e.g., *Howard v. Kunto*, 477 P.2d 210, 212 (Wash. 1970) (describing a plaintiff who aggressively sought his neighbors' vacation home, which had a dock).

<sup>84</sup> Cf. Holland et al., *supra* note 75, at 1714 ("[A]n example of [an internal self-justification strategy] for car drivers who have been confronted with the negative outcomes of their travel mode choice . . . could include attitude change ('My car is everything for me').").

<sup>85</sup> See, e.g., Elliot Aronson & Judson Mills, *The Effect of Severity of Initiation on Liking for a Group*, 59 *J. Abnormal & Soc. Psychol.* 177, 181 (1959); Harold Gerard & Grover Mathewson, *The Effects of Severity of Initiation on Liking for a Group: A Replication*, 2 *J. Experimental Soc. Psychol.* 278, 286 (1966).

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*3. Atrocity, Personhood, and the Cultural Dynamics of Violence*

The broader cultural dynamics of violence further suggest how personhood can spring from harmful conduct. Violence often has the aim and effect of drawing boundaries for perpetrator and victim alike. It is no coincidence that in *The Body in Pain*, Professor Elaine Scarry grounds her classic discussion of the relationship between torturer and victim in metaphors of property and territoriality. Torture is not just a “world-destroying” attack on the victim, Scarry writes.<sup>86</sup> At the same time, it can be “world expanding” for the torturer, constitutive of identity.<sup>87</sup> The torturer’s world is not simply defined by the absence or denial of pain. The infliction of pain is accompanied by a belief in a cause or goal beyond the narrowest objectives of torture. “The torturer’s questions,” according to Scarry, “announce in their feigned urgency the critical importance of [his] world, a world whose asserted magnitude is confirmed by the cruelty it is able to motivate and justify.”<sup>88</sup>

I suggest that this assertion of a particular set of commitments to justify torture continues outside the torture chamber. While Scarry describes the mechanisms by which a torturer “objectifies pain, then denies the pain,”<sup>89</sup> I would argue it is not true that “to allow the reality of the other’s suffering to enter [the torturer’s] own consciousness would immediately compel him to stop the torture.”<sup>90</sup> Rather, the torturer hears “prolonged, agonized human screams” with the same ears as anyone else.<sup>91</sup> What allows him to keep torturing—and to enjoy dinner with his family afterwards—is a commitment to his world. He must restate and justify it constantly.<sup>92</sup> The brutal, zero-sum expansion that defines the dynamics of torture compels justification; it is world-destroying, but also necessarily world-creating, and directly linked to personhood.

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<sup>86</sup> Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* 29 (1985).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 36.

<sup>89</sup> *Id.* at 57.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 51.

<sup>92</sup> Torturers may have a “covert disdain for confession,” as Scarry asserts. *Id.* at 29. That disdain may extend not only to confessions by torture victims, but also to admissions of wrongdoing by torturers.

*4. Personhood, Violence, and the Law*

The idea that personhood can derive from violence is hardly confined to the context of torture. It plays out in more mundane circumstances in communities every day. And every day it moves from neighborhoods into the courtroom. When the law considers conflicts over property, many of these cases involve a considerable measure of nastiness, anger, and pain. And this conduct, impinging on the aspirations and expectations of others, can be constitutive of people's sense of themselves and their land. Navigating this landscape poses a challenge for property law. When Professor Robert Cover theorized the relationship between law and violence in his classic essay *Violence and the Word*, he used criminal sentencing and the death penalty to describe how "the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts."<sup>93</sup> But in a footnote, he wrote that he was "prepared to argue that all law which concerns property, its use and its protection, has a similarly violent base."<sup>94</sup> Perhaps Cover's intriguing footnote reflects a view of property that accounts for the potential for violence to erupt in conflicts over land. Unlike criminal law, however, property law does not prevent or monopolize violence through the direct administration of pain by the state. Property law might on occasion acknowledge the possibility of violence.<sup>95</sup> It often acts to curb nasty behavior.<sup>96</sup> But it usually does so without directly confronting or outlawing the behavior at issue. This indirection may be necessary in part because such a wide range of behaviors implicate personhood and because it can be difficult to distinguish personhood's most amiable manifestations from its least. When property law declines to decide property conflicts as competing personhood claims, even the least sociable owners retain their stake in the regime, and cooperation rather than violence remains the norm.

It may be hard to square the multiple valences of personhood, positive and negative, with the longstanding cultural values that have encouraged Americans to invest themselves in their property.

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<sup>93</sup> Cover, *supra* note 38, at 1607.

<sup>94</sup> *Id.* at 1607 n.16.

<sup>95</sup> See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160–61 (Wis. 1997).

<sup>96</sup> See *infra* Part III.

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Personhood in property is closely connected to American identity and the “American dream.” But putting personhood into historical context reveals that even at the origin of the American dream, personhood cut in different directions. The next Part examines the role of atrocity in enabling Americans to embrace the land, a constitutive violence that continues to manifest itself in property cases today.

## II. BLOOD AT THE ROOT: ATROCITY AND THE CREATION OF THE AMERICAN PROPERTY TRADITION

While the preceding theoretical discussion helps make sense of why atrocity might foster personhood, this Part considers atrocity from a more immanent, historical perspective. After first outlining the links between property, personhood, and the American dream, I turn to the historical experience of the Puritan-Indian encounter in seventeenth-century New England to explore how violence played one role among many in the creation of a strong cultural value that supports personal identification with property.

### *A. Property, Personhood, and the American Dream*

“Property,” Professor Joseph William Singer writes, “is central to the American story,” a social institution “at the core of the American dream.”<sup>97</sup> For centuries it has defined how Americans have thought of themselves and their communities. It has been a constant source of inspiration, aspiration, and striving. Americans have molded the rhetoric and substance of their politics around property, and it has been the medium through which Americans have conceived of liberty and equality and the relationship between individuals and government in a republic.<sup>98</sup> Property is a dream of wealth and prosperity, and one of the key achievements of the American Revolution was the triumph of a broadly accessible market-driven vision of land over static notions of perpetual

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<sup>97</sup> Singer, *supra* note 58, at 1020.

<sup>98</sup> Alexander, *supra* note 55, at 17 (“Property has been a powerful cultural symbol throughout American history.”); Singer, *supra* note 58, at 1009, 1010, 1020 (“[P]roperty is central to the way we Americans define ourselves as a people.”).

family ownership.<sup>99</sup> Property is also a dream of democracy and community, as the combination of autonomy and obligation in ownership molds a virtuous citizenry.<sup>100</sup> And property represents an American dream of self-realization and individual fulfillment. When Thomas Jefferson spoke of “[t]hose who labour in the earth” as “the chosen people of God,” whose “manners and spirit” contribute to the “permanence of government” and “preserve a republic in vigour,” he attributed their virtues to the moral effect, the “happiness,” that arises from committed ownership.<sup>101</sup> The American dream may envision using property for material ends, but it also loves and celebrates the land. The personhood that people invest in their property has long contributed to nationhood.

The centrality of land in American life is instilled as a cultural value in elementary school. “In their first history lessons,” Singer writes, “children are taught about brave western settlers staking claims in the wilderness, building the family home, planting the crops, and reaping the rewards of hard labor.” It is a creation story that seems to have no place, in Singer’s wry phrasing, for “the little problems of conquest of Indian nations, the enslavement of Africans, and the unequal status of women.”<sup>102</sup>

This Part suggests that the tragic histories of atrocity and inequality in the United States are not incompatible with the ways in which Americans have associated property with their happiness and fulfillment and have invested so much of themselves in it. While the role of slavery in shaping American attitudes towards property has been the subject of a steadily expanding body of scholarship,<sup>103</sup> I focus on how violent encounters with Native

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<sup>99</sup> Gordon S. Wood, *The Radicalism of the American Revolution* 269–70 (1991); Singer, *supra* note 58, at 1020 (“John Locke is the ultimate Founding Father.”). Gregory Alexander has compellingly shown, however, how that older, proprietarian vision of property persisted long after the Revolution. See generally Alexander, *supra* note 55.

<sup>100</sup> Alexander, *supra* note 55, at 30–33; Rose, *supra* note 55, at 51.

<sup>101</sup> Thomas Jefferson, *Notes on the State of Virginia* 197 (David Waldstreicher ed., Bedford/St. Martin’s 2002) (1787).

<sup>102</sup> Singer, *supra* note 58, at 1020.

<sup>103</sup> See, e.g., Alexander, *supra* note 55, at 211–40; Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* 297 (1975); Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 *Harv. L. Rev.* 385, 419–21 (2006); Purdy, *supra* note 45, at 1060–68. Alexander includes a fascinating discussion of pro-slavery theorist Thomas Cobb’s

Americans helped shape the ways in which American colonists identified with the land. My interest is less in the conquest of nations than in the killing of Native American men, women, and children.<sup>104</sup> I explore these questions through the prism of King Philip's

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concerns that the commodification of slaves would turn Southerners into people who were "less citizens than . . . autonomous, preference-maximizing agents." Alexander, *supra* note 55, at 239. I would argue that the commodification of slaves, the increase in the number of transactions and the cruelty of separating families, strengthened feelings of mastery and with it a sense of ownership in its fullest, proprietary sense. From the Revolution onward, a steady abolitionist drumbeat put evidence of slavery's horrors squarely before slave-owners. Many pro-slavery writers initially responded by acknowledging the cruelty of the institution, but over time they began to devise arguments for its wisdom and superiority to free labor. See Michael O'Brien, *2 Conjectures of Order: Intellectual Life and the American South, 1810–1860*, at 938–92 (2004); Daniel J. Sharfstein, *The Invisible Line: Three American Families and the Secret Journey from Black to White* 67 (2011). At the same time, slave-owners continued to acknowledge the cruelty of slavery in private, complaining about their overseers or more directly expressing reservations about the institution itself. Sharfstein, *supra*, at 62; see also William E. Wiethoff, *Crafting the Overseer's Image*, at xiii (2006). Even denials of slavery's cruelty are connected to personal experience of it. In *State v. Mann*, 2 Dev. 263, 267–68 (N.C. 1829), Judge Ruffin asserted that

the private interest of the owner, the benevolences towards each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves.

Five years earlier, Ruffin, who himself was in the business of selling slaves to Alabama, had received a complaint about the "evil and barbarous treatment" of his slaves by his overseer. Letter from Archibald De Bow Murphey to Thomas Ruffin (June 3, 1824) (on file with the Thomas Ruffin Papers (#641), Southern Historical Collection, Manuscripts Department, Wilson Library, University of North Carolina at Chapel Hill). Acknowledging the cruelty arguably made people see themselves as better masters, the very type who should be entrusted to own other people.

<sup>104</sup> Stuart Banner's fascinating account of the centuries-long process of dispossessing the Native Americans of their land emphasizes the relative power balance between early English settlers and Native Americans, and the long history of bargained-for land transactions before a more contract-oriented approach gave way to conquest in the nineteenth century. Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (2005). Joseph Singer's reckoning that "we non-Indians cannot trace our titles to a just origin" acknowledges that "[c]onquest is part and parcel of the American story," Singer, *supra* note 35, at 3, 7, but conquest—dispossession through collective action—is more abstractly related to the creation of the American property tradition than violence and atrocity. For hundreds of years, killing Indians was a fact of American life. From the beginning, it had an enormous constitutive role in how settlers understood and related to their land. On a cultural level, genocide sets

War, a conflict of elemental cruelty between Puritan colonists and Algonquin tribes in 1675–76 that destroyed half of the English towns in New England and ended only after a rampage of genocidal retribution.<sup>105</sup> Regarded by historians such as Professor Richard Slotkin as “an archetype of all the wars which followed,”<sup>106</sup> King Philip’s War inspired a tremendous outpouring of self-examination among the Puritans about their “errand into the wilderness.”<sup>107</sup> A significant historical moment, it suggests the complexity of personhood in property and how it was not solely the product of the noblest narratives of the American experience.

*B. The Howling Wilderness: Property as Loss in Early America*

It is easy to think that property has always been synonymous with the American dream.<sup>108</sup> Although property regimes tend to be shrouded in historical narratives of a mythical past,<sup>109</sup> American ideas of property have a specific history that happens to be coincident with the nation’s beginnings. With Thomas Jefferson championing the Republic of Yeoman Farmers and with Hector St. Jean de Crevecoeur writing at the dawn of the Republic of how his farm—how the “bright idea of property”—made him an American,<sup>110</sup> it can seem that property’s place in the American dream is as old as the idea of America itself.

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boundaries, Lepore, *supra* note 44, at xiii, and in the American experience it was closely tied to the meaning of property ownership.

<sup>105</sup> Jill Lepore describes it as “the most fatal war in all of American history but also one of the most merciless.” Lepore, *supra* note 44, at xiii.

<sup>106</sup> Slotkin, *supra* note 44; see also James D. Drake, *Restraining Atrocity: The Conduct of King Philip’s War*, 70 *New Eng. Q.* 33, 33 (1997) (describing King Philip’s War as “the war to end all wars in New England’s battle for supremacy”). While Jill Lepore disputes its “foundational” or “archetypal” status, she nonetheless concedes that “there remains something about King Philip’s War that hints of allegory. In a sense, King Philip’s War never ended. In other times, in other places, its painful wounds would be reopened, its vicious words spoken again.” Lepore, *supra* note 44, at xiii.

<sup>107</sup> Slotkin, *supra* note 44, at 38.

<sup>108</sup> Gregory Alexander notes that property represents multiple traditions, but the centrality of property, even as a concept that contains multitudes, is a given. Alexander, *supra* note 55, at 17.

<sup>109</sup> Rose, *supra* note 37, at 38.

<sup>110</sup> Crevecoeur, *supra* note 57, at 27.



But American traditions of property were made, not born. The first generations of settlers would not have recognized the celebration of American property that Jefferson and Crèvecoeur embraced. When the Mayflower anchored off the coast of Cape Cod in early November 1620, America did not seem like “home” for the English on board. “[T]hey had no friends to welcome them nor inns to entertain or refresh their weatherbeaten bodies,” wrote William Bradford of his fellow Pilgrims, “no houses or much less town to repair to, to seek for succour.”<sup>111</sup> Summer was long past, and the land was gray, a “hideous and desolate wilderness, f[u]ll of wild beasts and wild men.”<sup>112</sup> After six weeks of scouting, just as the English had decided to settle a place they would name Plymouth, Bradford’s wife Dorothy fell off the Mayflower and drowned, a death that has been widely regarded as a suicide.<sup>113</sup> America did not resemble a promised land. It was not a place where one would find oneself. It was a place where people disappeared.

In an unforgiving land, where winters meant starvation—many feared they would resort to cannibalism—and summers meant cholera and dysentery,<sup>114</sup> it was hardly a given that property would assume central importance in the culture of a new nation. For generations, American property was not a source of strength. “The land was ours before we were the land’s,” Robert Frost proclaimed in “The Gift Outright,” “Possessing what we still were unpossessed by, / Possessed by what we now no more possessed.”<sup>115</sup> The stark landscape was a representation of loss, of European lives and communities that the settlers would never know again. And it was a source of declension: the land, many feared, was turning Englishmen and women into savages.

The settlers of Massachusetts shared a seventeenth-century English sense that individual identity can and should be bound up in

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<sup>111</sup> William Bradford, *Of Plymouth Plantation, 1620–1647*, at 69–70 (Random House, Inc. 1981) (1856).

<sup>112</sup> *Id.* at 70.

<sup>113</sup> Francis Murphy, Introduction to Bradford, *supra* note 111, at xiii.

<sup>114</sup> Bradford, *supra* note 111, at 85–87 (describing “the starving time”); cf. Karen Ordahl Kupperman, *Apathy and Death in Early Jamestown*, 66 *J. Am. Hist.* 24, 24 (1979); Rachel B. Herrmann, *The “Tragicall Historie”: Cannibalism and Abundance in Colonial Jamestown*, 68 *Wm. & Mary Q.* 47, 48–49 (2011).

<sup>115</sup> Robert Frost, *The Gift Outright*, in *The Poetry of Robert Frost* 348 (Edward Connery Lathem ed., 2002). Slotkin quotes the poem, *supra* note 44, at 17.

one's property,<sup>116</sup> and owning land was supposed to be one of the essential things that made an Englishman different from an Indian.<sup>117</sup> But the land and its original inhabitants almost immediately marked the colonists, drawing them away from the lives they had known. The first generation of settlers lived in woven huts that resembled and were commonly referred to as "wigwams,"<sup>118</sup> and over time, as the settlers worked their way deeper into the wilderness, they began to shed their English identity in other ways, abandoning their religious traditions, changing their dress and diet, and relaxing their grip on their native language.<sup>119</sup> "Instead of being the stage for the perfection of piety," wrote Professor Jill Lepore, "the woods of New England might in truth be a forest of depravity."<sup>120</sup>

*C. Loving the Land After Killing for It: King Philip's War*

The first generations of New Englanders lived in fear that they would fail the trials that God was putting them through in the wilderness, that the land would strip them of everything that had made them a chosen people.<sup>121</sup> The settlers began to embrace the land in part because of routine property transactions. The widespread seventeenth-century practice of buying land from Native Americans enabled the English to think of them as allies as opposed to adversaries, people who shared core English values and whose villages often resembled life in England before the enclo-

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<sup>116</sup> See Alexander, *supra* note 55, at 8 ("[T]he proprietary conception was a well-established tradition in European legal-political thought, and eighteenth-century American legal intellectuals were the heirs of that tradition. . . . The American colonies themselves began as property-based arrangements that were overtly proprietary in character.").

<sup>117</sup> Lepore, *supra* note 44, at 76. For a discussion of Native American attitudes towards property in early New England, see William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* 62–67 (1983).

<sup>118</sup> Lepore, *supra* note 44, at 77.

<sup>119</sup> *Id.* at 6; Slotkin, *supra* note 44, at 18, 86 (quoting a 1676 sermon by Increase Mather decrying how "they that profess themselves Christians have forsaken Churches, and Ordinances, and all for land and elbow-room"); cf. Charles Woodman, *The Carolina Backcountry on the Eve of the Revolution* 7, 13, 15, 18, 25, 31, 52 (Richard J. Hooker ed., 1953).

<sup>120</sup> Lepore, *supra* note 44, at 6–7.

<sup>121</sup> On the Puritan fixation on declension, see generally Sacvan Bercovitch, *The American Jeremiad* (1978).

sure of common lands.<sup>122</sup> The existence of an active property market among the English further normalized life on the frontier.<sup>123</sup> In the relative peace of the mid-seventeenth century, colonists could coexist with Native Americans while creating an English-style property regime.<sup>124</sup> Southern New England's landscape began to resemble Europe, cleared and bounded.<sup>125</sup> But as Puritan settlements expanded, the hunting grounds, agricultural practices, and traditional lifestyles of the remaining tribes came under material and cultural pressures that grew increasingly desperate.<sup>126</sup>

If tensions were rising between settlers and tribes in the 1670s, neither side was prepared for the carnage of King Philip's War. It began in June 1675 as a series of attacks on English towns by the Wampanoags, a tribe that lived on Narragansett Bay in what is now Bristol, Rhode Island.<sup>127</sup> Their leader was a man whom the English called Philip.<sup>128</sup> Over the next year, Algonquin tribes from Rhode Island to Maine joined the struggle. Together, they almost drove the colonists into the sea, destroying twenty-five English

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<sup>122</sup> See Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 23–28, 37, 39 (2005); John Frederick Martin, *Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century* 18 (1991). As Martin notes, routine land purchases coexisted with conquest and extermination. Martin, *supra*; see also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1071, 1077 (2000). Although Puritans initially could not claim title to Indian land under the terms of their colonial charters, the earliest incidents of genocidal violence such as the Pequot War of 1637 directly led to the first claims that the English could take Indian territory. Drake, *supra* note 106, at 36. Devastating smallpox outbreaks also fostered closer ties between Indians and the English, decimating native settlements and convincing many Indians to embrace Christianity on their deathbeds and arrange for their orphaned children to be raised by the English. Lepore, *supra* note 44, at 28.

<sup>123</sup> For a discussion of land sales and speculation in colonial New England generally, see generally Martin, *supra* note 122.

<sup>124</sup> Drake, *supra* note 106, at 51. Christian Indians lived in “praying towns” in proximity to English settlements. Lepore, *supra* note 44, at 25.

<sup>125</sup> Lepore, *supra* note 44, at 77 (“By the 1670s, at the start of King Philip’s War, the English could boast that ‘by their great industry,’ they had ‘of a howling Wilderness improved those Lands into Cornfields, Orchards, enclosed Pastures, and Towns inhabited.’”).

<sup>126</sup> *Id.* at 96, 114–21; Cronon, *supra* note 117.

<sup>127</sup> The precipitating event was the hanging of three Wampanoag men at Plymouth for the murder of a Native American convert to Christianity who had told English authorities that the tribe was preparing for war. Lepore, *supra* note 44, at 23.

<sup>128</sup> His original name was Metacom. *Id.* at xvi.

towns—more than half of the settlements in New England—including Springfield and Providence.<sup>129</sup> The tribes brutalized English victims, who were frequently stripped naked and scalped, their fingers hacked off and worn as trophies.<sup>130</sup> Among the Puritans, it was widely believed that the war was God's punishment for relaxing their faith and shedding their English identity, punishment for what the land had done to them.<sup>131</sup>

To fight and win the war, colonial forces engaged in cruelty on a massive scale. They killed casually, simply turning their guns on even loyal Indians.<sup>132</sup> They filled boat after boat with Indian slaves in chains, destined for the Caribbean.<sup>133</sup> The Puritans engaged in deliberate and calculated acts of murder, individual and collective.<sup>134</sup> Their armies massacred entire settlements,<sup>135</sup> most notably on December 19, 1675, when a colonial military expedition discovered a large village of women and children in the Narragansett Great Swamp in southern Rhode Island. Soldiers began burning wigwams and shooting everyone who fled until the area was a wasteland of smoldering ash and thousands of charred corpses; neither food nor shelter was salvageable, both of which the colonists desperately needed.<sup>136</sup> Puritans frequently mutilated the bodies of

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<sup>129</sup> Id. at xi–xii. Lepore notes that Native American forces purposely targeted Puritan property, knowing its cultural significance. Id. at 95.

<sup>130</sup> Id. at 79.

<sup>131</sup> Richard Slotkin & James K. Folsom, Increase Mather: Puritan Mythologist, in *So Dreadful a Judgment: Puritan Responses to King Philip's War, 1676–1677*, at 57, 62 (Slotkin & Folsom eds., 1978).

<sup>132</sup> See, e.g., John Canup, *Out of the Wilderness: The Emergence of an American Identity in Colonial New England 186* (1990); Daniel Gookin, *An Historical Account of the Doings and Sufferings of the Christian Indians of New England, In the Years 1675, 1676, 1677 (1677)*, in 2 *Archaeologia Americana: Transactions & Collections of the American Antiquarian Society* 423, 475 (1836).

<sup>133</sup> See James D. Drake, *King Philip's War: Civil War in New England, 1675–1676*, at 136–39 (1999).

<sup>134</sup> After determining that an elderly prisoner was too old to sell into slavery, for example, his Puritan captors debated having him “devoured by doges” before deciding to “Cut Ofe his head.” John Easton, *A Relacion of the Indyan Warre (1675)*, in *Narratives of the Indian Wars, 1675–1699*, at 7, 16 (Charles H. Lincoln ed., 1913); see also Slotkin, *supra* note 44, at 82 (describing attempted lynchings in Boston); Drake, *supra* note 106, at 46 n.33 (describing an Indian woman whose captor ordered her torn apart by dogs).

<sup>135</sup> See Lepore, *supra* note 44, at 88.

<sup>136</sup> Id. at 88–89. Benjamin Tompson, a poet at the time, described the massacre: “Here might be heard an hideous Indian cry, / Of wounded ones who in the wigwams

their victims and marked the landscape with them. Roads were lined with heads on pikes. When colonial forces finally caught and killed King Philip near his traditional home in August 1676, they cut off his head and quartered him, leaving his body “to lie unburied and rot above ground.”<sup>137</sup>

The Puritans justified their excesses in myriad ways, as punishment for treason or as self-defense proportional to what had been inflicted upon them. They analogized to biblical accounts of the killing of the Amalekites and spoke of the massacres as God’s plan to subject the Indians to “utter destruction and extirpation from off the face of the earth, peradventure to make room for others of his people to come in his stead.”<sup>138</sup> In March 1676, with his home in Providence burning behind him, Roger Williams told a group of Narragansett Indians in a face-to-face meeting that “God had prospered *us* so that wee had . . . destroyed Multitudes of them in Fighting and Flying, In Hungr and Cold etc.: and that God would help us to Consume them.”<sup>139</sup>

At the same time, the bloodshed provoked widespread unease among the colonists.<sup>140</sup> The atrocities were gratuitous, often inflicted on noncombatants and occurring mostly after victory was assured.<sup>141</sup> Puritan killers knew many of their Indian victims; they had been neighbors.<sup>142</sup> The zeal to “take, kill, burn, sink, destroy . . .

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fry. / Had we been cannibals here might we feast / On brave Westphalia gammons ready dressed. / The tawny hue is Ethiopic made / Of such on whom Vulcan his clutches laid.” Id.

<sup>137</sup> Drake, *supra* note 106, at 40.

<sup>138</sup> William Hubbard, *A Narrative of the Indian Wars in New England* 234 (Brattleborough, William Fessenden 1814).

<sup>139</sup> Lepore, *supra* note 44, at 120 (quoting Roger Williams).

<sup>140</sup> See Slotkin, *supra* note 44, at 55.

<sup>141</sup> When the outcome was in doubt, the colonists tended to refrain from excessive violence out of fear that other Indian tribes would join the rebellion. Drake, *supra* note 106, at 42; see also Slotkin, *supra* note 44, at 173 (describing Benjamin Church’s horror upon finding Philip’s lieutenant Annawon’s head on a pike after the warrior had surrendered to him). The English well knew the distinction between “hot blooded” and “cold blooded” killing. See Barbara Donagan, *Atrocity, War Crime, and Treason in the English Civil War*, 99 *Am. Hist. Rev.* 1137, 1144 (1994).

<sup>142</sup> On November 15, 1675, for example, after “skulking rogues of the enemy” burned a barn full of hay and corn, colonists from Chelmsford, Massachusetts, held a meeting: “[I]t was moved among them and concluded,” according to the Puritan superintendent of Indians in Massachusetts:

that they would go to the wigwams of the Wamesit Indians, their neighbours, and kill them all; in pursuance whereof they came to the wigwams, and called to

and not to pity or spare any of them”<sup>143</sup> was almost too much for the Boston minister Increase Mather. In a March 1676 diary entry, he described telling a Plymouth man that “he should not so condemn all the Indians as he did wishing them hanged &c that then innocent blood would cry.” The response unnerved him: “He replied that he would say as the Jews did, their blood be upon me & my Children, which was a dreadful expression & made me fear what would come upon his Children.”<sup>144</sup>

While historians have suggested that the extremes of Puritan violence compromised their English identity—they were “fighting like savages” or brutalizing the natives as the Spanish had done<sup>145</sup>—the brutality tracked what soldiers had done in the English Civil War and the conquest of Ireland.<sup>146</sup> Committing atrocities, only to condemn them in hindsight as something that English people did not do, was arguably a hallmark of Englishness.<sup>147</sup> Far from being a moment of cultural defeat in military victory, the aftermath of King Philip’s War became an occasion when Puritan identity grew stronger, when a war that was seen as God’s retribution for declension prompted calls to recommit to original principles, and when new modes of storytelling such as the “sermon-narrative” emerged as powerful tools for stating and restating what it meant to be English in America.<sup>148</sup> Imagining that they had committed atrocities as Indians would have, the Puritans felt compelled to redouble their commitment to maintaining the integrity of their community, to

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the poor Indians to come out of doors, which most of them readily did, both men, women, and children, not in the least suspecting the English would hurt them.

Gookin, *supra* note 132, at 482; see also Canup, *supra* note 132, at 186–87.

<sup>143</sup> Lepore, *supra* note 44, at 121 (quoting Joshua Moody).

<sup>144</sup> Canup, *supra* note 132, at 196–97 (quoting Increase Mather).

<sup>145</sup> Lepore, *supra* note 44, at 7–8, 11; see also Canup, *supra* note 132, at 194 (“When they seized the Sword of the Wilderness from the Indians’ hands, it proved double-edged: as the colonists cut down the savage scourge, they also cut more of their ties to inherited cultural traditions. In victory, there was still defeat.”).

<sup>146</sup> Lepore, *supra* note 44, at 11; Slotkin, *supra* note 44, at 42; Donagan, *supra* note 141, at 1146.

<sup>147</sup> We saw a similar response to the Abu Ghraib abuses in 2004–05.

<sup>148</sup> Slotkin, *supra* note 44, at 22, 56, 67–68 (“The Indian wars, in which culture was pitted against culture, afforded a perfect opportunity for this sort of definition by repudiation.”).

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distinguishing themselves from Indians.<sup>149</sup> This cultural line-drawing took place on a physically altered landscape largely cleared of Native Americans, a bounded colony where life inside “the hedge”<sup>150</sup> no longer carried the existential threats of the wilderness. In this New World, Puritans could flourish as landowners—even love the land<sup>151</sup>—and in a way they had to. The more English they were in their commitment to their property, the less savage they could believe that they had been.<sup>152</sup>

Among the first settlers on the American frontier, personhood in property developed out of routine transactions, the freedom and prosperity that could be enjoyed in the New World, and the pleasures and challenges of community-building. But at the same time, it also had roots in the bloodiest of conflicts, in dynamics of rage and redemption that repeated themselves for centuries. The fact that Americans have traditionally invested themselves in their property reflects a complex and ambiguous legacy. As the Puritans came to learn, personhood can take root in the unlikeliest of soils.

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<sup>149</sup> Id. at 91 (“In order to create a world of divine law pure and simple, they had to subject themselves in part to the law of the devil.”). We could call this atrocity and propriety.

<sup>150</sup> Id. at 165.

<sup>151</sup> Id. at 21.

<sup>152</sup> See Lepore, *supra* note 44, at 175.

### III. BEATING THE BOUNDS:<sup>153</sup> HOW PROPERTY LAW NEGOTIATES THE ATROCITY VALUE

As the previous Sections suggest, personhood in property has a dark side. Property has a special significance in American culture in part because our ancestors killed for it, and even today, personhood can be the product of self-justifying behavior, as owners conflate unneighborly and even violent conduct with their property

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<sup>153</sup> I take this phrase from the practice of medieval English villagers who would ritually walk along the borders of their lands, spanking, boxing, dunking, and bumping their children at various points along the way to teach them the property boundaries. See Eve Darian-Smith, *Beating the Bounds: Law, Identity, and Territory in the New Europe*, in *Ethnography in Unstable Places: Everyday Lives in Contexts of Dramatic Political Change* 249, 249 (Carol J. Greenhouse et al. eds., 2002); John Gilbert, *A Picture Story Book of London; or, City Scenes* 140 (1866) (“’Twas once the plan / To seize any man / Or little boy they could find, / And bump him down, / Upon the hard stone, / To fix the said spot in his mind.”); George C. Homans, *English Villagers of the Thirteenth Century* 368 (1941). The practice is related to rituals surrounding the moment when ownership of property changed hands, the feoffment of the livery of seisin. The feoffment was enacted and symbolized with an exchange of twigs and clods of dirt, but in medieval England and elsewhere in Europe, the parties to the transaction often marked the occasion by beating children. See J. John Lawler & Gail Gates Lawler, *A Short Historical Introduction to the Law of Real Property* 41–42 (1940). What explains the literal presence of pain upon the transfer of seisin—an utterly primitive ritual alongside a quintessentially modern one? The conventional and contemporaneous explanation, undoubtedly true, is that the beatings created a long-standing memory of the event. *Laws of the Salian and Ripuarian Franks* 200 (Theodore John Rivers trans., 1986); Emily Zack Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* 150 (1988). I would argue that the choice to mark the occasion with pain rather than, say, laughter had an additional set of functions, subtler than memorialization but easily as important. On the one hand, beating a child made an unmistakable statement to the outside world, cf. Rose, *Possession*, *supra* note 35, at 77 (describing ownership as a set of communicative acts), embodying and announcing the sovereign power of the owner. The act warned all witnesses of what an owner was empowered, expected, and encouraged to do to anyone who interfered with his property. At the same time, inflicting pain on an innocent also affected a new owner’s relationship to his land, or at least to his role as landowner. As I read it, the beating became the first true statement of the stakes of ownership. In gaining a property right, a new owner was responsible for hurting a child, often his own. Tabuteau, *supra*, at 153. By embracing the often violent responsibilities of ownership, see, e.g., Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* 300 (2005), he could prove that the beating was not in vain—it had a righteous purpose, and the child simply made a momentary sacrifice for the good of the community. An irresponsible owner, however, was someone who in retrospect beat a child for no good reason; he had done something sinful, if not existentially ruinous. See generally James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (2008). The violence of the ritual worked to create a more personally invested owner.



rights and identities as owners. Yet property is not a violent institution. It enables thousands of peaceful and voluntary transactions every day. Many aspects of property law enhance economic efficiency and promote democratic values by resolving conflicts before they arise and forming a ready framework for cooperation and community. The personhood that arises from atrocious behavior presents a challenge to property law. Sometimes the parties to a dispute have long histories and even family ties, and their property conflicts are deeply personal. Often the parties are stuck together in their relationships as neighbors. It is not a given that a ruling will end the feuding or petty indignities that can mark a post-litigation relationship.<sup>154</sup>

The Part that follows explores several contexts in which atrocity fosters personhood and discusses how property cases manage these situations. It reveals how personhood claims are widespread and challenges the idea that a decision that recognizes and protects personhood would track the progressive or sociable side of an issue. Property law often checks atrocious behavior, but not through decisions that address personhood directly. This Part traces how property has domesticated and curbed atrocity by considering customary common property, trespass and adverse possession, and nuisance and takings.

#### *A. The Social Dynamics of Custom-Based Common Property*

For many years the default wisdom in property scholarship was that public ownership inevitably devolves into a “tragedy of the commons.”<sup>155</sup> Over the past two decades, however, social scientists and legal scholars have refined our understanding of the commons, distinguishing conventionally tragic “open access resources” from

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<sup>154</sup> The famous Hatfield-McCoy feud in late nineteenth-century Appalachia began after a lawsuit about lumber rights was decided. See Altina L. Waller, *Feud: Hatfields, McCoys, and Social Change in Appalachia, 1860–1900*, at 2, 41 (1988); see also James C. Smith, *Tulk v. Moxhay: The Fight to Develop Leicester Square*, in *Property Stories* 188 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009) (describing two hundred years of litigation over the same piece of land in London).

<sup>155</sup> Rose, *Comedy*, supra note 35. Until a series of cases in the 1970s relating to beach access, Carol Rose observed, custom had “almost no authority in American law.” *Id.* at 713–17; see also *Ghen v. Rich*, 8 F. 159, 162 (D. Mass. 1881) (noting “extremely limited” circumstances for following custom).

more functional and ably managed “common pool resources.”<sup>156</sup> Collective ownership has often worked well and, it turns out, has long had a place in American life and law. In her classic article *The Comedy of the Commons: Custom, Commerce, and Public Policy*, Carol Rose explored traditions of common ownership. Rose argued that customary uses of common property revealed the purpose and utility of common rights to land. The fact that such customary uses existed—the very fact that communities were “capable of generating [their] own customs”—showed how “even with respect to scarce resources, a commons need not be a wasteland of uncertain or conflicting property claims.”<sup>157</sup> Invoking specific customary uses such as roads, tidal lands and waterways, and recreational lands for “maypole dances, horse races, cricket matches, and the like,”<sup>158</sup> Rose suggested that at a basic level common ownership contributed to commerce “our quintessential mode of sociability.”<sup>159</sup> Public rights to land are a powerful “social glue” that “trains us in the democratic give-and-take that makes our regime function.”<sup>160</sup>

Rose’s view of custom, common ownership, and sociability provides an inspiring insight for progressive scholars of the “human flourishing-minded social-obligation” stripe,<sup>161</sup> who have cited her work in highlighting legal rules that have favored public access over the right to exclude in cases involving recreational uses.<sup>162</sup> The success of customary common ownership shows how the Law and Economics conception of property as a response to resource scarcity is necessarily linked to the social function of property, or what Jedediah Purdy elegantly described as our “imaginative and moral investment in these ‘resources.’”<sup>163</sup> Customary common ownership

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<sup>156</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* 48 (James E. Alt & Douglass C. North eds., 1990). Rose uses the term “managed commons.” Rose, *Comedy*, supra note 35, at 749; see also Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 *J. Legal Stud.* 131, 132–34 (2000).

<sup>157</sup> Rose, *Comedy*, supra note 35, at 743.

<sup>158</sup> *Id.* at 741.

<sup>159</sup> See *id.* at 776.

<sup>160</sup> See *id.* at 779–80.

<sup>161</sup> Alexander, supra note 24, at 808.

<sup>162</sup> *Id.* at 801–10.

<sup>163</sup> Jedediah Purdy, *A Foxy Hedgehog: The Consistent Perceptions of Carol Rose*, 19 *Wm. & Mary Bill Rts. J.* 1033, 1034 (2011).

helps us begin to understand how the classical assumption of a world of rational, self-interested utility maximizers cannot explain the origins of property—that in the beginning a system of property law requires “a community in which cooperation is possible.”<sup>164</sup> Customary common regimes reveal property’s role in constructing communities, how its connection to personal identity moves into a larger sphere of community identity. Common pool resources have emerged as one of the happier, more sociable accounts of property, a compelling, functional model of how a progressive vision imbued with civic virtue and democratic values can work for today’s law.<sup>165</sup>

But the sense of personhood and community created by common property regimes does not always arise from the positive things that communities do. Common property regimes depend on management by “an easily identifiable group of insiders”;<sup>166</sup> blocking access by outsiders is part of what distinguishes a commons from a “tragic” open access resource. Violence can serve a dual purpose: to keep outsiders out, but also to cement in-group loyalty. The commons is not just the market grounds or fields for a maypole dance or horse race.<sup>167</sup> It also includes the hanging tree.<sup>168</sup>

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<sup>164</sup> Rose, *supra* note 37, at 39.

<sup>165</sup> See, e.g., Alexander, *supra* note 24, at 801–07.

<sup>166</sup> Thráinn Eggertsson, Open Access Versus Common Property, *in* Property Rights: Cooperation, Conflict, and Law 73, 76 (Terry L. Anderson & Fred S. McChesney eds., 2003); see also Ostrom, *supra* note 156, at 21.

<sup>167</sup> Rose, *Comedy*, *supra* note 35, at 741.

<sup>168</sup> During the half-century epidemic of lynching in the American South from 1880 to 1930, thousands of extra-legal murders were not only ritualized trials and executions, but also ritualized picnics. See Davarian L. Baldwin, Our Newcomers to the City: The Great Migration and the Making of Modern Mass Culture, *in* Beyond Blackface: African Americans and the Creation of American Popular Culture, 1890–1930, at 159, 167 (W. Fitzhugh Brundage ed., 2011) (“Lynching had become the country’s most ‘Deadly Amusement,’ with white families bringing children and picnic baskets and helping to transform many a black southerner into a northern migrant.”). Members of the mob took their families along, bought food from vendors, collected gruesome souvenirs, and had pictures taken by roving photographers that they proudly mailed out as postcards. As these atrocities repeated themselves somewhere in the South every two or three days, lynching was routinely associated with recreation and outdoor space, fields and trees. See, e.g., Abel Meeropol, *Strange Fruit*, *reprinted in* David Margolick, *Strange Fruit: Billie Holiday, Café Society, and an Early Cry for Civil Rights* 15 (2000). If we conceive of white social privilege not simply as property, see, e.g., Cheryl I. Harris, Whiteness as Property, 106 *Harv. L. Rev.* 1709, 1709 (1993), but as a commons, atrocity helped make it functional and natural. It was undoubtedly a “social glue” that unified segregated communities.

The violence at the edge of some common regimes is vividly borne out by journalistic and anthropological accounts of Hawaiian surfer gangs who beat up outsiders and Maine lobstermen who protect informal territorial boundaries by cutting the lines of rival fishermen and even burning rival boats and docks.<sup>169</sup> What is fascinating about this connection between violence and the commons is not just the existence or character of the bad deeds. What is especially important to keep in mind is that everyone knows the stakes. Warring lobster gangs know that their actions and reactions have the result of keeping people just like them from feeding their families.<sup>170</sup> But they do it anyway. And the result is that the lobstermen are even more committed to fighting for their fishing territory, and the commons continues to thrive without the “tragic” consequences of resource depletion and underinvestment.

As Carol Rose has noted, American courts from the beginning have suspected that customary common regimes can be “mired in the swamps of medieval feudalism, hierarchy, and rigidity” and “incompatible with democratic forms of government.”<sup>171</sup> Property law addresses the downsides of the commons in several ways. In most contexts, property law simply refuses to recognize informal commons arrangements. The Maine lobstermen know that their violence has dire consequences for the victims and that it is punishable under criminal law. Just as importantly, they know that their territories have no legal sanction.

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<sup>169</sup> James M. Acheson, *The Lobster Gangs of Maine* 74 (1988); Benjamin Marcus, *Extreme Surf* 82 (2009) (“Surfing localism takes many forms, from verbal threats to punchouts to torched cars[,] . . . thefts, vandalism, gangs, terroristic threats, and physical violence. Everything from graffiti to murder, and which has spread across the surfing world from Angourie to Zihuatenejo.”); see also M. De Alessi, *The Customs and Culture of Surfing, and an Opportunity for a New Territorialism?*, 1 *Reef J.* 85, 88 (2009); Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 *Or. L. Rev.* 479, 486 (2000) (“As affectionate and appealing as [Acheson’s] portrait may be, however, it has a downside: from a more skeptical perspective the Monhegan fishermen look xenophobic, misogynistic, and bullying—characteristics rather reminiscent of the historic American legal concerns about customary law.”).

<sup>170</sup> Acheson, *supra* note 169, at 75.

<sup>171</sup> Rose, *supra* note 169, at 486 (“The judges saw these community practices as mired in the swamps of medieval feudalism, hierarchy, and rigidity; in particular, they thought that customary law was incompatible with democratic forms of government, in which communities pass laws for themselves not by looking to the past, but rather by looking to the open actions of democratically-elected representatives.”).

While the judicial skepticism about customary regimes may be taking aim at their worst impulses, the cases rarely attempt to distinguish good from bad kinds of personhood, or sociable from unsociable regimes.<sup>172</sup> Rather, the blanket suspicion of customary regimes has more to do with questions of internal governance. When property law sanctions common property arrangements—including concurrent and marital ownership, condominiums and cooperatives, and corporations—Professors Hanoch Dagan and Michael Heller have shown the importance of the possibility of exit and of governance structures and procedural transparency that aligns these arrangements with democratic norms.<sup>173</sup> Within these bounds, the courts give great latitude to these communities. They can still engage in and gain identity from acts that come at the expense of the personhood of individuals—often individual members of the group<sup>174</sup>—but the types of these acts and their consequences are bounded by the procedural requirements. Put another way, when a cat lover sneaks three kittens into her unit in a pet-free condominium complex, members of the community do not affirm their commitment to a pet-free life by acting violently towards the cats or their owner.<sup>175</sup> Instead, they follow a set of rules and levy fines, and if the cat lover does not like it, she can sell her stake and leave. Both violence and fines reinforce a community's pet-free identity, and both are hurtful to the cat lover's identity. But the law's procedural and exit requirements steer the community towards a balanced path that, while not addressing personhood directly, arguably protects the personhood of both sides of such conflicts.

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<sup>172</sup> Cf. *Ghen v. Rich*, 8 F. 159, 161–62 (D. Mass. 1881) (describing the rare circumstances in which courts defer to a customary regime).

<sup>173</sup> Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *Yale L.J.* 549, 567, 594–95 (2001); see also Rose, *supra* note 169, at 486.

<sup>174</sup> The personhood of individual residents targeted by their common interest communities can arise from ennobling activities like pet ownership, see, e.g., *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1277–78 (Cal. 1994), but people can also define themselves by the antagonistic relationships they make within their communities. See, for example, the conduct of the defendant in *40 West 67th St. v. Pullman*, 790 N.E.2d 1174, 1177 (N.Y. 2003), or the recent allegations against Anthony Michael Hall in Andrew Blankstein, *Actor Anthony Michael Hall Arrested in Dispute with Neighbor*, L.A. Now Blog (Sept. 6, 2011, 7:36 AM), <http://latimesblogs.latimes.com/lanow/2011/09/actor-anthony-michael-hall-arrested-in-dispute-with-neighbor.html>.

<sup>175</sup> *Nahrstedt*, 878 P.2d at 1277–78.

In at least one circumstance in which a court has sanctioned a customary public right, the case reveals the difficulty of discerning amiable from atrocious manifestations of personhood, as well as the utility of procedural clarity and exit rules in domesticating potentially violent customs. In the 1818 case *McConico v. Singleton*,<sup>176</sup> a property owner in the South Carolina interior<sup>177</sup> warned a man not to hunt deer in his forest, and when the interloper ignored him, he sued for trespass. It was a pure, face-to-face exercise of the right to exclude, but the landowner's claim failed at trial and on appeal. A jury and eventually the state's Constitutional Court of Appeals endorsed a broad right to hunt on "unenclosed and unimproved lands." "The forest was regarded as a common," the court wrote, "and it will not be denied that animals . . . are common property, and belong to the first taker."<sup>178</sup> Not only was the right customary, "universally exercised from the first settlement of the country up to the present time," according to the court,<sup>179</sup> but just as important, hunting had a central role in promoting and protecting the American republic. Because, the court noted, "[l]arge standing armies are, perhaps, wisely considered as dangerous to our free institutions," the forests were the militia's training ground, "necessarily constitut[ing] our greatest security against aggression."<sup>180</sup>

Linking public land rights to civic responsibility and the foundation of democratic government, *McConico*'s language suggests that hunting rights deserve protection because they are so noble. Decided not four years after the end of the War of 1812, the ruling had an obvious, intuitive logic. In a broader historical context, however, the rights that were vindicated by the court take on a more ambiguous valence. Fifty years earlier, in almost the exact same place where the events in *McConico* unfolded, hunting meant something completely different. After a Cherokee war devastated the South Carolina backcountry in 1760–61, local farmers endured

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<sup>176</sup> 9 S.C.L. (2 Mill) 244, 245 (1818).

<sup>177</sup> A will transcript available online from the South Carolina Department of Archives & History places *McConico* in the Sumter District of Clarendon County, roughly midway between Myrtle Beach and Columbia. Alexander Colclough, Will Transcript, at 2, Nov. 7, 1817, ser. S108093, available at <http://www.archivesindex.sc.gov>.

<sup>178</sup> *McConico*, 9 S.C.L. at 245.

<sup>179</sup> *Id.* at 244.

<sup>180</sup> *Id.* at 246.

years of thefts and physical attacks.<sup>181</sup> Cattle- and horse-rustling became epidemic, and stories abounded of torture, rape, and kidnapping by roving criminal gangs. Landowners had their eyes gouged out, their bodies branded with hot irons.<sup>182</sup> Although debtors, runaway slaves, and escaped felons had gravitated towards the area following the collapse of civil society, Professor Rachel Klein has described how the victimized population as often as not identified the root of the problem differently: hunters were the ones responsible. Those who hunted to survive were, as a general matter, landless with no “visible way of getting an honest living,” a group that was expanding in the 1760s because of the lingering effects of the Cherokee War and of two serious droughts.<sup>183</sup> Backcountry farmers and colonial leaders alike decried the “wandering indolence of hunting,” a drunken, squalid, “sluttish” lifestyle that produced people who were “little more than white Indians.”<sup>184</sup> It was a short step from hunting and foraging to poaching and outright invasion, and hunters often were found abetting or participating in the criminal gangs.<sup>185</sup> Hunters brought South Carolina to the brink of collapse.<sup>186</sup> There and elsewhere, statutes enacted during the colonial and early republic periods repeatedly targeted not only those who were “killing Deer at Unreasonable Times,” but also those

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<sup>181</sup> Richard Maxwell Brown, *The South Carolina Regulators 34–37* (1963); Rachel N. Klein, *Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760–1808*, at 38–39 (1990); Sharfstein, *supra* note 103, at 15.

<sup>182</sup> Brown, *supra* note 181, at 36.

<sup>183</sup> *Id.* at 49; Klein, *supra* note 181, at 54.

<sup>184</sup> Klein, *supra* note 181, at 51, 54 (“In 1750, the speaker of the [South Carolina] assembly told of the ‘many hundred men whom we know little of and are little the better, for they kill deer and live like Indians.’”).

<sup>185</sup> *Id.* at 59–61.

<sup>186</sup> Farmers in the South Carolina backcountry responded to the threat posed by hunters with a massive escalation of the daily violence of frontier life. Forming vigilante militias in 1767, landowners calling themselves “Regulators” went on a year-long rampage of hanging, shooting, and whipping men and women in hunting communities. Regulators burned itinerant settlements and forced vagrants, broadly defined, to work on farms. Although colonial authorities initially sympathized with the Regulators, the bloodletting became a new threat to the social order, pushing South Carolina to the brink of civil war. Sharfstein, *supra* note 103, at 16. The violence attendant to hunting may have created social cohesion among hunters and enabled them to make strong claims for their customary rights. But at the same time, as the victims and victimizers of hunters, backcountry landowners also strengthened their community and rights consciousness. Both effects are on display in the conflict at the root of *McConico*.

who simply were “Supporting themselves . . . by Hunting being People of loose disorderly Lives.”<sup>187</sup> After the Revolution, even committed patriots understood hunters to be, in the words of Crèvecoeur, “[o]ur bad people.”<sup>188</sup>

Yet just fifty years after the South Carolina unrest—a generation after Crèvecoeur’s assessment—hunting was quintessentially American, according to *McConico*, a paradigmatic example of how customary common rights could work for the country’s benefit and survival, even define its identity. This radical shift suggests the difficulty of making a judgment about whether this kind of common right deserves suspicion or sanction. Given the ubiquity of hunting, the difficulty of policing it, and arguably a commitment to hunting rights forged in a crucible of violence, it made sense for the South Carolina court to embrace hunting rather than to engage in a fight that could undermine the legitimacy of the law.<sup>189</sup> At the same time, by leaving open the possibility that owners could restrict hunting by enclosure or cultivation, rules that evolved into laws that allow owners to post signs forbidding trespass or hunting, the court clarified procedures that tamed the interaction between hunters and owners: a default that can be exited. *McConico* did not try to separate out friendly from nasty hunters. By not weighing personhood directly—a difficult task in any case given the varieties of personhood and competing claims—the court allowed both owners and hunters to retain a personal stake in the regime.

### B. Exclusion and Incursion

#### 1. Exclusion and Civil Rights: The Atrocity Value in Trespass

It is commonly understood that the right to exclude is, as Professor Thomas Merrill argues, “the *sine qua non*” of property.<sup>190</sup> Although exclusion can be understood as an indirect “means to an end” that efficiently protects uses that can promote human flour-

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<sup>187</sup> Klein, *supra* note 181, at 53.

<sup>188</sup> *Id.* at 53–54 n.13.

<sup>189</sup> Cf. “castle doctrine,” *supra* notes 16–19 and accompanying text.

<sup>190</sup> Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 730 (1998). The persistence of this view is all the more remarkable given the sustained intellectual critique of the primacy of exclusion. See, e.g., Thomas C. Grey, The Disintegration of Property, *in* Liberty, Property, and the Law: Modern Understandings of Liberty and Property (Richard A. Epstein ed., 2000).



ishing—“[n]o one except a fetishist would believe that exclusion is a positive good,” Henry Smith writes<sup>191</sup>—acting as a gatekeeper and protecting one’s boundaries does bond a person to her property independent of use.<sup>192</sup> Most notably in areas relating to race in American history, the pure exercise of exclusion rights has fostered personhood. Some of these personhood claims have arisen from the kinds of civil- and human rights-affirming contexts familiar to the literature on personhood. But personhood can also spring from much uglier exercises of the right to exclude. The Subsections that follow consider the personhood that can arise from exclusion and how property law contends with its multiple valences. Property law directly regulates some of the most hurtful behaviors with rules about discrimination and necessity. But even in those areas, it continues to strike balances between competing claims that implicate personhood.

*a. The Right to Exclude and Civil Rights*

The right to exclude establishes relationships among landowners, outsiders, and the state that are fundamental to liberty and equality.<sup>193</sup> An English case from 1814, *Merest v. Harvey*,<sup>194</sup> provides an excellent illustration of exclusion’s primacy as a core “human flourishing” property right: A “gentleman of fortune” shooting birds on his land refused a request to join his party made by a man who was “a banker, a magistrate, and a member of parliament.”<sup>195</sup> After the interloper went hunting anyway and “used very intemperate language, threatening, in his capacity of a magistrate, to commit the Plaintiff, and defying him to bring any action,” the landowner sued for trespass and ultimately won the astronomical

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<sup>191</sup> Smith, supra note 34, at 964; see also Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. Econ. & Pol’y 69, 76–80 (2005).

<sup>192</sup> Cf. Floyd W. Rudmin, “To Own Is To Be Perceived to Own”: A Social Cognitive Look at the Ownership of Property, in *To Have Possessions: A Handbook on Ownership and Property* 85, 92 (Rudmin ed., 1991) (describing as a “paradox of property” the notion that “[t]he more secure a possession is, as property, the less attention the owner directs to it”).

<sup>193</sup> Merrill, supra note 190, at 735.

<sup>194</sup> 128 Eng. Rep. 761 (C.P. 1814), 5 Taunt. 442. *Merest* is featured prominently in *Jacque v. Steenberg Homes, Inc.*, the first case excerpted in Merrill & Smith, supra note 67, 1–7.

<sup>195</sup> *Merest*, 5 Taunt. at 442.

sum of five hundred pounds.<sup>196</sup> Affirming the damages award, *Merest* suggests that without a robust right to exclude, a society would be beholden to might and the demands of the state and could easily degenerate into violence.<sup>197</sup> A right to exclude makes differences in social status functionally irrelevant. It does not matter if some own more land than others or hold positions of power. Every property holder is an independent sovereign, a nominal equality that makes a liberal republic possible.<sup>198</sup> When Crèvecoeur wrote shortly after the American Revolution that it is the “formerly rude soil” that “has established all our rights; on it is founded our rank, our freedom, our power as citizens,”<sup>199</sup> he was describing, at root, what flows from being able to exclude people from one’s land.<sup>200</sup>

The right to exclude has continued to play a role in the way Americans relate to their land, no more so than in the history of African American freedom. If slavery meant the negation of exclusion rights, freedom was synonymous with the integrity and importance of boundaries.<sup>201</sup> During the civil rights era, black-owned property became essential organizing spaces throughout the South, places where civil rights workers could stay and where meetings could take place, safely and quietly.<sup>202</sup> Veteran protesters such as Curtis Murphy, who participated in the 1960 Nashville sit-in campaign, were raised with the notion:

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<sup>196</sup> Id. at 442–43.

<sup>197</sup> Id. at 444 (Heath, J.) (upholding the award because such damages worked to “prevent the practice of duelling”).

<sup>198</sup> Jefferson, *supra* note 101, at 275.

<sup>199</sup> Crèvecoeur, *supra* note 57, at 27.

<sup>200</sup> Being landless, by contrast, meant dependency. Seth Rockman, *Scraping By: Wage Labor, Slavery, and Survival in Early Baltimore* 1–2, 53–54, 75–76 (2009).

<sup>201</sup> Land ownership was a central priority of newly freed slaves, and the nation’s ultimate failure to distribute confiscated Confederate land to them after the Civil War has had far-reaching and continuing social effects. See Melinda C. Miller, *Land and Racial Wealth Inequality*, 101 *Am. Econ. Rev. (Papers & Proc.)* 371 (2011), available at <http://www.aeaweb.org/articles.php?doi=10.1257/aer.101.3.371>. African Americans whose ancestors did manage to acquire property in the nineteenth century are far less likely to be on the wrong side of the wealth gap that continues to divide black from white. Id. For a discussion of the wealth gap, see Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* 1 (1999); Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 2 (rev. ed. 2006).

<sup>202</sup> See, e.g., Branch, *supra* note 9, at 57–58.

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If you owned your own land, then you were the master of your own destiny or as close as any black man could be to being his own master. “Every man should have his own piece of dirt. If you do that, if you own it, no other man, no matter what his color, can make you step off it,” [Murphy’s father] liked to say.<sup>203</sup>

To the contrary, a black landowner could force whites to leave. Land ownership with exclusion rights meant freedom and possibly even equality, and it defined who and what people aspired to be.

*b. The Right to Exclude and Segregation*

At the same time that the right to exclude became central to African American identity, it was also central to a segregationist white identity. Being able to exclude blacks from neighborhoods, churches, and business establishments helped constitute white privilege, and exclusion had little to do with use. Interestingly, when Margaret Jane Radin considered whether free speech rights should trump state trespass law on commercial property such as shopping centers, she cited *Bell v. Maryland*<sup>204</sup> as a case where a “personhood perspective” was of limited use.<sup>205</sup> *Bell*, involving trespass charges against sit-in protesters whom a Baltimore restaurant owner refused to serve “solely on the basis of their color,”<sup>206</sup> raised the difficult question for Radin of whether “a proprietor could argue that she had her personhood bound up with being able to exclude blacks.”<sup>207</sup> Noting that the “case is arguably a standoff from the perspective of personhood if we imagine a small proprietor whose prejudice is non-commercial and whose personhood is inseparable from the business,” Radin sidestepped the troubling nature of such a personhood claim in favor of “other moral arguments” that compelled access.<sup>208</sup>

Nevertheless, *Bell* provides Radin’s only acknowledgment that the personhood bound up in exclusion rights could work as a broad license to be exclusionary. Owners can exercise their exclusion

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<sup>203</sup> David Halberstam, *The Children* 362–63 (1998).

<sup>204</sup> 378 U.S. 226 (1964).

<sup>205</sup> Radin, *supra* note 19, at 1010–11.

<sup>206</sup> *Bell*, 378 U.S. at 227–28.

<sup>207</sup> Radin, *supra* note 19, at 1011.

<sup>208</sup> *Id.* The Supreme Court also sidestepped the question. Note that subsequently enacted state law and the Civil Rights Act of 1964 mooted the issue.

rights in hurtful and even deadly ways, and the pain that they inflict can contribute to their personal identification with their property and to their commitment to being effective gatekeepers.<sup>209</sup> Exercising the right to exclude is one of the key expressive acts that signal possession.<sup>210</sup> People can define themselves as individuals and as owners against those whom they keep off their land.<sup>211</sup> Given the stakes, property law directly intervenes to regulate away the worst exclusionary impulses. Doctrines of necessity trump exclusion when life and limb are on the line, and public accommodations and fair housing laws bluntly target the link between exclusion and personhood.<sup>212</sup>

But property law still strikes balances to keep even the losers in necessity and antidiscrimination cases invested in the larger property regime. In situations involving necessity, courts may require trespassers to pay for any damage they cause.<sup>213</sup> And while the Fair Housing Act aspired to change segregated norms over time<sup>214</sup> and ultimately to disaggregate exclusion and personhood, exemptions such as the for-sale-by-owner and “Mrs. Murphy” provisions<sup>215</sup> show a continuing interest in keeping owners, even the racist ones, personally invested in their property. If personhood was, as Radin suggests, not a good basis for deciding trespass cases involving sit-in protesters, it does seem to be accounted for and represented in the compromises between access and exclusion that property law makes.

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<sup>209</sup> See, e.g., Barros, *Home*, supra note 18, at 260 (castle doctrine).

<sup>210</sup> Rose, *Possession*, supra note 35, at 76.

<sup>211</sup> Cf. Stephen Birmingham, “Our Crowd”: The Great Jewish Families of New York 3 (1967) (“By the late 1930’s the world of Mrs. Philip J. Goodhart had become one of clearly defined, fixed, and immutable values. There were two kinds of people. There were ‘people we visit’ and ‘people we wouldn’t visit.’ She was not interested in ‘people we wouldn’t visit.’”).

<sup>212</sup> See, e.g., *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908); Smith, supra note 34, at 964.

<sup>213</sup> *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910); Merrill & Smith, supra note 67, at 441–42.

<sup>214</sup> Note the persistence of housing segregation more than forty years later. Craig Gurian, *New Maps Show Segregation Alive and Well, Remapping Debate* (Apr. 20, 2011), <http://bit.ly/dE2ni9>.

<sup>215</sup> 42 U.S.C. § 3603(b) (2006).

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*2. Adverse Possession**a. Good Faith, Bad Faith, and Personhood*

No property doctrine threatens to reward bad behavior more than adverse possession, which awards title to a trespasser who openly and notoriously occupies land for a set period of years. Although hornbook law and a majority of states have objective tests that define any non-permissive possession as “adverse under a claim of right,” judges and juries have traditionally resisted what could appear to be legally sanctioned theft. Instead, they have imported a subjective “good faith” requirement favoring people who had reason to think that the land they were occupying actually belonged to them.<sup>216</sup> Intriguingly, when cases that emit a whiff of bad faith succeed, it is often because the relevant facts have been finessed or even re-characterized as good-faith conduct.<sup>217</sup>

In the last five years, the rationales for affirming the possessors’ good faith have become far less intuitive, as several insightful articles have explored why the claims of bad-faith adverse possessors deserve to succeed. While Professor Lee Anne Fennell has made a utilitarian argument for bad-faith adverse possession as “efficient trespass,”<sup>218</sup> Professors Eduardo Peñalver and Sonia Katyal justified the practice on the “nonconsequentialist” ground that squatting has allowed people who are “disenfranchised from institutionalized structures . . . to challenge both existing property rules and established property entitlements.” Bad-faith adverse possession, they contend, “served a fairly important redistributive function and constituted a significant threat to absentee ownership.”<sup>219</sup>

Peñalver and Katyal conceive of and weigh the redistributive function of adverse possession not only in terms of land, but also in

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<sup>216</sup> Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. U. L.Q. 331, 358 (1983) (“Judges and juries . . . do take ‘subjective factors’ into account when these can be proved or inferred from the evidence. And they do regularly prefer the claims of an honest man over those of a dishonest man.”). But see Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 Wash. U. L.Q. 1, 23–46 (1986).

<sup>217</sup> See, e.g., *Lessee of Ewing v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837); *Merrill & Smith*, *supra* note 67, at 194–200.

<sup>218</sup> Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 Nw. U. L. Rev. 1037, 1038 (2006).

<sup>219</sup> Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. Pa. L. Rev. 1095, 1130–32, 1170–71 (2007).

terms of personhood, because adverse possession leads to ownership, which “is uniquely essential to the construction of personal identity” and “develops our capacity to act as autonomous beings.”<sup>220</sup> But the connection between adverse possession and personhood is more direct than that. The very process of adversely possessing property fosters personhood, which itself becomes a justification for adverse possession. Although the doctrine has traditionally been rationalized on the utilitarian grounds that it promotes effective gate-keeping by owners and lowers information costs for third parties, Oliver Wendell Holmes famously recognized in *The Path of the Law* that

[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.<sup>221</sup>

Adverse possession gives rise to personal identification with property as a result of the long time horizons involved, and also from the fact that it essentially requires successful claimants to “have enjoyed and used” the land “as [their] own.”

Scholars have suggested that the personhood value would be stronger in cases of good-faith adverse possession, but the opposite position—that personhood arises from bad faith—is not difficult to understand. Although Radin finds it hard to imagine “how one’s personhood can become bound up with the ownership of something unless she thinks she owns it,”<sup>222</sup> there are reasons to expect that a bad-faith owner could identify aggressively with her property. A good-faith owner may well appreciate a few extra inches on her side of a misplaced fence in the same way that she conceives of

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<sup>220</sup> Id. at 1130–32.

<sup>221</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897); see also Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), *quoted in* Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 669 n.183 (1988).

<sup>222</sup> Margaret Jane Radin, *Time, Possession, and Alienation*, 64 Wash. U. L.Q. 739, 749 (1986). Although Radin notes that “it seems Hegel contemplated that binding yourself to an object you know is not yours in fact will ultimately make it yours[,] [s]till it seems personality theory is more comfortable with the ‘color of title’ case than with ‘squatters.’” Id.

the rest of her land.<sup>223</sup> But a bad-faith possessor who aspires to anything more than a temporary squat has little choice and every incentive to commit herself wholly to the land. Through personally invested ownership, a bad-faith possessor appears more to courts and the rest of the world like a responsible gatekeeper favored by the legal doctrine. And for someone who has stolen land, proper stewardship can become its own justification for possessing the property.

*b. "Property Outlaws" and Personhood*

Despite the economic efficiencies and potential redistributive effects of bad-faith adverse possession, it would be a serious mistake to soft-pedal the conduct at issue. In their account of "property outlaws," Peñalver and Katyal draw on several examples that seem to have some progressive, or at least romantic, allure: the American Indian Movement occupiers of Alcatraz in the 1970s, nineteenth-century Western pioneers, civil-rights-era sit-in protesters, and urban squatters in New York in the 1980s. With the caveat that they are "under no illusions that property outlaws will always pursue ends that we consider good or worthy," Peñalver and Katyal argue that "[t]he nature of property lawbreaking suggests that it will be used by non-owners more than owners and by those isolated from the majoritarian process more than by those well connected to the levers of power."<sup>224</sup> Regarding the case of Western homesteaders, critics have taken issue with Peñalver and Katyal's choice to frame the history as a conflict between absentee land speculators and landless settlers, or in other words, as a manifestation of the question of "whether public lands should be used as a source of revenue to help pay off the national debt, or as a reservoir of public largess with which to create a nation of Jeffersonian small-holding property owners."<sup>225</sup> Peñalver and Katyal readily acknowledge that when understood as a conflict between settlers and the original Native American inhabitants, the story is less inspir-

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<sup>223</sup> See Rudmin, *supra* note 192 (discussing the connection between secure possession and indifference).

<sup>224</sup> Peñalver & Katyal, *supra* note 219, at 1137.

<sup>225</sup> *Id.* at 1106–07; Greg Lastowka, Property Outlaws, Rebel Mythologies, and Social Bandits, 20 *Cornell J.L. & Pub. Pol'y* 377, 383 (2010).

ing.<sup>226</sup> The settlement of the West may be a history of adverse possession from absentee owners,<sup>227</sup> but on a day-to-day level, it involved the deadly work of expelling Native Americans from their land.<sup>228</sup>

The experience of black property owners in the post-Reconstruction South provides a clearer example of the legacy of property outlaws, with no absentee owners to cloud the moral picture. It is no coincidence that the moment when African Americans were first able to participate in the property market in any appreciable number was also the moment when extrajudicial killing became a way of life in the South.<sup>229</sup> Across the decades, a large number of lynchings were related to property and the threat that black landownership posed to the prevailing social order.<sup>230</sup> In rural areas, towns, and cities across the region, concentrations of black ownership were repeatedly uprooted by mobs that shot, hanged, and burned individual victims and torched and terrorized entire communities.<sup>231</sup> Sometimes survivors made quick sales at deep discounts, reflecting the necessity of fleeing, if not outright coercion.<sup>232</sup> Other times, land was simply abandoned and lost through adverse possession or sold at tax auctions.<sup>233</sup> In such instances, the true owners were not mere absentees—they were refugees—and the

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<sup>226</sup> See Lastowka, *supra* note 225, at 387; Peñalver & Katyal, *supra* note 219, at 1106; Eduardo M. Peñalver, Response, 20 Cornell J.L. & Pub. Pol’y 393, 395–96 (2010).

<sup>227</sup> See Donald J. Pisani, Squatter Law in California, 1850–1856, 25 W. Hist. Q. 277, 292, 299 (1994) (documenting judicial and legislative efforts to expand “squatters’ rights” of adverse possession in California).

<sup>228</sup> See Lastowka, *supra* note 225, at 387 (describing Western settlement as “local might making local right”).

<sup>229</sup> Loren Schweninger, Black Property Owners in the South, 1790–1915, at 151–52, 228 (1990). See generally Crystal N. Feimster, Southern Horrors: Women and the Politics of Rape and Lynching 158–85 (2009) (discussing lynchings).

<sup>230</sup> See, e.g., Mia Bay, To Tell the Truth Freely: The Life of Ida B. Wells 82–85 (2009) (recounting the tragic story of three black proprietors of a grocery store in Memphis, Tennessee, who were arrested and lynched after a “riot” precipitated by a white rival grocer).

<sup>231</sup> See, e.g., Carrie A. Russell, Reckoning with a Violent and Lawless Past: A Study of Race, Violence and Reconciliation in Tennessee 8–14 (August 2010) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with the Jean & Alexander Heard Library, Vanderbilt University) (describing the lynching of a black property owner in Erwin, Tennessee and subsequent expulsion of the town’s entire black community).

<sup>232</sup> *Id.* at 12, 40 n.17, 159.

<sup>233</sup> *Id.* at 40.



“outlaws” were not effecting the progressive redistribution of property.

The communities that expropriated land in the West and the South justified their conduct in many ways, most notably by defining their victims as outsiders undeserving of property rights.<sup>234</sup> One could also imagine, as the mob in Greenwood, Mississippi did, violent expropriation contributing to a personal connection to the land that further justified the taking, at least to the takers. To the extent that adverse possession fosters personhood in both good- and bad-faith contexts, the law’s formal neutrality on the question of state of mind in most jurisdictions, coupled with an informal preference for good faith, serves multiple purposes. Even as it checks the worst kinds of expropriations, it continues to guide even bad-faith expropriators, over time, towards behaving like proper owners. Adverse possession doctrine does not function solely to deter lax gate-keeping. It also works to create the right kind of owners out of land thieves and squatters.

*C. Personhood and Conflicts Over Incompatible Uses: Nuisance and Regulatory Takings*

*1. Nuisance*

Alongside the right to exclude, the right to use one’s land is a core property right, directly related to how people conceive of themselves. Nuisance law both protects usage rights and limits them, regulating, among other things, activities on one’s land that intentionally, substantially, and unreasonably interfere with another owner’s use and enjoyment. Nuisance creates a framework to resolve disputes that routinely arise from incompatible land uses. But the doctrine is also necessary because some conflicts take on a momentum and logic of their own, fraught with the potential for self-justifying behavior, creating situations in which people derive satisfaction from hurting their neighbors. While stories of squabbling neighbors can appear comically trivial, they can contain real aggression and present seemingly incompatible versions of personhood. In such circumstances, it may be difficult to decide cases di-

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<sup>234</sup> On the ubiquity of “othering” in the history of violent expropriations in the United States, see Rose, *supra* note 77, at 28–29.

rectly on the basis of personhood, but nuisance law can manage the worst behavior by owners while still affirming a sense that they have a robust right to use their property.

Consider, for example, the case of Bobbe Ernst, an accomplished player of the marimba who drove her neighbors to distraction by loudly playing a theme song unique to each of them whenever she saw them nearby.<sup>235</sup> Certainly she enjoyed playing the marimba for its own sake, what the court called its “musical and melodious” tone,<sup>236</sup> but it is not hard to imagine that she also took special pleasure from watching her neighbor of six years, a Naval officer, wince every time the first notes of “Anchors Aweigh” chimed across the yard.<sup>237</sup> It is a pleasure that is uniquely rooted in and is a fundamental expression of ownership—Ernst thinks she is entitled to play “Jingle Bells” every time her pot-bellied, white-bearded neighbor walks by because she owns her property and supposes she can do what she wants on it. Perhaps, as Professor Nestor Davidson might suggest, doing something that lowers the value of a neighbor’s property makes one feel richer,<sup>238</sup> but even if that were not the case, there is pride and pleasure to be taken in the offensive acts that one can only do by virtue of being a property owner. By her logic, it seems, annoying the neighbors is a

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<sup>235</sup> *Collier v. Ernst*, 46 Pa. D. & C. 1, 4 (Pa. Ct. Com. Pl. 1942). I thank Jon Bruce for bringing this case to my attention.

<sup>236</sup> *Id.* at 2. The marimba is a percussion instrument of Central American and African origin. In an 1888 travelogue, William Eleroy Curtis was particularly impressed with its ubiquity in Costa Rica:

The marimba is constructed of twenty-one pieces of split bamboo of graded lengths, strung upon two bars of the same wood according to harmonic sequence, thus furnishing three octaves. Underneath each strip of bamboo is a gourd, strung upon a wire, which takes the place of a sounding-board, and adds strength and sweetness to the tones. The performer takes the instrument upon his knees and strikes the bamboo strips with little hammers of padded leather, usually taking two between the fingers of each hand, so as to strike a chord of four notes, which he does with great dexterity. I have seen men play with three hammers in each hand, and use them as rapidly and skillfully as a pianist touches his keys. The tones of the marimba resemble those of the xylophone, which has recently become so popular, except that they are louder and more resonant.

William Eleroy Curtis, *The Capitals of Spanish America* 214 (New York, Harper & Bros. 1888).

<sup>237</sup> *Collier*, 46 Pa. D. & C. at 3.

<sup>238</sup> Davidson, *supra* note 21, at 760.

power that ownership confers, a power that in turn contributes to her personal identification with and investment in her property.

Nuisance law can take these conflicts and balance the competing personhood interests, rather than choosing one set of interests over the other. In the case of the marimba player, a Pennsylvania court ruled that her conduct constituted a nuisance, enjoining her jaunty renditions of “Anchors Aweigh” and “Jingle Bells,” as well as “When Irish Eyes Are Smiling” and “Little Old Lady.”<sup>239</sup> But the injunction only covered certain times of the day, and Ernst was able to keep her beloved instrument. In the specificity of its decision, the court left open the possibility that in other circumstances the marimba-playing would be perfectly legal.

At a basic level, nuisance law tracks community norms and keeps the peace by requiring reasonable behavior. And the doctrine preserves the notion that owners retain broad usage rights. It does not, for example, touch objectively reasonable acts that may fall short of “assault by marimba,” yet still are aggressive, hurtful, and unneighborly. The West Virginia man who preemptively drills a water well on his property line after learning that his neighbor plans to put a septic tank there is not liable for nuisance,<sup>240</sup> because there is nothing unreasonable about the effects of a water well on a neighbor’s property rights.<sup>241</sup> Luxury condo owners in downtown Manhattan had no recourse against chain-smoking neighbors.<sup>242</sup> A Long Island property owner had no claim against a neighbor for landscaping that featured “unsightly dumpsters, an abandoned ice-box, ‘automobile hulks,’ or a ‘hideous rampart of dirt.’”<sup>243</sup> Nuisance cases acknowledge how important the right to use is as a personal matter for individual owners. And they show how difficult it is to draw lines between reasonable and unreasonable uses. The discre-

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<sup>239</sup> *Collier*, 46 Pa. D. & C. at 9–10.

<sup>240</sup> *Hendricks v. Stalnaker*, 380 S.E.2d 198, 203 (W. Va. 1989).

<sup>241</sup> In *Hendricks*, the well was held to be a reasonable use even though there was no other place on the neighboring property for a septic system. *Id.* at 200, 203.

<sup>242</sup> See *Ewen v. Maccherone*, 927 N.Y.S.2d 274, 276 (N.Y. App. Term 2011) (“[T]he law of private nuisance would be stretched beyond its breaking point if we were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building. Since there cannot be a substantially unreasonable interference by smoking inside the apartment, there could not be a private nuisance . . .”).

<sup>243</sup> *Ruscito v. Swaine, Inc.*, 793 N.Y.S.2d 475, 476–77 (N.Y. App. Div. 2005).

tionary balancing that marks many cases allows courts to resolve disputes and preserve order without lessening the connection, for better or worse, of use and personhood.

## 2. *Personhood and Resistance to Regulatory Takings*

The question of when the government is constitutionally required to pay “just compensation” for an exercise of the eminent domain power is both simple and hopelessly muddled. Physical takings—demolishing homes to build a freeway—are easy to recognize.<sup>244</sup> For scholars, lawyers, judges, and at least a generation of law students, the far more vexing question has been whether government regulation—say, an environmental protection statute limiting new construction of residential homes in coastal areas—amounts to a taking when it diminishes the value of private property.<sup>245</sup> In classic discussions of the takings divide, Professors Bruce Ackerman and Frank Michelman suggested that physical takings are a personal, demoralizing violation of one’s property rights,<sup>246</sup> while regulatory takings amount to a less demoralizing loss of mar-

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<sup>244</sup> The major questions are the measure of compensation and now the meaning of laws defining “public use” that were enacted after *Kelo v. City of New London*, 545 U.S. 469 (2005). See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2114 (2009) (arguing that most of the laws passed by state legislatures in response to *Kelo* “are likely to impose few, if any, meaningful restrictions on economic-development takings”). Somin cites a Texas law, that, among other things, excludes takings that are “merely a pretext to confer a private benefit” from the definition of a “public use,” as one such ineffectual law. *Id.* at 2135–36.

<sup>245</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (answering in the affirmative, provided that the taking “deprives land of all economically beneficial use,” and that such limitations were not “part of [the landowner’s] title to begin with”). The question of regulatory takings is a muddle because it reflects dueling traditions of property as wealth and as a basis for civic responsibility. See Rose, *supra* note 56, at 588–91.

<sup>246</sup> See Radin, *supra* note 19, at 1003 n.166 (citing Bruce Ackerman, *Private Property and the Constitution* 129–34 (1977)) (“[Ackerman] claims he can thus explain . . . why is it that six-figure losses imposed by zoning regulations will go uncompensated, while seizure of a one-acre plot of unused gravel patch will be compensated . . .”); cf. Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165, 1201–02 n.77 (1967) (noting in the context of nuisance law that “if, after restrictions are imposed, the owner retains a significant latitude for choice about his property’s destiny” so “he can feel himself imprinting his will or personality on that property’s future—then it may be said that critical value has been preserved”).

ginal wealth. A personhood perspective explains why: “Object-loss is more important than wealth-loss,” wrote Margaret Jane Radin, “because object-loss is specially related to personhood in a way that wealth-loss is not.”<sup>247</sup> Nevertheless, over the last twenty-five years, the Supreme Court has become far more aggressive about requiring compensation for regulatory takings.<sup>248</sup> And the last several years have been particularly energetic ones for political movements seeking to redefine most land-use controls as takings, with property rights ballot measures going to a vote in seven Western states since 2004.<sup>249</sup> While critics have regarded these movements as more “astroturf” than grassroots, funded by big developers and agricultural landowners,<sup>250</sup> the property rights movement would not have gained the traction it did without a broader, more intuitive appeal.

The opposition to regulation suggests that the distinction between object-loss and wealth-loss is an incomplete account of personhood in takings cases. Regulation is not just a curb on the right to use, which is closely linked to personhood, but there is also arguably a loss of personhood when the government proscribes a noxious use: the personhood that arises from foisting externalities upon others. As in nuisance contexts, these noxious activities can become synonymous with ownership and personhood; after all, the only reason people think they can get away with doing such things

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<sup>247</sup> Radin, *supra* note 19, at 1004. The “diminution of value” test that courts commonly consider in determining whether a regulation constitutes a taking suggests that there is a point at which wealth-loss becomes as demoralizing as object-loss.

<sup>248</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994) (protecting a property owner’s “right to just compensation” if the government demands any part of her property “for a public purpose”); *Lucas*, 505 U.S. at 102 (requiring compensation unless the regulation is grounded in nuisance law); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (prohibiting the “obtaining of an easement to serve some valid governmental purpose” when done “without payment of compensation”).

<sup>249</sup> Anti-regulation initiatives went on the ballots of seven Western states, passing only in Oregon and Arizona. Somin, *supra* note 244, at 2144. Oregon’s Measure 37, enacted in 2004, was later repealed in large part by a 2007 ballot measure (Measure 49) that “limits some of the development that Measure 37 permitted.” Measure 49, Clatsop County Oregon: Land Use Planning, available at <http://www.co.clatsop.or.us/default.asp?pageid=558&deptid=12> (last visited Dec. 5, 2011).

<sup>250</sup> See, e.g., Hannah Jacobs, Note, Searching for Balance in the Aftermath of the 2006 Takings Initiatives, 116 *Yale L.J.* 1518, 1526 (2007) (noting that “in Washington, state and county farm bureaus and individual owners of farms, dairies, and orchards provided approximately 59% of the funding” for a failed post-*Kelo* initiative).

and externalizing the costs is because they own their property and believe they can use it however they want.<sup>251</sup>

Years of objections by neighbors and attempts by agencies and other bodies to outlaw the conduct can make owners more committed to the activities, and the activities become more connected to their status as owners, citizens, and individuals. Cessation would not only be a surrender, but an admission of wrongdoing. Although broader and more abstract than the injuries that give so much pleasure for so many nuisance defendants, societal externalities are something that many Americans embrace as part of their political identity.<sup>252</sup> For some people, polluting is status affirming.<sup>253</sup> And it bonds people to their property. Regulation does not simply lower one's net worth. It takes something that defines people as individuals and as owners.

Recent decisions that have sought to clarify takings doctrine, both receptive and hostile to regulation, have heightened the wide-

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<sup>251</sup> Cf. Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in *Property and Community* 57 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010). I have a different take on externalities—property law and norms do not simply recognize (and condemn) some and obscure (and allow) others. Rather, they foster awareness that one's conduct produces externalities, but allow an owner to do them anyway.

<sup>252</sup> An unscientific survey of the blogosphere suggests there is widespread sentiment, or at least a market for hyperbolic satire proclaiming, as one cyber-sage did, that “gas is for guzzling . . . all i know is i like to take my hummer for two tank drives and enjoy polluting its my right to pollute i have the money to pollute god bless gasoline yes.” See Bombaytearooms, who cares about the GM volt i love my gas guzzler, *Thoughts.com* (Aug. 12, 2009), <http://bit.ly/qD1Atg>; cf. The Gallant Asthmatic, *If I didn't have asthma I'd probably smoke, Hardluck Asthma* (Feb. 11, 2011), <http://bit.ly/qd0otI> (“I love going outside blowing snow with my snow blower at 7 a.m. in the morning when it's five degrees above zero, with the engine roaring at a decibel loud enough for everyone in the neighborhood to enjoy. I love that it puts fumes in the air that I can smell. I love that it uses a ton of gas. I love polluting the air.”). T-shirts and license plate frames proclaiming “I Love My Gas Guzzler” are on sale at one retailer. *I Love My Gas Guzzler Gifts, T-Shirts, Stickers & More*, *CafePress*, <http://shop.cafepress.com/i-love-my-gas-guzzler> (last visited Dec. 5, 2011).

<sup>253</sup> Thousands of people each year pay a premium to eat endangered species on the black market, and it is almost certainly not because snow leopard, ape, or elephant tastes delicious. Anneli Rufus, *Endangered Species on the Grill: The Black Market in Illegal Meat Flourishes in the US*, *AlterNet* (Feb. 15, 2010), <http://bit.ly/9wjb4f>. The pleasure may come from the thrill of doing something illegal and in some circles may signal wealth and power, but is also undeniably connected to the cruelty and irreversible consequence of eating a species into extinction.

spread view of government as an oppressive outsider.<sup>254</sup> The rise in hostility to regulation underscores the enormous challenge of instilling new behavioral norms and making effective environmental policy. Perhaps, then, it reveals the pitfalls of clarity and the benefits of property's indirect approach. What Carol Rose has called the "muddle" of ad hoc calculations seems to respect how personhood can accrete around resistance to regulation without hobbling the ability of the government to regulate. It recognizes the validity of individual rights while insisting that property law has to balance them with important collective interests. In the muddle, there is opportunity to reconcile owners to the larger compromises that Americans have always had to make.<sup>255</sup>

#### CONCLUSION: DOING DIRT

A generation of scholars has embraced the "human fulfilling" aspects of property, but for hundreds of years, it has been possible for Americans to identify with their land because they have been able to hurt people in the course of acquiring and owning it. While long associated with the most progressive values of property, personhood has a dark side, as people justify morally unacceptable conduct by investing themselves in their land. From the beginning of the American experience of property, personhood has cut in multiple directions. It has been less of a progressive value in property than a challenge that the law has had to negotiate.

It might seem possible to ignore the historical link between atrocity and personhood and focus on ways to cultivate human fulfillment in the present. But as long as people find personhood in bad behavior as owners, property will continue to have to balance incompatible personhood claims. Given its ambiguous valence, ignoring personhood altogether in favor of deciding property questions with other moral principles may be tempting.<sup>256</sup> But the American cultural investment in property is so closely tied to per-

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<sup>254</sup> See, e.g., Somin, *supra* note 39, at 1190–91 (noting that one post-*Kelo* survey showed "81 to 95 percent of the public disapproved of the Supreme Court's decision," and a later survey "showed 71 percent of the public supported the enactment of state laws forbidding economic development takings").

<sup>255</sup> See Rose, *supra* note 77, at 24–25 (detailing one such compromise after the Civil War).

<sup>256</sup> See Radin, *supra* note 19, at 1010–11; Stern, *Residential*, *supra* note 52.

sonhood that ignoring it risks moving the law too far from shared normative assumptions about the obligations of ownership. As a result, people may view such rules as illegitimate, or they may invest less of themselves in the land, altering their sense of ownership in socially detrimental ways.

Progressives aspire to shape property's norms to "promote . . . environmental stewardship, civic responsibility, and aggregate wealth" and to "establish the framework for a kind of social life appropriate to a free and democratic society."<sup>257</sup> But the complex moral valence of "human flourishing" compels more sustained attention to the ways individuals might resist progressive measures as well as the kinds of indirect approaches the law has long relied upon to contain and channel the behavior of property owners. When property conceives of personhood as a fact of ownership, for pleasure and for pain, as opposed to a basis for decision, it can balance competing interests and give both sides a continuing and ultimately cooperative stake in making the system work.

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<sup>257</sup> Alexander et al., *supra* note 31, at 743–44.