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## Property and the Right to Exclude II

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## PROPERTY AND THE RIGHT TO EXCLUDE II

THOMAS W. MERRILL\*

In 1998 I published a short essay entitled *Property and the Right to Exclude*.<sup>1</sup> It appeared in an issue of the *Nebraska Law Review* honoring Lawrence Berger, a long-time property professor at Nebraska. The essay has been rather widely cited, but I have my doubts as to whether it has been widely read. A review of citations in Westlaw suggests that the essay is commonly identified as arguing that the right to exclude is the “*sine qua non*” of property, a statement that appears in the opening paragraph.<sup>2</sup> The typical citing author takes this to mean that the essay argues the right to exclude is the only relevant attribute of property, or that the right to exclude is the social goal to which the institution of property is dedicated—two propositions disavowed in the essay. The author then uses this caricatured view of the exclusion thesis as a foil against which to develop his or her more nuanced or ethically satisfying view of property.

I stand by most of what I said in the Nebraska essay, including the statement in the opening paragraph. *Sine qua non* is a Latin legal term meaning “without which it could not be.” In other words, without the right to exclude, there can be no property. None of the attacks on the right to exclude using the Nebraska essay as a foil has convinced me that this is wrong. Does the right to exclude capture every relevant attribute of the institution of property? No, but I did not argue that. I said only that it was a foundational attribute of property. Is the right to exclude the end or the ultimate value to which the institution of property aspires, a vision caricatured in one article as a society of hermits?<sup>3</sup> Obviously not. Giving individuals

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\* Charles Evans Hughes Professor, Columbia Law School. A condensed version of this Article was presented at the 2013 Brigham-Kanner Property Rights Conference at William and Mary Law School. I thank the Conference organizers for the honor of naming me the Brigham-Kanner Property Rights Prize recipient for 2013, and the panelists and conference attendees for their many insightful responses and comments.

1. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) [hereinafter *Nebraska Essay*].

2. *Id.* at 730.

3. Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1841 (2006) (claiming “[t]he traditional account of the property right to exclude emphasizes a solitary, isolated individual who excludes everyone from his land,” and labeling this “The Hermit’s Right”).

the right to exclude others from particular resources is a way of organizing the management and control of resources in society. As such, it is a means to promoting a variety of ends, including, I will argue, a willingness to share resources. It also has a number of drawbacks, which means there will inevitably be exceptions and qualifications to the right to exclude. But I also said this explicitly in Nebraska essay.

The present Article revisits and expands upon the Nebraska essay. I will begin by restating the argument of the Nebraska essay, which I will call the exclusion thesis. After that, I will offer some clarifications, inspired by some of the critiques as well as my own reflections in the time that has passed since the Nebraska essay was published. Building on the clarified thesis, I will highlight some of the normative pros and cons of property that flow from the right to exclude. I will then offer something new: an explanation for how the right to exclude came to be the critical attribute differentiating property from other social institutions. The explanation is grounded in the concept of possession and the information cost advantages of using possession to differentiate between things that are mine and not mine as we navigate through everyday life. Possession is based on a perception of a capacity or intention to exclude others from a thing, and insofar as the institution of property is built on or evolves from a foundation of possession, I will argue that this accounts for why property always entails a right to exclude. I will wrap up by offering a few observations about what has emerged as the dominant critique of the exclusion thesis: that it promotes an excessively individualistic conception of property and downplays the communitarian or social obligation perspective on ownership.

## I. THE EXCLUSION THESIS

The exclusion thesis, as set forth in the Nebraska essay, is analytical or interpretative. It is an attempt to advance our understanding of what property means, by identifying a common thread among all the interests we call property. Although the exclusion thesis has normative implications, as I will discuss, it is not itself a normative vision. Nor does it purport to exhaust the understanding of what is entailed by the institution of property. The law of property, to state the obvious, is quite complicated, and includes much besides the right

to exclude others. What the exclusion thesis maintains is that if and when we recognize something as property, we will invariably find the right to exclude others.

Property, according to the exclusion thesis, is characterized by a triadic relationship.<sup>4</sup> The triad consists of an owner, a thing, and the right of the owner to exclude others from the thing. Provided the three elements are satisfied, the owner has property in the thing. If any of the elements is missing, there is no property in the thing. The Nebraska essay said that the right to exclude is a necessary and sufficient condition of identifying something as property.<sup>5</sup> A more accurate statement, although I think this was implicit in the essay, is that all three elements of the triadic relationship are individually necessary and jointly sufficient to make something property. But the critical point is that the right to exclude others from the thing is essential. Indeed, the scope of the owner's property rights is defined by the extent of the owner's right to exclude. For example, if someone has leased a car for a term of one year, and if being a leaseholder gives one the right to exclude others from the thing that is leased, then one has a property right in the car for one year.

The right to exclude is a right, not a duty; as such, the right to exclude can be waived. When I wrote the Nebraska essay, I assumed that the right to exclude entails the right to include, by simple operation of waiving the exclusion right. I described exclusion as a "gatekeeper" right,<sup>6</sup> that is, the right to determine who can or cannot enter or touch a particular thing. For this reason, I have been surprised by articles that argue in favor of a "right to include" or "right of entrance" and juxtapose this to the exclusion thesis.<sup>7</sup> Given the nature of the right, the right to exclude and the right to include are effectively the same thing. Admittedly, the only interest created by a simple waiver of the right to exclude is a license, and as Dan Kelly highlights, the law of property has given us a variety of more permanent inclusionary devices, such as easements and leases, for dividing up or sharing property.<sup>8</sup> I do not dispute this, but the point

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4. Thomas W. Merrill, *The Property Strategy*, 160 U. PENN. L. REV. 2061, 2063 (2012) [hereinafter *Property Strategy*].

5. *Nebraska Essay*, *supra* note 1, at 740.

6. *Id.* at 740.

7. *E.g.*, Eduardo M. Penalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005).

8. Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014).

is not inconsistent with the exclusion thesis. To the extent the law permits fragmentation of undivided property into lesser property rights, each of the fragments entails a right to exclude.

Another important attribute commonly associated with property is the right to use the thing. Undoubtedly a primary reason for creating and maintaining a system of property is to promote the effective use of things. But the way we do this is by giving owners the right to exclude others from the thing. In the Nebraska essay, I argued that the right to exclude (and include) leads naturally to the right to use a thing.<sup>9</sup> By giving the owner the right to determine who can enter or touch a thing, we effectively give the owner the power to determine the use of the thing. The right to exclude allows the owner to bar access to those who would interfere with the owner's desired use, and the right to include allows the owner to call on the services of various agents and contractors who can assist in developing particular uses of the thing.

James Penner has argued that the right to exclude is grounded in our interest in the use of things.<sup>10</sup> If by this he means that the exclusion right will only attach to things that have some use value, in the sense that they are scarce relative to demand for them, this is surely correct. The "things" to which the exclusion right attaches must be resources that have value, meaning they have potential use. This was mentioned in passing in the Nebraska essay,<sup>11</sup> and I have made it more explicit in subsequent writing.<sup>12</sup> The "things" to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want. Property does not attach to things that are so plentiful they are not scarce, or to things that no one wants.

If we go further, however, and maintain that the right to use is the defining feature of property, as opposed to the right to exclude, then I think the argument breaks down. For one thing, those who argue for the primacy of the right to use, like Eric Claeys, stipulate that this is a right of *exclusive* use.<sup>13</sup> But how do we get to exclusive

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9. *Nebraska Essay*, *supra* note 1, at 741.

10. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997).

11. *Nebraska Essay*, *supra* note 1, at 733.

12. *Property Strategy*, *supra* note 4, at 2063–64.

13. *E.g.*, Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on Property as the Law of Things*, 125 HARV. L. REV. F. 133, 143 (2012); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 633–34 (2009).

use, without a right to exclude? At the very least, those who would make a right to use an essential condition of property must also add the right to exclude. For another, not everything we call property entails a right to use. Pharmaceutical companies can obtain patents to new drugs, and can thereby block others from making the drug, but may have no right to use these patents without FDA approval. The Penn Central Company had air rights above the Penn Central terminal, and could exclude others from entering this airspace, but it had no right to use this space because of a preservation order.<sup>14</sup> If the government bars the owners of a wetland from draining or filling the land, the owner still has the right to exclude others from the wetland, but the government edict may mean that there is little or nothing in the way of effective use to which the land may be put. In each of these cases—the drug patent, the air rights, the wetland—the owner still has the right to exclude others, even if the owner has no right to use the resource. Significantly, however, we still speak of the owner as having property in the resource.

Still other important attributes of property involve the right to transfer, whether by gift, sale, or inheritance. Here too we can say that the right to transfer is a primary reason for establishing a system of property. Some property, money being the clearest case, has little or no value other than serving as a medium of exchange. But again, the right to exclude is the means by which we make possible the transfer of rights in things. We need to know which objects are mine and which are yours before any transfer of rights to things can take place. This division of the world is accomplished by giving each of us rights to exclude others with respect to particular things. Without property, that is, without the right to exclude, there can be no gift-giving, no contractual exchange, or no inheritance.

As in the case of the right to use, we can see how the right to exclude easily morphs into a right to transfer.<sup>15</sup> Perhaps the place to start is with abandonment of property. This can be regarded as a generalized waiver of any right to exclude, typically signaled by relinquishing possession of the object. By waiving all rights to exclude, the owner signals that the object has been returned to the common pool, and is open for claiming by others. In effect, the object has been transferred from A to an unknown future B, that is, the person who takes

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14. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

15. *Nebraska Essay*, *supra* note 1, at 742–44.

up possession and now exercises the right to exclude. It is but a small step from abandonment to gifts, which combine a relinquishing of any right to exclude by the owner with an intention to designate a specific other as the new owner of the thing. A gift is typically signaled by a transfer of possession from the giver to the recipient. It differs from abandonment only in that we have a transfer of the object from A to a known B. Once we recognize transfer by gift, it is yet another small step to bargained-for exchange, for example by barter. Obviously, at some point the law kicks in, dictating various formalities that must be observed to make an enforceable contract for the exchange of rights or a valid will that provides for a transfer of property on death. Nevertheless, the right to exclude is the major step that gets us started down this path.

As in the case of the right to use, one can also have property without having the right to transfer. The classic usufruct, which Bob Ellickson has described as the earliest form of property in land,<sup>16</sup> gave the holder the right to exclude others while the land was in active use. Nevertheless, the right was neither alienable nor inheritable. In the modern world, we also find instances where property is declared inalienable for policy reasons, such as the ban on transfer of eagle feathers, made to discourage the killing of eagles for commercial gain.<sup>17</sup> After the ban, we continue to regard eagle feathers as being owned objects, because the owner has the right to exclude others, even though the right to transfer has been taken away.

What then is the relationship between the right of persons to exclude others from particular things and the other attributes commonly associated with property, such as the right to use and the right to transfer? The right to exclude is a necessary condition, and together with the other legs of the triadic stool, the presence of a particular person and a particular thing of value, is jointly sufficient to establish something as property. The right to use is obviously very important and is nearly always associated with property, but it is not a necessary condition. It is possible to have property without having the right to use. The same holds for the right to transfer. The right to transfer increases the value of property tremendously and is nearly always associated with property, but again it is not a

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16. Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1364–68 (1993).

17. *Andrus v. Allard*, 444 U.S. 51 (1979).

necessary condition. It is possible to have property without having the right to transfer.

The Nebraska essay argued that the primacy of the right to exclude finds empirical support because it is a characteristic of virtually everything that is commonly regarded as property.<sup>18</sup> This includes not just tangible property like land and chattels, but also intangible rights like future interests, security interests, and stocks and bonds. In each case, the holder of the intangible right can exclude others from interfering with the right, for example by preventing others from interfering with a future interest once the condition is satisfied that allows it to become possessory. The interests we call intellectual property, including patents, copyrights, trademarks, and trade secrets, are also characterized by the right to exclude others from certain types of production, copying, or use of demarcated intellectual goods.<sup>19</sup> The fact that the exclusion thesis correctly identifies as property such a broad array of interests commonly regarded as property is a strong point in its favor.

The exclusion thesis does not maintain that everything of value is property. Rights of bodily integrity and personal autonomy are, like property, good against the world, but such rights do not pertain to any particular thing separate and apart from the person. Contractual obligations that bind only the parties fall outside the thesis, since they do not create rights against the world. The same can be said of statutory entitlement programs that create a government obligation to make payments to designated beneficiaries. These confer no right to exclude others, at least not in the ordinary meaning of the term. The fact that the Supreme Court has characterized some government entitlements as “property” for procedural due process purposes reveals that there are some uses of the term property in law that deviate from the exclusion thesis.<sup>20</sup> I regard these decisions as being driven by an instrumental desire to strengthen the procedural rights of entitlement holders, with the concept of property being stretched beyond its ordinary meaning to achieve this goal. My claim is that virtually everything commonly regarded as property is characterized

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18. *Nebraska Essay*, *supra* note 1, at 747–52.

19. In the case of trade secrets, this consists of a Hohfeldian power to prevent others from disclosing the secret.

20. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).



by the right to exclude, not that the Supreme Court has correctly used the concept of property in all its decisions.

## II. CLARIFICATIONS AND NORMATIVE IMPLICATIONS

Let me turn now to some clarifications of the exclusion thesis, and, building on the clarifications, offer an outline of the normative implications, pro and con, of giving individuals the right to exclude others from things.

One important clarification about the exclusion thesis is that exclusion is not absolute. This was made explicit in the concluding section of the Nebraska essay.<sup>21</sup> The common law recognized exceptions to the right to exclude, such as the defense of necessity to an action for trespass, and the public privilege to use navigable waters that overflow private land. The immunity of landowners for committing low-level nuisances (“live and let live”) also necessarily qualifies the exclusion rights of other owners. The modern regulatory state imposes many more restrictions, such as anti-discrimination laws.

If the right to exclude is a necessary condition of property, as the exclusion thesis maintains, how can there be exceptions to the right to exclude? These propositions can be reconciled once we recognize that the right to exclude is a *residual* right. Property entails having a general right to exclude *after* certain exceptions grounded in common law and statutes have been subtracted. There must be enough residual exclusion to be able to say that the owner exercises significant discretion about who can come and go and who can touch or use the thing. But as long as we leave enough residual discretion in the owner, we still regard the owner as having property. For example, public utility companies may be highly constrained in terms of who they must serve and at what prices. Yet they typically retain enough discretionary authority over the selection, maintenance, and operation of their equipment and transmission lines that we readily identify these things as their property. Similarly, landlords in New York City may be highly constrained in terms of what they can charge in rent and when they may terminate a tenancy. Nevertheless, they retain enough control over the selection of new tenants, determining

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21. *Nebraska Essay*, *supra* note 1, at 753.

how to maintain the property, and establishing rules for the use of the rental property, that we regard them as owners.

At some point, if the discretion of a person relative to a resource becomes too constrained, we stop referring to the interest of the person as property. Consider a security guard at a factory or an attendant in a parking garage. Each of these persons has some authority to exclude others from the things in question. Yet whatever authority they have is very tightly circumscribed. The security guard, for example, is authorized only to exclude trespassers from the factory. He has no authority to determine what the factory will produce, when it will be engaged in production, who shall be included as an employee or supplier to implement these decisions, when it will be sold or leased, and so forth. The parking garage attendant is authorized to deter persons from stealing or vandalizing autos. But he has no authority to sell a car, sit in it on his lunch break, or to let anyone but the owner take the car for a joyride. We could say these persons are simply agents or bailees of owners and, in so doing sidestep any issue about ownership. But even aside from the law of agency, these sorts of “excluders” do not have enough discretionary authority over how they exercise the right to exclude to qualify as persons who exercise a residual right to exclude, that is, to qualify as owners.

Because the exclusion thesis is analytical or interpretative, it is not a normative argument about the ends of property. In other words, the thesis is not a claim that we have property because it is desirable to exclude others from things. As my frequent co-author Henry Smith has emphasized, the right to exclude is a means toward various ends, not an end in and of itself.<sup>22</sup> There are numerous points that bear on a normative assessment of the institution of property, both good and bad. I believe that the exclusion feature is responsible for many if not most of these features. Thus, it is important to understand the exclusion thesis before rendering judgment about the normative end or ends of property as an institution.

In clarifying the role of the exclusion thesis in rendering normative judgments about property, it is helpful to consider further why the right to exclude leads to various attributes of property that are normatively relevant. Simplifying somewhat, the right to exclude confers

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22. Henry E. Smith, *Mind the Gap: The Indirect Relation Between Means and Ends in American Property Law*, 94 CORNELL L. REV. 959 (2009).

two general powers on owners. First, it gives them managerial authority over the thing. It does this for the reasons previously noted with respect to the right to use things. If someone has the right to exclude (and include), they have the ability to control who enters or touches the thing. And by controlling who enters or touches the thing, this person, whom we call the owner, secures managerial control over the thing. Larissa Katz has captured this understanding in arguing that property entails the power to determine “the agenda” of the thing.<sup>23</sup> Jeremy Waldron has said something similar. As he puts it, an owner of property is someone who has the final decision “how the object shall be used and by whom.”<sup>24</sup> What neither has noted is that this agenda-setting or use-determining power derives from a more fundamental attribute, the right to exclude.

Second, the right to exclude gives owners accessionary rights with respect to the thing. In other words, the owner automatically captures changes in the value of the thing over time, including the fruits immediately produced by the thing. Thus, the owner of land captures the value of crops that grow on the land, the owner of a share of stock captures the dividends and any appreciation in the value of the stock due to retained earnings, and the owner of a patent captures the monopoly rents that can be generated through commercial development of the patent. These accessionary rights are again a function of the right to exclude. The owner of land can exercise the right to exclude not only to plant and till but also to harvest the crop. The same point can be made about other property rights. This feature of property requires that we develop understandings about what objects are sufficiently prominently connected with the thing to constitute a derivative or accessionary right to the original thing.<sup>25</sup> For the most part these understandings operate intuitively and without controversy, such as the understanding that the tomato that sprouts on a plant in a garden belongs to the owner of the garden. These understandings have been supplemented by a variety of legal doctrines, such as the understanding that baby animals belong to the owner of the mother (the doctrine of increase) and minerals under the ground belong to the surface owner (the *ad coelum* rule).

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23. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275, 278 (2008).

24. Jeremy Waldron, *What Is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 327 (1985).

25. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009).

Both managerial control and accessory rights, consistent with the earlier clarification about the exclusion right, are residual. Thus, the right to manage a thing will be subject to various regulatory constraints imposed by common law and positive regulation. Similarly, accessory rights to a thing are subject to various contractual obligations and taxes imposed by the state. Accessory rights are thus also residual rights, roughly equivalent to what economists have called residual claims.

Let me briefly list some of the normative arguments that have been advanced for and against property as an institution.<sup>26</sup> In virtually every case, these arguments flow either from the exclusion right or from one or both of its derivative implications, residual managerial authority and residual accessory rights. First, on the positive side:

- Giving owners residual managerial authority over things establishes a highly decentralized mode of resource management. This draws on local knowledge, which permits a more efficient use of resources than would likely prevail if more centralized or bureaucratic modes of resource management were utilized.
- Combining residual managerial authority and residual accessory rights creates a powerful incentive for owners to invest effort and ingenuity in the use of resources so as to maximize their value. Property, as the old saying goes, rewards labor by allowing the owner to reap what she has sown.
- Endowing owners with exclusionary rights over all things they own allows owners easily to scale up and scale down their business or residence, all the while maintaining the same degree of control and accessory rights over the combination of things they own.
- Establishing exclusionary rights to things eliminates the problems associated with open access resources like fisheries, such as wasteful racing to grab resources, premature consumption of resources, or inadequate restocking of resources.
- Creating exclusionary rights in things establishes the precondition for engaging in exchanges of resources. Free exchange

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26. The list is drawn from *Property Strategy*, *supra* note 4, at 2081–94, where the reader will find appropriate citations.

of resources allows those who value particular resources most highly to end up with those resources, enhancing the general welfare.

- Allowing individuals to exercise control over resources diffuses power in society, thereby improving the prospects for individual liberty, free expression of ideas, free association, and democratic government.
- Permitting individuals to exercise exclusionary rights over things facilitates the realization of personal goals and aspirations, and hence promotes individual flourishing.

Let us now turn to the negative side of the ledger:

- Dividing up the world into separate units of discrete exclusionary rights creates incentives to foist costs onto other units of discrete exclusionary rights. Thus, although the exclusion strategy solves some externalities—those associated with open access regimes—it simultaneously creates the condition for other externalities in the form of spillovers.
- Because of the exclusion feature, all property rights are monopoly rights. When particular property rights have no good substitutes, this allows owners to charge monopoly prices for access to the resource they control, to the detriment of consumers.<sup>27</sup>
- Property rights are of little value unless interlaced with networks of roads, markets, recreational areas and other public rights. Paradoxically, therefore, private exclusion rights are dependent on public rights to realize their potential. Too much exclusion, in the wrong places, can choke off the positive benefits of property rights.
- Exclusion rights not only magnify incentives but also enhance risks. Natural disasters, criminal predation, and illness pose grave threats to those whose property is highly concentrated in one form and place. Where insurance markets and social safety nets are poorly developed, some form of communal sharing may be necessary to reduce the risks of private ownership.

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27. See Katarina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125 (2013) (recounting history of restrictions on the number of taxi medallions in New York City and the monopoly rents this generates for medallion owners).

- Because of the accession feature, those who have property tend to get more property, often without regard to their ingenuity or effort. Insofar as the positive effects of exclusion rights are dependent on a broad diffusion of property rights, some form of redistribution may be necessary to counteract the inherent tendency of property to beget more property.

Notice that one normative implication I have not listed is the promotion of communitarian values: an impulse to share resources with others, or a sense of obligation to others. This is a rather startling omission, since the central critique of the exclusion thesis by those who wish to promote more sharing, obligation to others, or community values is that the exclusion feature works against these ends. I have my doubts about this claim, but the issue is sufficiently important that I will defer it to Part IV of the Article.

Putting aside communitarian values, the current normative debate over property largely turns on whether one is more impressed with the list of benefits or the list of costs. Those who are more impressed with the benefits would like to see exceptions to the right to exclude held in check, in order to preserve the benefits of a robust system of private property. The pro-property faction, if that is the right term, would dial up the degree of exclusion associated with ownership in different contexts, in order to secure more of the benefits of exclusion rights. Those who dwell on the costs would like to see more restrictions on the exclusion right, in order to advance competing social goals, such as environmental protection, restrictions on monopoly pricing, and a more egalitarian distribution of wealth. They would dial down the level of exclusion, in order to minimize the costs of property systems.

The exclusion thesis, as I see it, frames the debate but cannot resolve it. It all depends on what weight one attaches to the benefits as opposed to the costs of private property. My own normative preferences fall on the side of strong property rights in most contexts. But the normative case for this must be made independently of whether the exclusion thesis is correct or not.

### III. THE RELEVANCE OF POSSESSION

The Nebraska essay did not address the question of causation. How did exclusion come to be the *sine qua non* of property, rather

than something else, like the right to use or the promotion of human flourishing or what have you? I will take a stab at answering that question here. This is the short version: Exclusion lies at the root of property because the institution of property is dependent on possession, and exclusion lies at the root of possession.

Possession plays a rather odd role in American property scholarship. Every teacher of property law spends significant time dealing with possession. The first possession cases, starring that perennial favorite, *Pierson v. Post*,<sup>28</sup> are invariably granted significant class time. Adverse possession, whereby possession is transformed by the passage of time into ownership, is routinely covered. Finders cases, which confer special rights on possessors, are popular; bailments, which entail a transfer of possession but not ownership, may also make an appearance; and so forth. At some point there will almost certainly be a reference to the old saw that possession is rather more than nine points of the law.<sup>29</sup>

Yet, given all this attention to possession, there is surprisingly little analysis of possession in the recent scholarly literature. Possession is clearly different than property. Possession is often said to be a fact; property is a legal right.<sup>30</sup> This may be correct as a first approximation, but what is more telling, in terms of understanding the nature of property systems, is respect for possession established by others. Respect for possession of others is a social norm, or, as I will argue momentarily, an ingrained human instinct shaped by social norms. This phenomenon—respect for possession—is I believe the foundation of the legal institution of property.

What does it mean to possess a thing? Everyone agrees possession refers in some sense to control over a thing. There are longstanding debates among civil law scholars about whether the required element of control refers to actual control, an intention to control, or some of both.<sup>31</sup> It may be that actual control is necessary in order to establish an initial claim of possession. In first possession cases, some courts have held that even the clearest manifestation of an intention to

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28. 3 Cai. R. 175, 2 Am. Dec. 264 (Sup. Ct. N.Y. 1805).

29. *Corporation of Kingston-upon-Hull v. Horner* (1774) (Mansfield, J.).

30. Indeed, this truism is repeated in the *Nebraska Essay*, *supra* note 1, at 732–33.

31. Yun-chien Chang, *The Economy of Concept and Possession*, in *LAW AND ECONOMICS OF POSSESSION* (Yun-Chien Chang ed.) (forthcoming 2014) (reviewing different positions among civilians about actual controls versus intent to control).

control will not suffice to establish possession, unless and until actual control has been established. Once actual control has been established, however, an intention to maintain control will often suffice, even if there are lapses in actual control. In the famous case of *Haslem v. Lockwood*,<sup>32</sup> the plaintiff gathered droppings of manure on the road into piles, left them for a day, and returned to find them gone; the court held he had established possession because the gathering into piles signaled an intention to control the manure. In the law of larceny, some courts have gone even further and have held that a clear manifestation of an intention to deprive someone of control is enough to establish criminal liability, even if the thief does no more than touch the object.<sup>33</sup>

But let us put aside questions about the relative proportions of actual control and intention to control in determining when someone is in possession of a thing. What does control mean in this context? It means, quite simply, that a person is in a position to exclude others from a thing. Thus, in *Eads v. Brazelton*,<sup>34</sup> the initial finder, Brazelton, was deemed not to be in possession of a sunken vessel, because he had not placed his salvage operation over the site in such a way as to exclude Eads from gaining access to the wreck. When speaking of an intention to maintain control, what we mean is that the person has signaled an intention to exclude others from taking the thing. In *Haslem*, putting the manure into piles signaled an intention to exclude others from the manure, even if the plaintiff lost the capacity to do so temporarily. Thus control of a thing, actual or intended, means excluding others from the thing.<sup>35</sup>

What is missing from property scholarship is the recognition that possession plays a ubiquitous role in everyday life. Ask yourself this: How is it possible that people can navigate through everyday life without getting into constant disputes over who has the right to exploit different objects of value? The answer, I submit, is a near-universal respect for possession established by others. We ascertain whether something is possessed based on physical cues about the

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32. 37 Conn. 500 (1871).

33. *People v. Olivo*, 420 N.E.2d 40 (N.Y. 1981).

34. 22 Ark. 499, 79 Am. Dec. 88 (Ark. 1861).

35. See Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 547 (2000) (characterizing Holmes as understanding possession to entail an intent to exclude others from interfering with one's own use of a thing).



relationship between persons and tangible things. We process this information instantaneously and unconsciously. When something is perceived to be possessed, we steer clear of it, just as we expect others to steer clear of things in our possession. The process works the same in both intimate and anonymous social settings. Even thieves are highly selective about which objects in possession of others they target for appropriation. In most of their interactions with others, even thieves respect possession established by others.

Take a scene with which you are all no doubt highly familiar: an airport passenger terminal. Dozens, sometimes hundreds or even thousands, of people are walking, standing or sitting in the terminal. Nearly all of them are pulling some suitcase on wheels or carrying a backpack or some other kind of satchel. Why are these people not engaged in a constant struggle to seize control of the choicest-looking suitcases or satchels? Is it because they fear the police would arrest them? Maybe, but outside the security gate, there may not be very many police around. In a busy airport it would be fairly easy to snatch a suitcase from a dozing passenger and disappear into the crowd. No doubt this happens, but it seems to be a rare occurrence. And think of the curious scene in the arrivals area, where elaborate conveyor belts spew forth dozens of suitcases to waiting passengers, and many more suitcases are often lined up on the side, awaiting the arrival of some claimant on an earlier or later flight. Remarkably, individuals arriving on flights carefully scrutinize each bag as it comes off the conveyor, taking care to claim only their own, often marked by some colored ribbon or tape, and not someone else's. Here it would seem to be even easier to grab a choice-looking suitcase belonging to someone else and jump in a cab before being detected. Again I assume this happens, but not very often—certainly not often enough to generate a demand for systematic inspection of claim tickets by security guards.

Nor do I think we can ascribe the respect for suitcases of others to a social norm, at least not the kind of norm developed through repeated interactions of persons living in close-knit communities.<sup>36</sup> When I pass through O'Hare Airport I rarely encounter another person I know, even though I lived in Chicago for most of my adult life. Nearly everyone is a stranger to everyone else, and yet the respect for possession seems secure. More strikingly still, consider that the

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36. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 177–78 (1991).

scene I have described is virtually the same the world over. It is no different in Richmond, Virginia, than it is in Moscow, or Taipei, or Nairobi. How is it possible that expensive-looking suitcases belonging to anonymous travelers remain undisturbed, for the most part, in all the corners of the world?

The reason there is no free-for-all over suitcases in airports is that people instinctively respect possession established by others. I say instinctively advisedly. Respect for possession established by others is likely something that is hardwired in human psychology. It is a species of what Daniel Kahneman calls “thinking fast” or System 1 cognition.<sup>37</sup> It occurs automatically and unconsciously, without any effort at deliberate reasoning on our part. As Jim Krier has suggested, the roots of this instinct may lie in our evolutionary past.<sup>38</sup> Biologists have identified an evolutionarily stable “bourgeois game,” in which animals aggressively defend their territory from attack but retreat in the face of a defense of territory by another. The possession instinct may derive from a similar innate proclivity. In other words it is in our genes, having been selected out for its superior survival value over the millennia. Be that as it may, a virtually automatic respect for possession established by others appears to be the best explanation for how human beings navigate, without confusion or turmoil, through the everyday world filled with valuable objects.

Although the possession instinct appears to be universal throughout human societies, the particular signs used to communicate an intention to possess undoubtedly have a social element.<sup>39</sup> Bob Ellickson’s well-known study of the different social norms for establishing possession among different whaling communities is an example.<sup>40</sup> Depending on the species of whale pursued and its behavior, there were variations in what communicative acts were required to establish possession, for example in terms of whether a line must be maintained between the harpoon and the whaling vessel. This was clearly part

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37. DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

38. James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 *CORNELL L. REV.* 139 (2009).

39. On the communicative aspect of possession, see Carol M. Rose, *Possession as the Origin of Property*, 52 *U. CHI. L. REV.* 73, 78 (1985); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 *STAN. L. REV.* 1105 (2003).

40. Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 *J. L. ECON. & ORG.* 83 (1989).

of the cultural knowledge transmitted within each whaling community. The more important point, for present purposes, is that all whaling communities followed a rule of first possession in allocating rights to particular whales among whaling vessels. The variations involved the communicative acts that signaled possession, not the basic principle of respect for possession established by others. With respect to suitcases in airports, the use of luggage tags and colored ribbons to identify suitcases possessed by others is undoubtedly learned behavior. In this case, the learning appears to have spread rapidly throughout the world and is so obvious it requires no explicit instruction. People quickly pick it up observing what other people do. The rapid diffusion of common signs is made possible, I would suggest, because the instinct for respecting possession is universally shared.

Why does possession perform the task of differentiating among objects in the everyday world rather than ownership? The reason, I believe, is that ascertaining possession, in most situations, entails very low information costs. Information about possession can be gathered at a glance and processed by our brain automatically and instantaneously. Possession is based on physically observable facts about the relationship between persons and tangible objects. Significantly, possession applies only to tangible things like land and chattels. One can possess land, cars, clothing, laptop computers, and suitcases; one cannot possess an invisible right, such as a future interest, a security interest or an intellectual property right. The evidence used to establish possession consists of physical facts about the relationship between natural persons and tangible objects. The relevant facts are those that indicate that particular persons have established control over particular objects and/or are signaling an intention to maintain control over the object. Our brain uses this evidence, quickly and reflexively, to raise inferences about whether objects are possessed or unclaimed. If possessed, we avoid interfering with the object. Others do the same. The result is that airport terminals exhibit very little discord in matching thousands of objects with thousands of persons, many of whom come from foreign cultures and nearly all of who are complete strangers to each other.

Establishing ownership, in contrast, entails much higher information costs. Establishing ownership entails ruling out any superior right in third parties, which means tracing the chain of title back in

time. Thus, ownership is established primarily by documentary evidence, such as bills of sale, deeds, certificates of title, and registries of rights. It takes time and some sophistication to uncover and interpret these documents. Ownership is often qualified by invisible rights, such as security interests and future interests, which are even more difficult to establish and interpret. And owners include not just natural persons, but also artificial entities like corporations that act through natural persons, which raises potential questions of authority and agency.<sup>41</sup> It is conceivable that in some futuristic world persons could navigate through valuable objects using the concept of ownership. They could wear some new generation of Google glasses that would scan small bar codes on objects that embody the relevant documentary information about ownership, which information would then be processed by a computer, which would then send a verbal message to the person wearing the glasses about the ownership status of each object encountered. But think back to the airport terminal. The number of messages would be overwhelming, not to say irritating. Far better to rely on the computer that has evolved in our brains, which sends silent messages like “not yours,” “not yours,” “not yours,” “yours!”—messages that allow us to navigate successfully through the world of objects without thinking about it.

Even if possession is critical to everyday interactions among people and their objects, and perceptions of possession entail some combination of capacity to exclude and intention to exclude, why does it follow that property should similarly be anchored in a right to exclude? The answer has already been intimated. Because possession, for information-cost reasons, is the concept that dominates world of objects in everyday life, it is critical that property and possession remain synchronized. If possession were grounded in one concept (exclusion), and property in another (need, promotion of human flourishing, whatever), there would be too much incompatibility for the system to bear. This is because the system of property rights—a legal institution—presents an enormous information-cost problem, given the very large number of persons and objects covered by the system. The only way to overcome this information-cost problem is to borrow from the information-saving attributes of possession.

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41. BENITO ARRUNADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE 76–85 (2012) (making the point that questions of agency authority in corporations parallel questions of title in property transfers).

Consider, as one striking example of the dependence of property on possession, the use of possession as a proxy for ownership in virtually all low-valued transfers of property rights. If you buy a bottle of water from a street vendor, for example, you do not demand documentary evidence that the vendor has good title to the bottle of water sitting in his cooler. The fact that the vendor is in possession of the water bottle is taken as sufficient evidence of the vendor's capacity to transfer title. We accept possession as evidence of title in these circumstances for the obvious reason that the transaction costs of doing a "title search" of the water bottle would be prohibitive, relative to the value of the object being exchanged. As objects become more valuable and durable, the calculus changes. Thus, we do title searches before transferring ownership of land or airplanes, and sophisticated purchasers of artwork will demand evidence of the provenance of the work before they buy. But for consumables like food and beverages, articles of clothing, and most other forms of personal property, possession functions as a stand-in for ownership. Notice that there is no bright line separating this possession proxy from title-searching as modes of establishing ownership. Purchasers of land nearly always do a title search *and* inspect the property for evidence of undisclosed possession. And the transfer of some expensive personal property, like antique jewelry, may also entail an investigation of provenance. Clearly, it would be awkward and confusing rigorously to separate possession and title as modes of determining ownership. Far better to synchronize the concept of ownership with possession, which means in effect that ownership, like possession, must be grounded in exclusion.

Further illustrations of dependence arise in resolving disputes between possessors and owners. Ownership trumps possession, but as previously indicated the costs of establishing ownership are much higher than the costs of ascertaining possession. Not surprisingly, therefore, when disputes break out between possessors and would-be owners, the first step in resolving the dispute is to enforce the right of possession. When the police are called to mediate a fight between a repo man and the owner of an auto, or to determine whether a landlord is entitled to evict a tenant, the police generally allow possession to remain undisturbed pending a more formalized resolution of the respective rights of the parties. Again, one can say that the concept

of possession is being deployed as a surrogate for title, given that the urgency of the situation does not permit any kind of investigation of the chain of the title before deciding who is entitled to the thing in question.

The general point is this. Respect for possession established by others is a universal attribute of human societies. Call it a social norm or an instinct shaped by social norms or whatever you want. Respect for possession operates through perceptions that individuals have either established the capacity to exclude others from things or have an intention to exclude others from things. Property is a legal institution, one that exists only in societies that have some formalized method of adjudicating rival claims to particular resources. Property, as a legal institution, is dependent upon respect for possession, and interacts with possession in many critical ways. There are probably multiple reasons for this, but a basic one is information costs: information about possession is much cheaper and quicker to process than is information about ownership. In order for this interaction to work, however, property—the legal institution—must mimic or be synchronized with the basic features of possession. This means the right to property must always include, as one critical element, the right to exclude.

#### IV. SHARING PROPERTY

Let me close with some brief comments about the burgeoning literature that attacks the right to exclude on the ground that it devalues the importance of community, social cooperation, and sharing of resources. Preliminarily, I would distinguish two positions.

One, which is a variant on conventional egalitarianism, wants more people to participate in the benefits of owning property. Those who espouse this view look at the list of benefits of property set forth in Part II, especially the benefits of prosperity, security, liberty and the development of personhood, and say: If property does these good things, then everyone should have some property! This was essentially the argument of Charles Reich, in *The New Property*,<sup>42</sup> who worried about the proliferation of licenses, jobs, and benefits dependent on the discretion of the state. He wanted to redefine these entitlements as

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42. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

“property,” in order to provide those whose livelihood was dependent on them the benefits associated with property. Another prominent voice sounding this theme is Hernando de Soto,<sup>43</sup> who wants to transform informal occupancy rights in developing countries into formal property rights, in order to provide greater access to credit markets by the poor.

I think Reich was in error in thinking that discretionary government benefits can be reconceived as property. The entitlements he considered are more like revocable licenses or contracts. Otherwise, I have no particular quarrel with “more property” proposals. Indeed, there are good theoretical and empirical reasons to believe that widespread distribution of conventional property maximizes both the economic and the social and political advantages of a private property system. There are of course serious questions about how to generate or sustain a more egalitarian distribution of property. I regard expropriation as a bad idea, and pushing people to buy homes using sub-prime loans is not much better. Making education widely available and reducing the regulatory impediments to starting new business ventures are better ideas. In any event, I see nothing in the “more property” version of the argument for greater sharing incompatible with the exclusion thesis. The disadvantaged and disfavored who previously have had little or no property will want to be able to exercise the exclusion right once they get their hands on some property, in order to capitalize fully on the advantages of ownership.

A second variant on the need for more sharing is more problematic. This is the idea that the government should enforce greater sharing of existing property rights, by mandating access to valuable resources, restricting changes in use, imposing rent controls, compelling mediation before co-owners can seek partition, and the like. I will call this the “forced sharing” argument.<sup>44</sup> Forced sharing differs

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43. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

44. I cannot provide a complete bibliography of works that espouse some variant on what I have characterized as the “forced sharing” position. Prominent works that I have in mind include Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011); Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009); and JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000). Obviously, I cannot do justice to the many subtleties in argument or variations in approach reflected in these and other related works. What generally unites them in my mind is a critique of the exclusion thesis

from the standard arguments for restricting exclusion rights in order to limit externalities, control abuses of monopoly, or to provide public goods like roads. These standard arguments are designed to restrict the exercise of exclusion rights by some in order to enhance the value of property rights more generally. Forced sharing also differs from proposals for government insurance or social safety nets, in order to reduce the risks of private ownership, or arguments for progressive taxation, in order to mitigate the tendency of property systems to produce increasing inequalities. These programs generally proceed by taxing fungible income or wealth and do not necessarily entail modifying the traditional prerogatives of ownership. Forced sharing, in contrast, advocates tinkering with the mechanics of the institution of property itself, in order to open the gates to more widespread participation in the use and enjoyment of discrete resources. The battle stanchion of the forced sharing proponents is the New Jersey Supreme Court's decision in *State v. Shack*,<sup>45</sup> which suggested the right to exclude is subject to override by courts based on an ex post balancing of the interests of the owner and the parties seeking access. The ultimate vision here is imposing some kind of "just cause" limitation on the right to exclude, with courts or some other agency of government passing judgment on whether owners have sufficiently good reasons for managing their property the way they do.

One obvious concern is that too much dilution of the exclusion right will sap the engine of property of much of its vitality. Forced sharing would inevitably result in more complicated management problems, with more people demanding access to resources and more conflicts among competing claimants to sort out. Owners would worry about what the "Sharing Commission" will say about their resolution of these conflicts and consequently would have less time and energy to devote to managing the resources themselves. Larger owners would hire "sharing compliance officers," giving corporations a comparative advantage relative to small proprietors. In order to avoid litigation, owners would tend to steer clear of decisions that might be questioned as violating the sharing principle.

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coupled with an endorsement of significant governmental restrictions on the prerogatives of ownership in order to promote distributive justice goals.

45. 277 A.2d 369 (N.J. 1971).



Overall, greater timidity would creep into the management of property. Innovation and experimentation would decline. Idiosyncratic uses of property, including perhaps uses by dissenting religious sects or political groups, would be discouraged.

Less obviously, it is not clear to me that forced sharing would lead to more sharing. It all depends on whether people are more likely to share resources voluntarily or if sharing will be better promoted by government compulsion. It is plausible, to me at least, that people have a natural impulse toward communal engagement and that there is an “altruism instinct” to go along with the possession instinct.<sup>46</sup> Secure and relatively unqualified property rights may increase the willingness of owners to share with neighbors and friends, if only because they are confident that if the sharing does not work out, they can terminate the sharing by reasserting their right to exclude. If forced to share, the natural impulse toward sociability and altruistic sharing may be extinguished. Owners may do as little as possible to comply with regulatory mandates, or may exchange their property for other resources that are easier to conceal or that can be moved to jurisdictions where sharing is not compelled.

There are unquestionably counterarguments. Regulatory mandates can change preferences. Seat belt laws have changed people’s attitudes about using seat belts; laws against smoking inside public buildings have presumably discouraged some people from smoking. Perhaps forced sharing of property would eventually shape preferences by developing a taste for sharing. I have my doubts. It would be hard to argue that there is more sharing between landlords and tenants in jurisdictions like Berkeley and New York that have rent and eviction controls than there is in jurisdictions without such controls. And I am skeptical that colleges in New Jersey are more hospitable to outsiders demonstrating on campus, where such access is mandated,<sup>47</sup> than are schools in other states where access is left to the discretion of the college. But it is ultimately an empirical question.

What can hardly be doubted is that if there is no “altruism instinct,” in other words, if people are entirely self-centered and selfish, then forced sharing is unlikely to yield more sharing. Instead, questions

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46. See, e.g., Nicholas R. Eaton et al., *Is Altruism a Genetic Trait?*, SCIENTIFIC AMERICAN (Sept. 30, 2010).

47. *Princeton University v. Schmid*, 423 A.2d 615 (N.J. 1980).

about sharing of resources would be transferred from the realm of individual discretion to the political realm. And if people are self-centered and selfish, then the outcome in the political realm will be a function of the relative power and capacity for political organization of those who have resources as opposed to those who do not. Here there can be little doubt that those who have, being a relatively more concentrated interest, will as a general matter out-organize and out-lobby the relatively unorganized set of persons who prefer more sharing. Forced sharing, on these assumptions, would simply sap the institution of property of much of its vitality with little gain, other than an increase in the size and complexity of government.

#### CONCLUSION

The right to exclude, I continue to believe, is an essential condition of identifying something as property. Exclusion is not the only important attribute of property. The right to include, to use, and to transfer are all obviously important, but they are dependent upon and derive from the right to exclude, which is indispensable. Exclusion is not a goal or valuable end of the institution of property. It is a critical feature that produces a variety of ends, many good, some bad. The normative evaluation of property as an institution depends on how we weigh the goods versus the bads. I have argued here that the right to exclude is an essential feature of property because exclusion of others is an essential feature of possession, and property builds on and relies continually on possession in many of its operations. As for those who argue that the right to exclude should be compromised in order to promote forced sharing of resources, I think the consequences of moving too far in this direction would be undesirable, and I am skeptical that in the final analysis forced sharing would increase the total amount of sharing we witness.