PROPERTY IN THE EMPIRICAL WORLD

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Review of *Property Theory: Legal and Political Perspectives* (James Penner and Michael Otsuka (eds), Cambridge University Press, 2018, ISBN 978-11-08500-04-3)

Property theory seeks to answer two related questions: first, what is property and, second, assuming its invocation by a polity, can it be justified? Put simply, the former involves a consideration of the normative content of the concept of property – this inquiry usually coalesces around Wesley Newcomb Hohfeld's 'jural opposites',[1] Anthony M Honoré's eleven standard incidents of ownership,[2] or Margaret Jane Radin's 'liberal triad' of use, exclusivity, and alienability,[3] all of which is summarised by the 'Hohfeld-Honoré bundle of rights metaphor'.[4] The second question focuses on the range of theories said to justify the concept which have been proffered over time.[5]

James Penner and Michael Otsuka's *Property Theory: Legal and Political Perspectives* – the latest contribution to the vast and growing body of property theory scholarship – brings together some of the leading contemporary scholars currently working on the related themes of content and justification.[6] The chapters can be divided into two groups: the first considers content or, as Penner and Otsuka

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1 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16.

2 Anthony M Honoré, 'Ownership' in Anthony G Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107.

3 Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88(8) *Columbia Law Review* 1667.

4 J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43(3) *UCLA Law Review* 711.

5 J W Harris, *Property and Justice* (Oxford University Press, 1996).

6 Two of the contributors have had a profound impact on recent property theorising: J E Penner has written the definitive account of *both* the concept of property in law (*The Idea of Property in Law* (Oxford University Press, 1997)) *and* of the bundle of rights metaphor (see n 4); Larissa Katz's 'agenda-setting', as a means of describing the power of ownership encapsulated in property, has gained international critical acclaim ('Exclusion and Exclusivity in Property Law' (2008) 58(3) *University of Toronto Law Journal* 275). This is not, of course, to detract from other leaders in the field, including, but by no means limited to Gregory S Alexander, Kevin Gray, Thomas C Grey, Michael A Heller, Thomas W Merrill, Stephen R Munzer, Eduardo M Peñalver, Margaret Jane Radin, Carol M Rose, Joseph William Singer, Henry E Smith, Laura Underkuffler and Jeremy Waldron.

put it, 'the legal theoretical side of the ledger … bring[ing] pressure to bear on several popular ideas which have tended to shape the discourse in this area';[7] the second, justification – the political implications of a state's adoption of a system of property.[8] In both parts, justice considerations loom large. Anyone who today seeks to understand either what property is or how it can be justified must engage with these theorists and, for that reason, each chapter repays our close and careful attention. In this review, however, having briefly recounted the arguments made by the contributors, I turn to an important but unstated implication of their work: the need to bridge the divide between theorising about property and the way in which property itself actually operates and is understood by those who use it in the empirical world. For quite apart from adding to an already voluminous literature on property theory, what really matters is how property exists in the empirical world.

The first part of the book comprises five chapters, the first two of which examine the way in which the content of property might further just outcomes for individuals. Rejecting the traditional public-private divide as relevant to understanding the nature of property, Lisa Austin argues that because property comprises a legal relationship between persons – which means that it is both private *and* public – it is capable of achieving an allocation of goods and resources that produces *both* distributive *and* corrective justice.[9]

Larissa Katz extends this concern for justice, arguing 'that Hohfeld's account of jural relations does more than just establish a neutral technology for moral and political action: it sets out the ways that people might relate in law, given Hohfeld's conception of persons for the purposes of law'.[10] Taking the atypical property form found in the trust as a focus, Katz argues that in Hohfeld one finds a means of understanding property as moral. Katz's project seeks 'to reframe the disagreement between moralist and formalist as a disagreement about what … legal forms are and the extent to which [such] forms are themselves sources for thinking morally about problems in our shared lives. Everyone agrees that juridical ideas run out at some point; the rest is politics'.[11]

If property is moral, if it can achieve both distributive and corrective justice in the allocation of scarce things, the question arises: what is essential, as a matter of normative content, to allow one to conclude that property in fact exists? Answering the question requires engagement with the long-standing 'essentialism' debate, which concerns the standard incidents of ownership first identified by Honoré.[12] Which, if any, of those incidents is essential to the existence of property? The final three chapters of the first part tackle this question, asking in turn whether, even if

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7 James Penner and Michael Otsuka, 'Preface' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) ix, ix.

8 Ibid.

9 Lisa M Austin, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 1, 1–2.

10 Larissa Katz, 'Legal Forms in Property Law Theory' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 23, 25.

11 Ibid 25–6.

12 The classic exposition is Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77(4) *Nebraska Law Review* 730.

one can find the 'essential' attribute or incident of ownership, that really matters, or whether it is, in fact, the 'thingness' of property, in contrast to the abstract bundle of rights, that really matters.[13] This is a deeply significant contribution to an old debate: is property things, rights, or both?

The second part of the book interrogates the political implications of adopting property as an allocative tool, each chapter suggesting that Lockean thought retains much of significance by way of justification: Nicholas Sage examines original acquisition of a resource as a means of justifying property in it;[14] Michael Otsuka and James Penner the 'enough and as good' proviso;[15] and Norman Ho the parallels between Confucian and Lockean approaches to property.[16]

Perhaps of greatest interest are the opposite sides taken up by Otsuka and Penner over Locke's 'enough and as good' proviso when applied to land. Otsuka and Penner consider whether the initial distribution of land or its allocation through the operation of market forces results in a just outcome for the members of a society. Otsuka argues that the 'enough and as good' proviso can continue to ground an egalitarian claim to the spatial regions above and below land, as well as to natural resources found within it, in both post-industrial money-based economies as well as in primitive agrarian barter economies.[17] For Otsuka, 'every individual is entitled to a right to access the material resources of the earth to an extent which is calculated by dividing [those] material resources … by the number of individuals living at any one time'.[18] Penner, however, argues that 'the distribution of … land, even in conditions of scarcity, is irrelevant to the question of distributive justice … Where the real action lies is in a just distribution of the fruits of a division of labour, which, under the developed Lockean theory of just contractual exchange, does not allow first acquirers of titles in land to exploit the landless'.[19] This is a bold move, and one that forces us to shift our focus from the

13 James Y Stern, 'What Is the Right to Exclude and Why Does It Matter?' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 38; Christopher M Newman, 'Using Things, Defining Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 69; Johan Olsthoorn, 'Two Ways of Theorizing "Collective Ownership of the Earth"' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 187.

14 Nicholas Sage, 'Is Original Acquisition Problematic?' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 99.

15 Michael Otsuka, 'Appropriating Lockean Appropriation on Behalf of Equality' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 121; James Penner, 'Rights, Distributed and Undistributed: On the Distributive Justice Implications of Lockean Property Rights, Especially in Land' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 138.

16 Norman P Ho, 'Lockean Property Theory in Confucian Thought: Property in the Thought of Wang Fuzhi (1619–1692) and Huang Zongxi (1610–1695)' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 161.

17 Otsuka (n 15) 121.

18 Penner (n 15) 138.

19 Ibid 139.

acquisition of a resource to contractual exchange in respect of it – for it is there that injustice and unfairness most commonly occur.[20]

The contributions to this volume clearly offer bold and refreshing treatments of the old questions surrounding content and justification. Still, while property theorists – including the contributors to this volume – continue to debate the content of and the justifications for property, few seek to consider how their theories might in fact explain what property means to real, flesh and blood people. Put another way, theory presents concepts and posits hypotheses about what property might be – as the contributors to this book show, concepts and hypotheses about morality, justice, and egalitarian distributions of goods and resources – but it does not tell us a great deal about what it really *is* for the non-theorist and the non-lawyer. In short, how do laypeople understand what property means when going about their lives?[21] If, as Katz has rightly claimed, what matters most is the power to set agendas about the use of a resource, whatever it happens to be,[22] then it matters just as much what people think they can and cannot do with a thing for which they set that agenda. Such decisions bear consequences not only for those making them, but for others, too – usually for the economy, the environment, or both. Property theory risks losing relevance the more it disregards these 'lay understandings' of property.

Yet, in raising this point, far from suggesting a rejection of property theory (or this book) as irrelevant, my intention is rather to emphasise that turning our attention to what real people think about property is an important question that ought to be a central concern of property theorists. In fact, this book provides the perfect entrée to do just that. Asking what real people think about property begins with Morris Cohen's 'Property as Sovereignty',[23] written almost 100 years ago: property, Cohen argued, *is* power over things and over others, and it is hard to justify. If that is so, we need to move beyond debates about those two aspects of property and think more clearly and more carefully about how we might encourage people, in exercising the significant power conferred by property, to take account of the things and the others affected by their decisions. It is only in focusing attention on what people do with property that it becomes possible to make any inroads into the consequences – whatever they may be – of decisions taken in furtherance of the power that property confers.

But what *do* people think about property? We know that 'bundle of rights' theorising allows ever greater levels of abstraction, so as to ensure property's utility in allocating items of social wealth which may have little if any obvious tangible existence. Such abstractions began with Jeremy Bentham's aphorism that 'property and law are born together, and die together. Before laws were made there

20 Ibid 160.

21 See especially Paul T Babie, Peter D Burdon and Francesca da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40(3) *Houston Journal of International Law* 797; Paul T Babie et al, 'The Idea of Property: A Comparative Review of Recent Empirical Research Methods' (2019) 26(2) *Indiana Journal of Global Legal Studies* 401.

22 See Katz, 'Exclusion and Exclusivity in Property Law' (n 6).

23 Morris R Cohen, 'Property and Sovereignty' (1927) 13(1) *Cornell Law Quarterly* 8.

was no property; take away laws, and property ceases'[24] and Pierre-Joseph Proudhon's 'Property is theft!'.[25] These abstractions of the nature and content of property reach a zenith in the work of Kevin Gray and Thomas C Grey. The former wrote that

> Proudhon got it all wrong. Property is not theft – it is fraud. Few other legal notions operate such gross or systematic deception. Before long I will have sold you a piece of thin air and you will have called it property. But the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept – oddly enough rather like thin air.[26]

But this is nothing like what the non-specialist thinks about property; Thomas C Grey writes that

> … the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people … conceive of property as *things* that are *owned* by *persons*. … By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things.[27]

While theorists and judges have little difficulty viewing property in abstract terms,[28] it is not so clear that non-theorists and non-lawyers see it the same way. Yet, can we even be sure that Grey is right? The truth is, we do not really know. Why? Because few have asked the questions that would elicit the empirical data that would provide the answers. Such research might reveal that the layperson understands property as abstract rights which come with obligations;[29] but it might just as easily show that property is viewed more as things rather than rights.[30]

Whatever theory may say about it, we cannot know what the layperson thinks about property until the questions are asked and the research done. Does suggesting this mean that we ought to abandon property theory? Absolutely not. Indeed, one of the foremost empirical sociologists, Herbert Blumer, wrote that

> [t]he aim of theory in empirical science is to develop analytical schemes of the empirical world with which the given science is concerned. This is done by conceiving the world abstractly, that is, in terms of classes of objects and of relations between such classes. Theoretical schemes are essentially proposals as to the nature

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24 Jeremy Bentham, *The Theory of Legislation*, tr Richard Hildreth (Oceana Publications Inc, 1975) 69.

25 Pierre-Joseph Proudhon, *Qu'est-ce que la Propriété? Ou Recherche sur le Principe du Droit et du Gouvernement* (Brocard, 1st ed, 1840) 1–2.

26 Kevin Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252, 252.

27 Thomas C Grey, 'The Disintegration of Property' in J Roland Pennock and John W Chapman (eds), *Property: Nomos XXII: Yearbook of the American Society for Political and Legal Philosophy* (NYU Press, 1980) 69 (emphasis in original).

28 See, eg, *Yanner v Eaton* (1999) 201 CLR 351. And on this trend generally, see Michael A Heller, 'The Three Faces of Private Property' (2000) 79(2) *Oregon Law Review* 417.

29 See Bethany R Berger, 'What Owners Want and Governments Do: Evidence from the Oregon Experiment' (2009) 78(3) *Fordham Law Review* 1281; Jonathan Remy Nash and Stephanie M Stern, 'Property Frames' (2010) 87(3) *Washington University Law Review* 449.

30 See Krithika Ashok, Paul T Babie and John V Orth, 'Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States' (2019) 42(2) *Fordham International Law Journal* 999.

> of such classes and of their relations where this nature is problematic or unknown. Such proposals become guides to investigation to see whether they or their implications are true. Thus, theory exercises compelling influence on research – setting problems, staking out objects and leading inquiry into asserted relations. In turn, findings of fact test theories, and in suggesting new problems invite the formulation of new proposals. Theory, inquiry and empirical fact are interwoven in a texture of operation with theory guiding inquiry, inquiry seeking and isolating facts, and facts affecting theory. The fruitfulness of their interplay is the means by which an empirical science develops.[31]

What we need is empirical research to test the concepts and classes of relations proposed by property theory as they exist in the empirical world. Devising ways to test those theories which in turn constitute theories which will require further refinement and modification once tested. And identifying the absence of such theories and of empirical research which tests them is, in fact, far from identifying a shortcoming of this book. Rather, it is to suggest an opportunity, for Penner and Otsuka's important book, containing contributions from the most important property theorists of our time, represents an excellent place for such empirical research to start, for it opens a dialogue – a 'fruitful interplay' – between abstract theory and the empirical world of agendas set by real people for goods and resources. This book allows the formulation of hypotheses about how the real-world holders of property understand the nature of the choice available to them in the empirical world. And it can therefore form the basis upon which to develop an empirical science as a counterpart to property theory.

31 Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (Prentice-Hall Inc, 1969) 140–1.