Margaret Jane Radin Reinterpreting Property

PERSONALITY THEORY OF PROPERTY

“The personality theory is an aspect of traditional liberal thought about property. It elaborates the notion that ownership is bound up with self-constitution or personhood. It connects ownership with central ideological commitments of liberal thought, particularly with notions of freedom and individualism. In reconsidering the personality theory I have juxtaposed it with two other main aspects of liberal property theory, the labor theory stemming from Locke and the economic theory stemming from Bentham.” 1

LAW AND ECONOMICS MOVEMENT

“This branch of liberal theory supports the law and economics movement. In the economic view, private property is justified because it is necessary to create, through internalization of benefits, incentives to produce activity. As the nations of Eastern Europe try to develop market societies in the 1990s, this is the branch of liberal theory that occupies the foreground of discussion. Yet in these essays I was not concerned primarily with the economic theory of property, but rather with property and personhood.” 7

HEGEL AND KANT

“Neither Kant nor Hegel (who is very Kantian in his passages on “Abstract Right”) thought property—or contract, or any of the other juridical relationships of abstract right—to be anything but socially mediated. Indeed, Kant’s point about property was that property must become a juridical (i.e., socially mediated) relationship precisely because it is crucial to the full scope of the will of persons, and thus related to the moral law.” 8

HEGEL

“In “The Rhetoric of Alienation” (chapter 7) I suggested that Hegel was ambivalent about the subject/object dichotomy because his commitment to the market society (requiring free alienation of private property) reinscribed the dichotomy even as other aspects of his theory undercut it. Whether Hegel did or did not reinscribe the subject/object dichotomy is a matter of serious controversy among Hegelians. On the one hand, his reference to the “initial gulf” between subject and object in the section on “Abstract Right” implies that this gulf is *aufgehoben* (transcended) in later, more actualized stages of theory and history. On the other hand, it is hard to see how he can argue in “Abstract Right” that whatever is external to personhood is required to be alienable, while whatever is internal to personhood is required to be inalienable, without presupposing at least an “initial” sharp divide between what is external and what is internal to the person. Then if the relationships described in “Abstract Right” are supposed to remain intact, even after they are *aufbehoben* in later stages, it may seem that the internal/external distinction must also remain. I did not intend my remarks to adjudicate this Hegelian controversy. In my writings I found Hegel’s text on property suggestive for exposing my view, and several times returned to it, but in the end the project of intellectual history—getting the best interpretation of Hegel—is not the primary one that engages me.” 8-9

PRAGMATIST APPROACH TO SUBJECT/OBJECT

“In fact, my view can be understood as blurring both the subject/object distinction and the subjective/objective distinction. These have slightly different connotations. The subject/object distinction calls to mind the disjunction between persons and things, and the subjective/objective distinction calls to mind the disjunction between what is “inside” the will of a person (arbitrary, merely a matter of preference or desire) and what is “outside” in the world of objects (fixed, mind-independent reality). The pragmatist breakdown of these categories consists in showing that each is an exaggerated caricature; or, in the manner of deconstruction, that if they are constructed in this exaggerated way, each must permeate the other. What exists “inside” a person doesn’t spring from nothing; it is constructed out of interactions with other people and things (culture and the natural world). What exists “outside” a person isn’t a timeless mind-independent absolute; it is constructed out of the perspectives of culture as we meet problems and create tools—ontological as well as technological—to solve them. The border between “inside” and “outside” is not usefully conceptualized as a permanent fissure in the universe.” 10

PROPERTY AND SUBJECT/OBJECT

“The word “property” crosses over the traditional divide by means of the pun that I discuss in “The Rhetoric of Alienation” (chapter 7). When “property” means an attribute of a person, it is “inside” (on the subject side). When it means a thing that a person has the right to control, it is “outside” (on the object side). As long as we can maintain a perfect disjunction between what counts as a thing “outside” the person, to be manipulated, and what counts as an attribute “inside” the person, part of the entity doing the manipulating, we can also maintain the traditional divide. But I think there are cases where we do not maintain such a perfect disjunction. Things that we see as mostly “outside” can also, at the same time, be seen as partly “inside”—can become to some extent assimilated to the attributes of the person. Another way to put this is that the person’s context, as we understand it, can to some degree become inseparable from the person. This is how I think the traditional subject/object distinction becomes blurred.” 10

COMMON PROPERTY AND INDIVIDUALISM—NEED FOR A SUBSTANTIVE COMMUNITARIAN THEORY OF PROPERTY

“But it cannot be denied that to accept as a starting point the traditional ideology of property is to grant individualism more mythological force than it deserves. Often things that are held in common are the most precious to us. It would be good to have a theory that could help us see that better. Certain groups other than business entities (churches, Indian tribes, clubs, schools, nations) might claim their group’s substantive existence as a group is bound up with property (land, buildings, cultural artifacts). Even business entities might, under some communitarian theory in opposition to traditional liberalism, claim to be bound up with some of their property. For those who are outraged by the way the Supreme Court found nothing to oppose desecration of Native American sacred sites, a substantive communitarian theory of property seems to be needed.” 13

RHETORICAL STRATEGY OF MAKING PROPERTY OUT OF PERSONAL RIGHTS

“Recently, Bruce Ackerman has suggested a similar rhetorical strategy. He would have us characterize as a property right, for example, the right of Michael Hardwick to engage in homosexual acts with his lover in private. I predict that this strategy will not be successful; Ackerman will not succeed in altering the general contemporary language so that we conceive of such personal rights as property rights. But even if it succeeded in altering the language, I am afraid the strategy would ultimately backfire. These “property” rights that describe personal interactions rather than the classic picture of landholding will turn out to be second-class “property” rights (just as “new property” rights did). Moreover, if the language really becomes altered in this way, then we will be out of the frying pan and into the fire. When personal interactions come to be conceived of and perspicuously described as transactions of property, then we have progressed very far indeed toward a commodified world view. Things which we previously conceived of as intrinsic to the person, or attributes of personhood, come to be conceived of, and socially constructed as, separable alienable objects.” 15

ECONOMIC DEFINITION OF PROPERTY—RAPE AS A VIOLATION OF PROPERTY RIGHT (POSNER) 15

PERSONHOOD AND PROPERTY

“The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights. Although explicit elaboration of this perspective is wanting in modern writing on property, the personhood perspective is often implicit in the connection that courts and commentators find between property and privacy or between property and liberty. In addition to its power to explain certain aspects of existing schemes of property entitlement, the personhood perspective can also serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law.” 35

FUNGIBLE PROPERTY

“The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons. The archetype of such a good is, of course, money, which is almost always held only to buy other things. A dollar is worth no more than what one chooses to buy with it, and one dollar bill is as good as another. Other examples are the wedding ring in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord. I shall call these theoretical opposites—property that is bound up with a person and property that is held purely instrumentally—personal property and fungible property respectively.” 37

SELF-IDENTIFICATION THROUGH OBJECTS

“The intuitive view of property for personhood just stated is wholly subjective: self-identification through objects varies from person to person. But if property for personhood cannot be viewed as other than arbitrary and subjective, then personal objects merely represent strong preferences, and to argue for their recognition by the legal system might collapse to a simple utilitarian preference summing. To avoid this collapse requires objective criteria differentiating good from bad identification with objects in order to identify a realm of personal property deserving recognition. The necessary objective criteria might be sought by appeal to extrinsic moral reality, to scientific truths of psychology, or to the concept of person itself. Taking the last route, this section approaches the problem of developing a standard for recognizing claims to personal property by referring to the concept of “person” itself. If that concept necessarily includes certain features, then those features can determine what personal property is while still avoiding ethical subjectivism.” 38

4 WAYS OF DEFINING THE PERSON: KANT, LOCKE AND OTHER WESTERN VIEWS

“Perhaps the closest to the persona of Roman law, the first conception is of the person as rights-holder. For Kant, the person is a free and rational agent whose existence is an end in itself. I shall call Kantian the view of the person focusing on universal abstract rationality. In this view, personhood has no component of individual human differences, but rather by definition excludes the tastes, talents, and individual histories that differentiate one from another. Another classical view of the person makes its essential attributes self-consciousness and memory. Locke defines a person as “a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places.” For Locke, memory signifies this continuous self-consciousness. Locke’s theory still holds great appeal for those who puzzle over the mysteries of personal identity. These two classical view are compatible with thinking of persons as disembodied minds or immaterial essences. In contrast is the view that persons are human bodies. The sophisticated version is that continuous embodiment is a necessary but not sufficient condition of personhood. To recognize something as a person is, among other things, to attribute bodily continuity to it. Indeed, Wittgenstein says that the best picture of the human soul is the human body. Last, some theorists find these traditional views too pale, and suggest that the individual’s ability to project a continuing life plan into the future is as important as memory or continuing consciousness. Allied with this is the view that what counts in recognizing something as a person is a consistent character structure. Persons are what they are in virtue of their past and future integrated by their character.” 39

CRITIQUE OF WESTERN VIEW OF PERSON: PERSON AS A SOCIAL RELATION

“A communitarian would find all of these concepts of personhood wrongheaded because they all derive from the individualistic worldview that flowered in Western society with the industrial revolution. In a society in which the only human entity recognized in social intercourse is some aggregate like the family or clan, there could not be such intense philosophical attention to the biological individual and its ontological, psychological, moral and political status. In view of the individualist roots of these theories of the person, it comes as no surprise that thinkers who wish to progress from an individualist to a communitarian worldview are impatient with them. Communitarians see the myth of the self-contained “man” in a state of nature as politically misleading and dangerous. Persons are embedded in language, history, and culture, which are social creations; there can be no such thing as a person without society.” 40

LOCKE, PROPERTY, AND SELF-PRESERVATION

“Locke says that “every Man as a *Property* in his own *Person*,” from which it immediately follow that “[t]he *Labour* of his Body, and the *Work* of his hands…are properly his.” Though we have seen Locke elsewhere considers the person as reflective of consciousness and memory, he may well mean here that one literally owns one’s limbs and hence must own their product. If not, perhaps property in one’s person should be understood to mean simply that an individual has an entitlement to be a person or to be treated as a person. This would probably include the right to self-preservation on which Locke bases the right to appropriate.” 40-41

PROPERTY IN ONE’S OWN BODY 41

PROPERTY AND THE REALIZATION OF FUTURE EXPECTATIONS

“This view of personhood also gives us insight into why protecting people’s “expectations” of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.” 42-43

PROPERTY IN HEGEL’S PHILOSOPHY OF RIGHT

“The property theory of Hegel’s *Philosophy of Right*, although based on a conception of persons, does not immediately invoke the intuitive personhood perspective. Hegel’s person is the same as Kant’s—simply an abstract autonomous entity capable of holding rights, a device for abstracting universal principles and hence by definition devoid of individuating characteristics. In postulating persons as rights holders, Hegel thus initially assumes away those characteristics that render individuals unique beings—particular commitments and character traits, particular memories and future plans, particular relationships with other people and with the world of external objects. In contrast, the intuitive perspective assumes that persons are not persons except by virtue of those particulars, and therefore sees the person as the developed, individual human being in the context of the external world. Personal property is important precisely because its holder could not be the particular person she is without it. Hegel’s property theory is only the first part of a logical and historical progression from abstract units of autonomy to developed individuals in the context of a developed community. Hence, Hegel’s theory may function to take the person from the abstract realm of rights into the world of concrete individuals having the attributes of personhood as we commonly conceive them. Thus, even though Hegel does not use the word person for the entity described as the person in the theory of personal property, Hegel’s theory can be seen as consistent with the idea of personal property. Whereas the theory of personal property begins with the notion that human individuality is inseparable from object-relations of some kind, Hegel makes object-relations the first step on his road from abstract autonomy to full development of the individual in the context of the family and the state. Because the person in Hegel’s conception is merely an abstract unit of free will or autonomy, it has no concrete existence until that will acts on the external world.” 45

HEGEL AND OCCUPANCY

“Hegel’s property theory is an occupancy theory; the owner’s will must be present in the object. Unlike Locke’s theory of appropriation from the state of nature, occupancy in Hegel’s view does not give rise to an initial entitlement which then has a permanent validity. Rather, continuous occupation is necessary to maintain a property relationship between a person and any particular external thing, because “the will to possess something must express itself.” As the autonomous will to possess comes and goes over time, so property must come and go.” 45-46

HEGEL AND INDIVIDUALISTIC PROPERTY

“But because Hegel believes the rights he describes there concern only the Kantian “abstract personality,” he treats them as both logically and developmentally prior to any relationships of right arising from the person’s interaction with others in society. Subsequent sections of his book introduce other, more particular property relationships that arise from the nature of groups—the family and the state—rather than from individual autonomy alone. In Hegel’s scheme of progress from abstract units of will to the final ideal unity of individuals and the state, these other kinds of property relationships are higher and more advanced. Hegel departs from the classical liberalism in discussing these other kinds of property relationships. For Hegel, individuals could not become fully developed outside such relationships.” 46

“For Hegel, the properly developed state (in contrast to civil society) is an organic moral entity, “the actuality of the ethical Idea,” and individuals within the state are subsumed into its community morality. Hegel’s theory of the state thus carries the seeds of destruction of all liberal rights attaching to individuals (because in the state particular arbitrary will passes over into willing the universal). Hence, there is in Hegel’s theory a foundation for the communitarian claim that each community is an organic entity in which private property ownership does not make sense. Hegel does not make this claim, perhaps because he is too firmly rooted in his own time.” 46-47

ALIENATION AND PROPERTY

“First, the notion that the will is embodied in things suggests that the entity we know as a person cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with portions of that environment.” 47

HEGEL AND GROUP RIGHTS

“Hegel thought that freedom (rational self-determination) was only possible in the context of a group (the properly organized and fully developed state). Without accepting this role for the state, one may still conclude that in a given social context certain groups are likely to be constitutive of their members in the sense that the members find self-determination only within groups. This might have political consequences for claims of the group on certain sources of the external world (i.e., property).” 47-48

MARX: PROPERTY IN THE MEANS OF PRODUCTION DOES NOT LEAD TO FREEDOM AND AUTONOMY 49

L.T. HOBHOUSE AND PROPERTY AS SOCIAL RELATION 49

“This passage implies that while “control of things” might be justified by the classical theory, “control of persons through things” cannot be so justified. Hobhouse went on to assert that “modern economic conditions have virtually abolished property *for use*—apart from furniture, clothing, etc.,” while bringing about “the accumulations of vast masses of property *for power* in the hands of a relatively narrow class.” “50

CALABRESI-MELAMED: PROPERTY AND LIABILITY RULES 52

PERSONHOOD PERSPECTIVE: PROPERTY CONTINUUM FROM PERSONAL TO FUNGIBLE

“Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement. Does it make sense to speak of two levels of property, personal and fungible? I think the answer is yes in many situations, no in many others. Since the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone’s being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum.” 53

4TH AMENDMENT, PRIVACY, AND PROPERTY 60

WOULD SOME CONSERVATIVE JURISTS VIEW CIVIL RIGHTS AS A TAKING? 102

PERSONHOOD THEORY AND ADVERSE POSSESSION

“If one assumes, contrary to Hegel, that placing one’s will into an object, in the sense of having it become bound up with personhood, is a process that does not take place overnight, then the personality theory is as follows: The possessor’s interest, initially fungible, becomes more and more personal as time passes. At the same time, the titleholder’s interest fades from personal to fungible and finally to nothingness. At what point is the titleholder detached enough and the adverse possessor attached enough to make the switch? This is not a statute of limitations, but a moral judgment.” 111

RESTRAINTS ON ALIENATION: OPPOSITION OF FUTURE MARKET VERSUS PRESENT LIBERTY

“The common law limits on restraints on alienation suggest that there may have to be some limits on market transactions now in order to ensure that there will still be a market in the future. This can be perfectly rationalized in utilitarian terms, as can the common law rule that “a man cannot create a new kind of inheritance.” Assuming that it is efficient to maintain a market with a large scope forever (the long run), then it is efficient to impose enough restraints now to prevent grantors from tying up resources for the future in ways that seriously reduce the scope of the free market. And it seems prima facie cost-effective to disallow endless proliferation of different “bundles of sticks” which would cause a great amount of uncertainty and transaction costs; although, of course, the grantors’ welfare in imposing their whims would have to be weighed against this, and whims are hard to weigh.” 114

CLASSICAL LIBERAL CONCEPTION OF PROPERTY

“The classical liberal conception of property embraces a number of broad aspects or indicia, often condensed to three: the exclusive rights to possession, use, and disposition.” 120

“Epstein succinctly expresses the classical liberal view when he states that “[t]he conception of property includes the exclusive rights of possession, use, and disposition.” Elaborating on possession, he says that “[t]he idea of property embraces the absolute right to exclude.” Elaborating on use, he implies that property includes the right to choose any use or nonuse so longs as it is not a nuisance. Elaborating on disposition, he stresses alienation. This is the most important liberal subcategory of disposition, the right of one owner to transfer entitlement to another. Alienation in this sense underlies freedom of contract and hence is at the heart of the market order.” 121-122

THE CONSTITUTION AND CLASSICAL LIBERAL NOTION OF PROPERTY]

“Unlike Richard Epstein, our Supreme Court has not fully constitutionalized (that is, found “in” the Constitution) the classical liberal conception of property. The questions to ask are to what extent the Court has done so, and whether there is now a trend under way to constitutionalize the liberal conception further.” 123

*LORETTO V. TELEPROMPTER MANHATTAN CATV* 124

COURTS AND MARKET ALIENABILITY

“In *Andrus v. Allard*, with no dissent, the Court held that it was not a taking for Congress to declare eagle feathers and other bird artifacts nonsalable pursuant to a conservation statute. The liberal aspect of market inalienability, though it is a pillar of the notion of private property in a capitalist society, has not received the solicitude accorded to the aspect of exclusive physical occupation. Neoconservative dismay over cases like *Andrus* has not yet moved the Court. Yet it may have begun to move some of its members. In *Hodel v. Irving*, Chief Justice Rehnquist and Justices Scalia and Powell thought *Andrus* must now be limited “to its facts,” implying that they think that market-alienability is generally of constitutional stature.” 125

CLASSICAL LIBERALISM AND NEGATIVE LIBERTY IN PROPERTY

“The idea that property is a “sovereign island” that one can use to defend her arbitrary freedom of action seems to be an aspect of the liberal ideology of negative liberty. Inside your “sovereign island” your freedom consists in doing anything you want, no matter how irrational or antisocial, as long as you do not harm others—in whatever sense the harm principle is to be construed.” 130

“Yet affirmative incursion seems to make more explicit and immediate the fact that the owner is not alone in control of a “sovereign island.” The forced sharing of space brings home the forced coexistence with other people in the world and the forced sharing of decision-making power. Affirmative incursions, in other words, conflict more sharply than do negative restrictions with the ideology of individualism that underlies the liberal conception of liberty. Affirmative incursions must be anathema to anyone who accepts Blackstone’s declaration that property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” Thus, a commitment to negative liberty with a consequent constitutionalization of the “sovereign island” picture may be the reason for the centrality of the idea of “physical invasion” in the constitutional jurisprudence of property. If so, the Court has constitutionalized the “sovereign island” picture in a conservative and not very thoughtful way. The Court has applied this ideological picture only to traditional property interests, and has not taken into account the difference in the ethical case for a “sovereign island” depending upon whether the property holder is a person or a corporation.” 130-131

PRAGMATISM AND ITS PARTICULARISM: THE FEAR OF ARBITRARINESS 132

MAJORITY RULE AS A SHIFTING COALITION OF RENT-SEEKERS: HOBBESIAN VIEW OF POLITICS 133

“One who accepts a Hobbesian model of politics requiring law as the model of rules also accepts an underlying Hobbesian model of human nature. In this model of human nature, limitless self-interest and the consequent urgent need for self-defense require the most expansive possible notion of private property, indeed, the classical liberal conception of property. Nothing will get produced unless people are guaranteed the permanent internalization of the benefits of their labor; nobody will restrain herself from predation against others unless all are restrained from predation against her.” 134

PRIVATE PROPERTY AND FREE CONTRACT AS THE UNDERPINNINGS OF MARKET SOCIETY 135

ALIENABILITY OF PROPERTY RIGHTS

“In traditional legal and moral discourse about property, the word “alienation” means “transfer.” Alienability of property rights, or freedom of alienation with respect to property, is one of the most important indicia of liberal (capitalist) private property. The infrastructure of the free market is a system of private entitlement linked to a system of private transferability: private property plus free contract. Freedom of alienation of property rights expresses the “free contract” part of this nexus. The market theorists argues both than in order for private property to be complete or well developed it must be freely inalienable and that in order for free contract to flourish there must be a well-developed system of private entitlements. Everything must be both ownable and salable.” 192

ALIENATION MAY ALSO IMPLY ESTRANGEMENT (MARXIAN USAGE) 192

“Contract-alienation is linked to object-property. Alienation is accomplished when an owned object is transferred from one holder to another. Estrangement-alienation is linked to attribute-property. Alienation comes about when attributes of personhood are sundered. Contract-alienation and estrangement-alienation are linked by the general notion of separation. In the free-contract aspect of alienation, a separation of an entitlement, and hence a property object, from its holder takes place when it is transferred to another holder. The separation is viewed as constitutive or expressive of the market system. By market adherents it is viewed as an exercise of liberty. In the estrangement aspect of alienation, the separation of the person from her proper physical or social environment, or from her creations, is pathological and harmful to the person, and signifies unfreedom rather than freedom.” 193

PARADOX OF LIBERAL IDEOLOGY OF PROPERTY

“In the traditional liberal ideology of property, the two meanings of the word property are also sometimes linked. If private property is necessary for autonomy or liberty, and autonomy or liberty is a necessary attributes of persons, then property (object-aspect) is a property (attribute-aspect) of persons. The link is shown, for example, in Locke’s use of “the general name, *Property*,” to refer to people’s “Lives, Liberties and Estates.” For us, life and liberty are attribute-properties of persons and estates are object-properties, but for Locke (given that estates originally referred to status, not mere landholding) there was probably not this clear distinction. Now if we hold fast to the traditional theory that property is a property of persons, and at the same time accept the modern distinction between object-property and attribute-property, the lurking pun can also cause dissonance and paradox. When property is a property of persons, my liberty is my property. Does this mean I abdicate personhood if my liberty is voluntarily relinquished? Apparently yes, if property means attribute-property. But if at the same time property also means object-property, then voluntarily relinquishing my liberty is also an instance of contract-alienation, and in traditional liberal ideology this is an instance of self-expression and fulfillment of personhood rather than its negation. Abdication of liberty is both destructive of personhood and expressive of it. The pun is the surface manifestation of a deep fissure in liberal ideology.” 194

DISAGGREGATING PROPERTY TO RESOLVE THE PARADOX

“One way to try to resolve this tension or mediate the paradox at the heart of liberal property ideology is to disaggregate property. That is, perhaps we could recognize that some categories of property rights do justifiably become bound up with persons and then ought not be prima facie subject to rearrangement by market forces, while at the same time recognizing that other categories of property rights do not, or do not justifiably, become bound up with persons and are appropriately left to market forces. In other words, we could delineate categories in which the distinction between object-properties and attribute-properties justifiably becomes blurred. This is a strategy that I and other have pursued. I have call the first kind “personal” property, and the second kind “fungible.”” 197