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Foreword: Toward a Multicultural Theory of Property Rights

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FOREWORD: TOWARD A MULTICULTURAL THEORY OF PROPERTY RIGHTS

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This panel, sponsored by the Minority group and Property Sections of the AALS for the January, 2000 annual meeting, was composed of an exciting group of scholars critically analyzing traditional theories of property and current distribution of resources.[2] The panel, entitled "Reviewing the Legacy of Liberalism: Life, Liberty, and the Pursuit of Happiness — Linking Property to Rights," challenged traditional notions of property rights, from a discussion of the gender implications of African property law, to a critique of traditional analyses of *Johnson v. M'Intosh*,[3] to property as heteronormative. Because the articles provide so much rich and thought-provoking material, I would like to focus my comments on ways in which ongoing historical disputes about property rights will be manifested in the coming years as highlighted in the papers that follow.

A fundamental tenet of neoclassical liberalism posits that equality of rights is necessary to human flourishing. And a principal right is that of property, a right that even in a Marxist regime is protected at some level on the grounds that labor should be encouraged and that basic needs satisfied. Some notion of property is necessary for human existence. But in our current legal regime, the overriding legacy of liberalism is a privileging of the right to exclude over the variety of other rights in the bundle of property rights.[4] Unlike the rights to use, alienate, or devise, the

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1. Assistant Professor of Law, University of Florida Levin College of Law. I would like to thank Berta Esperanza Hernández-Truyol for giving me the opportunity to participate in this exciting symposium. I would also like to thank Florence Roisman for her dedicated chairmanship of the property section this past year. And I would of course like to thank the panel members: Leslye Obiora, Guadalupe Luna, Jo Carrillo, Frank Valdez, and Sumi Cho. And I especially want to thank Nissa Laughner and Katie McKinley for their comments and suggestions, as well as their cite checking and editing of this Foreword and the following articles. Any mistakes remain entirely mine.

2. Papers were presented by Jo Carrillo, Professor of Law at University of California at Hastings; Sumi Cho, Associate Professor of Law at DePaul University School of Law; Guadalupe Luna, Associate Professor of Law at Northern Illinois School of Law; Leslye Amede Obiora, Associate Professor of Law at the University of Arizona College of Law; and Francisco Valdez, Professor of Law at University of Miami College of Law.

3. 21 U.S. (8 Wheat.) 543 (1823).

4. The most common expression of this version of property comes from Blackstone, who wrote that:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion

right to exclude is the right upon which market value most directly depends and, in a capitalist market, enjoys the status of the legally protected right that makes the world turn. The life of liberalism began in capitalist market societies and it can only be fully comprehended in terms of the social and economic institutions that shaped it.[5] Thus, although liberalism relies on certain concepts of rights, equality, and justice, property plays a central role in human individuality and freedom, and is therefore a principal component of liberal society.

But liberal society has its problematic elements. As Rousseau argued, the right to exclude is an invention of the rich to secure their greater possessions against the threats of the poor by convincing the latter that they too benefit from the right to exclude, that in protecting the property of the rich they protect their own measly shares.[6] But as Rousseau saw the bargain, the institutionalization of property was a race to meet their chains, for:

> [s]uch was, or must have been, the origin of society and laws, which gave new fetters to the weak and new forces to the rich, destroyed natural freedom for all time, established forever the law of property and inequality, changed a clever usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjected the whole human race to work, servitude, and misery.[7]

The right to exclude, for Rousseau, is at the heart of the inequality created by a property-based regime, an inequality that liberalism at one level seeks to overcome.[8] Yet the realization that property creates inequality, but protecting property is the first goal of civil society, means that liberalism

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> 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.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765-1769); *see also* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L. J. 601 (1998).

5. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (NY: Cambridge UP, 1960); JOHN RAWLS, A THEORY OF JUSTICE (London: Oxford UP, 1971); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (NY: Cambridge UP, 1982); Immanuel Kant, *Critique of Practical Reason*, *in* IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS (NY: Random House, 1949); John Stuart Mill, *On Liberty*, in THE UTILITARIANS (Garden City: Doubleday, 1961).

6. JEAN JACQUES ROUSSEAU, THE SECOND DISCOURSE, 2nd Part, at 159-60 (Roger Masters, ed., NY: St. Martin's Press, 1964).

7. *Id.* at 160.

8. One of the principal goals of liberalism is some relatively robust version of equality. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Cambridge: Harvard UP, 1977); RAWLS, *supra* note 5.

contains an inherent tension in its protection of property rights on the one hand with its commitment to justice and equality on the other. This tension can be seen in a multitude of areas, but I mention just three that I believe will pose interesting dilemmas in the coming years.

One area of fundamental tension, evident to those of us who work in areas of environmental law and takings, involves the rhetoric and mythology of absolute dominion continually contrasted to necessary restrictions on property rights in disputes over limitations on use, public rights, and communitarian notions of stewardship.[9] Blackstone best articulated the Roman law precept of strict property rights when he wrote of "property as absolute dominion, '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.'"[10] Robert Gordon, however, has explained that the "unruly pluralism" of

> basic eighteenth-century social and economic institutions were not absolute dominion rights but, instead, property rights fragmented and split among many holders; . . . property relations of dependence and subordination; property subject to arbitrary and discretionary direction or destruction at the will of others; property surrounded by restriction on use and alienation; property qualified and regulated for communal or state purposes; [and] property destabilized by fluctuating and conflicting regimes of legal regulation.[11]

The latter part of this century has witnessed a profound rise in the popular appeal of the myth of absolute dominion through increased takings litigation, introduction of compensation legislation in every state legislature and Congress, and a fundamental redefinition of regulatory takings doctrine.[12] I suggest that this tension will continue to grow because of the fragmentation of property rights, the destabilization of takings

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9. David Seipp, *The Concept of Property in the Early Common Law*, 12 LAW & HIST. REV. 29 (1994); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LET. HIST. 465 (1993); Carol Rose, *supra* note 4, at 601; Glen Sugamelli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORD. ENVTL. L. J. 521 (1997); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L. Q. 89 (1995).

10. 2 BLACKSTONE, COMMENTARIES 2.

11. Robert Gordon, *Paradoxical Property*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 96 (Brewer & Staves eds. 1996) [hereinafter EARLY MODERN CONCEPTIONS].

12. William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & M. L. REV. 1151 (1997); Byrne, *supra* note 9, at 89; Jerold S. Kayden, *Hunting for Quarks: Constitutional Takings, Property Rights, and Government Regulation*, 50 WASH. U. J. URBAN & CONTEMP. L. 125 (1996).

doctrine, and the rhetorical appeal of absolute dominion.[13] One of the implications of that fragmentation and destabilization, however, is the ever-widening gap between a mythology of property as absolute dominion and an equally troubling mythology of property as communal and non-exclusive.[14]

Jo Carrillo's paper is a nuanced examination of the contrast between a private property regime based on the right to exclude and a mythological story about indigenous understandings of land use. The myth is typically placed in contradistinction to a European notion of absolute property rights in such a way as to occlude the complicity of the private property regime in creating the myth to justify its own existence. As Carrillo explains: "the fact that indigenous rights and interests are discussed in the first year curriculum *only* in the first year property course functionally transforms the indian into a signifier whose political function throughout the rest of law school is essentially to make student-initiates of the legal profession skeptical about indigenous property interests on both a broad, ideological level as well as on an unconscious, symbolic level."[15]

Carillo begins by exploring the way in which mythologies and legal narratives are similarly constructed. By drawing from a mythology of the indian as "conquered, defeated, excluded outsider[]," [16] judges created a legal narrative that in turn influenced and determined the law. The myth, in essence, has become the law in a way that "has robbed indigenous communities of their right to control, or even to participate in the credited production of the U.S.' governing mythologies."[17] Bringing to light the inner-workings of the mythology of conquest, hopes Carrillo, will reveal the irrationality of the symbol of the indian as a foil used to teach liberal ideologies, and will, at the same time, reflect back on the law as a symbol itself.[18] This may be a fancy way of saying that the mythology of primitive indigenous peoples has become an unassailable "truth" in our legal system by occupying a position of ideological dogma that cannot be challenged.

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13. *See* Gordon, *in* EARLY MODERN CONCEPTIONS, *supra* note 11, at 96. "[T]he price that has been paid for the compulsive power of the absolute dominion trope has been a heavy one, a maddeningly persistent tendency to suppress and to deny the collective and collaborative elements, the necessity of mutual dependence, inherent in social endeavor, and a consequently enormous distortion in our common capacities to understand and regulate our social life." *Id.* at 108.

14. Jo Carrillo, *Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law*; *in* EARLY MODERN CONCEPTIONS, *supra* at 11, at 13; Siepp, *supra* note 9; Treanor, *supra* note 12, at 1151; John Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

15. Carrillo, *supra* note 14, at 29.

16. *Id.* at 14.

17. *Id.* at 16.

18. *Id.* at 19.

To support her claim, Carrillo looks primarily to Justice Marshall's promulgation and legalization of the mythology of conquest in *Johnson v. M'Intosh*. For Carrillo, Marshall's failure to recognize the first in time indian grants stemmed from his belief that indian possession of land was not a right of property or dominion that an indigenous person could legitimately expect to have backed up by U.S. law. Perhaps the most powerful point of Carrillo's argument is her description of how a narrative of European violence and genocide is rewritten as an apologetic of civilization, ascendancy, and "hard Yankee bargains,"[19] and then repackaged for first-year law students as a story about how generous Marshall was in finding some sort of indigenous property rights he could protect from within a framework of European property law that could only conceive of property as absolute dominion and exclusivity.

Carrillo's critique is a powerful indictment of the way indigenous people have been caricatured and stereotyped by the majority colonial culture for centuries as uncivilized, savage, barbarous, primitive, mystically motivated, irrational, unassimilable and ultimately unsuited to possessing legal property rights. For Carrillo, however, the failure of any late twentieth-century casebook writer to at least question the Indian narrative which uses the indigenous peoples as signifiers rather than subjects in their own right perpetuates the de-historicizing of the narrative and operates as a "disabling certitude."[20] And it is this absence of the indigenous narrative within law that destabilizes the dominant narratives and results in an incomplete legal education and a profoundly unjust legal system.

To the extent that property rights continue to be ranked in ascending order, with the right to exclude at the top, law students will continue to be skeptical of multiple perspectives and values in the post-modern commitment to equality. Moreover, to the extent we continue to uncritically offer a strict private property regime that privileges absolute dominion as the norm and essential characteristic of property, students will view multiculturalism as the artificial construct, rather than multiculturalism calling into question the artificial constructs of an essentialized notion of absolute dominion that is bolstered by the mythology of indigenous property beliefs.

Another debate that will continue to fester in property scholarship is the question of welfare rights, or the rights of the have-nots to some portion of the wealth of the haves. Ironically, the grandfather of Liberalism's property rights theory, John Locke, included two provisos in his famous labor theory of property. The first was the proviso not to waste,

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19. *Id.* at 23.
20. *Id.* at 29.

and the second was that everyone has an "equal right" or "a right in common . . . [to] provide for their subsistence."[21] As Richard Ashcraft explains:

> this right to subsistence is defended by Locke as a necessary means to fulfill the general obligation laid upon each individual by the Law of Nature to act so as to preserve all mankind. Thus, an individual has 'a right to the surplusage' of another's goods because natural law gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has not means to subsist otherwise.[22]

But David Hume and Edmund Burke ultimately won the debate about the rights of the laboring poor to legally protected subsistence rights in a post-subsistence form of society. As Ashcraft explains:

> Burke declared, 'we have heard many plans for the relief of the "laboring poor,"' but such plans are foolish, if not pernicious, since 'to provide for us in our necessities is not in the power of government.' Hence, 'meddling with the subsistence of the people' . . . is a misdirection of energy; the poor must be left to provide for themselves, and, whatever the material outcome of their efforts, they must learn to accept their condition with patience and submission.[23]

I believe we will see a continued tension between the Burkean ideology of the laboring poor pulling themselves up by their bootstraps, a position entrenched in the liberal property right to exclude, and the Lockean stricture that all people have a natural right to satisfaction of basic human needs. Insofar as property is necessary to basic human needs, a liberal theory that ignores the racial and gendered ways in which certain groups are excluded from legal protections of property rights cannot provide significant applicability to a post-colonial, multicultural world.

In exploring the links between liberty and property, Guadalupe Luna analyzes the story told by silence in the law regarding conflicts arising out of the U.S. government's promise to the nation's earliest Chicana/os that they could remain on their land in the territory annexed through the Treaty

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21. JOHN LOCKE, *supra* note 5, FIRST TREATISE, pars. 86-93, at 97; SECOND TREATISE, par. 25.

22. Richard Ashcraft, *Lockean Ideas, Poverty, and the Development of Liberal Political Theory, in* EARLY MODERN CONCEPTIONS, *supra* note 11, at 45.

23. *Id.* at 55.

of Guadalupe Hidalgo.[24] Prior to the war with Mexico, men and women of Mexican and Spanish descent had settled in what is now the Southwestern part of the United States under the authority of the Spanish, and then the Mexican government. The Treaty of Guadalupe Hidalgo guaranteed that they would retain ownership of their land with all the legal rights and privileges necessary to protect their rights under American law. Within a short period of time, however, almost all of Chicana/o property had vested in non-Chicana/o hands through such mundane actions as refusing to recognize title in the possessor if there were no recorded title documents, failing to consider the role of land grant legislation, and neglecting to honor the terms of the Treaty. The effect was to return the grantees to their original status as Mexican foreigners and dispossess them of their land and their legal rights.

Luna goes on to show how the erosion of Chicana/o property rights resulted in erosion of liberty and obscuring of the race, class, and gender implications of the post-Treaty dismantling of Chicana/o legal rights. After describing a number of land grant cases and the role played by Justice Roger Taney in their resolution, Luna calls for a fuller analysis of land grant adjudication, the revisionist legal history of the period, and the meaning of the linkages between property and liberty interests necessary for meaningful citizenship.[25] She points particularly at the racism that motivated much of the legal maneuverings that resulted in the loss of a majority of Chicana/o land both to individual land grabbers and the governments. Much of the public land of the Southwest subsequently distributed to homesteaders, the railroads, or retained as public lands was acquired through governmental complicity and participation in dispossessing the original grantees of their land. Thus, while the Treaty promised these landowners equal status and legal protections, subsequent state and federal property jurisprudence re-racialized them, stripped them of their property and political liberty, and returned them to their original outsider status.[26]

In critiquing the post-war treatment of Chicana/o property rights, and the dominant explanation of that history, Luna cogently reveals the complicity of the government and property law in the disempowerment and dispossession of outsiders, by race, class, or gender. Thus, the Lockean proviso that the poor have a right to subsistence levels of property seems disturbingly insufficient in light of institutional structures and behavior that create and guarantee an underclass of non-propertied, politically disenfranchised, and racialized poor. Recognizing that rights to

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24. *See* Guadalupe Luna, *Chicana/os, "Liberty" and Roger B. Taney*, 12 U. FLA. J.L. & PUB. POL'Y 33 (2000).

25. *Id.* at 36-37.

26. *Id.* at 50-51.

resources are fundamental to human flourishing, and therefore undergird any justifiable theory of property, requires that we examine carefully the role of any property regime in the creation and maintenance of a class of non-propertied individuals.

A third area where I foresee tensions between liberal notions of property and the changing values of a post-modern world are in personhood and identity rights exemplified in group rights, tribal rights, or cultural rights to such things as cultural symbols, historical artifacts, and native practices.[27] For this idea we turn to Rousseau who declared that "the first person who, having fenced off a plot of ground, took it into his head to say this is mine and found people simple enough to believe him, was the founder of civil society."[28] For Rousseau, Lockean labor is a form of subjugation: "the fence is the permanent sign both of individual appropriation and of the neighbor's recognition of that gesture. For Rousseau, it marks a deep form of alienation."[29] Rousseau's response to the first fencer comes from the poor person who replies,

> who gave you its dimension . . . and by virtue of what do you presume to be paid at our expense for work we did not impose on you? Do you not know that a multitude of your brethren die or suffer from need of what you have in excess, and that you needed express and unanimous consent of the human race to appropriate for yourself anything from common subsistence that exceeded your own.[30]

For Rousseau, therefore, the first fencer is disturbing the equilibrium of "an already integrated network of social relations."[31] He also exists in an uneasy contradiction between the alienating forces of property and the liberal tenet that "property is the true basis of civil society."[32]

The tension of Rousseau's first fencer is clearly evident in the contemporary debates about identity, personhood, and property and in the diversity of cases concerning group rights and cultural property.[33] To the

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27. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Rosemary Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J. L. & JURIS. 249 (1993); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559 (1995); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987).

28. ROUSSEAU, *supra* note 6, at 141.

29. Patrick Coleman, *Property, Politics, and Personality in Rousseau*, *in* EARLY MODERN CONCEPTIONS, *supra* note 11, at 258.

30. ROUSSEAU, *supra* note 6, at 158.

31. Coleman, *supra* note 29, at 259.

32. *Id.* at 262.

33. *See* articles on cultural property, *supra* note 27.

extent to which property disturbs social relations, we see in the appropriation of minority signs or resources by the majority culture an inherent conflict between liberalism's commitment to the right to exclude and property's dependence on social relationships. Leslye Obiora illustrates this point well in her paper on the gendered effects of land redistribution in Africa.[34]

Obiora first discusses the effects of colonialism on traditional beliefs about property and the importance of land to family and community stability. Prior to colonization, land was held not so much communally, but through a structure of lesser usufruct rights wherein each citizen had a right of access to the resources of the territory, and an individual had an inheritable right to the land he or she cultivated.[35] But because there were few people to whom one could alienate one's land, and because political relationships were not premised on landholding, as they were in feudal Europe, large landholders exploited large areas of land because they controlled a large number of people, not the other way around.[36] As she explains, however, "[a]s African 'communities became increasingly incorporated in a Western-oriented trade economy, property became more commercialized' and 'the basis of holding land [shifted] from one of community and custom to one of individualism and contract.'"[37] Ironically, the result of this shift was to elevate notions of communal landholding that made it difficult to alienate land because it was deemed to be held in trust for future members of the community. But in effect, the community was represented by the head of the family, which paradoxically "affirmed an orthodox notion of collective ownership at the same time that it accentuated the conditions for individual ownership and furnished the paraphernalia for its security."[38] This, in turn, created a regime that eroded traditional claims by women to land, as patriarchal values were superimposed on the strict communal form of landholding.

In the post-colonial period, social transformations have provided an impetus to convert to a market economy in land which accelerates individualization and privatization of landholding.[39] But women inevitably lost out in this transformation. Land redistribution in Zimbabwe, for instance, has been motivated by a prioritization of the struggle against racism over the struggle against patriarchy, which leaves women disempowered as their male counterparts acquire political and economic

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34. Leslye Amede Obiora, *Remapping the Domain of Property in Africa*, 12 U. FLA. J.L. & PUB. POL'Y 57 (2000).

35. *Id.* at 60.

36. *Id.* at 61.

37. *Id.* at 61-62.

38. *Id.* at 65.

39. *Id.* at 62.

wealth. The essence of Obiora's argument is that, without tending to the gender disparities created during the colonial period, current land redistribution based in some part on the status quo simply reimposes gender differences as Africa is forced toward a system of private landowning.

Obiora's paper brilliantly shows how a system of private property that fails to take into account a robust notion of community and family norms and does not adequately recognize the struggle of minority groups to equal resources will result in a skewed and ultimately discriminatory and dysfunctional property regime. Obiora's paper, along with the others, reflects on the consequences of redressing current claims to property by outsiders through a system of property whose very foundations depend on the continuation of insider/outsider distinctions.

In the Afterword, Berta Hernández-Truyol and Shelbi Day explore Liberalism's linkage of status and property through the lens of the exclusion of sexual minorities from fundamental property rights.[40] In analyzing the denial of property rights to same-sex couples and the elevation of marital status to a property right, Hernández and Day argue that sexual minorities are treated today like racial and ethnic minorities were treated a century ago.[41] Calling it the "straightness as property paradigm," Hernández and Day critique liberalism's privileging of marital status, the Supreme Court's reliance on moral and religious values in deciding disputes involving property rights of sexual minorities, and Congressional and state legislature efforts to preclude recognition of same-sex couples. Hernández and Day argue that the Courts have both a moral and Constitutional obligation to ensure that regulations affecting sexual minorities do not violate Constitutional liberty and property rights of individuals.[42] This Afterword provides a fitting return to the theme of the Symposium by reminding us that cultural context is a necessary backdrop for understanding property rights. For while the context may change with new groups seeking protection of their rights, the struggles are disturbingly the same.

Ultimately, I would suggest that the legacy of liberalism is a complex imbrication of competing social, legal, and political forces in an inherently contradictory scheme of property rights. Locke, Burke, and Rousseau are theorists whose very differences ironically compose certain of the fundamental tenets of liberalism. And it is from those contradictions and differences that contemporary scholars can unpack liberalism's reliance on the right to exclude as the primary stick in the bundle in order to

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40. Berta Hernández-Truyol & Shelbi Day, *Afterword — Straightness as Property: Back to the Future — Law and Status in the 21st Century*, 12 U. FLA. J.L. & PUB. POL'Y 71 (2000).

41. *Id.* at 90.

42. *Id.* at 88.

recover the unruly pluralism of fragmented and collective property rights. By viewing the historical legacy of liberalism we can see the roots of inequality inherent in a regime of private property that frustrates liberalism's true goal of equality and justice. For justice cannot exist if it does not exist for everyone.