The Spatial: A Forgotten Dimension of Property

PAUL BABIE*

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* © 2013 Paul Babie.  B.A., Calgary; B.Th.St., Flinders; LL.B., Alberta; LL.M., Melbourne; D.Phil., Oxon.; Associate Professor and Reader, Associate Dean of Law, Research, Adelaide Law School, The University of Adelaide.  I am grateful to John Orth, Bruce Ziff, Ngaire Naffine, and Matt Lady for helpful conversations about and comments on earlier versions.  I am especially grateful to Peter Burdon for his comments and his encouragement with this Article and to the participants in a University of Adelaide Law School seminar in 2005 and those in a University of Windsor Faculty of Law seminar in 2007 for helpful comments.  I am also grateful to Dean David R. Percy, Q.C., of the University of Alberta, Faculty of Law and to Dean Bruce P. Elman of the University of Windsor, Faculty of Law for providing me with space to work on this Article during my sabbatical in 2007 and to the staffs of those law schools for helpful conversations. Richard Sletvold, LL.B., 2012, provided outstanding comments and research assistance in the preparation of this Article, for which I am extremely grateful. Finally, thanks to Nigel Williams for preparing the figures.  Any errors that remain are entirely my own.
I. INTRODUCTION

On most days, around the middle of the working day, I leave my office, walk along a corridor, travel down some stairs, and exit the building in which I work. Outside, I pass over a driveway that connects to a street. From there, I proceed along a sidewalk next to a grassy boulevard. On this strip of green, students often sit and discuss the morning’s lecture or their plans for the afternoon. Sometimes I see homeless people sleeping under a tree, their belongings spread out beside them. I walk to the corner, cross the street, and continue down another street, past a church where people may be entering for worship. Sometimes a person standing in front of the church speaks about Christianity and offers me a leaflet, proclaiming that it is not too late for me to be saved. I walk on, past various shops and restaurants, and turn into a pedestrian mall. The mall is often crowded with people, and very often I am approached and asked if I have any spare change or if I would like to join any of a number of charitable or environmental organizations. Many people talk animatedly on iPhones or work on iPads. Finally, I arrive at one of a number of sandwich shops and cafés where I usually eat my lunch. This is not unlike journeys that most of us take for various purposes in our own cities every day.

On my journey, I interact with others—work colleagues, a homeless person, the street preacher—through and with property. Legal theorists tell us that property is constituted by a set of rights, use privileges and control powers, entitlements, or any one of dozens of ways of describing what property is.\(^1\) Property theorists might also tell us that those rights,

or however they describe the content of property, are constituted by the social relations that exist between others and me and that may or may not be recognized and enforced by law. They conclude, above all, by telling us that property is an undeniable part of life. And so it is. From earliest childhood, property acts as a sociocultural symbol, maintaining a central, powerful, rhetorical, mythological, and emotional hold on our imaginations. It defines the control that we have over our own bodies, structures our relationships with others, and goes to the core of what is necessary to achieve proper self-development. In every way, property structures my daily stroll for lunch and everything else that you, those around me, and I do.

Yet many theorists leave out, or at least fail to identify explicitly, something important about my journey, about any journey that any of us ever takes, indeed, about anything that we do. It is the place or the space in which my journey and any other human activity takes place. Or, in the context of property, the space in which property exists, operates, and has meaning in people’s lives; the space in which the social relationships


4. Harris, supra note 2, at 8–13.

5. *See id.* (discussing lay and legal “property talk”).


that constitute property exist; the space where rights and relationships structure our lives; and the space that we structure through those rights and relationships. At every moment of life, we are interacting with others and the world around us through some form of property—private, common, or public.

And as we interact with the physical space through which we move—on my lunchtime walk, it is streets, grassy boulevards, malls, shops, and cafés—we interact with others and make choices about those interactions—for me, during lunch, with students, the homeless, proselytizers, salespeople—and so, social interaction adds a layer to the physical space. Through our choices and our interactions with physical space and with others, we structure, create, and produce “social” spaces and over time, alter and restructure, recreate, and reproduce those physical and social spaces. And because we are part of it, physical and social space interacts with us in the same way that we interact with it.

If property is central to our lives, ought not those who theorize about it say something about this obvious spatial dimension and the ways in which property plays a role in and influences that dimension? My argument is that inherent in the meaning, the existence of property—while admitting that there is no univocal concept of property—one finds the importance of space, and theorizing about property does say something about space, but in an incomplete and inexplicit way. A reassembling of what we already know about property reveals the implicit role of space in an understanding of what property is. This restructuring requires us to say something about the constituent elements of human life in society—social life—something that expressly includes a consideration of the spatial dimension.

Still in its early stages, a “spatial turn”—the recognition of space as central to all aspects of human life—has begun to transform the human sciences:

> It arises... from a deeply held belief that whatever your interests may be, they can be significantly advanced by adopting a critical spatial perspective. Spatial thinking in this sense cannot only enrich our understanding of almost any subject but has the added potential to extend our practical knowledge into more effective actions aimed at changing the world for the better.¹⁰

In earlier work, I began to explore the role played by property law in shaping the space in which we live.¹¹ Yet, for two reasons, both of

which this Article explores, such a spatial turn in the case of property theory requires further elaboration and exploration. First, analytically, the spatial turn can be used to reassemble what we already know about property to recognize expressly the spatial dimension of property, thus revealing what has always been there but which has rarely been named and discussed: property emerges from, exists in, and is replicated through space. Second, and equally important, normatively, revealing the spatial dimension adds context to the social understanding of property and thereby allows us to see and encourage further exploration of the role of property as both the source of spatial injustice and a vehicle for achieving “spatial justice.”

Part II uses the work of urban sociologist and planning theorist Edward W. Soja to argue that human life comprises three components: (1) history

(Nicholas Blomley et al. eds., 2001) (demonstrating the relationship between law and geography); Andreas Philippopoulos-Mihalopoulos, Introduction to LAW AND THE CITY 1, 9–10 (Andreas Philippopoulos-Mihalopoulos ed., 2007) (exploring the spatial as inherent to the way in which law operates in cities); William Taylor, Introduction to THE GEOGRAPHY OF LAW: LANDSCAPE, IDENTITY AND REGULATION 1, 1 (William Taylor ed., 2006) (showing the spatial to be a component of law in its construction of individual autonomy and identity); Franz von Benda-Beckmann et al., Space and Legal Pluralism: An Introduction, in SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY 1, 2–3 (Franz von Benda-Beckmann et al. eds., 2009) (injecting the spatial into the power structures found in law). Still others have considered property law and its impact on the geographies that we inhabit. See, e.g., NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 4–5 (1994) (exploring the role of property law, space, and the use of power but not theorizing the spatial as an element in the construction of property law itself); Abrahm Bell & Gideon Parchomovsky, Reconfiguring Property in Three Dimensions, 75 U. CHI. L. REV. 1015, 1022 (2008) (identifying the spatial as an important aspect of determining ownership of land); Peter S. Menell & John P. Dwyer, Reunifying Property, 46 ST. LOUIS U. L.J. 599, 607 (2002) (showing how property law structures the control of resources by using early English settlements in New England as an example).


and temporality, or what Soja calls “historicality”; (2) social context and society, or “sociality”; and (3) space, both physical and socially constructed, or “spatiality.” Taken together, and to emphasize their interrelatedness, Soja calls these an ontological “trialectic.” Rather than privileging historicality and sociality over spatiality, as most theoretical discussions of human ontology traditionally do, it is important to give each dimension of this trialectic equal importance with the others. In the absence of any of the three elements, it is impossible to understand fully human life lived in society and those instances where justice is denied to its members. Parts III and IV of this Article use Soja’s spatial scaffolding to see property anew, with the obvious spatial dimension brought to the foreground of a discussion of property.

Part III of this Article uses the ontological trialectic to reassemble what we already know about property. This demonstrates that the theory of property implicitly recognizes the importance of addressing and responding to each of the three ontological fields. Overlooking any of the three makes it difficult to understand how property is central to human life. Part IV shows why this restructuring is important. Recognizing the interwoven complexity to and inseparability and interdependence of the ontological elements of property allows space an explicit role in defining what property is, when it exists, and how it is central to and affected by human life. But more importantly, it reveals how property is the cause of spatial injustice, which opens the possibility of using property as a vehicle both to seek and to achieve spatial justice. This latter task, how it is that property can seek and achieve spatial justice, is not one that is fully developed in this Article. Rather, although it points to that possibility, this Article identifies the types of spatial injustice in which property can be implicated, leaving to future work the task of recrafting property as a vehicle of achieving spatial justice. Still, although that task is left for another day, it is clear that the path, at least in a rough way, lies in the same processes through which injustice occurs. Part IV, therefore, reflects upon the emerging definition of spatial injustice, how property is one source of such injustice, and how recognizing the spatial dimension may allow us to see and to remedy instances of it. Part V concludes.
II. EDWARD SOJA’S ONTOLOGICAL TRIALECTIC AND SPATIAL JUSTICE

Most conceptions of what it means to be human and how we gain knowledge about the world around us have been limited to historicality—history or time—and sociality—social relations or society. Edward Soja, however, contends that this approach represents a modernist binary that must be broken open through an injection of space or the spatial dimension. In other words, there exist three, not two, ontological “fields” that explain the world around us and the way in which we exist within it. Soja’s work in urban sociology and planning theory is intended to achieve other objectives; nonetheless, for present purposes, we can extract from it the notion of an ontological trialectic, which is both a statement of what the world must be like in order for us to have knowledge of it and a statement of what it means to exist in the world in which we live.

The first of these fields, historicality, captures the cache of background knowledge about the world around us, knowledge that everyone carries with them, which tells them about and helps them make sense of the world in which they live. The second field, sociality, captures the social or sociological dimension of whatever subject we are trying to make sense of, whether writing a biography, interpreting the significance of a momentous event, or simply dealing with everyday life. This “social field” captures the social context within and about which the historical field provides useful knowledge. There are usually thought to be historical and social dimensions to every event, every activity, and every life we consider. Soja argues that “[a]lthough there are significant exceptions, few would deny that understanding the world is, in the most general sense, a simultaneously historical and social project.” These two foundational components, however, are given an epistemologically privileged status in almost all attempts to understand what it means to be a social being, to be human.

In the late twentieth century, the seminal work of theorists like Henri Lefebvre and Michel Foucault presented and broke open this otherwise

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closed, binarist debate between historicality and sociality about the ontological production of knowledge. Essentially, these theorists argued, to be complete, the dialectical historical-social approach had to give way to something that contained space and included all three ontological elements. For them, the dialectic required the injection of a spatial dimension. Lefebvre ultimately offered a comprehensive account of the social production of space, while Foucault left us with little more than a group of reflections on the role of space in dialectical logic and reasoning; both rely extensively on history and society in presenting their notions of space. Yet from the accounts outlined and mapped by these two intellectuals, contemporary theorists have come to regard space or spatiality as a “keyword” for understanding culture and society— for understanding what it means to be human.

Soja, one of those contemporary scholars, argues that to exist, to “be,” in the world involves not only historicality and sociality but also space—spatiality. Accepting that it must be included in an understanding of ontology, the question arises, what does it mean, or more to the point, what does it include? Undoubtedly it involves space per se—the physical contextual location. But although it is true that physical space is immutable, primordial, and material, for Soja, this understanding of it falls far short of its organization and meaning as a product of social translation, transformation, and lived experience, all of which arise from purposeful social action.

Because we are intrinsically spatial beings—active participants in the construction of our spatial lives and reality—it is necessary to “think

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20. Lefebvre, Production of Space, supra note 18, at 401–26; see also Łukasz Stanek, Henri Lefebvre on Space: Architecture, Urban Research, and the Production of Theory 25–27 (2011).
23. See supra note 15 and accompanying text.
differently about the meanings and significance of space and those related concepts that compose and comprise the inherent spatiality of human life: place, location, locality, landscape, environment, home, city, region, territory, and geography. 26 In two ways, social life—society—has a definite spatial form:

First, it arranges people in space in that it locates them in relation to each other, with a greater or lesser degree of aggregation and separation, engendering patterns of movement and encounter that may be dense or sparse within or between different groupings. Second, it arranges space itself by means of buildings, boundaries, paths, markers, zones, and so on, so that the physical milieu of that society also takes on a definite pattern. In both senses a society acquires a definite and recognisable spatial order. 27

Scholars from many disciplines, therefore, continue to give “[i]ncreasing attention . . . to the problems of the city, urban and regional issues, to locality, to the body, to place, to the relationships between the local and the global, to boundaries, to borders, to what can most broadly be described as the spatiality of human life.” 28

Soja therefore argues that spatiality, in addition to physical space, includes the social production of space, or lived social space—the created space of social organization and production. 29 Both are interrelated, because although physical space obviously impacts upon, indeed is the very crucible of lived social space, the latter also influences the former. 30 For Soja, this collectively created spatiality and its social consequences are a vital part of making theoretical and practical sense of life on all levels—from the intimate to the global. 31 Moreover, it represents “a kind of rebalancing of critical thinking, asserting the importance of the spatial or geographical imagination against the long-established monopoly of the historical and sociological imaginations.” 32 Thus, an ontological trialectic is a recognition that history, society, and space are equally essential to understanding what it means to be a human being living in a society. Equally important, it recognizes that there is an interwoven complexity to and an inseparability and interdependence of the three

29. See Soja, Thirdspace, supra note 14, at 1.
31. Soja, Thirdspace, supra note 14, at 1.
32. Soja, supra note 28, at 1423.
fields. Such a change in the way we think about space thus has a profound impact on the way we study history and society because it permits the insight that the ontological fields actually contain each within the other and cannot be understood in isolation one from the other or epistemologically privileged one over the other. Soja presents a very useful figure for visualizing this complexity, interdependence, and inseparability:

FIGURE 1

And above all, though, bringing together the three fields and by rejecting any privileging of one over the others, the trialectic defends against any form of “binary reductionism or totalization,” a phrase Soja used to critique the modernist project and its tendency to think in exclusively privileged binarist terms: “subject/object, subjectivity/objectivity, real/imagined, body/mind, man/woman, black/white, capital/labor, capitalism/socialism.” All of this concerns Soja, for

[a]ll of these binaries that have defined the development of both theory and politics for the past 150 years have come under significant attack by a variety of postmodern critics as being overly exclusive and “totalizing,” ruling out

33. SOJA, THIRDSPACE, supra note 14, at 71 (permission to reproduce granted by John Wiley & Sons Ltd., Oct. 30, 2012).
34. Id. at 72.
35. Soja, supra note 28, at 1421.
alternatives and silencing “other” voices that do not fit the strict either/or choice.36

While disavowing both radical postmodernism and radical modernism, Soja nonetheless argues that both may provide useful tools, such as the postmodern “insight that entities that we now think of as separate and autonomous are not only interdependent but also often contain elements of their symbolic opposites.”37 But helpful as they may be, Soja rejects all forms of reductionism designed to rule out alternative possibilities in favor of only “either/or” choices.38 In place of such binarisms, Soja opts for a “both/and also” logic for application to the issues of human life.39 This in turn has the advantage of encouraging creative combinations of matters that fall within more than one of the three elements identified in the ontological trialectic.40

Is it possible for legal scholars to implement Soja’s ontological trialectic in order to understand the operation and application of law?41 Soja expresses concern that legal scholars and lawyers may be very highly socialized in either/or thinking.42 Yet, there are nonetheless ways in which both/and also approaches to property can be taken, but this requires one to focus on the way in which geography, or more broadly, social space, social spatiality, affects law and legal development. “Geography has always been a fundamental aspect of legal development and the law has always involved itself with the location of things, with disputes over turf, territories, boundaries, borders, jurisdictions [or sovereignty] . . . .”43 There are two modes of linking spatiality and law in this way: (1) to determine how spatiality—the physical and the social space—shapes or influences law and legal development, such as property, and (2) to determine how law shapes social space, “legal understandings and knowledge of law are applied to help in understanding the social

36. Id.
38. Soja, supra note 28, at 1421.
39. Id. at 1421–22.
40. Soja, Thirdspace, supra note 14, at 3–5; Soja, supra note 28, at 1424 (arguing more generally that legal scholars can apply this framework to their work).
41. For an example of Soja’s ontological trialectic applied to law, see generally the collection of articles in Symposium, Surveying Law and Borders, 48 STAN. L. REV. 1037 (1996).
42. Soja, supra note 28, at 1424.
43. Id. at 1425.
production of space, how social spatiality is constructed and organized and expressed. This is a more extroverted and more interdisciplinary approach. The second way in which Soja argues that a both/and also approach can be taken in legal theory is by recognizing that in making these links between spatiality and the traditional binaries, there is a link between local and global that must be explored. Spatial thinking, then, allows us to identify instances and events of systemic injustice and to find ways to do justice, both social and spatial; in short, “the new urbanization processes have built into their impact the magnification of economic and extra-economic (racial, gender, ethnic) inequalities along with destructive consequences for both the built and natural environments.” Spatial thinking assists us in locating these processes and their consequences and allows us to see how law can become a vehicle not merely for locating such injustice but for correcting it. Law, then, may “reshape the social production of space in more socially beneficial ways; to restructure the relations between space, knowledge, and power; to deal more effectively with the problems of race, class, gender, and all forms of oppression, subjugation, and exploitation; to create a more forceful notion of spatial justice.”

Spatial justice means that in viewing the totality of human existence—historical, social, and spatial—we must identify where injustice is being done to people and the environment, how it needs to be corrected, and how we might go about doing that. Applying Soja’s ontological triadetic to property seeks to identify the ways in which property, which is central to human life, is one of the principal legal vehicles responsible for the production of spatial injustice. This project involves reassembling what we already know about property.

III. REASSEMBLING PROPERTY

If we look closely, contemporary theorizing about property conforms and responds to the ontological triadetic. The difficulty in seeing this lies in the way property theory is structured. Some theories emphasize the role of history and temporality—rights and the stringency of their protection in law, or the timing of an allocation of rights. Others focus on the role of social context or society in determining what property is, when it exists, and how it operates. Others, although few, consider the

44. Id. at 1426.
45. Id. at 1426–27.
46. Soja, Postmetropolis, supra note 14, at 410.
47. Soja, supra note 28, at 1429; see also Soja, Postmetropolis, supra note 14, at 407–15 (providing examples of how law can influence the social production of space).
role played by space—physical or social—in deciding what property is and whether it exists in a given case. Fewer still expressly explore the possibility that understanding each of these fields and their interrelatedness is necessary to understand what property is in any given society.

Thus, although contemporary theory about property does identify these fields, in the case of space and the relationship between the three, this is more implicit than explicit. We need a reassembly of what we already know about property, one that allows us to determine when property might exist, what it might be like in a given society in a given case, and how it works in that context, both social and spatial. Above all, it would more explicitly recognize the interrelatedness of the three fields—the overlaps and crossovers between the background knowledge of property, its social constitution, and the space where it happens. If property is central to human life, then it must be possible to organize the elements of property theory in such a way to tell us how it corresponds to what being human in society is like. And by restructuring, reorganizing, and reassembling the themes that we already find in contemporary property theory according to this ontological trialectic, we see revealed the importance of accounting for the spatial dimension in understanding what property is, how it operates, and how it affects our lives. We might call this the “property trialectic.” This Part is divided into three subparts, each corresponding to an ontological field.

A. Historicality: Rights and Allocation

1. Private Property and Bundles of Rights

Although it can be put dozens of different ways and although it might have been exceptional centuries ago, today, it is trite to say that property’s historical “tools of the trade” consist of a legally enforceable “bundle of rights” that control a person’s interaction with others and with things.  

48. UNDERKUFFLER, supra note 1, at 16 (suggesting that property rights and powers are not definitive and cannot be easily defined); see also Underkuffler, supra note 6, at 128 (noting scholars’ difficulty in defining property).

49. On the idea that rights are the background knowledge of modern property, see Robert C. Ellickson, Unpacking the Household: Informal Property Rights Around the Hearth, 116 YALE L.J. 226, 236–40 (2006), which compares modern property rights to rights within the traditional household. On the extent of informational knowledge concerning the rules of property, see Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 STAN. L. REV. 1105, 1106 (2003), which argues that bundles
It all started with private property, which William Blackstone asserted, 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.” Jeremy Bentham added that “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”

This Blackstone-Bentham view is, though, nothing more than a “simple and non-social” beginning; the contemporary orthodoxy of private property is built upon the monumental work of Wesley Newcomb Hohfeld and A. M. Honoré. Although Hohfeld would probably have rejected such an application of his “jural relations”—rights, powers, privileges, and immunities—to property, others, using an intermixture of jural relations with Honoré’s eleven standard incidents of ownership—possession, use, management, income, capital, security, transmissibility and absence of term, duty to prevent harm, liability to execution, and residuarity—have used that reasoning to arrive at a “rights plus” approach to private property, what may be referred to as the “Hohfeld-Honoré bundle of rights picture of property” or simply the “bundle of rights” of rights are arbitrary and that communicating information is key to understanding property rights.

50. 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (emphasis added); see also MUNZER, supra note 2, at 17 (defining property as a mix of “things” and “relations among persons”); Stephen R. Munzer, Property as Social Relations, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001) (arguing for a social relations conception of property).


55. See HARRIS, supra note 2, at 121.

56. Honoré, supra note 54, at 113.

57. UNDERKUFFLER, supra note 1, at 13.

picture of property.59 Best known as the “sophisticated” or “legal” conception of private property, perhaps its best statement is Munzer’s:

[Private] property . . . involves a constellation of Hohfeldian elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalog of “things” (tangible and intangible) that are the subjects of these incidents. Hohfeld’s conceptions are normative modalities. In the more specific form of Honoré’s incidents, these are the relations that constitute [private] property.60

Essential to this metaphor is the notion of “preference-satisfaction” or “self-seekingness” in the exercise of private property rights.61 In other words, “the rules of [a] property institution are premised on the assumption that, prima facie, [a] person is entirely free to do what he will with his own, whether by way of use, abuse, or transfer.”62 Moreover, “[h]e may also, within the terms of the relevant property institution, defend any use or exercise of power by pointing out that, as owner, he was at liberty to

60. MUNZER, supra note 2, at 23; see also Penner, supra note 59, at 712–14 (describing the “conventional formulation” of the Hohfeld-Honoré bundle-of-rights thesis).
62. HARRIS, supra note 2, at 29.
suit himself.” Of course, according to the sophisticated view, in addition to protecting the rights themselves against interference from others or from government, those very laws also impose limits on self-seekingness.

Although it has come under increasing attack as an appropriate metaphor to describe property, however one describes it, this background knowledge, the historicality of property, dominates contemporary mainstream scholarship and judicial decisionmaking and is largely understood, at least in outline, by most people. So pervasive has it become that three strands of approach are evident: (1) “neoconservative” or “essentialist” theories, which identify essential rights that constitute the irreducible core of private property—usually the right to exclude, to possess, to use, and to dispose; (2) “nominalist” or “disaggregated” theories, which view private property as having no fixed content, an empty vessel into which each society’s legal system may pour content

63.  Id. at 31.
64.  There has yet to be any example in the history of human society where “sole and despotic dominion” described the on-the-ground distribution of resources or social wealth. Blackstone himself recognized this. See BLACKSTONE, supra note 50, at *2; see also Frederick G. Whelan, Property as Artifice: Hume and Blackstone, in PROPERTY: NOMOS XXII, at 101, 114–25 (J. Roland Pennock & John W. Chapman eds., 1980) (describing Blackstone’s theory of property). For more contemporary critiques, see Michael A. Heller, Three Faces of Private Property, 79 OR. L. REV. 417, 419 (2000), and Carol M. Rose, Canons of Property Talk, or, Blackstone’s Anxiety, 108 YALE L.J. 601 (1998). Even the Romans—to whom the notion of absolute dominium in things is often attributed—did not in practice recognize such a possibility. Joshua Getzler, Roman Ideas of Landownership, in LAND LAW: THEMES AND PERSPECTIVES 81, 82–85 (Susan Bright & John Dewar eds., 1998).
65.  See generally HARRIS, supra note 2; Penner, supra note 59.
68.  RADIN, supra note 9, at 121–23.
70.  Merrill, supra note 69, at 734, 737–38. These theorists base their work on LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 66 (G. E. M. Anscombe trans., 3d ed. 2001); see also BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88–99 (1977) (discussing competing definitions of property); Gaus, supra note 58, at 213 n.18 (acknowledging Wittgenstein’s influence).
71.  CHRISTMAN, supra note 66, at 20–22.
according to its cultural, political, or ideological beliefs; and (3) hybrid theories, which combine elements drawn from both essentialism and nominalism. And although theorists may disagree about a unifying core of legally enforceable rights operative within a property system, they nonetheless agree that property begins with rights—it is simply a matter of identifying what they are.

2. Two Other Ideal Types

To complete the historicality of property, one must add to private property two other ideal types—common and state/public—as well as the boundaries between the three. Although it does exist in real-world societies, true common property is very rare—the atmosphere, for instance, as contrasted with the public domain of intellectual property. Rather than describing any real-world place, common property typically serves as a residual theoretical category necessary to describe any property regime that is neither private nor state/public. It is also a hypothetical postulate for a theory that attempts to demonstrate conceptually and logically the emergence and ongoing existence of private property in any society. In other words, it is the method of resource allocation in a society where it cannot be said that private or state/public property exists, whatever content those categories may have. As a matter of content,

73. Merrill, supra note 69, at 739; see also WALDRON, supra note 1, at 47–53 (exemplifying a hybrid theory).
75. The “ideal-typic” and “ideal types” phraseology was coined by Heller, supra note 64, at 422; see also Heller, supra note 66, at 1191–92, 1200.
76. See Heller, supra note 66, at 1169.
77. Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1381 n.342 (1993); Heller, supra note 64, at 421 (arguing that property theorists always recognize that any actual regime should and will contain all elements of the trilogy of private, commons, and state property).
78. HARRIS, supra note 2, at 110; Heller, supra note 64, at 419.
79. HARRIS, supra note 2, at 111–14.
80. WALDRON, supra note 1, at 277–78; Heller, supra note 64, at 420; Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 YALE J.L. & HUMAN. 37, 52 (1990); see also BLACKSTONE, supra note 50, at *2–8; JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285–302 (Peter Laslett ed., Cambridge Univ. Press 3d ed. 1988) (1690).
common property is the absence of any exclusionary rights; rather, everyone has the privilege, and no one has the right to exclude others in relation to the resource or thing in question. Michelman says that in the commons, “[p]eople are legally free to do as they wish, and are able to do, with whatever objects (conceivably including persons) are in the [commons].” 81 In other words, in the commons, the protections afforded private or state/public property have not been extended to the resource in question. 82

Many examples of state/public property—sometimes also called “collective property” 83—can be found in existing societies, 84 such as eminent domain land, although, like common property, it also represents a theoretical counterpostulate to private property. It exists where “the collective, represented usually by the state, holds all rights of exclusion and is the sole locus of decision-making regarding use of resources.” 85

Thus, drawing parasitically upon private property, this ideal type confers bundles of rights on agents of the state or other public officials in relation to certain assets. The only distinction between this and private property is the fact that unlike its private counterpart, theoretically, no legitimate, self-seeking, preference-satisfying, or self-regarding exploitation is allowed; rather, any use is governed by the conceptions of social function according to the public enterprise in question, typically by legislative means. 86

3. Allocation

Finally, as we know, historicality also involves time or a temporal dimension. Thus, property theory, too, must require such a component if it is to explain adequately what property is and when it exists. And it does—the sophisticated metaphor posits that a legal system confers upon people or groups of people bundles of rights, whatever they are, at particular moments in time. As far back as Locke’s “first-possession” thesis, 87 we find a focus on the importance of time, or temporality, in the

81. Michelman, supra note 66, at 5; see also Heller, supra note 64, at 419–20 (discussing Michelman’s definition of common property).
82. HARRIS, supra note 2, at 110.
83. Heller, supra note 64, at 420.
84. MUNZER, supra note 2, at 25.
85. Heller, supra note 64, at 421.
86. HARRIS, supra note 2, at 105.
87. LOCKE, supra note 80, at 275–302; see also David Schmidtz, The Institution of Property, in PROPERTY RIGHTS, supra note 7, at 42, 42–43 (discussing original acquisition theory).
acquisition and fixing of property rights. Robert Nozick, for instance, argues that property rights initially acquired at a particular moment in time by a legitimate method are fully in the control of the owner—this is his principle of justice in initial acquisition. He adds to this a principle of transfer, which allows voluntary conveyance of property to another person partially or wholly. The only means of interfering with the bundle of rights vested in the holder, once acquired—initially or on transfer—at the particular moment in time is state acquisition on just terms compensation. The importance of Nozick’s “historical” view of property here is the insight that bundles of rights are acquired and fixed at particular moments in time. Joseph William Singer says this:

We might call [these] magic moments. At these magic moments, property rights are created or allocated to a particular owner. Initially, property rights are acquired by labor or by possession of unowned resources. Subsequently, those rights can be transferred to others. The principle of transfer implies that rights can be acquired by purchase or contract, as well as initially through labor or possession. It also includes the right to leave one’s property at death by will to whomever the owner may choose.

Differences arise, of course, between theorists regarding whether these “magic moments” ought alone to determine the allocation of scarce resources. For Nozick, acts that happen in history fix property rights for all time. Yet, leaving the initial acquisition or moment of transfer to determine these allocations may result in morally problematic distributions of resources. For this reason, Singer characterizes Nozick’s view as inadequate, simplistic, and antihistorical essentially because it “presumes that the context in which property rights are exercised over time is a matter of no interest.” For Singer, property rights are exercised over time, and thus, the issue of time is of crucial importance. The consequences of self-seeking exercises of rights have consequences in and over time. For this reason, it is not only the magic moments of acquisition and transfer that matter but also continuing moments in

89. Nozick, supra note 88, at 151–52.
90. Id.
91. Id. at 153–55.
92. Singer, Entitlement, supra note 2, at 172.
93. See Nozick, supra note 88, at 151–53.
94. Id. at 173.
which property rights are exercised. For, as Laura Underkuffler points out, “property [is] an individual right, fluid in time, established and re-established as ‘new . . . circumstances . . . justify.’”

Although one might try to come to terms with what property is without referring to the background of bundles and magic moments, any such attempt would ultimately prove futile because one would be speaking an unrercognizable language to those steeped in the liberal conception of property that dominates the legal, political, philosophical, economic, or any other debate about it. As Underkuffler says, although “[p]ROPERTY as the rights, privileges, powers, and immunities granted over the tangible and intangible things of the world may not be an unerring guide for sifting that which is property from that which is not . . . it is a very useful starting point.” And any inquiry into the concept of property starts with the bundle metaphor, which along with allocation, we have called the historicality of property.

Before moving on to the sociality of property, it might be useful to attempt a knitting together of the two elements of historicality—rights and allocation—with a concrete example. Return for a moment, then, to my short stroll. We can see on that journey each of the three ideal-typic categories of property at work, and it is obvious that knowing something about each of them helps us make sense of what is happening in the world around me. And, of course, the property in the various places through which I pass was allocated to government, community, and individuals at some moment in time. Taken alone, though, historicality is not enough—it only tells us that there are rights that were allocated at some time and that they allow some actions and disallow others. We do not know how the rights came into existence or how they operate in people’s lives. To know about that, about what the rights mean and how they shape what we see and experience, we need to know that there is a context, a society of which rights help us to make sense, and that there is a space that has been produced by those rights within that society and in which we experience what is happening in time. And so we have arrived then at the point in this reassembly where little more can be said about the historicality of property theory without crossing over into sociality.

95. Id. at 173–74; see also Underkuffler, supra note 1, at 43 (explaining why fixing property rights at a given moment in time is “highly problematic”).
96. Underkuffler, supra note 1, at 50 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 454 (1982) (Blackmun, J., dissenting)).
97. Underkuffler, supra note 1, at 17 (internal quotation marks omitted).
98. Penner, supra note 59, at 712 n.1. Even those who deny the usefulness of the bundle-of-rights picture nonetheless posit the centrality of rights to any understanding of the concept of property. See id.
B. Sociality: Social Origins and the Socially Contingent Boundaries of Rights

1. The Social Origin of Property

In an attempt to maintain analytical clarity,99 I have deliberately avoided saying too much about society in understanding the sophisticated view of property—Part IV examines the interrelationship between the three fields. Having said that, however, consider Felix Cohen’s important modification to the bundle-of-rights metaphor:

Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out [that] decision.100

In other words, the rights in the bundle are not in relation to things but are the outcome of relationships among people; the bundle-of-rights picture is nothing more than a “simple and nonsocial”101 beginning. This idea that social relationships between people are the source and the origin of property, that they are constitutive of it—found most forcefully in the work of “property as social relations” theorists102—is a major shift.

99. The bundle-of-rights metaphor clearly requires some adverting to social context. Harris, supra note 2, at 3–13, 63–99; Munzer, supra note 2, at 15–36; J. E. Penner, The Idea of Property in Law 1–6 (1997); Radin, supra note 9, at 9; Underkuffler, supra note 1, at 1–15; Waldron, supra note 1, at 26–61; Underkuffler, supra note 6, at 128.


101. Alexander, supra note 52, at 321.

102. This view can be traced to Hohfeld, Fundamental Legal Conceptions I, supra note 53, at 746–57; Hohfeld, Fundamental Legal Conceptions II, supra note 53, at 45–55. These ideas were subsequently taken up by the early American legal realists. See Cohen, supra note 100, at 361–63; Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 12 (1927); Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 604–05 (1943) [hereinafter Hale, Bargaining, Duress, and Economic Liberty]; Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 471–73 (1923) [hereinafter Hale, Coercion and Distribution]. More recently, they have been extensively developed and expanded, especially by those of the critical legal studies movement. See Carol M. Rose, Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 4–7 (1994); Singer, Entitlement, supra note 2, at 13–15; Joseph William Singer, Property Law: Rules, Policies, and Practices, at xlix–l (4th ed. 2006); Singer, The Edges of the Field, supra note 2, at 3; Underkuffler, supra note 1, at 12–13; Baker, supra note 8, at 742–43; Duncan Kennedy, The Stakes of Law, or Hale and Foucault?, 15 Legal
Although historicality posits that rights in relation to things are the cornerstone of property, the social relations view reveals property to be relationships between people concerning control over things.

Morris Cohen was the first to claim that private property confers a form of “sovereignty” on rights holders, creating a relationship between the person holding such sovereignty and others. Felix Cohen, as we have seen, and Hale extended this understanding, while contemporary scholars—most significantly, Macpherson, Nedelsky, Kennedy, Rose, Baker, and Underkuffler—have extensively developed and elaborated it. Joseph William Singer, the foremost exemplar of the current social relations view, argues that property comprises a web of social relationships among people that concern “control and disposition of valued resources.” Singer provides the most succinct summary of what we can call the “sociality of property”: “Property concerns legal relations among people regarding control and disposition of valued resources.”

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113. See Munzer, *supra* note 50, at 36–75 (discussing the dangers of an amalgamation of social relations views).

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resources. Note well: Property concerns relations among people, not relations between people and things.⁴¹¹₅

Thus, to understand the way that property rights work in, affect, and help us make sense of the world in which we live, one needs to understand the social context from which they emerge. Indeed, there is no point to the rights if they do not originate from, operate in, and assist in making sense of a social context. Given that rights are the foundation of distributing scarce resources among people, no property theorist today seriously questions that rights help us make sense of the world around us and that thus, sociality is necessary to an understanding of a system of property.

2. The Content of the Bundle

Delving further into sociality reveals that because the bundle of rights is social in origin, property lacks a built-in unitary structure that can be discerned by logical deduction either from a “conception” of property¹¹⁶ or from the social practices or norms surrounding property use.¹¹⁷ Rather, as Singer and Jack M. Beermann argue,

[P]roperty rights are various. A wide variety of property interests have been created by private arrangement and recognized by government. . . . [T]he definition of property rights depends on a host of instrumental and value judgments and cannot be derived simply by a logical process that appears to be value neutral and nondiscretionary. . . . [P]roperty rights are socially and politically constructed by both private action and government policies.¹¹⁸

Property then can be seen only as a dynamic social construct that at any one moment in time is “a cultural creation and a legal conclusion.”¹¹⁹ It flows from and has meaning according to its social context.¹²₀ Rather than being acontextual, private property cannot exist without social context. Property therefore lacks any coherent structure that can predict with certainty its content; it is an empty vessel into which any content

¹¹⁵. Id. (footnote omitted).
¹¹⁶. Some might argue otherwise. See Underkuffler, supra note 1, at 6, 15, 33; Waldron, supra note 1, at 30–33, 432–39; see also Alexandra George, The Difficulty of Defining “Property,” 25 OXFORD J. LEGAL STUD. 793, 794–95 (2005).
¹¹⁷. Singer & Beermann, supra note 8, at 228. For a fuller explication of this proposition, see Singer, Entitlement, supra note 2, at 1–18; Singer, supra note 102, at xlix–l; and Singer, The Edges of the Field, supra note 2, at 1–6.
¹¹⁸. Singer & Beermann, supra note 8, at 228.
¹¹⁹. Baker, supra note 8, at 744.
¹²₀. Underkuffler, supra note 6, at 128.
can be poured according to the cultural, political, and ideological beliefs of a particular society. Far from being essential, the presence of any one right from the bundle identified by historicity is entirely optional; a society and its legal system can label as property anything it chooses. In other words, although there may be background knowledge about property—the bundle of rights and its allocation—it is impossible to identify an objective, acontextual meaning of the content of the bundle itself. Both for those who believe that property can be identified working from an attempt to define the bundle of rights and for those who take a nominalist approach, social context is considered critical in making sense of what property is for a society. The bundle that any property holder enjoys is packaged and allocated according to social context. “Understanding what is . . . property is an inductive and iterative process, one that looks to the chaos of real world relations . . . “

3. Autonomy and Socially Contingent Boundaries

A social context-dependent understanding of the content of property has implications for whether property can secure autonomy for its holder. Examining property rights without taking account of their social constitution ignores the many other social functions that property may serve and establishes a metaphor in which “[r]ights define boundaries others cannot cross and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy.” This “[metaphorical] boundary . . . misconceives the basis for autonomy,” which depends “not

121. Merrill, supra note 69, at 737–39. This can be traced to the seminal work of Thomas C. Grey, supra note 72, at 69–85; see also ACKERMAN, supra note 70, at 26–29; CHRISTMAN, supra note 66, at 20; Robert W. Gordon, Paradoxical Property, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 95–110 (John Brewer & Susan Staves eds., 1995). But see WALDRON, supra note 1, at 47–53.

122. UNDERKUFFLER, supra note 1, at 15. Some argue that it is possible to reconcile socially contingent conceptions of property with the idea of an acontextual concept of property. See, e.g., George, supra note 116, at 795, 810.

123. See, e.g., HARRIS, supra note 2, at 3–6; MUNZER, supra note 2, at 1–3; PENNER, supra note 99, at 1–6; RADIN, supra note 9, at 1, 9; WALDRON, supra note 1, at 26. For more recent acceptance of the relevance of social context, see Daniel Fitzpatrick, Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access, 115 YALE L.J. 996, 1016–23 (2006), and George, supra note 116, at 810–13. On the fact that most of these scholars, in one way or another, adopt a bundle-of-rights approach whether they say so or not, see David Lametti, Property and (Perhaps) Justice: A Review Article of James W. Harris, Property and Justice and James E. Penner, The Idea of Property in Law, 43 McGill L.J. 663, 666 (1998) (book review).

124. Heller, supra note 64, at 432.


126. Nedelsky, Reconceiving Rights, supra note 102, at 7.
Rather than inhibiting freedom and autonomy, people best function within a web of social relationships that allow “their own abilities to flourish.”

According to Singer, “interdependence is the foundational characteristic of free individuals.”

For this reason, the “human interactions to be governed [by law should not be] seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy.”

In concluding that interdependence is the foundation of autonomy, we need not dismiss rights but rather must reconceptualize them to reveal the socially contingent nature of the boundaries between them. Rather than being rigid and unyielding, boundaries between rights actually operate within a social context of relationships involving mutual dependence and obligation.

Individual autonomy is not the only purpose served by private property, and indeed, it ought not to be conceived as an absolute value. Rather, autonomy is conceived and protected and allows people to flourish only in relationship with others, which means that it becomes possible for private property to serve a host of social purposes.

Property’s socially contingent boundaries between rights means that it is constantly being recreated by social context, building upon historicality in order to explain further and make sense of the ever-changing world in

127. SINGER, ENTITLEMENT, supra note 2, at 130–31 (quoting Nedelsky, Reconceiving Rights, supra note 102, at 8) (internal quotation marks omitted); see also Baker, supra note 8, at 742–44 (asserting that the basis of property is “relations between people”); Nedelsky, Reconceiving Rights, supra note 102, at 8 (arguing that this view of autonomy is “deeply misguided”).

128. SINGER, ENTITLEMENT, supra note 2, at 130–31.

129. Id. at 131.

130. Id. (quoting Nedelsky, Reconceiving Rights, supra note 102, at 8) (internal quotation marks omitted).

131. Id.

132. Id. (quoting Nedelsky, Reconceiving Rights, supra note 102, at 8).
which we live. Although historicality provides the framework,133 what property actually is for a society and how it helps one make sense of the world depends upon an understanding of social context, which engenders a sense of community and the bringing together of various communities or subgroups in relation to scarce resources within a web of socially contingent boundaries.134 To see this, we must become “hypothetical social anthropologists,”135 looking for the core or central “organizing idea”—the network of social relations and intentions colored by shared value-laden assumptions within which people live their lives, the bulk of which we take for granted as the background of everything thought or said—around which that society constructs its system of distributing resources. In other words, we must look beyond the bundle.

The need to become a hypothetical social anthropologist is powerfully demonstrated by Singer, who argues that property includes reliance interests136 and entitlements,137 both of which may or may not be formally legally recognized or enforceable but which nonetheless constitute a part of what a society, broadly conceived, recognizes as a component of its property system. Singer thus demonstrates that sociality adds something to our understanding of property—it is more than formal, legally recognized rights alone. A society may take rights that are legally recognized and shape and modify them to suit new conditions and assist those living in those conditions to understand them better. Judges, legislators, and we miss this if we prioritize historicality and ignore sociality.

Remember my lunchtime walk. When we considered the historicality of property, we saw that the three ideal-typic categories of property were at work and interacting with one another. We saw that in some way, the rights that constitute those categories were allocated to their holders in some way at some time according to legal rules. What we could not see then was the way those categories of property and the way in which they were allocated assisted me in making sense of the world through which I was passing on that walk. Nor did we see much about the way in which I interacted with those types of property. Historicality makes clear my legally structured and enforceable relationships with others. It does not make so clear where private property—the restaurants and cafés, what I

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133. See Baker, supra note 8, at 743.
134. Harris, supra note 2, at 3–4, 9–10.
135. The phrase “hypothetical anthropologist” was coined by Andrew Reeve, Convention and Justification: Professor Harris on Property and Justice, 19 Oxford J. Legal Stud. 323, 331 (1999) (reviewing Harris, supra note 2). I have added “social” in view of the obvious significance of social context to Harris’s understanding of property.
136. Singer, supra note 74, at 661–63.
137. Singer, Entitlement, supra note 2, at 13–14.
eat there, how I pay for it—exists, how it applies, where it ends, and what it means. The same can be said of the commons property—the grassy boulevard and those on it—and the public property—the streetscape—with which I interact. When we open up social context, then we can see how the various relationships that constitute those types overlap and interact with each other. And above all, from this perspective may emerge other forms of socially created interests in these places—based upon relationships, formal or informal, with others: the homeless persons leaving their belongings in public places may have some sort of “entitlement” to that space; those who are selling things or proselytizing on the street may have some sort of “right” to do so; and employees of the café may have some sort of “reliance interest” in relation to the security of their employment.

Although background knowledge helps us make sense of the world, only an examination of the social context—the relationships between people that constitute those rights—from which property emerges and by which it is constituted reveals that about which we are trying to make sense. The historicality of property then is only a starting place. Whether one considers it relevant to understanding what rights a society’s legal system accepts as part of its property institution or to understanding the new relationships that build upon those rights and establish boundaries in relation to autonomy, sociality is an essential component to understanding what property is, how it works, and how it is central to human life. Still, although all theorizing tends to focus exclusively on historicality—a theory of rights—and sociality—the importance of relationships—we are not finished with our reassembly of property theory. We might call rights and social context the binarism of property theory, and that fails to give explicit, and in some cases any, attention to the spatial dimension. This binarism is not, therefore, enough to give us a full picture of what property is and how space is important to understanding it and its importance for human life. That is our next task.

C. Spatiality: Property “Produces” Spatially Contingent Boundaries

We have seen that what we know about property includes historicality and sociality. To complete the picture of property, however, the trialectic requires the breaking open of this binarism and the injection of spatiality. Although it is difficult to find this explicitly theorized, for two reasons, space is central to an understanding of what property is. First, as my
daily lunchtime walk demonstrates, the rights that constitute property operate in and apply to physical space. Waldron says this:

Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location. Moreover, though everyone has to be somewhere, a person cannot choose any locations he likes. Some locations are physically inaccessible. And, physical inaccessibility aside, there are some places one is simply not allowed to be.

One of the functions of property [rights], particularly so far as land is concerned, is to provide a basis for determining who is allowed to be where. For the purposes of these rules, a country is divided up into spatially defined regions or, as we usually say, places. The rules of property give us a way of determining, in the case of each place, who is allowed to be in that place and who is not.138

Second, property rights are not only the product of social context, helping us to explain the physical space in which we live our lives, but they also, through the choices that we make in exercising them and our interactions with physical places and with others, produce, affect, alter, and are affected and altered by the physical space and the social context. In other words, rights exist, operate in, and are limited by physical and social space. Both ways in which space matters are connected; in addition to assisting us in explaining the world around us, most of us have property—rights constituted by the social context in which we live and conferred upon us by legal means. And through those rights, we make choices, interact with the physical space, and produce and reproduce the social space around us. These ideas require further development, and this subpart explores what we know about the “spatiality of property,” looking first at physical space before turning to social space.

1. Physical Space

Accounts of the importance of physical space are common in the practice of property law but are at best implicit in property theory.139 One can discern two approaches in the literature. The first we might call “thin,” by which I mean those in which the theorist might agree that physical space is important to an understanding of what property is and how it interacts with the world around us without expressly theorizing that importance. Almost all contemporary theories of property take


this minimal approach to space. Harris, for instance, argues that notwithstanding the fact that property might deal with items of social wealth, it also applies to rights to things—this, Harris says, identifies a connection between the individual who holds those rights and the physical environment. This is another way of saying that viewing property as rights attaching to things identifies the physical space in which that right operates and to which it applies.

Another version of a thin approach looks more broadly at the society under consideration. A visit to post-Soviet Moscow, for instance, brought Michael Heller face-to-face with empty storefronts alongside full street-side kiosks. The problem, Heller argued, was that resources were prone to underuse because multiple owners each had a right to exclude others from a scarce resource, with none of them enjoying an effective privilege of use. This in turn resulted in an excessive fragmentation of rights among many users, without any one of them having the ability to make effective use of the resource. Heller identifies a range of contexts in which such “anticommons tragedies” may arise: the Moscow street, rapid enterprise privatization, fractionalization of Native American lands, gimmick giveaways of infinitesimally small parcels of land, and postearthquake reconstruction in Kobe, Japan. In response, Heller created “anticommons property,” a new theoretical category of property, to explain this real-world problem. Again, although Heller’s examples clearly allude to the fact that rights work in physical space and that one sees that operation in such spaces, space is given no explicit theoretical status.

The second approach to physical space we can call “thick”; theorists in this camp simultaneously recognize the importance of physical space and expressly theorize it. One way of achieving that result is to view property as a relationship between or among individuals, filtered or

140. HARRIS, supra note 2, at 3–14.
142. Heller, supra note 141, at 671, 677; Heller, supra note 64, at 423–24.
mediated through objects of social wealth.\textsuperscript{145} In this way, the object of a property relationship becomes important because it has an impact upon the property relationship itself, for “specific objects of property . . . carry with them duties of stewardship, or obligations to use in a specific manner.”\textsuperscript{146} Or one might argue, as does Laura Underkuffler, that physical dimension is “of critical importance in every legally cognizable conception of property: until we know the space or conceptual area of field to which our theory of rights applies, we cannot know—as an actual or functional matter—what our conception of property is.”\textsuperscript{147}

Thin and thick accounts recognize the importance of physical space in understanding what property is, but only the latter expressly theorizes that importance. Such accounts tell us that property involves relationships and rights that exist in and operate upon objects found within a concrete physical setting. This is important because focusing on the object may well tell us more about specific normative duties and obligations or limits upon rights in relation to it, and an examination of the entire physical field will tell us more about what that property is, its relevant rights, the relationships that give rise to those rights, and the way in which those rights shape and structure the physical space itself. Property, its rights, and its relationships, by shaping and structuring the physical space around us, establish what we might call “spatially contingent boundaries” between people, things, and types of property—private, state/public, and common. Both accounts of physical space highlight then the fact that property, whatever it is, interacts with and shapes physical space. But there is more to the notion of spatially contingent boundaries: although property shapes and structures physical space, it can and does “produce” a social space that exists within the physical; those social spaces also constitute boundaries, again, between people, things, and types of property. We have seen some of this in the sociality of property, but we must account more explicitly for this social space as well, for it also influences and is influenced by property.

2. Social Space

Spatiality captures not only the physical dimension but also the social or “socially produced space.”\textsuperscript{148} This is useful for an understanding of human life within society because it recognizes the importance of the

\begin{itemize}
\item \textsuperscript{145} David Lametti, \textit{The Concept of Property: Relations Through Objects of Social Wealth}, 53 U. TORONTO L.J. 325, 355 (2003); Lametti, \textit{supra} note 139, at 149.
\item \textsuperscript{146} Lametti, \textit{supra} note 139, at 160.
\item \textsuperscript{147} Underkuffler, \textit{supra} note 1, at 23–24.
\item \textsuperscript{148} Soja, \textit{Thirdspace}, \textit{supra} note 14, at 72.
\end{itemize}
relationship between physical and social space. When applied to property, this spatiality of property opens up the historical-social binarism to reveal that although rights and social context are present, there is much more to property than what those two elements alone can tell us. We have already seen that social relationships are constitutive of property rights—which may include reliance interests or entitlements—and that they establish boundaries in relation to autonomy through interdependence. This view, however, focuses on only those relationships that constitute property, which are merely a subset of all relationships that constitute the society in which we live.\(^149\) What we have called the sociality of property, in other words, captures only those social relationships constitutive of property rights. We might call these “property social relationships.”

The social world in which we live goes far beyond property social relationships; it includes what we might call the “constellation of all social relationships.” Unfortunately, most theories of property fail explicitly to account for this, which represents a serious omission. Overlooking the broader sphere of relationships surrounding the sociality of property means that we miss the reality that how people exercise property rights affects and is affected by the social world in which they live. Exercises of property rights—historicality—structure, shape, and produce not only the physical space, as we have seen, but the very social context itself—sociality—the engine room for the production of the constellation of all social relationships. The physical and social space so produced itself restructures, reshapes, and reproduces property. The “new” physical and social space so produced in turn reshapes property, which again restructures, reshapes, and reproduces space. And on the cycle goes. This constellation of all social relationships constitutes “produced space,” which for our purposes, in turn “produces” property itself, and both reproduce each other in a dynamic, continuous, reiterative cycle of action and reaction, as shown in Figure 2.

\(^{149}\) See Munzer, *supra* note 50, at 40–41.
The key to this cycle of property production lies in property’s content—what it confers on its holder. As we saw earlier, that content concerns rights constituted by relationships among people regarding control and disposition of valued resources. Yet this alone fails to capture fully the impact that the exercise of rights has on the world around us, both physical and social.¹⁵¹ Rather, we must take account of the interaction of rights within physical and social space. To account for this, a better way of describing the content of property is to call it what it is: “decisionmaking authority,” which C. Edwin Baker says is “the role of property as a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the decisionmaking authority of the holder of that right.”¹⁵²

Exercises of decisionmaking authority permit property holders to alter unilaterally the physical world and to alter the status of everyone else in

¹⁵⁰ This figure is adapted from SOIA, THIRDSPACE, supra note 14, at 71 (permission to reproduce granted by John Wiley & Sons Ltd., Oct. 30, 2012).
¹⁵² Baker, supra note 8, at 742–43; see also SINGER, ENTITLEMENT, supra note 2, at 134–39 (presenting a theory of property rights that focuses on social relations); SINGER, THE EDGES OF THE FIELD, supra note 2, at 20–21 (discussing how property systems regulate the relationships among rights holders); Singer, Sovereignty and Property, supra note 102, at 41 (describing how social relationships are central to property); Singer, supra note 74, at 655 (describing the social relations approach to property).
society by involuntarily imposing, amending, or eliminating duties not to interfere on others.\(^{153}\) Decisionmaking authority then is where choices about the resources over which we are said to have property are made. It is the ability, through making a choice, to control, to master, to rule a part of, and to effect change in the real world. In other words, the content of property is power; the “world” to which it applies is the totality of the physical and social space—the constellation of all social relationships—within which we live.

If unfettered, as social conditions and relationships change, property runs the risk of producing negative social outcomes in physical and social space. If such deleterious social outcomes are to be avoided, the underlying social values and purposes of property require regulation by corresponding moral imperatives, duties, and obligations\(^{154}\) to monitor the balance between individual well-being and collective social good. For this reason, in every society that invokes property as a means of resource distribution, decisionmaking authority is hemmed in by the state’s police power—the community’s ability to control and alter the scope of private property rights over time as their social meaning changes.\(^{155}\) Over time then, regulation preserves the social function of a property right, whatever it might be, within a context of relatedness to others, thus protecting others against harmful outcomes brought about through choices.\(^{156}\) David Lametti says that

\[\text{[s]ince . . . property by definition entails scarcity, and since by allocating the resource through a . . . property regime to individuals we create inequality, it is thus entirely justifiable and understandable that the institution comes with strings attached. . .} . \text{[P]roperty must in some way serve some greater good in order to be justified. While definitely important, the promotion of individual autonomy cannot persuasively stand as the sole reason justifying property rights. Some other goals, including collective ones, must be served.}\(^{157}\)

Every property system, in other words, comes with “strings attached”—moral duties, imperatives, and obligations—manifested in regulation to ensure the balance between individual and collective.\(^{158}\)

\(^{153}\) See Lametti, supra note 145, at 346–47.
\(^{154}\) Id. at 346–48; see also Lametti, supra note 123, at 667–68 (describing further the duties, responsibilities, and obligations of private property).
\(^{155}\) Singer & Beermann, supra note 8, at 228.
\(^{156}\) Id.
\(^{157}\) Lametti, supra note 139, at 154.
\(^{158}\) See SINGER, ENTITLEMENT, supra note 2, at 205–06; SINGER, THE EDGES OF THE FIELD, supra note 2, at 41–42.
To recap: the rights constitutive of property or other interests that may be recognized as property, such as reliance interests, are produced by and operate within physical and social space. And the power they place in the hands of holders has the ability to effect change within, indeed to “produce” those very spaces. Property social relationships structure what decisionmaking authority is and will be in relation to any given resource, and through the exercise of rights, those relationships are also structured by the very decisionmaking authority they produce. But more significantly, the constellation of all social relationships—spatiality—itself affects and produces and is affected and produced by property social relationships and its resultant rights. Of course property relationships constitute and define property, but so too does the constellation. The constellation, the subset of property social relationships, and the interaction of both with physical space comprises property’s spatiality. The next Part considers the interrelatedness of the three elements of property as we have reassembled it.

IV. THE INTERWOVEN COMPLEXITY TO AND INSEPARABILITY AND INTERDEPENDENCE OF PROPERTY OR, VISIONS OF SPATIAL INJUSTICE

A. Background

The novelty of this reassembly lies not in its constitutive parts, although an explicit theorization of spatiality as encompassing the physical and the social is lacking, but rather, when we look at the real world, the institution itself exhibits the interwoven complexity, inseparability, and interdependence of these elements: rights—or historicality, social origins and socially contingent boundaries—or sociality, and spatially contingent boundaries within physical and social space—or spatiality. Seeing property this way reveals aspects of social relationships that we might otherwise overlook: components of our social world—the constellation of all social relationships—that affect and are affected by what property is, the way that rights are structured and defined, their exercisability, and the way that they are exercised. We see that rights impact upon, construct, and shape the social context that both gives rise to them and the social context in which they occur and that the space, both physical—including the natural environment—and social, in turn has an impact on the way in which rights are structured. This interwoven complexity, inseparability, and interdependence is occurring constantly and is dynamic.159 From this perspective, two important points emerge: first, one cannot prioritize

159. See Lametti, supra note 139, at 155–56, 159–62.
one ontological field of property over either of the other two, and second, from this complexity emerges spatial injustice.

1. Complexity, Inseparability, and Interdependence

In order to understand property and its importance to human life, there is simply no way in which one can look at any of these elements in the real world without taking account of the role played by the other two. No one of the three ontological fields can be epistemologically prioritized over the others; indeed, by their very nature it would be impossible to do so. This fluidity is not restricted to the relationship between the three ontological fields of property but also manifests itself within the elements themselves. Thus, for example, in the case of historicality, there is fluidity between the three ideal-typic categories that have been identified, as well as in relation to new categories, such as Heller’s anticommons and liberal commons.

Yet, to see this interwoven complexity of property, we must look beyond decided cases and legislative enactments. Neither of these sources reveals the importance of viewing property through an ontological taxonomy. Rather, because they are securely locked within the historicality of property—rights allocated at magic moments—for judges and legislators, it is simply a matter of determining in a formulaic Hohfeld–Honoré way whether the necessary bundle of rights is present. This fails to comprehend what property is—it fails to comprehend that property involves, in addition to rights, social context and spatial reality. It fails to consider the constellation of social relationships occurring within physical space that do not themselves constitute property but have an effect on the property that a society does recognize. Rather, as Robert Ellickson says, “Lawyers and legal scholars understandably tend to focus on domains of life where law is central.”160 In relation to property, this misses the fact that much can be learned from a consideration of the entirety of any social space, not only from the legal arrangements there, but also from the informal and even the entirely illegal ones. Both informality and illegality affect and ultimately structure the formal arrangements and relationships recognized and enforced by law as property. It is quite possible to find examples of this that demonstrate the

necessity of moving beyond the judicial-legislative view of property to see it trialectically. Indeed, they abound.

2. Spatial Injustice

From this complexity we can begin to see that property plays a role in spatial injustice. As we saw in the introduction, spatial injustice as a concept involves identifying those instances and events of systemic injustice that may be of racial, gender, ethnic, or economic origin or any combination of them, that are caused by the economic, social, and political production of space, both physical and social, and that evolve over time. Spatial thinking assists us in locating these processes and their consequences. But the point is simple—we are looking for those “unjust geographies in which we live” and the processes that cause them. This Article posits that one of the processes responsible for unjust geographies is that which is enshrined by law in property.

If we are looking for the unjust geographies in which we live and for their causes, then we must also be looking for the ways in which we can act to change both the processes and so the geographies. This Article is concerned more with the unjust geographies, but it is worth identifying, if only in a preliminary way, the ways in which those may be addressed, if for no other reason than to point the direction of future work. In other words, we need also to have in the back of our mind the notion of spatial justice, a concept still in its infancy—frequently, other terms have been used in the past to describe it: “territorial justice, environmental justice, the urbanization of justice, or . . . the geography of social justice.” Because it is in the early stages of its development, no “cookbook” definition can be advanced. Instead, it is enough at this stage to know simply that spatial justice is not a substitute for social, economic, or environmental justice. Rather, it is an amplification and extension of those concepts into new areas of understanding and political practice. What this means is that “everything that is social (justice included) is simultaneously and inherently spatial, just as everything spatial, at least with regard to the human world, is simultaneously and inherently socialized.” Soja concludes that

162.  *Soja, supra* note 10, at 5.
163.  *Id.* at 4.
164.  *Id.* at 6.
165.  *Id.* at 5–6.
[s]eeing justice spatially aims above all at enhancing our general understanding of justice as a vital attribute and aspiration in all societies. It seeks to promote more progressive and participatory forms of democratic politics and social activism, and to provide new ideas about how to mobilize and maintain cohesive coalitions and regional confederations of grassroots and justice-oriented social movements.166

Although my lunchtime stroll might serve as a simple example of the complexity, inseparability, and interdependence of the three ontological elements of property and of the production of spatial injustice that they engender, the world around us provides excellent evidence from which to draw. Four areas of contemporary spatial life demonstrate the interwoven complexity to and the interdependence and inseparability of the property trialectic. The four “communities” selected take us from intimate to global to demonstrate how formal, legally recognized property rights work and how the social space from which those rights emerge and in which they operate produce “new” social and physical contexts in which new rights may emerge or existing rights may be modified. This in turn highlights the importance of taking account of spatiality, for doing so takes a broader view, one that encompasses the constellation of all social relationships, both those that constitute property and those that are not directly related to it. Above all though, taken as a whole, the four communities demonstrate places where both social and spatial justice can be done.

Before moving on, remember also that the four contexts chosen here are merely representational of all social contexts and by no means exhaust the totality of the world in which we live. Each deserves and has been given elsewhere much more attention than can be given them here. For our purposes, they are presented in very summary fashion simply to demonstrate the interconnectedness of the property trialectic.

**B. At Home: The Person and “Intimate Community”**

“Intimate community” begins with the human person, and it is here that we find the first and most intimate demonstration of the interwoven complexity of the trialectic fields of property. As early as 1980, the United States Supreme Court held that it was possible to patent a living organism.167 In 1990, the California Supreme Court found that it was

166. Id. at 6.
It is possible to hold property in human tissue and that the person from whose body the tissue was taken ceased to have any proprietary claim.\textsuperscript{168} And very recently, the U.S. Supreme Court held that a DNA segment that has been isolated but is naturally occurring is a product of nature and therefore not patent eligible but that cDNA, which is not naturally occurring, is patent eligible.\textsuperscript{169}

The point about the human person though is this: presently, there are patents held to over 2000 human genes or twenty percent of all human genes\textsuperscript{170}—in other words, our own bodies themselves are the first spatial field defined by property. Whether the possibility of patentability of genes or human tissue exists or not, the issue of property defining the human person according to the three trialectic fields is a real one. Michael Heller describes this problem in his novel as the “tragedy of the anticommons,” which in the case of the human person involves the segmenting and fragmenting of the very stuff of which we are made.\textsuperscript{171} In this sense, the most intimate dimension of human society, the person, is a spatial component and is therefore a site at which spatial injustice may occur and has occurred in cases such as \textit{Moore} and the lower court decision in \textit{Molecular Pathology}, in which not the person in whose body the tissue or gene occurs, but an external party, holds the property.\textsuperscript{172} And this has real-world consequences that produce spatial injustice, about which Heller simply asks, “How many more lives could be saved if biotech property rights were better designed?”\textsuperscript{173} In short, at this most intimate level, spatial injustice involves not only control over the basic components of life but also the cures for life-threatening illnesses.

\begin{footnotesize}
\begin{enumerate}
\item[168.] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 492–93 (Cal. 1990).
\item[169.] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2111 (2013); see also Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1305 (2012) (holding along similar lines on the basis that genetic material is part of the laws of nature).
\item[171.] \textsc{Michael Heller}, \textsc{The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives 1–2} (2008).
\item[173.] Heller, supra note 171, at 50.
\end{enumerate}
\end{footnotesize}
In order to survive, people need, among other things, shelter. For many of us, that involves a home, an important human institution—one that “lies at the core of everyday life.” Yet, here, property theory tends to focus on formal, legally recognized arrangements, notwithstanding that these are nothing more than background to the informal arrangements that emerge from and are of greatest significance to the operation of the household. In an examination of the demography of the household, Robert C. Ellickson found that members of a household—its owners, the ones who hold the property in the house, and its occupants, those who do not hold formal, legally recognized property interests—

together manage a real estate enterprise that makes use of inputs of land, capital, and labor in order to provide shelter, meals, and other services. Members of a household, through their repeated interactions, typically generate a set of norms to govern their behavior, including their duties to supply household inputs and their rights to share in household outputs.

The household is a socially produced space; it is an intimate community in which rights and relationships interact with one another. Although it seems so obvious as to go without saying, the space of the household is not founded solely upon property relationships and the rights they constitute. Yet, as Ellickson points out, this is the very oversight made by most who study the household—legal scholars, demographers, historians, social historians, cultural anthropologists, and sociologists. And in doing so, these scholars miss important nonproperty relationships within the household that result in the establishment of informal relationships that affect not only the way in which formal, legally recognized relationships exist and the way in which the resulting rights are exercised but also affect the resulting restructuring and reestablishment of the informal rights.

It is therefore important to study the intimate spatiality of the household, both physical and social, for what it reveals about the “norms, duties, and rights,” in other words, the “informal property rights” that respond to the formal property structure—historicality and sociality—and emerge from this social space. But of even greater importance is what it tells us about

175. Id.
176. Id.
177. Id. at 232.
178. Id. at 297–326.
the formal, legally recognized property arrangements themselves. These, through the exercise of choices predicated upon the rights formally conferred, interact with and restructure the sociality and spatiality that influenced their emergence in the first place. This may have even broader social importance for, as Ellickson concludes, “scholars who study the structure of business and governmental organizations can learn from Aristotle’s basic insight that social arrangements that succeed within the household commonly inspire creators of more complex human institutions.”

C. Stepping into the Street: “Local Community”

Stepping through the front door of the house, one enters the local surrounds of the home, what we might call the “local community.” Here again, property theory fails to account for what one finds. When exploring the local community, property theorists, drawing on the judicially and legislatively created historicality of property, rivet our attention on rigid classifications of the physical space around us. These theorists typically begin with a “property boundary” intended to describe the divisions between the ideal-typic categories. Sadly, in the real world, the boundary offers no assistance in making sense of the local community. Rather than neat boundaries and divisions, the real world contains interwoven examples of each of the three ideal-typic categories of property. The boundary fails to adapt to social and spatial interactions in the real world, and it fails to show how the ideal-typic categories fit together in a functioning system of property. We are left, then, with questions: What constitutes one type of property and what another; where does one type of property begin and another end, and why? Is a particular set of legal or social relationships cross-boundary, fitting within one category alone, or both, or several, or does it shift depending on circumstances and purposes? The property boundary, founded upon historicality, fails to provide any answers to these questions.

We can, albeit with great difficulty given the control exerted by judicial and legislative conceptions, shift our focus from historicality to the sociality and spatiality of the community. If we do, rigid divisions disappear. In the real world of the local community, in produced social spaces, where choice and interaction with others occur, we observe the ideal-typic theoretical categories of property’s historicality interacting

179. Id. at 229, 328.
180. Id. at 327.
181. See Heller, supra note 64, at 433–34.
182. Id. at 421.
with one another, rendering almost irrelevant the rigid boundaries between private, public/state, and common property. Some theorists assist us in this effort, noting the way in which the ideal-typic categories operate within physical space and interact with and overlap in social space. Carol Rose, for instance, uses the term “inherently public property” for all assets over which there is a public right of access, whether the asset itself is treated by law as private, public/state, or common property. Bruce Ziff points out that rather than neat distinctions between them, in the real world, the three categories tend to merge in our consciousness, so that we see public parks and roads sometimes as common property and other times as public/state property. Although formal title to these lands is placed in public authorities, we all tend to believe that we have some right to access these places and not to be excluded from them. And even the public-private divide blurs: ultimate title to private property may nonetheless remain vested in the state, or at the very least, the state may retain some interest in that property. In public parks, for instance, informal, private property-like rules may spring up in relation to the use of various things found there, such as “fountains, swings and benches.”

But just as the household is a produced space, so too is the local community; indeed, the former exists and operates in and interacts with the latter. The obvious overlap of the three ideal-typic categories is what we have called the historicality of property, which on its own, fails to account for everything that occurs in the real world. The historicality of property, as we have seen, is concerned with only the way in which rights are organized to produce the three ideal-typic categories. But it is not the totality of what we find in the real world. In the real world,

184. For a full analysis of these property boundaries, see generally Heller, supra note 66.
186. Rose, supra note 185, at 781.
187. Ziff, supra note 185, at 8.
188. Id.; see also Ellickson, supra note 77, at 1387.
historicality interacts with the constellation of social relationships, producing novel, informal relationships that may or may not be legally recognized as property. This is where property plays a role in the production of physical and social space and where that spatiality in turn plays a role in shaping what property is. Just as was the case with the household, even more so is the local community not founded solely on property relationships and resultant rights. Rather, when we step through our door into the community, we find a world in which not only do the three ideal-typic categories disappear, merging in our consciousness, perhaps in a form of property best captured by Rose’s “inherently public property,” but also a world in which property interacts with all nonproperty relationships to create new relationships and interactions, which affect the formal, legally recognized property rights, as well as produce new, informal property and nonproperty relationships. Exercises of formal, legally recognized property rights ultimately constitute new informal property rights, which in turn produce and reproduce spatiality. We see this when we venture into the community if, of course, we shift our focus from historicality to the sociality and spatiality of property. We see this when we move beyond the local surrounds of our homes.

D. Venturing Beyond the End of the Street: “Regional Community”

The corner at the end of our street is not the end of the inseparability and interdependence of the property trialectic. Rather, just as the local community exhibits a complex relationship between these three ontological fields, so does the broader community, what we might call the “regional community”; this is the community that comprises both cities and rural areas of life.189 Examples of this community are endless and exist all around us. This subpart offers only two, drawn from very different parts of the world: Ukraine and Los Angeles.

1. Ukraine: Poverty and Crime

We have already seen that the former Soviet Union has had difficulty adapting to postcommunist, market-based capitalism; in other words, the movement to private property has brought with it substantial growing

Michael Heller’s anticommons property was coined in response to a walk down a Moscow street. Other post-Soviet states have faced similar obstacles in the transition from public to private property. Indeed, for many in the former Soviet Union, the cruel reality is that private property has operated to impoverish rather than liberate, to create instability rather than certainty. Consider, for example, Ukraine.

By 1991, the year it gained independence, Ukraine was in economic decline. Although its release from Soviet shackles ought to have buoyed it, its new government faced four problems created by the split: (1) the removal of the larger Russian economy as the main, if not exclusive, market for Ukrainian products; (2) the elimination of former Soviet republics as suppliers of raw materials or finished products necessary for the production of goods; (3) the increase in energy costs, which under communism had been kept artificially low; and (4) the ongoing impact of the Chernobyl nuclear disaster. The fact that the major players who presided over the collapsing Soviet economy were the same ones charged with transforming Ukraine’s into a market economy only served to exacerbate the impact of these problems—different views proliferated within government about the appropriate and necessary policy to direct the shift from communism to capitalism. But as Orest Subtelny says, whatever method was chosen, putting the old guard in charge was “comparable to engaging Wall Street ‘sharks’ to transform a capitalist economy into a communist one. Obviously, most of the new/old Ukrainian elite had neither the will nor the ability to introduce effective economic reforms. And if it did introduce reforms, they were usually ones that served its own interests.”

In this economic environment, notwithstanding the Ukrainian Constitution’s requirement that “[t]he use of property shall not cause harm to the rights, freedoms and dignity of citizens [or] the interests of society,” and in the absence of any other formal laws or legislation to enforce these hortatory words, the establishment of private property

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193. Id. at 619.
194. Id. at 619–24.
195. Id. at 619.
conferred decisionmaking authority upon Soviet-era oligarchs. This in turn spurred what we may call “privatization by seizure,” occurring in various ways: some “simply transformed Communist party funds and property into private holdings”; others took advantage of monetary policy to reap huge profits, which were used to purchase entire industrial sectors, while still others purchased cheap raw materials and “then obtained hard-to-come-by export licences” to sell them on the world market. In every case, government “connections were more important than capital” in obtaining private property, resulting in the “rapid transformation of the most intrepid members of the old Soviet nomenklatura into incredibly wealthy oligarchs. However, unlike the robber barons of early capitalism, these new ‘captains of industry’ acquired their wealth by undermining rather than expanding the economy.”

Such unfettered self-seeking exercises of newly conferred decisionmaking authority merely stoked the flames of poverty already smoldering in the late Soviet era. Rather than correcting an existing problem, private property had quite the opposite effect—bloating an already serious poverty among a growing unemployed and indigent population. According to Subtelny, “Statistics provide only a pale approximation of the depressing reality.” And the statistics were depressing enough—in 1992, “Ukraine’s economy contracted by 20% while inflation [skyrocketed] by 2500%.” “Between 1991 and 2000, the country’s GDP had sunk over 63%, one of the worst declines in the former USSR,” and “[t]he standard of living plummeted to the point where about 70% of [the] population [was] close to or below the poverty line.”

Poverty is only one side of the coin. The lack of regulation that might alleviate it also leads to systemic instability and a lack of what Munzer calls “actual control.” In other words, “If burglaries are rampant, the owner’s actual ability to exclude others may fall well short of his legal power to exclude them.” The creation of private property, in the absence of any legally enforceable protection for that right, means that the security normally associated with this institution is lacking. This may result in alternative, usually illegal, means of ensuring control of the resource. Moreover, in the absence of state-sanctioned means of

197. Subtelny, supra note 192, at 621.
198. Id. at 621–22.
199. Id. at 589.
200. Id. (citing Chrystia Freeland & Edward Balls, Facing Harsh Realities, FIN. TIMES, Jan. 27, 1993, at 29).
201. Id. at 618.
202. See Ziff, supra note 185, at 73–77.
203. Munzer, supra note 2, at 92.
204. Id. (emphasis added).
protecting exclusivity, further criminal opportunities emerge as those with property seek to exploit the systemic instability, creating “incentives to strip assets, corrupt officials, evade taxes, illegally export capitals and launder money.”\textsuperscript{205} Indeed, this is the very thing that has happened in Ukraine and in most post-Soviet states.\textsuperscript{206} This leads in turn to further inequality of distribution of scarce resources and further poverty. For those with property, in the absence of the monitoring and regulation necessary to prevent unequal holdings and negative social outcomes, there is little of the security normally associated with property rights. This produces criminal forms of protection and opportunities for further criminal activity, further inequality, and ultimately more crime. These illegal forms of protection and the criminal opportunities that result from a lack of regulation are the informal property and nonproperty relationships that emerge from formal, legally recognized property but that we only see when we shift our focus from rights alone—historicality—to the totality of what is happening in the real world—the sociality and spatiality of property.

There is nothing new in identifying the relationship between property, poverty, and crime. David Harvey has summarized this nexus as a form of “uneven geographical developments” in which the steady progression of neoliberal economic, social, and legal forces structure the world according to a specific view of how humans interact, leaving in their wake the “unpalatable aspects of neoliberalism,” most notably financial crises.\textsuperscript{207} In the context of property theory, what the Ukrainian example demonstrates is this: the source of poverty, an aspect of human life, involves the totality of a property system—the rights conferred by private property, the social context from which they emerge, and the spatiality within which they operate, on which they have an impact, and of which they are both product and producer.\textsuperscript{208} There is no way to separate one dimension of the property trialectic from or privilege it over the others; if one does, an important part of the solution to this social problem is missed. Indeed, an important part of the problem itself is missed.

The example makes clear not only the necessity of looking at all three of the elements of human life found in property but also the need for

\textsuperscript{205} VARESE, supra note 190, at 36.
\textsuperscript{206} See id. at 1–36.
\textsuperscript{207} DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 87 (2005); see id. at 87–119.
\textsuperscript{208} See id. at 2.
monitoring and regulating their interaction in the real world. The failure to do so results in a failure to account for negative outcomes, such as poverty, which in turn has an impact on the social relationships that give rise to property. It affects the broader constellation of social relationships and in this case, opens up further criminal possibilities to exacerbate an already unequal distribution of wealth, which produces informal “property rights” requiring illegal means of protection. All of this affects the existence and operation of formal, legally recognized property rights, such as the actual control available to the holder of those rights in response to the exigencies of the spatial dimension.

As with the human person, the home, and the local community, when we look at the larger community, we see a socially produced space in which formal, legally recognized rights may exist but in which nonlegal, informal rights emerge in order to adapt to the spatial dimension. But can the informal property relationships and rights that emerge in a spatiality, such as that found in Ukraine, in fact produce new variants of formal, legally recognized property rights, as opposed to altering simply the exercisability of those that already exist? The next subpart examines how new variants of formal, legal rights can be produced in response to a spatial dimension in which crime is rampant and how this can in turn lead to spatial injustice.

2. Los Angeles: Gangs and Common Interest Developments

There is no doubt that crime strongly shapes the social and spatial fabric of contemporary urban life. Los Angeles—immortalized in numerous movies framed by Colors (1988) and Crash (2004)—represents the exemplar of urban American crime. The unequal distribution of wealth and resources and the disparity between property and no property and haves and have-nots produces poverty that goes hand in hand with crime, gang-related activities, and “turf.” In its totality, this constitutes a socially produced urban spatiality. From that spatiality and the interaction of poverty, crime, and gang membership emerges an ever-

211. See id. at 293–309.
212. See generally SOJA, POSTMETROPOLIS, supra note 14, at 115–415.
213. DAVIS, supra note 209, at 270; SOJA, POSTMETROPOLIS, supra note 14, at 302.
increasing destruction of public space, an increased security offensive, both public and private, and the hemming in of the homeless into a “Skid Row.” Similar urban spatialities are replicated to greater or lesser degrees in every major city worldwide.

Gangs drastically alter life at every level, including property, for those in Los Angeles: police activity, community development, fear of crime—whether perceived or real—drug use and abuse are all outcomes of gang-related crime. These activities lead to a redistribution of the land resource as well. Although formal, legally recognized property rights may allocate public and private space in one way, the lived reality of the spatiality is very different. Gang “territories” or “turfs” dominate the poorer parts of Los Angeles; as such, any recourse to formal, legal property rights becomes irrelevant as “a quiltwork of blue-ragged Crips [a gang], both Eastside and Westside, as well as miscellany of other gangs” operates at an informal and illegal level to control spaces and what happens there.

Soja explains how this affects the intimate, local, and regional communities identified earlier:

At a much more intimate scale in [Los Angeles] is a household militia of extraordinary proportions. Lethal weapons are kept in most homes and in an increasing number of automobiles, creating a heterogeneous, fragmented, and highly mobile civilian armed force capable of shooting all trespassers on sight, wherever they may roam. Patrolling the private turfs, edges, and transgressions of the carceral postmetropolis, this localized army aims also to make and mark space, and contributes to keeping everyone in their proper place, whether it be not-in-my-back-yard or not-in-my-freeway-lane. The potential for everyday violence is thus raised to new heights, triggering often-fatal attractions to a disciplinary technology of security and surveillance that patrols the region with endless eyes.

214. Soja, Postmetropolis, supra note 14, at 304 (citing Davis, supra note 209, at 226–27). The “Skid Row” policy of the Los Angeles civic authorities became the subject of a cruel and unusual punishment claim under the Eight Amendment to the United States Constitution in Jones v. City of Los Angeles, 444 F.3d 1118, 1120 (9th Cir. 2006). On the issue of property and homelessness, see Waldron, supra note 138, at 309–38.


217. Id. at 299, 301 (citing L.A. Police Dep’t., 77th St. Div., 1972 Gang Map (1972)).

218. Id. at 309–16.

219. Soja, Postmetropolis, supra note 14, at 309.
New forms of “property”—in weapons, drugs, and turf—develop in the lived urban spatiality of Los Angeles. Although it may be informal and illegal, the consequences for both gang and nongang residents are very real: the lack of safety and fear of crime, the terrible human toll of guns and drugs, especially rising juvenile crime and hospital admissions for drug trauma, and the increased police presence resulting in limited freedom for everyone. Hemmed in on three sides by armed residents, gang turfs, and a police presence, residents in the poorer areas of Los Angeles live in nothing less than a war zone. This affects property from the intimate community of the home, where fear and a “household militia” prevail, to the local community, where drugs and boundary disputes over “turfs” and “territories” cut private, commons, and public property along lines not formally recognized in the regional community.

With actual control and enforceability of rights normally associated with private property vanishing and with the emergence of turf battlegrounds on formerly common and state/public property and concomitant police raids, a person’s home is no longer one’s castle. And property rights and even social context can tell us little about what is happening here. The former focuses on the formal, legally recognized rights themselves while the latter focuses on the way in which those rights emerge from and operate within a network of property social relationships. Those focusing on only the property social relationships argue that this is how the rights emerged, while those focusing on the rights tell us that the rights are still there, although they might agree, given their limited enforceability, that they have less meaning than for those who do not live in such places. At the regional community level, then, the overwhelming response to this altered spatial reality is “urban flight,” producing in turn urban “sprawl.”

The reality of life in gang turfs, the resulting fear created by gang activities and drug use—spawning its own crime—and the resulting sprawl have an impact on property. We see this when we look at the regional spatiality of Los Angeles. Within this ever-expanding metropolis—and most major world cities—one finds new communities springing up in the exurbs and the suburbs—“luxury island sanctuaries, residential areas with ‘clout’ enough to partition themselves off fearfully from the real and

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imagined spaces of the criminalized poor.” These new communities go by many different names. “Common interest developments” (CIDs)—known by lawyers as “association-administered servitude regimes”—are formed by contractual agreements that bind all residents to certain rights and obligations. The contracts are often “‘themed’ around a chosen image for the community [such as] . . . Greek Island Villa [or] Hawaiian Resort.” All have homeowners’ associations (HOAs) or residential community associations (RCAs), although not all of these are CIDs. There are nearly 200,000 RCAs in California, which includes most “HOAs and nearly all CIDs.” Cutting across all of these are “gated communities,” which can be found in both the poor inner suburbs and the “wealthy Outer City.” Blakely and Snyder explain gated communities as residential areas with restricted access in which normally public spaces are privatized. They are security developments with designated perimeters, usually walls or fences, and controlled entrances that are intended to prevent penetration by nonresidents. They include new developments and older areas retrofitted with gates and fences, and they are found from the inner cities to the exurbs and from the richest neighborhoods to the poorest.

Statistics are difficult to compile, but across the United States there are an estimated 20,000–30,000 of these communities, with more than 3 million households and 8.4 million residents. Flight from crime or the perception of it may not be the only cause of the establishment of these new communities, but it is a major one. And once there, one finds that the community controls every aspect of what one might otherwise do with one’s home, prescribing everything.

223. SOJA, POSTMETROPOLIS, supra note 14, at 313.
224. Id. at 315.
225. Id.
226. Id. at 315–16.
227. Id. at 316.
228. Id.
229. EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 2 (1997); see also SOJA, POSTMETROPOLIS, supra note 14, at 316 (citing BLAKELY & SNYDER, supra, at 7).
230. SOJA, POSTMETROPOLIS, supra note 14, at 316 (citing BLAKELY & SNYDER, supra note 229, at 7).
from the color and the decor to the residential theme, all “spelled out in . . . contracts with the developer” imposing restrictive covenants.233 And this produces unique forms of social relationship, in which fear of the very thing from which the residents have fled—crime—remains ever-present:

If the [gated community] is a sanctuary from crime’s realities, it is also a marker of fear’s distant reach.

Perhaps that is why one waterfront mansion bristles with video surveillance cameras and electronic listening devices. Neighbors debate endlessly whether to upgrade the 30 year old gatehouse where private guards watch the only road inside. Roving security patrols remind residents to keep their garages closed. Driving off the Island into the real world, “all our shields go right up,” says one resident . . . .

. . .

“It don’t go downtown . . . [e]ver,” said [another] . . . resident . . . .234

It seems that in their attempt to ensure greater security from crime, those who establish and live in gated communities have simply exchanged one form of pressure—crime outside the community—for another—fear of crime and the informal property rights that have emerged through contract or nonproperty social relationships within the community. Or perhaps, given that these are “gated” communities, they have simply multiplied the pressure of modern life by adding fear of crime, social ostracism, and informal property arrangements to the reality of crime.

Our concern here, of course, is whether this trend produces variations in formal, legally recognized property rights. The answer is almost certainly yes. There is little doubt that the ideal-typic categories of property are no longer the same in such communities. The formal, legally recognized property rights that constitute its historicality may still be present, but the social context that originally constituted those rights has changed and so has the spatial dimension in which they now operate. And new forms of rights, either formal or informal, have emerged. This has not escaped theoretical inquiry. Hanoch Dagan and Michael Heller have argued that many such communities emerge from widely held values particular to the social setting under scrutiny235. These theorists argue that what is happening here is a new form of property known as “liberal commons,” which is an ideal type distinct from both private and commons property but which draws elements from each. They define it this way:

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233. SOJA, THIRDSPACE, supra note 14, at 269.
Any legal regime can qualify as a liberal commons when it enables a limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy to individual members. Constructing a successful liberal commons is always challenging, but it is not an inherently contradictory or practically unattainable goal.

The key here is not the gated community or the CID itself, which as every gated community, clearly is a response to the turmoil of life in urban spatialities, such as Los Angeles, based upon widely held values—fear and a desire for safety. The central importance of examining these communities is that the threat or perceived threat of crime resulting from increased gang violence—nonproperty relationships—has an impact upon the way in which formal, legally recognized property rights and the social relationships that give rise to them operate. When one views the spatiality of Los Angeles, there is much more occurring than is revealed simply through an analysis of the historicality of property or the sociality in which it provides useful information and from which it emerges. The spatiality results in new arrangements among groups of people in response to the constellation of all social relationships. Liberal commons property may be nothing more than a modification of private and commons property rights to suit a changing sociality and spatiality. But it is formal, legally recognized, and protected, and it is a response to social changes occurring at an informal and illegal level in physical and social space.

E. Crossing International Borders: “Global Community”

Sociality and spatiality do not stop at our civic or national borders. We have seen in the intimate, local, and regional communities that formal property rights operate in those spatialities to affect not only the intracommunity spatiality but also intercommunity life. In other words, each of these communities is connected. We have seen how informal property rights can emerge within the home, both as between the property and nonproperty holders to achieve tasks and outputs and as between those residents in the home and those not—increased fear-producing alternative means of protection and security—which in turn result in changes to the local community where public places become turfs and territories, themselves alternative and illegal forms of “property.” This can in turn produce new forms of legally recognized property in the

236. Id. at 553 (footnote omitted).
regional community, such as the liberal commons property of CID's and gated communities.

Of course, what is happening at the broader community level also influences the intimate, as demonstrated by the fear of crime leading to the establishment of HOAs, CID's, and gated communities, which induce individual homeowners or residents of nongated communities to purchase guns for increased protection, changing the way in which the private property of the home interacts with the local community and the public and commons property there. There is no way to identify the sole factor leading to any of these outcomes; rather, the totality of the property trialectic must be viewed as a whole in order to see and to understand these relationships and connections. Thus, the simple diagram we saw in Figure 2 requires some modification, in Figure 3, to add the additional components that lie behind historicality—the common, private, and public ideal types; sociality—relationship, community, and obligation; and spatiality—intimate, local, regional, and global. The trialetic, as its name suggests and as we have seen, is ongoing and recursive, constantly restructuring and reproducing property, both formal and informal.

FIGURE 3

The Interwoven Complexity to and Inseparability and Interdependence of Property

The connections between communities in one city and its region extend to the same sorts of synergies found in other cities and their regions and to other state divisions. Thus, our activities in the intimate, local, and regional communities affect the broadest spatiality. We are now well aware of our interconnectedness at a global level, which means that what we do in the spatiality of one community anywhere on the globe has an impact on the spatiality of another community somewhere else. In other words, the interconnectedness of communities through property means that the entire globe is a community, the “global community.” What we do with resources, assets, and intangible things through the exercise of property rights has an impact on the broader global spatiality in which we live. Consider this hypothetical:

Imagine . . . an affluent gated community on the New Jersey shore. Some of the inhabitants move . . . on a daily basis into and out of the financial district of Manhattan where they set in motion movements of credit and investment moneys that affect social life across the globe, earning thereby the immense money power that permits them to import back into . . . their gated community all of the energy, exotic foods and wondrous commodities they need to secure their privileged lifestyle. The inhabitants feel vaguely threatened, however, because they sense that there is a visceral, undefinable and unlocatable hatred of all things American arising in the world out there and its name is “terrorism.” They support a government that promises to protect them from this nebulous threat. But they become increasingly paranoid about the hostility they sense in the world around them and increasingly look to build up their . . . space to protect themselves, building higher and higher walls, even hiring armed guards to protect the borders. Meanwhile, their profligate consumption of energy to power their bullet-proof humvees that take them into the city every day, proves the straw that breaks the back of global climate change. Atmospheric patterns of circulation shift dramatically. Then, in the compelling but rather inaccurate popularized depiction of chaos theory, a butterfly flaps its wings in Hong Kong and a devastating hurricane hits the New Jersey shore and wipes out the gated community. Many residents die because they are so fearful of the outside that they ignore the warnings to evacuate.238

Although this scenario239 deals with the global impact of capitalism, it demonstrates the interwoven complexity to and inseparability and interdependence of property in each of the communities we have seen.

238. HARVEY, supra note 22, at 134–36.
239. A real-life example is found in Southern California’s ports, where international trade of goods, both imported and exported, requires labor and industry, in turn making extensive use of fossil fuels, which produce carbon emissions, leading to global warming, which affects the very international environment that trade is intended to benefit. See California’s Ports: Smoke on the Water, ECONOMIST, Apr. 28, 2007, at 54.
What one does with one form of property in one place—the movement of credit and capital in the global community—creates a lack of it in another—poverty and starvation in the local and regional community. The creation of ever-greater security fortresses in one place—gated communities locally and protection against terrorism globally—results in less security in another—poverty, homelessness, weapons, and drugs locally, regionally, and globally. The ever-increasing use of fossil fuels in one place—Humvees and energy-inefficient homes in the intimate, local, and regional communities—produces global warming and climate change in another—severe weather events, such as hurricanes, in the global community. This hypothetical demonstrates that property can have an impact upon both the social and the physical space in which its rights are exercised. Even more, it is not confined to the immediate spatiality—the effects can be intimate, local, regional, and global.240

But this is only a hypothetical, right? Wrong. Human activity is a major contributor to global warming. The United Nations Intergovernmental Panel on Climate Change is clear that there is a substantial scientific link between human activity and global warming.241 And although recent years have seen a decline in the popular perception of climate change as the cause of many of the extreme weather events witnessed the world over, recent scholarship confirms that climate change remains a real and serious threat to humanity;242 indeed, some scientists may even be changing from a position of skepticism to one of acceptance of the role human activity plays in warming the climate.243

By “human activity” I mean cars, homes, factories, energy production, and so on. And the link between this human activity and the carbon emissions that cause global warming is the concept and the institution of property, for it confers the decisionmaking authority over things the exercise of which results in carbon emissions from things such as cars, homes, and factories. There are the obvious consequences of global warming—rising sea levels brought about by the melting of polar ice,
which affects social life in communities around the globe, in extreme
cases resulting in the complete dislocation of people—“environmental
refugees”—and more extreme outcomes, such as the hypothetical we
saw above, are possible. Severe weather events, which continue to affect
agriculture and almost every other economic and social activity the world
over, are the direct result of global warming, which, as we have seen,
is a direct result of human activity, which is, in turn, as we have seen,
facilitated by property.

We already know that the property trialectic is cyclical; thus, if
property can be identified as the ultimate cause of the global warming
brought about through human activity, then it must be the case that the
ultimate outcome, the severe weather event—take Hurricane Katrina as a
recent and well-known example—has an impact on property, both formal
and legally recognized and informal, at every level of community. There is
little question that Hurricane Katrina left in its path radical changes to
the sociality and spatiality of New Orleans. In the immediate aftermath,
increased crime, especially looting, and homelessness altered the actual
enforceability and security of formal property rights, thus affecting their
exercisability. Long-term changes included vacant land where homes
were destroyed and which now stand empty, with former residents unable
or unwilling to reoccupy them due to their derelict state or because they
are waiting for insurance payouts or other forms of government aid.
The physical space is affected by this; in some places, a year after the storm,
toxically moldy houses stood empty with nonworking refrigerators full
of rotting food, making it impossible for entire local communities to

244. Sara C. Aminzadeh, Note, A Moral Imperative: The Human Rights Implications of
245. See Hansen et al., supra note 242, at 1.
246. Id.; Climate Conversion, supra note 243, at 4; Muller, supra note 243.
247. Babie, Choices That Matter, supra note 61, at 323; Babie, Climate Change,
supra note 61, at 19–21; Babie, Climate Change and the Concept of Private Property,
supra note 61, at 7; Babie, supra note 11, at 5; Babie, How We Control, supra note 61, at
279; Babie, Idea, Sovereignty, Eco-colonialism, and the Future, supra note 61, at 527–28;
Babie, Private Property, supra note 61, at 17; Babie, Why Should I Do This?, supra note
61, at 166.
248. See Nancy Gibbs, An American Tragedy, TIME, Sept. 12, 2005, at 45; Hurricane
249. See Cathy Booth Thomas, You’re on Your Own: On the Eve of Hurricane
Season, New Orleans Has Learned Katrina’s Lesson: Trust No One and Nothing, TIME,
May 29, 2006, at 25.
rebuild. New communities sprang up—rather than living in homes, many residents now live in newly established trailer parks originally intended to be temporary. In some areas that are being rebuilt, larger expensive houses replace smaller inexpensive ones, exacerbating the pain of the poor, who were already suffering before the storm. Landlords drag their feet regarding whether to rebuild accommodations for the poor, thus displacing them, without possibility of return even to collect possessions, and scattering them to other areas and other cities. Even as structures are rebuilt, there are further problems created by the lack of labor to fill the construction industry.

All of this affects the intimate, local, and regional communities—as people left New Orleans for safety in other cities, families were split up, fracturing the intimate community of the home and the local community of the neighborhood. At the regional level, a massive influx of people to Houston altered its social and physical space, most notably in relation to crime. At least in the immediate aftermath, this raised Houston’s homicide rate as a direct result of the influx of New Orleans gangs following Hurricane Katrina. Above all, questions continue even now to swirl about the viability of rebuilding the city at all and if so, whether it should be a smaller city and what impact that has on poverty; charges of racism abound. In a twist that brought together the entire cycle of property production, Hurricane Katrina badly damaged the oil rigs that supply the bulk of America’s domestic oil production, badly impairing the flow of the very fossil fuels burned to power the SUVs and energy-

251. Id.
252. For an excellent analysis of the tension between liberty and regulation in the context of poverty both pre- and post-Katrina, see Singer, supra note 143, at 270–73, and see also The Mississippi Delta: Renaissance Deferred, ECONOMIST, May 13, 2006, at 35, which describes the difficulties of rebuilding New Orleans, especially for those living in poverty.
256. Id.
inefficient buildings that cause carbon emissions and greenhouse gases, which produce the global warming that causes severe weather, including Hurricane Katrina. Of course, the rigs have been repaired, the oil is flowing once again, and the SUVs are still being mass-produced.

The causes and consequences of Hurricane Katrina demonstrate the interwoven complexity to and inseparability and interdependence of property. The operation of formal, legally recognized property rights at the intimate level—the human person and household energy consumption producing carbon emissions—at the local level—the use of automobiles or public places and buildings that emit greenhouse gases or use energy—and at the regional level—the power generation necessary to supply homes and industry—causes global warming that affects each of those communities and similar communities in other places, resulting in the restructuring and reproduction of formal and informal property rights in both spatialities, which begins the cycle again. Although long-term changes to formal property rights in New Orleans remain to be seen, this much is true: with global warming worsening, there will be an increase in severe weather events, which will come with more frequent short-term changes to social and spatial contexts at every level, in turn producing the very sort of spatial injustice that we saw both prior to and following Hurricane Katrina. This will affect the shape and exercise of formal property rights within social relationships—historicality and sociality—that may over time produce long-term and permanent changes to those rights, establishing new variants of formal, legally recognized property rights and acting as the catalyst for the emergence of informal property rights, which will in turn produce and reproduce the spatial context in which we live, which will lead to various forms of spatial injustice.”


261. See supra Figure 3.

262. Aminzadeh, supra note 244, at 231.
injustice. And the contexts identified in this Part, although indicative of the various fields of human endeavor—intimate, local, regional, and global—that we may find, the specific examples are by no means exhaustive of the sorts of spatial context and spatial injustice that we may find in the world around us. Rather, the very point of identifying the interwoven complexity to and inseparability and interdependence of property means that the possible manifestations of produced space and the injustice that may be present there are infinite.

V. CONCLUSION

Property theorists tell us that property is an undeniable part of human life. Yet, in explaining that undeniability, those same theorists work with only property rights and their social origin or what this Article calls the historicality-sociality binary of property. This Article argues, however, that we see the centrality of property to human life most forcefully when we look at place—the space where property happens, where it exists, and where it operates. There we see how property shapes and structures the physical and the social space in which we live and how those spatialities shape and structure property. This Article demonstrates that the property rights-social origin binary can be broken open through the injection of spatial thinking, without losing anything of the debate about what property is. It merely requires a restructuring or reassembly of what we already know about property. Such a project shows that property contains the same elements that urban sociologists and planning theorists tell us are central to an ontology of human life: historicality which, in the case of property, is rights, their formal legal recognition and protection, the limitation of their self-seekingness, and their allocation; sociality, or the social origins of rights, their legal protection, recognition, regulation, allocation, and the socially contingent nature of boundaries between them; and spatiality, or the realm of the physical space to which rights apply and the social space constituted by the constellation of all social relationships. This is the property trialectic.

The examples presented in the latter half of this Article show us that once we break open the historicality-sociality binary in property theory and identify the three constituent elements of the property trialectic, we locate the interwoven complexity to and inseparability and interdependence of property and reveal what property actually is in the real world, in the lives of people. There is no way to understand this unless we take the three elements together. We see that this happens intracommunity—intimate, local, regional, and global—and intercommunity. In every way, through this reassembly, we see that property structures all that we do. It is truly an undeniable part of human life.
Above all though, this reassembly is no arid academic exercise—it is important to see property this way because it captures the totality of human existence, allowing us to see how property plays a role in being human. It is important because if property involves ensuring justice for people, then we must see that concept in its totality, as something that must be done both socially and spatially. Property must, in other words, do its part to ensure spatial justice along with social justice; indeed, that is the very point of the ontological trialectic, and it is the point of reassembling what we already know about property in the same way. Emphasizing the role of property in the spatial dimension of human life allows us to identify instances of spatial injustice wrought by property, pointing the way to where justice, spatial justice, needs to be done in ways ranging from the intimate to the global.

Current theorizing about property, by omitting explicit reference to spatiality, cannot capture the ways in which property may be failing to foster spatial justice and may, in fact, be doing precisely the opposite—creating spatial injustice, as we have seen in intimate settings, such as the human person and the home, to local and national contexts, such as Ukraine and Los Angeles, to the global context in the case of global climate change. Hurricane Katrina, for instance, showed us what it means to be poor. We saw people out of options; we saw people who were desperate; we saw people left behind; we saw people begging for help. We saw people who lost their lives. We saw the human beings behind the abstractions. We saw what happens when we push people off the national agenda.

In short, what we saw was spatial injustice stemming from the reality of large disparities of income and wealth distribution, bearing consequences within the spatiality of the real world. Hurricane Katrina brought together in one moment the role of property in the four communities—the intimate, the local, the regional, and the global—revealing spatial injustice, both before and after the storm. Studying the background and consequences of Hurricane Katrina reveals how recognizing the spatial dimension

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263. Much of contemporary property theory is directed at achieving justice. For a full canvassing of theorizing about the justice of property, see Harris, supra note 2, at 165–369. Harris concludes that “[p]roperty is []just, to a [d]egree, [s]ometimes.” Id. at 362.

264. Singer, supra note 143, at 245.
would have uncovered the spatial injustice produced by property and might have stimulated efforts at spatial justice *before* the storm and the floods.

And above all, it is necessary to move beyond our focus on the historical-social binary of rights and their social origins in property theory to offer legislatures, policymakers, and courts an accurate—as opposed to theoretical—picture of what is happening not only in physical space but also in social space. If we want government to become more proactively involved in correcting such problems, then we must be willing to accept that it must use law to reshape property’s role in the production of social and physical space to produce more socially beneficial outcomes. For New Orleans this would have meant looking at the totality of property to prevent the poverty that was there before Katrina ever struck and after, to ensure that a host of social ills, especially poverty, did not reestablish themselves. For other people in other places such as Ukraine, Los Angeles, and regional communities the world over, it means learning from New Orleans. But we can only see the ways that property needs to be reshaped if we can see the way it works in the world, which means looking at its totality, which means looking at it trialectically. Only then can we see how property shapes physical and social space, how it produces injustice, and how that spatial and social reality in turn shapes property in an ongoing cycle. Only then can property be reshaped to combat “the problems of race, class, gender, and all forms of oppression, subjugation, and exploitation.”265