

PROPERTY'S RELATIONS: TRACING ANTHROPOLOGY IN PROPERTY THEORY

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INTRODUCTION

Anthropology has long found a home in property theory, perhaps more than in any other area of law. Thanks to the influence of legal realists on both anthropological and legal scholarship, the theory of property that dominated legal scholarship in the second half of the twentieth century—that property was a relationship between people with respect to things—dovetailed precisely with anthropological property theories. Property theorists coming from the law and economics tradition also drew on other strains of anthropological theory to ground economic theories of property rights. These two lineages represent the main opposing camps in contemporary property theory. How might we explain the apparent paradox that these opposing camps, albeit in different ways, both draw from anthropology to theorize property?

This Article examines the intellectual history of the role of anthropology in property theory. I describe its influence on legal realist notions of property as social relations in Part I and its use as a privileged view into individual human nature in property theories in the law and economics tradition in Part II.¹ In Part III, I argue that anthropology can and should continue to productively shape theories of property, but should do so via a more nuanced understanding of the discipline's objects and methods. I suggest that it is anthropology's focus on *relations* as its primary object of study that is so productive for property theory, illustrating the role that the discipline's epistemological and methodological approach could play in opening up relations, the central nexus of theories of property across the field.

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1. In doing so, I am inspired in part by Annelise Riles, who has called for anthropologists of law to make legal knowledge—and property theory, in particular—the object of anthropological inquiry. Annelise Riles, *Property as Legal Knowledge: Means and Ends*, 10 J. ROYAL ANTHROPOLOGICAL INST. 775, 777 (2004).

I. ANTHROPOLOGY AND LEGAL REALISM: ALL ROADS LEAD TO
LLEWELLYN

The roots of some of the clearest synergies between anthropological and legal theories of property are grounded in the famous collaboration between anthropologist E. Adamson Hoebel and legal realist Karl Llewellyn. The most well-known product of this collaboration was their coauthored book, *The Cheyenne Way*, published in 1941.² *The Cheyenne Way* was based on fieldwork with the Northern Cheyenne in Montana and offered a study of Cheyenne law via a series of “trouble cases,” which the authors used to illustrate Cheyenne norms as well as modes of resolving conflict and ordering society.³

The Cheyenne Way was and is much more directly influential in anthropology than in legal scholarship.⁴ It had a significant impact within legal anthropology in particular and is widely credited for turning anthropological studies of law toward the case method and the methodological centering of disputes.⁵ While anthropologists critiqued the fact that the book drew largely on interviews about disputes that had taken place often many years in the past, relying on memory and oral history to reconstruct complex cases, the book remains indisputably part of the canon.⁶

Although *The Cheyenne Way* had a less clear direct influence on legal scholarship, the collaboration with Hoebel had a significant impact on Karl Llewellyn—and in turn, on legal realism.⁷ Llewellyn was insistent that legal realism was not a theory, but a method.⁸ He drew on anthropological approaches in his use of groups as his unit of analysis, as well as customs and practices as the basis for the study of law. He was working on the analysis of the materials for *The Cheyenne Way* at the same time he began his work on what would eventually become Article 2 of the Uniform Commercial Code.⁹ This Article shifted the basis of sales law directly toward a correspondence with the customs of merchants—a dramatic shift for commercial law and one that

2. K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

3. *Id.* at vii.

4. Ajay K. Mehrotra, *Law and the “Other”: Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way*, 26 *LAW & SOC. INQUIRY* 741, 742 (2001).

5. John M. Conley & William M. O’Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 *LAW & SOC. INQUIRY* 179, 181 (2004).

6. Bronislaw Malinowski, *A New Instrument for the Interpretation of Law—Especially Primitive*, 51 *YALE L.J.* 1237, 1237 (1942); Conley & O’Barr, *supra* note 5, at 179.

7. Mehrotra, *supra* note 4, at 744; N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: *SEARCHING FOR AN AMERICAN JURISPRUDENCE* 286 (1997); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 168–69 (Robert Stevens & William Twining eds., 1973).

8. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 510 (1960); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 181 (1992).

9. David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 *BUFF. L. REV.* 1457, 1459 (1999).

reflected the ways that Llewellyn's realist method was shaped by anthropological approaches.¹⁰

Article 2 of the UCC may be the clearest example of the role of anthropology in shaping Llewellyn's realist approach to a specific legal regime, but it was anthropological functionalism that had perhaps the most far-reaching influence on legal realism's underlying methodological approach. Functionalism emerged in early twentieth-century anthropology and refers to a mode of analyzing society that focuses on the function that given social institutions serve in maintaining society as a whole.¹¹ Functionalism was an explicit attempt to move beyond evolutionist accounts of social history, and it shifted anthropology toward analysis of the contemporary function of social institutions.¹² Anthropologist Bronislaw Malinowski was a leading figure in this school of thought and embraced the central role of fieldwork in studying social behavior.¹³ His ethnographies of the Trobriand Islands, still a critical element of the anthropological canon, established fieldwork as central to anthropological methods.¹⁴ His work in legal anthropology used this fieldwork-based approach to inquire into the many different sources of norms in a given society that could be understood as binding and also to be attentive to the distinction between what people said they did and what they actually did.¹⁵

Malinowski's functionalism had a clear influence on Llewellyn's realism. In *The Cheyenne Way*, Llewellyn and Hoebel embraced functionalism and cited Malinowski throughout.¹⁶ For Llewellyn, Malinowski's fieldwork methods and his focus on legal practices—rather than rulebooks noting ideal, as opposed to actual, patterns of behavior—were a crucial mode of inquiring into the gap between law in the books and law in action that was a central tenet of legal realism.¹⁷

Llewellyn critiqued the generality of Malinowski's descriptions and focused on trouble cases to provide a more detailed view into legal disputes.¹⁸ Even

10. Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 355 (1995); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 278 (1998).

11. IAN CHARLES JARVIE, FUNCTIONALISM (1973).

12. *Id.*

13. *Id.*

14. BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA (1922).

15. *E.g.*, BRONISLAW MALINOWSKI, CORAL GARDENS AND THEIR MAGIC: A STUDY OF THE METHODS OF TILLING THE SOIL AND OF AGRICULTURAL RITES IN THE TROBRIAND ISLANDS (1935); BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).

16. LLEWELLYN & HOEBEL, *supra* note 2, at 229, 234, 251, 266.

17. *See* William Twining, *Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration*, 7 LAW & SOC'Y REV. 561, 569–60 (1973); TWINING, *supra* note 7, at 153–54. William Twining's biography of Llewellyn noted that "[t]his was a meeting of realistic jurisprudence and functional anthropology. If Hoebel had been a rebel against Malinowski's functionalism, or if Llewellyn had been a more orthodox lawyer, collaboration would have been harder and much less fruitful." *Id.* at 167.

18. *See, e.g.*, LLEWELLYN & HOEBEL, *supra* note 2, at 28–29.

these trouble cases, however, formed part of Llewellyn's functionalist view of legal order. Trouble cases were one of several elements of Llewellyn's overarching theory of "law-jobs," which he described as the main functions that law performs in all groups in order to sustain the group.¹⁹ Hoebel later wrote that what Llewellyn had stated as law-jobs, Hoebel formulated as "functions," and Llewellyn himself also frequently described jobs as functions.²⁰

The emphasis on trouble cases in the law-jobs theory is widely understood as having pushed legal anthropology toward a focus on disputes, which imported a version of the legal case method into the subdiscipline.²¹ At the same time, although the law-jobs theory is not generally cited for this, it also facilitated the incorporation of anthropological functionalism into legal realism. Law-jobs served to illustrate universal functions that law plays in all societies, even if the specific institutions or manifestations of those functions might differ between societies. This approach demanded an emphasis on an empirical understanding of what people actually do with law. Functionalism, in many ways, tied together the methods and objects of study of Llewellyn's realism.

The incorporation of functionalism into legal realism opened it up to the critiques that many levied against functionalism more broadly—of functionalism's tendency toward overgeneralization and its difficulties in accounting for social change. *The Cheyenne Way* itself was the object of criticism on precisely these grounds. Llewellyn scholar William Twining noted the importance of *The Cheyenne Way* for pushing against the notion that groups like the Cheyenne had no law and also against a study of law that would produce a rulebook rather than an understanding of law based on its functioning in society.²² But he also noted the fact that the book was written in the ethnographic present based on oral histories about events that had occurred over fifty years prior.²³ This produced a static analysis of the Cheyenne as suspended in time, describing their law as serving the same function in the 1930s, when the oral histories were conducted, as in the mid-1800s, when the disputes recounted occurred.²⁴ In his analysis of the influence of *The Cheyenne Way*, Ajay Mehrotra emphasizes just how nostalgic and misplaced this notion was, as throughout the time period covered by the book, the Cheyenne were

19. These law-jobs included the "disposition of trouble-cases," the "preventive channeling and the reorientation of conduct and expectations so as to avoid trouble," the "allocation of authority and the arrangement of procedures which legitimize action as being authoritative," and the "net organization of the group or society as a whole so as to provide direction and incentive." K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1373 (1940).

20. E. Adamson Hoebel, *Karl Llewellyn: Anthropological Jurisprudence*, 18 RUTGERS L. REV. 735, 741 (1964); Llewellyn, *supra* note 19, at 1363, 1374.

21. For a discussion of this approach in legal anthropology, see JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT 3–4 (1981).

22. TWINING, *supra* note 7, at 156.

23. *Id.* at 162.

24. *See id.*

continually under pressure due to government land expropriation, white settlement, and the expansion of wage labor.²⁵ Their legal culture was thus not only internally dynamic, but also constantly interacting with the political and economic shifts that were occurring on the Great Plains.

The generalization of The Cheyenne Way, however, led to a shift toward generalization for Llewellyn's approach more broadly. Twining noted that after The Cheyenne Way, Llewellyn's

ideas move more easily on to a general plane, with implications that are seen to transcend a particular society at a particular time. The "law-jobs" theory is a theory about group-life that applies to almost any human group, complex or simple, large or small. It is the foundation for a general sociology of law that he continued to work towards for the rest of his life.²⁶

The realist approach left a legacy of course not only in the commercial sphere but across fields of law, including property.²⁷ Property scholarship in the second half of the twentieth century was heavily influenced by legal realists and remains so today, although it is more divided. The notion of property as a "bundle of rights," often (arguably incorrectly) attributed to Wesley Hohfeld and later developed by the realists, was taken up by property scholars to describe property as a set of entitlements between people with respect to things.²⁸ This was a departure from the classical Blackstonian view of property as exclusive dominion over a thing.²⁹

This conception of property as a fundamentally social institution opened up decades of scholarship on the relationship between property and society that incorporated the functionalist tendencies of legal realism. Early property scholars in the realist tradition, like Felix Cohen, explicitly identified functionalism as the root of realist theories of property and called for drawing on legal science and social values to understand the role that property—and law generally—played in society.³⁰ Later property scholars implicitly incorporated the functionalist approach of the realists, focusing their theories of property on the various roles it played in sustaining society. Many focused on the human values and kinds of social relationships that property could foster, such as autonomy, democracy, justice, community, and human flourishing.³¹ This

25. Mehrotra, *supra* note 4, at 769.

26. TWINING, *supra* note 7, at 168–69.

27. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 311–12 (1997).

28. *Id.* at 319.

29. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

30. Felix Cohen rehearses the ways in which functionalism had transformed a variety of disciplines, including anthropology, and outlines its role in a realist approach to law and property. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822, 824, 840 (1935).

31. HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 96, 162–85 (2011); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1303–25 (2014); Eduardo M. Peñalver, *Land Virtues*,

approach is the focus of the progressive property school and of many other scholars who continue to write in the realist vein.³²

The functionalist tendencies within property scholarship facilitated avenues for understanding the social relations of property that were critically important and were never adequately captured by the classical Blackstonian conception of property. At the same time, however, the incorporation of functionalism into property scholarship via realism created an implicit notion that there could be central functions across human societies that property might always serve in its reflection of values such as democracy or liberty. Even as property theorists in this vein are attentive to different manifestations of property in distinct societies and to the ways that social disruption can shift property rules over time, this work at its highest level of abstraction inherits from realism the functionalist notion that there are specific roles that property serves or should serve in human society.

II. PROPERTY AND HUMAN NATURE

Although for decades the realist-inspired mainstream of property scholarship dominated the field, in recent years property scholarship influenced by law and economics and classical theories of property has risen in prominence. Anthropology has also served an important role in these economic and biological theories of property, one that is far more explicit than its influence on scholarship in the realist lineage. Scholars in these areas have drawn upon anthropology as evidence of generalizable principles of human nature related to property and also critiqued cultural anthropology's shift away from universal models of human nature and behavior.

One of the canonical articles in this line of scholarship is economist Harold Demsetz's *Toward a Theory of Property Rights*.³³ Demsetz argues that property rights develop where the benefits to defining rights exceed the costs.³⁴ He draws heavily upon anthropological research to make this argument, describing anthropological work on property as key to an attempt within the discipline to uncover the "true nature" of man outside the "artificialities" of civilization.³⁵ He uses as the central evidence for his argument about property a comparison of anthropological work with Canadian First Nations people in Labrador to scholarship on Native Americans in the southwestern United States.³⁶ He

94 CORNELL L. REV. 821, 828 (2009); PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010); GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018).

32. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009).

33. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. ASS'N 347 (1967).

34. *See id.* at 354.

35. *Id.* at 351.

36. *See id.* at 351–53.

claims that the Canadians did not recognize private property prior to the expansion of the fur trade, but established property rights to land as the fur trade made doing so economically valuable.³⁷ In contrast, he finds that Native Americans in the Southwest did not develop established property rights.³⁸ He reasoned that, unlike in Labrador, animals in the U.S. plains were not commercially important and largely wandered over large tracts of land, such that the costs of establishing rights over the land would exceed the benefits.³⁹

The notion of the “true nature” of man is, of course, a critical element of economics writ large, from Adam Smith’s notion of the human propensity to truck and barter to the eventual concept of the rational *homo economicus* that came to define economic theories of society.⁴⁰ As such, it was central to the law and economics movement and to property scholars writing in that tradition, following scholars like Demsetz and Ronald Coase.⁴¹

There were differences of opinion, however, regarding the extent to which anthropology might be useful in defining this true nature of man. While Demsetz drew on anthropological work as his central evidence, later law and economics scholars of property were divided about its utility. Robert Ellickson, for example, embraced anthropological fieldwork methods for his classic study of cattle ranchers’ property norms in Shasta County, California, *Order Without Law*, calling for more legal scholarship in the “anthropological mode.”⁴² But he bemoaned the prevailing trends of anthropology of the time away from universally generalizable models of human behavior and from the use of fieldwork to test scientific hypotheses about human nature. While he embraced earlier anthropological functionalists as “on the right track,” he critiqued renowned anthropologists of the time—such as Clifford Geertz and Marshall Sahlins—for being insufficiently willing to generalize knowledge of local practices to understand universal elements of rational human nature.⁴³ He noted that, unlike this latter lineage of anthropologists, “[p]ractitioners of law and economics . . . rarely shrink from applying in every context the model of rational, self-interested, human behavior.”⁴⁴ Ellickson self-consciously used anthropological fieldwork methods, but drew on them explicitly to further his understanding of specific elements of human nature that he argued emerge in most societies.⁴⁵

37. See *id.* at 352.

38. *Id.*

39. *Id.* at 353.

40. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 20 (1776).

41. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

42. ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 2 (1991).

43. See *id.* at 7, 150.

44. *Id.* at 7.

45. *Id.* at 7–8, 149.

Unlike Ellickson's work, law and economics scholarship on property largely does not employ anthropological fieldwork methods. Much of it does, however, tend toward an understanding of property as a basic element of human nature, following a lineage of property scholarship that owes many of its foundational principles to Demsetz and to Coase before him.⁴⁶ Some of these scholars have, like Demsetz, drawn on anthropology as evidence of the universal nature of property as a form of organizing resources.

Thomas Merrill calls this universal element of human nature the "property strategy," arguing that "[a]ll organized human societies use the property strategy."⁴⁷ Although he notes that not all property laws are the same across societies, property law is directly related to the characteristics of this universal property strategy, chief among them the right to exclude.⁴⁸ Merrill offers several empirical illustrations of this argument, including the American family farm, Native American tribes, and the household.⁴⁹ His analysis of Native American tribes relies largely on work in legal and economic anthropology—including scholarship by none other than Hoebel—and the extensive anthropological work on gift-giving practices in different societies, inspired by Marcel Mauss.⁵⁰ Although Merrill's analysis of gift-giving as evidence of exclusive ownership veers sharply away from anthropologists' own accounts of gift-giving as evidence of reciprocity, he draws on anthropological work on gift-giving to illustrate the notion that the property strategy is universal to human societies that engage in agriculture.⁵¹

There is work in the general vein of law and economics that hews more toward a contingent view of property, such as that of Carol Rose. Although Rose's work is influenced by law and economics scholarship that highlights the universality of property in human nature, her humanistic strain opens up her work to the importance of interpretation, culture, and local knowledge.⁵² In *Property as Storytelling*, for example, Rose discusses the importance of narrative for explaining the more cooperative elements of property relationships that classical individual utility-maximizing theories of property as human nature

46. See Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S78–80 (2011) for a description of the influence of Coase, and later Demsetz, on law and economics theories of property.

47. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2062 (2012).

48. *Id.* at 2063, 2066–67; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

49. Merrill, *supra* note 47, at 2071–76.

50. In addition to Hoebel, Merrill cites, among others, Melville Herskovits's work on land tenure, Marshall Sahlins's work on exchange, and the work that inspired much anthropological scholarship on gift exchange, Marcel Mauss's *The Gift: Forms and Functions of Exchange in Archaic Societies*. *Id.*

51. Merrill, *supra* note 47, at 2072–74.

52. See, e.g., CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 295–96 (1994).

might miss.⁵³ Here, and throughout her work, Rose uses characters as ideal types to describe kinds of people with particular preferences or orientations toward the world. In *Property as Storytelling*, she presents several of these characters to illustrate the potential proliferation of preferences beyond individual utility maximization: John Doe (whose preference is that he gets a lot while everyone else does as well); King of the Mountain (whose preference is to get a lot while everyone else gets nothing); and Mom (who, like John Doe, wants everyone to get a lot but whose lower preferences reveal she would rather get less than others if necessary).⁵⁴ In Rose's *The Moral Subject of Property*, she outlines a rational, self-interested subject that many assume to be universal, suggesting that this universal subject is inadequate and fails to account for the more complex morality not only of participants in property regimes but of the regimes themselves.⁵⁵

And yet despite Rose's clear turn away from universality in property theory, the notion of property as human nature is so important to property scholarship in the law and economics tradition that even Rose's work has frequently been interpreted as contributing to a notion of property as a universal element of human nature. On the occasion of the awarding to Rose of the Brigham-Kanner prize in property rights scholarship, colleagues wrote tribute pieces that crafted a version of her work that might speak to property's universal qualities, despite Rose's insistence on pushing back against this idea. Bob Ellickson, for example, suggested in his tribute piece that with a globalized economy, property's signs have become universal. Taking on board Rose's claim that communication and language are key to property, Ellickson argued that "property claimants everywhere increasingly make use of a universal sign language to communicate *in rem* claims to passersby."⁵⁶ A piece by Henry Smith, titled *Rose's Human Nature of Property*, uses Rose's lively characters in her work as illustrations of human nature rather than examples of the ways that notions of universal human nature fail.⁵⁷ Smith argued that we need a view of human nature like Rose's "Mom," for example, to build consensus around a "common sense morality" that might ground rules that can be broadly applied without the need to consider contingencies or context.⁵⁸

Rose pushed back on both of these arguments from colleagues, insisting on the importance of local knowledge, contingency, and different property cultures.⁵⁹ And yet the impulse in the pieces by Ellickson and Smith was clear:

53. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMANS. 37, 39 (1990).

54. *Id.* at 43–45.

55. See Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007).

56. Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015, 1027 (2011).

57. See Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047 (2011).

58. See *id.* at 1054–55.

59. See Carol M. Rose, *Response*, 19 WM. & MARY BILL RTS. J. 1057, 1058 (2011).

while there might be some contingency around the edges, at its core, property was an element of universal human nature. Anthropological work, but also humanistic work of any kind, could be marshaled to the project of further evidencing property's universal qualities.

Biological theories of property have taken an entirely different route through anthropology as evidence for what is, in the end, a very similar account of the universality of property in human behavior. Scholars in this lineage tend toward citing evolutionary anthropology for the proposition that there is a biological human propensity to establish and maintain property. Jeffrey Stake, for example, in *The Property 'Instinct,'* draws on the work of biological and evolutionary anthropologists to argue that irrespective of the differences across legal systems in particular rules, humans as a species share a property instinct understood as a genetic predisposition toward the acquisition and retention of property.⁶⁰ This approach is related to a broader effort to theorize property as a form of natural right.⁶¹

III. PROPERTY'S RELATIONS

Across these different scholarly approaches within property theory, there is a clear conceptualization of property either implicitly or explicitly in relation to its universality, from theories of how society functions to generalizable notions of individual human nature. Property scholars have found different strains of anthropological thought to be useful in this endeavor, with scholars in the realist lineage drawing on some of cultural anthropology's more functionalist approaches and scholars influenced by law and economics or biology often drawing on more evolutionary approaches within anthropology. Critiques by scholars like Ellickson of cultural anthropology's shift away from universal theories of human behavior indicate the desire to mobilize anthropology as scientific evidence of universally generalizable property theories—efforts that were supported by particular strains of anthropological scholarship, and not others. This frustration with the shifts in anthropological thought tracked anthropology's own internal debates around the extent to which anthropology should be understood as a “science.”⁶² Scholars like

60. See, e.g., Jeffrey Evans Stake, *The Property 'Instinct,'* 359 PHIL. TRANSACTIONS ROYAL SOCIETY LONDON 1763, 1763–64 (2004). Here, Stake cites evolutionary anthropologists such as William Irons and Steven Gaulin. *Id.* at 1769–70.

61. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5–6 (1985).

62. One illustration of this internal debate within anthropology is the American Anthropological Association's decision in 2010 to strike from its long-term mission statement the term “science.” This shift changed the mission of the Association from advancing “anthropology as the science that studies humankind in all its aspects” to advancing “public understanding of humankind in all its aspects.” Nicholas Wade, *Anthropology a Science? Statement Deepens a Rift*, N.Y. TIMES (Dec. 9, 2010), <https://www.nytimes.com/2010/12/10/science/10anthropology.html>. This change sparked a heated debate within the discipline, particularly between subfields with scholars identifying more with natural scientists,

Ellickson, in fact, correctly observed that most contemporary sociocultural anthropologists do not understand their object of study to be human nature as biological or universal fact.⁶³

Property scholars, in drawing on anthropology to support implicit or explicit claims to universality, are looking to the discipline for the wrong reasons. Anthropology's gift to property theory is not evidence of generalizable social functions or human behaviors. Nor is it, as some anthropologists have contended, empirical data revealing a more complex, contextual understanding of property in different sites.⁶⁴ Rather, it is a sophisticated epistemological and methodological approach to *relations*—the very concept that is at the heart of all property theories, from progressive property scholars' notions of property as relations between people to law and economics scholars' desire to return to classical notions of property as a relation between a person and a thing. Property theorists across the spectrum theorize property as made up of relations; this is an insight that property scholars and anthropologists share. What anthropology can offer are tools for opening up relations as a concept and an object of study. Rather than *data about* relations, anthropology offers an *approach to* relations, turning them from an assumed category into an epistemological point of departure.

In her recent book, *Relations: An Anthropological Account*, Marilyn Strathern illustrates how relations for anthropologists are both a methodological entry point and the discipline's primary object of study.⁶⁵ Anthropological analysis depends on discerning the nature and specificity of relations and relational worlds. These worlds are composed of persons and also other-than-persons: species, phenomena, collectives, ecologies, beings, the state. Recently, much anthropological attention has revolved around what could be understood as—though cannot be reduced to—relations between people and “things,” from relations with other species and ecologies to relations built around infrastructure.⁶⁶ The critical focus of this scholarship is to parse how those relations unfold and what they mean to their various participants.

Strathern argues that these recent developments in anthropological theory illustrate the limitations of Western understandings of relations such as property.⁶⁷ Her work has long focused on the ways in which subjects and

such as biological anthropology, and those more actively straddling social science and the humanities, such as sociocultural anthropology. *See id.*

63. *See* Ellickson, *supra* note 42.

64. Annelise Riles critiques this approach within the anthropology of property, noting that it is often focused on objections to accounts of property from legal theory as insufficiently complex. Riles, *supra* note 1, at 786–87.

65. MARILYN STRATHERN, *RELATIONS: AN ANTHROPOLOGICAL ACCOUNT* 2 (2020).

66. For a review of some of these approaches, see S. Eben Kirksey & Stefan Helmreich, *The Emergence of Multispecies Ethnography*, 25 *CULTURAL ANTHROPOLOGY* 545 (2010); Brian Larkin, *The Politics and Poetics of Infrastructure*, 42 *ANN. REV. ANTHROPOLOGY* 327 (2013).

67. MARILYN STRATHERN, *THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA* 18 (1988); Stuart Kirsch, *Property Limits: Debates on the Body, Nature and Culture*,

objects are understood differently in different places, resisting logics that might draw clear lines or discontinuities between persons and things.⁶⁸ She has used these observations to argue that property is not an appropriate analytic to use in non-Western sites where things may not be so neatly defined and subject-object relations may not manifest themselves as clear dualities.⁶⁹

Her work points to the core of the definition of a property relation, which is that lines must be drawn between subjects and objects. There are no natural, pre-political owners and things to be owned. Rather, who can own and what can (and cannot) be owned are socially determined—a function of time, place, culture, and law. So, too, are the property relations that emerge from the drawing of these lines.

While Strathern takes this as evidence of the inapplicability of property as an analytic outside the West, it is precisely this central aspect of property into which anthropology can offer unique insight both within and beyond the West. At the heart of the anthropological endeavor is the effort to take relations not as a given but rather as an entry point. The aim is to analyze relations—how they come into being, shift, and are maintained—through ethnography. This approach to property opens up the process of drawing lines between subjects and objects and the ways in which subjects and objects come into relation with each other. It illustrates how property is built through daily practice—through rules and simultaneously how people interact with rules, each other, and their environment.

What would drawing on such an approach to relations in property theory look like? Let's take a classic example used by property scholars in the law and economics tradition to discuss property as a relationship between a person and a thing: the car. In his classic article arguing for property as an *in rem* relationship between a person and a thing, Henry Smith uses the car to describe a neatly bounded object for which ownership is crystal clear.⁷⁰ For Smith, everyone

in TRANSACTIONS AND CREATIONS: PROPERTY DEBATES AND THE STIMULUS OF MELANESIA 23–24 (Eric Hirsch & Marilyn Strathern eds., 2004).

68. Strathern's work on Melanesia discusses various aspects of particular cultural approaches to the formation of subjects and objects. She theorizes "dividual" personhood in Melanesia as made up of ongoing relations and components from the entire community, distinguishing this from Western concepts of the bounded individual. STRATHERN, *supra* note 67, at 15. She also explores gift-giving practices, noting that when people give gifts, they are also giving elements of themselves. *Id.* at 134.

69. See STRATHERN, *supra* note 67, at 104. This approach involves something of a caricature of Western approaches to property as involving relations between a discrete subject and object that are defined by exclusion. This understanding of Western property relations has resonances with recent theories of property in the law and economics tradition that focus on an exclusive relationship between a person and a thing as the core of property. See, e.g., Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95 (2014); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012) [hereinafter Smith, *Law of Things*]. It conflicts, however, with approaches in the realist tradition that have theorized property as a function of social relations not limited to exclusion. Elsewhere, I discuss the ways in which "things" can often fail to be neatly defined even in Western contexts. Meghan L. Morris, *Property and the Social Life of Things* (Sept. 6, 2019) (unpublished manuscript) (on file with author).

70. Smith, *Law of Things*, *supra* note 69, at 1703.

knows not to steal a car whether or not they know the owner, if the owner is virtuous, or how the car is used.⁷¹ In this description, the nature of the property relationship between the owner and the car is assumed. This is purposeful flattening, as Smith's goal is to render property modular and abstract, avoiding "governance" strategies that might require taking other information about users and their rights into account and thereby reducing information costs.⁷²

Anthropological inquiry into the relationship between people and cars gives us insights into how one might open up this relation, treating it as a point of departure. This scholarship begins with the relation, unpacking it via a series of interrogations. It asks questions about the emotional life we have around our cars, the role of generation in the development of relations with cars, and the ways that automobility interacts with experiences of landscape and notions of home and belonging.⁷³ Design anthropology has examined the interactional elements of the relationship between people and cars, while other scholarship has explored the sensory aspects of driving as a relational activity.⁷⁴ This work does not assume that the relation takes a particular form but rather takes it as an object of inquiry.⁷⁵ These aspects of the person-car relationship are relevant for the kinds of rules that we build related to property in cars, from state rules on ownership and remedies to federal tax rules to constitutional exceptions related to automobiles.⁷⁶

Similarly, anthropology's approach to relations can open up property as relations between people. One of the classic examples used by property scholars in the realist tradition is democracy and the role of property in facilitating democratic social relations. Joseph Singer, for example, argues that property is

71. *Id.*

72. *See id.* at 1703–04.

73. *See, e.g.,* Catherine Lutz, *Marketing Car Love in an Age of Fear: An Anthropological Approach to the Emotional Life of a World of Automobiles*, 19 *ETNOGRÁFICA* 593 (2015); Pierre Lemonnier, *Auto-Anthropology, Modernity, and Automobiles*, in *THE OXFORD HANDBOOK OF THE ARCHAEOLOGY OF THE CONTEMPORARY WORLD* 741 (Paul Graves-Brown et al. eds., 2013); Andrew Dawson, *The Road to Srebrenica: Automobility and Belonging in a Post-Socialist/War Milieu*, 21 *ANTHROPOLOGICAL NOTEBOOKS* 5 (2015).

74. *See, e.g.,* CHRISTINA WASSON ET AL., *THE SOCIAL LIFE OF THE CAR* (2014); Andrew Dawson, *Why Marx Was a Bad Driver: Alienation to Sensuality in the Anthropology of Automobility*, 7 *ADVANCES ANTHROPOLOGY* 1 (2016).

75. This work inquires into relationships between people and cars in ways that courts themselves have recognized as valuable in assessing things like remedies or specific property distributions in a divorce. For example, the court in *Glavin v. Eckman* concluded that the value of the loss of mature oak trees might not be captured through a market measure of damages and required an analysis of the importance of the trees to the owner. *Glavin v. Eckman*, 881 N.E.2d 820, 824–826 (Mass. App. Ct. 2008). Court determinations over the distribution of the family home may not take for granted that the relationship of divorcing spouses to the family home is equivalent to its market price; instead, they interrogate the relationship between the owners and the house as an investment, a space for raising children, an asset requiring maintenance, and a location related to work and school, amongst other elements.

76. This work provides an ethnographic view into some of the dynamics of relationships with cars that legal historian Sarah Seo discusses in her account of the relationship between the rise of the automobile and police power in America. SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019).

the “law of democracy” and serves as a “quasi-constitutional framework for social life.”⁷⁷ In this scholarly tradition, there is not a purposeful flattening of relations as in work focused on property as the law of things. The realist lineage’s inclination toward understanding conflicting values and the character of social interaction provides an opening for anthropology to play a productive role.

Anthropology can provide an epistemological and methodological approach to understanding and centering things like democratic relations as the object of inquiry. Political anthropology, for example, emerged as a field from efforts to interrogate political distinctions, using democracy as a starting point. Political anthropologists have long made democracy a point of departure for assembling questions about the organization of relations of power, processes of opposing and normalizing political forms, and modes of conceptualizing collective will.⁷⁸ Anthropological work on democracy asks questions regarding the nature of democracy as an analytical category, political form, and site of values and struggles.⁷⁹ This approach to democratic relations largely centers relations of democracy as the object of inquiry, interrogating the specificities of these relations and their political and social dynamics.⁸⁰

In this sense, Strathern’s critique of property as an analytic for anthropology illustrates the precise reason why anthropology is so important for property theory. At the most general level, anthropological analysis of relations could contribute to taking property theory beyond its current core debate over who and what is in relation, to deepen an understanding of how lines are drawn to create and substantiate the participants in property relations, and to further open up the relations themselves to sustained inquiry. Whether we understand property as a relationship between people and things or between people with respect to things, how might we render not the fact of the relation, but rather its nature and quality, the object of inquiry? How and why do we draw particular lines around who is owning and what is owned in these situations, and how are those lines communicated and enforced? How do relations between participants come into being, and what forms of reciprocity, power, sociality, care, and attention are tied up with them? These are some of the many questions that an anthropology of property can help to answer—not by turning to anthropology for evidence of universal social functions or human

77. Singer, *supra* note 31, at 1334–35.

78. See, e.g., BANERJEE ET AL., DEMOCRACY: ANTHROPOLOGICAL APPROACHES (Julia Paley ed., 2008); Julia Paley, *Toward an Anthropology of Democracy*, 31 ANN. REV. ANTHROPOLOGY 469 (2002); Carol J. Greenhouse, *Political Anthropology*, in THE INTERNATIONAL ENCYCLOPEDIA OF ANTHROPOLOGY 1 (Hilary Callan ed., 2018).

79. Paley, *supra* note 78, at 471.

80. Even so, anthropology of course carries its own assumptions about democracy. Carol Greenhouse notes that anthropology as a discipline would do well to reflexively evaluate its own assumptions regarding democracy, which she argues inform its methodological principles and approach to studying politics. Greenhouse, *supra* note 78.

behaviors, but by taking advantage of the discipline's greatest strength to fully theorize the core of property theory: relations.

CONCLUSION

Anthropology has had a significant influence on property theory, from the legal realist tradition to scholarship influenced by law and economics. Scholars in these lineages have drawn on anthropology largely to either implicitly or explicitly support claims of property's universality, related to either the functions or values that it serves in society or the role it plays in defining individual human nature. The value of anthropology for property theory, however, lies not in its ability to provide evidence of universality or generalizability, but rather its methodological and conceptual focus on relations. Relations lie at the heart of property theory and are at the crux of central debates in the field. A shift toward engaging anthropology as a resource for opening up relations would draw on the discipline's strengths to expand and deepen how relations are conceptualized within property theory.