Contemporary Property Law Scholarship: A Comment

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In his essay *The Dynamic Analytics of Property Law*, Professor Michael Heller describes and criticizes the familiar, current analytical tools of property theory and calls for the adoption of a more dynamic approach. In this comment, I shall address briefly two issues discussed in Heller's paper: his suggestion that we add a fourth type of property — "anticommons property" — to the well-known "property trilogy" of private property, commons property, and state property; and his critique of the "bundle of rights" approach of the courts to the takings problem, which leads to excessive fragmentation of private property. The former issue nicely demonstrates the current tendency of scholars to argue against "too much private property." The latter illustrates the familiar, futile search of property scholars for an all-encompassing metaphor to describe and identify private property.

I. The "Too Much Property" Argument

Heller warns against excessive privatization which can lead to the creation of inefficient anticommons property.[1] An anticommons can emerge when multiple owners each have a right to exclude others from some resource and no owner has an effective privilege of use. The tragedy of the anticommons — in contrast to the famous "tragedy of the commons" — is the waste associated with underuse of resources. Heller's main examples of anticommons property are Moscow storefronts during the transition to a free market society and

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1 Heller's argument is fully elaborated in two previous articles: Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621 (1998); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? — The Anticommons in Biomedical Research*, 280 Science 698 (1998).

overlapping patents in biomedical research. In both cases, as he states, "[a]dding the idea of anticommons property to our analytic toolkit ... helps to reveal precisely how privatization can cause an unexpected, new form of resource tragedy" and "give[s] voice to previously inchoate worries about the progressive march of privatization ... ."

In my view, anticommons property is not so much a new, fourth form of property as a manifestation of circumstances in which private property may be misused or lead to undesirable outcomes. Put another way, anticommons may emerge whenever there is a need for a group of property owners to negotiate, organize, and agree on some cooperative project, which will result in a better use of resources. If agreement cannot be reached — due to holdouts, strategic behavior, cognitive biases, or other bargaining difficulties — the beneficial use cannot be realized, hence the "tragedy of the anticommons." Putting aside the rather special examples Heller offers for the formation of anticommons when new property rights are created,[2] his more realistic examples, more relevant to Western societies, are better described as I suggest.[3] Anticommons, in my view, is an illustration or manifestation of the possible drawbacks of private property.

In a wider context, the claim of "too much private property" fits in nicely with current property scholarship. After dedicating much time and effort to exploring theories justifying private property and the specific legal rules that can be derived from these theories,[4] contemporary scholarship in this field has reached a turning point. Current literature highlights the disadvantages, misuse, and drawbacks of private property and moves in the

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2 Aside from Heller's central example of Moscow storefronts in post-socialist Russia, see also the discussion of Quaker Oats Cereal's sale of numerous one-square-inch pieces of land in the Yukon and of post-earthquake reconstruction in Kobe, Japan, in Heller, *supra* note 1, at 682-85.

3 See, for instance, the following examples offered in Heller, *supra* note 1, at 674-76, 679 n.259: multiple landowners effectively delaying land use development in their area; minority unit owners in condominiums successfully blocking desirable changes in restrictive covenants; and private ownership of lateral easements to pass along private beaches. For additional examples, see Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163, 1203-22 (1999).

4 *See, e.g.*, the following notable examples: Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) (advocating a libertarian approach, based on the occupation and labor theories of property); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165 (1967) (offering a compensation theory based on utilitarianism); Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982) (relying on Hegel's personhood theory of property).

opposite direction: that is, advocating limitations on private property and calling for less protection of individuals against state intervention. The "too much property" claim is applied in many contexts, with varying degrees of persuasion and success.

Let me clarify my argument with an illustration from the economic analysis of property rights (similar examples of this evolution in property scholarship can be given using other theories of private property, such as the personhood and labor theories).

The efficiency justification for private property dates back to Jeremy Bentham's utilitarian theory of property.[5] Drawing on Bentham's work, the first phase of economic writing focused on the importance of private property in enhancing society's wealth. Private property is an important tool for maximizing total wealth, because it assures long-term enjoyment of assets and protects against future pain and loss. Absent property rights, the fruits of one's labor and investment could be forcibly taken by other people. Negative results would ensue, such as a shift to subsistence methods that do not require much investment or wasting resources to guard against theft. This would harm society's productivity. In addition, property rights achieve a greater internalization of externalities and prevent inefficient use of resources.[6]

The second phase of property scholarship focused on the specific rules that can be derived from these economic justifications, dealing with such questions as when compensation for injury to property should be paid. Compensation may be required because a constant or widespread practice of non-compensation would cause demoralization to individuals and inefficiency in the long-run (even if every injuring act is efficient in itself). Frank Michelman's landmark article *Property, Utility and Fairness* was a major contribution to the second phase of property scholarship, offering a compensation formula to distinguish between cases in which compensation should be paid and those in which the injury to property need not be remedied. Under Michelman's formula, compensation should be paid for an action injurious to private property only when the settlement (administrative) costs of granting compensation are lower than both the

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5 *See* Jeremy Bentham, *Principles of the Civil Code, in* 1 The Works of Jeremy Bentham 307-08, 309-11 (John Bowring ed., 1843) (Chapters 7 & 10).

6 *See* Bruce A. Ackerman, Economic Foundations of Property Law 2-11 (1975); Robert Cooter & Thomas Ulen, Law and Economics 76-78 (2d ed. 1995); Richard A. Posner, Economic Analysis of Law 36-38 (5th ed. 1998); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 350-56 (1967) (Papers and Proceedings).

demoralization costs of non-compensation and the efficiency gains of the action.[7]

Michelman's compensation formula is both elegant and simple and has the advantage of a high degree of generality. It combines the basic, main considerations that affect the compensation issue and determine their interrelation. These features may explain the article's great influence on and relevance to subsequent property scholarship.[8]

Having exhausted the first two stages of economic analysis of private property, scholars have reached a third phase. This stage is characterized by attempts to create ever more specific, sophisticated, and detailed rules concerning private property and by suggestions to limit the protection afforded property rights. In some cases, these arguments of "too much property" have been taken too far, undermining the very justification for property rights. For instance, some articles on the takings issue have made the claim that government compensation creates an excessive incentive to invest in the development of land, in disregard of the risk of planning activities that may harm the value of the land. If, for instance, a landowner ignores the risk that her land will be expropriated by the state (figuring that in any case, she will be compensated for the expropriation), she will overinvest in "dangerous" land. This problem may be overcome by totally denying compensation (thereby forcing individuals desiring protection to purchase insurance in the market) or by limiting compensation to the value

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7 *See* Michelman, *supra* note 4, at 1214-18.

8 The following are examples of scholars relying on and further developing Michelman's thesis: William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 150-206 (1985) (Chapters 8 & 9); Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. Rev. 165 (1974); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of Just Compensation Law*, 17 J. Legal Stud. 269 (1988). It should be stressed that this second stage of property scholarship was only partially successful. The attempt to deduce compensation rules from one theory of private property or from one central principle has led to the disregard of important considerations. For example, severe difficulties arise in applying Michelman's compensation formula. It is very hard to estimate people's long-term demoralization from non-compensation of specific injuries, and as a result, the formula gives clear answers only in the extreme cases, in which few people suffer grave losses or many people bear small losses. For detailed criticism of Michelman's compensation formula, see Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. Toronto L.J. 47, 92-98 (1996).

of the land as it would have been developed had the government not paid compensation.[9]

To my mind, such compensation rules are doomed to failure. First, it is often difficult to estimate the chance of damage to land's value and the opposite chance of an increase in value due to favorable planning changes. An unknown or low probability risk does not distort the individual's investment decisions, because such risks cannot be taken into consideration. Second, it is highly questionable whether compensation rules affect the development decisions of owners of residential land or non-professional investors, both of whom usually do not conduct cost-benefit analyses and are not indifferent to investing in "dangerous" land due to the certainty of compensation (the theoretical analysis also ignores the fact that the compensation granted in reality is never full compensation). Third and more generally, the argument that compensation harms efficiency because it encourages overinvestment in land squarely contradicts the efficiency arguments supporting private property in the first place.

As I mentioned before, private property is justified by economic analysis precisely because absent private property, people would invest *too little* in assets, fearing that others will forcibly take the fruits of such an investment. Property rights are granted to encourage people to invest in assets *above the level of investment they would have chosen had no protection been given*. In other words, we are interested that people invest in land, for example, with the knowledge that they will be protected from future takings, and compensation is a form of such protection. The argument against compensation means that people should invest in land as they would do were no compensation available, that is, as if they had no property rights. There is a contradiction between the efficiency argument justifying private property and the overinvestment efficiency argument against compensation. I believe that the rope cannot be held at both ends.[10]

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9 *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 618-19, 622-23 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 511, 529-32, 551, 615 (1985/86).

10 This is not to say that the third phase writers' concerns about the misuses and drawbacks of private property are totally unfounded. However, they are relevant only in certain, special circumstances that can be dealt with separately and do not require the altering of general principles, rules, and intuitions supporting compensation for property owners. For example, if after the announcement of the authority's intention to change land uses in a given area, a landowner builds in a way that conflicts with the intended change in an attempt to frustrate it, granting him full compensation will, indeed, encourage undesirable behavior. These rather

It may be worthwhile to note that unlike the economic analysis of property rights, not all areas of property theory have reached the "third phase." For instance, the incorporation of insights and experiments from behavioral studies and cognitive psychology into the theoretical analysis of law is still a rather novel approach. Research in this area is still in the phase that applies the basic and main insights, theories, and conclusions to the law, and the results are often more interesting and promising.[11]

To sum up, private property does have its drawbacks and may sometimes lead to undesirable results. However, these problems can be dealt with specifically, within the existing framework. In many cases, the creation of new, highly complex and sophisticated theories and rules — as has been done by the "third phase" scholars — does not improve or contribute to the solution of practical, real-life problems.

II. THE SEARCH FOR THE "ULTIMATE PROPERTY METAPHOR"

The second issue I shall address briefly is the "thing" versus "bundle of rights" metaphor of property. In his article, Heller describes the historical shift from viewing property as a physical or legal thing to viewing it as a bundle of numerous and distinct rights. He criticizes both approaches and

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exceptional cases — in which a very high probability or almost certainty of injury to property exists — can be dealt with specifically and independently, without creating broad rules applying to other cases. The Israeli Planning and Building Law treats such cases in the following way: After publication of the preparation or deposit of a plan, the authority may restrict or prohibit the granting of building permits according to the current plans. In addition, the Law explicitly states that compensation is denied for injuries caused by a plan to buildings or activities that were executed after the publication of the notice of the plan's deposit. Sections 78, 87, 97A, 98, 201 of the Planning and Building Law, 1965, 19 L.S.I. 330, 330, 350, 351, 352, 373 (1964-65).

11 *See, for example*, David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 Osgoode Hall L.J. 737 (1992); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. Chi. L. Rev. 373 (1999); Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 Wash. U. L.Q. 59 (1993); Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 Vand. L. Rev. 1541 (1998). This relatively new field of analysis has come to be known as "behavioral law and economics." For a general survey of this field and its major contributions to legal analysis, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998).

calls for the creation of a better organizing metaphor or image of property: "the idea of property as things misses the complex internal relations among owners of a thing ... while the modern bundle metaphor suggests more fluidity than appears in existing property relations ... more analytic work may be useful in moving to a next, better organizing metaphor." In addition, Heller criticizes the American courts for adopting uncritically the bundle of rights view of property and using it "inadvertently to collapse the idea of private property as a distinct economic and constitutional category."

I agree that both metaphors are lacking. Neither the one nor the other by itself can satisfactorily explain when a thing or a right should be regarded and protected as private property. Furthermore, this claim carries over to the interpretation and understanding of court decisions regarding the takings issue. Although some decisions may be seen — as Heller suggests — as adopting the bundle of rights view,[12] there are many more cases that seem to adopt instead the historical or archaic "property as thing" approach. As an outsider to the American system, I was quite amazed to discover the existence of a sharp distinction between physical and non-physical injuries to land. While even a slight physical injury to land requires compensation (such as granting right of way to the public or expropriating a very small part of the land),[13] enormous reductions in value — amounting to most of the land's economic worth — caused by the restriction of development rights are not compensated.[14] This case law may be regarded as an adoption of the "property as thing" view: since no physical object was taken and some reasonable use of the property remained (albeit a low value use), property was not "taken" by the state. Be that as it may, I agree with Heller that the results reached by the courts are unsatisfactory and in need of change.[15]

I fear, however, that the search for a new, improved, and all-encompassing metaphor for describing or recognizing private property is a futile endeavor. This is because the determination whether a certain interest should be protected as "property" depends on various relevant considerations, the "type" of injury inflicted being only one amongst many. Thus, in certain circumstances, individuals should not be protected from mere diminution

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12 Such as *Hodel v. Irving*, 481 U.S. 704 (1987), discussed in Heller, *supra* note 3, at 1213-17.

13 See, respectively, *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

14 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31, 136 (1978); HFH Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237, 240, 244, 247 (1975); Agins v. City of Tiburon, 598 P.2d 25, 29, 31 (1970).

15 For detailed analysis and criticism, see Lewinsohn-Zamir, *supra* note 8, at 114-26.

in the value of one of their interests. In other cases, such an injury should be regarded as a "taking" of property. A full discussion of the various considerations pertaining to this complex issue exceeds the scope of this comment. I can only offer a list of considerations which I do not view as exhaustive: the purposes of the injurious act (and, in particular, whether the injury inflicted is intentional or just a by-product of the act — in the case of the former, compensation or other means of mitigating the injury can frustrate or hamper the achievement of the desired goals); the magnitude of the injury; the extent of the injury's distribution throughout society; the directness of the injury; the costs of protecting the owners; the fact that the injury prevents harmful activity; the existence of moral grounds for non-recognition of injuries; and the existence of non-monetary compensation.[16]

A physical injury — such as an expropriation of a piece of land — is almost always compensated for, not because courts believe property to be a "thing," but because such an injury is usually not egalitarian. It is not distributed randomly and commonly throughout society. In such a case, compensation usually does not frustrate the attainment of the injurious act's goal, and it is relatively easy to identify the injured owners; hence, the administrative costs of compensation are relatively low. A non-physical injury or a diminution in the value of an interest may not require compensation, not because no "thing" has been taken, but for other reasons. For instance, the injury involved in such cases may be relatively small or widespread, and compensation might hamper the achievement of the desired goal.[17]

In a more general vein, I believe that the complexity of social reality makes it impossible for any theory of property law to lay down a single

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16 I have elaborated on the relevant considerations in Lewinsohn-Zamir, *supra* note 8, at 76-113.

17 These considerations may explain why the United States Supreme Court was justified in rejecting the takings claim made in *Andrus v. Allard*, 444 U.S. 51 (1979). The *Andrus* case involved a diminution in value of privately owned eagle feathers caused by a ban on their sale. Invalidating the regulation or compensating owners for the injury to their property would have frustrated the important goal of protecting an endangered species. In contrast — and contrary to the Court's actual decision — compensation should have been granted in the *Penn Central* case (438 U.S. 104). This case — like the *Andrus case* — dealt with the diminution of the value of property. In *Penn Central*, the diminution was caused by a restriction on building above the original train station, in the interest of historic preservation. By upholding the authority's decision to deny existing development rights without monetary compensation, the Court allowed an infliction of a special burden on a single owner, for the benefit of the public-at-large.

analytical tool, simple principle, or elegant rule that will satisfactorily deal with all cases. The variety of types of property, types of injury to property, and the many considerations, principles, and interests involved in the takings issue (as well as in other property issues) require that we pay heed to a wide range of criteria.

In closing, let me join Michael Heller in hoping that both future property scholarship and property law will keep pace with the ever changing needs of society and economy and find the route between the different images of property and the competing policy considerations.