

## ARTICLES

# THE WORLD OF *DEADWOOD*: PROPERTY RIGHTS AND THE SEARCH FOR HUMAN IDENTITY

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### ABSTRACT

The year is 1876. Gold has been discovered in the fledgling camp of Deadwood, attracting hordes of new arrivals each day seeking to strike it rich. The allure of wealth is coupled with the allure of complete autonomy. There is no law. Although part of the United States, Deadwood is unaffiliated with any existing territorial government. It is free. Or is it? From this backdrop, HBO's highly-acclaimed drama *Deadwood* springs forth. Series creator David Milch is frank about his mission behind the story: to explore how order arises from chaos. The assignment and protection of property rights play central roles in this journey from anarchy to law. In the world of *Deadwood*, where ownership of land can be worth millions, law's promise and law's pitfalls are both on full display. The stakes are high; the lessons are many.

Stories are powerful teaching tools because they marry information and context. Film and television also supply a picture of law in action, marshalling the power of the visual to make law more real, less abstract. Because of its rich complexity and invocation of ancient debates over what property is and who rightly can be deemed to own it, the three-season run of *Deadwood* provides fertile ground for this type of interdisciplinary study. *Deadwood* demonstrates that the interrelationship between property and law is complex, with many moving pieces and many valid points and counterpoints. Property has both naturalist and positivist attributes, it both preexists and coexists with the state, it is about economic power and personal identity, and it supports both an individualist and communitarian mindset. Accounting for all of these strands in a balanced way is a lot to ask of legal institutions, especially inasmuch as the strands often are in competition with one another. *Deadwood* suggests that, while law is

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certainly a component piece in the puzzle of human relations, it alone cannot do all that we ask of it. And therein may lie the ultimate lesson: law can be a blessing, but the human condition requires more.

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“No law at all in *Deadwood*? Is that true?”

*Deadwood*, Episode 1<sup>1</sup>

## I. INTRODUCTION

The year is 1876. Gold has been discovered in the fledgling camp of Deadwood, attracting hordes of new arrivals each day seeking to strike it rich. The allure of wealth is coupled with the allure of complete autonomy. There is no law. Although located in present-day South Dakota, Deadwood is unaffiliated with any existing territorial government. It is free. Or is it? From this backdrop, HBO’s highly acclaimed drama *Deadwood* springs forth.<sup>2</sup> Series creator David Milch is frank about his mission behind the story: to explore how order arises from chaos.<sup>3</sup> The assignment and protection of property rights play central roles in this journey from anarchy to law. In the world of *Deadwood*, where ownership of land can be worth millions, law’s promise and law’s pitfalls are both on full display.

Scholarship on law and popular culture has many dimensions, including an analysis of the depiction of law in cultural formats such as television.<sup>4</sup> Because of its rich complexity and invocation of ancient debates over the nature of property and who rightly can be deemed to own it, the three-season run of *Deadwood* provides fertile ground for this type of interdisciplinary study. Film and television also supply a picture of law in action by marshalling the power of the visual, making law more real and less abstract. This is no small thing. Stories are powerful teaching tools because they marry information and context.<sup>5</sup> By seeing how law affects

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<sup>1</sup> *Deadwood: Deadwood* (HBO television broadcast Mar. 21, 2004).

<sup>2</sup> See generally *Deadwood* (HBO television broadcast Mar. 21, 2004–Aug. 27, 2006) (spanning three seasons in thirty-six episodes).

<sup>3</sup> Expanding on his vision of telling a story about civilization-building, Milch describes the core idea behind *Deadwood*:

*Deadwood* is a show about how order arises out of the mud. That’s what you see in the opening credits, and that’s what you see as the story moves forward: men coming together out of the most limited motives to create something larger than themselves. Order is provisional and mysterious. It requires a temporary suspension of immediate concerns in the interest of an agreed-upon fiction about a better tomorrow.

DAVID MILCH, DEADWOOD: STORIES OF THE BLACK HILLS 135 (2006). Milch is an artist of the first order and has experience creating transformative television. In particular, prior to *Deadwood*, he cocreated the iconic police drama *NYPD Blue* and won an Emmy for his work on *Hill Street Blues*. READING DEADWOOD: A WESTERN TO SWEAR BY 104–05 (David Lavery ed., 2006). See also Alan Sepinwall, *Milch + Mann + Hoffman = Awesome?*, WHAT’S ALAN WATCHING?, (Mar. 2, 2010, 2:05 PM), <http://sepinwall.blogspot.com/2010/03/milch-mann-hoffman-awesome.html> (describing Milch as “one of the smartest and most talent writers to ever work in TV”).

<sup>4</sup> See Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1587 (1989) (explaining dimensions of popular legal culture).

<sup>5</sup> See CHIP HEATH & DAN HEATH, MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE 204–37 (2007) (describing the role of stories in the spread of new ideas). See also Lance McMillian, *The Death of Law: A Cinematic Vision*, 32 U. ARK. LITTLE ROCK L. REV. 1, 11 (2009) (explaining why the “broad reach of popular culture inevitably shapes popular opinions about the law”).

characters we know and care about, we become more attune to the potential effects of legal decisions in the real world.

Building on this potential, this Article considers the following questions in the context of the drama that unfolds in *Deadwood*: How are claims to property established in the absence of government? How does the future “threat” of law affect the functioning of the organic property system that arises in law’s vacuum? When law inevitably arrives, what standards should be employed to determine the validity of the initial, non-legal claims? What stakeholders should be allowed to decide what these standards are? From where does law’s legitimacy to authoritatively settle these nascent property divisions derive? Is this legitimacy just? How does property and the standards by which it is defined shape identity, both with regard to individuals and their community? By analyzing these questions through the creative platform of *Deadwood*, this Article strives to reinforce in a new and interesting way the indispensable role property rights play in the guaranty of freedom.

## II. THE STORY OF *DEADWOOD*

The narrative of *Deadwood* begins in 1876. Bare wilderness only a short time before the viewer joins the story, the camp of Deadwood has just arisen from the mud. Its existence is geographical fortuity. Deadwood sits in close proximity to the Black Hills where gold has been discovered.<sup>6</sup> This discovery produces a predictable metamorphosis, as Deadwood rapidly changes from wilderness to civilization. Law plays an enormous role in this transformation. The three-season arc of *Deadwood* can be divided into three phases of “law” that capture the town’s evolution: (1) Season One—the world without law; (2) Season Two—the rumor of law; and (3) Season Three—the birth of law. This development does not arise in a vacuum. Gold—and the actions of those who thirst after it—controls Deadwood’s trajectory:

The only reason the town of Deadwood exists is gold . . . .

. . . .

[T]he presence of gold brings in all these new people from the outside: hardware stores selling tools to the miners and telegraph wires to keep markets informed of the quantities of gold that are mined, which influence the market price of gold in London and Zurich. And hardware store owners and telegraph operators have their own needs, which in turn must be served by more outsiders.

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<sup>6</sup> *Deadwood* is a mix of the factual and the fictional. Deadwood was a real camp that originated with the discovery of gold in the Black Hills. Many of the show’s characters—Al Swearengen, Seth Bullock, Wild Bill Hickok, and George Hearst, for example—are historical figures, while others (Alma Garrett, most prominently) are not. The show itself makes only a slight pretense to historical accuracy. Rather, *Deadwood* is Milch’s vehicle to tell his stories.

That's why the world of Deadwood keeps getting more complicated, as alliances are formed and discarded, and new realities evolve that have their own influence on the situation, which is always fluid and evolving. That's how the civilizing game is played.<sup>7</sup>

Gold—that is, property—is the key to everything, including the growth of legal norms and the self and collective identities of all those who eventually call Deadwood home.

#### A. SEASON ONE: THE WORLD WITHOUT LAW

*Deadwood* is a work of art, filled with nuance, subtlety, and layers of meaning that deepen with each viewing. Synopsizing the story inevitably weakens it and carries a meaningful risk of doing a disservice to both the show and to the reader.<sup>8</sup> With this disclaimer in mind, we seek only to highlight those plot elements necessary to (a) provide sufficient factual context so that those who have yet to see *Deadwood* can nevertheless find value in this Article, and (b) advance the discussion of the role property rights play in the drama that unfolds over *Deadwood*'s three seasons.

The first season of *Deadwood* portrays a world without law. Deadwood has no mayor, no sheriff, and no government of any kind. Nor is it associated with any existing United States territory. It is free, unincorporated, and unencumbered. Gold and autonomy beckon the

<sup>7</sup> MILCH, *supra* note 3, at 45–46.

<sup>8</sup> While this Article focuses on property rights in *Deadwood*, the show also meaningfully explores other themes universal to the human condition. These include escapism through intoxicants such as drinking, gambling, and drugs; love and marriage; sex and prostitution; the oppression of women and minorities; and the relationship between language and meaning. The imprint of Milch, the person and the artist, resonates on all these themes. Drawing on his own life, for example, Milch explains the link between substance abuse and self-identity:

When the disjunction between our own inconsequence and what we would like to feel about our vital connection to the universe gets to be too much, we try to resolve that contradiction through the pursuit of altered states. I always had the secret suspicion that history had tended toward my birth and would trail into tawdry inconsequence after I left. Yet the facts of the universe appear to mitigate against that conclusion. The more that we are able to organize our own experience so that it seems to obey our imagination, and less to obey the processes of nature, the more we possess that belief in ourselves that produces exaltation. One way to get that feeling—and it's no secret that I have some extensive personal experience in this area—is to get fucked up.

*Id.* at 67. This type of depth on display in *Deadwood* explains why many consider the series to be one of the greatest television shows of all-time. See Andrew Johnston, Matt Zoller Seitz & Alan Sepinwall, *David vs. David vs. David; or Which Is the Greatest TV Drama Ever*, *Simon's The Wire*, *Milch's Deadwood, or Chase's The Sopranos?*, THE HOUSE NEXT DOOR (Mar. 5, 2008, 1:00 PM), <http://www.thehousenextdooronline.com/2008/03/david-vs-david-vs-david-or-which-is.html> (arguing that *Deadwood* is the greatest show ever according to NEW YORK TIMES critic Matt Zoller Seitz); A.J. Schnack, *Ode to Deadwood*, ALL THESE WONDERFUL THINGS (June 10, 2006), [http://edendale.typepad.com/weblog/2006/06/ode\\_to\\_deadwood.html](http://edendale.typepad.com/weblog/2006/06/ode_to_deadwood.html) (arguing that *Deadwood* is the "finest series on television"); *The 50 Greatest TV Shows of All Time*, EMPIRE ONLINE, <http://www.empireonline.com/50greatesttv/default.asp?tv=31> (last visited Feb. 8, 2011) (ranking *Deadwood* among all-time greats).

adventurous. Lawlessness combined with the race for vast amounts of wealth seems to be a bad combination. Thomas Hobbes's warning that life in such a state of nature is "solitary, poore, nasty, brutish, and short" strikes a chord here.<sup>9</sup> The reality in Deadwood, however, is different. In the absence of law, custom and community norms control, and a functioning market quickly develops. Freedom appears to work, and the people of Deadwood seem pleased with the emerging course of dealing.

But this is not to say that those in Deadwood believe that they will be free forever. The happenings in Deadwood do not go unnoticed by the outside world. And therein lies a threat. Deadwood lacks an affiliation with any existing territory because the land upon which it sits legally belongs to the Sioux. The settlers of Deadwood, however, have no fear that the Sioux will assume ownership of the emerging gold claims. This is 1876, after all. Instead, their concerns center on the potential legalities posed by the presence of the Sioux factor. Magistrate Clagett, a political fixer hired to help the camp in its political dealings with outsiders, explains the risk that Deadwood's organic property system may be for naught once the federal government and the Sioux reach an agreement on a new treaty:

Assuming the new treaty, the hills will be annexed. The territory respects the statutes of the Northwest Ordinance, which state that a citizen can have title to any land unclaimed or unincorporated by simple usage. Essentially, if you're on it and you improve it, you own it. But, what complicates the situation is that the hills were deeded to the Sioux by the 1868 Fort Laramie Treaty. This could mean that the land occupied by the camp doesn't fall under any statutory definition of unclaimed or unincorporated.<sup>10</sup>

Al Swearngen, owner of the Gem Saloon and unofficial leader of Deadwood, responds to Clagett's warning with blunt realism: "So who needs to get paid?"<sup>11</sup> This theme of Deadwood-against-the-world recurs throughout the series. It is impossible for Deadwood to remain autonomous forever. The key question relates to whether Deadwood will join with others on its own terms or someone else's.

Four seminal events dominate the landscape of Season One: (1) the arrival of Seth Bullock in Deadwood to open a hardware store; (2) the murder of another new arrival, Wild Bill Hickok; (3) the battle over the Garrett gold claim; and (4) the decision of the town elders to institute the symbols of legal order. Each of these happenings, in its own unique way, reveals a great deal about how property rights systems operate in the void of formal law. In America, law is the great arbiter. Without this umpire of

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<sup>9</sup> THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

<sup>10</sup> *Deadwood: No Other Sons or Daughters* (HBO television broadcast May 16, 2004).

<sup>11</sup> *Id.*

last resort, who decides what? The common link among these events is that they illuminate how context determines the answer to this important question.

First, there is Seth Bullock, a marshal in the Montana territory, seeking to make the transition from lawman to businessman. His insight: gold miners need tools. Seeking to capitalize on this basic idea, Bullock and his business partner, Sol Star, leave Montana for Deadwood. The aspiring entrepreneurs quickly identify the perfect plot of land, which is owned by Swearingen, for their new endeavor. Negotiations follow. The first exchanges between Bullock and Swearingen are significant, as the two men loom large throughout *Deadwood's* run. Bullock represents the reserved, flawed hero; Swearingen represents the larger-than-life, redeemable antihero.<sup>12</sup> Initial discussions abruptly end when Swearingen—distrustful of Bullock's incipient friendship with Wild Bill Hickok— informs the would-be purchasers, "here's my counteroffer to your counteroffer: Go fuck yourself!"<sup>13</sup> When a competing saloon moves in across the street from Swearingen's place, negotiations resume. The dialogue that follows touches upon a number of issues familiar to first-year property students:

AL: I only hope you understand my being short with you out in the street this morning.

SOL: You had a lot on your mind.

AL: I had a lot of what's left of my fucking mind, these new interests coming in. I only hope you understand and see my thinking in not selling you that lot outright.

SETH: What's your thinkin' today?

<sup>12</sup> Milch writes that "[Swearingen] is a very good man with none of the behaviors of goodness." MILCH, *supra* note 3, at 17. Swearingen is played by veteran British actor Ian McShane, whose performance helps to create one of television's greatest and most interesting characters.

<sup>13</sup> *Deadwood: Deep Water* (HBO television broadcast Mar. 28, 2004). In *Deadwood*, profanity becomes a controversial art form due to its unrelenting ubiquity. See, e.g., Carl Swanson, *Cussing and Fighting*, N.Y. MAG., Apr. 19, 2004, available at [http://nymag.com/nymetro/news/people/columns/intelligencer/n\\_10191/](http://nymag.com/nymetro/news/people/columns/intelligencer/n_10191/) (detailing criticism and noting that the first episode of *Deadwood* used the word "fuck" or its derivation forty-three times); *The Number of Fucks in Deadwood*, THE W. VA. SURF REP., <http://www.thewvsr.com/deadwood.htm> (last visited Feb. 1, 2011) (numbering the instances of the use of "fuck" during the run of *Deadwood* as 2980). The use of "fuck" in *Deadwood* is not gratuitous. It serves an artistic purpose. The same personality who would risk everything to come to Deadwood in the first place is the same personality who would flaunt social conventions through liberal use of the words "fuck," "cocksucker," and the like. Milch explains:

The men who came to Deadwood craved a new beginning, a chance to break their ties to civilized institutions and forms of meaning. All the men in *Deadwood* swear—from passing vulgaritisms to inflamed blasphemy to savage obscenities. Profanity purges language of meaning, and this is why it's necessary. To raze the English language—down to the ground, down to the harsh syllables of profanity—is to break free.

MILCH, *supra* note 3, at 15. Profanity and the personal autonomy promised by the idea of a lawless *Deadwood* walk hand-in-hand together.

AL: Gets dead set at the fucking point which I like in most situations. Do you know these new saloon interests? Are you acquainted with them at all?

SOL: Nope.

SETH: Not them and not Bill Hickok. And all we want to do is run a hardware business.

AL: I have got to be satisfied. See, I'm the simple type cocksucker. That when he sees lightening, readies for thunder. And takes the thunder if it comes from part of the same fuckin' storm.

SOL: Why wouldn't ya, Mr. Swearengen?

AL: Well thank you for sayin' that, even if you don't fuckin' mean it.

SETH: What would make you comfortable sellin' to us?

AL: Thousand. Plus right of first refusal on any further sale.

SOL: Accepted.

AL: And right to buy back at the original price, plus the cost of your improvements.

SOL: Accepted.

AL: No gambling on the fuckin' premises. No association of any kind with these Bella Union cocksuckers.

SOL: Accepted.

SETH: We can't sell 'em our goods?

AL: No. What do you think of that?

SOL: Accepted.

AL: What do you think?

SETH: Accepted.

AL: Or, they could buy your wares in your normal course of your normal fucking business. I'd guess it'd be okay to transact with these cocksuckers.

SETH: So we can sell 'em our wares?

AL: Your normal fucking wares. No gambling, whoring or whiskey on the fucking premises is the chief fucking point.

SOL: Agreed. [Puts his hand out]

AL: I spit in my hand. [Does so] Will that drive you screaming into the hills? [Sol spits in his own hand and they shake, Al then shakes with Seth—who has not spit into his hand] The ah, thousand'd be nice.<sup>14</sup>

This brief discussion explicitly raises basic property questions of rights of first refusal, covenants not to compete, and servitudes. But how are these agreements enforced? And why does Swearengen have the right to sell the plot under consideration in the first instance? Deeds do not exist and

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<sup>14</sup> *Deadwood: Reconnoitering the Rim* (HBO television broadcast Apr. 4, 2004).

transactions are secured by handshakes—with spit or without. When expectations go asunder, there are no courts to which to appeal. In this type of culture, a commitment to honor and well-established business practices are seemingly essential to maintaining order.

The second major event that occurs early in Season One is the murder of Wild Bill Hickok, a famous gunfighter, by the coward, Jack McCall.<sup>15</sup> Based on a true event in which the real Hickok was the victim of a gunshot to the back of the head, the circumstances of the killing are irrelevant for present purposes; the aftermath is key. In a world without law, how will murderers be brought to justice? The very American instinct of those in Deadwood is to have a trial. Swearingen, however, becomes concerned that a trial would attract unwanted federal attention, due to Wild Bill's fame and notoriety. Swearingen explains his fear that the trappings of a trial presuppose a sovereignty that does not exist and could destroy the expectations of those who have come to Deadwood to make their fortunes:

We're illegal. Our whole goal is to get annexed to the United fuckin' States. We start holdin' trials, what's to keep the United States fuckin' Congress from sayin', "Oh, excuse us, we didn't realize you were a fuckin' sovereign community and nation out there. Where's your cocksucker's flag? Where's your fuckin' navy or the like? Maybe when we make our treaty with the Sioux we should treat you people like renegade fuckin' Indians. Deny your fuckin' gold and property claims. And hand everything over instead to our ne'er-do-well cousins and brothers-in-law."<sup>16</sup>

These concerns lead Swearingen to arrange for the jury to acquit McCall.<sup>17</sup> Swearingen then wisely advises McCall to quickly leave town before others take justice into their own hands.<sup>18</sup> Bullock is among those who are most incensed that Hickok's murderer is set free. He tracks down McCall and contemplates killing him, but ultimately decides to turn McCall over to United States authorities.<sup>19</sup>

The next major event in Season One is the discovery of the Garrett gold claim. Brom Garrett is a bumbling man from New York who is not as smart as he thinks he is. Swearingen uses a stooge to sell Garrett a worthless gold claim. Garrett becomes suspicious after surveying the

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<sup>15</sup> *Deadwood: Here Was a Man* (HBO television broadcast Apr. 11, 2004).

<sup>16</sup> *Deadwood: The Trial of Jack McCall* (HBO television broadcast Apr. 18, 2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The acquittal of McCall by a Deadwood jury is historically accurate. See Press Release, S.D. Office of Tourism, Marks of History: Hanging of Jack McCall (June 3, 2009), available at <http://www.travelsd.com/Newsroom/Detail?id=90332> (last visited Feb. 9, 2011). Subsequently, McCall was retried for the murder by a federal court in South Dakota. *Id.* McCall claimed that the retrial violated the constitutional guarantee against double jeopardy. See *id.* The court rejected this argument, however, precisely on the grounds that the Deadwood trial was illegal in light of Deadwood's lack of sovereignty. *Id.* McCall was thereafter convicted and executed. *Id.*

property and demands that the deal be voided. He even threatens to bring in the Pinkertons to investigate.<sup>20</sup> Before Garrett rescinds the deal, Swearngen convinces Garrett to do another inspection with his muscleman, Dan Dority. Predictably, Dority pushes Garrett off a cliff. Before this happens, however, Garrett and Dority discover gold.<sup>21</sup> The worthless gold claim is no longer worthless. Indeed, it is the largest strike in Deadwood by far.

After Garrett is murdered, the ownership of the gold claim passes to Garrett's widow, Alma Garrett. Recognizing its worth, Swearngen tries to buy the land back from Alma through a surrogate. This act is significant in itself: despite his murdering ways, Swearngen still views Alma as the rightful owner of the claim—a powerful symbol of the sanctity of gold claim transactions in the Deadwood community. In fact, Garrett's murder is precipitated by his threat to upset the functioning of this system. Alma, however, is not as foolish as her late husband, and she wonders what prompted the new sudden interest to buy back the gold claim. She enlists the help of Hickok, Bullock, and expert gold prospector, Whitney Ellsworth, to safeguard her interests.<sup>22</sup> When the true value of the claim is discovered, Swearngen backs off. Alma is a rich woman. But as subsequent seasons of *Deadwood* bear out, the battle for her gold is hardly over.

Lastly, there is a decision by the town elders to institute the signs of legal order. Yet why? If part of Deadwood's attractiveness lies in its autonomy, what is the point of organizing a governing structure at all? The thinking centers on the world external to Deadwood. Even if Deadwood wanted to live without law in perpetuity, the rest of the United States would not accede to that wish. By organizing itself, Deadwood hopes to gain legitimacy in the eyes of the troublesome outsiders. Swearngen explains his thoughts to Bullock: "Informal municipal organization. Not government. No, that would mark us rebellious. But structure enough to persuade those territorial cocksuckers in Yankton that we're worthy enough to pay them their fucking bribes."<sup>23</sup>

A meeting of the town leaders is therefore called, even though there is considerable confusion as to who fits this bill. Basically, anyone who attends the meeting is considered to fit the bill. Swearngen explains to the group that "[o]ur proper order of business is to make titles and departments

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<sup>20</sup> The Pinkertons were detectives in the employ of the renown Pinkerton National Detective Agency. See generally JAMES D. HORAN, *THE PINKERTONS: THE DETECTIVE DYNASTY THAT MADE HISTORY* (1967) (detailing the controversial history of the Pinkerton family father-sons-detectives).

<sup>21</sup> *Deadwood: Reconnoitering the Rim*, *supra* note 14.

<sup>22</sup> *Id.*

<sup>23</sup> *Deadwood: No Other Sons or Daughters*, *supra* note 10. At this time, Yankton was the territorial capital of the Dakota Territory. See Lance D. Dutton, *South Dakota's Aggravating Circumstances on Trial*, 53 S.D. L. REV. 139, 150 n.77 (2008).

before the territorial cocksuckers send in their cousins to rob and steal from us.”<sup>24</sup> Echoing his earlier comments to Bullock, Swearngen describes the realities on the ground, including the link between bribing the politicians and creating some type of town structure:

I’m declaring myself conductor of this meeting as I have the bribe sheet.

.....

So, U.S. Government’s negotiating peace with Spotted Elk, Red Cloud and other leaders of the heathens. The heathens will get money to give up the hills and the hills’ll be annexed to the territory. Cost to avoid getting fucked in the ass by those legislative cocksuckers was just handed to me by Yankton’s toll collector, who suggests also our best case in keeping title to the claims, property and businesses is to start up now, a kind of an informal governing organization that will be recognized by the territorial cocksuckers and given legal status when the territory is annexed, since we’ll all have proved ourselves civilized sorts that don’t only wear our pants to cover our tails. Hence the fuckin’ meeting.<sup>25</sup>

No real authority springs forth from this gathering.<sup>26</sup> None of these men<sup>27</sup> want to be governed by each other or by strangers from Yankton. The decision to form an “informal municipal organization” is strategic only, designed as a defensive maneuver to protect their property rights. It is playing the game of politics. At Season One’s end, it can fairly be said that Deadwood remains essentially free. There is no law. But here is the inescapable rub: law is coming.

#### B. SEASON TWO: THE RUMOR OF LAW

While the early days of Deadwood lack a formal legal structure, a type of quasi-law emerges in the form of well-established norms to which the members of the community conform. This arrangement seems to work. Expectations are settled, and people know where they stand. What happens, though, when this apple cart gets overturned? When the certain becomes uncertain? The answer is fear and chaos. Law is set to arrive in Deadwood, but no one knows exactly what it will look like. Rumors, however, abound,

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<sup>24</sup> *Deadwood: No Other Sons or Daughters*, *supra* note 10.

<sup>25</sup> *Id.*

<sup>26</sup> For example, Swearngen’s proposed method of selecting officeholders is to “[p]ick the names from a fuckin’ hat.” *Id.* A short discussion occurs as to whether taxes should be collected to pay the necessary bribes. *Id.* E.B. Farnum—a repugnant little man who nobody respects—observes, “[m]ore than providing services to ‘em, taking peoples money is what makes organizations real, be they formal, informal or temporary.” *Id.* Despite the universal disregard of Farnum, the others agree to his request to be the new mayor. *See id.*

<sup>27</sup> And it is all men at the meeting. *Id.* Alma Garrett is not invited even though she is the richest person in the town. Even after forming the town bank in a later season, Alma never finds herself considered one of Deadwood’s leaders.

which greatly impacts the existing market for gold claims. This is the story of Season Two.

Two new characters on the scene loom large in sowing and reaping the seeds of this new uncertainty: Hugo Jarry (the politician) and Francis Wolcott (the businessman). Jarry is an official with the Yankton territorial government. He is a standard political hack.<sup>28</sup> Upon arriving in Deadwood, Jarry uses his position to cast doubt as to whether the new territorial government will honor existing gold claims. Jarry accomplishes this aim in a public notice that utilizes classic government doublespeak:

NOTICE!

As to ownership of the claims in the newly constituted County of Lawrence, as annexed to the Dakota Territory, a presumption of legitimate title shall obtain for claims filed, or staked according to custom, and worked actively and continuously prior to amendment of the treaty with the Sioux Nation, September 1876. This presumption shall be subject to qualification, according to mitigating facts. New title will be awarded on claims to which title is denied, at set prices, via lottery, as conducted by the county commissioner, at times and locations to be publicly announced.<sup>29</sup>

The problem with this language is that the first two sentences stand in marked tension with one another. “[A] presumption of legitimate title” is a meaningless guarantee if it is “subject to qualifications, according to mitigating factors.” In effect, Jarry is telling the people of Deadwood, “Your title is safe until the politicians decide otherwise.”

The locals understand this message and do not take kindly to it. A mob forms, attacks Jarry, and appears ready to kill him until Bullock—who is now the sheriff—fires a shot into the air to restore order. Jarry quickly leaves town, but the disquiet he unleashed remains in his wake. Naturally, the greater the doubt concerning the legal standing of the existing gold claims, the less value these claims have on the open market. This economic reality plays right into the hands of Francis Wolcott.

Wolcott is the right hand man of gold tycoon George Hearst. The mere mention of Hearst’s name inspires fear and reverence. Farnum, the feckless and corrupt mayor, tries to scam Wolcott but withers when he learns that Wolcott is in Hearst’s employ. To make up for the attempted fraud, Farnum agrees to do Wolcott’s bidding and spread rumors among the people of Deadwood, calling into question “the validity of the present titles to the

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<sup>28</sup> In an unrelated storyline, Wolcott is revealed to be a disturbed man who murders prostitutes. See *Deadwood: Advances, None Miraculous* (HBO television broadcast May 8, 2005). But even he has standards. After meeting with Jarry, Wolcott observes, “I am a sinner who does not expect forgiveness. But I am not a government official.” *Id.* One senses from comments like this throughout *Deadwood* that Milch has a low opinion of politicians and bureaucrats.

<sup>29</sup> *Deadwood: Complications (Formerly “Difficulties”)* (HBO television broadcast Apr. 3, 2005).

claims.”<sup>30</sup> This misdirection, combined with Jarry’s official pronouncement, causes a panic among those holding gold claims, which is Wolcott’s intended result.<sup>31</sup> The lawless stability of Season One thus shatters as rumors of law abound. Wolcott capitalizes on this development and purchases most of the existing gold claims at discounted prices using Hearst’s money. Hearst begins mining operations almost immediately.

After the massive sell-off of gold claims, the only meaningful gold claim that eludes Hearst’s grasp is the one belonging to Alma. The battle between Hearst and Alma forms the backbone of Season Three. In Season Two, however, the mysterious circumstances under which Alma’s late husband died, come back to haunt her. Alma is innocent of wrongdoing; however, her in-laws hire the Pinkertons to frame Alma for the murder of her late husband.<sup>32</sup> With Alma out of the way, the gold would then belong to her in-laws who would quickly sell to Hearst. The plan falls apart when the Pinkertons try to bribe Swearngen for \$50,000 to claim that Alma hired him to kill her husband.<sup>33</sup> Swearngen resists for two reasons. First, he passionately hates the Pinkertons because he sees them as tools of the rich to oppress others.<sup>34</sup> Second, Alma’s presence is the only obstacle standing between Hearst and the complete control of Deadwood.<sup>35</sup>

A final aspect of Season Two centers on Deadwood’s attempt to gain bargaining leverage in its dealings with Jarry and the territorial government of Yankton. Swearngen and Bullock hatch a plan. Just as Jarry and Wolcott fostered uncertainty in Deadwood through vague statements and rumor-mongering, the town leaders also create uncertainty as to whether Deadwood would actually become a part of Yankton. Rumors begin to circulate about serious annexation talks between Deadwood and the Montana territory.<sup>36</sup> This talk is make-believe, but the assumed supremacy of Yankton no longer seems secure.

Jarry quickly arrives back in town, ready to bargain. Because of Hearst, title to gold claims is no longer the predominant legal issue facing those in Deadwood. Instead, self-government in the form of elections serves as the focal point of negotiations between Swearngen and Jarry.<sup>37</sup> An agreement is reached guaranteeing elections in six weeks’ time with eligible voters being those residing in the area for two or more weeks.<sup>38</sup> With Hearst

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<sup>30</sup> *Deadwood: New Money* (HBO television broadcast Mar. 20, 2005).

<sup>31</sup> *See id.*

<sup>32</sup> *Deadwood: E.B. Was Left Out* (HBO television broadcast Apr. 17, 2005).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> As Swearngen tells a surprised Alma, “I don’t like the Pinkertons. Bein’ the Hearst combine and their fucking ilk got their eyes on taking over here, your staying suits my purpose.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

himself now in Deadwood, Season Two ends with spirits running high as the big news spreads: “Elections are coming! Elections are coming!”<sup>39</sup>

### C. SEASON THREE: THE BIRTH OF LAW

In the world of *Deadwood*, no one is more powerful than George Hearst. That said, Hearst does not seek power for its own sake, unlike many people. Rather, power is just a means to his singular end of obtaining more gold, or as Hearst calls it, “the color.”<sup>40</sup> This relentless pursuit is not merely—or even primarily—economic. Because of his prowess at discovering gold, Hearst earned the nickname “boy-the-earth-talks-to” from the Indians.<sup>41</sup> There is an almost religious relationship between the earth and Hearst that represents the driving force of Hearst’s life. Everything is about the color; nothing else matters.

And that includes other people. Hearst is utterly ruthless with those that stand between him and his passion. A shocking scene between Hearst and Swearingen occurs early in Season Three. Hearst wants the Garrett gold claim and enlists Swearingen’s help with these menacing words: “I’ll not name how you would benefit from the action I wish you to take, saying only instead that it’s my will. To which I will have you bend . . . .”<sup>42</sup> When the defiant Swearingen resists, Hearst cuts off one of his fingers.<sup>43</sup> The larger-than-life Swearingen temporarily becomes a humbled and insecure mess in the aftermath.

To assert psychological dominance over the town, Hearst employs a strategy of terror. First, he orders the murder of a miner named Pasco who attempted to unionize Hearst’s workers.<sup>44</sup> Next, he arranges for the body of the dead man to be left in the middle of Deadwood’s main street with a knife in his chest.<sup>45</sup> The message is “I can do whatever I want to do, and you cannot stop me.” Bullock is enraged at Hearst’s brazenness. When Hearst tells Bullock to go “fuck [himself]” and talks of killing him, Bullock arrests Hearst for threatening a peace officer and fittingly places him in a cell that contains Pasco’s corpse.<sup>46</sup> The general reaction to the arrest is telling: instead of celebrating Bullock’s willingness to stand up to the town bully, the fear is that Bullock’s rashness may impel Hearst into destroying Deadwood.<sup>47</sup> Hearst’s mission to instill fear in the populace has succeeded.

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<sup>39</sup> *Deadwood: Boy-The-Earth-Talks-To* (HBO television broadcast May 22, 2005).

<sup>40</sup> *Deadwood: Tell Your God to Ready for Blood* (HBO television broadcast June 11, 2006) (“[A]ffairs of that sort are not my interest, Mr. Bullock. My only passion is the color.”).

<sup>41</sup> *Deadwood: Boy-The-Earth-Talks-To*, *supra* note 39.

<sup>42</sup> *Deadwood: I Am Not the Fine Man You Take Me For* (HBO television broadcast June 18, 2006).

<sup>43</sup> *Id.*

<sup>44</sup> *Deadwood: A Two-Headed Beast* (HBO television broadcast July 9, 2006).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Deadwood: A Rich Find* (HBO television broadcast July 16, 2006).

But the people of Deadwood remain a proud, independent bunch. The elders come together again to plot strategy. Is violence the answer? Not yet. As an alternative, the passive-aggressive course of action is chosen. A.W. Merrick, owner and operator of the Deadwood newspaper, publishes a letter from Bullock to Pasco's mother, informing her of her son's murder.<sup>48</sup> Since everyone knows that Hearst is behind Pasco's murder, the purpose behind printing the letter is to place a bright spotlight on the human costs of Hearst's barbarism. The letter reads:

It becomes my painful duty to inform you that Pasco Carwen was killed earlier this week. His body was found dead in the road. . . . It was not mutilated in any way. His death seems to have been instantaneous as he was stabbed through the heart. Pasco's funeral occurred today and was attended by coworkers and friends who all shared the same high opinion of him. Everything was done by kind hands that was possible under the circumstances, and a Christian burial was given him. I was not personally acquainted with Mr. Carwen, save for one encounter where he demonstrated grief and deep compassion at the passing of a friend. I knew him by reputation as an earnest worker and a diligent believer in right and wrong. His memory I am sure will always be with those who knew and loved him, among whose number I imagine you as first. A letter from you which I found in his tent causes me to convey this sad intelligence to you. Sincerely yours, Seth Bullock.<sup>49</sup>

The message of condemnation conveyed by the publication of this letter is not lost on Hearst. He responds by hiring twenty-five Pinkerton agents to serve as his muscle in town.<sup>50</sup> If the murder of Pasco was a play to establish psychological dominance over Deadwood, the Pinkerton gambit represents an effort to assert physical dominance. Almost immediately, one of the Pinkerton agents pistol whips Merrick and trashes the newspaper offices in retaliation for publishing the Bullock letter.<sup>51</sup>

Hearst's central concern, however, remains obtaining the Garrett gold claim. Knowing Hearst's intent, a naïve Alma attempts to reach out to Hearst by proposing a business partnership between the two of them.<sup>52</sup> The mere idea of this partnership offends Hearst greatly, and he almost rapes Alma in response. Growing more cognizant of the type of man Hearst is, Alma nevertheless digs in her heels and refuses to sell, which only ratchets up the tension even more.<sup>53</sup> One day as Alma walks to her bank, gun shots

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<sup>48</sup> *Deadwood: Unauthorized Cinnamon* (HBO television broadcast July 23, 2006).

<sup>49</sup> *Id.*

<sup>50</sup> *Deadwood: A Constant Throb* (HBO television broadcast Aug. 13, 2006).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

are fired at her. Swearengen protects her and encourages her to complete her walk to “get that fucking angler fulminating.”<sup>54</sup> More Pinkertons arrive, one of whom murders the gold prospector Ellsworth, who is now Alma’s new husband.<sup>55</sup> Alma has no choice but to sell, which she does with a gun at the back of her head.<sup>56</sup> Hearst pays her a fair price but becomes offended when Bullock suggests that Hearst might steal the money back.<sup>57</sup> Remarkably, Hearst appeals to Alma to renounce Bullock’s uncivilized insult.<sup>58</sup> Alma responds: “I acknowledge the pretence to civility—in a man so brutally vicious—as vapid and grotesque.”<sup>59</sup>

What about the hoped-for elections? Hearst is unimpressed. He tells Jarry, “Elections cannot inconvenience me. They ratify my will or I neuter them.”<sup>60</sup> Here, the election serves to ratify Hearst’s will. In weeks prior to the voting, hundreds of United States soldiers are purposely stationed near Deadwood so as to become eligible to vote.<sup>61</sup> Working through the corrupt Jarry, Hearst instructs the soldiers how to vote, thereby dictating the electoral outcome.<sup>62</sup> With his mission satisfied, Hearst prepares to leave town, surrounded by his bodyguards.<sup>63</sup> Tensions remain high. In response to Hearst’s amassing of Pinkertons, Swearengen has called upon significant reinforcements of his own.<sup>64</sup> The forces of the two men are armed and ready to fight.<sup>65</sup> One wrong move could lead to a bloodbath. But everyone stands down, and violence is averted. Hearst leaves town, bringing Season Three of *Deadwood* to an uncertain close.<sup>66</sup>

### III. THEORIES OF PROPERTY

As the foregoing narrative suggests, property interests play a crucial role in the saga of *Deadwood*. The surrounding land and its resources act as a primary draw for new residents, who seek to obtain riches either by striking gold or by providing goods and services to those attempting to do so. Property is also at work in a broader sense as a representative of liberty

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<sup>54</sup> *Id.*

<sup>55</sup> *Deadwood: The Catbird Seat* (HBO television broadcast Aug. 20, 2006).

<sup>56</sup> *Deadwood: Tell Him Something Pretty* (HBO television broadcast Aug. 27, 2006).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Deadwood: A Constant Throb*, *supra* note 50.

<sup>61</sup> *Id.*

<sup>62</sup> *Deadwood: Tell Him Something Pretty*, *supra* note 56.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> A planned, final fourth season of *Deadwood* never materialized. Milch rationalizes the denial of the opportunity to complete his vision as follows: “The biggest lie is the idea that we are entitled to a meaningful and coherent summarizing, a conclusion, of something which never concludes. In that regard, this is the lie I’m telling myself so I don’t set fire to anything.” Alan Sepinwall, *Welcome to \*^&@ Deadwood and The Wire on DVD!*, WHAT’S ALAN WATCHING? (Dec. 23, 2008, 5:02 PM), <http://sepinwall.blogspot.com/2008/12/welcome-to-deadwood-and-wire-on-dvd.html>.

and freedom. The allure of wealth is coupled, and perhaps enhanced, by the prospect of complete autonomy, untouched by the laws that restrain other communities. Of course, this absence of a formal legal system simultaneously threatens any rights in property, due to the vice and lack of stability it engenders. Thus, for the protection of their interests, the residents develop an organic system of property and government in the absence of law, and they ultimately seek the protection of a more formal regime. The introduction of this regime, however, threatens the continued existence of the rights and relationships previously forged. These various struggles to acquire and protect property serve as catalysts in shaping the identity of both the individual characters and the larger community in which they take part.

For these reasons, *Deadwood* presents a useful backdrop against which to consider some well-established theories about the nature and extent of property rights. This part provides brief descriptions of select property theories implicated by the story of *Deadwood*. At the outset of this discussion, the adjectives “brief” and “select” are emphasized. It is not the purpose of this part to provide a comprehensive examination of the various ways in which property has been considered in American legal thought, nor do we imagine the following to be a full account of the theories discussed. Such feats would prove difficult even for an entire volume and are quite impossible in the limited space set aside for this discussion. Rather, the aim is to provide succinct (but hopefully adequate) overviews of some of the more prominent strands in American thinking regarding property, grouped roughly into three related categories: (1) the origins and proper definition of “property” and the rights it encompasses, (2) property’s relationship to social and political structures, and (3) property’s relationship to personhood and community.

#### A. THE ORIGINS AND DEFINITION OF “PROPERTY”

Private property has been described as “a vital need of the [human] soul”<sup>67</sup> and “a paradigmatic right” in Western thinking.<sup>68</sup> Such statements suggest that property is significant not only as an area of legal inquiry, but also as a cultural phenomenon. Despite this seeming importance, property’s precise origins, along with its proper definition, have long been a subject matter of intense debate. Among the most contentious issues is whether property is a creature of positive law that primarily focuses on the relationships between individuals or, instead, whether it exists as a natural right focusing on an individual’s relationship to things. This section seeks

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<sup>67</sup> BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW*, 1150–1626, at 157 (1997) (quoting SIMONE WEIL: *AN ANTHOLOGY* 135 (Siân Miles ed., Grove Press 1986)).

<sup>68</sup> *Id.* at 131.

to provide a basic overview of how this issue has played out in American thinking on property rights.

### 1. *Property as Creature of Positive Law—Of Bundles and Exclusion*

The idea that property is an institution created by positive law primarily to regulate social relations between individuals has a long pedigree in Western thought. A famous pre-modern example of this line of thinking is found in the fourteenth century writings of the Franciscan jurist Bonagratia of Bergamo, who argued that private property is a product of human law, necessary to counter the social ills that resulted from mankind's fall into sin.<sup>69</sup> A similar mindset, absent the theological underpinnings, has prevailed among American jurists and scholars since the early twentieth century. Reflecting the broadly-held understanding of his time, Charles Reich in 1964 offered the following description: "Property is not a natural right but a deliberate construction by society. If such an institution did not exist, it would be necessary to create it, in order to have the kind of society we wish."<sup>70</sup> Thus, property is widely viewed as a creature of the law itself, designed initially to serve specific societal ends and capable of being redesigned as society (and the ends to be served) evolves.

Perhaps the most accessible example of this positivist notion lies in the "bundle" metaphor that is widely used in current discussions about property.<sup>71</sup> Made popular by the legal realists of the early twentieth century,<sup>72</sup> this metaphor provides that property is not fundamentally about one's rights in or to a thing. Rather, property is an amalgam of various rights and duties that ultimately serve to define and regulate one's relationships with other people, with any particular thing being only of secondary importance.<sup>73</sup> According to this metaphor, property is dependent on the social context in which it occurs and the legal rules that define that

<sup>69</sup> See *id.* at 151–53; Thomas Frank, *Exploring the Boundaries of Law in the Middle Ages: Franciscan Debates on Poverty, Property, and Inheritance*, 20 LAW & LITERATURE 243, 254 (2008).

<sup>70</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771–72 (1964).

<sup>71</sup> See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1870 (2007) (indicating that modern legal thought takes "as self-evident [the proposition] that property is a bundle of rights, the content of which is whatever lawmakers decide it should be").

<sup>72</sup> See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001) (stating that bundle metaphor "became popular among the legal realists of the 1920s and 1930s"); Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2008–13 (2009) (discussing connections between legal realists and positivist bundle theory).

<sup>73</sup> See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 27 (1977) ("[P]roperty is not a thing, but a set of legal relations between persons governing the use of things."); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 363 (1955) ("Property . . . is basically a set of relations among men, which may nor may not involve external physical objects."); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 743 (1917) ("[T]he supposed single right *in rem* correlating with 'a duty' on 'all' persons really involves as many separate and distinct 'right[-]duty' relations as there are persons subject to a duty . . ."); Merrill & Smith, *supra* note 72, at 357–58 (identifying as "conventional wisdom" the notion that "[p]roperty is a composite of legal relations that holds between persons and only secondarily or incidentally involves a 'thing.'").

context, which can be changed as circumstances require. For this reason, the configuration of the bundle that forms property in any given instance is subject to wide variation. “[P]roperty,” as noted by one scholar, “is simply a label for whatever ‘bundle of sticks’ the individual has been granted” by the legal system,<sup>74</sup> and the particular sticks included in the bundle are contingent on the given milieu in which they operate.

Once property is defined in this manner, however, certain theoretical problems necessarily arise. If property is merely any set of entitlements bestowed by the state, then it becomes difficult to differentiate property from other areas of legal inquiry. Under such a framework, there is little analytically to separate property from tort, contract, or other doctrinal rules that govern social and personal relationships. And without some substantive distinction among these areas, the question becomes whether property as a separate category serves any real function at all.<sup>75</sup> Indeed, legal realists Walter Hamilton and Irene Till famously described property as nothing more than “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”<sup>76</sup> Taken to its logical conclusion, the bundle theory strips property of any fixed or inherent meaning.<sup>77</sup>

To overcome this dilemma, the legal realists and their successors had to link the bundle theory to some core principle that, more or less, would normally be expected to exist in the relationships they categorized as property.<sup>78</sup> In this vein, many courts have seized upon four such principles, declaring that the full bundle of property in most circumstances includes the rights of exclusion, possession, use, and disposition.<sup>79</sup> These rights have an extensive history in American jurisprudence, predating both the bundle metaphor and the social-relations context in which the legal realists advanced it.<sup>80</sup> Nonetheless, one of these rights—the right to exclude others—has become the chief component of property in modern American thinking. Felix Cohen, for example, proposed “a realistic definition of

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<sup>74</sup> Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1086 (1984).

<sup>75</sup> See Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (indicating that “ultimate consequence” of this type of thinking is “that property ceases to be an important category in legal and political theory”).

<sup>76</sup> Walter H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R. A. Seligman & Alvin Johnson eds., 1937).

<sup>77</sup> See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) (“Labeling something as property does not predetermine what rights an owner does or does not have in it.”).

<sup>78</sup> See Cohen, *supra* note 73, at 378 (discussing the need to “get rid of the confusion of nominalism”).

<sup>79</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

<sup>80</sup> See, e.g., *Ex parte Law*, 15 F. Cas. 3, 7 (S.D. Ga. 1866) (No. 8126) (“Property is the right of any person to possess, use, enjoy, and dispose of a thing. . . . The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself.”) (quoting respectively *Wynehamer v. People*, 13 N.Y. 378, 433 (1856) and Grotius, book. 2, ch. 6, § 1); *Vallance v. Bausch*, 8 Abb. Pr. 368, 374 (N.Y. Gen. Term 1859) (“What other or further right of property is there or can there be, than the right of its free and exclusive use and enjoyment during life, with a right of free and absolute disposition.”). See also discussion *infra* Part III.A.2 (discussing these rights in context of property as a product of natural law).

private property in terms of exclusions which individuals can impose or withdraw with state backing against the rest of society.”<sup>81</sup> The Supreme Court has described the right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>82</sup> Thomas Merrill has gone even further, calling it “the sine qua non.”<sup>83</sup> Thus, while the bundle can be configured and reconfigured by the lawmaker to deal with the exigencies of any particular set of circumstances, at the end of the day, the bundle normally needs at least some exclusion right to qualify as property.<sup>84</sup>

It should be noted that not all of those who have advanced exclusion as the most significant element of property adhere to the bundle metaphor or its positivist viewpoint.<sup>85</sup> Even so, it seems logical that the prominence of the right to exclude corresponded with the rise of positivism and the bundle metaphor. If property really is a set of distinct right-duty relationships defined by the state, then the right to exclude would naturally achieve some primacy because it is the ingredient most infused with social meaning. As Adam Mossoff has explained, “[t]he social-relations view of the concept of property thus leads its advocates to identify the right to exclude as the essential element or ‘stick’ of property because this is the only formal element of this concept that reflects its social function.”<sup>86</sup> Exclusion touches the relational aspect of property to a greater degree than any of the other principles usually mentioned as composing the bundle. Moreover, this right to exclude others, created and enforced by the state, provides a certain value to the relationship described as property that does not exist where the exclusion right is absent.<sup>87</sup> In short, the right to exclude others is deemed essential because, by and large, it is this state-sanctioned exclusion that distinguishes a relationship as property in the first instance. For the modern positivist, where the law gives no such right or where there is no social context in which to implement it, property does not exist.

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<sup>81</sup> Cohen, *supra* note 73, at 378.

<sup>82</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

<sup>83</sup> Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

<sup>84</sup> *But see Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980) (rejecting the argument that constitutional property rights were infringed even while acknowledging that state “literally” had taken right to exclude).

<sup>85</sup> See Merrill & Smith, *supra* note 71, at 1890–91 (grounding the right to exclude in non-legal moral intuitions, rather than solely in legal institutions). See generally Merrill, *supra* note 83, at 734–54 (criticizing nominalism of bundle theory and arguing that exclusion is an essential element of property on other grounds).

<sup>86</sup> Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 396 (2003).

<sup>87</sup> See, e.g., *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456 (Fed. Cir. 1988) (stating that “the principal value of a patent is its statutory right to exclude”); *United States v. Williams*, 15 C.M.R. 241, 245 (C.M.A. 1954) (“[T]he right to exclude others from the use of property of any sort, real or personal, may well be deemed the chief ingredient of its value.”).

## 2. Property as Natural Right—Of Labor and Possession

Juxtaposed against the foregoing framework is an alternative theory of property, which also enjoys a long pedigree. In contrast to the positivist viewpoint outlined above, this alternate system views property as a natural institution that pre-exists and is independent of formal legal conventions. Aristotle, for example, viewed private property as an outworking of the natural moral order,<sup>88</sup> which had implanted in each individual a basic love of self.<sup>89</sup> Property helps to satisfy this natural self-love by encouraging the individual to look after his own affairs, maximize his own happiness, and derive additional pleasure by benefitting others with his possessions.<sup>90</sup> In short, property “satisfie[s] an innate human urge to possess.”<sup>91</sup> Centuries later, in response to Bonagrata’s positivist description of property, Pope John XXII suggested a divine source of this urge, arguing that private property was established by God in the initial state of nature.<sup>92</sup>

Building on these traditions, later theorists rooted property rights squarely within natural law. Perhaps the most famous of these theories, especially in American thinking,<sup>93</sup> is that developed by English philosopher John Locke. Like Pope John, Locke posited that property was a God-given right that existed in the state of nature apart from and antecedent to the formation of political society.<sup>94</sup> Although this divine grant initially gave the fruits of the earth to all humanity in common, the natural order also included a means by which persons might appropriate these common jointly held benefits for their own individual good.<sup>95</sup> For Locke, this means of acquisition rested in each person’s own labor.<sup>96</sup> Reminiscent of Aristotle’s relationship between property and the self,<sup>97</sup> Locke suggested that “every man has a *property* in his own *person*,” which “nobody has any right to but himself,” which includes “[t]he labor of his body, and the works of his hands.”<sup>98</sup> Thus, by laboring, an individual extends the scope of his or her property beyond himself or herself to reach the objects of his or her labor, removing them from the common and rendering them his or her

<sup>88</sup> See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 541 (2005) (discussing Aristotle’s conception of property).

<sup>89</sup> ARISTOTLE, *The Politics*, in THE POLITICS AND THE CONSTITUTION OF ATHENS 9, 36 (Stephen Everson ed., rev. student ed., Cambridge Univ. Press 1996).

<sup>90</sup> *Id.*

<sup>91</sup> Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT’L & COMP. L. REV. 201, 207 (2007).

<sup>92</sup> See TIERNEY, *supra* note 67, at 153–57 (discussing Pope John’s theory).

<sup>93</sup> See Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 155 (2002) (“[T]he imprint of Lockean ideas upon American conceptions of property is striking.”).

<sup>94</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (C. B. Macpherson ed., Hackett Publ’g Co. 1980) (1690); *id.* at 18–19.

<sup>95</sup> *Id.* at 18–19.

<sup>96</sup> *Id.* at 19.

<sup>97</sup> See Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 138 (1990) (noting that “Locke’s conception of property” was “rooted in human personality”).

<sup>98</sup> LOCKE, *supra* note 94, at 19.

own.<sup>99</sup> In Locke's own words, "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."<sup>100</sup>

Locke's conception of property enjoyed wide influence in the formative years of American law and politics.<sup>101</sup> For example, James Madison, in his 1792 essay concerning property, spoke of property both as an individual's "actual possessions" and as "the labor that acquires [his] daily subsistence."<sup>102</sup> Another celebrated example is Justice Paterson's 1795 opinion in *Vanhorne's Lessee v. Dorrance*, in which the jurist explicitly equated property with "the fruits of [an individual's] honest labour and industry."<sup>103</sup> Traces of this same theory can be seen in a number of nineteenth century decisions connecting property with the expenditure of labor,<sup>104</sup> and it has found some judicial acceptance more recently as well.<sup>105</sup>

Noting the influence of Locke's theory on American property jurisprudence, however, is not to say that the theory is without problems. Like the bundle theory of the legal realists, Locke's emphasis on labor raises some logical quandaries. As an initial matter, it is not entirely clear why an individual has property in his person or in the labor that flows from it. As Locke himself notes, mankind is the workmanship of God, and because of the divine labor expended in their creation, men and women "are his property, whose workmanship they are."<sup>106</sup> It is not self-evident, in light of this prior claim of divine ownership, why individuals can be viewed as having a property in their own persons. Moreover, even if we admit that each person has property in his labor, it is not obvious that the expenditure of that labor should extend the reach of that individual's property to things with which that labor is mixed. Why, instead, is the property not lost to the commons, rather than the commons appropriated

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 21.

<sup>101</sup> See Underkuffler, *supra* note 97, at 138 ("Locke's views exerted a powerful influence on the American Founders and on the early years of American jurisprudence.")

<sup>102</sup> James Madison, *Property*, in 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner, eds. 1987).

<sup>103</sup> *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).

<sup>104</sup> See, e.g., *Hetterman Bros. v. Powers*, 43 S.W. 180, 182 (1897) (holding that skilled laborers have property interest in label indicating their creation of a particular product); *Randol v. Scott*, 42 P. 976, 978 (Cal. 1895) (describing as "unjust" a forfeiture action brought by a lessor who received "a valuable property" resulting from the labors of the defaulting lessees); *Matsell v. Flanagan*, 2 Abb. Pr. (n.s.) 459, 461-62 (N.Y. Ct. Com. Pl. 1867) (invoking labor theory to protect trademarks and trade names); *Chappell v. Cady*, 10 Wis. 111, 114 (1859) (holding that bailee whose labor adds value to thing entrusted to him obtains lien rights in that thing). See also James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 929-38 (2006) (discussing use of Lockean labor theory by nineteenth century courts to create rights in occupational freedom).

<sup>105</sup> See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing Locke's theory in discussing property rights in trade secrets); *Washlefske v. Winston*, 234 F.3d 179, 184, 184 n.2 (4th Cir. 2000) (citing Locke's theory for proposition that "private citizens ordinarily have a constitutionally protected property interest in the wages earned from their labor under employment contracts").

<sup>106</sup> LOCKE, *supra* note 94, at 9.

via the labor? In the words of Robert Nozick's well-known query, "If I own a can of tomato juice and spill it in the sea so that its molecules . . . mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"<sup>107</sup> Nozick's hypothetical raises additional questions, as well: How much labor, and of what type, is necessary to create a property right? If nothing more is required to own the seas than pouring in a can of tomato juice, for example, then Locke's theory loses its moral sway.<sup>108</sup> Finally, as Carol Rose has pointed out, if we accept labor as the justification for property, we still have not defined the scope of the property rights established.<sup>109</sup> It is not necessarily manifest, to use Locke's own example, why cultivating a field bestows title to the field itself, rather than simply the crops produced by those actions.<sup>110</sup>

Just as the legal realists seized upon the right to exclude to overcome the logical hurdles of their bundle theory, many naturalists have seized upon possession—or more precisely, integrated possessory rights—to help answer the questions raised by the labor theory. As an initial matter, these scholars answer the question about ownership in one's labor by pointing out Locke's focus on self-preservation, both for the specific individual and the entire human race. After noting the divine workmanship that created mankind, Locke states: "Every one, as he is *bound to preserve himself*, and not to quit his station willfully, so by the like reason . . . ought he, as much as he can, *to preserve the rest of mankind*, and may not . . . take away, or impair the life, or what tends to the preservation of the life, liberty, health, limb, or goods of another."<sup>111</sup> Thus, for Locke, men and women do indeed belong to God, but they have received from him, as creator and owner, a moral command to preserve themselves and each other.<sup>112</sup> It is this obligation for preservation that leads to each individual owning his own labor, since labor is the mechanism by which such preservation can be accomplished.<sup>113</sup> Thus, for the Lockean, labor does not mean mere exertion or activity—such as pouring a can of tomato juice into the sea—but rather is understood as meaning the production of useful and valuable things that

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<sup>107</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 175 (1974).

<sup>108</sup> Cf. Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 733 (2003) (criticizing system of allocating property rights in internet domain names as rewarding "[a] trivial amount of effort" with "a very valuable" property interest).

<sup>109</sup> Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73–74 (1985).

<sup>110</sup> Boyce, *supra* note 91, at 224.

<sup>111</sup> LOCKE, *supra* note 94, at 9.

<sup>112</sup> See Mossoff, *supra* note 93, at 160 (discussing Lockean conception of self-preservation and its connection to labor).

<sup>113</sup> See *id.* See also LOCKE, *supra*, note 94, at 21 ("God and his reason commanded [man] to subdue the earth, i.e., improve it for the benefit of life, and therein lay out something upon it that was his own, his labour.").

serve to uphold and maintain an individual's own interest, and by extension the interests of mankind at large.<sup>114</sup>

This view of labor leads to a definition of property that promotes what we understand as rights of possession. The reason that an individual who cultivates a field is said to own that field is because it is her value-adding activity that accounts for the real worth of the field, which would be worthless apart from the things it could produce.<sup>115</sup> Put differently, the use of the field to create valuable commodities sets that field apart as valuable itself, and this value-adding use justifies the acquisition of the field by the user. To protect that acquisition, however, other rights must also be implied: For example, the right to transfer both the field and the things it produces, as well as the right to keep others from interfering with the value-adding means of production.<sup>116</sup> Taken together, these rights form the heart of the idea of property “as a unified whole of rights concentrated in the thing owned,”<sup>117</sup> rather than a bundle of separate rights focusing on social relationships. This group of rights ultimately can be viewed as giving the user of the field some sort of dominion and control over it, which goes by the shorthand term, “possession.”<sup>118</sup> And, for those in the Lockean tradition, this possession exists as a right of nature regardless of the existence of political society or the pronouncement of any positive regulation.

#### B. PROPERTY'S RELATIONSHIP TO SOCIAL AND POLITICAL STRUCTURES

In addition to the origins and scope of property rights, there has been much consideration of how property relates to social and political structures. This should be evident from the preceding discussions, where the differing views about property derive in some measure from differing associations between it and the context of human interaction. Although there are myriad dimensions to, and ideas about, this question, two are of particular significance to both American intellectual thought and the story of *Deadwood*: (1) property's relationship to the formation and functions of civil government; and (2) property's relationship to social and political power.

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<sup>114</sup> Mossoff, *supra* note 93, at 159–63. *See also* Chander, *supra* note 108, at 741–43 (linking Lockean concept of labor with value-adding activity).

<sup>115</sup> Mossoff, *supra* note 93, at 161.

<sup>116</sup> *See* Mossoff, *supra* note 86, at 402–03 (“The substantive role of acquisition, use and disposal derive from the fact that property is a consequent of the actions necessary to maintain life and liberty. The formal role of exclusion derives from the fact that property cannot do what it is supposed to do—maintain one's life and liberty—if the owner cannot prevent other people in society from appropriating the property.”).

<sup>117</sup> Eric Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. UNIV. L. REV. 187, 193 (2004).

<sup>118</sup> *See* BLACK'S LAW DICTIONARY 1281 (9th ed. 2009) (defining “possession” in terms of dominion and control).

### 1. *Property and Civil Government*<sup>119</sup>

That property serves as a powerful force in the formation of civil government is an idea deeply rooted in the American psyche. Indeed, many scholars have observed that protecting private property was one of the primary purposes of the men who created our constitutional system.<sup>120</sup> The delegates to the Constitutional Convention were in widespread agreement that the goal of the new government should be the protection of liberty and property, and at least three delegates openly described the protection of property as the superior concern.<sup>121</sup> Of those three, Gouverneur Morris of Pennsylvania,<sup>122</sup> pronounced property to be “the main object of Society” and indicated that individuals gave up the state of nature solely “for the sake of property which could only be secured by the restraints of regular Government.”<sup>123</sup> In his essay on property a few years later, James Madison expressed a similar sentiment: “Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”<sup>124</sup> American jurists concurred, incorporating these concepts into the case law of the young nation.<sup>125</sup>

Just as he had influenced early American thinking about the origins of property, John Locke served as one of the primary sources for these intellectual connections between property and government. According to Locke, all persons initially lived in a state of nature apart from any organized political society.<sup>126</sup> In this state of nature, each person enjoyed the freedom to decide for himself or herself how to arrange his or her own affairs, including the use and disposition of his or her person and possessions.<sup>127</sup> So long as individuals remained in the state of nature, however, this freedom lacked stability because every individual enjoyed the exact same freedom. None had authority to settle disputes or regulate

<sup>119</sup> The discussion in this section is based on Michael B. Kent, Jr., *From “Preferred Position” to “Poor Relation”*: *History, Wilkie v. Robbins, and the Status of Property Rights Under the Takings Clause*, 39 N.M.L. REV. 89, 94–100 (2009).

<sup>120</sup> See *id.* at 94 n.44 (citing various sources).

<sup>121</sup> See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 3–4 (1985).

<sup>122</sup> According to McDonald, the other two were John Rutledge of South Carolina and Rufus King of Massachusetts. *Id.* at 3–4, 295–96.

<sup>123</sup> *Proceedings of Convention, June 19–July 13, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 524, 533 (Max Farrand ed., 1966).

<sup>124</sup> Madison, *supra* note 102, at 598.

<sup>125</sup> See, e.g., *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (identifying the security of property as “a primary object of the social compact,” because it “was one of the objects, that induced [people] to unite in society” in the first place); *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 556 (La. 1815) (Derbigny, J.) (indicating that “protect[ing] the citizens in the enjoyment of their property” was one of the “first principles of the social compact”); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 276 (1828) (Green, J.) (stating that “security of private property is one of the primary objects of Civil Government”).

<sup>126</sup> Locke, *supra* note 94, at 8.

<sup>127</sup> *Id.*

conduct for the mutual benefit of all.<sup>128</sup> For this reason, the rights enjoyed in the state of nature were always in danger, being “constantly exposed to the invasion of others.”<sup>129</sup> To obtain greater security for these rights, people united together “for the mutual *preservation* of their lives, liberties and estates,” which Locke called “by the general name, *property*.”<sup>130</sup> Thus, for Locke, the primary purpose for which individuals create and submit to formal government “*is the preservation of their property*.”<sup>131</sup>

Locke’s view of government promoted the rights and choices of individual citizens, and property rights took center stage. Another philosophical tradition prevalent during America’s formative years—republicanism—placed a greater emphasis on the community of which those individuals were a part. Nonetheless, property played a central role in this theoretical system as well. Republican philosophy promoted the idea that government should advance the best interests of the entire political community, which occasionally necessitated the subordination of individual interests to the needs of the commonwealth.<sup>132</sup> This idea depended on the concept of public virtue, the ability of every citizen to give “himself totally to the good of the public as a whole.”<sup>133</sup> Virtue, in turn, required that no citizen should be dependent upon another, lest he be corrupted by that dependency and act in the interests of those to which he was beholden, rather than in the common interest.<sup>134</sup> For republicans, a significant mechanism for fostering this type of virtue was private property.<sup>135</sup> Property ownership advanced virtue by instilling values important to the preservation of autonomous and responsible citizens: “an attachment to community, self-sufficiency, stability, and wisdom.”<sup>136</sup> As one commentator has explained: “Only a person who was independent in this sense, who could transcend selfish considerations and resist manipulation by men ambitious for power, was truly free politically to act for the good of the commonwealth.”<sup>137</sup> Thus, whether viewed through the Lockean system of individual rights or the republican system of community wellbeing, private property has been strongly connected to our views about government since the beginnings of the American republic.

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<sup>128</sup> *Id.* See also *id.* at 66.

<sup>129</sup> *Id.* at 66.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See, e.g., MCDONALD, *supra* note 121, at 70–71. See also 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 67 (7th ed. 1991).

<sup>133</sup> MCDONALD, *supra* note 121, at 71.

<sup>134</sup> See *id.* at 70–71.

<sup>135</sup> See *id.* at 74–75.

<sup>136</sup> DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 13 (2d ed. 2005).

<sup>137</sup> 1 KELLY, HARBISON & BELZ, *supra* note 132, at 39.

## 2. *Property and Power*

Property also has been characterized by its strong relationship to social and political power. Indeed, this idea is implicit in the philosophical systems already discussed. Whether one identifies with a liberal or communitarian viewpoint about government, there is much truth in Charles Reich's statement that "property guards the troubled boundary between individual man and the state."<sup>138</sup> Equally true, regardless of whether one views property in positivist or naturalist terms, is that property often tends to the troubled boundary between an individual and his neighbors. The ability of an individual to control valuable or value-producing objects necessarily speaks to the power that individual has vis-à-vis others.

Looking first at its relationship to external power, Anglo-American thought has long associated property with the ability to be independent from outside coercion. In his *Commentaries on the Laws of England*, for example, William Blackstone described property in terms that made its connection to personal freedom obvious. Property consisted of "the free use, enjoyment, and disposal of all [of an individual's] acquisitions, without any control or diminution, save only by the laws of the land."<sup>139</sup> Thus, property bestows on its owner a unique sphere of sovereignty that allows him or her a certain amount of liberty. To quote Reich again:

Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. . . .

. . .

Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.<sup>140</sup>

Importantly, the circle drawn by property not only protects the owner from governmental intrusion, but also allows him or her to enlist the government in helping ward off intrusions by other private actors.<sup>141</sup> Where the owner can be sure that this sphere of sovereignty will be recognized and enforced, property fosters self-sufficiency, predictability, and order by "afford[ing] day-to-day protection in the ordinary affairs of life."<sup>142</sup>

In addition to protecting against external power, however, property also enables the individual to exert power himself or herself. By creating this

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<sup>138</sup> Reich, *supra* note 70, at 733.

<sup>139</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, \*138 (Childs & Peterson 1860).

<sup>140</sup> Reich, *supra* note 70, at 771.

<sup>141</sup> R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 5 (2d ed. 2006).

<sup>142</sup> Reich, *supra* note 70, at 771.

sphere of sovereignty, property vests the owner with authority to decide whether, how, and when to utilize and exploit the thing that is owned.<sup>143</sup> The exercise of this power, in turn, can have profound effects on the rights of others. Property includes, to varying degrees, the ability to influence resource allocation, economic production, the actions of other persons, and the mechanisms of governance. Abuse of this ability can easily lead to a myopic view that ignores, or in some cases exploits, the rights and interests of other persons or groups. Large aggregations of property can make this abuse easier to undertake and more intense in its effects.<sup>144</sup> Property, then, might be viewed as a double-edged sword, providing the means to resist power and, at the same time, the means to exert it.

### C. PROPERTY'S RELATIONSHIP TO PERSONHOOD AND COMMUNITY

This dual nature of property also suggests that it speaks, in some manner, to its owner's persona, character, and identity. Inasmuch as property bestows power on its owner, whether that power is defensive or offensive in nature, it relates to who he is as a person. So, too, does the manner in which he chooses to exercise that power, or whether he even exercises it at all. These ideas lead to the final category in our theoretical excursion—the relationship of property to personhood and community.

Modern discussions of this subject conventionally begin with German philosopher Georg W.F. Hegel. Hegel's thought describes "a person" as "a consciously free will . . . consist[ing] in a formal, simple and pure reference to itself as a separate and independent unit."<sup>145</sup> A chief problem for a person, however, concerns how this will is manifested. Because the individual lives in a world of physical objects external to his will, he needs some objective means of expressing that will. Otherwise, he is at risk of being only "something subjective," which ultimately "contradicts and destroys" his nature.<sup>146</sup> To achieve full realization, the person must express his will in some material way through these external objects,<sup>147</sup> and the mechanism by which that expression occurs is property.<sup>148</sup> By exerting power over the external object, the person gains possession of it, and this possession results in "a tangible existence" by which the abstract will becomes "an actual will."<sup>149</sup> For Hegel, this self-actualization is a necessary

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<sup>143</sup> See Michael B. Kent, Jr., *Pavesich, Property and Privacy: The Common Origins of Property Rights and Privacy Rights in Georgia*, 2 J. MARSHALL L.J. 1, 21 (2009) (describing property rights in terms of these attributes).

<sup>144</sup> Cf. Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 877–78 (1932) (discussing property in context of industrialization).

<sup>145</sup> GEORG H.W. HEGEL, *PHILOSOPHY OF RIGHT* ¶ 35, at 2 (S.W. Dyde, trans., Cosimo, Inc. 2008) (1821).

<sup>146</sup> *Id.* at 3.

<sup>147</sup> *Id.* at 4.

<sup>148</sup> *Id.* at 6–7.

<sup>149</sup> *Id.* at 7.

first step in the process of becoming a fully developed individual, which starts with a person's relation to external things and progresses to higher relations with other persons—specifically in the group context of family and state.<sup>150</sup> For Hegel, then, property is an essential expression of personhood and individuality that leads to higher and better expressions of groups and communities.

In American thinking about property, Hegel's theory has found its most prominent voice in Margaret Jane Radin's *Property and Personhood*.<sup>151</sup> Radin argued that Hegel's system offered three primary insights relating to property regimes. First, Hegel's view of self-actualization through the material world underscored not only the "ongoing relationships" between persons and their physical environments, but also "that these relationships can be very close to a person's center and sanity."<sup>152</sup> Second, Hegel's concept of this self-actualization as leading to fuller relationships with other persons implied that "certain groups are likely to be constitutive of their members in the sense that the members find self-determination only within the groups."<sup>153</sup> Finally, Hegel's theory supported the intuitive notion "that certain kinds of property relationships can be presumed to bear close bonds to personhood."<sup>154</sup>

For Radin, these insights suggested that property be considered along a continuum, receiving increasing protection as one progressed from one end to the other.<sup>155</sup> At the lower end were "fungible property" rights, identified with those objects, such as money, that are "perfectly replaceable with other goods of equal market value."<sup>156</sup> At the higher end were "personal property" rights, identified with things like a wedding ring or a family home, the loss of which "causes pain that cannot be relieved by the object's replacement."<sup>157</sup> In such a system, the level of protection afforded to any given property interest will depend to some degree "on an internal quality in the holder or a subjective relationship between the holder and the thing."<sup>158</sup> This is so because, in certain contexts, property can be more than just an object or a set of rights. It also can be something that is almost "part of oneself,"<sup>159</sup> that is inextricably wrapped up in "human flourishing."<sup>160</sup>

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<sup>150</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 972–77 (1982) (discussing Hegel's theory); Peter G. Stillman, *Hegel's Analysis of Property in the Philosophy of Right*, 10 CARDOZO L. REV. 1031, 1035–41 (1989) (discussing Hegel's theory).

<sup>151</sup> Radin, *supra* note 150.

<sup>152</sup> *Id.* at 977.

<sup>153</sup> *Id.* at 978.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 986.

<sup>156</sup> *Id.* at 959–60.

<sup>157</sup> *Id.* at 959.

<sup>158</sup> *Id.* at 987.

<sup>159</sup> *Id.* at 959.

<sup>160</sup> See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904 (1987) (linking "personhood" to a "conception of human flourishing").

From this idea that certain types of property can help define individual identity, it is but a small leap to consider how property might also shape the identity of an entire community. Indeed, Radin allowed for this when she mentioned that property claims by “a minority group or some group outside the mainstream of American culture” might be stronger because the claimed property rights would be “more clearly necessary to their being able to constitute themselves as a group and hence as persons within that group.”<sup>161</sup> Other scholars have extended this idea to argue for a “peoplehood” view that protects property based on the degree to which it serves to identify a particular group, such as Native Americans.<sup>162</sup> Property plays a vital role in identifying not only the individual self, but also the community in which that individual participates because the two, ultimately, are inseparable.<sup>163</sup>

#### IV. PROPERTY THEORY IN ACTION: DEADWOOD

The importance of property to identity is evident in the lives of those who reside in Deadwood. This relationship between ownership and self should not be surprising. Property’s promise draws the initial settlers to Deadwood. Safeguarding the fruits of this promise brings the community together in the search for law’s protection. Through this process, individual identity lessens and collective identity takes shape. Growing pains between Deadwood and the outside world follow, which in large measure mirrors the theoretical struggle between the Lockean and positivist conceptions as to the nature of property. The wild card is Hearst. This Part explores the unfolding of these events in *Deadwood* through the lens of the various property theories discussed above. What emerges is a compelling picture as to why freedom and identity depend on meaningful property protections. In an integrated world, the right of property can never be absolute. Civilization demands that human beings give up some of their natural property rights for the security of having the greater whole of their rights protected by broader society. This exchange works both ways, however. When the governing collective breaches its side of the promise by failing to protect a basic level of individual property interests, both the individual and society suffer tremendously. From this perspective, *Deadwood* is simultaneously a story of hope and warning—of success and failure. In keeping with Milch’s grand design for *Deadwood*, this duality also tells the story of the universal human condition.

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<sup>161</sup> Radin, *supra*, note 150, at 1013.

<sup>162</sup> See, e.g., Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 344–64 (2008).

<sup>163</sup> See Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 139 (2009) (“Each of our identities is inextricably connected in some sense with others with whom we are bound as members of one or typically more communities.”).

A. THE WORLD WITHOUT LAW: *DEADWOOD* MEETS JOHN LOCKE

What is property? Are the naturalists correct that it is an organic right that pre-exists civil government? Or are the positivists correct that it is a creature of positive law made necessary to regulate social relationships? The initial settlers in *Deadwood* would seem to fall squarely on the natural rights side of this debate. In the early days of the camp, gold claims are established by a simple precept: you work it, you own it. There is no law; there is no government. There is, however, property, created by the sweat and equity of those who got there first. The idea that property originates from labor, not law, obviously reflects a Lockean perspective, one that Swearingen makes explicit early in the show's first season. Noting the increasing presence of newcomers to the camp, Swearingen complains: "Where were they when Dan and me were chopping trees in this gulch? Hands all blistered. Bucktooth fuckin' beavers rolling around in the creek. Slappin' their tails in the water like we was hired entertainment."<sup>164</sup> For Swearingen, the value-adding labor of those who created the camp simultaneously created the property being sought out by the later interlopers. This was accomplished without law, government, or any formal society.

A similar spirit of freedom, self-reliance, and self-interest animates a conversation between Swearingen and gold prospector Ellsworth in one of the very first scenes in Season One:

ELLSWORTH: Now, with that limey damn accent of yours, are these rumors true that you're descended from the British nobility?

AL: I'm descended from all them cocksuckers.

ELLSWORTH: Well, here's to you, your majesty. I'll tell you what. I may have fucked my life up flatter than hammered shit, but I stand here before you today beholden to no human cocksucker. And workin' a payin' fuckin' gold claim. And not the U.S. government sayin' I'm trespassin' or the savage fuckin' red man himself, or any of these limber dick cocksuckers passin' themselves off as prospectors had better try and stop me.

AL: They better not try it in here.

ELLSWORTH: Goddamn it, Swearingen. I don't trust you as far as I could throw ya, but I enjoy the way you lie.

AL: Thank you, my good man.

ELLSWORTH: You're welcome! You conniving, heavy thumbed motherfucker.<sup>165</sup>

<sup>164</sup> *Deadwood: Reconnoitering the Rim*, *supra* note 14.

<sup>165</sup> *Deadwood: Deadwood*, *supra* note 1. Blogger Chris Moeller helpfully explains the real meaning of this passage:

ELLSWORTH: Are you descended from British royalty, Al?

Ellsworth's labor—his “workin’ a payin’, fuckin’ gold claim”—creates an expectation in his mind that the land upon which he works belongs to him alone—not the Sioux (the legal owners of the land), the federal government, or other prospectors in the area. Significantly, Ellsworth's claim is not simply to the gold he brings out of the ground; rather, in Lockean fashion, that claim extends to the ground itself, over which Ellsworth asserts the dominion and control associated with integrated possessory rights. This mindset of acquisition and possession through personal conquest provides a living example of Locke's state of nature in action. Property rights come from labor, not law.

Other early settlers in Deadwood share Ellsworth's conception of the origins and nature of property. The most obvious manifestation of this community consensus is the respect afforded by everyone to the organic claim system that arises in law's absence. No one contests Ellsworth's asserted ownership of the land that he works. No one contests that the plot of land Bullock and Star seek to purchase belongs to Swearengen, implicitly because Swearengen was among the pioneers to forge the camp out of the “nothing” that was there before. The negotiations over the purchase and sale of the plot presuppose that whatever agreement is reached will be honored. More remarkably, even after murdering Alma's husband over a dispute involving the Garrett gold claim, Swearengen still recognizes that the best way to reacquire what had been his is through bargaining, not violence. When bargaining fails, Swearengen gives up the chase, foregoing a vast amount of wealth in the process.

Why does Swearengen give up the chase? Because Swearengen, who epitomizes Deadwood by being its *de facto* leader, has invested himself in the idea that labor creates property, and that ultimately means honoring the

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SWEARINGEN: Yes.

ELLSWORTH: I come from humble stock myself, but I've worked pretty hard to get what I have.

SWEARINGEN: I know that's true.

ELLSWORTH: Here's to you, Al.

SWEARINGEN: Cheers.

The Chris Moeller Archives, ‘*Cocksucker*’ University: *The Deadwood-To-English Dictionary* (Feb. 24, 2006, 5:43 PM), <http://chrismoeller.blogspot.com/2006/02/cock-sucker-university-deadwood-to.html>. This humorous “translation” demonstrates that *Deadwood*'s heavy use of profanity serves a compelling purpose. In the famous case of *Cohen v. California*, Justice Harlan observed the link between language and emotional expression: “[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.” *Cohen v. California*, 403 U.S. 15, 26 (1971). In the context of *Cohen*, saying “Fuck the Draft” expressed a qualitatively different thought than simply saying “The Draft is Bad” or “I Hate the Draft.” The “fuck” changed the contours of the underlying idea being expressed. Similarly, any attempt to sanitize the dialogue in *Deadwood* strips the language of much of its original intention. Profanity oftentimes conveys meaning, and this expressive function has a large place in the Lockean self-identity of the people of Deadwood. See also MILCH, *supra* note 3, at 19 (“The prospect of freedom drew so many characters to the gold strike camps. They wanted a liberation from the restrictions of language just as they wanted a liberation from politics.”).

possessory rights others have in the things one desires to obtain for oneself. This investment has social implications, to be sure. Gold is the engine behind the camp's growth, and this type of development can only exist where market transactions are certain and settled. Accordingly, rules and norms must be obeyed. In the final analysis, the violent and incorrigible Swearengen seems to acknowledge property rights for their own sake, which is what one would expect from a man who views property as a naturally occurring right resulting from industry and persistence. Protection of one's own rights necessitates some recognition of the rights of others. And protecting the possessory rights acquired by one's labor is of utmost importance to the continued preservation of self that, according to Locke, gives an individual rights in his or her labor to begin with. Thus, from a Lockean perspective, the honoring of these customs is really about protecting one's own property and therefore serves as a bridge between the state of nature and the beginnings of a formal social compact.

Season One of *Deadwood* depicts the maneuvers behind this transition. Two different stories unfold. First, there is the internal narrative: How do those in Deadwood interact—and, more importantly, transact—with each other in a world without law? Second, there is the external narrative: How do those in Deadwood approach their dealings with the powerful outside interests that threaten the camp's cherished autonomy? These dual storylines fittingly merge at the season's end as Deadwood goes through the motions of erecting an “informal municipal organization” to “persuade those territorial cocksuckers in Yankton that we're worthy enough to pay them their fucking bribes.”<sup>166</sup> Much like the decision to acquit Jack McCall for Wild Bill Hickok's murder, the choice to form a quasi-government is an internal decision compelled by external considerations. Even in the lawless wilderness, Deadwood is never truly alone.

While the enthusiasm for this move toward the illusion of a social compact is tepid at best, the leaders of Deadwood recognize the inevitability of government. The idea of Deadwood—the world without law—works best when meaningful economic opportunity is available to all. When this condition exists, self-interest produces a rough conformity that benefits the camp's pioneers. But what happens when the saturation point is reached and there are no more plots to buy or gold claims to develop through one's labor? Many arrive too late to enjoy the spoils of the initial financial windfall. The interest of this later group is not to safeguard the fruits of its (or anyone else's) labor, but rather to appropriate—via politics, violence, or any other means—the wealth of those who came before.

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<sup>166</sup> *Deadwood: No Other Sons or Daughters*, *supra* note 10.

Bullock, especially, seems to understand the danger that others may become emboldened to take away what he considers to be his. When Hickok observes that “pretty quick you’ll have laws here and every other damn thing,” Bullock replies, “I’d just settle for property rights.”<sup>167</sup> In other words, Bullock, the former marshal and future sheriff, seeks from the law a guarantee that the property he accrues through hard work will be protected from attack. His statement tracks Madison’s thinking, highlighted in Part III about the primary role of the state: “Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”<sup>168</sup>

The paradox of Deadwood is this: its property and freedom become threatened by the very independence and lack of government that drew in most of its early settlers. Locke theorized that rights held in the state of nature are “constantly exposed to the invasion of others” due to the lack of enforcement mechanisms.<sup>169</sup> Autonomy has its limits. This fundamental truth applies with special force to Deadwood, which (a) finds itself surrounded on all sides by bigger and stronger neighbors and (b) possesses property in the form of gold that contains enormous value to the outside world. These basic facts ensure that, at some point, the external narrative of the *Deadwood* story will consume the internal narrative. Milch describes the progression:

Deadwood, like other gold rush towns, was a kind of reenactment of the founding of our country. When gold was discovered, there was a rush toward a new territory, followed by a collective regression from society—thus, the Wild West. And later, there was a regeneration of society seemingly *de novo*, from new. That happens in the hopes that the contradictions of the old social order will finally be resolved. But once the news comes of a strike, settlement patterns immediately change. Waves of prospectors and parasites, merchants, fortune hunters, displaced persons, and government bureaucrats rush in to this new space, bringing with them all the old forms of civilization from which the first wave of adventurers had fled.<sup>170</sup>

The world without law cannot last long. Either law will arrive, or lawlessness will collapse on itself.

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<sup>167</sup> *Deadwood: Here Was a Man*, *supra* note 15.

<sup>168</sup> Madison, *supra* note 102, at 598. See also MILCH, *supra* note 3, at 119 (“Law is a fiction the members of society rely on to protect their lives and to preserve the order they have already built. Cops preserve order while pretending to be interested in the law.”).

<sup>169</sup> LOCKE, *supra* note 94, at 66.

<sup>170</sup> MILCH, *supra* note 3, at 41, 43.

Recognizing their vulnerability, the leaders of Deadwood make the fateful, albeit reluctant, choice to embrace the concept of government. Once this decision to organize is made, it is clear that law will soon be coming to Deadwood. This impending presence of formal laws and institutions promises to test the labor-based view of property around which the camp has been structured. A new era of Deadwood is set to begin.

#### B. THE RUMOR OF LAW: DEADWOOD VS. THE POSITIVISTS

If Season One of *Deadwood* helps demonstrate, however imperfectly, Lockean ideas about property and the social compact, then Season Two suggests what might happen when the social compact actually begins to take shape. Uncertainty about the future sets the residents of Deadwood on a journey that ironically ends with their decision to acquire the trappings of the very order Deadwood was designed to avoid. Although this decision initially has an air of insincerity about it, there seems to be an understanding on the part of both those inside and outside the camp that some type of genuine government must come. Deadwood's residents reluctantly acquiesce to this realization as the best hope for securing their property and, with it, their freedom. Those outside of Deadwood on whom the promise of stability and government ultimately depend have different understandings. Season Two of *Deadwood* thus shows the tensions that arise at the birth of the social compact, as the state of nature begins to give way to the state.

As noted above, Season Two revolves largely around the actions of Hugo Jarry and Francis Wolcott. In many ways, these characters and their actions can be viewed as representing a more positivist outlook than is revealed by Deadwood's leaders. Whereas Swearingen looks back to days when the first few settlers fashioned the camp out of the surrounding wilderness, Jarry and Wolcott see the camp as a future part of the Dakota Territory and the United States, with all of the social implications that such a relationship entails. Both men, of course, are corrupt exploiters of the first order, and it is clear that getting the camp's gold into their hands (or the hands of those whose bidding they do) is of primary importance. But this should not completely overshadow the larger reality. Once legitimated, Deadwood will serve several important functions, from a strategic military outpost to a burgeoning center of "civilization" in the heart of Indian country. And the gold, too, will serve important functions, bolstering the financial stability and influence of the territory, serving as a catalyst for investment and economic activity, and providing the means by which the camp might indeed be transformed into a town. What difference does it make, these characters might ask, if a few pockets happen to get lined in the process? For them, the gold in Deadwood ultimately means progress.

Thus, with the prospect of law still in nascent form, the gold to which the camp owes its existence is evolving, below the surface, from a thing acquired and possessed via the hard work of autonomous individuals into a complex engine of social change and transformation.

For this transformation to take place, however, the property rights in the gold cannot remain stagnant. For Jarry and Wolcott to achieve their ends, the gold claims must be redefined, or at least be susceptible to redefinition, to accommodate the new order. Consider again the public notice posted by Jarry:

NOTICE!

As to ownership of the claims in the newly constituted County of Lawrence, as annexed to the Dakota Territory, a presumption of legitimate title shall obtain for claims filed, or staked according to custom, and worked actively and continuously prior to amendment of the treaty with the Sioux Nation, September 1876. This presumption shall be subject to qualification, according to mitigating facts. New title will be awarded on claims to which title is denied, at set prices, via lottery, as conducted by the county commissioner, at times and locations to be publicly announced.<sup>171</sup>

Although it seems to acknowledge Deadwood's preexisting property regime, the notice simultaneously suggests that any rights acquired under that regime are subject to alteration by the territorial government. Property, in Jarry's view, is not some indissoluble right of the natural order. Rather, echoing a positivist viewpoint, Jarry's notice implies that property is a construction of the law that is designed to meet specific societal contexts. As those contexts change, so too does property. Property is, in other words, a bundle of legal rights, and the existence and definition of that bundle depend on how the law is structured and restructured over time. In this view, as the unruly mining camp of Deadwood transforms into a civilized member of the Dakota Territory, it is only to be expected that the rights and relationships that make up the bundle will undergo some transformation as well.

To some degree, this seems to be a natural outworking of Locke's social compact. Once individuals consent to unite in political society, they necessarily must be viewed as surrendering some of the privileges and freedoms they enjoyed apart from that society. Locke himself noted that once an individual consents to government, he also submits his person and possessions to the positive legislation adopted by that government. "[I]t would be a direct contradiction," Locke wrote, "for anyone to enter into

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<sup>171</sup> *Deadwood: Complications (Formerly "Difficulties")*, *supra* note 29.

society with others for the securing and regulating of property; and yet to suppose his land, whose property is to be regulated by the laws of the society, should be exempt from the jurisdiction of that government, to which he himself, the proprietor of the land, is a subject.”<sup>172</sup> To escape the evils presented by the state of nature, one must give up some of the freedoms of the state of nature; to do otherwise would be a denial of the social compact itself. Applied to *Deadwood*, if the camp wants the benefits of territorial membership, then it must live by the rules the territory promulgates, including those regulating its gold.

The independent residents of Deadwood naturally chafe at this idea, and their discomfort is only made worse by the maneuverings of Jarry and Wolcott, who use the law not only to regulate the prior relationships but also to turn them completely on their heads. The threat posed by Jarry’s notice—that the law can and will reshape property in ways that contradict earlier expectations—creates panic and further instability. Wolcott exploits this climate of uncertainty to work a redistribution of the gold claims, securing them for his employer, Hearst, at a fraction of what they would be worth in a more settled market.<sup>173</sup>

However, it is important to note that Jarry and Wolcott do not overtly steal the claims. They do not trespass, or ride in with armed gunmen. Even in the context of their exploitative activities, these men attempt to attain their goals through recognized channels. Ultimately, they purchase the gold claims and do not resort to taking them. Thus, unlike many of the legal realists for whom property is an empty concept, Jarry and Wolcott tacitly acknowledge that property means something. It is malleable, to be sure, and can be changed by the state as the state deems best, but property also means something. Jarry and Wolcott’s purchase of the claims suggests that, while many of the expectations of the camp’s early residents will be up for grabs once law officially arrives in Deadwood, the residents’ right to exclude others from their property will largely remain intact. This concern

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<sup>172</sup> See LOCKE, *supra* note 94, at 64.

<sup>173</sup> One intended lesson of this story arc is to highlight the disjunction between law and order. In Season One, order exists in Deadwood without the presence of law. In Season Two, the fear of law creates disorder and confusion. Milch explains:

A misapprehension that can distort one’s understanding of Deadwood—and the world in which we live today—arises from the way that law and order are commonly conjoined. The phrase “law and order” can easily create the impression that these two very different social phenomena arise from a common human impulse, or that they are somehow one and the same. Law and order are not the same. It is common for us to try to retrospectively apply the sanction of law to the things we do to maintain order. Our desire for order comes first, and law comes afterward.

MILCH, *supra* note 3, at 121. The people of Deadwood seek the protection of law to protect the old order they established in law’s vacuum, that is, the Lockean transformation from the state of nature to the social compact. Jarry, on the other hand, sees law as a positivist tool to create a new order based on new understandings. In both cases, the end is the creation of a recognizable order. Law is merely the means of accomplishing this objective.

for exclusion seems to underlie not only the strategy to purchase the claims (rather than simply squat on them), but also to do so as quickly as possible. Inasmuch as the right to exclude essentially characterizes property from a social-relations point of view, to deny such a right would be to admit that the gold claims were not property. And that admission would mean that the claims were valueless, both to the initial settlers and to anyone who came after. At the same time, it is concern over this same right to exclude that pushes Jarry and Wolcott to act quickly, procuring the claims before annexation occurs and formal mechanisms for enforcement exist. Thus, Jarry and Wolcott appear to reflect the modern perspective about property: it is a set of right-duty relationships between persons, defined primarily by the ability of some of those persons to exclude others from engaging in certain conduct or behavior. So long as these exclusion rights exist, the relationship qualifies as property, regardless of how else it might change.

As this positivist mindset creeps into Deadwood, its residents get more than they bargained for. The move toward government was designed to help secure their property interests and way of life, but those interests now face new threats as a result of the government's different understanding of property and the abuse of power that the gold has helped create. The instability created by these competing ideas about property prompts a massive transfer of the gold, and as the gold changes hands, so does the balance of power inside the camp. In response to the change of power, Deadwood residents adjust and formulate a new plan of action by placing property interests center stage. Not all of the gold belongs to Hearst yet. The Garrett claim remains in Alma's hands, providing a counterbalance to the Hearst machine. Moreover, learning from their experience with the positivists, Deadwood's leaders understand that the claims now held by Hearst are also subject to redefinition if the political and social context changes yet again. Coalescing around the strength provided by the Garrett claim, Swearingen and the others seize the opportunity to create their own brand of apprehension by spreading rumors that the camp might be annexed to Montana instead of Dakota. Such a move would potentially jeopardize Hearst's interests and deprive Dakota of the social and political influence of the gold mining operations. The immediate result of this ploy is a promise of official elections, by which Deadwood might better achieve a political voice and regain some modicum of autonomy. Beyond that, however, these struggles over property and power continue to transform Deadwood; the identities of its residents and the town itself are changing.

### C. THE BIRTH OF LAW: POWER AND PERSONHOOD IN DEADWOOD

In Season Two, the arrival in Deadwood of George Hearst, who now owns the bulk of the town's gold claims, heightens the already elevated

tensions and serves as a focal point for the residents' anxiety. Hearst's presence, which coincides with the dawning of a formal legal regime, also provides a compelling illustration of the link between property and power. It is Hearst's ownership of other gold claims located elsewhere that gives him the political sway he enjoys over Dakota's territorial leaders, who not only post the aforementioned notice that destabilizes the claims in Deadwood, but who also help rig the promised elections according to Hearst's designs.<sup>174</sup> It is his newfound ownership of the gold in Deadwood itself that supplies the audacity for Hearst's actions once present in the town, allowing him to interfere with the freedom of the press, murder those who stand in his way, and even pressure the previously untouchable Swearingen. Hearst is a personification of what can happen when property, and the sovereignty and influence that it helps create, are abused. Moreover, the vastness of Hearst's property only creates a larger sphere of sovereignty and influence that makes his efforts to manipulate and ignore the rights of other people easier to accomplish. This truth is recognized by Bullock's deputy sheriff, who angrily labels Hearst's agent Wolcott, "Mr. Amalgamation and capital."<sup>175</sup> In Hearst, the worst potential of property as a tool for tyranny is on full display.

But the promise of property as a positive force for freedom is equally exhibited as the show progresses into its final season. As noted earlier, until the very end of Season Three, one claim remains outside the grasp of Hearst's control—that of Alma Garrett—and it is this claim that ultimately provides whatever liberty the town continues to enjoy. As the only landowner in Deadwood whose holdings can in any way compete with Hearst's, Alma begins to exemplify the town's deeply held desire for independence. Her gold claim provides Alma with a sphere of sovereignty that, if not exactly comparable to Hearst's, nonetheless prevents him from exercising complete control.<sup>176</sup> Alma's claim represents the freedom that property provides, a freedom from undue interference resulting from a circle of control that allows people to go about their ordinary lives.<sup>177</sup>

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<sup>174</sup> The bastardized version of the Golden Rule has figurative and literal meaning here: "He who has the gold makes the rules." See, e.g., STACY D. PHILLIPS, *DIVORCE: IT'S ALL ABOUT CONTROL—HOW TO WIN THE EMOTIONAL, PSYCHOLOGICAL AND LEGAL WARS* 20 (2005) (stating that "[h]e who has the most gold rules").

<sup>175</sup> *Deadwood: Amalgamation and Capital* (HBO television broadcast May 1, 2005). Interestingly, Wolcott responds to the deputy's question—"It's all fuckin' amalgamation and capital, aint it, Wolcott?" with a series of questions that suggest his own recognition that property can be viewed in both positive and negative terms: "Mr. Utter, are you a student of Hume? Smith? A disciple of Karl Marx?" *Id.* These questions also suggest that there may be more similarity between Hearst and the early residents of Deadwood than the deputy cares to admit—that is, both the pioneers and Hearst were drawn to Deadwood by the hope of utilizing property—and the sovereignty it produces—for their own individual purposes.

<sup>176</sup> *Id.*

<sup>177</sup> See Reich, *supra* note 70, at 771.

The rest of the town, understanding the significance of her claim, gradually begins to identify with Alma. Swearengen, who earlier ordered the murder of her husband and contrived for her departure, now views Alma's presence as the town's last, best hope against the threats from Hearst. As Swearengen tells her, "[Y]our staying suits my purpose."<sup>178</sup> Later, when Alma is shot at by Hearst's men, Swearengen becomes her rescuer, leaping from a balcony to escort her to safety inside his saloon.<sup>179</sup> Additionally, Swearengen orders one of his confidants to guard Alma's adopted child.<sup>180</sup> Upstairs in his office, an exchange between these former enemies reveals a growing respect and appreciation:

AL: Easily as it could have been some hooplehead, not knowing who or what he was shooting at, it's likely prudent to credit you as the target.

ALMA: Yes.

AL: If I'd been aimed at, of course dozens of authors would need be considered.

ALMA: Yes.

AL: So I know someone's in there, vary your replies, such as, "Yes...and I'd be one of them."

ALMA: That wouldn't be very grateful of me.

AL: It's horrible being shot at. Never gets no better.<sup>181</sup>

As Swearengen leaves the room, Alma explicitly thanks him, and later acknowledges to one of his prostitutes that she is "very grateful to be under Mr. Swearengen's protection."<sup>182</sup>

The events surrounding the shooting is one of a myriad of examples in *Deadwood* of how property helps to mold not only the identity of its owners, but also the identity of the larger community in which they interact. In Hegelian fashion, the residents of Deadwood seem to find initial actualization by relating to their physical environments. Gold is the catalyst that draws them together, and it becomes a part of who they are as persons. This extends from the community's individual relationships with this external commodity and begins to bind them together in deeper ways. The gold not only becomes a part of each individual's own personal story, but it also entwines those stories with the stories of others, forming a common narrative in the process. In *Deadwood*, we see the personhood theory of property in action—the residents' individual relationships to property become bound up with the individuals themselves, and those individuals

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<sup>178</sup> *Deadwood: E.B. Was Left Out*, *supra* note 32.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Deadwood: A Constant Throb*, *supra* note 50.

<sup>182</sup> *Id.*

eventually become bound up with each other, forming a larger collective also linked to (and by) property. Thus, new identities begin to take shape.

In *Deadwood*, property simultaneously serves as a means for promoting both individual freedom and community welfare. The prospect for wealth and autonomy first drew people to Deadwood, and as these people are increasingly connected through their shared pursuits, their social relationships become richer. The wilderness is transformed into a camp, which in turn becomes a town. The promise of personal prosperity enables a more communitarian outlook.<sup>183</sup> Bullock, who comes to the camp as an individualistic entrepreneur, ends up as the town's pillar of stability and justice. Calamity Jane, a dysfunctional drunk who arrives with Wild Bill Hickok (seemingly to escape conventional society), becomes the camp's Florence Nightingale during a smallpox epidemic. Alma, who at one point complains that "my life is living me, and soon will be over, and not a moment of it will have been my own,"<sup>184</sup> nonetheless remains in Deadwood and uses her position to form a bank for "the good of the camp."<sup>185</sup> Her second husband, Ellsworth, explains to Alma's adopted daughter that her mother is a "service to the camp, turning her mine into houses and the like getting built, businesses begun. Some for people that'll never know her name."<sup>186</sup> These examples provide a budding virtue of the type promoted by the civic republicans—in other words, the ability of individual persons to give of themselves for the greater good. Just as republican thinking viewed property as essential to the fostering of such virtue, in *Deadwood* property is found at the center of the camp's virtuous transformation.

Even so, the wheels of corruption set in place by Hearst and his followers eventually take their toll. At the end of the series, Alma finds another husband murdered and her gold claim in Hearst's hands. Not all, however, is lost for Alma and her neighbors. Despite the threat of immense violence that will soon engulf Deadwood, Hearst, having finally secured all of the property that interests him, leaves town, tacitly turning his attention to other pursuits. Property has once again defined Deadwood's course. At the end of the day, the town is left in peace, with the bulk of its property and freedom intact. What is more, Deadwood is now a community of individuals that, while still seeking to advance their own respective

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<sup>183</sup> As explained by one commentator: "In *Deadwood*, when people get together, social life becomes rationalized along economic lines, people seek ways in which to specialize their service, and the social life of the camp moves, sometimes in fits and starts, toward peace." Jordan J. Ballor, *A Law Beyond Law: Life Together in Deadwood*, RELIGION & LIBERTY, Summer 2007, at 44–5. The examples of Seth Bullock, Calamity Jane, and Alma Garrett discussed in this paragraph are all raised in Ballor's article. *See id.*

<sup>184</sup> *Deadwood: Boy-the-Earth-Talks-To*, *supra* note 41.

<sup>185</sup> *Deadwood: Something Very Expensive* (HBO television broadcast Apr. 10, 2005).

<sup>186</sup> *Deadwood: Full Faith and Credit* (HBO television broadcast July 2, 2006).

interests, seek, however imperfectly, to look after each other's interests as well.

## V. CONCLUSION

David Milch calls *Deadwood* a story about “men coming together out of the most limited motives to create something larger than themselves.”<sup>187</sup> Consider the case study of the character of Ellsworth, who is a microcosm of the entire *Deadwood* experiment. In the show's inaugural episode, Ellsworth colorfully asserts to Swearingen, “I stand here before you today beholden to no human cocksucker.”<sup>188</sup> It is hard to conceive of a more forceful statement of personal autonomy. The source of this autonomy is Ellsworth's possession of a “payin' fuckin' gold claim” that belongs to him alone.<sup>189</sup> Emphasizing his Lockean sense of independence, Ellsworth goes on to proclaim his property and his labor off-limits to all outsiders: “[N]ot the U.S. government sayin' I'm trespassin' or the savage fuckin' red man himself or any of these limber dick cocksuckers passin' themselves off as prospectors had better try and stop me.”<sup>190</sup> Ellsworth belongs to himself and no one else.

But just as *Deadwood* matures from camp to town through an increase in communal ties, Ellsworth abandons his radical individualism by purposefully binding himself to other people in deep and meaningful ways. His marriage to Alma Garret was briefly referenced in Parts II and IV. Left unstated were the circumstances that brought the two together. Impregnated by the married Bullock, Alma faces the social scorn of having a baby out-of-wedlock. To preserve Alma's virtue in the eyes of the community, Ellsworth offers to marry her, expecting nothing in return.<sup>191</sup> He thereafter becomes surrogate father to Sofia, a young orphan adopted by Alma after bandits murder her parents. The metamorphosis of a man “beholden to no human cocksucker” to selfless husband and father serves a metaphor for the process of civilization-building that so intrigues Milch. Ellsworth

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<sup>187</sup> MILCH, *supra* note 3, at 135.

<sup>188</sup> *Deadwood: Deadwood*, *supra* note 1.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> As *Deadwood* matures, so do its customs. Ellsworth's overture arguably demonstrates the civilizing effect that property has on individuals and communities. Milch expands on this idea by tracing the growth of marriage to the evolving needs of a society seeking to obtain order:

I think marriage is a name given to a series of accommodations of convenience that are repeated enough times that their utility gains some independence. And so we say that it's right for a man and woman to marry, and we recognize their union as productive for the stability of the society. Marriage is a foreign condition in *Deadwood*, but as the town becomes dependent not exclusively on gold, but on a whole series of collateral arrangements that are secondary to it, what happens is that institutions can organically develop, of which marriage is one.

MILCH, *supra* note 3, at 99.

surrenders part of himself to become a functioning part of something bigger. He is then murdered because of this decision.

In Ellsworth's growth and tragic death, the best and worst of America are on full display. Milch explains:

None of us want to realize that we live in Deadwood, but all of us do. That is the point of the exercise. After first recoiling in horror, we come to love the place where we live, in all of its contradictions. To love not just America, but the world of which America is simply the most recent form of organization. American materialism, in all of its crassness and extravagance, is simply an expression of the fact that we have organized ourselves according to a more energizing principle than any civilization that came before us.

I'd guess I'd paraphrase Jefferson, that with all its horrors, Deadwood is the last, best chance of all human cocksuckers.<sup>192</sup>

This "energizing principle" of which Milch writes is the American consensus that gold is property and has value so as to serve as the means of exchange for other types of property.<sup>193</sup>

It is gold that originally draws people to Deadwood. It is gold that motivates a group of strangers to come together to form a town out of the mud. It is gold that produces stability in the absence of law. It is gold that motivates Ellsworth to work a gold claim, Bullock to open a hardware store, Swaengen to operate a saloon, Alma to form a bank. It is gold that prompts the people of Deadwood to form a government to protect one another's interests—property and otherwise. It is gold that spurs progress and brings the hope of law. Conversely, it is also gold that drives the ruthless and relentless Hearst. It is gold that leads the scores of prostitutes in Deadwood to sell their bodies several times a day. It is gold that buys off the corrupt politicians, thus revealing the limits of formal legal regimes. It is gold that murders Ellsworth and forces Alma to relinquish her claim with a gun to the back of her head. Yet it is ultimately gold that yields a reluctant peace among divisive factions who hate one another passionately.

What then are the lasting lessons of *Deadwood*? As an initial matter, the series reinforces the characterization of property noted earlier in this Article: in *Deadwood*, property is "a vital need of the soul."<sup>194</sup> *Deadwood*, of course, is fiction, but it provides a realistic glimpse of the human

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<sup>192</sup> *Id.* at 213.

<sup>193</sup> *Id.* at 41 ("Everyone in town takes up a position in a social order that is based on the premise that gold has value. . . . The agreement to believe in a common symbol of value is really a society trying to find a way to organize itself in some way other than, say, hunting or killing. I read somewhere that baboons cannot move in groups of more than forty because they have to be able to see their leader. Humans need to see only the *totem* of the leader. If you can symbolize the leader, you can begin to organize in larger groups. You are no longer confined to tribes.").

<sup>194</sup> TIERNEY, *supra* note 67, at 157.

condition. Human beings tend toward the establishment of some system of ownership, some way of separating what things belong to what person, some method of determining “mine and thine.”<sup>195</sup> And as *Deadwood* suggests, this impulse toward property does not appear to depend on formal legal regimes. History is replete with examples of men and women forming property arrangements in the absence of law or recognized enforcement mechanisms. Two famous illustrations of this process in action include the nineteenth century whaling industry<sup>196</sup> and the American gold miners on whom *Deadwood* is based.<sup>197</sup> In both instances, entire property systems arose organically through custom and tradition. Scholars have also noted other areas where custom and social norms continue to play significant, albeit more subtle, roles in shaping property expectations.<sup>198</sup> In the world of *Deadwood*, which is consistent with Aristotlian theory, property is a natural result of human nature, which occurs whether political society exists or not.

Similarly, *Deadwood* also suggests that property’s independence from law and government can be a positive attribute. As noted above, property provides stability and order apart from law, serving as a backdrop to the usual affairs of everyday living, even when the law seems complex or chaotic. Property serves as a source of power, enabling its owner to resist tyranny and interference, and in some cases even from the state itself. Property also serves to animate the human spirit. In *Deadwood*, it is not law that lures the settlers, nor is it government that stimulates their creative efforts. Rather, they are motivated primarily by the prospect of acquiring and controlling an asset that will help them better control their own destinies. And in the process of obtaining this asset, community and civilization are born. James Kent, the famous American jurist, vividly touched upon this aspect of property:

The sense of property is graciously bestowed on mankind for the purpose of rousing them from sloth, and stimulating them to action . . . . The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts,

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<sup>195</sup> See Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 1 (2006).

<sup>196</sup> See *Ghen v. Rich*, 8 F. 159, 160–62 (D. Mass. 1881) (allocating property rights in a whale according to the custom of whaling industry); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 83 (1989) (stating that evidence from whaling industry “strongly supports the proposition that property rights may arise anarchically out of social custom” rather than solely from state action).

<sup>197</sup> See Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850–1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 LAW & SOC’Y REV. 235, 236 (1976) (discussing system of property developed by gold miners in 1850s California).

<sup>198</sup> See, e.g., Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQ. L. 5, 6 (2009) (identifying adverse possession, nuisance, and law of waste as areas where custom influences legal decisionmaking).

the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.<sup>199</sup>

In this view, echoed by the story of *Deadwood*, it is not law that begets property, but property that begets law (and much more).

The view that property exists apart from the law, however, should not be confused with the idea that property rights are in all respects absolute. That property pre-exists political society does not mean that political society is not beneficial. As Locke theorized, property without law can be a risky proposition. The social compact is designed ultimately to provide better protection and stability for each individual's rights (property and otherwise), and this is accomplished by means of each individual sacrificing some of his autonomy for the good of the collective. For law to accomplish its purpose, there are times when the individual must yield. On this score, the positivists clearly have a point. Property does serve a social function, and this function requires that it be susceptible to some degree of regulation and refinement. *Deadwood's* fictional portrayal of George Hearst illustrates that property can be used as much for tyranny and oppression as for liberty and edification, and the law certainly has a role in preventing the former while promoting the latter.

The law of eminent domain provides a less dramatic, but still useful, example of how the social compact works in action.<sup>200</sup> When the state needs property to provide some service for the general welfare, such as a public road, the rights held by the individual property owner must give way. Because government exists for the purpose of securing the rights of all citizens, each citizen must pay his fair share of the collective burden. It would be inequitable to allow the landowner, whose own property benefits from similar roads and other services, selfishly to thwart a project necessary to promote commerce and safe travel for the whole community. At the same time, the state's power to redistribute property to the public depends on the payment of just compensation to the owner, which operates as the mechanism by which his property, though taken, is nonetheless protected.

Another lesson from *Deadwood*, however, is that the state, itself vulnerable to corruption, might not always live up to the bargain. Indeed, the state may act in ways that betray the purposes underlying its creation, which in turn may lead to increased frustration, distrust, and instability on the part of those it was designed to protect. A real world example of sorts is

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<sup>199</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 320 (O.W. Holmes ed., 12th ed. 1873).

<sup>200</sup> See, e.g., *Parham v. Justices of Inferior Court of Decatur Cnty*, 9 Ga. 341, 344–45 (1851) (discussing eminent domain in terms of the social compact).

provided by the case of *Kelo v. City of New London*,<sup>201</sup> where the state utilized the law to work a result considered by many to be not only unjust, but also a denial of first principles.<sup>202</sup> The tradeoff of Locke's social compact, the reason that the residents of Deadwood relinquish their autonomy, is the securing of what each citizen already believes to be his or hers. The purposes for which government is created thus act as a limit on the state's ability to reshape those interests. *Deadwood* colorfully shows the dangers that can arise when the state exceeds that limit and ignores the objectives it was designed to fulfill.

Just as law should keep in view the goals it was designed to achieve, *Deadwood* suggests that it would also do well to recognize the powerful role property plays in shaping persons and communities. A legal regime that too quickly overlooks the interconnection between persons and the things they hold dear may ultimately fail in its larger purposes. The plaintiffs in *Kelo*, for example, did not appear to be economic holdouts—that is, they were not exercising monopoly power to leverage exorbitant prices for commodities they actually were willing to sell. Rather, it seems that the *Kelo* plaintiffs challenged the condemnation of their homes because they attached a different, and perhaps greater, value to those homes than the market recognized.<sup>203</sup> The popular outrage over *Kelo* had as much to do with the idea that “one's home is one's castle” as it did with government overstepping its bounds.<sup>204</sup> As Eduardo Penalver has explained:

[P]eople do really think of their homes, however humble, as their castles. . . . To fail to treat someone's home with the respect that it deserves is to seriously insult their sense of dignity and self-worth. Far more than they expect to be free from any state interference in their use and enjoyment of their homes, people expect their homes and their homeownership to be treated with the respect and dignity appropriate to the significance it has in their lives.<sup>205</sup>

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<sup>201</sup> *Kelo v. City of New London*, 545 U.S. 469, 469 (2005) (holding that because the economic benefits gained by the community when the city used its eminent domain power to transfer property from one private owner to another constituted a “public use,” the city did not violate the Fifth Amendment).

<sup>202</sup> See Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's “Summer of Scrutiny,”* 59 ALA. L. REV. 561, 609 (2008) (“For many, *Kelo* represented an alarming exemplar of the ability of special interests to capture governmental decisionmaking power and use it to violate the cherished right of private property. *Kelo* breached [the] ‘social compact’—government invaded the right of private property for the benefit of a private party that happened to be a big business.”). See also Sandefur, *supra* note 195, at 2 (describing *Kelo* as “the result of a crisis in American political philosophy”).

<sup>203</sup> See *Kelo*, 545 U.S. at 475 (“[Petitioner Susette Kelo] has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles . . . has lived in the house since they married some 60 years ago.”).

<sup>204</sup> See Eduardo M. Penalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2975 (2006).

<sup>205</sup> *Id.*

*Deadwood* demonstrates that property is, to varying degrees, bound up with our identities as persons (individually) and as people (collectively), and this is one of the many considerations that law should take into account.

But this seems to bring us to a final, perhaps unsettling, lesson. The interrelationship between property and law is complex, with many moving pieces and many valid points and counterpoints. Property has both naturalist and positivist attributes, it both pre-exists and coexists with the state, it is about economic power and personal identity, it supports both an individualist and communitarian mindset. Accounting for all of these strands in a balanced way is a lot to ask of legal institutions, especially inasmuch as the strands are often in competition with one another. *Deadwood* suggests that, while law is certainly a component piece in the puzzle of human relations, it alone cannot do all that we ask of it.<sup>206</sup> Law is not a panacea for all of the world's evils; it cannot always fix the competing tensions of human interaction. Moreover, law can be utilized for evil itself. And this brings us full circle. The camp of Deadwood was created without the benefit of law, arising from pre-legal impulses and desires. And the camp ultimately responds to those that would do it harm by appealing to something beyond the law. Recall Bullock's letter to the mother of the murdered Pasco who was left dead in the street with a knife sticking out of his chest. In response to Hearst's violence, a violence that the official legal regime leaves unpunished, the town leaders decide to publish the letter in the local newspaper. Swearingen later questions the objectives behind this plan, describing himself as "mystified I was moved to endorse it."<sup>207</sup> His old friend and thespian, Jack Langrishe, replies: "Mystified, Al, at proclaiming a law beyond law to a man who's beyond law himself? Its publication invoking a decency whose scrutiny applies to him as to all his fellows. I call that strategy cunningly sophisticated . . ."<sup>208</sup> This may be the ultimate lesson of *Deadwood*: law can be a blessing, but the human condition requires more.

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<sup>206</sup> Cf. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 811 (2006) (intimating that American desires for law are too ambitious).

<sup>207</sup> *Deadwood: Unauthorized Cinnamon*, *supra* note 48.

<sup>208</sup> *Id.*

