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Getting Real, Getting Personal: Fictions and Realities of Property Across Borders (Review of Lionel Shriver, *Property: Stories Between Two Novellas* and Ayelet Waldman, *Love & Treasure*)

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BOOK REVIEW

GETTING REAL, GETTING PERSONAL: FICTIONS AND REALITIES OF PROPERTY ACROSS BORDERS

PROPERTY: STORIES BETWEEN TWO NOVELLAS. BY LIONEL SHRIVER. NEW YORK, NY: HARPERCOLLINS, 2018. PP. 317. \$26.99.

LOVE & TREASURE. BY AYELET WALDMAN. NEW YORK, NY: ALFRED A. KNOPF, 2014. PP. 335. \$26.95.

*Reviewed by Jorge L. Contreras**

There is a long-running debate among American property scholars whether the law of property is, and should be, concerned primarily with authority over *things* or whether it really relates to relationships among *people*. The former camp, which has its origins in the earliest legal conceptions of property, was first challenged in the twentieth century by proponents of the emerging legal realism movement. The realists, inspired by the rights-based classification system of Wesley Hohfeld,¹ conceptualized property law as defining a “bundle of rights” among legal actors. As argued by Arthur Corbin in 1922, “‘property’ has ceased to describe any res, or object of sense, at all, and has become merely a bundle of legal relations – rights, powers, privileges, immunities.”² This “bundle of rights” understanding supplanted earlier views of

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1. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

2. Arthur L. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922).

property law without major opposition for three quarters of a century. But beginning in the 1990s, scholars including James Penner, Thomas Merrill, and Henry Smith began to challenge the realist view, seeking to return property to its roots as a law of “things.”³ Today, the debate between these opposing theoretical camps continues.⁴

As a complement to more customary legal accounts, fiction can sometimes open useful windows onto legal structures and the ways that individuals perceive them. As law professor Richard Weisberg explains, fictional depictions of people facing legal rules, predicaments, and institutions are beneficial to lawyers, courts, and society:

[S]tories provide sources of legal understanding unavailable elsewhere; their writers’ enhanced appreciation of the language and psychology of nonlawyers uniquely democratized law and illuminated the struggles and the ambitions of men and women who never see a law-school classroom, people with whom lawyers will be constantly working throughout their careers and about whom judges will be rendering decisions whose real-life effects their lofty opinions sometimes ignore.⁵

Thus, Weisberg and others in the “law and literature” movement view literary works as sources of *information* about public attitudes toward law and legal institutions that can help practitioners and judges operating within those institutions. This function underlies Dean John Henry Wigmore’s early twentieth century effort to compile a list of “legal fiction” that no lawyer can “afford to ignore.”⁶

3. See, e.g., J. E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711 (1996); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

4. See, e.g., Katrina M. Wyman, *The New Essentialism In Property*, 9 J. LEGAL ANALYSIS 183 (2018) (summarizing current status of the “new essentialism” movement in property law scholarship).

5. Richard H. Weisberg, *Wigmore and the Law and Literature Movement*, 21 L. & LITERATURE 129, 133 (2009).

6. See John H. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574, 575 (1908); Weisberg, *supra* note 5 (commenting upon and updating Wigmore’s list); Jorge L. Contreras, *Science Fiction and the Law: A New Wigmorean Bibliography*, 12 HARV. J. SPORTS & ENT. L. (forthcoming 2022) (commenting on Wigmore’s bibliography and adopting its format to a different genre).

But the study of fiction by legal scholars can yield further dividends. Fiction not only informs legal readers about public attitudes toward law, it also allows legal scholars to observe the nature of those attitudes in settings that range far beyond the case reports, statutes, and administrative documents that represent the mainstay of legal analysis. Literary explorations offer views into the legal matters that arise in everyday life but which do not result in litigation or regulation. As a result, scholars can gain valuable insight from fiction into the quotidian, non-litigious interactions of individuals with the law and legal institutions, and in so doing enrich their understanding of the law and its place within society.

With this in mind, fiction concerning property can serve as a rich source for scholarly investigation. Notions of property have long pervaded works of fiction, from the grail quest⁷ to “The Gift of the Magi”⁸ to the pseudo-factual reality show *Flip This House*.⁹ Even children’s literature is rife with property-based conflicts and tensions, from the intentional trespasses of Goldilocks¹⁰ to the postwar attitudes toward ownership reflected by Dr. Seuss.¹¹ From our earliest days, we are steeped in stories revolving around the acquisition, and loss, of property. For these reasons, Lionel Shriver’s collection of short fiction—*Property: Stories between Two Novellas*¹²—and Ayelet Waldman’s novel *Love & Treasure*¹³ are particularly worthy of attention. Each of these works sheds new and interesting light on assumptions about property across

7. The quest for the Holy Grail, a legendary cup associated with Jesus Christ, is a recurring theme in medieval, Arthurian and Romantic literature. *See, e.g.*, RICHARD BARBER, *THE HOLY GRAIL: IMAGINATION AND BELIEF* (2004).

8. O’Henry, *Gifts of the Magi*, N.Y. SUNDAY WORLD (Dec. 10, 1905) (the touching story of young lovers who each sell something of value to themselves to buy a gift for the other).

9. *Flip This House* (A&E, 2005-09) (American reality television series about the rapid purchase, renovation, and sale of residential real estate for investment). *See also Flip That House* (TLC, 2005-08). Not surprisingly, both shows were canceled following the 2008 mortgage crisis and housing crash.

10. *See, e.g.*, John Robinson, *Goldilocks, Aragorn, and the Essence of Property*, 22 INDEP. REV. 403, 406-08 (“Goldilocks is not commonly read as a powerful pro-private-property tract, but the tale as a whole would be incomprehensible without a notion of property as an institution that excludes nonowners in some way from the thing owned.”).

11. *See* Jorge L. Contreras, *No Matter How Small . . . Property, Autonomy and State in Horton Hears a Who!*, 58 N.Y. L. SCH. L. REV. 603 (2014) (identifying property law themes in the well-known Dr. Seuss story).

¹² Lionel Shriver, *Property: Stories between Two Novellas* (2019).

¹³ Ayelet Waldman, *Love & Treasure* (2014).

national and cultural boundaries and raises questions about the place of property in shaping the human experience.

In two novellas and ten short stories, Shriver, an award-winning novelist and cultural critic,¹⁴ explores the impact of various forms of personal and real property—a sculpture, a tree, a townhouse, even a tube of Chapstick—on the lives and relationships of her all-too-human characters. In each of these tales, the laws and assumptions of property flow quietly beneath the sometimes quirky, sometimes touching, and sometimes tragic currents that shape her characters' lives.

The twelve works in *Property* span the Atlantic, taking place largely in the United States and the United Kingdom, with some detours to more far-flung locales. This juxtaposition of locations, and the attitudes toward property that are exhibited in Shriver's characters, establish an interesting comparative exercise. They invite the reader to question whether Shriver's views are rooted in "American" ideals of acquisitiveness, or whether these attitudes toward owning things are more universal attributes of the human character (a question further pressed by Waldman in *Love & Treasure*, discussed below).

In the epigraph of her book, Shriver announces the scope of her project and the lens through which she wishes the reader to view it—quoting E.M. Forster's 1926 essay "My Wood,"¹⁵ she asks, "If you own things, what's their effect on you?" Shriver's fictions are far from didactic yet, taken as a whole, they offer keen insight into the multifaceted ways in which property affects us all, and in which ways of thinking about property influence our thoughts about ourselves and one another. As such, property scholars and lay readers alike will benefit from her artful depictions of property in life.

Take, for example, "The Standing Chandelier," the novella that opens the book. The protagonist, Jillian Frisk, is an eccentric, aging, slightly unhinged artist whose lifelong friendship with Weston—

14. Shriver is the author of twelve prior novels, the winner of the 2005 Orange Prize for Fiction, and a National Book Award finalist. See Stephen McCauley, *Money Can't Buy Love, but it Can Buy goods – and in These Stories, Lots of Trouble*, N.Y. TIMES (May 21, 2018) (reviewing LIONEL SHRIVER, *PROPERTY: STORIES BETWEEN TWO NOVELLAS* (2018)). For a discussion of the controversy surrounding Shriver's cultural criticism, see *infra* note 21 and accompanying text.

15. E.M. FORSTER, *My Wood*, in *ABINGER HARVEST* 22, 23(1926).

college sweetheart, occasional lover, longtime tennis partner—is threatened by Weston’s new girlfriend Paige. Jillian first experiences a twinge of jealousy when Weston informs her that he has been teaching Paige to play tennis. “You’re trying to replace me,” she charges. He responds, “You and I aren’t exclusive, you know.”¹⁶ Predictably, Paige does slowly displace Jillian in Weston’s life, and Jillian responds in kind.

She creates an object—a sculpture—imbued with herself. It is a six-foot tall, inverted chandelier/candelabra welded together and wired with hundreds of tiny lights. Affixed to its metallic limbs is an oddball assortment of personal mementoes: a bird’s skull, a troll doll, a kazoo, and more personal artifacts like girl scout badges, strings from an old tennis racket and a pair of extracted wisdom teeth. When Jillian unveils the assemblage for Weston he admires it, but it does not derail his engagement to Paige. So, in an act of extreme generosity—or is it spite?—Jillian makes a wedding gift of the unusual sculpture.

A year passes and Jillian has only fleeting contact with Weston, whose new spouse has forbidden him from maintaining any relationship with her. Jillian tries to move on with her own life, and sends Weston an email requesting the chandelier back. To her surprise, the couple have become attached to the strangely totemic object; they refuse to return it and Jillian is left without recourse.

The story, of course, is not about the ownership of an object or the irrevocability of an executed gift. It is about people and the fraught, shifting, possessive relationships among them. From the outset, the three characters are engaged in a triangular contest of ownership, not of objects, but of one another. Paige tells Weston that Jillian “acts as if she owns you”.¹⁷ Yet Paige eventually wrests control of Weston away from Jillian and makes him her own. The chandelier, embodying so much of Jillian’s persona, is at first hers, but she conveys it to Weston and Paige, who refuse to relinquish dominion over it—“a single disparity distinguished the two squared-off factions: he and Paige had custody of it, and [Jillian] didn’t.”¹⁸

¹⁶ SHRIVER, *supra* note 12, at 13.

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 78.

But what does the chandelier represent after Weston breaks off his twenty-five-year friendship with Jillian? Shriver explains, “Without relationship, there is no society. The ties between the two parties had been severed. All that remained was stuff.”¹⁹ In Shriver’s world, lifeless, inanimate things, like shipwrecks washed up on a beach, are the detritus of human relationships.

To the afflicted individuals, these empty hulks of human interaction continue to evoke the relationships that once were. Shriver’s characters “would all three continue to pretend that the chandelier was a symbol, when really it had become a thing. [Jillian] wanted the thing. Weston wanted the thing. Improbably, even Paige wanted the thing. A thing of which possession was tenths, like most of one’s belongings.”²⁰ Jillian melodramatically declares that Paige views the chandelier as a scalp, a gruesome trophy of her conquest.²¹ Thus, through some combination of habit, stubbornness, and spite, each character yearns to possess the contested object imbued with a person’s essence. But even Jillian, who poured her own DNA (literally) into the grotesque, inverted chandelier, cannot reclaim it as her own.

Shriver ingeniously employs the rhetoric of property to describe things that are, by their nature, impossible to own. In

¹⁹ *Id.*

²⁰ *Id.* at 79.

21. Shriver deliberately employs the racialized language of conflicts between white settlers and the native peoples of North America twice in the novella: here, and earlier, when Jillian requests that Weston return the chandelier, explaining, “I would like it back. I don’t mean to be an *Indian giver*.” *Id.* at 71 (emphasis added). Shriver highlights the problematic usage as Jillian’s email continues, “Paige wouldn’t approve; I think that expression is no longer PC, though I don’t know another expression that has replaced it.” *Id.* Both usages of these racialized phrases are by Jillian, a character that Shriver portrays as unbalanced and “under-socialized.” *Id.* at 32. Though, even Paige eventually succumbs to the utility of the term “Indian giver.” *Id.* at 73 (“Oh, and I like her saying she doesn’t ‘mean to be’ an Indian giver, when that’s exactly what she’s being.”). In some ways, the unfiltered Jillian may be a stand-in for Shriver herself, who was widely criticized in 2016 for a speech in which she diminished the significance of cultural appropriation and defended her depiction of a Black character in a prior novel. See Lionel Shriver, Keynote Speech, Brisbane Writers Festival (Sept. 8, 2016) in *I hope the concept of cultural appropriation is a passing fad*, GUARDIAN (Sept. 13, 2016), <https://www.theguardian.com/commentisfree/2016/sep/13/lionel-shrivers-full-speech-i-hope-the-concept-of-cultural-appropriation-is-a-passing-fad> [https://perma.cc/A7U6-STRV]; Rod Nordland, *Lionel Shriver’s Address on Cultural Appropriation Roils a Writers Festival*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/books/lionel-shriver-cultural-appropriation-brisbane-writers-festival.html> [https://perma.cc/4RJ3-5LKP].

doing so, she latches onto the intuitive public understanding of property that Professors Michael Heller and James Salzman observe in their recent book *Mine!*.²² But as Shriver's stories unfold, the reader comes to realize that our notions of ownership extend well beyond the realm of tangible artifacts and real estate. Far more fundamentally, ideas about property inform (infect?) our thinking about relationships of all kinds—not just authority over things, but among individuals and institutions. With apologies to the classic Charlton Heston film, Shriver shows us that, as we always suspected, property is *people!*²³

In “The Standing Chandelier,” the characters struggle for emotional control over one another, a control that is symbolized by a physical work of art. In “The Subletter,” the novella that concludes the collection, Shriver conceptualizes the protagonist's internal struggle through a different property metaphor. Sara Mosley is an American journalist living in Belfast during the “Troubles.” She writes a Saturday column titled “Yankee Doodles” for the *Belfast Telegraph*. Above all else, Sara prides herself, after eleven years, on being an outsider's insider—the American who knows the local Belfast scene, with its daunting politics and personalities, better than any other non-native.

After a decade in Ulster (the local term for Northern Ireland, which Sara regularly, and ostentatiously, uses), Sara feels that it is time to move on, and accepts a one-year stint at an NGO in Bangkok. To do this, however, she must sublet her Belfast flat, which occupies the top floor of a ramshackle mansion in a decaying part of town. Though Sara merely rents the lodgings, she has proprietary feelings about them. As she learned as a child, “You could own something just by taking care of it”.²⁴ Thus, Sara considers the flat to be “*her house*.” The fact that the deed was not filed in her name was a technicality, nay, an economy. It saved on taxes.”²⁵ Given this setup, it is hardly surprising that conflicts develop between Sara, a punctilious neat-freak, and Emer Branagh, the free-spirited American memoirist to whom she sublets the flat.

²² Michael Heller & James Salzman, *Mine!: How the Hidden Rules of Ownership Control our Lives* (2021).

²³ *SOYLENT GREEN* (Metro-Goldwyn-Mayer 1973) (directed by Richard Fleischer).

²⁴ SHRIVER, *supra* note 12, at 267.

²⁵ *Id.* at 267 (emphasis in original).

The plan is simple. While Sara takes a trip home to Boston, Emer will move in and get settled. When Sara returns to Belfast to make final preparations for her relocation to Bangkok, Emer will find alternate accommodation. And when Sara leaves for Thailand, Emer will occupy the flat for the year that Sara is away. Of course, the best laid plans seldom work out, and Sara has second thoughts about the Thai gig. Which is a problem because Emer has already moved into the flat and is, it turns out, a slob. Grudgingly, Sara agrees to share the flat while Emer is finding alternate arrangements (a protracted process), and the predictable conflicts erupt.

“The Subletter” is not, however, a mere *Odd Couple*-style farce involving comically incompatible roommates. Yes, Sara is an admitted “ledger keeper[] and lunch bill tallier[]”²⁶ and her innate proprietary leanings come to a boil as Emer helps herself to Sara’s coffee, canned goods, and printer paper with nary a thought of reimbursement. Worse still, Emer fails to pay her share of the rent. But conflicts over grocery items and the flat itself (Emer colonizes Sara’s bedroom with an ersatz Buddhist shrine) are not at the heart of the story. Rather, it is Emer’s gradual encroachment on Sara’s intellectual territory.

The defining feature of Sara’s persona is her status as *the* recognized American authority on all things Ulster. And while few seem to value her expertise as much as Sara herself does (her editor at the *Telegraph* doesn’t seem to care whether she continues her “Yankee Doodles” column when, and if, she returns from Bangkok), she imbues her status with a property-like character.

To all appearances, her possessions were few. She didn’t own a microwave or washer. Her computer was a dinosaur . . . On the other hand, she did own all of Northern Ireland. Which might have come as a surprise to the other people who lived there. Yet recognition that her personal deed to Ulster was ludicrous didn’t compromise the sensation in the slightest. *Ownership is as much state of mind as legal entitlement.*²⁷

Thus, when Sara learns that Emer has maneuvered to take over her column at the *Telegraph* (“I’ve another American girl” her editor admits, “Fresh perspective—stranger in a strange land sort

²⁶ SHRIVER, *supra* note 12, at 243.

²⁷ *Id.* at 263-64 (emphasis added).

of thing, all wide eyed and what's-this,"²⁸) she breaks. Her rivalry with Emer over the flat and its contents suddenly spills over into the imagined property that really matters to Sara—her social status, her reputation, her *identity*. Shriver captures Sara's sentiments in terms of property and her instinctive need to protect what she believes to be her own.

It does not matter that, unlike groceries or a sublet flat, there is no legally cognizable property interest in one's status as a uniquely knowledgeable person on a particular topic. Sara conceptualizes her public reputation as a hard-earned form of property, like the polished linoleum floors over which her mother exercised dominion during her childhood, notwithstanding her father's legal title to those floors and everything else in the house.²⁹

For Sara Mosley, Jillian Frisk, and Shriver's other characters, the rhetoric and modalities of property offer not so much a set of legal entitlements as a framework for thinking about the world and their places in it. When it comes to property, it's not the *things* that we care about, but the human relationships that they represent or that flow out of them. Here is the relational nature of property.

The other stories in Shriver's collection make the point to a greater or lesser degree. In "Sycamore," two neighbors feud over the seeds dropped by one of their trees into the other's yard. But when one, in an acrobatic effort to abate the offending trespass, falls into the other's yard and sustains injuries, the two become reconciled. In "Domestic Terrorism," parents try to evict their indolent adult son from his old room. But when he refuses to leave, their legal entitlement is defeated by his superior relational tactics. In "Royal Male," a postman purloins the letters that he is supposed to deliver, and in so doing meets one of the unsatisfied

²⁸ SHRIVER, *supra* note 12, at 290.

²⁹ Sara's possessiveness toward her earned reputation evokes the recent controversy over the "bad art friend," a dispute between a woman who prided herself on her organ donation and the writer who appropriated her story. See Robert Kolker, *Who Is the Bad Art Friend?*, N.Y. TIMES MAG. (Oct. 5, 2021), <https://www.nytimes.com/2021/10/05/magazine/dorland-v-larson.html> [<https://perma.cc/C3J6-RAPL>] ("... to Dorland, this was more than just material. She'd become a public voice in the campaign for live-organ donation, and she felt some responsibility for representing the subject in just the right way. The potential for saving lives, after all, matters more than any story. And yes, this was also her own life — the crystallization of the most important aspects of her personality, from the traumas of her childhood to the transcending of those traumas today.").

correspondents. They become romantically involved, and she eventually joins his letter-stealing scheme. And in “Chapstik,” a traveler refuses to part with a tube of lip balm while going through airport security, a small act of defiance that has predictable and outsized consequences. Though he misses his flight, the delay forces him to spend more time with his dying father. You get the idea. Shriver builds a bridge between acknowledged items of property—a sculpture, a flat, a Chapstik—and the human relationships that they represent—which in turn can be depicted in terms of property.

Shriver’s deployment of property rhetoric in relation to things that are not generally thought of as property—a friendship, a reputation, one’s place in society—offers interesting insight into the human (or at least American) inclination to think about life in possessory terms. But why are thoughts of property so deeply ingrained in the psyche of Shriver’s characters? Is this “normal,” or are her characters allegorical—emotionally and intellectually distorted by an obsessive attachment to a single principle—like Melville’s Ahab³⁰ or Anderson’s grotesques?³¹

Though the line may be fuzzy, Shriver does not view her characters in this kind of tragic light. Rather, she presents their tendency to think of human relationships and attributes in property terms as typically human and even commonplace. Her characters are not distorted or destroyed by their obsessions with property, at least not overly so. Rather, they display an affinity toward property thinking that, according to Heller and Salzman, is widely shared, at least in American society.³² As they explain, “the idea of ownership seems natural and beyond contest. You know what it means to own stuff, whether you’re buying a new home or claiming the last slice of pie.”³³ The vehemence of local controversies over zoning, public housing, eminent domain, evictions, and property crimes underscore the importance that individuals place on property and its ownership.³⁴ In the

30. Herman Melville, *Moby Dick* (1851).

31. Sherwood Anderson, *Winesburg, Ohio* (1919).

³² HELLER & SALZMAN, *supra* note 20, at 1

33. *Id.*

34. See, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109-2114 (2009) (highlighting public outcry over Supreme Court decision in *Kelo v. New London* eminent domain case); J. Rosie Tighe, *Public Opinion and Affordable Housing: A Review of the Literature*, 25 J. PLANNING LIT. 3 (2010) (studying

Everypersons that Shriver depicts, the guiding spirits of John Locke and William Blackstone—and a natural proclivity toward ownership—run fast and strong.³⁵ In this respect she even channels James Madison, who wrote (in opposition to government monopolies) that citizens’ “free use of their faculties, and free choice of their occupations . . . not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.”³⁶

Shriver’s turn toward property in all things also echoes current trends in academic thinking. Recent (and not so recent) scholarship has explored the application of property law principles to a range of unlikely intangibles including welfare benefits,³⁷ one’s job,³⁸ taxi medallions,³⁹ information about one’s health,⁴⁰ physical and mental ableness,⁴¹ and even membership in street gangs.⁴² Should these inchoate “things” be subject to the laws of property, as are land, cars, and shares of stock? A realist might answer, “Why not?” If property is no more than a bundle of rights that shapes

public opposition to affordable housing); Harold A. Ellis, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENV’T. L. 275 (1992) (noting public opposition to zoning plans).

35. John Locke’s *Two Treatises of Government* (1689) is viewed as one of the fundamental texts establishing the moral and philosophical foundations for property in Western thought. William Blackstone’s *Commentaries on the Laws of England* (1765) famously describes property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” – a characterization that may or may not have accurately reflected Blackstone’s own views on the matter. See David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2007).

36. James Madison, *Property*, NATIONAL GAZETTE, Mar. 27, 1792, reprinted in 14 PAPERS OF JAMES MADISON 266, 266-68 (Robert A. Rutland & Thomas A. Mason, eds., 1983), <https://founders.archives.gov/documents/Madison/01-14-02-0238>.

37. See generally, Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. L. POVERTY & POL. 89 (2002).

38. See generally, William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885 (1986).

39. See generally, Tom W. Bell, *Copyright Porn Trolls, Wasting Taxi Medallions, and the Propriety of ‘Property’*, 18 CHAPMAN L. REV. 799 (2015).

40. See generally, Jorge L. Contreras, *The False Promise of Health Data Ownership*, 94 N.Y.U. L. REV. 624 (2019).

41. See generally, Angelica Guevara, *Ableness as Property*, 98 DENV. L. REV. FORUM 1 (2020).

42. See generally, Lua Kamál Yuille, *Manufacturing Resilience on the Margins: Street Gangs, Property & Vulnerability Theory*, 123 PA. ST. L. REV. 463 (2019) (arguing, based on property takings theory, that “local governments should compensate gang members for refraining from certain, otherwise lawful, gang activity.”).

human interactions, then there is no principled reason to limit its application to the physical or the fiscal.

As Professor Robert Merges has observed, “there is no easily-identified menu of ‘ideal’ property rights for a given economy at a given moment in time”⁴³—the decision whether or not to recognize a property interest in a particular intangible depends on the context and the moment. In *Kremen v. Cohen*,⁴⁴ the U.S. Court of Appeals for the Ninth Circuit developed a three-part test for determining whether a property interest should be recognized in an intangible—the “medallion” license issued to authorized taxi drivers—for purposes of “takings” analysis under the Fifth Amendment. To make this determination, the court in *Kremen* reasoned, “First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.”⁴⁵ In the eyes of Shriver’s characters, the *Kremen* test might indeed be satisfied by the range of inchoate attributes, relationships, and identities that they embrace as property interests—from an exclusive relationship with a friend to a recognized position of expertise.

After considering the twelve property-centric tales that Shriver has collected, one cannot help but return to E.M. Forster’s meditation on the acquisition of a small, wooded plot near his home. The author of *A Room with a View* and *Howard’s End* (works whose very titles encompass dwelling places) asks, “If you own things, what’s their effect on you?” The answer that Forster offers regarding “his” wood is all too human. “In the first place, it makes me feel heavy . . . In the second place, it makes me feel it ought to be larger.”

So, too, with Shriver’s characters. For them, property represents a struggle, a tension between the burdens of ownership and the often-unquenchable desire for more. But the lesson that Shriver offers is that these conflicting sentiments arise not from some innate desire to exercise dominion over the *things* of the

43. Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577, 588 (1999) (considering the patentability of methods of doing business).

44. 337 F.3d 1024 (9th Cir. 2003).

45. *Id.* at 1030 (citing *G.S. Rasmussen Assoc. v. Kalitta Flying Ser.*, 958 F.2d 896, 903 (9th Cir. 1992)).

world, but from the way in which things shape our conceptions of ourselves and our interactions with the *people* who populate it. In this sense, property represents not just dominion over things, and not even a bundle of rights, but a bundle of relationships—very human relationships. One suspects that Wesley Hohfeld would be pleased.

Ayelet Waldman’s 2014 novel *Love & Treasure* widens the lens of this inquiry to explore the significance of property not just to individuals, but to an entire people. Waldman’s multi-stranded fictional narrative revolves around the infamous Hungarian “Gold Train.”⁴⁶ We first encounter the train, the repository of the accumulated goods confiscated from Hungary’s Jewish population during World War II, as a squad of American GIs intercept it on its way through Austria immediately after Germany’s surrender. The Americans order the train’s officer to open its boxcars, expecting to see weapons or refugees or perhaps sacks of gold bullion. But what they find is even more unnerving:

He showed them crude pine crates of bed linens and fur coats, cases of men’s pocket and wrist watches, of women’s jewelry . . . a box full of evening purses, most of them beaded or decorated with silver chains. Another of silver sugar basins, silver teapots engraved with monograms, bronze statuettes of

46. Soon after Germany invaded Hungary in 1944, German and Hungarian authorities stripped Hungary’s 800,000 Jewish residents of their possessions. In late 1944 or early 1945, as German defeat became imminent, Hungarian officials loaded these items onto a 44-car train (the “Gold Train”) with the intention to deliver its contents to Germany. However, in May 1945, the train was intercepted by Allied forces in Austria, and its contents were taken into custody by the U.S. Army. The train’s contents remained in an American-operated warehouse in Salzburg for some time while debates ensued over their disposition. Given the difficulty of identifying the original owners of the contents of the train, the U.S. Army donated or auctioned most of the goods over the next several years, donating the proceeds to different Jewish organizations. See Presidential Advisory Commission on Holocaust Assets in the United States and Art & Cultural Property Theft, *Hungarian Gold Train Progress Report as Released, 10/14/99*, CLINTON DIGITAL LIBRARY <https://clinton.presidentiallibraries.us/items/show/29425> [https://perma.cc/95VQ-FE6R] (accessed June 19, 2021).

In 2001, a number of Hungarian Jews and their descendants brought a class action lawsuit against the United States in the U.S. District Court for the Southern District of Florida seeking compensation for the property that was never returned to them. That lawsuit resulted in a settlement agreement in which the United States established a fund of \$25.5 million, approximately \$21 million of which was to be used to provide social services and humanitarian relief to eligible victims of Nazi persecution. *Rosner v. United States*, No. 01-1859-CIV-SEITZ, at *4 (S.D. Fla., Sept. 30, 2005), <https://2009-2017.state.gov/documents/organization/87320.pdf> [https://perma.cc/2C5R-UUUY].

men on horseback. In some cars they found heaps of leather wallets alongside silver cigarette cases, heavy musty-smelling furs piled on top of brightly colored Oriental carpets, tangles of costume jewelry, paintings of all sizes stacked one upon the other . . .⁴⁷

When serviceman Jack Wiseman asks, “But who does it belong to?”, the officer in charge responds, “All property belongs to the people of Hungary.” When the Hungarian officer expresses concern over what the conquering Allied army might do with the trove, the American commander assures him that “the American government is not in the business of stealing anybody’s property.”⁴⁸

But, of course, none of this proves to be true. The property does not belong to the people of Hungary, broadly understood, notwithstanding the fact that it was collected and stored at the Hungarian state bank. Rather, the heaps of personal goods belong, or belonged, to hundreds of thousands of Hungarian Jews, many of whom were deported to concentration camps shortly after their property was seized.

Moreover, once the captured train’s contents are unloaded into a gigantic warehouse in Salzburg, the American government *does* steal it. The theft comes in the form of requisitions by senior Allied officers stationed throughout the occupied territory who demand cutlery, china, carpets, and other furnishings for their temporary quarters. Though Jack, now in charge of security for the warehouse, has qualms about releasing the property to these officers, he reluctantly does so time after time.

To Waldman, the contents of the Gold Train—the boxcars full of personal goods, artifacts and valuables—come to represent the entirety of the Hungarian Jewish population. This is everything that they had, and in many cases all that is left of them. As such, the fate of the contents of the Gold Train—the “treasure” —becomes a political question. After the war, the US Army must consider the conflicting demands of the new Soviet-leaning Hungarian government, international refugee organizations, and the Palestinian Jews over the fate of the train, resulting in years of bureaucratic paralysis. When the goods—less the gold, jewels and artworks that are siphoned off elsewhere—are eventually

⁴⁷ WALDMAN, *supra* note 13, at 22.

⁴⁸ *Id.*

auctioned by the Intergovernmental Committee on Refugees, they earn a mere two million dollars, “enough to feed and house the displaced Jews of Europe for approximately one week.”⁴⁹ Ultimately, Waldman observes, the property didn’t really matter as much as the people who owned it, and now both are gone.

In the end the real wealth of the Hungarian Jewish community had not been packed in crates and boxes and loaded onto the train. What is the value to a daughter of a single pair of Sabbath candlesticks passed down from her mother and grandmother before her, generation behind generation, for a hundred, even a thousand, years? Beyond price, beyond measure. And what of ten thousand pairs of similar candlesticks, when all the grandmothers, mothers, and daughters are dead? No more than the smelted weight of the silver. The wealth of the Jews of Hungary, of all of Europe, was to be found not in the laden boxcars of the Gold Train but in the grandmothers and mothers and daughters themselves, in the doctors and lawyers, the green dealers and psychiatrists, the writers and artists who had created a culture of sophistication, of intellectual and artistic achievement. And that wealth, everything of real value, was all but extinguished.⁵⁰

If there is hope in *Love & Treasure*, it comes not from the grim reality of the Gold Train, but from the personal stories of its survivors. Waldman skillfully blends these two aspects of the narrative, personalizing the conflict through the character of Ilona Jakab, a Hungarian Jew who has been assigned to a displaced persons facility near the Salzburg warehouse where the train’s contents are initially stored. She and Jack Wiseman become romantically involved, but when she learns that her sister has died (along with the rest of her family), Ilona challenges Wiseman regarding the return of the property and his role in its pilfering.

“When will it be time, Jack, to give it all back?”

“I don’t know”

“You don’t know? Those are *my* dishes and *my* glasses and *my* silverware. My bracelets and my candlesticks and my . . . What? My fur! And my bicycle, Jack. They took my bicycle. Give it back to me! Give it all back!”

⁴⁹ *Id.* at 330.

⁵⁰ *Id.*

...

This had, he knew, nothing to do with the train and its contents, or the secret he'd kept from her about the generals and their requisitions This had only to do with her sister.

⁵¹

Jack's reaction to Ilona's outrage is predictable, but only partially accurate. While it is true that Ilona is upset by her sister's death, her anger at Jack's complicity in the theft of items from the warehouse has its roots beyond her personal grief. The property from the Gold Train represents not only a collective, cultural identity, but the identities and histories of hundreds of thousands of individuals, families, and loved ones. And each of these is important, at least to the individuals concerned.

The above selections do not do justice to the complex narrative of *Love & Treasure*. Spanning a full century, its unifying thread is a singular item—a jeweled pendant in the shape of a peacock—that Jack finds on the Gold Train and impulsively pockets. Here, Waldman wisely resists the pull of romantic devices since time immemorial—when Jack shows the pendant to Ilona, she does not dramatically reveal that it belonged to her grandmother. Instead, she admits that she does not recognize it at all.

Gradually, Waldman describes the origin of the pendant and its circuitous route from Hungary to Austria to the United States and, finally, to Israel. On its journey, it passes through the hands of a Hungarian suffragette, a Transylvanian dwarf, a Freudian psychoanalyst, the rebellious daughter of a bourgeoisie merchant, a forgotten symbolist painter, Weisman, his granddaughter, and finally an elderly woman living outside of Haifa, who will probably sell it. Ironically, this singular item from the Gold Train that finds its way back to someone with a genuine connection to it was stolen by an American serviceman who kept it guiltily hidden in his dresser drawer for more than half a century.⁵²

The plot surrounding the pendant and its return is intricate and engaging, filled with twists, turns and interesting historical

⁵¹ *Id.* at 91-92 (emphasis in original).

⁵² In describing Jack's growing obsession with the pendant, Waldman invokes the trope of obsessive possession, *The Lord of the Rings*. WALDMAN, *supra* note 13, at 158 ("He was like Bilbo with the ring," Jack's granddaughter tells a friend, "He didn't want to give it up.").

tidbits. But far more important is the perspective that it gives on Waldman's view of property.⁵³ Just as the value of the collected treasure of the Hungarian Gold Train pales in comparison to the lives, experiences, and personal histories lost during the Holocaust, the value of a single jeweled pendant lies not in its monetary worth, but in the memories and experiences that it witnessed.

Yet unlike the collective loss that Waldman eulogizes, the pendant also heralds renewal. Not only does its final owner plan to sell it to help pay her rent, but even Ilona, destitute and living in a DP camp, does not want this memento of a past irrevocably erased. She tells Jack, when he tries to give her the pendant, that she does not want it. "[E]ven if you had found something that belonged to me back then, I don't know if I would want it. All that is the past. And I am done with the past. I don't want anything from the old world."⁵⁴

Like the pendant itself, Ilona leaves Europe behind to start again in Israel. The things of her past—her bicycle, the pendant, the other property from the train—no longer matter to her. Unlike Shriver's characters, Ilona breaks free from the grasp of property. It no longer defines her, as it defines Jillian and Sara. As the pendant's sometime holder, the Freudian psychoanalyst Dr. Zobel, might have said, "sometimes, stuff is just stuff."

The contrasting and intersecting views of property and the human attachment to property offered by Shriver and Waldman illuminate the complex place that property holds in contemporary society. To some, property encompasses not only the things that they possess, but integral aspects of their identities with which they cannot bear to part. But to others, property is not so firmly rooted in identity—it is stuff, and stuff only. As such, it can be shed while life moves on.

To a degree, these differing attitudes may reflect different national and cultural understandings of property and its place in

53. Waldman, a Harvard-educated lawyer and adjunct professor at the UC Berkeley law school, is no stranger to the doctrines of property law. See Heidi Benson, *Profile: Ayelet Waldman*, SFGATE (Oct. 22, 2003), <https://www.sfgate.com/entertainment/article/PROFILE-Ayelet-Waldman-Everybody-has-2552597.php> [https://perma.cc/HHV3-GRM3]; *About the Author*, AYELET WALDMAN, <http://www.ayeletwaldman.com/about-1> [https://perma.cc/GQ7N-DXLX] (last visited Feb. 25, 2022).

⁵⁴ WALDMAN, *supra* note 13, at 104.

human society. Both Shriver and Waldman contrast the attitudes of American characters with those of non-Americans. In Shriver's "The Subletter," the American journalist Sara develops a strong, property-like attachment to her reputation and place in an alien society—a reputation that she struggles to keep from losing to her equally tenacious co-national, Emer. Their petty contest appears all the more ridiculous against the sober backdrop of Ulster, a profoundly troubled region in which contested borders result in far more deadly consequences than hurt feelings. Waldman, likewise, contrasts the proprietary intuitions of American serviceman Jack with those of Hungarian refugee Ilona. While Jack is wracked with guilt and uncertainty over possession of the goods from the Gold Train, Ilona, the "true" owner of at least some of these goods, eventually rejects them as immaterial to her new post-war life.

In wrestling with the nature of property, what "things" should carry legally recognized property entitlements, and how property should be treated under the law, American and other legal scholars would do well to consider the fictional, yet very real, attitudes toward property elucidated by these fine works of fiction.