Introduction

Property law presents an expansive canvas filled with colorful conflicts between neighbors, sobering tones of exclusion and discrimination, standardized and customized real estate transactions, and evocative rights of ownership and possession. Psychological perceptions, behavior, and in some cases foibles are integral to this canvas, guiding certain aspects of property law and suggesting reforms for others. Property may be particularly psychologically resonant, as the English jurist William Blackstone suggested: “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property” (1893, *393). Since Blackstone, a growing body of research on human mental processes and behavior has illuminated the psychological components of ownership, dispossession, and other aspects of property law.

Property rules and doctrines aim to increase people's welfare, create socially desirable distributions of property rights, and shift property to high-value uses. In seeking to accomplish these objectives, the law of property is concerned with human behavior driven by psychological traits and states. How do we allocate property rights, both initially and over time, and what factors determine the perceived fairness of those distributions? How do owners and courts determine and compare property values? What social and psychological forces underlie determinations by courts or property owners and users that certain uses of property are reasonable? What remedies do property owners prefer and find most psychologically satisfying? Property law, with its focus on the distribution of gains and losses, fairness and spillover effects, and social context, calls for illumination provided by psychological research.

In this book, we examine property rules and long-standing theoretical debates through the lens of psychology. Psychology research enables us to compare the assumptions about human behavior that underlie laws against the empirical data and to suggest ways to improve property law. For some property rules, the empirical research points to ways that
their underlying goals could be achieved more successfully with a different rule or no rule at all. Psychology also suggests new perspectives and justifications for theories of private property rights and the goals of property law.

Not only does psychology offer insights into property law, but property law in turn affords psychology ways to apply, and refine, its insights outside of the lab. As one example, while psychology experiments often fail to differentiate between ownership and possession, law is highly attentive to this distinction. As this book will show, there are substantial opportunities for applied psychology research in numerous aspects of property law such as conflicts over possession and ownership, appropriation of property by the state or loss of property to creditors, housing transactions, and remedies.

The Nature and Function of Property Rights

The right to property is fundamental. Property law governs the acquisition, use, possession, ownership, leasing, and transfer of land, buildings and fixtures, chattel, and other resources.1 Property law resolves competing claims to property; provides legal rules for transactions; reconciles different, and sometimes conflicting, land uses; and determines remedies. In addition, property law addresses the protection of private property rights from interference or appropriation by the state. In these functions, the law of property structures legal relationships between people with regard to valuable resources (Hohfeld 1913; Singer 2017, 2). Property can be held by individuals, groups, entities, or the state. This book focuses primarily on private property, which is the dominant property system in most countries.

Unlike contractual rights, which generally pertain only to the contracting parties, property rights are in rem. This means that one's rights in private property are “good against the world” (or, more precisely, they bind an unidentified set of people). Property right holders can enforce their rights against nonconsenting third parties. For example, if person A has ownership rights over a parcel of land, then others generally cannot use A's land without her consent. Any person who comes onto the land without permission has violated A's property rights, which the law typically recognizes in an action for trespass.
Property rights, including ownership, are not absolute. At times, individual property rights cede to social goals and the needs of others. For example, rights to exclude others from one’s land or other property are subject to a variety of limitations, including statutes and constitutional laws prohibiting discrimination. The common law doctrine of necessity makes it lawful for a person to pass through another’s property when required to prevent greater harm to the trespasser, his property, or the community (e.g., due to storms, flooding, or other conditions) (Epstein 1990). Property rights are also routinely limited by environmental laws that restrict use and development and the constitutional power of governments to appropriate property for public use with just compensation.

While people intuitively think of property as “ownership of a thing,” many judges and legal scholars conceive of property as a “bundle of rights” representing distinct interests in and rights to property (Corbin 1922; Honoré 1961; J. R. Nash and Stern 2010; for critiques of the “bundle of rights” conception of property, see Penner 1996, 723; Merrill and Smith 2011, S82). The “sticks” in the bundle of rights include the right to possess the property, to control its use, to convey all or part of the property, to mortgage it, to exclude others from the property, and, in many circumstances, to destroy it. An interest in property may not include all of the sticks in the bundle of rights. Renting, termed a “leasehold estate” in property law, grants tenants possessory rights while landlords maintain residual ownership and the ability to convey the property (with the lease carrying over to the new owner). In other cases, a person may hold a property interest but not the right to use or possess the property until a future point in time. For example, in US law, the “remainderman” to a life tenancy lacks current possessory rights and instead holds a future interest. The life tenant has the right to use and profit from the property during her lifetime but not the right to sell or mortgage it. When the life tenant dies, the property will pass to a third party specified in the grant (the remainderman) or, if there is no remainderman, will revert to the original grantor (Thompson and Goldstein 2014, 527–28).

An important function of property law is to resolve competing claims to property. Property rules determine how claimants establish possession and ownership of property in the first instance and how subsequent conflicts over property rights are to be resolved. For example, laws governing the capture of wild animals and acquisition of natural resources
and water rights determine how people gain, and lose, property rights in these resources. Another example is the doctrine of adverse possession, which allows a trespasser, under certain conditions and with the passage of time, to gain rights over the land or property of another. Property law also determines whether one party may injure the property rights of another. The law of nuisance offers a classic example. If a landowner builds a polluting factory or noxious-smelling hog pen that significantly affects neighboring owners’ enjoyment of their property, she has possibly impaired her neighbors’ rights, and they can sue for an injunction to make her stop or to provide damages to compensate for the harm. To minimize such conflicts, local governments regulate the location of various types of property uses (e.g., residential, commercial, industrial); the size, spacing, and structure of buildings; and noise, pollution, and other disturbances.

Property law offers both ex ante protections and remedies ex post for injury to property rights. In some instances, such as government appropriation or some property and bankruptcy laws, the legal system extends heightened protection against dispossession to certain types of property. For example, while government entities have the constitutional right to take private property for public use with just compensation, some American states have adopted laws that forbid government appropriation of residential homes unless the home is blighted (i.e., unsafe and substantially deteriorated). Legal protections also take the form of remedies that seek to make the injured party whole with respect to his or her property rights. Remedies include injunctions, which are court orders compelling parties to take or refrain from taking specified actions, and monetary damages to compensate the wronged party or punish the wrongdoer.

At the level of markets, property law governs transactions and promotes trade. A key role of property law is to create configurations of rights (e.g., “ownership” or “rental”) that facilitate buying and selling property. Property law creates a degree of standardization that lowers the costs of transacting property (Merrill and Smith 2000). Property laws also reduce the costs and risks of transactions by creating land registration systems to record sales and different forms of deeds that provide varying levels of assurance of the seller’s good and marketable title. For residential real estate transactions, statutory law and common law offer a number of protections to buyers. Many of these laws aim to
ameliorate information asymmetries by providing information to buyers about the property’s condition or mortgage products. Other property laws, such as the Fair Housing Act (FHA) in the United States, seek to ensure fair and open property markets by prohibiting discrimination in real estate sales, leasing, and lending.3

While property systems allocate property rights, they often fail to define prospectively what resources constitute property. Throughout history, there has been controversy about what is included in the set of items defined as legal “property.” For example, courts and policy makers have debated whether to extend property rights to government entitlements (e.g., government-funded income and benefits, subsidies, licenses, franchises), gene sequences, and domesticated pets (see, e.g., Reich 1964; Barrad 1993; Root 2002). Because property serves human ends, its definition cannot cohere in a unitary theory or remain static across time and context. Social and economic forces drive the creation of novel forms of property and reshape property rights over time (Banner 2011, 175, 238–48). Throughout this book, we consider the interrelations between legal conceptions of what constitutes property and psychological research on what people perceive as property.

Justifications for Private Property

The theoretical justifications for private property depict property’s critical role in furthering autonomy, liberty and freedom, self-development, social welfare, and efficiency. These theories differ in content but converge to support private property rights. For the purposes of this overview, these theories can be loosely divided into two groups: one focusing on individual rights and the other based on efficiency and aggregate welfare.

First, a number of theories of private property justify property rights based on individual rights to the fruits of one’s labor, autonomy and liberty, and personhood development. John Locke argued that each individual has the right to one’s own person and the fruits of one’s labors; as a result, when people “mix” their labor with unowned property, they acquire property rights under natural law, which is antecedent and superior to government-made law ([1690] 1967, 305–06). Locke qualified his labor theory based on distribution: labor creates ownership “at
least where there is enough, and as good left in common for others” (306). Other theorists have focused on property’s role as a boundary that safeguards individual liberty and creates a zone of freedom from interference from the state (see, e.g., Ely 1992; Buchanan 1993). Jennifer Nedelsky (1990) has critiqued this conception of autonomy as individualistic and proposed a legal model of autonomy based on human relations and their role in self-constitution.

Some theories of property’s importance to individuals’ rights make distinctly psychological claims about property’s role in self-development and well-being. In the early nineteenth century, Hegel ([1821] 1967) developed a theory of property’s necessity to develop personality. In order to develop freedom, which Hegel describes as personal agency and free will, people must impose their will on the external world. Property is the “embodiment of personality” and enables people to move from a subjective sense of free will to objectively acting upon their will through the appropriation and control of their property (51). These actions vis-à-vis property make one’s self concrete so that the property holder can perceive her personality and communicate it to others (for further discussion, see Waldron 1988, 353). Building on Hegel’s philosophy, Margaret Radin (1982) contends that property law should secure owners’ ongoing rights to certain forms of property that are integral to personhood. Other theorists have described a role for property in well-being and flourishing. Amartya Sen has articulated a philosophy of capabilities where certain property, such as shelter, is necessary for citizens to have freedom to achieve their capabilities to live a life they have reason to value (A. Sen 1984; Nussbaum and Sen 1993, 40–42). Martha Nussbaum’s interpretation of capabilities theory specifically cites the ability to hold property and for those property rights to be on an equal basis with others (2011, 307–24).

Second, a constellation of theoretical work justifies private property rights on the basis of efficiency and creating value in society. Stable private property rights create incentives for people to invest in and improve property (Demsetz 1967; cf. S. M. Stern 2017). Without such rights, people cannot reap the fruits of their labors and investments, leading to the dissipation of value (e.g., A. Bell and Parchomovsky 2005). Private property rights allow people to realize the rewards of beneficial actions and require them to bear the costs of harmful behavior (Demsetz 1967,
347–50). For example, Harold Demsetz (1967) described how the advent of the European fur trade led to the emergence of private hunting grounds and property rights in certain Native American communities in order to capture gains from trade not possible under the tribe’s traditional open-access hunting commons. Private property rights created incentives for owners to maintain and increase hunting stock by rotating hunting grounds, retaliating against trespassers, and negotiating with neighboring owners whose actions threatened hunting stock (351–58).

Another efficiency justification for property law is its potential to move property to its highest value use, either through a system of market transfer or through legal rules that seek to approximate this efficiency function. As the Coase (1960) theorem famously observed, in a world where there is no cost or effort to bargaining, voluntary negotiation among private parties to resolve property disputes (i.e., without the intervention of courts or law) leads to the most efficient outcomes for society. Efficiency means that resources and goods are held by the users who value them the most. Yet, as Coase cautioned, such a low-transaction-cost world does not exist. When transaction costs are high, it is desirable to have legal rules that reduce them or, failing that, initial allocations that mirror the likely outcome had bargaining been able to occur (Cooter and Ulen 2012, 93). Secure property rights reduce transaction costs and facilitate private bargaining (Coase 1960). Property law also enhances transactional efficiency by lowering the costs of delineating, and deciphering, property rights (Merrill and Smith 2000).

Real-World Impacts of Property Law

Among legal disciplines, no area of law has more widespread impact on our daily lives than property law. The vast majority of us own some form of property, ranging from valuable real estate to prosaic items such as the clothes on our backs. In the United States, the homeownership rate is 64 percent, and the rate in other developed countries commonly ranges from 30 to 65 percent (with some, such as Bulgaria, as high as 90 percent) (US Census Bureau 2018; Laurie Goodman and Mayer 2018). In 2017, more than 6 million homes were sold in the United States (National Association of Realtors 2018). Commercial real estate is also a major market sector, with $490 billion in deal activity in 2017 alone. And, of
course, all manner of personal property from manufactured goods to livestock is bought, owned, sold, or disposed of every day.

Not surprisingly in light of the ubiquity of property rights and volume of property transactions, property disputes generate substantial litigation. Looking at the United States, in the twelve-month period ending in September 2016, more than 10,000 cases concerning real property and housing civil rights actions commenced in US federal district courts, with the highest number of federal actions concerning lenders foreclosing on property as a result of unpaid debts (US Courts 2016). The actual number is likely higher, since many cases involving property, such as commercial real estate cases, are brought as breach of contract claims. In a study sampling state courts, the National Center for State Courts (2015) found that cases involving real and personal property are common categories of civil litigation, with the most frequent categories of claims overall including debt collection, landlord-tenant claims, and foreclosure, as well as tort and small claims cases. Landlord-tenant cases are the most common state court case, representing 29 percent of all state court civil cases (19).

Many property cases are not high-dollar claims. Seventy-five percent of real property awards in US state courts total less than $106,000 (most of these judgments occurred following lower-cost administrative court proceedings or settlements in the early stages of litigation) (24, 27). In both small claims courts and state trial and appellate courts, the majority of litigants in property cases represent themselves (32). This reflects the fact that more sophisticated and well-resourced litigants, in both the United States and other countries, have turned to private forums, such as alternative dispute resolution and arbitration. The propensity of litigants to bring claims pro se, meaning without legal counsel, underscores the importance of layperson perceptions and attitudes in property disputes and in shaping property law. Absent knowledge of property law or recourse to lawyers, people’s intuitive or instinctive perceptions of property rights and obligations can fuel disputes and litigation.

The Psychology of Property Law

A number of areas of psychological research are highly relevant to property law and will be featured throughout this book.
Introduction

Psychological Ownership versus Formal Property Rights

Amitai Etzioni describes property as existing at two levels, first as an “attribute of the mind” derived from perceptions, attitudes, and culture; and, second, at the concrete level, as a real object or resource owned by a person, entity, or group (1991, 465–66). Psychologists describe the former as psychological ownership and have studied it in the context of feelings toward possessions, as well as the psychological commitment employees feel toward their work, the products of their labor, or the organizations they work for. According to Pierce, Kostova, and Dirks, psychological ownership is “the feeling of possessiveness and of being psychologically tied to an object” (2001, 299). In some cases, a possession becomes an important component of an individual’s identity (Belk 1988; Dittmar 1992). There are different theories of how psychological ownership develops. Using the property or controlling its use, forming an association that over time leads the person to know the item well or intimately, and creating or constructing the possession all appear to increase psychological ownership (Rudmin and Berry 1987; Beggan and Brown 1994; Csikszentmihalyi and Rochberg-Halton 1981).

Research on psychological ownership suggests new ways to think about theories of private property and laws protecting property from appropriations by the state and from dispossession by private parties. For example, as discussed earlier, John Locke famously argued that “mixing one’s labor” with property should give rise to ownership of unowned property. Psychology research suggests more specifically that creating or constructing, not merely laboring, may produce the strongest attachments and subjective feelings of ownership (Levene, Starmans, and Friedman 2015; Norton, Mochon, and Ariely 2012; Sarstedt, Neubert, and Barth 2016). Other applications come from the common law of property. For example, common law doctrines base possessory rights and acquisition of unowned property on touchstones such as physical contact or, in the case of certain natural resources (e.g., wild animals) attaining “certain control.” Yet, psychology research shows that people can develop feelings of ownership or attachment from mere proximity, purchase of a good (prior to delivery), and imagining contact with an object.

Evidence about how people view their property and rights enables us to align property doctrines with commonly held perceptions when
such alignment is desirable for policy making. Our claim is not that psychological ownership and perceptions alone should determine property law, but rather that they are important factors that policy makers should consider in the design of legal rules. Reducing the friction between law and public perceptions can enhance efficiency, the perceived legitimacy of property law, and compliance. For example, research suggests that on the basis of psychological harm the law may overprotect residential property and underprotect other kinds of property, such as commercial real estate, unrealized development rights, or personal possessions. Psychology also offers an explanation for why people sometimes react quite negatively to regulations that burden their property rights, despite the fact that such regulations usually do not rise to the level of a regulatory taking under US federal constitutional law. Attentiveness to how people view and value their property rights in the design of property laws can lessen public disapproval or backlash against those laws.

Property laws that are out of sync with citizens’ perceptions, preferences, or psychological ownership can threaten the operation of property law systems. For example, a study in Korea of squatter eviction found that 37 percent of city officials and police charged with evictions and 43 percent of members of the general public believed, contrary to the law, that owners should evict only if they need to use the land or after they have tried to pay the squatter to leave (Hahm 1963, 66, 69). The divergence between Korea’s European-derived system of eviction law and the perceptions of Koreans resulted in lower use of the eviction process by owners and more friction and unrest when owners did resort to formal ouster (64–65). Laws that do not reflect commonly held perceptions about property rights may also be more vulnerable to gradual undermining or nullification by common law judges, who interpret and fill gaps in statutes. The legal realism movement has shown how judges and other lawmakers can stray over time from the law on the books to reflect their perceptions and “inarticulate and unconscious judgment” (Holmes [1897] 1997, 998). For example, while some state legal doctrines maintain that state of mind and intent are irrelevant to an adverse possessor’s claim of title, courts in those jurisdictions frequently impose a good faith requirement on adverse possessors (Helmholz 1983). Requiring that adverse possessors believe that they own the property they
have possessed reflects norms against taking property from others and strategic behavior or land-grabbing.

**Bounds on Rationality**

While property law often assumes rational and comprehensive information processing, people exhibit systematic limitations on their ability to gather, process, and remember information (Jolls, Sunstein, and Thaler 1998, 1477–79). People hold persistent biases, including the tendency to be averse to losses; exhibit undue optimism about outcomes; and overweigh recent, publicized, or otherwise salient, but not determinative, information (Kahneman, Knetsch, and Thaler 1990; Sharot 2011; Tversky and Kahneman 1974). For example, in real estate transactions sellers tend to overvalue their property, and all parties may struggle to understand information about property condition or financing and update property valuation accordingly.

The psychological research on bounded rationality indicates that sometimes people will not intuit or understand property law or relevant information sufficiently to achieve the underlying aims of the laws in question. Bounded rationality also suggests that people experience information-processing barriers or emotional sticking points that impede bargaining to efficient outcomes over property rights. For example, it may be efficient and socially desirable for a property owner to negotiate with a neighbor who has built a high and unsightly fence, rather than utilizing complex zoning laws, local enforcement, and court process. However, strong emotions, conflicting intuitions about the neighbors’ respective property rights, and difficulties valuing the fence’s impact on property value and enjoyment may stymie efforts to resolve the conflict privately.

Property law might respond to or “debias” bounds on rationality in three different ways. First, legal reforms can minimize information-processing shortfalls and biases by reducing cognitive load and other circumstances likely to create or exacerbate biases. In an attempt to do just this, the US Consumer Finance Protection Bureau recently created a standardized and greatly simplified mortgage disclosure form that lenders must provide to residential borrowers. Second, property law can
exploit existing biases to achieve desired ends or correct one psychological bias by activating another (S. M. Stern 2016, 49–51; Pi, Parisi, and Luppi 2004). For example, local officials might seek to counteract residents’ oversized risk aversion to the possibility of increased traffic following city approval of the construction of a “big-box” retail store. The city could do this by informing citizens that without taxes and impact fees from the big-box store, residents will face an average $200 in increased property taxes. Because people tend to overvalue losses, they are likely to be more receptive to avoiding the certain loss from paying additional taxes by accepting the uncertain impacts of the new development (Kahneman and Tversky 1979). Discomfort with the state manipulating people’s psychological tendencies makes this form of debiasing controversial, perhaps particularly so in the domain of property, which many equate with autonomy and liberty (see, e.g., R. A. Posner 2009; S. M. Stern 2016, 68–72). Third, property law might remove the opportunity for bias—and for choice—through regulation that prohibits transactions with high risks of consumer confusion and harm. For example, as we will see, there has been significant debate about whether states should prohibit brokers from simultaneously representing residential buyers and sellers in the same transaction. It is exceedingly difficult to debias real estate brokers from conflicts of interest—a fact that buyers often fail to grasp when they receive disclosures about the conflict of interest.

The Science of Well-Being

One goal of legal systems, including property law systems, should be to increase human welfare. In the past, the most common proxy was preference satisfaction, a measure that focuses on whether one fulfills specific, ex ante desires. Yet, psychology research suggests that often we lack well-delineated, ex ante preferences. Instead, preferences are often unstable and context dependent and change with task, choice-environment, and in response to shifting personal goals (Kahneman and Tverskey 1982; Slovic 1995; for a review, see Warren, McGraw, and Van Boven 2011). Moreover, preference satisfaction does not inevitably increase welfare in an objective sense. According to an objective approach to welfare, certain things—such as knowledge of ourselves and the world around us, accomplishment of worthwhile goals, and attainment of meaningful
relationships—have intrinsic value, independent of whether individuals desire them (for an objective-welfare theory of property law, see Lewinsohn-Zamir 2003).

A rapidly growing body of research on well-being, referred to as “positive psychology,” has begun to clarify how life circumstances, experiences, relationships, health, wealth, homeownership, and personal possessions affect happiness. Psychologists measure well-being in a variety of ways, including surveys asking people to describe how they feel about their lives, measures of positive or negative affect (emotion), and experience sampling where participants report their level of happiness at multiple, random points throughout the day (Diener 2000, 34–35). The psychology research shows that without intervention, people frequently misestimate the circumstances and actions that are likely to improve their well-being (Wilson and Gilbert 2005).

Happiness and well-being data can offer an approximate measure of social welfare, an outcome that economics and law have long sought to increase but struggled to define. Policy makers and governments have taken note of well-being research. The United Nations annual World Happiness Report now measures well-being in 156 countries, the former French president Nicolas Sarkozy proposed making a happiness index the key economic indicator for France, and the constitution of the country of Bhutan states that the government should “strive to promote those conditions that will enable the pursuit of Gross National Happiness.” Yet there is division about whether well-being itself should be the end goal or whether government should seek to provide citizens with the liberties and resources necessary for them to pursue well-being.

The research on happiness has a variety of applications for property rules and institutions. Happiness metrics can inform the degree of protection we accord owners against dispossession of their property by government, creditors, or private parties, the tax and legal incentives we provide for homeownership versus renting, the monetary compensation required to “make someone whole” following property loss or infringement, and the type and magnitude of government-mediated property redistribution between private citizens. We can use happiness to measure the value of public goods, such as public parks and clean water, and to improve cost-benefit analysis (Bronsteen, Buccafusco, and Masur
Correlating citizens’ reported well-being with public goods (and bads) has provided valuations for the harms caused by airport noise, air pollution, and flood hazards (see Stutzer and Frey 2012, 664–65).

Well-being research has other implications for land use regulation and planning. For example, if commuting decreases well-being, as some research has found, then “smart growth” land use policies that favor higher-density development proximate to work centers and transportation networks should increase objective well-being (though not necessarily subjective preferences for lower-density residential living) (Fagundes 2017, 1920–22; Stutzer and Frey 2008; Roberts, Hodgson, and Dolan 2011; but see Dickerson, Hole, and Munford 2014). In the legal scholarship, Dave Fagundes (2018) has proposed reforms to support the “sharing economy” (e.g., person-to-person short-term rentals via Airbnb or ride sharing through Uber) and enable zoning and construction of more affordable apartments and homes with very low square footage (micro-housing). He bases these proposals on psychology research showing that sharing property and devoting more time and attention to social relationships increases happiness, not accumulating property. Abundant psychology research on the harms to well-being from social isolation may also cause us to rethink aspects of housing policy (Baumeister and Leary 1995; Myers 2000). For example, the growing numbers of elderly and disabled citizens may benefit from “accessory dwelling units” attached to or on the lots of primary dwellings (e.g., coach houses, in-law apartments) that enable them to reside with family or remain in their community. Currently, local ordinances typically prohibit or restrict accessory dwelling units.

In-Groups, Bias, and Discrimination

Property law, as we have noted, structures legal relationships among people with respect to property. Social psychology is similarly concerned with understanding a person’s relationships with other individuals, including the impact of group membership. The research in psychology on the power and influence of one’s identification with a group provides a new vantage point from which to consider property law. Property law, in its conceptualization and its rules, at times has neglected the legal
relationships among *groups* with respect to property in favor of a more atomistic focus on individuals.

Social psychologists have found that bias against members of groups other than one’s own and tendencies to stereotype (i.e., develop beliefs about an individual based on generalizations about that person’s group) are ubiquitous features of social life (see, e.g., Brewer and Brown, 1998; Dovidio 2002). When intergroup bias and stereotyping translate into discriminatory behaviors, this creates a range of harms and lost opportunities that property law often seeks to address. In particular, psychology research points to ways to improve fair housing law and local land use laws to reduce discrimination and promote residential integration. For example, nondiscriminatory social norms can be a powerful deterrent to discrimination—perhaps even more so than “command and control” regulations that explicitly prohibit and penalize discrimination. When people learn that members of a group who they identify with hold or do not hold negative beliefs about another group (e.g., African American students) their attitudes shift in the direction of the group to which they belong (Sechrist and Stangor 2001; Stangor, Sechrist, and Jost 2001; Haslam et al. 1996; Wittenbrink and Henly 1996). This research suggests underappreciated importance to provisions of the FHA that promote nondiscriminatory norms, such as the act’s prohibition on making discriminatory housing statements or publishing discriminatory housing advertisements.

Psychology also suggests limitations to law for addressing bias. For example, psychologists have found that bias is often unconscious (i.e., people are not aware they are biased), that victims of bias face harsh social judgment for reporting discrimination, and that negative bias often increases as a result of antibias mandates or forced inclusion (Gaertner and Dovidio 2005; Kaiser and Miller 2001, 2003; Dobbin and Kalev 2016). All of these factors represent challenges for fair housing law and suggest the need to expand the legal and nonlegal tools that governments employ to combat housing discrimination.

**Process, Meaning, and Outcomes**

The characteristics of legal process and the social meaning of legal rules matter to people as much as, and sometimes more than, outcomes.
Property law, and law and economics, focus heavily on outcomes, such as the magnitude of compensation or property redistribution. Yet, people often care greatly how outcomes are achieved and whether the outcome is associated with success or failure (Tyler 2006; Lewinsohn-Zamir 2006, 385–89). One example of this is the research on source dependence, which shows that the source of an object affects how people value that object and their willingness to part with it. A number of experiments have found that when people are told that an object they were given, such as a mug, is an award or recognition for their performance, they value it more highly than those who are given the identical object randomly (Loewenstein and Issacharoff 1994; Bühren and Plessner 2014). Property and, as we will suggest, property rules that are associated with success, talent, intelligence, or other socially desirable characteristics confer heightened value to recipients.

In some cases, it may be possible to deliver greater gains to social welfare through careful design of the processes and social meaning of legal rules and remedies. For example, people may derive greater utility from redistribution through property, such as adequate housing, rather than an equivalent amount of cash, because of the stigma and loss of esteem associated with welfare payments. Similarly, with respect to remedies, people are not always indifferent between remedies of equal monetary value. For example, in some circumstances they may prefer in-kind remedies to monetary ones or favor an injunction halting the injury rather than a remedy that provides monetary compensation but allows the injury to continue. Other examples come from the rich literature on procedural justice in law and psychology. People want legal systems to hear their voices, treat them respectfully, and employ neutral rules and impartial decision makers (Tyler and Jackson 2013, 78–79). This research highlights costs to laws that truncate legal process, such as state “quick-take” statutes for government appropriation of property or mandated fair housing settlement procedures.

The Limits of Psychology for Property Law

In this book, we delve deeply into psychology research and theory to offer new perspectives on property law. We examine the psychology evidence and consider ways in which this research can improve the design
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of property rules and institutions. Our goal is to provide an empirically based account of the psychological forces affecting property law. Judges, legislators, lawyers, law students, and citizens can benefit from appreciating how human psychology affects the property rules, transactions, and remedies that they encounter in their work or in everyday life. Understanding psychology’s relevance to property law is essential to optimizing the development of property rules, articulation of rationales, and distribution of property rights in complex property systems.

While psychology research offers valuable insights for property law, there are important caveats as well. First, psychological forces are not the only factor that is relevant to the design of property law systems. At times, efficiency, administrability, political sentiments, social needs, and a variety of other context-specific factors may demand a different property rule or outcome than what psychological considerations would suggest. Appreciating the psychological costs and benefits of different property law rules enables citizens and other decision makers to weigh psychological considerations against social, economic, and administrative factors in order to design effective property law systems.

Second, as with any method of inquiry, empirical research has both inherent strengths and limitations. The rigors of the scientific method, data collection and analysis, and peer review increase the quality of empirical psychology work and complement theoretical work in law and other fields. However, it is possible that an empirical study will produce anomalous findings or that psychological effects will not generalize from the laboratory to real-world settings. To reduce these risks, empirical researchers often replicate findings, both in the same context as the original experiment and in other settings and with participants of different backgrounds. In view of the importance of reliability and validity, this book focuses on well-established psychological findings.

Scope of the Book

The ways that psychology can inform property law are numerous. In this book, we have selected eight important topics from property law to which psychology has a great deal to contribute. The following chapters examine how psychology research may cause us to rethink legal rules for rights in property, state interference with property, real estate
transactions, and remedies. Throughout the book, we draw from diverse fields of psychology, including social, cognitive, personality, and moral psychology. The book addresses the implications of psychology for real property (i.e., land and immovable fixtures attached to land) and personal or “chattel” property (movable property, including manufactured goods, animals, and other possessions). We do not consider intellectual property, not due to any inapplicability of psychology to intellectual property, but in order to focus on the substantial topics of real and personal property. In addition, although we focus more strongly in this book on formal property law, we recognize that most property disputes are resolved informally (or do not occur in the first place because people follow social norms regarding possession, trespass, infringement, and other aspects of property) (Ellickson 1994). The psychological research we apply to formal law in this book also matters greatly in the domain of social norms, or, as Robert Ellickson has described it, order without law.