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PRIVATE OWNERSHIP

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The most powerful response to growing skepticism about the intelligibility of the idea of private ownership has been cast in terms of an owner's rights to the exclusive use of an object. In these pages, I argue that this response suffers from three basic deficiencies—rather than merely explanatory gaps—that render it unable to overcome the specter of skepticism. These deficiencies reflect a shared want of attention to the normative relationship that ownership engenders between owners and nonowners. In place of the right to exclusive use, I set out to develop an account of private ownership that seeks to defeat skepticism concerning this idea. The proposed account insists that the idea of private ownership picks out a special authority relation between an owner and a nonowner involving the normative standing of the latter in relation to an object owned by the former. I further demonstrate the important place of this idea in shaping the contours of normative disagreements about the point of ownership rights and responsibilities.

I. INTRODUCTION

The idea of private ownership gives rise to two analytical questions in particular: one, its existence; the other, its content. These questions have forced theories of property into two distinct approaches. Dominating the field for most of the past century has been a sense of skepticism about the idea, which has led scholars to embrace a nuanced and intricate view of private ownership as a bundle of rights. Although there are many different accounts of ownership associated with this view, it is generally understood to be a placeholder for the thesis that the idea of ownership does not exist and that if it does, it is useless or otherwise unable to illuminate theoretical and popular discussions of property.[1] On the other side of the conceptual

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1. For a recent statement, *see* Pey-Woan Lee, *Inducing Breach of Contract, Conversion and Contract as Property*, 29 OXFORD J. LEGAL STUD. 511, 514 (2009) (denying that property features "a singular coherent concept"). *See also* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 7 (2000) (discarding ownership "as an organizing category.").

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debate, opponents of the bundle-of-rights approach have sought to revive the view shared by luminaries such as David Hume, Immanuel Kant, and William Blackstone, according to which the idea of private ownership picks out the right of owners to exclusive use of objects.[2] Current articulations of this approach are far more elaborate and sophisticated than ever before, to be sure, but they do share with the accounts of their intellectual ancestors a single analytical commitment concerning the conceptual core of private ownership—to repeat, exclusive use.

Thus the exclusive-use account casts itself as a prominent—perhaps the most prominent—way out of the conceptual skepticism celebrated by the bundle-of-rights approach.[3] In these pages, I shall seek to challenge this view in two different ways without thereby embracing skepticism or legal realism concerning private ownership.[4] First, I argue that the exclusive-use account is not a theory of the idea of private ownership, properly conceived. Even worse, it is a theory of possession that fails to account for elementary features of private ownership such as the idea that it takes the form of a private-law practice. Second, I outline a novel account of private ownership emphasizing the authority relations it engenders between owners and nonowners with respect to the normative standings of the latter to objects.[5]

It is important to note at the outset that I shall not attempt a detailed review of the literature but rather deploy stylized accounts of the opposing approaches to the questions of the existence and content of the idea of private ownership. This hardly does justice to the sophistication and rigor of such theories, but it is nonetheless appropriate insofar as I seek to render more transparent the need to create conceptual space, as it were, for a novel approach to the analytics of private ownership.

2. *See, e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2003); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 86–106 (2009).

3. Perhaps another way out, which is not considered in these pages, is offered by James Harris, who claims that ownership is the organizing principle of property institutions. JAMES W. HARRIS, PROPERTY AND JUSTICE 5 (1996). Some of my critique against the exclusive-use account may be relevant to Harris's impressive work, though I leave this for another occasion. The reason for not addressing his account directly at present is in part because Harris asserts that "any attempt to articulate a single conception of ownership . . . would be hopeless." *Id.* at 75. Indirectly, of course, my ambition to develop an idea of private ownership may address Harris's skepticism concerning what he takes to be the "open-ended character" of ownership. *Id.* at 76.

4. In place of skepticism and legal realism, the approach I marshal gives special emphasis to the form that private ownership takes, as opposed to the functions it may serve. While I do not seek to revive the Langdellian sort of legal formalism, taking form seriously, as I argue below, is necessary for an adequate articulation of the idea of private ownership.

5. I explain my usage of normative (in *normative standing*) in text accompanying note 47.

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II. THE DISTINCTIVENESS OF PRIVATE OWNERSHIP: AN OVERVIEW

A theory of the idea of private ownership must begin with a working hypothesis according to which this idea exists—that is, that it contains certain necessary properties. More important, a theory of this kind must establish the distinctiveness of this idea. It therefore must explain this idea on its own terms rather than explain it away by casting this idea in terms of other ideas. While there may be many different ways in which an idea may be characterized as distinctive, I emphasize three basic ways: first, in relation to other ideas concerning being in control of objects (especially possession); second, in relation to the private *or* public form of legal ordering onto which it may map; and third, in relation to other systems of property regulation such as state-collective ownership. These three do not settle the case for private ownership, to be sure; they set the stage for developing an account that is sufficiently precise to capture the idea of private ownership in particular rather than any other idea (despite potential levels of resemblance); that is, a theory that fails to capture all three separately does not so much explain the idea of private ownership as it explains it away.

First, an adequate idea of private ownership must be capable of distinguishing itself from another idea that figures prominently in many systems of property regulation—namely, possession.[6] An account of the idea of private ownership that in fact reduces this idea to possession does not defend private ownership on its own terms. It fails to make independent conceptual space, as it were, for private ownership. To assimilate private ownership into possession is not to gain an insight but to lose a concept.

Second, an adequate idea of private ownership must account for the distinctive way in which the law of property approaches private owners: as agents who assert their special authority over nonowners rather than as patients benefiting from the state's policing of nonowners with relation to owned objects.[7] By approaching owners as agents, the law of property takes the form of private law as opposed to public law. Private owners are agents insofar as they exercise the right to determine the standing of others in relation to objects; and they additionally exercise the authority to vindicate this right as a matter of (private) law. In that, they are viewed by the law

6. On the centrality of possession in property law, *see* Section III.A.

7. It is important to note, to forestall misunderstanding, that the conception of agency I invoke in the main text above is a normative one. A normative conception of agency picks out the authority of owners to fix the rights and duties that nonowners may have in relation to objects. This conception of agency should not be confused with a functional conception of agency. On the functional conception of agency, the owner holds the superior power to determine the uses, agendas, purposes, or functions of an object, not necessarily the rights and duties of other persons (the nonowners). I elaborate on this distinction in text accompanying notes 56–60. I borrow the terminology of *agents* and *patients* but not the theory or methodology, from Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291, 2295 (2003).

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not merely as victims of wrongs done to them by nonowners but also as plaintiffs who seek legally to compel nonowners to right these wrongs.[8] In other words, property law in its private-law instantiation focuses on what owners can do—how they can affect a change in the rights and obligations of nonowners by the operation of their wills. A public-law protection of ownership, by contrast, would pay special attention to the question of what happened to owners: Were they wronged, and if so, what ought we—society as a whole—to do about it?

Private ownership (and private property more broadly) has been a core component of private law for many centuries.[9] Yet an account that fails to capture private ownership's private-law form is not merely inconsistent with history. More important, it renders immaterial the entire legal structure—the private-law legal structure—within which private ownership is embedded. A theory of private ownership indifferent to this feature of private ownership does not reflect the insignificance of the distinction between private and public legal orderings. The better view is that it represents a theoretical failure on the part of the theory of the idea of private ownership.

Third, the emphasis on owners being agents rather than patients manifests itself in connection not only with the form of law distinctive of private ownership but also with its *content*. Indeed, ownership can take the form of private law but nonetheless depart substantially from the lived experience of private ownership in a market economy. This departure occurs especially when owners are legally barred from exercising rights to alienate objects (as may have been the case in the past in certain Communist states). Severing this power from owners turns them, in matters of exchange and commerce, into the patients of a central planner, devoid of any control over the transfer and reassignment of their own objects. As I argue below, this picture of ownership—*personal* ownership—is qualitatively different from the idea of private ownership.

Against the backdrop of these three short observations, the next stage of the argument takes stock of the dominant account of private ownership as the right to exclusive use of objects. The point of this exercise is not merely to criticize the exclusive-use account of private ownership. Rather, the point is to demonstrate and further elaborate on the importance of the three distinctive features I am attributing to private ownership. As this demonstration will seek to show, failing to account for the distinctiveness

8. *See* Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 632–636, esp. 635 (Jules Coleman & Scott Shapiro eds., 2002) ("The notion that a plaintiff is entitled to a right of action is . . . centrally important to the idea of private law."). Note that my insistence in the main text on the private-law form of private ownership is not meant to deny that some public-law protection of ownership is impossible, unwarranted, or even unnecessary. The point is that the private-law form is an ineliminable aspect of viewing private owners as agents.

9. Although as I note below, this has not always been the case. *See* Section III.B.

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of private ownership bends the account under consideration in counter-intuitive ways—that is, casting private ownership as an idea of possession, which is perfectly compatible with being a species of public legal ordering and which allows for categorical prohibitions against alienation (including, in particular, market exchange). Rather than inviting skepticism about the coherence of the idea of private ownership, this failure opens the space for an account that seeks to take seriously the freestanding idea of private ownership. The account I shall offer below seeks to fill out this space by explaining private ownership in terms of a special power to fix and change the rights and duties that nonowners have toward the owner with respect to an object.[10]

III. WHAT IS EXCLUSIVE USE A THEORY OF?

To set the stage for a critical examination of the exclusive-use idea of private ownership, I shall commence with a brief elaboration of this idea. In particular, I shall explain the nature of the relationship between exclusion and use.

The exclusive-use account of ownership is in fact a framework shared by different theories (with sometimes comprehensively different ideologies, methodologies, and ambitions) that nonetheless casts private ownership in terms of the right of an owner to exclude others from the object in question. But exclusion as such is not the point of private ownership, as most advocates of the exclusive-use theory of ownership insist. Indeed, it would be odd to explain the grounds of private ownership in terms of the categorical importance of the owner's right to exclude others without more, that is, without elaborating on the service that exclusion renders values (such as autonomy) or social goals (such as efficiency). And this service can get going in the first place through exclusion's protection of the right of the owner to *use* the object.

Indeed, seeking exclusion, at a more concrete level, means requiring others to discharge a duty of forbearance, which is to say a duty not to interfere with the excluder's use of the thing. Symmetrically, any given instance of the practice of private property of invoking the right to use a thing implies a reason, indeed a duty, on the part of all others not to meddle with this right-exercising. Thus the right to use a thing requires the right to exclude others from the thing, and the right to exclude presupposes a right to use. Or perhaps it would be more accurate to say that private property is not just about excluding others and about the right to use, taken severally, but rather about the right to exclusive use.

Thus the notion that ownership is essentially the exercise of a right to the exclusive use of an object implies that nonowners incur a duty to keep

10. *See* Section IV.

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off objects owned by others and thus indirectly to sustain use by owners. As emphasized on many occasions, there is a sense in which this simple account of ownership captures the everyday meaning of assertions of the kind 'this is mine.'[11] That said, I argue that this account suffers from three deficiencies: that it fails to explain ownership in terms other than possession (including a special case of possession); that it fails to explain the private-law form that private ownership takes; and that it fails to come to terms with the Marxian distinction between personal and private property. I take each in turn.

A. The Possessory Theory of Private Ownership

Accounts of the right to exclusive use, as mentioned above, have dominated theoretical reflections on property law for many centuries. However, these are in fact accounts of possession (of whatever degree or strength). Blackstone, whose remarks on the right of exclusive use are perhaps the most familiar lines in the history of modern property law, elsewhere observes that ownership, "property in it's [*sic*] highest degree," just is possession "without owing any rent or service to any superior."[12] Ownership, on the standard theory of exclusive use, has been at best a particular case of possession, not an idea or concept that stands on its own independent feet. Or so I am arguing. It is worth observing at the outset that whether possession can generate property rights (including, in particular, ownership), and whether ownership is necessarily relative or absolute are familiar questions in legal history as well as theory, giving rise to important insights concerning the relationship between possession and ownership.[13] My argument draws on these insights to develop a *conceptual* claim concerning the logical object of any theory of ownership emphasizing the entitlements of persons to the exclusive use of things—namely, it is possession rather than ownership. Thus I do not claim (at this stage of my argument) that ownership picks out this or that idea. Rather my claim is that the right to exclusive use is a defining

11. *See, e.g.*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (distinguishing between the standpoints of ordinary observer and scientific policymaker); STEPHEN R. MUNZER, A THEORY OF PROPERTY 16 (1990) (contrasting popular with scientific conceptions of property); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 1 (1994) (casting the everyday meaning of ownership in terms of an exclusive right to a thing).

12. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *105 (1979) (1766). The quoted excerpts appear in Blackstone's discussion of fee simple. There Blackstone aims to show that this kind of estate is recognized as private ownership by the common law. It is important to note that at other places in his *Commentaries*, Blackstone does distinguish clearly between possession and what he often calls right of property. *See, e.g.*, 3 *id.* at *190–191. It is beyond the purpose of my argument to adjudicate beyond the conflicting accounts of ownership in the *Commentaries*.

13. For a celebrated account, *see* FREDRICK POLLOCK & ROBERT S WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW pts. I–II (1888). For the distinction between relative and absolute ownership, between common-law and Roman-law views of ownership, *see* H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 145–166 (3d ed. 1972).

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feature of possession, and therefore an account of ownership cast in terms of exclusive use necessarily fails to explain ownership in terms other than possession (including the highest degree of possession).[14]

I shall commence with noting that possession can be thought of as a range property (to borrow from John Rawls),[15] with factual possession capturing one extreme of this range and ultimate possession, ownership, at the opposite end.[16] In between there exist different instances of rightful possession (e.g., being the finder of a lost or mislaid object; bailee; and tenant). This range of possessory interests represents varying degrees of the right to exclusive use. Each case of possession (including mere factual possession) features a right to exclusive use, with the only difference being the number of people excluded by the law from the object in possession. This is most eloquently articulated in *The Common Law*, where Oliver Wendell Holmes, after observing that the "rights of ownership" are "substantially the same as those incident to possession," offers the following distinction: "The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one, and is accountable to no one but him."[17]

Even this picture is overdrawn, since the highest degree of possession—ownership—is never literally exclusive or otherwise absolute. Indeed, proponents of ownership absolutism such as Blackstone have always recognized any number of ways in which exclusive use is not, after all, a legal right to use an object to the exclusion of *all* others in *all* situations. There is abundant evidence in law to the effect that the exclusive use attached to ownership is relative.[18] Thus the exclusive use characteristic of private ownership is not

14. The argument in the main text focuses almost exclusively on the common-law principles, doctrines, and materials pertaining to possession. However, legal protection of possession as such, including factual possession, was familiar in the Roman-law system as well, despite the (disputable) fact that it embraced an absolutist view of ownership rights. *See* Peter Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, 1985 ACTA JURIDICA 1, 29 (noting that "the protection of possession went on without reference to entitlement: to be a protected possessor was no indication of the rightfulness of possession."); *see also id.* at 29–31 (the Romanist concept of ownership, despite its absolutist nature, admitted relative protection of possession as such). *Cf.* JOLOWICZ & NICHOLAS, *supra* note 13, at 146–155, 259 (arguing, against Max Kaser's theory of relative ownership, that Romanist ownership law was absolute, meanwhile finding that possession "without reference to its rightfulness or wrongfulness" received legal protection through possessory interdicts).

15. JOHN RAWLS, A THEORY OF JUSTICE 508 (1971) (employing the notion of range property in the context of singling out the natural capacities of persons that make them worthy of equal justice).

16. *See generally* D.R. Harris, *The Concept of Possession in English Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE 69, 73 (A.G. Guest ed., 1961).

17. OLIVER WENDELL HOLMES JR., THE COMMON LAW 246 (1881).

18. *See, e.g.*, Ploof v. Putnam 71 A. 188 (Vt. 1908) (private necessity); RESTATEMENT (SECOND) OF TORTS §196 (1965) (public necessity); McKee v. Gratz, 260 U.S. 127, 136 (1922) (customary limitations on the right to exclude); Countryside and Rights of Way Act 2000 (a limited right to ramble around uncultivated private land across England and Wales); DAN B. DOBBS, THE LAW OF TORTS §76, at 173 (2000) (authority to enter the land of another to make arrests). Of course this is only a partial list. For the proposition that the Romanist idea of ownership, although absolute on its face, "was not, strictly, absolute," *see* Birks, *supra* note 14, at 1.

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even a qualitatively different case of possession; the nature of its departure from other cases of possession is merely a matter of degree.

A similar conclusion—that the exclusive-use account of ownership picks out a theory of possession rather than a freestanding idea of ownership—is reached by recalling the obligation on the part of nonowners to exclude themselves from the properties of others. As I shall observe below, this is an obligation to respect *possessory* interests, not necessarily and not even mainly ownership rights.

To begin with, the obligation of noninterference or keeping-off mentioned above, whose existence is the ultimate expression of the exclusive-use idea of ownership, often takes the form of a tort duty against committing trespass upon the property of another.[19] Proponents of the exclusive-use conception of private ownership routinely emphasize, indeed celebrate, the rigid protection it provides owners against unwelcome invaders—in particular, its imposition of strict tort liability and the powerful arsenal of remedies (including injunctive relief and punitive damages) it may render in protection of victims of trespass upon land or chattel.

However, trespass sustains exclusive use of objects by their possessors, including possessors whose claim for exclusive use does not stem from a *right* to possession or a title more generally.[20] Simply put, actual possession, rather than ownership, is the ground of the common-law duty of noninterference; moreover, an owner who is out of possession does not have the standing to sue for trespass.[21] Of course, the class of person brought under the duty of noninterference may vary depending on the kind of possessory interests in question (say, an outlaw possessor may not be able to enjoin the dispossessed owner from recovering her object but he may sue others for trespassing against the object in his possession). But just like the relative right to exclusive use mentioned above, the protection provided to possessors of any sort (owners included) is relative in nature. Thus variations in degree of protection need not strike a qualitative rather than a quantitative difference between mere actual possession and the rightful possession of an owner.

This analysis strikes a familiar cord in the lived experience of common-law property lawyers (as well as common-law historians), as legal disputes over property entitlements, including actions for the recovery of property (formerly called *ejectment*), give rise to the question of who holds the better right to the possession of the object in dispute.[22] John Fleming puts the point succinctly, observing that with respect to actions for the recovery of

19. *See* PENNER, *supra* note 2, at 72; Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 992 (2004).

20. *See, e.g.*, DOBBS, *supra* note 18, at 102–103.

21. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 78 (5th ed. 1984).

22. For a standard account to this effect, *see* E.H. BURNS, MODERN LAW OF REAL PROPERTY 26 (16th ed. 2000). For a historical account in this spirit, *see* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 119 (2d ed. 1981).

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disseised property, the common law "recognises only relatively good or bad rights to possession."[23]

Against the backdrop of the preceding discussion there emerges a rough but nonetheless good sense of the proper place of exclusive use within the structure of the common law of property. I show above that the right to exclusive use is first and foremost a feature of possession. Analytically speaking, it is not distinctive of ownership. Moreover, its legal protection renders the fact of ownership unnecessary (and, according to the leading scholars mentioned above, also immaterial). More precisely, ownership does not seem to be doing any work in the legal protection of the right to exclusive use apart from playing an *evidentiary* role—that is, ownership helps in establishing the strength of a claim for a better, though not necessarily the best, right to possession when compared to similar claims made by nonowners.[24]

Thus a conceptual account emphasizing that private ownership is essentially a right to exclusive use does not state the case for a freestanding idea of ownership. Rather it explains ownership in terms of possession and therefore explains away whatever it is that renders ownership a distinctive form of being in control (in the right sense) over an object. Proponents of the exclusive-use account of ownership may concede in return that ownership is indeed at its core an instance of possession.[25] They may also claim that this is an importantly special instance of possession, standing at a critical distance from any other case of (wrongful or rightful) possession. But as I shall argue in this section, it is not clear why an owner's right to exclusive use is so special. The only way out of this embarrassment is to argue that ownership presents the most powerful right to possession of all (though, recall, it never amounts to an absolute right to exclusive use). But this gambit does not overcome the initial difficulty of articulating an account of ownership solely in terms of possession. After all, appealing to the strength of owners' rights to exclusive use means that we keep coming back to possession, including the highest degree of possession. To defend ownership's special right of exclusive use in terms of a particularly powerful instance of

23. The relevant passage reads:

> [T]he common law continued to adhere to the principle, developed in relation to the real actions, that the nature of the right asserted in ejectment is merely the plaintiff's better right to possession rather than abstract ownership or an absolute right good against the world. Thus, our modern law, like the medieval, recognises only relatively good or relatively bad rights of possession.

JOHN G. FLEMING, THE LAW OF TORTS 49 (8th ed. 1992). *But see* JAMES GORDLEY, THE FOUNDATIONS OF PRIVATE LAW 49–65 (2006) (denying the historical truth of the possessory account of ownership).

24. I say *not necessarily the best* in recognition of cases such as adverse possession, according to which mere possession may defeat title. Adverse possession is certainly not alone in qualifying ownership's strength as a claim for the better right to possession.

25. The familiar adage according to which "possession is the root of title" is but one reminder (in the area of original occupancy) of the relationship between ownership and possession.

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possession is, again, to explain ownership in terms of possession—an exclusive use by owners just is (the highest degree of) possession. In order to stand out as an account of ownership as such, the explanation of the right to exclusive use must employ conceptual materials other than possession, which might be impossible because there is nothing to say about exclusive use other than that it is a defining feature of the legal protection of possession.[26]

B. Exclusive Use and Private Legal Orderings

Most modern systems of private ownership give rise to normative relations between right-holders and duty-holders inter se.[27] Nonowners have obligations that are owed to and owned by property owners. In other words, these are obligations that run from the former directly and exclusively to the latter, the enforcement of which therefore is vested in the latter's discretion. Society as a whole facilitates this private legal ordering, to be sure, and at a deeper level makes it possible to begin with. But once the system of private ownership gets going, society takes the backseat, allowing for private-law rights and duties to engender normative relations between owners and nonowners, as mentioned above.

The private-law structure that private ownership takes appears at first glance to be natural. In fact it is anything but natural. The fact that contemporary private law provides for the protection and enforcement of ownership rights by means of imposing private-law duties on nonowners is what one must explain rather than assume. The divide between private and public law, between proprietary tort and crime, was anything but familiar in the early days of the common law. Trespass upon land, for example, was a wrong of breaching the king's peace, the medieval equivalent of public order, as much as it was a private wrong done to the person in possession of that land. Furthermore, a modern version of a public-law institution of private property is not impossible to imagine once it is sought. For instance, it might combine criminal-law duties (which are owed to society) against trespass with a public scheme of insurance (financed through general tax

26. It is important to note, before moving to the next stage of the argument, that my argument—viz., that the exclusive-use account explains what ownership is solely in terms of possession and therefore explains it away—does not turn on the normative considerations in favor of protecting the exclusive use of possessors. Certainly, the reasons for sustaining the right to exclusive use by owners may be entirely different from the reasons for protecting a similar right in the case of nonowners (either wrongful or rightful possessors). The relativity of possessory interests reflects this reality. However, insofar as these considerations, in the case of ownership, are cashed out in terms of legal protection of exclusive use, ownership becomes an instance of possession and so its explanation (rather than justification) is made by reference to the concept of possession.

27. By *normative relations* I mean a form of human connection established through legal or moral rights and obligations (and norms more generally) rather than merely social relations.

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coffers) to compensate owners for losses to their property resulting from violation of the (criminal) law against trespass.[28]

Now, it is of less importance for the purpose of my argument to consider in depth aspects of these or other alternatives, including their desirability. It is important, however, to ask whether the idea of ownership (whatever it is) can account for the private-law form that the system of private ownership currently takes. Indeed, a public-law institution of private ownership seems remarkably different from what we have. And an explanation of the nature of private ownership that remains flatly indifferent to the form that it takes (whether private or public) falls short of providing an adequate account of this basic feature of private ownership. This is not only because it departs significantly from the lived experience of the current system of private ownership, but also because it settles on an extremely parochial explanation of the idea of private ownership. It amounts to saying that ownership could feature a three-place relationship between nonowners, society at large, and an object. On this relationship, a nonowner owes a duty of noninterference to society (as in all duties of criminal law) with respect to an object that is privately owned by another individual. The owner herself is left outside this triangle, rendering the *agential status* of the private owner redundant (which is a position of extreme opposition to private ownership's current empowerment of the owner as constituting a legal authority over nonowners in relation to her object).[29]

And yet this is precisely what the exclusive-use idea of private ownership may claim for its own theory. Anything beyond this claim—in particular, that private ownership takes the form of private law—falls outside the conceptual materials of this account. This is not to say that this account is not compatible with the private-law form. Rather the argument is that the conceptual materials of the exclusive-use account fall short of taking notice of, let alone specifying, the private-law aspect of ownership; still less do they explain why it must be the case that private ownership gives rise to rights of action on the part of owners and duties of noninterference owed to and owned by them.

Indeed, the notion that ownership is in essence the right of exclusive use begins with the importance of allowing owners the right to the uninterrupted use of their objects. Grounded in considerations ranging from freedom to efficiency, this is the right to be the lord of one's own castle. The centerpiece of this analysis, however, is the correlative *duty* incurred by nonowners, with the content of keeping off the castle in question.[30]

28. A substantially similar approach has been adopted in New Zealand with respect to personal injuries. For an overview, *see* Geoffrey Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44 U. TORONTO L.J. 223 (1994).

29. I say more about the legal authority characteristic of owners below.

30. *See* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 281 (2008) (noting that on the exclusive-use account, "[o]wnership . . . is the product of a norm that protects the boundaries around an object so as to exclude the whole world but the owner.").

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Larissa Katz accurately observes that the exclusive-use account of ownership presents "a theory of nonownership."[31] Thus, soon after establishing the liberty to use one's own object, this approach to the idea of ownership moves forward and away from this liberty to elaborate extensively on the duties of noninterference mandated by the idea of ownership as exclusive use. However, it is not clear whether owners figure in these duties in any significant way.

Furthermore, it even seems that for some prominent theories of exclusive use, the duties of noninterference are akin to *in rem* duties, owed to "the plurality of property holders"[32] or to "a large and indefinite class of holders of [property] rights."[33] And they depart in nature, rather than merely in kind, from duties *in personam*, owed to a particular owner or a specific class. However these duties are cast, the right to exclusive use does not specify any particular connection between the right-holder, the owner, and her correlative duty-holder, the nonowner. It does require that the law see to it that nonowners be excluded from property not theirs so that owners can enjoy the liberty (within limits) to deploy their objects. But the right to exclusive use cannot provide us with further details concerning the precise legal form that these duties of abstention take: Are these duties owed to and owned by each owner in particular or the entire society a whole (or perhaps an intermediary class of people)? Indeed, criminal-law duties are, conceptually speaking, perfectly compatible with the need to sustain owners' rights to exclusive use (even if they are arguably less desirable for whatever reason), which is to say that the idea of ownership that emphasizes the right of exclusive use fails to account for the special normative power exercised by owners in the administration of their own rights. They could become patients, as it were, of the criminal-law system, the mere beneficiaries of society's commitment to sustain public order by protecting their liberties to use their own objects to the exclusion of others.[34]

C. Is Personal Property a Private Property?

Although Marx's name is justly synonymous with the abolition of private ownership—the property regime enshrined in the modern bourgeois society—and with the installment of the scheme of collective ownership he

31. Katz further observes that the conceptual center of the exclusive-use theory is the elaboration of "a general duty not to cross over the boundaries of objects one does not own." *Id.* at 277. As I note below, it is an open question whether Katz's account overcomes her own critique of the exclusive-use account.

32. PENNER, *supra* note 2, at 27.

33. Thomas Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789 (2001).

34. As a preeminent historian of the common law observes, in the early lawsuits for wrongs (such as trespass) "the essence of the victim's role in such proceedings lay not in their initiation, as has been supposed, but in making the proof. He was a witness." MILSOM, *supra* note 22, at 285.

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proposes instead, he is careful not to overstate the change he is advocating.[35] In particular, Marx warns his readers not to confuse this grand thesis with the abolition of what he calls *personal property*: it is only private, not personal, property that must and will die. Before getting to the crux of this distinction, it would be important to note that the value of this distinction for contemporary discourse about private ownership does not (or at the very least need not) lie in the adequacy of employing the idea of private property in the way Marx did or, more broadly, in the merits of the abolitionist thesis; rather it is important because this distinction has direct bearing on what an adequate theory of private ownership *should* account for.

By personal property, Marx does not mean to follow the familiar common-law characterization of this term—that is, the class of movable things as opposed to real, immovable things.[36] Nor does he identify personal property with objects of intimate or sentimental value.[37] Instead, Marx develops the notion of personal property by reference to a distinction, familiar at least since Aristotle, between two values credited to owned objects. An object can be a bearer of use-value, though it need not have this (as when the object is fiat money); it may also be a bearer of exchange-value. The distinction is not a feature of some inherent characteristic of the object in question (e.g., a toothbrush is normally appreciated for its use-value but it can certainly be understood as a competitor for the dentist's tools). Rather it derives its validity from two independent sources:[38] the economic condition and, more important, the law's official attitude toward economic markets. The former source accounts for economic modes of social organization that emphasize self-sufficiency or communal production at the expense of exchange. Feudal England operated for some time under these circumstances with a corresponding static system of ownership, namely, personal property (in the Marxian sense). The latter source pertains to a legal order featuring a planned economy sustained by laws against individuals' engagements in

35. In the *Manifesto of the Communist Party* Marx and Engels boldly assert that "the theory of the communists may be summed up in the single sentence: Abolition of private property." KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY, *in* KARL MARX: SELECTED WRITINGS 232 (David McLellan ed., 1977).

36. *See* 2 BLACKSTONE, *supra* note 12, at *384ff ("Under the name of things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes.")

37. Moreover, personal property in the Marxian sense is not the same as personal property in the justification of private ownership made familiar in Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). The former is predicated upon the nonmarket economic value, whereas the other is predicated upon the object's contribution to the ethical and psychological development of its owner.

38. The analysis in the main text is my reconstruction of the Marxian distinction between use value and exchange value; it is by no means an attempted exegesis of his work. My reconstruction draws on MARX, THEORIES OF SURPLUS VALUE, and MARX, CAPITAL, especially Part VIII of vol. I. It rejects the orthodox approach according to which the distinction in question is meant to capture the divide between nonproductive (e.g., a toothbrush) and productive objects (e.g., a steel factory). As I explain in the main text above, even one's toothbrush has an exchange value. Moreover, a steel factory can fall within the category of objects of use value, say, if it is family-run and its output is put to use in the farm of this same family.

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transactions, especially commercial ones but possibly also noncommercial ones (such as making bequest or giving a gift).

The former Soviet Union came very close to the state of affairs depicted above when it abolished private property, installed a planned economy, and nonetheless recognized a system of personal property.[39] To illustrate the point, a second house held as a real estate asset, hence as a bearer of exchange value, could not have been owned personally. But if it served the owner as a country house, the result was the opposite, and the house became a recognized object of personal property.[40]

Against this very rough sketch of the Marxian idea of personal property I shall argue that the exclusive-use idea of ownership picks out personal rather than private property. Moreover, I shall suggest that a theory of private ownership that applies the same idea of ownership across diverse systems of property law such as feudal England, the Soviet Union, and the modern West renders this idea useless for want of theoretical and practical guidance.

It is important to note, to forestall misunderstanding, that my argument does not aim at collapsing contract law into property law or vice versa. Contrary to J.E. Penner's insistence on keeping them strictly separated,[41] I do not argue that private ownership just is the combination of personal ownership and contract. Rather, a logically and normatively prior question to contract law is whether people are entitled to participate in such a practice to begin with. Having the liberty (in the Hohfeldian terminology) to approach owners with a business offer relating to the owners' object is not the same as intending to enter, let alone entering, a contractual relationship with the owner. Similarly, having the power to exchange one's object is not the same as intending to make, let alone making, an exchange. Thus, rather than mixing categories of property and contract, the distinction between private and personal ownership turns on the powers that each system of property grants or denies owners, respectively. The distinction concerns the normative preconditions for contractual relationships rather than the contractual relationships themselves. More precisely, it renders vivid the hierarchical nature of the relations between private ownership and contract: it is a transcendental condition of the possibility of the latter that the former obtains. This legal hierarchy between private ownership and contract

39. For the proposition that the Soviet Union adopted the Marxian distinction between private and personal property, *see* M. TSUNTS, I. FURMAN & S. YEZERSKAYA, PERSONAL PROPERTY IN THE SOVIET UNION 11 (S. Smith trans., 1960). There the authors cite *The Communist Manifesto*'s distinction between personal and private property and note that "[t]he socialist state does not repudiate personal property, but encourages its growth." *Id.* For the property arrangement in the Soviet Union, as mentioned in the main text above, *see* W.E. BUTLER, SOVIET LAW 180 (2d ed. 1988).

40. *See* BUTLER, *supra* note 39, at 185. *And see id.* at 183: "whether an object may be personally owned is less a question of its natural properties than the actual nature of its use."

41. *See infra* note 42.

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may be so ubiquitous that it often takes a distinction between personal and private ownership to call our otherwise unreflective attention to it.

As mentioned above, the theory of ownership as fundamentally a right to exclusive use focuses on the duties of noninterference that arise in connection with the owner's freedom to exploit her object uninterrupted. These duties do not apply to interactions between owners and nonowners as they seek, on the standard account, to separate them from one another, or so the adjective *exclusive* entails. It is possible, of course, to extend the right to use an object to capture the right to alienate it and indeed to exchange it in a market transaction; most proponents of exclusive use are not at all hostile to economic markets. However, this extension does not originate from the idea from which the exclusive-use account begins—that is, the right to exclude others from the boundaries of one's object (and the correlative duty to keep off this object). Thus the right to take one's object to the market is perfectly compatible with the right to exclusive use, but the former right is not a feature of the latter one. It is not, in other words, an inherent element of the idea of private ownership but rather an additional component. Indeed, leading scholars of the exclusive-use account insist on this point, seeking (for entirely different reasons) to purge the idea of private ownership of commercial or transactional traits, limiting the essential core of ownership to the right to restrict others from an object not theirs.[42]

It is not incoherent or otherwise mistaken to develop a theory of the idea of private ownership without any reference to an owner's legal power to give her title away in return for some consideration. Depending on the context in which it is deployed, this idea may even count as a virtue since it could illuminate the extent to which private ownership has a truly fixed meaning, capturing radically different periods in the historical development of human institutions of property. Nevertheless, the virtue is straightforwardly balanced insofar as the idea in question cannot even begin to make sense of the difference in character, rather than merely scope, of the powers and rights society confers upon owners. It may even miss entirely the phenomenon of fiat money, perhaps the most prominent object of private ownership at the present time, carrying nothing but exchange value.[43] Above I argue that the right to exclusive use, because it is indifferent to the legal form that private ownership takes (criminal or civil law), fails to account

42. Thus Waldron argues that the more restricted the definition of ownership, the less controversial it would be. The right to exchange (and different other rights not related to exclusive use) should for this reason be cast away. *See* WALDRON, *supra* note 2, at 50–55. Penner argues that ownership promotes the owner's autonomy and that exchange promotes an interpersonal activity of engaging others in a joint activity. Therefore the latter does not form an organic aspect of the concept of ownership. *See* PENNER, *supra* note 2, at 91–92. *See also* Merrill & Smith, *supra* note 33 (emphasizing exclusion and distinguishing it from the legal practice of contract).

43. I do not mean to imply that a system of personal property cannot operate in concert with an economic environment featuring fiat money. Rather, fiat money and the idea of owning it are immaterial and indeed conceptually insignificant for a system governing the use value of objects.

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for the special agential status of owners. Now I return to this argument, this time approaching the special status of owners through the lens of the distinction between personal and private property.

The legal powers vested in a Soviet citizen owning personal property (say, a TV set) and in her Western fellow owning the same object as private property are different not only in degree—more or fewer rights—but also in the nature of these powers. As I argue above, the possessory account of ownership admits of a sliding scale of degrees: the right to exclusive use characteristic of ownership is only relatively higher, so to speak, than other instances of possession. Unlike the relativity of possessory rights, the move from the right to exclusive use to the right to purchase or sell one's property on the market—to take advantage of the exchange value of one's object—is not a move to some higher position on the scale of exclusive use. Rather it empowers the owner to participate in the very market for rights to exclusive use of objects. This difference is anything but trivial to the understanding of private ownership. It expresses the difference between being an owner in a society with a legal ban on market transactions and holding the legal power actively to engage others in commercial exchange.[44]

IV. OUTLINE OF A THEORY OF PRIVATE OWNERSHIP

A. Private Ownership

Insofar as society seeks to avoid the Hobbesian state of nature, it must order its members' affairs involving external objects. Indeed, there are certain objective conditions (the circumstances of property, if you like) that call for establishing a scheme of coordination between the members of society as regards external objects. Moderate scarcity is perhaps the most familiar condition.[45] However these conditions are cast, it is clear that every society must settle on some scheme that solves questions such as (but not limited to) who can use and profit from which object and how they can do this. To be sure, the conditions that give rise to a system of property need not

44. Whereas the difference I am arguing for is moral or legal, there may surely be psychological implications to living under a property regime that denies owners the right to sell their objects on the market. *See* Richard Pipes, *Human Nature and the Fall of Communism*, 49 BULL. AM. ACAD. ARTS & SCI. 38 (1996).

45. While it is beyond dispute that scarcity makes coordination a difficult achievement, this might not be a conceptual truth about the need for property coordination. For this need can arise from another direction—namely, the human condition characteristic of modern, complex societies. In these societies, persons may disagree over substantive questions of all sorts, ranging from justice in holdings to the concrete arrangements of particular persons' holdings. Some of these disagreements do not turn on scarcity. That is, the source of disagreement—the fact of pluralism, as John Rawls calls it—has no perfect overlap with scarcity. Moreover, Lawrence Becker observes that insofar as private ownership (or property rights more generally) is necessary in order for persons to be well-functioning ethically speaking, an economic reality of scarcity is sufficient but not necessary for a private-property regime to arise. *See* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 6 (1977).

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determine, either partly or wholly, the shape of this system—this task is normative, never merely causal.

Property, understood as a system of rules and principles pertaining to external objects, takes up this need for coordination. The idea of private ownership presents a form of solution by introducing a system of rules and principles relating to property coordination.[46] It identifies correctly that which lies at the root of this system: a question concerning people's normative standing, by which I mean the legal (and perhaps also moral) rights and duties held against one another with respect to an object.[47] In particular, it gives rise to a first-order question concerning the normative standing of people to an object and a second-order question concerning the normative standing to determine the former question. As I shall suggest below, private ownership is a three-place relationship between owner, nonowners, and an object that can be described in the following manner. Being an owner involves a special normative power—that is, the power to change (in some nontrivial measure) the rights and duties that nonowners have toward the owner with respect to an object. More precisely, private ownership comes into being when society vests practical authority in an individual (the owner) to fix in some measure the normative standing of others in relation to an object.

Thus a legal institution of private ownership operates by generating, so to speak, in rem signals (good against the world) conveying the following normative content: the point of view of the relevant owner—through which she forms intentions and indeed negotiates the world as a free and equal agent—must be accorded some specified measure of respect and recognition in many sorts of interaction that others have or intend to have with objects not theirs. That is to say, whatever one's course of action, one must accept the point of view of the owner as an independent constraint on one's own plans (insofar as these plans include the employment of an object not one's own), not just as one judges from his own point of view what this owner may require, but rather what the owner actually requires.[48] This embrace of the point of view of the owner as an independent source of claims engenders normative relations of two general kinds. Negatively, the authority on the part of the owner demands that potential intruders take (to some extent) the point of view of the owners as their guide to conduct insofar as

46. There are other competitive or complementary systems (such as state property) but I set these to one side.

47. Normative standing should, therefore, be distinguished from other ways in which people can stand in relation to an object. Thus, people can stand in causal or factual relations to an object (perhaps because they happen to hold it); or they may be tied affectively to it (because it once belonged to their ancestors). Neither of these nonnormative standings need obtain for the normative aspect of standing to arise.

48. The last part of the sentence in the main text is meant to distinguish between what one impartially takes the judgment of another to be and the (unfiltered) judgment of this other. For more on the crucial place of owner's unfiltered judgment, *see* KEETON ET AL., *supra* note 21, at 113.

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the decision of the owner fixes the normative standing of the intruders to the owner's object. Positively, if a nonowner seeks to affect a change in her normative standing to that object, she is required to engage the point of view of the owner. In many cases (most importantly, cases involving members of a modern society) this engagement will take the form of a contract, including negotiations that precede the contract.

As I characterize it here, private ownership—the authority to fix the normative standing of others in relation to an object—overcomes the shackles of the possession-based theory of ownership, the equivocation of the private/public legal ordering, and the equivocation of the personal/private property. I take each one in turn below.

I begin with the notion that the right to exclusive use is a feature of possession as such, not distinctively of ownership. Actual possessors, to repeat, exercise some degree of legal power to use the object in possession to the exclusion of most others. So do rightful possessors, including (ultimately) owners in possession of their objects. An actual possessor, however, can change the normative standing of no one in relation to an object in her possession—she is a possessor, not an owner. A trespasser seeking to enter the land held by an actual possessor (who is herself a trespasser) remains a trespasser even if the latter invites or otherwise allows him to enter. With respect to both persons, the owner is the only one with the authority to change their normative status—to turn them from trespassers into holders of some right with respect to her object (such as an easement or tenancy). Rightful possessors other than the owner may assume this authority only insofar as the owner, the source of this authority, has delegated it to them. Moreover, an adverse possessor could gain this authority only insofar as her possession entitles her, after a limitation period, to a de facto ownership.

Against this backdrop, the relativity of the right to exclusive use and of possession more generally is replaced (on my proposed account) by the qualitatively different characteristic of ownership—the establishment of a connection between an authority (owner) and its subjects (nonowners) concerning the latter's legal relation to the former's object. However limited this authority may be in some cases (say, cases of necessity), the strict separation between those who have it and those who do not remains as firm as before. Thus it overcomes the relative superiority of possessory rights, since the right to fix the normative standing of nonowners is vested exclusively in the owner and those to whom she either delegates her authority or losses it completely through adverse possession. In short, there may be any number of possessory interests held by different persons in respect to an object but only one authority in control of the normative standing of all other persons in regard to an object.

The idea that ownership involves the authority to fix in some measure the normative standing of others in relation to an object possesses the right conceptual materials with which to illuminate the private-law character of private ownership. This is because ownership (on the proposed

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account) engenders a normative relationship specifically between an owner and nonowners. The duties incurred by nonowners, as mentioned above, are to respect the point of view of the owner, that is, her intentions concerning nonowners' normative standing in relation to her object. These are straightforward duties owed to and owned by each owner in particular. Thus, whereas the right to exclusive use is compatible with the status of owners as patients of the criminal-law system, the account I develop emphasizes that owners are agents actively exercising legal authority over others. This is easiest to see in the paradigmatic private-law case of an owner making and carrying out a contract with a nonowner with regard to her object. A contract of this kind can be made in the first place only insofar as owners under a system of private property hold the authority to change the normative standings of others, including (most importantly) transferring to them the authority itself.

Finally, I shall briefly return to the Marxian distinction between personal and private property. The proposed account casts into sharp relief the conceptual and normative gulf that exists between owners of personal property and their counterparts who own private property. The former may have the right to exclude some others from their object, but they are otherwise completely impotent, legally speaking, since their positions qua owners give them zero legal power over the normative standing of others.[49] More precisely and more dramatically, it is prohibited by law to engage nonowners in relations (such as the sale of goods) that aim to change the latter's normative standing and more broadly to assume authority over one's fellow compatriots in relation to objects. The idea of private ownership, on my account, emphasizes this authority as being the single most important feature thereof, which is, for liberal egalitarian societies, also the most normatively controversial aspect of the modern idea of private ownership.[50]

49. Owners in a personal-property system may of course decide not to exercise their rights to exclude others by inviting nonowners in. But this act does not amount to a change in the normative standing of others since they have not earned any right in relation to the object in question other than a mere license. The system of personal property I have in mind does not allow owners to vest others with rights to their property. This may not have been the actual system operating in the Soviet Union, but in principle it is possible for personal property to take this form.

50. Surely the right to exclusive use (of whatever degree) is controversial as well. Indeed, the background conditions under which a person could acquire this right are morally arbitrary—as when a person is simply born into a wealthy family in a wealthy state that is located on a wealthy continent. That said, a starting-gate theory of distributive justice could correct for this source of inequality by neutralizing the negative and positive effects of chance. However, even when this stage can be completed successfully, a further source of inequality appears in connection with the rights of owners to take their objects to the market, whose operation pays no particular attention to concerns of moral desert, chance, and choice (which are generally considered by liberal egalitarians as key elements in the pursuit of equality). At this stage, starting-gate redistribution is inadequate, and it is an open question among egalitarians how to respond to inequalities generated by markets, whose operation presupposes private property and rejects personal property. For more, *see* Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks*, 9 THEORETICAL INQUIRIES IN LAW 239 (2008); Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES IN LAW 151 (2008).

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Before I move to the next stage of the argument, it will prove helpful to consider very briefly a recently articulated account of private ownership that emphasizes the position of the owner as setting the agenda for her object. The reason is that this account emphasizes the authoritative position of owners, updating an analogy between property and sovereignty familiar at least since Morris Cohen's classical essay "Property and Sovereignty."[51] It would therefore be in order to spell out its important distance from my outlined account. According to Katz, the exclusivity of private ownership is first and foremost a feature of the owner's authority "to set the agenda for a resource," which is the authority to determine what function(s) the object will serve.[52] Nonowners incur a duty to fall in line with this determination. For example, suppose an owner of a piece of land decides not to use it at all except for doing what is necessary to keep it in reasonable shape while waiting for an opportunity to sell it.[53] Under these circumstances, nonowners do not incur a duty to keep off tout court. They will be enjoined from any activity that might not fall in line with the agenda or function set by the owner. In another case, when the agenda set for the land is farming, social workers need not be excluded from entering the place for the purpose of visiting migrant laborers temporarily housed there.[54] In cases where the function set by the owner for her object is unknown or unclear, an absolute

51. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). Neither Katz's nor my account, however, accepts Cohen's elaboration of sovereignty in connection with private ownership (nor his legal realism more broadly). Cohen begins his argument by severing property rights from physical possession, asserting that "the essence of private property is always the right to exclude others." *Id.* at 12. According to my argument above, however, the right to exclude is a feature of possession, not ownership (or property rights). Nevertheless, his main point does not turn on this shortcoming, as I now explain. Indeed, the centerpiece of his argument, understood in the context of the heydays of laissez-faire, is that certain property right-holders exercise a de facto power of taxation over others in need of the former's resources even at the cost of "hard labor and disagreeable service." *Id.* More specifically, people in need of resources "necessary for their subsistence" cannot but literally give themselves—their labor or money—over to right-holders to make a living or get necessary goods respectively. *Id.* To this extent, property rights are state authorizations conferred upon private entities to collect taxes (and therefore exercise political sovereignty) from economically dependent individuals and thus adversely to affect the redistribution of wealth among members of society. *See id.* at 13. Without going into the merits of Cohen's thesis, it is clear that his argument from sovereignty does not amount to a conceptual account of the idea of private ownership (or, for that matter, property rights). Indeed, his account aims at property rights over the means of production, and even then, not necessarily any means. *See id.* at 14 (raising the concern that "the wealthy few determine the mode of life of the many"). It is certainly not in the nature of private ownership, at least not on my account of ownership, that owners could exercise a de facto authority to tax economically dependant people. (For more, *see* Section IV below, especially my discussion of the just-price doctrine.) Moreover, Cohen self-consciously limits the character and scope of his thesis concerning property as sovereignty, e.g., to "modern owner of capital," "modern large property owners," "railroad," "public service corporation," "captain of industry and of finance," and "gas company." *Id.* at 13–14.

52. Katz, *supra* note 30, at 290.

53. I borrow this example from Katz (*id.* at 291) who develops it in another (though related) context.

54. Here again, I borrow the example from Katz (*id.* at 301) who draws on New Jersey v. Shack, 277 A.2d 369 (N.J. 1971).

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duty of noninterference might come into play to ensure that nonowners will not pursue nonconforming plans vis-à-vis the actual (unknown) function.[55]

This incisive account certainly improves on the exclusive-use account to the extent that it does not overlook the special status of the owner (though it may not be as successful on other counts).[56] But it takes the wrong turning when it identifies the owned thing rather than the nonowner as the logical object of the owner's authority. Whereas on my account the owner possesses the authority to fix the normative standing of others in relation to a particular thing, the agenda-setter possesses the authority to fix the kind of usage appropriate (on her view) for the thing. The authority relations of the former kind emphasize that the idea of private property is first and foremost about normative relationships between persons, and only secondarily about the res or thing.[57] The latter authority has it the other way around, establishing authority relations between owners and their objects with nonowners taking the backseat. Indeed, the authority characteristic of the agenda-setter singles out the person who has the final say with respect to the kinds of function or agenda to be fulfilled by the thing in question as an owner. Thus, if both an owner and a nonowner set their respective agendas for the same object, the decision made by the former outclasses the latter's because of her authority over the object and, most important, only insofar as these agendas are inconsistent with one another.

Accordingly, whether or not the nonowner experiences a change in his normative standing in relation to an object as a result of the owner exercising her agenda-setting authority is a matter of happenstance—the extent to which the course of action he pursues might come into conflict with the kind of service the owner has designated for that object. It is always necessary, in order to know the normative standing of a person to an object, to begin by ascertaining the agenda set by the owner for this object. Only then—only after the owner settles on her preferred agenda—can the law proceed to sort out the class of nonowners whose normative standing in relation to an object is thereby implicated. By implications, the owner cannot fix the normative standing of others in relation to an object unless it is necessary for sustaining the agenda she has set for this object. For example, suppose an owner actively prefers her piece of land to remain open and uncultivated. Against the background of this agenda, the owner cannot deny others from

55. Katz, *supra* note 30, at 300.

56. In particular, it is an open question, and one that plagues Katz's theory, whether the right to set the agenda for an object can explain cases in which the court recognizes a right to exclusive use even when the nonowner's activity can hardly be said to be inconsistent with the agenda set by the owner. The paradigm case here is Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997). Katz could claim, as she indeed does (*supra* note 30, at 303–305), that the precise agenda set by an owner can be interpreted broadly to include overarching agendas such as sustaining privacy. But the more one stretches the scope of the agenda, the more it loses its initial appeal, submerging in the exclusive-use account.

57. I elaborate on the distinction between property-as-relations and property-as-thingness below. *See* Section IV.B.

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crossing through it, for their course of action does not conflict with the owner's agenda for the object. On the agenda-setting account, the owner does not possess the authority to determine the standing of the crossing others unless she resets the agenda for the object so that it comes to stand in conflict with the nonowners' activity of crossing.

The indirect and coincidental connection between the agenda-setting authority of the owner and nonowners suffers from the three above-mentioned shortcomings that plague the exclusive-use account. Casting ownership in terms other than possession, accounting for the private-law form that it takes, and distinguishing it from personal property all call on us to focus our attention on normative relations and away from objects.[58] However, both accounts hold in common a rather loose connection between owners and nonowners while elevating the object—the thingness—to prominence. According to the exclusive-use account, private ownership is at its core a relationship of abstention between nonowners and an object not theirs. And according to the agenda-setting account, the idea of private ownership amounts to the authority relation that exists between an owner and an object—her object.

Against this backdrop, it is possible to extend, mutatis mutandis, the three challenges I mount above against the exclusive-use account to the agenda-setting account. I shall not repeat these but only make three brief observations specifically relevant to the agenda-setting account. First, this account does not deny the *relativity* of agenda setting, the exercise of which is not a distinctive characteristic of ownership.[59] The special position of the owner lies in the fact that she is the *supreme* agenda-setter, while possessors with inferior rights (including mere actual possessors) exercise a similar authority, though to a lesser degree. Indeed, their agendas may not override those set by the owner, but (at least in the eyes of tort law) possessors may seek the exclusion of all (save for the owner) who pursue nonconforming plans to the agendas they have set. Thus the position of agenda setting is a feature of possession and the law's protection of the interest in actual possession and not strictly speaking of ownership.

Second, setting an agenda for one's object, unlike my proposed account, does not implicate the normative standing of others to the object, at least not directly, as I argue above. To repeat, the authority vested in the owner concerns the object itself—the power to determine what functions it will serve. It implicates nonowners only coincidentally through the (criminal or private-law) duties of noninterference that might come into play, when

58. That said, I do not deny, nor could I, that the object as such is not a constitutive element of the practice of private ownership nor of any other form of ownership more generally. I do deny, however, that its role in a successful account of private ownership must play out in the normative relations that property rights establish. On my account, an object is the context in which the authority relations between owners and nonowners operate.

59. "An owner is not necessarily the *only* decision maker with respect to a resource." Katz, *supra* note 30, at 294.

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appropriate, to protect the function determined by the owner. To this extent, the agenda-setting account holds in common with the exclusive-use account the notion that the owner exercises her authority (or, as Katz would say, sovereignty) over a physical domain, which in turn may consequentially result in the need to impose obligations on the part of certain nonowners.[60]

Third, the agenda-setting account, like the exclusive-use account, focuses on the uses made or that will be made by the owner and the necessary exclusion of others that they might demand. The power to exchange the object for consideration—the authority of the owner to turn a nonowner into an owner—is not an aspect of the exclusion of nonowners who do not fall in line with the agenda set for the object by the owner. Like the exclusive-use account, the account of ownership as something that sets the agenda for a resource is compatible with a system of private property but nonetheless confines its account of ownership to capture a (Soviet-like) regime of personal property.

B. Hohfeld's Legacy: Separating Formalism from Realism about Private Ownership

Certainly, my account follows the Hohfeldian analytical insight that legal norms—including powers, rights, and duties—govern relationships between persons inter se, not between nonowners and objects of others.[61] I remain agnostic, though, concerning the legal-realist notion that private property is a hodgepodge bundle of sticks, as often associated with Hohfeld.[62] Some exponents of the exclusive-use account of ownership, by contrast, appear to take the two Hohfeldian theses—property-as-relations and property-as-bundle-of-sticks—to stand or fall together. This appearance comes from their insistence on rejecting both theses and, more important, from associating them with legal realism and conceptual skepticism.[63]

60. In contrast, on my preferred account, the authority characteristic of ownership is directed at and exercised over the normative standing of nonowners. Accordingly, the right to determine functions of a resource is merely the upshot of authority—a consequence thereof—rather than its immediate object. The agenda-setting account has it the other way around in this particular respect.

61. At this stage of my argument, I use *relations* in the limited sense of juridical and in particular authority relations. In future work I shall seek to show that these relations can also engender morally important *social relations* of respect and recognition between owners and nonowners. This showing, it is worth noting, does not seek to derive property rights from preexisting social relations, which is a thesis defended in, e.g., Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1989). Rather, the claim is that ownership creates a thin though intrinsically valuable society between persons simply by virtue of their being persons, regardless of preexisting social relations.

62. Whether or not this association does justice to Hohfeld or to legal realism is a separate question that I set aside. Likewise, it is not clear to me why viewing private property as a bundle of sticks must carry overtones of a free-floating conception of property.

63. See, e.g., J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

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For example, at the very outset of her account, Katz attributes skepticism about the coherence of the idea of ownership to the bundle-of-sticks thesis.[64] She then goes on (I repeat) to develop a theory of ownership that defeats skepticism by emphasizing the special connection of the owner to an object. That is, the owner as the supreme agenda-setter exercises the power to determine the functions to be served by an object. By this method, Katz purports to do away not only with the bundle-of-sticks thesis but also with the property-as-relations thesis. As explained above,[65] the relation singled out by Katz's idea of ownership is that which lies between the owner and an object: of being in the superior position to fix the agenda for an object.

Against this backdrop, is my selective endorsement of Hohfeld tenable? In particular, how can siding with the property-as-relations thesis not render my account of private ownership susceptible to the bundle-of-sticks thesis?[66] In answering these questions, I am assuming, for the sake of argument, that the bundle-of-stick thesis must invite one to view ownership as an amalgam of sticks or incidents devoid of necessary content.[67]

To begin with, the marriage between the two Hohfeldian theses—property-as-relations and property-as-bundle-of-sticks—has no conceptual foundations. Of course, it may not be inconsistent to hold (or reject) them together. However, there is nothing in a commitment to the former thesis that entails or even implies the latter. On my proposed account, the special authority relation at the conceptual core of the idea of ownership picks out the form of ownership, which sets out ownership's necessary content. Qua form, it remains indifferent to the functions or purposes for which the right of ownership may be enlisted—that is, it resists the pressure toward becoming a placeholder for fungible sticks.[68]

Moreover, the conceptual separation between the two theses hints at a deeper divide between them: the property-as-relations thesis, unlike the bundle-of-sticks thesis, is not an insight originating exclusively from legal realism nor from skepticism about legal concepts. In fact, although the first thesis (which is the one I endorse) is widely attributed to Hohfeld, it was presented more than a century before Hohfeld published his seminal essay.[69] It was Kant who observed that "it is clear that someone who was

64. Katz, *supra* note 30, at 275, 275 n.1, 283.

65. *See* text accompanying notes 56–61.

66. There is at least one other important thesis associated with Hohfeld's account of rights: that in rem and in personam rights are indistinct at their core. I leave the effort of articulating an account of the distinctive nature of property rights for another occasion.

67. *See* Anthony M. Honoré, *Property and Ownership: Marginal Comments*, *in* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS 129, 131 (Timothy Endicott et al. eds., 2006) (denying the association of the Hohfeld-Honoré approach to property and ownership with conceptual skepticism about these concepts).

68. A more complete elaboration on the form of private ownership and its importance for property discourse appears below. *See* Section V.

69. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). *See* SINGER, *supra* note 1, at 133 (noting that "Hohfeld was the first to popularize the idea that liberties entail relations.").

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all alone on the earth could really neither have nor acquire any external thing as his own."[70] Accordingly, Kant sought to develop a formal account of private ownership fully contained within his theory of rights as relational authorizations to employ coercion against duty-holders.[71] It is less important for the present purpose whether Kant's account ultimately succeeds in deriving absolute ownership from the principle of freedom;[72] the crucial point is that ownership *can be approached* from a nonrealist perspective such as Kant's without thereby relinquishing the property-as-relations thesis.

V. THE IDEA OF PRIVATE OWNERSHIP AND THE FACT OF DISAGREEMENT

The argument so far seeks to show that the proposed theory of private ownership makes good on three threshold requirements for adequate explanation of its subject matter: that of explaining the idea of ownership independently of possession, as a form of private legal ordering, and in a way that makes sense of the distinction between personal and private property. The argument henceforth develops what may be thought of as its most important contribution to the *theoretical* elaboration of the idea of private ownership under the conditions of modernity.[73] Specifically, I shall argue that an adequate theory of private ownership must create ample conceptual space, as it were, for normative disagreements about both the substantive rights that should make up the core of ownership and their appropriate scope (call them disagreements about the breadth and scope of ownership, respectively). Disagreements of these two types are pervasive in philosophical, legal, and popular discourse and have deep significance for anyone who is affected by the institution of private property, which is just about everyone. Together they constitute *the fact of disagreement*—an inevitable and fundamental feature of open societies wrestling with the legitimacy of the institution of private property.

70. Immanuel Kant, The Metaphysics of Morals 6:261, at 49 (Mary Gregor trans. & ed., 1996) (1797).

71. *See* Ripstein, *supra* note 2, at 86–106, esp. 93 n.11.

72. Although Kant's account of property proceeds on the basis of relational rights of ownership, there are some striking differences between my proposed account and his—at least as developed in Ripstein's illuminating book; *see id.* Three are worth mentioning at this stage. First, Kant begins with a general and abstract idea of law and property—an a priori idea of reason and reason alone—and then works out the implications of this idea for actual legal practice. By contrast, I seek to reconstruct the idea of private ownership from the actual legal practice. Second, the Kantian account of private ownership may be best understood as a variation on the exclusive-use theme, the theme I have been criticizing above. Third, Kantian ownership is in principle absolute. There is nothing except for the equal freedom of others that can render legitimate society's attempt to narrow it (say, by pursuing a luck-egalitarian program). As Section V of my account makes clear, however, private ownership need not call for absolute rights.

73. I emphasize *theoretical* elaboration and leave to another occasion the doctrinal aspects of my account (viz., the elaboration of particular doctrinal areas in property law in the light of the concept of private ownership I develop).

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Disputes concerning the breadth of ownership revolve around owners' substantive rights; some elevate the right of owners to exclusive use, others the right to sell, waste, donate, or bequeath an object, and yet others the responsibilities of owners to promote social justice in the light of the inequalities generated in part by their ownership.[74] Disagreements concerning the scope of ownership focus on whether any one right of ownership should be extended or restricted—say, the extent to which owners can exclude others, the financial terms of mortgaging one's land to a lender, the kind of restraints on the right to destroy an object (say, a Cézanne), or the eligibility of owners, by virtue of their ownership, to claim the entire proceeds from the sale of land.

These disagreements may arise when one believes, with Holmes, that "[t]he absolute protection of property, however natural to a primitive community more occupied with production than in exchange, is hardly consistent with the requirements of modern business."[75] Or society may take private ownership to be commending more respect for owners' right to exchange their objects, as when it repels the just-price doctrine and grants owners the discretion to determine the terms of the exchange (including, most importantly, the exchange value of objects). More recently, normative disagreements may also erupt when society decides for compelling reasons to denounce restaurant owners' rights to exclude black nonowners as an allegedly natural expression of their private ownership. And finally they pervade the current efforts to determine the contours of private ownership in matters of intellectual property, featuring arguments for and against the adoption of the model of ownership rights characteristic of tangible property.[76]

In all these cases, the disagreements are normative from beginning to end. They may not be eliminated simply by conceptual arguments that lead one side to appreciate its errors and accept the claims of its rival. Indeed, they do not present themselves—or would be better not to present themselves—as analytical arguments about the idea of private ownership. (Consider the oddity of an analytical effort in this vein, applied to the right of restaurant owners to exclude patrons on the basis of their race or an argument saying that the fair-use doctrine is incompatible with the logic of private ownership of copyrighted work.)

But are we entitled to consider these widespread disagreements in terms of arguments concerning private ownership in the first place? Perhaps they share nothing special in common and thus present isolated problems about the appropriate regulation of distinct relationships between persons in relation to objects. This would be the case if reference to private ownership—the

74. The locus classicus of these and other substantive rights or incidents of ownership is Anthony M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961).

75. HOLMES, *supra* note 17, at 100.

76. For more, *see* Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, THEORETICAL INQUIRIES IN LAW (forthcoming 2010).

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idea—turns out to be doing no work in disciplining the arguments or otherwise laying the backdrop against which to analyze them thoroughly. Thus the fact of disagreement concerning the breadth and scope of ownership prompts the question of whether the idea of private ownership has necessary content at all, for otherwise it would be best to do away with it. And even if it has, can this content make sense of these disagreements, for example, by drawing the line between arguments about private ownership (say, how best to realize it) and claims against it (say, an argument in favor of an alternative system of ownership)?

There is an obvious trade-off here between the necessary content of private ownership and the fact of disagreement. Thus, for example, the argument made by Holmes and mentioned above in favor of a more relaxed protection of ownership can be seen as a claim about the contours of private ownership—the appropriate scope of private ownership. Or it can be understood to be an argument against private ownership and in favor of a different system of ownership governed by a different idea of property (call it shrivate shownership). The more substantive the content of private ownership gets, the less conceptual space is left within the discourse of private ownership for disagreements. The more open-ended it becomes, the more space is available for these disagreements.

The danger, however, is that substantive content necessarily renders the idea of private ownership too parochial to account for the fact of disagreement concerning ownership's breadth and scope. And vice versa, an open-ended content, because it generates no necessary content, might fail to exhibit any idea of private ownership to begin with.[77] In both cases, the idea of private ownership may be useless. Substantive content might increase the demand for more concepts (such as shrivate shownership) to compete against the narrow idea of private ownership to the point of creating a hyperinflation of ideas. Open-ended content might go the other way, eliminating the need for a unifying idea altogether.

An adequate idea of private ownership, I argue below, must not only convey some necessary content but must also (and more fundamentally) provide a *formal category* against which substantive disagreements could flourish. Moreover, and once again, this formal category must be thin enough to avoid crowding out normative disagreements but not so thin that it becomes useless. As I seek to show, the formal category offered by the exclusive-use account fails to appreciate the former hazard, whereas conceptual skepticism about the idea of private ownership invites the latter hazard. The proposed account, by contrast, provides a formal characterization of the idea of private ownership which is appropriately thin (though not too thin) to accommodate disagreements about the breadth and scope of private ownership. The

77. For elaborations on this proposition, *see* HARRIS, *supra* note 3, at 119–161; Henry E. Smith, *Mind the Gap: The Indirect Relations between Means and Ends in American Property Law*, 94 CORNELL L. REV. 959 (2009).

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reason for this, I shall argue, is that the idea of private ownership—namely, an authority to fix in some measure the normative standing of others in relation to an object—does not predetermine the breadth and scope of ownership.[78]

To set the stage, I consider the response of the exclusive-use account to the charge of the bundle-of-rights account concerning the useless character of the idea of private ownership, showing that this response remains in the end just as unsatisfying. To begin with, the fact of disagreement has been utilized by the bundle-of-rights account as evidence for the lack of an idea of private ownership or for its uselessness. The most celebrated (and extremist) attack of this sort is Thomas Grey's thesis concerning the disintegration of property. Grey's claim, in essence, is that the idea of private ownership—and perhaps property more generally—is used to express many different ideas and that these cannot hang together. He lists six different usages of the term: property as real estate, a right in rem, an entitlement that advances allocative efficiency, a public-law entitlement (also known as the new property), a thinglike definition of property for the purpose of the taking clause of the U.S. Constitution, and an injunctive remedy (contrasted with liability rule).[79] However, that a term such as property or ownership is employed by English-speakers in connection with these or other notions says absolutely nothing concerning the coherence or incoherence of the idea of property or, for the present purpose, private ownership. And Grey's assertion that these are "discontinuous usages"[80] is of no help, which renders unacceptably conclusory his entire thesis that we should understand institutions of private property without recourse to an idea of private ownership.

It is possible to restate the disintegration thesis more moderately to provide for a less radical and plausibly a more potent challenge to the thought that private ownership has a unifying idea despite the fact of disagreement mentioned above. Hanoch Dagan, rejecting the conceptual nihilism of the preceding account, argues that property and private ownership give rise to several institutions or sets of rules that share a Wittgensteinian family resemblance.[81] Thus the legal arrangements that figure in different social contexts (say, the economic market or the family) and are applied to different categories of resources (such as land or chose of action) defy their reduction into a unified form.[82] The family-resemblance argument can certainly account for the theoretical and doctrinal variations in property law throughout the different areas it purports to regulate without endorsing

78. A more precise explanation appears in text accompanying notes 85–92.

79. Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69, 71–73 (J. Roland Pennock & John W. Chapman eds., 1980). *And see* MUNZER, *supra* note 11, at 31–36 (providing a sustained attack on Grey's thesis).

80. Grey, *supra* note 79, at 72.

81. *See* Hanoch Dagan, Exclusion and Inclusion in Property (unpublished manuscript on file with author); Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1558–1565 (2003).

82. According to Dagan, "ownership for one purpose does not imply ownership for another." Dagan, *Craft*, *supra* note 81, at 1563.

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the disintegration thesis. However, it may not so easily entitle one to reject the possibility that the idea of private ownership does the work of picking out, as it were, the several family members of private property such as those identified above. Quite the contrary, in fact, for the resort to the idea of family resemblance (or to a set of property institutions) presupposes a common origin—an overarching conceptual structure that allows one to think in terms of family resemblance to begin with, that is, an idea by virtue of which it is possible to come to a conclusion about resemblance, and a familial one at that.

The Dagan resort to family resemblance need not deny the existence of an overarching idea of private ownership.[83] It can concede the point but scale down its significance by urging that a unified idea of private ownership is so abstract and open-ended as to render its ambition to shape the normative discourse about private ownership redundant; in which case Dagan has made a full circle back to Grey—to agree that the idea of private ownership is useless.

By contrast, the exclusive-use account is widely considered to have shown that the idea of private ownership can nonetheless be useful. It provides a stable, univocal background—a formal definition—against which the regulation of relationships between persons in connection with objects can be developed and evaluated in a coherent fashion. And this is because it carries necessary content that is also truly concrete: private ownership picks out the right to use an object to the exclusion of others. In earlier stages of my argument I argue that this is not after all an idea of private ownership. Now I am arguing that this idea may in addition be of no help in sorting out disagreements about the breadth and scope of ownership. That is, the right to exclusive use falls short of accommodating normative and political disagreements about the breadth and scope of ownership. This shortcoming, I shall argue, is inherent to casting private ownership in the terms of exclusive use.

Whereas the open-ended idea presupposed by the bundle-of-rights account cannot guide, let alone help settle, the disagreements mentioned above, the trouble with the idea of private ownership as the right to exclusive use is that it settles them too early, as it were. Indeed, the exclusive-use account takes sides in the substantive disagreements about both breadth and scope. It argues that the right to use an object to the exclusion of others is the defining formal feature of private ownership; and it argues for a more or less maximalist scope for this right. It therefore presents a narrow and rigid understanding of private ownership that pays no heed to the disagreements characteristic of popular and theoretical discourses about what many participants would regard as the contours of private ownership.

83. It is not implausible to interpret Dagan as advocating this thought in saying that his preferred approach "understands the forms of property . . . as important default frameworks of interpersonal interactions." *Id.* at 1558. The important question is, of course, how rebuttable the default is.

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By implication, any argument that deviates from this (substantive) position amounts to a claim for an alternative idea to that of private ownership.[84] In this world, the idea of private ownership could therefore do no work, since in principle, disagreements concerning the breadth and scope of ownership rights become disagreements between competing ideas of property arrangement rather than between competing conceptions of the concept or idea of private ownership. Or so I am arguing.

Perhaps, however, the right to exclusive use is less parochial and rigid than I suggest here. As mentioned above, the right to exclusive use does not empower the owner to exclude the rest of society; it is not, strictly speaking, a right good against the world, as there is any number of situations in which nonowners need not exclude themselves from an object. It is better viewed as a limited right to exclude others. But the qualifier *limited* bends the idea of exclusion in an unnatural direction.[85] Indeed, there is a point on the limited-exclusion scale where talk of the right of exclusive use becomes incoherent and, indeed, mistaken. Limitation, in other words, must be allowed on the margins only.

Many disagreements about the breadth and scope of private ownership concern, directly or indirectly, the appropriate balance between the *limited* and the *exclusion*. Recall the disagreements regarding the adoption of a model of tangible property rights in the case of copyright (disagreements about the breadth and scope of copyrights). Certainly a broad interpretation of the fair-use doctrine is incompatible with a right to exclusive use, including a limited right to exclude others. Would this necessitate the conceptual argument according to which copyright does not fall within the idea of private ownership? It is not clear why this must be so. Of course, there may arguably be good reasons that we should not conceive of copyright as a case of private ownership. However, these do not amount to denying that copyright can be cast in terms of private ownership.

The same can be further extended in considering disagreements about the scope of ownership of tangible property, as in the case of Britain's Countryside and Rights of Way Act 2000. According to this act, private owners cannot exclude nonowners rambling around certain uncultivated parts of their lands. Here again, the key question on the exclusive-use account would

84. Another way to put this point is to say that the exclusive-use account, because it insists on the essentiality of the right to exclusive use, purports to be the only conception of the concept of private ownership. A conception, on the Rawlsian terminology, is a theory of the concept. *See* RAWLS, *supra* note 15, at 5–6. The concept/conception distinction is introduced to property discourse in WALDRON, *supra* note 2, at 47–53, and more recently deployed in LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 19 (2003). But both of these cases are mistaken insofar as they take *conception* to stand for a concrete application of the concept. Once again, according to Rawls, a conception of the concept is not an application but rather a *theory* of the concept.

85. Smith concedes that the right to exclusive use "is best regarded not as absolute but as carrying heavy presumptive force." And he further observes that characterizing heaviness in this regard is "a worthy topic for debate." Smith, *supra* note 77, at 968.

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be how substantial the limitation is on the right to exclude nonowners. Perhaps in this case the limitation might seem fairly trivial (though I doubt that). At any rate, these and numerous other examples (some of which are mentioned above) force the exclusive-use idea of private ownership to grapple with the metaphysical question of how limited the concept of limited exclusion proves to be in any given case.

But this approach to sorting out disagreements about the breadth and scope of private ownership seems counterintuitive. With a focus on the appropriateness of the limitation on exclusive use, disagreements about the breadth and scope of ownership become nothing but disagreements about the very idea of private ownership. Any argument in favor of imposing limitations on the right to exclude is in the first instance an argument against the very idea of private ownership, unless these limitations are sufficiently insignificant as to bear merely on the margins of exercising the right. The thought that according to the exclusive-use account of private ownership, disagreements about the breadth and scope of ownership are disagreements about the idea of private ownership is not surprising but it is remarkable. It is not surprising, because the term *exclusive use* turns, by definition, on breadth and scope—bluntly put, its quality is purely a property of its quantity. The remarkable thing about this thought is that many of the disagreements about the breadth and scope of ownership do not cast themselves in terms of arguments for or against the very idea of private ownership. They do not seek to advance alternative ideas to private ownership. Rather they represent substantive disagreements about the appropriate shape that private ownership should take. Some, depending on their moral and political beliefs, may envision a less limited form of private ownership, and others would have it the other way around. But they are all of a piece insofar as they seek to present what they separately view as the best case for private ownership—the most compelling interpretation or the best realization of this idea. The idea of private ownership picked out by the exclusive-use account cannot account for this state of affairs and more precisely fails to appreciate the distinction between the very idea of private ownership and its substance—its breadth and scope.

In contrast, the idea of private ownership developed above—namely, the authority to fix in some measure the normative standing of others in relation to an object—entertains sufficient space for normative disagreements concerning the substantive rights of ownership. Like the exclusive-use account, it rejects skepticism about private ownership by articulating a formal definition of this idea. Unlike the exclusive-use account, however, it provides a formal framework within which substantive disagreements are settled by recourse to normative rather than conceptual arguments. In particular, the space it creates provides the scope and breadth needed to show that disagreements about the core rights of ownership, including disagreements between the exclusive-use and the bundle-of-rights accounts, are not disagreements about the very idea of private ownership. More precisely, its

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necessary content—the authority to fix normative standing—does not specify the breadth and scope of ownership rights and so does not preempt normative and political disagreements in these matters. Moreover, its formal character does not render the idea useless. Let me explain.

I begin with the scope of ownership rights. Some of the disagreements in question, perhaps most of them, are focused not on the number of rights that form the core substance of ownership but rather on the appropriate scope of each particular right. The very idea of ownership, the very idea of assuming authority to fix the normative standing of others in relation to an object, does not entail absolute rights to exclude, destroy, sell, and so on. There is nothing in the proposed account of ownership that turns on the scope, maximal or otherwise, of the authority of owners to fix the normative standing of others. It is sufficient for the authority vested in owners that they could exercise *some* power over the standings of others to an object. Accordingly, it takes a normative rather than conceptual argument to specify the precise scope of each and every substantive right of ownership.

To be sure, some measure of authority on the part of owners is not only sufficient but also necessary; otherwise private ownership is impossible even on its own formal terms. Thus, on the one hand, holding title subject to the right of nonowners to compel owners to sell any of their objects for a reasonable price cannot be cast in terms of private ownership because a widespread practice of private taking renders meaningless the authority of owners to fix the normative standing of others in relation to an object.[86] Precisely the same rationale explains why private ownership rules out perpetuities (because contingent threats of future forfeiture negate the authority of the present and future owners of an object subject to perpetuities) and the medieval French doctrine of *retrait lignager*, according to which an owner cannot alienate her landed property without securing the expected heir's approval.[87] On the other hand, a just-price doctrine places constraints on owners' authority because it fixes the economic terms of the exchange by reference to objective criteria, but it does not abrogate the authority altogether. Certainly owners can nonetheless determine the normative standing of other parties to the transaction even when the details of the bargain itself are not fully at their respective wills.

More broadly, the idea of private ownership reflects a necessary *form* of relations between owners and others, namely, authority relations between

86. One of the benefits of the proposed theory of private ownership is that it accounts for the qualitative difference between eminent domain and private taking. Because the state vests owners with the authority to fix others' normative standing to an object, the state need not be subject to this authority in the same way that fellow citizens are. The state has compelling reasons to defer to the authority in question at most times, to be sure, and the general constitutional considerations of fairness that govern its interactions with citizens are not without force here.

87. For the doctrine of *retrait lignager*, *see* 2 FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF ENGLISH LAW 313 (2d ed. 1923).

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owners and the normative standing of others. Inasmuch as the right in question takes this form, as the idea of private ownership requires, mere variations on its scope remain fully committed to this idea. The stage, then, is appropriately left for normative arguments about the point of private ownership and how best to realize it.

Apart from variations on the scope of the substantive rights of private ownership taken severally, the proposed idea of private ownership keeps to an important extent a critical distance from the breadth of the rights that taken together might form its core. Indeed, prior to the question of scope, disagreements often focus on whether owners should be allowed to exercise all the rights traditionally associated with private ownership. That is, whether their authority to fix the normative standing of others in relation to an object must or should be carried forward into all sorts of relationships engendered by these rights. The straightforward answer is no, for the same reasons given with respect to the scope of private ownership. For example, the right to destroy one's object has been receiving greater critical attention in the light of the increasing concerns for the environment. By implementing some form of prohibitions against waste, society does not thereby abandon private ownership even though it diminishes its previous breadth. Indeed, being a sufficiently thin formal category, private ownership can *generally* range from parsimonious to generous versions, from few to many rights and powers available to owners, depending on the balance of reasons established through normative and political disagreements about its breadth.

However, the fluidity that the idea of private ownership allows cannot go unrestrained. In particular, there must exist some rights that give rise to the authority relation characteristic of private ownership. This requirement is a logical upshot of my account, as the proposed idea of private ownership would amount to empty formalism were no rights of ownership to obtain. More concretely, the right to alienate an object, I argue, must be part of these necessary rights, for otherwise the authority to fix the normative standing of others in relation to an object—to turn a nonowner into a right-holder—amounts to an empty set.[88] Unlike proponents of the exclusive-use account, who insist on the strict separation of this right from private ownership,[89] and unlike those who marry this right with private ownership by reference to a normative argument about the desirability of doing so,[90] my proposed

88. It does not follow that other rights traditionally associated with private ownership are necessarily contingent. Thus, for example, the right to some measure of exclusive use might be necessary insofar as it is a prerequisite for the exercise of the authority vested in private owners to fix the normative standing of others in relation to an object. I leave this secondary question for another occasion.

89. *See* PENNER, *supra* note 2, at 91–92, and recall my analysis in the main text concerning the conceptual difference between private ownership and contract in my account.

90. *See* Jeremy Waldron, *What Is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 341–344 (1985).

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account renders the connection between the right (of alienation) and the idea (of private ownership) a conceptual one.[91]

That the power of alienation is the surface manifestation of the very idea of private ownership is already implicit in my critique of the exclusive-use account. The private-law form that private ownership takes, its qualitative difference from possession (of whatever strength), and its opposition to the idea of personal ownership are three implications of the authority relations it engenders between owners and nonowners. The right to alienate, on this account, is just the execution of these authority relations, as the alienator—the owner—fixes the normative standing of the alienatee—the nonowner—in regard to an object. Of course, as the preceding analysis makes clear, it takes a normative argument to determine the precise scope of this right. However, because an outright elimination of the right renders obsolete the authority relations that make up the core of the idea of private ownership, disagreements concerning the very necessity of this right are not merely debates about the breadth of private ownership and the best ways to realize its idea in practice; rather they take stock of the idea of private ownership itself—they involve arguments for and against private ownership.[92]

The formal category of private ownership outlined in these pages is not, of course, bereft of normative content. No account in the realm of law could stay aloof from controversy. However, its susceptibility to the fact of disagreement, as demonstrated here, renders it thin enough to set the conceptual backdrop against which substantive disagreements about the contours of private ownership take place. The reason, as explained here, has been that the breadth and scope of private ownership are not parts of the proposed idea of ownership being an authority to fix in some measure the normative standing of others in relation to an object.

VI. CONCLUSION: FROM MORPHOLOGY TO NORMATIVITY

In these pages I have sought to reclaim the characterization of private ownership. I elaborate on the qualitative difference between the idea of private ownership and possession, the private-law form that this idea takes, its intimate connection with economic markets, and its openness to substantive disagreements about its best realization. In future work I shall deploy this

91. By using the term *the right to alienate*, I do not seek to overplay idiosyncratic powers such as the right to make a bequest (which involves the question of whether the authority of the owner exists posthumously) or gratuitously give a gift (which normally presents itself within circles of intimacy or sectarian fraternity). Instead, in line with the entire argument of these pages, the emphasis is on the right of free exchange, including the exchange of certain rights—say, the right to use an object—for consideration.

92. And once the latter set of arguments wins the debate, and the right to alienate is thereby abolished, the idea of private ownership transforms into a conceptually different system of possessory rights that displays indifference to the private or public form that it takes and naturally applies to command economies.

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theory in the service of explaining core features of private ownership such as the *numerus clausus* principle and the nature of in rem rights of property. In the remaining paragraph, I speculate on the implication of thus characterizing the idea of private ownership for the separate question of justification. It is beyond the purpose of my current argument to consider this question in depth. However, it would be apt to conclude the argument by reflecting on how the proposed account of private ownership could illuminate the justification of private ownership.

Normally, private ownership is praised or blamed for its consequences to individual liberty, optimal allocation of resources, and distributional equality among members of society. My emphasis on the normative—legal and moral—relations it establishes between persons could bring into sharp focus entirely different considerations that earlier treatments of the idea of private ownership have left unaddressed and so unexplained. Thus private ownership, because it demands that nonowners submit to the authority of owners, raises concerns for the legitimacy of authority that might be analogous to the problem of political authority familiar from the field of political philosophy: How is authority—here an owner's authority—possible? One way out of this difficulty could be to elaborate on the society that authority relations might engender between an owner and a nonowner. Indeed, a relation involving a nonowner respectfully recognizing to some extent the point of view of an owner as a freestanding constraint on the nonowner's own practical affairs suggests that a practice of private ownership might in itself be a value quite apart from its positive or negative consequences for liberty, equality, and efficiency. A person embracing the point of view of another as being in some measure authoritative comes to respect the latter on her own terms, not merely on his parochial and egocentric terms. Private ownership, on this speculation, might be associated with a liberal form of social solidarity that private-law practices more generally aspire to generate among members of a complex, modern society.[93]

93. For efforts in this vein, *see* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004); Avihay Dorfman, *What is the Point of the Tort Remedy?*, AM. J. JURIS. (forthcoming 2010).

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