3

Homelessness, Liberty, and Property

The previous chapter provided an overview of the main constitutional challenges related to homelessness and laws that govern public property in Canada and the United States. It showed how constitutional law does not provide a positive right to housing, and it demonstrated how existing interpretations of constitutional rights fail to protect unhoused persons against different threats of governmental interference.

This chapter explores how legal theorists have examined the relationship between homelessness, property, and two forms of liberty: negative liberty as noninterference, and positive liberty as self-actualization.[1] These conceptions of liberty (or freedom) deepen our understanding of homelessness.

The present chapter shows why positive and negative conceptions of liberty provide an incomplete understanding of the relationship between homelessness, liberty, and property. Subsequent parts of the book show why we gain a more complete understanding of this relationship when also consider how unhoused persons lack a third form of liberty: republican liberty as nondomination.[2] The term "domination" implies that individuals are vulnerable to the threat of unilateral interference by others.[3] Together, this chapter and the following ones illustrate how

[1] Isaiah Berlin, "Two Concepts of Liberty" in Henry Hardy (ed.), *Liberty* (Oxford University Press, 2002) at 169–70 (distinguishing positive and negative liberty). For examples of scholars who have examined the connection between homelessness, property, and positive and negative liberty, see Jeremy Waldron, "Homelessness and Community" (2000) 50:4 *U Toronto LJ* 371; Jeremy Waldron, "Community and Property – For Those Who Have Neither" (2008) 10:1 *Theor Inq L* 161; Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 *UCLA L Rev* 295; Nicholas Blomley, "Homelessness, Rights, and the Delusions of Property" (2009) 30:6 *Urb Geo* 577; Jane Baron, "Property and No Property" (2006) 42:5 *Hous L Rev* 1425; Jane Baron, "Homelessness as a Property Problem" (2004) 36 *Urb Law* 273; Jane Baron, "Rescuing the Bundle-of-Rights Metaphor in Property Law" (2013) 82:1 *U Cin L Rev* 57; Ben McJunkin, "The Negative Right to Shelter" (2023) 111 Cal L Rev 127.

[2] Christopher Essert, "Property and Homelessness" (2016) 44 *Phil & Pub Aff* 266 at 266.

[3] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) at 7; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1999) at 22–23.

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unhoused persons lack political equality because their positive, negative, and republican freedom are all limited in ways that do not affect people with access to housing.[4]

3.1 PRIVATE PROPERTY AND POSITIVE FREEDOM

3.1.1 *An Overview of Positive Freedom*

Isaiah Berlin famously distinguished between two conceptions of liberty: positive and negative. Positive freedom implies liberty as a form of self-mastery, self-actualization, or self-government.[5] The positive conception of liberty seeks to answer basic questions such as "who governs me?" and "by whom am I ruled?"[6] It is closely related to values such as autonomy and self-government.[7] Berlin argued that the positive conception of freedom distinguishes between one's higher and lower selves.[8] The higher self is self-actualized, rational, self-controlling, and concerned with one's long-term interests.[9] The lower self is the opposite: irrational, impulsive, and driven by impulses and short-term interests.[10] Berlin contended that positive liberty is central to certain religious and philosophical traditions, such as Ascetism, Quietism, Stoicism, and Buddhism.[11]

Positive liberty acknowledges that structural factors can influence the availability of opportunities that promote self-actualization.[12] For instance, poverty and lack of access to resources can hinder individuals' liberty to achieve certain goals, pursue certain plans, or make certain decisions.[13] Matthew Kramer notes that positive freedom emphasizes the availability of resources and opportunities, and individuals' actual use of such resources and opportunities to achieve their own authentic

[4] Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 *Windsor YB Access Just* 226 at 242.

[5] Berlin, "Two Concepts of Liberty" at 178. *See also* Matthew Kramer, *The Quality of Freedom* (Oxford University Press, 2003) at 96. Kramer points out that the concept of positive liberty is often associated with other terms that resemble self-mastery and self-actualization, such as autonomy, self-government, and self-determination. *See also* John Christman, "Liberalism and Individual Positive Freedom" (1991) 101 *Ethics* 343 at 344.

[6] Berlin, "Two Concepts of Liberty" at 177; Lester Crocker, "Rousseau's Soi-Disant Liberty" in Robert Wokler (ed.), *Rousseau and Liberty* (Manchester University Press, 1995) at 244.

[7] *See, e.g.*, Deborah Hellman, "Resurrecting the Neglected Liberty of Self-Government" (2015–16) 164 *U Pa L Rev Online* 233 at 233; Kai Möller, "Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights" (2009) 29:4 *Oxford J Leg Stud* 757 at 757–58.

[8] Berlin, "Two Concepts of Liberty" at 179.

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.* at 182; Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge University Press, 1989) at 115; Richard Sorabji, "Freedom and Will: Greco-Roman Origins" in Richard Seaford, John Wilkins, and Matthew Wright (eds.), *Selfhood and the Soul: Essays on Ancient Thought and Literature in Honour of Christopher Gill* (Oxford University Press, 2017) at 49–50.

[12] Lawrence Crocker, *Positive Liberty: An Essay in Normative Political Philosophy* (The Hague: Martinus Nijhoff, 1980) at 2.

[13] *Ibid.*

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ends.[14] In his view, positive liberty emphasizes the accomplishment of objectives rather than whether others physically hinder an individual's actions or plans.[15] In contrast to the negative theory of liberty – which construes freedom as noninterference – positive liberty is less concerned with coercion and concrete obstructions that restrict with one's movement or actions.[16]

Berlin was preoccupied by how the positive conception of liberty was incorporated within political theory and ideology.[17] He argued that authoritarian and totalitarian regimes emphasized positive liberty to justify tyranny.[18] In his view, these regimes employed coercion under the guise of necessity for individual and collective self-actualization.[19] He objected that totalitarian regimes portrayed coercion as a form of liberation rather than a hinderance to freedom.[20] Despite these concerns, Berlin also recognized that positive freedom is an essential component of liberty and that it is a "valid universal goal."[21]

Scholars argue that the positive conception of liberty is valuable for various reasons. First, in contrast to negative liberty theory, the positive conception of freedom more heavily emphasizes how access to opportunities and resources are necessary for self-actualization.[22] Impecunious persons may lack the financial resources to travel, access education, or enjoy a basic standard of living – all of which endow greater positive liberty to pursue their authentic interests and shape the course of their lives.[23] This explains why positive liberty is associated with the welfare State, resource redistribution, and structural forces within society that influence individuals' opportunities.[24]

[14] Matthew Kramer, "Freedom and the Rule of Law" (2010) 61:4 *Ala L Rev* 827 at 830.

[15] *Ibid.*

[16] *See, e.g.*, Steven Heyman, "Positive and Negative Liberty" (1992) 68:1 *Chi-Kent L Rev* 81 at 81; Ernest van den Haag, "Liberty: Negative or Positive" (1978) 1 *Harv JL & Pub Pol'y* 63 at 63–64.

[17] Berlin, "Two Concepts of Liberty" at 179; Isaiah Berlin, "Introduction" in Henry Hardy (ed.), *Liberty* (Oxford University Press, 2002) at 37; Maria Dimova-Cookson, "Defending Isaiah Berlin's Distinctions between Positive and Negative Freedoms" in Maria Dimova-Cookson (ed.), *Isaiah Berlin and the Politics of Freedom* (New York: Routledge, 2013) at 79; Ian Shapiro and Alicia Steinmetz, "Negative Liberty and the Cold War" in Steven Cherniss and Joshua Smith (eds.), *The Cambridge Companion to Isaiah Berlin* (Cambridge University Press, 2018) at 208.

[18] Berlin, "Two Concepts of Liberty" at 179–81, 197–99; Gina Gustavsson, "The Psychological Dangers of Positive Liberty: Reconstructing a Neglected Undercurrent in Isaiah Berlin's 'Two Concepts of Liberty'" (2014) 76:2 *Rev Pol* 267 at 268 (summarizing how some scholars have interpreted Berlin's conception of positive liberty).

[19] Berlin, "Two Concepts of Liberty" at 179–81, 197–99.

[20] *Ibid.* at 179–81, 197–99. *See also* Gustavsson, "The Psychological Dangers of Positive Liberty" at 269, 272–73.

[21] Berlin, "Two Concepts of Liberty" at 192–93; quoted portion in Berlin, "Introduction" in Hardy (ed.), *Liberty* at 39.

[22] Crocker, *Positive Liberty* at 2. Note that Crocker disagrees with Berlin's conception of positive freedom as self-mastery (*ibid.* at 4).

[23] *Ibid.* at 2–7.

[24] *See, e.g.*, Robert Goodin, "Freedom and the Welfare State: Theoretical Foundations" (1982) 11:2 *J Soc Pol'y* 149 at 151–52; Partha Dasgupta, "Positive Freedom, Markets, and the Welfare State" (1986) 2:2 *Oxford Rev Econ Pol'y* 25 at 26; Crocker, *Positive Liberty* at 2; Jason Brennan and John Tomasi,

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Second, the positive conception of liberty elucidates the comparative or relative social dimension of freedom.[25] All individuals may enjoy the same negative rights, meaning rights that protect against State interference. Yet positive liberty underscores how impecunious persons enjoy less positive freedom compared to affluent ones, even if the former experience no concrete interference.[26] Positive liberty thus acknowledges how individuals may enjoy different degrees of freedom based on the resources and opportunities that are available to them.

Third, positive freedom is concerned with the authenticity of human agency.[27] It accords importance to the ways in which values and preferences are shaped, and the ways in which individuals maintain control over the formation of their values and preferences.[28] For instance, individuals enjoy less positive freedom when their preferences and choices are conditioned by external influence, brainwashing, or manipulation.[29] Positive liberty thus connotes that individuals act consistently with reasons and values that they themselves shaped.[30]

Fourth, positive freedom is associated with the protection of basic capabilities that are necessary to live a dignified life.[31] Scholars such as Amartya Sen and Martha Nussbaum have advanced the Capabilities Approach, which posits that a central set of capabilities – or freedoms – must be protected so that individuals can live a meaningful life.[32] Central capabilities include, for instance, being able to live a normal-length life, enjoy bodily health and integrity, have control over one's environment, and affiliate with others.[33] Factors such as poverty, lack of educational resources, and diminished opportunities all influence the degree to which individuals enjoy such basic capabilities and can live a meaningful life.[34] The Capabilities Approach also recognizes that the State must provide access to resources that protect the basic capabilities and allow for human flourishing.[35]

"Classical Liberalism" in David Estlund (ed.), *The Oxford Handbook of Political Philosophy* (Oxford University Press, 2020) at 120.

25 Crocker, *Positive Liberty* at 7.

26 *Ibid.* at 2.

27 John Christman, "Freedom in Times of Struggle: Positive Liberty, Again" (2015) 37:1–2 *Analyse & Kritik* 171 at 177.

28 Christman, "Liberalism and Individual Positive Freedom" at 344–46.

29 *Ibid.* at 345–46; George Crowder, "Why We Need Positive Liberty" (2015) 77 *Rev Pol* 271 at 277.

30 Christman, "Liberalism and Individual Positive Freedom" at 345–46.

31 Christman, "Freedom in Times of Struggle" at 177–79. *See, e.g.*, Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011) at 17–21 (on the Capabilities Approach).

32 *See, e.g.*, Nussbaum, *Creating Capabilities* at 18–20; Amartya Sen, *Development as Freedom* (Oxford University Press, 2001) at 18, 24–25.

33 Nussbaum, *Creating Capabilities* at 33–34.

34 Sen, *Development as Freedom* at 87–88.

35 Martha Nussbaum, "Foreword: The Constitution and Capabilities: 'Perception' against Lofty Formalism" (2007) 121 *Harv L Rev* 4 at 11–13.

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The distinction between positive and negative liberty is not neat. Some posit that positive and negative freedom are inseparable from one another.[36] They suggest that the negative conception of liberty as noninterference is valuable because it secures positive freedom and individual autonomy.[37] According to this view, negative freedom is thus a precondition for positive liberty.[38] In other words, "freedom is always *both* freedom from something and freedom to do or become something."[39]

3.1.2 *Property Rights, Positive Freedom, and Homelessness*

Property promotes positive liberty in various ways. First, a private property right allows a person to secure autonomy through means other than their physical bodies.[40] Individuals use property – such as structures, objects, and things – to pursue their authentic goals and purposes.[41] The ways in which property resolves allocation problems fosters autonomy in a consistent and predictable manner. The property law regime solves issues regarding the allocation, control, and use of things.[42] A private property scheme settles competing claims about who is entitled to use or enjoy a given thing.[43] In doing so, it protects expectations, ensures predictability, and promotes stability in how individuals can use objects to self-actualize.[44] Individuals can better plan their lives and coordinate with others knowing that they can use property to further their interests.[45]

Second, property protects the central capabilities, and safeguards interests that are central to self-actualization, such as liberty, privacy, well-being, and security.[46] A home characteristically safeguards these interests and can promote an individual's sense of belonging.[47] Within the home, individuals can privately pursue certain

[36] *See, e.g.*, Maeve Cooke, "A Space of One's Own: Autonomy, Privacy, Liberty" (1999) 25:1 *Phil & Soc Criticism* 25:1 at 39.

[37] *Ibid.*

[38] *Ibid.* at 32.

[39] Gerald McCallum Jr., "Negative and Positive Freedom" in David Miller (ed.), *Liberty Reader* (New York: Routledge, 2017) at 102, 107 (quoted portion at 107, emphasis in original).

[40] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) at 88.

[41] *Ibid.*

[42] Jeremy Waldron, "What Is Private Property" (1985) 5:3 *Oxford J Leg Stud* 313 at 318. Private property rights also help ensure stability because they solve allocation problems within society. Namely, a private property scheme settles competing claims about who is entitled to use or enjoy a given thing.

[43] *Ibid.*

[44] Nestor Davidson, "Property's Morale" (2011) 110:3 *Mich L Rev* 437 at 439; Gregory Alexander, "Property, Dignity, and Human Flourishing" (2019) 104:4 *Cornell L Rev* 991 at 1045–46 (describing how property promotes self-authorship).

[45] Henry Smith, "Mind the Gap: The Indirect Relation between Ends and Means in American Property Law" (2009) 94:4 *Cornell L Rev* 959 at 970.

[46] Margaret Jane Radin, "Property and Personhood" (1982) 34:5 *Stan L Rev* 957; Gregory Alexander, *Property and Human Flourishing* (Oxford University Press, 2018) at 200.

[47] Benjamin Barros, "The Home as a Legal Concept" (2006) 46:2 *Santa Clara L Rev* 255 at 259; Alexander, "Property, Dignity, and Human Flourishing" at 1045.

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aims free from scorn, judgment, or ridicule by others.[48] Similarly, a home's privacy allows for intimate acts or deep discussions that may be less appropriate or candid in public.[49] Housing fosters self-authorship because an individual controls access to a place that safeguards their interests without the need to rely on others.[50]

Third, certain types of property – such as a wedding ring or a home – are bound up with an individual's personhood and are central to their past, present, and future.[51] The home is often the locus of family life, intimacy, holidays, friendships, and gatherings.[52] Children are often raised within their homes. And certain monumental life events – such as moving to a different city to pursue education or employment – are marked by one's departure from their home. The notion that something "feels like home" exemplifies a sense of comfort, belonging, and familiarity that highlights the relationship between property and personhood.

Fourth, private property rights structure legal relationships in a manner that promotes autonomy.[53] Private property confers normative powers – such as the power to exclude others – which individuals exercise to secure their privacy, security, and liberty.[54] In this way, the right to enjoy property constitutes a form of "keystone right" that secures other rights, interests, and ultimately, individual autonomy.[55]

To be clear, distinct types of private property – such as homes, condominium units, apartments, trailers, and so on – foster positive freedom to different extents. Moreover, each of these types of private property also vary in terms of their size, location, quality, and degree of governmental regulation, which affects the rightsholder's autonomy and self-actualization. A rightsholder's status can also shape the degree of positive freedom they enjoy. For instance, individuals who own a detached home may enjoy the greatest privacy and liberty to undertake certain activities that are associated with self-actualization. In contrast, tenants may not engage in autonomy-promoting activities – especially those that result in greater noise or movement within the dwelling – because it may lead to conflicts with neighbors, noise complaints, or eviction. Tenants also enjoy less positive freedom in contexts where landlords fail to maintain a dwelling's quality, such that the tenant is exposed to danger, unsanitary living conditions, or excessive noise.

The fact that unhoused persons lack private property rights explains why they enjoy less positive freedom than others. Those who must live on public property lack the security and privacy that others enjoy.[56] They may suffer physical and

[48] Benjamin Barros, "Property and Freedom" (2009) 36:4 *NYU JL & Lib* 36 at 47.
[49] Emily Stolzenberg, "Properties of Intimacy" (2021) 80:3 *Md L Rev* 627 at 666–67 (noting the relationship between property and intimacy).
[50] Alexander, "Property, Dignity, and Human Flourishing" at 1045.
[51] Radin, "Property and Personhood" at 959, 991–92.
[52] *Ibid.* at 1013.
[53] Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021) at 41–49.
[54] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990) at 294–96.
[55] *Ibid.*; Carol Rose, "Property as the Keystone Right?" (1996) 71:3 *Notre Dame L Rev* 329 at 362.
[56] Terry Skolnik, "Freedom and Access to Housing" at 232.

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psychological harm because they lack protection against the elements, and against threats of interference by other individuals.[57] As discussed in previous chapters, unhoused persons have a lower life expectancy compared to the general population.[58] They may be less able to plan their lives because they lack the stability and predictability that housing affords.[59] Furthermore, without access to housing, they may be unable to accumulate or store a significant amount of property that individuals normally keep within their homes.[60] They may not have access to basic sanitation infrastructure that helps them live a meaningfully dignified life, such as a bathroom or shower.[61] And without access to housing, they may lack free access to the place that typically anchors family life, belongingness, and continuity with the community.

The lack of a judicially enforceable right to housing in Canada and the United States contributes to unhoused persons' lack of positive freedom. Courts in Canada and the United States have not yet recognized a positive constitutional right to housing, which would protect individuals against the condition of homelessness, and safeguard their most basic capabilities and interests.[62] Without the judicial acknowledgment of such a right, the State has no constitutional duty to secure one of the most fundamental resources to promote self-actualization and human flourishing: access to housing.

3.2 PRIVATE PROPERTY AND NEGATIVE FREEDOM

3.2.1 *An Overview of Negative Freedom*

Isaiah Berlin's second conception of freedom is negative liberty, which construes freedom as noninterference.[63] Individuals are negatively free to the extent that they do not experience concrete interference by others.[64] The fewer externally imposed constraints, the greater an individual's freedom.[65] Negative liberty is fundamentally

[57] Terry Skolnik, "Homeless Encampments: A Philosophical Justification" (2023) 36 *JL & Soc Pol'y* 97 at 100.

[58] *See, e.g.*, C. James Frankish, Stephen Hwang, and Darryl Quantz, "Homelessness and Health in Canada: Research Lessons and Priorities" (2005) 96:2 *Can J Pub Health* S23 at S24; Stephen Hwang, "Homelessness and Health" (2001) 164:1 *CMAJ* 229 at 230–31; James O'Connell, *Premature Mortality in Homeless Populations: A Review of the Literature* (Nashville: National Health Care for the Homeless Council, 2005) at 13; Elise Roy, Nancy Haley, Pascale Leclerc et al., "Mortality in a Cohort of Street Youth in Montreal" (2004) 292:5 *JAMA* 569 at 569–70.

[59] Alexander, "Property, Dignity, and Human Flourishing" at 1045.

[60] Kevin Bundy, "Officer, Where's My Stuff? The Constitutional Implications of a *De Facto* Property Disability for Homeless People" (2003) 1 *Hastings Race & Poverty LJ* 57 at 67.

[61] *See, e.g.*, Taunya Lovell Banks, "The Disappearing Public Toilet" (2020) 50:4 *Seton Hall L Rev* 1061 at 1080; Ron Hochbaum, "Bathrooms as a Homeless Rights Issue" (2020) 98:2 *NC L Rev* 205 at 208.

[62] *See* Chapter 2 of this book.

[63] Berlin, "Two Concepts of Liberty" at 169.

[64] *Ibid.*

[65] *Ibid.* at 170.

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concerned with coercion, which Berlin described as "deliberate interference of other human beings within the area in which I could otherwise act."[66] The negative theory of freedom seeks to answer basic questions such as "how far does government interfere with me?" or "how much am I governed?"[67] As Philip Pettit notes, various influential political theorists described liberty in negative terms, including Thomas Hobbes,[68] William Paley,[69] and Jeremy Bentham.[70]

The negative conception of liberty posits that actual interference is necessary to restrict freedom.[71] According to this view, individuals enjoy freedom unless others concretely hinder their actions, movement, or choices.[72] Negative freedom theory underpins the ways in which constitutional law primarily protects negative rights, which safeguard individuals against concrete governmental interference.[73] Doctrines such as standing – which requires an individual's rights to be infringed to bring a constitutional claim – and the cases and controversies requirement in the United States – which authorizes courts only to hear cases between parties and forbids judicial advisory opinions – exemplify the role of negative rights and actual interference within constitutional law.[74]

Private property rights safeguard negative freedom in various ways. First, the physical structure of a home protects individuals and their property against attacks, trespasses, and intrusions by others.[75] It also shields individuals against

66 *Ibid.*

67 *Ibid.* at 178. The latter question is asked in Oren Ben-Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* (London: Hart, 2000) at 254.

68 Pettit, *Republicanism* at 41, citing Thomas Hobbes, *Leviathan* (New York: Barnes and Nobel, 2004) at 158–59.

69 Pettit, *Republicanism* at 46, citing William Paley, *The Principles of Moral and Political Philosophy*, Vol. I (New York: B&S Collins, 1835) at 74.

70 Pettit, *Republicanism* at 44, citing Letter from Jeremy Bentham to John Lind (March 27–28–April 1, 1776) in Timothy Sprigge (ed.), *Correspondence of Jeremy Bentham*, Vol. I: *1752–1776* (London: UCL Press, 2017) at 310–11.

71 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) at 9; Charles Larmore, "Liberal and Republican Conceptions of Freedom" in Daniel Weinstock and Christian Nadeau (eds.), *Republicanism: History, Theory, and Practice* (London: Frank Cass, 2004) at 92.

72 Larmore, "Liberal and Republican Conceptions of Freedom" at 84–85. As Larmore explains, though, Berlin also observed that threats or penalties undermine negative liberty because they make actions more costly. *See* Charles Larmore, *The Autonomy of Morality* (Cambridge University Press, 2008) at 171.

73 *See, e.g.*, Eoin Daly, "Freedom as Non-Domination in the Jurisprudence of Constitutional Rights" (2015) 28:2 *Can JL & Jur* 289 at 308; David Currie, "Positive and Negative Constitutional Rights" (1986) 53:3 *U Chi L Rev* 864 at 864, 886 (providing an overview of how the Bill of Rights primarily protects negative liberties).

74 *See, e.g.*, Eugene Kontorovich, "What Standing Is Good For" (2007) 93:7 *Va L Rev* 1663 at 1670–71. Note that the doctrines of third-party standing in the United States and public interest standing in Canada also exist. However, these doctrines apply exceptionally. *See, e.g.*, Brian Charles Lea, "The Merits of Third-Party Standing" (2015) 24:2 *Wm & Mary Bill Rts J* 277 at 278–79; Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 *UBC L Rev* 255 at 259–62.

75 Barros, "The Home as a Legal Concept" at 260–63.

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surveillance.[76] Actual or suspected surveillance alters how an individual experiences a situation.[77] Surveillance unwillingly turns authentic participants of an unfiltered experience into guarded observers of their own actions.[78] A person may watch themselves, change their behavior, or self-censor because they are concerned with how they appear to outsiders – all of which undermine autonomy and authenticity.[79] Private property rights are valuable because they enhance authenticity by shielding individuals against surveillance. Private property rights also confer private law protections that safeguard individuals against interference by others.[80] Statutes and the common law prohibit individuals from trespassing onto others' private property.[81] The police are empowered to remove trespassers from an individual's property.[82] Private property rights also safeguard individuals' land against encroachments, which also constitute a form of trespass.[83] For instance, individuals cannot lawfully place fences or billboards on another's property without permission.[84]

Second, private property rights protect individuals against governmental interference.[85] The home attracts one of the strongest expectations of privacy in search and seizure law.[86] Leaving aside exigent circumstances, officers generally require a warrant to search a person's home.[87] They also tend to require a warrant to arrest someone within their home.[88] The State is also prohibited from using various forms of warrantless surveillance within a person's home, such as wiretaps or surreptitious video recordings.[89] The areas surrounding a person's home – such as their yard and the home's perimeter – also enjoy protection against trespassing and police surveillance.[90]

Third, private property rights protect negative liberty because they reallocate power away from the State and towards individuals.[91] Property rights trace

[76] Robert Gerstein, "Intimacy and Privacy" (1978) 89 *Ethics* 76 at 79–80.
[77] *Ibid.* at 77, 79.
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.* at 263–69.
[81] James Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43:3 *UCLA L Rev* 711 at 743.
[82] Waldron, "Homelessness and the Issue of Freedom" at 300.
[83] Gideon Parchomovsky and Alex Stein, "Reconceptualizing Trespass" (2009) 103:4 *Nw U L Rev* 1823 at 1857 (describing trespass and encroachments).
[84] *Ibid.*
[85] Barros, "The Home as a Legal Concept" at 263–70.
[86] *Ibid.*; Stephanie Stern, "The Inviolate Home: Housing Exceptionalism in the Fourth Amendment" (2010) 95:5 *Cornell L Rev* 905 at 912–13.
[87] Barros, "Home as a Legal Concept" at 267–68.
[88] *Ibid.* at 268.
[89] *Ibid.* at 269. In Canada, *see R* v. *Wong* [1990] 3 SCR 36 and Criminal Code, RSC 1985, c. C-46, s. 487.01 (video surveillance within a dwelling home requires a general warrant); ss. 185–86 (setting out the requirements for judicial authorization of wiretaps); *R* v. *Duarte* [1990] 1 SCR 30.
[90] Anna Lvovsky, "Fourth Amendment Moralism" (2018) 116:5 *U Pa L Rev* 1189 at 1211.
[91] Benjamin Barros, "Property and Freedom" (2009) 4:1 *NYU JL & Lib* 36 at 47; Robert Ellickson, "Property in Land" (1993) 102 *Yale LJ* 315 at 1352–54; Jennifer Nedelsky, "Reconceiving Autonomy:

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a boundary between the individual and the State.[92] Private property imposes limits on the State's authority over certain matters, activities, and conduct that take place in the private sphere – a sphere where individual liberty takes precedence over State regulation or intrusion.[93] Given the vast array of authority that the State exercises over individuals, private property shifts some of that power back to the individual and allows them to be the master of their own lives within a certain space.[94] To the extent that a person's lawful conduct on private property defies majoritarian preferences, the sanctity of private property protects that individual's lifestyle against majoritarian will.[95] Conversely, without private property rights, the State has greater power over the individual and the latter is subject to a greater degree of majoritarian will.[96]

Fourth, private property rights help secure negative freedom because they grant a power to exclude others.[97] Individuals preserve their negative liberty by excluding others from their homes.[98] Conversely, a home maximizes freedom as noninterference because it protects individuals against others' power of exclusion.[99] This power of exclusion protects an individual's agenda-setting authority, meaning that they can determine who can access their private property and what they can do in that space.[100] Agenda-setting authority enables a person to control and enjoy property by simultaneously denying that same control and enjoyment to others.[101]

Fifth, private property rights protect third parties' negative freedom and other interests. These rights ensure that an individual can privately engage in conduct in a manner that does not affect others.[102] Rightsholders can engage in personal or intimate acts in the privacy of their homes without turning others into unwilling spectators.[103] In this way, an individual's private property rights promote others' sovereignty and autonomy.[104] Individuals who engage in private conduct within their homes respect others' choices not to witness conduct that may be personal, inappropriate, or offensive.[105]

Sources, Thoughts and Possibilities" (1989) 1 *Yale JL & Feminism* 7 at 17, cited in Laura Underkuffler, "On Property: An Essay" (1990) 100:1 *Yale LJ* 127 at 132–33.

92 Charles Reich, "The New Property" (1964) 73 *Yale LJ* 733 at 733, 771.

93 *Ibid.* at 771; Helen Nissenbaum, "Privacy as Contextual Integrity" (2004) 79 *Wash L Rev* 119 at 125.

94 Reich, "The New Property" at 771.

95 *Ibid.*

96 Charles Reich, "The Liberty Impact of the New Property" (1990) 31:2 *Wm & Mary L Rev* 295 at 304–05.

97 Waldron, "Homelessness and the Issue of Freedom" at 305; Skolnik, "Freedom and Access to Housing" at 233.

98 Skolnik, "Freedom and Access to Housing" at 233.

99 Skolnik, "Homeless Encampments" at 99.

100 Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 *U Toronto LJ* 275 at 277–78.

101 Laura Underkuffler, "Property: A Special Right" (1996) 71:5 *Notre Dame L Rev* 1033 at 1039.

102 Andrew Simester and Andrew von Hirsch, "Rethinking the Offense Principle" (2002) 8:3 *Leg Theory* 269 at 275–76.

103 *Ibid.*

104 Joel Feinberg, *Offense to Others* (Oxford University Press, 1985) at 24.

105 *Ibid.*

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Several caveats are necessary. For one, private property can also negatively impact an individual's liberty, security, and autonomy.[106] The home may be a place where a person is subject to violence, abuse, and neglect – acts that are hidden from others' view because they take place within the home.[107] Although private property rights can promote a range of fundamental interests, a home's physical barriers can also conceal particularly egregious forms of wrongdoing.

Furthermore, an individual's degree of negative freedom also varies according to their type of private property right. Different types of private property may be subject to varying degrees of governmental regulation and interference. For instance, police officers typically require a warrant (or judicial authorization) to enter a private home or its periphery to conduct a search.[108] Yet individuals who reside in public housing may be subject to more surveillance, inspections, and other forms of interference that restrict the degree of their liberty.[109]

Lastly, the extent of a rightsholder's reasonable expectation of privacy also varies according to their type of private property.[110] Individuals who own a detached home may enjoy greater protection against governmental surveillance compared to tenants who reside in an apartment building.[111] Police officers cannot lawfully trespass onto the perimeter of a detached home to look through its windows, or to attempt to listen to conversations that take place within the home.[112] In contrast, individuals who reside in an apartment enjoy less privacy. Police officers can freely enter common areas in an apartment building, such as entrances and hallways.[113] Like everyone else, they may be able to hear conversations or smell substances that emanate from a particular apartment without having to obtain a warrant.[114] The scope of a rightsholder's negative freedom thus varies according to their type of private

[106] Catherine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 186–91; Ruth Gavison, "Feminism and the Public/Private Distinction" (1992) 45:1 *Stan L Rev* 1 at 24, 35–37.

[107] *See, e.g.*, Catherine MacKinnon, "Privacy v. Equality: Beyond *Roe* v. *Wade* in Catherine Mackinnon (ed.), *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1988) at 96–97.

[108] William Stuntz, "Privacy's Problem and the Law of Criminal Procedure" (1995) 93:5 *Mich L Rev* 1016 at 1024, 1029–30.

[109] *See, e.g.*, Priscilla Ocen, "The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing" (2012) 59:6 *UCLA L Rev* 1540 at 1566–67; Erin Murphy, "The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions" (2013) 111:4 *Mich L Rev* 485 at 509–10; Alexis Karteron, "When Stop and Frisk Comes Home: Policing Public and Patrolled Housing" (2019) 69:3 *Case W Res L Rev* 669 at 682–83.

[110] William Stuntz, "Distribution of Fourth Amendment Privacy" (1999) 67:5 *Geo Wash L Rev* 1265 at 1270, 1272.

[111] *Ibid.*

[112] In Canada, *see, e.g.*, *R* v. *Grant* [1993] 3 SCR 223.

[113] *See, e.g.*, Jackie McCaffrey, "Fourth Amendment Protections in Common Areas of Apartment Buildings: How the Whitaker Holding Contributes to the Circuit Split" (2018) 2018:3 *U Ill L Rev* 1147 at 1148–49.

[114] Stuntz, "Distribution of Fourth Amendment Privacy" at 1270, 1272.

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property. And as discussed in the next subsection, unhoused persons tend to enjoy the least negative freedom because they have no private property rights.

3.2.2 *Property Rights, Negative Freedom, and Homelessness*

Compared to people with access to housing, unhoused persons enjoy less negative freedom because they lack private property rights and the physical and legal protections that these rights secure. Without access to housing, unhoused persons do not have physical protection against violence, threats, and theft.[115] Research indicates that compared to individuals with access to housing, unhoused persons are roughly ten times more likely to be victims of assault.[116] Studies also show that people experiencing homelessness are more likely to be victims of theft compared to the general population.[117] Unhoused persons also lack various legal protections that safeguard negative liberty. Some courts decide that unhoused persons have no right to store their belongings on public property.[118] Others conclude that the police do not require a warrant to search an unhoused person's tent because they have no right to erect one on public property.[119] Furthermore, people experiencing homelessness are more vulnerable to police surveillance because they spend much of their time in public space.[120]

Jeremy Waldron argues that unhoused persons are negatively unfree because of the cumulative effects of two forces: laws that regulate public property and others' private power of exclusion.[121] The starting point of Waldron's argument is that "[e]verything that is done has to be done somewhere," meaning on public property or on private property.[122] As part of the human experience, everyone must sleep, eat, urinate, defecate, sit, and so on.[123] Individuals cannot refrain from these acts without experiencing harm.[124] Most individuals alleviate their

[115] Amanda Eisenmann and Francis Origanti, "Homeless Rights: A Call for Change" (2021) 30:1 *J Soc Distress & Homelessness* 90 at 92.

[116] Joshua Ellsworth, "Street Crime Victimization Among Homeless Adults: A Review of the Literature" (2019) 14:1 *Victims & Offenders* 96 at 96–97, 112.

[117] *Ibid.* at 112.

[118] *Church* v. *City of Huntsville*, 30 F (3d) 1332 at 1335 (11th Circ 1994).

[119] *Ibid.*; Lindsay Gus, "The Forgotten Residents: Defining the Fourth Amendment House to the Detriment of the Homeless" [2016] *U Chi Leg F* 769 at 784; Evanie Parr, "When a Tent Is Your Castle: Constitutional Protection against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons" (2019) 42:2 *Seattle U L Rev* 993 at 1007, citing *State* v. *Cleator*, 857 P (2d) 306 (Wash Ct App 1993); *United States* v. *Ruckman*, 806 F (2d) 1471 (10th Circ 1986). *See also R* v. *Picard*, 2018 BCPC 344 at paras. 39–41; Sarah Ferencz et al., "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2022) 67:4 *McGill LJ* 369 at 371.

[120] *See, e.g.*, Don Mitchell and Nik Heynen, "The Geography of Survival and the Right to the City: Speculations on Surveillance, Legal Innovation, and the Criminalization of Intervention" (2009) 30:6 *Urb Geo* 611 at 619–20.

[121] Waldron, "Homelessness and the Issue of Freedom" at 315.

[122] *Ibid.* at 296.

[123] *Ibid.* at 321.

[124] *Ibid.*

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basic needs within their homes.[125] But the situation is different for unhoused persons. Since they lack private property rights, they have no default private place where they can freely alleviate their basic needs without interference.[126]

The problem is that the law prohibits unhoused persons from alleviating their needs on public property and on others' private property.[127] As discussed in the Introduction, municipal ordinances proscribe sleeping, erecting shelters, urinating, and defecating on public property.[128] However, unhoused persons require permission to do these acts on others' private property.[129] People experiencing homelessness commit a trespass if they attempt to access others' private property or alleviate their needs on others' land without permission.[130] This explains why there is no public or private place where unhoused persons can freely and consistently alleviate their needs without interference; it is as if the law comprehensively prohibits them from alleviating their needs.[131] For this reason, Waldron concludes that "homelessness *consists* in unfreedom."[132]

Waldron's Complementarity Thesis offers an account of why laws that govern public property are objectionable in how they apply to unhoused persons.[133] The Complementarity Thesis evaluates whether individuals do acts on public property *as a complement* to what they could have done on private property.[134] When all individuals have access to housing or shelter, they have a private place to alleviate their needs, and enjoy complementarity between public and private property.[135] Laws that govern public property are more legitimate in such contexts because individuals can obey them freely. In contrast, unhoused persons lack such complementarity.[136] Laws that regulate public property are objectionable in such contexts because unhoused persons lack reasonable alternatives to violating these laws. Ultimately, municipal ordinances are problematic because they presume that unhoused persons enjoy complementarity between public and private property that they in fact lack.[137]

Other scholars highlight that unhoused persons lack negative freedom because of how the private property regime disparately allocates rights, duties, liabilities, and powers within society – an argument that is based on Wesley Hohfeld's concept of

[125] *Ibid.* at 311.
[126] *Ibid.*
[127] *Ibid.* at 304, 315.
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.* at 297.
[131] *Ibid.* at 302, 310.
[132] *Ibid.* at 306. Italics in original text.
[133] *Ibid.* at 301, 310.
[134] Waldron, "Homelessness and Community" at 374, 394–95.
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*

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jural correlatives.[138] Hohfeld famously argued that the jural correlative of a right is a duty and that the jural correlative of a power is a liability.[139] When an individual has a real private property right, others have a duty not to interfere with that right.[140] The rightsholder also has a private power to exclude others from that property, while others are liable to that power of exclusion.[141]

Jeremy Waldron and Jane Baron note that the private property regime disproportionately burdens unhoused persons with duties and liabilities yet confers them none of its rights and powers.[142] Unhoused persons have a duty not to interfere with everyone else's private property rights.[143] They are liable to civil trespass or criminal liability if they do not fulfil that duty.[144] Yet they have no correlative power to exclude others because they lack private property rights.[145] Conversely, others have no duty to respect unhoused persons' private property rights because they have no such rights.[146] This explains why people experiencing homelessness enjoy less negative liberty than people with access to housing. To paraphrase Jeremy Waldron, unhoused persons bear all the burdens of the private property regime that constrain their negative liberty yet enjoy few of its benefits that would expand their negative freedom.[147] This unequal allocation of benefits and burdens results in rightsholders exercising their power of exclusion simultaneously and collectively against unhoused persons.[148] People experiencing homelessness are constantly at the receiving end of interference, with none of the rights or powers that can protect them against it.

3.3 CONCLUSION

This chapter provided an overview of two main conceptions of freedom: positive liberty as self-actualization and negative liberty as noninterference. It showed how private property rights promote both forms of freedom. It demonstrated how the extent of a rightsholder's positive and negative freedom vary according to their type

[138] Baron, "Homelessness as a Property Problem" at 287; Waldron, "Community and Property" at 164–67; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 *JL & Equal* 69 at 91; Walter Wheeler Cook, "Hohfeld's Contributions to the Science of Law" (1918–19) 28:8 *Yale LJ* 721 at 723 (describing Hohfeld's concept of jural correlatives).

[139] Wesley Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916–17) 26:8 *Yale LJ* 710 at 710.

[140] *Ibid.*

[141] *Ibid.*

[142] Baron, "Property and No Property" at 1427–29; Waldron, "Community and Property" at 164–67.

[143] Baron, "Property and 'No Property'" at 1427–29.

[144] *Ibid.*

[145] *Ibid.* at 1427, 1429.

[146] *Ibid.*

[147] Waldron, "Community and Property" at 171. Waldron's exact quote: "[The poverty stricken and the homeless] are people who bear all of the restraints, but enjoy none of the benefits, that accrue from the rights distributed in a property regime."

[148] *Ibid.* at 164–67.

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of private property right. And it explained why unhoused persons enjoy less positive and negative liberty because they lack private property rights.

The next chapter introduces a third conception of liberty: republican freedom as nondomination.[149] It argues that republican freedom offers new insight into the importance of private property rights, the nature of homelessness, and the impact of laws that govern public property. Together, this chapter and the next show how unhoused persons lack political equality because they lack freedom in all its forms: positive, negative, and republican.[150]

[149] Pettit, *Republicanism* at 22–23.

[150] Skolnik, "Freedom and Access to Housing" at 242; Skolnik, "Homelessness and Unconstitutional Discrimination" at 94.

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