

Property and Ownership

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1 PRIVATE PROPERTY: FUNDAMENTAL OR PASSÉ?

For the last half century, thinking within political philosophy about private property and ownership has had something of a schizophrenic quality. The classical liberal tradition has always stressed an intimate connection between a free society and the right to private property.¹ As Ludwig von Mises put it, “the program of liberalism...if condensed to a single word, would have to read: *property*, that is, private ownership...”² Robert Nozick’s *Anarchy, State and Utopia*, drawing extensively on Locke, gave new life to this idea; subsequently a great deal of political philosophy has focused on the justification (or lack of it) of natural rights to private property.³ Classical liberals such as Eric Mack — also drawing extensively on Locke’s theory of property — have argued that “the signature right of any rights-oriented classical liberalism is the right of self-ownership.”⁴ In addition, Mack argues that “we have the same good reasons for ascribing to each person a natural right of property” in “extrapersonal objects.”⁵ Each individual, Mack contends, has “an original, nonacquired right ... to engage in the acquisition of extrapersonal objects and in the disposition of those acquired objects as one sees fit in the service of one’s ends.”⁶ Essentially, one has a natural right to become an owner of external property. Not all contemporary classical liberals hold that property rights are natural, but all insist that strong rights to private property are essential for a free society.⁷ Jan Narveson has recently defended the necessity in a free society of property understood as “a unitary concept, explicable as a right over a thing owned, against others who are precluded from the free use of it to which ownership entitles the owner.”⁸

The “new liberal” project of showing that a free society requires robust protection of civil and political rights, but *not* extensive rights of private property (beyond personal property) has persistently attacked this older, classical, liberal position. L.T. Hobhouse, one of the first new liberals, insisted that “we must not assume any of the rights of property as axiomatic;” we must replace the individualistic, “laissez-faire,” older conception of property with a new, more social, conception which recognizes that production is essentially a social enterprise, and so its fruits must be shared by all producers — most importantly, the workers.⁹ Recent defenses of the new (or, as it is sometime now called “egalitarian”) liberalism have continued to attack strong, classical liberal, rights of private property, often by trying to distinguish the importance of private property as personal property from (far less important, and highly qualified) property rights as the basis of market exchange,¹⁰ or else seeking to show that, properly conceived, a defense of private property requires a state that ensures certain sorts of egalitarian distributions.¹¹

The debate between classical liberals and new (or egalitarian) liberals in the last part of the twentieth century (and the beginning of the twenty-first) has been a continuation of the debate that commenced at the end of the nineteenth century: the former upholding the central importance of the right to private property in a liberal society, the latter disputing or qualifying this. The apparent schizophrenic quality of this current debate is perceived once we recognize that the latter part of the twentieth century witnessed a fundamental reconceptualization of the concept of property. In his now classic 1980 essay, Thomas C. Grey announced the “disintegration of property.”¹² Grey acknowledged that in the less complex days of Locke and Blackstone — what he called the “high point of classical liberal thought” — property could be described in terms of a person’s fairly unqualified ownership of a thing. To Blackstone, ownership was “that sole and despotic dominion which one man claims and exercises over the

external things of the world, in total exclusion of the right of any other individual in the universe.”¹³ But, Grey pointed out, the law no longer deals with property as a unified authority over objects. For one, property is now seen as a bundle of various rights, liberties, and powers that can be divided among many parties in numerous ways, thus making the very idea of unified ownership passé. When an “owner of a thing begins to cede various rights over it — the right to use for this purpose tomorrow, for that purpose next year, and so on — at what point does he cease to be the owner, and who then owns the thing? You can say that each one of many right holders owns it to the extent of the right, or you can say that no one owns it.”¹⁴ And it doesn’t seem to matter which. Secondly, Grey stressed that to even see property as primarily about rights over things or objects is largely anachronistic. “Consider the common forms of wealth: shares of stock in corporations, bonds, various kinds of commercial paper, bank accounts, insurance policies — not to mention more arcane intangibles such as trademarks, patents, copyrights, franchises, and business goodwill.”¹⁵ If as Jeremy Waldron says, private “[o]wnership ... expresses the abstract idea of an object being correlated with the name of some individual, in relation to a rule which says that society will uphold that individual’s decision as final when there is any dispute about how the object should be used,”¹⁶ we are often left searching for the object of ownership. For Gray, once we understand that property as the classical liberal knew it has disintegrated, the debates between capitalism and socialism are really beside the point: we have a complex of dispersed rights held by different persons and organizations, including the state. Thus according to Gray, “the substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory.”¹⁷

If most philosophers rejected the bundle of rights view, or if most thought that property rights are important only when exercised over real property — objects such as land, resources and so on — it would not be puzzling that so much of the debate about the place private property in the late twentieth century was a continuation of the nineteenth century debate. But, oddly, the bundle of rights view is widely embraced, and philosophers know that many property rights are more akin to contractual rights (in which the core rights are to certain performances by other persons) rather than to a right to a parcel of land. And yet the debate has run on, often in terms of rights to things in the obvious sense, such as natural resources. When political philosophers debate substantive issues it seems that we live in Locke's world; when they engage in conceptual analysis, they think in terms of the fragmented property rights of the twenty-first century.

In this chapter I seek both to defend this charge while avoiding Grey's radical conclusion that the status of property no longer matters to political theory. I argue that political philosophers (and here I include some earlier essays of mine) for the most part have not successfully come to terms with the implications of the modern concept of property; I try to show that the fragmentation of property is real, and is not easily overcome. I begin in the next section by reviewing the bundle of rights approach; section 3 examines several attempts to identify a normative or logical structure to these rights that preserves the classic conception of ownership. Section 4 presents an alternative conception of a regime of strong property rights which, I think, should be attractive to classical liberals yet does without an appeal to the classic idea of ownership, accepting both Gray's fragmentation and the "no things" theses. However, even given the fragmentation of property, I hope to show that questions of the proper strength and scope of property rights remain at the core of political philosophy.

2 THE FRAGMENTATION OF OWNERSHIP

Drawing on the classic analysis of A. M. Honoré, let us say that a person (Alf) has full ownership of X if Alf has¹⁸

- (1) *Right of Use*: Alf has a right to use X, that is,
 - (a) Alf has a liberty to use X, and
 - (b) Alf has a claim on others to refrain from use of X.
- (2) *Right of Exclusion* (or possession): Others may use X if and only if Alf consents, that is,
 - (a) If Alf consents others have a liberty to use X;
 - (b) If Alf does not consent others have a duty not to use X.
- (3) *Right to Compensation*: If someone damages or uses X without Alf's consent, then Alf has a right to compensation from that person.
- (4) *Rights to Destroy, Waste, or Modify*: Alf has a liberty to destroy X, waste it, or change it.
- (5) *Right to Income*: Alf has a claim to the financial benefits of forgoing his own use of X and letting someone else use it.
- (6) *Absence of Term*: Alf's rights over X are of indefinite duration.
- (7) *Liability to Execution*: X may be taken away from Alf for repayment of a debt.
- (8) *Power of Transfer*: Alf may permanently transfer (1)–(7) to specific persons by consent.

To have a property right is to have some bundle of these rights. Now conceptually there is no problem with reconciling the bundle of rights view with full ownership: if one holds all these rights in an unlimited way, one is the owner of X in the classic sense.¹⁹ However, in any advanced economy many (indeed, most) of these rights, liberties and powers will often be fragmented in some way. For any X, these rights (or, as they are called, “incidents”) can be, and very often are, divided up among many different parties in complex ways. Suppose X is a case of

real property, such as a house. One may sell his right to live in the house (rent it), put it in trust (in which case the trustee does not have the right to use it uneconomically), sign over to a historic commission the right to change the exterior, agree to a covenant with one's neighbours about acceptable exterior colors, and agree not to sell it to parties not approved by one's neighborhood association. On the other hand there may be a law that does not allow you to refuse transfer on the basis of race; it may be mortgaged, in which case it may not be able to be taken in payment of debt, and one may not have the right to destroy the house. If there are zoning laws there are many uses that are precluded; if it used as a business, it may be illegal to exclude some persons on the grounds of race or ethnic origin. If there are building codes, many changes may be illegal. And many of these dispersions of rights may occur at the same time. Thus the question "who is the owner?" may be answered by saying there is no owner, that there are many owners, or picking out some crucial incident such as the right to exclude (see section 3) and saying whoever has *that* incident is the owner (but even this incident can be fragmented: think about a case of a business that has the right to exclude on some grounds but not on race or ethnicity). But nothing seems to turn on this: whatever decision one makes about how to identify the "owner," the rights will be divided in whatever way they are: who holds what rights, powers, and liberties is what is important, not who gets the honorific title of "owner."

3 RESCUING OWNERSHIP: FINDING A STRUCTURE TO THE BUNDLE

3.1 The Justificatory Instability of Full Ownership

The most ambitious, and obvious, way to reconcile the traditional notion of ownership with the bundle of rights view is to argue that there is a compelling normative case for combining all these incidents (I leave aside until section 4.2 the problem of property over "no things"). In the

present context we cannot review all the cases seeking to demonstrate a normative basis for full ownership: in some sense this would constitute nothing less than a review of the classical liberal project.²⁰ I review here two of the most important approaches; I suspect that the basic justificatory instability we shall uncover characterizes all defenses of full ownership.

The Problem of Restricted Justification. The most famous contemporary argument for ownership adapts Locke's argument from original acquisition. According to Locke:

Though the Earth, and all inferior Creatures, be common to all Men, yet every Man has a *Property* in his own *Person*: this no Body has any right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men. For this *Labour* being the unquestionable property of the *Labourer*, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.²¹

The general form of an original acquisition argument for ownership is:

Under conditions *C*, Alf's action ϕ in relation to any unowned object *X* makes Alf the (full) owner of *X*.

Thus for Locke, if there is some unowned parcel of land (*X*), Alf's mixing his labor with the land (ϕ), under certain conditions *C* (such as enough and as good is left for others) renders Alf the owner of that land.

The core challenges confronting such arguments are two. First, and most obviously, it has to be shown why ϕ -ing has an ownership-bestowing quality. As Nozick famously remarked, it is not clear why simply mixing your labor with an unowned thing makes the unowned thing yours rather than losing your labor. If you mix your tomato juice with the ocean, you lose your tomato juice, you do not gain the ocean.²² These problems have been thoroughly explored in the literature; I pass them over here.²³ The second problem is our real concern: even if it can be shown that some ϕ action grants one rights over an unowned object, it also must be shown that the justification of ϕ 's ownership bestowing qualities is such that a ϕ -er gets the full bundle of property rights over X. In regard to Locke's own theory, Steven Buckle has argued that since Locke justifies the necessity of property in terms of what is needed for humanity's survival and flourishing, uses of property that undermine this aim are not justified. Thus Buckle argues that the Lockean justification of property involves limits of transfer: trades that undermine the end of property (alienating food to obtain cocaine, for example) would not be justified.²⁴ And in a similar vein Locke explicitly excludes the right to destroy: if the world is given to mankind by God to use, one cannot not gain a right to simply destroy it. "Nothing was made by God for Man to spoil or destroy."²⁵

Jan Narveson has recently advanced another original acquisition defense of private property:

In the course of action, we use things, and if nobody else is already doing so, then the way is clear for us to use them, and to insist on the right to continue to use them. We do not need to justify our acquisition of x by demonstrating that it will best serve the public good if *we* are allowed to use it rather than someone else — even if that is quite often true. The point is that people being able to use what was previously unused, at will, enables a better off society. Indeed, it enables a better off society even in the (presumably

numerous cases) in which there is someone out there who might make better use of it than the person who becomes the owner.²⁶

Accepting that first possession justifies rights of use and, let us say, exclusion, we still do not obviously have a case for rights of transfer. Narveson seeks to expand the set of rights to include transfer by appealing to the Pareto criterion: if Alf and Betty can exchange their property each will be better off. However, it is not clear that the Pareto criterion is really so hospitable to full ownership. Suppose we accept:

1. Original acquisition divides resources between Alf and Betty;
2. Property rights must be mutually beneficial.

From (1) and (2) it seems easy to infer:

- (3) Alf's property right over some resource must benefit Betty, and certainly must not be an overall cost to her.

In his original and insightful book on *The Right to Exploit*, Gijs van Donselaar implicitly invokes this trinity of claims to argue against "parasitism" and, so, fixed property rights in resources. Natural resources, van Donselaar argues, are scarce, and so we compete for them; property rights divide these resources, and if the property system is to be mutually beneficial this division must work to the advantage of society. Consequently, if someone appropriates a natural resource but does not employ it in a way that improves the lot of others (and of course, more strongly, if he employs it in a way that worsens their lot), his claim to the scarce resource cannot be justified through appeal to mutual benefit. Compared to the world in which the unproductive appropriator did not exist, others are worse off: he denies the use of the scarce resource to others by claiming property over it, but does nothing with it. Thus justified property is limited by whether one is productive (and, again, it seems difficult to

justify rights to destroy). Indeed, we might question Narveson's insistence that the appropriator need not be the most efficient user of the resource. In a world where a less efficient producer has control of a scarce resource the opportunity costs of allowing her to control the resource (the gains society forgoes by not placing it in the hands of a more efficient producer) exceed the benefits (the gains from the resource being in the hands of the present less efficient producer). This looks straightforwardly inefficient; there is a sense in which we are all worse off because the less efficient producer has gained control of the resource and so there are less of its fruits available to society. Thus, according to van Donselaar:

The entrepreneur's duty is not just to produce as efficiently as he can, but to produce at least as efficiently as any of his competitors would have done in his position (as far as that position is defined by control over resources). That implies that he may be required to produce more efficiently than he can. Where he fails to do so, he has no right to be in his position. Where he fails, his factor endowments ought to be adjusted.²⁷

As interpreted by van Donselaar, our trinity of claims makes each the steward of external resources over which he has property rights, a stewardship that requires the most efficient use for its continuance. Fixed rights in resources, von Donselaar argues, license parasitism: some gaining at the expense of others.²⁸ Again, we see that once we closely examine a supposed case for acquisition it is exceedingly difficult to see how it grounds the full panalogy of unfettered property rights. Let us call this the problem of *Restricted Justification*.

Liberty Upsets Ownership. It would seem that a far more promising approach to justifying full ownership would be to appeal to what Eric Mack calls the "ur-claim" of each to live her

own life in her own way.²⁹ Or, as Loren Lomasky puts it, a liberal order that adequately accommodates our fundamental interest in pursuing our own projects in our own way must give an important place to robust property rights, which carve out a domain in which an individual has morally secure possession.³⁰ Of special interest to our inquiry is that neither Mack nor Lomasky hold that there is a natural right to a certain bundle of property rights (Lomasky explicitly acknowledges the bundle of rights analysis). For both, what we have a basic right to is an adequate scheme of property rights that gives each the ability to appropriate and possess property, allowing one to live one's own life as it one sees fit.

Some have argued that if (broadly speaking) the justification of property is to promote the autonomy or sphere of decision making for each, all that it is required is the right to use and exclude but not, say, the right to gain income.³¹ After all, Lomasky himself stresses possession: "The creation of social institutions that recognize and define principles of noninterference with a person's holdings transform *having* into rightful *possession*."³² But this seems too narrow: if the aim is to secure domains that are maximally responsive to a person's projects and desire to lead her own life in her own way, rights to engage in a wide variety of trades, investment, and commerce must be acknowledged.³³ One understanding of the human good is productive work. The work to be valued is varied, from the self-employed artisan to participation in team work, but it also involves organization, personal initiative, and innovation in production. One of the basic themes of Ayn Rand's novels is that entrepreneurship is itself a form of human flourishing. Start-ups, innovation, risk-taking, organizing groups to solve problems and implement new ideas — all are basic to the projects, plans and ideals of many.³⁴ To exclude all these personal ideals about what is worth doing in life on the grounds that the right of use without the right of income is sufficient to live one's

own life in one's own way unacceptably constrains the ability of many to lead lives in which their fundamental values hold sway over some parts of their life.

But while the crux of the project pursuit case for property plausibly lends itself to a wide array of property rights (not just use, but transfer, income, and even destruction), it also justifies the very fragmentation of property that poses the challenge to liberal ownership. Suppose that we commence at "time zero" with a system in which all owners are full owners. Even so, it very often will be in the interests of individuals to fragment their property. Recall that many of our examples of fragmentation of house ownership (§2) were voluntarily made by the owner. Thus even if we start out with a system of full ownership, if people make a series of free choices it is almost certain that ownership will end up fragmented. Nozick is famous for arguing that liberty upsets any pattern of holdings: if individuals start with some pattern of property holdings P but are able to freely choose what to do with their property, it is almost certain they will act in such a way as to bring about a non- P pattern.³⁵ What we now see is that for the same reason liberty upsets full ownership. If we start off with full ownership (which, after all, is simply a certain pattern of the incidents of the bundle), the free choice of individuals to trade and give away some incidents will result in a fragmentation of property rights. Thus not only is the fragmentation of property a fact about the modern world, it seems an inevitable result of a system in which people are free to form bundles according to their own choosing. Let us call this the problem that *Liberty Upsets Ownership*.

We now can see the problem of justifying full ownership. Many justifications will be characterized by the problem of Restricted Justification: we can justify a stable right to property but it seems unlikely that the justification will include the full range of incidents

included in the ideal of full ownership. I have presented a sketch of the difficulties for original acquisition theories; the literature indicates that the same problem applies, for example, to the sort of self-expressive theory of ownership advanced by Kant and Hegel. For Kant property is based on the necessity of a will acting in the world to go beyond mere possession of things with which it is involved and to claim a continuing juridical relation to its objects — to make them its property.³⁶ But while this may ground rights of use and exclusion, it is unclear that full rights to income and transfer follow.³⁷ Much the same has been said of Hegel's related account.³⁸ Utilitarian or consequentialist arguments for property seem obviously open to a wide variety of possible restrictions on the rights of ownership; under non-ideal conditions such as information asymmetry and other sorts of imperfect information, bargaining inequalities and so on, there may be compelling grounds to limit the rights of owners.³⁹ Even Stephen Munzer's pluralist theory — drawing on utilitarianism but adding Kantian considerations and notions of desert — does not justify “unfettered private ownership” but rather “a constrained system of private ownership.”⁴⁰ So most of the justifications that have been advanced for ownership seem, even if successful, to yield only restricted bundles. On the other hand, it does seem possible to justify all elements of the bundle by stressing the fundamental importance of giving individuals maximum ability to possess domains that suit their aims and projects whatever they may be, but then we face the problem that Liberty Upsets Ownership: such a system allows individuals to fragment their ownership. And of course subsequent generations will be born into a world of fragmented property, such as the one in which we find ourselves.

It is hard to even see how a full-not-be-fragmented bundle of rights can be justified on autonomy/project pursuit grounds. One possibility is to draw on Mill's argument that a

defense of liberty should not defend the liberty to permanently alienate liberty.⁴¹ In a similar way, it might be argued that a defense of full ownership based on the pursuit of autonomy should not defend the ability to alienate full ownership. But this clearly will not do, for a defense of the right to alienate is essential to full ownership. It seems most odd to hold that on autonomy grounds we have the right to alienate all of the incidents (as in transfer) but not some-short-of-all of them. If we take this (paternalistic?) line of reasoning seriously, the right to transfer and give away property is itself called into question. Alternatively, it might be argued that the fragmentation of property is a sort of negative externality: it creates an environment in which future generations of project pursuers enter a world not neatly divided up via full property rights. So the idea might be that we must limit the ability of the present generation to pursue their goals (by preventing fragmentation) in the interests of the autonomy of the future. Not only does this line of reasoning depend on highly controversial weighting of the autonomy interests of different generations, but once again it opens a Pandora's box for the classical liberal. If we now are limiting the property rights of the present to enhance the autonomy of the future, then the right to destroy or waste certainly looks susceptible to being limited on similar grounds. Whatever argument we employ to limit the right to fragment seems sure to ground a case for a less than full bundle.

3.2 Retreating to a Core

In the face of the difficulties of justifying the full set of property rights involved in liberal ownership, we might retreat to a core set of rights that characterizes ownership. For example, we might hold that one is the owner if one has the rights of use, exclusion, transfer, compensation and income.⁴² But, first, this is already a sufficiently large enough bundle that

the Problem of Restricted Justification is apt to arise again: we would need a justification that points to this, specific, entire bundle of rights. More importantly, each of these incidents itself fragments. For example zoning and historic district laws regulate *some* uses, consumer protection and laws against fraud limit *some* transfers of rights, right-of-way provisions as well as racial discrimination laws prohibit *some* exclusions, banking and financial regulations prohibit *some* ways of earning income from a variety of financial instruments. Limited liability companies restrict *some* rights of compensation. We should not think of the fragmentation thesis as holding that there are, say, eight discrete rights which may break apart: each of these rights itself fragments into a variety of rights, liberties, and powers in particular contexts.

David Schmitz, while acknowledging that “today the term ‘property rights’ generally is understood to refer to a bundle of rights that could include rights to sell, lend, bequeath, use as collateral, or even destroy,” nevertheless insists that “at the heart of any property right is a right to say no: a right to exclude non-owners. In other words, a right to exclude is not just a stick in a bundle. Rather, property is a tree. Other sticks are branches, the right to exclude is the trunk.”⁴³ This is because, Schmitz argues “without the right to say no, other rights in the bundle are reduced to mere liberties rather than genuine rights.”⁴⁴ More strictly, if one does not have the right to exclude, but does have the right to transfer, income, and compensation, one can be said to have a *liability right*: others can use X without one’s consent, but they must compensate one for doing so, and one can transfer this right to others and earn income from it.⁴⁵ Like most distinctions, this one becomes less clear when we look at it closely. Consider the classic case presented by Joel Feinberg:

Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly someone else's private property. You smash a window, enter, and huddle in the corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace you keep warm. Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person.⁴⁶

It looks very much like circumstances have transformed the cabin owner's property right into a liability right: the stranded hiker can use it provided she pays compensation. Even if the owner erected a large sign saying "Can you use this cabin in case of emergency? No!" it would not be wrong for our hiker to use it provided she compensated afterwards. Lomasky argues that in such cases the justification for property in the first place — that it facilitates projects — fails to justify the right to say "no": we cannot expect a person to accede to our project-based demands at an extraordinarily high cost to his own.⁴⁷ In this case while it seems unreasonable to insist on a property right, a liability right is justifiable.⁴⁸ (Note that this is a version of the problem of Restricted Justification, here about the scope of the right to exclude). In this case we would not want to say that the owner of the cabin is not "really the owner" since he does not have a core right of exclusion in this case.

Thus there are important rights to property that are, strictly speaking, liability rights, and only because they are liability rights rather than pure exclusionary rights (with the power to say "no") are they justifiable. Suppose, though, it is claimed that these are marginal and exceptional cases. Wouldn't we say that real and important property rights always involve

the core power to say “no,” and if one has that core right protected one is the owner? I do not think so. Certainly exclusion (and, say, the ability to refuse transfer, part of the Schmitz’s general right to say “no”) is an important incident, but so is the right to transfer. We cannot, I think, say that one who has the right to exclude and manage but not transfer is unambiguously the owner, while someone who has a transferable liability right with right to income is not. Consider the principle of entail in the common law; an owner of an entailed property (such as a family estate) could exclude others at will and determine the use to which land was put and earn income from its use, but he was without the right of transfer. Was he the owner? Not without reason was such a person often described as the “the holder” of the property. As Mrs. Bennett remarked of the Collinses in *Pride and Prejudice*, “Well, if they can be easy with an estate that is not lawfully their own, so much the better. I should be ashamed of having one that was only entailed on me.”⁴⁹ Certainly in many contexts a transferable liability right may better allow one to advance one’s ends than a nontransferable right to say “no.” As the much-maligned Mrs. Bennett also sensibly remarked, “There is no knowing how estates will go when once they come to be entailed.”⁵⁰

3.3 Defragmenting Property: The Logical Structure of Ownership

Daniel Attas has recently advanced a sophisticated analysis with the aim of showing “that ownership exhibits an internal coherence such that which incidents can subsist independently of others is not an entirely contingent matter the incidents of ownership cannot be divided coherently in just any odd way.”⁵¹ Attas disputes Grey’s disintegration thesis, arguing that there is a *conceptual* structure of ownership, such that holding some incidents implies that

one must hold others. First, he argues, we must distinguish the content from the form of the property right:

If a property right can be said to reside in a person (P) with respect to a thing (X), then the content of the right is those features of it that have the thing owned as their subject (the right to use X, possess X and so on), and the form of the right is those features of it that have the right itself as their subject (the right is continuous, the right is transferable and so on). In other words, the content incidents are first order moral positions and the form incidents are second order moral positions.⁵²

Attas divides the content incidents into two subgroups: control and income. The former — control — include, among other incidents, (1) possession, (2) use (e.g., consumption and modification), and (3) management. Now, importantly, Attas claims “there is a certain progression in the scope of the control incidents, such that each incident presupposes or includes within it those that precede it.”⁵³ One cannot have the right of use without the right of possession, and one cannot have the right to manage without the right to use. Thus for Attas “using the asset oneself is therefore simply one exercise of the right to manage.”⁵⁴ Much depends here on just how we interpret these rights, but it is quite clear that one can have a right to manage that includes the right to allow others to use the property in broader ways than one can use it oneself (thus one has less than full use rights). A trustee may possess the right to manage a property without having the right to consume it. Interestingly, the trustee could sell the right to consume the property for enjoyment to a third party if this trade benefited the trustor, though the trustee herself has no right to use the property in uneconomic ways (§2). In such cases one who has the power to manage a property does not have the right to use it (certainly not consume it) herself, but would have the power to allow

others to use it. But then her right is a power to allow others to consume it if they provide sufficient compensation (to the trustor), not itself a right of use.⁵⁵ Note that Attas says that “management includes the right to decide how a thing shall be used, to allow others to use the thing, or to impose certain conditions on its use” — none of which are either of the rights that Attas considers crucial for use — “consumption and modification.”⁵⁶ But then it is hard to see how “the right to manage must include all the control rights.”⁵⁷

“It also follows,” Attas argues, “that control rights cannot be split among several partial owners since any control right by one person will exclude the possibility of any other control right held by any other.”⁵⁸ We might interpret this in three ways: Given some property X, at some time *t*, (i) Alf and Betty cannot exercise joint control over some aspect of it, *a*; (ii) Alf cannot control aspect *a* of X while Betty controls aspect *b*; (iii) Alf and Betty cannot both independently control aspect *a*. Attas explicitly allows joint ownership as in (i),⁵⁹ and (ii) cannot be correct. The city of New Orleans closely controlled modification of the front of my house facing the street (*a*), while I had wide control over the back (*b*). The city controlled some aspects of my property while I controlled others. So the worry must be about (iii): two agents cannot independently exercise the same control over the same aspect, and this looks correct. A coherent system of rights cannot recognize two, potentially conflicting, property rights over the same aspect of the same thing. Now it might seem that this implies, to use Hillel Steiner’s term, that a necessary condition for genuine control rights is that they must be “compossible”: if Alf and Betty have bona fide control rights over some aspect *a* of X, it must be possible for them to simultaneously exercise their rights.⁶⁰ A conflict of control rights as interpreted by (iii) would grant Alf a right to use to aspect *a* of X in a way that is inconsistent with Betty’s use, to which she also has a right, and so compossibility is violated.

However, we do not require anything as strong as compossibility: a consistent set of rights requires that in situations of conflict, there are priority rules that determine under what conditions Alf's right gives way to Betty's. Again, we come to the complicated play of property and liability rules (§3.2). One possibility is that Alf's right to use his cabin furniture may give way to Betty's right to build a fire out of it *if* Betty compensates Alf for her use and so overriding his right to use. We certainly require that conflicts of rights be sorted out, but this is consistent with a complex criss-crossing of control rights.

4 PROPERTY AS JURISDICTIONS

4.1 Rethinking the Ideal of Strong and Extensive Property Rights

Most defenders (interestingly, not Attas)⁶¹ of the classic view of ownership advance a case for “full liberal ownership” — that ownership is justified and consists of essentially of the entire bundle of incidents — because they wish to defend *strong and extensive property rights*. Classic liberals, holding that a free society must be based on private ownership, seek to justify extensive and strong property rights, and full ownership obviously seems to fit the bill.⁶² But we have seen that liberty upsets full ownership (§3.1); it is hard not to wonder whether full ownership is really the ideal of strong and extensive property rights consistent with the aims of classical liberals. Thinking more broadly about what constitutes a strong regime of extensive property rights, we might distinguish two other senses of extensive and strong ownership.

A private property regime can be said to be *strong* if whatever elements of the bundle one has, only weighty moral reasons, or reasons of great and pressing social utility, could justifiably override one's rights. Although some libertarians have held that these rights are

absolute — they are of such weight that no considerations could justify overriding them — this seems an extreme view (think again of Feinberg’s classic cabin case). Most classical liberals have held that taxation or public goods, poor provision, and taking of land for critical public uses is justifiable; so too are some zoning laws. But while the classical liberal need not insist on anything like rights of absolute weight, it is certainly inconsistent with an ideal of strong rights to say, for example, that since property rights are created by the state, one’s property rights cannot, conceptually, be infringed by any state taxation.⁶³ Whatever part of the bundle one holds, they must provide weighty reasons justifying one’s continued rights to control, transfer, and so on.

Property rights are *extensive* insofar as, for any given asset X, it is the case that there exists some non-governmental agents or agencies which hold each of the incidents of the property rights bundle. This is not to say that there is any single agent, group, or corporation that holds all the incidents in relation to X, but that each the incidents is held by some such agent. Thus the incidents over X may be highly fragmented; I might have sold my right to mine my land but not farm it, I might sell the water rights, the right to develop it, and so on. All these rights may be held by different individuals and corporations, but insofar as none are controlled by public decision making, we would still have a regime of extensive private property rights.

Conceptually, the strongest and most extensive system of private property rights would be one in which all the incidents over every asset are privately held, and each of these rights, liberties, and powers are maximally weighty. This may be a logical ideal, but it is unappealing as a normative ideal. There is, for example, strong case for governmental control of public spaces and urban areas.⁶⁴ And there is good reason to laud the fact that the

private ownership of land no longer includes the ownership of the airspace above it, which is now regulated by the state.⁶⁵ In contemporary American society, property rights are quite extensive, though certainly not maximal (think of the absence of transfer and income rights over heroin, certain sexual services, and kidneys) and certainly property rights are often overridden (think of licensing regulations, environmental regulations, health and safety rules, and so on). Nevertheless, we can still identify dimensions of strength and extensiveness: the classical liberal will argue that along both dimensions, a society should tend towards the stronger and more extensive ends of the continuums.

4.2 Liberalism, Jurisdictions, and Property in the Wide and Narrow Senses

Reflect again on the argument for property based on project pursuit and one's desire to live one's own life in one's own way (§3.1). We saw that, while this argument seems plausibly to support the idea that each person has an extensive domain in which to lead her life in her own way, based on her own values, projects and ends, it does not lead to the ideal of full ownership; to be maximally responsive to a person's ends and values, it would seem a system of property must allow people to devise domains that best suit their ends and purposes, and this very ideal will lead to fragmenting property. But while this ideal does not lead to the classic idea of full ownership, it does, I think, endorse a system of strong and extensive property rights. It requires a system of strong property rights insofar as, whatever incidents are part of one's domain, unless these rights are weighty, they will not provide a secure basis for living one's life as one sees fit. To grant property rights, but allow that these are easily overridden by other moral and policy considerations, hardly makes them a crucial tool in living one's own life in one's own way. And of course in a more nuanced account of strength

we would have to consider the vexed issue of the relation of property and liability rights. Strict property rights are clearly a stronger (though in a somewhat different sense) form of property than liability rights, so a regime of strong property rights would certainly not be a regime in which people generally hold liability rights, as Schmidtz rightly maintains.

It may seem more obscure why these rights should also be extensive. There are two ways in which rights can fail to be extensive. First, there may be no right assigned over some aspect of some asset, and so each is at liberty to possess, use, or destroy it as she sees fit, though others may compete and seek to interfere with her. Sometimes this is perfectly acceptable: we compete for space on the sidewalk without too many ill effects. But typically, leaving assets in the “common” not only leads to their waste as people compete to consume them first,⁶⁶ but the prospect of conflict undermines secure expectations of how one can go about fulfilling one’s projects, and living according to one’s values and aims. The other way in which property fails to be extensive is, of course, when incidents are controlled by government. As I have argued throughout, classical liberals have always recognized that there is considerable role for government, but there is always the problem that, because we do not agree on values, ends, and projects, government decisions typically advance the values of some over those of others. In this way government decision is at best a compromise, at worst a case of mere conflict. John Gray once noted how private property rights economize on collective justification:

The importance of several [i.e., private] property for civil society is that it acts as an enabling device whereby rival and possibly incommensurable conceptions of the good may be implemented and realized without any recourse to any collective decision-procedure One may even say of civil society that it is a device for securing peace by

reducing to a minimum the decisions on which recourse to collective choice — the political or public choice that is binding on all — is unavoidable.⁶⁷

In the public deliberation about political decisions a person has simply one controversial set of values, ends, and projects, which may or may not be reflected in collective decisions; over her property a person's decisions — based on her controversial values and projects — have weighty publicly recognized authority over others.⁶⁸ Thus property is so important to the rights of the moderns because it allows each a jurisdiction in which his values and ends hold sway and so minimizes appeal to collective choices among those who disagree on the ends of life.⁶⁹

Once we see that property is crucially about securing a domain or jurisdiction in which one's values, ends, and aims hold sway, we can see that there need be no necessary reference to things, objects, or even assets in our understanding of property (though we may employ it for ease of exposition). A shortcoming of Attas's otherwise impressive analysis is his reliance on the classic idea (taken from the analysis of real property) that "property assigns things (rights over things) to individuals..."⁷⁰ The idea that property is about "using bits of things in the world" remains critical to the classic view of ownership.⁷¹ Recall that, in addition to advancing the disintegration thesis, Grey's second challenge to the traditional conception of property was to deny that in most cases it makes sense to even talk of things. As Grey stressed, when we think of complex financial instruments and intellectual property, the line between contract and property fades.⁷²

Nothing turns on this for the jurisdictional view. Property rights define domains or jurisdictions, and these always are defined in terms of rights, claims, and powers relating to other agents. Sometimes these rights and claims clearly involve objects, while at other times

the property right is solely to be explicated in terms of rights, claims, and powers on the actions of others. Property merges into contract, but it also merges into the basic rights of the person — which is why the claim that we are self-owners is so plausible. Indeed, as Buckle shows in his study of natural law theories of property, the idea that one’s property can be understood broadly to include all the rights in one’s domain goes back to natural law theorists, who insisted on an intimate connection between a person’s rights and what “belongs” to that person. This idea of what belongs to a person or *suum* concerns a set of “essential possessions”: life, limbs and liberty. Thus understood, says Buckle, the *suum* is “what naturally belongs to a person because none of these things can be taken away without injustice.”⁷³ This is not to say that in most contexts we cannot distinguish, say, a right to free speech from the property right to one’s Subaru Outback, but we should not expect there to be a deep and clear distinction in principle between the rights, powers, and claims that comprise one’s domain.⁷⁴

5. CONCLUSION

Grey held that, given the disintegration of property rights, the old battle between liberalism and socialism was over: there was no unequivocal ownership to be granted to private parties or the state. Instead, we are faced with a disintegrated bundle of rights, some held by governments, some by individuals, some by corporations. There could be changes at the margin, but it seemed there was no longer any great dispute in principle. The typical response of those in the classical liberal tradition has been to seek to defend full liberal ownership against this disintegration or fragmentation thesis. In this essay I have argued that the disintegration thesis is powerful: it is not only what we are faced with in our contemporary

world, it is the inevitable result of freedom under conditions of diversity of values and ends. But, I have argued, this does not mean that the question of whether a free society must have strong and extensive private property is passé. Socialists and new liberals argue that core human values require that many of the incidents be controlled by public, collective, decision-making, while the classical liberal insists on the importance of strong and extensive private property to protect freedom and promote efficient economic transactions. These disputes do not go away simply because the incidents are fragmented. The idea that, further, a regime of private property rights must grant full ownership is largely a distraction. The classic liberal who upholds such a bundle often believes he is defending the basis of a free society, but the very freedom she cherishes upsets the pattern of full ownership.

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Notes

¹ See John Gray, *Liberalism* (Milton Keynes: Open University Press, 1986), chap. 8.

² Ludwig von Mises, *Liberalism: The Classic Tradition* (Indianapolis: Liberty Fund, 2005), p. 2. Emphasis in original.

³ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

⁴ Eric Mack, "The Natural Right of Property," *Social Philosophy & Policy*, vol. 27 (Winter 2010): 53-78 at p. 53. See also the articles in the present volume on Classical Liberalism and on Nozick.

⁵ Mack, "The Natural Right of Property," p. 53.

⁶ Ibid.

⁷ See e.g., David Schmitz, "Property and Justice," *Social Philosophy & Policy*, vol. 27 (Winter 2010): 79-100; Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), chap. 6.

⁸ Jan Narveson, "Property and Rights," *Social Philosophy & Policy*, vol. 27 (Winter 2010): 101-34 at p. 101.

⁹ L.T. Hobhouse, *Liberalism* (New York: Oxford University Press [1911], 1964), pp. 54, 98-9. The "new liberalism" arose at the end of the nineteenth century in England, seeking to distance liberalism from capitalism. For an excellent account, see Michael Freedman, *The New Liberalism* (Oxford: Oxford University Press, 1978). Very similar ideas were at the heart of the political philosophy of John Dewey and the American progressive movement. See Dewey's *Liberalism and Social Action* (New York: Perigee [1935], 1980).

¹⁰ See, for example, Barbara Fried, "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution," *Philosophy & Public Affairs*, vol. 24 (1995): 226-245; John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (New York: Oxford University Press, 1994), esp. Part III; Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), chap. 12.

¹¹ For views that seek to combine strong property rights with extensive redistribution, see Michael Otsuka, *Libertarianism without Inequality* (New York: Oxford University Press, 2003); Peter Vallentyne, "Libertarianism and the State," *Social Philosophy & Policy*, vol. 24 (Winter 2007): 187-205.

¹² Thomas C. Grey, "The Disintegration of Property," in *NOMOS XXII: Property*, edited by J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980): 69-85.

¹³ Quoted in *ibid.*, p. 75,

¹⁴ *Ibid.*, p. 70.

¹⁵ *Ibid.*

¹⁶ Jeremy Waldron, *The Right to Private Property*, p. 47.

¹⁷ Grey, "The Disintegration of Property," p. 81.

¹⁸ A. M. Honoré, "Ownership" in *Oxford Essays in Jurisprudence*, edited by A. G. Guest (Oxford: Clarendon Press, 1961): 107-47. See also Lawrence C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge & Kegan Paul, 1977), chap. 2; James O. Gruenbaum, *Private Ownership* (London: Routledge and Kegan Paul, 1987), chap. 1.

¹⁹ An issue arises here concerning the legal power of the state to alter these incidents. If the state has such a power, it might be held that it, not Alf, is in some sense *really* the owner. Classical liberals thus typically hold that the state does not have the legal power to alter these incidents without consent (for Locke the consent of the people as represented in the legislature was required). Scott Arnold has recently argued that in contemporary legal systems the state is the residue owner of everything. See his "Are Modern Liberals Socialists or Social Democrats?," *Social Philosophy & Policy*, vol. 28, no. 2 (Summer 2011).

²⁰ I provide some brief sketches of common approaches, and their difficulties in "The Idea and Ideal of Capitalism" in *The Oxford Handbook of Business Ethics*, edited by George G. Brenkert and Tom L. Beauchamp (Oxford: Oxford University Press, 2009): 73-99. See also the essay on classical liberalism in the present volume. For a useful general survey of accounts of property, see Andrew Reeve, "Property" in *A Companion to Contemporary Political*

Philosophy, edited by Robert Goodin and Philip Pettit (Oxford: Blackwell, 1993): 558-67. For a thorough but critical survey of attempts to justify liberal ownership, see Christman, *The Myth of Property*, Part II.

²¹ John Locke, *The Second Treatise of Government* in *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1960), §27. Emphasis in original.

²² Nozick, *Anarchy, State and Utopia*, pp. 174ff.

²³ See, e.g., Lawrence Becker, *Property Rights*, chap.4; Eric Mack, "The Natural Right of Property," Daniel Russell, "Locke on Land and Labor," *Philosophical Studies*, 117 (2004): 303-25. A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), chap. 5; Waldron, *The Right to Private Property*, chapter 6.

²⁴ Stephen Buckle, *Natural Law and the Theory of Property* (Oxford: Clarendon Press, 1991), p. 180. I consider Buckle's analysis in more detail in "Property, Rights, and Freedom," *Social Philosophy & Policy*, vol. 11 (Summer 1994): 209-40 at pp. 222-24.

²⁵ Locke, *Second Treatise*, §31.

²⁶ Narveson, "Property and Rights," p. 116.

²⁷ Gijs van Donselaar, *The Right to Exploit: Parasitism, Scarcity, Basic Income* (Oxford: Oxford University Press, 2009), p. 54.

²⁸ A claim with which Gauthier appears to concur in his endorsement on the back of van Donselaar's book. In his *Morals by Agreement* [Oxford: Oxford University Press, 1986], p. 293] Gauthier advocated a weak requirement of efficient use as necessary for rightful possession.

²⁹ Mack, "The Natural Right to Property," p. 55.

³⁰ Lomasky, *Persons, Rights, and the Moral Community*, pp. 111ff.

³¹ For an argument along these lines see Christman, *The Myth of Property*, pp. 127ff.

³² Lomasky, *Persons, Rights, and the Moral Community*, p. 121. Emphasis in original.

³³ See Stephen Kershnar, "Private Property Rights and Autonomy," *Public Affairs Quarterly*, vol. 16 (July 2002): 231-58 at pp. 247-49.

³⁴ An investor in the “Impossible Project,” a firm seeking to bring Polaroid film back in production, said to the founder: “I have looked all your team in the eye and none of them is in here for the money. They are in here to make it happen.” *Financial Times*, August 15/16, 2009, Life and Arts Section, p. 15.

³⁵ Nozick, *Anarchy, State and Utopia*, pp. 160ff.

³⁶ See Immanuel Kant, *The Metaphysical Elements of Justice*, 2nd ed., edited and translated by John Ladd (Indianapolis: Hackett, 1999), pp. 43ff.

³⁷ See Kenneth R. Westphal, “Do Kant’s Principles Justify Property or Usufruct?” *Jahrbuch fuer Recht und Ethik*, vol. 5 (1997): 141-94. See also Alan Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984), chap. 3.

³⁸ Waldron, *The Right to Private Property*, pp. 432ff.

³⁹ See Ryan, *Property and Political Theory*, pp. 106ff;

⁴⁰ Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), p. 7.

⁴¹ John Stuart Mill, *On Liberty* in *The Collected Works of John Stuart Mill*, edited by John M. Robson, (Toronto: University of Toronto Press, 1977), vol. 18, p.299.

⁴² See my “Property, Rights, and Freedom,” pp. 213-4. See also Frank Snare, “The Concept of Property,” *American Philosophical Quarterly*, vol. 9 (April 1972): 200-206.

⁴³ Schmitz, “Property and Justice,” p. 80. Schmitz attributes the metaphor of property as a “bundle of sticks” to John Lewis, *Law of Eminent Domain* (Chicago: Callaghan and Co., 1888).

⁴⁴ Schmitz, “Property and Justice,” p. 80.

⁴⁵ *Ibid.*, pp. 80-81. The classic analysis of this distinction is Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” *Harvard Law Review*, vol. 85 (1972): 1089-1128.

⁴⁶ Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” *Philosophy & Public Affairs*, vol. 7 (1978): 93-123 at p. 102.

⁴⁷ Loren E. Lomasky, "Compensation and the Bounds of Rights," in *NOMOS XXXIII: Compensatory Justice*, edited by J. Roland Pennock and John W. Chapman (New York: New York University Press, 1991): 13-44.

⁴⁸ Schmitz acknowledges that "the right to say no is stringent but not absolute." "Property and Justice," p. 82.

⁴⁹ Jane Austin, *Pride and Prejudice* (numerous editions), chap. 40.

⁵⁰ *Ibid.*, chap. 13.

⁵¹ Daniel Attas, "The Fragmentation of Property," *Law and Philosophy*, vol. 25 (2006): 119-149.

⁵² *Ibid.*, p. 141.

⁵³ *Ibid.*, pp. 141-42.

⁵⁴ *Ibid.*, p.142.

⁵⁵ Attas seeks to avoid this conclusion by distinguishing content rights (rights directly relating to control of the thing) from formal incidents, such as powers of transfer. But the core point here is that a manager may not have full rights of use, but powers to grant full rights of use; because it obscures this point we have grounds to question the utility of the content/form distinction.

⁵⁶ Attas, "The Fragmentation of Property," p. 142

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, p. 142n

⁶⁰ Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), pp .2-3, 89ff. In Steiner terms, these rights are not "categorically compossible" though, of course, they may be compossible in some circumstances (i.e., where Alf and Betty happen to agree).

⁶¹ Attas's inclination is to hold that "property rights should be abandoned." "The Fragmentation of Property," p. 122.

⁶² Of course classical liberals and libertarians exhibit great diversity on the nature of this case, and how strong property rights must be. For an overview of the varieties, see Eric Mack and Gerald Gaus, "Classical Liberalism and Libertarianism: the Liberty Tradition," in *Handbook of Political Theory*, edited by G. Gaus and C. Kukathas (London: Sage Publications, 2003): 115-130.

⁶³ See, e.g., Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002), 32-33. I consider their argument in "Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt," *Social Philosophy & Policy*, vol. 27 (Winter 2010): 233-275.

⁶⁴ Liberal society has thrived in urban areas with extensive public space, not gated communities where all space is privatized. I make this point in my review essay of Randy Barnett's *The Structure of Liberty, Criminal Justice Ethics*, vol. 19 (Summer/Fall 2000): 32-43.

⁶⁵ See Schmitz, "Property and Justice," pp. 82-84.

⁶⁶ See Garret Hardin, "The Tragedy of the Commons." *Science*, vol. 162 (1968): 1243-48; David Schmitz, *The Limits of Government* (Boulder, CO: Westview, 1991), chap. 2.

⁶⁷ John Gray, *Post-Enlightenment Liberalism* (London: Routledge, 1993), p. 314.

⁶⁸ I have argued this in "Recognized Rights as Devices of Public Reason," *Philosophical Perspectives: Ethics*, vol. 23 (2009): 111-36.

⁶⁹ See further my essay "On Justifying the Moral Rights of the Moderns: A Case of Old Wine in New Bottles." *Social Philosophy & Policy*, vol. 25 (2007): 84-119

⁷⁰ Attas, "The Fragmentation of Property," p. 134.

⁷¹ Advocates of this view sometime speak of "intangible things," which rather reminds one of "incorporeal body" — which Hobbes called "a mere sound" without sense. *Leviathan*, edited by Edwin Curley (Indianapolis, IN: Hackett, 1994), p. 21.

⁷² Attas seeks to erect a clear line: "A contractual right not only originates in a voluntarily initiated state of affairs (a transaction or a relationship), but also persists only so long as the state of affairs persists. In this sense it has no independent existence of its own." "The Fragmentation of Property," p. 144. But consider trusts set up by a contract that holds in

perpetuity: these may far outlast any property right, which would revert to another at death. "The law requires trustees of a charitable trust to adhere to the donor's stated charitable purpose for the stated period, even if forever." Evelyn Brody, "Charitable Endowments and the Democratization of Dynasty," *Arizona Law Review*, vol. 39 (Fall, 1997): 873-948, at p. 877.

⁷³ Buckle, *Natural Law and the Theory of Property*, p. 29

⁷⁴ See James Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press, 1975), p. 10. I did not appreciate this point in "Property, Rights, and Freedom," p. 221n.