

In this article, I propose a model for understanding the concept of ownership that I call the ‘exclusivity model.’ Like many of the contemporary critics of the ‘bundle of rights’ approach to ownership, I insist that ownership is a legal concept with a well-defined structure. I differ from most of them, however, in the model of ownership that I believe to be at work in property law. Most of these critics propose a model of ownership that emphasizes the owner’s right to exclude non-owners from the owned thing as the central defining feature of ownership. I call this the ‘boundary approach’ to highlight its fixation on the owner’s power to decide who may cross the boundaries of the owned thing. But this, I argue, makes it impossible for the boundary approach to explain adequately the many subsidiary rights in things that coexist with the rights of owners. Indeed, I argue that when we look more closely at the structure of ownership in property law, its central concern is not the exclusion of all non-owners from the owned thing but, rather, the preservation of the owner’s position as the exclusive agenda setter for the owned thing. So long as others – whether they be holders of subsidiary property rights or strangers to the property – act in a way that is consistent with the owner’s agenda, they pose no threat to the owner’s exclusive position as agenda setter.

Key words: property theory/ownership/freedom/rule against perpetuities/
adverse possession/trespass/easements

I Introduction

For the better part of the past century, legal scholars have been sceptical about the coherence of the idea of ‘ownership.’¹ Ownership was (and by

* Assistant Professor, Faculty of Law, Queen’s University.

† I presented drafts of this paper at the McGill/Queen’s Young Scholars Conference in February 2007, at a UBC Faculty Seminar in April 2007, and at the IVR 2007 Special Workshop on the Law and Philosophy of Property; I am grateful to participants at each for helpful comments, particularly David Lametti, Amnon Lehavi, David Schorr, James Penner, and Katrina Wyman. I am also grateful to Gregory Alexander, Lee Ann Fennell, Eduardo Peñalver, Henry Smith, Malcolm Thorburn, and the two anonymous *UTLJ* reviewers for insightful comments.

1 See, e.g., Bruce Ackerman, *Private Property and the Constitution* (New Haven, CT: Yale University Press, 1977) at 26–7 [Ackerman, *Private Property*], describing a ‘bundle of rights’ approach or ‘Scientific property talk.’ See also Arnold Weinrib, ‘Property and Information’ (1988) 38 *U.T.L.J.* 117 at 120 (taking a bundle-of-rights approach and describing the ‘conclusory nature of the term “property.”’) For the genesis of the bundle-of-rights approach in the work of A.M. Honoré and Hohfeld, see James E. Penner, ‘The Bundle of Rights Picture of Property’ (1996) 43 *U.C.L.A.L.Rev.* 711 [Penner, ‘Bundle’]. But see A.M. Honoré, ‘Property and Ownership: Marginal Comments’ in Timothy Endicott *et al.*, eds., *Properties of Law: Essays in Honour of Jim*

some still is) seen as a ‘bundle of rights.’² On this approach, ownership is not a concept that constrains judges in the resolution of use conflicts³ but, on the contrary, the output of a judicial balancing of uses, the sticks that a court has handed out in a particular case after comparing the efficiency or utility of conflicting uses.⁴

The bundle-of-rights approach has been roundly criticized by modern proponents of a much older view of ownership as an open-ended sphere of liberty preserved by the right to exclude others from a particular thing (an exclusion-based or ‘boundary approach’).⁵ A boundary approach avoids many of the weaknesses of a bundle-of-rights approach by recognizing the coherence of the idea of ownership and thus its proper role in judicial reasoning: ownership, on a boundary approach, is a baseline or an input to a court’s decision. Blackstone’s *Commentaries*, which famously describes ownership as sole and despotic dominion in total exclusion of

Harris (Oxford: Clarendon Press, 2006) 129 at 131 (asserting, ‘that property is always concerned with relationships between people as to the use or exploitation of things is attributed ... to *illegitimate* inferences drawn from treatments of the topic by Hohfeld and myself.’)

- 2 The ‘bundle of rights’ label has been applied broadly, and not everyone who shares the label shares this view of property. See Stephen R. Munzer, ‘Property as Social Relations’ in Stephen R. Munzer, ed., *New Essays in the Legal Theory of Property* (Cambridge: Cambridge University Press, 2001) 39 [Munzer, ‘Social Relations’]. For a classic statement of the bundle-of-rights view, see Thomas C. Grey, ‘The Disintegration of Property’ in J. Roland Pennock & John W. Chipman, eds., *Nomos XXII: Property* (New York: New York University Press, 1980) 69. Law and economics has largely followed the legal realist view of property as a bundle of rights. See Thomas Merrill & Henry Smith, ‘What Happened to Property in Law and Economics’ (2001) 111 *Yale L.J.* 257 [Merrill & Smith, ‘What Happened’].
- 3 See Ackerman, *Private Property*, supra note 1 at 26 (to a proponent of a bundle-of-rights approach, ‘it risks serious confusion to identify any single owner as *the* owner of any particular thing’). See also Karl Llewelyn, ‘Through Title to Contract and a Bit Beyond’ (1938) 15 *N.Y.U.L.Rev.* 159 at 171 (in a sale-of-goods context, ‘The Title-concept lumps so many policy issues together that the same decision about Title, in two cases involving similar facts, would repeatedly lead to unfortunate results in one or the other, according to the issue’).
- 4 See Thomas Merrill & Henry Smith, ‘The Morality of Property’ (2007) 45 *Wm. & Mary L.Rev.* 1849 at 1851 [Merrill & Smith, ‘Morality’] (‘bundle of rights’ metaphor suggests that content of rights mutates case by case); Henry E. Smith, ‘Exclusion and Property Rules in the Law of Nuisance’ (2004) 90 *Va.L.Rev.* 965 [Smith, ‘Nuisance’].
- 5 For criticism of the bundle-of-rights view see Penner, ‘Bundle,’ supra note 1; Merrill & Smith, ‘What Happened,’ supra note 2; Merrill & Smith, ‘Morality,’ supra note 4 at 1867. The most important modern proponents of a boundary approach, on different grounds, are Henry Smith and Thomas Merrill, on the one hand, and James Penner, on the other. See Smith, ‘Nuisance,’ supra note 4 at 987 (‘... exclusion does seem to be the more basic and foundational strategy in a wide variety of property situations’); J.E. Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997) [Penner, *Idea*].

the rights of others, is taken to be the *locus classicus* of an exclusion-based approach.⁶ Contemporary proponents of a boundary approach have modernized Blackstone, recognizing that dominion is not absolute but insisting that ownership is essentially constituted by the exclusion of others from the object owned.⁷

A boundary approach, unlike a bundle-of-rights approach, properly recognizes that there is a concept of ownership at work in law, but it does not account for the phenomenon of ownership: it fails to explain its crucial features.⁸ We might better characterize a boundary approach as a theory of non-ownership. The focus of analysis for a boundary approach is on the position of *non-owners*, which it defines in terms of a general duty not to cross over the boundaries of objects one does not own. A boundary approach, in effect, relies on a process of elimination to distinguish owners from non-owners: an owner is the last person standing after the exclusion of everyone else from the object owned. But this provides only the weakest account of the owner's special position *within* the boundaries of the thing: by default, after the exclusion of others, the owner is left at liberty to use the thing.

The grain of truth in a boundary approach is that ownership is indeed an exclusive right. But a boundary approach wrongly assumes that what it means for ownership to be exclusive is that others generally have a duty to exclude themselves from the object owned. In conflating the concept of an exclusive right with that of the right to exclude, proponents of a boundary approach trade on an ambiguity in the meaning of 'exclusive.' There is a distinction between a right that is exclusive in the sense that it has the function of excluding others from the *object* of the right and one that is exclusive in the sense that its holder occupies a special *position* that others do not share. I argue here that ownership, like sovereignty, is an exclusive position that does *not* depend for its exclusivity on the right to exclude others from the object of the right. What it means for

6 See Merrill & Smith, 'What Happened,' supra note 2. See Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 Neb.L.Rev. 730 [Merrill, 'Exclude'].

7 See Hanoch Dagan & Michael Heller, 'Conflicts in Property' (2005) 6 Theor.Inq.L. 40.

8 It is commonplace for English lawyers to deny that there is a concept of ownership in the common law. See Kevin Gray, 'The Idea of Property in Land' in Susan Bright & John Dewar, eds., *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 15 at 35 (the 'most striking feature of English land law is precisely the absence, within its conceptual apparatus, of overarching notions of *ownership*'); Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 29 [Waldron, *Right*] ('The lawyer certainly who is concerned with the day to day affairs of all these people will not be interested in finding out which of them really counts as an owner. His only concern is with the detailed contents of the various bundles of legal relations'). But see J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 69–72 (arguing that 'ownership is not a conveyancer's problem but it is a conception – or rather a battery of conceptions – internal to the law') [Harris, *Justice*].

ownership to be exclusive is just that owners are in a special position to set the agenda for a resource.⁹ Ownership's exclusivity is simply an aspect of its nature as a position of agenda-setting authority, rather than, in itself, the essence of ownership.

An exclusivity-based approach better explains the nature of ownership and also the institutional structure on which it depends. Ownership requires not that others keep out so much as that they fall in line with the agenda the owner has set. The law preserves the exclusivity of ownership not by excluding others but by harmonizing their interests in the object with the owner's position of agenda-setting authority.¹⁰ The law accomplishes this in two ways. First, familiar property law doctrines, such as the rule against perpetuities, easements law, and finders' law, carve out a position of authority for owners that is neither derived from nor subordinate to any other's. These and other rules create the institutional structure that permits the owner to function as the supreme agenda setter for the resource. Secondly, property-related tort law protects the owner's exercises of authority by obligating others to act in a way that is consistent with the owner's actual or imputed agenda. I will argue that this, and not the protection of a right to exclude others from the object, is the proper function of the law of trespass.

An exclusivity-based approach to ownership revives the old analogy of ownership to sovereignty. Ownership, like sovereignty, relies on a kind of notional hierarchy, in which the owner's authority to set the agenda is supreme, if not absolute, in relation to other private individuals. By analysing ownership in terms of exclusion, a boundary approach fails to explain the true significance of much of property law and property-related tort law to the creation and preservation of the owner's special position.

I begin in Part II with an explanation of the exclusion-based approach to ownership and its shortcomings. A right to exclude, I argue, does not define the contours of the owner's special position. Part III introduces the idea that ownership is a special position of agenda-setting authority, drawing in particular on the law of adverse possession to illustrate this claim. In Part IV, I argue that the exclusivity of the owner's position does not necessarily depend on exclusion of others from the owned

9 Eduardo Peñalver helpfully suggested the term 'agenda setting.'

10 My focus is on the concept of ownership rather than the concept of property more generally. It is important to distinguish between the two. Property includes interests in resources that are subordinate to the owner's, such as easements, mortgages, and possessory rights. See J.W. Harris, 'Legal Doctrine and Interests in Land' in J. Eckelart & J. Bell, eds., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1987) 167, for a description of the features of non-ownership interests in land.

object; rather, ownership depends on rules that ensure the supremacy of the owner's agenda-setting authority and on rules that ensure that others fall in line with the owner's agenda. This, I argue, is the function of trespass law and of certain core property doctrines, including the rule against perpetuities. In Part v, I consider and reject the view that the justifiability of ownership in terms of freedom depends on the right to exclude others from the objects of the right. Part vii concludes.

II *From exclusion to exclusivity*

A WHAT IS AN EXCLUSION-BASED APPROACH?

I begin here by examining the basic features of an exclusion-based approach, then move on to explain why it fails to explain crucial aspects of the nature and structure of ownership.

Exclusion-based accounts of property emerge from a range of very different normative and methodological approaches.¹¹ One cluster of theories is, broadly speaking, rights based.¹² From this group, I will focus on the work of James Penner, one of the most influential proponents of a boundary approach, who analyses the nature and structure

11 See Thomas W. Merrill, 'The Landscape of Constitutional Property' (2000) 86 Va.L.Rev. 885 at 971 [Merrill, 'Constitutional Property'] ('Whether one calls this the right to "determine how the object shall be used and by whom," or a "right to exclude others from things which is grounded by the interest we have in the use of things," or the right of "direct trespassory protection," or the "gatekeeper" right, this conclusion has been independently reached over and over again'). See also Waldron, *Right*, supra note 8 at 39; Jeremy Waldron, 'Property' in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, online: The Stanford Encyclopedia of Philosophy < <http://plato.stanford.edu/entries/property/> > [Waldron, 'Property'] ('Society simply pledges itself to enforce the rights of exclusion that ownership involves wherever those rights happen to be'); Penner, *Idea*, supra note 5 at 71; James Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 13 [Harris, *Justice*]; Kevin Gray, 'Property in Thin Air' (1991) 50 Camb.L.J. 252 at 268, 306 [Gray, 'Thin Air'] (excludability is the basis for propertizing resources); Merrill, 'Exclude,' supra note 6 at 748.

12 Lockean liberals and libertarians are important constituents of this approach. See Stephen Perry, 'Libertarianism, Entitlement and Responsibility' (1997) 26 Phil.& Pub.Aff. 351 at 364–5 [Perry, 'Libertarianism']; Richard A. Epstein, 'Takings, Exclusivity and Speech: The Legacy of *Pruneyard v. Robins*' (1997) 64 U.Chi.L.Rev. 32. So are philosophers working in the tradition of H.L.A. Hart and Joseph Raz: see Penner, *Idea*, supra note 5. Other rights-based philosophers who concede the central importance of exclusion include Harris, *Justice*, supra note 8, and Waldron, *Right*, supra note 8. Exclusion-based approaches to property rights also include those whose moral outlook is, broadly speaking, duty based. See David Lametti, 'The Concept of Property: Relations through Objects of Social Wealth' (2003) 53 U.T.L.J. 325; Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 Phil.& Pub.Aff. 215 [Ripstein, 'Harm Principle']; Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Va.L.Rev. 1391 at 1406 [Ripstein, 'Private Order'].

of property rights in terms of our enduring interest in determining the use of things.¹³ The exclusion of others is how the law goes about protecting this interest, which is one aspect of our more basic interest in personal autonomy (control over one's material environment is a component of an autonomous life).¹⁴

It is not only rights-based accounts of property that emphasize exclusion; there are also utilitarians in the camp.¹⁵ Most prominently, Thomas Merrill and Henry Smith have developed a cost-based account for the exclusion strategy that they argue is typical¹⁶ of ownership, eschewing the modern utilitarian preference for a bundle-of-rights approach.¹⁷ Property rights are defined in terms of exclusion because the alternative, defining them in terms of specific use rights (a governance strategy), presents greater information costs that typically outweigh the benefits of the greater precision governance rules provide.

The challenge I face in this section is to identify the common aspects of these diverse exclusion-based accounts.¹⁸ While, ultimately, these theorists

13 Penner, *Idea*, supra note 5. Jeremy Waldron offers an important rights-based analysis of ownership in which decisional authority is preserved by the right of exclusion. See Waldron, *Right*, supra note 8 at 294, describing the rights and powers associated with ownership, including 'the exclusive right to determine what shall be done with a resource; connected with first the right to exclude others from the use of a resource; and characteristically, the power to alienate one's rights over a resource on whatever terms one thinks appropriate.' See also Jeremy Waldron, 'Property Law' in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996) 3 at 6 (defining ownership in terms of the decisional authority that separate individuals (or groups) have over separate objects).

14 See Penner, *ibid.* at 71 ('use serves a justificatory role for the right, while exclusion is seen as the formal essence of the right'). Cf. Waldron, *Right*, supra note 8 at 168–9, exposing the weakness in the argument that exclusion is practically necessary if resources are to be used.

15 Of the rule-utilitarian, or indirect-consequentialist, variety. On the distinction, see Bernard Williams, 'A Critique of Utilitarianism' in *Utilitarianism For and Against* (Cambridge: Cambridge University Press, 1963, rpt. 1993) 81 at 118.

16 See Henry E. Smith, 'Property and Property Rules' (2004) 79 N.Y.U.L.Rev. 1719 at 1753 [Smith, 'Property Rules'] ('for reasons of information cost it is often advantageous and almost inevitable that rights will be delineated by ... an "exclusion strategy"').

17 See Merrill & Smith, 'What Happened,' supra note 2. Smith emphasizes that while exclusion rules are at the core of property, property law also uses governance rules, rules that work out intense relationships between the owner and specific others. Governance rules are refinements on the core property relationship, but the on/off function of boundaries is fundamental to Smith's understanding of the standard case of property. See Merrill & Smith, 'Morality,' supra note 4 at 1891; Henry E. Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31 J.Legal Stud. S453 [Smith, 'Governance']. See also Merrill, 'Constitutional Property,' supra note 11 at 971–4.

18 The 'boundary approach' that I describe here will be at best a rough amalgam of these different views. Ultimately, it does not do justice to any one writer's account but, rather,

may disagree about whether a right to exclude is essential to the idea of property, practically necessary to serve the interests that motivate property, or simply typical of rights that are *in rem*, they appear to agree that – at the very least – what we mean when we say that ownership is exclusive is that owners have a right to exclude¹⁹ and that the right to exclude has a certain effect: the indirect creation of the space within which the owner's liberty to pursue projects of her choosing is preserved.²⁰

Ownership, on an exclusion-based or boundary approach, is the product of a norm that protects the boundaries around an object so as to exclude the whole world but the owner.²¹ The owner controls access to the attributes of the resource within the boundaries, which are hers in virtue of the exclusion of others. An owner has, in effect, a gatekeeping function.²²

The salient shortcoming of a boundary approach is that it fails to take the owner's special position as an object of analysis that is independent of the right to exclude.²³ The essential feature of ownership on a boundary

aims simply to examine what an emphasis on exclusion and boundaries reveals about ownership.

- 19 Penner thinks that a 'right to exclude' suggests a right of self-help and prefers the language 'right of exclusion,' correlating to a duty of non-interference. Penner, *Idea*, supra note 5 at 70.
- 20 See Smith, 'Property Rules,' supra note 16 at 1772, for a discussion of the overlap between autonomy-based and information-cost-based approaches.
- 21 As Carol Rose notes, land is the paradigm of property on this approach, perhaps because land is easy to conceive of in these terms. Carol M. Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems' (1998) 83 *Minn.L.Rev* 129 [Rose, 'Futures of Property']. See also Gray, 'Thin Air,' supra note 11 at 286 (noting that land is the most readily excludable resource). Smith emphasizes spatial boundaries and things themselves, although he does acknowledge that there are cases in which the on/off signal is not provided by physical boundaries. See Merrill & Smith, 'Morality,' supra note 4 at 1891 (understanding of harm to a property right is 'conditioned in property law on spatial boundaries and things'); Smith, 'Governance,' supra note 17 (boundaries are created by grouping complementary attributes of a resource together or by following natural boundaries).
- 22 See Penner, *Idea*, supra note 5 at 74; James E. Penner, 'Ownership, Co-ownership and the Justification of Property Rights' in Timothy Endicott *et al.*, eds., *Properties of Law: Essays in Honour of Jim Harris* (Oxford: Clarendon Press, 2006) 167 [Penner, 'Justification']; Thomas W. Merrill & Henry E. Smith, 'The Property/Contract Interface' (2001) 101 *Colum.L.Rev.* 773 at 790 [Merrill & Smith, 'Interface'] (property specifies which person acts as gatekeeper).
- 23 Exclusion-based approaches vary in the extent to which they consider ownership itself to be an object of analysis. Harris, *Justice*, supra note 11, gives ownership equal billing with the right to exclude by pointing out that property institutions entail both trespassory rules and a spectrum of ownership interests. In so doing, he rejects the view that the content of ownership (use privileges, control, and transmission powers) is set by what he calls trespassory rules, although he acknowledges their essential protective role. According to Harris, the content of ownership is determined by variable cultural assumptions. But this is not so far off the views of most proponents of a boundary approach. Few would deny that restrictions on the uses we can make

approach is that others have a duty not to cross over the boundary of the object owned without permission.²⁴ Within the boundaries of her right, the owner is simply at liberty to use the resource, but this liberty is not otherwise guaranteed.²⁵ Put more starkly, ownership is nothing more than the space left for the use of the thing by the owner once others are kept out. As Penner puts it, ownership is ‘the right to determine the use . . . of a thing *in so far as that can be achieved by others excluding themselves from it.*’²⁶

Merrill has a similar take on how ownership is the effect of a right/duty of exclusion: simply by virtue of the exclusion of others, owners are free to determine the use of things. He writes,

A’s right to exclude with respect to Blackacre leads directly to A’s right to dictate the uses of Blackacre, because no one else will be in a position to interfere with the particular uses designated by A.²⁷

Smith, similarly, emphasizes that the law gives the owner ‘an open-ended set of uses *implicitly* by giving the owner the right to exclude others from the asset.’²⁸ An owner’s property right is thus the reflex of a simple and general duty to ‘keep off’ that is signalled by the boundaries of the thing and that requires neither a deep contextual knowledge of the situation nor the personal acquaintance of the owner.²⁹ The information

of our property reflect our society’s values and commitments but simply emphasize the dominant role of exclusion in determining the open-ended character of ownership. The difference between Harris’s approach and a boundary approach is the attention he gives to the different forms of ownership interest along what he calls the ownership spectrum.

24 See Merrill & Smith, ‘Morality,’ supra note 4 at 1871 (‘An intentional trespass occurs when the defendant knowingly or deliberately crosses the boundary lines of another’s land, either personally or with an object large enough to displace the owner of possession’).

25 See also Merrill & Smith, ‘What Happened,’ supra note 2 at 389 (suggesting that the right to exclude protects use indirectly).

26 Penner, *Idea*, supra note 5 at 103 [emphasis added]. See Penner, ‘Justification,’ supra note 22 (ownership provides owners with a realm of non-interference in which they may realize the value of particular things, which, *in virtue of this protection*, they are said to own). See also Penner, *Idea*, supra note 5 at 72–144 (describing that right as being shaped by the duty others have to exclude themselves).

27 See Merrill, ‘Exclude,’ supra note 6 at 741. According to Smith, exclusion is the only way to secure to the owner an open-ended sphere of choice. See Smith, ‘Property Rules,’ supra note 16 at 1759–62; Smith, ‘Nuisance,’ supra note 4 at 979 (‘The right to exclude is built around a signal – presence inside or outside a boundary – that is not directly tied to use but that when invoked protects an owner’s interest in use indirectly’).

28 Smith, ‘Property Rules,’ *ibid.* at 1759.

29 Penner, *Idea*, supra note 5 at 28; Merrill & Smith, ‘Interface,’ supra note 22 at 794 (*in rem* rights offer standardized packages of duties of abstention that apply automatically

that a person needs to avoid trespass is simple and impersonal, insofar as it is communicated by the boundaries of the object itself.³⁰

In sum, the ability of the owner to use and dispose of her thing is simply the *effect* of her right to exclude others generally. It does not, on this view, represent any additional power or require any separate justification.³¹

Proponents of a boundary approach acknowledge the gap between form and substance, between the right to exclude and our interest in using things. Penner argues that exclusion is practically necessary and certainly sufficient to protect our interest in using things. Smith argues that it is this gap that permits property rights to be defined with lower information costs: through the exclusion of others, the law indirectly protects a wide swathe of activities, rather than engaging in the more costly strategy of directly protecting specific use interests.³² They emphasize that it is 'absolutely vital' to grasp the importance of the *in rem* nature of property, which means that bearers of rights and duties relate to each other through the thing but not to each other directly.³³ These arguments are geared to respond to a bundle-of-rights approach, which pulls in the direction of disaggregating the concept of ownership into a shifting bundle of use rights. Against a bundle-of-rights approach, it is important to make the case that ownership protects an open-ended set of choices and that ownership is impersonal. A boundary approach does not mischaracterize ownership in this respect; but it misunderstands the role

to all persons in the society when they encounter resources that are marked in the conventional manner as being 'owned').

30 A significant weakness of the boundary approach is the undue reliance it places on the physical boundaries of property to signal to others generally to keep out. The dangers of conflating physical and legal boundaries have been noted by others; see Perry, 'Libertarianism,' supra note 12. Some proponents of the boundary approach have acknowledged that while physical boundaries typically stand in for on/off signals, they do not always do so. See note 21 supra and accompanying text; see also Emily Sherwin, 'Two- and Three-Dimensional Property Rights' (1998) 29 *Ariz.St.L.J.* 1075 (boundaries of intangibles rendered determinate through law). The trouble for those who emphasize the simplicity of a fundamentally exclusionary property right is that the more detached property rights are from physical boundaries, the heavier the informational load presented by rights/duties of exclusion. There are, of course, other reasons to suspect that property rights and duties require more contextual knowledge than is often supposed on a boundary approach; for example, even the most basic, preliminary assessment of whether a resource is owned by someone else or abandoned, and thus whether there is a duty of exclusion or a right to acquire the thing, depends heavily upon contextual information. See *Stewart v. Gustafson*, [1999] 4 *W.W.R.* 695 (Sask. Q.B.) (discussing factors for determining abandonment).

31 See Smith, 'Property Rules,' supra note 16.

32 Henry E. Smith, 'Intellectual Property as Property: Delineating Entitlements in Information,' (2007) 116 *Yale L.J.* 1742 at 1747.

33 Penner, *Idea*, supra note 5 at 30; Smith, 'Property Rules,' supra note 16.

of exclusion in producing an open-ended and impersonal right, and, ultimately, it does not say enough about the owner's position. I explain below that the law does not rely on exclusion to carve out the position of owner and that it is not the thing but the agenda for the resource that mediates the relationship between owners and others.

A final clarification is in order concerning the use of the concept of exclusion by proponents of a boundary approach. The role of exclusion on a boundary approach is not to be confused with the kind of exclusion that Felix Cohen made famous in 'Dialogue on Private Property.'³⁴ Cohen summarized the idea of property in terms of the following label:

To the world:

Keep off *X* unless you have my permission, which I may grant or withhold.

Signed: Private citizen

Endorsed: The state

As much as this sounds like a boundary approach, Cohen and other realists did not link exclusion to the distinctive essence of property. A right to exclude, for the realists, refers just to the enforceability of the right in question.³⁵ Cohen appears to have meant simply that a property holder has a right to draw on the power of the state to enforce the right, whatever its content, against others. The security of property rights, on the realist view, depends on a state-backed right to exclude. As Cohen put it, property rights simply 'wouldn't amount to anything if you couldn't exclude others' from interfering with the right. But the same could be said of any right. Indeed, for the realists, exclusion – meaning the state protection of the right – is a feature not just of property rights but of all private rights that the state enforces. This, of course, brings into question the difference between *in rem* and *in personam* rights, which for the realists was a distinction in degree, not in kind.

In short, while the realists put forward the right to exclude as a necessary feature of (all) rights, exclusion in their sense does not constitute the distinctive feature of property, as it does on a boundary approach, and does not speak to control over real and determinate boundaries. As

34 Felix Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers L.Rev. 357 at 374 [Cohen, 'Dialogue']. That said, Merrill, for instance, gives Cohen's endorsement of the right to exclude as evidence of general support for an exclusion-based view of property. See Merrill, 'Constitutional Property,' supra note 11 at 971.

35 See Penner, *Idea*, supra note 5 at 71, discussing the right to exclude as an auxiliary right. I am not sure whether Penner was really focusing on the realists' sense of exclusion, because he seems most concerned with confusing the right of exclusion with a self-help right to exclude: 'the fact that we may not have the right to throw trespassers off our land and must call the police to do so instead does not mean that we do not have a right to the land but only that our means of effecting the right are circumscribed.'

Cohen writes, ‘the essential factor that we are reaching for here is the power to exclude, whether that power is exclusive or shared with others.’³⁶ One illustration of the difference between exclusion on a boundary approach and exclusion for realists like Cohen is found in the different treatment of easements by each. According to Cohen, a person with an easement (which he called a ‘non-exclusive’ right of way) has a power of exclusion every bit as much as a person with fee simple. By contrast, on a boundary approach, easements do not imply exclusion, except in exceptional cases, such as rights of way for railway tracks, where there is a high degree of physical occupation and so it is sensible to speak of perimeter protection – what proponents of a boundary approach mean by exclusion.

B EXCLUSION AND THE CONTOURS OF OWNERSHIP

The most basic criticism we can make of a boundary approach is that we cannot look to the right/duty of exclusion to define the contours of an owner’s position.³⁷ I will consider here examples of ownership in which variations in the scope of the owner’s position are not reflected in variations in the duties others have to exclude themselves from the thing. The conclusion that I draw from this exercise is that exclusion does not deserve the emphasis it receives in conceptual analyses of ownership. There is, in other words, too much of a gap between the form ownership is thought to have, on an exclusion-based approach, and the substance of the right. One way to respond to the inflexibility of an exclusion strategy is to revert to *ad-hocery* to explain differences in owners’ positions: variations in the scope of ownership authority are simply external restrictions on the owner’s position. I explain below why this option is unsatisfactory before going on to introduce the idea of ownership as a position of agenda-setting authority preserved by exclusivity rules. It is the language of agenda setting that permits us to explain the variations in the scope of the owners’ positions in the examples to which I now turn.

Imagine for a moment that a person hikes past Greenacre, land heavily burdened by restrictive covenants, next past Pinkacre, land subject to Aboriginal title, and finally past Blackacre, land that is owned in fee simple, the least restricted form of ownership in the common law. Does her duty to exclude herself change or vary with the kinds of positions that the respective owners have? Proponents of a boundary approach

³⁶ Cohen, ‘Dialogue,’ *supra* note 34 at 370.

³⁷ I discuss below attempts to refine exclusionary views of ownership by introducing concepts such as ‘governance,’ in which the owner’s general right to exclude is subject to one-off accommodations of the interests of others. See note 39 *infra* and accompanying text. This might explain limits on an owner’s position, but it does not explain the nature of the owner’s position in terms that are intrinsic to it.

would want to argue that our hiker has the same duty not to jump the fence into Pinkacre and Greenacre as she would have with respect to Blackacre; she would otherwise be required to know something about the owner and her particular relationship to her property. Potential trespassers are, according to exclusion-based approaches, supposed to be able to avoid such intimate inquiries into the identity of the owner(s) and to rely instead on a simple keep-off message. Let us assume that the duty of exclusion conveys a simple and unwavering keep-off message. At the very least, we should conclude that this duty of exclusion tells us very little about the nature of the position that it protects.

Take Pinkacre, subject to Aboriginal title. Aboriginal title, when seen from the perspective of Canadian law, is a form of ownership right. It is subject to a limit on uses that are inconsistent with the traditional use that gave rise to title in the first place.³⁸ Thus, if an Aboriginal group's hunting activity on a parcel of land leads to the recognition of Aboriginal title, then strip mining, which is inconsistent with hunting, is outside the

38 The difficulties that Aboriginal title presents for an exclusion-based approach might be dismissed on the grounds that Aboriginal title is more than a proprietary right; it also has territorial dimensions. See *Campbell v. British Columbia (A.G.)*, 2000 CarswellBC 1545 at para. 137 (B.C.S.C.) (connecting the right of Aboriginal people to make communal decisions about land use with the right to limited self-government); Kent McNeil, 'Self-Government and the Inalienability of Aboriginal Title' (2002) 47 McGill L.J. 473 at 486 (acknowledging that Aboriginal title does have a proprietary aspect but arguing that it also has a territorial aspect: 'social, cultural, and political dimensions that are beyond the scope of standard conceptions of private property'); Mark D. Walters, 'The Morality of Aboriginal Law' (2006) 31 Queen's L.J. 470 at 498 (the morality of Aboriginal law – Canadian law about Aboriginal people – depends on reconciling Crown sovereignty with Aboriginal sovereignty). An argument could be made that an exclusion-based theory of property does not aim to and so cannot be faulted for failing to account for full-fledged territorial rights. But even if Aboriginal title does require some recognition of public decision-making authority, Aboriginal title, seen from the perspective of Canadian law, is, at the very least, a form of ownership. See *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 54 [*Bernard and Marshall*] (Aboriginal title is cognizable as a modern common law property right); *R. v. Delgamuukw*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] (recognizing the proprietary status of Aboriginal title and, at paras. 170–1, leaving unresolved the question of self-government). For the limited purposes of this article, I argue (only) that a theory of ownership ought to be able to account for these proprietary aspects of Aboriginal title. On an exclusivity-based view of ownership, the distinction between territorial and proprietary claims to land is less dramatic than on an exclusion-based view: all ownership is a kind of authority, the legality of which might depend on constraints on abuse of power or other public trust constraints, topics I will leave for another paper. I make no claims here about independent Aboriginal perspectives on ownership rights in land, which are not fully represented in Canadian law. See Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening?' (2006) 69 Sask.L.Rev. 281 at 290–1. I am grateful to Cherie Metcalf and Mark D. Walters for their comments on this issue (although the views expressed here, as well as any errors, are my own).

authority of the Aboriginal group holding title, but other non-traditional uses – say, running an eco-tourism business – may be within the authorized range of uses. From the point of view of potential trespassers, which is the point of view that proponents of a boundary approach characteristically take, the exclusionary aspect of Aboriginal title would be the same as that of privately owned land. Proponents of a boundary approach would have to concede that, to the extent that a ‘keep out’ signal is conveyed to a potential trespasser when she confronts non-Aboriginal land, the same signal is conveyed when she approaches Aboriginal land. Outsiders do not enjoy greater liberty with respect to Pinkacre in keeping with the greater restriction placed on the agendas that Aboriginal people are able to pursue.

The same is true of Greenacre, subject to a restrictive covenant. Restrictive covenants prevent an owner from setting certain agendas with respect to the land, although the boundary of Greenacre is exactly where it would be if the land were unburdened by restrictive covenants. A proponent of a boundary approach would hardly be able to insist that the limits on the agendas the owners can pursue in these cases are reflected in a correlative variation in the scope of the duty others have to exclude themselves. But in that case, it is of little value to look to the right/duties of exclusion to tell us about the position that owners occupy. An emphasis on exclusion leaves us unable to describe important structural limits on the owner’s authority.

The question that comes to mind here is whether refinements on a basic exclusion approach might not address this lacuna just as well as, or better than, the shift in conceptual starting-points that I will argue for in this article. Smith, for instance, argues that while the core of property is exclusion, every property system refines this basic approach in certain contexts. These refinements, which he calls governance rules, balance the interests of specific individuals in the use of a thing. But governance rules do not explain variations in the owner’s position in terms that are internal to the concept of ownership. Merrill and Smith treat a governance strategy as the preserve of a kind of bundle-of-rights approach, writ small. Governance rules represent the kind of *ad hoc*, pragmatic determination of use rights that is characteristic of the bundle-of-rights approach more generally.³⁹ And a bundle-of-rights approach, as we have seen above, does not contribute to a coherent idea of ownership. On a governance strategy, unlike on the exclusion strategy, the owner is not picked out as special *vis-à-vis* others.⁴⁰ This is why Smith, along

39 See Merrill & Smith, ‘Morality,’ supra note 4 at 1891; Smith, ‘Governance,’ supra note 17.

40 On Merrill and Smith’s view, the owner’s special status is coextensive with her right to exclude. As evidence of the special status of owners, Merrill and Smith point to the law’s rejection of Coasean reciprocal causation when evaluating the actions of a trespasser – another way of saying that ownership as the right to exclude is a

with Merrill, contends that when we move beyond what they consider the core of ownership (*i.e.*, exclusion) toward these refinements on it (governance), ‘the simple robust morality supporting exclusion gives way to a more pragmatic *situational* morality.’⁴¹ The courts and legislatures, in other words, find themselves balancing the interests of competing users in these contexts rather than crafting their response around the owner’s special position.⁴² A governance strategy does not refine our understanding of the concept of ownership so much as retreat from the concept of ownership toward *ad-hocery* to explain structural variations in the positions owners occupy.

It might be argued that the variations in the owner’s positions with respect to Pinkacre and Greenacre are not structural features of ownership and so are appropriately treated as external limits on the core of ownership. Surely some limits on what an owner can do with her property do not bear on the structure of ownership itself, and we should not expect to account for them in describing the position an owner occupies – criminal prohibitions on murder that limit what the owner can do with her gun, for instance, or a municipal by-law prohibiting graffiti on external walls that limits what an owner can do with her house. But we can distinguish between duties that are freestanding and external to ownership, on the one hand, and internal or structural variations in the scope and kind of agenda-setting authority that an owner has, on the other. The limits suggested by restrictive covenants and Aboriginal title are variations in the scope and kind of authority that the owner has. It would not do to explain these as *ad hoc* modifications to some more basic position. Restrictive covenants are enforceable in equity precisely because they are structural features of the servient tenement owner’s right.⁴³ Thus, the cases that recognize equity’s jurisdiction to enforce restrictive covenants have carefully noted that restrictive covenants are internal limits on the scope of ownership rather than

baseline that judges protect. Merrill & Smith, ‘Morality,’ *supra* note 4 at 1861–2; see also Henry E. Smith, ‘Self-Help and the Nature of Property’ (2005) 1 J.L.Econ.& Pol. 69 at 70–1. In situations in which governance rules apply, they argue, judges and legislatures do move closer to accepting Coasean assumptions of causal symmetry. Smith, ‘Governance,’ *ibid.*

41 Merrill & Smith, ‘Morality,’ *supra* note 4 at 1852 [emphasis added].

42 Governance rules are much broader than exclusivity rules that regulate certain kinds of relationships and otherwise work in property law to preserve exclusivity. For instance, Smith includes state regulations on use, nuisance law, and private contracting as species of governance rules. Smith, ‘Governance,’ *supra* note 17; Merrill & Smith, ‘Morality,’ *supra* note 4 at 1891.

43 See, *e.g.*, *Rhone v. Stephens*, [1994] 2 W.L.R. 429 (H.L.) [*Rhone*]; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481, 211 D.L.R. (4th) 1 (C.A.) [*Amberwood* cited to O.R.]; *Rowan v. Eaton*, [1927] 59 O.L.R. 379; 2 D.L.R. 722 (C.A.).

independent obligations that a person has.⁴⁴ As these cases point out, if restrictive covenants were indeed independent obligations that bind the owner of a servient tenement, they would contradict the common law rule that a person cannot be forced to assume a burden that she did not voluntarily undertake. Similarly, it is a structural feature of Aboriginal title as it is articulated in Canadian law that groups holding title lack authority to put their land to uses inconsistent with the traditional uses underlying title. Aboriginal people are not subject in law to any separate and externally imposed duty to act in a way that is consistent with the use that grounded Aboriginal title in the first place; they do not breach a duty that sounds in damages or penalties if they engage in inconsistent use. They simply lack the (ownership) authority to do so.⁴⁵

We simply cannot learn enough about the shape of the owner's position by defining ownership in terms of exclusion. The form that ownership takes is much more closely allied to its purpose than proponents of a boundary approach acknowledge. The way in which restrictive covenants or the limit on non-traditional uses affect the contours of ownership can only be explained using the concept of agenda setting. The limits on authority in these cases are limits on the kinds of agendas that the owners can set and pursue.

III *An exclusivity-based approach to ownership*

A AGENDA-SETTING AUTHORITY

Ownership, seen from a boundary approach, is a gatekeeping position. The essential feature of ownership, on this account, is the power to determine who can enter and who must keep out. A boundary approach assumes that the exclusivity of the owner's position depends on the exclusion of others from the object owned. The core insight that I defend here is that ownership is an exclusive right that does not

44 In *Rhone*, *ibid.* at 432–3, Lord Templeman held that '[e]quity does not contradict the common law by enforcing a restrictive covenant against a successor in title of the covenantor but prevents the successor from exercising a right which he never acquired... Equity can thus prevent or punish the breach of a negative covenant which restricts the use of land or the exercise of other rights in connection with land.' See *Amberwood*, *ibid.* at para. 31 (explaining that in *Rhone*, 'the enforcement of a negative covenant in equity did not contravene the common law rule of privity of contract because, in essence, equity was simply giving effect to a *legal right whose scope was restricted by the covenant*' [emphasis added]).

45 More commonly, the effect of the limit is that actions that are otherwise illegal cannot be justified by appeal to proprietary authority where the actions themselves are inconsistent with the traditional uses that might have given rise to title in the first place. See *R. v. Denault*, 1998 CarswellBC 3041 (Prov. Ct.).

always depend for its exclusivity on protecting the boundaries of the thing.

This insight raises two questions. First, what kind of an exclusive position is ownership? And, second, by what means does the law carve out an exclusive position for owners, if not through the exclusion of others from the object owned? I will begin here with the first question and will take up the second in Part IV below.

Ownership is, as a boundary approach indicates, an exclusive right. But the exclusivity of ownership does not describe the essence of ownership. There are many exclusive positions that are not ownership positions: judges have exclusive jurisdiction in their courtrooms; parents are exclusively in charge of their child's well-being; a sovereign has exclusive authority within her jurisdiction. What is distinctive about the exclusive position that owners occupy? Ownership's defining characteristic is that it is the special authority to set the agenda for a resource. The exclusivity of ownership is just one aspect of ownership's character as a position of agenda-setting authority.

We can illustrate the centrality of the owner's special agenda-setting authority to the idea of ownership by looking at how property law conceives of the most basic threat to the owner's position, adverse possession. The law of adverse possession has a transformational effect: a squatter who is a mere trespasser before the expiry of the limitation period is transformed into the owner once the limitation period has elapsed.⁴⁶ Common law jurisdictions have now split on what is required for a squatter to obtain title to land through adverse possession. A dominant Canadian approach, which until recently was also the approach in England and Australia, requires a squatter, in effect, to oust the owner.⁴⁷ She must show not just that she is in possession without the

46 See Larissa Katz, 'The Moral Paradox of Adverse Possession' (2008) [unpublished, on file with author] [Katz, 'Adverse Possession'] (distinguishing the current English model of adverse possession, in which the effect of adverse possession is merely the extinction of the original owner's rights, from dominant Canadian and American models, in which the effect of adverse possession is understood to be the *acquisition* of rights by the squatter). See also Brian Bucknall, 'Two Roads Diverged: Recent Decisions on Possessory Title' (1984) 22 Osgoode Hall L.J. 377 (criticizing the Ontario approach to adverse possession for assuming that statutes of limitation concern the acquisition of rights).

47 *Pye (Oxford) Ltd. v. Graham*, [2003] 1 A.C. 419 (H.L.) [*Pye*] (overturning *Leigh v. Jack*, [1879] 1 Ch. 19). See Adrian J. Bradbrook, Susan V. MacCallum, & Anthony Moore, *Australian Real Property Law*, 4th ed. (Pyrmont, NSW: Lawbook Co., 2008) at 688–94. This approach has its strongest currency in Ontario but has come under attack across Canada. I have argued that the trend to reject this approach is misguided: it wrongly construes the test of inconsistent use as contrary to the modern approach to adverse possession, and it wrongly assumes that the test reflects the immorality of deliberate adverse possession. See Katz, 'Adverse Possession,' supra note 46.

true owner's permission but also that her use of the land is inconsistent with the owner's plans.⁴⁸ Acts of possession that are consistent with the owner's present or future plans for the land will not amount to ouster. The inconsistent use test insulates the true owner against squatters so long as the latter's use of the land does not interfere with her agenda.⁴⁹ For instance, the squatter who farms Blackacre is not acting inconsistently with the intended uses of a true owner who wants only to keep the weeds at bay while she waits for an opportune time to sell, and so he will not prevail against the original owner.⁵⁰

Because the inconsistent use test tends to give owners the upper hand over squatters, the test has been construed as a policy response to the perceived immorality of bad-faith squatting.⁵¹ The recent rejection of the inconsistent use test in England stems from an understandable reluctance

48 See *Keefer v. Arillota* (1977), 13 O.R. (2d) 680 [*Keefer*], relating inconsistent use to the requisite intention; *Mueller v. Lee*, 2007 CarswellOnt 4194 (S.C.J.) [*Mueller*]; *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 [*Masidon*], holding that inconsistent use reflects dispossession. The inconsistent use test comes from an English case, *Leigh v. Jack* (1879), 5 Ex. D. 264 (Eng. C.A.) at 273, *per* Bramwell L.J.: 'in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it.' English courts have recently rejected this requirement; see *Pye*, *ibid.* at paras. 36, 45, *per* Browne-Wilkinson L.J. For criticism in Ontario, see *Bradford Investments (1963) Ltd. v. Fama*, (2005) 257 D.L.R. (4th) 347, 77 O.R. (3d) 127 [*Bradford*]. The adverse requirement in the United States has received different interpretations, some jurisdictions requiring an intent to oust the owner and others an intent merely to possess the land. In other jurisdictions, it is only the squatter's actions, not her intentions, that matter. See Lee Anne Fennell, 'Efficient Trespass: The Case for Bad Faith Adverse Possession' (2006) 100 Nw.U.L.Rev. 1037 [Fennell, 'Bad Faith'].

49 See, *e.g.*, *Masidon*, *ibid.* (squatter's use of land for a private airport not inconsistent with owner's intended use of land for later development).

50 See *ibid.* and accompanying text. See also *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722 at 724 (Ont. C.A.) (squatter who plants buckwheat to keep weeds down does not adversely possess where owner's intended use of land is just as a buffer between her cow pasture and neighbours' lots). The Court in *Bradford*, *supra* note 48 at para. 99, wrote that there is a 'hint of artificiality, and even mysticism, in the notion of a person 'using' land by doing nothing other than to hold it in the hope of a profitable sale at some indefinite time in the future ...' The problem here might be cast simply as the absence of any real agenda.

51 Justice Laskin in *Teis v. Ancaster (Town of)* (1997), 35 O.R. (3d) 216, 152 D.L.R. (4th) 304 at para. 28 [*Teis*], for instance, explicitly construed the test of inconsistent use as a tool to restrict and punish land thieves 'by strengthening the hand of the true owner in the face of an adverse possession claim by a knowing trespasser.' This is in keeping with the view in many US jurisdictions that deliberate squatting is immoral. See R.H. Helmholz, 'Adverse Possession and Subjective Intent' (1983) 61 Wash.U.L.Q. 331 at 331-2 (showing the negative reaction of judges to deliberate squatters, even in jurisdictions where good faith is not required). For the views of property scholars on the morality of deliberate squatting, see Fennell, 'Bad Faith,'

to introduce hurdles into the law of adverse possession on the basis of such policy considerations.⁵² However, it is a mistake to see the inconsistent use test as a policy tool designed to punish or limit deliberate squatters. The inconsistent use approach to adverse possession, in fact, speaks to the core characteristics of ownership and, at the same time, to the limited relevance of exclusion to the concept of ownership.⁵³ On this model of adverse possession, it is not enough for a deliberate squatter merely to show that she has challenged the owner's gatekeeping function by physically occupying the land in question without permission. She threatens the essential core of the owner's position only by challenging the owner's more basic agenda-setting function, by showing that her use is inconsistent with the original owner's agenda.⁵⁴ An attack on the owner's right to exclude is not on its own a subversion of the owner's position: repeated trespass may undermine the effectiveness of an owner's gatekeeping function, but repeated trespass alone will not dislodge the owner from her position as the agenda setter.⁵⁵ To be an owner, then, requires that one hold on to one's exclusive position as the supreme agenda setter.

It is precisely because the core of ownership is a special agenda-setting authority that adverse possession is such a threat to the owner's position. By acting in a manner inconsistent with the owner's intended use of the

supra note 48 at 1048 (citing Richard Epstein, Thomas Merrill, Richard Helmholz, Richard Posner, and others on the immorality of deliberate squatting).

52 See *Pye*, supra note 47 at paras. 32–45 (describing the inconsistent use test as 'heretical'). The concern is that it introduces elements into the law of adverse possession that were abolished in the 1833 reforms to the law, on which modern statutes of limitations in Ontario, England, and Australia are based. This concern has been echoed in recent Canadian case law. See, e.g., *Bradford*, supra note 48 at para. 80. In the 1970s, there was a backlash against a particularly egregious variant of the inconsistent use test that deemed occupation by a deliberate squatter to be non-adverse, or with the implied permission of the owner. This implied licence theory comes from *obiter* by Lord Denning in *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and B.P. Ltd.*, [1974] 3 W.L.R. 387. See *Powell v. McFarlane*, (1977) 38 P. & C.R. 452 (Ch. D.), and UK Law Reform Committee, *Final Report on Limitations of Actions*, (1977) 976–7 Cmnd. 6923, Twenty-first Report at 44–6.

53 But see Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) at 142 (contrasting nuisance with trespass on the basis that '[i]nterference with use and enjoyment does not typically challenge the owner's title to the land, and so the law need not take a strict vindicatory attitude to it').

54 See *Keefer*, supra note 48; *Teis*, supra note 51.

55 Trespass alone is not sufficient to succeed in a claim of adverse possession. See *Ewing v. Burnet*, 36 U.S. 41 (1837); *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990). See also *Shilts v. Young*, 567 P.2d 769 (Alaska 1977), where a person who flew over property, occupied it one day a year, and walked around the boundaries did not establish sufficient possession to succeed in a claim of adverse possession. See also *Keefer*, supra note 48; *Teis*, supra note 51.

land, an adverse possessor defies the owner's agenda-setting authority and asserts her own. If, but only if, the adverse possessor wrests control of the agenda, the law recognizes that the squatter has assumed the core function of ownership.⁵⁶

B ANALOGY TO SOVEREIGNTY

As noted above, an exclusivity-based approach to ownership revives the age-old analogy of ownership to sovereignty. The analogy between ownership and sovereignty is not a perfect one and is further complicated by the longstanding use of this analogy in property theory, most famously by the legal realist Morris Cohen.⁵⁷ Legal realists use the sovereignty metaphor to draw attention to the potential for domination that follows from the control owners have over scarce resources. They present the coercive power of owners as analogous to the power of a sovereign over her subjects. This is not the basis on which I mean to draw the analogy between sovereignty and ownership. The analogy is perhaps weakest with respect to the kinds of power owners and sovereigns have over others. The realists suggest that owners are like sovereigns in that they have power over others in virtue of their control over scarce resources. But the leverage that owners sometimes have in virtue of their position is not at all like the authority that sovereigns (always) have over their subjects.⁵⁸ Owners may be in a position to coerce others because they are

56 This result is typically justified as a kind of trade-off: the security of property rights balanced against other concerns, such as third-party reliance, neglectful owners, and evidence lost with the passage of time. See Thomas Merrill, 'Property Rules, Liability Rules and Adverse Possession' (1985) 79 *Nw.U.L.Rev.* 1122 at 1126–31; Fennell, 'Bad Faith,' *supra* note 48.

57 Morris R. Cohen, 'Property and Sovereignty' (1927) 13 *Cornell L.Q.* 8 (suggesting that the distinction between property and sovereignty is blurred, as property is just another form of power over others). See Gregory Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (Chicago: University of Chicago Press, 1997) at 335–40 (Robert Hale's discussion of property as a form of power predates Cohen's). The sovereignty analogy has made its way into property theory generally. See, e.g., Edwin Baker, 'Property and Its Relation to Constitutionally Protected Liberty' (1986) 134 *U.Penn.L.Rev.* 741 at 751–3, 769–70; Thomas W. Merrill, 'Constitutional Property,' *supra* note 11 at 972–3 (describing property as the devolution of power from the state to private owners and citing Cohen, *ibid.*); Gray, 'Thin Air,' *supra* note 11 at 304 ('private property is never truly private. The control function of property is delegated sovereignty'); Henry E. Smith, 'Governing the Tele-semicommons' (2005) 22 *Yale J.on Reg.* 289 at 299 (explaining that exclusion is low cost 'because officials need not delineate or know about use directly – owners are delegated authority over this choice').

58 See Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988, rpt. 2008) at 71–5 (the state's power depends on its 'primary normative technique of authoritative guidance,' not on coercion). See Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975) at 154–62 [Raz, *Practical Reason*] for a more general discussion of

empowered to set the agenda for a resource. They are not, however, in a position to govern the conduct of others by imposing obligations on them, as sovereigns are.

The realists may not have made the best use of the analogy of ownership to sovereignty by using it to explain the domination potential of ownership. There are, however, other aspects of the analogy that are helpful to explain the exclusivity of ownership. Ownership most closely resembles sovereignty in its *structure* as a supreme right rather than in its *substance* as a position of power. Ownership, like sovereignty, relies on the notion of hierarchy: others need not be excluded from the owned resource, so long as their position is subordinate to the owner's. Thus, an owner is not necessarily the *only* decision maker with respect to a resource. By analogy, a sovereign's exclusive political authority does not require that others exclude themselves from her territory. While the exclusion of others might place the sovereign in the exclusive position to control the goings-on in her territory, a sovereign does not need to reserve all decisions to herself in order to rule. (In the case of sovereignty, in fact, the exclusion of others does not just over-protect but undermines the possibility of political authority: sovereigns need subjects.⁵⁹)

Just as a sovereign governs a territory without making all decisions that concern it, so the fate of a thing is not solely a function of an owner's decisions.⁶⁰ Ownership does not imply mastery of a thing (which would indeed require exclusion of others to be effective, insofar as another's use of a thing would reduce the extent to which the owner's will alone

the idea that the view of law as sanctions backed by force does not explain the normativity of law. See also Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35.

59 While an exclusive position is not necessarily exclusionary, and indeed, in the case of sovereignty, may be harmed by the exclusion of others, a limited pairing of exclusion with exclusivity may strengthen the position. For instance, a sovereign enjoys greater security where she has the power to demand that treacherous subjects go into exile. Similarly, a right to exclude is not essential to ownership.

60 Although exclusion-based approaches concede that ownership is not absolute, ownership is taken to mean the freedom to master the thing. The emphasis on mastery has Hegelian overtones: 'les choses dont on est le souverain sont des biens matériels, ou réifiés, une matière passive et largement indéterminée, terre d'accueil de l'action formatrice de son maître.' Mikhail Xifaras, *La Propriété : étude de philosophie du droit* (Paris: Presses universitaires de France, 2004) at 480 [Xifaras, *La Propriété*]. Touiller C-M T., DCT (5) III No. 341 at 216 ('La lien de la propriété attache les biens à l'homme, mais il n'attache pas l'homme aux biens. Il peut disposer des choses qui lui appartiennent de la manière la plus absolue,' including abandonment), cited in Xifaras, *ibid.* at 121. Of course, modern proponents of the boundary approach deny the Blackstonian hyperbole that property is absolute dominion, acknowledging, for instance, state-imposed limits on what the owner can do through zoning. See Carol Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' (1998) 108 *Yale L.J.* 601 [Rose, 'Blackstone'].

dominates). Thus, not surprisingly, the character of ownership is not lost where others have a part in determining what happens to a resource. An easement holder, for instance, is at liberty to pave the road over which she has a right of way.⁶¹ A bailee is at liberty to handle, and even alter, a piece of jewellery that she has been hired to repair or, in some circumstances, to part with possession of it temporarily to someone more expert than she.⁶²

While others may be in a position to make some decisions that affect the resource without undermining the possibility of ownership, the owner's position – like the sovereign's – is necessarily supreme. It is a position that can neither be derived from nor subordinate to another's. The same, of course, is true of sovereignty. A municipality, for instance, is not sovereign, because its authority is derived from another entity (the province) and because that other entity is in a position to abrogate its authority. For a person to be described as the owner of a resource, she must be in a position that is, like a sovereign's, supreme. Finally, while ownership is *like* sovereignty, it is not actually a form of sovereignty.⁶³ Owners are supreme *vis-à-vis* other private individuals but not, *qua* owners, sovereign *vis-à-vis* the state that provides the authoritative assurances of legitimacy necessary for ownership. This explains why the state continues to have the power to regulate the use of resources and to control their allocation.⁶⁴

61 See, e.g., *Bunty Alf Ltd. v. Grace Evangelical Lutheran Church at Oakville*, [1986] O.J. No. 1189 (Ct. J.) (QL) (paving is within the easement holder's right of way and so not act of adverse possession); *Almel Inc. v. Halton Condominium Corp. No. 77*, [1997] O.J. No. 824 (C.A.) (QL). See also *Das v. Linden Mews*, [2002] 2 E.G.L.R. 76 (C.A.) (for the general proposition that an easement holder can engage in uses that are ancillary to the core use that is the subject of the easement).

62 See *Punch v. Savoy's Jewellers Ltd.* (1986), 54 O.R. (2d) 383 (C.A.); *Duncan v. Allen* (1983), 28 Sask. R. 177 (Q.B.); *Tremblay c. Trade Watch Repairs Registered*, [1983] C.P. 194 (Que. C. Prov.).

63 Aboriginal title is a form of ownership that is arguably concomitant with Aboriginal sovereignty. But as a form of property within the common law system it does not, without more, amount to sovereignty *vis-à-vis* the state. See note 38 *supra*.

64 The state, in regulating resources, is not just another player in the private arena, *i.e.*, an owner. See *California v. Superior Court of Riverside County*, 78 Cal. App (4th) 1019 at 1031 (2000) ('But the State's power under the Water Code is the power to control and regulate use; such a power is distinct from the concept of "ownership" as used in the Civil Code and in common usage'). On an exclusion-based view, the state tends to be seen as bound by a duty to keep off. See *Semayne's Case* (1604), 77 E.R. 194. In the United States, exclusion gets the attention of the courts and is protected against state taking without compensation. See Richard Epstein, 'Weak and Strong Conceptions of Property: An Essay in Memory of Jim Harris' in Timothy Endicott *et al.*, eds., *Properties of Law: Essays in Honour of Jim Harris* (Oxford: Clarendon Press, 2006) 97, suggesting that while exclusion is protected, use and disposition are not. This is simply to treat the state like any other intruder who must keep off a person's

IV *Exclusivity without exclusion*

Ownership, like sovereignty, is an exclusive position that does not necessarily entail the exclusion of others from the object of the right. In some cases, not only is exclusion unnecessary, it would not be sufficient. Consider the classic story of the rogue who fraudulently mortgages or sells off another's property. The rogue's fraud, if effective against the true owner, would usurp the owner's exclusive authority to decide when to dispose of his property and so would strike at the very heart of ownership, but it need not involve any invasion of the boundaries of the thing itself. The rogue can purport to mortgage or sell the property without ever setting foot on the land in question. Exclusion rules on their own are thus insufficient to protect the owner's exclusive position from the rogue's machinations. The threat posed by the rogue reveals that (a) it is possible to harm an owner's position without invading the boundaries of his property and (b) exclusion rules do not adequately preserve the owner's exclusive authority to set the agenda for a resource against these fundamental challenges.

How does the law maintain the exclusive position of the owner, if not through exclusion? In the case of the fraudster, the law protects the owner's agenda-setting authority directly, not by obligating the buyer to exclude herself (on the contrary, she acquires possessory rights that are subordinate to the owner's) but simply by insisting that the rogue lacks the authority to confer ownership rights on the buyer – *nemo dat quod non habet*.⁶⁵

property; it does not illuminate the way in which individuals are drawn into a relationship with the state through ownership.

⁶⁵ There are, of course, exceptions to this rule in certain cases involving good-faith purchasers for value. See Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Canada, 2006) at 432–9 [Ziff, *Property Law*]; Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* (New York: Foundation Press, 2007) at 890 [Merrill & Smith, *Policies*]. Exceptions to *nemo dat* in the sale-of-goods context are due in no small part to the legal realists' scepticism about the normative value of the concept of ownership. See Michael G. Bridge *et al.*, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1999) 44 McGill L.J. 567 at 573. In those cases involving good-faith purchasers for value in which the authority of the owner is not preserved, tort law does its best by enabling the owner to seek an *in personam* remedy against the rogue. But this hardly preserves the owner's position and is of little help in the case of a bankrupt fraudster. There are major disruptions to the property system when the *nemo dat* rule is dispensed with. See *Lawrence v. Maple Trust Co.* (2007), 84 O.R. (3d) 94 at para. 57 (C.A.), for the inadequacy of remedying the loss of ownership rights with an award of damages ('The idea that a person who buys a specific parcel of land with a specific house on it should be compensated in damages runs contrary to the notion that real property, in such circumstances, is not fungible'). In *Lawrence*, the ownership of a home was fraudulently transferred and a mortgage registered in a land titles system. The pure

More generally, the possibility of exclusive agenda-setting authority depends on two things, which I discuss in turn below. First, it requires that the law protect owners from potential usurpers of their agenda-setting authority. Because the biggest threat to an owner's authority is not use of the resource by others but use that is inconsistent with her plans, the law preserves the owner's exclusive position not by ordering others to keep out but by obligating them to fall in line with the owner's agenda. Property-related torts such as trespass are typically seen as requiring others to keep out, but they are better understood as ensuring consistency with the owner's actual or imputed agenda.

Second, the possibility of ownership requires that the law carve out a position that is neither derived from nor subordinate to other rights, privileges, or powers with respect to the resource. I explain below how a number of familiar property doctrines, such as the rule against perpetuities, finders' law, and the law of easements, function to preserve the nature of ownership as a supreme position of agenda-setting authority.

A PROTECTING AGENDAS THROUGH TRESPASS LAW

An important element of the exclusivity of ownership is the priority the owner enjoys relative to others in determining the agenda for the resource. Rights or privileges to use or access a resource present no threat to the owner's supreme authority, so long as these interests are clearly organized around and not inconsistent with the retained authority of the owner.⁶⁶ By contrast, such rights of use or access are a threat to an exclusion-based approach, which is why proponents insist that they are exceptional or are simply refinements on the basic idea of property.⁶⁷ As the following discussion shows, these subordinate interests are not only basic to any system of property but also perfectly consistent with the idea of property as an exclusive right.

1 *Exclusivity rules generally*

In most societies, multiple users have property interests in the resources owned by others, and property law then aims to render those interests consistent with the owner's position. Property law preserves the core of

land titles system, in which the register trumps, was modified to avert the problems introduced by doing away with the *nemo dat* rule.

66 Contrast theories of ownership that present the owner as the residual claimant after all other rights to the thing from contract or property law are accounted for. See Smith, 'Property Rules,' supra note 16; Yoram Barzel, *Economic Analysis of Property Rights* (Cambridge: Cambridge University Press, 1989).

67 On an exclusion-based approach, others are potential competitors, dealt with typically by exclusion and, more rarely, by governance rules, in which their interests are traded off against those of the owner. See Smith, 'Governance,' supra note 17 at 468.

ownership not through the exclusion of others but through rules and principles that harmonize the interests of others with the owner's supreme position of agenda-setting authority. Other potential users of a resource have a subservient rather than a competitive relationship with the owner, who is left in charge of the resource.⁶⁸

Take the following simple example. Virtually anyone has a privilege to ring my doorbell during the day for any number of reasons: to ask me to donate cans of food to a food bank, to inquire whether I own the car whose lights have been left on, or to give me information on a neighbourhood event.⁶⁹ But customary norms limit the access others have to my front door to daytime hours; no one has a privilege to ring the bell at midnight, absent a clear emergency. Custom ensures that the privileges others have in a resource are consistent with a default agenda that reasonable homeowners are presumed to have: as homeowners, we are presumed to participate in a community of people but also to want to preserve the privacy to sleep at night uninterrupted.

Exclusivity rules that harmonize the activities of others with the owner's imputed agenda are well illustrated by the Scandinavian custom of *Allemansratt*.⁷⁰ The principle of *Allemansratt* ensures that

68 Proponents of the boundary approach are encouraged to overlook the relevance of internal relations by the law's failure to regulate one important kind of internal relation, co-ownership. Thus, with respect to the law of co-ownership, proponents of a boundary approach insist that, whatever sharing must go on between co-owners, property is exclusionary on the outside. See Rose, 'Futures of Property,' supra note 21 at 132, 144. This view is aided by the paucity of law on how co-owners must interact. See Penner, 'Justification,' supra note 22 at 185–6; Hanoch Dagan & Michael Heller, 'The Liberal Commons' (2001) 110 Yale L.J. 549 [Dagan & Heller, 'Liberal Commons']. See also Henry E. Smith, 'Semicommons Property Rights and Scattering in the Open Fields' (2000) 29 J.Legal Stud. 131 at 167.

69 See Cane, *Anatomy of Tort Law*, supra note 53 at 142 (noting that 'not all unwanted intrusions are necessarily tortious – for instance, the owner is assumed (in the absence of contrary indication) to be willing to allow people, under normal circumstances, to enter the land to get to the front door of a dwelling'). For a similar analysis based on implied consent, see *Massachusetts v. Richardson*, 48 N.E.2d 678 (Mass. 1943), in which the owner of an apartment building sued Jehovah's Witnesses for trespass after they entered the front atrium through an unlocked door and rang the doorbells of tenants. The Court held that through the presence of bells in the front atrium, 'an implied license was granted ... for the purpose of seeking an interview with the tenants.'

70 In Sweden, the old customary right of public access to nature is constitutionalized, affording a 'limited right to enter and be on another's land' as well as to collect certain resources such as berries, mushrooms, and so on. See Lukas Prakke & Constantijn Kortmann, eds., *Constitutional Law of 15 EU Member States* (Deventer, The Netherlands: Kluwer Legal Publishers, 2004) at 854. See also Kevin Colby, 'Public Access to Private Land – Allemansratt in Sweden' (1988) 15 Landscape and Urban Planning 253 at 262 [Colby, 'Public Access']; Klas Sandell, 'Access to the "North" – But to What and for Whom? Public Access in the Swedish Countryside and the Case

anyone can use rural land for recreational purposes, *so long as these uses are not inconsistent* with the uses to which the owner has decided to put the land.⁷¹ Hikers and recreational users can pick flowers or mushrooms, can hike, and can even stay overnight. But they must fall in line with the owner's agenda. This means maintaining the privacy of a dwelling by staying away from 'a space adjacent to a dwelling where the homeowner can reasonably expect freedom from intrusion.'⁷² It also means refraining from interfering with any economic activity on the land. For instance, users must avoid trampling a freshly ploughed field or disturbing livestock. The owner remains clearly in charge throughout without, however, being able to exclude hikers. For example, it is for the owner to decide where to place his dwelling house and whether or not to farm certain fields or to leave others fallow. The owner's choices constrain the kinds of decisions others can make about rural land, such as where to hike.⁷³

2 *Harmless trespass*

On the approach I take here, ownership is defined in terms of agenda setting, and the owner's agenda has an important role in mediating relations between owner and non-owner. It is not surprising, however, that this role is often overlooked in favour of an exclusion-based

of a Proposed National Park in the Kiruna Mountains' in Colin M. Hall & Margaret E. Johnston, eds., *Polar Tourism: Tourism in the Arctic and Antarctic Regions* (Chichester, UK: John Wiley, 1995) 131. I am grateful to Eduardo Peñalver for bringing this to my attention.

71 Similar, albeit more narrowly construed, privileges to roam exist in England. See 'A History of the Campaign,' online: The Ramblers' Association <<http://www.ramblers.org.uk/freedom/righttoroam/history.html>>, describing the passage of the Countryside and Rights of Way Act 2000. See generally Michelle Stevens-Hoare & Rupert Higgins, 'Roam Free?' (2004) 154 New L.J. 1846 at 1848; Angela Sydenham, 'The Countryside and Rights of Way Act 2000: Balancing Public Access and Environmental Protection?' (2002) 4 *Envtl.L.Rev.* 87. *Party Wall etc. Act 1996* (U.K.), 1996, c. 40, s. 8 provides another example from English law of how subordinate interests are harmonized with the owner's position, without relying on exclusion. The act gives neighbours the right to repair or alter party walls and to enter and remain on the other party's land, but only during "usual working hours," in order to do so. See Kevin Gray and Susan Francis Gray, 'The Rhetoric of Realty' in Joshua Getzler, ed., *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: Butterworths, 2003) 204 at 260.

72 Colby, 'Public Access,' *supra* note 70 at 254. This will usually be understood to mean keeping a distance of at least 200 m, although the 'area is not defined with specific dimensions.' *Ibid.*

73 Ancient common law principles also allow for the use of private property when the public route is impassable. See *Taylor v. Whitehead* (1781), 2 Dougl. 745, 99 E.R. 475 (K.B.) (defendants for the proposition that 'where a common highway is out of repair, by the flooding of a river or any other cause, passengers have a right to go upon the adjacent ground'); *Dwyer v. Staunton*, [1947] 4 D.L.R. 393 [*Dwyer*].

boundary approach to the definition and protection of ownership. An exclusion-based approach is particularly plausible where the owner does not make his agenda for the thing explicit and where the appropriate way for most non-owners to fall into line with the owner's agenda is simply to exclude themselves from the thing. For example, owners of dwelling houses are assumed to have plans for their property that require privacy. While even in the case of private homes some access will be consistent with the privacy agenda, as I suggest above, it is plausible to expect non-owners to refrain from accessing parts of the property that are particularly associated with privacy interests – a backyard, for instance, or the inside of a house. But this is not because owners always have a general right to exclude others from the object owned, protected by a duty of exclusion. Rather, it is because the law imputes an agenda to the owner that will tend to be satisfied only by limiting the access that others have to the land in that context.

To see the subtle but important difference between the two approaches here, let us once again take up the example of *Allemansratt*. The owner does not have a general right to exclude others from the land. But owners are assumed to have a privacy-related agenda that guides the restrictions on approaching dwelling houses that we see in *Allemansratt*. The same default agenda is imputed to homeowners in Canada and determines what counts as a trespass.⁷⁴ The orientation of trespass law toward agendas has been made explicit in some trespass cases. Consider the modern approach to the rule that a person owns everything above or below her land, taken in *Didow v. Alberta Power Ltd.*⁷⁵ In *Didow*, the cross-arms of power lines hung over the property line above the plaintiff's land at a height of about 50 feet. The Alberta Court of Appeal held that this encroachment constituted a trespass. What is important about this case is that the Court did not define trespass in terms of the owner's right to exclude others from a determinate column of airspace. Rather, the Court defined trespass in terms of the owner's agenda: the encroachment was a trespass to the extent that it protruded into airspace that was reasonably necessary for ordinary actual or

74 For an example of privacy-related default agendas, see Justice Laskin's comments, in *obiter*, in *Harrison v. Carswell*, [1976] 2 S.C.R. 2000 (dissenting on other grounds): 'Trespass in its civil law sense, and in its penal sense too, connotes unjustified invasion of another's possession. Where a dwelling-house is concerned, the privacy associated with that kind of land-holding makes any unjustified or unprivileged entry a trespass, technically so even if no damage occurs' [emphasis added].

75 (1988), 60 Alta. L.R. (2d) 212 (C.A.), leave to appeal refused [*Didow*]. See also *Geller v. Brownstone Condominium Assoc.*, 82 Ill. App. (3d) 334 (1980) (dismissing a claim that encroachment of temporary scaffolding is a continuing trespass on the grounds that an owner owns only as much airspace as she can practicably use).

potential uses of the land.⁷⁶ What is going on in this decision is not the allocation of specific, concrete use rights to the owner but, rather, the protection of the owner's agenda (the protection of a type agenda, not a specific token use) from inconsistent use of the resource by others.

While in many cases the law imputes an agenda to the owner, there are cases in which the owner's actual agenda matters in determining what counts as trespass. In *New Jersey v. Shack*,⁷⁷ for instance, the owner of a farm brought an action in trespass against two social workers who had visited migrant labourers housed temporarily on his land, although he had earlier refused their requests for permission to enter. The Court held that no trespass had been committed: the owner did not have a general right to exclude others without reason, and the visits were entirely consistent with the owner's agenda of farming. The Court did go on to note that, had these visits interfered with farming, they would indeed have constituted trespass. The actual agenda of the owner also plays a role in separating out so-called spite cases from cases in which the owner is justified in requesting that a non-owner fall in line with an agenda that requires her to keep out.⁷⁸ A person acting out of spite or

76 Compare with *Griggs v. Allegheny County*, 369 U.S. 84 (1962), in which the defendant's lessees (airlines) flew planes 30 to 300 feet over the plaintiff's residence. Noise at takeoff and landing made the plaintiff's house unsuitable for its actual use as a residence.

77 277 A.2d 369 (1971). In *New Jersey v. Schmid*, 423 A.2d 615 at 629–31 (1980), Schmid, a political activist pamphleteering on Princeton University's campus without permission, was convicted of trespass under state penal law. The majority found that, in evicting Schmid and pressing charges for trespass, Princeton had interfered with Schmid's (state) constitutional freedom of speech and assembly. In its reasoning, the Court emphasized that Schmid's activities were 'not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes.' *Ibid.* at 631.

78 For a general discussion of spite as an excluded purpose, see *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 at paras. 35–51 (describing reception of abuse-of-right doctrine in Canada). See also *Burke v. Smith*, 69 Mich. 380 (1888) (otherwise lawful fence built out of spite to block light and air could be removed, as a nuisance); *Panton v. Holland*, 17 Johns 91 (N.Y. 1819) (saying in *obiter* that an exercise of a lawful right may be actionable 'if it appears that the act was done maliciously'). Courts, however, have not uniformly denied protection where owners, ostensibly pursuing an ordinary agenda for their property, are in fact motivated by spite. See *Letts v. Kessler*, 46 Ohio St. 83 (1896) (a spite fence does not ground a cause of action, and to hold otherwise would be to enforce a 'rule of morals'). A question that I do not have the space to address here concerns the sufficiency of an agenda that concerns not the actual use of the resource itself but the economic power or leverage that property rights confer. For example, in *Leavest Ltd v. Scotia Towers Ltd.*, [1981] 126 D.L.R. (3d) 239 at para. 15 (Nfld. Sup. Ct.), the owner refused the defendant's permission to swing cranes across its land in order to force the defendant to construct a smaller building. The Court held that 'a person is entitled to protect his property rights even though his motives in doing so may have other goals.' See also *Bradford v. Pickles*, [1895] A.C. 587 (affirming the owner's right to

malice fails to set an agenda that the law will protect. She cannot, in the circumstances, exclude others on the grounds that someone else might have had an agenda that would have required exclusion.

Questions about an exclusivity-based approach will no doubt surface most strongly in the context of harmless trespass, cases in which the owner has not suffered harm and yet the law prohibits the activity anyway. Harmless trespass cases are taken to be the strongest evidence that exclusion is the essence of ownership.⁷⁹ We protect against harmless trespasses, it is thought, because a boundary crossing is an *injury* to the owner's right to exclude and thus an attack on the integrity of her position, whether or not she suffers measurable *harm*.⁸⁰

The case of *Jacque v. Steenberg Homes*⁸¹ has become the paradigmatic harmless trespass case used to illustrate the centrality of the gatekeeping function to ownership.⁸² The case has been cited for the proposition that harmless boundary crossings are wrongs no matter what the owner's reason for exclusion might be.⁸³ The defendant, a mobile home company, approached the Jacques, an elderly couple, to ask for permission to cross their field in winter to deliver one of their homes. The Jacques refused permission, but the defendant's agents nonetheless transported the home across the field. Witnesses reported that the defendant's agents giggled as they disregarded the plaintiffs' refusal to grant permission. The Jacques sued, asking for punitive damages, and won.⁸⁴ The Court distinguished between measurable harm and injury to the right, and emphasized the importance of guarding against the latter.

If we take protection against 'harmless trespass' to signify the protection of exclusive agenda-setting authority rather than the protection against boundary crossings, we do not collapse this distinction between harm and injury. Harmless trespass cases do speak to the importance of protecting the core of ownership even in the absence of measurable damages; however, the injury is not to the bare right to exclude but, once again, to the exclusivity of the owner's agenda-setting authority over the owned

drill a well to divert water where his motive was to force the plaintiff to pay for the passage of water across his land).

79 See *Jacque v. Steenberg Homes*, 209 Wis. (2d) 605 (1997) [*Jacque*], which I discuss in more detail below. But see *Dwyer*, supra note 73 (finding that defendant had a right to cross over private land over the protestations of the owner when snow blocked the public highway).

80 Put another way, harmless trespasses are seen as problematic insofar as property law is committed to the principle that '[n]obody needs to cooperate with others if they do not wish to do so.' See Ripstein, 'Private Order,' supra note 12 at 1411.

81 Supra note 79.

82 See, e.g., Merrill & Smith, 'Morality,' supra note 4; Smith, 'Nuisance,' supra note 4 at 983-4.

83 *Ibid.*

84 *Jacque*, supra note 79.

resource. Take the case of the extremely skinny man who creeps into my bed in the afternoon, takes a nap, and leaves without a trace, not even an imprint on the sheets.⁸⁵ Assume that I have not actually made plans to sleep during the afternoon. The skinny man does no harm to my actual agenda. But there is an injury to the privacy-driven agenda that the law imputes to ordinary homeowners. Harmless trespasses are not oxymoronic on an exclusivity-based approach; rather, they simply guard against an injury that is not founded on the right to exclude.

The *Jacque* case presents something of a challenge to an approach focused on the exclusivity of the owner's agenda-setting authority. Indeed, at first blush, it might seem to be incompatible with this approach, and we might expect a contrary result, given that crossing the snow-covered field with the mobile home did not interfere with the Jacques' agenda, farming. Compare *Jacque* with the outcome in *Dwyer v. Staunton*, a case with similar facts that was decided as we might expect from an exclusivity-based approach.⁸⁶ In *Dwyer*, the defendants drove across the plaintiff's field to get into town after a snowstorm essentially blocked the public road. The plaintiff stopped them on their way into town. After protesting the crossing, the plaintiff allowed them to pass, but warned them that they could not drive across his land on the way back. On their return, the defendants attempted to take the same route; they were again stopped by the plaintiff but disregarded his protestations and drove through his barbed-wire fence and across his field in order to continue on their way home. The Court held that the defendants were within their rights in using the plaintiff's field, in the circumstances, provided they did no unnecessary damage. The implication of the decision in *Dwyer* is that there is no general right to exclude; others owe the owner a duty of exclusion where her agenda for the resource requires it.

Although *Jacque* was most likely wrongly decided, it is possible to construe the Court's decision as an attempt to preserve the owners' agenda-setting authority. Consider the cases to which the Court in *Jacque* appealed for the principle that harmless trespass is a serious attack on the integrity of ownership, sometimes deserving of punitive damages. These cases emphasize not the importance of protecting the right to exclude as such but the importance of ensuring deference to the owner's agenda-setting authority. When the owner's agenda is an ordinary and reasonable one, such as using a house as a private dwelling, or land for hunting, courts look particularly harshly on flagrantly inconsistent behaviour. In *Merest v. Harvey*,⁸⁷ cited in *Jacque*, the Court upheld

85 See Ripstein, 'Harm Principle,' supra note 12 at 219ff.

86 Supra note 73.

87 (1814), 128 E.R. 761 (C.P.), cited in *McWilliams v. Bragg*, 3 Wis. 424 at 428 (1854).

punitive damages against the defendant, a magistrate and member of Parliament, who forcibly joined the plaintiff's hunting party on the plaintiff's land after having asked and been refused permission to do so. This was a case of protecting the owner's agenda and not simply enforcing the duty others have to exclude themselves from the land: the plaintiff used the land for hunting, and the defendant's actions, spoiling the grass and shooting at the game that the plaintiff had found, very much interfered with this agenda.⁸⁸ Both the ordinariness of the plaintiff's agenda and the incompatibility of the defendant's actions with it are evident in, for example, the concern raised by the defendant's counsel that the jury, as 'lords of manors in sporting country,' was obviously motivated to find in favour of the plaintiff by 'the jealousy of preserving game' and in the praise heaped on the plaintiff for keeping his cool.⁸⁹

It is similarly the importance of preserving the owner's agenda-setting authority that was behind Chief Justice Gibbs' hypothetical in *Merest*, which finds its way into the reasons in the *Jacque* case:

Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say 'here is a halfpenny for you which is the full extent of the mischief I have done.' Would that be a compensation? I cannot say that it would be.⁹⁰

The hypothetical, like the *Merest* case itself, points to an interference with the owner's agenda-setting authority, a deliberate, even insulting, effort to act in a way inconsistent with the privacy-related agenda we impute to homeowners.

Does the *Jacque* case similarly display the Court's concern to ensure deference to the owner's agenda? Recall that the case concerned not a private home but a farmer's field, which, as it was winter, was not under crop. And yet we may be able to discern even here the Court's concern for the owner's agenda-setting ability. This is where it helps to keep in mind that the owner has a fundamental interest not just in deciding how to use the resource but also in securing her position. No sovereign can afford to attend only to ruling, ignoring the preservation of her effective power to rule. The Jacques did have a reason for denying access: they were concerned with losing title through adverse possession. Now, they were mistaken as to the law in this case, and their project –

88 The punitive damages were no doubt also motivated by the defendant's abuse of public office: the defendant threatened 'in his capacity as magistrate' to arrest the plaintiff and defied him to bring an action. *Ibid.* at 442–3.

89 *Ibid.* at 444 ('There was not one country gentleman in a hundred, who would have behaved with the laudable and dignified coolness which this Plaintiff did').

90 *Ibid.* at 443.

bolstering title by limiting access – was, objectively, not going to bear much fruit; an adverse possessor will succeed only where he possesses *without* the owner’s permission. But deference to owners includes leaving it to owners to pursue questionable projects, within certain limits.⁹¹ It would be quite a different matter if the Jacques really had no overall agenda that they sought to preserve through exclusion but were seeking to exclude the defendants out of spite. Harmless trespass cases do not protect owners where they purely seek vindication of exclusionary rights and where the integrity of agenda-setting authority is not also at stake. Where the owner seeks to exclude for no reason at all, she does not advance an agenda worth protecting. Her desire to exclude others cannot, on its own, justify protection against harmless trespass in the form of an injunction or punitive damages, as the Court found in *Dwyer*:

B PRESERVING HIERARCHY: THE RULE AGAINST PERPETUITIES, EASEMENTS, AND FINDERS’ LAW

I began Part IV by pointing out that exclusive agenda-setting authority requires two things. The first, discussed just above, is rules that obligate others to fall in line with the owner’s agenda. The second is rules that ensure that the position of ownership is non-derivative and not subordinate to another’s position with respect to the property. A number of property rules that I will consider here accomplish this. Chief among them is the rule against perpetuities. Future interests that cut short the present owner’s tenure on the happening of an event that might occur remotely attract the rule against perpetuities.⁹² To put it another way, the rule summarily voids contingent future interests that are not sure to vest (if at all) within a suitably short time frame.⁹³

91 I leave a discussion of the limits on ownership authority, or what constitutes an abuse of right, to another paper.

92 Certain contingent future interests – executory interests, contingent remainders that follow life estates, and class gifts – are vulnerable. Mysteriously, other future interests are not. In the United States, ‘for the purposes of the rule against perpetuities, a reversion in the grantor, as well as a possibility of reverter and a power of termination/right of reentry are all vested interests, although not vested in possession, at the time of creation,’ and are therefore immune. ‘Perpetuities’ in *American Jurisprudence*, 2d ed., vol. 61 (Rochester, NY: Lawyer’s Cooperative, 2007) at § 45. See also *Hopkins v. Grimshaw*, 165 U.S. 342 (1897). In Canada, a right of entry is treated as a contingent future interest. See Anne Warner LaForest, *Anger & Honsberger Law of Real Property*, 3d ed. (Aurora, ON: Canada Law Book, 2006) at § 9:70.10 [LaForest, *Anger & Honsberger*]; *North Gower Township Public School Board v. Todd* (1967), 65 D.L.R. (2d) 421 (Ont. C.A.).

93 The classic statement of the modern rule, by J.C. Gray, is as follows: ‘No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.’ LaForest, *Anger & Honsberger*, supra note 92 at §§ 10.20.10,

On an exclusivity-oriented view, the rule against perpetuities has a clear role *within* our property system: its function is to preserve the status of ownership as a supreme position of authority. The problem with contingent future interests is not that the past owner limits what the present owner can do with her property but, rather, that the past owner has altered the position of ownership itself by introducing a threat of forfeiture that could hang over the position indefinitely. In removing such threats of forfeiture, the rule against perpetuities prevents past owners from turning a supreme position into a subordinate and contingent one and so creating a power vacuum. Take the following grant of Blackacre: to X and his heirs if we are at peace, but if there is a war, immediately to Y. X and his successors may come and go as owners of Blackacre without war breaking out and so without losing their position. But even if X and his successors suffer no actual restrictions or loss because of the condition, the office vacated by the grantor is not entirely filled by X, nor by anyone, unless and until Y's interest vests or is struck down. X and his successors may fulfil the basic functions of ownership in the mean time, but they stand to forfeit their position unpredictably and suddenly to another.

To understand the function of the rule against perpetuities, it helps to recognize that it does not favour any particular present or future owner. It does not strive to ensure that any individual holds on to her rights. The rule is concerned not with the officeholder but, rather, with the office itself. Thus, the rule appears to be indifferent both to whether the future owner's interest vests and to whether the present owner's interest is cut short: the pressing concern is to avoid situations in which the future interest might vest *outside* the set period. Once it is clear that the future interest will vest, if at all, within an acceptably short time frame, the rule gives no further thought to the fact that the current owner might have her interest cut short *within* that set time frame. We can tolerate a short interregnum in which the present owner operates temporarily under the threat of forfeiture but not one that lasts indefinitely, or for too long.

A boundary approach, in looking to the right to exclude to determine the structure of ownership, misses the importance of the rule against perpetuities in preserving the necessary conditions for the possibility of ownership. The rule is rationalized, if at all, as a refinement on ownership that reflects a trade-off: the owner's basic liberty balanced off

10.20.20. See also *Palmer v. Holford* (1828), 38 E.R. 857 (invalidating a gift to all grandchildren alive twenty-eight years after the testator's death on the grounds that the testator had created a gift that could be suspended beyond twenty-one years after the death of the life in being (the testator's son)); *Robinson v. Adair* (2004), 247 Sask. R. 148 (Q.B.) at para. 14.

against other goods, such as intergenerational equity, which is undermined by dead-hand control, or market efficiency, which is adversely affected by excessive fragmentation of legal rights.⁹⁴ The deficiency of this account is most evident when we examine how the rule against perpetuities works in the context of the property system as a whole. There are three reasons that the rule against perpetuities ought not be seen as primarily concerned with offsetting the effects of dead-hand control over the use of the land. First, the rule is activated even where the condition triggering the future interest has nothing to do with the present owner or her use of the land. There are, of course, conditions subsequent that aim to have the same effect as a restrictive covenant: to Jones, but if anyone desecrates the family graveyard, then to Smith. But the rule also applies to the following: 'to Jones, but if any of A's children marry, to the first of them to do so.' Here Jones is subject to the risk of forfeiture, although the condition, which has to do with A's and A's children's choices, does not dictate what Jones and his heirs can do with the land. The application of the rule to both these situations suggests that dead-hand control over land use is not primarily the issue that the rule addresses.

Second, past owners exert a great deal of influence over the present owner's choice set in circumstances that the law does not aim to forestall or correct.⁹⁵ With respect to many ownable resources, the present-day owner fills a position vacated by a predecessor through death, gift, or sale. This is particularly true of land, which endures indefinitely and so witnesses a long parade of owners over time.⁹⁶ Pre-owned resources, and land in particular, bear the legal and physical imprint of the

94 Merrill & Smith, 'Morality,' supra note 4 at 1892 (explaining that the rule against perpetuities reflects a balancing of owner autonomy with other competing concerns in extraordinary circumstances). Penner, *Idea*, supra note 5 at 99–100, has a more complicated view about the rule against perpetuities as a means of preventing dead-hand control over the use of property. He argues that new owners succeed old ones not through any kind of transfer but, rather, by 'directional abandonment,' whereby the ex-owner withdraws her will from a thing in such a way that the new owner is in a position to pick it up. When people die, their interest in the thing does too, and so there is a real problem when their intentions outlast their death. The rule against perpetuities ensures that at some point the intentions of the ex-owner 'fall away,' making room for the will of the new owner. Because Penner sees ownership not as a kind of authority-wielding office but, rather, as a space for expressing one's will, his theory has difficulty explaining how ownership is and ought to be transferred from one person to the next.

95 This raises issues of intergenerational equity, but, for the most part, property law does not, as it is now, aim to account for this.

96 Rose, 'Blackstone,' supra note 60 at 614, suggests that 'land's durability is also the reason why land is so central to doctrinalism.'

agendas set by prior owners.⁹⁷ A prior owner sets the course for the decisions of future owners through the agenda she chooses; for example, the new owner of Blackacre might no longer be able to use it for agriculture if a previous owner used it for waste disposal, and the new owner of an evening gown might not be able to wear it if a previous owner had it altered to a size that is too small for her. Even when the owner is not bound to follow the prior owner's agenda, the suitability of the resource for the present owner's purposes is, in part, a function of its history and of the choices others have made. This narrowing of an owner's choice set is perfectly consistent with the idea of ownership. Property law does not ensure that the owner can make any use of the resource that she might desire.

Finally, if the rule against perpetuities was primarily a policy response to dead-hand control over use, it would be quite inconsistent with other property devices, such as restrictive covenants, life estates, and trusts, that enable the prior owner to curtail dramatically the kinds of decisions that the present owner can make. Restrictive covenants, for instance, are not strictly construed, as are conditions subsequent, but, rather, are tolerated as a kind of private zoning device.⁹⁸ The rule against perpetuities does not work at cross-purposes, because it does not aim to root out excessive restrictions on choice; rather, it seeks to ensure a timely transfer of authority from one owner to the next by cutting out transitional positions subject to forfeiture. Restrictive covenants are not subject to a similar corrective because, unlike conditions subsequent, they affect the scope of an owner's authority without reshaping the very idea of ownership, through the threat of forfeiture, into a transitional and uncertain position. An owner who breaches a restrictive covenant may be subject to an injunction but does not stand to lose her position.⁹⁹

Life estates similarly enable a former owner to restrict the present owner's use of land but do not attract the concern that conditions on fees do.¹⁰⁰ This is because the owner's position is not subject to the

97 This is what Peñalver calls 'land's memory.' See Eduardo Peñalver, 'The Problem with Land' (2007) [unpublished, on file with the author].

98 See note 44 *supra* and accompanying text.

99 One exceptional context in which a breach of restrictive covenants might lead to the loss of property rights is a common development, in which members are bound by reciprocal agreements to pay fines or penalties for breach of covenant to the homeowners' association. A failure to pay the agreed-upon fines or penalties can lead to liens placed on the property and ultimately entitle the association to foreclose. See Gemma Giantomasi, 'A Balancing Act: The Foreclosure Power of Homeowners' Associations' (2004) 72 *Fordham L.Rev.* 2503.

100 For instance, life tenants are limited in their ability to alter the property. For a discussion of the law of waste, see Ziff, *Property Law*, *supra* note 65 at 163–6.

possibility of forfeiture. The remainderman's takeover is, unlike the contingent future interest holder's, certain and predictable (which explains why we treat remainders, in the ordinary course, as vested rights rather than as contingent rights that cut short the prior interest).¹⁰¹

Finally, the fiduciary restrictions on trustees are also, unlike the condition subsequent, consistent with the full assumption of ownership authority.¹⁰² Trustees are obliged to set an agenda for the resource in a way that serves the interests of the beneficiaries of the trust, a major restriction on use. But then, the very idea of political sovereignty and its claim to legitimacy works in the same way. Political sovereigns, like trustees, are constrained to set an agenda that serves the interests of their constituents, but they wield agenda-setting authority nonetheless.

The apparent contradiction between the rule against perpetuities and other property tools, such as restrictive covenants, trusts, and life estates, dissolves once it is clear that the function of the rule against perpetuities is to guard against forfeiture rather than to prevent dead-hand control over use.

1 *Easements*

The law of easements is also geared toward ensuring that owners occupy the right place in the property hierarchy, that their position is, in other words, supreme. Limits in property law on what qualifies as an easement amount to exclusivity rules that preserve the supremacy of the owner's position. Thus, an interest cannot be an easement where it is *inconsistent* with retained ownership rights. This point was explicitly made in, for example, *Shelf Holdings Ltd. v. Husky Oil Operations Ltd.*¹⁰³ In that case the right to run pipelines underneath farmland qualified as an easement only because the Court struggled to find that the pipelines were perfectly consistent with the agenda the owner had set, *viz.*, farming.

101 A similar concern with the institution of ownership more generally explains why, in the case of chattels, the law does not prohibit the destruction of things – the surest way for one owner to prevent anyone else from wielding agenda-setting authority with respect to a thing. Once again, property law aims to preserve the institution of ownership and so, too, the possibility of agenda-setting authority with respect to ownable things. This does not mean that the law sets out to protect things themselves in order that someone might some day own them. See Lior Jacob Strahilevitz, 'The Right to Destroy' (2005) 114 Yale L.J. 781.

102 Restrictions flowing from the terms of the trust are questionable. Perhaps the answer is that the threat to the institution of ownership is under control because beneficiaries to the trust can get together and collapse it.

103 (1989), 56 D.L.R. (4th) 193 (Alta. C.A.).

Notwithstanding the long-term physical presence of the pipelines, the Court found that the interest in question was not so broad as to interfere with the owner's agenda-setting authority.¹⁰⁴ The case underscores the importance of preserving the owner's special agenda-setting authority.

2 *The law of finders*

The law of finders provides another illustration of the harmonizing effect of exclusivity rules. The law of finders ensures that things that are lost or mislaid do not go unused, all the while preserving the owner's position of supreme authority. Finders are not obligated to exclude themselves but, rather, can pick up and use lost or mislaid things.¹⁰⁵ Property law permits a person to pick up goods that may have been abandoned or lost, so long as the finder does not intend to deprive another of her rights. The finder's relationship to the owner reflects a clear hierarchy of authority, with the owner on top. The finder's first obligation is to care for the thing and to take reasonable steps to reunite it with the owner. This quasi-bailment obligation limits what the finder can do: she cannot act in a way that is inconsistent with the return of the thing to the owner. A finder's limited power to make decisions about the use of a thing does not extend to dissipating its value or to consuming or destroying the thing itself. The owner's position is safeguarded by the finder's obligation to defer to her superior right and the owner's ability to retake charge of the thing at anytime. It is not exclusion but, rather, rules that harmonize the finder's position with the owner's that protect the core of ownership in cases of lost or mislaid goods.

Ownership is not necessarily exclusionary, but *is* necessarily an exclusive position of authority. Property law can fail to ensure that others exclude themselves from a thing without jeopardizing the security of the owner's position. But if property law failed to ensure that the owner is fully in charge of the resource, either by harmonizing the interests of others with the owner's position or by ensuring a full transfer of authority from one owner to the next, it *would* undermine the possibility of ownership.

104 This case may have been wrongly decided on the facts: the permanence of the pipelines might jeopardize the ability of the owner to set a different agenda in the future.

105 See *Parker v. British Airways Board*, [1982] 1 Q.B. 1004 at 1017–8, 1 All E.R. 834 at 514 (C.A.) (the finder has an obligation to take all reasonable measures in the circumstances to return the chattel to the true owner and to care for it in the mean time). Finders are treated as quasi-bailees. See *Trachuk v. Olinek*, [1996] 4 W.W.R. 137; see also *Bird v. Fort Frances*, [1949] 2 D.L.R. 791 at para. 35 (Ont. H.C.).

V *Justifying property: Exclusion, exclusivity, and freedom*

Why have property theorists so tenaciously emphasized exclusion? I cannot provide a complete answer to this question, but I will consider here why the exclusion of others from the object of the right is thought to matter so much to the justification of ownership. The argument is that the right to exclude forges the link between property and freedom, and freedom is the key justificatory reason for ownership. In what follows, I explain that we do not in fact lose traction in the argument that ownership promotes freedom by emphasizing the exclusivity of ownership over its exclusionary function.

I am most interested here in how the right to exclude is thought to feature in property's promotion of freedom from domination, the kind of freedom that it is the state's business to promote and the promotion of which offers a strong justificatory case for private ownership. Insofar as exclusion-based accounts of ownership establish the critical contribution of a right to exclude to freedom of this kind, the value and even the indispensability of a right to exclude might follow. I aim to show that ownership's freedom-enhancing effects do not depend on the right to exclude.

To start with, it should be clear that freedom is not simply the freedom to choose among an adequate range of valuable options (personal autonomy). It has another aspect: the freedom from manipulation, or the freedom to determine one's own values and interests and to sort through and prioritize these values and interests in deciding how to act. This aspect of freedom, which we can call moral autonomy, has an important role in the justification of a system of property. Civic republicans claim that ownership (of some property) is justified on the grounds that its wealth-enhancing effects ensure substantive moral autonomy: a person of means is not dependent on others for her well-being and is thus free to act morally rather than merely prudentially. Poverty threatens autonomy because

[i]f a person is faced with abject and long-term material deprivation, he will be preoccupied with his most impelling needs and will have neither the opportunity nor the psychological space to consider in general how he wants his life to go.¹⁰⁶

Bruce Ackerman explains the point thus: '[a] propertyless person lacks crucial resources needed for self-definition. . . . He can never enjoy the luxury of asking himself what he really wants out of life. . . .'¹⁰⁷ Property

106 Waldron, *Right*, supra note 8 at 306.

107 Bruce Ackerman & Anne Alstott, *Stakeholder Society* (New Haven, CT: Yale University Press, 2000) at 191.

is said to ensure that a person will have the freedom to choose her projects for reasons that are truly her own.

There is no reason to think that a right to exclude others from the object owned does something for moral autonomy that a non-exclusionary right would not.¹⁰⁸ Most republican accounts of the connection between moral autonomy and ownership are set out in terms of the economic security that ownership creates: ownership (and historically the focus was on ownership of land) produced enough wealth to meet a person's needs, to leave her free to turn her mind from prudential matters to moral questions. But a right to exclude is not specially tailored to produce the kind of independence-creating effects that a republican has in mind. A right to use can generate wealth just as much as a right to exclude¹⁰⁹ and can therefore also generate the material independence with which republicans are concerned.

Does it count as an independence-enhancing feature of a right to exclude that it does not require the cooperation and consultation with others that a non-exclusionary use right might require?¹¹⁰ In other words, are exclusionary rights alone able to promote moral autonomy, whereas, on the other end of the spectrum, rights to share in the use of a resource will tend not to? The answer, simply, is no. Moral autonomy is not undermined by the social requirements of cooperation in the context of communal ownership, with the kinds of exchange and compromise that cooperation requires. Cooperative exchange is an exchange between equals. Moral autonomy is threatened not by cooperative exchange but by the toadying and self-abasement that mark a relationship between unequals.

Ownership is also (and perhaps more commonly) said to contribute to *personal* autonomy. A person's ability to author his own life (which is what we mean by personal autonomy) is enhanced where he has an expanded set of valuable choices from which to select. Implicit in the idea of choice is that a person has the means to carry through in pursuit of his chosen ends.¹¹¹ Property rights are said to serve our interest in personal

108 The argument could be pushed further: there is no reason why the economic benefits of ownership could not be provided by some non-proprietary kind of wealth, such as income from a job with a reasonable security of tenure.

109 If a right to use is not limited to one's own personal needs but is transferable, or if the surplus from use is transferable, then we can readily see how a right to use might generate wealth.

110 Co-tenancies, for instance, may require some degree of coordination if tenants are to access the full benefits of their rights. The same is true of communal property regimes. See Dagan & Heller, 'Liberal Commons,' *supra* note 68, for a discussion of some of the dangers of and possible solutions to being bound together with others.

111 For the distinction between wishing and choosing see Arthur Ripstein, 'As If It Had Never Happened' (2006) 48 *Wm. & Mary L.Rev.* 1957 at 1965–6.

autonomy by expanding the set of ends that we have the means to pursue: ownership of a thing yields an open-ended, if not unlimited, set of options concerning what to do with the thing, what to consume, and what to produce. Ownership of all kinds of things is said to have this effect. For instance, James Buchanan argues that the freedom created by a system of private property extends even to those who are entitled merely to a claim of money (as opposed to an asset that produces goods in kind).¹¹² A right to money, within an economy based on private ownership of productive assets, leads to demand-side or consumer choice (even if the choice of what to produce is constrained). The ownership of productive assets, of course, leads to even greater freedom than a monetary claim, because owners of things have the ability to generate options for themselves by deciding what to produce.

How might property's exclusionary nature forge its relationship to personal autonomy? It might be argued in support of an exclusion-based approach that a right to exclude is critical to personal autonomy on the same grounds that the modern form of the *jus abutendi* or *abusus* is. The modern *abusus* is the owner's power to engage in non-conforming uses, to put the thing to a use other than what, objectively, might be considered its most natural or efficient use.¹¹³ Although our intuitions do not lead us to link the right to misuse a thing to freedom, the importance of the right to misuse to the exercise of the will and to self-definition has received a great deal of attention in modern democracies.¹¹⁴ A right to misuse a thing, it could be argued, is part and parcel of personal autonomy: the ability to choose an agenda that is not to the liking of one's peers.¹¹⁵

It might similarly be argued that the exclusion of others from the object owned is part and parcel of a person's ability to apply her means only to the ends she has set for herself. The argument roughly is that property relates to freedom insofar as it establishes a sphere of liberty to set and pursue one's own ends and that it enables the independent setting and pursuing of ends insofar as others are excluded from the object. On this view, we protect against harmless trespasses because anyone else's unlicensed use of your thing usurps your ability to choose the ends to which your means are directed.¹¹⁶

112 James Buchanan, *Property as a Guarantor of Freedom* (Aldershot, UK: Edward Elgar, 1993) at 38–40.

113 See Xifaras, *La Propriété*, supra note 60 at 113, on modern *abusus* and *jus abutendi*.

114 See Strahilevitz, 'Right to Destroy,' supra note 101.

115 Again, this raises important questions about abuse of right, or the inherent limits on agenda-setting authority: the pursuit of valued and valuable ends ought to count as a legitimate exercise of agenda-setting authority, no matter how trivial or idiosyncratic the ends sought.

116 This view is suggested in Ripstein, 'Harm Principle,' supra note 12.

There is great appeal in the fusion of the right to exclude with property's freedom-enhancing quality. If an owner's resource may be the means to another person's ends, even if the pursuit of those ends does not interfere with the owner's pursuit of her own, it seems right that an owner is thereby deprived of the ability to decline to exercise her powers to pursue purposes that she has not set. But the importance of exclusion to personal autonomy depends on the extent to which the real boundaries of the thing are coextensive with the owner's exclusive authority.¹¹⁷ Does it necessarily follow that another's relationship with a resource limits an owner's ability to set and pursue her own ends? Is it enough to guarantee personal autonomy that an owner has the *indirect* ability to limit another's access, by setting an agenda to which others owe deference, or does personal autonomy require more, the *direct* ability to 'decide when to make property [the physical thing] available to others'?¹¹⁸ Whether or not another's use of a thing is a usurpation of the owner's means in furtherance of ends that she has not set (and, thus, ought to be free not to pursue) depends on the extent to which the object itself exists *solely* to serve her ends.

Understandably, if a person achieves autonomy only through mastering external things, then ownership must entail the right to exclude or else fail to enable autonomy. One cannot master a thing – be, in other words, the one whose will shapes the fate of the thing – if another is also at liberty to leave her mark on the thing by using it. But what connects mastery, and, by implication, the exclusion of others, to autonomy? One answer is distinctly Hegelian: it is in 'investing an object with purpose' that a person becomes aware of the 'features of rationality,' purpose and will, and thus is constituted as a free person.¹¹⁹

Modern proponents of exclusion-based approaches to property explain the importance of access control in terms of privacy rather than of metaphysics. Jeremy Waldron, for instance, explains that exclusion avoids the moral exhaustion that would result if we had constantly to act in accordance with the interests of others: 'it is important for individuals to feel that they can make some decisions without treading on the rights of others.'¹²⁰ Waldron explains that, because of the physical dimension of human activity, private decision making requires control over one's material environment. Some idea of 'one's own' is necessary to autonomy. And 'one's own,' a private sphere, necessarily implies exclusion of the *interests of others* in decision making.

117 See Perry, 'Libertarianism,' *supra* note 12.

118 Waldron, 'Property,' *supra* note 11.

119 Waldron, *Right*, *supra* note 8 at 302.

120 *Ibid.* at 295.

Let us accept for a moment what Waldron has to say about the importance of being free to disregard the interests of others in deciding how to act. Does this lead us to conclude that a right to exclude is morally significant in and of itself? Is the right to exclude others from the object owned the only way to protect what amounts to the self-seeking nature of ownership, the ability to ignore the interests and projects of others in making choices about the resource?

Exclusion-based approaches move too quickly from the importance of a self-seeking sphere of action to the importance of the right to exclude others from the thing. This is to confuse self-seekingness with self-assertion over inert material objects. Exclusion might be particularly important if mastery over things were critical to autonomy, but it is not necessary for the kind of self-seeking decision making that appears to be the real concern that Waldron raises. If the owner is in a position to disregard the interests of other individuals in setting her agenda, the fact that others may have some access to the object (in a way that does not dictate the agenda for it) ought not to lead to the moral exhaustion Waldron describes. The relationships others have to a resource need not limit the owner's ability to set the agenda for it, and to do so for reasons that are truly her own, where these relationships are organized around the owner's position.

In summary, in denying that the right to exclude forms the core of ownership, we are not denying ownership's link to freedom. The exclusivity of ownership ensures that others do not dictate what agenda the owner must set for a thing, and it does not require that the owner elevate the interests of particular other individuals above her own.

VI *Conclusion*

I have argued above that the exclusivity of ownership refers not to the right that others exclude themselves from the object owned but, rather, to the owner's special agenda-setting authority, a position that is neither derived from nor subordinate to the positions of others with respect to that resource. The function of much of property law and property-related tort law, I have argued, is to preserve the exclusivity of the position of the owner by ensuring its supremacy in relation to the rights and privileges of others and by ensuring that non-owners fall in line with the owner's agenda. Exclusion is simply a special case of a more general strategy of deference to the owner's agenda.