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## Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right

**ABSTRACT.** This Essay puts forward the conceptual and normative underpinnings of a principle of abuse of property right. Owners abuse their right, I argue, when their decisions about a thing are designed just to produce harm. This is so whether that harm is an end in itself (spite) or a means to achieving some ulterior and possibly even valuable end (extortion). Theorists have tried to explain those limits concerned with spite in terms of maximizing utility or enforcing virtue. But these theories posit significant external limits on owners' freedom and still do not explain those limits concerned with extortion.

I argue that ownership's political foundations account for its internal limits. Ownership confers the authority to answer what I call the Basic Question—what constitutes a worthwhile use of a thing. This authority is required to overcome twin problems of standing and coordination in a state of nature. We all have an interest in coordinating our uses of things (to avoid waste and conflict), but each of us faces a moral duty to forbear from imposing his answer to the Basic Question on others. A system of private property overcomes this dilemma, but its political foundations also give rise to constraints of legitimacy. Owners are charged with making decisions about things, but this authority does not extend to using a resource to gratify spite or gain leverage for some further end. These are not answers to the Basic Question, but rather efforts to use the position of ownership just in order to dominate others. When owners exceed their authority in this way, they abuse their right.

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**INTRODUCTION**

Consider the following two stories. Boymelgreen, a developer in Brooklyn, converted a seven-story building into condominiums with windows on the property line overlooking a parking lot.<sup>1</sup> After he finished the building, he realized that he did not have an easement for air and light over the neighboring land, which he needed in order to ensure that the units conformed to city rules. Walentas, the owner of the parking lot and a rival developer in Brooklyn, was willing to grant the easement—but only if Boymelgreen would agree to sell him a (third) lot elsewhere in Brooklyn. Boymelgreen refused. Walentas then drew up plans and obtained a building permit for a sculpture that he described to the *New York Times* thus: “It’s steel columns in front of the windows with plates strategically placed where the windows are, just as a little negotiation . . . . It frankly was designed to block those windows . . . . So we torture him a little bit.”<sup>2</sup> Walentas’s decision to place a steel structure in front of his neighbor’s windows was made with a direct intent to harm, where harm was not only foreseen but was indeed the desired outcome of the decision.<sup>3</sup> His plan was designed to create leverage to extract a benefit from Boymelgreen—the sale of the other Brooklyn lot.

Now consider a second story. Zarlenga is the owner of a heritage building in Old Town Alexandria, Virginia, known for its upscale businesses and restaurants and its historic sites. City planners rejected Zarlenga’s proposal to renovate the building to accommodate his expanding hunting and fishing business. Frustrated, Zarlenga deliberately “sought a tenant that would be a poke in the eye for Alexandria,” initially approaching fast food chains and ultimately leasing the building to a sex shop.<sup>4</sup> Zarlenga both foresaw and desired to harm the city of Alexandria as an end in itself. The reason for Zarlenga’s choice of tenant was to cause harm in order to gratify spite.

Many of us are likely to find Walentas’s and Zarlenga’s actions troubling.

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1. William Neuman, *Rivals Rumble in Dumbo*, N.Y. TIMES, Jan. 22, 2006, <http://www.nytimes.com/2006/01/22/realestate/22deal.html>.

2. *Id.*

3. This is not to suggest that Boymelgreen was personally deserving of our sympathy. Indeed, Boymelgreen, after he was made aware that he lacked the required easement, continued with his plans to unload the condos on unsuspecting buyers. Walentas alerted the Attorney General to the problem, and Boymelgreen was forced to give buyers the option to abandon the deals. *Id.* But the moral deserts of the “victim” are quite beside the point, as my analysis will demonstrate. The owner’s reasons are what we scrutinize, not the “all-things-considered” deserts of the person harmed.

4. Theo Emery, *A Landlord’s Revenge Divides the Neighbors*, N.Y. TIMES, Mar. 21, 2009, <http://www.nytimes.com/2009/03/22/us/22sexshop.html>.

Neither owner was setting an agenda for the property that he genuinely thought was worthwhile in itself. Their decisions—the choice of sculpture and the choice of tenant—were clearly designed just to cause harm. But as troubling as this sort of behavior might be, property theorists have surprisingly little to say about it.<sup>5</sup> Those who concede that an owner's reasons sometimes matter in property law offer only the barest of concessions: in correlative rights cases (e.g., concerning the rights of riparians or neighbors), they acknowledge that courts may sometimes refuse to protect an owner who acts purely out of spite or may even treat her actions as a nuisance.<sup>6</sup> They are unwilling to go any

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5. Few property theorists in the Anglo-American world have put their minds to the matter of abuse of property right in any systematic way. There are some important exceptions. Ernest Weinrib has recently considered how a principle of abuse of property right concerned just with spite might fit within a Kantian idea of property: we cannot claim property rights, on the grounds that this extends our capacity to set and pursue our own ends, just in order to block the purposiveness of others. See Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191 (2011). Dan Kelly has recently published a paper on the law and economics of leverage cases, in which he argues that there are good economic reasons for curtailing strategic maneuvering. See Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641 (2011). While these are all valuable perspectives on the problems of spite and extortion, they assume a certain normative framework that in my view incompletely accounts for the internal limits of ownership authority. See discussion *infra* note 101 and accompanying text.

For reasons that I articulate in this Essay, I think that it is important to consider abuse of property right specifically in light of the idea of ownership and so apart from its analogues in other areas of the law. Others have written on a general doctrine of abuse of right, notably Joseph Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995). Henry Smith has argued that equity is a general device in private law for curtailing opportunism. He provides a cost-based explanation for why it is left to equity to deal with opportunism case by case. The simple in rem structure of property rights is left intact, on this story, supplemented by equity's in personam approach to curtailing opportunistic behavior. See Henry E. Smith, *An Economic Analysis of Law Versus Equity* (Oct. 22, 2010) (unpublished manuscript), [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf). This Essay ventures a new account of abuse of property right that takes a very different view of the moral underpinnings of ownership and its limits: rather than an external and ad hoc reflection of a simple moralist distaste for opportunism (as Smith's account might suggest), there are weighty jurisdictional concerns that limit this kind of abuse, even when the ultimate social goal served by a decision is valuable.

6. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 232 (1985) [hereinafter EPSTEIN, *TAKINGS*]; Richard A. Epstein, *Rights and "Rights Talk"*, 105 HARV. L. REV. 1106, 1112 (1992) (reviewing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)) ("It would be a mistake, however, to assume that all disputes over property rights, even in land, should be resolved by turning to Blackstone's regime of absolute rights. . . . If the law held that any physical invasion, however trivial, constituted a nuisance that could subject its creator to actions for damages and injunctions, who would prove the winner from so grotesque a scheme? Everyone would violate the rules in question and would be faced by a host of demands for damages or injunctions brought by disgruntled or vengeful neighbors."); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 753 (1998) (noting that while the right to

further because they are committed to an idea of ownership that fits poorly with the regulation of an owner's reasons.<sup>7</sup> While the law might prohibit certain uses of property, the story goes, it has no business scrutinizing an owner's reasons for choosing among otherwise permitted uses.

But the law *does* sometimes care about owners' reasons for deciding, and this fact, I argue, provides a crucial insight into the nature of ownership and its political foundations.<sup>8</sup> This Essay aims to show that a principle of abuse of right is a crucial component of the idea of ownership, providing a powerful rationale for a set of otherwise puzzling cases in Anglo-American property law. Some but not all of these cases are concerned with the correlative rights of neighbors.<sup>9</sup> And some but not all are concerned with animus, or decisions made just to gratify spite. A small but revealing subset of these cases concern decisions about things that are designed just to cause harm in order to gain leverage over others.<sup>10</sup> In leverage cases, the decision is made just for the reason that it will produce harm. Harm is desirable in leverage cases not as an end in itself, but as a means of achieving something else that the owner *does* value (e.g., greater wealth, the punishment of a wrongdoer, control over the character of a neighborhood). What spite and leverage cases have in common is that the owners do not just foresee that harm may result from their decisions;

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exclude is integral to the concept of property, it is not necessarily an unqualified right).

7. There are deep disagreements about the conception of ownership that is at work in the law. In the twentieth century, a consensus seemed to take hold that ownership is a bundle of rights. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 357 (2001). Recently, however, there has been a resurgence of exclusion-based accounts of ownership. See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 68-104 (1997); Merrill, *supra* note 6; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754-55 (2004). There are other views. Hanoch Dagan, for instance, has developed a neorealist account of property rights that emphasizes the close relationship between the structure of property rights and the different values these rights promote in different contexts. See HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 3-5 (2011). Bundle-of-rights approaches may simply seek to treat abuses of right as occasions to "balance" the interests of the parties. Exclusion theorists, like Henry Smith, are forced outside of their exclusion framework to ad hoc restrictions on the right to exclude. See *supra* note 5 (discussing Smith's argument that there is an external source, located in equity, restricting opportunistic behavior more generally); *infra* note 101 and accompanying text (suggesting that a jurisdictional account of property provides a better explanation).
8. The examples from the case law are drawn from across the Anglo-American world. I could not possibly (and do not aim to) give the reader a jurisdiction-by-jurisdiction overview of the case law. My use of case law is primarily illustrative: I aim to show that a principle of abuse of property right serves an important explanatory role with respect to cases where owners act just to harm others by revealing the internal limits on the idea of ownership in law.
9. See *infra* notes 28-30.
10. See *infra* Section I.B.

they actually set out to achieve this harm through the office of ownership. In these cases, the value to the owner of an abusive decision is indirect, derived just from the harm it will cause to another. None of these property law cases go so far as to establish a freestanding tort of abuse of right (familiar to us from civilian systems).<sup>11</sup> What we see instead is a role for a *principle* of abuse of property right that makes sense of a range of judicial responses to spiteful or extortionate uses of ownership. This single principle can illuminate remedial tinkering (e.g., substituting damages for injunctions),<sup>12</sup> denying the right to exclude, and even treating the abusive behavior as itself a nuisance.

The kind of jurisdictional limits on reasons that I propose here is more familiar to us in the context of public offices.<sup>13</sup> We readily recognize that a judge abuses her authority when she chooses a sentence within the sentencing guidelines but for the wrong reasons (e.g., to generate kickbacks from a juvenile detention center rather than for reasons relating to the accused or the crime).<sup>14</sup> The reasons that she has relied on in making her decision—the kickbacks she will receive for each child sent to a detention center—make it impossible to characterize her decision as an answer to the question that she has been entrusted to answer. There is a related (although not identical) structure to a principle of abuse of property right in the context of the office of ownership.<sup>15</sup> Ownership, I argue, is an office dedicated to a specific

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11. There may be other areas of the law that have worked out clear-cut tortious liability for abuse of rights. I have found no grounds for that conclusion with respect to abuse of *property* right.
  12. For an analysis of the use of damages instead of injunctions to rein in abuse in the context of easements, see Lee J. Strang, *Damages as the Appropriate Remedy for “Abuse” of an Easement: Moving Toward Consistency, Efficiency, and Fairness in Property Law*, 15 *GEO. MASON L. REV.* 933 (2008).
  13. The importance of reasons to private jurisdiction is not entirely foreign to the law. For arguments to the effect that consent is the exercise of authority that is subject to jurisdictional limits, see ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999); and Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *YALE L.J.* 1070 (2008). A person cannot give someone the power to hurt her for any reason at all. Rather, she has the power, through consent, to engage in a shared or cooperative enterprise. This explains why it is possible to consent to being tackled in a football game (as part of a cooperative enterprise), but not to have someone do the same thing to you for the wrong reasons (e.g., tackling you just to inflict bodily harm).
  14. See Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, *N.Y. TIMES*, Mar. 27, 2009, <http://www.nytimes.com/2009/03/28/us/28judges.html>. Note that these judges have since been tried: one pleaded guilty and the other was convicted. See Craig R. McCoy, *Ex-Judge Mark A. Ciaverella Jr. Guilty in “Cash for Kids” Case*, *PHILA. INQUIRER*, Feb. 19, 2011, [http://articles.philly.com/2011-02-19/news/28611757\\_1\\_worst-judicial-scandals-juvenile-law-center-ciavarella](http://articles.philly.com/2011-02-19/news/28611757_1_worst-judicial-scandals-juvenile-law-center-ciavarella).
  15. See *infra* Section I.B, where I distinguish between legitimate and illegitimate leverage and

task—setting the agenda for a thing.<sup>16</sup> Owners have the standing to resolve what I will call the Basic Question: what (in their view) constitutes a worthwhile use of a thing. A principle of abuse of property right simply marks the limits of that jurisdiction.

But why should this be the nature of the jurisdiction that owners are given? Why should an owner not be free to make decisions about things just in order to harm others if that helps her to accomplish her broader life goals? The reason, I argue, lies in the political foundations of the office of ownership itself. On the one hand, it is in everyone's interest that *someone* determine the agenda for each thing. Having someone in charge of a thing is one way to solve the problem of coordinating our uses of our collective resources in the face of genuine and good faith disagreement about what those uses should be.<sup>17</sup> On the other hand, however, granting the authority to determine the agenda for things to others raises an important autonomy worry.<sup>18</sup> When someone is granted ownership authority to determine the agenda for her property, she is then in a position to make decisions that bind us all. The thing was available to us all until it was privately appropriated, but now we are constrained by the owner's decisions with respect to that thing. This points to a problem about standing: What entitles a private actor to make those decisions, no matter how expertly or altruistically, for the rest of us? Claims of ownership are thus claims of *authority* to perform precisely this task in the name of all.

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develop the metaphor of ownership as a clearinghouse for ideas.

16. See Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) [hereinafter Katz, *Exclusion*] (developing the idea of ownership as an office of agenda-setting authority); Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029 (2012) [hereinafter Katz, *Governing*] (analyzing this mode of governance). This Essay delves into the normative inquiry, unpacking the political foundations of ownership and connecting them to a broad-ranging principle of abuse of property right. For a good conceptual overview of the idea of offices as they apply to ownership, see Chris Essert, *The Office of Ownership*, 62 U. TORONTO L.J. (forthcoming 2013), which distinguishes his view from mine on the grounds that his is a purely formal claim about the structure of the right.
17. Private ownership is one strategy for regulating our conduct with respect to our collective resources, but it is not the only one. See Larissa Katz, *The Regulative Function of Property Rights*, 8 ECON J. WATCH 236 (2011). I assume in this Essay that it is a good thing to have private actors making some or most of the decisions about things if only because there are strong empirical arguments for pursuing this strategy over (say) widespread state ownership of things. On the coordination function of ownership, see *infra* Section II.B.
18. By autonomy, I mean freedom from domination in the sense that Philip Pettit and Kantians like Arthur Ripstein use that term. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) (developing Republican ideas of nondomination as freedom from the arbitrary exercise of power); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL THEORY* 33-34, 42-43 (2009) (understanding domination to mean that "[o]ne person is subject to another person's choice").

Because owners' authority to set the agenda for things always threatens the autonomy of others in this way, we should constrain owners' jurisdiction to no more than is necessary to solve our coordination problem. If we allow owners to set agendas that they themselves do not take to be worthwhile for the thing, just in order to harm others, authority that was conferred *only* to solve the coordination problem is now being exercised for reasons that go beyond their charge.<sup>19</sup> We limit the extent to which we subject ourselves to others' decisions through a principle of abuse of right.

For both pragmatic and principled reasons, the law takes a coarse-grained approach to regulating owners' decisions. We defer to an owner's judgment of what constitutes a valuable agenda for a thing.<sup>20</sup> But an owner necessarily exceeds her jurisdiction when she makes an otherwise permitted decision about a thing just for the reason that it will harm others. She has in that case used her power *qua* owner not to determine a worthwhile use of the thing but to address some other question: how she might use her position just in order to harm someone else, out of spite or to gain leverage. When an owner's decision about her thing is designed just to cause harm to another—whether as an end in itself or even as a means to some further valuable end—she abuses her right.<sup>21</sup>

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19. *But see infra* Subsection I.B.1 (discussing the special power of owners to substitute their judgment for what is worthwhile for the judgment of others—to act, in other words, as a clearinghouse for ideas about the use of the thing).
  20. Every legal system prohibits certain uses of things outright, on public policy grounds (e.g., I cannot build a factory on a tract of land that is zoned for residential use). But this is consistent with the wide deference given to an owner to decide for herself what agenda to set from among those that are permitted.
  21. There is a large literature in civilian jurisdictions on *abus de droit*, a general, stand-alone tort, particularly important in the context of contract law. *See, e.g.*, CODE CIVIL [C. CIV.] art. 1382 (Fr.) (declaring that any loss that a person suffers must be repaired by the person whose fault it was that the loss occurred, a limit on CODE CIVIL [C. CIV.] art. 544 (Fr.), which allows for the absolute right to use property rights as one sees fit, provided it is not prohibited by law). For a treatment of French abuse-of-right doctrine, see L. CAMPION, *DE L'EXERCISE ANTISOCIAL DES DROITS SUBJECTIFS: LA THÉORIE DE L'ABUS DES DROITS* (1925); LOUIS JOSSERAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ: THÉORIE DITE DE L'ABUS DES DROITS* (1927); ANDRÉ NADEAU & RICHARD NADEAU, *TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE* (1971); John H. Crabb, *The French Concept of Abuse of Rights*, 6 INTER-AM. L. REV. 1 (1964); D.J. Devine, *Some Comparative Aspects of the Doctrine of Abuse of Rights*, 1964 ACTA JURIDICA 148; Antonio Gambaro, *Abuse of Rights in Civil Law Tradition*, in *AEQUITAS AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS* 632 (Alfredo Mordechai Rabello ed., 1997); Frédéric Pollaud-Dulian, *Abus de Droit et Droit Moral*, 21 RECUEIL DALLOZ SIREY CHRONIQUE 97 (1993); A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New . . .*, 54 LA. L. REV. 1173 (1994); and Emmanuelle Lévy, *Preuve par Titre du Droit de Propriété Immobilière* (Mar. 24, 1896) (unpublished Ph.D. dissertation, Faculté de Droit de Paris) (on file with the Bibliothèque



This Essay is in two parts. In Part I, I argue that a principle of abuse of property right makes sense of a set of cases that might otherwise be treated as marginal in the law of property. I argue that despite a few clear statements in the law to the contrary, there is significant evidence in the case law that owners' reasons *do* matter in the common law tradition. A principle of abuse of property right is not limited to correlative rights cases, where the owner and victim are asserting reciprocal rights. This principle also applies, for instance, where an owner claims a right to exclude outsiders or to contain a benefit that otherwise would flow to an outsider. It constrains owners' authority both where harm is an end in itself, in spite cases, and where the harm constitutes a form of leverage. In this Part, I also distinguish between *legitimate* leverage, where an owner acts as a clearinghouse for ideas by legitimately substituting others' judgments about how best to use a thing in place of her own, and *illegitimate* leverage or extortion, where an owner achieves leverage by using her position just to cause harm.

In Part II, I argue, as a normative and conceptual matter, that a principle of abuse of property right is a crucial aspect of the idea of ownership. In this Part, I connect a principle of abuse of property right to the political foundations of ownership.

## I. ABUSE OF RIGHT IN PROPERTY LAW

The conventional view is that the common law does not join its civilian counterparts in broadly regulating an owner's reasons.<sup>22</sup> One of the most

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Nationale de France). For a particularly good comparative treatment of civilian *abus de droit*, see MICHAEL TAGGART, PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND: THE STORY OF EDWARD PICKLES AND THE BRADFORD WATER SUPPLY (2002). Taggart provides an excellent history of the famous House of Lords case *Mayor of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) (appeal taken from Eng.), tracking the reluctance of common law courts to consider reasons or motives at all and comparing this approach with civil law jurisdictions. This Essay will not undertake a comparison of civilian and common law traditions. My aim here is to establish the contours of a principle of abuse of property right that emerges, as I see it, from the idea of ownership in the common law.

22. See, e.g., John Finnis, *Intention in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229 (David G. Owen ed., 1995); John Murphy, *The Merits of Rylands v. Fletcher*, 24 O.J.L.S. 643, 658-59 (2004); Lionel Smith, *The Motive, Not the Deed*, in RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53, 66 (Joshua Getzler ed., 2003) (noting the common law's tendency to shrug off the relevance of motive but arguing that a classification of obligations solely in terms of results in the world is incomplete). In American law, there appears to be less reluctance to accept the significance of motive. The closest thing to a systematic recognition of abuse of right is the *prima facie* tort doctrine. But that does not explain abuse of ownership right. Oliver Wendell Holmes, who was largely responsible for developing *prima facie* tort doctrine, takes care to distinguish between the

famous cases to reject the relevance of an owner's reasons is *Mayor of Bradford v. Pickles*.<sup>23</sup> The town of Bradford depended for its water supply on the flow of water that percolated under the land of the defendant Pickles. Pickles, under the pretext of developing his land for commercial mining, sank a shaft on his land, which had the effect of polluting and diminishing the water supply to the town. The town sued, alleging, inter alia, that Pickles's real purpose was not to mine his land but rather to coerce the town into paying him to stop diverting the water. The House of Lords found in favor of Pickles. In his speech, Lord Halsbury delivered the famous dictum that an otherwise lawful act is not rendered unlawful by a bad motive.<sup>24</sup>

Although there are such clear general statements of the irrelevance of reasons in the law of property, there are many cases throughout the common law world that point in quite the opposite direction. Abuse of right cases most commonly concern owners' decisions about use that correlative rights-holders (e.g., neighbors who have identical rights of use with respect to their own property) ordinarily would be bound to accommodate. A principle of abuse of property right is not as well entrenched in situations where rights are *not* correlative, such as where the owner removes a benefit from a free rider, e.g., the passage of light or the flow of percolating water under her land,<sup>25</sup> or sues to

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use of a property right, which by public policy we have decided is absolute, from activity that inflicts harm that is justified (or not) by reference to its ends. See *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) ("If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, those affecting the use of land, are absolute, others may depend upon the end for which the act is done." (citation omitted) (citing *Pickles*, [1895] A.C. 587)). For further discussion of American courts' recognition of motive, see J.B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905).

23. [1895] A.C. 587.

24. *Id.* at 594. For a particularly egregious rejection of the relevance of reasons, see *Chapman v. Honig*, [1963] 2 Q.B. 502 (Eng.). In that case, a tenant gave evidence under subpoena in a case against his landlord. The next day the landlord presented him with a notice to quit the premises. The landlord admitted in court that he had a vindictive motive. The court cited *Pickles* for the proposition that motive is irrelevant (with Lord Denning dissenting). *Id.* at 510; accord *Allen v. Flood*, [1898] A.C. 1 (H.L.) (appeal taken from Eng.). Some American courts adopted this view of the irrelevance of motive. See *Holke v. Herman*, 87 Mo. App. 125, 141 (Ct. App. 1901) (collating the leading authorities in support of the general doctrine that a person's motives in making use of her property are immaterial where the act is lawful); *Letts v. Kessler*, 42 N.E. 765 (Ohio 1896); *Metzger v. Hochrein*, 83 N.W. 308, 309 (Wis. 1900) (holding that whatever a person "may do lawfully on his own property under any circumstances," he may do regardless of motive).

25. See *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 122 (1836) (holding that the owner of land has an absolute right to appropriate the water underneath it but noting that these rights "should not be exercised from mere malice"); see also *Katz v. Walkinshaw*, 74 P. 766 (Cal.

stop unauthorized access, e.g., the operation of cranes in the owner's airspace or the encroachment of a neighbor's building or fence.<sup>26</sup> And yet here, too, we find cases that are best explained in terms of a principle of abuse of property right.

With respect to both correlative and noncorrelative cases, it is tempting but misguided to focus just on those cases that involve spite as an end in itself. I show in what follows that the most revealing cases of abuse of property right are not necessarily those that we intuitively recognize as such. It is through a study of the use of ownership as leverage—where the harm caused is a means to achieve some further, possibly even valuable goal in life—in which we see most clearly the jurisdictional nature of abuse of right. In illegitimate-leverage cases, just as in spite cases, the reason for a decision to use the object or to exclude another is the harm it will cause to another's interests: it is this harm, and the leverage it creates, that further contributes to some otherwise desirable end. As desirable as the owner's purposes may be—whether to punish wrongdoers, to maintain the integrity of a neighborhood, or to force others to pay for the advantages they enjoy—the owner's authority is not a tool for deciding this sort of question.<sup>27</sup> Ownership is, rather, the authority for resolving the much narrower question of what is a worthwhile agenda for an object of property—what I call the Basic Question.

A principle of abuse of property right is most obvious in cases involving holders of correlative rights, such as neighbors' mutual rights of lateral

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1903) (requiring that percolating water be diverted only for some "useful purpose in connection with the land from which it is taken"); *Bartlett v. O'Connor*, 36 P. 513 (Cal. 1894) (holding the same); 3 HERBERT T. TIFFANY & BASIL JONES, *TIFFANY REAL PROPERTY* § 747 (2008) (discussing malicious interference). There are a few cases in the United States that took the English approach with respect to percolating water, e.g., *Chatfield v. Wilson*, 28 Vt. 49 (1855) (holding that correlative rights do take malice into account because the limit of the right is reasonable use, but that there are no correlative rights in percolating as opposed to surface streams).

26. Ames, *supra* note 22 (giving examples of situations where a person was putting an end to another's tort). The examples Ames discusses include removing an encroaching force, turning a trespassing horse out into the highway where it was lost or stolen, or suing a trespasser "in a spirit of malevolence." *Id.* at 412-13. But these may also be explained as cases of mixed motive, where the vindication of spite was a desired side effect but not the reason for action. See *infra* Section I.C.
27. Even the state, with a public mandate that includes responsibility for punishing, regulating the character of a neighborhood, etc., cannot make ownership decisions that are themselves calculated just to cause harm to others. A state has the public authority to build prisons, for instance. But it seems to me that a state would abuse its right were it to build prisons not because it genuinely wants prisons but just out of spite or (say) to put pressure on local politicians to achieve some ulterior purpose.

support,<sup>28</sup> riparians' rights in surface water,<sup>29</sup> and neighbors' rights to be free of unreasonable interferences with use and enjoyment of their land.<sup>30</sup> In these cases, the scope of an owner's authority is defined by the extent of the accommodation that she can demand from others with rights correlative to her own. Many property lawyers recognize, for instance, that malice may be grounds for treating even a low-level interference as a nuisance.<sup>31</sup> But spite cases are only one category of abuse-of-right cases. An owner exceeds her jurisdiction, I will argue, whenever her real purpose is not to carry out any bona fide project but rather to cause harm – not only as an end in itself but also as a means to gain leverage.

Although a principle of abuse of right in the context of correlative rights looks a lot like a failure to justify *prima facie* wrongdoing,<sup>32</sup> I show that this is

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28. *Panton v. Holland*, 17 Johns. 92 (N.Y. Sup. Ct. 1819) (holding that malice might render an otherwise lawful act—digging up soil that supported the foundation of a contiguous house—actionable, but finding that malice was not proved under these circumstances).
  29. *Dumont v. Kellogg*, 29 Mich. 420, 423-24 (1874) (“It is a fair participation and a reasonable use by each that the law seeks to protect.”); *see also* RESTATEMENT (SECOND) OF TORTS § 833 (1979) (stating that nuisance rules are applicable to surface water invasions); *id.* § 826 (assessing liability by asking whether the gravity of the harm caused by the invasion exceeds the utility of the activity causing the invasion).
  30. *Hornsby v. Smith*, 13 S.E.2d 20 (Ga. 1941); *Burke v. Smith*, 37 N.W. 838, 838 (Mich. 1888) (holding that a fence erected maliciously and with no other purpose than “to shut out light and air” is a nuisance); *Ibottson v. Peat*, (1865) 159 Eng. Rep. 684 (Ex.); *Hollywood Silver Fox Farm v. Emmett*, [1936] 2 K.B. 468 (Eng.); *Christie v. Davey*, [1893] 1 Ch. 316 (Eng.).
  31. *See, e.g.*, EPSTEIN, TAKINGS, *supra* note 6, at 232 (noting that the prohibition on suing for low-level interferences (the “live and let live rule”) does not protect malicious interferences).
  32. And, indeed, the abuse-of-right doctrine in civilian jurisdictions has sometimes been interpreted in a way that looks quite like the *prima facie* tort doctrine. *See* Paul A. Crépeau, *Abuse of Rights in the Civil Law of Quebec*, in *AEQUITAS AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS*, *supra* note 21, at 583, 631 (“The doctrine of abuse of rights serves to ensure that, in the promotion of personal interests, rights are not exercised in a manner which unjustifiably deprives others of the enjoyment of their own rights.”); *see also* Note, *The Prima Facie Torts Doctrine*, 52 COLUM. L. REV. 503, 503 (1952) (“In its emphasis on liability stemming from principle rather than precedent, the doctrine reflected an attitude which had long been incorporated in the civil law.”). This assumes the correlativity of rights, as is also the case in Scottish Law’s *aemulatio vicini*. *More v. Boyle*, (1966) 1967 S.L.T. 38 (Sh. Ct.) (Scot.) (confirming that the doctrine of *aemulatio vicini* is a part of Scots law); *see* Elspeth Reid, *Abuse of Rights in Scots Law*, 2 EDIN. L.R. 129, 153 (1998) (arguing that while *aemulatio vicini* exists in Scottish law, Scottish courts have been heavily influenced by the English rule laid down in *Mayor of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) (appeal taken from Eng.), and have largely ignored the doctrine); *id.* at 155 (arguing that the doctrine is largely unavailable outside the domain of “neighborhood relations”); Elspeth Reid, *The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction*, 8.3 ELECTRONIC J. COMP. L. (2004), <http://www.ejcl.org/83/art83-2.html> (“The doctrine . . . encompasses the general principle that no one should exercise what is otherwise a legitimate right in a way

not so: it is not an exercise in balancing harm against social utility.<sup>33</sup> Rather, a principle of abuse of property right sets out an *internal* restriction on an owner's jurisdiction. This is why acting for the wrong reasons still matters in cases where we might otherwise "justify" harm in terms of the value of the ulterior purposes that it advances, as we will see in the discussion of cases to follow.<sup>34</sup> The jurisdictional nature of abuse of property right will become even clearer when we examine how it works in the context of *noncorrelative* rights, cases where no one else's property right is implicated but, rather, the owner is making decisions about what goes on within the boundaries of her own property or even guarding against boundary crossings by others. The jurisdictional problems created by an abuse of right exist where an owner is merely withholding a benefit from a free rider or even putting an end to another's tort.

In the discussion that follows, I draw on spite and leverage cases that include noncorrelative rights precisely because it is in this context—where we are dealing primarily with the law of trespass rather than the law of nuisance—where many property lawyers least expect to find evidence of a principle of abuse of property right. As we will see, more and more courts are deciding cases in a way that is consistent with a principle of abuse of property right where the exercise of reciprocal rights is *not* at issue.

#### A. *Animus*

In animus cases, the injury against which an owner seeks protection or the agenda that she pursues is entirely contrived: her purpose in exercising or enforcing her right is to cause harm as an end in itself. A clear example of a spite case is *Brownstone Condominium Ass'n v. Geller*.<sup>35</sup> Geller, the owner of a

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which is solely motivated by the desire to cause annoyance to his or her neighbour.”).

33. The prima facie tort doctrine is not usually applied to the exercise of property rights in any case. *See supra* note 22.
34. This jurisdictional approach avoids the paradox often associated with the idea of abuse of right. On the debate over whether rights can be abused, see, for example, Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981). *See also* *Hornsby v. Smith*, 13 S.E.2d at 23 (“No court could correctly hold that the law would prevent an individual from doing the identical thing that the law authorizes him to do.”); 2 MARCEL PLANIOL & GEORGE RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 298 (10th ed. 1926) (suggesting that a right leaves off where abuse begins: either the act is in excess of the right or it is legitimate—it cannot be legitimate and yet abused).
35. 415 N.E.2d 20 (Ill. App. Ct. 1980); *see also* *Pickering v. Rudd*, (1815) 171 Eng. Rep. 70 (K.B.) (Eng.) (refusing to treat a permanent encroachment of a nail and board into the airspace above the plaintiff's garden as trespass, in the absence of any interference with the plaintiff's ordinary use).

single-family home next to a condominium development, had sued to enjoin the developer from erecting scaffolding overhanging his property. He lost. A few months later, the developer retaliated by suing to force Geller to remove nine five-inch bolts that many years earlier Geller had driven into the rear wall of the developer's building in the course of screening in a part of his backyard. Seen in one way, the important aspect of the case is the *de minimis* quality of the trespass. While no doubt an important fact, if only as evidence of the petty or spiteful nature of the suit, the court properly emphasized the fact that this case was brought in retaliation for Geller's earlier suit and so was clearly what the court called a "spite case."<sup>36</sup> Seen in this way, what is important is that the injury was entirely "contrived."<sup>37</sup> It is the aspect of sham that makes this an abuse-of-right case—the protection of an owner's right to exclude as a pretext, where the real purpose was just to cause harm.<sup>38</sup>

In *Jaggard v. Sawyer*,<sup>39</sup> an owner attempted to use a right of exclusion to punish a neighbor for circumventing restrictions on development. The case involved two homeowners on a cul-de-sac bound by reciprocal covenants restricting development. Each homeowner on this cul-de-sac also owned a stretch of the road in front of his house up to the midpoint of the road. One owner tried to get around the restrictive covenant by building house number 5A on land *outside* the cul-de-sac backing onto his house on the cul-de-sac (house number 5)—over the objections of the plaintiff and other neighbors. His plan was to pave a part of No. 5's land as a driveway so that No. 5A could have access to the private road in the cul-de-sac and thence to the public road. His neighbor believed that he had behaved improperly and greedily in sidestepping the restriction on development and retaliated by suing to enjoin the use of her stretch of the shared private road for the purposes of accessing No. 5A.<sup>40</sup> The injunction would have had the effect of forcing the owners of

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36. *Geller*, 415 N.E.2d at 22.

37. *Id.*

38. A whole genre of spite cases involve the spite fence. See, e.g., *Woolley v. Baier*, No. 224168, 2002 WL 265902, at \*2 (Mich. Ct. App. Feb. 19, 2002) (explaining that the "purported benefit or advantage to themselves" does not immunize defendants from an injunction where the motive is spite); see also *Flaherty v. Moran*, 45 N.W. 381 (Mich. 1890) (holding that a spite fence erected purely for malice is a nuisance); *Burke v. Smith*, 37 N.W. 838 (Mich. 1888) (same). In many jurisdictions there is regulation limiting the erection of spite fences. See, e.g., CAL. CIV. CODE § 841.4 (West 2012); IND. CODE ANN. § 32-26-10-1 (2012); MINN. STAT. ANN. § 561.02 (2011); N.Y. REAL PROP. ACTS. LAW § 843 (McKinney 2012); 53 PA. CONS. STAT. § 15171 (2012). See generally *Wilson v. Handley*, 119 Cal. Rptr. 2d 263, 267-68 (Ct. App. 2002) (briefly discussing the history of spite-fence laws).

39. [1994] 1 W.L.R. 269 (C.A.) (Eng.).

40. The judge of first instance stated, in denying the injunction: "I find that the reason which weighs with Mrs. Jaggard is that Mr. Sawyer should not be permitted to behave as she

No. 5A to detour slightly around the bit of road owned by the miffed neighbor each time they wished to access their driveway, resulting in considerable inconvenience and the likelihood of future conflict. As the court of first instance recognized, the plaintiff's reason for seeking the injunction was in essence to punish the defendant, Sawyer, for what she thought was a circumvention of the restrictions on building in the cul-de-sac. Indeed, as the court noted, an injunction once the house was a *fait accompli* would have delivered the plaintiff to the defendant "bound hand and foot."<sup>41</sup> The court instead offered a remedy tailored to vindicate the plaintiff's right of way without allowing the plaintiff to use her right as a tool to punish the defendant. Damages representing a reasonable price for the use of the private road were far less than the "ransom price" that a neighbor in the plaintiff's position might wish to demand.<sup>42</sup>

Abuse of property right is fairly straightforward when the owner's motive is spite or harm as an end in itself. By far the most controversial type of case—and yet the one that best reveals that abuse of right is a question of jurisdiction (rather than a question of virtue, utility, or even social responsibility)—is the leverage case, where the harm that an owner uses her position to achieve is itself a means of accomplishing some other purpose.

### *B. Leverage*

On my account, the problem in illegitimate-leverage cases, as in spite cases, is one of jurisdiction. In such cases, the owner exercises his ownership authority just to cause harm that will exert pressure on another to accept his demands or go along with his plans. A good example of this is the behavior of Walentas, the Brooklyn developer who built a sculpture next to his rival's lot just because of the harm it would cause—harm that would serve as leverage in his bid to acquire another parcel of land. Where an owner's design is to cause harm, rather than to set an agenda that is directly of value to him, the owner

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thinks that he has," rather than any reason to do with the defendant's use of the laneway. *Id.* at 275; accord RESTATEMENT (SECOND) OF TORTS § 941 cmts. a, c (1979) (noting that courts will consider the parties' motives and the potential for extortion in deciding whether to grant an injunction).

41. [1994] 1 W.L.R. at 288. An interlocutory injunction, sought before the house was built, would not have had the same punitive effect. Had the plaintiff sought such an injunction earlier, she might have prevailed.
42. *Id.* at 282-83. The court noted that, while it could not grant the defendant an easement over the private road, its award of damages calculated to match the costs of such a right of way would rule out future actions for continuing trespass. A plaintiff "could not complain of that for which he had already been compensated." *Id.* at 280-81.

abuses his right. His reason for exercising his authority—i.e., the harm that will result—is neither an adequate nor an appropriate ground for determining a worthwhile agenda for a thing.

The challenge is to distinguish between legitimate and illegitimate leverage. While owners do not *directly* value the agendas they are pursuing in abuse-of-right cases, it would be wrong to conclude that owners abuse their right in all cases where the value to them of an agenda is *indirect*, a function only of its value to others. Speculators and ordinary dealmakers, for instance, make decisions as owners that are entirely based on the actual or expected value of that decision to someone else. What distinguishes legitimate leverage from an abuse of right, I argue, is that an owner's decision takes the form of an answer to the question of what is a worthwhile agenda for an object, whether the owner applies her own judgment or substitutes the judgment of another in answering the Basic Question. When owners substitute the judgments of others for their own views about how best to use a thing, they are acting legitimately as a clearinghouse for ideas about worthwhile uses of things.

### 1. *Legitimate Leverage*

Ownership is generally seen as conferring a bargaining chip. It has been said that the law “puts [owners] in a position to secure payment by waiving their rights.”<sup>43</sup> And so it does. An owner is in a position to sell an easement, a license to use or to access her property, or a promise to forbear from an undesirable activity. She can make the purchase of a privilege or right more attractive *by any means she legitimately has*. Where a legitimate use of ownership authority brings someone else to the bargaining table, so much the better for the owner.

The real question then is: What are the means that ownership confers? What is an owner authorized to do in order to bring someone else to the bargaining table? Take the example once again of *Mayor of Bradford v. Pickles*.

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43. PETER CANE, *THE ANATOMY OF TORT LAW* 141-42 (1997). While Cane describes an owner's leverage in terms of her ability to waive her rights, others have put it in terms of the ability to veto a transaction. See Lee Anne Fennell, Response, *Order with Outlaws?*, 156 U. PA. L. REV. PENNUMBRA 269, 273 (2007), <http://www.pennumbra.com/responses/12-2007/Fennell.pdf> (“The ability to veto a transaction altogether—whether it means keeping someone from crossing one's property line or preventing a neighbor from forcibly purchasing one's home—is central to our notion of property.”); see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (“An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”).



In that case, Lord Macnaghten said:

[Pickles] has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good.<sup>44</sup>

There is an important kernel of truth in this reasoning, but we can accept Lord Macnaghten's premises—that property rights may be exercised for self-regarding reasons, that an owner may bargain with another to waive her rights, and that an owner need not keep her land in a state most conducive to the public good—without accepting his conclusion that Pickles had acted within his rights in diverting the water to force the town to pay him to stop. Of course, owners are sometimes entitled to profit from the value their property holds for another. But the leverage that owners have is a function of their legitimate use of ownership authority—that is, their power to resolve subjectively the question of what would be a worthwhile agenda for a resource. Pickles *was* authorized to make self-serving decisions, including the decision to open a mine, even where harm to others was foreseeable, without abusing his right. He would have been within his rights to sell an easement guaranteeing the flow of water to the town even though the value to him of enabling the flow of water to the town is purely a function of how much the town values it. Pickles would only have been acting *ultra vires* (on my analysis) in using his ownership authority merely to cause the harm that would pressure the town to bargain with him.

A very important piece of the puzzle in distinguishing between legitimate and illegitimate leverage is the ability of owners to substitute the judgment of others for their own. Owners routinely agree to do or not to do something that *someone else* finds valuable but which they personally do not. Speculators, like altruists, reason in terms of the value that *others* place on property. For example, a developer might build homes just because others might value this development and pay a handsome premium to buy in. The same is true in one-off deals where owners agree to do or not do something for pay, e.g., to license certain uses, to grant covenants or easements, to lease land, etc. For example, a farmer might bind his land with a conservation easement without believing this to be a worthwhile use of the property because conservationists offer him a lot of money for doing so.

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44. [1895] A.C. 587 (H.L.) 600-01 (appeal taken from Eng.).

While there may well be good grounds for limiting the ability of owners to speculate (or, for that matter, to patronize others),<sup>45</sup> it is indisputably within the power of a speculator, dealmaker, or altruist to substitute the judgment of others for her own judgment about what constitutes a worthwhile use of her property. What needs explaining, then, is why it is sometimes problematic and an abuse of right if the value of an agenda is a function of its (negative) value to someone else, and yet in other contexts not at all problematic that an agenda lacks any direct value for the owner.

This ability to substitute judgment is an important feature of ownership authority. It would be an abuse of power in many cases for public officials to substitute the judgment of someone else for their own where they do not at the same time believe that decision to be reasonable.<sup>46</sup> For example, while a judge might well be persuaded by the reasons of another and adopt them as her own, it would be improper for her to substitute someone else's judgment for her own, where it is not in her view the right one. And yet, not only do owners routinely commit themselves to acting on the basis of others' reasons, but we can also justify this feature of ownership authority in terms of the nature of ownership and its institutional role. Ownership, unlike other positions of authority, does not rely on the special expertise or unique suitability of a particular holder of a right to make decisions affecting a thing. A thing is properly the object of property when anyone is as well suited as anyone else, in the eyes of the law, to be the owner of that particular thing.<sup>47</sup> While as a matter of fact a particular owner may be better or worse suited to managing that kind of object, this is not something to which the law generally attends. If people do tend to own the things they have an interest in and feel competent to manage, that is merely a fortuitous and entirely contingent fact. What this tells us is that

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45. See, e.g., Shaheen Borna & James Lowry, *Gambling and Speculation*, 6 J. BUS. ETHICS 219, 222 (1987) (arguing that "speculative actions can lead to price destabilization with a negative influence on economic stability"); *id.* at 223 (likening speculation to gambling, and surveying authors who maintain that gambling is immoral). But see Richard T. Ely, *Land Speculation*, 2 J. FARM ECON. 121 (1920) (providing a limited defense of speculation to promote orderly growth and development). For discussion of the deadweight loss of gift giving, see Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328 (1993), estimating that holiday gift giving leads to a deadweight loss that is as large as one-tenth that of income taxation.

46. Delegation is another matter altogether. Thus, states or provinces delegate decisionmaking authority to municipalities, with the result that municipalities come up with answers that the state legislature might disapprove of. And owners of course may delegate some decisions to lessees, bailees, etc. My concern here is substitution of judgment, not the delegation of authority.

47. However, this has not always been the case, and indeed many societies have held certain kinds of people to be unworthy of occupying the office of owner, e.g., women, noncitizens, etc.

there is nothing inherently special (from the law's perspective) about an owner's opinion about worthwhile uses of things that might act as a bar to substituting the judgment of others. (By contrast, when we appoint particular people to be judges and assign them to hear cases, it is because we want *them* to provide the answers.)

What is more, there are important institutional reasons for enabling owners to make substitutions—reasons that do not obtain in the context of public officials. This concerns the importance of enabling the office of ownership to serve as a clearinghouse for ideas about the use of things. The hierarchical nature of ownership, which enables owners to *disregard* the interests and opinions of others in setting the agenda for an object, may seem to belie this function. But if we look more closely at why ownership is hierarchical, we can more readily see how it is consistent with the underlying aims of ownership to enable owners to substitute the judgment of others for their own. The hierarchical structure of private property rights enables things to be used without conflict. The owner has supreme agenda-setting authority, and a system of property is designed to ensure that others fall in line with owners' decisions about their things. By establishing a supreme decisionmaker for each object of property, a system of ownership coordinates our activities with respect to objects of property and so ensures that things can be used cooperatively or separately without conflict. The reason why a system of private property subordinates the interests and opinions of others to the owner's is not because the latter's necessarily have greater merit, morally speaking. Rather, private ownership releases owners to act on their own interests and opinions because this is a good way to ensure that things are used without conflict in the face of divergent views about their best use.<sup>48</sup> But what this tells us is that, after having cabined the normative force of the opinions of others and their potentially chaotic effect, the law is then (understandably) very eager to enable owners privately to accommodate the opinions and interests of others. And so the law endorses the use of the office of ownership as a clearinghouse for ideas: while only one person can have the final word on the matter, it is and should be possible that owners consider and act on the opinions and interests of others.

My point so far is that there is an important difference between an owner's decision that substitutes another's judgment for her own and an abuse of property right. Ownership inherently is a bargaining chip insofar as owners are able to make decisions that affect the interests of others and at the same time

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48. *Cf. infra* Section II.C (explaining why we do not have a more restrictive principle of abuse of right that requires us actually to track the interests of others rather than simply to do what we genuinely think is worthwhile).

are able to substitute others' judgments about how best to use a resource in place of their own. Both in cases where owners act on their own judgment and in cases where they substitute the judgment of others for their own, the decision reflects *someone's* view of what constitutes a worthwhile use of an object of property and so is responsive to the question owners are charged with answering.

2. *Illegitimate Leverage*

In illegitimate-leverage cases, an owner's decision to use or to enforce her property rights is based solely on the harm to others, and so the leverage, that will result. Owners have attempted to use ownership authority to resolve any number of issues: to put an end to another's tort, to extract a gratuitous benefit from a neighbor, to bring a reluctant partner to the bargaining table, to force a free rider to contribute to a common good. But in all these cases, owners fail to apply their authority to resolving the Basic Question: what in their view would be a worthwhile use of the object. In what follows, I consider a range of illegitimate-leverage cases, in which owners use their position just to produce the harm that will bring others to heel.

*Hollywood Silver Fox Farm v. Emmett*<sup>49</sup> is a classic leverage case. The defendant, Emmett, asked the owner of a fox farm to move a sign advertising his business out of view. Emmett's concern was that the sign would make his property less attractive to prospective buyers of lots in the subdivision he was developing. When the fox-farm owner refused to move the sign, Emmett threatened to shoot guns off near the boundary between their properties in order to disturb the foxes during breeding season. Emmett made good on his threat, on the pretext that he was controlling the rabbit population. On the last night of shooting, Emmett responded to his neighbor's protests by once again asking if he would remove his sign.<sup>50</sup> The fox farmer sued to enjoin. *Hollywood Silver Fox Farm* is best understood as a case of abuse of right, in which the owner uses his position to cause harm as a means of forcing his victim to accept his terms. Emmett's purpose throughout seems to have been to put pressure on his neighbor to remove the sign. The fox-farm owner won in this case. The court held that motive matters, at least in cases of nuisance by noise. Without offering any real explanation for why noise cases are special, the court summarily carved out a rather large exception to *Bradford v. Pickles* in English law.

The use of ownership as leverage is not just problematic in cases where the defendant seeks to gain a benefit to which he knows he has no right, as in

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49. [1936] 2 K.B. 468 (Eng.).

50. *Id.* at 470.

*Hollywood Silver Fox Farm*. An owner exceeds her jurisdiction whenever her reasons for acting do not concern what she thinks is a worthwhile use of her property. *Christie v. Davey* illustrates this broader jurisdictional point.<sup>51</sup> In *Christie*, the defendant's aim was to put an end to what he thought was a nuisance. The Christies were musicians who taught and practiced in their row house early in the morning and late into the night. The noise disturbed their neighbor, Davey, who required quiet for his work as a wood engraver. In order to force the Christies to give up their musical activities, he took up makeshift instruments and made a racket whenever the Christies were practicing or giving lessons. When the Christies complained, Davey responded that "I have a perfect right to amuse myself on any musical instrument I may choose . . . . [W]hat is sauce for the goose is sauce for the gander."<sup>52</sup> In an action for nuisance brought by the Christies, the court found that, while the same level of noise would not have been a nuisance if it were made innocently, it was a nuisance when done just in order to harm the Christies.

An attempt to bring an end to another's tort by responding in kind is an improper use of ownership authority because it is a decision about use for the wrong reasons. Thus, in *Christie*, although the defendant purported to be choosing a worthwhile use of his property, in fact he was not. The question he put to himself was not how best to use his property, but rather how most effectively to force the plaintiffs to cease their musical enterprises. There are, of course, good policy reasons to preclude an owner's use of her agenda-setting authority as a tool to correct private wrongs. One possible explanation for cases like this is that the use of reciprocal powers as leverage may not be sufficiently narrowly tailored to achieve a corrective justice effect. In *Christie*, for instance, the defendant seems to have used excessive pressure in causing a ruckus whenever the plaintiffs played any music and so was in fact demanding more quiet than he was entitled to.<sup>53</sup> But as the next case will show, it is not just that owners are likely to make mistakes about the rights that they seek to enforce—indeed, there are other avenues of self-help just as likely to be overzealously pursued.<sup>54</sup> Rather, it is the attempt to exercise ownership

51. [1893] 1 Ch. 316 (Eng.).

52. *Id.* at 319-20.

53. For example, the court found that the noise the Christies inflicted on Davey during the day was perfectly reasonable, notwithstanding its effects on Davey's work. *See id.* at 327-28. The defendant in this case, like the plaintiff in *Rogers v. Elliott*, 15 N.E. 768 (Mass. 1888), had a particular sensitivity to noise that was not taken into account when determining what his neighbor could reasonably inflict.

54. *See Smith, supra* note 7, at 1785-90 (summarizing the literature on the inefficiency of other means of self-help); Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69 (2005).

authority to resolve the wrong question—how best to correct a neighbor’s behavior rather than what agenda to set for the land in light of one’s own opinions about its worthwhile uses—that explains what is most problematic about Davey’s behavior.

In a similar case, *Ibottson v. Peat*,<sup>55</sup> the defendant also intended his actions to be a form of self-help. Here the court (in dicta) ruled out the use of ownership power as an instrument of self-help regardless of whether the owner had been wronged. The plaintiff in this case, Ibottson, had been luring grouse off the neighboring duke’s property by putting corn on his own land, with full knowledge that the duke had gone to great expense to attract the grouse in the first place. The duke’s servant, Peat, retaliated by setting off fireworks near the boundary line in order to prevent the plaintiff from shooting the grouse. Ibottson brought an action for nuisance, arguing that the fireworks were set off just to cause him harm, a purpose that Peat himself acknowledged in his own plea. Peat made clear in his plea that he only intended—in causing harm to the plaintiff by setting off the fireworks—to redress a wrong done to *him*.<sup>56</sup> The court found against Peat, with two of the justices emphasizing that it is never justified to meet wrong with wrong (drawing an analogy to someone who libels a horsewhipper or horsewhips a libeler).<sup>57</sup> What is telling in this case is that Peat’s reasons for shooting off fireworks mattered in the classification of his actions as a wrong in the first place. It is *because* the defendant’s decision was meant to cause harm, in order to force the plaintiff to conform to the defendant’s view of his rights, that the acts met wrong with wrong and constituted a nuisance.<sup>58</sup> It only makes sense to treat Peat in the same category as the man who horsewhips the libeler if we acknowledge first that it is an abuse of right to exercise ownership authority for reasons other than the task with which owners are charged. The status of horsewhipping as a legal wrong does not depend on whether its purpose is vigilante-style punishment. But the use of ownership powers to punish in the *Christie* and *Ibottson* cases is the very basis for treating the owners as having done wrong (and so as illicitly meeting wrong with wrong).<sup>59</sup> It is an abuse of office to use the position merely to force

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55. *Ibottson v. Peat*, (1865) 159 Eng. Rep. 684 (Ex.).

56. *Id.* at 686.

57. *Id.*

58. *Id.* (“[T]he defendant, by his plea, says, ‘You have done me some wrong and I have been endeavoring to redress that wrong by doing some wrong to you.’ As a general proposition it may be laid down, that cannot be done.”).

59. The court disagreed with Peat (and his employer, the duke) that the plaintiff had committed a wrong in luring the grouse. In so finding, the court distinguished *Keeble v. Hickeringill*, (1707) 88 Eng. Rep. 1127 (Q.B.): the plaintiff in *Ibottson* was not acting out of spite but genuinely in order to attract and hunt the grouse himself. In so doing he committed no

others to conform to one's idea of what justice requires. Cases like *Ibottson* illustrate the point that the exercise of ownership authority for the wrong reasons—to exert pressure on a neighbor rather than to make what the owner thinks is a worthwhile use of the property—is an abuse of property right.

A principle of abuse of right also provides a compelling rationale for crane cases, a familiar scenario for extortionary uses of ownership power.<sup>60</sup> Tower cranes, even if located on their operator's property, frequently sail over the property of neighboring landowners. This is simply because of the amount of clearance space required for a crane. In many urban construction sites, it is impracticable to design a building, and so to set the location of the crane, in such a way that the swing radius is entirely over the developer's property. When at rest, the horizontal member (the boom or jib) must be let to swing with the wind, or risk the crane's toppling over. As a result, it is not always possible to control whether the boom passes over the neighbor's property. And in moving material around, the crane operator may have no choice but to swing the boom over the adjoining property. This situation sets up a classic holdout problem if courts are willing to award an injunction for trespass into airspace.

*Lewvest, Ltd. v. Scotia Towers, Ltd.*<sup>61</sup> illustrates the kind of economic leverage owners have when they are not constrained by a principle of abuse of property right.<sup>62</sup> The defendant, by allowing the boom of its crane to pass over the plaintiff's property, stood to save approximately \$500,000 in construction costs. The plaintiff sued for an injunction to prevent the oversailing on the grounds that it was a trespass. The plaintiff's reason for seeking the injunction appears to have been to pressure the defendant to settle for a smaller building that would not require a crane with so large a swing radius (although an additional motive was likely the ransom price it could collect following an

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wrong.

60. There are, amazingly, no American cases, at least none that I was able to find, that deal with the special problems of nuisance or trespass posed by overhanging cranes. The nearest thing appears to be scaffolding cases. See, e.g., *Slotoroff v. Nassau Assocs.*, 428 A.2d 956 (N.J. Super. Ct. Ch. Div. 1980) (refusing to grant an injunction where the scaffolding over the plaintiff's property was (1) temporary and (2) not interfering with a present use).
61. *Lewvest, Ltd. v. Scotia Towers, Ltd.* (1981), 126 D.L.R. 3d 239 (Can. Nfld. S.C. (Trial Div.)).
62. The famous American cave cases, *Edwards v. Sims*, 24 S.W.2d 619 (Ky. 1929), and *Edwards v. Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936), illustrate a similar power to extort but just with respect to subsurface rights. In these cases, Lee sought to enjoin Edwards from bringing tours through the portion of the cave that (he thought) lay beneath the surface of his land. Although Lee's reason for seeking the injunction was clearly just to put pressure on Edwards to share the profits from operating the tours, Lee won on the grounds that even a harmless trespass is a trespass.

injunction).<sup>63</sup> The judge ruled that the defendant had trespassed and awarded an injunction. He opined that “property rights are sacrosanct” and “if a third party can gain economic advantage by using the property of another, then it must negotiate with that other to acquire user rights. The Court cannot give it to him.”<sup>64</sup> As to the plaintiff’s purpose, the judge simply insisted (but cited no authority for the proposition) that an owner’s reasons do not matter.<sup>65</sup>

*Woollerton & Wilson, Ltd. v. Richard Costain, Ltd.*, perhaps the most famous crane case, not only recognizes the problem of extortion but suggests a conservative but effective way that a principle of abuse of right might be applied in this context.<sup>66</sup> The defendant company was in charge of construction of a post office next to the plaintiff’s factory and warehouse. The plaintiff in that case was annoyed by the increased congestion in the streets and wanted to halt the construction.<sup>67</sup> A crane used in the construction swung over the plaintiff’s warehouse, clearing it by fifty feet, and was sometimes blown over the plaintiff’s property by the wind when not in use. At no time did the crane carry loads over the plaintiff’s property, and the plaintiff made no claim that it was in any way inconvenienced or put at risk by the crane’s passage over its building.<sup>68</sup> Nevertheless, the plaintiff demanded that the defendant company stop and rejected the defendant’s substantial offer to pay it for the privilege to continue. When the defendant continued with construction, the plaintiff sued. The defendant conceded trespass and so the court was left only to determine the appropriate remedy.

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63. *Lewvest*, 126 D.L.R. 3d at 241.

64. *Id.*

65. *Id.* (“[A] a person is entitled to protect his property rights even though his motives in doing so may have other goals.”).

66. [1970] 1 W.L.R. 411 (Eng.); see also *Messina v. Arena Devs., Ltd.*, [1985] B.C.W.L.D. 3851 (Can. B.C. Sup. Ct.) (awarding exemplary damages because the plaintiff had a right to refuse access to their property, but limiting the amount to avoid rewarding the plaintiff’s unreasonable attempts at leverage); *Kingsbridge Dev., Inc. v. Hanson Needler Corp.* (1990), 71 O.R. 2d 636 (Can. Ont. H.C.J.) (denying an injunction because the defendant’s use of the plaintiff’s airspace was a nuisance, rather than a trespass, and damages were an adequate remedy). Note that not all crane cases involve the use of air rights just to gain leverage. See, e.g., *Anchor Brewhouse Devs., Ltd. v. Berkeley House (Docklands) Devs., Ltd.*, (1987) 2 E.G.L.R. 173 (Ch. Div.) (U.K.) (granting an injunction to prohibit the defendant’s trespass). The overhanging crane in that case interfered with the plaintiff’s actual agenda—its plans to redevelop its land. See *id.* at 177.

67. The court also said that the construction project caused congestion in the street, which annoyed the owner of the factory. *Woollerton*, [1970] 1 W.L.R. at 412-13.

68. *Id.* at 413; cf. *Kelsen v. Imperial Tobacco Co.*, [1957] 2 Q.B. 334, 343-47 (Eng.) (finding trespass where the plaintiff could have rented the airspace out to someone else had the defendant not been trespassing).



It was quite clear in the *Woollerton* case that the plaintiff was seeking an injunction in order to hold the developer up for ransom: the impetus for the injunction was not actually the interference with the plaintiff's airspace but rather the leverage the plaintiff would gain over the defendant if an injunction were awarded.<sup>69</sup> If the developer had been enjoined from swinging the crane over the plaintiff's property, construction would have come to a halt, and the developer would have had to redesign the building at great expense. The remedy the court ultimately devised reflected its reluctance to allow the plaintiff to hold the developer up for ransom: the court held that an injunction was the appropriate remedy for trespass but then nullified its effect by suspending its operation for a year until after the construction was finished.<sup>70</sup>

The problem in crane cases (and in other extortion cases) is not the evil of markets. The law may tolerate the leverage that owners have just by virtue of the independently formed preferences of others, e.g., when a speculator buys and subdivides land, anticipating demand and profits from it. Although we may have good moral or economic reasons to control prices or to limit speculators' access to the land market,<sup>71</sup> the speculator does not abuse her right when she sells the land for a profit (so long as she does not also use her position in order to cause harm that generates demand). The idea of ownership is consistent with the freedom to enjoy the bargaining position that another's preferences independently produce. The problem with extortionary uses of ownership is a jurisdictional problem: owners lack the jurisdiction to exercise their authority just for the reason that it will cause harm to another.

### C. *Mixed Motives*

What are we to make of cases where an owner has mixed motives?<sup>72</sup> A

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69. *Woollerton*, [1970] 1 W.L.R. at 416 (noting that the defendant "got [itself] into the position of being . . . held up to ransom").

70. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 941 cmt. c (1979) (discussing reasons to deny an injunction, including that it "might make the court a party to extortion"); see also *Kratze v. Indep. Order of Oddfellows, Garden City Lodge No. 11*, 500 N.W.2d 115, 120 (Mich. 1993) (discussing two considerations in awarding an injunction for encroachment: "[a]n interest in avoiding judicial approval of private eminent domain by the encroacher, and an interest in preventing extortion by the encroachee, who may use the injunction to 'compromise' the claim"); *Didow v. Alberta Power, Ltd.* (1987), 45 Alta. L.R. 2d 116 (Can. Alta. Q.B.); *Kingsbridge*, [1990] 72 O.R. 2d at 159.

71. *But see Ely*, *supra* note 45 (arguing that speculators provide some value when they hold property for a future more valuable use).

72. See, e.g., *Kuzniak v. Kozminksi*, 65 N.W. 275, 276 (Mich. 1895) (holding that a building erected "for a useful purpose" was not a nuisance, despite "some malice displayed in putting it so near the complainant's house"); see also *Beardsley v. Kilmer* 140 N.E. 203, 205 (N.Y.

principle of abuse of right clearly rules out uses of ownership authority *just* in order to cause harm. In such cases, the owner's decision is based only on reasons that are clearly inadequate or inappropriate for resolving the kind of question that she has the authority to resolve, and her decision is properly treated as an abuse of right. But is it an abuse of right when an owner has mixed motives—when she is motivated to act by several reasons, only one of which is concerned with the harm that will result to others from her conduct?<sup>73</sup>

In many instances, mixed-motive cases may be resolved simply on the basis of the distinction between reasons for a decision and side effects. The *reasons* for a decision affect the quality or character of a decision; side effects, however much appreciated, do not. John Finnis makes this point in his example of a soldier whose reason for signing up for service is that he has been drafted but who welcomes the “bonus side-effect[.]” of seeing the world.<sup>74</sup> Even if a “bonus side-effect” is certain to occur, it may still not be an outcome that the person set out to achieve. As Finnis explains, where a person tries to bring about an outcome and acts so as to reduce the risk of its nonoccurrence, then that result is more than merely a desired side effect.<sup>75</sup>

The distinction between reasons and side effects might be able to account for cases like *Greenleaf v. Francis*.<sup>76</sup> In that case, the defendant dug as close to the plaintiff's well as he could on his side of the property line, with the result that he diverted groundwater from the plaintiff. The court found that the trial judge had drawn the appropriate distinction between reasons and side effects in its instructions to the jury:

[T]hat if he dug the well where he did, for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable in this action; but that if he thus dug his well, for the purpose of accommodating himself with water, he was not liable for so doing, *even if he at the same time entertained hostility towards the plaintiff*

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1923) (“[W]hen . . . there were also legitimate purposes the rule seems to be perfectly well established that there is no liability.”).

73. See Peter Cane, *Mens Rea in Tort Law*, 20 O.J.L.S. 533, 539 (2000) (“[T]ort law uses the concept of ‘predominant motive’ to measure, in a vague way, the relative strengths of mixed motives.”). For treatment of an analogous problem, see John Gardner, *Justification Under Authority*, 23 CAN. J.L. & JURISPRUDENCE 71 (2010), which discusses mixed motives for consented-to action.

74. Finnis, *supra* note 22, at 236.

75. *Id.* at 237.

76. 35 Mass. (18 Pick.) 117 (1836).

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*and a desire to injure her, and these feelings were thereby gratified.*<sup>77</sup>

But the *Greenleaf* case also illustrates a particularly difficult aspect of regulating reasons for decisions about things.<sup>78</sup> The court does not merely distinguish between reasons and foreseen side effects; it entertains the possibility that one might not be acting abusively even if causing harm to one's neighbor was among one's reasons for action.<sup>79</sup> Here, the case seems to turn on a rather different distinction, between the choice to act at all and the choice of how to undertake the chosen action. So long as the owner was motivated to dig a well at all for legitimate reasons, the court seems to be saying, it does not matter if he was motivated to put it in a particular location by reasons of animus to his neighbor. This second set of reasons is merely adverbial, determining how the legitimate action will be undertaken, and therefore do not render the act as a whole abusive. Had the decision to drill a well at all been made simply to harm the neighbor, however, the court suggests that this would have been treated as an abuse of property right.

This approach is even more explicit in *Kuzniak v. Kozminski*,<sup>80</sup> in which the defendant erected a coal shed for his tenants very close to the plaintiff's property. The court found that the shed was for "a useful purpose; and, while there may have been some malice displayed in putting it so near the complainant's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in the complainant to have the building removed."<sup>81</sup>

Could cases of mixed motives, where animus is among the owner's reasons, have been treated otherwise in property law? It is perfectly consistent with the idea of ownership to insist that owners, like public officials, act only for permitted reasons. For example, we uncontroversially consider it an abuse of public authority if a judge's reasons for sentencing include the kickbacks that she will receive even if her decision is also motivated by legitimate sentencing concerns. There is variability in the way that legal systems might implement a principle of abuse of property right. And yet any legal system that regulates owners to the extent that it regulates public officials invites a massive burden

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77. *Id.* at 119 (emphasis added).

78. Thanks to Henry Smith for pressing me to discuss this issue further.

79. This is similar to the French approach in which a right is not abused where the dominant purpose is a legitimate one. See 1 HENRI MAZEAUD, LÉON MAZEAUD & ANDRÉ TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE 635 (5th ed. 1957).

80. 65 N.W. 275 (Mich. 1895).

81. *Id.* at 276.

on the courts.<sup>82</sup> There are many more owners than there are judges, and there are obvious costs associated with overseeing the decisions owners make (increased caseload, a heavy evidentiary burden in uncovering motives,<sup>83</sup> the social tension that may result when neighbors have an incentive to investigate each other's motives, etc.). There are thus good pragmatic reasons for limiting a principle of abuse of right to situations where the owner not only has acted out of animus, but also has no other legitimate purpose in making the decision about the thing.

One final clarification is in order. It does not count as mixed motives for a person to set out to make a decision about a thing designed just to cause harm, where the harm that results might itself serve some further valuable end. All leverage cases involve reasoning through the harm that the owner aims to produce through her ownership decisions, to some other valuable outcome that the harm, through its coercive effect on others, will advance. The point here is that, if the ownership decisions are themselves made just in order to generate harm, an owner exceeds her jurisdiction, even if her goals in life more generally might be advanced by that kind of decisionmaking about things (i.e., the kind that is designed just for the harm that is produced.).

It is important to see why these further and valuable goals can never redeem otherwise abusive conduct by an owner (and indeed we need to reach back into the political foundations of ownership, as I do in the next Part, to grasp fully the basis for this distinction). The claim I will defend is that the office of ownership is one strategy whereby we confer enough jurisdiction on owners to resolve the Basic Question—what in their view is a worthwhile use of the thing—on behalf of us all.<sup>84</sup> An owner's decision about the thing has a positive valence just insofar as it is what she thinks is a worthwhile use of the thing and is not taken just in order to cause harm to someone else. Where an owner makes decisions about things that are not strictly answers to the Basic Question (but are meant to serve solely to generate leverage over others or to

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82. See, e.g., H.C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 25-27 (1933) (discussing the evidentiary problems inherent in interrogating litigants' motives, on either subjective or objective standards).

83. Abuse of property right often comes to light because of public declarations by owners or a public course of dealing, as in the *Geller* case, that unambiguously points to a direct intent to harm. See *Brownstone Condo. Ass'n v. Geller*, 415 N.E.2d 20, 21 (Ill. App. Ct. 1980).

84. I have previously begun developing this conceptual and functional account of the nature and structure of ownership as an office of agenda-setting authority. See Katz, *Exclusion*, *supra* note 16 (arguing that ownership takes the form of an exclusive office dedicated to the task of agenda setting); Katz, *Governing*, *supra* note 16 (showing how and why states commandeer the office of ownership for the purposes of government). This Essay discusses the political foundations of ownership from a normative perspective, offering a principle to explain abuse-of-right cases.

gratify spite), we are subjected to a much broader decisionmaking power than is required to solve the collective problem about coordination that ownership authority is meant to address. This leads me now to a more detailed explanation of the political foundations of ownership and the limits it implies on the reasons for which owners legitimately can act.

## II. THE POLITICAL FOUNDATIONS OF OWNERSHIP AND ITS LIMITS

It should now be clear that a principle of abuse of right provides a rationale for a range of judicial responses to ownership decisions that are taken just in order to harm someone else. What remains is to explain why the office of ownership should be limited at all, and also why we have the particular limiting principle that I have argued is at work in the law of property. Why is ownership concerned just with the task of resolving what I have called the Basic Question—that is, what in the owner’s view constitutes a worthwhile agenda for an object?<sup>85</sup> Put another way, when and why are owners not given *more* deference (so that we defer to owners’ agendas without inquiring into their reasons) or *less* deference (so that we require owners’ decisions in fact to track the interests of others)?

A principle of abuse of property right reflects the political foundations of the idea of ownership and what owners are legitimately charged to decide on behalf of everyone else. There are three steps in the argument. The first step shows how private decisionmaking about things raises a problem about standing, a problem that we solve through the office of ownership. In the second stage of the argument, I will show that the reason owners have standing is to perform a coordination function that all of us have reason to accept. We all benefit from this coordination *about the use of things*. But the worry about domination means that we must constrain that ownership authority to its narrowest scope consistent with discharging the coordination function. That is why reasons that go beyond the thing itself are *ultra vires*. In the third stage, I argue that a more robust limit on ownership, requiring that owners in fact track the interests of others, is undesirable, primarily for freedom-based reasons.

### A. A Problem About Standing

The claim I defend here is that a principle of abuse of property right is part of the law’s answer to a basic and intuitive moral problem. How is it ever my

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85. Recall here the possibility of substituting someone else’s judgment of what is worthwhile for one’s own. See *supra* Subsection I.B.1.

business to impose my decisions about resource use on others? This is a problem about standing: I have a moral duty to forbear from imposing my decisions on others because others have an interest in autonomy that I must respect. It is, I think, quite intuitive that we have an interest not just in coming up with the “right” answer about resource use (if there is such a thing) but also an interest in governing ourselves. Respect for the autonomy of others is a good reason to forbear from imposing even our expert opinions on them. Others may have reason to listen to me, but that does not give *me* reason to impose my views on *them* in case they do not. Indeed, this respect for others is necessary for social relations and ethical life to exist at all.

We can model this problem in an imagined state of nature.<sup>86</sup> In an imagined world in which no one has yet appropriated anything, we all stand in the same relation to things in the world. Things that are suited to productive use are aspects of our *shared* environment, and we each have an interest in making decisions about these collective resources for ourselves. In a state of nature, we are just so many independent moral opinionators: no matter how diligently we think through moral problems, and no matter how good our answers are, the human condition is inherently characterized by disagreement. Our solutions to our shared problems thus remain *private* ones that we have no standing to impose on others.

Thus conceived, this state of nature looks like a very different place than the one Locke described. Locke’s view was that everyone is at liberty to use things in the commons.<sup>87</sup> There is no obstacle then to appropriating things in a Lockean state of nature (provided that the use be productive, not wasteful, and that there be enough and as good for others). Thus, the starting point, for Locke, is one of universal *liberty* to appropriate things initially held in common. The classic alternative to the Lockean account is the view that the state of nature is a place where everyone has a *right*, in common with everyone else, to

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86. State-of-nature models are useful devices for understanding the difference that a state—or civil society—makes to the kinds of claims we can legitimately make vis-à-vis one another. Thus, a state-of-nature story illustrates not just the limits of the state’s authority but also the limits of what we can do *without* civil society. See, e.g., RIPSTEIN, *supra* note 18, at 87; cf. James Penner, *Ownership, Co-Ownership, and the Justification of Property Rights*, in *PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS* 166, 171 (Timothy Endicott et al. eds., 2006) (“The general point of state-of-nature models is to determine those rights which individuals bring with them when they enter civil society, rights which therefore cannot be stripped of individuals by the social contract . . . [without] their own fully-informed consent.”).

87. JOHN LOCKE, *The Second Treatise of Government* § 27, in *TWO TREATISES OF GOVERNMENT* 265, 288 (Peter Laslett ed., Cambridge Univ. Press 2008) (1690) (“For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.”).

use everything and thus a veto power that must be extinguished before anyone is justified in appropriating a resource.<sup>88</sup> My analysis of the commons does not begin with an assumption about universal rights of use, but rather insists that everyone has a duty to forbear from taking charge of things. The challenge I mount to the Lockean view of universal liberty comes from the problem about standing to impose one's own moral solutions, no matter how worthy, on others.<sup>89</sup> In a state of nature, we are all under a moral duty to forbear from acting unilaterally on the basis of any reasons in favor of taking charge of an object, whatever the merits of our views.

The famous case of *United States v. Holmes*<sup>90</sup> is a dramatic illustration of how standing is prior to expertise in justifying private decisions about collective resources—in that case, access to a lifeboat. A standing problem arises wherever one person, no matter how effective, fair, altruistic, or wise, unilaterally assumes control of common goods that start out open to all. The case of *Holmes* concerned a ship that struck ice and went down off the coast of Newfoundland. The captain, some of the crew, and one passenger escaped onto one small boat. The first mate got into the longboat with the remaining eight crewmen (one of whom was the defendant, Holmes) and thirty-two passengers. It was clear from the beginning that the longboat did not stand very good odds of carrying its passengers to safety: it was overfull and already leaking. After twenty-four hours, the first mate determined that all would be lost if they did not throw about half the passengers overboard. He instructed his crew to select victims on the following basis: from among the passengers, men only and first those who were unmarried. The survivors were picked up a day later by a passing ship. On arrival in Philadelphia, Holmes was charged with murder.<sup>91</sup>

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88. This view is captured in the idea of “positive community” that some have associated with a Grotian take on the state of nature. See RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 126-31, 145-50 (1951); John Salter, *Hugo Grotius: Property and Consent*, 29 *POL. THEORY* 537 (2001). A modern articulation of this view is found in J.W. HARRIS, *PROPERTY AND JUSTICE* 184 (1996), which suggests that natural equality does not commit one to the view that anyone owns any particular resource but, rather, that everyone has an equal natural right to everything.

89. On my view of the state of nature, people have only their autonomous faculties of moral (practical) reasoning. We would undermine the point of looking to state-of-nature models if we imported institutional structures into them.

90. 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

91. In fact, two threads emerge in the court's discussion of the defense of necessity claimed by Holmes. The first is that the preexisting relations that govern the conduct of seamen toward passengers do not dissolve in the case of emergency. Seamen continue to have an obligation to put the lives of passengers first, which in effect amounts to saying that they were not in a state of nature. *Id.* at 363. The second thread of the discussion is more relevant to my

In the course of considering Holmes's claim of necessity, the court discussed how a person might legitimately proceed in a state of nature. In order to distribute advantages and disadvantages in a state of nature, some mode of selection must be fixed. But, the court insisted, a mode of selection is legitimate only to the extent that it puts everyone on equal footing. The court held that drawing lots is the only way that "those having equal rights [are] put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict."<sup>92</sup> The principle of selection devised by the mate in this case—unmarried male passengers first—may in fact have had much to recommend it in substance. In his experience, it may well have been true that his method was least likely to cause a backlash that would have put everyone at risk. If, after drawing lots, he had had to toss crewmen overboard, he might have been left with a weaker and less obedient group. If he had been obliged to eject married men or women or children, he might have faced more resistance from the passengers. The first mate erred not in formulating selection criteria that were irrational or morally suspect, but rather in acting on his own opinion at all. The first mate had a duty to forbear from exercising his own judgment in determining the allocation of advantages even if he had been quite convinced that his decision tracked the moral merits of the situation.

The *Holmes* case is a useful illustration of why there is no prepolitical, morally justifiable liberty to take control of collective resources but rather a moral duty to forbear from taking charge.<sup>93</sup> The *Holmes* analysis hints at why a person in a state of nature has a duty to forbear from imposing her views concerning the just allocation of benefits and burdens on others, no matter how expert her opinion: standing is conceptually prior to expertise. Once again, we might have reason to listen to experts, but no enforceable duty to do so.

Owners, like the first mate in the *Holmes* case, make decisions about our common goods that purport to bind us all. This is why they confront the question: What business is it of mine to decide for everyone what uses will be

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account.

92. *Id.* at 367.

93. For another approach rejecting the idea of a prepolitical liberty, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 8 (2002). They suggest that owners have no entitlement that preexists the state. As a result, the state's attention to societal needs is not a constraint on liberty but rather just an articulation of the proper, limited scope of these rights. This stands in strong contrast to the Lockean view that though we may run into organizational problems in a state of nature, we have the basic tools to construct a full-fledged property system without the state. See LOCKE, *supra* note 87, §§ 6-13, at 270-76; see also *supra* discussion accompanying note 87 (noting that there is no obstacle in a Lockean state of nature other than actual conditions of scarcity, where the Lockean proviso does not obtain).



made of a thing? No matter how good their decisions about the use of things, owners need to establish their standing to make those decisions.<sup>94</sup> Respect for others and their interest in self-government motivates our duty to forbear from unilaterally taking charge of common goods. Our duty to forbear can also be seen as a special form of duty, in which we owe it to *ourselves* to act in accordance with our fundamental conception of ourselves as people with social consciences.<sup>95</sup> A person has an intrinsic moral duty to act in a way that expresses the values of tolerance and respect for others, values that give life meaning.<sup>96</sup> An attitude of respect and tolerance is a precondition for relations with others, and a capacity for and success in forming social relations are aspects of a life worth living. Our duty to develop a capacity for the possibility of social life, an objectively valuable good, is an important part of ethical life. Our own interest in being someone who respects and expresses respect for others grounds our duty not to impose our opinions on others.<sup>97</sup> A person has a duty to forbear from taking charge of things simply because “there is no moral sanction” for doing otherwise.<sup>98</sup>

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94. At least in its conclusions, my account has something in common with Kantian accounts. Kantians, too, insist that property rights are not fully enforceable in a state of nature because of problems about standing or unilaterality. See RIPSTEIN, *supra* note 18, for a full exposition of Kant’s arguments about private and public right. See also Larissa Katz, *Ownership and Social Solidarity: A Kantian Alternative*, 17 LEGAL THEORY 119 (2011). Whereas I have argued here that there is a moral duty to forbear from making decisions about our collective resources in a state of nature, Kantians recognize no such moral quandary. On the contrary, the imperative of rightful honor requires us to avoid putting ourselves in the position of being means to another’s end. Where others are not bound to respect our interests, we can have no moral duty of forbearance ourselves. The differences between Kantian accounts and my own are in fact much deeper than this. The most crucial difference concerns the role of the state: while I see the state as helping us to overcome a moral problem we confront in a state of nature, Kantians see the state as constitutive of freedom.
95. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 210–13 (1986) (discussing intrinsic duties in the context of friendship); see also PENNER, *supra* note 7, at 55 (describing a duty we owe ourselves to live ethically).
96. RAZ, *supra* note 95, at 313–20 (discussing the convergence of acting morally and acting to further one’s well-being).
97. On the possibility of duties owed to oneself, see JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 40 (1995). Raz discusses the duty we owe to ourselves to honor the conditions for self-respect. This duty, even if not other-regarding, is nonetheless an exclusionary reason for action. See also RIPSTEIN, *supra* note 18, at 18, 161 (describing Kant’s notion of an “internal duty” of “rightful honor,” an obligation to “assert[] one’s worth as a human being in relation to others”).
98. Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 762 (1989). Even if one could establish that one has the morally weightiest interest, this would at best establish what Harris calls “mere property,” and not “full-blooded ownership,” HARRIS, *supra* note 88, at 28–29, as a strong personal interest in a thing would not necessarily justify a power to

How then do property rights overcome this moral duty to forbear from taking charge of things? Moral problems of this sort—problems about standing—are particularly amenable to *legal* solutions. The law is itself a mode of collective self-government. When the law confers authority on owners to make decisions about things, it thus rules out of court autonomy-based objections. It makes owners' decisions about things not an instance of one person's imposing his views on another but a case of our deciding for ourselves that the owner has the authority to decide certain questions for us all. While the state may also have a role to play in helping us to make substantively better decisions about the use of a thing, the expertise of the state does not account for the crucial role of political authority in establishing property rights.<sup>99</sup> Ownership depends on political authority because the law is the most effective mechanism for resolving problems about our standing to impose our views on others.

The moral difference that a system of private property makes is that it releases owners to act on their own opinions in making decisions about resources. Through a system of property rights, the state, rather than instructing us to subordinate our views to those of the collective, does quite the opposite: it authorizes us to act on our opinions with respect to things we own.<sup>100</sup> Owners are not required to be expert. They are not required *actually* to have good reason for their decisions. They simply must take themselves to have good reasons and to include these in the reasons for which they act.

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transmit it to another.

99. There is a lot of controversy about when and if the state is in a better position than individuals to direct the use of resources. Owners may well be experts about the asset itself and its potential uses. Many assume that they have relatively greater ability in this regard than officials. See, e.g., Smith, *supra* note 7, at 1754 (“Plausible and widely accepted assumptions about the relative abilities of owners, takers, and officials to generate information about assets—and, as I emphasize, assign them to actuarial classes—provide a clear rationale for protecting owners with property rules.”). But this is not to say that individuals are in the best position to generate and act on information about our collective interests. See also *infra* note 106 and accompanying text (discussing epistemic obstacles that individuals face in making distributively just decisions).
100. See Jeremy Waldron, *Kant's Theory of the State*, in *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* 179, 188-94 (Pauline Kleingeld ed., David L. Colclasure trans., 2006). On Kant's view, most of the “moral difference” that a state makes is to tell us when we subordinate our own opinions to the state's decisions: we put aside the outcomes of our practical reasoning. Ownership achieves just the opposite. Ownership releases us to act on our opinions about what is a worthwhile use of resources, in light of our interests.

*B. The Proper Role of Coordination*

Ownership decisions raise a problem about standing because of their domination potential. Why then do we not simply say that these decisions are not decisions that we want *anyone* making on our behalf? What reason do we have for conferring standing on anyone to make this kind of decision for the rest of us? There are some decisions that we might say we have an autonomy interest in *no one* making and so we simply go without any coordinated solution to the problem: for instance, we might say that we have a shared interest in the truth but we do not want to confer the standing on anyone to make authoritative decisions about what is true that rule out dissent or alternate explanations of phenomena. It is simply too dangerous to confer this standing on someone no matter how pressing our need is for coordination. By contrast, we face a particular kind of collective action problem when it comes to things in the world: we do not and cannot exist in separate, parallel material worlds in which each person is free to act without coordination, in pursuit of his own best moral vision, whatever the costs. Because we necessarily share a single material world, our moral duty to forbear from imposing our own views about the use of things on others means, at the same time, a moral duty to forbear from using things *at all*. We thus have reason to authorize *someone* to make decisions about things on behalf of the rest of us in order to avoid a dilemma. Through this authorization, we are no longer caught between our moral duty to forbear from taking charge of things and our interest in discovering their productive uses. The office of ownership gives owners the standing to make decisions on behalf of the rest of us about what constitutes a worthwhile use of a thing: ownership overcomes the problem of multiple conflicting views about what constitutes a worthwhile use by conferring on owners the standing to impose their own moral viewpoints about the thing on others. Ownership thus ensures that people can use things productively and without conflict by getting all of us behind the owner's decisions about the thing. Decisions about the thing made through the office of ownership command deference and rule out conflicting moral viewpoints about what constitutes a worthwhile use of the thing. If there is no agenda setter managing our resources and coordinating our uses, we each face a reduced sphere of freedom: our capabilities are depleted where we must fight to gain access to a resource or are diminished where we withdraw from use to avoid conflict. The potential for conflict (like the potential for domination generally) has a freedom-diminishing effect.

The reason owners have standing to make decisions about things—decisions that otherwise erode our autonomy to govern ourselves—is the coordination problem presented by collective resources. We tolerate the special

power owners have over the rest of us because we all benefit from this coordination *about the use of things*. But the worry about domination means that we must constrain that ownership authority to its narrowest scope consistent with discharging the coordination function. That is why reasons that go beyond the thing itself are *ultra vires*.<sup>101</sup> Owners lack the standing to make decisions that govern any other aspect of our lives, and so when they use their power qua owner in order to get us to go along with their plans for their lives (rather than just their views about what constitutes a worthwhile use of a thing), they abuse their right.

*C. Principled and Pragmatic Constraints*

The final question that I consider here concerns the scope of a principle of abuse of property right. Why does a principle of abuse of right not go further than I have suggested and require that owners in fact track the interests of others? Few would deny that some external restrictions on the *answers* to the Basic Question that owners come up with are perfectly consistent with the idea of ownership: no matter how genuinely worthwhile you think it is to have chickens in your backyard, we may decide as a political community to exclude that use from your choice set.<sup>102</sup> But we can readily imagine more exacting restrictions on the selfishness of owners built into the right itself. Property theorists like Gregory Alexander and Eduardo Peñalver insist that owners are bound to consider how their decisions affect the interests of others and to ensure that the decisions they reach conform to the demands of virtue—the so-called “social obligation norm.”<sup>103</sup> French philosophers have argued for an objective approach to abuse of right, according to which owners would be required to track the interests of society and to act in conformity with the social or economic values that justified the grant of authority in the first place.<sup>104</sup>

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101. This distinguishes my account from the utilitarian view of Dan Kelly or the equity-based view of Henry Smith about why sometimes we refuse to tolerate antisocial behavior by owners. See Kelly, *supra* note 5; Smith, *supra* note 5 (arguing that equity is a targeted moralistic device that operates in personam to constrain opportunistic behavior).

102. While some restrictions on the distributive effects of ownership decisions may be necessary for justice, it is well beyond the scope of this Essay to consider the threshold condition that a just system of property must meet. This would entail some kind of an overall evaluation of the property system as a whole and its place in our larger “justice agenda.” See HARRIS, *supra* note 88, at 368 (arguing that a just system of property is only part of the “justice agenda” of a society).

103. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

104. See, e.g., JOSSEAND, *supra* note 21.

These are very close to the demands that we might place on public officials in the exercise of their authority. It would hardly be controversial to require public officials to track the public interest and to avoid advancing their own interests. Nor would it be unusual to require that officials arrive at a decision that they genuinely think resolves the question they have been charged with answering rather than substituting the opinion of others, however genuinely held. So what accounts for the coarse-grained approach that I argue for, one that requires owners just to do what they think is worthwhile but not necessarily to set objectively valuable or other-regarding agendas?

The answer, I think, is one part principled and one part pragmatic: there are both epistemological limits on the capacity of individuals to figure out the moral merits of others' interests and also good liberty-based reasons not to require them to do so. If we want to delegate collective decisionmaking about things to private individuals, some accommodation for their limited moral perspectives and for their interest in a private sphere free from the claims of others is in order.<sup>105</sup> Private individuals cannot be expected to inform themselves about the content and moral merits of others' views and also to act exclusively on this information, were it available to them.

The first part of this claim is epistemological: owners should not be counted on or expected to make distributively just decisions simply because they do not have access to sufficient information about the moral merits of the interests or views of others.<sup>106</sup> Owners may well be experts about the asset itself and its potential uses. Many indeed have argued that private individuals have relatively greater ability in this regard than officials.<sup>107</sup> But distributively just

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105. Of course, one might say, if individuals are so limited in their capacity to attend to the interests of others, we might do well to avoid charging them with making decisions about our common resources and to look instead to public officials or the state to do the morally strenuous work of making decisions about things that track the interests of everyone. To be sure, this is one possible response. But we live in a time when problems of state ownership and overall benefits of private ownership are so widely acknowledged that I need spend very little time here considering the merits of this position in principle.

106. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 158 (1974) (discussing Hayek's view that we can never know enough to distribute to each according to his moral merits and questioning whether justice would require us to do so if we did have that knowledge); see also F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 97 (1960) (noting that a society in which distributive shares were proportioned according to merit "would . . . be the exact opposite of a free society. It would be a society . . . in which the individual was . . . relieved of the responsibility and the risk of decision. But if nobody's knowledge is sufficient to guide all human action, there is also no human being who is competent to reward all efforts according to merit.").

107. The law protects owners in their ability to make bets on the future value of their assets, in light of their special information and their own interests, while leaving responsibility for public welfare in public hands. See Smith, *supra* note 7, at 1754 (arguing that the advantages

decisions about things, those that truly track the interests or opinions of others, require much more than just information about the thing: they require information about others. Owners are simply not in a position to gather and act on information about how best to use a thing all things considered. There are thus epistemological obstacles in the way of a more strenuous abuse-of-right principle.

There are also freedom-based reasons to avoid a stricter principle: we would suffer what Jeremy Waldron calls “moral exhaustion” if we had no private sphere into which to retreat from the claims of others.<sup>108</sup> It is one thing to require that owners genuinely pursue what they subjectively think is worthwhile. It is quite another to require that every decision they make in fact track the interests and opinions of others. Unlike public officials, owners have no more private sphere to which they can retreat than the world made up of things they control. Liberty concerns should incline us to favor the coarse-grained approach I argue for.

Finally, there are significant cost-based reasons to leave it to owners to make the call about what counts as a worthwhile use of a thing. A system of private property is a distinctive strategy for managing our common resources. The very point of private property as a strategy for managing our common resources is to provide an alternative to costlier forms of collective decisionmaking<sup>109</sup> about how a thing ought to be used. It would undermine the point of a system of private property rights to micromanage owners’ decisions by tailoring their rights to ensure they produce what we collectively determine (through state decisions, legislative or otherwise) are good outcomes. When we use a system of private property rights to allocate control over things, it is because we *want* individuals to take over the business of deciding what constitutes a worthwhile use of a thing. This of course means that some objectionable answers get through. The worst of these we regulate from the outside (that is, not through the definition of property rights themselves, but

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of property owners in gathering information about their assets provides strong reasons to protect owners with property rules). Something like a principle of abuse of property right follows from this: a system of property cannot be expected to have this wealth-maximizing effect if owners do not make the kinds of choices that have been delegated to them – if they do not set out to choose what they think, from their special vantage point, is a worthwhile use in light of their own interests.

108. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 295 (1988) (“[S]uch complete answerability would be morally exhausting and individually debilitating.”).

109. See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. LEGAL STUD.* 453, 468 (2002) (arguing that in a transaction-cost-free world, we might indeed have a system of “governance rules” in which all uses of a thing could be defined and distributed *ex ante*, but that the costs of doing so in the real world would be prohibitively high).

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through criminal, tort, or administrative law), but for the most part, a system of private property only works if we tolerate the plurality of answers that private decisionmaking produces.

Ownership thus authorizes the kind of subjective decisionmaking authority with respect to resources that would be immoral in a state of nature. This frees owners to act in the face of genuine disagreement about what is right and good to do with our common resources.<sup>110</sup> But where the owner fails to take herself to be determining what constitutes a worthwhile use of a thing, she abuses her position of authority and either loses the law's full protection or, in some cases, even attracts sanction.

### CONCLUSION

This Essay has examined a crucial jurisdictional limit on the office of ownership, which I have called a principle of abuse of right. On my account, we do not abuse ownership by exercising the right in ways that are inconsistent with some criterion external to the idea of ownership (such as community, efficiency, fairness, etc.). Rather, the very idea of ownership itself has limits that are not always made explicit in the law, but that are implied by the political preconditions of private decisionmaking about our collective resources. To abuse a property right on my account is simply to do something that is not really within one's right in the first place. Owners have the standing just to determine what constitutes a worthwhile use of a thing and must act for reasons that are appropriate and adequate for resolving *that* kind of question.

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110. See Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1540 (1996).