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Property Rights and the Regulatory State

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Introduction

When state regulations prevent owners from certain uses of their property, is this action of the state a taking of property which requires compensation? One answer might point to the fact that the use is an essential incident of the right to property and infer from this that governmental regulations impairing the use of property count as takings. Another answer might proceed in the other direction, by arguing that use is not, in fact, an essential, definitory aspect of the right to property, and infer from this that state regulations are not takings of property. These two answers can be seen as two different versions of a bundle-of-rights theory of property.

On the one hand, one variant of the bundle-of-rights theory of property holds that there are essential and less essential features of property, such that taking away the less essential features is compatible with retaining an (overall) right to property; therefore, since use is not so essential, if the state takes it, property is not impaired.[1] On the other hand, there is a variant of the bundle-of-rights theory on which all incidents, or at least the classical Roman law incidents of possession, use and disposition, are necessary for the right to property: the (total or partial) impairment of any of these incidents is, *eo ipso*, a (total or partial) impairment of the right to property itself.[2]

What underlies both answers is the assumption that the way to answer the question is by making an inquiry into whether use is an essential feature of the right to

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1. E.g., *Andrus v Allard* [1979] 444 US 51 at 65-66; *Penn Central Trans Co v New York City* [1978] 438 US 104 at 130-31.
2. Richard A Epstein, *Taking: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985) at 57-92 (arguing that the right to use is a necessary compliment of the right to property, and that regulatory policy takes away this right); Richard A Epstein, "Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property" (2011) 8:3 Econ J Watch 223 (arguing that unified bundles are a protection against the government); Emily Sherwin, "Two- and Three-Dimensional Property Rights" (1997) 29 Ariz St LJ 1075 at 1096-99 (arguing that, in addition to objects and the individuals assigned, property rights have a third dimension, concerning use). This variant of bundle-of-rights is criticized in Leif Wenar, "The Concept of Property and the Takings Clause" (1997) 97:6 Colum L Rev 1923 at 1924 (holding that the Hohfeldian conception implies that the constituent entitlements of property should be held intact). Such a conception of the bundle-of-rights view of the property is more common to the Civilian Law jurisprudence. See Yun-chien Chang & Henry E Smith, "An Economic Analysis of Civil Versus Common Law Property" (2012) 88 Notre Dame L Rev 1 (arguing that the Civilian tradition, following the Roman law, has a top-down approach, from the core of the property to the incidents, while the Common Law tradition, following the feudal system of fragmented rights, has a bottom-up approach, from the incidents to the core).

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property. However, I will argue that an answer to the above question can be given without recourse to investigations of what incidents are definitory for the concept of property rights. Instead of trying to establish what incident is essential for the right to property, we should explore what the consequences are of the fact that incidents are expressed through different legal positions. Thus, the tracks that we will pursue involve, in the first instance, considering the legal positions expressing the incidents of property, and, in the second instance, investigating what effects the nature of these legal positions will have for the questions of whether state regulations are takings. This two-tier inquiry is the task of this essay.

For the first tier, I will argue that the incident of use is expressed through a Hohfeldian liberty, rather than a claim-right. As for the second, instead of a categorical answer (yes or no), I will argue that limiting the liberty to use should be seen as performing a taking of property to a lesser extent than a state action of taking away the right to exclude. This reason disallows putting them on the same level because there is a significant distinction between transgressing a right to exclude (being worse) and transgressing a liberty to use. This implies, concerning the question of what counts as a taking of property, that there should be a differential treatment between use-impairing regulations and state actions taking away the right to exclude: the former should trigger less scrutiny and should be treated more permissively than the latter.

The Bundle Theory of Property Rights

On the bundle theory, property is seen as a bundle of incidents or rights loosely speaking, and the question is whether we could subtract some incidents and still have a property right. Against this background, the debate concerning whether the state regulation takes away property with respect to the *incident of use* usually revolves around the issue of whether the incident of use can be subtracted from the property (qua a bundle of rights), without thereby extinguishing the right to property as a whole, or, in other words, around the issue of whether use is necessary, or as necessary for the core of property, as the right to exclude. On the one hand, one variant of the bundle-of-rights theory of property holds that in order for there to be property, a sufficient number of incidents must be retained, and if some non-essential incidents are taken away, but enough other incidents are left, then property is not impaired. According to this theory, one could hold, for instance, that the incident of use is not as essential for the concept of ownership as is the right to exclude, the relinquishment of which amounts by itself to a taking of property.[3] Therefore, taking away use is not a taking of property. On the other hand, there is a variant of the bundle-of-rights theory on which all incidents, or at least the classical Roman law incidents of possession, use and disposition, are necessary for the right to property: the (total or partial)

3. E.g., *Kaiser Aetna v Unites States* [1979] 444 US 164 at 179-80 (the right to exclude, "so universally held to be a fundamental element of the property right" cannot be taken without compensation).

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impairment of any of these incidents is, *eo ipso*, a (total or partial) impairment of the right to property itself.

My argument proceeds by differentiating between an incident being important in virtue of its content (what the incident stands for, e.g., possession, use, income), and an incident being important in virtue of the type of jural position by means of its expression. The two bundle-theories above can be seen as conducting the debate on the first understanding of importance, by assuming that the importance of the incidents is given by their content. The problem with this approach is that it is caught in a dilemma, of the following sort: since it is common to think of property as serving an interest in use for the owner, the incident of use could be regarded as expressing the fundamental interest in property, and the right to exclude as only an ancillary instrument for promoting the interest in use. This would make the second variant of the bundle theory closer to truth. However, if so, then the capacity of a democratic state to enact regulatory policies is severely impaired (the higher pressure to compensate would deter it from pursuing such policies). But, I think, another way to conduct the debate is to shift from the content of the incident to the legal medium conveying that incident.

Instead of considering whether use is as important an interest as possession, we should consider whether the legal entitlement expressing the interest in use (which, as I will argue, is a liberty) is as capable in resisting government interference as the legal entitlement that will protect the interest in possession (which, as I will argue, is a claim-right).[4] I assume, *arguendo*,

4. It could be objected that the Hohfeldian jural positions are neutral legal categories, which could not explain the distinction between the incidents of property, since such distinction has to do, to a large extent, with normative, extra-legal reasons. However, this objection would have been fatal if the incidents being *expressed* by two different jural positions (which is my claim) *explains* the normative distinction between the incidents of property (which is not my claim). The fact that the two incidents are conveyed by means of two different legal media is not something that defines the incidents, helping us to distinguish between them, but it is something *extrinsic* to the incidents themselves (something that happens to them in virtue of some independent features). In this sense, being expressed through a certain legal medium does not have a practical relevance or importance with regard to issues such as the definitory features of the concept of property (here what is relevant is something like the content of the incident, which is *intrinsic* to the incident). Nevertheless, the fact that the incidents are expressed by two different legal categories has a practical relevance or importance in regard to something else. It pertains to the importance of the incidents concerning what counts as property taken, for the purposes of the eminent domain. The Hohfeldian jural positions do their work only after normative (pragmatic, value-based, etc.) reasons have established that a certain incident is part of the right to property (even though I have assumed, rather than argued, that the incidents of possession and use are equally essential for the right to property, the argument in this paper should be seen as conditional on this assumption). The objector, however, could accept all this, but point to a related problem: the task of establishing the importance of the incidents with regard to the question of what counts as a taking is itself a task relying, to a large extent, on normative (extra-legal) reasons, such that relegating the burden of accomplishing that task to some Hohfeldian normatively neutral categories is problematic. However, my argument in this section will aim precisely at showing that, in the case of the incident of use, there are pragmatic, extra-legal reasons which constrain what form of Hohfeldian category the incident of use could take (see below). In this sense, the fact of the use being expressed through a Hohfeldian liberty is a result of a normative inquiry, and for this reason, the task of determining what counts as a taking, though undertaken at a conceptual legal level, will rely indirectly on normative reasons.

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that use is the interest which grounds the whole right to property.[5] This does not imply, as I will argue, that state regulation impairing the incident of *use* is as detrimental to the (whole) right to property, as is state action denying the owner's right to *exclude*. The reason is that the *liberty* to use permits a higher range of government interference than the *right* to exclude.

It could be objected that such a position does not actually stay true to its assumptions, since, if the interest in use is the most fundamental interest, then it should enjoy the strongest possible legal protection, not a weak protection (or arguably no protection at all), such as that secured by a Hohfeldian liberty. However, we should notice that liberty of use is not the most important protection of the interest in use. The claim-right to exclude offers, even indirectly, is a more robust protection of this interest because this right provides a right against others not to use one's property. This right makes it up to the owner to decide how the property is used. In this sense, it protects the interest in the *use* of a thing that the owner has, as opposed to the rest of the world.[6] The right to exclude allows the owner a perimeter within which she can determine the uses of her property and reap its fruits. However, the objector could concede that the right of exclusion protects the interest in use in a robust way (a more robust way than the liberty to use, at least), but still insists that it does not secure as high a protection as a possible *claim-right to use*. Even though this is true, I think that the concept of a claim-right to use (both in a positive and a negative construction) is untenable, on grounds that I will explore in what follows. So, if my argument proves correct, then we should be content with the highest protection *possible*, which is provided by the right to exclude.

Why Liberty to Use?

The incident of use should be seen as a liberty, and not as a claim-right. The distinction between claim-rights and liberties is that the former are correlated with duties in others, while the latter with no-rights.[7] If A has a liberty to do X, B has no right against A that A do X; but is also follows that A is under no obligation to B not to do X. A is permitted to do or abstain within his correlation with B. B has no right against A regarding X.

Liberty expresses only this lack of obligation. We can apply this to the use of property. The fact that A has a liberty to use her property in a specific way means only that some other(s) lack a right to demand A not to use the property in the way

5. Throughout this article, when I am referring to the 'right to property', I do not mean a claim-right to exclude, but I mean rather an aggregate of jural positions, in the sense of rights as molecular structures—see Carl Wellman, *Real Rights* (Oxford University Press, 1995) on this. By contrast, when I am referring to the right to exclude, I mean a Hohfeldian claim-right.

6. Arthur Ripstein, "Possession and Use" in James Penner & Henry Smith, eds, *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 156 at 162, 169.

7. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (Yale University Press, 1919) at 39-41.

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she wants.[8] However, the fact that A lacks an obligation toward the others does not, by itself, imply that the others have an obligation toward A. If A has the liberty to watch her neighbor's business from her property, this does not imply that A's neighbor C has a duty to refrain from preventing A from watching her; if the neighbor, therefore, builds a high fence, this does not infringe A's liberty. Therefore, we can say that the entitlement given by the liberty is not an entitlement to a certain result (the state of A seeing what her neighbor does), but only the lack of an obligation not to watch her neighbor's business; the fact that A lacks the duty not to watch and that A's neighbor does not have a claim-right against A not to be watched does not imply that A has a right to watch; anything that A's neighbor does (insofar as he does not interfere with A's right to exclude others from her property or her right of bodily integrity) in order to prevent A's watching does not violate a duty that he owes to A. Now, the question is: why should the incident of use be protected by such a weak legal entitlement as liberty, which does not secure the holder against an interference with the successful performance of one's activity?

I will answer that question by investigating why it is that the use cannot be expressed by a claim-right to use. There are more ways in which such a claim-right could be specified, but I shall argue that neither one of them is actually tenable.[9] I begin by considering a positive claim-right to use, and then three possible forms of a negative claim-right to use.

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8. By using Hohfeld's concepts of claim-right and liberty, I am not thereby committed to other features of his thought, such as the decomposability of *in rem* right-duty relationships to *in personam* relationships (see Hohfeld, *supra* note 7 at 95). I think Hohfeld's distinction between liberty and claim-rights is compatible with (and the insight of the distinction is not lost by) holding that a claim-right is against the world, where the world is not simply the aggregate of all other individuals. See also *infra* note 25.

9. My argument that the incident to use cannot be expressed through a Hohfeldian claim-right is based upon normative-pragmatic considerations, as I have mentioned in note 4. These considerations do not pertain, however, to controversial moral positions, but to pragmatic 'conditions of possibility' and to noncontroversial efficiency considerations: given the structure of the Hohfeldian claim-right, guiding the social interactions by such a jural position would defeat the very purpose of having the legal entitlement in question, or it would conflict with the basic premises of interaction in modern societies. This is not an argument stemming from the inner nature of the Hohfeldian categories, but from the interaction of such an inner nature with the extrinsic features of the social interaction in which such categories are supposed to function. These considerations could help us overcome an objection of the following sort. Amnon Lehavi, *The Construction of Property. Norms, Institutions, Challenges* (New York: Cambridge University Press, 2013) distinguishes in the first chapter between the content of the property (the way a state decides to formulate a property regime), which should be in his conception entailed by normative, extra-legal considerations, and the structure of property, which is the basic *sine qua non* legal form of property and which is mostly normatively neutral (i.e., it does not entail normative positions with regard to the content of property). Now, in light of this distinction, my argument that the incident to use must be expressed by a Hohfeldian liberty could be understood as (i) one which seeks to determine the structure of property (since it concerns a basic legal form), in which case it would be wrong because it would put too much into the structure, no longer leaving room for extra-legal normative considerations to influence the content of property (i.e., the structure establishes the content of property) that a society could choose, or, alternatively, as (ii) using a normatively neutral legal structure (the Hohfeldian legal category) to derive the content of property (the property characterized by the liberty to use). However, as far as (ii) is concerned, this should not be worrisome, since the content of the property is not derived solely from a Hohfeldian category, but it is based

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1. The positive claim-right to use

A positive claim-right to use would make the holder able legally to demand others to aid her in using her property. We can identify two different forms of a positive right to use:

1.1. The outcome-based positive claim-right to use

Based on this entitlement, A has a right to have X obtained, where X is a specific use of her property. This right creates an obligation for B to do whatever she can so as to contribute to obtaining X; B's duty is satisfied only when X is obtained. However, such a claim-right would run into the obvious difficulty of not ensuring the concurrent exercise of the right by all the owners. Consider the following example: both A and B use their separate lands for a certain agricultural use X. A has the right against B that B act so as to help A to have X obtained, and this duty is not exhausted until A has succeeded in having her land subject to the use X. The same goes for B. However, let us assume that the land could not be put to the use X except in a certain limited period of time (an agricultural season), and that the use X demands considerable effort and amount of time, such that all the help that B would give to A or A would give to B, renders the helper unable to secure for herself the obtaining of the outcome consisting in the use X. In this sense, an outcome-based positive right to use cannot be jointly performed by all parties holding the right. It is not compossible.

1.2. The process-based positive claim-right to use

Based on this entitlement, A has a right against B that B do a certain action P, where the action P contributes to A using her property in a certain way X. This right, unlike the outcome-based right, identifies the locus of obligation for B not in an outcome of use that she must do whatever she can to secure, but in an action or set of actions. If B has performed that action, she has fulfilled her duty toward A, regardless of whether the outcome in use has been thereby secured. This right's problem stems from the fact that A's help of B entails costs of opportunity for A, and, in this sense, the help B provides to A could be understood as cancelling out A's costs of opportunity, and vice versa. Now, the question is: why should both A and B rely on each other's help to override the costs of having to help each other,

upon normative-pragmatic considerations, pertaining to the interaction between the structural nature of the legal category and the social environment (we could, nonetheless, understand my argument as *structural*, if by 'structural' we mean pertaining to the real-world conditions for the functioning of a legal system, but this does not make it less normative in the sense specified above). As far as (i) is concerned, I do not think that the worry of putting too much into the structure is founded, since (a) the structure itself has been justified on normative grounds, such that, even though it leaves little room for other normative considerations, the structure compensates for this by being itself a result or a summary of other normative considerations, and (b) I think that the legal structure should not be seen as providing an exclusionary reason for adopting a certain content, but rather a *pro tanto* reason. On this perspective, the property defined by the liberty to use could be seen as establishing only a *default* content of property, but which could be adjusted on a case by case basis to meet new normative expectations.

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when they could equally obtain the same result by doing the work on their own? If anything, the latter system seems preferable to the former, inasmuch as it does not generate costs of communicating the tasks and, more significantly, of monitoring each other's completion of the task.[10]

2. The negative claim-right to use

I will identify 3 possible ways of construing the negative claim-right to use and show why each of them fails.

2.1. The right against others not to interfere with one's use of property

According to this right, if A is the owner of X and A performs a certain activity by using X, then others are disallowed to make it the case that A no longer performs the activity in question. Such a right would protect the use of the title-holder above and beyond the protection secured by the right to exclude. For this reason, in order to isolate more clearly the effect of this claim-right to use from the effect of the right to exclude, I will concentrate more upon property in chattels. If A is the owner of a car, and today it happens that she is blocked in a traffic jam, then it would follow that the rest of the car-owners who make it much harder for A to drive her car, are in violation of a duty owed toward A not to interfere with the use A makes of her car. However, this claim is counter-intuitive. In a large society with complex interactions, there is the risk of any action constituting an interference with the way any other person is making use of his or her property. Therefore, imposing a right against such interference would impose too high a demand on anyone, that could not be possibly met in all circumstances. If we lived in a world in which such a right existed and everyone complied with it, then we would probably be in a primitive and economically undeveloped world. The existence of the claim-right to use would ensure the fact that people are not forced to tailor their own actions—and, implicitly, the use of their property, in accordance with what others would do; such autarchy is in tension with the interdependencies of the economic interactions of the modern world.

However, it could be objected that the interferences in the above example are not an intentional, but only foreseen ones, and since foreseen interferences could not be counted as transgressions of a duty, the interferences in the above examples are not violations of a duty.[11] However, I think this objection is problematic.

10. This is especially so, since the generation of the right to exclude (and the liberty to use) could be understood as resolving the problems of managing the common resources by decreasing, *inter alia*, the costs of monitoring the monitoring the contributions to the public goods. See Robert Ellickson, "Property in Land" (1993) 102 Yale LJ 1315. In this sense, a process-based right to use would seem to reintroduce, in another form, the very problems to which the private property was designed as a solution.

11. Of course, on a strict liability view of rights to use, we would not need to make foreseeability a condition; any interference with the right to use would count as a violation. However, a strict liability construction of the right to use would be utterly implausible: it would take everybody to cease interacting with everybody else in order not to risk interfering with their uses of property.

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If A signs a contract with B worth a certain amount of money, but, at a later date, having a better offer from C, signs another contract with C, which is worth a larger amount of money than the contract with B, but such that the performance of the contract with C makes it impossible for A to perform her contract with B, we could say that A's non-performance of the contract with B is a foreseen, but unintended result, since A's only intention was to get richer. However, I think it is more difficult to say that, as a result, B no longer has a claim-right against A to perform the action A agreed to in the contract. It could be answered that A did not violate, but merely infringed B's right[12], since considerations of social utility makes A's non-performance permissible. But if this is so, when translated into the case of the right to use, this point means that a car driver A, whose presence on the street forces B to slow down the speed of her car, even if A drives permissibly, must compensate B (or, at least, must issue an apology to B) for the loss incurred.[13] However, this consequence is counter-intuitive.

Moreover, what is truly problematic is that, given the wide scale at which we affect each others' actions and uses of property, it seems that we do not have an answer to the question of what the purpose is of holding a right if that right is being constantly and permanently infringed by everybody, in every move. What is the purpose of holding that the drivers in the traffic jam are infringing each other's right to use, if they are doing so mutually and if *any* action they make would seemingly result in affecting how others drive their cars (on what bands of the road others drive, with what speed others drive, and so on)?

For the above reasons, we can conclude that a claim-right against others not to interfere with one's property is untenable. However, the negative claim-right to use can be construed in different ways. Some authors have argued that the right to property is not a right to exclude but rather a right to the exclusive determination of the use of the thing owned.[14] This idea can be specified in many legal ways, some of which may not include the incident to use at all.[15] However, there are two main ways to specify the right to exclusive use determination which involve the incident of use: the claim-right against others not to interfere with the

12. A right is violated when the transgressor has acted impermissibly; a right is infringed when the transgressor has acted permissibly. See Judith Jarvis Thomson, "Some Ruminations on Rights" in William Parent, ed, *Rights, Restitution, and Risk* (Harvard University Press, 1986) at 51. I want to remain neutral here concerning the validity of the violating/infringing objection.

13. The requirement to compensate or to apologize has the moral function to overcome a "moral residue", which was produced by the infringement of the right, and which expresses the fact that the infringer is indebted to the infringee. See John Oberdiek, "Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights" (2004) 23:4 L & Phil 325 at 331.

14. Larrisa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275 at 278, 290; Eric R Claeys, "Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights" (2010) 85:4 Notre Dame L Rev 1379 at 1403-04, 1435; Eric R Claeys, "Property 101: Is Property a Thing or a Bundle?" (2009) 32 Seattle U L Rev 617 at 633; Eric R Claeys, "Exclusion and Private Law Theory: A Comment on Property as the Law of Things" (2012) 125:1 Harv L Rev 133 at 143.

15. For example, Katz's idea of exclusive use determination can be specified only through a qualified right to exclude (the right is violated only by trespass which is not in accordance with the owner's agenda). See Katz, *supra* note 14 at 301.

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determined use of property, and the claim-right against others not to interfere with the process of the owner's determination of the use of her property. Let us take them in order.

2.2. The claim-right against others not to interfere with the determined use of property

This is a right that A holds against the world that no one interferes with the use that A has determined for her property.[16] However, if construed in this way, the negative claim-right to use incurs all the problems of the above construction, at 2.1. Moreover, the compliance with this right would not only be burdened by the problems indicated above, but also by informational costs stemming from the difficulty of figuring out the particular use of property that the owner has set for the things.

2.3. The claim-right against others not to interfere with the process of the owner's determination of the use of his or her property[17]

Consider the following situation: A is in the possession of some technological capital, and has not decided yet the use to put it for, but had to choose among 2 options, let us say between (using it for) products X and Y. While A was deliberating, the entrance of new competitors on both the market for X and the market for Y drove prices so low that it made impossible for A to enter any of them. Let us say that A was left with no other option but to redeploy one's technological capital for some use (producing Z) that one has never wanted (for both economic and non-economic reasons) and still does not want (for non-economic reasons), but which is for A the only alternative to mitigate the impact of a burdensome debt. Let us assume, further, that all the owners would enjoy a claim-right not to be interfered with in the process of determining the use of property. From all this, it seems to follow that the new entrants on the X and Y markets have violated or at least infringed A's right to use her property (we assume that these entrants foresaw, but were not motivated by the fact, that A, or at least that some unidentified persons, would be hurt). As we have also noticed in the case of construction 2.1. above, the full compliance with such a right is incompatible with the workings of a modern, interdependent society, in which people make choices based on the choices the others make.

Holding that actions such those in the above example amount only to infringements, and not violations, of rights, does not work. Let us say that A decides the use of the newspaper (which is her private property) whenever she is on the public bus, on a case-by-case basis. Suppose that in the first five minutes while

16. This sense of the right to exclusive use determination is closer to Katz's idea of agenda-setting (see *supra* note 14).

17. This construction of the right to exclusive-determination is closer to Claeys' notion of the owner's right to the freedom to choose the uses of his or her property. See Claeys, "Jefferson Meets Coase", *supra* note 14 at 1435.

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in the bus, A deliberates whether to keep her newspaper in the pocket or to use it in order to read the news, but, before she reaches a conclusion, the bus becomes crowded, and a passenger blocks the space that she would need in order to read and this occurs precisely at the time that she decided that she wanted to read the news, but before making any decision how actually to use the newspaper. Let us assume further that the A is visibly holding the newspaper in her hand folded, and this is a fact from which the passengers could infer that A would probably (but not certainly) unfold the newspaper to read it. All the facts above imply that the passenger infringes A's right that the process of determining the use of her property not be interfered with. (Therefore, we could presume that there is some debt left over, which could be cancelled by an apology.) However, this result seems counter-intuitive. Given that in everyday life every decision we make has a consequence for what others decide (albeit the number of options that these others have need not be as small as A's number of options in the above example[18]), it is worth asking which is the purpose of holding a right that is being systematically and continually infringed by everybody?

For the reasons given above, I conclude that neither the right to exclusive use determination, in both of the constructions considered above, is tenable. Therefore, we must accept that the incident of use is best expressed not in terms of a Hohfeldian claim-right, but in terms of a Hohfeldian liberty. The Hohfeldian liberty accounts, naturally, for all the cases presented above. Because it marks only the absence of a duty to the contrary, the liberty to use is not being transgressed when the others frustrate the owner's specific use of a thing or affect the owner's desire to employ her property to a particular thing or defeat the process in which the owner decides to which use to put her property. Since holding a liberty to use means that the holder does not have a claim-right against anyone interfering with her use, one is not violating or infringing any duty when one frustrates the other in the use of property (unless other rights, such as the right to exclude, protect the owner's use). The liberties give their holders a space free of obligation to act in whatever manner they like, but A *not* being obligated to do X does not give the others an obligation to act in any manner necessary (including an obligation to not interfere), to ensure that the outcome of A obtaining X.[19] Liberties are not *outcome-oriented*:[20] if, for example, A has a liberty of speech, A does not have an entitlement against others to make any single speech. In other words, A does not have an entitlement that others act such that the outcome of A's speaking occurs. Similarly, if A has a liberty to use her property, she does

18. Claeys, "Jefferson Meets Coase", *supra* note 14 at 1410, 1435, considers the restriction of options that owners have with regard to the use of their property, to be in tension with the owners' right to exclusive use determination of their properties.

19. Glanville Williams, "The Concept of Legal Liberty" (1956) 56:8 Colum L Rev 1129 at 1130, 1146-47; Matthew Kramer, "Rights Without Trimmings" in Matthew Kramer, NE Simmonds & Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 1998) at 11-12.

20. Alessandro Spena, "The Strange Case of the Protective Perimeter: Liberties and Claims to Non-Interference" (2011) 31:2 L & Phil 161 at 173-74, claims that liberties are entitlements to aim at something, but not also to attain something.

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not have an entitlement against others that they act in such a way to secure (by non-interference) A's use of property. If, for example, B has the liberty to use the factory that he owns in order to produce X, this does not give one an entitlement against others to act in any manner is necessary to ensure that the outcome of B's actually using the factory to produce X obtain. The same goes for A's liberty to use a car or a newspaper.

The Importance of the Liberty to Use

For the reason given above, we should see the right to property as a bundle of entitlements, as an aggregate made up of at least a right to exclude and a liberty to use.[21] However, the view that property consists of a bundle of rights has come under intense scrutiny in recent years. Accordingly, it could be said that the view

21. The view that property rights are characterized at least by a right to exclude and the liberty to use can be found objectionable, beyond the grounds that I will discuss below, on the ground that it seeks to impose an essence of property, which is too strong to account for the variety of forms of property. See, in this regard, Lehavi, *supra* note 9 (arguing that identifying the property with features, such as the right to exclude, amounts to a form of essentialism, which seeks to pre-determine at the level of basic legal structure, the content property could take in various legal systems). However, this could be answered in the following way. Firstly, my main argument thus far has been that property is characterized by a liberty to use, rather than a right to use (I have assumed a right to exclude, but my argument does not depend on property being generally defined through a right to exclude). A liberty to use is able to accomodate a higher range of possible jural positions that the society could decide to ascribe to the owner than could a right to use. In this sense, the structure of property pre-determines the content to a lower degree than it does in the case of the essentialists criticized by Lehavi. Secondly, I have distinguished between incidents and the jural positions through which they are expressed; only the former are essential to defining the concept of property; it is a further task, that of deciding through what legal form to express the content of the incidents, and this task could well be achieved by considering extra-legal normative reasons (or could be left to the democratic process). Nonetheless, I have argued that property, as a general matter, should be characterized by at least one Hohfeldian category, and this could be said to pre-determine the content the property could take. However, as I have argued above (see note 9), this implication should not be seen as problematic. Thirdly, I think that my position in this essay can account for Lehavi's argument against essentialism. He argues that if viewing the property—at a structural level, as consisting of substantive properties, such as the right to exclude, would preclude from accounting for various forms of property. The specificity of forms such as the common property or the lease could be accounted within the perspective of what I have said thus far in this essay, by (i) the existence of other incidents, such as, for example, the incident of management, which could be conveyed legally through various legal media allowing, for example, co-ownership, or restricted rights and powers; (ii) the fact that the right to exclude and the liberty to use are conceived as only *default* jural positions, which could be changed if normative considerations require it. Insofar as the property of corporation is concerned, I think that the essentialist can account it in terms of an abstract, divided ownership (*contra* Lehavi, *supra* note 9 at 199). The reason for this is that the essentialist can view property as an "office of ownership" (see Christopher Essert, "The Office of Ownership" (2013) 63:4 UTLJ 418), such that the corporation itself could be identified with that office. Viewing property in this way, moreover, has the advantage of avoiding asking metaphysically dubious questions such as 'who is the owner of the corporation?' (the corporation is a legal construct or a set of rules identifying roles; one could not, as such own a legal construct; similarly, the office of ownership is occupied, but not owned from outside). If the corporation as a whole is identified with the office of ownership, then the shareholders need no longer be identified as owners or as engaged in forms of property (that do not necessarily entail ownership); they are defined instead by the roles within that office (and that role corresponds more to members of a legislature, and this accounts more naturally, for the differences in power between them, than does conceiving them as owners).

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that I defend is also vulnerable to those objections. However, I think that my view of the property as a bundle is compatible (or at least, nearly compatible) with the truth of these objections.

One prominent criticism of the bundle theory[22] is that the central feature of the property right is the right to exclude, which is both a necessary and sufficient condition, and all other features, such as the use incidents are secondary aspects, that are entailed by, but do not entail in their turn, the right to exclude.[23] A powerful way to defend this thesis is by means of an economic argument. This argument proceeds by noting that assigning rights to use in objects is inefficient, because in a large and anonymous society, the informational costs of keeping track who is entitled to *what* use are very demanding. The argument then notes that less demanding informational costs would be entailed by a system of complying with rules that make no reference neither to the persons holding the entitlements, nor to the specific actions that they are allowed to perform, i.e. the uses they are allowed to make of things. The latter type of rules are the rules underlying a private property system centered around the right to exclude.[24] If this argument is correct, and if it is therefore true that the right to exclude is both a necessary and sufficient condition for property, then it seems that the thesis viewing property as an aggregate of the right to exclude and the liberty to use, is in

22. There are more criticisms of the 'bundle theory' in the literature, but they target different ideas. Besides the criticism levelled at the bundle theory, where that is taken to mean that the right to property is an aggregate of more jural posistions, there is a criticism levelled at the bundle theory, where that it taken to hold that the *in rem* right-duty relationship of property rights is decomposable into (or is an aggregate of) individual relationships (for the original expression of this thesis, see Hohfeld, *supra* note 7 at 95). For advocates of such a view of the bundle theory, see Pavlos Eleftheriadis, "The Analysis of Property Rights" (1996) 16:1 Oxford J Legal Stud 31; Avihay Dorfman, "Private Ownership" (2009) 16 Legal Theory 1 (arguing that what distinguishes property from ownership is the power of the owner to decide who can enter the property, and this power implies that the duty of the others is dependent on the owner, which makes their duty individualized or *in personam*). This idea has been criticized on two grounds. Firstly, concerning the right part of the right-duty relationship, it has been held that the right to property cannot be one that the owner negotiates with every non-owner, since that would not explain the persistency of the right beyond the particular right-holders. See Essert, *supra* note 21. Secondly, concerning the duty part, it has been argued that, just as the right against others not to trespass does not is not dependent on the identity of the right-holder, so neither is the duty correlative to that right, dependent on the identity of the particular duty-holders, for otherwise the right to property would vary in scope with the fluctuations in population. See James Penner, "On the Very Idea of Transmissible Rights" in James Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford University Press, 2013) at 244. However, the truth or falsity of this 'bundle of rights' theory is immaterial concerning the truth or falsity of the picture of property rights as a bundle that I endorse here.

23. Thomas W Merrill, "Property and the Right to Exclude" (1998) 77:4 Neb L Rev 730.

24. Thomas W Merrill & Henry E Smith, "What Happened to Property in Law and Economics?" (2001) 111:2 Yale LJ 357; Thomas W Merrill & Henry E Smith, "Making Coasean Property More Coasean" (2011) 54:4 JL & Econ S77; Thomas W Merrill & Henry E Smith, "The Property/Contract Interface" (2001) 101:4 Colum L Rev 773 at 791-98; Henry E Smith, "Property as the Law of Things" (2012) 125: 7 Harv L Rev 1691 at 1704. The arguments made by Merrill and Smith do not apply to all forms of property, since certain forms, such as common property or property held in trust, in which the management is based not upon delegation to the owner's discretion, but upon contract-like arrangements and enforceable norms. See Gregory S Alexander, "Governance Property" (2012) 160:7 U Pa L Rev 1853; Anna di Robilant, "Property: A Bundle of Sticks or a Tree?" (2013) 66:3 Vand L Rev 869.

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trouble. It would seem that adding the liberty to use to the right to exclude is incompatible with viewing property rights as defined only by the right to exclude. If the right to exclude is the central definitory feature of the right to property, then this seems to preclude us from holding that *both* the possession and the use incidents are equally important incidents, as I assumed above.

However, I think that the liberty to use can be seen as of equal importance to that of the right to exclude for the purposes of defining the concept of property rights, without that view impairing the possibility of also holding that the right to exclude is a necessary and sufficient condition for the right to property. The bundle theory that I endorse holds that both the right to exclude and the liberty to use are *jointly* necessary conditions for the concept of the right to property: taking away any one of them results in taking away the right to property. Now, I think we could hold a compatibility view of the following form: holding that (i) the right to exclude is a necessary and sufficient condition for the right to property, is compatible with holding that (ii) the liberty to use is a necessary, but not a sufficient condition for the right to property. I think the following reason supports this compatibility view: while the liberty to use does not entail a right to exclude, a right to exclude does entail a liberty to use. The right to exclude entails a liberty to use in the following sense: if A is being granted the right to exclude others from Blackacre, then it naturally follows that A is the only one entitled to use Blackacre. The right to exclude works as a protective perimeter, leaving alone to A the use of the land. Therefore, whenever a right to exclude occurs, a liberty to use occurs: requiring a liberty to use to occur alongside a right to exclude is a redundant requirement; it tells us nothing more than that a right to exclude is necessary. The liberty to use does not by itself entails a right to property, but, this is the position entailed both by the view that the right to exclude is a necessary and sufficient condition for the right to property, and by my view that liberty to use is a *jointly* necessary condition for the right to property, since, for an instance of X to be a right of property, that instance must have not only the liberty to use, but also the right to exclude.

Having a liberty to use is not sufficient for the right to property: one could have a liberty to use, by being member of a collectivity with no system of ownership. However, having a liberty to use is necessary for the right to property. We can arrive at this conclusion, not by considering in what ways the liberty to use, *by itself*, contributes to property, but simply by accepting that the right to exclude is a necessary condition. Since the right to exclude entails the liberty to use, then, if the right to exclude is necessary, it also follows that the liberty to use is necessary.[25] Therefore, the perspective that I have assumed, namely that the incident of use is at least as important as the right to exclude, is compatible with the view that

25. Consider, by analogy the following argument: Being a rational animal is a necessary (and sufficient) condition for being human; Being a rational animal entails being a living entity; therefore, being a living entity is a necessary condition for being human. At the same time, being a living entity is not a sufficient condition for being human.

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the right to exclude is both a necessary and sufficient condition for the right to property.

The above argument depends on the soundness of the claim that the right to exclude entails the liberty to use. But, in saying this, I do not think that we should be impeded by such problems as to whether the right to exclude *always* entails a liberty to use.[26] My argument is aimed to apply to the core cases of property rights in a functioning legal system. Since the scope of our inquiry is being constrained in this way, we can say that within the scope, the right to exclude necessarily entails the liberty to use. The question of property should be judged not by extreme cases, but by ordinary and common situations (in order for our discussion to be relevant to actual problems). In these situations, the owner, who has a right to exclude others from a thing, also has the liberty to use that thing.

Moreover, the idea that one could have a right to exclude, without this right functioning to protect a liberty to use, would defeat the very premise of the economic argument, namely that rights to exclude all others more efficiently serve the goal of *using* resources. In this vein, even prominent authors such as Henry Smith, belonging to the line of thinking that the right to exclude is central to the right to property, assume that the 'default package of rights', as pre-established by law and not yet subject to easements, includes not only a right to exclude, but also a liberty to use.[27] This is a further evidence that the centrality of the right to exclude is consistent with thinking of the right to property as an aggregate of the right to exclude and the liberty to use.[28]

However, it might be objected that the fact that the right to exclude is central does not entail that the right to exclude cannot be accompanied by the liberty to use, but that the mere (even though necessary) co-existence of the right to exclude and the liberty to use in a right to property does not make the property right in question a bundle of entitlements. For instance, some authors argue that the fact that the incident of use is actually a Hohfeldian liberty, and not a claim-right,

26. Of course, there can be situations in which conceptually, A has the right to exclude B from Blackacre, but A herself has a duty not to enter Blackacre. However, even in these cases, we could still say that A has a liberty to use, since A is at liberty to determine how Blackacre is being used, by restraining B's access to it.

27. Henry E Smith, "Self-Help and the Nature of Property" (2005) 1:1 JL Econ Pol'y 69 at 75-76. Smith says that the 'default package' contains "at most" a liberty to use, but, the point is that the respective liberty comes by default, together with the right to exclude, and is not the object of easements and additional contracted rights. Since the author usually criticizes (see *supra* note 24 and accompanying text) a view of property modeled on precisely such contracted rights, for entailing a sub-optimal system of rights, the author's admission that an efficient system of rules entails pre-contractual liberties (as opposed to rights) to use, shelters the liberties to use from the critique of being inefficient; this takes away the principal reason for which we should not see the liberty to use among the essential entitlements of the right to property.

28. Adam Mossoff, "The Use and Abuse of IP at the Birth of the Administrative State" (2009) 157:6 U Pa L Rev 2001 at 2004-13 and Adam Mossoff, "The False Promise of the Right to Exclude" (2012) 8:3 Econ J Watch 255 at 256, emphasize not only the compatibility, but also the affinity between the right to exclude conception of the property right and the bundle theory (construed to imply a liberty, not a right, to use).

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should be taken as an argument against the bundle theory.[29] The liberty to use means only the lack of an obligation to the contrary for the holder; it does not give her a positive title to the use; the only way the holder could have a claim against others interfering with her use is by means of the right to exclude.[30] Therefore, holding that A has a liberty to use alongside a right to exclude amounts to denying that A has any legal protection for the use of her property other than that afforded by the right to exclude; in this sense, the existence of the liberty to use does *not* add anything to the right to exclude. Therefore, speaking of a bundle or of an aggregate of jural positions deflects attention from the fact that, in reality, there is no meaningful addition, as such, that the liberty to use does not add up to the right to exclude (since it is already contained within the right to exclude).

However, I think this account is problematic. Firstly, the bundle of entitlements tradition stems from Hohfeld who himself had no trouble saying that the liberty to use is a part of the aggregate of the jural relations constituting the property.[31] Of course, this does not dispel the worry that the denomination of 'bundle' is only a semantic matter, with no substantive implications). Secondly, and much more importantly, the liberty to use sets some standards of behavior (e.g., against the state) that are not dependent upon and could not be inferred from, the right to exclude. It is true that, as I have mentioned above, to require of X to hold the liberty to use alongside the right to exclude, in order for X to count as a right to property, is redundant, since the right to exclude entails the liberty to use. But this does not entail that the concept of liberty to use could not be grasped independently of the concept of a right to exclude (we can imagine one having a liberty to use without also having a right to exclude, like in, e.g. the liberty to use public goods).[32] This conceptual autonomy implies, in certain circumstances, that one can make normative demands on others by relying on the liberty to use alone. For instance, A could protest the privatization of a common land, on the ground of her having a liberty to walk on and use (together with others) the land in question; this liberty would be in tension with A's new duty not to trespass on B's property. The demand that A makes could not be understood through the prism of a right to exclude: A is not protesting the infringement of a legal capacity to exclude others, since she had no such legal capacity with regard to the land in question, to begin with. A's demand, instead, could be understood through the concept of liberty alone: she is protesting the replacement of her liberty with a duty. Of course, there might also be other entitlements in play, such as an immunity against others not to have one's liberty replaced by a duty, but there are cases nonetheless imaginable, in which A did not have an immunity

29. Simon Douglas & Ben McFarlane, "Defining Property Rights" in James Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford University Press, 2013) at 219.

30. HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) at 171; Williams, *supra* note 19 at 1144; Kramer, *supra* note 19 at 11-12.

31. See Hohfeld, supra note 7 at 96-97.

32. The concept of liberty could be employed in a normative argument independently of the concept of property rights. See, e.g., Cheyney C Ryan, "Yours, Mine, and Ours: Property Rights and Individual Liberty" (1977) 87: 2 Ethics 126.

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(and the privatization that turned B into an owner was lawful and constitutional), and yet, her protest is meaningful. She could argue that her liberty protected a moral interest, or that the liberty has been traditionally respected; in all these cases, the *only* relevant *legal* aspect that renders A's demand meaningful is the existence of a liberty (A could not meaningfully demand the legal preservation of a legal entitlement that she has not been possessing).

Similarly, in the case of property, A's having a liberty to use could make meaningful A's protest against the environmental regulatory statute imposing on her a duty to not use her property in such and such a way. The regulatory guidelines do not trespass A's property, and, let us say that their enforcement is based on monetary sanctions for non-compliance, not on government officials entering A's land to ensure that the outcome of A's not using her property in such and such a way does actually occur. Nevertheless, the regulatory statute does impose on A an obligation, which limits A's liberty to use her property. The existence of A's liberty to use is the *only* legal entitlement in A's possession that makes meaningful her protest against the regulation; her right to exclude is of no help in aiding us to understand why A makes a complaint, since there has been no interference with that right. Even if, let us say, the statute would impose an obligation for A to let government officials on her property, in order to monitor the compliance with regulations, it is still the case that we cannot grasp A's protest without having in mind a concept of liberty to use, independent of the concept of the right to exclude, since the obligation to not use the property in a certain way is comprehensible even if there were no requirements for its enforcement amounting to the state not trespassing A's property. The trespass of the property by the state for monitoring purposes is dependent upon a prior statutorily defined obligation on the part of A; therefore, the existence of the trespass does not exhaust the meaning of there being an obligation for A not to use her property in such and such a way. A's obligation could be understood in isolation from the enforcement to which it antecedes. So, the protest that A could conceivably make does not depend upon her right to exclude, but upon her liberty to use, since it is this liberty that is being limited by the statutory duty.

What I am claiming is not that the liberty to use is, by itself, a normative support for a demand against the state. The liberty to use, by itself, does not entail that the state has no right (or, rather, power) to replace that liberty with a duty (just as the existence of a right to property does not, by itself, implies that the state has no power to relinquish that right; what is required is an immunity of the title-holder against the state). What I am claiming, however, is that, if there is a normative reason for A to make a demand to the state, whatever the normative reason for that demand (it could be a moral or a constitutional reason), that demand could not be grasped without the concept of legal liberty. In our case at hand, since the right to property is constitutionally protected, and the liberty to use is necessary for the right to property, it follows that the liberty to use is itself constitutionally protected. In this case, it is conceivable that A could demand that the state not replace her liberty to use with a duty to a contrary action. She has a constitutional claim against state action, but this constitutional

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claim is conceivable only by means of the category of a liberty to use, not by means of the category of a right to exclude.

Therefore, the liberty to use is not a non-entity and its existence is not a non-event. It is entailed by the right to exclude, but it is conceivable independently of the right to exclude; this conceptual autonomy can account for demands against the state,[33] that we would not understand by the existence of the right to exclude alone. For this reason, saying that property rights are a *bundle* of entitlements (and not merely rights reducible to the right to exclude), made up of a right to exclude and a liberty to use, is meaningful, because the liberty to use does *add* something to the right to exclude.

Two Kinds of Infringement

We have seen above that the concept of liberty is a weak legal protection of use, but nevertheless, is able to support normative demands without a reliance on the right to exclude. On one hand, the liberty of use is not an outcome-oriented entitlement; it does not give the holder an entitlement against others that a certain outcome of her using the property in a specific way obtain. This means that (absent additional protective rights), a holder can be interfered with by others in her actions covered by the liberty, with the result that the holder's end in pursuing those actions, is frustrated. Just as A's liberty to speak in public is not being infringed when others act with the result that A is no longer able to give her speech, so B's liberty to use her car in order to drive at the highest legally permitted speed is not being infringed when the other drivers' actions are such that they result in A no longer being able to use her car in order to drive at the speed she wanted.

On the other hand, the liberty to use can render meaningful a protest against being prohibited to use the property in a certain way. This is because, since the liberty is nothing more than the absence of a contrary obligation, the liberty is taken away whenever the correspondent contrary obligation is being imposed. If A has the liberty to build residential complexes on her land, then an environmental regulatory statute forbidding the building of residential complexes on the types of property that she possesses, has taken away A's liberty, since it imposes an obligation on A to refrain from doing what she has been permitted to do.

This nature of the liberty to use makes the case that the question of whether use-impairing regulation takes away property, is not straightforward. The liberty to use does not give the owner an entitlement against the state or any other private individual that the outcome of the owner using the property in a certain way must obtain. In this sense, it seems that the regulation, affecting an outcome to which the owner was not entitled to, has not infringed the owner's liberty. However,

33. What my argument supports is only a demand against the state, not also a demand against other private individuals. The liberty does not entitle anyone to expect anything from others, and the existence of a liberty does not make conceivable any such interpersonal demands; it is only a conceivability condition for claims against the state.

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since the regulation imposes duties on the owner to not use the property in a certain way, it limits, or it partially relinquishes her liberty to use. Merely replacing a statutory liberty with a statutory duty counts as a mere replacement, and not an infringement (or violation), of the liberty (even if one could regard this replacement as problematic from, e.g., a moral point of view). However, if the liberty to φ is constitutionally protected, then a statutorily defined duty to not φ seems to be infringing the liberty to φ (similarly, it makes sense to say of a duty imposed by the executive to be infringing, and not merely replacing, a statutory liberty)[34]. In this sense, if the liberty to use is constitutionally protected, then it seems that the use-impairing regulation gives the owner *legal* standing to protest (or to seek compensation for), on constitutional grounds, the limitation or the partial taking away of the liberty to use.

Now, if the constitution of a state guarantees the right to private property and makes the government liable to pay compensation when private property is taken away, and if (independently of, but concordantly with, the constitutional text), the right to private property is taken to be a bundle of entitlements made up of at least a right to exclude and a liberty to use, and if both of these entitlements are assumed to be essential, then it seems that the taking of the liberty to use amounts to a taking of the constitutionally protected private property.

I do not want to deny the above conclusion, but only to qualify it in the following sense: the infringement of the liberty to use could not be put on the same par with the infringement of the right to exclude, and this difference is relevant when assessing whether the infringement of any one of these two entitlements amount to a taking of private property. In this vein, I want to begin by making a comparison between the infringement of a right and the infringement of a liberty.

We can say that a right can be infringed along two different parameters. Let us call the first parameter the Existence Parameter (the E-Parameter) and the second, the Outcome-Parameter (the O-Parameter). We can see the E-Parameter as specifying what counts as an infringement from the point of view of the existence of the entitlement, while the O-Parameter, as specifying what counts as an infringement, from the perspective of the outcome to which someone might be entitled.[35]

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34. This point seems to run counter to the idea that liberties cannot be violated or infringed, but only "erroneously" denied in their existence. See Rowan Cruft, "Why Aren't Duties Rights?" (2006) 56:223 Phil Quarterly 175 at 189.

35. There is a vague analogy between this construction of infringement and the issue of what counts as restricting freedom. If the freedom of X is the entitlement to not be prevented by Y from doing Z, then, on an account of rights-based freedom, the Z parameter contains the actions that X has a right to do, and the Y parameter specifies, once the actions in the Z parameter are defined, what counts as an interference with those actions. In this sense, it seems that restricting the scope of the actions in the Z-parameter does not infringe freedom. Ralf Bader, "Moralizing Liberty" in David Sobel, Peter Vallentyne & Steven Wall, eds, *Oxford Studies in Political Philosophy*, vol 4 (Oxford University Press, 2018) 141. However, to keep the analogy with my account of infringing legal entitlements, it can be said that there could actually be an interference with freedom along the Z-parameter, if the actions defined in this parameter do not correspond to the actions that the agent has a right to in a higher-level parameter (e.g., the legislature could deny that the agent has a right to, or is free to, do actions which she has constitutionally a right to do or is free to do). This interference would not consist

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When a right which was supposed to hold in a certain circumstance, is being denied by means of, for example, the imposition of a duty, then this amounts to an infringement of the right along the E-Parameter. If A has a constitutionally protected right to exclude others from her property, then A's right is being infringed if the legislature imposes a duty to accept others on her property; this duty is a direct denial of the existence of A's right.

By comparison, if A has a right fully recognized by the legal system, A's right can be infringed if the content or the outcome that the right is an entitlement to, does not occur. This is an infringement or violation along the O-Parameter. If the state has recognized (and has not denied since) A's right to exclude others, then this right is being infringed when B trespasses on A's property. The right to exclude entitles the owner to the outcome consisting in the state of affairs of B, C and everybody else not trespassing on her property. The failure of B to act so as to ensure that the outcome to which A is entitled obtains, amounts to an infringement or violation of A's right. Similarly, if A has a contractual right against B that B perform some action X, this means that A has an entitlement against B that the outcome of B performing X, obtain; therefore, B's failure to perform X infringes or violates A's right along the O-Parameter.[36] In contrast to an interference along the E-Parameter, an interference along the O-Parameter occurs without denying the right-holder's entitlement. If B fails to bring about the outcome that A was entitled to, this does not amount to a denial of A's entitlement to that outcome.[37]

Let us consider now the liberty. If the way we have characterized the liberty above is true, then it must follow that the liberty can be infringed only along the E-Parameter. There cannot be an O-Parameter for liberty, since the liberty does not contain an entitlement to an outcome. So, if A's constitutionally protected liberty to speech concerning a certain issue, is being replaced by the legislature with a duty to not speak about that issue, A's liberty is being infringed along the E-Parameter. However, assuming that A's constitutionally protected liberty to speech has been fully recognized by the legislature, if B constantly interrupts A without allowing her to express her opinions in the manner she desires, B could not be said to commit an infringement of A's liberty, since this liberty did not give A an entitlement to the outcome of her speaking, in the first place.

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in preventing what is already defined for the agent, but in failing to define properly (this failure is not a prevention like the one in the Y-parameter, which is interfering with an *exercisable* right, but rather, the failure is to turn a guaranteed right into an exercisable one—assuming that constitutional rights do not apply directly, but require legislative specification, which can operate within or outside the constitutional boundaries).

36. This kind of infringement of a contractual right seems different from the kind of infringement that it occurs in a situation in which A has a contractual right against B, but an unauthorized trustee cancels B's duty without A's consent. See Pey-Woan Lee, "Inducing Breach of Contract, Conversion and Contract as Property" (2009) 29:3 Oxford J Legal Stud 511 at 531. In this situation, we can say that the infringement of the contractual right has occurred along the E-parameter, since its existence has been impermissibly denied.

37. It could be said that the distinction between the E-Parameter and the O-Parameter is an unnecessarily fancy piece of terminology for conveying a rather trivial idea. This is true; however, it is aimed at facilitating the argument (by making it more salient and easy to identify the levels of analysis) that will come concerning the contrast between the right to exclude and the liberty to use in the eminent domain context.

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An objection to this account can be brought along the following lines: even though a liberty does not give its holder an entitlement to an end-state, it could be said, nonetheless, that it gives its holder an entitlement *to aim* to achieving the end-state in question;[38] now, since the process of aiming could be seen as an outcome or as a state of affairs that the liberty-holder is entitled to, the interference with the process of aiming itself is something that could count as an interference along the O-Parameter. Therefore, we have reasons to claim that a liberty can be infringed, just as a right, along both the E- and the O-Parameters.

But, I think that the claim that a liberty entitles one to aim to achieve an end-state, is a claim which generates confusions. Consider the following situation: A has the liberty to drive her car at the legally highest speed rate, but she is being currently caught in traffic. If A's liberty could be rendered as an entitlement to aim at doing something (rather than achieving something), then it seems that A's liberty has been infringed, because, being stuck in traffic, there is no way for her to attempt to increase the speed, since any such attempt is physically constrained. However, this result is odd. It would seem that the car drivers violated each others' liberty and some form of (minimal) compensation is required. Because of the oddity of the result and its incongruence with familiar ways of social interactions, we could *not* say A has an entitlement to *aim* at driving at the desired speed.

The notion of entitlement to aim is misleading (it depends what part of a chain of action counts as 'aiming' in relation with the final result of that chain of actions), but I think that this notion has a sort of heuristic value, in guiding us toward the correct answer. I think we should reconsider this notion not as an entitlement at all, but as a sort of *legal enabler* (to aim or attempt). If A has been granted a driving license and has not been blocked by the police to drive (prior to the event of the traffic jam), these are facts that enable A to attempt at a (conceptually) distinct moment to achieve a certain result. This enabler should not be construed as something necessarily positive either, and neither as something having occurred prior to the attempt; we can think of the absence of the obligation to not drive in this part of the city (something negative) as enabling A to drive in this part of the city, not only prior to A driving in this part of the city, but also all along the time that A drives. In this sense, the relevant aspect of what we could somewhat misleadingly term as an entitlement to aim or to attempt, is the fact that it brings into *existence*, as a legal matter, a space of free action for A. That space in itself does not constitute the object of the entitlement; rather, the object of the entitlement is the mere fact of its *being brought* into existence. A's entitlement is to what enables or brings into existence that space of free action, and that is the liberty *itself*. That liberty could be marked positively, through an express license—that is the particular way in which it exercises its *enabling* function, but it could also be expressed merely through the absence of a contrary duty. In this sense, the only entitlement that the liberty-holder has is the absence of a

38. Spena, *supra* note 20.

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duty. Whenever someone is legally *disabled* from performing a certain action, this amounts to denying the liberty itself. Therefore, the only way a liberty can be infringed is along the E-Parameter.

What Do State Takings Infringe?

With this in mind, let us consider what happens when the state exercises its power of eminent domain. If the state takes away the liberty to use,[39] it performs an infringement on the E-Parameter. If it takes away the right to exclude of the owner, then it makes *at least* an infringement on the E-Parameter.[40] There is also a sense in which there is an infringement on the O-Parameter, but this statement must be justified. When the right is denied, the *outcome* in relation to which this right is an entitlement is also taken away. *Relinquishing* the right to exclude amounts to *trespassing* on the owner's property: the outcome of the others staying away from the property does not obtain. Of course, the trespass could physically take place after the relinquishment, when A no longer holds a title, but it is still true that relinquishing the right to exclude amounts to infringing an outcome that the owner *otherwise had* an entitlement to. When A sells her property, we could not say as intuitively as above that the outcome that A would have had, has been taken; but this is so only because the extinguishment of the right to exclude in selling does not count as an infringement in the first place, and therefore, its significance is *not carried over* to the outcome. When A sells her property to B, she gives up her right to exclude, such that she consents to being deprived of the entitlement to the outcome that the right to exclude protects; the outcome is no longer hers, so she could not meaningfully be seen as protesting its infringement. By contrast, when the state denies to A her constitutionally protected right to exclude, since this denial (even though justified) infringes (as opposed to violates)[41] A's right to exclude, we could not say that the *relationship* that A had with the *outcome* protected by the right to exclude is totally relinquished.

39. I want to clarify that when I refer to takings of liberty to use, I actually refer to takings of specific liberties to use, like the liberty to build something on one's land; it is natural that taking away the liberty to use *in toto* is a taking of property, since the continuing existence of the right to exclude is a mere formality. However, the question is whether takings of specific liberties to use count as takings of property.

40. The adverb 'at least' should be seen only as heuristic, not as part of a rigorous definition. If the state occupies one's land, without formally transferring the title (infringement on the O-, but not on the E-Parameter), we could see this as a taking. However, in some cases, where the trespass is minimal, as in *Loretto v Teleprompter Manhattan CATV Corp* [1982] 458 US 419, where the state has authorized an unconsented entrance on the property of landlords, in order to install cable television junction boxes, it is harder to see this infringement along the O-Parameter as constituting a taking; for the purposes of the eminent domain area, it seems more intuitive to treat this authorization as taking away a specific liberty to use (the liberty to not have cable television junction boxes installed). The trespass is only a means of carrying out the taking of this specific liberty to use (other means, such as imposing fines, might also involve trespass).

41. When I referred to infringements on the two parameters in the general discussion above, I did not mean to oppose it to violation. However, in the specific context of the eminent domain, I assume for now that making this distinction is appropriate (I will discuss below the case in which we do understand eminent domain through the lens of this distinction).

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The constitutionally protected right to exclude implicitly gave A a constitutionally protected entitlement to an outcome, and this entitlement subsists, as a sort of '*constitutional residue*'[42], even after A no longer has the right to exclude. This 'constitutional residue' gives us the sense that, when the state takes away the right to exclude on the E-Parameter, it also takes away an outcome that the owner is constitutionally entitled to.

For this reason, we could say that the eminent domain infringement of the right to exclude is a two-tiered process—it occurs on both parameters, while the eminent domain infringement of the liberty to use is only a one-tiered process—it occurs on a single parameter. When the state takes away the liberty to use, this has in common with the state taking away the right to exclude the fact that both are denying the existence of a legal entitlement. However, what the taking of the right to exclude has as a further feature is the fact that it relinquishes an outcome to which the owner had an entitlement to occur. Therefore, the taking of a right to exclude is something more than the taking of the liberty to use. Both of them count as takings of property, but in significantly different degrees. It takes more for a taking of the liberty to use to be translated into a taking of property than it takes for a taking of the right to exclude to be translated into a taking of property. Otherwise, we would not be able to account for the distinctiveness of the right to exclude as compared with the liberty to use.

Since the right to property could be seen as a conjunction of (at least) the right to exclude and the liberty to use such that taking away any one of the conjuncts amounts to taking away the property, it could be objected that, given the fact that the sole thing that counts for the taking of the liberty to use is an infringement on the E-Parameter, then whenever the existence of the liberty is (totally or partially) denied, the property should be counted as (totally or partially) taken, just as whenever the right to exclude is denied, the property should be counted as taken. But, I think that if we were to go with this strategy, we would not be able to account for the distinctiveness of the right to exclude, whose infringement actually amounts to much more than the infringement of the liberty to use. When the state denies the existence of the right to exclude, it also relinquishes an outcome to which the owner was entitled; the same cannot be said of the infringement of the liberty to use. The question then is: why do we have to treat these two infringements proportionally?

I think the answer lies in the fact that the liberty to use is a weaker protective entitlement than the right to exclude. As we have seen above, the right to exclude protects the interest in use in a more robust way than the liberty to use does. And

42. This is *somewhat* (not fully) analogical to the notion of 'moral residue'. For the latter, see Oberdiek, *supra* note 13 at 331. In the case of a 'moral residue', which remains after the justified infringement of a right (i.e., a debt left over, which the infringer owes to the person whose right has been infringed), what is being regretted is the state of affairs in which A enjoyed undisturbed her rights. Similarly, in the case of a '*constitutional residue*', which remains after the justified taking of the title of property, what is being regretted (here from a constitutional, as opposed to a moral perspective) is the state of affairs in which the owner enjoyed the outcome of non-trespass, which her title to property guaranteed.

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if the underlying rationale (or one of the underlying rationales) beneath the right to property is the interest in use, then we cannot consider the infringement of a less protective entitlement to be on the same par with the infringement of a more protective entitlement when evaluating what counts as a taking of property. Otherwise, it would be difficult to explain how the property in question serves an interest in use. Therefore, the reason why we can make, in this particular circumstance, the inference from (i) the infringement of the right to exclude amounts to something more than the infringement of the liberty to use, to (ii) what it takes for the right to exclude to be infringed is less than what it takes for the liberty to use to be infringed (i.e., treating their thresholds for infringement differently) is that, since infringing the right to exclude is more detrimental to the interest in use than infringing the liberty to use, it would mean to fail to recognize that property serves (maybe along other values) an interest in use, if we would allow that takings of the right to exclude are on the same par with takings of the liberty to use.

This recognition of inequality, for purposes of proportionality, does not translate into making the right to exclude a more essential incident of the right to property. We could make a distinction between (i) the concept of the right to property, and (ii) what justifies the right to property. As far as (i) is concerned, the bundle of rights view that I have endorsed entails that both the right to exclude and the liberty to use, are equally necessary. Taking away either one of these two incidents counts as a taking of property. However, as far as (ii) is concerned, I have assumed that the right to property is justified by an interest in use. This interest in use could be protected in different ways, and, therefore, consistent with protecting the interest in use, I think we should treat the normative weight of the right to exclude and of the liberty to use, as a function of their strength in securing the interest in use. Therefore, even if taking either the right to exclude or the liberty to use amounts to taking away the right to property, what it takes for X to be a taking away of the right to exclude is less than what it takes for X to count as a taking away of the liberty to use.[43] In this sense, we do not need to go into an investigation of what incident is more essential for the concept of the right to property. What is important is that the liberty to use is not an entitlement to an outcome, such that its infringement does not have the same high consequences for the owner as the infringement of the right to exclude.[44]

43. Consider the following analogy: it is the convention of a game that A wins whenever either of the two armies of B is being defeated; however, it takes much more, in terms of A's effort, to defeat an army, in comparison with the other. The strategies are equally essential in winning, even though the players may strategically treat them differently.

44. I do not want to devise a concrete test here; however, I think that a plausible test would be one in which a taking of the liberty to use is equivalent with a taking of the right to exclude, if and only if sufficiently many *specific* liberties of use have been taken away so as to render the situation functionally equivalent to one in which the right to property has been taken away (however, other tests could be devised); I think my account is compatible with holding that we could distingish between a partial and a total taking of property: in these cases, we could say that property has been partially taken if sufficiently many specific liberties of use has been taken, so as to render the situation functionally equivalent with taking a part of the possession (i.e., equivalent to the situation in which the state buys ony a part of one's property).

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Specified Rights

An objection of the following sort can be given against my account above: I started from the assumption that the state taking of property is an infringement, as opposed to a violation of a right, such that the denial of the right to exclude leaves a 'constitutional residue' to the outcome of non-trespass to which the owner was constitutionally entitled. This constitutional residue explains why the taking of a right to exclude amounts to much more than a taking of the liberty to use, since the former amounts also to an extinguishment of the outcome. If there were no 'constitutional residue', then the taking of the two incidents would have been perfectly identical: they would have amounted only to a denial of existence of the entitlement; the new legal situation in which A would no longer have the right to exclude would *ex officio* deprive her of any entitlement to the outcome of non-trespass; the fact of the state's trespass on her property is a mere effect of A not having the right to exclude, not an infringement of the right to exclude over and above her being deprived of the right to exclude. Now, the objection goes that this 'constitutional residue' is admissible when we adopt the infringing/violating distinction; however, we have doubts that this infringing/violating distinction is true: rights at the constitutional level are left underspecified, such that a lower-level delimitation and specification by, for example, legislative means, is required; this means that limiting rights is not an infringement, but a mere specification.[45] Along these lines of argument, the taking of property through eminent domain could plausibly be thought not as an infringement of a right to property, but a constitutional constraint on specification. The compensation would not be the expression of a 'constitutional residue', but rather a constitutional constraint on how to legislatively specify the right to property; whatever form and specific arrangements of jural positions the property would take, it should also contain a liability of being taken by the state and a claim-right to compensation (in whatever manner to be specified).

I do not want to take a stand on the plausibility of this view of eminent domain here. One could accept that the limitations of constitutional rights are not infringements, but merely specifications, but still hold that this view does not apply specifically to the case of the eminent domain. However, assuming that we can explain eminent domain in this way, I think we can reach the same conclusion as above, namely that what it takes for the claim-right to exclude to count as a taking is less than what it takes for the liberty to use to count as a taking. The reason for this lies, again, in the different natures of claim-rights and liberties. There is a higher range of specification for liberties than for claim-rights. A constitutionally protected liberty can be specified in more ways than a constitutionally protected claim-right. Since the claim-right must secure an outcome, the possible specifications that the legislature can pursue are limited to ensuring that the particular outcome in question is secured. But, in the case of

45. Grégoire CN Webber, *The Negotiable Constitution. On the Limitation of Rights* (Cambridge University Press, 2009) at 116-44.

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liberties, the same constraint is absent. The liberty to use can be specified without concern that a certain outcome of use does not occur, and this makes it the case that its possibilities for specification are higher. Moreover, if the liberty to use can be seen as an *enabler* to use the property, then this implies, again, a larger number of possibilities of specification for liberties, since there are more ways to be specified in which A is enabled to use the property, whatever the particular use is, than ways to be specified in which a certain use of property obtain, or the outcome of non-trespass obtain. For instance, regulatory policies could be seen not as much as restricting A's liberty to use, but rather as increasing it, by enabling A to use her property in other ways. For instance, an environmental regulation forbidding owners to use their properties in some pollution-inducing ways, may actually enable A to use the property in other ways, i.e. in ways which she would not be able to use otherwise, due to pollution. The regulation would not, therefore, be as much a restriction on the liberty to use, as a different specification of the *same* liberty to use.[46]

Therefore, the possible specifications of the claim-right to exclude which are compatible with the property not being taken by the state, are more limited than the possible specifications of the liberty to use which are compatible with the same. This implies that it takes more for a liberty to use to be considered taken, than for a right to exclude.

Compensation

In light of all what has been said, I want to add some thoughts on compensation for property taken. There is a clear problem with compensating the liberty to use. It is difficult to tell how the future might have been, if a certain use would have been left to the owner. Because the liberty to use is not an entitlement to the outcomes of any specific use, one could not have a title to be compensated for being left without the *possibility* of arriving at a certain outcome. This would have been a further argument for why infringing the liberty to use should not be easily translated into a taking of property. The argument would proceed with the idea that the liberty to use cannot be infringed along the O-Parameter, and this fact would make its taking most likely uncompensated, since for one to be compensated, there must preferably be the case that an outcome to which one had a title, has been extinguished (it is preferable if we want to avoid the problem of

46. Similarly, Eric R Claeys, "Takings, Regulations, and Natural Property Rights" (2003) 88:6 Cornell L Rev 1549 at 1554, 1567, 1576, 1585-89, following American nineteenth-century natural law jurisprudence, argues that regulations do not count as takings insofar as they increased the owner's sphere of freedom of use and beneficial uses of property. However, in my account, it is the *same* liberty to use which, while being regulated, is not restrained (but even increased), while on Claeys' account, the regulations restrict some entitlements, but do not count as compensable takings of those entitlements, if the scope of *other* entitlements is increased. Moreover, and more importantly, my account concerned a conceptual distinction between claim-rights and liberties, while Claeys' account concerned a moral point (rooted in natural rights theory) applicable to all entitlements.

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compensating based on guesses of how things would turn out[47]; by contrast, when the outcome is guaranteed legally to the owner, it does not matter how things would have been; all that matters is that the outcome has been extinguished). Since the liberty to use cannot be compensated, it follows that its taking could not be translated into a taking of property, since the taking of property is compensable.[48]

Conclusion

I have argued that takings of the incident of use should be treated differently than takings of the incident of possession. I argued that what it takes for an infringement of the right to exclude to be translated into a taking of the (whole) property is less than what it takes for the infringement of the liberty to use to be translated into a taking of property. I arrived at this conclusion not by considering that the incident of use is not as essential for the definition of the property right as it is the incident of possession, but by considering the nature of the entitlements that protect these two incidents. The incident of possession is protected by a Hohfeldian claim-right to exclude, while the incident of use is protected by a Hohfeldian liberty. Since the infringement of a claim-right amounts to more than the infringement of a liberty, and since this difference has a relevance for how the property's interest in use is being protected, then, I argued, we should consider that what it takes for the infringement of a liberty to use to count as a taking of property is more than what it takes for the infringement of a right to exclude to count as a taking of property.

47. On this problem, see Donal Nolan, "Rights, Damage and Loss" (2017) 37:2 Oxford J Legal Stud 255.

48. However, a question that this argument raises is whether we establish something to merit compensation because (among others) compensation could be easily determined, or do we make something compensable in virtue of its meriting compensation, no matter how hard it is to determine the compensation?

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