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A FIDUCIARY THEORY OF PROPERTY

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PROPERTY RIGHTS do not just give a person the power to rule over things, for example to command the use of the material or immaterial assets that the person holds as their own. They also give an owner power over other persons. An owner's legally granted authority to determine who can enter their home, for example, implies a power to exclude others from enjoyment of the same good. Property is always a triadic relation, between an owner, a thing, and a nonowner. This is more or less a truism in property theory. But some owners have control over vital resources that are of great importance to the lives of others. Hence ownership power can become harmful to nonowners, more or less analogous to the way the exercise of political power can become problematic for those subjected to it. This analogy between property and political power received canonical expression in the work of early twentieth century American legal realists such as Morris Cohen, who claimed that "dominium over things is also imperium over our fellow human beings."[1] However, the analogy has always remained suggestive at best, and it has never been accepted by standard libertarian or egalitarian approaches to property. Can it be saved?

The strategy that I explore in this paper is to apply to ownership a widespread understanding of political power in the Western tradition: as an *office* in which governments hold their power in trust, to the benefit of those over whom they rule.[2] This is a *fiduciary* understanding of the political relation between rulers and subjects. In such a fiduciary relation, a fiduciary is empowered to make decisions over a beneficiary, for the interest of that beneficiary. In the private sphere, lawyer-client, doctor-patient, and teacher-student relations are prominent examples of fiduciary relations. The present paper proposes to apply this fiduciary model to ownership as well. It argues that owners have fiduciary duties to nonowners when they interact with them on terms that risk exploiting them. When properly enforced, these fiduciary duties tame the power of

1 Cohen, "Property and Sovereignty," 13. More recently, the emphasis on power has been retrieved in property theory by Robé, *Property, Power and Politics*; and Ireland, *Property in Contemporary Capitalism*. For a response to Robé, see Claassen and Katz, "Property."

2 Fox-Decent, *Sovereignty's Promise* and "Challenges to Public Fiduciary Theory"; Leib et al., "Mapping Public Fiduciary Relationships"; and Criddle et al., *Fiduciary Government*.

ownership and prevent abuses of power over nonowners. With great power comes great responsibility—in this, political rulers and owners should be alike.

The paper is set up as follows. In section 1, I argue that libertarian and egalitarian property theories, while opposite in many ways, share an *absolutist* understanding of ownership. *Stewardship* theories of property reject this understanding and position the owner as responsible to others. The fiduciary property theory is a species of such a stewardship view.

In sections 2 to 5, I develop my fiduciary property theory. In section 2, I build on Larissa Katz's theory of ownership as an office and argue that ownership is a legally created power that makes owners into fiduciaries for the legal system as a whole. In section 3, I argue that owners become fiduciaries for particular nonowning persons, in two types of situations: when they cooperate with others in contexts of incomplete contracts, and when they impose externalities on others. In both contexts, the risk of exploitation justifies the imposition of fiduciary duties. In section 4, I elaborate a conception of exploitation to specify and justify this position. Exploitation happens when nonowners are unfairly taken advantage of; it requires the acceptance of a specific theory of justice. By avoiding exploitation, owners contribute to realizing a just society. In section 5, I turn to the problem of how to implement fiduciary duties in practice. Both court enforcement and democratization of ownership are ways of dealing with this problem.

The final two sections compare my fiduciary property theory to relevant alternatives. In section 6, I contrast it with the work of three property theorists who have proposed similar views. In section 7, I return to the contrast between fiduciary and egalitarian property theories. Both promise to restrain the powers of owners over nonowners, but in different ways. The fiduciary relationship holds the potential for reforming the relationship between public authorities and private owners, from an antagonistic to a (more) cooperative one.

1. LOCATING FIDUCIARY VIEWS WITHIN PROPERTY THEORY

In this section, I sketch the landscape of property theory with a view to locating how a fiduciary theory fits into it. Simplifying a rich tradition that cannot be comprehensively surveyed here, I start with the basic dichotomy between libertarian and (liberal-)egalitarian views on property.[3] Libertarian property theories defend robust property rights. They often (though not always) are philosophical descendants of Locke's property theory, which allows for

3 For surveys of the tradition, see, e.g., Garnsey, *Thinking About Property*; Pierson, *Just Property*, vols. 1–3; Becker, *Property Rights*; and Ryan, *Property and Political Theory*.

unilateral appropriation under the right conditions.[4] Property rights on a libertarian view are meant as a protection against the state encroaching on an owner's power over their goods. Hence the bar for state regulation must be appropriately high. Tomasi expresses this in a Rawlsian framework by arguing that all property rights should be counted among the basic liberties, which can be restricted only for the sake of other basic liberties.[5]

Egalitarian property theories locate themselves opposite to libertarian property theory. They see property rights as state-guaranteed rights that are *instrumental* to a higher-order (liberal) good. For example, Rawls designs his two principles of justice so as to realize for each citizen the two moral powers, their capacity for a sense of justice and their capacity for a conception of the good. In light of this normative justification, property rights in personal goods are classified as basic liberties, but property rights in the means of production are not.[6] Hegelian and Kantian theories are another example. Hegelians see the value of ownership in the opportunities for owners to express their will in the control over their properties.[7] For Kantians, property can be justified only as an expression of the omnilateral will, in contrast to Lockean unilateral appropriation.[8] Such theories can be developed in an egalitarian direction, arguing for regulation or redistribution of property rights.[9]

To locate fiduciary views of property, we must first understand what libertarian and egalitarian views have in common, despite all their differences. Both accept that ownership entails having discretionary power over goods, within the limits established by law. Beyond these legal limits, owners rule absolutely in that they are *absolved* from justifying their choices to third parties, as a public official normally is required to do.[10] As Hanoch Dagan says, "When public officials occupy a position of authority, they purport to represent the state. . . . The authority of owners, by contrast, relies on their subjectivity—their intention,

4 Locke, *Two Treatises of Government*; Nozick, *Anarchy, State, and Utopia*; and Narveson, *The Libertarian Idea*.

5 Tomasi, *Free Market Fairness*. Similarly, see Gaus and Lomasky, "Are Property Rights Problematic?"

6 Rawls, *A Theory of Justice*.

7 Hegel, *Elements of the Philosophy of Right*.

8 Kant, "The Metaphysics of Morals."

9 See Waldron, *The Right to Private Property*; Radin, "Property and Personhood"; and Ripstein, *Force and Freedom*.

10 Katz, "Property's Sovereignty," 304. The notion of absolutist property is often associated with Blackstone's famous dictum of ownership as a "sole and despotic dominium." See Blackstone, *Commentaries on the Laws of England*, bk. 2, p. 1.

judgment, and point of view—as a free-standing source of legal claims over others."[11]

This absolutist nature of property does not mean that an owner's power is unlimited. The qualifier 'within the limits of the law' is crucial. Public laws can restrict specific exercises of property rights by imposing duties in the public interest. For example, a law can restrict my right to trade my properties by specifying times and places where trade can take place. Throughout this paper, I will refer to such state-imposed legal duties as *regulatory duties*, to avoid confusion with fiduciary duties (which can also be imposed by law). Absoluteness pertains to the decision space left to owners *after* regulatory duties have been imposed. Libertarian positions (pleading in favor of minimizing legal restrictions on ownership) as well as egalitarian positions (pleading in favor of more substantive restrictions) differ on the size of these legal restrictions but agree on the underlying absolutist conception of property. This makes the absolutist conception virtually unchallenged in modern property theory.[12]

Fiduciary property theories reject this absolutist conception of property. A fiduciary relation typically involves two persons, a beneficiary and a fiduciary. Between them, there is a fiduciary relation when: (1) the fiduciary exercises discretionary power over the interests of a beneficiary; (2) the beneficiary is vulnerable to (or dependent on) the fiduciary; and (3) the beneficiary must trust the fiduciary to act in their best interests, and the fiduciary must act in a trustworthy manner.[13]

11 Dagan, *A Liberal Theory of Property*, 62.

12 Olsen, "The Early Modern 'Creation' of Property and Its Enduring Influence," 127; and di Robilant, *The Making of Modern Property*, 29. Absolutist notions of ownership are often associated with classical liberalism, against which egalitarians would hold a "bundle of rights" view, on which several persons can hold various "incidents of ownership" with respect to the same good. See Honoré, "Ownership." But on my understanding, absolutism does not necessarily imply "full liberal ownership." For example, a landlord holds rights to sell their property and retains the right to get an income but has contracted away the right to use the property to a tenant. These fragmented property constructions are simply a matter of legal reality. See Grey, "The Disintegration of Property." The point is that *both landlords and tenants can be absolutist* with respect to the part of the bundle of property rights that each of them holds. No fiduciary orientation necessarily comes into being just by dividing the incidents of the bundle over multiple persons. I will for simplicity speak of owners but mean to include holders of lesser property rights as well.

13 Frankel, *Fiduciary Law*, 2; Miller, "The Fiduciary Relationship," 69; and Fox-Decent, *Sovereignty's Promise*, 29. There are competing legal theories about how to define and understand the relation. For an introduction, see Smith, "Parenthood Is a Fiduciary Relationship," 402–18.

A fiduciary duty is, in the first instance, a moral duty. There is a separate field of "fiduciary ethics."[14] But as is the case for other types of moral duties, a subclass of them can be recognized and enforced in law. Under fiduciary law, fiduciaries have two main types of duties. The duty of loyalty requires the fiduciary to act as a loyal representative of the beneficiary's interests.[15] This duty would be breached if the fiduciary abuses the beneficiary's trust for their own interest. Conflicts between the fiduciary's own interest and the interests of any beneficiaries must be avoided.[16] The duty of care refers to a reasonable standard of care that the fiduciary must live up to. If the fiduciary is not sufficiently careful, she acts with negligence.[17]

According to many authors, the duty of loyalty is at the heart of the fiduciary relationship. It expresses a demand that can be cashed out in subtly different ways. Generalizing over these differences, the crucial point is that loyalty does not require one particular course of action but instead refers to a particular attitude or orientation on the part of the fiduciary. Since the power is discretionary, no particular course of action can be established as "the right one," independent from the judgment of the fiduciary. The fiduciary, in the terminology of Stephen Galoob and Ethan Leib, must have an intention to "attribute nonderivative significance to her beneficiary's interests."[18] Or it requires, in Lionel Smith's words, that the fiduciary "exercise judgment in what they subjectively believe to be the best interests of the beneficiary."[19] Or finally, in Daniel Viehoff's terms, it requires the fiduciary to deliberate in such a way that she is "guided by" the interests of the beneficiary.[20] In brief, the fiduciary must engage in an internal decision-making process resulting in an intention (judgment/decision) to act on behalf of someone else; and this process has as its focal point the interests of that other person.

What would it mean to understand ownership as a fiduciary relation? Interestingly, property has been at the heart of the development of fiduciary law, so

14 Mussell, "Theorising the Fiduciary."

15 Elsewhere I discuss the representative nature of the property relation, in the context of work on representation in democratic theory. See Claassen, "Property as Power."

16 Samet, *Equity*, 114.

17 Smith, "Parenthood Is a Fiduciairy Relationship," 200–1. What both duties imply in practice may depend. The duties of parents, teachers, lawyers, doctors, etc. are each determined by the very different relationships they have with their beneficiaries. Moreover, the duties depend upon the wider culture's ideas about good teaching, doctoring, raising children, etc. For ownership, a separate account is necessary, as for any other fiduciary relation.

18 Galoob and Leib, "Intentions, Compliance, and Fiduciary Obligations," 10.

19 Smith, "Fiduciary Relationships," 611.

20 Viehoff, "Legitimate Injustice and Acting for Others," 332.

much so that fiduciary theorists feel a need to argue that "fiduciary relationships are not confined to situations of financial or property management."[21] However, property and fiduciary relations meet each other here to regulate situations in which a fiduciary manages someone else's property, e.g., when she acts as a trustee, the director of a company, or a legal advisor. Usually, the beneficiary has voluntarily trusted their property to the fiduciary for this purpose. The vulnerability of the beneficiary is self-inflicted. The fiduciary property theory to be developed in this paper, however, is concerned with a very different phenomenon: the situation where the fiduciary manages *their own* property, and the beneficiary is a *nonowner* who has not voluntarily consented to anything but experiences the negative consequences of the owner's exercise of ownership rights. She is a *negative beneficiary*, so to speak. Fiduciary duties in such situations have as their purpose to protect these vulnerable nonowners.[22]

This application of fiduciary principles to property, which is not recognized in fiduciary law, is what I will refer to as *fiduciary property theory*. It requires a series of further explanations, which this paper aims to provide. But first: Are there any historical examples of fiduciary property theories? To the best of my knowledge, fiduciary property theories have had a marginal presence in property theory overall. They are known under the label of "stewardship" theories and have mainly been defended in two contexts.

First, various religious and Indigenous traditions hold stewardship views of property.[23] For example, Catholic social doctrine declares that the main principle for thinking about property is the *universal destination of goods*: owners are to use their property so as to also benefit the common good.[24] In the Christian tradition, this view goes back to Aquinas and Aristotle, who argued that private

21 Smith, "Parenthood Is a Fiduciairy Relationship," 452.

22 Note that it is certainly not uncommon that fiduciary relations are recognized where there is no consent to transfer authority from the (vulnerable) beneficiary to the fiduciary: the incapacity of a child or a comatose patient are examples of such situations. Nonowners here are in a similar position.

23 For example, Dagan writes about the Jewish conception of property: "Property was entrusted to us by God for our well-being; but property-owners are mere custodians of the resources they hold" (*Unjust Enrichtment*, 58). The Islamic view of property starts from a similar position. See Sait and Lim, *Land, Law, and Islam*. For a comparative discussion of ownership duties in Jewish, Christian, and Islam traditions, see Singer, *The Edges of the Field*. For stewardship in Indigenous traditions, see Carpenter et al., "In Defense of Property."

24 For the latest version of the Catholic social doctrine, see Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, sec. 178.

ownership is always burdened with a duty to "common use."[25] Practically, the most important application is that owners have duties to share their superfluous possessions with those in need. This grounds the Christian duty to practice charity.[26]

A second context in which stewardship theories play a role is environmental ethics and environmental law. Here, some authors argue that owners should act as stewards for future generations and possibly also for animals and ecosystems.[27] This would justify concrete duties to act as responsible owners with respect to land and natural resources, in particular with the aim of conservation. Owners here are put in a double position: they are both themselves beneficiaries of these resources and charged with the task of taking into account the legitimate interests of other beneficiaries, like future generations.

I do not have the space for a full discussion doing justice to these theories. One obvious problem for religious property doctrines is that they rely on spiritual foundations, which are not easily acceptable to all in a secular context. The environmental notion of stewardship is restricted in the scope of its application to land and natural resources. Can a fiduciary property theory be constructed with a broader scope (applicable to all types of resources) *and* with a justification that is acceptable in the context of a liberal-democratic society? Or is a fiduciary approach an antiquated dead end in property theory, as many seem to believe?[28]

25 Aquinas builds on canon lawyers' treatments of the duty to share with the poor in situations of dire need. See Tierney, *The Idea of Natural Rights*, 1150–625, 70–76. This "right of necessity" was shared by later thinkers such as Grotius, Pufendorf, and Locke. Aristotle, like the later Christian tradition, struck a middle road between unconstrained private property and communal property, in which private owners must accept a condition of holding property "common in use." See Aristotle, "Politics." For discussion, see Lametti, "The Objects of Virtue," 5–15; and Frank, *A Democracy of Distinction*, 54–80. For a contemporary view building on both Aristotle and Aquinas, see Lametti, "The Concept of Property."

26 Aquinas, *Political Writings*, 208; and Finnis, *Aquinas*, 188–96.

27 See Attfield, *The Ethics of the Global Environment*; Lees, "Property in the Anthropocene"; and Rodgers, "Nature's Place?"

28 I say antiquated since some critics associate fiduciary property views with feudalism. For example, legal scholars criticizing Katz's and Essert's theories of ownership as office (on which I rely hereafter) have characterized the idea of office as amounting to bringing "premodern" or "feudal" property forms back in. See Ripstein, "Property and Sovereignty," 254; and Penner, "Private Law Offices," 312. For Katz's reply to this, see Katz, "It's Not Personal," 112. In my view, the association of a fiduciary property theory with feudalism is not wrong—feudalism did conceive of property as trusteeship. See Rose, "Property as Wealth, Property as Propriety," 237. The question is whether it is necessarily feudal or whether a nonfeudal, liberal-egalitarian fiduciary theory can be developed. I discuss the relation between modern property and feudalism in Claassen, "Property and Political Power."

2. OWNERSHIP AS AN OFFICE

Fiduciary relations lead to the creation of an office, which the fiduciary holds on behalf of others.[29] Recently, two legal scholars have proposed a theory of ownership as an office. I here focus on Larissa Katz's elaboration of this idea.[30]

Katz first introduces an uncontroversial understanding of offices. They are positions of authority, roles to be filled by office holders in the context of a wider practice, such as a religious practice (a priest), a familial practice (a parent), or a political practice (a president). The role is separable from the holder—i.e., it can be fulfilled by different people acceding to the office in turn. This makes the exercise of authority to some extent impersonal. Finally, the position is a stable, enduring source of authority because when an officer dies or resigns, the office can be filled by someone else. Orphans need new, legally appointed parents, as presidencies need presidents, and companies need directors.[31] Offices are an institutionally embedded form of power, transcending the individuals fulfilling the role.

Katz applies this notion to ownership. For her, the core of ownership is "the special authority to set the agenda for a resource."[32] This definition hints at an analogy with sovereignty, the exclusive agenda-setting authority of those occupying the office of government.[33] The authority of owners is the result of a form of delegation of authority by the state. We can think of this as a constitutional choice, on a par with delegations of authority to towns and provinces or other lower levels of government. Owners are licensed to do things with their property that nonowners are precluded from doing. According to Katz, a primary argument for conceiving of ownership as an office is that it captures the *impersonality* of ownership. Office holders' authority must be recognized by all others, in virtue of their holding of the office, regardless of the specific agreements (contracts) between the office holder and these others. Ownership rights are *in rem*, not *in personam*, and the notion of office explains what that means. The authority towards third parties is linked to the owner's authority over things. When ownership of a thing is transferred to someone else, then

29 For the close link between fiduciary relations and the notion of office, see Dagan and Scott, "Reinterpreting the Status-Contract Divide"; and Samet, *Equity*, 124.

30 Katz has written extensively on the topic. See Katz, "Property's Sovereignty," "It's Not Personal," and "Ownership and Offices." Hence, I focus on her work. Essert wrote one article defending the idea ("The Office of Ownership") but later expressed skepticism ("The Office of Ownership Revisited").

31 Katz, "Governing Through Owners," 2037.

32 Katz, "Property's Sovereignty," 316.

33 Katz, "Exclusion and Exclusivity in Property Law," 293–95.

all others acquire a duty to accept the authority of the new owner. Nonowners have duties to respect the authority of the owner, regardless of the specific identity of the owning person at any point in time.[34]

Katz's understanding of office is formal. It accepts the absolutist action orientation of owners as providing the baseline for their decisions. The unique feature of Katz's ownership-as-office theory is to interpret this absolutist power as a matter of holding office. This combination of absolutist ownership with the idea of office has been criticized by Arthur Ripstein, who argues that an office must be understood more substantively, as a position in which you act as a steward on behalf of others: "Ordinarily, an official is charged with advancing or protecting the purposes of the institution in which that office is found. By contrast, an owner typically has untrammeled discretion with respect to the purposes for which the property will be used. 'Do whatever you want' is not a mandate."[35] It is characteristic of offices, on a substantive understanding, that they must be fulfilled to best realize the interests of the persons over whom authority is exercised. This is office as the locus for a *fiduciary* relation.

So should we go beyond Katz's formal concept of office and conceive of ownership as such a more substantive, fiduciary office? Two initial objections may seem to make this a problematic move.

The first is that fiduciary relations normally apply between one fiduciary and one concrete beneficiary party, on the model of binary relations such as doctor-patient and teacher-student. Is the generic power of ownership, holding *erga omnes*, too diffuse to be qualified as fiduciary? Notably, some other offices have as their task not to represent a designated set of particular beneficiaries but a purpose. Miller and Gold refer to these as situations of *fiduciary governance*.[36] For example, a judge holds an office but does not represent the concrete interests of (one of) the two litigating parties in front of them; that is the lawyers' job. But judges do make authoritative decisions, and their authority is impersonal and transmissible to other judges. They fulfill a purpose worth fulfilling in the eye of the state that creates the office.[37] The recent application of fiduciary theo-

34 In addition, Katz claims the notion of office also helps to understand the puzzle of the *transmissibility* of ownership. A transfer of ownership can be understood as the succession of a new officeholder to the office. See Essert, "The Office of Ownership," 436; and Katz, "Ownership and Offices," 269. Finally, it helps us to understand why the law abhors *vacancies* in ownership. Unclarity about "who is in charge" upsets the legal order, for property management as much as for the governance of political territories. See Katz, "Ownership and Offices," 279.

35 Ripstein, "Property and Sovereignty," 254. Similarly, see Penner, "Private Law Offices," 313.

36 Miller and Gold, "Fiduciary Governance."

37 Katz, "Ownership and Offices," 274.

ries to political and public offices would be unthinkable without this extension of fiduciary duties from a binary duty to a duty discharged on behalf of multiple beneficiaries ("the public"), as defined by a purpose.[38]

The decision-making power of owners can also be understood as a matter of fiduciary governance, although an owner's office is obviously very different from that of public officials like judges. Indeed, Katz's formal characterization of ownership as an office to set the agenda for the use of things includes such a purpose. The purpose, or public interest, at stake, which, in her view, justifies the state's authorization of owners, is that of *coordination*: of creating a well-ordered society, minimizing the risk of conflicts, chaos, and violence that might take place when it is not specified who has an ownership claim over what.[39] Owners have a constitutionally mandated duty to uphold this scheme. This can be understood as an office they hold in trust, as fiduciaries of the legal system (and through it, of society at large).[40] To this extent, Katz's theory is fiduciary in a minimalist sense.

A second objection might be motivated by the widespread belief that the duty of loyalty forbids self-serving behavior. Judges are not authorized to decide cases in ways that serve their own personal interests. The same seems true for other private and public offices. But owners make self-serving decisions all the time. Does this not disqualify them from being fiduciaries of society? However, the prohibition on self-servingness must be qualified; and this is especially important in the context of fiduciary governance for a purpose, towards a wider group of people. For the fiduciary can be among the beneficiaries as well. A member of parliament must represent a multiplicity of constituents. The duty of loyalty is directed to all of them at once and requires the member of parliament to compromise between them on a fair and reasonable basis. And the member of parliament is herself one of these persons, for she is herself a resident of the district she represents.[41] Similarly, if five business partners appoint one of themselves as managing partner, that partner makes

38 Fox-Decent, *Sovereignty's Promise* and "Challenges to Public Fiduciary Theory"; Leib et al., "Mapping Public Fiduciary Relationships"; and Criddle et al., *Fiduciary Government*.

39 Katz, "Spite and Extortion," 1478. Elsewhere, Katz specifies the purpose in terms of a division of labor (in her discussion of Duguit's property theory): "The license to make self-regarding decisions was simply a matter of a convenient division of labour: there is social value in everyone's flourishing and it just so happens that the burden of making sure that I too flourish is delegated from society to me" ("It's Not Personal," 107). Essert mentions a range of normative purposes but remains agnostic ("The Office of Ownership," 437).

40 A similar suggestion has been made in republican political theory: Domènech and Bertomeu, "Property, Freedom and Money"; and Cassasas and Mundó, "Property as a Fiduciary Relationship and the Extension of Economic Democracy."

41 Criddle, "Stakeholder Fiduciaries," 125.

decisions on behalf of all of them, *herself included*.[42] In such contexts, the fiduciary needs to balance her own interests against those of others. This could be applied to ownership as well.

In conclusion, the notion of ownership as a formal office sets up the owner in a socially responsible role with a general fiduciary duty to do their part in the coordinating the use of goods in society. But this formal conception leaves the agenda owners set for their things completely up to the owners themselves; they may fully focus on self-regarding aims. The formal conception does not introduce particular fiduciary duties towards concrete nonowners as an actual restraint on the owners' absolutist discretion. It does not require introducing such additional duties, but it is compatible with such a move.[43] Then we would move to a substantive concept of office. When—if at all—would that be justified?

3. Triggering Fiduciary Duties: Incompleteness in and Beyond Contract

A first step in answering this question is to see when and why fiduciary relations normally emerge. Daniel Markovits offered an enlightening explanation in his discussion of the difference between contractual and fiduciary duties. In this section, I will show that ownership meets his description of when fiduciary duties arise.

Markovits's starting point is that contracts are the basic tool to facilitate cooperation between private parties. Legally, contractors are held to a duty to deal with each other *in good faith*, e.g., by not manipulating and deceiving one's contract partner. This sets a lower bar and allows for self-seekingness in all other respects. When a conflict arises after the contract has been made, then the intentions as laid down in the contract are the "lodestar" in resolving the problem. Markovits calls this a form of "sharing *ex ante*": the contract lays out how to share the burdens of a problem that emerges later or how to resolve a dispute about the distribution of benefits that emerge later.[44]

The contractual relation can be contrasted with the fiduciary relation. As Markovits explains, "a fiduciary relation becomes appealing partly because a principal requires her agent to act in ways that she cannot substantially specify

42 Criddle, "Stakeholder Fiduciaries," 110–17. Similarly, see Viehoff's discussion of "acting for others," in which he emphasizes that officials who act for citizens as beneficiaries are themselves among the beneficiaries: Viehoff, "Legitimate Injustice and Acting for Others," 358, 363.

43 Katz acknowledges this. See my discussion in section 6 below.

44 Markovits, "Sharing *Ex Ante* and Sharing *Ex Post*," 213.

ex ante or cannot directly evaluate *ex post.*"[45] These are situations in which the contract is necessarily incomplete (because of the impossibility to specify everything), and this incompleteness leaves the principal (beneficiary) vulnerable. There is a potentially abusive power relation.[46] As a solution, the contract partners decide to let the sharing decisions be made *ex post*: the fiduciary. The beneficiary "buys her fiduciary's initiative."[47] To safeguard the beneficiary's interests, the law imposes duties of care and loyalty on the fiduciary.

We can extend Markovits's insight. Any scheme of cooperation can suffer from the problem of contractual incompleteness. In the case of a society, John Rawls argues that cooperation raises a question of justice—the fair division of the benefits and burdens of social cooperation.[48] This will lead to the adoption of some highly abstract guidelines *ex ante* (the principles of justice); but the actual work to implement them is left to a government. In the case of a corporation, Luigi Zingales argues that cooperation between various stakeholders creates a need for corporate governance, in which decisions about the distribution of the rents are made *ex post*. Again, the need for governance is dictated by the fact that the original contract cannot specify in advance all the possible contingencies that may arise during the cooperation.[49]

Hence for both societies and corporations, the creation of a position of authority deciding on an ongoing basis about matters pertaining to the scheme of cooperation is justified by the impossibility of foreseeing everything in the initial contract. States and corporations manage property for their purposes. But the same thought can be applied to individual owners as well. For example, when involved in a series of ongoing transactions with a supplier, an owner may create expectations about future contracts that, when violated, are costly given the investments the supplier has already made. Similarly, temporary workers may invest in their skills because of the nature of the job they hold (so-called *asset-specific skills*) and be harmed when the employer does not extend the contract. Such an investment creates a risk of being vulnerable to the owner's decision once the investment has been made.[50]

Incompleteness of contract is so pervasive that we may wonder when the recognition of a fiduciary duty would be justified. What is the norm that triggers the shift in register from contractual to fiduciary duties? Markovits hints

45 Markovits, "Sharing *Ex Ante* and Sharing *Ex Post*," 215.

46 Markovits, "Sharing *Ex Ante* and Sharing *Ex Post*," 215.

47 Markovits, "Sharing *Ex Ante* and Sharing *Ex Post*," 216.

48 Rawls, *A Theory of Justice*.

49 Zingales, "Corporate Governance," 2325.

50 Scott, "The Law and Economics of Incomplete Contracts."

at the relevant norm when he argues that a breach of fiduciary duties happens when there is an abuse of power. I will refer to this phenomenon as *exploitation*, broadly understood as one party unfairly taking advantage of another. In the next section, I will elaborate a suitable notion of exploitation. For now, the core idea is simple: relations in which there is a sufficiently serious risk of exploitation trigger and justify fiduciary duties.

Beside incompleteness of contract, there is a second context in which fiduciary duties to specific parties may arise for owners: when they are not engaged in a voluntary scheme of cooperation but still interact with others in the sense that they impose an involuntary effect upon another person. In economics, these situations are referred to as *externalities*.[51] The link with property is made explicit by Demsetz in his economic theory of property rights. He argues that property rights allow societies to internalize externalities.[52] In the absence of property rights, one person's action very often imposes an externality on others. In connection to resources, one person using a resource diminishes what is available for others. In a state of abundance, this is no reason to worry. Property rights emerge where externalities become significant, and the benefits of having property rights outweigh the transaction costs involved with such a system.

However, the introduction of a property rights system often does not internalize all externalities. A persisting externality points to an incompleteness in the property rights system. Such a situation leads to a problem parallel to that of incomplete contracts. Why do externalities persist? Property rights fulfill the function of boundary setting, demarcating where the scope of one person's property right ends and the rights of others begin. The norms of property law help establish the boundaries between owners' property and nonowners' rights, determining what counts as a relevant externality and what does not.[53] But these norms are often not sufficiently detailed. Hence, disputes may arise, and there is no predetermined notion of property that will settle them.[54]

Here, too, incompleteness provides an occasion for the exercise of exploitative power by owners over nonowners. Here, too, a fiduciary duty is needed to fill the gap, tame this power, and prevent exploitation. To mention only the most obvious example, environmental pollution is often conceptualized as an

51 For in-depth discussion of the concept, see Hausman, "When Jack and Jill Make a Deal."

52 Demsetz, "Toward a Theory of Property Rights," 350.

53 Singer, "How Property Norms Construct the Externalities of Ownership," 60.

54 As Coase argues in "The Problem of Social Cost," externalities are about symmetric situations. When you have the right to build a skyscraper on your land, and that skyscraper blocks my sunlight, you impose an externality on me. When your landownership does not entail this right, then my right to prohibit you from building the skyscraper imposes an externality on you.

externality. The exploited parties (such as animals or future generations who are dependent on the environment) suffer from a gap in the property rights system. A fiduciary theory of property understands this as a situation in which a fiduciary duty should be imposed on owners. The legitimacy of ownership rights in environmental resources cannot be disentangled from the simultaneous presence of fiduciary duties to prevent the exploitative use of these rights with respect to these third parties.

The analysis in this section hence points to situations, in and beyond contract, in which owners can leverage their power over vulnerable nonowners and exploit them. These situations trigger a fiduciary duty not to exploit. But to make this analysis work, we need a conception of exploitation that underlies and justifies such fiduciary duties. Proposing such a conception is the task of the next section.

4. THE DUTY NOT TO EXPLOIT

The general concept of exploitation captures the wrong of situations where person *A* benefits from taking advantage of person *B*. The concept can be applied to both consensual and nonconsensual interactions, although it is often thought most pertinent to diagnose consensual interactions (since nonconsensual interactions are already considered wrong in virtue of the coercion involved). This broad range of application is important for ownership exploitation, which includes both types of situations (with externalities being nonconsensual but not obviously coercive).[55] The general concept of exploitation is broad in another sense as well: it can be applied to both mutually beneficial interactions and interactions that are harmful for the exploited party, although, for similar reasons, mutually beneficial interactions are often taken to be most interesting. In the following, I will work with examples of consensual and mutually beneficial interactions.

The crucial task in elaborating a theory of exploitation is to specify the condition of *taking advantage* and justify its wrongfulness. The condition is often specified as taking *unfair* advantage, since many authors argue we need a theory of justice to spell out which distribution of benefits is justified.[56] After all, a winning sports team benefits by taking advantage of the weaknesses of

55 Remember that externalities are symmetrical. (See previous note.) Hence, prior to a normative determination regarding which side should bear the externality, we cannot say who is coercing who. And once we have determined this, the coercion is justified (or the term 'coercion' does not apply).

56 There are, however, various theories of exploitation that explicitly reject such a basis in a theory of justice. For an example, see Vrousalis, "Exploitation, Vulnerability, and Social

their losing opponent, and these gains are legitimate, unless for some specific reason the losing team does not get what they are entitled to. Specifying these entitlements is the task of a theory of justice.

One prominent theory of exploitation uses the perfectly competitive market as a benchmark. Transactions in the context of a perfectly functioning market are fair (because reflecting the scarcity value of the good in question) and hence nonexploitative. By contrast, it is exploitative for someone to take advantage of another by exploiting a market imperfection, such as an information asymmetry.[57] On this view, a water-deprived, dehydrated person in the desert who arrives at the doorstep of the owner of the only water well is exploited by the latter if the owner sets an above-market price for their water. The owner exploits the fact that they are a (local) monopolist.

The main reason for rejecting such a market-based theory is that exploitation is not restricted to imperfect markets.[58] Imagine a desert example in which we do not have a monopolist but a set of competing owners of water wells. If they all charge a competitive market price of twenty dollars to the thirsty person, who is also a poor person and cannot afford that price, they are still exploiting that person. Admittedly, when drawing this conclusion, we rely on an egalitarian conception of justice, which moves beyond the identification of justice with whatever perfect markets happen to deliver. For the sake of the argument here, think of such an egalitarian theory of justice as holding that everyone is entitled to a basket of basic resources or to the fulfilment of basic needs or basic/central capabilities.[59] The thought then is that producers in perfect markets who leave consumers without access to these basic resources, needs, or capabilities act exploitatively.

In this paper, I presuppose the correctness of such an egalitarian theory of justice and do not engage in the well-worn debates between different variations of egalitarian justice or between egalitarian and libertarian theories. More important for my purposes is the fact that *even if* one accepts such an egalitarian

Domination." For a response from a justice-based perspective, see Arneson, "Exploitation, Domination, Competitive Markets, and Unfair Division."

57 Wertheimer, *Exploitation*.

58 For critiques of Wertheimer's view, see, e.g., Arneson, "Exploitation, Domination, Competitive Markets, and Unfair Division"; and Miklós, "Exploiting Injustice in Mutually Beneficial Market Exchange."

59 For resources, see, e.g., Rawls, *A Theory of Justice*; and Dworkin, "What Is Equality? Part 2." For needs, see, e.g., Copp, "The Right to an Adequate Standard of Living"; and Gough, "Lists and Thresholds." For capabilities, see Nussbaum, *Creating Capabilities*; and Sen, "Capability and Well-Being." For all of these theories of basic needs, resources, or capabilities, an obvious question arises about responsibility sensitiveness. A reasonable level of responsibility sensitiveness can be built into such theories, I argue in Claassen, *Capabilities in a Just Society*.

theory of justice, one can still defend a market-based conception of exploitation and hence push back against my conclusion that owners have a fiduciary duty not to exploit. For egalitarians can argue that owners of water wells cannot be made responsible for the "background injustice" of the thirsty person's lack of money. Similarly, if capitalists charge below living wages to workers, they do not exploit them since the fact that the latter have nowhere else to turn is not their fault. In both cases, it is up to the state to remedy these background injustices so that private parties can concentrate on their market-based exchanges. Exploitation can then be confined to diagnose defects in the market.

This is an important objection, so let us unpack it. State responsibility for remedying background injustices can refer to the state providing certain basic resources as public goods, either to all or targeted to those who fall below a level of basic resources through their own efforts. But many basic resources are allocated through the market as private goods—we concentrate on these here. For these private goods, egalitarian defenders of a market-based conception of exploitation could argue, the state can impose regulatory duties on owners. For example, the state could enforce maximum prices on water, just as it can enforce minimum wages. In this way, the state prevents exploitation by private owners. The objection exemplifies the standard egalitarian's position on ownership (see section 1), which grants owners' absolutist powers within the limits of the law.[60]

60 It may be confusing that I adopt an egalitarian theory of justice but place the fiduciary theory in opposition to egalitarian property theories. (See section 1.) To clarify: my fiduciary property theory does not provide a normative justification for private property itself. It can share with (and borrow from) egalitarian property theories whatever normative justification they provide for private property. I have defended my own favored egalitarian theory elsewhere (Claassen, *Capabilities in a Just Society*) but here remain agnostic. All these egalitarian theories share an argument of roughly the following form: whatever justification one gives for the property of person *A* (property contributes to the development of a person's moral powers, property provides opportunities for the exercise of a person's will, property is necessary for the protection of a person's external freedom, etc.), consistency then requires that all other persons *B*, *C*, *D*, etc. can also enjoy the condition that the justification refers to. This justification generates the egalitarian conclusion that some form of redistribution is needed (when people cannot acquire necessities through their own private activities). This form of argument is used by Murphy and Nagel in their attack on "everyday libertarianism": "The tax system … is not like an assessment of members of a department to buy a wedding gift for a colleague. It is not an incursion on a distribution of property holdings that is already presumptively legitimate. Rather, it is among the conditions that create a set of property holdings, whose legitimacy can be assessed only by evaluating the justice of the whole system, taxes included" (*The Myth of Ownership*, 36–37). Another good example is Brettschneider: "I argue that private property can be justified only in regimes in which basic material rights are guaranteed to all members of society. Specifically, private property regimes are not justifiable unless they exist in states that secure some form of a basic

My response to this objection would be that it seems to have conceded the crucial point. The state presumably regulates ownership in such cases to legally enforce a *moral* duty of owners of water wells to service thirsty persons at affordable prices. The state through its regulatory actions expresses its acceptance of this moral duty, which exists independently of the existence and actions of the state. Toy examples of desert confrontations between thirsty persons and water well owners are meant to stimulate such state-of-nature-like thinking to identify our moral duties. For owners not to fulfill these moral duties is for them to exploit nonowners. These moral duties are fiduciary since the owner has discretionary power over a vulnerable nonowner in the context of the management of a societally valuable resource.

The argument here, then, rejects a picture in which, as a matter of ideal theory, all the burdens of justice are on government. In an ideal world, owners would do their parts in realizing justice without being forced by the state's regulatory apparatus to do so. This supplements the formal account of ownership's purpose in section 3. There I argued, following Katz, that a purely formal account of ownership as office sees its purpose in *coordination*: preventing conflicts in society about who owns and therefore decides about what. Here we see that exploitation potential arises in cases where resources are critical to meeting people's justice-based claims. Then ownership acquires a second purpose: to use the resources with which owners are entrusted so as to contribute to the fulfillment of the justice-based claims of nonowners. These critical resources would include most of what is often captured under the term 'means of production', from patents and other intellectual property rights to land and real estate, natural resources and financial resources for investment.[61] To the extent that owners benefit themselves from using these resources productively to satisfy other people's needs, their personal purpose is aligned with this social purpose. But where the two conflict, then the duty not to exploit puts a strict limit on the owner's personal purposes.

Accepting the argument so far, an egalitarian property theorist might at this point argue that situations like that of the owner of the desert water well are better classified not as fiduciary duties but as *another* (nonfiduciary type of) positive duty—namely, a duty to rescue (or duty to assistance). Why not

welfare right" ("Public Justification and the Right to Private Property," 4). My fiduciary theory shares this "package deal" justificatory strategy with egalitarian property theories. One cannot justify property rights without simultaneously justifying the imposition of the relevant duties on owners. The difference is in how to understand these duties: this is embodied in the contrast between regulatory duties and fiduciary duties, which animates the main text in this section and in section 7.

61 Edmundson, "What Are 'The Means of Production'?"

endorse a property theory based on absolutist ownership, flanked with duties to rescue where necessary?

In response, I think duties of rescue differ from the fiduciary duty not to exploit in two ways. First, they are not necessarily tied to ownership but more broadly to a "capacity" to rescue, which may or may not originate in one's ownership. For example, it may also originate in being at the place of the accident, as the person walking by the pond who sees a drowning child. Second, they are not fiduciary duties, which require an exercise of discretionary power that can issue in various courses of action, but duties aimed at a more or less concrete course of action (the rescue mission). The second difference points to the fact that fiduciary relations do not arise in one-off situations where one person exercises power over another but rather in situations of "administration": where there is a structural relation of power between fiduciary and beneficiary that is institutionally embedded.[62] The administration (office) at stake for owners is *resource management*. A duty of rescue can arise also in cases where owner and nonowner are not in a relation of exploitation or not even in any kind of sustained relation, e.g., after a natural disaster (and one could accept such duties in addition to my fiduciary duties). However, when there is a situation of nonowners being structurally exploited by a practice of owners' resource management, it would be misplaced to understand the necessary duty as one where the exploiters "rescue" the persons they exploit. The fiduciary theory developed here aims to cover these situations.

Let us conclude. In this section, I have argued for the recognition of owners' fiduciary duty not to exploit nonowners. This is a moral duty. It is a further question whether this should be a *merely* moral duty, adherence to which in practice depends on the personal conscience of owners, social pressures, and protests mounted by nonowners, or whether this should also be a legally enforced duty. It is open to the egalitarian objector to concede the fiduciary moral duty in this section but to still argue that it should be legally enforced through regulation. In the next sections, I move to think about enforcement and answer this further objection.

5. How to Impose Legal Fiduciary Duties on Owners

Fiduciary duties can exert a moral appeal on owners. They can be the basis of protests, campaigns, media coverage, etc., in which exploited nonowners and/or other parties attribute blame to owners. But very often legal action is to be preferred over such voluntary actions, for various reasons. One is that

62 Fox-Decent, *Sovereignty's Promise*, 96–101.

legal action may be necessary given the limited societal effectiveness of moral appeals. Owners' self-interest may simply be stronger than their sense of justice. Also, people may disagree about the requirements of justice. They may not accept each other's moral judgments on the matter, and then only legal action can settle the matter in an authoritative way. Legal action over time can be seen as a "discovery procedure" for societies trying to sort out their moral intuitions about what justice requires. Finally, even when the requirements of justice are clear (in terms of the rights of those on the "demand side"), sometimes legal action is needed to determine the burden (or fair share) of each owner compared to others (the "supply side").

Legal action can take two forms in these contexts. One way is for the state to regulate situations in which owners have exploitative power over nonowners. Regulation *removes* the fiduciary situation: the discretionary power of the owner, for example, to charge anything above ten dollars per bottle of water disappears the moment the state regulates a ten-dollar maximum price. The vulnerability of the nonowner also disappears. The moral fiduciary duty in this way is converted into a legal regulatory duty. Alternatively, the moral fiduciary duty can be converted into a legal fiduciary duty. This *maintains* the fiduciary relation between owner and nonowner. In this section, I will focus on this second path, to create legal fiduciary duties. I address the issue of how to think about the choice between these two paths to legal action in section 7.

The second path itself consists of two main strategies. Effective implementation of legal fiduciary duties can be done through court enforcement or through democratization of owners' decision-making. Since the precise content of fiduciary duties needs to be tailored to specific types of ownership, I will use an example in which both strategies are actually discussed: big data companies.

Many have argued that big data companies exploit their consumers when they engage in price discrimination, fail to show products from other companies, sell the data of their consumers, etc. As an alternative to detailed state regulation that specifies which actions are forbidden, some have proposed a fiduciary alternative: these companies should be made into "information fiduciaries," imposing a fiduciary duty (also sometimes referred to as a duty of care in this context) to abstain from exploitative actions. This makes data companies themselves responsible for caring for the legitimate interests of their customers.[63] One concrete proposal is to tie the commencement of such duties to the market dominance of a company as established under antitrust law. When

63 Balkin, "Information Fiduciaries and the First Amendment"; Khan and Pozen, "A Skeptical View of Information Fiduciaries"; and Slater, "Enforcing Information Fiduciaries."

a company becomes dominant, the risk that it will exploit its consumers is material, so this would be a good point at which to introduce fiduciary duties.[64]

The scope and limits of this legal fiduciary duty would, in the final instance, have to be determined by the courts. Such an approach can hold real promise. To take another example, in 2021 a Dutch court convicted the multinational oil company Shell of breaching its duty of care by not reducing its emissions in line with the Paris Agreement on climate change.[65] The court held that human rights need to be read into the duty of care. The relevant standard was that Shell was violating the human rights of future generations to life and health. This court's judgment was made in the absence of specific legislation targeting Shell's emissions (that is, in the absence of regulatory duties). Philosophically, this can be understood as a case of structural injustice.[66]

Court enforcement is a check on an owner's (here, a company's) decisions. But some have argued that legal controls are not sufficiently effective to counter the potential for exploitation on the part of fiduciaries. Lina Khan and David Pozen sound the alarm bell over proposals to make tech platforms into information fiduciaries:

> The tension between what it would take to implement a fiduciary duty of loyalty to users, on the one hand, and these companies' economic incentives and duties to shareholders, on the other, is too deep to resolve without fundamental reform. To suggest otherwise is to risk mystification of "surveillance capitalism," entrenchment of prevailing business models, and legitimation of a wide range of troubling practices, if not also the unraveling of fiduciary law itself.[67]

In brief, Khan and Pozen believe that the incentive structures for business corporations and their shareholders are too antithetical to be remedied through the creation of fiduciary duties. Believing anything else would be naive.

64 Sauter, "A Duty of Care to Prevent Online Exploitation of Consumers?"

65 *Milieudefensie et al v. Royal Dutch Shell*, Rechtbank Den Haag [The Hague District Court], May 26, 2021, C/09/571932, ECLI:NL:RBDHA:2021:5339, available at https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339. In the 2024 appeal case, the original verdict was overturned, although the Court of Appeal judged that breach of the duty of care is possible in principle for these kinds of cases, when the right kind of evidence is presented. See Gerechtshof Den Haag [Court of Appeal of The Hague], November 12, 2024, 200.302.332/01, ECLI:NL:GHDHA:2024:2100, available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100. The case is currently awaiting a final decision by the Dutch Supreme Court.

66 Bziuk, "Can Business Corporations Be Legally Responsible for Structural Injustice?"

67 Khan and Pozen, "A Skeptical View of Information Fiduciaries," 534–35.

Let us accept that Khan and Pozen are right about the insufficient effectiveness of legal controls of fiduciary duties in the context of the tech platforms and hence about their call for more structural reforms. Still, a fiduciary theory of property as I conceive of it has the resources to move in this more structural direction as well. This brings us to the second strategy for implementing fiduciary duties, democratization. As mentioned above, fiduciary theories are now also applied to the political relationship between citizens and governments. In democratic societies, citizens are not—at least in theory if not always in practice—passive beneficiaries of their rulers. Citizens have the right to vote their rulers in and out of office, to protest and participate in discussions about proposed legislation, etc. The fiduciary relation in a well-functioning democracy has become democratized. The control of the fiduciary's duty is then not outsourced to a third party (the courts) but enshrined in a package of democratic rights for beneficiaries.

Similarly, the relation between owners and exploited nonowners can also be democratized. This is simply one step further in terms of redressing the imbalance of power between fiduciaries and beneficiaries. It is not a denial of the fiduciary model but rather a variation within it. To illustrate, consider the economically most important property form, the corporate structure. The current situation is one in which shareholders are (*de facto* if not *de jure*) treated as the sole beneficiaries on behalf of whom corporate boards exercise their fiduciary duties. These same shareholders hold the right to vote the corporate board in and out of office. Note that this example shows the conceptual point I just made: that a fiduciary relation can simultaneously be a democratic one. Other beneficiaries (often called stakeholders in the corporate context), do not get any democratic rights and hence are often exploited. The solution, from a fiduciary perspective, can be to give democratic rights to them as well. For example, in proposals for workplace democracy, such rights are also allocated to workers.[68]

Such proposals give control rights to stakeholders, which are then shared between them and shareholders. This leaves shareholders with the economic rights to the corporation (dividends and capital gains), which often gives rise to the erroneous idea they are the "owners" of the corporation.[69] A further step would be to make one or more stakeholder groups into shareholders as well. This is effectively what happens in cooperatives and commons structures. Hence, democratic (and/or socialist) proposals for adopting such cooperative

68 Malleson, *After Occupy*; Ferreras, *Firms as Political Entities*; and Hayden and Bodie, *Reconstructing the Corporation*.

69 Ciepley, "The Anglo-American Misconception of Stockholders as 'Owners' and 'Members.'"

and common property forms are fully in the remit of the fiduciary theory of property. The theory can endorse fiduciary duties checked by courts as well as any of these democratic property forms, depending on whatever is most effective at countering exploitation. The theory does not have to pin itself on one best alternative but shows the underlying fiduciary logic common to all of them, where the variable is how radically the control rights of beneficiaries are enshrined to make sure fiduciaries do not exploit them. This institutional flexibility is a major pragmatic advantage to the fiduciary theory, while its ability to capture the normative logic underlying this full spectrum of options makes it into a generic theory of property.

6. DUTIES OF OWNERS IN PROPERTY THEORY

In this section, I compare the fiduciary property theory to three property theories that may seem to venture into a similar direction, since they also defend that ownership carries inherent limits (i.e., independent from concrete forms of state regulation).[70] The comparison with these theories serves to further clarify the scope and shape of the fiduciary theory.

First, Hanoch Dagan and Avihai Dorfman defend a theory in their article "Justice in Private" in which private individuals bear duties of relational justice towards each other. These duties inform different areas of private law such as contract law, tort law, and also property law. Liberal views of justice normally require individuals to recognize others only as merely formally free and equal. In Dagan and Dorfman's view, individuals must recognize each other as substantively free and equal persons in their interactions. Concretely, this requires that they "accommodate, to some extent, the personal characteristics that are necessary for the parties to recognize each other as free and equal persons."[71] This entails respecting persons' immutable circumstances and their personal choices, particularly those tied to their most fundamental "ground projects."[72] An example of a duty following from this relational theory is that landlords in

70 We might understand these theorists as elaborating on the only duty among Honoré's incidents of ownership, the duty not to harm others. See Honoré, "Ownership," 174. This duty has sometimes had a hostile reception in property theory. For example, Harris argues that such limitations are "not strictly necessary requirements of property institutions" (*Property and Justice*, 33). Another example is Penner, who argues forcefully that this duty is an unhelpful addition to Honoré's list ("The Bundle of Rights Picture of Property," 761–62).

71 Dagan and Dorfman, "Justice in Private," 190.

72 Dagan and Dorfman, "Justice in Private," 193.

their decisions to choose a tenant should not be allowed to discriminate against tenants on grounds such as religion or the color of their eyes.[73]

My theory agrees with Dagan and Dorfman's in the fundamental starting point that individuals owe each other duties of justice *qua* private individuals. It shares with them the rejection of the Rawlsian and Kantian notion of a strict division of moral labor whereby only the state is in the business of realizing justice.[74] However, Dagan and Dorfman conceive of these duties of individuals as forming a *separate* part of justice—"relational" and horizontal, in contrast to the state's effort at realizing "distributive" justice, which leads to vertical duties between state and citizens.[75] Relational justice has a *separate* task: to address the appropriate respect for personal characteristics in interpersonal relations.

By contrast, I have modelled the subject matter of the fiduciary duty on an egalitarian theory of justice. As stated in section 5, the fiduciary theory is concerned with persons' needs/capabilities for basic resources, the nonfulfillment of which marks the point at which exploitation arises. This brings concerns of distributive justice into the horizontal relation between citizens. Exploitation is cashed out in terms of this theory of egalitarian justice. The fiduciary theory is not particularly concerned with interpersonal respect for personal characteristics, as is Dagan and Dorfman's theory of relational justice. Hence, while there is a similar starting point in the project (to infuse private relations with justice requirements), the two theories have a different focus.

A second useful comparison is with Katz's theory of abuse of rights. As we saw above, Katz's property theory adheres to a formal understanding of ownership as an office. She distances herself from stewardship theories, arguing that "owners are free generally to advance their own private interests through the agendas they set for the thing (the very essence of corruption in other contexts)."[76] However, she does recognize that duties may be attached to the office of ownership via a *principle of accession*.[77] One important application of this principle of accession is Katz's argument that ownership is limited through the general private law doctrine of abuse of rights.[78] This is interesting beyond

73 Dagan and Dorfman, "Justice in Private," 175.

74 Dagan and Dorfman, "Justice in Private," 179–83.

75 Dagan and Dorfman, "Justice in Private," 174.

76 Katz, "Property's Sovereignty," 317. See also Katz, "Spite and Extortion," 1479–82; "Ownership and Offices," 274; and "It's Not Personal," 114–17.

77 Katz, "Property's Sovereignty," 306.

78 Katz, "Spite and Extortion." Another application of this principle is that governments may use owners to delegate specific public tasks to them, such as snow shoveling their part of the sidewalk so that pedestrians can safely use them. Katz refers to this phenomenon as *governing through owners*. See Katz, "Governing Through Owners."

Katz's particular account of this doctrine, since other legal scholars too may hold that the only legitimate limits on ownership rights (beyond regulatory duties) are those emanating from abuse of rights.

The doctrine of abuse of rights aims to carve out an exception to the rule that it is permissible for owners to use their property rights in ways that harm others as long as this use is not prohibited by regulation. Owners harm others in many different ways: by winning competitions, by building structures disliked by the neighbors, etc. Abuse of right obtains where the sole reason or motive of the owner's action is to impose harm on a nonowner, either for the sake of harm itself (cases of "spite") or by using their property as leverage to pressure nonowners into changing their behavior (cases of "extortion"). Katz argues that these harms can be construed as illegitimate because they violate ownership's purpose: to set an agenda for the goods in question that owners judge valuable. One example Katz cites is a case where the neighbor of musicians, tired of the sound of the musicians' daily practice, responded by himself making noise on makeshift instruments. Instead of making valuable use of these instruments, his purpose was merely to retaliate.

Abuse of right answers a normative question orthogonal to the fiduciary property theory. Applying the fiduciary theory to the case of the musicians, the question would be whether the neighbor's level of noise is such as to cause a first-order injustice to the musicians, e.g., by depriving them of their sleep (arguably a basic need). Absent such an injustice, from the point of view of the fiduciary theory, the musicians simply have to put up with the sound. It would not matter—from the point of view of diagnosing exploitation—whether the neighbor was motivated by spite or extortionary intentions. This is not incompatible with an additional normative inquiry into abuse of right, but the latter is simply a different undertaking. Katz recognizes as much when she positions the doctrine of abuse of rights in between a standpoint that gives *more* deference to owners (by accepting the agendas they set) and a standpoint that gives *less* deference to owners by requiring owners to "track the interests of others."[79] The fiduciary theory here exemplifies this latter standpoint, searching for the conditions under which owners must indeed track the interests of others.

Finally, Gregory Alexander's progressive property theory is important as a point of comparison. Alexander's theory does go into an interest-tracking direction. He proposes that owners are subject to a social obligation norm.[80] Alexander's theory, like the fiduciary theory defended here, argues that owners

79 Katz, "Spite and Extortion," 1472.

80 Alexander, "The Social-Obligation Norm in American Property Law" and *Property and Human Flourishing*.

have obligations to nonowners that are "conceptually entailed in ownership."[81] Alexander grounds these duties in a "human flourishing theory" that takes its inspiration from Amartya Sen and Martha Nussbaum. He singles out four capabilities as essential for human flourishing: capabilities to life, freedom, practical reasoning, and sociability.[82] Finally, his theory is built on a concept of community, since (following Charles Taylor's *social thesis*) individuals can flourish only in communities and hence have a duty to support the existence of these communities.[83] With respect to ownership, this leads Alexander to endorse the general principle that "the social obligation may require the owner to provide resources, in ways that are appropriate to that owner, to others in the owner's community (or communities) where necessary to support the development of their requisite capabilities."[84]

The similarities between Alexander's theory and the fiduciary theory may seem strong, as both of them widen the concept of an owner's duties. However, there are also striking differences. First, the fiduciary theory is not wedded to an understanding of ownership duties that is tied to reciprocating towards other members of a community. Instead, fiduciary duties are triggered whenever owners have the power to exploit the lives of nonowners, whether or not the nonowners are part of the same community. Second and most importantly, Alexander restricts the scope of ownership's duties through a further distinction between *general* and *special* obligations. He argues the former are about "basic material conditions that a humane liberal society needs for its members to flourish"; they are owed to society in general by everyone and are redistributive, paid through taxation.[85] Special duties are owed by owners to their particular communities. They are limited to particular incidents of ownership, and nonredistributive.[86] This distinction allows Alexander to focus attention on the latter, and hence he at length discusses particular duties of owners, e.g., in the context of land reparations, access to beaches, and preservation of historic buildings.

The fiduciary theory presented here, by contrast, does not accept this distinction between general and special obligations. I have argued that when owners control resources that are critical to nonowners, they have opportunities to exploit the latter. This can sometimes be remedied through taxation, but

81 Alexander, *Property and Human Flourishing*, xv.

82 Alexander, *Property and Human Flourishing*, 7.

83 Alexander, *Property and Human Flourishing*, 44–55.

84 Alexander, *Property and Human Flourishing*, 60.

85 Alexander, *Property and Human Flourishing*, 56.

86 Alexander, *Property and Human Flourishing*, 56–62.

on other occasions, regulation or legal fiduciary duties are a better response. (See also the next section.) As a consequence, Alexander's distinction allows him to contain owners' inherent duties to a relatively small set of particular situations, but if I am right, a larger set of situations related to economically vital resources can be classified as giving owners exploitative power, triggering fiduciary duties.

7. THE NORMATIVE UPSHOT: RECONCEIVING THE RELATION BETWEEN STATES AND PRIVATE OWNERS

As we saw in section 1, on an absolutist understanding of ownership, the state can impose regulatory duties to restrict the power of owners. Absolutist ownership is always exercised within the limits of the law, and an egalitarian state can set strict limits. The picture emerging from this is a dualist one, where owners concentrate on their own private interests (however conceived), and states provide a counterweight through regulation. In this section, I want to compare this picture with the fiduciary property theory developed over the course of this paper.[87]

The dualist picture has been forcefully defended by Arthur Ripstein in his critical discussion of stewardship theories of property. Imagining someone who argues that property needs to be rethought in light of challenges such as climate change, he replies:

> It is incumbent on sovereigns to preserve the natural conditions of the continued existence of their societies, and so, in the service of that mandatory purpose, to constrain and coordinate the ways in which land is used and other resources depleted within their political societies, to restrict deforestation or impose carbon taxes, and so on. But these are fundamentally public matters, not because private owners should take no moral interest in them, but rather because any solution to them is essentially public and global, not a matter of the state reminding particular individual citizens and owners about the specific things that they were already under an obligation to do in their capacity as owners of land or other property.[88]

With this, Ripstein reaffirms the traditional division of moral labor between states and owners. For owners, a quasi-mechanical obedience to these lawfully

87 Elsewhere I elaborate this comparison in terms of two alternative views of representation: one indirect (via the state), the other direct (at the level of ownership). See Claassen, "Property as Power."

88 Ripstein, "Property and Sovereignty," 268.

imposed duties is enough. The traction of this objection goes beyond Ripstein's own Kantian property theory. A similar objection can be made using a variety of normative bases. Earlier, in section 1, we saw how libertarian and egalitarian theories both are wedded to an absolutist conception of property, even if they disagree about how many regulatory limits to impose. How to respond?

Ripstein's reference to being "under an obligation" most probably refers to moral obligations. (If we understand them as legal obligations, his claim is trivially true: before the state's declaration of a law, no legal obligations exist.) I argue the claim is untenable. Even before the state has decided that the use of child labor in the production of textiles is exploitative and should be prohibited, it already is exploitative. Even before the state has decided that making consumers addicted to nicotine is exploitative, it already is so. If there is a prepolitical, moral claim (from the point of view of a person "in the state of nature") to see one's *de facto* possessions recognized as one's legitimate property under law, then there is also a prepolitical, moral claim that owners should not exploit nonowners.[89] This amounts to the recognition of a moral fiduciary duty, on the level of fiduciary *ethics*.

Of course, in less clear-cut cases, a legal determination is necessary to establish what is and what is not going to count as exploitative; and legal enforcement is certainly necessary to make this effective in practice. But at the political level, Ripstein excludes without argument fiduciary duties as potential solutions that a lawgiver might adopt (and often does adopt). Of course, lawmakers also regularly adopt Ripstein's favored nonfiduciary solution, a regime of regulatory duties. From a claim of exploitation in fiduciary ethics, we can still go both ways at the level of legal action. It all depends on the relative effectiveness of external regulation vis-à-vis fiduciary governance, which is hard to decide *a priori*. But conversely, there is no reason to presuppose that fiduciary governance can *never* be more effective.

An analogy with multiple layers of public governance is helpful.[90] States make national laws to govern the internal affairs of their citizens. However, this leaves many matters unresolved. Some are left to lower-level governments, like provinces and municipalities. These do not mechanistically apply national law but form a separate sphere of jurisdiction. Different layers of authority are nested into each other. Similarly, fiduciary ownership is decentralized governance, under the larger umbrella of the nation-state. This decentralization empowers fiduciary owners themselves, but this power can be checked at the

89 If we, along Kantian lines, call the former *provisionally rightful possession* (see Kant, *The Metaphysics of Morals*, 410 [6:257]), then let us call the latter a *provisional duty to nonexploitation*.

90 See González-Ricoy, "Little Republics," 115.

level of courts, which decide on a case-to-case basis but simultaneously develop a legal set of precedents over time. Moreover, as we have seen, it can also be checked through more democratic arrangements at the level of ownership.

There can be good reasons for choosing this fiduciary route. For one thing, the same information problems that make it difficult to make a complete contract between private parties (owners and nonowners) may also make it equally (or even more) difficult for government as an external party to regulate. Also, regulation can be ineffective not because of informational problems but because it is introduced in situations where interests are opposed. Regulatory efforts often meet with resistance, either overt or covert, and powerful owners try to influence the political system to have favorable regulations applied. Regulation of property has achieved impressive results in the "regulatory state" that has been built up since the Second World War in many countries.[91] Still, as Paul Babie argues, "recognizing the place of regulation within the concept of private property is not to say that a system achieves perfect symmetry. Comparing the legal protection of choice to regulation always yields a surplus of individual choice and a deficit of regulation."[92] The reason for this is ultimately that the private/public dualism that Ripstein celebrates puts owners in a position where they do not have to take wider interests into account.

Maintaining an absolutist preference for state regulation ultimately means outsourcing the problem of ownership's exploitation potential to states with limited regulatory capacities. The fiduciary perspective opens up a route that would change the mindset of owners by requiring them to adopt a broader stance. One author, in the course of defending the proposal mentioned earlier to turn platform providers into information fiduciaries, sums up the case for this perspective when she writes:

> The fiduciary model is a happy marriage of pragmatism and aspirational ethics. Surely, not every doctor, lawyer, or other fiduciary professional is a paragon of virtue or is able to provide the best advice for their clients in every case. But for the most part, many of us do in fact trust the fiduciaries in our lives, and when they let us down, remedies are available.[93]

If this would work for owners, it would lead to a fundamental shift in our economic life, especially in the current context in which owners of productive assets too often exploit the earth's resources and transgress planetary boundaries, lobby for minimal regulatory burdens, and subvert regulation that has

91 Moran, "Understanding the Regulatory State."

92 Babie, "Private Property Suffuses Life," 139.

93 Slater, "Enforcing Information Fiduciaries," 89.

been passed into law. The alternative would be a relation whereby states and private owners are not antagonists in a cat-and-mouse regulation game but rather cooperating partners who work together toward a less exploitative economy.

8. Conclusion

Ideas about owners as stewards have an old pedigree. As we have seen, religious and Indigenous traditions have been protagonists of such views, as have recent environmentalist theories with respect to natural resources. However, beyond these particular contexts, no secular and general theory conceiving of ownership as stewardship has been developed. An absolutist understanding of property underlies both libertarian and egalitarian property theories.

In this paper, I have used the technical notion of a fiduciary relation to propose such a theory. Fiduciary relations are recognized in private law (albeit not for ownership) and increasingly used to understand public office as well. First, the theory proposed here is grounded in Katz's legal theory of ownership as a state-mandated office. Second, it makes use of the economic analysis of incomplete contracting and externalities, in combination with an ethics of exploitation, to diagnose when nonowners deserve protection through moral fiduciary duties. Third, it argues these moral duties can be discharged in various ways, through regulatory duties enforced by the state, as well as through legal fiduciary duties checked by courts or various democratic forms of ownership.

The central point is that the granting of ownership rights and the imposition of fiduciary duties should not be separated. Property rights confer powers on owners to control assets—powers that, by virtue of their social recognition, enable owners to exercise power over nonowners, which can turn into exploitation. Legitimation of such powers (if at all) often requires the recognition of fiduciary duties on owners to abstain from exploitation. Both are a package deal. To externalize the question of duties and define the office of owners only through their rights would be similar to defining the position of political rulers through their prerogatives alone, failing to describe their duties to govern for their people. While the cases are not exactly similar—owners, unlike politicians, retain an allowance to act for self-serving purposes within these limits—the analogy is stronger than often acknowledged.

If this is convincing, then the marginal existence of stewardship views of property is unwarranted. They are not tied to particular religious beliefs that ground an owner's assignment to manage all earthly resources in a divine command. Instead, stewardship duties can be grounded in mainstream egalitarian theories of distributive justice. They are not tied to a particular set of resources, such as in theories of environmental ethics that focus on natural

resources. Instead, stewardship duties can extend to whatever resources the theory of justice recognizes as vital for all persons to sustain their basic needs or capabilities.[94]

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