Property and Personhood*

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This article explores the relationship between property and personhood, a relationship that has commonly been both ignored and taken for granted in legal thought. The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights. Although explicit elaboration of this perspective is wanting in modern writing on property, the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy[1] or between property and liberty.[2] In addition to its power to explain certain aspects of existing schemes of property entitlement, the personhood perspective can also serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law.

Almost any theory of private property rights can be referred to some notion of personhood. The theory must address the rights accruing to individual persons, and therefore necessarily implicates the nature of the entity to which they accrue. It is not surprising that personhood has played a part in property theories all along the political spectrum. Conservatives rely on an absolute conception of prop-

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1. The fourth amendment, which protects individuals' "houses, papers and effects" (as well as "persons") from unreasonable search and seizure, is interpreted by the Supreme Court as a form of privacy protection. Katz v. United States, 389 U.S. 347 (1967). *See* text accompanying notes 134–62 *infra*.

2. "[T]he dichotomy between personal liberties and property rights is a false one . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

erty as sacred to personal autonomy. Communitarians believe that changing conceptions of property reflect and shape the changing nature of persons and communities. Welfare rights liberals find entitlement to a minimal level of resources necessary to the dignity of persons even when the entitlement must curtail the property rights of others. This article does not emphasize how the notion of personhood might figure in the most prevalent traditional lines of liberal property theory: the Lockean labor-desert theory, which focuses on individual autonomy, or the utilitarian theory, which focuses on welfare maximization.[3] It rather attempts to clarify a third strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of "things." This "personhood perspective" corresponds to, or is the dominant premise of, the so-called personality theory of property. Two main functions of any property theory are the general justification of property rights and their delineation. My purpose here is to consider these two functions from the perspective of personhood. But since a systematic general justification of property rights involves other concerns not within the scope of this article, I will concentrate on the latter function: exploring how the personhood perspective can help decide specific disputes between rival claimants. Positive analysis will attempt to demonstrate that the personhood perspective has been reflected in some past legal decisions; normative analysis will attempt to show how some legal decisions are justified in light of the personhood perspective and how some are not.

In what follows I shall discuss the personhood perspective as Hegel developed it in *Philosophy of Right*,[4] trace some of its later per-

3. The personality theory, the labor theory, and the utilitarian theory are respectively associated with Hegel, Locke, and Bentham. *See* G. HEGEL, PHILOSOPHY OF RIGHT (T. Knox trans. 1821); J. LOCKE, SECOND TREATISE OF GOVERNMENT (New York 1952) (6th ed. London 1764); J. BENTHAM, THEORY OF LEGISLATION (R. Hildreth trans. 1840) (1st ed. 1802). The sociobiological/psychological "territorial imperative" theory may be a fourth type stemming roughly from Darwin and Freud. *See* S. FREUD, *Civilization and Its Discontents*, in 21 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 111–14 (J. Strachey ed. 1964); *see generally* M. LEVINE, PROPERTY AS AN IDEA AND A PROCESS § 1(b)(3), at 66–100 (tentative ed. 1975).

Locke's theory has long been defended or characterized by modern writers as a labor-*desert* theory. One must somehow *deserve* to own items mixed with one's labor, rather than simply dissipate one's labor. *See, e.g.*, R. NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974) (Nozick's example: If I empty a can of tomato juice into the ocean, do I own the ocean?). Bentham's theory has been reincarnated in the economic analysis of law. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

4. G. HEGEL, *supra* note 3.

mutations and entanglements with other perspectives on property, and try to develop a contemporary view useful in the context of the American legal system. Part I presents an intuitive philosophical outline of the personhood perspective and how it figures in the justification of property rights. Part II presents various positions on the appropriate definition of a "person." Part III then distinguishes Hegel's concept of persons from the intuitive view discussed in Part I, but identifies some of his insights as useful in developing the idea of property for personhood. Part IV shows that the personhood perspective provides a moral basis for protecting some rights more stringently than others in the context of a legal system. Part V surveys a range of legal problems from the viewpoint of property for personhood. Of particular interest is the way that the personhood property perspective cuts across many different fields of law, as seemingly disparate as criminal procedure and freedom of expression. Part VI concludes that a right to property for personhood should be recognized.

I. PROPERTY FOR PERSONHOOD: AN INTUITIVE VIEW

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.[5] If so, that particular object is bound up with the holder. For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so.

The opposite of holding an object that has become a part of one-

5. Economic language, though awkward in this realm, would say that the holder of such an object has a large amount of consumer surplus that would be very difficult to ascertain accurately. The holder typically would not think about the object in monetary terms at all. Applying economic reasoning to things of high sentimental value presents difficulties because such things are likely to represent a large proportion of a person's total "wealth." *See* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). *See also* Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 1 (1975).

self is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons. The archetype of such a good is, of course, money, which is almost always held only to buy other things. A dollar is worth no more than what one chooses to buy with it, and one dollar bill is as good as another. Other examples are the wedding ring in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord. I shall call these theoretical opposites—property that is bound up with a person and property that is held purely instrumentally—personal property and fungible property respectively.[6]

Why refer these intuitions to personhood at all? It may appear that the category I call personal property could be described as simply a category of property for personal autonomy or liberty. Property for personal autonomy or liberty might be a class of objects or resources necessary to be a person or whose absence would hinder the autonomy or liberty attributed to a person. But there is something more in an affirmative notion of an individual being bound up with an external "thing." If autonomy is understood as abstract rationality and responsibility attributed to an individual, it fails to convey this sense of connection with the external world. Neither does liberty, if understood in the bare sense of freedom from interference by others with autonomous choices regarding control of one's external environment.

Once we admit that a person can be bound up with an external "thing" in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that "thing." But here liberty follows from property for personhood; personhood is the basic concept, not liberty. Of course, if liberty is viewed not as freedom from interference, or "negative freedom," but rather as some positive will that by acting on the external world is constitutive of the person, then liberty comes closer to capturing the idea of the self being intimately bound up with

6. The distinction is not simply between consumer property and commercial property. While it is likely that most commercial property is not property for personhood but rather held instrumentally, a great deal of consumers' property is also not property for personhood in the special direct sense I am trying to bring out. Many items—e.g., pots and pans, lawn mowers, light bulbs—can also be characterized as valued instrumentally, not in the same sense as something one holds only for exchange, but in the related sense that they are held in order to perform a service and it is the service that is substantively valued.

things in the external world.[7]

It intuitively appears that there is such a thing as property for personhood because people become bound up with "things." But this intuitive view does not compel the conclusion that property for personhood deserves moral recognition or legal protection, because arguably there is bad as well as good in being bound up with external objects. If there is a traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself *in the wrong way* or *to too great an extent* in external objects. Property is damnation as well as salvation, object-fetishism as well as moral groundwork. In this view, the relationship between the shoe fetishist and his shoe will not be respected like that between the spouse and her wedding ring. At the extreme, anyone who lives only for material objects is considered not to be a well-developed person, but rather to be lacking some important attribute of humanity.[8]

II. THE ROLE OF THE CONCEPT OF PERSON

The intuitive view of property for personhood just stated is wholly subjective: self-identification through objects varies from person to person. But if property for personhood cannot be viewed as other than arbitrary and subjective, then personal objects merely represent strong preferences, and to argue for their recognition by the legal system might collapse to a simple utilitarian preference summing. To avoid this collapse requires objective criteria differentiating good from bad identification with objects in order to identify a realm of personal property deserving recognition.[9] The necessary objective

7. The distinction is between conceptions of negative freedom ("freedom from"), characteristic of English liberalism, and positive freedom ("freedom to"), typical of Hegel's and other continental theorists' views. *See* I. BERLIN, TWO CONCEPTS OF LIBERTY (1958); Berki, *Political Freedom and Hegelian Metaphysics*, 16 POL. STUD. 365, 365 (1968) (Hegel was "not an advocate of 'negative freedom' "). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 889 (1978). The principal difference between the theories of Locke and Hegel is that for Locke the source of entitlement is labor, whereas for Hegel it is will. The Lockean individual has a natural right to property and broad negative freedom regarding that right. Hegel's notion of rights—autonomy or freedom in the positive sense—is logically bound up with entitlement to external objects. *See* text accompanying notes 49–73 *infra*. The historical importance of this distinction between negative and positive freedom is that Hegel's intellectual descendants tend to consider property rights as socially based, while Locke's followers tend to remain individualistic.

8. *See* text accompanying notes 41–48 *infra*.

9. The problem of bridging the gap between subjective and objective views of a person is inherent in trying to accord persons their moral deserts by means of a political system. Indeed, the subjective/objective dichotomy may be inherent in the nature of human individ-

criteria might be sought by appeal to extrinsic moral reality, to scientific truths of psychology, or to the concept of person itself. Taking the latter route, this Part approaches the problem of developing a standard for recognizing claims to personal property by referring to the concept of "person" itself. If that concept necessarily includes certain features, then those features can determine what personal property is while still avoiding ethical subjectivism.

A. *Theories of the Person*

The polymorphous nature of the word "person" inevitably creates problems for a moral thesis about property built upon notions of personhood. "Person" stems from the Latin *persona*, meaning, among other things, a theatrical role. In Roman law, *persona* came to mean simply an entity possessing legal rights and duties. Today it commonly signifies any human being.[10] But for philosophers the nature of a person has never been reduced to a generally accepted theory.[11] An overview of their continuing debate suggests four main lines of theory.

Perhaps closest to the *persona* of Roman law, the first conception is of the person as rights-holder. For Kant, the person is a free and rational agent whose existence is an end in itself.[12] I shall call Kantian the view of person focusing on universal abstract rationality. In this view, personhood has no component of individual human differences, but rather by definition excludes the tastes, talents, and individual histories that differentiate one from another.[13]

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uality in the context of community. *See* T. NAGEL, *Subjective and Objective*, in MORTAL QUESTIONS 196 (1979).

10. Danto, *Persons*, in 6 ENCYCLOPEDIA OF PHILOSOPHY 10 (P. Edwards ed. 1967).

11. *Id.*; Penelhum, *Personal Identity*, in 6 ENCYCLOPEDIA OF PHILOSOPHY 95. *See generally* THE IDENTITIES OF PERSONS (A. Rorty ed. 1976) (collection of conflicting views about criteria for personal identity).

12. I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (T. Abbott trans. 1949); *see* Danto, *supra* note 10.

13. This seems to describe the persons in John Rawls's original position, who are called upon to develop a social contract to which all would consent purely on the basis of rationality, in ignorance of their individual particularities. *See* J. RAWLS, A THEORY OF JUSTICE (1971). Recently Rawls has distinguished three conceptions of the person: (1) an artificial agent of construction in the original position, possessing only rational autonomy; (2) an ideal of the person affirmed by the citizens of a well-ordered society, possessing full autonomy; and (3) an actual citizen in her personal affairs, possessing particular attachments and loves, and particular religious and philosophical commitments. Rawls, *Kantian Constructivism in Moral Theory*, 9 J. PHIL. 515, 533–35 (1980). The conception of person I refer to in the text as Kantian is, according to Rawls, for both Kant and himself merely a philosophical construct for abstracting principles of justice, and not the same as the notion of person in society or everyday life.

Another classical view of the person makes its essential attributes self-consciousness and memory. Locke defines a person as "a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places."[14] For Locke, memory signifies this continuous self-consciousness.[15] Locke's theory still holds great appeal for those who puzzle over the mysteries of personal identity.[16]

These two classical views are compatible with thinking of persons as disembodied minds or immaterial essences.[17] In contrast is the view that persons are human bodies.[18] The sophisticated version is that continuous embodiment is a necessary but not sufficient condition of personhood. To recognize something as a person is, among other things, to attribute bodily continuity to it.[19] Indeed, Wittgenstein says that the best picture of the human soul is the human body.[20]

Last, some theorists find these traditional views too pale, and suggest that the individual's ability to project a continuing life plan into the future is as important as memory or continuing consciousness.[21]

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14. J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXVII, § 9 (A. Fraser ed. 1894) (1st. ed. London 1690).

15. For a critique of Locke's views on personhood, see Flew, *Locke and the Problem of Personal Identity*, 26 PHIL. 53 (1951).

16. David Wiggins builds on Locke, arguing that in seeking to create a personal identity condition we are seeking to describe "a persisting material entity essentially endowed with the biological potentiality for the exercise of *all* the faculties and capacities conceptually constitutive of personhood—sentience, desire, belief, motion, memory, and so forth." Wiggins, *Locke, Butler and the Stream of Consciousness: And Men as a Natural Kind*, in THE IDENTITIES OF PERSONS 139, 149 (A. Rorty ed. 1976).

17. The ontology of the person is not a settled matter in philisophical discourse. *See, e.g.*, B. BRODY, IDENTITY & ESSENCE (1980); S. SHOEMAKER, *Are Selves Substances?*, in SELF-KNOWLEDGE & SELF-IDENTITY 41 (1963); Shoemaker, *Embodiment and Behavior*, in THE IDENTITIES OF PERSONS 109 (A. Rorty ed. 1976).

18. This view seems overinclusive: Is a dead body or a body that is alive but exhibits no brain function a person?

19. P. F. Strawson argues that person is a primitive concept to which two classes of predicates both apply: "M-predicates" which are applicable to mere material bodies, and "P-predicates" which imply possession of consciousness and are not applicable to mere material bodies. P. STRAWSON, INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS 87–116 (1959); *see also* B. WILLIAMS, *Are Persons Bodies?*, in PROBLEMS OF THE SELF 64 (1973); B. WILLIAMS, *Bodily Continuity and Personal Identity*, in PROBLEMS OF THE SELF 19 (1973); B. WILLIAMS, *Personal Identity and Individuation*, in PROBLEMS OF THE SELF 1 (1973).

20. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 178 (G. Anscombe trans. 3d ed. 1958). Part of what Wittgenstein meant by this must have been that "when we are asked to distinguish a man's personality from his body, we do not really know what to distinguish from what." B. WILLIAMS, *Personal Identity and Individualization*, in PROBLEMS OF THE SELF 12 (1973).

21. *See, e.g.*, Williams, *Persons, Character and Morality*, in THE IDENTITIES OF PERSONS

Allied with this is the view that what counts in recognizing something as a person is a consistent character structure.[22] Persons are what they are in virtue of their past and future integrated by their character.

Other ways of thinking about persons may not fall within these four rough categories.[23] The thorough empiricist or metaphysical skeptic may say there is no such "thing" as a person. To that end, Hume argues that a person is "nothing but a bundle or collection of different perceptions," and that the feeling of self-identity over time is merely a persistent illusion.[24] The behavioral psychologist might say that the self is nothing separate from the body's processes and activity in the environment. In a similarly empirical and skeptical vein, a positive economist might conceive of a person as nothing but a bundle or collection of tastes and desires, conventionally recognized as a unit; but the economist must borrow enough of the Kantian view to attribute instrumental rationality to this aggregate.[25] Alternatively, non-behavioral psychologists may think of the person as a self, a subject of mental states. This conception relates both to the Lockean self-consciousness theory of the person and to the theory of character structure. Still, the structural postulates of Freudian theory may perhaps be considered a separate theory of the person.[26]

A communitarian would find all of those concepts of personhood

197 (A. Rorty ed. 1976). The Kantian view does not do justice to "the importance of individual character and personal relations in moral experience," *id.* at 201; "such things as deep attachments to other persons will express themselves in the world in ways which cannot at the same time embody the impartial view." *Id.* at 215. With regard to the Lockean emphasis on memory, see Wiggins, *supra* note 16, at 149–50.

22. *See* Williams, *supra* note 21.

23. *See, e.g.*, Dennett, *Conditions of Personhood*, in THE IDENTITIES OF PERSONS 175, 177–78 (A. Rorty ed. 1976). Dennett distinguishes six themes, each familiarly claiming to be a necessary condition of personhood. They are: (1) that persons are rational beings; (2) that persons are beings to which states of consciousness are attributed; (3) that whether something counts as a person depends on the stance others take in relating to it—i.e., that it is treated as a person; (4) that the object of the personal stance must be capable of reciprocating its treatment as a person; (5) that persons must be capable of language and verbal communication; (6) that persons have a special consciousness or self-consciousness distinguishing them from other species.

24. D. HUME, *Of Personal Identity*, in A TREATISE OF HUMAN NATURE, bk. I, pt. IV, § VI (1888).

25. The familiar "economic man" is simply that entity which applies pure instrumental rationality to satisfy its arbitrary tastes and desires. How would such an entity be conventionally recognized? Perhaps by an equilibrium that becomes stable enough to persist over time, i.e., the status quo. *See generally* J. BUCHANAN, THE LIMITS OF LIBERTY (1975).

26. S. FREUD, *The Ego and the Id*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 18 (V. Strachey ed. 1961); *see also* Moore, *The Unity of the Self*, in NATURE ANIMATED (M. Ruse ed. forthcoming 1982).

wrongheaded because they all derive from the individualistic world-view that flowered in western society with the industrial revolution. In a society in which the only human entity recognized in social intercourse is some aggregate like the family or clan, there could not be such intense philosophical attention to the biological individual and its ontological, psychological, moral and political status. In view of the individualist roots of those theories of the person, it comes as no surprise that thinkers who wish to progress from an individualist to a communitarian world-view are impatient with them. Communitarians see the myth of the self-contained "man" in a state of nature as politically misleading and dangerous. Persons are embedded in language, history, and culture, which are social creations;[27] there can be no such thing as a person without society.

For the sake of simplicity, I shall initially confine my inquiry to the types of the person posited by the more traditional, individual-oriented theories. But the communitarian critique reminds us that the idea of the person in the abstract should not be pushed beyond its usefulness. In what follows I shall on occasion attempt to pay attention to the role of groups both as constituted by persons and as constitutive of persons.

B. *Property and Theories of the Person*

Bypassing for the moment Kantian rationality and Lockean memory, let us begin with the person conceived as bodily continuity. Locke says that "every Man has a *Property* in his own *Person*," from which it immediately follows that "[t]he *Labour* of his Body, and the *Work* of his hands . . . are properly his."[28] Though, as we have seen, Locke elsewhere considers the person as reflective consciousness and memory, he may well mean here that one literally owns one's limbs and hence must own their product.[29] If not, perhaps property in one's person should be understood to mean simply that an individual has an entitlement to be a person or to be treated as a person. This would probably include the right to self-preservation on which Locke bases the right to appropriate.[30]

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27. *See, e.g.*, J. Habermas, *Historical Materialism and the Development of Normative Structures*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 95, 100 (T. McCarthy trans. 1979) (linguistic development contributes to ego development).

28. J. LOCKE, *supra* note 3, ch. V, § 27.

29. As Macpherson and others have pointed out, to say "must" at this point requires a capitalist mentality. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 13 (1962).

30. J. LOCKE *supra* note 3, ch. V, § 25.

If it makes sense to say that one owns one's body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one's personhood. If the body is property, then objectively it is property for personhood. This line of thinking leads to a property theory for the tort of assault and battery: Interference with my body is interference with my personal property. Certain external things, for example, the shirt off my back, may also be considered personal property if they are closely enough connected with the body.[31]

The idea of property in one's body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner: Blood can be withdrawn and used in a transfusion; hair can be cut off and used by a wigmaker; organs can be transplanted. On the other hand, bodily parts may be too "personal" to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.[32]

Another paradox is whether replacing any of my body parts with fungible plastic makes me a different person, and whether the plastic parts once inserted should be considered personal property or something else.[33] The plastic parts question represents the converse of the problem concerning the sale of natural organs. The natural organ becomes fungible property when removed from the body, but remains purely personal, thus seemingly not property, while it is still inside the body. Conversely, plastic parts are fungible when sold to

31. Hence, a touching of one's clothes or cane, etc., can be a battery. W. PROSSER, LAW OF TORTS § 9 (4th ed. 1971).

32. Whether society should permit bodily parts to become commodities is controversial. *See A Brazilian Tragedy—Desperation: Selling Your Eye, Kidney*, L.A. TIMES, Sept. 10, 1981, § I, at 1, col. 1; *Man Desperate for Funds: Eye for Sale at $35,000*, L.A. TIMES, Feb. 1, 1975, § II, at 1, col. 3. *See generally* G. CALABRESI & P. BOBBIT, TRAGIC CHOICES (1978) (reasons society might disallow such transactions).

33. The first inquiry raises the point that the parameters of personal identity may be scalar rather than binary; but that we may leave to the philosophers of personal identity. *See, e.g.*, Parfit, *Later Selves and Moral Principles*, in PHILOSOPHY & PERSONAL RELATIONS 137 (A. Montefiore ed. 1973).

the hospital, but once inserted they are no longer fungible, and should be considered as the natural organs they replace, hence perhaps no longer property at all.

Next, let us consider the person as individual rationality, the Kantian person.[34] If persons are bare abstract rational agents, there is no necessary connection between persons and property. Therefore, Kantian rationality cannot yield an objective theory of personal property. One might introduce external objects to a population of Kantian persons in the state of nature or in Rawls's original position[35] to see how they divide things among themselves (and so it might be hard to think of justice among these persons without property), but object relationships are still not a necessary corollary to the concept of personhood in this view.[36]

In Locke's view of persons as continuing self-consciousness characterized by memory, the external world may enter the concept of person. Memory is made of relationships with other people and the world of objects. Much of the property we unhesitatingly consider personal—for example, family albums, diaries, photographs, heirlooms, and the home—is connected with memory and the continuity of self through memory. But the pure Lockean conception of personhood does not necessarily imply that object relations (and the expected continuity of those relations that property gives) are essential to the constitution of persons, because that conception is disembodied enough not to stress our differentiation from one another. It is possible to hold the Lockean conception and still believe that memory is part of an immaterial essence of the person that has no inherent connection to the material world. But in a neo-Lockean view rejecting such dualism and making self-differentiation important, it seems object relations are necessary and central to self-constitution.[37]

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34. *See* text accompanying notes 12–13 *supra*.

35. *See* J. RAWLS, *supra* note 13, at 17–22.

36. Since objects do not become bound up with the person considered as abstract rationality, one might expect a tendency of Kantian rational persons to treat all property as fungible. These are the people in Rawls's original position, or, in Michelman's quasi-Rawlsian analysis of just compensation law, the "patient, far-seeing, reasonable folk who inhabit the fairness model." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1224 (1967).

37. The process by which a person develops object relations and an appropriate differentiation from the environment of other people and things is the subject of large portions of psychological and psychoanalytic theory. *See, e.g.*, H. KOHUT, THE ANALYSIS OF THE SELF (1971); D. WINNICOTT, *Transitional Objects and Transitional Phenomena*, in COLLECTED PAPERS 229 (1958); Steele & Jacobsen, *From Present to Past: The Development of the Freudian Theory*, 5 INT'L REV. PSYCHOANALYSIS 393 (1977).

Finally, let us consider the view that what is important in personhood is a continuing character structure encompassing future projects or plans, as well as past events and feelings. The general idea of expressing one's character through property is quite familiar. It is frequently remarked that dogs resemble their masters; the attributes of many material goods, such as cars and clothes, can proclaim character traits of their owners. Of course, many would say that becoming too enthralled with property takes away time and energy needed to develop other faculties constitutive of personhood.[38] But, for example, if you express your generosity by giving away fruits that grow in your orchard, then if the orchard ceases to be your property, you are no longer able to express your character.[39] This at least suggests that property may have an important relationship to certain character traits that partly constitute a person.

This view of personhood also gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations. This turn to expectations might seem to send property theory back toward Bentham, who declared that "the idea of property consists in an established expectation."[40] But this justification for honoring expectations is far from Benthamite, because it applies only to personal property. In order to conclude that an object figuring into someone's expectations is personal, we must conclude both that the person is bound up with the object to a great enough extent, and that the relationship belongs to the class of "good" rather than "bad" object-relations. Hence we are forced to face the problem of fetishism, or "bad" object-relations.

C. *The Problem of Fetishism*

We must construct sufficiently objective criteria to identify close

38. E. M. Forster expressed this view: "I shall wall in and fence out until I really taste the sweets of property. Enormously stout, endlessly avaricious, pseudo-creative, intensely selfish, I shall weave upon my forehead the quadruple crown of possession . . . ." E. FORSTER, *My Wood*, in ABINGER HARVEST 23, 26 (1936).

39. The connection between certain kinds of property rights and the person viewed as continuing character structure was recognized by Bernard Bosanquet in 1895. *See* B. BOSANQUET, *The Principle of Private Property*, in ASPECTS OF THE SOCIAL PROBLEM 308, 311, 314, (1895).

40. J. BENTHAM, *supra* note 3, at 112.

object relations that should be excluded from recognition as personal property because the particular nature of the relationship works to hinder rather than to support healthy self-constitution. A key to distinguishing these cases is "healthy." We can tell the difference between personal property and fetishism the same way we can tell the difference between a healthy person and a sick person, or between a sane person and an insane person.[41] In fact, the concepts of sanity and personhood are intertwined: At some point we question whether the insane person is a person at all.[42] Using the word "we" here, however, implies that a consensus exists and can be discerned. Because I seek a source of objective judgments about property for personhood, but do not wish to rely on natural law or simple moral realism,[43] consensus must be a sufficient source of objective moral criteria—and I believe it can be, sometimes, without destroying the meaning of objectivity.[44] In the context of property for personhood, then, a "thing" that someone claims to be bound up with nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is an objective moral consensus that to be bound up with that category of "thing" is inconsistent with personhood or healthy self-constitution.

Judgments of insanity or fetishism are both made on the basis of the minimum indicia it takes to recognize an individual as one of us.[45] There does not seem to be the same reason to restrain a private

41. *See* Moore, *Legal Conceptions of Mental Illness*, in MENTAL ILLNESS: LAW & PUBLIC POLICY 25 (B. Brody & H. Engelhardt eds. 1980); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

42. *See* J. MURPHY, *Incompetence and Paternalism*, in RETRIBUTION, JUSTICE AND THERAPY 165 (1979); P. STRAWSON, *Freedom and Resentment*, in FREEDOM AND RESENTMENT 1 (1974).

43. *Cf.* Moore, Moral Reality (1981) (unpublished manuscript on file with Stanford Law Review) (arguing that legal decisions can and should be made on the basis of moral reality).

44. Whether any kind of consensus can ever be a source of objective moral judgments is the subject of philosophical dispute. I have argued elsewhere that our present state of philosophical enlightenment on the subject of moral objectivity seems to be consonant with the argument that "deep" moral consensus—not mere social consensus, or subjective preference counting—should be treated as objective for political purposes. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1176 n.109 (1980); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1030–42 (1978). *See* Rawls, *Kantian Constructivism in Moral Theory*, *supra* note 13, at 570–71.

45. There has not been much philosophical analysis of perversion; *but see* T. NAGEL, *Sexual Perversion*, in MORTAL QUESTIONS 39 (1979). There are varying philosophical approaches to the necessary criteria or indicia for recognizing someone as one of us. For Moore, *supra* note 41, the criterion is rationality, the ability to carry out intelligible rational syllogisms. Drawing out these notions of intelligibility, Morse, *supra* note 41, at 581–90, distin-

fetishist as there would be to restrain an insane person prone to violence against others. But the restraint of denying the fetishist's property special recognition as personal is less severe than that imposed on someone deemed violently insane. To refuse on moral grounds to call fetishist property personal is not to refuse to call it property at all. The immediate consequence of denying personal status to something is merely to treat that thing as fungible property, and hence to deny only those claims that might rely on a preferred status of personal property.[46]

A broader aspect of the problem of fetishism is suggested by Marx's "fetishism of commodities."[47] Marx attributed power in a market society to the commodities that form the market. He believed that people become subordinate in their relations to these commodities. In other words, under capitalism property itself is anti-personhood.

Even if one does not accept that all capitalist market relations with objects destroy personhood, it is probably true that most people view the caricature capitalist with distaste. Most people might consider her lacking in some essential attribute of personhood, such as the capacity to respect other people or the environment. If there is some moral cut-off point, beyond which one is attached too much or in the wrong way to property, the extent to which someone may emulate the caricature capitalist and still claim property for personhood is not clear, but is not unlimited. Although the caricature capitalist cannot express her nature without control over a vast quantity of things and other people, her need for this control to constitute herself the complete capitalist could not objectively be recognized as personal property because at some point there is an objective moral consensus that such control is destroying personhood rather than fostering it.[48]

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guishes "crazy urges" and "crazy reasons." Strawson, *supra* note 42, speaks of responses to entities in terms of personal or objective attitudes. Dennett, *supra* note 23, speaks of the indicia of "intentional systems."

46. What sort of claims might be associated with a preferred status of personal property is discussed in Parts IV-V *infra*.

47. K. MARX, CAPITAL ch. I (S. Moore & E. Aveling trans. 1889).

48. If we deny the caricature capitalist the claim that her empire is personal, that still leaves her with an empire of fungible property; and Marx would probably be quick to point out that its fungible character in the hands of the capitalist makes it no less oppressive to the property-less. Thus, the hypothetical caricature capitalist brings up a further aspect of the festishism problem: the effect of one person's claimed property rights on the personhood of others. The extent to which a liberal government may permit private individuals to engage in practices which impinge on the personhood of others is a difficult question of political theory.

III. HEGEL, PROPERTY, AND PERSONHOOD

A. *Hegel's* Philosophy of Right

The property theory of Hegel's *Philosophy of Right*,[49] although based on a conception of persons, does not immediately invoke the intuitive personhood perspective. Hegel's person is the same as Kant's—simply an abstract autonomous entity capable of holding rights, a device for abstracting universal principles and hence by definition devoid of individuating characteristics.[50] In postulating persons as rights holders, Hegel thus initially assumes away those

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It is the inverse of the problem of welfare rights, that is, to what extent certain interests in personhood (regardless of whether embodied in property or not) ought to be guaranteed by the government even against the claimed property interests of the rich. This is a problem not directly addressed in the present article, though it is further noticed in text accompanying notes 109–17, 182–99 *infra*.

49. The standard English translation of GRUNDLINIEN DER PHILOSOPHIE DES RECHTS is PHILOSOPHY OF RIGHT (T. Knox trans. 1942) [hereinafter cited as PR]. Citations in this article are to the Knox translation; in a few quotations I have made minor emendations for the sake of clarity. The text of the work consists of numbered sections, "remarks" added to the text by Hegel [hereinafter cited with "R" following the section number], and "additions" obtained by early editors from collating student lecture notes [hereinafter cited with "A" following the section number]. The English title of the work is slightly misleading, because "right" does not capture the full sense of "*Recht*," by which Hegel means "not merely what is generally understood by the word, namely civil law, but also morality, community morality [*Sittlichkeit*], and world-history . . . ." PR § 33A. *Cf.* PR § 29 ("[*Recht*] therefore is by definition freedom as Idea"). Thomas Hill Green, a 19th-century British Hegelian, understood *Recht* as meaning the system of positive law, but wished it to connote instead both "moral duty in regard to actual [i.e., positive, legal] obligations, as well as . . . the system of rights and obligations as it should become." T. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION § 10 (reprinted 1927 from II GREEN'S PHILOSOPHICAL WORKS (L. Nettleship ed. 1886)); *see also id.* §§ 9–11; *cf.* § 11 n.1.

Although the *Philosophy of Right* is a philosophy of law, Anglo-American legal scholars have not systematically examined it. The best discussion I have found of Hegel's property theory in English is Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, in NOMOS XXII, PROPERTY 130 (J. Pennock & J. Chapman eds. 1980). *See also*, S. AVINERI, HEGEL'S THEORY OF THE MODERN STATE (1972); Stillman, *Person, Property and Civil Society in the* Philosophy of Right, in HEGEL'S SOCIAL AND POLITICAL THOUGHT 103 (D. Verene ed. 1980); Stillman, *Hegel's Critique of Liberal Theories of Rights*, 68 AM. POL. SCI. REV. 1086 (1974).

50. Hegel puts this as follows:

> 35. The universality of this consciously free will is abstract universality, the self-conscious but otherwise contentless and simple relation of itself to itself in its individuality, and from this point of view the subject is a person . . . .
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> 35R. Personality begins not with the subject's mere general consciousness of himself as an ego concretely determined in some way or other, but rather with his consciousness of himself as a completely abstract ego in which every concrete restriction and value is negated and without validity . . . .
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> 36. (1) Personality essentially involves the capacity for rights and constitutes the concept and the basis (itself abstract) of the system of abstract and formal right. Hence the imperative of right is: "Be a person and respect others as persons."

characteristics that render individuals unique beings—particular commitments and character traits, particular memories and future plans, particular relationships with other people and with the world of external objects. In contrast, the intuitive perspective assumes that persons are not persons except by virtue of those particulars, and therefore sees the person as the developed individual human being in the context of the external world. Personal property is important precisely because its holder could not be the particular person she is without it.

Yet, Hegel's property theory is only the first part of a logical and historical progression from abstract units of autonomy to developed individuals in the context of a developed community.[51] Hence, Hegel's theory may function to take the person from the abstract realm of rights into the world of concrete individuals having the attributes of personhood as we commonly conceive them. Thus, even though Hegel does not use the word person for the entity described as the person in the theory of personal property, Hegel's theory can be seen as consistent with the idea of personal property. Whereas the theory of personal property begins with the notion that human individuality is inseparable from object relations of some kind, Hegel makes object relations the first step on his road from abstract autonomy to full development of the individual in the context of the family and the state.

Because the person in Hegel's conception is merely an abstract unit of free will or autonomy, it has no concrete existence until that will acts on the external world. "[T]he person must give its freedom an external sphere in order to exist as Idea."[52] At this level of particularization, the external sphere "capable of embodying [the person's] freedom" consists of the rest of the world, everything that is distinct from the person.[53]

From the need to embody the person's will to take free will from the abstract realm to the actual, Hegel concludes that the person becomes a real self only by engaging in a property relationship with

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PR §§ 35, 35R & 36. *Cf.* T. GREEN, *supra* note 49, § 27 ("[the proposition that all rights are personal] means that rights are derived from the possession of personality—a rational will").

51. *See* notes 56, 62, and text accompanying note 62 *infra*.

52. PR § 41; *cf.* PR § 39 ("Personality is that which struggles . . . to give itself reality, or in other words to claim that external world as its own [*jenes Dasein als das ihrige zu setzen*]."). Since Hegel, like Plato, was an idealist, something must exist as Idea in order to be actualized or real.

53. PR § 41.

something external.[54] Such a relationship is the *goal* of the person. In perhaps the best-known passage from this book, Hegel says:

> The person has for its substantive end the right of placing its will in any and every thing, which thing is thereby mine; [and] because that thing has no such end in itself, its destiny and soul take on my will. [This constitutes] mankind's absolute right of appropriation over all things.[55]

Hence, "property is the first embodiment of freedom and so is in itself a substantive end."[56]

Hegel's property theory is an occupancy theory; the owner's will must be present in the object.[57] Unlike Locke's theory of appropriation from the state of nature, occupancy in Hegel's view does not give

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54. "I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of *property*, the true and right factor in possession." PR § 45.

55. PR § 44. It is unclear why Hegel referred in this passage to the thing becoming "mine" [*die Meinige*] rather than "the person's." Perhaps by this lack of parallelism he meant to suggest the change from abstract personhood to concrete individuality brought about by embodiment of the will.

56. PR § 45R. To understand why Hegel says property is only the first embodiment of freedom, one must understand both the structure of the *Philosophy of Right* and the Hegelian meaning of freedom. Hegel's *Philosophy of Right* is divided into an Introduction and three Parts, entitled, "Abstract Right," "Morality," and "Community Morality" [*Sittlichkeit*]. *See* note 68 *infra*. The first Part considers relationships among individuals viewed as persons or as abstract autonomous entities possessing arbitrary free will, *see* note 50 *supra*, in the contexts of property, contract, and crime. The second Part considers individuals as subjective entities having a consciousness and conscience which direct the individual will towards its own conception of the good. The third Part considers individuals as grounded in an objective ethical order consisting of the customs, history, and spirit of a nation. This discussion covers the family, civil society, and the state. Hegel argues that freedom is finally realized when the individual will unites with and expresses itself as part of the objective ethical order—an absolute mind or spirit (*Geist*) embodied by the state. *See* Solomon, *Hegel's Concept of "Geist"*, in HEGEL: A COLLECTION OF CRITICAL ESSAYS 125, 125 (A. MacIntyre ed. 1972) ("What clearly emerges from Hegel's writings is that 'Geist' refers to some sort of *general consciousness, a single 'mind' common to all men.*") (emphasis in original); *cf.* C. TAYLOR, HEGEL AND MODERN SOCIETY 111 (1979) (*Geist* is "cosmic spirit"; "spiritual reality underlying the universe as a whole").

For Hegel, real freedom (rather than just its initial stage) depends upon the individual's assumption of an appropriate role in the properly developed state, a concept quite different from the notion of (negative) liberty, or freedom from external constraints. *See* note 7 *supra*. *See* Schacht, *Hegel on Freedom*, in HEGEL: A COLLECTION OF CRITICAL ESSAYS, *supra*, at 289, 320. *Cf.* Berki, *Political Freedom and Hegelian Metaphysics*, 16 POL. STUD. 365, 376 (1968) (Hegel's "*philosophical freedom* grows with comprehensiveness and with ever higher degrees of realized self-determination. Thus, an animal is freer than a physical object, a man freer than an animal, the family freer than the individual, the State freer than the family, World-History freer than the State, etc.").

57. "Since property is the *embodiment* of personality [*Dasein der Persönlichkeit*], my inward idea and will that something is mine is not enough to make it my property; to secure this end occupancy [*die Besitzergreifung*] is requisite." PR § 51.

rise to an initial entitlement which then has a permanent validity. Rather, continuous occupation is necessary to maintain a property relationship between a person and any particular external thing, because "the will to possess something must express itself."[58] As the autonomous will to possess comes and goes over time, so property must come and go.[59]

Hegel's argument about property in the realm of abstract right mostly reaffirms the liberal positions on property.[60] But because Hegel believes the rights he describes there concern only the Kantian "abstract personality,"[61] he treats them as both logically and devel-

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58. PR § 64R. Hegel thus makes it clear that prescription or adverse possession is *not* based on an "external" theory that a statute of limitations is needed to cut off the "disputes and confusions which old claims would introduce into the security of property." *Id.* Rather, things become unowned when they are "deprived of the actuality of the will and possession." PR § 64.

59. Alienability also follows; things which have become property are alienable simply by withdrawing one's will. PR § 65. Those things which constitute the will or personhood must, however, be inalienable. PR § 66. The concept of Mind [*Geist*] could not be actualized if persons could dispose of their personhood. PR § 66R.

60. Hegel believes that his argument yields not only a property relationship, but *private* property.

> 46. Since my will, as the will of a person, and so as a single will, becomes objective to me in property, property acquires the character of private property; and common property of such a nature that it may be owned by separate persons acquires the character of an inherently dissoluble partnership in which the retention of my share is explicitly a matter of my arbitrary preference.

PR § 46. Hegel believes that "[o]wnership therefore is in essence free and complete." PR § 62. The notion of divided ownership poses "an absolute contradiction." What is mine is "penetrated through and through by my will," but that cannot be if the "impenetrable" will of another is supposedly present in the same thing. *Id.*

Although Hegel thought his argument necessitated private property, he did not think it had anything to do with who gets what. He took care to point out that in this sphere of abstract right, where he considers only units of personal autonomy and no forms of social interaction or social entities, there are no issues of justice in distribution. Hegel discusses here only the "rational aspect"—that individuals possess property as expressions of their wills; he does not consider here the "particular aspect"—that how much one possesses depends on "subjective aims, needs, arbitrariness, abilities, external circumstances, and so forth." PR § 49.

Hegel adds:

> At this point, equality could only be the equality of abstract persons as such, and therefore the whole field of possession, this terrain of inequality falls outside it.
>
> We may not speak of the injustice of nature in the unequal distribution of possessions and resources, since nature is not free and therefore is neither just nor unjust . . . . On the other hand, subsistence is not the same as possession and belongs to another sphere, i.e., to civil society.

PR § 49R. Hegel means by "civil society" [*die bürgerliche Gesellschaft*] roughly what most liberals mean by the state; that is, the sphere of political economy in which individuals pursue their own selfish ends. *See* PR §§ 182–256; note 67 *infra*.

61. PR § 40R.

opmentally prior to any relationships of right arising from the person's interaction with others in society. Subsequent sections of his book introduce other, more particular property relationships that arise from the nature of groups—the family and the state—rather than from individual autonomy alone.[62] In Hegel's scheme of progress from abstract units of will to the final ideal unity of individuals and the state, these other kinds of property relationships are higher and more advanced.[63] Hegel departs from classical liberalism in discussing these other kinds of property relationships. For Hegel, individuals could not become fully developed outside such relationships. They are important in comparing Hegel's theory to a theory of personal property, because the concept of person in the theory of personal property refers to the fully developed individual.

Hegel derives family property from the personhood of the family unit. When personality or "immediate exclusive individuality" enters into marriage, it "surrenders itself to it," and the parties become one person, or a single autonomous unit.[64] It follows that there must be family property wherein "the family, as person, has its real exter-

62. In fact, he remarks that the civil law's traditional classification of rights, derived from Justinian, was confused because of its "disorderly intermixture of rights which presuppose substantial ties, e.g., those of family and political life," with those stemming from personhood simpliciter. PR § 40R. This distinction presents a basic question for interpreters of Hegel's property theory: To what extent are his considerations of property rights from the first Part of *Philosophy of Right* ("Abstract Right") superseded in turn by the considerations in Part two ("Morality") and Part three ("Community Morality")? *See* note 56, *supra*. Hegel thought of these dialectic stages as both historical and conceptual, occurring successively in history as well as in logic. The Idea, the concept of absolute mind as the perfection of both the universal and all particulars, was the ultimate goal of both his conceptual system and the process of history. Hegel's initial sphere of abstract right might be considered comparable to a Hobbesian state of nature from a Kantian perspective. Conceptualizing a person merely as a separate autonomous unit possessing arbitrary will leaves out the "later" spheres of moral sentiments and participation in family and community. Do Hegel's remarks on property apply to a society in which these later stages are to some degree already actualized?

If one interprets the structure of the *Philsophy of Right* according to the most usual understanding of the Hegelian dialectic, then earlier stages are "*aufgehoben*" by the later. They are at once destroyed, transcended, and incorporated into a new synthesis. *See, e.g.*, C. TAYLOR, HEGEL AND MODERN SOCIETY 49, 53–66 (1979); Findlay, *The Contemporary Relevance of Hegel*, in HEGEL: A COLLECTION OF CRITICAL ESSAYS, *supra* note 56, at 1; Findlay, *Some Merits of Hegelianism*, 56 PROC. ARISTOTELIAN SOC'Y 1 (1955). T. M. Knox, the translator of the *Philosophy of Right*, thought that abstract right and morality are both "absorbed into ethical life [community morality] as its constituents." Knox, *Translator's Foreword* to HEGEL'S PHILOSOPHY OF RIGHT at x (1942). If this is correct, then the type of community entity that realizes the Idea would contain property relationships of the sort he set out in the sphere of abstract right. That is, the Hegelian ideal state would still contain the property relationships characteristic of liberalism.

63. *See* note 56 *supra*.

64. PR § 167. Marriage is one of the "absolute principles" on which community moral-

nal existence."[65] Family property must therefore be common property by nature.[66]

Hegel seems to make property "private" on the same level as the unit of autonomy that is embodying its will by holding it. He argues that property is private to individuals when discussing it in the context of the autonomous individual will and that it is essentially common within a family, when discussing it in the context of the autonomous family unit. He does not make the leap to state property, however, even though his theory of the state might suggest it. For Hegel, the properly developed state (in contrast to civil society) is an organic moral entity, "the actuality of the ethical Idea,"[67] and individuals within the state are subsumed into its community morality.[68]

Hegel's theory of the state thus carries the seeds of destruction of all liberal rights attaching to individuals (because in the state particular arbitrary will passes over into willing the universal).[69] Hence,

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ity depends, PR § 167R, and in a family one has "self-consciousness of one's individuality within this unity" as a "member," not as an "independent person." PR § 158.

65. PR § 169.

66. PR § 171. Hegel also argued that children are not property since they are "potential freedom." PR § 175. He conservatively favored inheritance but disfavored freedom of testation. PR §§ 178-80. He also endorsed the traditional roles of husbands and wives. PR § 166.

67. PR § 257. The state is "absolutely rational," PR § 258, and the "actuality of concrete freedom," PR § 260, and in the state "personal individuality and its particular interests . . . pass over of their own accord into the interest of the universal," which they "know and will" and "recognize . . . as their own substantive mind," *id.* In contrast, Hegel conceives of civil society as "an association of members as self-subsistent individuals." PR § 157. By voluntarily contracting with each other, the autonomous units in civil society fulfill each other's needs. In the sphere of political economy, Hegel draws conclusions very similar to those theorists who derive a "minimal" state from strictly individualist premises. Civil society, as an aggregate of autonomous units of arbitrary will, is an aggregate of private property-owning individuals. "As the private particularity of knowing and willing, the principle of this system of needs contains absolute universality, the universality of freedom, only abstractly and therefore as the right of property." PR § 208.

68. Hegel's special use of the word *Sittlichkeit*, the subject of the third Part of his work, causes a translation problem. *See* note 56, *supra*. Knox translated this word as "ethical life" to distinguish it from *Moralität*, the subject of the second part of the work, even though both words ordinarily mean "morality." Hegel differentiated the two because he wanted *Moralität* to connote the morality of the individual conscience and *Sittlichkeit* to connote the collective morality of a society including the totality of its history and customs. PR §§ 33, 141; *cf.* Knox, *Translator's Notes* to PHILOSPHY OF RIGHT, 319 n.75 (*Moralität* is abstract morality; *Sittlichkeit* is concrete morality.). A more suggestive translation of *Sittlichkeit* might be "community morality," which I use in this article, although most Hegel scholars either leave the word untranslated or use Knox's "ethical life."

69. *See* PR § 260; note 67, *supra*. Hegel objects to classical liberal theories of the state:

> If the state is confused with civil society, and if its specific end is laid down as the security and protection of property and personal freedom, then the interest of

there is in Hegel's theory a foundation for the communitarian claim that each community is an organic entity in which private property ownership does not make sense. Hegel does not make this claim, perhaps because he is too firmly rooted in his own time. He thought his theory of the state required that the state must take the form of a constitutional monarchy, in which the monarch and the landed aristocracy "attain their position by birth" and "possess a will which rests on itself alone."[70] Hegel at least clearly makes the claim that a human being can only become properly developed—actualize her freedom—in the context of a community of others. Thus, though he speaks of the person in the sphere of abstract right only in the Kantian sense of abstract rationality, he implicitly claims that personhood in the richer sense of self-development and differentiation presupposes the context of human community. If accepted, this claim has important ramifications for a theory of personal property which does rely on that richer sense of personhood.

B. *Hegel and Property for Personhood*

The intuitive personhood perspective on property is not equivalent to Hegelian personality theory, because that perspective incorporates the attributes of personhood that Hegel initially assumes away. Nevertheless a theory of personal property can build upon some of Hegel's insights. First, the notion that the will is embodied in things suggests that the entity we know as a person cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with portions of that environment.[71] The idea of embodied will, cut loose from Hegel's grand scheme of absolute mind, reminds us that people and things have ongoing relationships which have their own ebb and flow, and that these relationships can be very close to a person's center and sanity. If these relationships justify ownership, or at least contribute

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> the individuals as such becomes the ultimate end of their association, and it follows that membership of the state is something optional. But the state's relation to the individual is quite different from this. Since the state is objective mind [*Geist*], it is only as one of its members that the individual himself has objectivity, genuine individuality [*Wahrheit*], and community morality. . . . [The individual's] particular satisfaction, activity, and mode of conduct have this substantive and universally valid life as their starting point and their result.

PR § 258R.

70. PR § 305. *See also* K. MARX, CRITIQUE OF HEGEL'S "PHILOSOPHY OF RIGHT" (1843).

71. *See* note 37 *supra*.

to its justification, Hegel's notion that ownership requires continuous embodiment of the will is appealing.

Second, Hegel's incompletely developed notion that property is held by the unit to which one attributes autonomy has powerful implications for the concept of group development and group rights.[72] Hegel thought that freedom (rational self-determination) was only possible in the context of a group (the properly organized and fully developed state). Without accepting this role for the state, one may still conclude that in a given social context certain groups are likely to be constitutive of their members in the sense that the members find self-determination only within the groups. This might have political consequences for claims of the group on certain resources of the external world (i.e., property).

Third, there may be an echo of Hegel's notion of an objective community morality in the intuition that certain kinds of property relationships can be presumed to bear close bonds to personhood. If property in one's body is not too close to personhood to be considered property at all, then it is the clearest case of property for personhood. The property/privacy nexus of the home is also a relatively clear case in our particular history and culture.[73]

IV. Two Kinds of Property: The Dichotomy as Critique

One element of the intuitive personhood perspective is that property for personhood gives rise to a stronger moral claim than other property. This division of property resembles a recurrent kind of critique of real-world property arrangements.[74] The underlying insight of the many dualist property theories seems to be that some property is accorded more stringent legal protection than other property, or is otherwise deemed more important than other property by social con-

72. This is not presently a well-developed philosophical literature. *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 149 n.65 (1976); Van Dyke, *Justice as Fairness: For Groups?* 69 AM. POL. SCI. REV. 607 (1975); R. Garet, The Existence of Groups: An Adjudicative Theory of Group Rights (Ph.D. diss. Yale 1981).

73. Some of these relationships are examined in text accompanying notes 118–200, *infra*.

74. The insight that there are two kinds of property appears in quite disparate contexts. In addition to the critiques discussed in the text of this Part, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 116–18, 156 (1977) (social property and legal property); Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 2–3 (1965) (property for production and property for consumption); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (property for use and property for power); Donahue, *The Future of the Concept of Property Predicted from Its Past*, in NOMOS XXII, PROPERTY 28, 56, 67 n.104 (J. Pennock & J. Chapman eds. 1980) (suggesting a distinction between offensive and defensive use of property).

sensus. To the extent these theories are normative, the claim is that some property is worthier of protection than other property.

If the areas of greater and lesser protection under the various dualist theories coincide to any extent, then there is room for a new and more precise theory of the areas of weaker and stronger property. I suggest that the common thread in these theories relates the stronger property claims to recognized indicia of personhood. The personhood perspective can thus provide a dichotomy that captures this critical intuition explicitly and accurately.

The premise of this form of critique is that any dichotomy in property significantly affects the justification of property rights in the real world. Liberal property theories have traditionally justified a property rights scheme by relying on some paradigm case.[75] But if the paradigm case only applies to a subset of all the things called property, then only that subset is justified, and a dichotomy is established between that subset and forms of property that fall outside the purview of the justification. Locke, for instance, justifies property with a theory of just acquisition, in which the basic assumption is the person in the state of nature. In a heroic inferential leap, he concludes that if property is justified under those conditions, then it is ipso facto justified in the capitalist market society with money and wage-labor.[76] The leap may lead to incoherence if it ignores limitations implied in the premises. Thus, if Locke's claim is that property is justified because it is a condition necessary to produce or sustain free individuals, his theory carries the inherent limitation that any form of property incompatible with free individuals is not justified.[77]

A. *Marx and Hobhouse*

Marx's distinction between property resting on one's own labor and property resting on the labor of others is an example of this kind of critique.[78] In the *Communist Manifesto*, Marx and Engels allude to a discontinuity in justification based on this distinction:

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75. For Locke, the paradigm case was mixing one's labor with the environment in a state of nature. J. LOCKE, *supra* note 3, ch. V, ¶ 27.

76. *Id.* ¶¶ 36–50.

77. Critiques of Locke that reflect this view are T. GREEN, *The Right of the State in Regard to Property*, in LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION, *supra* note 49, §§ 211–32; C. MACPHERSON, *supra* note 29, at 197–221. A critique of Hegel in a similar vein is Piper, *Property and the Limits of the Self*, 8 POL. THEORY 39 (1980).

78. Marx said that private property resting on the labor of others is the "direct antithesis" of private property resting on the producer's own labor. K. MARX, CAPITAL ch. XXXIII, at 790 (S. Moore & E. Aveling trans. 1889). Marx's two kinds of property could not coexist; rather, they are viewed as distinct historical stages. Capitalist or bourgeois property, resting

> The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property . . . .
>
> We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the ground work of all personal freedom, activity and independence . . . .
>
> . . . Do you mean the property of the petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily.[79]

In this passage, Marx and Engels implicitly criticize liberal theories based on personality or on labor-desert as being inapplicable to capitalism. Property in the means of production is not the type of property that forms the basis for personal freedom.

A similar criticism of the classical liberal justification of property is expressed in the dichotomy between property for use and property for power, introduced early in this century by L. T. Hobhouse. Hobhouse distinguishes "use" and "power" as two "social aspects of property" and he implies that the classical theory justifies property for use, but not property for "control of persons through things."[80]

> In a developed society a man's property is not merely something which he controls and enjoys, which he can make the basis of his labour and the scene of his ordered activities, but something whereby he can control another man and make it the basis of that man's labour and the scene of activities ordered by himself. The abstract right of property is apt to ignore these trifling distinctions . . . . Now these two functions of property, the control of things, which gives freedom and security, and the control of persons through things, which gives power to the owner, are very different. In some respects they are radically opposed . . . .[81]

This passage implies that while "control of things" might be justified by the classical theory, "control of persons through things" cannot be so justified. Hobhouse went on to assert that "modern economic conditions have virtually abolished property *for use*—apart from furniture, clothing, etc.," while bringing about "the accumulation of vast

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on wage labor, was the historical successor of forms of property resting on the fruits of one's own labor. *Id.* ch. XXXII.

79. K. MARX & F. ENGELS, THE COMMUNIST MANIFESTO 96 (Penguin Books ed. 1979) (S. Moore trans. 1st ed. 1888).

80. Hobhouse, *The Historical Evolution of Property, in Fact and in Idea*, in PROPERTY: ITS DUTIES AND RIGHTS 3, 9–11 (2d ed. 1922). This distinction was later noted by Morris Cohen, *supra* note 74; and most recently by C. B. MacPherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 12 (1978).

81. Hobhouse, *supra* note 80, at 9–11.

masses of property *for power* in the hands of a relatively narrow class."[82]

This argument has in common with Marx two important features. First, both critiques assume that human individuality and autonomy bear some relation to one's freedom to use, work on, and form expectations about the resources of the external environment. This implies that there is some core of insight, however distorted, in the classical liberal theories of property.[83] Second, both formulate a dichotomy in property in terms of the purposes of the person exercising control over it. While the first feature reflects the persistent insight that the concept of personhood necessarily includes some kinds of continuing relationships with the external environment, the second focuses on the effect of certain types of property arrangements on personal expression and development, that is, on the personhood which is supposed to be their *raison d'être*.

In the Marxist dichotomy, one can clearly distiguish between ownership of something one has labored on and ownership of things others have labored on. Marx asserts that private ownership of things labored on by others is unjustified, but does not assert that private ownership of things labored on by oneself is necessarily justified. Perhaps Marx would accept the idea that some solidity of expectations based on the freedom to fuse oneself by one's efforts with the external environment is justified because that act is bound up

82. *Id.* at 23. This, of course, sounds similar to Marx's insistence that property resting on the employment of others' labor must inevitably be the historical successor of property resting on the employment of the producer's own labor. *See* note 78 *supra*. Yet English reformers such as Hobhouse—and T. H. Green before him—did not assert that capitalism must necessarily result in property-less (and therefore dehumanized) proletarian masses. They merely argued that, insofar as capitalist laws and institutions do result in such a property-less proletariat, they are unjustified and should be reformed. *See* Green, *supra* note 49, §§ 227–31.

83. On Marx and property, see Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, *supra* note 49; Brenkert, *Freedom and Private Property in Marx*, 8 PHIL. & PUB. AFF. 122 (1979). Suggestive passages are found in Marx & Engels, *The German Ideology*, in THE MARX-ENGELS READER 110 (R. Tucker ed. 1st ed. 1972), and in Marx's discourse on estranged or alienated labor in Marx, *Economic and Philosophical Manuscripts of 1844*, in THE MARX-ENGELS READER 52 (R. Tucker ed. 1st ed. 1972). Marx's point was not that object-relations are unimportant, but that wage-labor perverts them. Wage-labor makes man's "life-activity, his *essential* being, a mere means to his *existence*." *Id.* at 62.

> Private property has made us so stupid and one-sided that an object is only *ours* when we have it—when it exists for us as capital, or when it is directly possessed, eaten, drunk, worn, inhabited, etc.,—in short, when it is *used* by us. Although private property itself again conceives all these direct realizations of possession as *means of life*, and the life which they serve as means is the *life of private property*—labour and conversion into capital.

Id. at 73.

with autonomy and individuality in a way not historically determined by capitalist relations of production, even though he was not willing to extract what he called the property of the artisan from its historical period.[84] In his early writings he spoke of alienated labor as a perversion of man's nature as a laborer at one with his environment, which was man's "species being."[85] Although the laborer who is not alienated has an integrated relationship with the environment, it would not follow that everything worked on could thereby legitimately become property.

Though Marx introduced no element of subjective intent, one might wish to distinguish between laboring on resources that are intended to remain bound up with one's own life and laboring on resources that one intends to use to make exchanges with others.[86] If one has a personhood perspective and feels that a relationship between person and thing is stronger when resources are bound up with the individual than when they are free to be traded or held for trade, then one could more easily justify ownership where resources are to be bound up with one's own life. To put this roughly in Marxist terminology, in a market society this perspective would provide a stronger justification for property held for "use value" than property held for "exchange value."[87]

Perhaps Hobhouse's dichotomy is meant to capture this kind of intuition. But Hobhouse's distinction between property for use and

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84. *See* note 78, *supra*.

85. "Species being" stems from Marx's term *Gattungswesen*. In the section of the *Economic and Philosophic Manuscripts* on estranged labor, Marx stated: "In creating an *objective world* by his practical activity, in *working-up* inorganic nature, man proves himself a conscious species being . . . . This production is his active species life." *Economic and Philosophic Manuscripts of 1844*, *supra* note 83, at 62.

86. This distinction assumes the existence of a market society. Marx did not hold that merely producing commodities for exchange with other commodities was alienating; rather, he held that alienation was produced by the "fetishism of commodities," that is, producing commodities for market exchange. K. MARX, CAPITAL, *supra* note 78, ch. I, § 4; *see* text accompanying notes 47–48 *supra*. In a society based on barter between producers who know each other, this fetishism of commodities would not develop.

87. *See* K. MARX, CAPITAL, *supra* note 78 ch. I, § 1. "Exchange value" is basically what economists call market value. "Use-value" is the utility to the consumer: "Use-values become a reality only by use or consumption: they also constitute the substance of all wealth, whatever may be the social form of that wealth." *Id.* at 2–3. Marx used the term "value" simply to refer to the amount of labor socially necessary to produce a commodity. *Id.* ch. I. For more discussion of these concepts, see Cohen, *Labor, Leisure, and a Distinctive Contradiction of Advanced Capitalism*, in MARKETS AND MORALS 107 (G. Dworkin, G. Bermant & P. Brown eds. 1977).

property for power remains vague.[88] It is not clear whether the status of the property holder as producer or non-producer is the only relevant distinction, or whether the intent of the holder also counts. Is the dichotomy meant to be between property valued by an individual producing it only for its "use value" and all other property? Or is it between property held by the individual producing it and all other property?

Intent may be irrelevant for Hobhouse as it is for Marx. Hobhouse seems to associate property for use simply with that produced by one's own labor and property for power simply with that produced by the labor of others. If this is all that Hobhouse means, then it is Marx's dichotomy minus Marx's assertion that the two types of property could not historically coexist.[89] Apparently this is the way subsequent writers interpret the distinction between property for use and property for power.[90] Yet in Hobhouse there are traces of the intuition which I likened to the distinction between "use value" and "exchange value." In associating property for use with something one can make "the scene of his ordered activities," Hobhouse seems to contemplate the continuing control and continuity of expectation with regard to some resource in the external environment. That is, he seems to associate property for use with personal property. If the foundation of Hobhouse's dichotomy was a concern that a justification of property that purports to rest on individual freedom could not extend to cover instances of property that restrict individual freedom, then he would have had to consider intent with which an individual values something.[91]

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88. It also exhibits the logical problem that all property gives power over others in the sense that it confers enforceable claims on the holder and hence power to have them enforced.

89. *See* note 78 *supra*.

90. *E.g.*, Cohen, *supra* note 74.

91. A theory that takes intent into account need not be normative. When Ackerman says his Ordinary Observer will distinguish between social property and legal property in interpreting the takings clause of the fifth amendment, the dichotomy is firmly based on the subjective way individuals value things. B. ACKERMAN, *supra* note 74, at 116–18, 156–57. Social property is a claim based on "existing social practices which any well-socialized person should recognize as marking a thing out as *Layman's* thing." *Id.* at 117. Legal property is a claim that Layman does not believe is justified "without appealing to the opinion of a legal specialist." *Id.* Ackerman's Observing Judge, whose "principal objective is to protect Layman's understanding of his relationship to his things," will consider social property a stronger claim against government interference than legal property, and interpret the takings clause accordingly. *Id.*

Ackerman's dichotomy differs from the Hobhouse use/power dichotomy in being formulated only in terms of whether or not social consensus (the ordinary language of social intercourse in the cultural mainstream) supports a claim. It states that claims so based on social consensus are stronger, at least against the government, than claims not so based. This for-

B. *A Utilitarian Dichotomy*

In apparent contrast to these assertions that certain property claims are stronger than others, some utilitarians might claim that since there is only one social goal, maximization of welfare, so there is only one kind of property—that which results in maximization of welfare. In this utilitarian scheme, there will also be no reason for distinctions between property entitlements and other kinds of individual entitlements except for deference to linguistic tradition. Posner's position represents this view: Efficiency will be maximized only when anything that is scarce in the relevant human society during the relevant time period (thus, a "good" and not merely an undifferentiated attribute of the environment) is the subject of an entitlement.[92]

Yet those who espouse utilitarianism in the form of instrumental economics have elaborated a hierarchy of *remedies*. The Calabresi-Melamed distinction between protecting entitlements with "property rules" or "liability rules" is now a widely recognized tool of economic analysis.[93] An entitlement is protected by a property rule if *B* can obtain it from *A* only by paying whatever price *A* sets as a willing seller, or if *A* can obtain an injunction to prevent *B*'s interference. An entitlement is protected by a liability rule if *B* can obtain it from *A* by paying some extrinsically determined price (such as the "market" price), even if *A* is not a willing seller, or if *A* can obtain only damages on account of *B*'s interference. To some extent, this system does not correspond to the ordinary meaning of property[94] Most

mulation embodies the notion that property based on consensus morality is a stronger claim, and may thereby be indirectly related to individual moral autonomy. But unlike the use/power dichotomy it need not be related to the ultimate justification of property. In fact, it is not, unless social consensus constitutes justification of a property claim. If, on the other hand, Ackerman intends a normative distinction, and if the ultimate justification of property is in terms of autonomy and self-hood, his formulation misses the intuition expressed, though ambiguously, in the use/power distinction. Both ownership of a factory and ownership of a homestead are social property in our society, at least if owned in fee simple absolute; yet factory ownership seems less related to the core individualist justification in terms of self-hood.

92. This is a cultural-historical interpretation of Posner's "universality" criterion for an efficient system of property rights. R. POSNER, *supra* note 3.

93. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Their hierarchy is not really a dichotomy, since they also designate a category of "inalienable" entitlements. No one may choose to submit to murder or to sell herself into slavery. In general, it seems that the inalienable entitlements they point to are not of the sort traditionally thought of as property rights. *See* note 94, *infra*.

94. The Calabresi-Melamed use of the term "property rule" seems to bend the language. In the incarnation of utilitarianism known as economic analysis of law, there is no role for a distinction between personal rights and property rights. An entitlement to bodily integ-

rights traditionally called property are protected against the government only by a liability rule.[95] On the other hand, some rights not traditionally called property, like freedom from bodily intrusion, are protected by property rules.[96]

Calabresi and Melamed sketch some efficiency considerations for making the choice between property and liability rules,[97] and others have investigated the problem in more depth.[98] Without attempting to outline their effect or interaction with efficiency concerns, Calabresi and Melamed also recognize that "distributional" considerations may be relevant to such a choice.[99] Here I merely want to reemphasize that the problem of levels of entitlements is very much a live issue, and the thought persists, for whatever reasons, that some kinds of entitlements are more worthy of protection than others.

The distinction between property and liability rules is different from the others mentioned, not just because it is ostensibly about remedies and not the initial setting of entitlements, but also because it is formulated merely as a statement that different levels of protection do exist, without telling us which items deserve which levels. Writers of the allocative efficiency school suggest that the criterion for a lesser level of protection is the presence of any condition that might block market transactions from achieving the efficient outcome, such as information costs, or free-rider or holdout problems. I am interested in developing a non-utilitarian, moral theory which would provide an alternative explanation for the observed hierarchy of protection, as well as help us to critique it where it goes wrong. It should be possible to give moral reasons why some claims are or should be subject to greater protection (either inalienability or prop-

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rity or free speech is not different in kind from an entitlement to exclusive use of some object or resource in the external world. All are simply goods; all have prices.

95. *See generally* Berman v. Parker, 348 U.S. 26 (1954); 1 P. NICHOLS, NICHOLS' THE LAW OF EMINENT DOMAIN chs. I–III (J. Sackman & R. Van Brunt rev. 3d ed. 1981); Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717 (1964).

96. Or by inalienability rules. *See* note 93, *supra*. But inalienability would often be disfavored by market theorists on efficiency grounds. *See, e.g.*, R. POSNER, *supra* note 3, at 111–16 (sale of babies should be legalized).

97. Calabresi & Melamed, *supra* note 93, at 1106–10.

98. *E.g.*, Polinsky, *Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches*, 8 J. LEGAL STUD. 1 (1979); Polinsky, *On the Choice Between Property Rules and Liability Rules*, 18 ECON. INQUIRY 233 (1980).

99. Calabresi & Melamed, *supra* note 93, at 1110. Ellickson has attempted to identify situations in which something can be said about these "distributional" concerns. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

erty rules) than others (either liability rules or no entitlement), either as between individuals or between individuals and the government.[100] Though much might be said about the other distinctions, especially the criteria for inalienability, discussion here will be confined primarily to property rules versus liability rules.[101]

C. *The Personhood Dichotomy*

The personhood dichotomy comes about in the following way: A general justification of property entitlements in terms of their relationship to personhood could hold that the rights that come within the general justification form a continuum from fungible to personal. It then might hold that those rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.[102]

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100. Of course, such an exercise is trivial to thoroughgoing ethical subjectivists; in the Calabresi-Melamed terminology, these reasons are mere "moralisms," just another word for strong subjective preferences. Calabresi & Melamed, *supra* note 93, at 1111–13.

101. Distinguishing "inalienability rules" from "property rules" is an important problem that implicates the nature of contract, because the issue is when the law ought to disallow or void someone's attempt to relinquish an item voluntarily; contract, as well as property, may be perceived based on personhood. *See, e.g.*, Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980). This problem is beyond the scope of the present article, but a few words are necessary. First, I find convincing the argument that inalienability attaches to personhood itself, *cf.* Hegel's argument, *supra* note 59, and probably to rights that are too close to personhood to think of as property. Easy examples of contracts that would be disallowed would be selling oneself into slavery or agreeing to commit suicide; less easy would be contracts to sell one's child or one's kidney. Second, more problematically, inalienability might also attach to rights that are not too close to personhood to be considered property, but which are at the personal end of the metaphorical continuum running from personal to fungible. This would require an objective moral consensus about the protected objects. *See* text accompanying notes 9–48 *supra*. In addition, the more an object seems to be personal, the more one might scrutinize the "voluntariness" of the transaction by which it is relinquished. The analysis becomes entwined with wealth distribution arguments, since some theorists would not consider choices motivated by dire economic necessity "voluntary" enough to validate a transaction relinquishing a clearly personal item. Finally, there may be classes of transactions which should be presumed invalid (hence categories of inalienability) because of the costs of case-by-case investigation and the risk of error against the "involuntary" seller.

102. In this way the dichotomy between personal and fungible property is similar to C. Edwin Baker's distinction between valuing activities substantively (i.e., intrinsically) and valuing them instrumentally. Baker, *Counting Preferences in Collective Choice Situations*, 25 U.C.L.A. L. REV. 381, 393–99 (1978).

Does it make sense to speak of two levels of property, personal and fungible? I think the answer is yes in many situations, no in many others. Since the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum. Perhaps the entrepreneur factory owner has ownership of a particular factory and its machines bound up with her being to some degree. If a dichotomy telescoping this continuum to two end points is to be useful, it must be because within a given social context certain types of person-thing relationships are understood to fall close to one end or the other of the continuum, so that decisionmakers within that social context can use the dichotomy as a guide to determine which property is worthier of protection.[103] For example, in our social context a house that is owned by someone who resides there is generally understood to be toward the personal end of the continuum.[104] There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic.[105]

Though they all derive from a common central insight, the personhood hierarchy is different from the property dichotomies I cited earlier. It differs from the Marxist distinction between property resting on the labor of others and property resting on one's own labor because it focuses on where a commodity ends up, not where and how it starts out. In addition, it focuses on the person with whom it ends up—on an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing. The same claim can change from fungible to personal depending on who holds it. The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan's own labor. Conversely, the same item can change from fungi-

103. *See* text accompanying notes 118–62 *infra*.

104. While residences are not specially protected against eminent domain, such legal protections as homesteading and special mortgage redemption rights show a degree of special concern. An economist would tend to find that substantial consumer surplus attaches to people's homes. *See, e.g.*, Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 735–37 (1973) (suggesting "bonus" system to give approximate compensation for consumer surplus).

105. *See* Part II *supra*.

ble to personal over time without changing hands. People and things become intertwined gradually.

The personhood hierarchy also does not correspond to the implicit Marxist distinction between "use value" and "exchange value", since some things held for "use value" are still not bound up with personhood. Since Hobhouse's "use/power" distinction seems to be merely an ambiguous amalgam of the two Marxist distinctions just mentioned,[106] it too would not correspond to the personhood dichotomy.

The Calabrese-Melamed distinction between property rules and liability rules is initially positivist; it merely recognizes that some entitlements are harder to extinguish than others.[107] In order to make it take on a moral function, there would be a nice simplicity in hypothesizing that personal property should be protected by property rules and that fungible property should be protected by liability rules. If that were true, much that is now protected by a property rule—for example, property held only for investment—is overprotected. In that respect, the claim would be truly revolutionary. Yet it would not be revolutionary enough for those who think fungible property should not always be protected even by liability rules—for example, when fungible claims of the rich deprive the poor of meaningful opportunities for personhood. But although the problem does not reduce to such nice simplicity, one might claim that *at least* personal property should be protected by property rules.[108]

D. *Welfare Rights and A Dichotomy in Property*

The personhood dichotomy in property, by focusing attention on the importance of certain property to self-constitution, can avoid some distortions that might result from justifications in which all entitlements are considered alike.[109]

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106. See text accompanying notes 88–91 *supra*.

107. *See* text accompanying notes 93–100 *supra*.

108. The claim that fungible property should not override personhood interests of others is not considered radical when the personhood interest at stake is so close to personhood that we hold it to be inalienable. *See* note 101 *supra*.

109. All entitlements are treated alike in the economic model. *See* note 94 *supra*. Economists typically rely on efficiency criteria and not on the perspective of autonomy or personhood in seeking to determine whether certain entitlements should be accorded greater protection than others. *See* text accompanying notes 97–100 *supra*. In a neo-Lockean natural rights scheme, property rights might swallow up other concerns. Such a scheme might hold that personal rights or civil liberties are derived from property rights, which exist a priori in persons. Once the government has mechanisms for ensuring that people's a priori rights are not violated, whatever pattern of entitlements that results from the voluntary interaction of

It might be argued, however, that what a personhood perspective dictates is a dichotomy in entitlements, not a dichotomy in property. A welfare rights theory might derive from the needs of personhood a set of core entitlements encompassing both property interests, such as shelter, and other interests, such as free speech, employment and health care.[110] In such a scheme, the distinction between property and other rights breaks down.[111] There would be room for a personhood dichotomy but it would not be related to interests traditionally called property. The general task of such a welfare theory would be to carve out for protection a core containing both property interests and other interests.[112]

Whether or not the personhood dichotomy in property is useful in such a theory depends on whether it makes sense, in the context of a larger personhood dichotomy in entitlements, to maintain a distinction between property and non-property rights.[113] I think that it does make sense. In the real world, the categories of ordinary language

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the right-holders must not be disturbed. *See, e.g.*, R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). Under such a scheme, a political system must protect property, thereby doing all it can to protect autonomy or personhood. *See* Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (1980). Note as well Senator John Sparkman's polemic against the Civil Rights Bill because of its threat to property rights. Sparkman, *Civil Rights and Property Rights*, 24 FED. BAR J. 31 (1964).

110. *See, e.g.*, Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV 877 (1976); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

111. Another approach that also has the effect of doing away with any intrinsic difference between property and non-property rights is simply to identify all claims or interests that the government ought to protect, and then call them "property." This is the tendency of Reich's "functional" approach; he calls for "new property" rights in government largess to the extent necessary to maintain people's independence from government. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

112. Note Dworkin's "rights thesis," holding that certain rights based upon the equal concern and respect due persons must "trump" utilitarian concerns. R. DWORKIN, TAKING RIGHTS SERIOUSLY 81–84, 269 (1978). A welfare rights theory might hold that entitlements to one's "just wants" based on the needs of personhood are to be given preference over other kinds of entitlements. *See, e.g.*, Grey, *supra* note 110; Michelman, *supra* note 110.

113. Grey argues that the distinction between property rights and non-property rights loses its significance when a "bundle-of-rights" conception of property is substituted for a "thing-ownership" conception of property. Grey, *The Disintegration of Property*, in NOMOS XXII, PROPERTY 69 (J. Pennock & J. Chapman eds. 1980). Such a transformation aids in curtailing property rights for the sake of the goals of the welfare state, and is one response to perceived injustices of a Lockean natural rights scheme. I would argue, however, that recognizing the distinction between fungible and personal property might be a preferable approach leading to a similar result. It would allow curtailing fungible property rights without relinquishing the notion of thing-ownership in personal property, where thing-ownership seems embedded in the ideas of self-constitution through object relations.

and culture seem reason enough to maintain the distinction. The ordinary connotations of property as external objects reflect our perception of the world in terms of certain aggregations of stimuli.[114] To carve out of all personhood rights a subcategory of personal property suggests that to say that property is a property of persons may be more than just word play. The attachment to "things" may be different from other necessities of personhood, and it may be worth noticing the difference sometimes, even though, by itself, it would not determine questions of just distribution.[115]

A welfare rights or minimal entitlement theory of just distribution might hold that a government that respects personhood must guarantee citizens all entitlements necessary for personhood. If the personhood dichotomy in property is taken as the source of a distributive mandate as part of such a general theory, it would suggest that government should make it possible for all citizens to have whatever property is necessary for personhood. But a welfare rights theory incorporating property for personhood would suggest not only that government distribute largess in order to make it possible for people to buy property in which to constitute themselves[116] but would further suggest that government should rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property. That is, a welfare rights theory incorporating the right to personal property would tell the government to cease allowing one person to impinge on the personhood of another by means of her control over tangible resources, rather than simply tell the government to dole out resources.[117]

Curtailing fungible property rights that impinge on others' opportunities for self-constitution may seem a more radical sort of reform than wealth redistribution through taxation. But purely

114. The nature of our perception of "things" may be implicated, for example, in the issue of when government action constitutes a taking. *See* text accompanying notes 163–81 *infra*.

115. For example, paying attention to the notion of personal property would lead not merely to a right to shelter in general, but a right to a particular house or apartment.

116. This might follow from Reich's argument that largess should become "property" so it could fulfill the function—making people independent of the government—which he saw the prevailing pattern of property rights as failing to fulfill, *see* Reich, *supra* note 111, if one assumes that independence from government is necessary for self-constitution and that government must make self-constitution possible.

117. For example, it would tell the government to curtail landlords' rights against tenants, rather than simply distribute money to tenants (or provide housing itself). *See* text accompanying notes 122–33 *infra*.

fungible property is just like any other form of wealth. If a welfare rights theory of distribution makes personhood interests take precedence over some claims to wealth, permitting taxation to provide largess for the poor, it may equally permit curtailing fungible property rights that impinge on the poor, unless doing so only for the holders of certain assets would under the circumstances violate accepted norms of equality.

V. Two Kinds of Property: A Selective Survey

This Part surveys a number of disparate legal issues from the viewpoint of property for personhood. These issues represent types of cases in which the rough dichotomy between personal and fungible property approximates the world well enough to be useful. Although such a survey does not amount to a systematic critique of the current allocation of property rights, it nonetheless demonstrates both how the personhood perspective is implicit in our law, and how its explicit application can help resolve some recurrent problems.

A. *The Sanctity of the Home*

1. *Liberty and privacy.*

The idea of the sanctity of the home is a rich field for examining property for personhood in the positive law. The home is a moral nexus between liberty, privacy, and freedom of association. A clear example of the nexus is *Stanley v. Georgia*,[118] with its mixture of first amendment, privacy, and sanctity-of-the-home reasoning.[119] In *Stanley*, the Supreme Court held that a state may not prosecute a person for possessing obscene materials in her home. Although the Court

118. 394 U.S. 557 (1969).

119. Another example of the nexus is Ravin v. State of Alaska, 537 P.2d 494 (1975), in which the Alaska Supreme Court held that the state could not criminalize possession of marijuana for personal use in one's home. The decision rested on the right to privacy granted in Alaska's state constitution. The opinion is not a straightforward analysis but rather a set of ruminations on the various meanings of privacy in the law and in common sense. Its two bulwarks are personal autonomy and the sanctity of the home. The two are obviously but ambiguously intertwined in reasoning as well as in the result. The court said that "the right to privacy 'guarantees to the individual the full measure of control over his own personality consistent with the security of himself and others.' " *Id.* at 501, quoting State v. Kantner, 53 Hawaii 327, 493 P.2d 306, 315 (1972) (Levinson, J., dissenting). The court also said that the home "carries with it associations and meanings which make it particularly important as the situs of privacy." 537 P.2d at 504. The court in fact thought that much of the Bill of Rights was aimed at or interpreted in light of the sanctity of the home (third, fourth and fifth amendments), not omitting notice of the reference to "marital bedrooms" in Griswold v. Connecticut, 381 U.S. 471, 486 (1965).

rested its holding on the "philosophy of the first amendment," it is apparent that the Court was influenced by an appreciation of our society's traditional connection between one's home and one's sense of autonomy and personhood.[120]

One reason the government should not prescribe what one may do in one's home is liberty; such government prescription is an infringement of an aspect of personhood in the Kantian sense of autonomy or arbitrary will. But if liberty is the reason for limiting the government in such a case, then the rationale has nothing to do with *where* the actor is when she tries to exercise her will. The liberty rationale can be bent into a privacy rationale by considering the limitations on liberty set by the presence and activities of other people. The argument would be that people do not have sufficient liberty unless they have some realm shut off from the interference of others. Further reasoning is needed to get from the privacy rationale to a "sanctity of the home" rationale. Social convention and people's normal expectations make the home a logical place to consider the arbitrary will least limited; we can readily see that this is where to set off the necessary private sanctuary.[121]

There is more to the rationale based on sanctity of the home; it contains a strand of property for personhood. It is not just that liberty needs some sanctuary and the home is a logical one to choose because of social consensus. There is also the feeling that it would be an insult for the state to invade one's home because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference.

2. *Residential tenancy as property for personhood.*

One problem is that someone's home may not be exclusively her property; it may simultaneously be a landlord's property too. The sanctity of the home as an aspect of the personhood perspective seems to be at work in the modern development of the law of landlord and tenant. Courts frequently picture the residential lease transaction as

120. "Georgia contends . . . that there are certain types of materials that the individual may not read or even possess . . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 394 U.S. at 565.

121. *See, e.g.*, L. TRIBE, *supra* note 7, at 906–07, 984–85 (1978).

taking place between a poor or middle-class tenant acquiring a home and a business enterprise owning and leasing residential property.[122] This is one basis for the revolution in tenants' rights. Courts began to view the rights in question as more closely related to the personhood of the tenant than to that of the landlord, and accordingly moved to protect the leasehold as the tenant's home, and many state legislatures followed suit.[123] Of course, this picture of the transaction is overgeneralized. Some landlords live in one half of a duplex and rent the other half, or rent the remodeled basement or attic of their home. Some tenants rent an apartment so that members of their firm will have a place to conduct confidential business. The picture of a poor tenant and commercial landlord may have been a fair generalization for residential tenancies in Washington, D.C., where the revolution in the common law began, but it may be an entirely unwarranted generalization for other communities in diverse states that have adopted the same rationales.

Viewing the leasehold as personal property recognizes a claim in all apartment dwellers, not just poor ones. The common law revolution in tenants' rights, to the extent it relies only on landlords being rich and tenants being poor, could reflect merely a conviction about wealth redistribution.[124] But it is my thesis that the intuition that the

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122. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078–79 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970):

> Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation."
>
> . . . In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building.
>
> . . . .
>
> . . . The inequality in bargaining power between landlord and tenant has been well documented . . . . Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation.

See also Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 158–59, 550 P.2d 1001, 1022–23, 130 Cal. Rptr. 465, 486–87 (1976); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

123. Thirteen states have enacted the Uniform Residential Landlord and Tenant Act (1974) [hereinafter cited as URLTA], with its liberal positions on tenants' rights and remedies, and the implied warranty of habitability has become the majority rule on the duty to maintain the premises. *See* RESTATEMENT (SECOND) OF PROPERTY §§ 5.1–5.6 (1977); Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976).

124. A similarity exists between the development of tenure rights in residential tenancies and tenure rights in jobs. *See* M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 143–205 (1981). One might explain both of these developments on the basis of general norms for wealth distribution or on the basis of moral reasoning about what rights are necessary to

leasehold is personal is also at work in the recent common law development. New tenants' rights are granted to all tenants, even where the result is to redistribute wealth to tenants who are wealthier than their landlords. Viewing the leasehold as personal would tend to influence courts and legislatures to grant to all tenants entitlements intended to make an apartment a comfortable home—a perpetual and non-waivable guarantee of habitability.[125]

The notion that the law should grant permanent tenure to tenants during good behavior, regardless of what the lease contract says about the term, is a more direct instance of the personhood perspective applied to residential tenancies. Consider a hypothetical statute (of a kind often proposed by tenants' rights advocates) providing that a tenancy cannot be terminated except for specified reasons, such as waste, after the tenant has been there for a year.[126] This kind of statute works a profound change in property law, at least in form, since it renders the landlord's reversion conditional and thus in effect changes the time-honored meaning of fee simple absolute. Such a statute supposes that the tenant has put roots into the place (which explains the one-year waiting period). It also incorporates the normative judgment that tenants should be allowed to become attached to places and that the legal system should encourage them to do so.

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protect personhood. The connection with personhood is the need for food and shelter. Yet I would argue that something is "left over" with regard to residential tenancies, and that is the sanctity of the home, the attachment of self to a particular place with its particular context of objects.

125. Courts imposing warranties of habitability often say they are simply applying contract rules to leases, arguing that the parties bargain on the assumption that habitable premises will be supplied. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The difficulties with this are (1) reasonable parties would not assume habitable premises will be supplied if the common law rule was still in effect; (2) making the habitability rights inalienable (non-waivable) moves them out of the realm of contract and into the realm of property.

126. *See, e.g.*, N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1981): "No lessee or tenant . . . may be removed by the county district court or the Superior Court from any house, building [etc.] leased for residential purposes, other than owner-occupied premises with not more than two rental units . . . except upon establishment of one of the following grounds as good cause. . . ."; H.B. 2695, Or. 1977 (not enacted): "[N]o action or proceeding to recover possession of a dwelling unit may be maintained against any tenant who has resided in said dwelling unit for a continuous period of one year or more immediately prior to the announcement of said action or proceeding except upon one of the following grounds. . . ."

Although this kind of statute seems to be a direct manifestation of the pershonhood perspective when it is enacted alone, where it is proposed in conjunction with rent control it may simply be a safeguard designed to assure the success of the redistributive scheme. Restricting the grounds for eviction is necessary to implement the statute, especially where rent control statutes allow uncontrolled price increases when the units are vacated. *See, e.g.*, Block v. Hirsh, 256 U.S. 135 (1921).

These judgments are based on two assumptions. First, that in today's society a tenant makes an apartment her home in the sense of a sanctuary needed for personhood. Second, that the old rule, under which the landlord could evict a tenant without cause at the expiration of the tenancy—a rule that might have been related to the autonomy and individuality of the landlord—is of lesser importance or less clearly implicated in the typical case today.[127] Once such a statute is viewed as an instance of the personhood perspective at work, then the extraordinary development of the doctrine of retaliatory eviction,[128]—under which a landlord may evict for any reason or no reason, so long as it is not the wrong reason—may be seen as a way station along the path toward making the landlord's reversion conditional, because it is fungible, and the leasehold permanent (though defeasible), because it is personal.

The attempt to assure poor tenants of decent housing by imposing implied warranties of habitability[129] may also be understood in light of the personhood perspective, although the argument is less direct. In an article that defends imposing habitability obligations on landlords,[130] Ackerman suggests that decent housing should be-

127. The autonomy and individuality of the landlord is more clearly implicated when the landlord is not simply a commercial investor. If the prevailing pattern of leaseholds in a given time and place is that both landlord and tenant occupy the land at the same time, then the need for sanctity of the home would not favor the tenant. *Cf.* N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1981) (exemption to tenant's tenure for landlords who reside on premises and maintain only one or two rental units).

128. The doctrine began with the notion that the landlord would not be able to end a month-to-month tenancy if her motivation for eviction was to retaliate against the tenant for complaining of housing code violations on the premises; the rationale was that to permit such evictions would render the housing codes, which depended on private enforcement, ineffectual. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). Some jurisdictions have enacted legislation that defines certain landlord conduct, such as eviction, increasing the rent, or cutting off the heat, as impermissibly retaliatory if motivated by tenant activities. *See, e.g.*, URLTA § 5.101; CAL. CIV. CODE § 1942.5 (West Supp. 1982).

129. Whether imposing such warranties could actually improve the quality of low-income housing has been much doubted. *See* Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098 (1975); Note, *The Great* Green *Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729 (1976).

130. Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971). Ackerman does not show that the costs of habitability standards are in fact borne by landlords. Rather, he constructs a model to show that landlords would bear the expense of bringing apartments up to code standards under strict code enforcement (and therefore also under the imposition of warranties of habitability) if his model's assumptions held true. Some of the important assumptions of his model are: landlords are perfectly competitive, not collusive or oligopolistic; landlords make sufficient profit to absorb all costs of maintaining apartments up to code standards and still stay in the landlord business (or, to the extent they cannot, the government

come a right based upon the tenant's "dignity as a person."[131] He argues further that it is fair to charge some of the costs to landlords rather than to tax society as a whole, because "in a society in which wealth is unjustly distributed it is fair to impose a requirement of decency upon those in the relatively privileged classes who engage in long-lasting relationships with the impoverished."[132] This may be a species of welfare rights or "just wants" argument based on personhood, but it is not simply a conventional argument for wealth redistribution. Instead, it appears to be closer to the argument that private law should cease allowing some people's fungible property rights to deprive other people of important opportunities for personhood. While Ackerman did not elaborate this argument, considering residential tenancies as personal property helps complete the moral underpinning that he considered tentative and sketchy.[133] The argument would justify charging habitability costs to landlords whenever landlords' fungible property rights are prohibiting tenants from establishing or maintaining the kind of personal relationship in the home that our culture considers the basis of individuality.

3. *The fourth amendment: homes and cars.*

Preventing eviction and imposing warranties of habitability protect possession of the home and the quality of physical comfort it

will enter the market to make up the deficit in supply); all interchangeable local low-income housing is brought up to standard at once so that people fleeing from an unreconstructed ghetto will not bid up the prices in a neighboring reconstructed ghetto; the marginal ghetto dweller is completely indifferent to better housing and will not pay a penny more for it (i.e., the demand curve won't shift so as to enable a rent increase); and that iron-clad race or class prejudice will keep outsiders from moving into the ghetto even if ghetto housing substantially improves in quality (i.e., the demand will not increase relative to supply so as to enable a rent increase).

It is difficult to suppose that all of these assumptions would hold true for any given community. The last one is the most ironic: In order for a code enforcement scheme to benefit those who suffer from racial or class oppression, the prejudices supporting their oppression must continue unabated. Those who observe "gentrification" in areas subject to code enforcement (like Washington, D.C.) argue that this is not the case; when the housing improves, the middle class moves in.

131. *Id.* at 1171.

132. *Id.* at 1173.

133. Ackerman's tentative argument that the law should enforce landlords' moral obligation to respect tenants' dignity is consonant with his later elaboration of the morality required of the citizens and lawmakers in the liberal state. *See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). "*Each* person must be prepared to answer the question of legitimacy when *any* of his powers is challenged by *anyone* disadvantaged by their exercise." *Id.* at 4–5 (footnote omitted). Legitimacy depends upon treating people with equal respect or moral equality. *Id.* at 15–19. Affirmative action to reduce or end exploitation is required of the liberal statesman. *Id.* at 249–64.

affords. Another aspect of the sanctity of the home, as mentioned earlier, is privacy—home is a place where intimate things are kept from prying eyes and intimate relationships are carried on away from prying ears. So in a general way, the sanctity of the home also has much to do with the path the Supreme Court has taken in interpreting the fourth amendment's protection against unreasonable searches and seizures and its warrant requirement.

The Supreme Court recently held, in *Payton v. New York*, that while warrantless arrests in public are constitutional, warrantless arrests in the home are not.[134] In declaring felony arrests with probable cause to be unconstitutional if carried out in the suspect's home, the Court rejected a well established practice.[135] The majority based its opinion on a firm distinction between the home and all other places where citizens or their effects may be found.[136] Yet, in other circumstances the Court is quite scornful of such a dichotomy, reminding us that the fourth amendment "protects people, not places."[137] The theoretical difficulty of explaining what protecting the core of personal autonomy from the government has to do with the sanctity of the home or of one's property helps to explain the difficulties the Court has had in delineating the scope of the fourth

134. Payton v. New York, 445 U.S. 573, 589–90 (1980); *see also* United States v. Watson, 423 U.S. 411 (1976).

135. The challenged New York statute permitting the practice had been in effect for nearly 100 years and was in fact thought to be the common law rule. *See* Payton v. New York, 445 U.S. 573, 582, 591–98, 604–05 (1980) (White, J., dissenting).

136. *Id.* at 582 n.17. "[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Id.* at 585 (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)). The Court endorsed the statement of the dissenters below that "the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home." 445 U.S. at 582. The *Payton* majority also adopted the passage from Coolidge v. New Hampshire, 403 U.S. 474 (1971), recognizing "a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere." 445 U.S. at 586 n.25. And it quoted the classic passage from Boyd v. U.S., 116 U.S. 616, 630 (1886): "[T]he principles reflected in the Amendment . . . 'apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.' " 445 U.S. at 585.

137. In United States v. Chadwick, 433 U.S. 1, 7 (1977), the Court quoted this phrase from Katz v. United States, 389 U.S. 347, 351 (1967). In *Chadwick* the court held that a locked footlocker, seized on the probable cause grounds that it contained contraband when its owners were arrested, could not be opened and searched in official custody without a warrant. The majority opinion said that the government was wrong in arguing that "only homes, offices, and private communications implicate interests which lie at the core of the Fourth Amendment." 433 U.S. at 7. Both the concurring and dissenting opinions agreed with this view. *Id.* at 16 (Brennan, J., concurring); *id.* at 17 (Blackmun, J., dissenting). Similarly, the three dissenters in *Payton* argued that "the Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere." 445 U.S. 573, 615 (1980) (White, J., dissenting).

amendment.[138]

The fourth amendment historically was thought of in terms of protecting property. The Lockean form of this rationale is elaborated in *Boyd v. United States*.[139] In *Boyd*, the Court reasoned that an individual's most personal thoughts as manifested in private papers deserved stringent protections. Intrusions are not to be tolerated unless state interests of the highest order are at stake.[140] *Boyd* quoted extensively from the opinion of Lord Camden in *Entick v. Carrington*, an action in trespass for "entering the plaintiff's dwelling-house . . . and breaking open his desks, boxes, etc., and searching and examining his papers."[141] Lord Camden had said:

> Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection . . . yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass . . . .[142]

This property theory of the fourth amendment required a defeasing argument to justify any seizures. In the case of stolen goods, the property argument is defeased because the goods do not belong to the holder; the government seizes them as agent of the true owner.[143] With respect to possession of contraband or fruits or instrumentalities of crime, the property argument is defeased because it is illegal to own the objects in question.[144]

The property theory had awkward results in the case law, particularly in the early eavesdropping cases where the legality of the intrusion might depend upon the technicalities of state trespass law.[145] It also did not provide a rationale for the seizure of "mere evidence,"

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138. *See, e.g.*, Robbins v. California, 101 S. Ct. 2841, 2847 (1981) (Powell, J., concurring.); Amsterdam, *Pespectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

139. 116 U.S. 616 (1886).

140. *Id.* at 625–28.

141. *Id.* at 626.

142. *Id.* at 627–28, (quoting Entick v. Carrington, 95 Eng. Rep. 807, 810 (1765)).

143. *See* Warden v. Hayden, 387 U.S. 294 (1967). In *Warden*, the Court noted that in Gouled v. United States, 255 U.S. 298, 309, 311 (1921), it had "derived from Boyd v. United States, supra, the proposition that warrants 'may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, . . . or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken' "; to seize the accused's property otherwise " 'would be, in effect, as ruled in the Boyd Case, to compel the defendant to become a witness against himself.' " 387 U.S. at 302. On the fifth amendment aspect of *Boyd*, see Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343 (1979).

144. *See* note 143 *supra*.

145. *See, e.g.*, Silverman v. United States, 365 U.S. 505 (1961).

because of the absence of a justification defeasing the holder's property rights in the evidentiary object. Dissatisfied with what it considered the anomalous results of a musty old doctrine, the Court in *Warden v. Hayden*[146] and *Katz v. United States*[147] decided that privacy, not property, is the philosophical bedrock of the fourth amendment.

In *Warden v. Hayden*, the Court interred the "mere evidence" rule. As it was to do later in the *Payton* case,[148] the Court quoted *Boyd*'s statement that the fourth amendment was intended to protect "the sanctity of a man's home and the privacies of life."[149] But, whereas in *Payton* the Court would again emphasize the first half of that phrase, in *Hayden* it took up the second: "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."[150] And in *Katz v. United States* the Court made its famous announcement that "the Fourth Amendment protects people, not places."[151] Mr. Katz could not constitutionally be spied upon in a bugged telephone booth (absent a warrant) to obtain evidence against him. The intrusion was a "search" for fourth amendment purposes, because, even though there was no trespass against Mr. Katz, he had a legitimate expectation of privacy (in his conversation) when he entered the booth. Even outside the sanctity of the home, this was one of the privacies of life that deserved protection.

Justice Harlan's concurrence in *Katz*[152] made clear that the test for whether someone has a legitimate expectation of privacy in a given setting has two prongs, both of which are positivist. First, "a person [must] have exhibited an actual (subjective) expectation of privacy" and, second, the expectation must be one that society is prepared to recognize as reasonable.[153] This positivism quickly got the Court into difficulty. For example, if the government announced that the police may search a citizen's bedroom with impunity, well-informed citizens could no longer reasonably expect privacy in their bedrooms. The Court now recognizes that a "normative inquiry" is

146. 387 U.S. 294 (1967).
147. 389 U.S. 347 (1967).
148. *See* note 136 *supra*.
149. 387 U.S. at 301.
150. *Id.* at 304.
151. Katz v. United States, 389 U.S. at 351.
152. *Id.* at 360. *See also* United States v. Miller, 425 U.S. 435 (1976).
153. 389 U.S. at 361.

needed in such a case.[154] So far the Court has not acknowledged that if a "normative inquiry" is relevant to such a case, it is relevant to all cases. It has thus been able to duck the question of exactly how that normative inquiry would proceed. Homes should be private, the court implies, regardless of what the government might say. And the Court has indicated that the personhood perspective on property (the sanctity of the home) sometimes provides its moral background by the way it draws the line at warrantless arrests in the home.[155]

If homes should be private, regardless of what the Court says, should cars be private, regardless of what the Court says? When automobile searches first became common, the Court treated cars as presumptively private. Warrantless automobile searches on probable cause were permitted only where the vehicle's mobility threatened that it might elude the officers' grasp, and the "automobile exception" to the warrant requirement was impliedly limited to instances where mobility was a worry.[156] But the Court broadened this exception by holding that cars impounded by police may be searched without a warrant if they could have been searched without a warrant while they were still on the road.[157] Furthermore, by applying the *Katz* "expectation of privacy" test to the situation where cars are impounded for reasons not connected with criminal investigation, the Court entirely eliminated fourth amendment protections with regard to a large category of searches by finding that there was little expectation of privacy in cars.[158] In doing so, the Court in essence declared that cars are generally not considered private.[159]

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154. *See* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979).

155. *See* notes 134–35 and text accompanying notes 134–36 *supra*. Why warrantless arrests in public should be prima facie valid (on probable cause), while warrantless searches are not—why one's goods should be more protected than one's body—is an irony of fourth amendment law upon which the personhood perspective does not shed any particular light. *See* United States v. Watson, 423 U.S. 411 (1976).

156. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 433 (1971); Carroll v. United States, 267 U.S. 132 (1925).

157. Chambers v. Maroney, 399 U.S. 42 (1970).

158. South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 443 (1973).

159. In Cardwell v. Lewis, 417 U.S. 538, (1974), the Court stated: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Id.* at 590. In spite of the Court's statement, most people undoubtedly use their private automobiles as repositories of personal effects. *See* text accompanying notes 159–60 *infra*. The Court has also found a diminished expectation of privacy in cars because they are licensed and subject to many regulations, and because inventory searches of impounded vehicles had been made standard operating procedure by certain police departments. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 439 (1973). But some inchoate feeling that cars are indeed personal may have influenced the

The personhood perspective can give us two avenues of approach in deciding the normative question whether cars ought to be a strong enough sanctuary against government intrusion that they should not be penetrated without a warrant. First, if in our society cars are in the general case likely to be personal, then it is as much an intrusion to invade a car as it is an intrusion to invade a home. Are cars likely to be personal? Some cars express one's personal taste and style, and are the recipients of tender loving care. Other cars are simply part of a company's sales fleet. But the reverence for cars in the popular culture might suggest they are toward the personal end of the continuum. Cars are the repository of personal effects, and cars form the backdrop for carrying on private thoughts or intimate relationships, just as homes do. Accordingly, cars should be treated as personal, at least to the extent of narrowing exceptions to the fourth amendment's warrant requirement. The error risked by doing so (costs to the government) seems less important than the risk of moral error against personhood inherent in some of the present rules. Second, if private enclaves are needed for personhood to develop and flourish, and if our society is now one in which many people's homes are not that sort of enclave (because of overcrowding, for example), then a liberal government that must respect personhood may be required to make it possible for people to treat their cars as such enclaves. The argument may also hold for a society in which most people do have homes but spend a great deal of time in their cars.

It is too simplistic for the Court to say that the fourth amendment excludes property considerations and focuses exclusively on privacy. Property and privacy are intimately intertwined. The fourth amendment is worded not in terms of privacy but rather in terms of protecting people's "persons" and people's relationships with certain aspects of their external environment (their "houses, papers, and effects"). It has a great deal to do with property, insofar as property is about the relationship between people and things. If through social analysis and normative inquiry one can delineate categories of personal property, then this inquiry also identifies certain interests protected by the fourth amendment.

This theory has the advantage of being somewhat congruent with the historical approach to the fourth amendment.[160] It is also consistent with an approach that treats the Bill of Rights as a list of enu-

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outcome in Wooley v. Maynard, 430 U.S. 705 (1977) (state may not constitutionally force one to display license plate motto as condition upon using one's car).

160. *See* text accompanying notes 139–44 *supra*.

merated interests indicating that government must respect personhood.[161] Of course, this perspective of property for personhood fails to give us a complete theory of the fourth amendment, since, first, that amendment grants security to one's "person," as well as one's house, papers and effects, and, second, the perspective of property for personhood does not exhaust the moral perspectives relevant to the relationships between persons and things.[162]

B. *Aspects of the Taking Problem*

The whole question of government regulation and "taking" of private property is the most difficult, yet most promising area for applying the personhood dichotomy. The personhood perspective cannot generate a comprehensive theory of property rights vis-à-vis the government; it can only add another moral inquiry that helps clarify some cases. But this is a field in which a unified theory has not been forthcoming[163]—even the Supreme Court admits that it has

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161. This approach rests on the premise that a liberal government must treat people with equal concern and respect and must treat them equally as *persons*. *See, e.g.*, B. ACKERMAN, *supra* note 133; R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). The court has found this approach appealing in some fields. For example, its eighth amendment jurisprudence rests on equal respect for human dignity. *See, e.g.*, Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). But the Court has not yet undertaken a systematic moral inquiry that would classify protected interests for the fourth amendment.

162. Hindering the Court's development of a normative inquiry for the fourth amendment has been distaste for the exclusionary rule, which sometimes allows criminals to go free because of technical violations. Because of their discomfort with the rule, some justices seize upon whatever rationale is handy to validate searches. In Rakas v. Illinois, 439 U.S. 128 (1978), a plurality held that people riding in a car do not have standing under the fourth amendment to challenge a search unless they own the car or the item whose seizure is challenged. This provoked the dissenters to invoke the irony of *Katz*: "The court today holds that the Fourth Amendment protects property, not people . . . ." 439 U.S. at 156. The result in *Rakas* is not inconsistent with the personhood perspective, but seems too narrow. The important issue for the personhood perspective is not the state of the legal title, but the state of the person's relationship with the object, if that relationship is deemed legitimate by society.

An issue similar to the status of "mere passengers" in a car is the fourth amendment "standing" of household visitors. As to items found in the apartment, the court has granted standing to (recognized a protected interest in) those who essentially treat the place as home, i.e., have some continuing relationship with it. *See* 439 U.S. at 141. This is not inconsistent with the property-for-personhood perspective. (Even casual visitors have a protected interest in their "persons"—physical body—because the fourth amendment protects "persons," as well as "houses, papers and effects.") *See* Ybarra v. Illinois, 444 U.S. 85 (1979).

163. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Michelman proposes a sophisticated utilitarian calculus designed to explain many of the anomalies of the case law. He rationalizes four incomplete strands of case law in terms of judicial intuitions relating primarily to this inherent utilitarian structure. The "physical invasion" test relates to high demoralization costs and low settlement costs. *Id.* at 1227. The "diminution of value" test boils

no coherent explanation that will cover all of its cases, and that its decisions are largely ad hoc.[164]

1. *Object-loss versus wealth-loss.*

Ackerman argues that stronger claims attach to items that are property in ordinary language—that is, to discrete units or "bundles of rights" that ordinarily come packaged together in our society.[165] He claims he can thus explain the results which have mystified economists: For example, why is it that six-figure losses imposed by zoning regulations will go uncompensated, while seizure of a one-acre plot of unused gravel patch will be compensated, though perhaps not much monetary loss can be measured?[166] In order for Ackerman's ordinary language explanation to be welfare-maximizing, it would have to be true that people think of their assets in discrete units, or traditional bundles of rights (e.g., my car, my piano, my sofa), rather than thinking habitually about their entire net worth.[167] If this were so, then there might be a special demoralization about losing one of these discrete units that presumably deprived a person of more utility than losing a larger dollar value from some other lessening of net worth that left the number of discrete units relatively intact.

The divergent results Ackerman seeks to explain might also be defended on moral grounds if those grounds establish a right to keep discrete units intact. In the positivist interpretation of why we should focus upon discrete units rather than only upon the size of the wealth loss, the personhood theory may explain the postulated special demoralization. Similarly, in the normative interpetation, the personhood theory helps us understand the nature of the right dictating that discrete units ought to be protected.

An argument that discrete units are more important than total

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down to an approximation of the "physical invasion" test. *Id.* at 1233. The "balancing" of the claimant's losses with society's gains relates to demoralization costs, *id.* at 1235, and the "harm and benefit" test is aimed at identifying "anti-nuisance" measures which merely rectify a pre-existing unilateral redistribution and hence do not properly raise a compensation issue, *id.* at 1239.

164. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), Justice Brennan, for the majority, wrote: "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty . . . . [T]his court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remaining disproportionately concentrated on a few persons." *Id.* at 123–24.

165. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 113–67 (1977).

166. *See id.* at 129–34.

167. Such a way of thinking is postulated in Michelman, *supra* note 163, at 1234.

assets takes the following form. A person cannot be fully a person without a sense of continuity of self over time. To maintain that sense of continuity over time and to exercise one's liberty or autonomy, one must have an ongoing relationship with the external environment, consisting of both "things" and other people. One perceives the ongoing relationship to the environment as a set of individual relationships, corresponding to the way our perception separates the world into distinct "things." Some things must remain stationary if anything is to move; some points of reference must be constant or thought and action is not possible. In order to lead a normal life, there must be some continuity in relating to "things." One's expectations crystallize around certain "things," the loss of which causes more disruption and disorientation than does a simple decrease in aggregate wealth. For example, if someone returns home to find her sofa has disappeared, that is more disorienting than to discover that her house has decreased in market value by 5%. If, by magic, her white sofa were instantly replaced by a blue one of equal market value, it would cause no loss in net worth but would still cause some disruption in her life.

This argument assumes that all discrete units one owns and perceives as part of her continuing environment are to some degree personal. If the white sofa were totally fungible, then magically replacing it with a blue one would cause no disruption. In fact, neither would replacing it with money.

Ackerman's ordinary language analysis may help account for the courts' tendency to protect discrete objects more than general net worth: The ordinary meaning of property is tied up with ordinary patterns of object perception. But this alone does not fully explain why courts are likely to consider object-loss more important than wealth-loss. Mere ease of categorization may complete the explanation: Granting relief for object-loss permits line-drawing. Courts can perceive whether or not an object has been taken, but cannot in the same way discern whether "too much" wealth has been taken. But the argument above suggests that another element in the explanation is courts' understanding of the necessity of object relations in ordinary life. Object-loss is more important than wealth-loss because object-loss is specially related to personhood in a way that wealth-loss is not. The cases economists find mysterious are mysterious just because economists generally treat property as fungible, and those cases treat it as personal.

2. *Object-loss: fungible versus personal.*

But the theory of personal property suggests that not all object-loss is equally important. Some objects may approach the fungible end of the continuum so that the justification for protecting them as specially related to persons disappears. They might just as well be treated by whatever general moral rules govern wealth-loss at the hands of the government. If the moral rules governing wealth-loss correspond to Michelman's utilitarian suggestion—government may take whatever wealth is necessary to generate higher welfare in which the individual can confidently expect to share[168]—then the government could take some fungible items without compensation. In general, the moral inquiry for whether fungible property could be taken would be the same as the moral inquiry for whether it is fair to impose a tax on this particular person.

On the other hand, a few objects may be so close to the personal end of the continuum that no compensation could be "just." That is, hypothetically, if some object were so bound up with me that I would cease to be "myself" if it were taken, then a government that must respect persons ought not to take it.[169] If my kidney may be called my property, it is not property subject to condemnation for the general public welfare.[170] Hence, in the context of a legal system, one might expect to find the characteristic use of standards of review and burdens of proof designed to shift risk of error away from protected interests in personal property.[171] For instance, if there were reason to suspect that some object were close to the personal end of the continuum, there might be a prima facie case against taking it. That prima facie case might be rebutted if the government could show that the object is not personal, or perhaps that the object is not "too" personal compared with the importance to the government of acquiring that particular object for social purposes.

This suggests that if the personhood perspective is expressed in law, one might expect to find an implied limitation on the eminent domain power.[172] That is, one might expect to find that a special

168. *See* note 163 *supra*.

169. A government should not take such an object from me unless my hypothetical relationship with the object were viewed as fetishism or slavery to material things rather than constructive of personhood. *See* text accompanying notes 44–45 *supra*.

170. *See* text accompanying notes 31–33 *supra*.

171. For an attempt to elaborate such a theory of review based on risk of error, see Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

172. Such an implied limitation might well be couched in terms of substantive due

class of property like a family home is protected against the government by a "property rule" and not just a "liability rule." Or one might expect to find that a special class of property is protected against taking unless the government shows a "compelling state interest" and that taking it is the "least intrusive alternative."

This general limitation has not developed.[173] Perhaps the personhood perspective is not strong enough to outweigh other concerns, especially the government's need to appear even-handed and the lower administrative costs associated with simpler rules. For example, perhaps we are unwilling to presume that all single-family homes are personal because many houses are held only for investment, and a subjective inquiry into each case slows down government too much. On the other hand, perhaps the personhood perspective is so deeply embedded that, without focusing on the problem, we expect that the condemning authority will take fungible property where possible. We may simply take for granted that the government will not take homesteads when parking lots will do. Still, the fact that the personhood perspective has not surfaced to give some explicit protection to family homes from government taking, such as stricter scrutiny, seems to be anomalous.

Although the personhood perspective has not yielded a general limitation on eminent domain, some fragmentary evidence suggests that *group* property rights, if connected with group autonomy or association, are given enhanced protection. For example, one state court held that a condemnor could not take a parcel sacred to a religous sect unless it could show no adequate alternative.[174] The most interesting area in this connection may be the evolving stance of federal and state governments toward Native American group claims to their ancestral territory.[175]

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process. See, for example, Moore v. City of East Cleveland, 431 U.S. 494 (1977), where a plurality found a substantive due process right to live in one's home with one's extended family, hence a substantive due process limitation on the power of local government to zone for occupancy by nuclear families only.

173. *See* Sager, *Property Rights and the Constitution*, in NOMOS XXII, PROPERTY 376, 378 (J. Pennock & J. Chapman eds. 1980):

> While exercises of the power of eminent domain nominally depend for their legitimacy upon the existence of a "public purpose," that requirement has passed beyond the pale of serious judicial enforcement. In practice, eminent domain may be employed for any scheme a governing body that has not utterly taken leave of its corporate senses might choose to undertake.

174. Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973).

175. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975). The legislative settlement of the Indians'

3. *Inverse condemnation.*

The earlier discussion suggested that uncompensated "mere" regulation, even if more costly, is more easily sustained by courts than taking of discrete items, because it is seen as wealth-loss rather than object-loss. As Michelman and Ackerman both point out, the "diminution of value" test found in the case law is really used to test whether so great a proportion of an object was taken as to be assimilable to object-loss.[176] If so, then the offending regulation would effectuate a taking, and compensation might be sought in "inverse condemnation."[177]

The personhood perspective may give us further insight into the vicissitudes of the "diminution of value" test. It seems likely that courts would protect one's home to a far greater extent than one's commercial plans, even if the result, in purely monetary terms, seems irrational. For example, in *Just v. Marinette County*,[178] the Wisconsin court held that waterfront land was not taken by the county wetlands act which prohibited the filling and subsequent development of the land. The court concluded that a supervening legislative act to require an owner to keep the land in its natural state was not a taking. Its application of the "harm/benefit" test is easily dismissed by those who reason in terms of expectation and market value.[179] But it is possible to infer that a court is more willing to let the legislature destroy the expectation of gain from fungible development rights than it would be to let the legislature destroy the personality ties someone had invested in a home or land.[180] The courts' broad defer-

claim that the *state* had unfairly obtained some of their ancestral territory provided for extraordinary protection against state eminent domain once certain lands were reacquired for the Indians. In contrast, it is well established that the federal government may "take" Indian land without even monetary compensation, unless a federal treaty promises that it will not, in which case just compensation will be due. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

176. B. ACKERMAN, *supra* note 165, at 142; Michelman, *supra* note 163, at 1233 (1967).

177. "Inverse condemnation" refers to an action brought by a property owner claiming that a government action not officially in eminent domain has in fact "taken" her property. Whether compensation and transfer of title to the condemnor would be the appropriate remedy in this type of action is currently in controversy. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

178. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

179. *See* Michelman, *supra* note 163, at 1197–201.

180. This inference helps explain the "mere" in some courts' reference to "mere diminution of market value," considered not compensable even though it may amount to huge losses of expected return on investment. *See, e.g.*, Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255 (1980) (In California in order for a zoning ordinance to be considered a compensable taking it must involve deprivation of "substantially all reasonable use" of the property; "mere diminution" in value yields no right to relief).

ence to land-use regulations that cause large decreases in market value of land may also reflect the fact that inverse condemnation actions are almost always brought by those who hold land for investment. In addition to the presumption that their property is fungible, investors in this field can be presumed to know their risks—even in the way of a certain probability of "unexpected" changes in the law—and hence already to have monetized them.[181]

C. *Fungible Property Rights versus Non-Property Interests in Personhood*

As suggested earlier, a theory of just distribution based upon personhood may be structured so that property for personhood is merely a subcategory of entitlements for personhood. The elaboration of the relationship of the personhood dicotomy in property to theories of justice based on personhood is beyond the scope of this essay, but a glance at some disputes involving non–property interests in personhood will help place the personhood dichotomy in a larger context. While I have argued that personal property should be specially recognized, I do not argue that there is no personhood interest even in fungible property.[182] Nevertheless, it is important to realize that in a larger scheme that accords special recognition to core personhood interests in general, some personhood interests not embodied in property will take precedence over claims to fungible property.

The line of cases from *Marsh v. Alabama* through *Hudgens v. NLRB*[183] addressed the problem of people who claimed free speech rights on other people's commercial private property. The Supreme Court ultimately decided that the property owner wins over the speech claimant.[184] In a later case, *Pruneyard Shopping Center v. Robins*,[185] the Supreme Court decided that the right to exclude free

181. *See* Michelman, *supra* note 163, at 1238. Unfortunately, it would be difficult to prove that courts' deference to land use regulations stems from perception of the affected property as fungible. Actions are not likely to be brought by those who have put down roots into a prior permitted use, because, when new regulations are imposed, local bodies usually exempt pre-existing non-conforming uses. *See, e.g.*, R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS: CASES AND MATERIALS 190, 194–98 (1981). Local bodies sometimes provide that nonconforming uses must be "amortized" over a number of years, although, as Ellickson & Tarlock make clear, this would not be applied to a home or other personal property.

182. *See* Part V-C *supra*.

183. Marsh v. Alabama, 326 U.S. 501 (1946); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

184. Hudgens v. NLRB, 424 U.S. 507 (1976), declared that Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), had effectively overruled Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

185. 447 U.S. 74 (1980).

speech on commercial property is not a federally protected property right. Although the would-be speakers have no federal first amendment right to go on private property, it is not a taking for a state to hold that its own constitution does provide access to private commercial shopping centers for speech claimants.[186]

The primary argument on behalf of recognizing a first amendment right in the speakers was that the types of commercial property in question were quasi-public, and therefore that the owners should treat speech claimants the way the government would have to.[187] But there is a separate argument to be made on behalf of the speech claimants. Shopping center property is not likely to be bound up with the personhood of the shopping center owner, while public speech, especially if considered political, is likely to be tied to the personhood of the speaker. The situation invites balancing, either of the strength of moral rights based on personhood[188] or, to translate into utilitarian terms, of the likely effects on individual and aggregate welfare if speech rights are granted or denied. At least in the moral weighing, the balance would have to consider the speech-content, but only to determine whether the speech is likely to be closely connected to personhood. One might roughly assume that "commercial" speech is not closely enough related to personhood and "noncommercial" or "political" speech is. One might also consider the importance to personhood of speaking at a particular shopping center rather than some other forum. The result of this rough weighing is that fungible property rights should yield to others' personhood claims. Large-scale commercial property ownership, which is likely to

186. *See* Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980).

187. *See, e.g.*, Comment, *The Public Forum from* Marsh *to* Lloyd, 24 AM. U. L. REV. 159 (1974); *but cf.* L. TRIBE, *supra* note 7, at 1165–67 (1978).

188. This intuition is nascent in Justice Marshall's opinions in the cases cited in note 183 *supra*, although he relies primarily on the quasi-public property argument. For example, in *Logan Valley*, because "the shopping center premises are open to the public to the same extent as the commercial center of a normal town," state trespass law may not be interpreted "wholly to exclude those members of the public" speaking "in a manner and for a purpose generally consonant with the use to which the property is actually put." 391 U.S. at 319–20. But, as a reason for overriding respondents' "claimed absolute right by state law to prohibit any use of their property by others without their consent," Marshall implies that the speakers should prevail over commercial property owners but not homeowners, because homeowners have a privacy claim and commercial owners do not. *Id.* at 324. It appears that to Marshall "privacy" invokes the same complex of protected values I associate with "personhood."

Dissenting in *Lloyd Corp. v. Tanner*, Marshall explicitly balanced "the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, [with] the freedom of a private property owner to control his property." 407 U.S. at 551, 580.

be fungible, must be deemed not to contain rights wholly to exclude *non-commercial* speakers, especially those that cannot speak effectively elsewhere.[189]

The shopping center demonstration controversy presents only one manifestation of the larger problem of elaborating the moral limitations on state trespass law. The general problem is to decide the enforceability of exclusion—"property"—rights against various categories of claimed interests in entry. The larger problem so defined bears some relationship to one form of welfare rights argument discussed earlier.[190] Is the property owner who seeks to exclude another person using fungible property rights in a way that significantly curtails the other's set of opportunities to develop and express personhood in our society? From this perspective one may decide, for example, that those who deliver basic welfare services to farm workers should be able to enter large farms over the objections of corporate growers.[191]

But the personhood perspective gives better insight into some situations than others. A hard case for making distinctions on the basis of personhood is *Bell v. Maryland*.[192] The issue in *Bell*—which the Court was able to avoid deciding because intervening civil rights legislation obviated the issue[193]—was whether a restaurant owner could invoke a state trespass law to exclude blacks who demanded service.

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189. Tribe argues that there is a problem with the "public function" analysis in that it makes first amendment rights depend on speech content. L. TRIBE, *supra* note 7, at 1167. From the personhood perspective, both the moral status of the shopping center property (roughly fungible) and the moral status of the claimed speech interests (related to personhood?) are relevant. If the speech interest were wholly commercial, it would not be characterized as closely tied to personhood. Consequently there would be no compelling reason to prefer the would-be speaker over the shopping center owner. Thus, a content distinction becomes relevant, similar to the distinction evinced in theories of freedom of speech that rest on personal dignity or autonomy. *See, e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976). A parallel theory of freedom of association would hold that the interest in forming a corporation is less important than the interest in forming a political party or religious group.

190. *See* Part IV-D *supra*.

191. *See, e.g.*, State v. Shack, 58 N.J. 297, 277 A.2d 369, 372 (1971) (state trespass law cannot be enforced by farmer against OEO worker seeking entry to aid migrant workers): "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises." *See also* Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); Donahue, *The Future of the Concept of Property Predicted from its Past*, in NOMOS XXII, PROPERTY 28, 67–68 n.104 (J. Pennock & J. Chapman eds. 1980).

192. 378 U.S. 226 (1964).

193. The Court remanded *Bell* so that the state court could consider whether Maryland's subsequently-enacted Public Accommodations Law would apply to void the trespass convictions. 378 U.S. at 228. The issue became moot because the Civil Rights Act of 1964,

From the perspective of personhood, a proprietor could argue that she had her personhood bound up with being able to exclude blacks, while the blacks could argue that their personhood is bound up with being served. The concurring opinions of Justices Goldberg and Douglas suggest that the property owner's argument should win if she is a homeowner, but should lose if she runs a commercial establishment where she may be catering to the prejudices of others to increase profits.[194] In other words, these opinions find a reason to believe the proprietor's claimed exclusion right is fungible rather than personal.[195] The case is arguably a standoff from the perspective of personhood if we imagine a small proprietor whose prejudice is non-commercial and whose personhood is inseparable from the business. At this point, other moral arguments, perhaps involving social obligations toward historically oppressed groups, would have to be brought forward on behalf of the black claimants.

A difficult case for the personhood perspective arises when groups claiming to be necessary to their members' self-constitution bring conflicting claims. In this kind of case, personhood is involved for the members of each group primarily in the claim of freedom of association whether or not the group's claim involves property. One reason this kind of case is difficult is that we lack a convincing theory of group rights. But as the communitarian critique of the traditional notion of person reminds us, group cohesion may be important or

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28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a–d, 2000a–h (1976) prohibits discrimination in places of public accommodation.

194. 378 U.S. at 246.

195. The corporation owning the restaurant refused service not because of dislike for Negroes but because " 'it' thought 'it' could make more money by running a segregated restaurant." *Id.* at 245 (Douglas, J., concurring). The dilemma here is that restaurants as businesses would presumably prefer to serve everyone because that will maximize their profit. But if most white customers would prefer to dine without blacks, then no restaurant can afford to serve blacks unless it can make more profits serving blacks only than serving whites only. The dilemma disappears when all businesses agree to serve blacks, or if a court or legislature imposes this "agreement" on them.

The possibility that relying solely on the personhood perspective may permit "discrimination" on the part of small proprietors may be more important in the landlord-tenant context. Is it fair to ask someone who rents out the basement of her home to live in close proximity with a person who represents something personally repugnant to her? (Imagine a Jew whose parents died in the holocaust being asked to rent part of her home to a member of the American Nazi Party.) Perhaps some such feeling of the limiting case justifies the exemption in Title VIII of the 1968 Civil Rights Act for single-family homes sold or rented by the owner and for small multiple dwellings in which the owner resides. 42 U.S.C. § 3603(b)(1), (2) (1976). But clearly this limitation would apply only to a narrow class of cases, which might be narrowed still further by other moral arguments not based solely on individual personhood.

even necessary to personhood.[196]

An example of this kind of case can be constructed by a somewhat free analysis of *Village of Belle Terre v. Boraas*.[197] The 700 residents of the Village of Belle Terre zoned their town to be open essentially only to nuclear families. Six students living together in a rented house challenged the regulation.[198] This dispute can be seen as involving personhood, in the guise of freedom of association, on both sides.[199] In fact, the case could easily involve property for personhood on both sides, if one imagines 700 single-family residences governed by a set of restrictive servitudes. Then, the students argue that their leasehold is personal, and the townspeople argue that their benefit under the servitude is personal. It is difficult to choose between these two arguments.

Justice Douglas may have decided for the village because the students' personhood interest seemed weaker, since they had not yet had time to put down roots in the village.[200] He mentioned family values,

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196. *See* note 56 and text accompanying notes 27, 70 *supra*.

197. 416 U.S. 1 (1974).

198. The Village restricted land-use to single-family dwellings. "Family" was defined to mean "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." 416 U.S. at 2. The six students, who attended nearby S.U.N.Y., Stony Brook, leased the house for 18 months. The owner-landlord and three tenants brought the action to invalidate the ordinance after the Village threatened to enforce it against them.

199. For insightful thoughts of commentators who keep recurring to the puzzle posed by the case, see L. TRIBE, *supra* note 7, at 975–80, 985, 989–90; Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 187–99 (1977–1978). Part of the difficulty comes in trying to fathom why the court went the other way in Moore v. City of East Cleveland, 431 U.S. 494 (1977), where a plurality found a substantive due process right to live in one's home with one's extended family, hence a substantive due process limitation on the power of local government to zone for occupancy by nuclear families only. One justice found this right to be a property right. The personhood insight helps to explain the overlap of property rhetoric with substantive due process rhetoric; the right to live with her extended family was important to Mrs. Moore as constitutive of herself as an individual and member of a group. Thus a government that must respect persons should not prevent her from choosing to live this way, unless it can show a morally compelling reason to override her choice.

From the personhood perspective, Mrs. Moore had a better case than the students in Belle Terre, since it would be much more difficult for her to leave the community in which she made her home to express her lifestyle elsewhere, and since her choice is more clearly self-constitutive. At the same time, East Cleveland, a town of 40,000, had a much less plausible claim than did the 700 people of Belle Terre that a crucial claim of personhood for its people depended on upholding the ordinance. *But see* text accompanying note 200 *infra*. The Village's claim would have been more plausible had the residents' group values not represented the American cultural mainstream.

200. The lower court opinion took note of the fact that other Long Island communities

and the importance of maintaining places where those values could be freely expressed. Yet one may be troubled by that aspect of the case which permits those who represent mainstream majority moral attitudes to exclude dissenters. Those who constitute themselves as members of traditional families presumably have ample opportunities in our culture to reinforce and express that life-style. The personhood perspective can give a clearer answer where one group stands to lose one of its few opportunities to express personhood, and the other does not. Thus, if the village residents had represented a minority group or some group outside the mainstream of American culture, their claims would seem stronger because more clearly necessary to their being able to constitute themselves as a group and hence as persons within that group.

VI. CONCLUSION

Just as Warren and Brandeis argued long ago that there was a right to privacy that had not yet been named,[201] this article may be understood to argue that there is a right to personal property that should be recognized. Concomitantly, I have preliminarily argued that property rights that are *not* personal should not necessarily take precedence over stronger claims related to personhood. Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society. Where other kinds of object relations attain qualitatively similar individual and social importance, they should be treated similarly.

I have not attempted to use the personhood perspective in property to determine a comprehensive structure specifying both a general justification of property and its detailed institutional working-out. Instead, I have only given a survey of some of its roots, manifestations, and implications.[202] At this stage of knowledge and insight

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equally convenient for Stony Brook students would not have excluded them. 476 F.2d 806, 817 (2d Cir. 1973).

201. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

202. The survey of its manifestations in Part IV *supra* was meant to be suggestive and by no means exhaustive. Some other legal fields in which property for personhood seems relevant are:

(1) The doctrine of ameliorative waste probably now rests implicitly on the assumption that the reversioner or remainderman has personhood interests at stake that are irrelevant to the valuations of the marketplace. In the well-known case of Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N.W. 738 (1899), Pabst, the holder of a life estate *pur autre vie* in the Melms residence, demolished it to add the land to its brewery next door. The Melms remaindermen sued for waste, but it was not readily believable that the homestead was personal, since it now

about the roles of the personhood perspective, I suggest, as a starting point for further thought, these propositions:

(1) At least some conventional property interests in society ought to be recognized and preserved as personal.

(2) Where we can ascertain that a given property right is personal, there is a prima facie case that that right should be protected

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stood in an industrial wasteland. The court denied relief but based its decision on a utilitarian rationale.

(2) The doctrine of specific performance gives enforcement of contracts for "unique" goods, but it simply assumes land is "unique" and it does not give adequate scope to the uniqueness of other goods to some holders. Neither does it take into account the fact that the item may be personal to the seller and fungible to the buyer seeking enforcement, which would be a ground for denying specific performance in some cases (i.e., land transfers) where it is now routinely granted. *See* Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 296–98 (1979).

(3) An interesting recent development that seems to stem directly from the civil law tradition of which Hegel was a part is the granting to artists of rights over their work after it has passed out of their hands. This kind of claim is called *droit moral* (moral right) or *Urheberpersonlichkeitsrecht* (author's personality right). It goes beyond copyright, which protects only against economic exploitation of one's work by others, to give the artist the right to prevent owners of her work from altering or destroying it. The California Art Preservation Act, CAL. CIV. CODE § 987 (West Supp. 1982), declares "that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations."

California also went beyond copyright in enacting the *droit de suite* (California Resale Royalties Act, CAL. CIV. CODE § 986 (West Supp. 1982)), granting artists additional property rights in the form of a 5% royalty most times a work changes hands. *See* Note, *The California Resale Royalties Act As a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315 (1981).

(4) The law has long allowed bankrupted persons to preserve some property claims against their creditors. The creditors' claims are clearly fungible and the exempt items may be personal. For example, the federal Bankruptcy Code exempts the debtor's interest (not to exceed $200 per item) in "household furnishings, . . . books, animals, crops, or musical instruments that are held primarily for . . . personal, family, or household use," 11 U.S.C. § 522(d)(4) (Supp. III 1979), and $500 worth of "jewelry held primarily for . . . personal, family, or household use," *Id.*, § 522(d)(4). *See* 3 COLLIER ON BANKRUPTCY ¶¶ 522.01–.26 (15th ed. 1981).

(5) Special protections for homeowners who borrow on purchase-money mortgages are common. *See, e.g.*, CAL. BUS. & PROF. CODE § 10242.6 (West Supp. 1982) (limiting prepayment charges for loans on owner-occupied single-family residences); CAL. CIV. CODE § 2949 (West 1974) (prohibiting declaring default or acceleration upon further encumbrance of owner-occupied single-family residence). The UNIFORM LAND TRANSACTIONS ACT (1978) grants enhanced rights to a "protected party"—defined essentially as a homeowner mortgagor—in many circumstances, e.g., longer notice before instituting foreclosure and a ban on deficiency judgments. *See* § 1-203 and Commissioners' Comment to § 1-203.

(6) The common law requirement that parties' attempts to create servitudes upon land will be honored only if they "touch and concern" the land could be related to preservation of autonomy and human dignity. *See* Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 143–50 (1978).

to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.

(3) Where we can ascertain that a property right is fungible, there is a prima facie case that that right should yield to some extent in the face of conflicting recognized personhood interests, not embodied in property. This case is strongest where without the claimed personhood interest, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.