https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

# PROPERTY AND RIGHTS

By Jan Narveson

## I. Introduction

Eric Freyfogle, in his recent book *On Property,* introduces the subject as follows:

> Today's conflicts over property have arisen chiefly because of changes taking place in American society. Some of the changes are demographic (we have more people), some are economic (we are wealthier overall and have new technology), some aesthetic (we want our landscapes to look better), and some intellectual or cognitive (we understand more how nature works and want to respect its ecological functioning). These [changes] . . . are calling us to revise the rights that landowners possess, and, once again, to draw new lines between the individual owner and the community, between individual liberty and democratic governance.
>
> . . . Private property is basically just a tool. It is a governance arrangement that exists because life with it is better than life without it. Just so, life with well-crafted ownership rules can be a good deal better than life with poorly shaped ones.[1]

This passage poses a general question about private property: Do the basic ideas of property need revision, or are there fundamental ideas here that are still valid and applicable? I will defend the apparently unpopular thesis that there are such ideas. I will do so despite agreeing with Freyfogle about the basic status of private property: it is indeed "a tool," and property rules are intended to make life a "good deal better." But putting it that way raises important questions: What if certain ways of drawing the lines of ownership would benefit some at the expense of others? If we set about redrawing lines and redefining property rules, what principles are there to guide us? I propose to defend what we might call the "classic" view of property. On that view, property is a unitary concept, explicable as a right over the thing owned, against others who are precluded from the free use of it to which ownership entitles the owner. We can attack many difficult issues in the light of these classic ideas, rather than finding altogether new ones. To that end, I will both restate and defend the classic

[1] Eric Freyfogle, *On Private Property* (Boston, MA: Beacon Press, 2007), xxi. Freyfogle is Professor of Law at the University of Illinois.

doi:10.1017/S0265052509990057
© 2010 Social Philosophy & Policy Foundation. Printed in the USA.

view, and will illustrate the view by applying it to the discussion of some important problems in property theory.

## II. Property: The General Story

The general story is clear enough. We have property because we need it, or at least want it, or, most likely of all, want things that require property notions and rights in order for us to have them. Moreover, we have the institution of property rights because we are particular people, vulnerable to various interventions by other people, and not happy at the prospect of continual incursions from them. For human beings, drawing lines around stable things and designating them as "belonging" to certain individuals as such, and thus not belonging to others, is just what is necessary to enable us to get on successfully with our lives.

Property is exclusionary. To say that *x* "belongs" to *A* is to say that others not identical with *A* are not to use *x* without *A*'s permission. Others are, in short, excluded from the sort of unilateral voluntary utilization of *x* that was enjoyed by *A* at the time of his initial acquisition of *x*. *A* is in charge: *A* becomes the authority on the use of *x*, and thus has the authority to exclude others who would make competing use of *x*. This I take to be a matter of definition.

On that point, we must make a further distinction, following Jean-Jacques Rousseau (among others).[2] This is the distinction between *possession* and *ownership*. 'Possession' is understood here as a purely descriptive relation between the possessor and the thing possessed, while 'ownership' is understood as a normative concept. If, after stealing it, I am in possession of your BMW, I am able to use it without your permission, though I have no right to do so. Likewise, if you own the BMW, then you are normatively permitted to use it without anybody else's say-so, though it does not follow that you are actually in a position to do so. Ownership, then, is entitlement to possession, which is to say, entitlement to use the thing oneself and to exclude others from using it. Ownership is also transferable, being a set of alienable rights. These rights are not only alienable but decomposable, so that one can transfer a part of one's rights, or transfer one's rights temporarily, and so on, to designated other parties. What makes ownership ownership is that the owner has the normative authority to do these things.

[2] Rousseau's distinction is found in his *Social Contract*, chapter 8: "What man loses is his natural freedom and an unlimited right to everything that tempts him and that he can get; what he gains is civil freedom and the proprietorship of everything he *possesses*. . . . [O]ne must distinguish carefully . . . between *possession*, which is only the effect of force or the right of first occupant, and *property*, which can only be based on a *positive title*." See Jean-Jacques Rousseau, *On the Social Contract (with Geneva Manuscript and Political Economy)*, trans. Judith R. Masters (New York: St. Martin's Press, 1978), 56; emphasis added.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

## III. Self-Ownership and Liberty: The Latter Not Founded on the Former

Many authors have treated 'self-ownership' as a basic concept, from which comes our general right of liberty; in turn, all other property stems from that general right. I think this view is mistaken. But there are different reasons why one might think it is mistaken. One thought would be that the concept of ownership is logically inapplicable to the self. Another would be that the idea of ownership of the self is morally objectionable. A third view would be that although neither of the first two objections can be sustained, it is also not the case that the ownership of anything else that can be owned *comes from* self-ownership.

The first view holds that the concept of 'ownership' does not *apply* to oneself. On the face of it, though, it seems as though the concept does. For to say that one owns anything is to say that others may not use it without one's permission. To say that one "owns oneself" is to say that others may not use one's *self* without that self's permission. Why, then, would there be a problem?

Those who object to such talk complain, especially, that in the case of our selves, the notion of being able to market those selves, transfer their ownership at will, and the like, does not apply. But those complaints are not obviously correct. Among the larger issues discussed among libertarians, for example, is the issue of whether voluntary slavery would be permissible. If it would be either permissible or not permissible, however, then transferring ownership of oneself is evidently being treated as at least logically possible. Thus, slavery as normally understood surely appears to be a case in which person *A* is owned by person *B: A* does not get to do with *A* whatever *A* chooses, being instead compelled to do what *B* chooses. This does not seem to be such a stretch; indeed, it seems to be the natural way to describe the situation. Whether slavery is normatively shipshape is, of course, an issue—if perhaps a dead one by now. But how could it ever have been an issue if the notion of ownership of selves doesn't even make sense in the first place?

Voluntary slavery is, of course, tricky. For one thing, it sounds like a contradiction in terms, slavery being quintessentially involuntary. For another, it is difficult to see what's in it for the voluntarily enslaved person. My hiring myself out to do a job for someone, in return for payment, makes so much sense as to be paradigmatic of the whole idea of employment. My "selling" myself into slavery suffers from an obvious problem: it's hard to see how I could be in a position to collect if slaves have no authority over themselves; the slave owner could simply prevent the now-enslaved person from collecting, ever. And there are other issues. For example, what if the voluntarily enslaved person has a change of mind, or heart, and wishes to withdraw? If the contract of slavery specified conditions for termination, the previous problem would obtain; that

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

is, the owner could simply prevent the enslaved person from suing for the enforcement of the contract. If this problem did not obtain, if the enslaved person had the option of suing, then would we not have to say that the individual in question was not quite a slave? Slaves ordinarily so called had no such options, after all.

The voluntary slave could perhaps make a contract calling for payments or other compensation to someone other than the slave (e.g., to his wife). In such cases, there might be legal enforcement of the condition as well. There is still a question about the moral acceptability of any such thing, and a question about whether a rational being could contemplate binding himself thus; but neither of those points casts doubt on the applicability of the terminology of ownership in the context of slavery. And we do read of the Roman era and others in which slaves could accumulate income and buy their release from that condition.[3]

If self-ownership were self-evident, it is hard to see how there could ever have been such a thing as slavery. If I own myself, then you don't, and if that is self-evident, you not only don't but *can't.* Yet slavery was practiced in a wide range of human societies, for a very long time. All this suggests that the ownership of persons by themselves is conceptually possible, and is basically on a par with the ownership of any other things that can be owned.

The second view is that talk of self-ownership is morally objectionable. This objection, of course, is partisan: that is to say, whether we are going to hold that people do indeed *own* themselves depends on what we think of freedom. People can ruin their own lives, or so we think. But even if we grant that, there is the question whether they have the *right* to do so. And there is, at least, a considerable weight of popular opinion behind the libertarian's view of the matter: the right to "go to hell in a handbasket" is one that we can defend without in the least endorsing any individual's choice to take that path.

In any case, I argue here for the third alternative: that, while self-ownership is both coherent and morally defensible, it is not helpful to suppose that the general right of property is *founded* on self-ownership. The argument that property is so founded would hold that the general

[3] According to the Public Broadcasting System Web site on Rome (http://www.pbs.org/empires/romans/empire/slaves_freemen.html): "Another difference between Roman slavery and its more modern variety was manumission—the ability of slaves to be freed. Roman owners freed their slaves in considerable numbers: some freed them outright, while others allowed them to buy their own freedom. The prospect of possible freedom through manumission encouraged most slaves to be obedient and hard working. . . . Formal manumission was performed by a magistrate and gave freed men full Roman citizenship. The one exception was that they were not allowed to hold office. However, the law gave any children born to freedmen, after formal manumission, full rights of citizenship, including the right to hold office."

On the idea of buying out of slavery in the modern setting of Sudan, see Kwame Anthony Appiah and Martin Bunzl, eds., *Buying Freedom* (Princeton, NJ: Princeton University Press, 2007).

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

right of *liberty* stems from self-ownership, and that the right of property follows from that general right. The problem here is fundamental. There seems to be an idea in the literature that the general principle of liberty, as in John Stuart Mill and John Locke, *rests on* the notion of self-ownership as its foundation.[4] But the preceding analysis should make it clear that this cannot be so. To act is to *use oneself* in some way—to put oneself into motion in some direction or other. Being at liberty means that one acts as one's own self directs, rather than as some other self directs; it therefore means that one *uses oneself* as one directs. The moral thesis of self-ownership asserts that this liberty is rightful. But if one wants to claim that people "by nature" *own themselves,* then one is simply proclaiming their general freedom to do as they please—which is exactly the libertarian principle itself, neither more nor less. The libertarian principle may be unfounded, but it cannot coherently be said to be founded *on* self-ownership, for to say that is to say that it is founded on itself.

## IV. Self-Ownership and Self-Possession

Perhaps what is meant by the claim that the general right of liberty is *founded on* self-ownership is something else: what we may call *self-possession.* Recalling our distinction between ownership, which is moral, and possession, which is descriptive, we can see that it is plausible to say that people "by nature" *possess* themselves. Individuals, we may say (and I would say) are essentially "souls," that is, personalities, minds. The point of self-possession talk would be that each individual is built in such a way that the decision-and-control parts of the individual's mind are connected with a certain body, and with the rest of the same mind, in a manner enabling that particular decision center to exercise (to whatever extent) direct control over that body. That is what makes us call it "his" (or "her") body and mind.[5] Paralysis might disable some of the connec-

[4] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), takes this approach. G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), takes Nozick to be doing so; see esp. chap. 3, "Self-Ownership, World Ownership, and Equality," 67–91. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 1990), 103–25, discusses the notion that liberty is founded on self-ownership at some length. My disagreement with much of Kymlicka's treatment would take too long to explain here. Note that I do not take these writers to suppose that either Locke or Mill themselves took the principle of liberty to be founded on self-ownership. Locke thinks that it is founded on reason, whatever that is supposed to mean, and Mill thinks that it is founded on utility.

[5] In so saying, I disagree with G. A. Cohen, who proposes that self-ownership is *fully reflexive,* so that "what owns and what is owned are one and the same, namely, the whole person" (Cohen, *Self-Ownership, Freedom, and Equality,* 69). I do not think that pure reflexivity makes sense, metaphysically speaking. What does make sense is the control of the rest of us by our proprietarily so-called "selves," that is, the consciously deliberating, willing, and feeling parts of our minds. This may be a metaphysical issue of little import—apart from its connections to, say, slavery. And in any case, I cannot discuss the issue further in the present essay.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

tions that normally obtain; external interference might make normal control difficult or impossible. But still, it is a fact about people that they can get their bodies moving on the say-so of the decision-and-command-making faculties that define those people as the particular persons they are (however those faculties are to be conceived).[6]

Nevertheless, it of course does *not* follow from the fact of possession that we have a particular *normative* status in doing either some or all of those things that we can by nature do. If there is anything to the idea that getting from 'is' to 'ought' is a problem, this is surely a case in point. Let *A* be ever so competent to decide to do this or that, the question whether he *ought* to do it, or even has a *right* to do it is logically open, as the foregoing discussion of slavery makes clear. It is a matter of substantive moral principle to say that he does have such a right or obligation. No amount of sheer description of how the human frame is put together will suffice to establish any normative claim about the relation between decision-and-command-making faculties and the associated self.

## V. Property: Public and Private

Discussions of property tend almost exclusively to be discussions about the legitimacy, extent, and nature of *private* ownership. This is understandable, but it has to be pointed out that there is no inherent reason why ownership cannot be public as well as private.

Using land as our prime example, we can distinguish three categories of ownership here:

(a) "Common" in the sense that there is *no* ownership;
(b) "Common" in the sense that there is *collective* ownership by some group or other; and
(c) Private ownership in the usual sense, that is, ownership by a person as such—one person (normally, or in the first instance), or else sets of persons who, in some specified arrangement, share control over the thing owned by them.

Each of these categories plays an important role in political communities. To be sure, the first and third categories, no ownership and private ownership, are prima facie nonpolitical. More precisely, we can distinguish between moral and political types of ownership (or senses of the term 'ownership') and can then note that the case for *A*'s being taken to be the legitimate owner of *x* may be exclusively moral, or it may be political and legal in the sense that the question is whether *A*'s possession

[6] Perhaps minds are entirely physical, in which case perhaps there is a literal location for the decision-making parts of the mind. That metaphysical question is of no special concern in this connection, interesting though it may be in its own right.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

of *x* is recognized and upheld in law or in the political structure of the community in question. I claim that the moral sense of ownership is the basic one, so that what we are discussing here is essentially moral, but with important and pervasive connections to the legal and political realm.

It is part of the logic of society, as we may put it, that ownership must begin with non-ownership, and that the beginnings of ownership must be by some process of acquisition. But how does this work? It is to this question that I now turn.

## VI. From Self-Ownership to Thing-Ownership?

Moral and social philosophers have long been concerned about the status of property in respect of things external to the self—though more recently, and interestingly, they have also been concerned about things such as intellectual property, which is (in a sense) not external, though its connections with what is external are very strong. We will see that the very nature of intellectual property (as an interface between the internal and the external) makes it important for the subject of ownership of "externals" in the more usual sense. Meanwhile, the situation has been, generally speaking, that many philosophers are inclined to accept some such thesis as self-ownership, but are disinclined to accept, without considerable qualification, ownership of things. The qualification in question is substantial. For if we suppose that whatever people earn by their work, with conditions of payment negotiated by parties acting voluntarily, counts on the face of it as *theirs,* then rates of taxation running from 30 to 50 percent[7] would seem to fly rather strongly in the face of accepting private ownership with any sort of robust conscience.

Why the concern? What makes theorists hesitate to accept that people can fully *own* various bits of the world? 'Fully owning' would mean that the owners may do whatever they want with the things in question so long as it does not violate the same rights of other persons, rights to themselves and to *their* property. But to say this is not to say very much until we are reasonably sure just which rights they have, and that is less than obvious. As a general principle, though, we can certainly say that the right not to be harmed by others is paramount here. And, as another very relevant fundamental principle, we can say that the notion of 'harm' must in the end be determined by the interests of the person in question, *as that person sees them.*[8] Thus, we have David Gauthier's lucid formulation, that

[7] Current federal income tax rates in the United States do not quite reach the 50 percent level, but they do in Canada, where I live, and in some countries in Europe. In any case, adding up various taxes and charges that amount to taxes (at the municipal, state, and federal level) will yield total tax levels on this order even in the United States.

[8] Malcolm Murray analyzes this, brilliantly, as a matter of acting with the consent of the individual affected. See Malcolm Murray, *The Moral Wager* (New York: Springer, 2007), esp. chap. 6.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

*A* is not to pursue his interests by thwarting those of *B,* unless there is no other way for *A* to avoid damage to himself.[9] Each person is a sort of barrier, or boundary, to each other person, not to be crossed without that person's permission, actual or implied.

Keeping this in mind, we need to ask: Why is the acquisition of property such a contentious issue? The reason is that appropriators of bits of the world, insofar as they engage in such appropriation, are accused of a sort of *theft.* It will be said that such acquisition cuts into the natural supply of resources available, in principle, to all, and that it deprives the excluded from a liberty they previously had. Thus, Freyfogle writes:

> [L]et's consider what really happens when a person becomes first owner of a tract of land and puts up no-trespassing signs around the perimeter. . . . The landowner, to be sure, has gained greater freedom over this exclusive piece of land. The owner's liberty has gone up. At the same time, everyone else's liberty has gone down.[10]

So when individual *A* acquires bit of land *x* in what appears to be a condition of wilderness, no other persons being present, theorists like Freyfogle have a surprise for him: people in general *do* have a claim on this land, despite their absence—indeed, despite the fact that, in most cases, they have not even been born yet. This thesis, which is apparently affirmed even by the otherwise sensible Locke,[11] evidently presumes that, somehow, everything basically *belongs* to everyone, where 'belongs' is taken in a strongly normative sense. For if it did not belong to them, how could the person who takes it be accused of taking it *from them*? So understood, this thesis is among the more intriguingly subversive bugbears of social philosophy.

To claim that everything "belongs to everyone" is, on the face of it, to claim that each person has the "right" to exclude every other person from the use of everything, that is, of *any natural object whatever.* This seems to be a textbook example of utter nonsense at work. Consider any thing, *x:* the claim implies that person *A* has the right to exclude *B* from use of *x;* yet, on this idea, person *B* in turn also has the right to exclude *A* from the use of *x.* So *A* may compel *B* to desist from using *x,* thus leaving *A* free to use it, but meanwhile *B* may also compel *A* to so desist, thus leaving *B* free to use it. Thus, the claim models the "condition of nature" according to Thomas Hobbes, where "every man has right to every thing."[12] But

[9] David Gauthier, *Morals by Agreement* (New York: Oxford University Press, 1986), 205.
[10] Freyfogle, *On Private Property,* 7.
[11] There is some dispute about Locke's intentions here. But in saying "God, who hath given the World to Men in common . . ." (*Second Treatise of Civil Government,* sec. 26), he certainly leaves the impression that everyone has a claim to the land, one which needs to be overturned by argument (which he tries to provide).
[12] Thomas Hobbes, *Leviathan* (New York: E. P. Dutton, 1950), chap. XII, p. 107.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

in the usual sense of the term 'right', what one has by right others (by that very fact) do *not* have, and thus the right-holder may legitimately defend his right, others being in the wrong. Obviously, to try to make this universal is simply nonsensical, as we have just seen. No coherent assertion about rights can be derived from this claim.

Any such claim, then, if it is to make any sense, has to be understood collectively. So understood, there is the usual problem that collectives do not have minds, and thus some kind of internal structure of command and control must be envisaged here. And what will that be? One tradition identifies it with the will of the King, who personifies "the community"—whether I or you happen to go along with that identification or not. Persons of liberal persuasion, in turn, will interpret the command-and-control structure democratically: the collective will make decisions about what to do with its estates by majority rule. For all *x,* then, the majority decides what is to be done with *x* and by whom. Yet majority rule is the very juggernaut against which individual rights are typically asserted in the first place: a *right* is what a mere majority does *not* get to overrule. Rights are a *constraint against* the majority, rather than a status that is entirely theirs to decide.

Whether those who agree with Freyfogle are correct in holding that the excluded individuals are somehow harmed by the first-comer's ownership of things is a crucially important question, and I will argue that they are not harmed. My reasons are as follows.

To begin with, if the idea is that excluded individuals are being harmed in the particular way that property owners are harmed by robbery, then the idea can be denied straight off. To say that excluded individuals are thus harmed is, really, to deny that there is such a thing as "property"—that natural items ever *can* be "acquired"—since, of course, for anyone to acquire anything is, logically, for others to be excluded from future use of it by the acquirer. But since, by hypothesis, the excluded individuals already "own" the things in question, they cannot be so excluded. And since ownership is, by definition, rightful use with power to exclude, it is a plausible inference that the situation of supposed "universal ownership" is a situation of universal uselessness.

Next, we observe that notionally, at least, "first-comers" are precisely people operating in a hypothetical environment in which no others are or have been around to acquire claims arising from previous use. Thus, by hypothesis, there simply is no one there to be "harmed," unless the question is begged by simply proclaiming the possession of rights over things by all, prior to and independent of any use anyone makes of the things in question, and in the absence of any reasons for the proclamation.[13] That

[13] For further discussion, see Ann Levey, "Liberty, Property, and the Libertarian Idea," in Malcolm Murray, ed., *Liberty, Games, and Contracts* (Burlington, VT: Ashgate Publishing Co., 2007), 147–56; see also my comments on her arguments (ibid., 231–34).

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

can hardly qualify as an "argument" for the claim that those rights are *due to* the harms to these individuals that would be caused by prior occupation.

Finally, we may ask whether possible future acquirers are indeed deprived of a liberty, as Freyfogle claims. I argue that they are not. We are all at liberty, given an environment in which there is unacquired potentially useful stuff lying around, to *attempt* to acquire some of it. We still have this liberty even though others have used the same liberty successfully in acquiring this or that bit of stuff. But we are not morally at liberty to acquire what others already have, and we are not automatically entitled to any particular bit of the Earth, or indeed to any of it at all. We must either earn what we have, by making or discovering or occupying it, or else be given it by someone else who legitimately has it. Now, first-comer *A* does not prevent *B* from *attempts* to acquire something; he merely, by being there first, prevents *B* from becoming the possessor of this already-possessed thing. Since nothing can be wholly owned by more than one independent party, the fact that occupancy by one person prevents occupancy by others obviously cannot visit a "harm" in the sense of a deprivation of something the others could also have had. For they "could have had" the thing only if someone else did not have it. Obviously, there cannot be a universal right to all things. There can only be a right to exert oneself in the pursuit of one's goals, given the similar right of others. And the acquisition of something one would like to have had, by someone else, does not deprive one of that right. Nor does it deprive one of the thing itself, which of course one did not have before. This means, therefore, that acquisition does not visit harms on others.

Meanwhile, of course, most finders of things do not operate in an uninhabited environment, and when they do not, there are others "around," with possible claims to be considered and cleared before acquisition by a particular individual can be legitimate. Most ownership issues will require negotiation and agreement at some point, leading to the adoption of more specific rules about many matters. Yet one of the premises that has to strongly influence the formulation of such rules is that an individual's use and occupation of some bit of nature, in the evident absence of others making competing claims by their presence at the time, gives that individual's property claim a very strong priority over any other claims. Possession, as the saying goes, is nine points of the law. In state-of-nature cases, make that virtually ten.

## VII. The Positive Argument for Liberty—and, Therefore, Property

The idea of self ownership—that is, of a general right to liberty—is rooted in our particularity and our individuality. Persons are separate: one person's purposes are not another's; there is no necessary normative

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

output from *A*'s interests to *B*'s. Consequently, when the pursuit of interests is to be curtailed by consideration of the interests of others, this will have to be due to aspects of *interaction,* specifically the impinging of some persons on others in such a way as to create a potential for cooperatively derived mutual benefit—or the reverse. This provides genuine reason, seen from each agent's internal point of view, for restricting one's own pursuit of benefit: the reason is simply that we stand to do better with such restrictions than without them, *provided,* of course, that others accept such restrictions as well.

This abstract result seems to be viewed with alarm by many theorists, who apparently suppose that morals must require self-abnegatory altruism. The trouble with that, however, is that selves are the only beings with interests; they are, normatively speaking, *all we have,* and therefore, negating them means, on the face of it, abandoning the whole point of being someone in particular—as we all are, after all. If the point is generalized, then it raises the problem that if *my* self means nothing, why should anybody else's mean something? If the satisfaction of some self doesn't count, independently of who provided the sources of that satisfaction, then the point of altruism is as completely defeated as the initial self-interest to be abnegated.

Our individual persons and pursuits are what we have, and the general principle of liberty protects us in being the persons we are, doing what we want to do, and thus acquiring what we can and want to acquire, compatibly with the similar right of others.

## VIII. Original Acquisition *Is* Exchange

Once things are acquired, their owners, having the right to do whatever they wish with the acquired items, provided they do it peaceably in relation to any others encountered, may proceed to exchange. Exchange, if voluntary, is for mutual benefit: *A* exchanges his *x* with *B*'s *y* because *A* prefers *y* to *x* and *B* prefers *x* to *y;* otherwise, the exchange would not voluntarily take place. Thus, both benefit from the exchange. Persons acquiring the sort of property (e.g., land) that can be improved by making it more productive of things (e.g., crops), the rights to which can be transferred from one person to another, will most likely proceed to just such exchanges, given the familiar story of diverse abilities and tastes as well as diverse resources.

What needs to be appreciated is that the situation leading to "original" acquisition is itself actually one of exchange. Each of us, as Hobbes puts it, "lays down" his or her liberty to interfere and "despoil" in exchange for similiar forbearance by others. The benefit of peace is a strictly public good: *A* can *only* get it from *B,* and *B* from *A.* Both are better off with it than without it, and so, if these value assessments are right, peace will be sought by reasonable people as a fundamental good and, indeed, the

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

precondition of all other goods, *including* that of acquired property. When *A* allows *B* to acquire, and *B* allows *A* to acquire, they are trading liberties.

This provides an underpinning for taking the point of view of the "social contract": self-imposed restriction of one's pursuits will be motivated by those very pursuits, in view of the ways that others relate to one. Classically, the social contract idea has led to major emphasis on what have come to be called "negative" rights: the agreement to refrain from inflicting damage on the other person, in return for a similar resolution on the other's part. Despite being negative, these rights are benefits in relation to what could otherwise be expected. They are, indeed, enormous benefits from the point of view of nearly anyone. If the social contract works, we are all safe from each other's capability of inflicting all manner of losses, up to and including death: we receive the benefit of being able to count on being alive tomorrow and next year, insofar as death could result from the intentional activities of others. For all of us, being alive is a necessary condition for accomplishing anything we are interested in—even suicide, which requires that its subject be alive to commit it. But more generally, being free from the predation of others, and not just having one's life intact, is a necessary condition for our accomplishing anything at all. The social contract recognizes this, in the ways made familiar by Hobbes and Locke: The "First Law of Nature," Hobbes writes, is to "seek peace" and resort to violence only when peace is not available from others.[14] Locke, in his very similar version of "the Law of Nature," has Reason telling us that "no one ought to harm another in his Life, Health, Liberty or Possessions,"[15] with a subsequent reference to people's "Lives, Liberties and Estates, which I call by the general Name, *Property.*"[16] That all this should be reasonably accounted "property" is what I shall argue further below. The general case of being able to use one's body and mind implies the slightly more restricted case of being able to use them to manipulate, fashion, and transform various bits of the world into bits more to one's liking and more conducive to flourishing and longevity.

## IX. The Basic Reason for Property

Property is closely bound up with negative rights. Indeed, it essentially is a negative right (or several?)[17] itself. To own something is for others to be required to keep off. They are already, we are supposing, required to

[14] Hobbes, *Leviathan,* chap. XIV.
[15] Locke, *Second Treatise of Civil Government,* sec. 6.
[16] Ibid., sec. 123.
[17] It has been popular to maintain that ownership is essentially a "bundle" of distinguishable rights, as if they had nothing to do with each other. For further discussion of this view, which I dismiss as a confusion, see Jan Narveson, *The Libertarian Idea* (Philadelphia, PA: Temple University Press, 1988; republished, Peterborough, Ontario: Broadview Press, 2001), 64; see esp. note 6 on p. 342.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

keep off *you.* You have property only if others are required to keep off *it,* unless you permit them to use it. So we can now pursue the central question of how to get from "you" to "it." What connects them? I believe that the answer is not very far to seek, even if it isn't exactly staring us in the face.

Ownership is a normative relation with three terms: (1) you, the owner; (2) whatever you own; and (3) everybody else. It is *not* a relationship between you and the thing owned, simpliciter. This seems not to have been appreciated by some writers, and one can only suppose that the reason is that from the point of view of the owner, it might look that way. But to think that is to confuse possessions with property. When I merely have something in my grasp, that has no immediate entailments for what anyone else ought to do, though it might have implications for what they would need to do if they are to get it out of my possession. But as soon as someone else makes a claim to the thing, I need to show that my possession of it is not only a fact but also *legitimate*—that my claim is reasonable, and thus to be respected. That means that the relation between me and that thing has to be claimed by me in such a way as to imply that you, and others, are morally (or, as may be, legally)[18] required to keep off. That is what is meant by insisting that ownership is three-termed, not two-termed. To fail to recognize this is to deny ownership any potential for resolving any normative problems. It can resolve such problems only if *A*'s ownership has reasonably clear implications concerning what *B, C,* and so on may or may not do.

## X. All Rights Are Rights to Act

There is another point to emphasize about the nature of rights: rights all fundamentally concern *actions.* A "right to a thing" is a right to do something with it. My rights against you are rights that you do or not do certain things to me, and, similarly, that I do or not do them to you. Any assertions about rights "to things," as we are accustomed to putting it, are assertions about what we may do in relation to each other, with or to or about the things in question. Rights enable us to tell each other where to get off—where to desist from doing what one might like to do (or perhaps not only to desist, but to do something else quite specific instead). Rights, then, relate the will of the right-holder to the wills of all others. The right-holder may do this or that, and this means that others are normatively required to refrain from or to do something. On the general liber-

[18] I mean 'legally' in the sense of called for by some actual body of law. The general point of view of this essay is the classic one in this respect as well—that positive law is properly subordinate to morality, which has often enough, as by Aquinas, been dubbed 'moral law.' Possession used to be said to be nine points of the law; in recent times, however, public intervention is so pervasive that the need for sharply distinguishing positive law and moral law is now evident.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

tarian view, the rights in question are, as I have said, fundamentally negative: they say what others are *not to do*, but not, basically, what they are *to do.*

Thus, the question is: Which facts about my possession of various things are such as to supply relevant premises for normative claims against the activities of others? To this, the libertarian has a general answer. Libertarianism proclaims that we all have a general right to liberty, and to have that right is, precisely, to have a right that others refrain from interfering with, negating, or undermining that liberty (i.e., interfering with, negating, or undermining the course of action, or inaction, that the right-holder has in mind to engage in). Libertarianism, in short, is essentially the affirmation of a general right against the initiation of force and the use of fraud by others against any person.

Why should we accept such a view? To begin with, I have denied that the hypothesis of a general collective ownership of everything natural has any rational standing. Instead, there is only (1) *us*—people—a bunch of organisms possessed of and animated by minds, and of various powers, including the power to communicate with each other, and in enough contact with each other to present potential problems for (as well as potential benefits to) each other; and (2) a whole lot of natural stuff which, so far as it goes, has no normative status whatever. What does have normative status is (or stems from) *us:* our lives, our actions, our interests.

Taken by themselves, however, our individual assertions of value have little purchase against others. To arrive at principles for us all, we must ask what we, collectively, might stand to benefit from and what we might stand to lose from. Abstractly, the case is pretty straightforward: what we each want is whatever is good for ourselves (at least), and what we want to avoid is what is bad for ourselves. So a general prohibition of actions that tend to undermine our welfare is called for, and a general endorsement—but not a flat requirement—of what tends to promote our various welfares is also called for.

How, then, do we get to property? In brief, the answer is that many of our actions involve the use of various bits of the world outside of ourselves. We want to be able to engage in those actions successfully, and to do this requires, generally, that others not intervene to upset those trains of actions, given the plans governing them. Successful actions "require" this in the straightforward sense that noninterference is a logically necessary condition of their success: if you stop me from doing $x$, then I don't do $x$, by definition; but $x$ here is, by hypothesis, the very thing I wanted to do.

This can generate misunderstanding, in one important respect. Obviously, many of our actions involve others, and many involve the joint use, by ourselves with others, of assorted material objects, spaces, and processes. A few actions might involve many others. But in virtually all of these cases, it is possible to distinguish between those *in* the group of

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

persons acting together and those *not* in that group, with the latter, usually, vastly exceeding the former in size. In those cases, persons outside the group can often act to prevent or greatly increase the difficulty of successful performance by those inside, including oneself. Here, too, property rules will often be necessary, or at least useful. A group of condominium owners (for example) needs freedom from a lot of external intervention, and each of its members has an interest in that freedom. The point generalizes: just as every individual is to have a right of liberty as against every other individual, so too every group, however small, has such a right against every other, however large.

The question from my individual point of view is: How do I induce you to refrain from such interferences? The proposed answer is that I make a very general deal, or arrangement, or agreement, with you: You refrain from interfering with me, in regard to certain bits of the world, and I refrain from interfering with you in your use of certain other bits of it. This is the proposed answer because, given that we are both capable of such interferences, mutual refraining is of mutual benefit for us. We both do better in the absence of such interference: with rights, we do as well as our own powers and our relation to our environment and to each other will enable us to do. This result is far superior to what we would be able to achieve under a regime where interference, by all and sundry, is common and expected (because it is not prohibited).

## XI. Property-Respecting as a Moral Duty

The moral dimension of all this is that, for full effect, we want this tendency to refrain from interference to become a strong internal commitment: we want everyone to have an internally monitored aversion to such interfering activity, a disposition to ask before we encroach, and not to proceed without assurance of (or reason to expect) an affirmative answer. The general possession of such a disposition is, I propose, to our maximum mutual advantage. I say "maximum" mutual advantage because this arrangement permits the widest range of potentially useful action on the part of each individual: if we ask for more, it will, by definition, be at the expense of someone else. Moreover, that expense is uncompensated, since if it were compensated to the satisfaction of the affected persons, an imposed restriction on those persons' powers would be unnecessary. For we suppose that we will do what benefits ourselves, and a deal from you leaving me better off does benefit me—but it also benefits you, since you need not have made it, but did so. Hence, we would voluntarily accept such a deal if it were offered, and so, mutual benefit ensues.

All that said, we very often know those with whom we interact well enough that we can, in many cases, anticipate permission from them for what would otherwise be infringements of their rights. Sometimes what I want of yours is trivially costly to you: the cost to you of my asking for

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

it, even when that would be easy to do, exceeds the cost to you of parting with the items in question. Sometimes we are friends and are disposed to help each other out, and sometimes we are neighbors, whose utility profiles are familiar enough to each other that we have developed mutually beneficial patterns of borrowing and trading various helpful things. And so on. But for all these things to work properly, the baseline has to be the general negative right to oneself and one's things, and a habitual respect for them by (preferably) everyone.

## XII. Original Acquisition

The preceding exposition emphasizes that the acquisition of things is the beginning of property rights. In the course of action, we use things, and if nobody else is already doing so, then the way is clear for us to use them, and to insist on the right to continue to use them. We do not need to justify our acquisition of *x* by demonstrating that it will best serve the public good if *we* are allowed to use it rather than someone else—even though that is, quite often, true. The point is that people being able to use what was previously unused, at will, enables a better-off society. Indeed, it enables that better-off society even in the (presumably numerous) cases in which there is someone out there who might make better use of it than the person who becomes the owner. That is because, on the face of it, the new acquirer, *A,* adds value, while subtracting none from anyone else. (*A* is prohibited from doing the latter.) If someone else, *B,* comes along and undoes *A*'s good work, then *B* negates this addition of value; and he or she thereby also undoes the pristine Paretian quality of *A*'s activities. I refer here to the criterion of Pareto efficiency, according to which an outcome is Pareto-efficient if it makes no one worse off and at least one person better off. Those who acquire property are better off, and those who don't are not worse off—they are only in whatever condition they were in before (namely, without possession of the thing that the envisaged new acquirer acquires). Of course, this sets the stage for further improvements due to exchanges of property.[19]

The argument here does not appeal to views about interpersonally compared utility; nor does it appeal to a supposed "intrinsic value" of liberty. The claim that the libertarian argument requires some such premise is made, for example, by John Christman in *The Myth of Property,* where he writes:

> Freedom construed in the non-normative sense is defined as the absence of restraints in the carrying out of a person's desires, and none of those key terms—"restraints," "persons," or "desires"—is

[19] See Jan Narveson, "The Invisible Hand," *Journal of Business Ethics* 46, no. 3 (2003): 201–12.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

> understood as a moral notion. . . . Hence, since non-normative freedom refers to *any* acts by persons free of restraints, the concept of freedom itself does not distinguish between being free to hit others with baseball bats and being free to make political speeches in a public park. . . . So the moral evaluation of allowing such freedom to flourish is not provided by the concept itself. . . .
>
> But recall that a separate premise—that liberty of this sort (construed non-normatively) has intrinsic value—will be included in arguments linking negative liberty (L1) and liberal ownership. This value, moreover, must be intrinsic, since it would not do to say that liberal ownership protects liberty but the value of liberty is merely instrumental. . . . Certainly the "freedom" to do the act, intrinsically and by itself, has no value whatsoever to the agent. For unless the absence of external physical restraints facing the agent in some way enhances the possibility that she will achieve something she wants to achieve, such an absence can have no value for the person. That is, L1 has no value except for its power to allow or bring about other things, such as L2, L3, or some other good for the agent. . . . [Christman defines liberty (L2) as "the relative absence of restraints and the presence of resources enabling agents to carry out their actual desires"; and L3 as "the relative absence of restraints (L1) and the presence of resources enabling agents to carry out their *critically appraised* desires."][20]

What this seems to amount to is that we are not interested in liberty except insofar as its absence is a restriction on something we want to do because we value it. The reason for attributing "intrinsic" value to liberty is found there: ordinarily we do what we do because we value something enough to do it, as a way of achieving or promoting that value. If that is Christman's point, he is certainly correct. But why does he think this is a problem for the libertarian? It is true that if *I* am prevented from doing something that I have no interest in doing anyway, then my liberty to do it is not of much interest to me. But suppose I later become interested in doing it, as well I might? Do I not have reason to prefer a system which does not deprive me of that liberty in advance? I think it's obvious that I do, even though I might be ready to trade it off for something more important. But, of course, doing that is not trading off liberty *tout court:* it is trading off a particular liberty to do a particular kind of thing, and we do that all the time. Trading off our general liberty (e.g., by putting oneself into slavery) is, on the face of it, a very different matter. In short, our liberty matters because our lives matter. A necessary condition of doing anything is that one was not prevented from doing that thing.

[20] John Christman, *The Myth of Property* (New York: Oxford University Press, 1994), 73–74. For Christman's definitions of L2 and L3, see ibid., 68 (emphasis in the original). Christman is Associate Professor of Philosophy at Pennsylvania State University.

There is nothing "iffy" or problematic about affirming the importance of liberty, even though it is hardly an "intrinsic" value.

There is sometimes talk of comparing liberty: we want to say that someone's liberty has been enhanced or the reverse, and also that some people have more liberty than others in some places or at some times. On this matter of "comparative" liberty, when someone sees himself to be better off, that involves a comparison, of course; but it need not be a comparison between his own utility state and that of others. Rather, it involves a comparison between two states of himself or, more precisely, two possible states of himself, between which he is to choose. The moral rule about property that I am proposing is required by the criterion of mutual benefit from interaction: an acquisition must not make someone else *worse off* as compared with what he or she would enjoy in the absence of that acquisition. Here no interpersonal comparisons of utility are necessary; nor do we compare the "amount" of liberty enjoyed by *A* relative to *B.* Rather, each person's liberty is to be respected by the other (and any relevant others). In many cases, acquisition is not interactive in the sense that *A*'s taking possession of some item *x* involves affecting someone else, *B,* in some way (apart from the fact that *A*'s acquisition means that *B* is no longer able to acquire *that particular item*). When no such interaction occurs, the original complaint of the socialist, as we may call him—that acquisition robs the nonacquirer—is pointless, since it is logically impossible for both of two people to acquire the same item. Thus, there is no relevant complaint on that score: we cannot reasonably complain about what is logically impossible. If *A*'s action left *B* without something that *B* previously possessed, that would be another matter. In such cases, assuming that *B*'s previous possession of the item was not, in its turn, at the expense of others, then *B*'s permission must be secured by *A* before *A* can take possession. However, in the case of *initial* acquisition, *A* deprives no current possessor of anything. On the one hand, then, he does not inflict any injury on *B.* On the other hand, someone's *now* taking *x* from *A would* inflict a harm on *A. A* currently both has it, and wants it; he prefers this to not having it, else he would part with it voluntarily—and for that, *B* needs but ask. What we term 'theft' is, therefore, the infliction of a harm: it makes the victim worse off than he was in the status quo prior to the thief's act. Were the thief not to engage in thievery, of course, his condition would be the same as it was in the status quo. Thus, theft is, as should be no surprise, action at someone else's expense. It is Pareto-inferior to its alternative.

## XIII. Is "Initial Acquisition" a Useful Concept?

Of course, it might be objected that initial acquisition is an empty category, since everything now *is* owned by someone or other. But that is

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

not entirely true even in the most ordinary sense; and in two further respects—both very significant—it is quite the reverse of true.

I deal first with the ordinary sense in which it is not true that initial acquisition is an empty category. Every now and then someone leaves various objects—"junk," leftovers, and so on—with the intention of simply abandoning his own right to them. In this case, they go to whomever happens upon them and wants them, thus having precisely the status that natural things have in the social contract account. Cases like this are rare, of course, but far from nonexistent, and certainly not impossible. Some uncharted areas of the world remain as well, and some areas that have been abandoned by previous inhabitants. Of course, all such areas are claimed by some state or other by now, complicating the inquiry. If we argue that states ought to grant maximum freedom to their inhabitants, however, then the rule of first users can be applied by states in such areas, and this too would be a nontrivial domain for the application of the first-use idea.

I turn now to the two more significant senses in which it is not true that initial acquisition is an empty category. The first of these concerns the extremely important case of *ideas*—intellectual property, as it is now called, including also artworks, scientific discoveries, and inventions. The creator of an invention or a work of art, or an original author, produces something altogether new. While this creation may involve paper, computers, canvas, and so on as material components or production aids, the created work is not identical with any of those. Given that it is the product of its creator and has not previously been in the possession of anyone, we can say, at least prima facie, that authors and artists do acquire rights in their work by original acquisition. (There are, to be sure, serious difficulties. One major difficulty is that, unlike the case with discovering a particular bit of the Earth, it is logically possible for two different persons to come up with the same idea, independently. In the case of scientific discoveries, this is not only logically possible but happens quite often. I discuss this topic further below.)

Second, there is the extremely fundamental case of *self*-possession. No one owns Louisa Jones prior to her first appearance, and she neither creates nor is given possession of herself. Nor does anyone relevantly create her. Parents, in a sense, *produce* her, but they do not and cannot *create* her: they don't work out a blueprint and make up a person out of prior stuff well put together. Insofar as anyone does that, nature does it, and neither parents nor anyone else can claim any entitlement to a child on the basis of natural possession. Rather, as soon as she counts as a person at all (this being, to be sure, a disputed matter) she is also the possessor of that person "by nature" (as I argued in Section IV), but not by nature the *owner* (as I argued in Sections II and III).

All these cases, ranging from trivial to critically important, show that the category of initial acquisition is not by any means an empty one. Of

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

course, this last case, self-ownership, leans on the others. I possess myself by "getting there first," by finding myself to be in control of various bits of a certain body and mind, and intimately affected by their various changes of condition; that is what makes me their possessor. It is also what creates my interest in liberty: those of us sympathetic to the liberal view of morals will also declare this prior possession to be a good ground for awarding moral ownership as well.

## XIV. Problem Cases

The theory of original acquisition gets us somewhere, but it falls far short of self-evidently answering all questions. The general point of view of this essay is that the principles of social morality are indeed social rules, and not "natural" ones. They are not genetically implanted in our minds, but must be worked out in the course of life, and especially of social life, that is, in the course of interaction with others. Nevertheless, we make these rules not arbitrarily but in the light of reason, or more precisely, reasons. We have good reason to want not to be damaged or interfered with, but we also have good reason to get along with our fellows. Rules on these matters, I suggest, have the support of reason in that *it would be a good idea for each individual to agree* to certain general rules about these matters, provided that one's fellows also subscribe to those rules. Obviously, there is the interesting theoretical problem that some may not "subscribe," and the practically much more serious problem that some who profess to subscribe do not in reality do so. Just how enforcement costs factor into the moral computation is a difficult and important question, which I cannot explore in any serious depth here.

The need for enforcement measures and their administration, and the inevitable vagueness and variability of what is agreed upon, mean that the rules can, to some extent, be arbitrary. Still, they cannot be entirely arbitrary, nor even very much so. In particular, the rules cannot simply be the arbitrary edicts of some strongman or, for that matter, some deliberative body. Considerations exist to guide any such bodies or rulers if they mean to be addressing us as reasonable beings. The arguments of the foregoing sections are intended to be examples of this: they are meant to pick out basic features of our situations and ourselves, attention to which leads us to adopt certain rules and not others. The question about original acquisition to be explored here is: How do we decide just what it is we have acquired when we do so in a "natural" way? That is, how do we do this when we do not have preexisting clear boundaries to form natural baselines for mutually beneficial agreed-upon exchanges?

The cases we want to focus on to begin with are cases of acquisition of land, water, and mineral resources. I will look especially at land, in part because of its importance: the acquisition and ownership of land has been the subject of most military conflicts since time immemorial, as well as of

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

local disputes among individuals and small groups. A special feature of land for this purpose is that it is readily divided into parcels, with definite locations and areas, and generally stays put (though earthquakes and volcanic activity may alter things; and water, of course, is a lot trickier in this respect). This characteristic of land, along with its usefulness, makes it a plausible subject for theorizing about ownership. We may well suppose that if lands puts us in intractable difficulties, things look bad for property in general.

In the subsections below, then, I will consider several problems that confront the property rights theorist. The general point of view from which I will pursue these problems has been set forth above. Rights to property are part of rights to action, that is, rights to do what we want to do—what we take to be the pursuit of the best life we can manage. This pursuit often involves or requires reliable use of various stably identifiable and definable "things," and when it does, there is an interest that our use of these things be stable and identifiable. This, given the enormous potential for conflict and competition, requires rights, absent which we will not be able to pursue our interests effectively in the social environment in which we all live. But that is all. There is no further source of "natural" rights. Rights to things are as natural as our interests, but those, after all, are to a very large extent malleable and socially shaped. And the existence of other people is natural, so far as we are concerned—that is, their existence is due to features of our social environment that are largely beyond our own control—and so we need to shape the rules by which we will relate to those other people as best we can.

With that in mind, let us consider several sources of difficulty for property rights. Property rights work very well when applied to real estate and to material objects, ranging from very small (but not microscopically small) to large (but not astronomically large). They work for land because that is what we walk around on. When we instead walk on other surfaces, someone has created those surfaces, invariably as the result of arrangements with various others, and thus we have ample evidence to go on in tracking the relevant rights. When objects are visible and manipulable, they become both convenient to use and easy to transfer to others. But when these characteristics are lacking, things can get difficult. In the following seven subsections, I discuss some principal areas in which difficulties arise.

### *A. Subsurface rights*

One very serious difficulty, given today's interest in oil and other minerals, pertains to the issue of just what one owns by virtue of owning, say, an acre of land. If a well drilled though a certain surface, previously acquired by Smith, strikes water ten feet or a hundred feet down, we have little hesitation in assigning the water rights to Smith, the owner of the

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

land at the surface. But suppose that oil is struck at four thousand feet below the surface, after much technically demanding and ingenious calculation by others? However owner Smith might have conceived his purchase, he is unlikely to have any inkling of what exists at such a depth, let alone any intention to seek it out and use it.

The nature of the problem suggests a solution. Who struck the oil and how did he find it? Suppose that person, Jones, drills holes on the surface of Smith's land. In this case, Smith gets to charge Jones for the right to do so, surely. (Or does he? Not if he is so unfortunate as to live on self-owned land in British Columbia, it seems. There, without your knowledge, a stranger can buy the right to explore beneath the surface of your land, and then leave lots of holes and debris around in the process.)[21] But suppose that Jones drills at an angle from an adjacent area owned by Brown (who permits him to drill) or by no one? We must then ask, first, whether any future externalities might occur that significantly affect Smith's property, as they surely might. Insofar as they do, Smith will have a case for compensation. Second, we must note that Smith is in a position to point out that it's a lot cheaper to drill straight down than sideways, and he can make an offer advantageous to Jones. Beyond that, however, I don't see that Smith has any obvious "natural" claim to rights, as it were, all the way down. One might also note that for such examples, there is the problem that all places on the surface of the Earth are such that if you go straight down, they will all meet at the center. Then what? Clearly we cannot simply extrapolate from the situation on the surface.

We can also mention the potential for pollution of groundwater, undermining of buildings, infestations of pests, microbes, or parasites, and so on. Solutions to such problems are contingent on the right solutions to the problem of subsurface rights. If Smith has clear title to some volume of earth, he also has the right that others not infest it or render it incapable of fulfilling his purposes in acquiring it, insofar as those purposes are themselves peaceable.

It seems to me that this last is not appreciated by Freyfogle, who points out, correctly enough, that "absolute ownership" is impossible, if we suppose this to include the right to exterminate the neighbors' prairie-dog population when those little beasts are attracting predators which feed on the prairie dogs but also attack other people's pets.[22] Such claims are the

[21] The Province of British Columbia's Mineral Tenure Act of 2002 permits this. See Kendyl Salcito, "'War Brewing' over Mining Rights in Rural BC," http://thetyee.ca/News/2006/06/14/MiningRights/. As a case in point, one Bruce Essington, who "lives in a tarp-covered bread truck on the side of Bluenose Mountain . . . has bought rights to about 150 acres of his neighbours' land. For $50." And "Essington was not charged for repeatedly scrawling 'free miners lic.' in blue paint on private property and removing 'For Sale' signs at the entrance of Kurt Yakelashek's driveway, for snooping around the property at night, or for leaving piles of beer cans around the grounds."

[22] Freyfogle, *On Private Property,* 20; the prairie dog example is discussed on pp. 1–2.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

stock in trade of critics of liberal rights, who take such rights to be a license to a free-for-all. But that is the pre-moral Hobbesian state of nature, and not the converting of liberty into a *right*. Such conversion is engaged in precisely for the purpose of blocking the free-for-all, and thus enabling persons to benefit from their activities. What I advocate here is the general recognition of the individual right to own property—ownership that is compatible with ownership by others. Thus, my right to what I own cannot extend to a right to destroy, damage, or interfere with anything that belongs to my neighbor. Often it is difficult to respect this, as when one has predatory animals on one's own land, while the neighbors have attractive prey for the predators. But what makes a solution to this problem both necessary and possible is recognition of the antecedent rights of the respective parties.

Of course, the libertarian will favor private methods for resolving conflicts in this area, and will deplore initiatives such as those of the province of British Columbia, initiatives that deny owners of surface land any priority in rights concerning what might lie beneath it. Development of mineral resources should not bypass people's rights.

### *B. Air rights*

Suppose we worry about what's in the air above? Here we need to distinguish two quite different contexts. On the one hand, there is pollution, and especially (in point of theoretical interest) noise pollution. I will address those separately below. On the other hand, there is the analogue to the previous case concerning areas beneath the surface. Perhaps the air contains noxious gases. Perhaps the air above *A*'s land in particular, for some reason, has more of these gases than that above *B*'s, so *A* might try to clean up "his" air by extracting cleaner air from over *B*'s land. Perhaps *A* is concerned about his sunlight being blocked by proposed neighboring tall buildings. Perhaps *A* is even concerned about changes in climate brought about, he supposes, by *B*'s lax behavior regarding $CO_2$ emissions. What now?

Someone occupying a bit of land is often able to do something about other persons' proposed alterations of the situation overhead—but, beyond a small distance, not usually very much. Some of the things those other people could do to the space overhead matter to him. But how much, and why? Because concerns of this kind are unusual and the potential for action is normally very limited, one important part of the answer is that these matters will be negotiable. We just have to see what turns up and then try to sort it out, building from the preexisting interests of those concerned. Paramount among those interests, no doubt, will be the health of the persons below; this anchors questions about air rights in the rights of the landowners below (particularly their rights in their own bodies). In time, a history of mutually agreeable dispute

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

settlements will be formed, and that will provide a basis for the negotiations in question.

*C. Aesthetic issues*

In public, it is easy for anyone to do something that some or many others won't like, even though what is done does not physically impinge on those others. Unattractive people generate negative externalities as they go about in public: we dislike to look at them, yet we do nothing to earn their unpleasurable presences. Likewise, attractive people generate positive externalities quite liberally, without the rest of us having done anything to deserve this pleasure. These externalities are (usually) minor—but an ugly house or garden next door can constitute quite a substantial source of negative utility. Is our general principle of liberty to be understood to imply that we may not annoy our fellows by subjecting them to experiences they find aesthetically displeasing? Obviously, given the wide variation in tastes among human beings, this will have its difficulties. In general, we shall have to say that the principle does not have this implication. But, obviously, this rather strongly raises the question of just what our proclaimed ownership of self amounts to in these important contexts. May people bother us all they please with impunity? Surely not. But if not, then criteria need to be formulated for defining the legitimate limits on the bothersome activity. At some point, the bothered person may be moved to relocate, an option that is always available to a property owner (or occupant). But though available, it might also be very expensive. The question is: At what level of bother should we say that the botherer "compelled" the botheree to move?

Aesthetic issues shade off into health issues, of course. Noxious odors are unpleasant, but they are also quite likely to have bad effects on the lungs or other organs of those who smell them. The question is whether the aesthetic objections have moral weight *independently* of the health issues. Many of us have always disliked cigarette smoke, but it wasn't until the surgeon general's report came out that we nonsmokers got some freedom from the tyranny of smoke in public stores, hallways, and other public areas. Should we have been able to get redress or protection of this kind?

The case of noise pollution, as we might call it, is perhaps more pressing yet. Beyond some threshold, noises can damage the ear, and even beneath that threshold, they can annoy, sometimes enormously. What is the relevant natural baseline here? The old saw has it that my right to use my fist terminates at your nose. Does my right to use my voice terminate at your ears? Are we entitled to dead silence on the part of those we meet? Or are they entitled to make noise to their hearts' content? (The case with regard to speech, as such, is rather different. There, content is everything, and the main requirement is that what is heard is heard voluntarily, in the

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

sense of not *in*voluntarily. Usually we can avoid unwanted speech; the speaker who refuses to be put off is invading the intellectual space, not just the acoustic space, of his reluctant audience.)

Reciprocity will take care of some problems here. I can respond to your unwanted noises by making noises that you don't want to hear; reciprocal silence is preferable, or sounds that we both like. And if I can't respond, then what? A further source of assistance lies in the ownership of spaces. If I own the space into which you project your noise, I can build soundproof walls (perhaps), or withdraw far enough (if I own enough space) that you are now happily beyond sonic reach. We can wear earplugs, though, unfortunately, they eliminate both the unwanted noises and those we would really like to hear, and they can be uncomfortable and inconvenient.

We are entitled to nonviolence. But are we entitled, in general, to nonannoyance? We characterize our general rights as rights to freedom or liberty, which suggests the freedom to *do* as we please. Nonetheless, the point of characterizing this as a right is that all have it, and this implies a duty to respect the freedom of others, which, in turn, means that we may *not* just do whatever we please. We are not Robinson Crusoe, and rarely is there no one within vocal or visual (or olfactory) reach. We also differ from one another, enormously, and imposing rules that make sense to all is a challenge. The key is finding the right baselines from which appropriate negotiations may proceed. In part, those baselines can be identified using rights to spaces, such as buildings and land. That will solve some problems, allowing all parties to do as they please in terms of emitting noises or creating visual surfaces out of visual and aural reach of all potentially nonconsenting others. It will solve more problems as technology advances and as the command over resources of all relevant parties increases: for example, the development of soundproof walls and floors between adjacent parties in apartment buildings and condos considerably increases the scope for activities that might otherwise be troublesome. When neighbors cannot afford such things, however, they will have more difficulty, and their only options will be negotiated solutions that are less satisfactory. Some of the problems thus generated will require a distributive solution, as in R. B. Braithwaite's ground-breaking essay, where the trumpet-playing neighbor and the silence-loving neighbor divide the time in some ratio, giving optimal relative utility to each.[23]

### *D. Offense and opinions*

If we have some right not to be subjected to noise, ugliness, and the like, then what about our souls? Are we also protected from insult, or

[23] R. B. Braithwaite, *The Theory of Games as a Tool for the Moral Philosopher* (Cambridge: Cambridge University Press, 1954). Braithwaite was for a long time Professor of Moral Philosophy at Cambridge.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

the intrusion into our acoustic environs of unwanted opinions? Take, for instance, the case of offense: Are we allowed to insult and vilify the religious beliefs of others, in their presence? Suppose I claim that *B*'s religious beliefs are a conceptual mess—incoherent, obscure, inconsistent, and out of touch with anything remotely resembling evidence. Is that an insult? I might be able to illustrate just how his beliefs do have all those putatively undesirable properties. Is it insulting even to mention such shortcomings? There is a serious need to determine how rights—whose rights, over what—yield a reasonable solution to the problems that can be created by such situations. One obvious point is that no one owns the laws of logic, and no one owns, as we might put it, the truth. We do own our own ears and tongues, however, and we own various spaces. The latter fact enables us to decide, quite often, who is speaking "out of turn." In *A*'s house, *B* is an invited guest, and *A* sets the terms regarding what may or may not be said. But *A* does not determine what is true and what is false, nor what is good reasoning and what is not. Truth and good reasoning are not subject to private possession, to the exclusion of others, and, therefore, they are not things that it is sensible to regard as anyone's property. Henry Sheffer discovered the Sheffer stroke, but he did not thereby come to own it.[24]

Thus, we can say that insofar as people are interested in coming to know about some subject, they submit themselves to the rules of logic and the disciplines of inquiry. If we want to know whether *p*, then anyone with relevant evidence or reasoning can provide that evidence and reasoning, and the exclusion of persons in possession of such resources is prima facie irrational. But insofar as the point of a communication is sheer vilification or psychological pain, it is subject to the same arguments as all other attacks on possessions. We shall want to uphold a right not to be subjected to that kind of "communication"—with the usual caveat that it, or something close to it, may in fact be deserved on some occasions.

It is often said that people have a right to believe whatever they want. There is a sense in which that is clearly false, and another in which it is plausible. What is false is that we *can* "believe whatever we want"; we believe what seems to be true, and wanting to believe something else will get us nowhere. Nor is it true that we are *entitled* to our beliefs. Many of them are unjustified, and, in intellectual terms, we are not entitled to them. (In philosophy, it is often appropriate to say, "I may agree with what you say, but I deny your right to say it!") So the right in question is

[24] Professor Sheffer discovered that all of the standard operations in the propositional calculus (or truth-functional logic) can be defined in terms of the function that amounts to "not p and q," nowadays referred to as the 'NAND' operator, short for 'not both . . . and. . . .' In fact, Charles Sanders Peirce discovered this thirty years earlier, but did not publish it. Sheffer's "discovery" (which there is no reason to think he plagiarized from Peirce) was published in 1913. H. M. Sheffer, "A Set of Five Independent Postulates for Boolean Algebras, with Application to Logical Constants," *Transactions of the American Mathematical Society* 14 (1913): 481–88.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

moral, and not intellectual. Many beliefs have moral implications, and a person who propounds such beliefs while having only bad reasons (or no reason) to support them may indeed be accused of a moral shortcoming.

*E. Inheritance*

If I own something, I decide who gets it if I want to part with it. But what becomes of my property after my own death? Does ownership include the right to decide who will inherit? Western countries have, in general, said that it does, but have at the same time imposed various levels of estate taxes and death duties. Are those taxes infringements of rights that we should think we have?

All taxes may be such infringements, of course. Income taxes, property taxes, and all the others are imposed against the wills and, prima facie, the interests of many. The question here is whether inheritance is special in some way. Many have thought that it is, but in two opposite ways. Some think it obvious that inheritance is entirely illegitimate, since, after all, the dead, as such, can have no rights. Many others have thought it obvious that whatever else we may be able to do with our property, we should certainly be able to leave it to our children (for example). Indeed, many people work as hard as they do to accumulate property precisely in order to make their children better off than they themselves were. So who's right?

First, it is clear that the persons who make decisions about inheritance are alive: when I choose to leave something of mine to someone after I die, it is a living person who makes that choice. Others act as administrators, for example, and will be bound by agreements to carry out my instructions after my death. However, it might be argued that they should not feel so bound, on the ground that, after my death, I am no longer on the scene and therefore not a person whose will must be respected.

It could be argued, plausibly, that to be denied the right to direct the disposition of one's property after one's death is counterproductive, depriving society of an important incentive for individuals to produce more than they otherwise might. But although I believe this is a good argument, it is an indirect one. A direct argument would purport to show that it is part of the idea of ownership that one has this right. Is it?

The owner of $x$ decides what happens to $x$: he or she has veto power over uses of $x$. Now, all these uses are future uses, in the most relevant sense. Property is inherently enduring: instantaneous ownership makes no sense. On that ground alone, we should side with the pro-inheritance position, prima facie. Moreover, the "indirect" argument becomes a direct one when we appreciate the force of the point that all rights are rights to act, with rights of ownership being an identifiable subset of such rights. The act of handing property over to kin or to deserving art galleries or to hospitals in Africa, and so on indefinitely, is a straightforward extension of this general idea.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

Whether inheritance taxes and the like can be justified at all depends on whether taxes in general can be justified. All taxes infringe on rights, and to justify the imposition of taxes, one needs to demonstrate that the infringement is justified. If such a justification can be found for other taxes, then it might also be found for inheritance taxes. I will not address the matter further here, except to note that finding such justifications is not easy.

### *F. Public property*

I noted at the outset the distinction between the "commons" in the sense of what is not owned at all, and the "commons" in the sense of property owned by "the public." The difference is that in the former case, there are no rules governing the commons, whereas in the latter, the rules are set by the public, somehow. But how?

When the sovereign or the legislature lays down rules about the use of "its" lands, minerals, or whatever, is it making law ex nihilo? Is it just asserting the (perhaps altogether arbitrary) will of the government? Or if not, then what is going on here?

Moreover, I have referred just now to "the public," but, in fact, land is often claimed by a great number of different publics—villages, cities, provinces, nation-states, and many nonpolitical organizations. If we talk of what is owned by "the public," then, we are either idealizing or generalizing. Generalizations are rather unsafe in view of the enormous differences among the numerous publics that, in fact, claim ownership of this or that bit of geography. Our generalization would have to be very thin to cover all cases. The safest generalization is the one that does no more than define the notion of property for publics. That definition is derived from our general definition: to own is to have the right to exclude others from use of the owned item. In the case where the relevant public is relatively small, so that it is one group among others, then the members of the group, as collective owners, would have the right to exclude persons from other groups, though this does not often happen any more at local levels.

But if we say that the world is owned by everyone in common, there would seem to be no one left to exclude, so where do we go from there? The answer is that we would have to distinguish between the individual acting privately, as an individual, and the individual acting in his role as a citizen or member of the public. In the latter capacity, we can pass legislation to prohibit private actions of various kinds by all. For example, we can collectively decree that land may not be privatized—however much we might, as individuals, want to possess this or that piece of land to the exclusion of others. Alternatively, we might collectively decree that land *may* be taken into private possession, with rules regarding how that is to be done, limits to the amounts or kinds of land or mineral resources that may be possessed by any one individual, and so on. Whether it is

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

rational to go in for such collective ownership depends on whether the returns to collectivization are higher than people could get acting independently. In many contexts, we may be sure, the returns are, on the contrary, far lower, as in China's agricultural regime under Mao, which led to massive starvation. Possibly, the returns for collectively owned national parks are more satisfactory.

In saying this, I do not intend a retraction of the individualist assumptions that underlie this essay. When we are members of a relevant collective, it remains true that the individuals within the collective have the relevant rights, and they must decide whether and in what ways they will support any kind of "collective" undertakings. The point I want to make is merely that we could have good reason to engage in some collective activity. This is activity where we can recognize the benefit of having general rules for the use of collectively owned items; the benefit associated with these rules gives us reason to support them.

Recognition of the wide range of possible patterns of exclusion prompts us to distinguish a wider and narrower sense of 'public.' Legislation, including moral legislation, is inherently public: it concerns rules for all (that is, for all persons that lie within the relevant jurisdiction, morality having as its basic domain everyone there is). In a narrower sense, however, we will distinguish between items owned by the public and items owned by individuals as such. The former might include public parks, government buildings, Social Security funds, and so on, while the latter will include privately owned land and buildings, privately acting firms, and so on. Then the question is: Should there be anything in the former category? The Stalinist will say that everything should be in it, with nothing left for individuals; the anarcho-capitalist might say that nothing should be in it, with everything to be owned by individuals or privately acting groups. In all but universal practice, though, there is a mix of the two types, along with complex rules identifying restrictions on each kind of ownership. Which is best depends on careful analysis. I incline toward the anarcho-capitalist end of the spectrum. But I do not think this can be settled *a priori.*

The economist Randall Holcombe observes that "[s]peculation on the nature of anarcho-capitalism has typically proceeded under the assumption that all property in anarcho-capitalism would be privately owned."[25] But he goes on to argue that the assumption "is not justified because property can come to be owned in common . . . and libertarian ethics would not allow the private appropriation of such common property."[26] As a plausible example, he observes that "[t]he ocean is available in common to all men, to use Locke's language, but crossing it in a ship does

[25] Randall Holcombe, "Common Property in Anarcho-Capitalism," *Journal of Libertarian Studies* 19, no. 2 (Spring 2005): 3–26. Holcombe is DeVoe Moore Professor of Economics at Florida State University.

[26] Ibid., 3.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

not cause that person to become the owner of the ocean, and others could legitimately come later and use the same ocean."[27] The example is well chosen: it illustrates the plausibility of the idea of common property, and it also raises, even in this ideally chosen case, the point that nation-states do privatize to some extent. States will declare that waters lying within specified distances of their shorelines lie within their territorial domain, and might, on some occasions prohibit occupation of those waters by foreign ships. The same is true of air spaces. In addition, of course, ponds, small lakes, and even portions of streams have been and are privately owned by individuals, not to mention by political entities below the level of nation-states. The question is, then, why we might want to retain a category of "commons"—even if we accepted, as Holcombe does, the arguments for anarcho-capitalism.

What is the rationale for retaining any public property? Or is there one? I believe there are two plausible answers to this, which work in tandem. On the one hand, in most communities there are areas that traditionally have been in the "commons" category, and it is arguable that privatization would violate the rights of the people who live in those areas and use the common property in question in ways that respect the similar rights of fellow users. On the other hand, it can be useful to have common property. Holcombe points to the example of paths and roads in a community that has considerable amounts of private property. These paths and roads are used by people generally, to get from one private place to another. "Simply traveling over a piece of land is not sufficient to say one has combined his labor with the land and therefore is the owner. The paths became thoroughfares, and became valuable, because of their common use by many people. Thus, they are not owned by a single owner but are owned in common."[28] The example is persuasive. It is in the interest of private businesses that members of the public generally be able to travel unimpeded to their places of business. Similarly, private home owners will want friends, guests, sharers of goals being pursued by several persons, and so on, to be able to arrive at their doors without substantial cost.

In turn, as with the ocean, business owners and private parties would prefer, if possible, that thieves and murderers be excluded from these public paths and roads. And in cases where there is considerable traffic, there might need to be rules of the road, even for pedestrians. Additionally, there may be problems of maintenance. Paths through woods and fields are, to an extent, self-maintained: frequent walking on the same path assures that it won't be overgrown. But it may be that travel is promoted by the installation of hard surfaces, and then what? Schemes for cost-sharing will need to arise, and these have typically taken the form of taxation, with all its attendant problems. Holcombe does not discuss

[27] Ibid., 5.
[28] Ibid., 8.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

"the interesting policy question of how this common property would be controlled and maintained."[29] What stands out is that acceptance of the general case for private property does not preclude recognition of some extent of common property as well. Indeed, we might view any particular commons as the joint property of a set of individuals, membership in the set being determined mainly by occupation of adjacent areas, with guest privileges, as it were, accorded to visitors from beyond the borders (however imprecisely defined) of that community.

Freyfogle notes that the doctrine of liberty led to arguments for both opening and closing land to private ownership. "Capitalist tendencies, then, pushed in both directions: keeping lands open and closing them."[30] He is correct, but the moral is not that the idea of liberty is either wrong or incoherent. Rather, it is that our interests in having open access to land conflict with other interests in using land that require exclusion, and this creates a need for negotiation among parties pursuing each of these interests. If those who hunt and forage in a certain area have it all their way, then those who would build and manufacture in that area cannot have it all their way, and vice versa. Property rights always entail the right to exclude, but who is excluded and from what depends on what the occupants want to do on the lands (or with the other things) in question. However, it is never true that the whole human race, going indefinitely into the future, has claims to be regarded. The homestead idea continues to be significant: it is the loose set of people already in the area who are excluded by the builders of markets and factories, and the latter who are excluded if the former's interests prevail. If, as we may suppose is the usual case, the hunters and gatherers came first, then those who would settle and produce need to clear it with the others—but they don't need to compensate the human race in general.

One plausible way for builders to effect (at least partial) compensation for previous occupants or users of the land would be for the builders to give up their right to hunt and forage in exchange for the others giving up their right to do so on this particular piece of land. Another way, soon available when manufacturing and farming increase the "social dividend," is for the builders/homesteaders to buy the right to the land from the others, though that is not so easy to do when the group who hunt and forage is indefinite and sizable, as with the American natives. In principle, there should be a point at which the hunters and gatherers are exactly compensated, we may surmise. Moreover, we can argue, as capitalists have for so many centuries, that growth in farming and manufacturing, and entrance into the exchange economy, will ultimately benefit the hunters and gatherers far more than enough to "compensate" them. Eventually, specified areas will be set aside for hunting and other wilderness

[29] Ibid., 3–4.
[30] Freyfogle, *On Private Property*, 55.

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

activities, not to be privatized further. But of course such areas *are* privatized in the sense that they are devoted to the interests of a specific group (hunters, say) to the exclusion of would-be individual privatizers.

Are there plausible micro rules for the use of common property? Surely there are. In the first place, as I have noted here, common property is used for specified purposes, and thus any use by an individual that tends to render the item unusable for those purposes, or significantly more difficult to use, is ipso facto to be regarded as a "misuse." Those who misuse common property are subject to requirements to restore the area to the status quo prior to their misuse of it, and perhaps to penalties for failure to make the appropriate amends. In the second place, of course, the general moral rule of nonharm always applies: we are not to molest others on the public roads, for example. More specifically, we should do what best enables each user to use the common property in the way he or she wishes, within the constraints of common use. (Thus, on the highways, people should be able to go at varying speeds, in a manner compatible with safety and comfort.)

### *G. Intellectual property*

The basis of modern economic civilization is the vast fund of ideas from innumerable innovators—engineers, entrepreneurs, designers—who enable us to produce so much more of what we want with so much less labor, or who make our labor so much more interesting. In what sense, if any, should we say that the discoverer or engineer or architect, say, who comes up with a good idea "owns" it? In principle, the answer is easy enough. Just as the agricultural worker enables the fruit to emerge, so the entrepreneur enables us to enjoy a well-built home or car, and so on. Assembly-line workers do not copyright their products; how do intellectual workers differ? Presumably, they differ in this way at least: they produce something that no one else does, or perhaps even could. They also produce it before anyone else.

In part, this suggests the homesteading principle: I thought of it first, so it's mine. Yet if someone else thinks of it second, and is ready to impart it to others at a lower price than I am, why should he not be able to do so? Is that anything like his stealing my car to resell it at a bargain price? Surely not. The problem is that thoughts are universals. A thought is *A*'s insofar as it is in *A*'s mind, or originated by *A*. The very same thought can be in the minds of indefinitely many others, and can even be originated by many others. This makes it difficult to establish ownership rights on a close analogy with rights to solid property.

Thoughts have economic value only if they are imparted to others, or used to produce things that are of interest to others. In the latter case, patent rights are relevant and would presumably absorb the costs of design and research. What about the former case, though? If we copyright ideas, does that mean that others are required to stop thinking about

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

those things? Or to pay a price if they do? This would clearly be an unsatisfactory conclusion, since the origination of these ideas takes place in individual heads, taking nothing from others.

A distinction has to be made between ideas, as such, and writings, as such. In the case of writings, such as books and articles, other people are overwhelmingly unlikely to write just the same things, beyond a few words. Instead, original thinkers need to publish, and if they accuse others of stealing their ideas, they must provide evidence that the others have done so. Original writers may establish copyright, and then the question is who will prosecute (and how) if their works are replicated by others without permission. If it is easy to replicate others' work, and difficult to detect when people replicate others' work without permission, the question of where we go from here is not an easy one to answer in practice.

I do not propose to discuss the matter further here. Rather, the general point is that here, again, we have plausible claims by first-comers against other plausible claims by idea-consumers, such as readers, the scientifically curious, and those interested in making practical use of others' ideas. The search is on for an optimal mix, taking into account advancing replicative technology, the march of knowledge, and consumer interests. Even so, however, the same old principles—principles of first occupancy or use, and defense of self against incursion—are what ground the actions of those who wish to defend intellectual property rights.

## XV. Conclusion

The classic theory of property has it that the person who first undertakes use of some hitherto unowned bit of the world should thereby be credited with a right to use it, and that others are to be excluded from activities that prevent the first users from realizing their ends. But this right is to be universalized, and thus the first users, likewise, are not to use their property in ways that undermine the activities of others, who are using other things in other ways.

A distinction between possession and ownership is essential, then. First possession is to be protected, and the category of ownership is precisely that of reasonably protected possession. Possessors possess things in order to use them, for pursuing their various purposes. And the purposes are wide-ranging indeed. Thus, there are potential conflicts, and these are to be resolved by negotiation from the baseline of first occupancy or use (these being really the same, in the end), together with the specific profiles of proposed new uses by those concerned. In turn, third parties are not to be harmed in the process, and we may also describe this prohibition on harm in terms of property, attributing to each person ownership of the body and mind possessed by that individual by nature.

Thus, we need not deny that, in detail, the rules of property will change over time, given emerging trends in technology, demographics, and con-

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press

sumer interests. But the changes in rules called for by these emerging trends would make basic principles more precise, rather than discarding them and starting over; so far as I can see, the basic principles would remain intact. First possessors have rights to what they possess; those who come later must negotiate further uses of what is already owned. Ownership is always the right to exclude, but the patterns of exclusion will be dictated by the varying interests and situations of the negotiating parties.

The proprietarian outlook has what seems to me to be an enormous advantage: it keeps the individual intact, never subordinating anyone to the "general good," except in the sense that the general good is, indeed, the general liberty. Maximization of the general liberty has to proceed by optimization, and it is easy to make the mistake, as some advocates of property rights do, of supposing that people have rights to specific things that entail what amounts to a setting-aside of the rights of others. But rights are not to be set aside; rather, they are to be refined by negotiation against a background of basic rights, established by initial possession. That the result is a society that works better for all is, I think, an altogether plausible thesis.

*Philosophy, University of Waterloo*

https://doi.org/10.1017/S0265052509990057 Published online by Cambridge University Press