

By the same author

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The Philosophical Foundations of Property Rights

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For Lynne, to whom I will always belong

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study *Property Rights*, has provided a lucid and systematic treatment of the area. James O. Grunebaum, in his very recent work *Private Ownership*, has argued effectively against the private ownership of land and resources. Macpherson, Becker and Grunebaum all ultimately find in favour of some form of property rights, but conclude by reinterpreting the term or qualifying its rightful application so as to limit, to some extent, the use of private property. This brief study is the result of some dissatisfaction with the recent treatment of property rights by such authors, and the felt need to scrutinise the bedrock of economic libertarianism.

Preface

At this historical conjuncture, economic libertarianism is the subject of a profound rebirth of interest. The governments of Britain and the United States of America, apparently consistent with espousing the values of self-reliance, outwardly reject any notion of the interference in private property or the fundamental redistribution of privately owned wealth by the state. It is not by chance that 'anarcho-capitalism' is daily gaining adherents. It is not by chance that Robert Nozick is one of the most important figures in contemporary social and political thought.

What economic libertarianism claims to oppose is the state—an ironic claim when western governments are presently increasing military expenditure, proclaiming the need for more law and order, and demanding a larger police force with more extensive powers to enforce the law. Even Nozick does not reject the state. He rejects the welfare state, yes; but he actually requires a state, albeit a minimal one. Why? In order to protect private property, of course. Property is again on the agenda. Property is again one of the most important issues of the day. It is, therefore, *apropos* that an analysis be undertaken to examine the adequacy of those arguments purporting to justify rights in property.

Such is the task of this study. Fortunately, this task has been made considerably easier than it would otherwise have been by the comparatively recent publication of a number of works on the subject. C. B. Macpherson has edited a collection of essays germane to this enquiry in his book entitled *Property: Mainstream and Critical Positions*. Lawrence C. Becker, in his

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1 Introduction

Formerly, other men's labour was used simply by violence, by slavery, in our time it is being done by means of property. In our time property is the root of all evil and of the suffering of men who possess it, or are without it, and of all the remorse of conscience of those who misuse it, and of the danger of collision between those who have and those who have it not.

Property is the root of all evil; and, at the same time, property is that toward all the activity of our modern world is directed, and that which directs the activity of the world. States and governments intrigue, make wars, for the sake of property, for the possession of the banks of the Rhine, of land in Africa, China, the Balkan Peninsula. Bankers, merchants, manufacturers, landowners, labour, use cunning, torment themselves, torment others, for the sake of property; government functionaries, tradesmen, landlords, struggle, deceive, oppress, suffer, for the sake of property; courts of justice and police protect property; penal servitude, prisons, all the terrors of so-called punishments—all is done for the sake of property.

Property is the root of all evil; and now all the world is busy with the distribution and protection of wealth.

Leo Tolstoy

It is nearly 150 years since Pierre-Joseph Proudhon asked his famous question 'What is property?', and gave the paradoxical reply 'It is robbery.' The reply strikes one immediately as being paradoxical because robbery presupposes the institution of property. This paradox has led many, including Karl Marx, to dismiss Proudhon out of hand. Besides, what a question! We all know what property is, don't we? Property is as familiar to us as our own skin, isn't it? Or so we seem to believe.

But if, instead, one were to ask 'Can one rightfully own property?', then the question is slightly more difficult to answer—if for no other reason than the obscurity of the

question. What does it actually mean? Does it mean, for example, 'Are there recognised procedures for acquiring property?' If so, we can unhesitatingly answer 'Yes'. We are all familiar with the rules for acquiring property such that no laws are broken. If this is all the question means, then it presents few difficulties. But what if the question 'Can one rightfully own property?' were taken to mean something else? What if the question were tacitly assumed to suggest a deeper, more philosophical meaning? What if it implied something like: 'Are the recognised procedures for acquiring property themselves rightful?' How would one begin to approach such a question? This study is an examination of the most seminal and persuasive attempts to provide an answer to this latter question—attempts which try to answer it in the affirmative in such a way that property rights can be seen to demand moral compliance and to be derived from morally compelling foundations.²

Now, we are all of the opinion that we do actually own property. Surely this could not be so unless property could be rightfully acquired? However, we must proceed cautiously for we do not wish to give so quick a response as to overlook potentially interesting aspects of the problem. Certainly, we are recognised by others to own things. Certainly, it is true that we are generally thought to own them rightfully. And it is certainly the case that if anyone were to take those things from us without our explicit consent, then there are police forces and, as a last resort, armies to ensure that they are returned, and that those who took them receive due punishment. The question is, though, given all this, is it right to punish those people, and is it right to prevent them from using those things which we consider to be our property?

Given that we do generally accept that we own property, and given that it might be the case that we do not own it rightfully, we require some method of referring to this 'property'. I propose to call that which is ordinarily considered to be property and, as a result, is protected by the threat of coercion: 'property *de facto*'. 'Property' is property *de facto* in this special sense irrespective of whether or not it is rightfully owned. The question which this study is concerned to answer can now be formulated as: 'Is property *de facto* owned

rightfully?' Were the answer 'Yes', then the property in question would have attained a certain status—the status of being rightfully owned. Such property I shall call: 'property *de jure*'. As a result, the question motivating this analysis could be posed alternatively as: 'Is there any such thing as property *de jure*?' Having made this distinction, I can now begin to define the area of this enquiry. I shall take no interest in the purely descriptive exploration of property *de facto*. Property *de jure*, which in the special sense in which I am using the term is essentially a normative concept, will be the object of my concern.

One short response with the question 'Is there any such thing as property *de jure*?' must be shown right at the outset to be unsatisfactory. It is the reply that goes: 'Of course there is property *de jure*; I have acquired this object legally, therefore I rightfully own it.' What is unsatisfactory about such a response is that it takes for granted the assumption that the laws are themselves rightful. Of course, there is a sense in which they must be—a sense in which it is a truism to say that the laws are rightful. The sense I have in mind is such that the rightfulness of the laws is taken to be analytically true. However, there is a meaningful way in which the rightfulness of the laws can be questioned—it is to ask questions about the moral acceptability of the laws. Now, the laws might be morally just, but what if they are not? My property may well be sanctioned by the law, but are not some laws unjust? Are not some laws morally opprobrious? Are we not inclined to say that some laws are, or some past laws were, just plain wrongful? If we are tempted to answer 'Yes' to any of these questions, then we must accept as a consequence that the interrogation of the rightfulness of lawfully held property is a meaningful activity. Hence, the short reply is inadequate. And if we are to feel morally obliged to respect the distribution of wealth in our society, then property *de jure* must be *shown* to be a valid concept which is legitimately derived from acceptable premises. My task in this study is to analyse those arguments which have attempted to do just that—those arguments that have attempted to prove that the notion of property rights can justifiably be applied to certain things, and that rights in property can be shown to follow logically from first principles

which we all accept.³ Such arguments purport to demonstrate that we are morally obliged to respect certain claims to property.

But before I can proceed with this investigation into property *de jure*, it is necessary to indicate in general what it is that talk of rights involves. It is also necessary to give some indication of what property is taken to be by those philosophers whom I shall discuss. Lawrence C. Becker lists ten elements in the root idea of a right which require full specification⁴ if the right is to be at all understood. If there is a right, then there must be (a) a right-holder. If the right is to be of any value, there must be those who respect the right— (b) right-regarders. Both need to be ascertained. It is also necessary to establish what (c) the relation between right-holders and right-regarders in general is. One needs to be clear about (d) what it is that the right-holder is 'owed'. Furthermore, as a right may not in all circumstances be binding or in force, (e) the conditions under which the right holds need to be specified. One also requires to know (f) what would involve a violation of the right. One would need to be able to answer the question: (g) when is it excusable for the right to be violated? And any inexcusable violation of the right requires the situation to be remedied. Not only would one have to know (h) what the appropriate remedies should be, one also has to know (i) what are acceptable methods for exacting such remedies—and who it is (j) who can justifiably exact them. Each of these details has to be filled in if any right is to be thoroughly comprehended. It is quite remarkable that philosophical discussions of property rights have rarely satisfied the need for such specification. Had the defenders of property been precise in their explication of what it means to have a right in property, the actual size of the task involved in providing a satisfactory foundation of that right might have been realised. To justify property rights adequately, one would need to give compelling reasons for what was specified for each of the ten elements.

With regard to property as such, the term 'property' covers a host of different things. However, there is a particular conception of property which is usually what philosophers seek to defend or attack. A. M. Honoré refers to this as 'full

liberal ownership', and he regards the following incidents as the most common ingredients in it:

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven incidents.⁵

Honoré does not regard the presence of each individual incident to be a necessary condition for ownership. His opinion of what ownership is appears to be rather like Wittgenstein's view of games and family resemblances.⁶ Accepting such a view means that the various different kinds of property could be said to form a family. However, for Honoré, full liberal ownership contains all of these incidents.

Two of these incidents (the prohibition of harmful use, and liability to execution) lead Honoré to assume that ownership is not essentially a claim-right. Using what one owns in a way likely to cause harm to others can lead to the legitimate confiscation of the good owned. Similarly, one may be deprived of the good because of outstanding debts, taxes, etc. Honoré takes these incidents to be inherent in the full liberal conception of ownership, and they are evidently not rights. Consequently, ownership is thought to be other than merely a system of claim-rights. I find it difficult to agree with Honoré on this matter. I would agree that the other nine incidents are present in the full liberal conception of ownership, but I do not accept that the prohibition of harmful use or the liability to execution are part of what it means to own a good. They are social restrictions in modern liberal societies on ownership. They are limits set by society upon ownership. They are conditions set upon our use of the things we own. They are not necessary or sufficient conditions of the concept 'ownership'. That there are prohibitions of harmful use, that there is a liability to execution, merely shows that ownership is not unrestricted in modern liberal societies.

Alan Ryan also doubts that the prohibition of harmful use is part of what it means to own a good. However, he insists that the liability to execution *is* part of our conception of ownership:

I am prohibited from using anyone's knife to stab you in the chest, so many harmful uses are prohibited without reference to ownership, whereas liability to execution is very much part of ownership. What attaches to ownership is less the prohibition of harmful use than liability for injuries *caused* by my property in the absence of human criminality—if a slate blows off the roof of my house and strikes you it is to me that you will look for compensation. One might say that the price of sovereignty over one's possessions is responsibility for their misdeeds.⁷

But such a liability is not part of the concept 'ownership'—it is a responsibility incurred by ownership. It arises because I (the owner) am deemed responsible for the maintenance of the house. But we could easily make those in possession of it (e.g. tenants), rather than the owner, responsible. So, this case is not relevantly different to my driving a car incurring a responsibility on my part to the dependents of anyone I should happen to kill while carelessly driving that car. And that is true of *anyone's* car that I happen to be driving. Just like the case of stabbing someone with anyone's knife I happen to have borrowed, it is not the fact of ownership that is necessarily significant. Moreover, if I am in possession of a vehicle (rather than owning it—for example, if I have taken it without its owner's consent, or if like the white bicycles of Amsterdam it is not owned by anyone) and I do not take the trouble to ensure that it is safe, then I am responsible regardless of the question of property. Consequently, any liability is no more part of ownership than is the prohibition of harmful use.

It might be argued that without liability to execution then there would be no possibility of mortgaging real estate. But that does not mean that liability to execution is part of the concept 'property'. If I mortgage a piece of real estate and I do not meet my responsibilities, then I forfeit that property. But I can place myself in all kinds of debts which incur all kinds of liabilities without reference to property. For example, by failing to meet certain responsibilities I can forfeit someone's friendship. But his or her friendship is not something that I *own*: I cannot sell it, or do many of the things with it that I can do with my own property. What is more, the fact that a 'right' can be forfeited (which is in effect what the liability to execution means) does not entail that it is not a right. Were Honoré correct to argue that the full liberal conception of

ownership were not a right because it could be forfeited, then any 'right' that could be forfeited would not be a right. And that is surely false.

In fact, Honoré himself admits that there is a sense of 'ownership' (he uses the phrase 'absolute ownership') which emphasises the exemption of ownership from social control. Of this sense, he writes:

... ownership has never been absolute. Even in the most individualistic ages of Rome and the United States, it has had a social aspect. This has usually been expressed in such incidents of ownership as the prohibition of harmful use, liability to execution for debt, to taxation and to expropriation by the public authority.⁸

But to admit that ownership has never in fact been absolute is to admit that the pristine concept 'ownership' lacks the qualifications concerning prohibition of harmful use and liability to execution. As it is these two incidents which lead Honoré to assume that 'ownership' is not merely a right, then Honoré's assumption must be brought in question.⁹

I shall refer to property as involving all the remaining nine incidents which Honoré adumbrates. I shall do so for two reasons: first, we have seen that there is cause to regard liability to execution for debt and the prohibition against harmful use as being restrictions on property, rather than elements of the actual concept; second, this enquiry concerns attempts to justify property *rights*. In which case, we need to be able to examine property rights irrespective of limitations which might be placed upon those rights. And the prohibition of harmful use and the liability to execution are not *rights*. Furthermore, although there are conceptions of property rights in some societies which do not subscribe to all nine incidents, the arguments purporting to create rights in property which are analysed in this study do appear (or have been taken) to have as their aim the justification of the full liberal conception of private property: property which can be possessed, used, managed, employed as a source of income, destroyed or alienated, held in security, transferred, held without a temporal limitation, and recovered when its lease expires or lapses. And some of the arguments in question would seem to attempt to justify property rights which are not,

or are no longer, obviously subject to the two restrictions mentioned by Honoré. Therefore, throughout the remainder of this enquiry, unless otherwise stated, I shall use the term 'property' to mean 'the ownership of a good such that the nine incidents specified above are deemed to be present'.

But before I can begin this analysis of certain arguments purporting to validate property rights, the extent of this enquiry must be further delimited. Many philosophers have attempted to justify claims¹⁰ to private property by recourse to the decisions of the sovereign¹¹ or the community as a whole.¹² In such cases, property rights must be considered to be parasitic upon the legitimacy of the sovereign authority or, at the very least, its right to promulgate property laws. I shall not consider arguments such as these because the problem shifts from an analysis of property *de jure* to that of assessing the right of the sovereign body over individuals. In such cases, the 'validation' of property rights is indirect; it is the outcome of prior arguments concerning authority. Property rights, in such a situation, stand or fall with the justification of the authority which promulgates them. Furthermore, a discussion of those philosophical arguments which purport to establish from first principles the validity of certain forms of authority would take us a long way from a discussion of property rights. Such an enquiry must be left for another time.

The arguments which I shall consider do not revolve around the authority of the sovereign, nor do they take the community as a whole as their starting point. If anything, the legitimacy of the sovereign is, in such arguments, thought to derive from the need to protect valid property rights. In fact, the arguments which I shall focus upon often have the authority of the sovereign as their end point. Moreover, they have an exceedingly long history: forerunners of the arguments which I shall consider were discussed by the Romans. For example, book II of Cicero's *De Officiis*

contains a long and bitter condemnation of agrarian laws, property taxes, confiscations, laws to abolish debts, and all legislation which tends to equalize property. Cicero condemns these things in words which historians of political thought seem to have overlooked, and which anticipate one of

the popular dogmas of modern political theory: he says that the state ought not to interfere with private property because the state was founded principally for the purpose of protecting the property of the individual.¹³

This present enquiry will mainly be confined to an examination of those arguments which try to derive property rights from the nature or predicament of humanity prior (either logically or chronologically) to the obligations of civil society. For most of the philosophers who have expounded such arguments, civil society is conceived of as primarily a social arrangement set up in such a way as to preserve existing rights in property. Such political philosophies as are thereby produced regard property as the central issue. Because of this, the arguments for property rights in these philosophical systems will be the ones assessed. However, I shall add two arguments to my list which do not strictly adhere to this criterion of inclusion — the arguments offered by David Hume and T. H. Green. These arguments will be analysed because of their intrinsic interest, their common appeal and the contribution they make to the attempt to demonstrate that property rights are morally legitimate.

Quite simply, I shall examine the most *prima facie* cogent arguments which purport to establish the philosophical foundations of private property. But I shall do so in the context of the philosophical systems in which they are situated. For example, the attempt to derive property rights from personality will be examined in the philosophical system in which it is most favourably developed—that of Hegel. The reason for adopting this approach (rather than considering the arguments in isolation) is that if the arguments are sufficiently compelling on their own, then they should stand out from the philosophy in which they are embedded in such a way as to demonstrate a lack of necessary support from the rest of the system. In which case, they should not suffer adversely from being associated with a particular philosopher. If, on the contrary, they require the rest of the philosophical system for support, then it will be present. Therefore, the analysis of the various arguments for property rights which I shall consider will take place in a way that allows those arguments the greatest chance of being effective.

I shall commence with the attempt to derive property rights from human labour. The most famous and thorough exponent of this argument is John Locke. It is, consequently, his treatment which I shall analyse. The second argument which I shall be concerned with is the derivation from desert, which owes its origin to John Stuart Mill, and has recently been further developed by Lawrence C. Becker. Next, I shall consider the derivation from political liberty, which has been associated with the influential work of Robert Nozick. The derivation from utility as espoused by Jeremy Bentham will be fifth on my list, followed by the derivation from efficiency, which is associated with economists such as Harold Demsetz. Next is the derivation from first occupancy. The most important philosopher who sets considerable store by this argument is Immanuel Kant. After travelling through Hegel's derivation from personality, I shall arrive at T. H. Green's derivation from moral development. This will be followed by the derivation from human nature—an argument made famous by Hume. This will be the final argument which I shall consider. And having assessed these arguments, I shall have analysed what have traditionally been the most famous, influential and cogent attempts to locate valid philosophical underpinnings for rights in private property. I should then be in a position to draw certain general conclusions about property rights—conclusions which have significant ramifications for societies based on the institution of private property. But before I can reach any such conclusions, I must examine the philosophical arguments which have been propounded in favour of property rights, and it is Locke's concern with labour with which I shall begin.

NOTES

1. Pierre-Joseph Proudhon, *What is Property? An Enquiry into the Principle of Right and of Government*, trans. Benjamin R. Tucker (New York: Dover, 1970), p. 11.
2. It should be noted that this study is concerned with private property and not with public or common property.
3. James Grunebaum, in his analysis of property, adopts what seems to me to be a totally acceptable methodological approach. If one wishes to

justify some form of ownership, then one cannot just presuppose ownership. But this is precisely what Grunebaum does. As he writes: 'Since the purpose of this work is to give a moral justification of a specific form of ownership . . . , the possibility that no specific form of ownership is justifiable is a possibility not to be taken seriously.' James O. Grunebaum, *Private Ownership* (London: Routledge & Kegan Paul, 1987), p. 24. And Grunebaum makes this appear plausible by so defining ownership that it is hard to conceive of a social situation without ownership. With ownership thus smuggled in at the beginning, then the only question which remains is 'What form of ownership ought we to prefer?' 'Should ownership be recognised?' is a question which is ruled out by definition. Alan Ryan is surely right to object: 'It has been suggested that it makes no sense to ask whether ownership ought to be recognised; if ownership is defined as *all* relations between persons with respect to things, then there is something to be said for the view that all societies must have some form of ownership, and the only question is what sort of ownership they ought to recognise. But it is an exaggeration. Persons could relate to one another with respect to things without ownership entering into the matter. The hunters who allow the man who kills the beast they chase to take the first piece of meat from it neither claim ownership of the beast for themselves nor confer it on the successful hunter. It is analytically more sensible to distinguish claims made to ownership or on the basis of ownership from all other claims on things.' Alan Ryan, *Property* (Milton Keynes: Open University Press, 1987), pp. 54–5.

4. See Lawrence C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge and Kegan Paul, 1977), pp. 9–11.
5. A. M. Honoré, 'Ownership', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961), p. 113.
6. Wittgenstein writes: 'Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don't say: "There *must* be something common, or they would not be called "games"—but *look and see* whether there is anything in common at all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. . . . We see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail. . . . I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: "games" form a family.' Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Oxford: Basil Blackwell, 1974), pp. 31–2.
7. Ryan, *op. cit.*, p. 54.
8. Honoré, *op. cit.*, pp. 144–5.
9. C. B. Macpherson is quite adamant that 'property' concerns rights: 'In common usage, property is things; in law and in the writers [on

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philosophical justifications of property], property is not things but rights, rights in or to things.' C. B. Macpherson, 'The Meaning of Property', in *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978), p. 2. That this is so becomes obvious when one considers seventeenth-century property: '... there were good reasons then for treating property as the right not the thing. In the first place, the great bulk of property was then property in land, and a man's property in a piece of land was generally limited to certain uses of it and was often not freely disposable. Different people might have different rights in the same piece of land, and by law or manorial custom many of those rights were not fully disposable by the current owner of them either by sale or bequest. The property he had was obviously some right in the land, not the land itself.' *Ibid.*, p. 7.

10. W. N. Hohfeld uses the term 'claim' to specify a single meaning of 'right': '... the word "right" is used generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power or immunity. In its narrowest sense, however, the term is used as the correlative of duty; and, to convey this meaning, the synonym "claim" seems the best.' Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. with an intro. by Walter Wheeler Cook (New Haven: Yale University Press, 1966), p. 71. I shall employ the term 'claim-right' to refer to what Hohfeld calls claims so as not to confuse Hohfeld's specific sense of 'right' with ordinary (non-legal) claims.
11. For example, though considering it unquestionable that the sovereign will protect his or her subjects' property, Hobbes considers property to be legitimate because of the sovereign's power: '... the introduction of *propriety* is an effect of commonwealth, which can do nothing but by the person that represents it, it is the act only of the sovereign; and consisteth in the laws, which none can make that have not the sovereign power. ...' Thomas Hobbes, *Leviathan* (London: Fontana, 1962), pp. 231-2.
12. Rousseau is one example of a philosopher who believes in the corporate state as the ultimate source of legitimate claims: 'In taking over the goods of individuals, the community ... assures them legitimate possession, and changes usurpation into a true right and enjoyment into proprietorship.' Jean-Jacques Rousseau, 'The Social Contract', in *The Social Contract and Discourses*, trans. and with an intro. by G. D. H. Cole (London: Dent, 1973), p. 180.
13. Richard Schlatter, *Private Property: The History of an Idea* (London: George Allen and Unwin, 1951), p. 25.

2 The Derivation from Labour

The great and chief end ... of men uniting into commonwealths, and uniting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting.

John Locke

That one has the right to the produce of one's labour is probably the most intuitively obvious basis for claiming the rightful existence of private property. The most famous attempt to present this intuition in the form of a philosophical argument is found in John Locke's *Second Treatise of Government*—a work which deserves close study if for no better reason than that it is adduced as a foundation of and a justification for the political system of the United States of America. And as the sanctity of private property is often presupposed in the writings of American political theorists (for example, Nozick's *Anarchy, State and Utopia*), then any study of the philosophical foundations of property rights would be seriously incomplete without due mention being accorded to Locke.

It is tempting to regard Locke's discussion of property as occupying a salient position within his political philosophy. As C. B. Macpherson points out: 'Some notable modern writers have inferred, from the central place Locke gave to property rights, that Locke's whole theory of limited and conditional government was essentially a defense of property.'¹ Locke is quite explicit in claiming that the preservation of property is the end of government.² What is most interesting about Locke is his belief that the rightful ownership of private property

arises prior to the establishment of any government. Governments are established, in part at least, to preserve this property. How, then, does this property arise?

We have seen that some property rights are thought by Locke to have arisen prior to the setting up of a civil society. Such a condition is called by Locke, as was common in seventeenth-century political philosophy, the state of nature. In such a state, 'all the Fruits' the earth 'naturally produces, and beasts it feeds, belong to mankind in common'.³ The problem, as Locke conceives it, is how is it, if the fruits of nature belong to all, that anyone is able to appropriate some of these fruits so that he or she may subsist? As he remarks: 'I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.'⁴

But how is Locke to demonstrate that these claims to property are morally justifiable when there is no civil law and when no compacts have been made amongst the inhabitants of the earth who are joint owners of all? The factor which will enable the change of status of a good from 'owned by all' to 'owned by one' is the expenditure of labour.

Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person'. This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we say are properly his. Whatsoever, then, he removes out of the state of Nature hath provided and left it in, he hath mixed his labour with it and joined it to something that is his own, and thereby makes it his property.⁵

It should be made clear that, by 'property', Locke means 'a right to possess the earth, with the beasts, and other inferior ranks of things in it, for his private use, exclusive of all other men'.⁶ That one's 'person' is for one's own 'private use exclusive of all other men' seems morally unassailable, granted an extreme individualism (because collectivists might be of the opinion that one's 'person' may ultimately be for the 'use' of the community as a whole). Unless we are extreme collectivists (which few of us are), we would appear, then, to have no immediately obvious cause to object to Locke's claim that 'every man has a "property" in his own "person"'. And the

labour and the work of a person could, possibly, also be 'property' in this sense. At first glance, then, Locke seems to have presented a plausible justification of property claims. If the labour exerted is mine and it is inextricably interlinked with natural objects through the process of expending work upon them, surely those objects should accrue to me?

Although this argument seems plausible, closer analysis reveals it to be quite unsatisfactory. Locke states that the labourer mixes his or her labour with an object. What can Locke mean by this? Labour is not the sort of material object that can be mixed with another. Hence, it is difficult to see how Locke is saying anything at all intelligible. The form of Locke's argument may lead to an over hasty acceptance because of a potential equivocation. The saying 'This is my labour' can be taken to mean 'This is my task', 'This is my activity' or 'This is the produce of my labour'. One should be wary of confusing 'This is the produce of my labour' with either of the other two meanings. Clearly, my task or my activity are mine exclusively. They are mine in a way that my field of corn, say, could never be. Their relation to me is necessarily inalienable (and the wage-relation at the heart of property-based capitalism demands that labour be alienable); whereas this is not true of my field. Certainly, the produce of my labour can be mixed with natural objects, but though my activity of labouring is exclusively mine, that the produce of my labour is so is precisely what has to be demonstrated. If labour *were* a material object, then we could certainly see how it could be mixed with another object. But even this would be of no avail, for as Robert Nozick asks:

Why does mixing one's labour with something make one the owner of it? Perhaps because one owns one's labour, and so one comes to own a previously unowned thing that becomes permeated with what one owns. Ownership seeps over into the rest. But why isn't mixing what I own with what I don't a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?⁷

As we can see, mixing what one owns with what one does not

cannot by itself be regarded as a claim to property. But there is a possible variant on the labour theme:

Perhaps the idea, instead, is that labouring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created. (Reinforcing this, perhaps, is the view that labouring is unpleasant. If some people made things effortlessly, as the cartoon characters in the Yellow Submarine trail flowers in their wake, would they have a lesser claim to their own products whose making didn't cost them anything?) Ignore the fact that labouring on something may make it less valuable (spraying pink enamel on a piece of driftwood that you have found). Why should one's entitlement extend to the whole object rather than just the added value one's labour has produced?⁸

Now, there is a second possible equivocation resulting from two entirely different senses of the word 'property' which might mislead one into accepting without question the derivation from labour. The first use is certainly applicable to labour—it is property as a disposition. For example, gold has certain properties. By this statement we mean that gold is disposed to 'behave' in a certain way: it conducts electricity, it is malleable, it is ductile, etc. In this sense of 'property', the ability to labour is one of our properties. But it should be noted that we would ordinarily say that the ability to labour is *a* property of ourselves, and not *the* property of ourselves. This distinction is masked when we say the ability to labour is our property. The word 'property' when preceded by the indefinite article often refers to a disposition. When the word 'property' is preceded by the definite article, on the other hand, the right to the exclusive utilisation of a good or service is often what is being denoted.

Having made this distinction, the second sense of the word would be applicable to possessions were we able to ascertain that we are justified in ascribing the status of property *de jure* to them. But to do so we would have to keep in mind that we are using 'property' in the sense of that which we may exclusively utilise. That we have the ability to use our labour ('property' in the first sense) is not to say that we have the rightful ability to exclude anyone else from using the products of our labour ('property' in the second sense). So, when Locke says that labour is 'the unquestioned property of the labourer',

it is only incontestable when 'property' is understood in the sense of a disposition. It is not at all obvious that labour can rightfully be bought, nor that the labourer is the only person who can rightfully utilise it without his or her consent. These assumptions have to be justified. They cannot simply be taken for granted, because it is certainly not universally recognised, for example, that there are absolutely no situations at all in which one can rightfully demand assistance. Thus, when Locke proceeds to state that 'no man but he can have a right to what' the labour of the labourer 'is once joined to', we cannot assent.⁹

Unfortunately, there is yet another possible equivocation to do with property—an equivocation which Locke appears to fall prey to. Believing that 'property' in the sense of ownership is a natural right, Locke wishes to ascertain at what point the right of ownership emerges:

He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could.¹⁰

But is the notion of 'his nourishment' being employed in the same way throughout this passage? I think not. To bring out the two uses, consider the following statement by Locke:

The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his—i.e., a part of him, that another can no longer have any right to it before it can do him any good for the support of his life.¹¹

In what sense is the nourishment the wild Indian's? Locke says that it is 'a part of him'. In this sense, the acorns are a part of the Indian when he digested them; not when he ate, nor when he boiled, nor when he brought them home, nor when he picked them up. 'His nourishment' may be understood either as the process of his being nourished (that is, the sustaining effect of the food), or it may be understood as that which he owns and which, once eaten, would sustain him. But one

cannot move directly from the first sense of 'his nourishment' to the second. It is indisputable that something is exclusively ours when another cannot use it, e.g. when fruit has been assimilated into the bloodstream; but that the uneaten fruit is exclusively ours is far from proven. If I say 'An experience is hers and could never be anybody else's', then we can see that this is necessarily so in a way that 'This house is hers and could never be anyone else's' is not. Similarly, one sense of 'This is his nourishment' is necessarily true in a way that the other sense is not. When 'his' or 'her(s)' applies to experiences, actions, or dispositions it is usually being used quite differently to how it is used when applied to material objects. The ease with which one may equivocate between these two uses greatly facilitates an unwarranted acceptance of the ostensible derivation of property rights from labour.

So far, I have been focussing upon the traditional interpretation of what Locke is attempting to do with his arguments concerning labour. However, C. B. Macpherson has cast some doubt upon this traditional view:

The chapter on property, in which Locke shows how the natural right to property can be derived from the natural right to one's life and labour, is usually read as if it were simply the supporting argument for the bare assertion offered at the beginning of the *Treatise* that every man had a natural right to property 'within the bounds of the Law of Nature'. But in fact the chapter on property does something much more important: it removes 'the bounds of the Law of Nature' from the natural property right of the individual. Locke's astonishing achievement was to base property right on natural right and natural law, and then to remove all the natural law limits from property right.¹²

What is most peculiar about Locke's argument is that he actually begins with the notion of property! The fruits of the earth have been *given* to humanity. The actual problem is that of how one person can eat something which all others own as well. Locke's real task that he sets himself is to attempt to demonstrate how this can be done without asking the permission of everyone else. Now, the claim that the fruits of the earth have been given by God can hardly be demonstrated, and so Locke appears to beg the question of the establishment of property rights by introducing the notion at the beginning

of his argument. However, Locke's position can be rescued without recourse to God, as I shall attempt to show.

If our conception of property is understood to have as major components (a) the right to use a good, and (b) the right to exclude others from using it, then Locke's initial starting point can be understood to concentrate upon (a). Everyone has the right to use the fruits of the earth. The problem for Locke is that eating an item of food prevents another from using that good. How is one, therefore, to move to (b)? This I take to be the essence of Locke's problem. And his solution to it is that if I have exerted labour on a good, and if there is 'enough, and as good left in common for others',¹³ then that good is rightfully mine to the exclusion of everyone else.

Why, though, should this be the case? Locke's answer is that the mixing of what I own with what I do not makes an object mine. This argument has already been rejected. What is more, if labour *per se* were to create property by being mixed with a good, why on earth should it be dependent upon how much remains for others? Surely, if labour is such a determining principle, then the question of what remains for others should be an irrelevancy? However, the general question of the establishment of (b) should not be dismissed too lightly. There might be some method of offering an alternative solution to Locke's problem. The most plausible answer to the question would be that while I have expended effort on something, then it would be morally unacceptable for another to prevent me from deriving benefit from that labour so long as there was no overriding factor which would justify some interference in my plans or expectations. Clearly, if there is enough of the same kind of thing that I have exerted labour upon left for others, and if the quality of the remaining goods is as high, then there can be no grounds (other than trying to prevent me from harming myself or others) for denying me my expected reward for my labours.

But as it stands, this would entail such a limited set of cases as to be worthless as a demonstration of property. Today, the only things where there is enough and as good left for others have no market value. No one tries to stop me breathing the air, or drinking water; and if they did, it would not be property rights which were being infringed. In fact, Locke's arguments

appear to do something much more interesting than the discussion so far would suggest. They appear to show how these two stipulations—(i) the sufficiency limitation, which stipulates that there be enough of a good left for others; and (ii) the spoilage limitation, which stipulates that one must not take more from the common stock than one can effectively use—can be transcended so as to pave the way for an extremely inegalitarian society; and transcended in such a way so as not to contravene morality.

How can an inegalitarian society arise without contravening morality? Locke's answer is that humanity agrees to the institution of money in the form of gold, which can be accumulated without spoiling. Moreover, this gold can be employed to pay labourers to work on the land, and so a vast amount of land can be appropriated legitimately without the spoilage limitation being infringed in any way. Furthermore, when labourers are hired, then they can produce enough food to go round, and so the sufficiency limitation will not have been broken. Hence, as Macpherson observes: 'With the removal of the two initial limitations which Locke had explicitly recognised, the whole theory of property is a justification of the natural right not only to unequal property but to unlimited individual appropriation.'¹⁴ This, Macpherson believes, is an 'astonishing achievement'. Were Locke successful, then it would be. But is he?

I cannot agree that he is. Imagine an individual who decided, in Locke's state of nature, to build a gigantic rainwater tank—one that could collect hundreds of thousands of gallons of rainwater. If we assume that the iron or steel required for such a tank was in abundance, what could be the possible grounds for interfering with this individual's project? Evidently, there will be rainwater enough and as good left for everyone else. But why should anyone wish to build such a tank? Such a project would be absurd. However, the accumulation of gold would not be. We can very well imagine a desire for the unlimited accumulation of this substance. And the reason for this is that gold is valuable. And being valuable it can be used to purchase the land appropriated by others, and it can be used to employ labour. But it is only valuable because it is in demand.¹⁵ It is only valuable because there is not

enough for all. Certainly, the accumulation of gold, which does not spoil, may enable one to transcend the spoilage limitation, but only at the expense of infringing the sufficiency one.¹⁶

Now, it might be objected that capitalism does not involve any infringements of the sufficiency limitation, because the market provides the possibility of purchasing what is required. One has the right to buy whatever one likes. But this defence simply will not do. If one lacks the money to buy the good in question, then the sufficiency is only formal. One is not denied the right to purchase whatever one likes—true; but some lack the physical power (the money) to do so. The sufficiency limitation is discussed by Locke with respect to the state of nature. He cannot mean that what is as good and enough left for others is only formally available. If acorns grow all over a tree and I pick up all the ones on the ground and no one can reach any of the others, it is clear that the sufficiency criterion has been infringed. The fruits of the earth were given to be enjoyed; they were given to sustain life. I cannot be sustained by acorns which I cannot reach but which I have a formal right to appropriate. Clearly, then, the sufficiency criterion would have to refer to the material power of others to make use of what is left, not to a mere formal right to do so. Capitalism cannot regard itself as justified because it refers to formal rights, and the sufficiency criterion must refer to material powers. I can see no way that one can move legitimately from a justification based upon the ability to use one's powers, to a defence of capitalism based upon mere formal rights. Unless this hiatus is bridged, then capitalist property relations, which are based upon money (gold), transgress the sufficiency criterion insofar as the criterion refers to the material ability to utilise what one requires, and not just to a merely formal right to one's requirements.

There is a further difficulty with Locke's argument. Let us consider the question of whether or not the spoilage limitation is being satisfied irrespective of the sufficiency limitation being contravened. Let us 'bracket-out' the sufficiency limitation and focus upon the spoilage one. The landowner has been able to employ a vast amount of hired labour, and this labour keeps the fields productive. Thus, the spoilage limitation is not

violated. But this is only the case while the labourers work. Were they to go on strike, then the crops would begin to spoil, the fields would begin to drop in value and in productivity, and the spoilage limitation would be violated. (Think of an Indonesian paddy field which requires its irrigation walls to be maintained. If the labour is withdrawn, then the walls begin to crumble, and the productive resource begins to spoil.)¹⁷ Or, if strikes are too suggestive of contracts being broken, were the workers to leave the employ of the landowner, and the landowner in question were 'blacked' so that he could not find alternative labourers (or if no one chose to work for him, or if no labourers were available to work for him), then 'his' land would begin to 'spoil'. But his ownership is conditional upon his acquisitions being no more than will spoil. This means that the responsibility for ensuring that the land does not spoil is the owner's, and his alone. If he cannot procure labour, then he is infringing the spoilage limitation. This is because the moral burden is upon the owner to maintain the land, and not upon others to labour for him. In other words, without others offering their labour, the land would cease to belong to the landowner, because he would contravene the spoilage limitation if he could not maintain the productive resource on his own. The result of this would be that the field would return to the common store available to all humanity.

The same situation would apply to industrialists. A general strike, an epidemic, or many workers quitting their jobs would see that machines were not oiled, that they would remain idle, and that they would start to deteriorate. All that the workers need to do in order to acquire the property at present in the hands of the owners of the means of production is to go on strike or quit their jobs and then re-occupy their workplace. Their possession of it would then be rightful as the ownership claim of the former proprietors would have lapsed. Now, the workers may or may not be guilty of breach of contract in so doing (and if they can stop working without breaking any contracts, then there are no moral problems at all concerning their re-occupation of the workplace), but even the workers breaking their contracts with their employer does not remove from the owner the responsibility of maintaining the means of production without spoiling. That his or her 'agents' (the

labourers) have not fulfilled the proprietor's expectations is beside the point. The spoilage limitation does not state that the proprietor must take some steps to avoid spoilage (i.e. merely employ labour); it states that he or she can only rightfully remain the owner of a good while it does not spoil. Therefore, even the sabotage of the means of production by his or her workforce, as morally unjustified as that may be, would defeat the industrialist's claim to the continued ownership of the factory. And in the case of a new factory being built, if the workers *en masse* refused to work for the 'owner' until there was evidence of spoilage and then entered the factory, it would be theirs.

The consequence of all this is that the ownership of any large-scale means of production which requires a significant labour force to be employed rests ultimately not on the claim-rights of the proprietor, but on the compliance of the workforce. I do not know what to call an exclusive possession which is solely dependent upon the compliance of others, but whatever it is, it is not what is meant by a property right. The claim to property is most certainly not dependent upon the continued co-operation of others; it is not lost by their failure to abide by their agreements, or by others simply not providing labour. It is, at the very least, a claim-right which others have the correlative *duty* to recognise irrespective of any desire to comply. Locke, then, has failed to establish that property rights arise as a result of the expenditure of labour—and that applies both to the labourer and, more significantly, to the employer of labour.

However, this discussion of Locke has taken us to the brink of a new way of regarding the exclusive utilisation of a good. That is to view exclusive utilisation as being a condition dependent not solely upon whoever enjoys the exclusive use, but also upon those who are excluded. I shall return to this in the final chapter. For now, suffice it to say, the most famous 'demonstration' of the derivation of property rights from labour has been examined and found wanting. It cannot merely be assumed that labour creates property rights; it must be demonstrated that this is so. The only *prima facie* plausible reason offered for assuming that labour does create rights in what it produces was the metaphor of 'mixing' what one owns

with what one does not. This was seen to fail as a justification of property rights. We have also seen that capitalism cannot legitimately arise out of the state of nature without contravening the sufficiency limitation; and we have also seen that the spoilage limitation remains a potential threat to property even if the other difficulties could be overcome. If property rights can be derived from labour, it has yet to be shown conclusively that this is so. More importantly, the spoilage and sufficiency limitations which, if not infringed, seem to allow appropriation, in actual fact prevent capitalist private property. Rather than establish property rights, Locke's arguments seem, instead, to lead to the rejection of the ownership of so large a means of production that hired labour is necessary (and this is hardly surprising, given *labour* as a potential source of property rights).¹⁸

NOTES

1. C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1964), pp. 194–5.
2. Locke writes: 'Government has no other end but the preservation of property.' John Locke, 'An Essay Concerning the True Original Extent and End of Civil Government', in *Two Treatises of Government* (London: Dent, 1924), p. 163–4.
3. *Ibid.*, p. 129.
4. *Ibid.*
5. *Ibid.*, p., 130.
6. John Locke, 'An Essay Concerning Certain False Principles', in *ibid.*, p. 69.
7. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 174–5.
8. *Ibid.*, p. 175. And if it is true that one 'owns' one's labour in some sense, then it is not in the full liberal sense. For example, one cannot bequeath one's labour. If one has exclusive rights over one's labour (if one 'owns' one's labour), then one has them only while one is alive. Why, therefore, does mixing what one owns in this sense with what one does not (in order to produce some article) give one greater rights in the product of labour than one has in one's own labour? Why does the right over one's labour while one is alive give one the right to say what happens to its products after one is dead (i.e. the right to bequeath it)?
9. But even if we were inclined to accept that no one else has a right to the product of one's labour, then this principle could hardly sustain capitalism. As Hastings Rashdall points out: 'The best way of criticising Locke's theory is to show that, when thought out, it contradicts itself. Let us suppose that ten men appropriate a desert island, divide it among themselves, and cultivate their respective shares. Each of them has ten sons, and having a taste for "founding a family" leaves his share to the eldest. In the next generation there will be ten landlords and ninety landless men. These men have a sacred, natural right to the fruits of their labour: but how are they to exercise it? They will say to the elder brothers: "We have a right to labour: let us work on your lands." "By all means," the elder brothers will say, "on condition of paying over to us all that the land produces over and above what will keep you and your families." In that way the principle contradicts itself. The right of property, supposed to be derived from a man's natural right to the fruits of his labour, involves the negation of that right in the non-inheritors of property.' Hastings Rashdall, 'The Philosophical Theory of Property', in L. T. Hobhouse *et al.*, *Property: Its Duties and Rights* (London: Macmillan, 1915), pp. 45–6. However, see the discussion of Nozick in Chapter 4 below.
10. Locke, 'An Essay Concerning the True Original Extent and End of Civil Government', *op. cit.*, p. 130.
11. *Ibid.*, p. 129.
12. Macpherson, *op. cit.*, p. 199.
13. Locke, 'An Essay Concerning the True Original Extent and End of Civil Government', *op. cit.*, p. 130.
14. Macpherson, *op. cit.*, p. 221.
15. Even Marx's labour theory of value requires that a good be in demand for it to have value. See Karl Marx, 'Wages, Price and Profit', in Karl Marx and Frederick Engels, *Selected Works in One Volume* (London: Lawrence and Wishart, 1970), p. 201.
16. For a critique of a weaker sufficiency limitation, see Chapter 4 below.
17. It is interesting that Mill writes: 'Whenever, in any country, the proprietor, generally speaking, ceases to be the improver, political economy has nothing to say in defence of landed property, as there established. In no sound theory of private property was it ever contemplated that the proprietor of land should be merely a sinecurist quartered on it.' John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (Clifton, New Jersey: Augustus M. Kelley, 1973), p. 231.
18. James Tully has argued against Macpherson's interpretation of Locke. According to Tully, Locke is not concerned to justify capitalism, but is instead principally concerned with the ownership of goods which are produced on a common. See James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980), *passim*. I have argued against Locke as if he were concerned to justify capitalism, because his arguments on that construal are generally taken to be a powerful attempt at legitimating private property. Similarly, in the chapters that follow I examine arguments that seem, or have been taken, to justify capitalism whether or not that was the actual intention of their authors.

3 The Derivation from Desert

The institution of property, when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. The foundation of the whole is the right of producers to what they themselves have produced.

John Stuart Mill

A recent treatment of Locke suggests that there might be more to his argument than the discussion in the previous chapter suggests. Lawrence C. Becker, in his book *Property Rights*, argues that there are more elements in Locke's arguments than is traditionally acknowledged. Becker observes that Locke struggled with several formulations of his attempted derivation of property rights, but the following is the final and most complete variant:

- (a) People have property in their bodies. . . .
- (b) Likewise, their labor is their property. . . .
- (c) 'That labor put[s] a distinction between [the thing worked on] and [what is held in] common.'
- (d) The distinction is that labor 'added something to [the thing] more than nature . . . had done . . .'
- (e) The thing labor adds—the difference it makes—is value. Things that are unappropriated are 'of no use' and labor is responsible for nine-tenths or perhaps ninety-nine hundredths of the value of the products of the earth . . .
- (f) Since things are of no use until appropriated, and appropriation in most cases involves labor which would not be undertaken except for the expected benefits, to let others have the 'benefits of another's pains' would clearly be unjust.
- (g) This is so 'at least where there is enough and as good left in common

for others' and where one takes no more than one can use. 'For he that leaves as much as another can make use of, does as good as take nothing at all.'

(h) Therefore, from (a) through (e) one is entitled to the whole of the value one's labor adds to things, and from (f) and (g)—together with elements from (a) through (e)—one is entitled to the other expected benefits as well.¹

It should be noted at the outset that all that the premises in (f) actually entail is that it would be unjust not to let the labourer use what he or she has produced. But this, in Hohfeld's terminology, is not a claim-right, but a privilege.² Property is considerably more than a mere privilege concerning use. A privilege concerning use does not necessitate the exclusion of others—that would involve a claim-right. Furthermore, this variant of the derivation from labour is still subject to my criticisms concerning the sufficiency limitation.

However, Becker sees in this final variant the seeds of an adequate derivation of property rights. He contends that

premises (f) and (g) . . . , taken together, constitute an argument for the benefits people expect, but cannot get title to from premises (a) through (e). If these benefits are ones people deserve by virtue of the (labor) pains they have taken, then that constitutes a good reason for granting benefits and if there are no countervailing strong reasons to the contrary, granting them is justified. This explication of the root idea [which Becker takes to underlie Locke's argument] has seldom been attacked.³

From this, Becker proceeds to develop an argument based upon desert. But as it involves the desert due to labour, it is arbitrary whether we consider it to be a distinct, attempted derivation of property rights, or a sub-argument of the ostensible labour derivation. I have chosen to deal with the argument separately. But before I examine Becker's own argument in detail, I shall consider a species of the desert argument which Becker locates in John Stuart Mill's remarks on property in the latter's *Principles of Political Economy*.

Mill, though aware of the possibilities of communal production, makes use of an assumption also relied on by Jeremy Bentham concerning the advisability of security in reaping the rewards of labour if any labour is to take place:⁴

. . . though the land is not the produce of industry, most of its valuable qualities are so. Labour is not only a requisite for using, but almost equally

so for fashioning, the instrument. Considerable labour is often required at the commencement, to clear the land for cultivation. In many cases, even when cleared, its productiveness is wholly the effect of labour and art. . . . The fruits of this industry cannot be reaped in a short period. The labour and outlay are immediate, the benefit is spread over many years, perhaps over all future time. A holder will not incur this labour and outlay when strangers and not himself will be benefited by it. If he undertakes such improvements, he must have a sufficient period before him in which to profit by them: and he is in no way so sure of having always such a sufficient period as when his tenure is perpetual.⁵

He would be more sure if he killed on sight everyone who approached his land, but the need to reap the benefits of one's pains would not justify this. Why, then, should property rights be justified—especially if they too are more than is required to reap such benefits? And they are clearly more than is justified by Mill's argument. All that is necessary for such labour to take place is that the labourer be *included* in the benefit arising from such labour. If strangers reaped the benefit and the labourer did not, he or she would be excluded from the fruits of his or her labour. But such exclusion usually presupposes property. The exclusion of others is what lies at the heart of private property. If property is not presupposed in advance, is the suggestion that a labourer needs property in order to prevent others, rather than himself or herself, enjoying the fruits of his or her labour so convincing? Is it convincing at all if Mill's arguments are seen only to justify the labourer's use as a privilege, rather than as an exclusive claim-right?

Nevertheless, Mill offers a line of reasoning from which a possible justification of property rights might follow. Rousseau had argued that

however speciously they [the rich] might disguise their usurpations, they knew that they were founded on precarious and false titles; so that, if others took from them by force what they themselves had gained by force, they would have no reason to complain. Even those who had been enriched by their own industry, could hardly base their proprietorship on better claims. It was in vain to repeat: 'I built this wall; I gained this spot by my industry.' Who gave you your standing, it might be answered, and what right have you to demand payment of us for doing what we never asked you to do? Do you know that numbers of your fellow-creatures are starving for want of what you have too much of? You ought to have had the express and universal consent of mankind, before appropriating more of the common subsistence than you needed for your own maintenance.⁶

It would appear to be an argument such as this which Mill has in mind when he makes the following rejoinder: 'It is no hardship to any one to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all.'⁷ From this, Becker reconstructs what he takes to be Mill's argument justifying property. And he considers Mill to have come as close as it is possible to get to a cogent justification of private property on the basis of a labourer's 'taking pains' to make something.

The argument is basically as follows. First, if one's labour is over and above what one is morally required to do for others, second, if it produces something that only exists because of that labour and, third, if others lose nothing by being excluded from such a product of labour, then for others to be excluded from its possession, use and so on is not morally wrong. And Becker clarifies this by claiming that it is not so much that the product is the desert of the producer, rather that no one else deserves it. Therefore, it is not wrong for others to be excluded from its possession. And because a system of property rights guarantees the product of labour to the producer, while excluding others, then such a system of property rights is justifiable.⁸

Becker, however, is conscious of how little can be justified by such an argument. Insofar as land is not the produce of labour, it cannot be owned.⁹ And how extensive is the restriction concerning others losing nothing? As property involves duties in others to refrain from the use of an owned good when permission has not been forthcoming, some freedom must be lost.¹⁰ Moreover, in a competitive situation, the loss of equality can be a considerable loss. The manufacture of something as apparently innocuous as a toothbrush, given exclusive use, would put its owner at a significant relative advantage over all others when it comes to having any success in job interviews, for instance. The corresponding relative disadvantage which others experienced would be a significant loss of prospects.

Becker, too, is of the opinion that Mill's principle of entitlement would be extremely limited in any competitive situation. In fact, he thinks that it would be so limited that the

private ownership of the major means of production could not be justified by it. In which case, the argument appears to be less a justification of 'possessive individualism' than for some form of socialism. The private ownership of natural resources, technology, and so on would put others at a competitive disadvantage. Hence, their private appropriation by the producers would violate the requirement that another must not suffer any loss as a result.¹¹

Furthermore, why is it the case that others do not deserve access to a labourer's produce? That the labourer should have the privilege (in Hohfeld's sense) of use surely goes without saying. But can it be assumed that others deserve to be excluded?¹² How about people who are incapable of looking after themselves due to, say, a mental or physical disability—they do not produce; do they deserve to be excluded from everyone's labour? If not, why is it obvious that anyone is under a duty to refrain from using a good produced by someone else? To destroy the good would deny the producer access to it. But, say in the case of a non-consumable, why should the privilege of usufruct not be automatically respected by the producer? And what, as Becker acknowledges, is 'above and beyond what morality requires a person to do for others'? Without a clear answer to this question, Mill's 'derivation' cannot even take off. Although the initial insight is appealing, it seems unable to justify property rights.

I now turn to Becker's own attempted derivation from desert. Becker begins by suggesting that the very notion of morality has included within it the notion of desert. Desert is, therefore, a fundamental moral principle. Moral sanctions are not invoked or applied at will in order to create the greatest happiness, for example. They are correctly applied only to those who deserve them. To receive reprobation, blame, punishment, etc. justifiably, one must be morally *blameworthy*. To be justifiably accorded approbation, praise, reward etc., one would have to be morally *praiseworthy*. 'Worthiness' is central to morality. As Becker writes: 'If agents can be morally responsible for their acts, they can by definition deserve reward or punishment for them. That is part of what it means to say someone is a responsible agent.'¹³

But what makes an individual deserving of moral

approbation or moral disapproval? Evidently, it is what individuals do or fail to do. As Becker asks, what apart from character and personal actions could provide the basis of personal desert? And that is why we do not usually offer reasons for basing desert upon character and personal actions. From this, Becker concludes that through helping others by inventing, discovering or improving something a person adds value to the world. And this provides the basis for a desert-claim, especially when the act of intervening, discovering or improving is morally permissible and more than is morally required. Hence, as our conception of personal desert entails that benefits befit such good deeds, then Becker assumes the following principle to be sound by definition:

A person who, in some morally permissible way, and without being morally required to do so, 'adds value' to other's lives deserves some benefit for it.¹⁴

Armed with such a principle, Becker asks whether there are some actions where the only fitting reward would be the granting of property rights, or at least whether such a grant would be the most fitting benefit awarded for some actions? If an affirmative answer can be extracted and the particular actions specified, then Becker would appear to have justified property rights.

What actions might deserve to be rewarded with property rights? Becker argues that, because genuine labour is a goal-directed activity, it is undertaken with the satisfaction of some desire in mind. If the desire in question is to acquire as property the produce of one's labour, then an appropriate benefit (Becker goes so far as to say the only suitable benefit), if the labour requires one, would be the granting of property rights in what is produced; that is, as long as the value of the benefit is not in excess of the value added by the labour.

Becker is now in a position to present a formal argument which purports to lay the philosophical foundations of property rights. First, benefits are due people whose morally permissible labour, which is over and above their moral obligations, adds value. And penalties are due them for the disvalue they produce. Second, these benefits and penalties should be proportional to the value or disvalue added, and

should be appropriate for the kind of labour engaged in. Third, if property rights in whatever that labour produces is the only appropriate benefit, and if such a benefit is proportional to the value added, then the labourer deserves those property rights. However, if such property rights or an alternative are an appropriate benefit (according to the purposes of the labour undertaken), then the labourer deserves either those property rights or such an alternative (assuming that it is acceptable). On the other hand, if property rights in whatever the labour produces are not an appropriate benefit or if that benefit would be more than proportional to the value added, then the labourer does not deserve property rights in the things produced. And fourth, penalties which are proportional to the loss incurred and which are appropriate to remedying whatever loss another has experienced as a result of the offending labour (according to the purposes with regard to which the offending labour has produced disvalue) are deserved and must be assessed against the labourer.¹⁵ Here, Becker appears to have provided a compelling and elegant justification of property rights which is derived from no more than an analysis of morality *per se*. But has he?

Property rights are a benefit which are deserved, but only so in proportion to the value that has been produced. Thus, Becker asks: 'Would the proportionality requirement look like this?'

benefit = value of labor + value of labor's product.¹⁶

However, it will be recalled that benefits are morally due those who have added value to others' lives. Becker himself observes that 'it should be noted that the labor-desert argument does nothing to establish entitlement in cases where the laborer's efforts have not benefited anyone else. Deserving a benefit for producing something which only you profit from is a strange notion'.¹⁷ It certainly is, but in that case should it not be that the proportionality in the second premise of Becker's formal argument must refer to the value added to the lives of others? Surely, what one deserves is a benefit from others proportional to the benefit given to others? What, then, has the value of the labour's product or the value of labour (when understood as

an economic value) got to do with anything? The value we have been concerned with up to now (the value relevant to moral desert) is social value. In actual fact, it is the value increase in others' lives. What is due (what needs *repayment*) are the benefits others receive. If such value is only received by some, how can property rights be owed by those who have not benefited by the labour? Labour, if it could generate property rights, would have to be labour benefiting all, or it would create at most a right *in personam* and not a right *in rem*, which is what property is taken to be. Furthermore, if one's labour benefited some more than others, would one have property rights of a different status *vis-à-vis* each group? And what, in any case, does Becker have in mind here?¹⁸ What labour is of such unequivocal universal benefit to humanity? Whatever it is, the value it has for others cannot be assumed to bear any direct relation to the quantity of labour embodied in the product, which is what Becker seems to have actually shifted to when he expands his second premise into benefit being equal to the value of labour plus the value of labour's product. Furthermore, the economic value of a labourer's product can be quantified, but how is the value of property rights to be ascertained? Property rights are qualitatively different from the things which one can or can not have property rights in.¹⁹

Moreover, Becker considers the right to the capital of a good as being the core element in our conception of property. The right to destroy a good (part of the right to the capital) would render ineffective anyone else's claim to that good. It is a right upon which all other rights depend. But, given this, how is the right to the capital of the produce of labour to be derived from Becker's argument concerning benefit to others? Are we to assume that the good would not have benefited another if it did not exist, and that the proportional benefit of property rights entailed is always equal to the value of the good produced? Are we to assume that the destruction of the good would return the social situation to the *status quo ante*? But this cannot be assumed at all. If I build a machine which reduces the labour time necessary to produce some good, if I am rewarded by being given property rights in that machine, if I then employ workers to run the said machine, and if those

workers, because of that, become dependent upon my machine, to destroy the machine would leave the social situation considerably worse than when the workers engaged in the previous, more labour-intensive form of production, but were not dependent upon me. How, then, could I be due the right to the capital of the machine? And as Becker considers the right to the capital to be so important, what is left of his derivation of property?

And why does Becker, after commencing with a conceptual analysis of morality, after resting his case upon our notions of 'praiseworthy' and 'blameworthy', assume that what is morally praiseworthy deserves material payment; worse, that material payment is due? Benefiting others is certainly praiseworthy, but can it be assumed to be *giftworthy*; or worse still, can it be assumed to be gift-demanding? Doing things for others might require some form of reciprocity. I say 'might' because if I build you a palace which you do not especially want, I fail to see why you then owe me one. But what about the central reason which Becker cites for property rights being appropriate? What about when one produces a good with the intention of acquiring it as property? Surely the intention underlying an action is of relevance when assessing the moral worth of the action?²⁰ If one produces a good with the aim of appropriating it, does this not devalue the moral worth of the action? And more paradoxically, if no productive labour is forthcoming, but the intention was noble, should property rights be given in something or other because the intention was praiseworthy? Has a good person a *claim* to a reward, or would it be morally praiseworthy on our part to reward a good person? Might we not then similarly expect a reward? In property rights, too?

And what about Becker's rider to the effect that property rights accrue when one accomplishes what is beyond what morality requires one to do for others? Becker himself admits that the applicability of labour arguments will be restricted if we are not merely obliged to refrain from harming others, but also have a duty to contribute to their welfare. Both Mill's and Becker's arguments for property rights do not apply to cases where one has a moral obligation to provide care for another. Hence, if one has a moral obligation to care for another, and if

that takes priority, then one cannot labour for oneself until that obligation has been met. This enables what Becker refers to as 'communitarians' to contest his and Mill's purported justifications of property rights.

However, Becker has a reply to such a line of criticism. For such a criticism to work, then

the moral duty to contribute (positively) to the welfare of others must have *priority* over any moral requirements to work for one's own good. That is, it is only '*prior*' moral duties which are at issue here now. It is reasonable to suppose that no positive duties to others could have priority over a requirement (if there is one) to do the (morally permissible) work necessary for one's survival. And certainly many people would hold that one's positive duties to others cannot have priority over even one's *liberty right* to survive.²¹

But a 'communitarian' would not accept this. Why, he or she would ask, must one's moral duties to others be necessarily *prior* to one's survival requirements if such duties are to be relevant in this particular case? Why could they not be 'synchronous', both temporally and logically? Communitarians would survive by working for the *community* of which they are a part. They work jointly for themselves and for others at the same time. If one's 'duties to oneself' and one's duties to others operate simultaneously, then a communitarian fulfils all his or her duties by community work. What one's moral duties are will differ between communitarian, or 'non-propertyarian', and individualist, or 'propertyarian' societies. In which case, to base an argument for property rights on duties derived from a propertyarian society is to engage in a circular argument. And if the derivation from desert is to carry any weight, then one must be clear about which duties to others are in force; for, as Becker admits, 'people don't deserve anything special for doing their duty'.²²

We can only conclude that neither Mill's nor Becker's form of the 'derivation from desert' establishes rights in private property. Bearing in mind the difficulty which will arise in determining *a priori* what one's duties are (for if there are duties to others, it is unlikely that they are restricted to the duty to leave their goods alone), and hence what one deserves for doing 'over and above' what duty calls for, it is hard to see

how one's morally determined deserts can be ascertained. In which case, it is hard to see how any attempt to derive property rights from moral desert would prove successful.

NOTES

1. Lawrence C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge and Kegan Paul, 1977), p. 35.
2. Hohfeld explains: "... a privilege is the opposite of a duty, and the correlative of a "no-right". In [the case of X exclusively owning land], whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.' Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. and with an intro. by Walter Wheeler Cook (New Haven: Yale University Press, 1966), pp. 38-9. The privilege of X entering does not involve a corresponding duty in Y to stay off.
3. Becker, *op. cit.*, pp. 35-6.
4. For a more detailed exploration of this issue, see the discussion of Bentham in Chapter 5 below.
5. John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (Clifton, New Jersey: Augustus M. Kelley, 1973), p. 230.
6. Jean-Jacques Rousseau, 'A Discourse on the Origin of Inequality', in *The Social Contract and Discourses*, intro. by G. D. H. Cole (London: J. M. Dent, 1979), p. 88. Proudhon considered this to sound the death-knell of the derivation from labour: "'The rich," exclaims Jean Jacques, "have the arrogance to say, 'I built this wall; I earned this land by my labour.' Who set you the tasks? we may reply, and by what right do you demand payment from us for labour which we did not impose upon you?" All sophistry falls to the ground in the presence of this argument.' Pierre-Joseph Proudhon, *What is Property? An Enquiry into the Principle of Right and of Government*, trans. Benjamin R. Tucker (New York: Dover, 1970), p. 84.
7. Mill, *op. cit.*, p. 233.
8. See Becker, *op. cit.*, p. 41.
9. Mill goes so far as to concede this point: 'The essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence, this principle cannot apply to what is not the produce of labour, the raw material of the earth.' Mill, *op. cit.*, pp. 229-30.
10. As Becker writes: 'The final blow to the argument is this: it may be that in some situations a labourer's accession to liberty rights [Hohfeldian privileges] is no loss to others, but the accession of a claim right, or a

power, or an immunity, is usually a different matter. The creation of the corresponding duties, liabilities, and disabilities in others constitutes a loss of liberty for them. Rights justified by this argument cannot, then, include claim rights, powers, or immunities *if and in so far as* the existence of those sorts of rights actually constitute a loss to others.' Becker, *op. cit.*, p. 44.

11. See *ibid.*, p. 43.
12. And what about the language employed in this argument? To reply to any questions concerning Mill's point with 'The producers deserve the property because they earned it with their labour', sounds convincing enough; but as Becker writes: 'When the reply here is taken out of the language of the work ethic and one substitutes for "industrious" the terms (equally accurate as things actually happen) "aggressive", "intelligent", and "strong", and substitutes for "unindustrious" the terms "passive", "unintelligent", and "weak", the reply loses some appeal. Why should the people with the natural advantage of intelligence (whether acquired by inheritance or by environment) inherit the earth? Have they *earned* the means which permit their acquisition?' *Ibid.*, p. 44.
13. *Ibid.*, p. 49-50.
14. *Ibid.*, p. 51.
15. See *ibid.*, pp. 53-4.
16. *Ibid.*, p. 124n.
17. *Ibid.*, p. 55.
18. Perhaps Becker is thinking of Locke's remark to the effect that labour is responsible for 'ninety-nine hundredths of the value of the products of the earth'? It is in what Becker takes to be the final variant of Locke's argument for property rights that this remark is found. But this remark, if it is to be plausible, must refer to measurable economic, not social, value. It must presuppose a labour theory of market value.
19. And if one subscribes to a labour theory of value (which would be appropriate give a 'labour-desert' argument for property), how does one measure the labour 'crystallised' in property rights?
20. Kant writes: 'A good will is good not because of what it performs or effects, not by its aptness for the attainment of some proposed end, but simply by virtue of the volition. ... Its usefulness or fruitlessness can neither add to nor take away anything from this value.' Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, trans. Thomas K. Abbott (Indianapolis: Bobbs-Merrill, 1949), p. 12.
21. Becker, *op. cit.*, pp. 108-9.
22. *Ibid.*, p. 50.

4 The Derivation from Liberty

Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right.

Robert Nozick

Locke has been extremely influential with regard to philosophical discussions of property, and his influence is noticeably felt in what is currently the most topical discussion of property rights. This is to be found in the work of Robert Nozick. In *Anarchy, State and Utopia*, Nozick's central thesis is that any systematic attempt to maintain an egalitarian redistribution of property will involve unacceptable restrictions on individual freedom. With this in mind, Nozick rejects distributions of property which are based on intended end-results (teleological theories) or on patterned distribution (such as egalitarianism). In place of such distributive theories, he offers his 'entitlement theory', which, in contradistinction to end-result and patterned theories, concentrates upon procedures for acquiring title in a just manner. This manoeuvre, if successful, would allow Nozick to regard as justified the growth of tremendous inequality in property. This is thought to be possible because, beginning with a state of nature where certain rights are respected (which Nozick believes even individualist anarchists would find acceptable), an unequal distribution of wealth develops, and does so without anyone's rights being violated. The result of this is that some would have

just claims to large amounts of property. Has Nozick provided the foundations for property rights? Let us see.

Nozick's discussion of property has two prongs. The first is a critique of alternative approaches to distribution; the second is a sketch of legitimate acquisition. I shall commence with his critique, because the strength of his alternative theory rests upon the apparent unacceptability of all other approaches. A further reason for paying attention to the critical side of Nozick's discussion is that it provides ammunition for those who oppose the redistribution of privately owned wealth. The relevance of any discussion of the philosophical foundations of property rights is overshadowed if it can be shown that it is unjust to rearrange present distributions of property. If property must not be tampered with, then the question of its philosophical legitimacy is vitiated. By rejecting all theories which seek to redistribute wealth, Nozick is attempting to secure the foundations of capitalism. If this critique succeeds, then the question of the foundations of property rights would be confined to that of legitimate acquisition; i.e., its concern would only be that of ascertaining that property is held by those entitled to it. It would no longer bear significantly upon the validity of the concept 'property *de jure*'.

Nozick divides theories of distributive justice into patterned or unpatterned theories, and historical or unhistorical ones. His definition of a patterned theory is as follows:

Let us call a principle of distribution *patterned* if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions.¹

Roughly, there is thought to be in patterned theories some factor or factors pertaining to an individual such that the quantity of that factor determines the quantity of goods which the individual receives. One such patterned theory may consider the relevant factor to be need. In which case, justice would be satisfied when the greatest amount of goods go to those in most need. Unhistorical non-patterned theories may be based on 'current time slice principles' or 'end-result principles'.² An example of an end-result principle is the principle of utility. It is concerned with the structural aspects of the situation, not with the proportion between the various

individuals' relevant dimensions and the benefits which accrue to them, as would be the case in patterned theories.

Nozick rejects 'end-result' theories because they are not concerned with who gets what. They are merely concerned with the structure of the distribution. As Nozick points out, we would not be satisfied if punishment were distributed in this fashion. What is important for justice is not how many are in prison and how many are free, but that those who commit crimes are in prison and those who do not are at liberty. By analogy, goods should be distributed to those who are entitled to them, and not according to some structural arrangement.

The entitlement theory which Nozick will argue for is neither patterned, nor an end-result theory. It is, however, an historical one. One justly owns a good if one has acquired it by means of just procedures. Hence, as long as the various transfers and original acquisition of a good are as according to the procedures, one is entitled to own the good in question. Nozick:

The entitlement theory of justice in distribution is *historical*; whether a distribution is just depends upon how it came about. In contrast, *current time-slice principles* of justice hold that the justice of a distribution is determined by how things are distributed (who has what) as judged by some *structural principle(s)* of just distribution.³

As has already been said, Nozick will offer this theory as an alternative to the theories of distributive justice which prevail—namely, end-result and patterned theories. And he is confident in doing so, because of his criticism of all redistributive theories of justice, which include end-result and patterned theories. End-result and patterned theories are included under the rubric 'redistributive theories' because a situation might naturally arise where the end-result sought for does not presently exist, or where individuals do not possess goods in proportion to the relevant dimension. In which case, the goods have to be redistributed. It is the critique of redistribution which is the kingpin of Nozick's political philosophy.

This critique revolves around an interesting example. Nozick considers the case of basketball fans who are willing to pay 25 cents per head to watch Wilt Chamberlain play. They

wish him to have the money, and he is happy to play for that remuneration. Nozick claims that it is unjust to prevent basketball fans from giving that money to him. Chamberlain has acquired the money in a just way—with the consent of all those who gave him the money. Would it not be a serious infringement of liberties to prevent such a gift? Nozick is of the opinion that it clearly would be. But such a gift would upset any end-result or patterned theory of justice. And the interference in personal liberties which would be required so as to maintain the 'justice' envisaged by end-result or patterned theorists would be intolerable. Surely one must be allowed to give to loved ones, or those one admires? If the consequence of redistributive theories of justice is a meddling in such liberties, then those theories ought to be rejected. Thus, at one stroke Nozick has dispatched all his opponents. Or has he?

We can see that his critique is based, not directly upon a respect for property, but a respect for individual liberty. Individual liberty is the foundation of the entitlement theory because it is liberty which disrupts his opponents' cherished patterns and, consequently, it is liberty which must be curtailed if the patterns are to be maintained. Adherents of end-result and patterned theories of justice must interfere with the freedom to give; they must interfere with 'loving behaviour'.⁴ As no one would doubt the unacceptability of such interference, Nozick appears to have propounded a devastating critique of redistributive theories of justice.

But who does Nozick think he is criticising? Most socialists would object that it could not be a criticism of their views. They would not admit to any inclinations towards preventing anyone choosing to give their possessions away. However, such a response would miss Nozick's point. As Thomas Scanlon puts it: 'Arbitrarily great inequalities in the starting places of members of one generation can result from gifts and voluntary exchanges by members of previous generations. Thus, maintaining even this looser kind of equality can require restricting these activities.'⁵ However, posing the problem in this manner allows Scanlon to add:

So put, this is not such a startling conclusion; certainly it does not make egalitarianism look as foolish as first appeared. This is so, first, because there

is no longer the appearance of unanimous consent. It is no longer plausible to respond, "Well, if the fans are all happy to pay [everyone now living in the society is a fan] and Wilt is willing to play at that price, how can a meddling egalitarian object?" Second, this way of looking at the example changes our picture of the liberties that are likely to be infringed. The liberties involved in the example seem to be these: the liberty of the fans to pay an extra quarter to see Wilt play, his liberty to keep any amount he may receive through such transactions, his liberty to decide whether or not he wants to play for the amount remaining after taxes from what the fans and promoters offer him, and, finally, the liberty of his heirs to keep any amount of money he wishes to pass on to them. It does not seem likely that egalitarians . . . will want to keep watch over everyone's quarters or to conscript basketball stars. What is at issue, then, is the right of a person to keep as much as others are willing to pay him for his services and the right of his heirs to receive unlimited bequests. But there is no strong intuitive ground for thinking that these rights are absolute, and little ground for surprise at the suggestion that the pursuit of equality might call for their infringement.⁶

Furthermore, I have mentioned that Nozick regards as just that which has arisen by means of just procedures. Is this necessarily so, for his whole Wilt Chamberlain example takes it for granted? From the 'propertarian' anarchist society⁷ which we find at the beginning of Nozick's exposition, protection agencies are thought to arise which offer the service of facilitating in the settlement of disputes. Eventually, one such protection agency attains a monopoly position. From this arises the minimal state. If Nozick's procedural contention is correct, then this situation must be morally just. But what if one protection agency gained a monopoly of coercion in one geographical location, and a different one rose to a position of ascendancy in another? What if they each had tremendous power due to the voluntary contributions of their respective members towards armaments thought to be necessary for the protection agencies to function satisfactorily? What if their members consisted of less than half of the human race? And what if these two protection agencies were about to destroy the world because of their mutual fear—more precisely, because the threat of the other required a nuclear offensive? Is this situation morally acceptable because it has arisen through 'just procedures'? Should one be allowed to contribute more funds to such a growth in the possibility of total annihilation? Is one morally bound to refrain from interfering in this 'just'

situation? If it could be shown that the destruction of the world was imminent, would it not rather be the case that one was morally *obliged to interfere*? And if so, what is left of Nozick's procedural justice? What is left of Nozick's claim that 'whatever arises from a just situation by just steps is itself just'?⁸ And if Nozick heroically insists that such a situation is 'just', then there must be more binding moral commitments than 'justice'.

Moreover, even if the protection agencies are not close to mutual destruction, they must employ agents who are suitable to carry out the functions of the agency.⁹ No one would regard just anyone as a suitable agent—agents would have to be trustworthy at least. Were they not, how could one begin to prevent a dominant protection agency from becoming a protection racket? But would we allow these individuals who have been accepted for their suitability as agents to give their jobs to whomever they choose? Surely not, and neither would we regard it as a loss of liberty on their part that they should not have the power to do so. We would only be inclined to think that their liberty was being infringed in such a case if we thought that a responsible job was something like the full liberal conception of property; at the very least, jobs would have to be alienable property. But this indicates to what extent Nozick's whole argument presupposes property rights.

That Nozick presupposes property is a point made by Onora O'Neill. Commenting upon the intuitive feeling that there seems to be nothing wrong with giving money to Wilt Chamberlain, she writes:

But this will hardly do as an argument against patterned and end-state principles of justice or for entitlement theory. The argument presupposes, so does not demonstrate, that it is wrong to interfere to restore disturbed patterns or end-states, and that such restorations are always redistributive and violate individual property rights. But it is just these property rights which have yet to be established. . . . Nozick comments at one point that we lack a theory of property (p. 171). We do indeed, but the lack cannot warrant the assumption (cf. pp. 281–2) that individual property rights are rights to control resources in all ways, to dispose of them however and to whomever the owner wishes, or to accumulate them without limit. This interpretation of property rights must be established *before* the restoration of patterns or end-states by state action can be rejected as unjustified interference which violates individuals' rights.¹⁰

Nozick wishes to undermine all alternative theories of the distribution of goods to pave the way for an easy acceptance of his alternative entitlement theory. However, as should now be quite clear, he presupposes full liberal ownership in order to do so. Thus, he commits a *petitio principii*. Consequently, capitalist property relations have not been shown by Nozick to be just.

I mentioned at the beginning of this section that Nozick's discussion has two prongs. The first has been dealt with. I now turn to the second—his theory of property acquisition. Nozick is rather reticent about developing a full-blown theory of property rights; however, he does indicate what such a theory would consist of. For there to be justice in holdings, three conditions would be relevant:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.¹¹

Our immediate interest must be with the first condition, which concerns the principle of justice in acquisition. Nozick, as a 'neo-Lockean', seems to be of the opinion that property can be rightfully acquired as long as a kind of 'Lockean' proviso is not infringed. Whereas Locke stipulated that as much and as good be left for others, Nozick offers a much weaker proviso:

Fourier held that since the process of civilization had deprived the members of society of certain liberties (to gather, pasture, engage in the chase), a socially guaranteed minimum provision for persons was justified as compensation for the loss. . . . But this puts the point too strongly. This compensation would be due those persons, if any, for whom the process of civilization was a *net loss*, for whom the benefits of civilization did not counterbalance being deprived of these particular liberties.¹²

Nozick appears to be of the opinion that one is at liberty to appropriate as long as in doing so one does not reduce the condition of another to one worse than that found in the state of nature (the 'baseline' condition). Here we have an attempted

justification of property rights which gains moral acceptance through the freedom of one to act as long as another is not adversely affected. And whether or not another is adversely affected is measured in terms of the condition prior to appropriation—the state of nature. Moreover, this weaker stipulation would be resistant to my previous criticisms of Locke's sufficiency and spoilage limitations.¹³

As an example of this 'Lockean proviso' in action, consider the case of several people stranded in the Sahara desert. As they approach a water-hole, one of them runs ahead. The proviso prevents that person from appropriating the water-hole. As David Lyons explains:

It will be recalled that Locke's proviso was that 'enough and as good' of whatever is being appropriated be left for others. Nozick does not regard this formulation as satisfactory, because it does not cover certain sorts of cases. 'The crucial point,' he says, 'is whether appropriation of an unowned object worsens the situation of others.' That is the sufficient condition, Nozick thinks, to place upon legitimate appropriation. If one does not worsen the situation of others, one acquires the right to a thing one has appropriated.¹⁴

Clearly, the desert situation is akin to the state of nature, and the appropriation of the water-hole by one person would seriously worsen the condition of the others. The 'Lockean proviso', therefore, rules out appropriation in this case. But where the condition of others is not worsened, then one is at liberty to appropriate. In fact, it would be an infringement of one's liberty if one were prevented from appropriating in such a case.

This weakened stipulation ostensibly allows the appropriation of great wealth. As everyone is materially far better off than in a state of nature, and as capitalist production provides the goods which have elevated the population above that baseline condition, then capitalist appropriation does not violate the 'Lockean proviso'. Nozick appears to have justified the full liberal conception of property, which lies at the heart of capitalist ownership.

It can readily be seen that Nozick's defence of rights in private property is grounded in his respect for liberty. But is his theory of acquisition really consistent with this? I suspect that although it appears to be so at first sight, it is actually

incompatible with it. When Nozick shows his concern for those whose situation might be worsened by others appropriating property, he reveals that concern to be restricted to the enjoyment of the material produce of society. Because capitalism produces an (apparent) abundance of goods, then people cannot be below the baseline condition. But this is beside the point. The question which should be asked by a philosopher whose main concern is freedom should instead be: 'Are those who have been deprived of goods that were previously open to common use less *free* than in a state of nature?' And the answer to this question can only be 'Yes'. And if the 'Lockean proviso' is understood in terms of freedom, rather than in terms of material produce available on the market, then capitalism breaks the proviso. This becomes obvious when it is recognised that wealth can create power. An unequal distribution of wealth is accompanied by an inequality of power. Clearly, the power which I have to interfere with the realisation of your intentions compared with your power to have them realised constitutes a zero-sum game. My freedom to restrict you is bought at the price of your freedom from interference. Property creates the power to restrict others, hence to limit their freedom.

Now, I have indicated that Nozick's defence of rights in private property is grounded in his respect for liberty. However, liberty is an extremely difficult and complicated concept. There are at least two aspects to liberty—what have come to be called 'positive' and 'negative' liberty.¹⁵ When it is claimed that property ought to be respected, the focus of discussion is usually on negative freedom—freedom *from* interference with what one owns, freedom from others using one's property. However, the freedoms mentioned by Nozick which are curtailed by appropriation are the liberties *to* 'gather, pasture, engage in the chase'. In other words, it is positive liberties which are curtailed. We might suspect, therefore, that Nozick's failure to come to terms with the way in which property can restrict freedom is due to his focus upon negative freedom to the exclusion of the positive variety. This would not be surprising in so far as liberal individualists are noted for ignoring positive freedom.¹⁶

We have seen that the power produced by property has

important consequences for freedom. One positive freedom which is curtailed by private property—a liberty which Nozick fails to mention in his remarks addressed to Fourier's contention—is the freedom to engage co-operatively in labour. How is one to know that those in a state of nature, where there had been no appropriation of the means of production by private individuals, would not eventually produce by collective effort the means of production capable of mirroring the achievements of today's technology? How is one to know that they could not surpass those achievements, especially when one takes into consideration the wastefulness caused by a competitive system; e.g. the waste caused by factories being laid idle as a result of bankruptcy? Yet such a possible co-operative situation would, with no private property, have to be called a state of nature. Why, therefore, is the baseline condition not such a productive scenario?¹⁷ Even if we assume that the state of nature was left at a time when the means of production were extremely primitive, why not take as one's measure the hypothetical level of existence which would be associated with a (by now) technologically advanced state of nature? If one admits the freedom to develop co-operatively the productive forces, then the freedom to do so is being ignored when the baseline is taken to be very low (and Nozick clearly does so, and has to do so for his 'justification' of property to work). Consequently, in terms of freedom, those who have appropriated private wealth have made the situation of the rest worse. And if the state of nature were allowed to develop along co-operative lines, the material condition of those expropriated (and the possibility of freedom) is conceivably worse than their condition in a state of nature would be *now*.

It might be objected that this cannot stand as a criticism of Nozick's position because the current development of the productive forces in a co-operative, rather than a property owning society, is an unquantifiable counterfactual. That it is an unquantifiable counterfactual, I concede. That it cannot count against Nozick, I do not. First, if the 'Lockean proviso' is such that the situation of an individual must not be worsened, then this proviso must also involve ensuring that his or her *future* condition will not be worsened. If my

companions are not thirsty today, surely that does not allow me to appropriate the water-hole when I know full well that they will require the use of the water-hole tomorrow. The question of whether or not the situation of another is worsened, then, cannot be restricted to the time when a good is appropriated. And as it cannot be assumed that the individuals in a state of nature who have before them the possibility of collective labour would stagnate, then the onus is on Nozick to show that co-operative labour in a state of nature is either impossible (and so the productive forces would not develop) or that it could not have produced the same quantity of material benefits which accrue from the capitalist system. I fail to see how Nozick can deal with this problem. Second, when discussing patents, Nozick, because of his position, is forced to claim that property rights are valid in a patent for a period up until that point in time when another would have discovered the invention in question. That one could even begin to predict such a thing seems to me to be an absurd suggestion. However, be that as it may, that Nozick expects us to engage in such calculations about counterfactuals means that we can legitimately employ counterfactuals against him.

The upshot of all this is that Nozick's proviso is unacceptable as a method for deriving capitalist property rights. Furthermore, the way that Nozick wishes to use his proviso is not in accord with his stress on individual liberty. Yet Nozick 'starts from the position that individuals have certain basic (natural) rights and duties, in particular the rights not to be harmed in life, health, and liberty.'¹⁸ We must conclude, therefore, that Nozick has been unsuccessful in his attempt to derive rights in private property from liberty. Moreover, we must also come to the conclusion that Nozick has failed to overthrow all theories involving the redistribution of wealth. This means that the possibility of dispossessing the wealthy remains a viable moral aim. Ironically, insofar as the ownership of vast wealth adversely affects the ability of many to do what they wish, one might feel morally impelled to oppose private property; and one might well cite liberty as one's justification.

NOTES

1. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 156.
2. *Ibid.*, p. 154.
3. *Ibid.*, p. 153.
4. *Ibid.*, p. 167.
5. Thomas Scanlon, 'Rights, Liberty, and Property', in Jeffrey Paul (ed.), *Reading Nozick: Essays on Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1981), p. 110.
6. *Ibid.*, pp. 110-11.
7. It is most odd that Nozick should assume that an anarchist society would recognise property rights. Few anarchist thinkers have recognised the ownership of the means of production by an oligopoly as being rightful. In fact, few important anarchist thinkers (the American anarchist, Benjamin R. Tucker, is perhaps the most notable exception) have recognised property rights at all.
8. Nozick, *op. cit.*, p. 151.
9. In what immediately follows, I take my lead from an example concerning teachers which is to be found in Cheyney C. Ryan, 'Property Rights and Individual Liberty', in Paul, *op. cit.*, p. 329.
10. Onora O'Neill, 'Nozick's entitlements', in *ibid.*, pp. 308-9.
11. Nozick, *op. cit.*, p. 151.
12. *Ibid.*, pp. 178-9n.
13. See Chapter 2 above.
14. David Lyons, 'The New Indian Claims and Original Rights to Land', in Paul, *op. cit.*, p. 367.
15. For the distinction between positive and negative freedom, see Isaiah Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. 118-72.
16. One possible response to this might be to argue that one is free or at liberty if one is free *from* interference. In which case, negative freedom would be a sufficient condition for being free. The freedom to gather, pasture, etc. would be beside the point. Many proponents of the capitalist system make similar claims—we live in a free society; that everyone is not free to enjoy the wealth of the few is of no account. But can it be assumed that one is free solely on the grounds of being free from any interference with whatever little one might own? The fact that the chairperson of a discussion is banned from leaving early, does not entail that he or she is banned! Why, therefore, should one assume that merely being free from interference with one's property entails that one is free? Neither must we fall into the trap of assuming that freedom is constituted solely by positive freedom. If we were to point out to obnoxious intruders that they were welcome to leave, it would be most rash to conclude from this that they were welcome. Why, therefore, should one assume that being free to sell one's labour in capitalist society entails that one is free? Being free seems more likely to include substantial elements of both positive and negative facets. If one is free

from interference with one's property by others, but one has so little property in a propertarian society that one can achieve none of one's aims, then it is unlikely that one is enjoying much liberty. Similarly, if one is free to partake of the benefits of a particular society, but one is constantly being constrained, then one would not appear to have much liberty there either.

One might, therefore, be tempted to conclude that being free requires both positive and negative aspects as necessary conditions. If one came to such a conclusion, a respect for liberty might involve a rejection of private property, because the disproportionate power of the wealthy, which is purchased at the expense of the poor, means that liberty can only be maximised throughout society by rendering the wealthy less potent. If their power is the result of their wealth, such wealth would have to be opposed. Quite simply, a respect for liberty does not mean a respect for the freedom of one group at the total expense of another. It means freedom for all, and insofar as political freedom is a zero-sum game, then disproportionate holdings in power must be opposed.

17. And if it is, then the freedom to do certain things which the development of technology in capitalism has enabled does not allow Nozick to claim that people are more free than in the state of nature. It only allows him to claim that they are more free than in what he regards as the 'baseline condition'.
18. O'Neill, *op. cit.*, p. 305.

5 The Derivation from Utility

Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases.

Jeremy Bentham

I now turn to consider the attempt to derive property rights from a utilitarian basis. Although John Stuart Mill is the most famous exponent of utilitarianism, it is Jeremy Bentham, the man usually considered to be the founder of the movement, who presents the first and most compelling attempt to found property rights upon the principle of utility.

But what exactly is this principle? Bentham explains that 'by the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or oppose that happiness.'¹ Happiness, Bentham believes, is to be understood in terms of pleasure and the absence of pain. Pleasure and pain 'govern us in all we do'.² The recognition of this must lie at the foundation of the moral law. Civil law, if it is to be in accord with morality, should have as its aim the interest of the community. And as the community is composed of its individual members, the object of law should be to maximise the happiness of the greatest number of those individuals. As Bentham observes:

An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.³

The morally guided legislator, then, 'should have for his end the happiness of society.'⁴

Bentham considers there to be four ends which are subordinate to the happiness of society: subsistence, abundance, equality and security. To the extent that each of these ends are met, social happiness is to be found. Obviously, there will be a preponderance of pain in society if the means of subsistence are threatened. As Bentham believes that happiness can be measured in terms of wealth, an abundance of goods will produce happiness. Interestingly, Bentham is of the opinion that an increment of wealth apportioned to the poor will provide more happiness than the same increment administered to the rich. Happiness is subject to the law of diminishing returns. This means that equality will be a more happy condition than one where goods are unevenly distributed throughout society. Bentham, however, does not accept that it is in the interests of society for legislation to operate with specific regard for each end. As he writes:

In legislation, the most important object is security. Though no laws were made directly for subsistence, it might easily be imagined that no one would neglect it. But unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone you will have done enough.⁵

Clearly, this argument is, at least in part, directed against socialism. It is assumed that unless the producers are guaranteed the produce they create, they would have no motivation to labour. And this seems *prima facie* plausible. Why should one work if others help themselves to what one has produced? Moreover, why should one produce if one can help oneself to the fruits of another's labour? So, subsistence and even abundance appear to depend upon one's expectation of the receipt of the fruits of one's labour being guaranteed. Consequently, the legislator must promulgate property laws. With the enforcement of such laws, a state of security will encourage the producer to labour hard so as to improve his or her own lot.

This would seem to be without problems for a society at its

birth, but how does this fare when faced with an existing society? How should the legislator treat the distribution of property as it is found in the world today? As much of the property owned by the rich is not of their own creation, should this not be redistributed? Bentham is adamant that this should not happen. The legislator 'ought to maintain the distribution as it is actually established', for 'how despoil any without attacking the security of all?'⁶

But with no redistribution of property, how will equality be achieved? And equality, it will be recalled, was an end conducive to the increase in social happiness. Bentham's answer is that there is a tendency towards equality in societies with agricultural, industrial and commercial prosperity. As this prosperity is due to hard work conditional upon security of property, this security leads to equality in society. This holds true even for the labourers who work for the rich entrepreneur. Though they are poor, they are under the apprehension that they too are 'candidates of fortune'. Moreover, their distance from the great riches of the wealthy prevent their happiness being marred by jealousy. Thus, the establishment of property rights is sufficient to encourage the growth of subsistence, abundance and equality. Hence, there appear to be insuperable reasons for acknowledging rights in private property.

Are these arguments convincing, though? Are Bentham's premises to be accepted? He begins with an image of human beings that portrays them as being solely concerned with exclusive acquisitions, engaged in individual and not social production, and more interested in taking for free than in participating in rewarding labour. Can this be assumed to be the disposition of people before the establishment of property rights or of people brought up in a more communal society; or is it a caricature of men and women who have been born into a society where the concept of private property is pervasive? As C. B. Macpherson comments:

From Bentham's whole treatment of the four subordinate ends of legislation, and from his preceding factual postulates, it is clear ... how deeply his general theory was penetrated by bourgeois assumptions. First we have the general postulates: that every person always acts to secure his own interest, to maximize his own pleasure or utility, without limit; and that this conflicts

with everyone else's interest. Then the search for the maximum pleasure is reduced to the search for maximum material goods and/or power over others. Then, postulates drawn from his contemporary capitalist society are presented as universally valid: that the great mass of men will never rise above a bare subsistence level; that for them fear of starvation rather than the hope of gain is the operative incentive to labour; that for the more fortunate, hope of gain is a sufficient incentive to maximum productivity; that, for this hope to operate as an incentive, there must be absolute security of property. Finally, we have security of property elevated to a 'supreme principle' absolutely overriding the principle of equality.⁷

Yet surely, it will be claimed, Bentham's fundamental point is that without a secure knowledge that the products of labour will accrue to the labourer, then no labour would be undertaken. But Bentham's assumption can hardly be true, for as Marx and Engels rightly point out:

It has been objected that upon the abolition of private property all work will cease, and universal laziness will overtake us.

According to this, bourgeois society ought long ago to have gone to the dogs through sheer idleness; for those of its members who work, acquire nothing, and those who acquire anything, do not work.⁸

What is more, Bentham assumes that industrial progress has a tendency towards equality. There are few grounds for confidence in this. In fact, with an increasing concentration of privately owned capital, the tendency is, if anything, the other way. Bentham fails to realise, as Marx was later able to, that the private ownership of the means of production forces workers to sell their labour-power (their capacity to labour), and the surplus produced by the worker, over and above the cost of his or her wages, is appropriated by the capitalist. The result is that property in this form necessitates growing inequality, not equality. Furthermore, the increasing concentration of capital and the cheaper cost of production for capital-intensive over labour-intensive methods of production drives the independent producer—the artisan—out of business.

We communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence.

Hard-won, self-acquired, self-earned property! Do you mean the property

of the petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily.⁹

And so, paradoxically as it might seem, the growth of industry, which Bentham saw as leading to equality, undermines the ability of the producers in society to produce their own wealth. Those engaged in the kind of labour which Bentham must have had in mind when his argument began—the small independent producers—are driven out of business, and those who do not labour—the owners of the means of production—receive the most income.

More importantly, there is a theoretical inconsistency in Bentham's argument—a contradiction which has been noticed by Macpherson:

...to say that security of property, while perpetuating inequality, maximises productivity, is not to say that it maximises aggregate pleasure or utility. Bentham has ... shifted his ground ... from aggregate utility to aggregate wealth. But these are different. The shift is illegitimate because, by his own principles of diminishing utility, a smaller national wealth, equally distributed, could yield a larger aggregate utility than a larger national wealth unequally distributed.¹⁰

Moreover, there are cases, such as in times of war, when insecurity has led to increased effort by the workers. So, Bentham is wrong to assume that labour will not take place unless the produce of the labourers is guaranteed to fall to them exclusively.¹¹ The principle of securing property has not, then, been shown to be sacrosanct. This being so, if utility is to be maximised throughout society, the redistribution of the products of labour cannot be assumed in advance to be too disruptive to be practised. Moreover, as less utility is produced by giving more food to the rich and well fed, than by giving it to the poor and starving, the principle of utility *demand*s that any property claims be rejected which lead to inequality in preference to a system facilitating a more equitable distribution of goods. As it is difficult to imagine a system of property which would not lead to an unequal distribution of goods,¹² then utility would appear to offer an argument against property rights.

But is there not a kernel of truth in Bentham's assumption that labour will cease if property rights are not enforced? It could be objected against Marx that labour only occurs (when the workers do not receive all the fruits of their labour) because the labourers are coerced into working. The property of the rich is protected by the state, and at least this property is required for labour to take place. Therefore, some coercion by the state, either to uphold the claims to the fruits of labour or to protect established property claims, appears to be necessary.

But is state coercion required for a sufficient degree of reliance on one another to be expected so that useful work will be undertaken? Surely not. Think of a game of tennis. In a game of doubles one partner might not put in much effort. How could doubles ever be played if players were not given a guarantee by the state that their partners would not merely, during the game, rely on their efforts? Clearly, such a question is absurd. Games only take place because of mutual trust—a trust which is not enforced by anyone external to the game. Players refrain from cheating because, *inter alia*, of the fear of social disapprobation, because of the fear of withdrawal of co-operation by others, and because of the threat of social ostracism. Tennis players do not have a *right* to have their respective doubles partners' contribution to their joint effort enforced. They expect the other's contribution because of mutual goals and mutual, though tacit, agreements concerning the distribution of effort. There are no laws or rights involved. The same is surely true of acephalous societies which have managed to exist for thousands of years without laws or formal rights, and yet survive by means of joint labour (for example, the Mbuti of the Ituri Forest).¹³ And so, when Bentham remarks that

if all property were equally divided, at fixed periods, the sure and certain consequences would be, that presently there would be no property to divide. All would shortly be destroyed.¹⁴

we might concur, if for no other reason than the continual redistribution of goods makes a mockery of the concept 'property'. However, it is this *concept* which would be 'destroyed'; I see no reason to conclude, as Bentham appears

to, that there would be no *things* to divide.

We must, therefore, reach the conclusion that neither rights nor laws are necessary for labour to take place.¹⁵ However, the expectation of fair treatment by others might be required if laws or rights are not established. But in this regard, it is merely necessary that one expects others to contribute work—that one expects that an approximate equivalent of one's own effort is to return to one—if labour is to be undertaken by individuals whose motive is essentially economic. A society based upon co-operation could satisfy this, and so laws and rights which ostensibly provide security are not a necessary condition for any labour to occur. Neither are they a necessary condition for the value of what one produces to return to the producer. In a co-operative society, those who consumed but did not produce could expect the rest of society to withdraw their co-operation—and not because their rights to property were being infringed, but because of a refusal to support a free-rider—namely, someone who is not contributing sufficient effort to the community.¹⁶ Moreover, were Marx correct to believe that the private ownership of capital in a competitive market leads to periodic crises in the economy¹⁷ with the result that many owners of property are dispossessed through going out of business, then property laws or rights do not provide the security Bentham takes for granted. In fact, they lead, instead, to widespread insecurity.¹⁸

Furthermore, security and utility are maximised by 'insurance'. Rather than sail alone on the seas of vicissitude, one's security would be considerably advanced by being able to rely on others when times were bad. But such a situation would be unlikely to arise if one were not prepared to reciprocate by helping those others when they require assistance. For example, one might consume what one produces only when other producers were not in penury due to some unexpected misfortune, such as a crop failure. During such adverse times, the unfortunate could freely take a portion of what another had produced. This would take place with an expectation on one's part that were one to suffer misfortune, then one could take some of the produce of another's labour. That one could justifiably expect to do so would involve a situation where the produce of one's labour was not

property—i.e., a right to exclude others irrespective of their need.

These remarks on the possibility of mutual aid suggest that a genuinely moral community might be considered to be a mutual aid society. John Rawls has suggested a model whereby justice is understood as a set of principles which disinterested, rational, autonomous moral agents would agree to be bound by. Such principles can be revealed by imagining a situation where one lacked knowledge of one's social status, natural abilities, etc., and by then seeing which principles guiding social arrangements would be freely chosen. Such a thought experiment would enable bias and privilege to be eliminated from the choice of principles, and a morally acceptable set could be isolated. As Rawls writes:

Justice as fairness begins . . . with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions. Then, having chosen a conception of justice, we can suppose they are to choose a constitution and a legislature to enact laws, and so on, all in accordance with the principles of justice initially agreed upon. Our situation is just if it is such that by this sequence of hypothetical agreements we would have contracted into the general system of rules which defines it. Moreover, assuming that the original position does determine a set of principles (that is, that a particular conception of justice would be chosen), it will then be true that whenever social institutions satisfy these principles those engaged in them can say to one another that they are cooperating on terms to which they would agree if they were free and equal persons whose relations with respect to one another were fair. They could all view their arrangements as meeting the stipulations which they would acknowledge in an initial situation that embodies widely accepted and reasonable constraints on the choice of principles. The general recognition of this fact would provide the basis for a public acceptance of the corresponding principles of justice. No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.¹⁹

Clearly, if it can be established that we have voluntarily agreed

to a situation without the threat of coercion, then there would be little grounds for denying that we are under an obligation. Rawls has come as close as possible to describing such a situation without any overt agreement ever actually having taken place. His model, therefore, gives a good basis for assessing the moral worth of a set of principles. Moreover, as Rawls points out: 'In justice as fairness society is interpreted as a co-operative venture for mutual advantage. The basic structure is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds.'²⁰

Now, from the standpoint of such a position as Rawls', utilitarianism might be able to establish property rights based upon the greatest happiness of the greatest number. Utilitarians might be able to describe a situation about which no reasonable person would say that he or she would not have assented to it. And were this the case, it would not upset my earlier remarks about co-operative, rather than coercive, societies. However, Rawls' model, rather than justify the utilitarian position, reveals how objectionable it actually is. As Rawls writes:

The principles of justice as fairness apply to the basic structure of the social system and the determination of life prospects. What the principle of utility asks is precisely a sacrifice of these prospects. We are to accept the greater advantages of others as a sufficient reason for lower expectations over the whole course of our life. This is surely an extreme demand. In fact, when society is conceived as a system of cooperation designed to advance the good of its members, it seems quite incredible that some citizens should be expected, on the basis of political principles, to accept lower prospects of life for the sake of others.²¹

In other words, the principle of utility, which could involve the sacrifice of an innocent individual for the social good, would not be accepted by rational, morally autonomous beings.

This, of course, bears upon the classic example raised against utilitarianism. According to the greatest happiness principle, if the killing of a tramp who had committed no antisocial act were to be carried out because the poor tramp alone would suffer, while very many people would be made

happy (perhaps because a murderer, known by the police to be dead, had instilled such fear into the general public that only appeasing the cry for a judicial execution of a person thought to be the murderer would allay the fear), such an act would be morally justified. But our intuitive response is that such an action would be highly immoral. Does this not show that utilitarianism is defective as a moral theory?

Now, the classic argument against utilitarianism either holds or it does not. If it holds, then utility is a defective base upon which to build an argument for property rights, and the derivation from utility is highly suspect; if it does not hold, then it is right to sacrifice the pleasure of an individual for the greatest happiness of the greatest number. In which case, the security of a rich minority can be sacrificed for the egalitarian distribution of property which the law of diminishing increments of pleasure demands. In short, the argument which derives from utility and purports to establish the inviolability of private property is shown to be unsatisfactory.

A possible response to this criticism is that general rules (such as the inviolability of innocent people) must be upheld because their sacrifice would create unhappiness.²² However, even the preservation of a rule is ultimately subject to the greatest happiness principle. And the pleasure rules of property give to those who own cannot compare with the distress they cause those who do not. There could be no better reason on utilitarian grounds for abandoning the notion of property *de jure*. Utility, then, seems to provide more of an argument against property rights, than an argument for them.

NOTES

1. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: The Athlone Press, 1970), pp. 11–12.
2. *Ibid.*, p. 11.
3. *Ibid.*, p. 12.
4. Jeremy Bentham, *Principles of the Civil Code*, reprinted in part as 'Security and Equality of Property', in C. B. Macpherson (ed.), *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978), p. 41.
5. *Ibid.*, p. 43.

6. *Ibid.*, p. 57.
7. C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), p. 33.
8. Karl Marx and Frederick Engels, 'Manifesto of the Communist Party', in *Selected Works in One Volume* (London: Lawrence and Wishart, 1970), p. 49. It is worth noting that a similar objection was raised contemporaneously by Mill: 'The objection ordinarily made to a system of community of property and equal distribution of the produce, that each person would be incessantly occupied in evading his fair share of the work, points, undoubtedly, to a real difficulty. But those who urge this objection forget to how great an extent the same difficulty exists under the system on which nine-tenths of the business of society is now conducted. The objection supposes, that honest and efficient labour is only to be had from those who are themselves individually to reap the benefit of their own exertions. But how small a part of all the labour performed in England, from the lowest-paid to the highest, is done by persons working for their own benefit.' John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (Clifton, New Jersey: Augustus M. Kelley, 1973), p. 204.
9. Marx and Engels, *op. cit.*, p. 47.
10. Macpherson, *The Life and Times of Liberal Democracy*, *op. cit.*, pp. 33–4.
11. And even if he were right to assume this, it could hardly act as a proof of the full liberal conception of ownership. As R. H. Tawney writes: 'All these rights—royalties, ground rents, monopoly profits—are "Property". The criticism most fatal to them is not that of Socialists. It is contained in the arguments by which property is usually defended. For if the meaning of the institution is to encourage industry by securing that the worker shall receive the produce of his toil, then precisely in proportion as it is important to preserve the property which a man has in the results of his own efforts, is it important to abolish that which he has in the results of the efforts of someone else.' R. H. Tawney, *The Sickness of an Acquisitive Society*, reprinted in part as 'Property and Creative Work', in Macpherson, *Property: Mainstream and Critical Positions*, *op. cit.*, p. 144.
12. See the discussion of Nozick in Chapter 4 above.
13. For an account of the Mbuti, see Colin M. Turnbull, *The Forest People* (London: Picador, 1976). For the significance of acephalous societies for political theory, see Michael Taylor, *Community, Anarchy and Liberty* (Cambridge: Cambridge University Press, 1982), *passim*.
14. Bentham, 'Security and Equality of Property', *op. cit.*, p. 52.
15. And this is so, even when Bentham's assumption of *homo economicus* is left unchallenged. But there are good reasons for questioning the premise that people are naturally economically motivated. Richard M. Titmuss, in his study of blood donors, shows not only that the supply of blood to British hospitals rests primarily on altruism, but also that when blood is acquired by means of economic inducement (as happens in America and Japan), 'great shortages of blood' are produced. People

- do not give blood voluntarily because they wish for a transfusion in return. It cannot, therefore, be assumed that discomfort and inconvenience (i.e., the giving of blood) will only be taken on voluntarily when it is rewarded. When the gift of blood is transformed by economic motivation, drastic results follow. As Titmuss writes: 'From our study of the private market in blood in the United States we have concluded that the commercialization of blood and donor relationships represses the expression of altruism, erodes the sense of community, lowers scientific standards, limits both personal and professional freedoms, sanctions the making of profits in hospitals and clinical laboratories, legalizes hostility between doctor and patient, subjects critical areas of medicine to the laws of the marketplace, places immense social costs on those least able to bear them—the poor, the sick and the inept—increases the danger of unethical behaviour in various sectors of medical science and practice, and results in situations in which proportionately more and more blood is supplied by the poor, and unskilled, Negroes and other low income groups and categories of exploited human populations of high blood yielders. Redistribution in terms of blood and blood products from the poor to the rich appears to be one of the dominant effects of the American blood banking systems.' He concludes that 'on four testable non-ethical criteria the commercialized blood market is bad. In terms of economic efficiency it is highly wasteful of blood; shortages, chronic and acute, characterize the demand and supply position and make illusory the concept of equilibrium. It is administratively inefficient and results in more overheads. In terms of price per unit of blood to the patient (or consumer) it is a system which is five to fifteen times more costly than the voluntary system in Britain. And, finally, in terms of quality, commercial markets are much more likely to distribute contaminated blood; the risks for the patient of disease and death are substantially greater. Freedom from disability is inseparable from altruism'. Richard M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London: George Allen and Unwin, 1970), pp. 245–6.
16. For an excellent discussion of the free-rider problem, see Michael Taylor, *Anarchy and Cooperation* (London: John Wiley and Sons, 1976), *passim*. Taylor shows that the problem the free-rider causes for social libertarians, though apparently insoluble when viewed from the perspective of game-theory (hence suggesting that coercive institutions should be introduced), is considerably less problematic when dealt with dynamically by means of the tool of 'super-games'. Super-games are not limited to two persons, nor to one set of choices; therefore they allow an analysis of changing situations where many individuals are involved over a long span of time—and this is surely more applicable to an analysis of society than the static one-off model derived from the 'Prisoners' Dilemma' and normally used in more elementary game-theory. A dynamic approach to the free-rider problem allows the introduction of strategies of conditional co-operation, which can render the behaviour of the potential free-rider tractable.
17. See Karl Marx, *Capital* Volume III (Harmondsworth: Penguin, 1981), *passim*.
18. 'Property is as much a source of anxiety as it is of security. It is one thing to own a piece of ground which will provide enough and a little over for yourself and your family—that is security. It is quite another when that piece of ground has to be devoted to cash crops which may fail to sell in a given season and so leave you and your family destitute—that is anxiety.' Alan Ryan, *Property* (Milton Keynes: Open University Press, 1987), p. 48.
19. John Rawls, *A Theory of Justice* (Massachusetts: Harvard University Press, 1971), p. 13.
20. *Ibid.*, p. 84.
21. *Ibid.*, p. 178. And for a critique of any attempt to justify private ownership of natural resources on the basis of Rawls' theory of justice, see James O. Grunebaum, *Private Ownership* (London: Routledge and Kegan Paul, 1987), pp. 110–15.
22. See J. J. C. Smart, 'Extreme and Restricted Utilitarianism', in Philippa Foot (ed.), *Theories of Ethics* (Oxford: Oxford University Press, 1967), pp. 171–83.

Union are inefficient in giving consumers what they want, and no better than economies based on private property so far as pollution, public health, job satisfaction and the rest are concerned.¹

Are these observations accurate? And do they lead us to conclude that private property is morally justified? Well, in order to answer these questions I shall look at each of these observations in turn.

The first is that 'parks are more littered than private gardens', and as such publicly owned facilities are less well-kept than privately owned gardens, then this apparently demonstrates that people only really care about what they themselves own, and are careless with what they do not own.² But this observation is of societies which are based fundamentally on private property. It is not an observation of societies in which there is no ownership. If people in a particular society have been brought up to respect private property, it is hardly surprising that only private property is respected in that society. This does not tell us that in all societies only private property is respected, nor that societies that stress private property are the best possible ones. If one wishes to legitimate private property, then the only acceptable comparison would be between a society based primarily on private ownership and a society in which there was no ownership. One would have to look at a society based fundamentally on private ownership and compare it with a society in which there was no ownership at all. To look solely at a society based on private property is to smuggle propertarian attitudes into the example. Any observation of a society where all that is valued is private property can be discounted because the high value given to private property and the low value accorded to public property might very well be due to the prevalence of propertarian conceptions, which might itself be due to the prevalence of private property in that society. Hence, the first observation is question begging. Moreover, some private gardens are worse-kept than *any* public park. The observation is not even an accurate one.³

It is also worth noting that so-called public property, such as parks, is not something which everyone feels that they have some relevant control over. 'Public' parks are administered by

6 The Derivation from Efficiency

... the main allocative function of property rights is the internalization of beneficial and harmful effects. ...

Harold Demsetz

An attempt to derive property rights which is closely related to the 'derivation' from utility is the one from efficiency. It is to this attempt that I must now turn. A stress on the relationship between property rights and efficiency is, of course, more often than not associated with economists than with philosophers. Probably the most famous argument relating property rights to efficiency is that developed by Harold Demsetz in his article 'Toward a Theory of Property Rights'. I shall discuss the specific points which Demsetz's article raises in due course. But before I do, it is necessary first to look more generally at some of the arguments associated with attempts to derive property rights from considerations of efficiency.

The fundamental basis of all the putative derivations from efficiency is the assumption that private property is clearly more efficient than other methods of allocating resources. Private property is, it is assumed, unarguably more efficient than state ownership, for example. Alan Ryan summarises the intuition underlying this approach as follows:

In general, the thought is that giving people property rights in anything of value is the best way of ensuring that resources are used as efficiently as possible. It is an empirical observation that parks are more littered than private gardens, that simple societies without private ownership do more damage to their land than complex, private propertied societies, that centrally planned, publicly owned economies such as that of the Soviet

bureaucrats that few people have any contact with. Parks are cultivated by professional gardeners, rather than by the people themselves. They are not the sorts of things that people are likely to identify with meaningfully. And that is because 'public property' is a form of *property* that often excludes the public from meaningful control over. Even if it were acceptable to take as a contrast with private gardens some other form of garden within the present social and economic system, then it would have to be some joint venture in which everyone was involved and exercised some measure of control over. But it is not at all clear that jointly run ventures in which many people actively participate involve less commitment and respect than purely private endeavours.

Let us, then, examine the second observation—namely, that 'simple societies without private ownership do more damage to their land than complex, private propertied societies'. It is certainly true that some 'simple' societies do damage the land. Slash and burn cultivation can be highly destructive. However, it is only highly destructive when it is practised too frequently on the same piece of land. And very often, the reason for that is that 'complex', private propertied societies have encroached upon the land which such societies range over, destroying their natural habitat, or setting up artificial national boundaries which inhibit their movement, thus forcing them to practise their form of agriculture in too confined an area. So, although the observation that some 'simple' societies which lack private ownership damage their land is true, it does not establish that private propertied societies are a solution to the problem. This is because the latter are very often the *cause* of such 'simple' societies having to damage the land.

Moreover, the observation is only true of *some* 'simple' societies. As a universal observation it is most definitely false. Many 'simple' societies have a tremendous reverence for their natural environment and are very careful not to upset its delicate balance; for example, the Mbuti (whom I mentioned in the previous chapter) take the greatest care of the Ituri Forest in which they live.⁴ This is to be contrasted with the massive destruction of the rain forests by private propertied societies. And concerning that level of destruction, no 'simple' society comes anywhere near competing.

The third observation is that 'centrally planned, publicly owned economies such as that of the Soviet Union are inefficient in giving consumers what they want'. This is true. It is also true that they have a very bad record concerning things like pollution (and this was the case long before the accident at Chernobyl). However, although the Soviet Union is extremely inefficient at meeting consumer needs, it was extremely efficient in mobilising resources (such as labour) in its early days. And its rate of growth from a very backward country under the Tsar to a major economic and political power shows that, even if the system is to be condemned on many counts, it is not wholly inefficient in developmental terms.

But why, in any case, contrast private property with state-owned property? The problem with the Soviet Union is precisely its form of *ownership*—state ownership. In the Soviet Union, indicative plans are concocted, and satisfying the plan, rather than producing what people want, is the criterion of success. If the plan refers to a certain weight of goods being produced, then this can mean producing over-heavy goods in order to fulfil the plan with greater ease. If the lampshades are too heavy for people's ceilings and happen to pull them down, then as far as the managers of Soviet factories are concerned: so what? Just as long as however many tons of lampshades have been manufactured, then the plan has been met. But these sorts of documented irrational features of the Soviet economy are due to the fact that ordinary people have no control whatsoever over production.⁵ In other words, it is their exclusion from any say in social production that is problematic. And this is, of course, a characteristic of *property*—in this case, state property. The observed inefficiency in the Soviet system has no relevance whatsoever for the question of whether or not property is legitimate. The best that such an observation might suggest is that privately owned property is better at meeting consumer choice than state-owned property. That is not to say that either form is better than no property.

There is another general argument that relates private property to efficiency. The argument has been forwarded by Richard Posner, and it concerns the tragedy of the commons. Basically, the argument is that the tragedy of the commons

shows the inefficiency of both a 'no-ownership system' and communal property. Therefore, they would give way to private property (which is thought to be more efficient). The tragedy of the commons concerns what befalls a group of villagers who use a communally owned pasture to graze their cattle on. Each member of the village reasons that if he or she were to increase the number of his or her cattle grazing on the commons, then he or she would benefit as a result. Consequently, too many cattle are put on the commons and it is destroyed through overgrazing. The problem appears to be that when anyone sees everyone else increasing the number of their cattle, then he or she has to do so too. That person's cattle are going to become more undernourished in any case, because the commons is becoming overgrazed. But two undernourished cows are preferable to one, so each person is driven to contribute to the increase of the herd, and that leads to the commons being destroyed. The conclusion seems to be that if the commons were privately owned, then each person would be charged for grazing his or her cattle. And the owner would not allow the land to be overgrazed. The owner would encourage the maximum number of cattle to be grazed without the commons being destroyed, because this would maximise his or her income. Hence, private property appears to be the most efficient solution to this problem.⁶

But if we did not each own the cows individually, then there would be no incentive to add to the herd. It is because we each individually derive benefit from our own cows alone that we are each induced to increase the number of cows using the commons. Not only is that which is being argued for—private property—presupposed in the example, it is the *private ownership of the cows which actually causes the problem*. If the cows were not privately owned, then there would be no reason to increase the number of cows above the optimal level for the pasture. Instead, we could ascertain and agree on how many cows the pasture is capable of supporting and collectively enjoy the milk produced.

Furthermore, Ryan has constructed a telling example where private property rights have been granted in land, and yet the same kind of tragedy as that of the commons still arises. Ryan asks us to imagine a situation where we each own a plot of

land with trees on it. Our own trees are particularly valuable to each of us as a source of firewood. However, they serve the vital public function of providing a windbreak, which is essential to prevent soil erosion. Each person realises that cutting down his or her own trees will not have a significant effect on the windbreak, and that his or her trees only add to the windbreak if everyone else does not cut down their trees. If they cut down their trees, he or she may as well do so too. If one person cuts down his or her trees and no one else does, then that person does no significant harm to the windbreak, so he or she may as well do so and make use of the firewood. If everyone else cuts down their trees, then one's own trees serve no purpose as a windbreak, hence they may as well be used as firewood. Thus, the windbreak is destroyed and the soil is eroded.⁷

It is clear from this example that allocating private property rights in land does not solve this particular tragedy. And what would solve the problem is some overall control of the land and the trees. Moreover, this would also solve the tragedy of the commons in the other example—a tragedy which was caused by overgrazing. Consequently, it is the lack of some overall control which is the problem, not the lack of private property rights. However, there are many different ways in which overall control could be effected. It could be effected by state control of the collective resource, in this case the windbreak. But given the inefficiency of the Soviet Union with regard to meeting consumer needs, then it is not a centralised overall control exercised by a minority of state personnel which is ideal. Instead, it is something like a situation where those who stand to lose by anyone cutting down a tree (irrespective of property rights) can veto, or demand appropriate compensation for, the destruction or damaging of a public good.

I now turn to the specific arguments which are offered by Demsetz. Like most other economists who discuss the relationship between private property and efficiency, Demsetz claims to be explaining the rise of property rights, rather than providing a normative justification for them. But it is clear, given the value which economists place upon efficiency, that the normative justification of private property is lurking behind

Demsetz's arguments. And even if Demsetz strenuously denies this, it is worth discussing his arguments as if they were an attempt to legitimate rights in private property. This is because others might very well decide to put Demsetz's arguments to such use, even if he chooses not to do so.

What, then, is Demsetz's major argument? On Demsetz's view, 'property rights signify how persons may be benefited and harmed, and, therefore, who must pay whom to modify the actions taken by persons. The recognition of this leads easily to the close relationship between property rights and externalities.⁸ By 'externalities' Demsetz means a harmful or beneficial effect such that 'the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worth while'.⁹ By 'internalizing' he means 'a process, usually a change in property rights, that enables these effects to bear (in greater degree) on all interacting persons'.¹⁰ And Demsetz proceeds to argue that 'a primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities'.¹¹ As Andrew Reeve explains:

The unifying theme in the economic approach to property rights is that the costs and benefits of a person's activities should rebound on him (as far as possible), and only on him (as far as possible). Property rights are structured (if necessary, re-structured) so that the harmful or beneficial effects of a person's activities are brought to bear on him rather than other people.¹²

Demsetz gives as an example an engineer constructing a dam which has deleterious consequences for those downstream.¹³ Private property rights enable those who suffer from the dam to deal with its owner.

Let us look at this example a little more closely. In the example, Demsetz assumes what he calls 'communal ownership', by which he means 'a right which can be exercised by all members of the community'.¹⁴ A farmer who owns a communal land right would prefer that an engineer who also has a communal land right did not interfere with the stream by damming it. The farmer can pay the engineer not to build the dam, but that would not stop anyone else from building one. If the engineer and the farmer both had private property rights, then they could easily negotiate. With no such private

property, the farmer would have to negotiate with the rest of the community, and the negotiating costs would be too high. Private property, therefore, is the most efficient method of internalising externalities.

But Demsetz had earlier claimed that 'communal ownership means that the community denies to the state or to individual citizens the right to interfere with any person's exercise of communally-owned rights'.¹⁵ Depending upon how this is to be construed, either this is or is not the same as no ownership, the engineer infringes the farmer's rights, or no one has the right to interfere in the farmer clearing the stream by pulling down the dam. In which case, the only reason why the farmer would not be free to do so would be if the engineer *privately owned* the dam. So, Demsetz's example of building a dam which affects others, just like the example of the tragedy of the commons discussed above, seems to presuppose private property rights.

Nevertheless, what Demsetz argues is that externalities (and pollution would be a good example) must be borne by those who produce them. In other words, externalities must be internalised by those responsible for them. And Demsetz assumes that this implies property rights so that those responsible for producing externalities can be charged for them. It might be possible for each member of the community to negotiate so as to deal with externalities, but, as has been noted, the transaction costs of so many negotiations would make that option inefficient. The most efficient solution is, it would seem, to grant property rights and to deal directly with the owner of the property that is causing some nuisance.

However, all that is required, in actual fact, is to make those who produce such externalities responsible for them. And making people responsible for something is not the same as giving them ownership rights. One can easily be made responsible for something without being given ownership rights in whatever it is. For example, in a rational bureaucracy people have certain duties and responsibilities which are related to their positions. But they do not *own* those bureaucratic positions: they cannot sell them; they cannot give them away to whomever they like; they cannot bequeath them; and so on. So it is clearly false that the only 'efficient' and

rational way to assign responsibility is to create property rights.

Moreover, instead of internalising externalities, private property can often 'externalise' what would otherwise be 'internalities'. As an example, the capitalist owner of a factory places on social welfare the workers he or she makes redundant. Instead of a worker being able to support himself or herself by working in a factory (that might be slightly less profitable to the owner with the particular worker working there), the whole society must bear the cost of supporting that now redundant worker.

It is worth noting that workers' co-operatives have been criticised for preferring not to make redundant those who work in them. The feeling of loyalty to fellow workers is such that every effort is made to avoid redundancies. This might lead to co-operatives being less efficient than capitalist firms. But though any individual workers' co-operative might, as a result, be less efficient than any individual capitalist firm, this is not to say that a society comprised exclusively of workers' co-operatives would be less efficient than a society in which the only firms were capitalist ones. When the capitalist firm discards workers, society as a whole has to support them. Society as a whole must bear the cost. However, if the workers are instead put to some use in a workers' co-operative, then the overall productivity in the society must be greater than if potential workers are sitting uselessly at home on welfare. In other words, though any privately owned firm might be more efficient than any workers' co-operative, a society of workers' co-operatives might be much more efficient than a society in which all the firms were privately owned. And this is because privately owned firms foist onto the community what co-operatives often consider to be their own responsibility. However, given the lack of motivation of workers in capitalist firms, and given the often astounding motivation of workers in co-operatives, it is unlikely that capitalist firms are in fact inherently more efficient than workers' co-operatives.

There is another aspect to Demsetz's claims that property rights are especially efficient. He claims that the communal ownership of resources would lead to them being depleted too rapidly. If each person could appropriate for himself or herself

as much as he or she wanted, then nothing would be left for future generations. The answer to this is private property rights. As Demsetz remarks:

If a single person owns land, he will attempt to maximize its present value by taking into account alternative future streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land rights. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death. It is very difficult to see how the existing communal owners can reach an agreement that takes account of these costs.¹⁶

But as James Grunebaum argues:

That an owner needs to consider the conditions which may occur after his death insofar as they affect the present value of this land makes sense only if the owner intends to sell his land or if he intends to bequeath a valuable piece of land to his heirs. But if the private land owner is only concerned about his own income from the land without any concern about selling it or what he may be able to bequeath, then the private owner might well exploit his land at a rate calculated to maximize his income over his life expectancy.¹⁷

The landowner might rationally choose to exploit the land so that he or she has exhausted all its potential at about the time of his or her expected death. In other words, a rational strategy would be to deplete the land over the full range of one's life so as to maximise the income that can be derived from the land. If the land had not been fully depleted at the time of one's death, then one would not have maximised the income from that land. In which case, Demsetz's argument would only hold if the landowner is concerned about bequeathing valuable as opposed to exhausted land to his or her heirs. But if the private landowner is concerned about bequeathing valuable rather than depleted land to a future generation, and perhaps also to its descendants, then he or she is not solely concerned with his or her own profit maximisation, and the fundamental premise of the economist is missing. Moreover, why should a community not also be concerned to leave valuable, rather than useless land, to its descendants? And as Grunebaum writes: '... it is not at all obvious that communal owners, who care about what subsequent generations might inherit, would too quickly deplete the land and resources'.¹⁸

This brings us to a related issue. Resources that are privately owned are often squandered. What others have a say in is, in fact, less likely to be squandered. Consider, for example, the waste characteristic of the rich. Consider the rich person who throws away a pair of socks after they have been worn once, rather than having to wear a pair that have been washed. Is this an efficient use of resources? And the inefficiency is clearly due to the fact that some have so many resources under their private control that they do not have to care about waste, whereas those who do care about waste have very few resources under their control. If we are to protect resources, then something like usufruct accorded by the community as a whole would be best. And if one is held responsible when using what one has usufruct privileges over, then externalities would be internalised, even though there were no private property.

If we are concerned with protecting resources (one aspect of efficient use on a planet of finite resources), then full liberal ownership is an odd method of doing so when it gives people the right to destroy what they own. Giving people that right is a peculiar method of preserving resources. Moreover, the question can be asked: How are future generations to be safeguarded against our squandering of resources? I doubt whether there is any convincing answer to this question if one assumes pure self-interest. However, if every generation today has a say in the use of resources, then the young will probably tend to contain the wastefulness of those who have no reason to care about tomorrow. Grunebaum argues that families and corporations may well solve the problem of resource squandering, because families and corporations continue after the death of any individual member. But this might be because younger generations make their wishes known and have some influence on the decisions that are taken about resource use. That implies that all generations must have a share in decisions about resources. And that means that the largest number of people must be able to express their concerns, and be able to veto squandering and misuse of resources,¹⁹ not the smallest number as private property entails. Only the owner has any say over what happens to resources when private property rights obtain.

I have left to the end the question with which I should,

perhaps, have begun—the question that must be answered before the derivation of property rights from efficiency can even get off the ground. When entertaining the derivation from efficiency, the first thing I should have asked is: Is the pursuit of efficiency a fundamental moral obligation? If it is not, then it is difficult to see how it can legitimate property rights. Even if granting property rights were the most efficient method of ordering goods, that does not mean that anyone has the right to enforce property rights *because* they are efficient. What if someone does not worship efficiency? By what right do we make someone respect claims to property which are based solely on their efficiency?

And there are very good reasons for not making a god of efficiency. When people become old and unproductive, then society has to 'take care of them' in some way or other. That is inevitably going to incur some social expense. No matter what option society takes, dealing with old people is going to be a loss-making business to society as a whole. The most efficient solution is, clearly, the one that requires least expense. Keeping old people in old people's homes incurs considerable expense for society as a whole. Less expense would be incurred by building a few gas chambers. As building and running gas chambers is cheaper than building and running old people's homes, then the most efficient way of dealing with old, unproductive people is to kill them. Only a madman (or, at the very least, someone who is totally amoral) would reduce the question of how to 'take care of the old' to that of discovering the most efficient (and final) solution. Efficiency should not dictate our morals. The most efficient form is what we should attempt to ascertain only after the moral questions have already been answered. We should be asking what is the most efficient way of bringing about what we consider to be morally legitimate goals. It is a fundamental mistake to determine our moral goals on the basis of what is most efficient. Consequently, efficiency is unlikely to be an acceptable basis for answering normative questions. Hence, it is unlikely to establish the legitimacy of property rights.

NOTES

1. Alan Ryan, *Property* (Milton Keynes: Open University Press, 1987), p. 106.
2. This observation can be traced back to Aristotle, who observes that whatever is communally owned will not be managed as well as that which is privately owned. See Aristotle, *The Politics* (Harmondsworth: Penguin, 1962), pp. 62-3.
3. And it would be illegitimate to generalise from such an observation, were it valid, to all goods. As Ryan points out: 'In some situations, "private" solutions work badly; "public goods" which may include clean air, national defence, safety devices like lighthouses and many more, and which *ex hypothesi* do not allow for the exclusion of anyone from using them, cannot be supplied by the market place trading in private property.' Ryan, *op. cit.*, p. 114.
4. Or at least did so at the time they were studied. See Colin M. Turnbull, *The Forest People* (London: Picador, 1976).
5. See Alec Nove, *The Economics of Feasible Socialism* (London: George Allen and Unwin, 1983), pp. 68-117; also see Mary McAuley, *Politics and the Soviet Union* (Harmondsworth: Penguin, 1977), *passim*.
6. See Richard Posner, *The Economic Analysis of Law* (Boston: Little Brown, 1978), p. 28; also see Ryan, *op. cit.*, pp. 104-5. But on the tragedy of the commons in general, see Michael Taylor, *Anarchy and Co-operation* (London: John Wiley & Sons, 1976), *passim*.
7. See Ryan, *op. cit.*, pp. 105-6.
8. Harold Demsetz, 'Toward a Theory of Property Rights', in *American Economic Review*, vol. 57, no. 2, May 1967, p. 347.
9. *Ibid.*, p. 348.
10. *Ibid.*
11. *Ibid.*
12. Andrew Reeve, *Property* (London: Macmillan, 1986), pp. 25-6.
13. Demsetz, *op. cit.*, p. 357.
14. *Ibid.*, p. 354.
15. *Ibid.*
16. *Ibid.*, p. 355.
17. James O. Grunebaum, *Private Ownership* (London: Routledge and Kegan Paul, 1987), p. 160.
18. *Ibid.*, p. 161.
19. See *ibid.*, *passim*. Grunebaum makes some useful points with regard to the legitimate concern of the community about resource use, and hence finds against the private ownership of resources. However, Grunebaum argues in favour of what is basically private property with regard to the products of resource use. In place of private ownership in general, he advocates what he calls 'autonomous ownership', which 'resembles private ownership in some ways and in other ways resembles communal ownership. Autonomous ownership resembles private ownership in the rules regarding self and labor. Autonomy requires that each individual have the right to direct his own labor and the right to the income from

his labor. The alternative, to regard the self and labor as being owned wholly or in part by other members of society, violates individual autonomy. The autonomous ownership rules for land and resources resemble communal ownership in that each individual must have the right to participate in decisions about how land and resources are used as well as the right to a share of the income produced by land and resource utilization.' *Ibid.*, p. 2. Personally, I value autonomy greatly. And I can see that autonomy is violated if individuals are forced to labour against their will and for those that they do not wish to work for. But why is autonomy violated by individuals not receiving the income from their labour? Does someone who, voluntarily, works for a charity without payment thereby sacrifice his or her autonomy? If someone does not work (excluding invalids, and so on) and receives an income from everyone else's labour, then the autonomy of everyone else might be violated. And if the central committee of an authoritarian community expropriates the income from everyone else's labour, then the autonomy of everyone else might also be violated. But why is 'from each according to his abilities, to each according to his needs' a violation of autonomy? Grunebaum appears to be moving illegitimately from the control over one's labour to control over the product of one's labour.

In any case, Grunebaum's conception of autonomous ownership is surely incoherent. The individual controls the product of his or her labour. The community controls the resources. But all products of labour are potential resources for future labour. Which means that the individual controls his or her product as it is the product of his or her labour, and the community controls it as it is a resource. Hence, 'autonomous ownership' is contradictory. It can also be objected against Grunebaum that too many capitalist presumptions remain in his conception of autonomous ownership. For example, he assumes that one should be free to work both for the state or for a private employer. But by what right does an employer make any profit out of his or her employees? Even if one has the right to the income from one's own labour, how does that give one the right to any of the income from another's (e.g. an employee's) labour? If you wish to expand your business, then you might allow others to work *with* you (for example when a workers' co-operative increases its membership), but what right do you have to make others work *for* you (in the sense of creating the wealth which you as an employer exploit)? Grunebaum makes some useful criticisms of the 'derivation' from efficiency, but his alternative notion of ownership uncritically contains too many capitalist elements.

7 The Derivation From First Occupancy

If it were held that no acquisition, not even provisional acquisition, is juridically valid before the establishment of a civil society, then the civil society itself would be impossible. This follows from the fact that, as regards their form, the laws concerning property in a state of nature contain the same things that are prescribed by the laws in civil society insofar as they are considered merely as pure concepts of reason; the only difference is that, in the civil society, the conditions are given under which the [right of] acquisition can be exercised (in conformity with distributive legal justice). Accordingly, if there were not even provisional property in a state of nature, there would be no duties of justice with respect to them, and, consequently, there would be no command to quit the state of nature.

Immanuel Kant

It is generally assumed that being the first person to take an object into one's possession or being the first person to occupy a plot of land establishes property rights in whatever has been possessed or occupied. Now, there are good reasons to grant preference to the first person in a queue. That person will have waited the longest. It is only right, therefore, that he or she should be dealt with first. But why is this the case? A possible reason is that the person who has waited the longest (the first person) will probably have suffered the most discomfort, and it is only fair that the person should be dealt with before others who have waited less time and probably suffered less discomfort. They in their turn will probably end up suffering no more than the first by the time they are seen to. Thus, discomfort is equalised, and the situation can be characterised as fair.

However, if it is considerably more painful for another to wait than the first in line, should that person not be given

preferential treatment? If the argument has to do with discomfort, the sick person who has waited less time than the healthy person should, nevertheless, be dealt with first. Perhaps this suggests that it is morally appropriate that being first in a queue does not establish claim-rights over those who follow irrespective of their individual situations. Why should first occupancy as a criterion for rightful ownership be regarded any differently? But most of us assume that first occupancy does establish the exclusive right to the utilisation of a good. Can this assumption be justified? The most influential philosopher to argue for the derivation of property rights from first occupancy is Immanuel Kant. It is to his arguments which I shall shortly turn.

Before I do, however, it must be pointed out that first occupancy poses some special difficulties. For one thing, if the first person to arrive at any place claims that area as his or her own, what are the limits to that claim? What is the extent of the area that is occupied, and how is it to be ascertained? The notion of occupation is itself problematic. Do I occupy an area of land merely by setting foot upon it? Or do I have to live there? But in this case, do I occupy the house in which I live, or the house and the fields in which the house is located? Or the whole valley? How are such questions to be answered? Unless the extent of occupation is quite specifically delimited, the first person to have stepped ashore on Albion may rightfully (given that first occupancy does establish ownership rights) claim the whole land. But why stop there? Why should he or she not also claim the sea and the lands bordering on it?

Having said this, it is evident that there must be some limits to the staking of claims. But what are they? Perhaps one occupies what one has physically staked out, say by a fence. But why should one think that one occupies the land enclosed? Why not assume that only the land under the fence is occupied?¹ Clearly, such questions would need to be answered before any derivation from first occupancy could be accepted.² However, I shall put aside such questions in order to see how an argument from first occupancy might be developed.

So, let us now consider Kant's arguments for property rights. Kant deals with the establishment of property rights in *The Metaphysics of Morals*. Property rights, for Kant, must,

like all just, legally endorsed claims, be grounded in pure reason.³ Kant is of this opinion because he takes human beings to be essentially rational. People behave morally when they freely choose to bind themselves to a rational law. Such a law is recognised by its ability to be universalised. And I am in agreement that this is *prima facie* a necessary condition for a moral community. If individuals are to live together, then it would appear that they need a code which they can follow. That the universalisability of a maxim is a sufficient condition for ascertaining the rules in any acceptable moral code can be questioned (and I shall return to this issue later), but that it is a necessary condition seems intuitively obvious. We often relate morality and justice to fairness, and a code which allows one individual a right which it denies to others seems most unfair. Such partiality would be exposed by the procedure of finding out whether the underlying maxim could be universalised or not. The inability to universalise a maxim suggests that the maxim is in conflict with our notions of fairness and, hence, is likely to be immoral. Insofar as justice must be moral, Kant appears to be on safe ground when he claims that 'justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom'.⁴ Certainly, if several wills could be bound together under a 'universal law of freedom', we might be tempted to regard such a situation as just.

With this notion of justice, Kant is in a position to begin to determine which actions are just, for 'every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist with the freedom of everyone in accordance with a universal law'.⁵ How, though, does this starting point enable property rights to be established? The answer is that if it can be shown that property rights are universalisable, then, according to Kant's moral theory, it is not immoral to exclude another from using what one owns. Moreover, it also follows from the theory that if

my action or my condition can coexist with the freedom of everyone in accordance with a universal law, then anyone who hinders me in performing the action or in maintaining the condition does me an injustice, inasmuch as

this hindrance (this opposition) cannot coexist with freedom in accordance with universal laws.⁶

So, property rights, by this argument, would be inviolable.⁷ All that Kant needs to do is to show how it is that property rights are acquired.

How is Kant to do this? Well, in order for individuals to act freely, it is necessary that they be able to subject external objects to their wills. It is necessary that they be able to make them objects of their wills.

An object of my will, however, is something of which I have the physical capacity to make use, a use that is within my power (*potentia*). This capacity must be distinguished from having the same object within my authority (*in potestatem meam redactum*). The latter presupposes, not merely a capacity, but also an act of the will. But in order to merely conceive of something as an act of my will, it is sufficient that I be aware of the fact that it is within my [physical] power. Consequently, it is an *a priori* assumption of practical reason that any and every object of my will be viewed and treated as something that has the objective possibility of being yours or mine.⁸

However, an object cannot be yours or mine unless it is first appropriated. This can only be done if the object has not already been appropriated. Because reason demands that there be an object of the will, the ability to appropriate that which has not already been appropriated must be presupposed. And this follows from the above postulate that every object might be yours or mine.

This postulate can be called a permissive law of practical reason (*lex permissiva*). It confers on us an authorization that we cannot derive from mere concepts of justice in general, namely, the authorization to impose an obligation on all others—an obligation that they otherwise would not have had—to refrain from using certain objects of our will because we were the first to take possession of them. Reason requires that this postulate be taken as a basic principle, and it does this as practical reason extending itself *a priori* by means of this postulate.⁹

Now, this might very well be the case: if every object has the possibility of being yours or mine, but why should this be the case? Kant's reason is as follows:

An object of my will is a thing that I have the physical power to use. Let us

suppose that it were absolutely not within my power *de jure* to make use of this thing, that is, that such power would not be consistent with the freedom of everyone in accordance with a universal law. In that case, freedom would be robbing itself of the use of its will in relation to an object of the same will inasmuch as it would be placing usable objects outside all possibility of being used. In other words, it would reduce these objects to nought from a practical point of view and make them into *res nullius*, although formally the will involved in the use of these things is still consistent with the freedom of everyone in accordance with universal laws.¹⁰

Certainly, if it were not within my rightful power to use an object, and if this were universalised, then no object could rightfully be used. However, although I cannot rightfully use an object which it is not within my 'power *de jure*' to make use of, it does not necessarily follow that I can only rightfully use an object if I own it. But Kant seems to be presupposing precisely that. And were such a presupposition granted, as it is the case that if an object is owned then another cannot rightfully use it without the owner's consent, then, as my will must be able to use some goods, this would mean that ownership rights must be determined by first occupancy. But all this presupposes first occupancy. If first occupancy is not assumed in advance to determine ownership, if it is instead realised that one can use an object without owning it when that object is not owned by anyone, if it is instead realised that it is within one's power to use an object which Kant regards as *res nullius*, then there is no longer any need to assume that I have come to own the object by using it. I can use an unowned object and not accept ownership rights. Hence, if everyone did this, the will could utilise objects without having to own them, because no one else's ownership would prevent one from using them. Therefore, the necessity of ownership must not be presumed in advance and, consequently, neither must it be presumed in advance that ownership is determined by first occupancy.

This becomes obvious when one considers the possibility that there is no such thing as property rights. In such a situation, first occupancy would not determine a property claim. Hence, using a good would not make the good one's property. And as no goods belonged to anyone, then there would be no reason to suppose that those goods could not be

rightfully used. Furthermore, as this is a conceivable scenario, then the possibility of no property rights might just be universalisable.

How can this be ascertained? In the *Fundamental Principles of the Metaphysic of Morals*, Kant's first formulation of the categorical imperative, the definitive Kantian statement on universalisability, is: 'Act only on that maxim whereby thou canst at the same time will that it should become a universal law.'¹¹ A maxim is a rule which underlies an action. Kant's view is that if an underlying maxim cannot be regarded as a universal law, then it is immoral to engage in any action informed by such a maxim.

To see how this works, let me take tennis as my example once again. Suppose that I refuse to play tennis with anyone who was worse at the game than I am. My reason for this might be that I needed to improve my game and I would only become a good player if I practised with those better than myself. I might refuse to play with inferior players because they would soon be as good as I am, and I could not agree to this happening, given such a competitive sport as tennis. I might also refuse to play with those of a comparable ability to myself because they might overtake me and my status within the game might be threatened as a result.

Kant's point is that such an approach would be immoral because the maxim underlying this could not be universally applied without contradiction. How is this so? Well, what would the maxim in question be? It would be something like:

Play tennis only with those better at the game than yourself.

But such a maxim, were it generally complied with, would entail that no games of tennis ever took place. I could play with you if you were better than I, but you could not play with me because I was worse than you. I could not play with anyone of the same ability as myself because they would not be better than I am. Similarly, I could not play with anyone whose standard was below mine. The only class of people which I could play with could not play with me. Hence, tennis as a sport would cease were this maxim universalised. We are now in a position to enquire whether or not the possibility of no

property rights at all might admit of universal application.

So, can a scenario of no property rights be morally erected upon a maxim capable of universal adherence? Most certainly. Such a possible maxim is:

Use any good that you like, as long as it is not being used at that particular moment by someone else.

Such a maxim establishes a limited exclusive use, but it does not establish property rights. Moreover, if the freedom of the will is what is at issue, the will would be able to make more objects subject to it, given this alternative maxim. The sole difference is that the objects subject to the will would be subject to it only while the will was directed to that object. But this is more in line with what we mean by subjecting an object to our will. Kant is confusing 'subjecting an object to my will' with 'placing an object permanently under my control'. There is no reason to assume that the will cannot make use of objects unless it has permanent and uninterrupted control over them. Kant must be making such an assumption. Furthermore, there is no reason to assume that an object can only be subject to my will if others are permanently excluded from using that object.

Thus, a maxim pertaining to limited exclusive use can be universalised. In which case, when Kant says that 'if ... my action or my condition in general can co-exist with the freedom of everyone in accordance with a universal law, then anyone who hinders me in performing the action or in maintaining the condition does me an injustice', then anyone who rejects property rights while acting upon the second maxim suggested above and uses any object he or she likes, so long as it is not being used by another at that moment in time, can only be prevented from doing so unjustly. People who prevent that person from using what they consider to be their own unused property would be doing that person an injustice. This peculiar consequence of Kant's theory suggests something about the actual status of the criterion of universalisability. As both the possibility of property rights and the possibility of no property rights are conceivable as universal situations, we can see that universalisability can be no more than a necessary condition for establishing what is uniquely just; it cannot be a

sufficient condition when two contradictory scenarios could separately be conceived to obtain universally.

However, Kant evidently does assume that universalisability is a sufficient condition for a moral situation to obtain. Consequently, as the establishment of property rights through first occupancy can be supported by a universalisable maxim, he assumes that property rights attained through first occupancy are morally binding over others. This assumption falls when universalisability is seen to be at most a necessary condition for moral claims. Now, it is true that theft is often based upon a maxim that cannot be applied universally. If I steal an object, I do so to keep it myself. This keeping of the object presupposes property (Hegel, in his *Philosophy of Right*, uses such an argument to suggest that criminals condemn themselves). I cannot universalise the taking of other's things while at the same time demanding that what I have taken should not be taken by another. But this argument does not establish property rights. If people who take objects are prepared to have those objects taken from them, then property is no longer presupposed. And such a situation is universalisable. Thus, universalisability is only a necessary condition and not a sufficient one; and it would need to be a sufficient condition and only applicable to property as opposed to no-property for Kant's 'derivation' to work. Kant's theory, then, cannot establish the validity of property rights through first occupancy, because it is just as capable of 'proving' the non-existence of property rights. And the establishment of property rights and their contradictory amounts to a *reductio ad absurdum* of the theory in question.¹²

With regard to the question of first occupancy, Bernard Bosanquet writes:

There is apt to be confusion between the history of property and the reason of its existence. 'Property ... originates in "first occupancy" or "appropriation"'. But this amounts to the truism that there must be appropriation if there is to be property, and assigns no reason why there is or why there ought to be property.¹³

There is certainly some truth in this. Rarely are any reasons given why the notion of private property can be derived from

first occupancy. That first occupancy determines property rights when property rights are taken for granted is often presumed. But this is quite a different issue to the one we are presently concerned with. We want to know why there should be any property rights at all. Kant's arguments do not appear to provide any satisfactory reason.

Perhaps the intuitive appeal to the establishment of the concept of property rights arises from the truism which Bosanquet has drawn our attention to. In any case, my discussion of Kant's treatment of the 'derivation from first occupancy' has suggested that a considerably attenuated form of exclusive use would increase freedom, rather than decrease it. Were the argument from first occupancy valid, were it the case that first occupancy established property rights, then the possibility of a more flexible approach to the use of goods (for example, something more like a universal employment of usufruct) would be seriously impeded. This is because unowned goods would acquire the status of being owned simply by their use. And this would limit the possibility of others using the good at a later date. The consequence of this is that 'freedom would be robbing itself of the use of its will inasmuch as it would be placing usable objects outside' a reasonable 'possibility of being used'. However, it is not at all clear why it should be accepted that first occupancy can actually produce this state of affairs, for we must come to the conclusion that the most powerful exposition of the argument from first occupancy—that expounded by Kant—is unconvincing.

NOTES

1. Nozick raises this question with regard to Locke's attempted derivation from labour: 'Which plot does an act bring under ownership? The minimal (possibly disconnected) area such that an act decreases entropy in an area, and not elsewhere? Can virgin land (for the purposes of ecological investigation by high-flying airplane) come under ownership by a Lockean process? Building a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).' Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 174.

2. And even if such questions were answered, what notion of 'property' would be justified? As Morris Cohen remarks: 'The right of others to acquire the property from him, by bargain, by inheritance, or by testamentary disposition, is not determined by the principle of occupation.' Morris Cohen, *Law and the Social Order*, reprinted in part as 'Property and Sovereignty', in C. B. Macpherson (ed.), *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978), p. 162.
3. Kant writes: 'A jurist can, of course, tell us what the actual law of the land is (*quid sit juris*), that is, what the laws say or have said at a certain place. But whether what these prescribe is also just and the universal criterion that will in general enable us to recognize what is just or unjust (*justum et injustum*)—the answer to such questions will remain hidden from him unless, for a while, he abandons empirical principles and searches for the sources of these judgements in pure reason.' Immanuel Kant, *The Metaphysical Elements of Justice*, being Part I of *The Metaphysics of Morals*, trans. and with an intro. by John Ladd (Indianapolis: Bobbs-Merrill, 1965), p. 34.
4. *Ibid.*
5. *Ibid.*, p. 35.
6. *Ibid.* This is in agreement with my remarks on Locke's sufficiency criterion, where I admit that it would be unwarranted interference to prevent an individual from enjoying the fruits of his or her labour when there is enough and as good left for others.
7. Kant adds: 'An object is mine *de jure* (*meum juris*) if I am so bound to it that anyone else who uses it without my consent thereby injures me.' *Ibid.*, p. 51.
8. *Ibid.*, p. 53.
9. *Ibid.* Kant labels such a postulate 'a postulate of pure practical reason'. 'By a postulate of pure practical reason, I understand a theoretical proposition which is not as such demonstrable, but which is an inseparable corollary of an *a priori* unconditionally valid practical law.' Immanuel Kant, *Critique of Practical Reason*, trans. and with an intro. by Lewis White Beck (Indianapolis: Bobbs-Merrill, 1956), p. 127. It should be noted that Kant employs such a postulate to 'demonstrate' the immortality of the soul. Infinite progress must be assumed to be the real object of the will, and how could infinite progress be possible if the soul were not immortal? There are striking similarities between this *non sequitur* and Kant's argument concerning first occupancy.
10. Kant, *The Metaphysical Elements of Justice*, *op. cit.*, p. 52.
11. Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, trans. Thomas K. Abbott (Indianapolis: Bobbs-Merrill, 1949), p. 38.
12. It might be objected that universality is recognised in law and this creates property rights. Kant is of the opinion that the law is absolute: 'It is the people's duty to endure even the most intolerable abuse of supreme authority. The reason for this is that resistance to the supreme legislation can itself only be unlawful...' Kant, *The Metaphysical Elements of Justice*, *op. cit.*, p. 86. But in this case, the law is

heteronomous to the individual's will—any talk of a general will notwithstanding. Yet Kant insists that morality involves an autonomous individual will. In which case, the law cannot impose upon the individual what he or she does not rationally decree for himself or herself, because he or she would not be morally bound to subscribe to such a law. It is the criterion of universalisability which determines a self-imposed rational decree and is, therefore, the binding limitation to an autonomous will. But universalisability cannot, as we have seen, resolve the problem of whether or not property rights should be universally acknowledged. As universalisability is the one moral limit to the will, the law does not resolve the problem. For a cogent critique of heteronomous laws from the standpoint of the Kantian moral autonomy of the individual's will, see Robert Paul Wolff, *In Defence of Anarchism* (New York: Harper and Row, 1976), pp. 12-19.

13. Bernard Bosanquet, 'The Principles of Private Property', in B. Bosanquet (ed.), *Aspects of the Social Problem* (London: Macmillan, 1895), p. 308.

8 The Derivation from Personality

A multitude of human beings can only call itself a state if it be united for the common defence of the entirety of its property.

G. W. F. Hegel

George William Frederick Hegel has developed an influential theory which purports to validate the concept of property rights. Like Kant before him, Hegel concentrates upon the will. However, unlike Kant, Hegel views property not so much as an object subject to the will, but instead as a thing invested with a purpose by the will. The right to invest such a purpose in an object derives from the rights of being a person. To understand this, it is necessary to examine Hegel's arguments in some detail.

These arguments are to be found in *The Philosophy of Right*. In this work, Hegel constructs a vast theoretical edifice whereby, beginning with 'Abstract Right', he marches through civil society to the state—'the actuality of the ethical Idea.'¹ The discussion of the establishment of property rights is to be found in the section on Abstract Right. Z. A. Pelczynski informs us that

by *abstraktes Recht* [Hegel] means the general principles of law concerning such personal rights as the right to life and property, and various personal liberties. Derived from Roman Law and developed and rationalized by generations of later jurists and exponents of natural law it forms, Hegel believes, a body of abstract principles which necessarily underlies all positive legal systems of civilized countries in so far as the systems were rational.²

It will become clear as I proceed that Roman Law plays an

important role in Hegel's arguments for private property. For now, what must be noted is that private property is a right which is ascertained in Hegel's system prior to civil society and also prior to the state.

As in the *Phenomenology of Spirit*, Hegel presents us with a self-conscious will, which comes to be conscious of itself by reference to the external:

As *immediate* individuality, a person in making decisions is related to a world of nature directly confronting him, and thus the personality of the will stands over against this world as something subjective. For personality, however, as inherently infinite and universal, the restriction of being only subjective is a contradiction and a nullity. Personality is that which struggles to lift itself above this restriction and to give itself reality, or in other words to claim the external world as its own.³

Hegel, then, is arguing that personality goes beyond subjectivity, and it does so by means of its relation to what is external to the pure subject. One might think of the way that personality is not confined to self-contemplating subjectivity. Personality is only revealed through external manifestations. As Hegel writes: "Person" is essentially different from "subject", since "subject" is only the possibility of personality; every living thing of any sort is a subject. A person, then, is a subject aware of this subjectivity, since in personality it is of myself alone that I am aware. A person is a unit of freedom aware of its sheer independence.⁴ But how is this independence to be recognised? Hegel's answer is that independence and freedom are observed through property. Hence property is essential to personality.

Does this entail private property, though? Hegel believes that it does, for

in property my will is the will of a person; but a person is a unit and so property becomes the personality of this unitary will. Since property is the means whereby I give my will an embodiment, property must also have the character of being 'this' or 'mine'. This is the important doctrine of the necessity of private property.⁵

But surely one can stamp one's personality on a great deal without having to own external objects? Graffiti artists, to take

the obvious example, reveal their personalities through their messages marked on walls; they do not need to own walls in order to do so. Moreover, by writing messages which all can read, they transcend the purely subjective. Individuals seem to reveal their personalities more through their actions than through their property.⁶

However, Hegel has a further reason for relating property to personality: property is more the investment of will into an object than a mere manifestation of personality. As Hegel writes:

A person has as his substantive end the right of putting his will into any and everything and thereby making it his, because it has no end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'.⁷

This passage is of immense significance, and I shall explain why shortly. First, though, as the passage stands, what sense can be made of it?

To help clarify this passage, Hegel adds the following gloss: "To appropriate" means at bottom only to manifest the pre-eminence of my will over the thing and to prove that it is not absolute, is not an end in itself. This is made manifest when I endow the thing with some purpose not directly its own.⁸ Obviously, one cannot put one's will into an inanimate object like one can put eggs in a basket. So what is meant here? Hegel appears to be saying that found 'things' are without purpose, but they can be given a purpose by using them for our purpose. Clearly, they cannot be given a purpose by us in the way that a vacillating friend can be given a purpose. Such a purpose would be the friend's, although it was given by us. The purpose given to a 'thing' remains our purpose. But although the purpose is ours, we cannot automatically assume that the thing which has been given this purpose, this *raison d'être*, is ours. To suggest as much is to make the same kind of illegitimate move Locke was found to make when he tried to move from 'the labour is mine' to 'the product of labour is mine'.

However, there is a case where the expression of a purpose or a will appears to be obviously the property of the individual who expresses it. If I express some thoughts in a poem, then the expression is mine and, surely, the poem is mine. But this

move parallels the move from 'my nourishment' to 'my acorns' which is found in Locke. Let us analyse 'the poem is mine' in such a way as to regard the poem as being like an idea (rather than like a paperback book, i.e. a material object). To do so, let us focus on the phrase 'the idea is mine'. Prior to the formation of such a phrase one might expect to hear the statement 'I have an idea'. Now, what does this phrase mean? There are two likely candidates: The first is that there is an idea 'in' my mind which is not 'in' yours until I tell you about it; but once I do, you also have it. Thus, once I inform you of it I no longer have it exclusively. The second meaning concerns the formulation of an idea. The action of formulating the particular idea is mine. I then articulate that idea. The action of articulating the idea is mine. If another person understands the idea thus articulated, the action of comprehending the idea is his or hers.

Now, we can readily see that the action of formulating the idea was mine, not another's, and we can contest any claim the other might make to the effect that he or she was the first to formulate it. But 'ownership' of the act of formulation is not the same as the ownership of the idea such that I have the exclusive *right* to that idea. As was made clear when I examined Locke's argument, there are ways of being mine that are necessarily inalienable—the act of formulation is one such case. Such a way of being mine is quite different from the way that an idea is *rightfully mine*. And this crucial difference explains why a move from the one to the other is invalid as a proof of property rights. By saying 'the formulation is mine', one is led to say 'the idea is mine'. If, on the other hand, one were to say 'I was the first to formulate the idea', then one is no longer so sure that the statement 'the idea is mine' (where this is taken to mean 'I rightfully own the idea') is entailed. The phrase 'the poem is mine' can be analysed *mutatis mutandis*.

Let us now examine the phrase 'the expression is mine' in a different context. Let us consider the case of a painter. If an artist paints a canvas red, then this expression, this act of painting, is his or hers. He or she can say 'the painting is mine', when 'painting' refers to the completed activity of painting. But from this, one cannot suddenly move to 'the painting is mine' when 'painting' refers to the canvas with red paint on it. That the expression is the artist's, there is no doubt; that the

object which embodies that expression is *therefore* the property of the artist is not at all obvious. However, equivocations on 'this is my expression', 'this is my painting', 'this is my poem', 'this is my idea', etc. mislead one all too easily into thinking that property rights follow as a matter of course. The equivocation is revealed when one realises that there is a sense of 'the expression is mine' such that the expression is potentially alienable, and a sense in which any notion of it being alienable is absurd.

Now, it might be claimed that there is a case where the manifestation of an expression of the will inextricably binds one to an external object. This case is where an object exists in a specific form due to the expression of the will. As an example of this, one might cut down a tree, plane the wood, etc. and thus manufacture a table. The tree might not have been the artisan's, but the table is because it is his or her table—it would not exist as a table were it not for him or her. The form of the table is his or her expression, the manifestation of his or her will. First, in such a case the expression is not alienable and so the 'ownership' of the form 'table' is not the same as a property right, which *is* alienable. Second, what if another put a seat on the table, turning it into a chair? The chair would now be the second individual's expression. It will no doubt be objected that the second individual should not have turned the table into a chair without the consent of the person who formed the table. I might be happy to grant this. But does the owner of the table-form own the chair-form? Clearly not. His or her expression was the table; that no longer exists, and so he or she can no longer own it. The material which bore the form has not been destroyed, but the table is no longer owned by the first artisan. Such a nebulous ownership of form, whatever we choose to call it, clearly does not constitute a property right in the material which appears in that particular form. And how can one move directly from an ownership of the form to an ownership of the material which bears that form? If one cannot, then when the form changes the original ownership evaporates.

However, perhaps Hegel has a quite different reason for assuming that personality is manifest through property. As we understand the word 'personality' today, the ownership of

property is not the *sine qua non* of having a personality. However, in the seminal passage quoted above (on p. 91), Hegel makes a strong distinction between 'persons' and 'things'. These are two categories in Roman Law. And Hegel writes: '... *jus ad rem* is the right of personality as such. But from the point of view of what is called *jus ad personam* in Roman law, a man is reckoned a person only when he is treated as possessing a certain status.'⁹ We need have no doubt that for Hegel, as well as for the Romans, such a status was dependent upon owning 'things'—that which can be appropriated as property.

The ramifications of this are that property rights can be derived from the concept of a 'person', when 'person' is understood in the juridical sense. This is because the notion of property rights is included in the juridical sense of 'person'. In other words, one cannot be a person unless one has property rights. Hegel, then, is surely correct to derive property from personality.¹⁰

But is he? The notion of a juridical 'person', as we have seen, has to do with status. Why should it be granted in advance that such status be accorded anyone? Certainly, property rights can be deduced from the notion of a juridical 'person', but why should it be assumed that there are such 'persons'? That everyone should be regarded as a person, I admit; but why should it be presumed that everyone should be regarded as a juridical 'person', i.e. a 'person' who has that status because of his or her property? Hegel takes for granted that there are persons of this juridical sort. And we are misled into following him when we fail to distinguish adequately between the two conceptions of 'person'. We all accept that there are persons and this fools us into agreeing that there are 'persons' (the juridical variety). If it is not presupposed in advance that there are juridical 'persons' as well as ordinary ones, or if it is not presupposed in advance that all persons must be juridical ones, then there is no reason to accept the claim that self-conscious subjects must come to acquire property rights.

What is most interesting here is that in the *Phenomenology* Hegel makes no such presumption. In his famous discussion of the master/slave dialectic, Hegel depicts the aspiration of consciousness to be recognised, and the form that this takes as

the struggle between consciousnesses. He writes: 'Self-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged.'¹¹ In the fight to be acknowledged, one consciousness is triumphant and becomes the lord, the other consciousness is subjugated and is reduced to a slave. But as a slave he or she must labour, and the dialectical development of this is the realisation of his or her own self-consciousness through transforming nature:

Through work, however, the bondsman becomes conscious of what he truly is. In the moment which corresponds to desire in the lord's consciousness, it did seem that the aspect of unessential relation to the thing fell to the lot of the bondsman, since in that relation the thing retained its independence. Desire has reserved to itself the pure negating of the object and thereby its unalloyed feeling of self. But that is the reason why the satisfaction is itself only a fleeting one, for it lacks the side of objectivity and permanence. Work, on the other hand, is desire held in check, fleetingness staved off; in other words, work forms and shapes the thing. The negative relation to the object becomes its *form* and something *permanent*, because it is precisely for the worker that the object has independence. This *negative* middle term or the formative *activity* is at the same time the individuality or pure being-for-self of consciousness which now, in the work outside of it, acquires an element of permanence. It is in this way, therefore, that consciousness *qua* worker, comes to see in the independent being [of the object] its *own* independence.¹²

As we see from this passage, for consciousness to realise itself effectively, it is merely necessary to labour; and to labour without ownership—it is the labour of the *slave* which produces the permanent objects through which his or her self-consciousness arises. What is more, the owner of the things, the master, is thwarted in his self-recognition in as much as he sought recognition by an equal, but by reducing his antagonist to a slave, this recognition was prevented. Property, therefore, by Hegel's own arguments, cannot be necessary for self-consciousness.

And in this labour, the labour of the non-owning producer, what we would ordinarily think of as personality is manifest. Hegel does not consider this possibility in the *Philosophy of Right* because 'personality' has become adulterated by connotations drawn from the juridical sense of 'person'. But this is to confuse our everyday notion of 'personality' with the juridical sense of 'person'. Personality can be expressed in

many ways without ownership. Only the juridical sense of 'person' cannot be expressed in any other way than through property. And the above arguments demonstrate that one cannot simply use the everyday notion of 'personality' to establish the juridical notion of 'person'.

But there is a possible objection which I must attempt to pre-empt. This objection derives from Hegel's conception of truth. In the shorter *Logic*, Hegel writes:

The thought, which is genuine and self-supporting, must be intrinsically concrete; it must be an Idea; and when it is viewed in the whole of its universality, it is the Idea or the Absolute. The science of this Idea must form a system. For the truth is concrete; that is, while it gives a bond and principle of unity, it also possesses an internal sense of development. Truth, then, is only possible as a universe or totality of thought. . . .¹³

Armed with this conception of truth, the defender of Hegel might feel inclined to reply that the notion of 'person' can only be fully understood in the total system of the *Philosophy of Right*.¹⁴ In other words, with the establishment of civil society and then the state, 'person' and 'thing', and the property relation between them, are established. And in the terms of the state, 'personhood' as the ability to hold property is justified.

But this is to put the cart before the horse. This is to justify what comes logically before by what comes chronologically after. One can support an element, to some extent, with what comes logically after if it is at that time present, i.e. an element can be supported by, and can itself help support, the rest of a synchronic structure (though to rely on such a support is likely to invite the charge of arguing in a circle). But if the 'support' follows chronologically, then it cannot yet be present. And if the rest of the logical structure is not yet present, it cannot act as a support. There are clear tendencies of this sort in Hegel's *Philosophy of History*, where a logical unfolding parallels a temporal one. The difficulty with this is that the ostensibly justifying structural location of a moment in the total logical structure where it will ultimately be situated cannot obtain when the completed structure has, as of yet, not been temporally developed; unless, that is, one admits the possibility of teleological causality. However, this last option is not open to Hegel as a method of logical justification in the

case of 'personality', for at the beginning of the *Philosophy of Right* Hegel asserts that

the science of right is a section of philosophy. Consequently, its task is to develop the Idea—the Idea being the rational factor in any object of study—out of the concept, or, what is the same thing, to look on at the proper immanent development of the thing itself. As a section, it has a definite starting-point, i.e. the result and the truth of what preceded it, and it is what has preceded it which constitutes the so-called 'proof' of the starting point.¹⁵

This eminently sensible approach (rather than a reliance on as unlikely a notion as teleological causality) rules out the possibility of justifying Abstract Right (and the rights in property which lie at its heart) in terms of the state, because the state appears later both historically and in Hegel's exposition. Hence, such an objection to my critique of Hegel on property must fail.

However, there is one argument which Hegel employs which must be attended to. Herbert Marcuse explains:

Hegel has stressed that the individual is free only when he is recognised as free, and that such recognition is accorded him when he has proved his freedom. Such proof he can furnish by showing his power over the objects of his will, through appropriating them. The act of appropriation is completed when others have assented to or 'recognized' it.¹⁶

Certainly, if others were to assent to one's exclusive utilisation of a good, then one may rightfully use it exclusively. But Hegel wants to say that such exclusive use is one's claim-right and must, as such, be posited in law:

I possess something, own a property, which I occupied when it was ownerless. This possession must now further be recognized and posited as mine. Hence in civil societies formalities arise in connection with property. . . . Now we may have an antipathy to formalities of this kind and we may suppose that they only exist to bring in money to the authorities; we may even regard them as something offensive and a sign of mistrust because they impair the validity of the saying: 'A man is as good as his word.' But the formality is essential because what is inherently right must also be posited as right. My will is a rational will; it has validity, and its validity should be recognized by others. At this point, then, my subjectivity and that of others must be set aside and the will must achieve security, stability, and objectivity which can be attained only through such formalities.¹⁷

I accept that others may choose to acknowledge one's expression, and may allow one exclusively to utilise that which one wills to set aside for oneself. But unless property rights have been validated, and we can see that Hegel has failed to do this, then if others are to forgo their potential use of a good, it must be because they have chosen to. That decision must remain their prerogative and, in consequence, any exclusive use based on the user's claim to a right should *not* be posited in law.

My counter-claim receives support from Shlomo Avineri when he writes: 'Through property man's existence is recognized by others, since the respect others show to his property by not trespassing on it, reflects their acceptance of him as a person.'¹⁸ Rather than this being an argument for the positing of property rights in law, it is an argument against it. Any respect shown by others for goods which one holds dear, or requires for certain ends, etc. would be much more valuable precisely in those situations where there is no legal obligation to observe private property. A juridical person might require the recognition of property in law, but the non-juridical personality requires a voluntary respect for what he or she values. I shall take up this issue again at the end of this study.

For now, we must conclude that Hegel has failed in his attempt to derive property rights *a priori* from personality. However, the insight which Hegel has concerning the relationships between external objects and our wills or our purposes must not be overlooked by any serious attempt to examine acceptable arrangements for the exclusive use of a good. Neither must we forget Hegel's point about the respect which others can show by refraining from the use of something held to be important by someone. I shall, therefore, return to these issues in the final chapter.

NOTES

1. G. W. F. Hegel, *Hegel's Philosophy of Right*, trans. and with notes by T. M. Knox (Oxford: Oxford University Press, 1967), p. 155.
2. Z. A. Pelczynski, 'The Hegelian Conception of the State', in *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge: Cambridge University Press, 1971), p. 8.

3. Hegel, *op. cit.*, p. 38.
4. *Ibid.*, p. 235.
5. *Ibid.*, p. 236.
6. In fact, one might actually regard one's personality as a disposition to act in a certain way. For a treatment of dispositionalism, see Gilbert Ryle, *The Concept of Mind* (Harmondsworth: Penguin, 1963), *passim*.
7. Hegel, *op. cit.*, p. 41.
8. *Ibid.*, p. 236.
9. *Ibid.*, p. 39. And as Knox points out, in a passage by Heineccius cited by Hegel, it is clearly stated that 'man and persons are quite distinct in law; a man is a being who possesses a human body and a mind endowed with reason; a person is a man regarded as having a certain status'. Trans. note, *ibid.*, p. 321.
10. It is interesting to observe the extent to which Marx follows Hegel's analysis: 'In order that these objects may enter into relations with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property.' Karl Marx, *Capital* Volume I, trans. Ben Fowkes (Harmondsworth: Penguin, 1976), p. 178.
11. G. W. F. Hegel, *Hegel's Phenomenology of Spirit*, trans. A. V. Miller (Oxford: Oxford University Press, 1977), p. 111. It is worth bearing in mind that part of what 'self-consciousness' means for Hegel is something like 'self-esteem'.
12. *Ibid.*, p. 118.
13. G. W. F. Hegel, *Hegel's Logic*, being Part I of *The Encyclopaedia of the Philosophical Sciences*, trans. W. Wallace (Oxford: Oxford University Press, 1975), pp. 19–20.
14. Hegel's tendency to situate a moment within a totality is, ironically, undermined by his stress on property. Marx points out that property separates the community into isolated individuals: 'The first way in which an object of utility attains the possibility of becoming an exchange-value is to exist as a non-use-value, as a quantum of use-value superfluous to the immediate needs of its owner. Things are in themselves external to man, and therefore alienable. In order that this alienation [*Verausserung*] may be reciprocal, it is only necessary for men to agree tacitly to treat each other as private owners of those alienable things, and, precisely for that reason, as persons who are independent of each other.' Karl Marx, *op. cit.*, pp. 181–2. This consequence of property relations is unfortunate for Hegel's system as he is apt to regard the individual as having worth only in the context of his or her relation to the whole. As an example, Hegel writes: 'The subjective will has . . . a substantial life—a reality—in which it moves in the region of *essential* being, and has the essential itself as the object of its existence. This essential being is the union of the *subjective* with the *rational* Will: it is the moral Whole, the *State*, which is that form of

reality in which the individual has and enjoys his freedom; but on the condition of his recognizing, believing in, and willing that which is common to the Whole.' G. W. F. Hegel, *The Philosophy of History*, trans. J. Sibree (New York: Dover, 1956), p. 38. Hegel adds: 'The relation of the individual to that Spirit is that he appropriates to himself this substantial existence; that it becomes his character and capability, enabling him to have a definite place in the world—to be *something*.' *Ibid.*, p. 74. Consequently, Hegel has to attempt to incorporate the isolated individuals of civil society into the state by means of certain institutions. For a devastating critique of these institutions, see Karl Marx, *Critique of Hegel's 'Philosophy of Right'*, intro. by Joseph O'Malley (Cambridge: Cambridge University Press, 1977), *passim*. But before anyone jumps to the conclusion that I am a Marxist, my *Marx: A Radical Critique* (Brighton: Wheatsheaf Books, 1988) should be consulted.

15. Hegel, *Hegel's Philosophy of Right*, *op. cit.*, p. 14.
16. Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (London: Routledge and Kegan Paul, 1955), p. 192.
17. Hegel, *Hegel's Philosophy of Right*, *op. cit.*, pp. 273–4.
18. Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), p. 136.

9 The Derivation from Moral Development

The ground to the right to free life, the reason why a man is secured in the free exercise of his powers through recognition of that exercise by others as something that should be, lay ... in the conception on the part of everyone who concedes the right to others and to whom it is conceded, of an identity of good for himself and others. It is only as within a society, as a relation between its members, though the society, be that of all men, that there can be such a thing as a right; and the right to free life rests on the common will of the society, in the sense that each member of the society within which the right subsists contributes to satisfy the others in seeking to satisfy himself, and that each is aware that the other does so; whence there results a common interest in the free play of the powers of all. And just as the recognised interest of a society constitutes for each of it the right to free life, just as it makes each conceive of such life on the part of himself and his neighbour as what should be, and thus forms the basis of a restraining custom which secures it for each, so it constitutes the right to the instruments of such life, making each regard the possession of them by the others as for the common good, and thus through the medium first of custom, then of law, securing them to each.

T. H. Green

Although the arguments for property rights offered by Hegel are unconvincing, there can be little doubt that as a philosopher he has had a considerable influence on political philosophy in general. Two philosophers in particular stand out as owing a great deal to him with regard to their political philosophies as a whole, but most importantly for the concerns of this study, with regard to their respective treatments of property rights: I have in mind the idealists Thomas Hill Green and Bernard Bosanquet. Both these philosophers are convinced that private property is necessary if the individual is to develop sufficiently to realise his or her full moral potential.

In this chapter, I shall examine this attempt to locate the philosophical foundations of private property in the desirability of moral development.

There is, though, a significant difference between Green and the other philosophers I have discussed so far. Green does not hold to the view that private property justifiably arises prior to civil society. But that is not to say that the right to hold property is not logically prior to, nor more binding, than the duty to obey a government. Nor is it to say that governments may not be thought necessary, because private property usually requires governmental action if property rights are to remain in force. Green does, however, clearly subscribe to the view that property rights are socially derived. It will be clear from the final chapter that this constitutes an advance over rigidly individualist approaches to the establishment of rights. Nevertheless, the adoption of a social, rather than an individual, approach to the moral justification of property does not on its own provide a sufficient justification. Specific reasons must be given for the institution of private property if one is to demonstrate why it is morally rightful. It is the reasons advanced by Green and Bosanquet which will occupy our attention for the time being. And of these two extremely influential philosophers, it is the arguments of Green which I shall analyse because his is the more comprehensive discussion of the two, and Bosanquet adds little to the former's exposition.

It must, however, be stated right at the outset that the attempt to derive the moral desirability of private property from the grounds of moral development does not originate with Green or Bosanquet. Aristotle offered an argument of this sort in response to the 'communism' of Plato. In *The Republic*, Plato had argued that property would be a corrupting influence on the guardian class, which would oversee society:

'Is there anything worse for a state than to be split and disunited? or anything better than cohesion and unity?'

'No.'

'And is not cohesion the result of the common feeling you get when all members of a society are glad or sorry at the same successes and failures?'

'Certainly.'

'But cohesion is dissolved when feelings differ between individuals, and the

same events, whether of public or private concern, delight some and dismay others.'

'Of course.'

'And doesn't this happen when people no longer agree in their use of the words "mine" and "not mine", "somebody else's" and "not somebody else's"?''

'That is very true.'

'So the best-run state is one in which as many people as possible use the words "mine" and "not mine" in the same sense of the same things.'

Perhaps the best society is one in which as many people as possible do not use the words 'mine' and 'not mine' at all?

Aristotle, in countering Plato's critique of private property, claims that joint enterprises lead to unnecessary bickering, which has an adverse effect on productivity, whereas 'with every man busy with his own, there will be increased production all round'.² This hardly constitutes a cut and dried argument which successfully establishes the need for property rights. For one thing, individuals used to isolated ventures will probably find some difficulty in co-operative endeavours. But those who are used to joint labour are unlikely to be so affected by an aversion for co-operation.³ And it is obvious that co-operation greatly increases productive capacity and ability. There are several tasks which an individual simply cannot accomplish on his or her own. For example, one person might be able to cut down a large tree, but he or she could hardly carry it away on his or her own. Surely Aristotle would not wish to hinder such joint activity?

He does have a further reason, though, for wishing objects to remain in private hands: 'The abolition of private property will mean that no man will be seen to be liberal and no man will ever do any act of liberality; for only in the use of money is liberality made effective.'⁴ Unfortunately for Aristotle's argument, liberality with money is most praiseworthy when practised in order to benefit those most in need. That need which is the correlative of admirable donation is the consequence of an unequal distribution of wealth—a product of the system of private property. Surely one would not wish need to be widespread so that some can show their generosity to most effect?⁵ And if not, then the liberality which would be made possible by private property would be considerably less

impressive when there is less of an unequal distribution of wealth than is to be found when property creates relative scarcity. If relative scarcity is an evil, its overcoming would leave the proponents of property rights with a less attractive notion of liberality than they would desire—unless, that is, they are suggesting that we ought to have scarcity so that some have the opportunity of appearing generous should they wish to do so! I doubt that anyone (other than an irrational bigot) would wish to try and defend this when it is reduced to such bare essentials, and so I shall consider a more substantial version of the ‘derivation from moral development’—that of T. H. Green.

In his *Lectures on the Principles of Political Obligation*, Green sees rights as resulting from the mutual recognition of an identity of interest by the members of a society. The recognition of this common interest makes everyone hold to a certain conception of what state of affairs should exist. From this emerges custom and, later, law to protect what is taken to be the common good. If property were thought to be for the common good, then the recognition of the right of an individual to be left in peace to enjoy his or her property would arise customarily. But why should property rights be taken to be for the common good? Green’s answer is that private property is necessary if the individual is to achieve his or her full moral development. The appeal of this answer lies in the priority it gives to morals. This study is concerned to ascertain whether or not private property can be shown to be necessitated by moral considerations, to see if property rights are morally binding. What better way to demonstrate this than to take as one’s starting point moral development? But let us see how Green’s argument unfolds.

Green begins by observing that attempts to justify or criticise property rights in general often conflate two quite separate issues concerning the origin of property. These are the question of how someone has come to appropriate something or other, and the question of how the notion of right has come to be associated with that appropriation. Green notes that it is important that these questions be kept distinct, and that they both be answered.⁶ (It will be recalled that it is the failure to keep these two questions separate which often lies at the heart

of the so-called ‘derivations’ from first occupancy.)⁷ Green’s aim would appear to be primarily that of providing an answer to the second question: How is it that appropriations have come to be considered rightful? And his answer to this question might show property rights to be morally justified.

But what does appropriation involve? Green replies with an answer very reminiscent of Hegel: ‘Appropriation is an expression of will; of the individual’s effort to give reality to a conception of his own good; of his consciousness of a possible self-satisfaction as an object to be attained.’⁷ This is more than the mere satisfaction of a want, because the satisfaction of a want generally involves the destruction of the object in question; it usually involves its consumption. Appropriation goes beyond the act of consuming a good in that the ability to do with a good whatever one likes whenever one wishes is entailed. This means that future satisfactions may be achieved by the same good, and this can only happen when the good is neither destroyed, nor expropriated. Certainly it is the case that one may destroy that which is one’s property, but one does not need to do so for it to be exclusively one’s own. Property, at least as regards the first generation of humanity, requires appropriation. As Green writes:

One condition of the existence of property, then, is appropriation, and that implies the conception of himself on the part of the appropriator as a permanent subject for whose use, as instruments of satisfaction and expression, he takes and fashions certain external things, certain things external to his bodily members. These things, so taken and fashioned, cease to be external as they were before. They become a sort of extension of the man’s organs, the constant apparatus through which he gives reality to his ideas and wishes.⁸

However, this alone could not constitute an argument for property rights. That would be no advance on Hegel. I can fashion many things without them having to be mine. Moreover, there are certain things I might wish to fashion which I should be prevented from effectively accomplishing; for instance, I could fashion interesting patterns on the surface of the planet by means of atomic bombs. It is also the case that I can give reality to my ideas through becoming, say, the kind of artist who chalks copies of the ‘Mona Lisa’ on pavements

without the pavement becoming, or having to become, mine.

A further premise must be proposed, then, if Green is to have any success in validating property rights. And such a premise is forthcoming:

... another condition must be fulfilled in order to constitute property, even of the most simple and primitive sort. This is the recognition by others of a man's appropriations as something which they will treat as his, not theirs, and the guarantee to him of his appropriations by means of that recognition.⁹

This is undoubtedly true. It means that property cannot simply be grabbed. The institution must be recognised before one can rightfully own a good. And if the institution is set up by joint agreement, there is unlikely to be any major moral problem concerning its justification.

But why should the institution be the subject of universal agreement? What is it about the system of private property which demands universal assent to it? Green sees the answer in terms of the benefits it has over the only alternative to the institution of private property he considers: the joint ownership which is found in tribal societies. Green argues:

From the moral point of view ... the clan-system is defective, because under it the restraint imposed upon the individual by his membership of a society is not, and has not the opportunity of becoming, a self-imposed restraint, a free obedience, to which, though the alternative course is left open to him, the individual submits, because he conceives it as his true good.¹⁰

It must be said, though, that the same is often true of the institution of private property when it becomes posited in law or custom. Nevertheless, Green argues that the clan prevents the development of any genuine individuality. Not only is this undesirable in itself, but without any developed individuality, there can be little moral responsibility or, *eo ipso*, any moral consciousness. The precondition for such individuality is thought to be private property:

A necessary condition at once of the growth of a free morality, i.e. a certain behaviour of men determined by an understanding of moral relations and by the value which they set on them as understood, and of the conception of those relations as relations between all men, is that free play should be given

to every man's powers of appropriation. Moral freedom is not the same thing as a control over the outward circumstances and appliances of life. It is the end to which such control is a generally necessary means, and which gives it its value. In order to obtain this control, men must cease to be limited in their activities by the customs of the clan. The range of their appropriations must be extended; they must include more of the permanent material on which labour may be expended, and not merely the passing products of labour spent on unappropriated material; and they must be at once secured and controlled in it by good-will, by the sense of a common interest, of a wider society, of a society to which any and everyone may belong who will observe its conditions, and not merely those of a particular parentage; in other words by the law, written or unwritten, of a free state.¹¹

Now, it will be recalled, for Green, society is the basis of property rights. But here he is advocating property as a precondition for individuality. This is not a contradiction as some might be inclined to think. Green is arguing that private property is a necessary condition for there to be individuality *in* society. And as he writes: 'That end is at once the emancipation of the individual from all restrictions upon the free moral life, and his provision with means for it.'¹²

This moral life depends upon the moral will. The ability of forming and acting upon a moral will is, for Green, the essentially human quality. It is necessary, therefore, that this moral will be developed. Green's central claim is that this is only possible within a system of private property because otherwise one would be tied to the clan and incapable of free individual expression. But does property allow free individual expression? It might for the wealthy, but what about the poor? And what if the wealthy do not in fact exhibit moral qualities when they make use of their property? Green writes:

The rationale of property ... is that everyone should be secured by society in the power of getting and keeping the means of realising a will, which in possibility is a will directed to social good. Whether anyone's will is actually and positively so directed, does not affect his claim to the power.¹³

In other words, property is deemed necessary for a moral will to develop, but if people actually behave immorally in a 'propertarian' system, then that is merely an historical contingency.

But is any of this convincing? Green's arguments only get off

the ground because he assumes the one alternative to private property is the clan, where all identity is submerged in the community. But is this so? People are not restricted to the choice of either individual, isolated production and enjoyment of produce, or worship of the community (or state) to the extent that it is thought to exist over and above all individuals. People are not confined to the choice of private property on the one hand, and communally or state-owned property on the other. Certainly, these two occurrences of *property* are the most common, but there is at least one other possible approach to external objects. They are not owned or controlled exclusively by the state (community) or by an individual, but are shared by co-operating individuals. Perhaps the most seminal example of this today is the workers' co-operative. Now, some of these may take the form of individual ownership, or of the co-operative being regarded as a communal 'being' over and above the individuals who are members of it. But some co-operatives are quite unlike either of these alternatives. In some co-operatives, individuals work together in such a way that private property is not stressed within the process of production, and neither is the co-operative (the institution) regarded as the owner of the means of production (though it might be legally), nor as an end in itself. The autonomous individuals relate to each other as sharing, co-operating *individuals*. This alternative to the (usually competitive) property owning individual on the one hand, and the submersion of the individual in the collectivity on the other, is a possibility which shows that private property is not necessary for individuality to develop.

What is more, though it is true that close communities can often stifle individuality, it is not necessarily the case that this is more true of 'non-propertarian' than of 'propertarian' ones. Small communities which are based on private property can be just as monolithic as communities where private property is not prevalent. What is important is how tolerant a community is to what it considers to be deviance, and there is no reason to think that the institution of private property makes people any more tolerant towards unusual behaviour.

Furthermore, what moral qualities does Green think that private property allows to develop which would be lacking in a

society where the institution of property was not present? Does he think that one can only be liberal with property? But one can be liberal with affection, assistance, in short, with many things besides possessions. Lawrence C. Becker has pointed out that private ownership is far from being necessary for the development of virtue. If virtue requires the development of various skills, then they can be developed without private property. Skills associated with management or use merely require the use of the things needed and, perhaps, some instruction. The things themselves do not have to be owned. Creativity does not require property, only the ability to consume whatever raw materials are necessary. And what Becker refers to as the 'dispositional virtues' (namely, temperance, self-control, perseverance and generosity) do not require private property for their development either. Generosity, for example, can be taught to a child by reference to things like personal services. Promises, expectations and delays in gratification—in fact, social interactions in general—allow the development of self-control, and so on. Becker is surely right in pointing out that these qualities are learned much more from social interactions than from dealing with one's private property.¹⁴

Moreover, it could be argued that the institution of private property stultifies human development, rather than encourages it. The point is made by Marx with regard to the production process as it occurs under the system of private ownership of the means of production:

Production does not produce man only as a *commodity*, the *human commodity*, man-in-the-form-of-a *commodity*; it also produces him as a *mentally* and physically *dehumanized* being. ... Immorality, malformation, stupidity of workers and capitalists. ... Its product is the *self-conscious* and *self-acting commodity* ... the *human commodity*.¹⁵

If Marx is correct in his description of capitalist property relations, then the requirement of moral development would constitute an argument against, rather than for, the institution of private property.

There are further difficulties with Green's 'derivation'. He observed at the beginning of his argument that the question of appropriation should not be confused with the question of

why appropriation is or should be deemed rightful. Green's arguments as to why appropriation is considered rightful (i.e. because it allows or facilitates moral development) do not specify what particular appropriations are justified. Clearly, one cannot be justified in appropriating just anything?—e.g. can one justifiably appropriate the cosmos? Limits must be set upon what can be appropriated and how it can be appropriated legitimately. One possibility would be to complement Green's general 'justification' of property rights with a specific argument such as the one concerning first occupancy. But I have yet to discover any valid argument which purports to determine who it is that owns what. A more revealing approach would be to extrapolate from Green's general argument towards a specific one concerning the legitimate distribution of goods, for without the specification of criteria determining who the holders of property will be, the 'derivation from moral development' is worthless.

How could the specification of property holders arise from Green's position? If moral development is what is at issue, are we to suppose that those in most need of moral development are the ones who should appropriate most? Is moral depravity to count as a reason for holding property? The suggestion is clearly too ridiculous to bear considering. Are we, then, to assume that most property should go to those most morally suited to administer that property? Should property go to the most morally developed? If so, who is to judge who is the most morally developed? The most morally developed? But that would involve an infinite regress. And what if owning property actually led to moral decline? To transpose Acton's famous epigram, what if the ownership of property corrupts and the absolute ownership of property corrupts absolutely? Insofar as wealth creates power, there might be some cause for asserting this. What if it were the case that the structural position in society occupied by property owners and determined by their property holdings itself determined the extent of their moral degeneracy? There would appear to be at least as much evidence in favour of this hypothesis as there is in favour of the claim that private property encourages moral development or responsibility.

Furthermore, it is unlikely that the corruption endemic in

property-based societies is merely contingent and not rooted in the institution of private property itself. The people who have the most property will almost certainly be those who are most skilful at its acquisition. And that does not suggest generous, caring, sharing, highly moral individuals. What does the ability to carve out great riches for oneself say about the moral make-up of those concerned? Greed, selfishness, a cut-throat mentality and expedient materialism are the qualities which spring to mind, rather than a concern with morality. And what about those who have been brought up in conditions of excessive wealth? Are they the more moral for it? Or do they expect preferential treatment, greater luxury, and all without labour on their part? Do they show concern for the rest of humanity, or do they exhibit class-based contempt for others less privileged than themselves, and less privileged more often than not through no fault of their own? Property is part of the reason for our lack of moral concern—it is not the precondition of virtue.

Moreover, as Green writes: 'Property implies a permanent possession'. But he advocates private property because it supposedly allows moral development. What about generosity? Property certainly allows one form of it. It allows one to surrender one's permanent possessions. The right to the permanent enjoyment of a good can be relinquished. But is this a good reason for establishing such a right? Should we give everyone the right to kill, so that they can exhibit their moral development by allowing others to live? What property rights allow is the right not to behave morally, the right to exclude others from what they are in need of. In short, if one's main concern is with moral development, that constitutes a good reason for rejecting the institution of private property.

NOTES

1. Plato, *The Republic*, trans. and with an intro. by H. D. P. Lee (Harmondsworth: Penguin, 1955), p. 219.
2. Aristotle, *The Politics*, trans. and with an intro. by T. A. Sinclair (Harmondsworth: Penguin, 1962), p. 63. This, of course, relates to my earlier discussion of private property and efficiency. See Chapter 6 above.

3. For an example of effective co-operative labour, consider the Mbuti hunt. Colin Turnbull writes that 'hunting, for a pygmy group, is a co-operative affair—particularly net hunting. . . . Even those groups that hunt mainly with bow and arrow hunt not as individuals, but rather for the group as a whole. But for the net hunters it is impossible to hunt alone. Men, women and children all have to co-operate if the hunt is to be successful'. Colin M. Turnbull, *The Forest People* (London: Picador, 1976), p. 91. In fact, this co-operative labour might be thought to provide the social cement which holds Mbuti society together.
4. Aristotle, *op. cit.*, p. 64.
5. As Hastings Rashdall states: 'Aristotle's intensely aristocratic moral theory, according to which virtue was only possible to gentlemen of education and "private means", while the slave and even the free artisan (if he was not a citizen) were mere means to virtue or noble life in another, prevented his arriving at any fully thought out theory which could be acceptable to those who have rejected his narrow civic and class morality.' Hastings Rashdall, 'The Philosophical Theory of Property', in L. T. Hobhouse *et al.*, *Property: Its Duties and Rights* (London: Macmillan, 1915), p. 37.
6. See Thomas Hill Green, *Lectures on the Principles of Political Obligation* (London: Longmans, Green and Co., 1911), p. 211.
7. *Ibid.*, pp. 212–13.
8. *Ibid.*, pp. 213–14.
9. *Ibid.*, p. 214.
10. *Ibid.*, p. 218.
11. *Ibid.*, pp. 218–19.
12. *Ibid.*, p. 219.
13. *Ibid.*, p. 220.
14. See Lawrence C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge and Kegan Paul, 1977), pp. 86–7.
15. Karl Marx, 'Economic and Philosophical Manuscripts', in *Early Writings*, intro. by Lucio Colletti, trans. Rodney Livingstone and Gregor Benton (Harmondsworth: Penguin, 1975), p. 336.

10 The Derivation from Human Nature

But though it be possible for men to maintain a small uncultivated society without government, it is impossible they should maintain a society of any kind without justice, and the observance of those fundamental laws concerning the stability of possession, its translation by consent, and the performance of promises. These are, therefore, antecedent to government, and are supposed to impose an obligation before the duty of allegiance to civil magistrates has once been thought of.

David Hume

I now come to my final examination of an attempt to derive rights in private property from first principles. All the other attempts to establish the philosophical foundations of property rights have been found to be unconvincing. Perhaps it is here in this final analysis that private property will be shown to be a morally compelling right? Perhaps it is here in the philosophy of David Hume that property will reveal itself as morally legitimate?

In his famous *Treatise of Human Nature*, Hume posits a necessary condition for property rights: Were it the case that a good were in abundance, the notion of private property in such a good would be redundant. On the other hand, if the good in question were extremely scarce, then it would be difficult to regard property claims to it as being just. Not only that, if the good in question were in great demand, it is difficult to see how exclusive claims to it could be enforced. If it were really sought after (for example, the rare antidote to a lethal virus everyone had contracted), how could even the enforcement agencies be expected to protect, or even respect, a minority's title to it? Hume therefore reaches the conclusion

that property only makes sense when a good is in limited, but not too limited, supply. A necessary condition for a just claim to private property is partial scarcity.

Now, it is clear that many of the goods which we desire are found in such relatively scarce quantities. Hume wishes to argue that this fact, coupled with certain aspects of human nature, provides the justification for a system of private property. However, Hume made a great advance over most other theorists of property rights in not considering such facts about human nature in themselves to entail an individual's right to property. As was the case with T. H. Green, property, for Hume, arises socially. Property arises through the necessity of social interaction between individuals. Property arises in the context of general rules which are arrived at by individuals so as to enable them to exist socially. Property is the child of justice. Can Hume develop a derivation of property rights from certain unquestionable facts about human nature such that for individuals to exist socially, then property rights are necessary? If he can, such a derivation would be a compelling one. Well, let me examine Hume's arguments and see if they stand up.

Hume begins by outlining the advantages of society. Given that we desire to live socially, then it is incumbent on us to observe certain rules which allow social harmony. Such rules are necessary because our nature prevents us from living harmoniously with others unless we are guided by general rules—rules which our reason provides. But what is it about our natural predicament which requires rules concerning property? Hume writes:

There are three different species of goods, which we are possessed of; the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquired by our industry and good fortune. We are perfectly secure in the enjoyment of the first. The second may be ravished from us, but can be of no advantage to him who deprives us of them. The last only are both exposed to the violence of others, and may be transferred without suffering any loss or alteration; while at the same time, there is not a sufficient quantity of them to supply everyone's desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the *instability* of their possession, along with the *scarcity*, is the chief impediment.¹

Hume claims that we naturally desire to have the pleasure derived from possessions to be as secure as those derived from the mind. But how is this to be achieved? Hume's answer is through the institution of property.

There is another facet of our nature which Hume takes to be relevant. We tend to reserve most of our concern for ourselves. We extend some concern to our relatives and acquaintances, but not as much as we keep for ourselves. Strangers enjoy our least concern. Hume posits that this partiality not only affects our behaviour, but infects even our notions of vice and virtue. But such partiality makes society difficult. How is it to be attenuated to as to facilitate social existence?

The remedy ... is not derived from nature, but from *artifice*; or more properly speaking, nature provides a remedy in the judgement and understanding, for what is irregular and incommodious in the affections. For when men, from their early education in society, have become sensible of the infinite advantages that result from it, and have besides acquired a new affection to company and conversation; and when they have observed, that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another; they must seek for a remedy, by putting these goods, as far as possible, on the same footing with the fixed and constant advantages of mind and body.²

But might it not be the case that the very problem is to try to put such goods on such a footing? Might it not be the case that because we are used to enjoying the pleasures of the mind (and according to Hume, the body to a lesser extent) without interference, we *mistakenly* extrapolate this towards external objects? Instead of realising that external objects do not have to be permanently possessed, we jump to the conclusion that if our minds and bodies are enjoyed and ever-present, then external objects, to be enjoyed, must also be ever-present. But such a conclusion would obviously be a *non sequitur*. Rather than reason informing passionate behaviour by subjugating one's activity to general rules (justice), reason could instead inform one that it is not necessary to have the exclusive use of a good in order to be able to derive enjoyment from it. And so when Hume, with regard to putting the advantages of external goods on a par with those of mind and body, writes that 'this can be done after no other manner, than by a convention

entered into by all the members of the society to bestow stability on the possession of those external goods, and leave everyone in the peaceable enjoyment of what he may acquire by his fortune and industry,³ we must ask whether the desire to do so does not rest on a mistake or some confusion. We must enquire as to whether or not the association of ideas⁴ (in particular, the constant accompaniment of enjoyment by exclusive use),⁵ which has mistakenly led to the assumption that exclusive use is a condition of enjoyment, should not be corrected by reason, rather than our behaviour be qualified by general rules which allow some goods to be enjoyed through exclusive use and most goods to be out of bounds. Clearly, unless we are extremely affluent, and this affluence must be bought at the cost of another's poverty, then the amount of goods which exclusive use allows us to enjoy is only a fraction of that amount of use which we are prevented from enjoying, because the institution of private property means that most goods would ordinarily be the preserve of others.

This state of affairs could be contrasted with that of the family, where any notion of 'mine' and 'thine' is often attenuated. Why should the family situation not be generalised? As Hume writes:

It is easy to remark, that a cordial affection renders all things common among friends; and that married people in particular mutually lose their property, and are unacquainted with the *mine* and *thine*, which are so necessary, and yet cause such disturbance in human society. The same effect arises from any alternation in the circumstances of mankind; as when there is such a plenty of anything as satisfies all the desires of men; in which case the distinction of property is entirely lost, and everything remains in common. This we may observe with regard to air and water, though the most valuable of all external objects, and may easily conclude, that if men were supplied with everything in the same abundance, or if *everyone* had the same affection and tender regard for *everyone* as for himself; justice and injustice would be equally unknown among mankind.⁶

But does partial scarcity rule out an extension of the family situation to the whole of society? Shortage does not lead to the breakdown of the family; in fact, it can often bring it closer together. Partial scarcity, then, does not seem to present the main difficulty. What would appear to be lacking generally in western society is the commitment to sharing which is found

within the family, but is rare outside of it. But is it impossible for such sharing to be extended beyond the family? Moreover, might it not be the case that the reluctance to share is the result of a shortage, not of goods, but of a feeling of community? And might it not also be the case that this is *due* to private property?

Why, though, should one be concerned with community? Why should one not just be concerned solely with oneself? Why not be a pure egoist? Hume wishes to reject isolation; and he does so because he considers society to be advantageous to the individual. The actual advantages of social existence offered by Hume for our contemplation (which recommend a concern for society because of selfish reasons) are the following:

When every individual person labours apart, and only for himself, his force is too small to execute any considerable work; his labour being employed in supplying all his different necessities, he never attains a perfection in any art; and as his force and success are not at all times equal, the least failure in either of these particulars must be attended with inevitable pain and misery. Society provides a remedy for these *three* inconveniences. By the conjunction of forces, our power is augmented; by the partition of employments, our ability increases: and by mutual succour we are less exposed to fortune and accidents. It is by this additional *force, ability, and security*, that society becomes advantageous.⁷

Whereas these aspects of society do recommend a social, instead of an isolated existence, they might instead be thought to militate against private property, rather than call for it. When I weighed up Bentham's arguments, I observed that the movements of capital can undermine security. As regards the force produced by co-operation and the skill derived from the division of labour, one might feel inclined to regard the products of force and ability as social products. It is only by means of social activity that such advances are made over isolated individual labour. Why, then, should one regard the products of such social activity to be anything other than social products, rather than goods to be privately and exclusively acquired? What is more, the fragmentation of society which can be conceived of as arising from private property might indicate that the very force, ability and security which can be derived from social activity is threatened by the

institution of property. A concern with these benefits from society would seem to suggest a critique of property, rather than a defence or justification of it.

But irrespective of these criticisms, Hume's arguments for property rest upon a specific conception of human nature. This is made clear when he writes:

Here then is a proposition, which, I think, may be regarded as certain, *that it is only from the selfishness and confined generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin.*⁸

So, the need for the particular social rules which Hume envisages to fall under the rubric 'justice' arises out of what Hume takes to be the selfish disposition of human beings. But how can Hume be sure that what is true of his European contemporaries is true of all men and women in all societies? Certainly, a study of Hume's acquaintances would suggest that people might by nature be selfish. But would we be justified in concluding that all human beings were naturally selfish—that selfishness was a universal trait of humanity?

Hume is attempting to prove that property makes sense because of human nature.⁹ But the examples of humanity which he takes to depict 'human nature' are men and women who live in societies dominated by property relations. How could one be sure that, rather than selfishness being a universal characteristic of humanity, selfishness was not instead the product of a society where a considerable stress was laid on private property? How could one be sure that it was not property which produced the selfishness in question?¹⁰ Without such an assurance, Hume's 'derivation' from human nature would be viciously circular.

So, a trait found in 'propertarian' societies is used to 'prove' that property is a necessary human institution. However, it could easily be argued that selfishness is a *product* of a society based upon property.¹¹ It might be that because property rights separate individuals, because property-oriented societies tend to stress competition, rather than co-operation, and because 'propertarian' societies make a virtue out of self-reliance, rather than mutual aid, it is the institution of property

itself which is responsible for the very characteristics which Hume takes for granted to necessitate property rights being universally acknowledged. Without property, it is at least conceivable that people would be less selfish. In which case, there would be no need for property rights to be instituted. Property would only be necessary when it existed! In other words, how can we be sure that Hume's arguments are not circular? How can we be sure that arguing for the necessity of the institution of property is not something akin to a self-fulfilling prophecy?

Now, this might lead one to argue that although Hume has not provided the grounds for legitimately instituting property, he has shown that if property has been instituted, then it is now a necessary and indispensable fact of life. But this could not be used to legitimise present *distributions* of property, nor can it be taken for granted that it is impossible to establish a non-propertarian society. And if it were true that people would be less selfish in a society where there was no property, then this would be a good reason for working towards the disestablishment of the institution of property.

How, though, could such conjectures as to the nature of non-propertarian humanity be assessed? One answer to this question is simply to engage in empirical ethnographic research to see if there are any societies which we would wish to describe as non-propertarian. The existence of one such people would seriously undermine Hume's contentions concerning human nature.¹² This would falsify the premises upon which Hume's 'derivation' of property is built. But even if no such empirical findings were forthcoming, should we have any confidence in Hume's assumptions? How could Hume's claims about human nature be unquestionably accepted? Although Hume rejects social contract theories of government, he himself is subject to all the criticisms which can be levelled against the concept of the state of nature that is presupposed by contract theorists. Where does Hume acquire his view of human nature from? It is from viewing men and women in his own society. Hume himself is open to the charge of projecting a notion of human nature which is derived from a culturally-specific view of humanity onto humanity in general.¹³

Similar difficulties attend Hume's other factor: partial scarcity. It will be recalled that Hume regarded partial scarcity as a necessary condition for rules of justice to become applicable. As Hume remarks:

... if every man had a tender regard for another, or if nature supplied abundantly all our wants and desires, that the jealousy of interest, which justice supposes, could no longer please; nor would there be any occasion for those distinctions and limits of property and possession, which at present are in use among mankind. Increase to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings. The selfishness of men is animated by the few possessions we have, in proportion to our wants, and it is to restrain this selfishness, that men have been obliged to separate themselves from the community, and to distinguish betwixt their own goods and those of others.¹⁴

Not only can it be argued that selfishness is the product of, not the reason for, property (particularly insofar as property involves the separation of the owner from the rest of the community—hence a cause of selfishness), but it can also be argued that partial scarcity is the product of property. How might this be so?

Hume argues that society increases productivity by the division of labour. Private property ensures that this will occur in the context of a market society (and this is undeniable when the means of production are privately owned). In order to prosper, the division of labour ensures that it is necessary to sell one's private produce which does not itself meet all one's individual requirements. In order to buy food, a shoemaker must sell the shoes he or she manufactures. This can only be accomplished if a market exists for the producer's commodity—in this case shoes. If the market is not already present, then it must be artificially created. As Marx writes:

Under the system of private property . . . each person speculates on creating a *new* need in the other, with the aim of forcing him to make a new sacrifice, placing him in a new dependence and seducing him into a new kind of *enjoyment* and hence into economic ruin. Each attempts to establish over the other an alien power, in the hope of thereby achieving satisfaction of his own selfish needs. With the mass of objects grows the realm of alien powers to which man is subjected, and each new product is a new *potentiality* of mutual fraud and mutual pillage.¹⁵

How can it be assumed that partial scarcity is the universal plight of humanity when it can be argued that scarcity is the result of needs engendered by private property?¹⁶ If many needs are the products of private property, they cannot be used to argue for the moral justification of its existence. The contrary is more likely to be the case. And how can the proliferation of needs be morally justified?

The question remains, however, as to whether or not there are some needs which are not socially produced which justify property rights. But this question can be dealt with in the same way that the question of human nature was. Empirical research into human needs would have to be undertaken and, for Hume's argument to be successful, it would have to be shown that they inevitably led to a partial scarcity which demanded private property. There would appear to be no evidence to substantiate such a claim. Not only do certain forms of social production not necessitate the growth of needs (there is no requirement for a market as such), but they appear to be quite capable of satisfying whatever needs there are in a less wasteful manner than the system of private ownership of the means of production—the latter being subject to its own capricious behaviour whereby economic resources are often laid idle so as to increase profit, or where necessities are hoarded so as to push up their price.¹⁷

We must, therefore, reach the conclusion that Hume has failed to derive rights in private property from indisputable universal characteristics of human nature. However, he does suggest to us a reason why the notion of private property may have arisen. We require the words 'mine' and 'yours' to refer to, amongst other things, the pleasures of the mind. We require the words if we are to determine who is pleased, who 'has' some particular pleasure. But pleasures, as with such things as phobias, are logically inalienable. Private property may well be the result of illegitimately extrapolating the use of the word 'mine' when it identifies the logically inalienable to those things which are not logically inalienable. What is often missed is that such an extrapolation involves a change of sense. This becomes obvious when it is realised that my goods are owned, but this is not so with regard to my pleasure or phobias, except metaphorically.

Furthermore, the failure to derive rights in private property from indisputable characteristics of human nature suggests a possible critique of the institution of private property. If the characteristics which Hume concentrates on are not universal, but are the result of living in a society which revolves around private property, then those characteristics, if they are undesirable, constitute an argument against private property, rather than an argument in favour of it. However, there is one respect in which Hume can be seen to make a considerable advance over most other theorists of private property—he sees property as a result, in part, of social interaction. His view is that society involves a sense of common interest, and because of this, general rules arise which regulate and facilitate social intercourse. Regarding property in particular, everyone realises that it is in the interest of each to leave everyone else's possessions alone, as long as they act in a reciprocal manner.¹⁸ That the exclusive use of a good may be respected by others is certainly a possible outcome of social relationships.

It is this insight which Hume had that I shall make most use of in my presentation of an alternative theory of exclusive use to that of private property. And it is necessary to develop an alternative theory, because Hume assumes that it is something approximating to the full liberal conception of property which mutual respect for possessions entails. But how does the common respect for possessions necessitate the right to hire them out, or the right to leave them to another in one's will? Why is it *property* that needs to be recognised? Why not merely temporary possession? If Jones were to presume that temporary possession was what was needed to be recognised and Brown were to presume that it was property which needed to be so, why should Jones be held to Brown's conception of property? Surely, all would have to reduce to the highest common factor; and in this case it would be qualified possession and not property. I must now attempt to draw my conclusions together.

NOTES

1. David Hume, *A Treatise of Human Nature*, Book III 'Of Morals' (London: Fontana, 1972), p. 219.
2. *Ibid.*, p. 220.
3. *Ibid.*
4. The association of ideas is a notion which plays a prominent role in Hume's epistemology. See, for example, David Hume, 'An Enquiry Concerning Human Understanding', in *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (London: Oxford University Press, 1975), *passim*.
5. C.f. Hume's account of causation in *ibid.*, pp. 60–79.
6. Hume, *A Treatise of Human Nature*, *op. cit.*, p. 225.
7. *Ibid.*, p. 217.
8. *Ibid.*, p. 225.
9. Hume is quite explicit about this: 'I have already observed, that justice takes its rise from human conventions; and that these are intended as a remedy to some inconveniences, which proceed from the concurrence of certain *qualities* of the human mind with the *situation* of external objects. The qualities of the mind are *selfishness* and limited *generosity*; and the situation of external objects is their *easy change*, joined to their *scarcity* in comparison of the wants and desires of men.' *Ibid.*, p. 224.
10. As Alasdair MacIntyre comments: 'Hume treats moral rules as given, partly because he treats human nature as given. Even though a historian, he was an essentially unhistorical thinker.' Alasdair MacIntyre, *A Short History of Ethics* (London: Routledge and Kegan Paul, 1967), p. 175.
11. MacIntyre writes: 'We are so constituted that we have certain desires and needs; these desires and needs are served by maintaining the moral rules. Hence their explanation and justification.' *Ibid.* However, if such desires and needs are the products of such moral rules, they would hardly constitute either an explanation or a justification.
12. Ethnographies of those peoples for whom sharing is a central feature of their societies would appear to offer an empirical refutation of Hume's belief in the universal nature of humanity. See, for example, the account of sharing amongst the !Kung in Patricia Draper, 'The Learning Environment for Aggression and Anti-Social Behaviour among the !Kung', in Ashley Montagu (ed.), *Learning Non-Aggression* (Oxford: Oxford University Press, 1978), pp. 44–7. Furthermore, the Yaghan Indians show little respect for their possessions, even their tools. 'The European observer has the impression that these Indians place no value whatever on their utensils and that they have completely forgotten the effort it took to make them. Actually, no one clings to his few goods and chattels which, as it is, are often easily lost, but just as easily replaced. . . . The Indian does not even exercise care when he could easily do so. A European is likely to shake his head at the boundless indifference of these people who drag brand-new objects, precious clothing, fresh provisions,

and valuable items through the thick mud, or abandon them to their swift destruction by children and dogs. . . . Expensive things that are given them are treasured for a few hours, out of curiosity; after that they thoughtlessly let everything deteriorate in the mud and wet. The less they own, the more comfortable they can travel, and what is ruined they occasionally replace. Hence, they are completely indifferent to material possessions.' Martin Guisinde, quoted in Marshall Sahlins, *Stone Age Economics* (London: Tavistock Publications, 1974), p. 13. If it were a universal trait to want possessions to be as permanently 'ready-to-hand' as mental and physical enjoyments, one would expect it to encompass such ordinarily valuable objects as tools. Does this not reveal the culturally-specific nature of Hume's pronouncements?

13. It is ironic that Hume should stumble down the same path as not only Locke, but Hobbes too. Hobbes assumed that the life of human beings in a state of nature would be 'solitary, poor, nasty, brutish and short'. The natural condition of humanity is where 'every man is enemy to every man'. Hobbes is confident that human beings would be like this in a state of nature, because of the behaviour of his contemporaries: 'When taking a journey, he arms himself, and seeks to go well accompanied; when going to sleep, he locks his doors; when even in his house he locks his chest; and this when he knows there to be laws, and public officers, armed, to revenge all injuries shall be done to him; what opinion he has of his fellow subjects, when he rides armed; of his fellow citizens, when he locks his door; and of his children, and servants, when he locks his chest.' Thomas Hobbes, *Leviathan*, ed. and with an intro. by John Plamenatz (London: Fontana, 1962), p. 144. What is wrong with Hobbes' argument is that it might very well be the case that such mutual mistrust is generated by the structure of one's contemporary society—a structure which is preserved and given its specific form by 'laws, and public officers, armed'. The reason why one cannot trust one's fellows could well be due to the behaviour produced by living in such a society—in particular, this could be so to the extent that property breeds competition, and inequality engenders resentment. It is for this reason that one cannot extrapolate from tendencies in one's own society to a state of nature. Similarly, Hume cannot extrapolate to a universal human nature from tendencies prevalent in his society.
14. Hume, *A Treatise of Human Nature*, *op. cit.*, p. 225.
15. Karl Marx, 'Economic and Philosophical Manuscripts', in *Early Writings*, intro. by Lucio Colletti, trans. Rodney Livingstone and Gregor Benton (Harmondsworth: Penguin, 1975), p. 358.
16. For an illuminating discussion of the relative nature of scarcity, see Sahlins, *op. cit.*, pp. 1–39.
17. Thorstein Veblen offers a similar critique of private property: '... the common practice has come to be partial employment of equipment and man-power on terms satisfactory to the owners; often rising to something near full employment for a limited time, but always with the reservation that the owner retains his legal right to withhold his property from productive use in whole or in part. Plainly, ownership

would be nothing better than an idle gesture without this legal right of sabotage. Without the power of discretionary idleness, without the right to keep the work out of the hands of the workmen and the product out of the market, investment and business enterprise would cease. This is the larger meaning of the Security of Property.' Thorstein Veblen, *Absentee Ownership and the Business Enterprise in Recent Times: The Case of America* (Boston: Beacon Press, 1967), pp. 66–7. Clearly, this applies equally to Bentham's 'derivation' from utility.

18. See Hume, *A Treatise of Human Nature*, *op. cit.*, p. 221.

11 Conclusion

The first man who, having enclosed a piece of ground, bethought of saying 'This is mine', and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not anyone have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows: 'Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.'

Jean-Jacques Rousseau

I have examined the major arguments which purport to establish the notion of property rights from first principles, and I have found them to be invalid. The philosophical foundations of property rights have been seen to collapse when subjected to a little subsidence. This does not prove once and for all that the notion of property rights is groundless or, what would be even more consequential, spurious. We may justifiably conjecture, though, that there is not, and never will be, a persuasive and valid argument which derives from first principles individual rights to property. Such an hypothesis might be provisionally accepted until such time as an effective proof of property *de jure* was formulated and, correlatively, falsified that hypothesis.¹

However, there is a reason why such a falsification might be thought unlikely. Many of the arguments I have considered focus upon the individual in isolation. This is not surprising when most 'propertarians' regard the ideal society as being one where its individual members are left to enjoy their property without any interference from others. Many of the arguments I have looked at were propounded by individualist liberals who

tend to regard society as analysable through its isolated parts. For a similar reason, this should not surprise us either. Most individualists since Hobbes² are of the opinion that any society is constituted by no more than its isolated individual members. As one famous critic of liberal individualism remarks:

... individualism has been an outstanding characteristic of the whole subsequent liberal tradition. Individualism, as a basic theoretical position, starts at least as far back as Hobbes. Although his conclusion can scarcely be called liberal, his postulates were highly individualistic. Discarding traditional concepts of society, justice, and natural law, he deduced political rights and obligation from the interest and will of dissociated individuals.³

With such a social ontology, it is hardly surprising that many liberals attempt to derive property rights from a focus upon the individual in isolation. We might postulate that this will be true for those most concerned to provide philosophical foundations for property rights. Liberals tend to regard themselves and others as something like isolated 'monads', who ought to be left alone. They are to be free within their respective, distinct boundaries of rights. Consequently, liberals will tend to attempt to justify property by focussing upon individuals as such isolated monads.

But there is, I suggest, reason to think that the notion of property rights could not possibly be established by attending to the individual in this way. What an adequate derivation of property rights would look like must depend upon what property rights are taken to be. Individualists, if they focus their attention solely upon an isolated individual and his or her relation to 'things', would have to regard property rights as pertaining solely to those 'things'. But a central aspect, perhaps *the most central aspect*, of our conception of private property is that others are excluded from the use of a good if the owner's permission is not granted. Even A. M. Honoré, who, it will be recalled, adumbrated eleven incidents of property,⁴ is of this opinion:

The right to possess, *viz.* to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the

right to remain in control, *viz.* the claim that others should not without permission, interfere.⁵

Property rights relate the owner of a good to non-owners of it—albeit principally by means of a relation of exclusion. The concept ‘property rights’, therefore, is a relational one. What kind of argument (other than an invalid one) could derive a social, relational notion from a study of an individual in social isolation? Does this question not suggest that the whole liberal individualist attempt to establish property *de jure* might be a bogus one?

But is exclusivity sufficient to maintain that property rights are actually relations between people? Two immediate difficulties present themselves: first, property is not regarded as a right against an individual (*in personam*) but ‘against’ a thing (*in rem*); second, rights appear to be too complex to be reduced to a simple relation. With regard to the first apparent difficulty, the influential legal theorist, W. N. Hohfeld, argues that *in rem* actually means that the right in question is held against many others, and that legal consistency demands the distinction between rights *in personam* and rights *in rem* to be recognised as actually being one of ‘paucital’, in contradistinction to ‘multital’, rights. As he explains:

A paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim (right *in rem*), is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.⁶

The first difficulty vanishes when rights *in rem* are seen to be multital rights—rights against many others.

With regard to the second problem, Hohfeld reveals that ‘rights’ is a much more complex concept than might at first be thought:

... the term ‘rights’ tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the

strictest sense; and this looseness of usage is occasionally recognized by the [legal] authorities.⁷

Property rights, then, are complexes which include claims, privileges, powers, and immunities. This complexity is elaborated by Hohfeld with reference to the various rights of *A*, who is the fee-simple owner of a piece of land. The first set of rights that *A* has are ‘multital legal rights, or claims, that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties’. *A* has, moreover,

an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within the limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons.

A also has

the legal power to alienate his legal interest to another, i.e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to create a reversion in himself; also the legal power to create a privilege of entrance in any other person by giving ‘leave and license’; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons—this meaning that the latter are subject *volens nolens* to the changes of jural relations involved in the exercise of *A*’s powers.

And the fourth set of rights comprise

an indefinite number of legal immunities, using the term in the very specific sense of non-liability or non-subjection to a power on the part of another person. Thus *A* has the immunity that no ordinary person can alienate *A*’s legal interest or aggregate of jural relations to another person; the immunity that no ordinary person can extinguish *A*’s own privileges of using the land; the immunity that no ordinary person can extinguish *A*’s right that another person *X* shall not enter on the land or, in other words, create in *X* a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of the persons in general.⁸

In other words, property rights consist in a complex of multital ‘claim-right/duty’, ‘privilege/no-right’, ‘power/liability’ and ‘immunity/disability’ relations.

Now, though it is clear that ‘property’ is too complex a

notion to be simply reduced to claim-rights alone, Hohfeld's discussion shows that all the various aspects (claim-rights, privileges, powers, and immunities) are each accompanied by correlatives—duties, 'no-rights',⁹ liabilities and disabilities. In short, all aspects of property rights which pertain to an individual are accompanied necessarily by correlatives which pertain to others. And so, observing that private property is an aggregate of claim-rights, privileges, powers, and immunities, rather than bringing the relational nature of property into question, shows the multiplicity of social relations which the notion encompasses.

However, if I am correct in considering the core aspect of property to be the claim to the exclusive use of a good, then that claim-right, because it is part of a jural *relation*, requires a correlative *duty* in another.¹⁰ If this is the case, then the fundamental problem in providing the philosophical foundations of property rights can be seen to involve not only justifying a claim to exclusive use, but more importantly, establishing that another is duty bound to observe such a claim. It is the failure to direct attention to this latter aspect of property rights which undermines 'justifications' of private property. But the relational aspect of rights means that if claim-rights are not the core aspect of property rights, then the even greater problem of establishing the no-rights, liabilities, and disabilities of others has to be addressed as well. In other words, the complexity of the concept 'property' does not weaken my criticism of liberal individualist approaches to property; it strengthens it.

Some further support for my scepticism with regard to property rights can be gained from the legal theorist Morris Cohen, who is also of the opinion that 'the essence of private property is always the right to exclude others'.¹¹ Cohen likewise believes that 'property' is a relational concept:

Anyone who frees himself from the crudest materialism readily recognizes that as a legal term 'property' denotes not material things but certain rights. In the world of nature apart from more or less organized society, there are things but clearly no property rights.

Further reflection shows that a property right is not to be identified with the fact of physical possession. Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between

an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals.¹²

Now, I have suggested that liberal individualists will tend to regard individuals as isolated monads. But property, as we have seen, is a relational concept. How is an individualist to conceptualise relationships? There are two contesting theories which might be utilised: either relationships are regarded as internal to the individual monads or they are external to them. But if they are internal to them, then elements drawn from civil society or the state (specific social relationships) cannot be used to justify aspects of the very same civil society or state when the individual is considered to be prior to them. A feature of that which is to follow logically cannot be employed at an earlier point in the argument to establish precisely that same thing which supposedly follows. This, of course, would be to argue in a circle; yet it is through such an approach that traits endemic to certain societies are often employed in attempts to justify universally the practices or institutions of those societies. With regard to property in particular, personality types arising within 'propertarian' societies are considered to exemplify universal human character traits, and the institution of property is thus deemed to be universally necessary. One cannot validate civil institutions by focussing upon an individual monad which, it is claimed, exemplifies humanity prior to civil society, when that monad incorporates relations which only obtain in civil society. Consequently, by relying on circularity, the internal approach to relationships does not appear to offer much hope of success to those wishing to validate the full liberal conception of ownership prior to the establishment of the state or civil society.

What about the external approach, then? If individuals are thought of as isolated monads, how can an examination of such a monad in isolation engender relationships between monads? The production of such relationships would amount to a greater return from the enterprise than was invested in it. Now, an examination of an individual monad might reveal a desire to forgo the use of a good in the belief that another will forgo the use of a different good, and this latter restraint is to the advantage of the first individual. But it is difficult to see

how a right against others can be derived from a consideration of an individual in isolation, because that would involve establishing a duty in a quite different, distinct and unrelated monad. And surely, this could not be ascertained from an analysis of a single monad. In which case, any such attempt to derive property rights is surely doomed to failure before it is even begun. Liberal individualism will tend either to produce circular arguments in the pursuit of a justification of property rights, or to try to bridge the unbridgeable—namely, what are considered to be completely distinct and socially isolated monads.

There is a second difficulty which is likely to emerge in the course of an attempt to validate claims to private property. The philosophers I have examined seemed or have been taken to want to justify rights in what I called at the beginning of this study, following Honoré, full liberal ownership. Many of the arguments which I have examined begin with some aspect of human life which suggests that some possessions are either necessary, or would maximise happiness, and so on. This, their proponents believe, means that *property rights*, full liberal property rights, have been established. They then usually proceed to discuss laws to protect these rights, and the need to create a whole system of political relationships, obligations, duties, etc. to make this possible. There is some similarity between this *non sequitur* and some of the arguments theologians have used to 'prove' the existence of God. For example, take the argument from design. Because order is perceived in the universe, the existence of a designer is deduced. Suddenly we are told that this means that we should pray to our saviour, our lord, our master. But as David Hume so mischievously points out,¹³ even if we have ascertained that a designer was responsible for the universe, we are none the wiser as to what the designer is like. We cannot legitimately proceed from the knowledge that a designer exists to the knowledge that He is the God of Christianity. Similarly, that we might be better off if we had some possessions which others refrained from using does not entail that we can use those goods as capital to exploit the labour of others. Nor does it mean that we have the right to any income from them. And neither does it mean that we can leave them in our testament to our children.¹⁴

Now, it might be considered wise to reject arguments for the full liberal conception of ownership and begin to bring together the arguments for a more restricted, yet more easily defensible, notion of property. This is essentially the tack which has to some extent been taken by several of the more recent approaches to the philosophical analysis of property rights. Lawrence C. Becker,¹⁵ and though much less concerned to defend the full liberal conception, C. B. Macpherson¹⁶ and James Grunebaum¹⁷ have, at least in part, redefined or restricted the application of property rights. I shall not follow their lead for the reason that the word 'property' as it is used today is so permeated by the full liberal conception that any use of the word, even when only a qualified conception of rightful property is intended, will be likely to result in the automatic acceptance by many of rights to capital, income, etc. My aim, therefore, is to attempt to weave together the various threads which I have exposed in the course of this analysis of the major arguments for property rights into a morally acceptable fabric regarding the exclusive utilisation of a good, yet which differs significantly from the full liberal conception which has (so far, at least) failed to be validated.

When considering Locke's arguments, I encountered the sufficiency condition, which prevented anyone from appropriating a good except when there is as much and as good left for others. Clearly, as I argued, this condition as it stands prevents the accumulation of capital. But does it prevent all accumulation? Hillel Steiner makes the following observation:

What protection is to be afforded to the appropriate entitlements of individuals-originating-at-a-historically-later-moment than individuals who are members of the first generation?

One solution is to require that no individual's appropriation of unowned natural objects may ever be so great as to preclude any other present or future individual from making a similar appropriation. This stringently conservationist interpretation of the just initial acquisition requirements, unwieldy as it would be, seems to be the only one which can circumvent the necessity of periodic distribution.¹⁸

One category which fits such a rigid requirement is consumables obtained from renewable resources. One could happily eat and drink within limit, wear certain clothes, etc., and do so whilst excluding others, without violating the

sufficiency proviso. But I have stressed that exclusive use, to be property, involves a duty which is incumbent upon another. Does the sufficiency condition establish such a duty? Apparently not. Why then should one expect to be able to enjoy certain consumables without interference from others?

The answer is that it is unreasonable to interfere with another when there is sufficient alternative satisfactory goods for oneself to enjoy. But if the goods another enjoyed exclusively were to become scarce, then it would no longer be reasonable to abstain from using them. Such defeasible exclusive use would not be a property right—certainly not property as we understand the term, not the full liberal conception of property. What is most important about this is that the exclusive use is not derived from an individual's claim (and this lies at the heart of property), but from others' deferral of any claim to use the good in question while there is enough and as good left for themselves. Furthermore, if one could expect to be left alone to enjoy such consumables (because it is universally recognised as an unnecessary imposition on another to interfere in his or her enjoyment of a good when there is enough for everyone else), then I have described a scenario of exclusive use which answers the main question of the relatively dispossessed with regard to property: 'What about the little things I own if there is no such thing as a legitimate claim to property?' This question more often than not refers to consumables which are in some degree of abundance—toothbrushes, chairs, ornaments, etc. And it could be argued that food is only scarce in certain parts of the world because of the way it is distributed¹⁹—*because of private property*.

However, my discussion of Nozick suggests a possible restriction on such expectations of exclusive use: when the exclusive use of a good significantly restricts another's liberty, then one should realise that others may not respect one's expectations concerning the exclusive use of that good. So, if the sufficiency proviso is met, and if the 'liberty proviso' is not violated, then one could justifiably protest that one's liberty was being infringed if others were to interfere in one's enjoyment of a good. But it is clear that the satisfaction of both provisos would only allow an unquestioned exclusive use of a

limited number and a limited type of goods. Moreover, it would only allow a limited form of 'enjoyment'. It could not justify the enjoyment of any income derived from hiring out the good, nor the enjoyment of any political power falling to the possessor. Consequently, capitalist property relations could not receive moral support from the kind of exclusive use I have been sketching out.

But are there any other occasions when a deferral of others' privilege to use a good might be expected? Mill's insight into desert provides us with a possible case. I could see no reason to deny that labour allows the privilege of access to a good.²⁰ We might choose to go further and acknowledge that the (Hohfeldian) privilege of use due to the producer is privileged; i.e., that the privilege of use enjoyed by the producer is a principle which is lexicographically ordered prior to the privilege of others' use of that good. This might be necessary to encourage production (and answer the problem of scarcity). This might be recognised in the mores of a society. In such a case, if and while the privilege of use by the producer is significantly affected by others using the good, then we might expect others to forgo their privilege of use. This situation would be tantamount, in effect, to a form of usufruct.²¹ But it would not concern property; deserved use would remain a privilege, rather than principally a claim-right. And so property rights (insofar as they are claim-rights) would not be involved, even though a considerable degree of privileged access to the produce of one's labour might obtain. However, I am of the opinion that the lexicographical ordering suggested above should be rebuttable by others' need. I doubt that the sufficiency proviso can be significantly transcended and the situation remain morally acceptable. I should also add that my discussion of the 'derivation' from efficiency indicates that those who make use of the privilege of usufruct (whether it is lexicographically ordered or not) should be recognised as incurring certain responsibilities by doing so.

When I discussed first occupancy, I alluded to the priority of satisfaction being accorded those who have waited the longest. This principle might allow some limited privileged exclusive use. We might choose to grant priority of access to the first in line. But to the extent that one's enjoyment of a good will

reduce one's suffering and the relative suffering of those awaiting enjoyment will rise, the restrictions on such exclusive use are obvious. First occupancy might determine who has property rights in what, if such rights are justified. I do not see how it can determine that property rights *per se* are justified. However, insofar as first occupancy could specify the holder of property should ownership be morally valid, it could also determine possession. First occupancy, in providing some criterion for possession, would have a role to play in deciding when not to interfere in another's enjoyment. But again, this would be limited by the sufficiency and liberty provisos.

My appraisal of the arguments offered by Hegel suggests a further possible reason why an individual should choose voluntarily to forgo his or her privilege of the use of a good so as to allow another the exclusive use of it. One's respect for a person might lead to one leaving alone whatever that person is particularly 'attached' to. If, for example, you have in your possession an object which evokes poignant memories, my respect for you would involve a respect for your sentimental relationship to that object (though that may need to be overridden when your exclusive use becomes, in some respect, unsalutary). And if one required the exclusive use of a good in order to accomplish some project, that may also be conditionally granted through respect. Projects certainly occupy a central place in our lives. In fact, they may underly much of our *prima facie* 'propertarian' dispositions. When one eats, one wishes to do so without undue interference or disturbance. It is the *action* of eating which is to be respected foremost. One might set aside food to eat later. The intention of that future action is what is frustrated by another taking 'one's' food. But this does not entail property rights—it merely shows that if one is to respect another's intentions, one's own use of certain goods must be restricted. Except in the case of what is destroyed by consumption, this would rarely involve permanent exclusion—and we have seen that consumables are not too problematic.

The confusion arising from failing to distinguish between frustrated intentions and infringements of property rights can be seen in the following example: If I borrow a lawnmower from my neighbour, then I expect to be able to use that

lawnmower to cut my grass. If you appear and take the lawnmower temporarily and then return it to the owner, we could hardly claim that my property rights had been violated. But your action would have frustrated my intention with regard to mowing my lawn. Would I not exclaim: 'You have taken my lawnmower'? But in doing so, I could not possibly be invoking property rights. Much of our irritation when 'property rights' are infringed arises from the way that our aims are thwarted by another depriving us of the use of a good. If we are to be respected as persons (in the non-juridical sense of 'person'), then we will occasionally wish to be left alone to use a good in private. But such respect should not be confused with property rights.

With regard to tools, the labourer may have a special 'attachment'. I, personally, do not write on books. Robert Nozick, however, finds it useful to interject comments into a text and, I presume, to underline passages of importance. To the extent that Nozick requires those particular books for his work (especially to the extent that he needs those comments he has written in them), he requires a privileged access to them. He requires access to those particular books more than I do. Insofar as he values those books, (within reason) I should respect that. Now, this concerns one person's individual respect for another ('respect *in personam*'). Why should it apply generally—two people may have no feelings at all for each other! Kant, however, is of the opinion that the mere fact of possessing rationality entitles one to some respect and to be taken into consideration by others. This could provide some general justification for acknowledging other's 'attachments'. However, again we must be clear that this argument is so limited as not to suggest property rights. Certainly it could generate a considerable degree of exclusive use (and this might crystallise into so strong an expectation of exclusivity being forthcoming as to be indistinguishable in operation from the institution of property), but how could the respect due to a person's 'attachments' or projects be more important than others' desperate requirements? Property rights grant so much respect for a person's attachments as to disregard completely those in dire need. Moreover, respect is voluntarily granted. If the awareness of the foundation of respect were to atrophy

into a demand by the possessor of exclusive use for others to observe a duty to keep off his or her goods, then the claimant of property should be reminded of the source of his or her benefits—a grant voluntarily made by others. For this reason, respect should not produce rights which are posited in law. That could only devalue such respect.

We can thus see that there are reasons to suppose that without there being property rights as such, some exclusive use by individuals would be granted by the voluntary deferral by everyone else of the (Hohfeldian) privilege of use. We can also see that some grants of this nature would come to be expected by the potential recipients of such grants. Those who grant exclusive use may feel morally compelled to so do; however, changing circumstances would lead to such a grant being rescinded. The central point here is that such morally acceptable exclusive use arises socially and through mutual respect. And such respect might be thought to occur more readily in a society based upon voluntary co-operation than in one where property rights ensure competition and social isolation.²² Moreover, a voluntary community of individuals socially interacting with each other may choose to live under general rules.²³ This might delimit certain areas where expectation of the exclusive use of goods is taken for granted.

One point is obvious. If people collectively choose rules of exclusive use, then there is no fundamental problem concerning their moral status. One can voluntarily place oneself under a rule which restricts one's behaviour. This may be undertaken in a context which establishes mutual restrictions. H. L. A. Hart writes:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative right to obedience.²⁴

However, if one does not wish to benefit from such rules, or thinks that the mutually shared goal could be achieved in a

better way by different rules being observed, the mutual adherence to the prevailing rules cannot, *pace* Hart, be imposed on those who were not party to the agreement which brought those rules into being.

If I am prepared to leave those items I call 'yours' alone, that does not impose the obligation upon you for a similar observance to be made by you with regard to 'my' goods if you are prepared to allow me to use 'your' goods whenever I like. Hence, such rules cannot be imposed upon just anyone. (When you expect me to refrain from what is 'yours', however, there would be grounds for regarding your disregard of what is 'mine' as immoral.) Property rights are thought to hold against everyone, irrespective of whether or not they were party to the rule-making procedure. This cannot be taken for granted. Property rights cannot be assumed to be morally binding. On the other hand, the 'non-propertarian' exclusive use which I have just been advocating is a form of voluntary co-operation. It is not a form of enforced duties. And as it rests ultimately on voluntariness, it is morally unproblematic. Property rights, however, involve the coercion of those who do not respect them.²⁵ Such coercion requires moral legitimation. The onus is on the propertarian to provide it.

And so we must reach the conclusion that even without property rights, some exclusive use could be predicted. But that exclusive use, when it is morally justifiable, would rely ultimately on a respect which would ordinarily be granted voluntarily. And we might expect such respect to be widespread when the absence of property rights facilitated closer social interaction and feelings of community than occur in 'propertarian' societies. And whereas we would expect a reasonable portion of food and the other necessities of life to be individually possessed when in sufficient abundance, with no rights in property we might expect them to be pooled in times of scarcity. Such pooling of resources raises difficulties in 'propertarian' societies, but in 'non-propertarian' ones no such difficulties present themselves. What is freely given (i.e. exclusive use) can be freely taken back—especially when exigency calls.

Most philosophers have tended to side with those who advocate the right to exclusive use (private property). One or

two have taken the view that there are no such things as rights in property and there should be no exclusive use either. There is, though, a third possible position which could be supported, but philosophers have tended to overlook it: there are no valid claim-rights to exclusive use, but exclusive use is often to be tolerated. It is simply not the case that there must be either exclusive use and accompanying rights, or no rights and no exclusive use. There can be exclusive use without there being any claim-rights to it. The outline which I have presented of a 'non-propertarian' approach to the exclusive utilisation of a good differs fundamentally from 'propertarian' ones in that it is based on the tolerance of those who choose to be excluded out of regard for those included, rather than on the intolerant, coerced exclusion of the dispossessed by those claiming rightful ownership. If such an outline were fully developed and put into general practice, it would be most likely that the widespread individual use of many things would be taken for granted and universally permitted, even though no rights were asserted. We might even expect that it would be considered justifiable for people to show displeasure if they felt others were not showing them sufficient respect by using goods the former were especially 'attached' to. But the same could not be said of the oligarchical ownership of the means of production such that most individuals are forced into a situation where they are exploited. That form of exclusivity would be a foolish one to grant voluntarily, and it would be foolish to respect others' 'attachments' to 'their' capital.

Small-scale exclusive use is seen to generate few moral difficulties. This cannot be said of our system of private property. The large-scale ownership of the means of production by a minority of the population, who consigns the rest to a shorter life expectancy, poorer health, less education, more toil and greater misery, requires considerably better justification than the various philosophical arguments which have been offered for it. And until compelling arguments have been presented which validate property *de jure*, why should anyone be expected to feel morally obliged to comply with the property claims of that minority which, at the expense of the rest, enjoys the benefits of the institution of private property which pervades our society? And by what right does that

minority and its agents coerce others into respecting those claims, when the claims lack adequate justification?

NOTES

1. See Karl Popper, 'Science: Conjectures and Refutations', in *Conjectures and Refutations: The Growth of Scientific Knowledge* (London: Routledge and Kegan Paul, 1972), pp. 33-65.
2. See Thomas Hobbes, *Leviathan* (London: Fontana, 1962), *passim*.
3. C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1964), p. 1.
4. See Chapter 1.
5. A. M. Honoré, 'Ownership', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961), p. 113. H. L. A. Hart makes a distinction between primary and secondary rules: 'Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movements or changes; rules of the second type provide for the operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.' H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 78-9. Insofar as the arguments which I have been concerned with attempt to validate property rights prior to government, then 'property', as the term is understood by those philosophers which I have examined, is evidently foremost a claim-right with a corresponding duty on the part of the non-owner and hence involves a primary rule. However, concerning the right to remain in control of a thing, it should be noted that, by acting in accordance with secondary rules, the government is quite capable of altering the nature and status of property rights.
6. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. with an intro. by Walter Wheeler Cook (New Haven: Yale University Press, 1966), p. 72.
7. *Ibid.*, p. 36.
8. *Ibid.*, pp. 96-7.
9. Hohfeld explains 'no-rights' as follows: '... it will be remembered ... that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the

- correlative of the latter relation is a "no-right". There being no single term available to express the latter conception. Thus, the correlative of *X*'s right that *Y* shall not enter on the land is *Y*'s duty not to enter; but the correlative of *X*'s privilege of entering himself is manifestly *Y*'s "no-right" that *X* shall not enter.' *Ibid.*, p. 39.
10. As Hohfeld remarks: 'Recognizing as we must, the very broad and indiscriminate use of the term "right", what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative "duty", for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative.' *Ibid.*, p. 38.
 11. Morris Cohen, *Law and the Social Order*, reprinted in part as 'Property and Sovereignty', in C. B. Macpherson (ed.), *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978), p. 159.
 12. *Ibid.*, pp. 158-9.
 13. Hume writes: 'But were this world ever so perfect a production, it must still remain uncertain whether all the excellences of the work can justly be ascribed to the workman. If we survey a ship, what an exalted idea must we form of the ingenuity of the carpenter who framed so complicated, useful and beautiful a machine? And what surprise must we feel when we find him a stupid mechanic who imitated others, and copied an art which, through a long succession of ages, after multiplied trials, mistakes, corrections, deliberations, and controversies, had been gradually improving? Many worlds might have been botched and bungled, throughout an eternity, ere this system was struck out; much labour lost, many fruitless trials made, and a slow but continued improvement carried on during infinite ages in the art of world-making. ... In a word, Cleanthes, a man who follows your hypothesis is able, perhaps, to assert or conjecture that the universe sometime arose from something like design; but beyond that position he cannot ascertain one single circumstance, and is left afterwards to fix every point of his theology by the utmost licence of fancy and hypothesis. This world, for all he knows, is very faulty and imperfect, compared to a superior standard, and was only the first rude essay of some infant deity who afterwards abandoned it, ashamed of his lame performance; it is the work only of some dependent, inferior deity, and is the object of derision to his superiors; it is the production of old age and dotage in some superannuated deity, and ever since his death has run on at adventures, from the first impulse and active force which it received from him.' David Hume, *Dialogues Concerning Natural Religion* (New York: Hafner Publishing Co., 1948), pp. 39-41.
 14. Were we to relax our full liberal conception of ownership, then we might heed the words of R. H. Tawney: 'Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the State. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and in moral

- justification. They may be conditioned like the grant of patent rights, or absolute like the ownership of ground rents, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a goldmine or rubber plantation. It is idle, therefore, to present a case for or against private property without specifying the particular forms of property to which reference is made. ... Arguments which support or demolish certain kinds of property may have no application to others; considerations which are conclusive in one stage of economic organization may be almost irrelevant in the next. The course of wisdom is neither to attack private property in general, nor to defend it in general; for things are not similar in quality, merely because they are identical in name. It is to discriminate between the various concrete embodiments of what, in itself, is, after all, little more than an abstraction.' R. H. Tawney, *The Sickness of an Acquisitive Society*, reprinted in part as 'Property and Creative Work', in Macpherson, *Property: Mainstream and Critical Positions*, *op. cit.*, p. 136. I, however, have chosen to view property in general. But I have done so because it is clear that the philosophers whose writings I have examined have done so; and it is also clear that the conception of property which they have in fact attempted to defend or have been taken to be defending is the full liberal conception; and it is the full liberal conception which I have criticised in particular.
15. Becker holds essentially to the full liberal conception of ownership, except that he argues for greater qualifications on use and appropriation than is usual for 'propertarians'. This is because the arguments for private property which he finds acceptable suggest a restricted application of property rights; for example, Becker believes that the approaching scarcity of resources entails restrictions on the private ownership of those resources. However, I have rejected, in the course of this examination, the arguments which Becker finds persuasive.
 16. Macpherson writes that 'property, although it must always be an individual right, need not be confined, as liberal theory has confined it, to a right to exclude others from the use or benefit of something, but may equally be an individual right not to be excluded by others from the use or benefit of some thing. ... The right not to be excluded by others may provisionally be stated as the individual right to equal access to the means of labour and/or the means of life'. C. B. Macpherson, 'Liberal Democracy and Property', in *ibid.*, p. 201. But this is tantamount to a complete redefinition of 'property'. We have seen that 'property' consists of claim-rights, privileges, immunities and powers. Macpherson is attempting to restrict the term to a privilege. Not only is an attempt to limit 'property' to one facet far too restrictive, but Macpherson disregards what is the most central aspect of property—the duty of others to recognise exclusive claim-rights. Macpherson's sole justification for this is to point out that common property is non-exclusive.

- Even if this were the case (and it is not certain that it is so—other nationalities may be excluded from common property, e.g. from parks in times of war), common property can hardly be regarded as such a paradigm case of property as to dismiss private property altogether—especially when private property constitutes the most common notion underlying the everyday use of the word 'property'.
17. For a critique of Grunebaum's conception of 'autonomous ownership', see note 19 in Chapter 6 above.
 18. Hillel Steiner, 'Justice and Entitlement', in Jeffrey Paul (ed.), *Reading Nozick: Essays on Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1981), pp. 381–2.
 19. See, for example, Francis Moore Lappé and Joseph Collins, *Food First* (London: Abacus, 1982).
 20. Though we might wish to restrict a homicidal maniac's use of a good which he or she has created. The prohibition against harmful use which qualifies the enjoyment of private property in a system of property rights would have a role to play in a 'non-propertarian' theory concerning the expectation of exclusive use. Antisocial behaviour might result in others revoking any grants of the exclusive use of a good which they may have awarded. Similarly, one might still be liable to execution for 'debt', even without there being any property rights.
 21. The Oxford English Dictionary defines 'usufruct' as: 'The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to this.'
 22. Cf. Becker when he writes: 'People who want property want to be left alone to acquire and enjoy it. They want to be able to do what they please with it—to consume it, transform it, exchange it, give it away, put it to good use, or just hold it.' Lawrence C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge and Kegan Paul, 1977), p. 1.
 23. But note, I am talking about general rules being chosen. Hume regards the general rule regarding property rights as being necessary and in need of enforcement.
 24. H. L. A. Hart, 'Are There Any Natural Rights?', in Anthony Quinton (ed.), *Political Philosophy* (Oxford: Oxford University Press, 1967), pp. 61–2.
 25. Becker claims that philosophers take the subsistence of a right to be something like 'the existence of a state of affairs in which one person (the right holder) has a claim on an act or forbearance from another person (the duty bearer) in the sense that, should the claim be exercised or in force, and the act or forbearance not be done, it would be justifiable, other things being equal, to use coercive measures to extract either the performance required or compensation in lieu of that performance'. Becker, *op. cit.*, p. 8.

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