CHAPTER 1

Property Rights: Changing Notions

The meaning, the understanding and the theory of property have undergone many changes over time. So also has the notion of rights, often in relation to the concept of property. Any discussion of property, as an issue in political theory, must take into account both the conceptual problems involved and the historical dimension of theory and practice of property, since there is neither something static about the institution of property, nor is there a common attitude to the desirability of a particular form of property. Notions of property are rooted in particular historical experience. This of course suggests that ideas about property, and institutional arrangements concerned with it, have changed over time; they are not immutable or fixed, but are always evolving and being derived from the changing political, social and economic landscape.

Western attitudes to property, for instance, are associated with the development of capitalism and with the notion of commodity, which leads on to a notion of 'private ownership' which confers, therefore, on the individual the right to its use and disposal. Property is a general term for rules governing access to and control of land and other material resources. Because these rules are disputed, both in regard to their general structure and in regard to their particular application, there are interesting philosophical issues about the justification of property. Modern philosophical discussions focus mostly on the issue of the justification of private property rights (as opposed to common or collective property), although of late the notions of 'collective' and 'common' property have become aligned with preceptions of global and ecological justice and are demanding more space within the liberal paradigm. Private property refers to a kind of system that allocates particular objects, like pieces of land, to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society. Property rights are rights of ownership; it has to do with the right to use, transfer, and the right to exclude others from the thing owned. Though these exclusions make the idea of private property seem problematic, philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents. However, As Lawrence Becker puts it, "the history of property acquisition is a sordid one...and inequity in the distribution of goods has always been visible. An institution which has to manage the results of
much injustice, and which has so often been used to perpetuate inequity, has an understandable aversion to moral analysis.¹

There is another sociological reason that makes the idea of private property a contested terrain. The whole idea of an individual actor having defined rights may be alien in some historical settings. There are fundamental differences in the concepts of ‘property’ and ‘persons’ in social groups belonging to a non-western setting. Property, therefore, needs to be understood both historically and contextually. Both ideas about property and the institutional arrangements concerned with it have changed over time, the rhythms and trajectories of change being different in different societies. Like most other rights, property too, has acquired a cultural content. Co-existing societies have different understanding and practices, and there is growing consensus that rights need to be responsive to these diverse practices. We are, in this chapter committed, however, to the study of private property, and its variant intellectual property (also referred to as the “new property”). The purpose here is to first examine the justificatory premises of private property, as they have been offered in some traditions, and then to see if similar justifications hold for intellectual property.

JUSTIFICATORY ARGUMENTS

Questions of justification and legitimacy involve a normative analysis of property. Thus very often we find in theories of property, concerns about the relationship between property and values like liberty and justice. Justifications of desired property systems have usually been attached to a large range of assumptions and presuppositions about human nature and its consequences for social organization.

Strictly speaking, ‘property’ is a general term for the rules that govern people’s access to and control of things like land, natural resources, the means of production, manufactured goods, and also (on some accounts) texts, ideas, inventions, and other intellectual products. A property right can be defined as a legally enforceable power to exclude others from using an object without the need to contract with them so that if you have a property right in A, the rights of use, possession and disposal of A are concentrated in you. A.M. Honore has given a detailed account of the ‘full’

¹ Lawrence C. Becker, Property Rights: Philosophical Foundations (London: RKP, 1977), 2
or the liberal concept of ownership which, he says is common to all mature legal systems. The list of elements that explicate the liberal notion of ownership are: The right to possess; the right to use; the right to manage; the right to income; the right to capital; the right to security; the power of transmissibility; the absence of term; the prohibition of harmful use; the liability to execution; residuary character. Property rights are, according to him, proprietorial rights, or ownership rights that a person exercises over corporeal, or incorporeal things.

Different scholars have different ideas about which from the above bundle of entitlements are essential elements. Some, like Hayek regarding the right to alienate as the most fundamental stick of the bundle. Some regard the "right of exclusion." as an essential feature of property rights in general. It is the power that may be exercised to the exclusion of all others, freely and without restrictions. The extent to which an owner is 'free' to operate his property and the extent to which he is unencumbered by 'restrictions' depends to a large extent on the notion or the perception of property that is prevalent in a society at a particular juncture.

Disagreements about property use are likely to be serious because resource-use matters to people. They are particularly serious where the objects in question are both scarce and necessary. Some have suggested that property relations only make sense under conditions of scarcity. But other grounds of conflict are possible: there may be disagreements about how a given piece of land should be used, which may stem from, for instance, the history or symbolic significance of that piece of land or whether land, in general, is scarce or not. Intellectual property provides an example of property rules that do not respond directly to scarcity; moreover unlike material objects, the objects of intellectual property are not exclusive by implication, for their use by any one person does not preclude their use by any number of others.

Different concepts of property exist in different legal systems as well as in legal theory. In a sense, opposite ideas of property: property as a commodity and, on the other hand, property open to "social needs". In the construct of property rights, the social aspect, even though it never

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5 For some distinctions, see generally James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain", 66 Law & Contemporary 33 (2003) (Boyle starts his analysis by asking whether public domain is "the opposite of property," and stating that it is impossible to think about the public domain or commons without considering the two basic ideas of property), http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+(WinterSpring+2003) . (accessed November 11, 2006)
completely fades away, can range from a very limited incidence to a large, broad influence. When the social aspect is almost nonexistent, property rights are deemed a “commodity” and what is stressed is the “power” of the owner. Conversely, emphasis on the social aspect of ownership stresses the interests of society as a whole, as opposed to those of the owner alone.

In an effort to simplify a very complex reality, one can argue that different theories, with different contexts and premises, can be reduced, as far as the construction of property rights is concerned, to either of the two premises mentioned above. For example the labour theory of property as elaborated by Locke or Nozick recognized that the power of the owner over what he creates as almost absolute (barring some egalitarian interpretations of Locke which have been discussed later); property in this theory serves an individual end and not a social function. Property only has the role of satisfying individual preferences. For Von Hayek, who was very sceptical about the “social function” of property rights and highly hostile about IPRs, commodification of property to its maximum extent is a necessary prerequisite for individuals to pursue their own ends and in so doing, to pursue individual liberty. 6 Utilitarianism, in another instance, permits both an individualistic reading as well as a reading which will permit property performing a social function. 7

Any society with an interest in avoiding conflict needs a system of rules based on some moral justification. These justifications establish that there ought to be property rules of some kind: private property rules are one variety. Some human societies have existed for millennia, satisfying the needs and wants of all their members, without private property or anything like it in land or the other major resources of economic life. So the first step in sound argumentation about property is distinguishing those arguments which support the existence of property in general from arguments which support the existence of a system of a specific kind. This chapter looks into the justificatory premises of private property, and specifically those that can be extended as a justification of intellectual property.

Intellectual property, one can say is a form of ‘new property’ both in a historical and conceptual sense. Historically intellectual property marks a new stage in the development of property. The vision of the post-industrial society is set in a new power frame which treats knowledge as intellectual property or a saleable commodity. Conceptually, to the list of things that count as property, gets added an intangible like knowledge. With the individuation of knowledge into

6 Fredrich Von Hayek, *The Road to Serfdom*.
7 For two interpretations of utilitarianism see Will Kymlicka, *Contemporary Political Philosophy* (Oxford: OUP, 2002), 32-37
property rights, knowledge becomes a form of appropriation of the cultural resources of society, thereby negating the links between a corpus of knowledge and its social constituency.  

The changes in property rights which have come about in the last three or four decades are vast. The modern industrial state has become so complex, so vast, its basic institutions so interdependent and entrenched that changes in the concept and institution of property, were perhaps an inevitable result arising from the need of institutions to constantly adapt to the changing environs. But while the environs have altered significantly in western societies, there have been minimal in traditional societies and in varying degrees in other parts of the developing world. The relation between property and persons may vary with societies. There may be traditions committed to other notions of property and therefore particular relationships between person and property need not be prescriptive. It would also serve us to know the ‘object’ of property at different historical junctures i.e. which things became the objects of property in different historical settings – objects, men, beasts, land, knowledge etc. Thus an exploration of property needs to encompass not only who may hold property, but also to what may constitute property.  

Discrimination between persons who may hold property is clearly something that needs justification, as much as the inclusion of particular resources amongst objects that count as property. These justificatory arguments, with respect to who may hold property as also what may count as property, have been classified by Becker in the form of philosophic arguments both for and against private property, and his book remains one of the best general analysis of justificatory arguments. According to him attempts to justify the institution of property have been based upon:  
- Argument of first occupancy  
- Labour theory of property acquisition  
- Arguments from utility  
- Arguments from political liberty

9 Lawrence C. Becker suggests three levels of justifications provided by philosophical arguments for property: the general justification which gives answers to the question of why there ought to any property rights at all; the specific justification which addresses itself to the question of why there ought to be specific property rights (eg. full, liberal ownership of land); and a particular justification which, more importantly, focuses on why particular persons ought to have a particular property right in a particular thing. Lawrence C. Becker, Property Rights: Philosophic Foundations (London: RKP, 1977), 23  
10 Ibid
Considerations of moral character.

The ambition in this chapter is not to present a complete terrain of the justificatory arguments in favour of private property rights. It is rather to elicit a set of principles that form the basis for a claim for intellectual property. The focus here is on those theories of property a) that have either located property in the ‘self’ (The labour-desert theory as explicated by Locke and Nozick) and have put forward a strong moral claim for property rights based on ‘self ownership’ and protection of individual liberty; or

b) that seek to put forward a contingent claim for property rights based on the benefits that accrue to the individual, economy or society, i.e. based on the principle of productivity and utility (utility based arguments- Adam Smith; Bentham).

The premise of a third approach -- derived loosely from the writings of Kant 11 and Hegel 12 -- is that private property rights are an extension of the personality and are crucial to the development of the self. Hegel's account of property centers on the contribution property makes to the development of the self. 13 For example, granting to ‘knowledge ‘creator’ the right to appropriate their labour and recognizing an interest in the knowledge that they consider part of their personalities promotes the development of knowledge generation and dissemination. Policymakers should thus strive to create and allocate entitlements to resources in the fashion that best enables people to fulfil those needs. From this standpoint, intellectual property rights may be justified either on the ground that they shield, from appropriation or modification, artefacts through which authors and artists have expressed their "wills" (an activity thought central to "personhood") or on the ground that they create social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing. While these form important philosophic inquiries into the legitimacy of private property they do not form the core of the justificatory premises employed currently at policy and international law levels. Also they are loosely implied in the first approach and therefore will be subsumed under the first approach itself.

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13 Hegel, Philosophy of Right. 1967 [1821], para. 41a.

http://www.marxists.org/reference/archive/hegel/works/pr/property.htm. (accessed Oct. 10, 2006) Kant began by emphasizing a general connection between property and agency, maintaining that there would be an affront to agency and thus to human personality, if some system were not arrived at which could permit useful objects to be used. He inferred from this that ‘it is a duty of right to act towards others so that what is external (usable) could also become someone’s’ (Kant 1991 [1797], 74 )
Two approaches currently dominate the theoretical literature on IPRs – self ownership (principle derived from labour theory) and utility. They form two of the strongest justificatory, and intuitively most persuasive arguments for intellectual property to be claimed as a right. The principle of self-ownership (s-o) draws from the proposition that a person, a ‘self-owner’, who labours upon resources, that are either unowned or “held in common”, has a natural property right, stemming from self-ownership, to the fruits of his or her efforts, and that the state has a duty to respect and enforce that natural right. These ideas, originating in the writings of John Locke, are widely thought to be especially applicable to the field of intellectual property, where the pertinent raw materials (facts and concepts) do seem in some sense to be “held in common” and where labour seems to contribute so importantly to the value of finished products. A good illustration of this perspective is Robert Nozick's brief but influential discussion of patent law in *Anarchy, State, and Utopia.*\(^\text{14}\)

The second, and the more popular of the two approaches, at least as far as justifications for IP rights are concerned, ‘utility’, employs the familiar utilitarian guideline that lawmakers’ summon when shaping property rights, of maximization of net social welfare. In the context of intellectual property, it is generally thought that lawmakers ought to strike an optimal balance between the power to stimulate the creation of inventions and works of art, on the one hand and the power of exclusive rights, which curtail widespread public enjoyment of those creations, on other hand.

The meaning of s-o was shaped by its historical role against the doctrines of political absolutism in the 17th C England, while that of utility was directed against the numerous collective privileges and powers of the landed aristocracy in the 18th C. Locke, for instance, was responding against the absolutist regime of that era. Those feudal collective privileges and rights blocked individual liberties and were incompatible not only with the conception of autonomous agency but also with commercial mobility of real estate. The endeavour was to link the demand for individual liberty with the freedom to alienate, exchange and capitalize one’s resources wherever profitable opportunities were made available. While the principle of self-ownership was used to vindicate the claim for individual autonomy and rights, and therefore for property rights, the principle of utility was used to assert the rights and ‘happiness/welfare’ of the majority against the elite minority and feudal landownership.

The contention of the chapter is that the principles of self-ownership and utility, which had been used at various historical junctures to legitimate different forms of ownership, of different objects, have been appropriated to form the basis of the claim that knowledge is an ‘object’ that can be owned and can be claimed as a property right. Justifications for IP rights also draw upon chiefly the principle of s-o and utility. At the heart of the justificatory arguments are notions of the ‘self’ and issues of efficiency and productivity. Thus arguments for intellectual property have been broadly categorized into two: 1) that self-ownership, of knowledge (as of body and labour) yields property rights over that which knowledge creates; 2) that these rights (IPRs) are desirable because they spur innovation, research, more efficient utilization of the world’s resources, and increase the social value of the product by bringing it in the domain of research and market exchange (and hence have utility). This view gains validity from its role in more practical deliberations about rights.

In self-ownership and utility we find two radically different formulations of why property rights are desirable and legitimate. While the principle of s-o is concerned with the issues of moral legitimacy of property rights, the principle of utility focuses on the issue of morality from a different perspective; it contends that private property is desirable, beneficial and therefore legitimate and moral. Both these are used in tandem, to legitimate intellectual property rights. This chapter will look at the justificatory arguments of John Locke, Robert Nozick, Adam Smith and Bentham and see how the principles of utility and s-o have been employed by them to legitimate property rights. The objective is to eventually test whether the canonical grounds developed to legitimate traditional, tangible property rights hold good for IP rights.

THE PRINCIPLE OF SELF-OWNERSHIP

Self-ownership as a principle was employed to denote the sovereignty of the individual over his self i.e. over his body and mind, which cannot be enslaved against his will. It was to discredit the practice of slavery that the principle of s-o was first employed. There is an egalitarian premise in s-o, that each of us has equal rights over our bodies, skills, talents etc. It is a moral right conferred naturally on the holder. It is condition for the realization of a person’s autonomy based on the belief that individuals have a distinctive moral position as self-governors of some sort. The best known historical expression of the doctrine is John Locke: ‘Every Man has Property in his
Person...’ (Treatise II, section 27). In a striking 20th C repetition, in Robert Nozick (Anarchy, State and Utopia.) rights are known as being possessed or owned by or being held as ‘freehold’ by individuals.

The principle of s-o links the individual’s claim for freedom and autonomy with the claim that freedom requires separate property. To the extent that ownership postulates the individual’s absolute command over things, the essential meaning of property was sought in each person’s claim for freedom and autonomy. It is a moral claim for ownership of the entire domain that emanates from ownership of the self. This is the libertarian view, that rights are a species of moral property in one’s person, personal powers and legitimately acquired external resources.

A powerful way of expressing the principle of individual liberty is to claim that individuals have full “property rights” over their body, skills and labour, and anything, justly acquired, with which they mix these becomes theirs to own, use and dispose freely. There are thus two components of ownerships that are implied here; one that individuals own themselves in the sense of having private property in their own person, and second, that they can also have extra-personal property in external resources by virtue of an extension of the principle of self ownership.

Self-Ownership and the Structure of Property Rights in Locke

“Though the Earth, and all inferior Creature be common to all Men, yet every man has Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined it to something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by his Labour something annexed to it, that exclude the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.” (John Locke, Second Treatise, section 27)

Two central ideas, which emerge from the above passage, form the core of Locke's argument. One, that individuals have property in their own person and therefore in their labour, talents, skills and other productive capacities. Second, that human beings generate much of what they want and need by mixing their productive capacities with other resources, producing objects and service of value. The belief is that, people are entitled to hold, as property, whatever they produce by their own initiative, intelligence and labour. As long as the resources with which people mix their productive capacities are justly acquired, they may legitimately own the product of the conjunction. It is though this 'Workmanship ideal' of ownership, which has been extensively incorporated into Western thinking, that matters pertaining to distribution are negotiated in Locke.  

The relevance of Locke for contemporary discussions on property is indirect and it is useful to highlight the historical conditions under which Locke established property as a natural right, by way of a contrast to contemporary settings. Locke's ideas were enunciated in the context of the natural rights theories of the 17th century. It must be remembered that property rights for him emerged naturally only from a particular historical construct of the state of nature in which all things were held in common. Locke's general framework of economic ideas are contained in the Second Treatise, and in particular his views on property in chapter 5 of the Second Treatise. It is necessary to situate the Two Treatise in the context of the range of social and political action Locke addresses in the writing on property. Therefore it is important to briefly outline the ideological context, which provided a backdrop for Locke's writing on property.

The leading issue to which Locke responds to in the Two Treatise is the arbitrary and absolutist government of Charles II. Locke's immediate objective in ideological terms can be identified as justifying resistance to Charles II's efforts to impose continental style absolutism in place of the limited monarchy in England. In chapter 5 of the Treatise Locke offers a vehement rejection of the principle of divine right, used to justify and cloak absolutism, to challenge the absolutism of Charles II. He mounts a blistering attack on its most popular defence: the political tracts of Sir Robert Filmer (1588-1652). Filmer's Patriarcha (1630) had advanced the case for absolute monarchy on the ground that the sole legitimate authority derives from God's donation of the world to Adam and thus to his lineal heirs who happen to be the current holders of thrones by

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18 Grotius; Pufendorf. For a discussion on the natural law tradition of Grotius and Pufendorf, see Karl Olivecrona, law as Fact (London: Stevens, 1971).
hereditary divine right. In its place Locke supplies a critique of the Stuart policy as subordinating the interests of the masses to the interest of the ruler and asserts a radical constitutionalist theory and an individualist theory of resistance to arbitrary government.

Locke's procedure for negating the basis of Filmer's argument involved a conceptualization of political society within the natural law framework. Locke is quite clear that the law of nature represents God's requirements for the preservation of his Creation. Locke's theory of property is informed by this teleology. According to Locke, where the ruler falls short of fulfilling his primary responsibility, it becomes justifiable to depose him, since his behaviour violates the very purpose for which society had been established, namely the protection of rights and property of members. The validity of this purpose rests on, what Locke calls, 'the Fundamental Law of Nature' which 'willeth the Peace and Preservation of all Mankind' (Treatise II, 6,7,16). For the preservation of mankind Locke envisages three natural rights, of 'life, liberty and estate'. The third natural right, the right to estate (property) is derived logically from the right to preservation. Self-preservation was, for Locke, a foundational right and by definition entailed the preservation of both one's life as well as one's property. Therefore one had the right to all things, within reason, for the maintenance of himself and his possessions. These rights were his and his only by the law of nature. Through this natural right the individual establishes as his own what originally was potentially available to all men (II, 25-6). Locke establishes property as a natural right, as a means to preserve oneself and to ensure the preservation of mankind. This natural right to persevere oneself also becomes the foundation for the right to resist arbitrary government. (II: 149).

(a) Appropriation

Locke's starting point is god's gift of the world to mankind in common and the need for individual appropriation before the bounty can serve the divine purpose of preserving men's lives. Reason prompts man to appropriate what he needs for self-preservation without waiting for others' consent. The problem, however, is to determine by what right or title the individual establishes as his own what originally was potentially available to all men (II, 25-6). For Locke the basis for this lies in the fact that 'every man has a Property in his own Person [which] no Body has any Right to but himself'. By mixing with it the undoubted property of his labour, the

individual establishes a right in ‘whatsoever... he removes out of the State that Nature hath provided, that is sufficient to exclude the common right of other Men’ (II, 27).

Locke was the first classical political theorist to place such great emphasis on labour, making it the cornerstone of his edifice of political ideas. He uses labour to show how things can unquestioningly be made our own without a preceding compact between all men. Man could legitimately acquire property in the state of nature by means of the work of his own hands, by mixing his labour with anything in nature. Labour was the original entitlements to private possessions and landed property as distinct from what was common. Man had property in his own person; anything with which he mixed his labour with became his property by natural right, property to which no one else was morally entitled. The expenditure of labour required no agreement, therefore the right to property was pre-social and pre-political, and as a result he was able to characterize the development of property as a natural economic process and assert it as a natural right. The infringement of what rightfully belonged to a person was morally wrong because the object was an extension of his moral being or person through his labour.

In the state of nature, the natural right to property was conditional; at least initially it was subject to the moral limitations of the law of nature on individual appropriation from nature. Natural law entailed that man is subject to divine imperatives. Within limits set by the law of nature men can act. The existence of natural law constraints on human autonomy meant that there were circumstances in which the exercise of otherwise legitimate rights appropriation would be curtailed; the right to appropriate from nature would be limited.

The exercise of this right is limited by the ‘fundamental law of nature’, called the “sufficiency limitation”, which requires man to preserve the rest of the mankind as much as he can ‘by leaving enough and as good for others’. It is also important to realize that God confers his bounty to mankind not merely for subsistence but in order to ‘the best advantage of Life and Convenience’ (II, 26), God has given us all things richly... to enjoy' (II, 31). God apparently intends that the earth should become the property of the ‘industrious and rational’, who when appropriate and cultivate the land advance the common good by maximizing the utility of land. Private property would lead to greater and more productive use of resources, which would then meet the needs of the propertyless. Locke believed that the foundational right, the right to

20 Natural law, Locke tells us, is to be distinguished from natural right: while a right indicates a capacity for autonomous action, law refers to externally imposed obligatory constraints.
Subsistence would be better protected if individuals had exclusive possessions over some resources. Through the institution of private property Locke thus removes the sufficiency limitation. Not only does Locke justify the appropriation of land in terms of mixing one's labour with it, but he also seeks to justify its appropriation on the ground that doing so serves to advance the common good by maximising productivity.

The link between labour on the one hand as the original title to property, (especially land) and on the other as the source of utility value were significant in establishing a legitimate shift from notions of common property to the notion of private property. Differences in industry and rationality accounted for differences in the extent of property owned by individuals. However, these differences remained insignificant, and still were constrained by the natural law operative: 'No Mans Labour could subdue, or appropriate all: nor could this Enjoyment consume more than a small part...' (II, 36). But this changed dramatically with the introduction of money.

Money, in acting as a store of value, transcends the second limitation i.e. the "spoilage" limitation (arising from prohibition of waste) and eventually leads to major differences in the distribution of property. The institution of money meant that it was possible for men to enlarge their possessions and establish a natural right to them without violating the spoilage limitation. After McPherson highlighted the magnitude of change brought about by the adoption of money, the role that money played in removing the natural law constraints and in establishing property as a natural right, is now fully appreciated.

What Locke endeavours to do is, within the Natural Law constraints, of leaving enough and as good for others, he tries to establish property as a natural and as an unlimited right. Locke did two things a/ devised a system which would render the natural law proviso of "sufficiency" and "spoilage" ineffective b/ embodied a measure of consent in the evolution of property from the unrestricted opportunities of the original state of nature to a situation in which some individual would possess extensive property and others considerably less or perhaps none at all; showed that this inequity in property distribution was not a violation of the law of nature. Locke uses the foundational right of subsistence to regard land as a part of the commons, a gift from the creator (god) to be held in common by mankind. Locke then goes on to use the labour theory of

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21 Subsistence here is derived from right to life, which was one of the three natural rights of man. The logic of the idea of preservation seems to indicate that subsistence was a foundational right for Locke.

appropriation to justify common property coming into private hands. Use of labour allows private property to get instituted from a position of common property.

(b) Enclosure

In the 17th century, improvement of wastes and forests, of "unimproved" commons became a regular slogan, given a large population to feed and clothe and the increasing unemployment. Locke echoed the language of the 'agricultural improvers' by his continuous reference to the need to increase agricultural productivity. Improvement in productivity meant improvement of the wastes and that meant, for the improvers, as it did for Locke, enclosure of the commons. The foremost argument for enclosure, shared and constantly stressed by Locke, was that it would lead to an increase in agricultural productivity, besides, of course relieving the unemployment situation. Enclosure was also thought to be a solution to the constant conflict over use rights that threatened to disrupt the harmony of the countryside. All these Locke refers to as the "inconveniences of the State of Nature". The purpose of civil society was to remedy these inconveniences through enclosures. Chapter 5 of the Two Treatise is a significant argument for justifying enclosure in 17th century England.

Locke is clear that property in land is acquired in much the same way as property in moveable things. This means that a piece of land becomes a man's own when he cultivates it i.e. mixes his labour, which is his property, with it. In this way land is removed from the state of nature and joined to the personality of the cultivator. 'He by his Labour does, as it were, inclose it from the Common'. Here the work on the land is expressly equated to 'inclosing'. Locke identifies enclosing with appropriating (II, 35). 'Whatsoever he enclosed, and could feed, and make use of, the Cattle and Product was also his' (II,38). In the inland parts of America, where there could be no hope of commerce the land would not be worth 'the inclosing' (II, 48).

The interest of Locke's account lies in the way he combines the structure of a theory of first occupancy with an account of the substantive moral significance of labor. In the hands of Samuel Pufendorf (1632-1694), a natural rights theorist, "first occupancy" theory proceeded on the basis that the first human user of a natural resource — a piece of land, for example — is

23 For a discussion see, Neal Wood, John Locke and Agrarian Capitalism. (Berkeley: University of California Press, 1984), 61
distinguished from all others in that he did not have to displace anyone else in order to take possession. It did not particularly matter how he took possession of it, or what sort of use he made of it: what mattered was that he began acting as its owner without dispossessing anyone else. Now although Locke used the logic of this account, it did matter for him that the land was cultivated or in some other way used productively.\textsuperscript{25} This is partly because Locke identified the ownership of labor as something connected substantially to the primal ownership of self. But it was also because he thought the productivity of labor would help answer some of the difficulties which he saw in ‘first occupancy’ theory. Though the first occupier does not actually dispossess anyone, still his acquisition may prejudice other’s interests of others if there is not, in Locke’s words, ‘enough and as good left in common’ for them to enjoy (II, para. 27). Locke’s answer to this difficulty was to emphasize that appropriation by productive labor actually increased the amount of goods available in society for others (II, para. 37).

Locke’s Labour theory of property is thus a basis for a theory of appropriation as well as of a theory of occupation, a means for defining rightful claim to previously unoccupied land. Locke’s writings, writes Neal Wood, ‘reflect basic structural changes in the social relation of production then occurring in the English countryside, especially those related to the development of agrarian capitalism that was coming to dominate the corn and mixed corn areas of the south and east. Each work reflects a fundamental concern with the agrarian sector and with agricultural productivity’.\textsuperscript{26} As Laslett points out, Locke is using the language of agrarian enclosure in England.\textsuperscript{27} Enclosure was thought to be a solution to the constant conflict over use-rights and also would lead to an enormous advance in productivity. Wood identifies Locke as a theorist of early agrarian capitalism and not as thinker who articulated the interests of a nascent mercantile and manufacturing bourgeoisie as argued by Professor C. B. Macpherson.

The widely held view of Locke as bourgeois philosopher and ideologist of early capitalism has been largely due to the scholarship of C.B. Macpherson.\textsuperscript{28} For Macpherson, Locke’s insistence that a man’s labour was his own and that it could be alienated for a wage provided the moral foundation for bourgeois appropriation. ‘If it is labour, a man’s absolute property, which justifies appropriation and creates value, the individual right to appropriation overrides any moral claims

\textsuperscript{25} For this reason, he expressed doubts whether indigenous hunters or nomadic peoples could properly be regarded as owners of the land over which they roamed.
\textsuperscript{26} Neal Wood, \textit{John Locke and Agrarian Capitalism}, 13.
\textsuperscript{27} Peter Laslett, (ed) \textit{Two Treatises of Government}. (Cambridge, Cambridge University Press, 1960; 1968), 306-308.
\textsuperscript{28} C. B. MacPherson, \textit{Political Theory of Possessive Individualism}. See, Chapter 5
of the society'. Commodification of labour and existence of wage relationship and assumptions of "class differential rationality and rights" in Locke are features of a "possessive market society" and makes Macpherson see Locke as a "possessive individualist" who was an ideologist of the rising capitalist market economy.

This interpretation has subsequently come under scrutiny and has been rejected by number of specialists. Peter Laslett, while admitting that Locke was born into the "classical atmosphere of early capitalism", professed that Locke was extremely mistrustful of commerce and commercial men. In late 1960s, John Dunn expressed agreement with Laslett's view by asserting that Locke at no point in his works extended moral enthusiasm to the role of the merchant or industrial producer. Macpherson's argument that Locke's writings were 'ideologically favourable for the capitalist society of the late 17th C England' and that it was fashioned because it served an ideological purpose were not accepted by Dunn either. Dunn argues that unlike what Macpherson suggests, Locke's thinking was not predicated on the sociological requirements of a rising capitalist society which considered the individual realization of natural individual liberties as a precondition. "The fundamental terms of Locke's theory of the human condition, politically, socially, morally, religiously were set not by Professor Macpherson's market society, nor by its accompanying psychology of possessive individualism. Nor were they set by the obtrusive ideological residues of the lordly way of life... What did set them rather was the simple frame of Puritan religious values..."

James Tully rejecting the bourgeois thesis sees Locke's thought as antithetical to capitalism. He suggests that Locke envisaged an artisanal economy, in which those who mixed their labour also owned its product. He sees Locke as a social and political egalitarian. Tully argues that the natural right to property in the state of nature is not the foundation for property rights in political society. He regards the distribution of property in society as conventional and only those that are 'vouchsafed to him by the positive law of the community.' In the Two Treatise Locke is primarily concerned with showing how the political society needs to be organized in accordance with natural law principles such that the right to property is an "inclusive" and not an "exclusive"

29 C.B. Macpherson, Political Theory of Possessive Individualism, 221-222.
30 Peter Laslett, Introduction, Two Treatise (1960), 207-208
32 Ibid, 33
33 James Tully, A Discourse Concerning Property: John Locke and his Adversaries (Cambridge: Cambridge University Press, 1980)
34 Ibid, 165
right. An “inclusive’ right because it includes others’ right to self preservation. Property for Locke, says Tully, was an inclusive claims right. In the state of nature members only have exclusive natural rights to life liberty and possessions required for self-preservation. Any surplus over and above what is needed belongs to the community. For Tully, Locke’s private property existed only as “an individuation or realization of common property” and is different “from a theory in which private property and common property are construed as mutually exclusive”. 35

He argues that “Locke goes on to show in Chapter V of the Second Treatise how common property can be individuated naturally and how common property of a political community can be individuated conventionally both in accordance with natural law”. 36 In fact Tully asserts that Locke is asserting a much broader distribution of property than actually existed in England in the 17th C. Jeremy Waldron disagrees with Tully’s thesis asserting that Locke supported property entitlements far beyond those ‘which are vouchsafed to him by the positive law of the community. 37 Waldron argues that that Locke did support natural entitlements in property. However, this is not to suggest that he regarded property entitlements as absolute or unlimited. “All entitlements, whether they are natural or conventional, are subject at all times to the requirement of charity and the demands of abject need…” 38

According to Wood, Locke made two fundamental points about the natural right to property in political society as distinguished from the state of nature. First, private property was defined and regulated by civil law. Man, in the first place, had created political society to secure and protect what was his own by the right of nature. Any violation of his natural right to property contravened the law of nature and was therefore morally illegitimate. However, it may be said, that the detailed provisions of natural law were to be moulded by the existence of a political society. 39 Second the natural right to property in a political society was not an absolute one, for it was subject to common good, the preservation of society being the first and fundamental law of nature. Locke regarded regulation of property to be justified provide it was for public good and was done in accordance with principle of consent, rule of law and the law of nature. 40

Ian Shapiro, in the same vein stresses that the existence of natural law constraints meant that not all

35 James Tully, The Political Thought of John Locke (Cambridge: Cambridge University Press, 1979), 130
36 Ibid, 131
38 Ibid, 105.
39 Locke gives the example of the laws of inheritance, which are ‘natural’ in the pre-political society. However if the political society meets the obligation to preserve the children the right to inherit may lapse and the parents could then choose who they might want to pass their property on to.
40 Neal Wood, John Locke and Agrarian Capitalism, 54
rights had the same status; “property rights occupied a circumscribed space in an hierarchical system”. 41

The degree to which natural law requirements or social needs and conventions limit property rights in Locke is, to be sure, a matter of debate. There appears in Locke competing requirements; one of natural law which privileges ‘subsistence’ as a right above all other rights and which could actually be pressed into service to provide a radical critique of property rights; the second being the claims of ‘human workmanship’ which upholds the right of human appropriation. Locke’s theory has left these claims open to interpretation and political arguments. Richard Ashcraft 42 terms the Two Treatise as “janus faced”, with both a conservative and a radical tenor. He argues that although Locke began with the radical language equality, liberty, “fellow Commoners”, a labour theory of Property, natural right, his stress tends to shift to a more conservative vocabulary of landed property, property differentials, money, exchange production, wage labour, and it ends with improvement and the problem of waste, the advances of enclosure and agricultural productivity. Locke takes the radical slogans of liberty and equality against tyranny and transforms it into a more conservative justification of inequality in landed property against absolutism.

These debates have been pressed into reference to undermine the assumption that rights of human appropriation are absolute in Locke and always supersede claims of just distribution. It is important to make a note of this reading of Locke because these welfare assumptions, acknowledged by some interpretations, are totally dropped in the neo-Lockean, neo-liberal formulations on property.

(c) Property in the 17th Century

From the arguments about the history of 17th C property to Locke’s legitimacy arguments, two issues over which there appears some measure of unanimity, emerge that need to be highlighted. First, that this period witnessed one of the largest movements in history of property i.e. from common to private property. There was an emergence of a distinction between private landed property and common landed property and as McPherson states ‘the idea of common property ‘drops virtually out of sight’ in the 17th Century. Conceptions of common property were based on

an individual right not to be excluded from the benefit and use of something whereas private property treated individual rights as the power to exclude others from the benefit and use of something. In Chapter 5 of the Treatise, Locke attempted to explain the appearance of differentials in landed holdings. The foremost argument for enclosure, shared and constantly stressed by Locke, was that it would lead to an increase in agricultural productivity. His interest however was not only in a history and the origins of private property in land but also in a moral justification, which he provided within the natural law discourse.

G.E. Aylmer's analysis of definitions of property suggests two developments. First was the emergence of absolute individual ownership and secondly, the erosion of the distinction between real and personal property. Whether ownership was absolute or whether there was merely an extension of the owner's powers, in terms of the means available to protect an interest or action available to recover the value of goods or increase in the powers of disposal of goods, this period can definitely be identified as one which led to a significant increase in the owners powers and rights which began to be held privately and not commonly as earlier.

Secondly, the principle of self-ownership emerged as the core belief in the legitimation of private property. What man creates is what he rightly owns. This fact about human creativity has been incorporated into western thinking and is based on the conviction that as long as the resources with which people mix their labour are justly acquired, they are the legitimate holders/owners of that product. It also implies that the owner of an object is the person who does not require the consent of others to use it and whose consent others must seek if they want to have access to or control over it. The nature of property in Locke is such that 'without a man's own consent it cannot be taken from him' (II, Sect. 93). It is important to underscore the fact that Locke establishes a formal link between property and consent for two rather different reasons. The first one to which James Tully draws our attention: Locke's definition marks a departure in the history of rights- from the earlier notion of rights as deriving from duties, and as an arena protected from interference by others based on the prescriptions of natural or divine law, to the modern concept which has them flowing out of our own moral sovereignty. 43 Property in self protects a person from interference by others but it does so by focussing on the agent's moral power to exercise his consent, his natural right to

43 James Tully, A Discourse Concerning Property, 114; for a discussion also see, Ian Shapiro, The Evolution of Rights in Liberal Theory (Cambridge: Cambridge University Press), 1986.
property, rather than granting primacy to others to perform their negative duties. The second is to secure a system of individual rights whose principle is private ownership. All rights that exist emanate from natural endowments, physical, mental, with which people come into the world. The purpose of all rights is to enable individuals to be in control of their lives. As Ingram writes, "What remains untroubled by any changes in the meaning of property is the idea that private ownership yields the form of all rights, both in personal powers and external resources." Locke used the term property to cover "life, liberty and estate". He extended the notion of property to include the ownership of one's life and sovereignty over one's action as well as the possession of goods. These three natural rights, of life, liberty and property, men bear to god. The law of nature, an embodiment of the will of God, directs man to preserve 'what they have not a power to part with' – i.e. the right to life, to exist. These natural rights, whose basis is in natural law, are inalienable because they are also in nature, duties men bear to God. The notion of inalienable rights was a product of a social and ideological system in which human attributes were people’s property and property entailed entitlement and ownership.

The primary social role of self-ownership (s-o) was in providing a moral defence for resistance to political absolutism and then for the creation of an alternative political authority. Subsequently self-ownership has become one of the foundational principles of liberty and legitimating arguments for private property. This has been the foundational claim of liberal philosophy from the time of Locke: ‘every man has a Property in his own Person’. In the 20th century it continues to be the foundational claim of Libertarianism, echoed in the works of Nozick (1974), and of Hillel Steiner (1994). Judith Thomson claims that the cluster of rights that people have in their house, shoes etc. is very similar to the cluster of rights that the people have in respect of their bodies. Steiner begins by arguing that our bundle of original property rights must include at least ourselves. 'We must each be self owners ... unencumbered s-o is one of our two original rights'. It is from this right that rights over fruits of our labour are derived. Any attempt to deprive us of the fruits is an encroachment of our s-o. Right holding is thus linked to ownership, with a proprietary control over the domain specified as the object of right.

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44 ibid, 115
48 Hillel Steiner starts with the premise of self-ownership, but recognizes the various difficulties in justifying unequal appropriation of the initially unowned world, and so accepts nationalization or equalization of natural resources, or compensation for those left propertyless.
The principle of self-ownership, as a right over one's body and talents, is joined with a principle of right over material resources. Bodily or mental powers require an implement and a material to act upon in order to create something. That something that is created becomes the property of the person who mixes his labour, powers or talents with it. Thinking about property, therefore, has been informed by considerations of the origin of the material. The creator was seen to be the legitimate holder of that property. This relationship between the creator and the material object is reflected in a property system and in rival political theories on property. The principle of rights over material resources will operate to validate existing property claims or to contest it and sanction some redistribution. In the context of the study of property, and the doctrine of IPRs, one can hold that the meaning of property to a large extent influences the meaning of rights.

How to organize distribution and property so that the moral principles of self ownership and the workmanship ideal are not violated has not only been a subject of intense debate but has also set the terms of the debate about ownership, just distribution, and even the definition of property. The enduring intensity of arguments about the principle of self-ownership or the workmanship ideal signifies that it still retains a powerful hold on the western political imagination. Locke's theological assumptions have long been abandoned in the dominant intellectual traditions of the West but many have tried to formulate secular variants of it in order to retain the powerful moral claims of the principle of self-ownership that can be used to bind legitimate property rights to the work of productive agents.

Nozick's Theory of Just Entitlements

In 'Anarchy, State and Utopia', Robert Nozick's account of the 'entitlement conception of just holdings', occupied a central position in an argument for the minimal state. And within the account, the author's construction of the right to appropriate occupied a central place in determining what rightfully and inviolably belongs to a person. Nozick presents compelling arguments as to why justice involves inviolable entitlements to individuals and why "patterned" or "distributionist" allocative principles cannot be principles of justice.

Like Locke, Nozick retains an abiding commitment to the workmanship ideal – acts of labour create entitlements in the objects or services produced. Nozick, however secularises the workmanship ideal and replaces the Lockean theology with a foundational appeal to the value of

49 See, Nozick, Anarchy, State and Utopia, (New York: Basic Books, 1974), Ch. 1
individual autonomy for more or less Kantian reasons\(^{50}\) i.e. like Kant, Nozick too links property rights over a person’s productive capacities to the preservation of his autonomy and freedom.\(^{51}\)

The basic thought is that we are born ‘owning ourselves’. Where Locke had said that men have property in their own persons, Nozick’s theory speaks of individuals as ‘holdings’. Each of us possesses a ‘freehold’ in ourselves. Nozick presents the principle of ‘self-ownership’ as an interpretation of treating people as ‘ends in themselves’, a Kantian formula, invoked by Nozick, for expressing our moral equality.\(^{52}\)

The heart of Nozick’s theory, laid out in the first sentence of his book, is that ‘individuals have rights, and there are things that no individual or group can do to them (without violating these rights)’ (Nozick1974, ix). Society must respect these rights because they ‘reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent’ (Nozick1974, 30-1).

Each individual is distinct with a distinct claim and his claim cannot be sacrificed for the sake of others, nor can he be treated as a resource of the society. For Nozick the most important rights are rights over oneself – the rights which constitute self-ownership. Nozick attempts to derive the idea of property-ownership from the idea of treating people as owners of themselves.

(a) Entitlement

Nozick’s conception of property begins with rights over one’s self. An object maybe mine on grounds that I made it. If it is mine I am justly entitled to dispose of it as I wish, and therefore the title to it may accrue to anyone to whom I donate or sell it. Nozick claims that everyone has an inviolable right to what one has produced or been freely given. An agent is entitled to dispose of what he has produced however he likes.


\(^{51}\) Kant’s liberalism belongs to a moral and political creed that is committed, without reservation, to upholding the claims of full individual ownership. He links property rights over a person’s productive capacities to the preservation of autonomy. The central premise of Kantian view on property is based on a simultaneous commitment to private property and equal original right.

\(^{52}\) It is unclear whether treating ‘people as ends in themselves’ amounts to treating people as equals. Rawls ties the idea of treating people as ends in themselves to a principle of equality. (Rawls 1971, 251-257) While a principle of abstract equality, it may be said, lies at the heart of Nozick’s theory of rights one can argue that Nozick’s entitlement theory is best defended by an appeal to liberty, rather than equality, equality being tied to a notion of an “end state”, a notion totally repudiated by Nozick. Nozick rejects the left libertarian and social theories because they tend to define justice in terms of “end states” like the satisfaction of needs, promotion if equality etc.
But Nozick realizes that property ultimately involves more than self-produced objects and ideas. The classic example is land. I may have improved the land but it was by no means created by me. So my title in land cannot be grounded solely in the exercise of my self-owned powers. Besides one is also an owner of things not produced or created by oneself. In his theory, the entitlement to external goods, like land, is in accordance with the principle of transfer. An entitlement to external goods like land comes from the fact that others have transferred the land to the individual, considered the owner. This ownership will be considered legitimate if the earlier owner had legitimately acquired the land. A transfer is just only if the initial acquisition had been just.

The world is divided into objects that are owned and objects that are yet unowned. All titles to produced or freely transferred goods must derive from titles to natural or previously unowned objects. No title to a manufactured or transferred object can be considered legitimate if that object was manufactured by or transferred by someone not entitled to acquire it in its natural unaltered state. If there was no legitimate initial acquisition then there can be no legitimate transfer. But whatever has been legitimately transferred becomes an inviolable right of the owner. Thus according to Nozick my legitimate property (freehold) comprises of: a/ things not previously possessed by anyone that are acquired through the exercise of my self-owned powers or b/ objects that have been transferred to me from a legitimate owner. This position has been summed up in the three main principles of Nozick's 'entitlement theory' (Nozick 1974, 151).

1. A principle of justice in acquisition – an account of how people came to initially own the things or what people create through the exercise of their self-owned powers which can be transferred in accordance with principle (2).
2. A principle of justice in transfer – whatever is justly acquired can be freely transferred; just acquisition being defined either by the exercise of self-ownership or by principle (2).
3. A principle of rectification of injustice—how to deal with holdings that have been unjustly acquired or transferred.

Taken together they imply that if people's holdings are justly acquired, then the formula for just distribution is 'from each as they choose to each as they are chosen' (Nozick 1974, 160). The

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53 This slogan was a kind of take-off from the Marxian slogan “from each according to his ability to each according to his need”. Nozick explains his slogan, summing up the three principles, more clearly: ' From each according to what he chooses to do, to each according to what he makes for himself (perhaps with the contacted
question about the initial acquisition is prior to the question of legitimate transfer. If there was no legitimate initial acquisition, then there can be no legitimate transfer. The validity of property rights depends on the validity of previous property rights. This means, in Nozick’s theory, going back to the chain of transfers to a point when it was first appropriated as private property and ascertaining if the initial acquisition was legitimate.

(b) The Lockean Proviso
The Lockean proviso of “leaving as good and enough for others”, essentially a safeguard for the general right to subsistence, was interpreted differently by Nozick. Each person has an inviolable right to what he legitimately owns provided it does not interfere with the like liberty of others. ‘A process normally giving rise to permanent bequeathable property rights in a previously unowned thing will not do so if the position of others no longer at the liberty to use the thing is thereby worsened. (1974, 178) Nozick is not concerned with the right to subsistence.

The concern is not with material condition of the non-appropriators. In the Nozickean scheme of things the only fetters that can limit absolute ownership right, are the rights of others. Worsening the position of others refers to curtailment of their rights, which would mean in this case, a loss of liberty to use or appropriate that object. If there is enough left, as in the case of sand from ‘Coney Island’ (1974, 175) then there are no legitimate grounds of complaint of loss of liberty. But if appropriation or privatization worsens the position of the non-appropriators, as in the case of the appropriation of the total supply of medical drugs (1974, 181) by either preventing him from appropriating or using the object in question to improve his situation, then they have to be compensated by counterbalancing their loss of liberty by an improvement in the overall situation from the time it was in common use.

Nozick employs what he calls, the Lockean proviso, to mean that all initial acquisitions would pass the test of ‘not worsening the situation of others’ because all initial enclosures of the commons led to an increased productivity thereby compensating for the loss of access to land for the propertyless.54 Therefore initial appropriation is legitimate because it does not make people worse off, in material terms, than they had been when it was in general use. Persons do not suffer

\footnotesize{aid of others) and what others chose to do for him and choose to give him of what they been given previously (under this maxim) and haven’t yet expended or transferred.’(Nozick 1974, 160)

\footnotesize{As argued that the only way to that we leave enough and as good for our children is to prevent the tragedy of the commons by allocating property rights over resources. (David Schmidtz 1990). quoted from Will Kymlicka, Contemporary Political Philosophy, 115.}
thereby any "net harm". Construed in this fashion, the Lockean proviso is not violated in most situations.

Nozick's view launches the idea that all ownership is naturally ownership of an outright freehold. Self-ownership yields absolute ownership rights over the external world. Since the latter includes the right of transfer it would form a legitimate basis for absolute ownership in all productive resources. For Nozick this principle of self-ownership necessarily yields absolute property rights, an implication that conflicts with the theories of redistribution. The central claim of Nozick's theory is that if we assume that everyone is entitled to the 'holdings' they possess then a just distribution is one that results from people's free exchanges and a free play of market forces. In Nozick's theory when we say that people are entitled to their holdings, it means that they have an absolute right to freely dispose of it as they deem fit, so long it does not involve force or fraud. Nozick thus favours a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on; any more extensive state will violate persons' right not to be forced to do certain things and is unjustified. (Nozick. 1974, ix). Nozick wants to argue that the minimal state or 'minarchy' is not only compatible with people's rights to self-ownership, but also that a minimal state would arise naturally without violating anyone's rights.

Nozick believes that individual rights are 'co-possible' i.e. each person may exercise his rights as he chooses. The exercise of these rights fixes certain features in this world. These features act as constraints within which social choices and social ordering have to be made. Only those alternatives of social ordering can be legitimately instituted which do not exclude anyone's exercise of his rights. 'If entitlements to holdings are rights then the social choice must take place within the constraints of how people choose to exercise their rights' (1974, 166). 'Patterning' will always be constrained by people's rights; it will always interfere with people's actions and choices.

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55 Alan Ryan, Property (Milton Keynes: Open University Press, 1987), 68.
56 This puts Nozick's theory within the social contract/rational choice tradition, as it justifies government by rational choice, though it does not justify rights this way. Rights are seen as prior to government. (Apart from securing rights from encroachment by the state, there is another reason why Nozick favours a minimal state. He argues that 'economically well-off persons desire greater political power in a non-minimal state'; the more extensive the state the more extensive will the political clout of the wealthy become who can give themselves 'differential economic benefits'. (1974, 272)
A major objection to everyone having a right to various things such as equality of opportunity, life and so on, and enforcing this right, is that, according to Nozick, these rights require a substructure of things, material and actions, and other people may have entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over". (1974, 237-238). Property rights act as constraints upon any principle of redistribution and reordering of material resources. 'Particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition' (1974, 238). Nozick argues that this conception of absolute property rights is the unavoidable consequence of a commitment to a deeper principle, namely, the principle of self-ownership, which treats people as, ends in themselves. End-state or pattern principles generally give everyone a share of the social product, which is produced by individual's labour. Thus, end-state or pattern principles generally institute partial ownership by others of people, their actions, and labour. In a purely egalitarian world, everyone has partial ownership of everyone else. In the libertarian world, everyone has ownership only of herself.

Property entitlements preclude a liberal redistributive scheme. Taxation, welfare schemes etc. are all activities that will constrain individual liberty, and arising from that, their right to appropriation and property. Nozick goes as far as regarding taxation as akin to 'coerced labour' (Nozick 1974, 265-268), one of the principal violations of the principle of s-o. 'Patterned distributional principles do not give people what entitlement principles do... For they do not give the right to choose what to do with what one has; they do not give the right to pursue an end involving the enhancement of another's position' (1974, 167). If justice consists in the pattern in which goods are distributed, then giving - which changes the pattern - will be unjust. The view that holding must be patterned perhaps will seem less plausible when it is seen to have the consequence that people may not choose to do acts that upset the patterning, even with things they legitimately hold'. (1974, 219-20). Thus patterned theories do not merely correct the mal-distribution, which allegedly happens under an entitlement theory; they also alter the concept of possession.

Assessing the Principle of Self Ownership

Liberal political philosophy, represented classically by John Locke and contemporarily by Robert Nozick, defends great inequality of economic outcome on the basis that people own themselves and are entitled to establish private property over the external world by virtue of self-ownership.
Attracta Ingram contends that in libertarian theory, what remains untroubled by any changes in the meaning of property is the idea that self-ownership yields the form of all rights, both in personal powers and in external resources. Ingram believes that it is a serious error to identify right-holding with ownership. Self-ownership according to her, endorses negative individual liberty, that is, the freedom to do as one pleases as long as one does not harm others. For her self-ownership is an expression of autonomy, which is a manner of being in control of our own lives and having the positive freedom to shape one's lives according to self chosen principles. She argues, "self-ownership is inevitably connected with our self-conception and our judgement about the importance of certain liberties. Autonomy is a matter of identifying and pursuing an ordered set of preferences". Autonomy, therefore, admits a plurality of people who differ in their substantive conceptions of good. This calls for a pluralistic culture based on the ability to 'govern oneself' in accordance with self chosen principles, rather than on the right to own oneself. For her the conditions of autonomy require a social structure which recognizes rights and duties going far beyond those provided under self-ownership. "The inadequacy of Nozick's theory is that it fails the test of connecting his suggested basis for rights with the capacity to construct a meaningful life".

Contemporary left-libertarian political philosophers such as John Rawls and Ronald Dworkin achieve their relatively egalitarian position by denying self-ownership as a premise. They question the Nozickean conclusion that inequalities that exist in society are ethically defensible; that justice is merely a matter of following the right procedures and not a matter of 'end states'. Private ownership of the external world initially unowned, is established by virtue of the exercise of the agents' self owning powers, subject to certain constraints on private appropriation that that aim to respect the rights and welfare of others. If people start with very different skills, Nozick's theory licenses a fairly rapid development of inequality of income or welfare.

The most sustained argument against this libertarian position is associated with Rawls and more recently Dworkin. They deny that each person should be the sole owner of his talents, i.e. that a person should have all the rights to differential income due to his productive skills and talents. At the core of Rawls argument is the idea that distribution of traits, skills or talents, is morally arbitrary. In Rawls' scheme of things we treat people as equals not by removing inequalities that

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57 Attracta Ingram, A Political Theory of Rights. p.19
58 Ibid., 20
59 Ibid., 94
disadvantage someone. Natural talents, like social circumstances, are matters of brute luck, and people’s moral claims should not depend on brute luck. In fact, Dworkin asserts that the undeserved character of natural assets makes the whole notion of equality of opportunity fraudulent. How then should we treat differences in natural assets? Rawls’ answer is that “the basic structure can be arranged so that these contingencies work for the good of the least fortunate”. This argument of Rawls is in accordance of the difference principle which says that those who are talented do not deserve their advantages and their higher expectations 'are just only if they work as a part of a scheme which improves the expectations of the least advantaged member of the society'.

Ronald Dworkin, in his work "Sovereign Virtue", puts forward his version of self-ownership through an equal society. "A political community must treat all its members as equals, that is, with equal concern and respect, and it must respect that sovereign requirement not only in its design of economic institutions and practices, but in its conception of freedom, of community, and of political democracy as well". In Dworkin’s theory, the talented and the naturally advantaged have a moral obligation to the disadvantaged. This is met by the talented owing 'insurance premiums' (taxes) that get paid out the disadvantaged. These are transfer payments that are paid to the disadvantaged to compensate for their natural disabilities or lack of talents. Because talents are undeserved, it is not a denial of moral equality for the government to consider it as a possible ground for claims to compensation. Thus in Dworkin’s theory, the talented owe insurance premiums that get paid out to the disadvantaged, while in Rawls’ theory the talented only benefit from their talents if it also benefits the disadvantaged.

Both Rawls and Dworkin have offered us theories of redistribution which are premised on the idea that economic freedoms are needed to enforce the more general idea of equality itself. The same principle that allows market freedom also limits the market where it penalizes the people for their unchosen circumstances. “The same conception of equality underlies both market freedom and its constraints”.

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65 Ibid., 75.
67 Will Kymlicka, *Contemporary Political Philosophy*, 88
For Nozick any demand for redistributive taxation, any equalizing measure, any interventions in market exchanges, any act which takes away the fruit of one’s labour from the self is a violation of the principle of s-o. Only unrestricted capitalism recognizes s-o. And s-o, for him, is crucial to treating people as equals. Nozick believes that self-ownership inevitably leads to unrestricted property rights as it logically entails access to resources. Will Kymlicka\(^\text{68}\) argues that the principle of s-o does not by itself generate a moral defence of capitalism. According to him we are confronted by a variety of regimes that are compatible with s-o. This depends on what different regimes regard as legitimate appropriation and their assumptions about the external world. Different regimes may employ different constraints on the extent to which the self-owning individual is allowed to retain their market rewards. Some will allow the naturally talented to reap the benefits of their talents which would translate into an unequal ownership of the external world; some would redistribute market income so as to ensure that the disadvantaged have access to resources (as in Rawls or Dworkin). ‘Self-ownership is compatible with all these options.’\(^\text{69}\)

Kymlicka finds a deeper problem with s-o, of the Nozickean kind, which translates into only a formal notion of s-o and not into a substantive idea of self-determination. Self-ownership, in his opinion, actually restricts the self-determination of the property worker and makes him a resource for others. Those who enter the market after others have appropriated all the available property has been appropriated are forced to work for and benefit others. This forced compliance with a property system constitutes a form of exploitation, violates self-ownership of the propertyless, limiting the exercise of their self-owned powers. Lack of property ownership by some is a denial of their self-ownership and is therefore inconsistent with Nozick’s root idea itself, which regards self-ownership as a foundational principle. “Since meaningful self-determination requires both resources and liberties, and since each of us has a separate existence, each person should have an equal claim to these resources and liberties.”\(^\text{70}\)

G.A. Cohen, from the analytical Marxist perspective, challenges the Libertarian concept of s-o in his book ‘Self-Ownership, Freedom, and Equality’.\(^\text{71}\) Cohen in this work attempts to negate Robert Nozick’s libertarian defence of capitalism. In a number of articles Cohen has set out a set of arguments rebutting attempts to derive property claims in alienable objects (“world ownership”) and non-patterned distribution of income (“capitalist inequality”). Cohen’s principle

\(^{68}\) Ibid., 121
\(^{69}\) Ibid., 122
\(^{70}\) Ibid., 124
concern is to defend an egalitarian distribution of income, which he considers to be compatible with the principle of self-ownership. He asserts that a ‘union of s-o and unequal distribution of worldly resources leads to an indefinitely great inequality of private property in external goods and hence to inequality of conditions, on any view of what equality of condition is’. He aims to de-legitimize the appropriation of external resources by individuals or groups, by which they come to have property in such resources that would exclude the rival claim of others.

While Cohen confirms the plausibility of each person’s property in his person, he targets Nozick and the connection he draws between each person’s property and liberty. According to Cohen, a person owns himself when he has all the control over his own body that a master would have over him were he a slave. Now since a master is entitled to make comprehensive use of his slave for his own profit, without owing any account or any contribution to anyone else, it seems to follow from the idea of self-ownership that a person must be allowed to profit equally comprehensively from the control of his own mental and bodily resources. Cohen argues that the Lockean proviso, employed by Nozick, fails the test. He argues that any appropriation will make someone ‘worse off’, for the simple reason that that someone will no longer be able to appropriate the now appropriated item. Even if a latecomer, finding no unappropriated resources left to appropriate, were to compensated with greater material benefit, this compensation cannot undo the fact that there has a contravention of that individual’s will (liberty). Cohen explains that even if property rights have been achieved fairly, they frequently lead to an unacceptable amount of power over others. Therefore Cohen explains that capitalist Libertarianism sacrifices the liberty of those who lack the conditions and power necessary for achieving true freedom between persons.

Cohen claims that individual appropriation cannot meet a properly formulated Nozickean proviso against harm and the like liberty of others, so there can be no legitimate or individual appropriation from a condition of no-ownership. Cohen considers the world of people with unequal talents who enjoy the rights associated with s-o. He argues that to enforce a system of equality in distribution of external resources in such a world would inevitably conflict with s-o, if

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71Ibid, 69.
72 Taking his cue from Nozick (1974) that taxation on earnings is a form of coerced labor, Cohen concludes that various egalitarian arrangements (like welfare paid for out of taxation) are incompatible with the self-ownership of the rich, just like inequalities are incompatible with the S-O of the unpropertied. We have to choose therefore between principles of equality and principles of self-ownership. Debate on this issue continues: some argue that what we owe to others must be figured out first before there can be any question of owning either our selves, our bodies, or other material resources; while for Nozick any attempt to make the argument in that order will lead to counter-intuitive results (Nozick, 1974: 234).
the latter is construed in merely a formal manner. *A strictly formal sense of s-o is one where individuals retain rights over their bodies and talents but have no rights over those material resources that enable them to lead a meaningful life.* On the other hand, a more *'substantive self-ownership'*, according to Cohen, demands a certain equality of condition.74 Cohen's own theory presents an alternative to ‘Nozick’s up for grabs hypothesis about the external world’ (Cohen, 1995: 14).75

John Christman76 argues that there are two different aspects of ownership – control rights and income rights – which ought to be considered separately and justified according to contrasting considerations. While a case can be made to defend *control rights* based on the value of autonomy and individual liberty (although, he says, that even these will rest on a consideration of the consequences of these rights on the society), the principle of *s-o* cannot be extended to justify *income rights* i.e. the right to benefit from the exchange of my skills in any way available. The value of these skills, and the income rights from them, is purely conditional on the contingencies of the market sector, in particular, others’ endowments (Christman 1991,40). Preventing a person from reaping increased benefits from market exchanges does not, for him, prevent a person from controlling his life and therefore not a contravention of the principle of s-o. “The belief that self-control can be trumped in favour of distributive processes, benefiting from one’s endowments via the happenstance of the surrounding distribution, is not so intuitively supported.” Christman thus bifurcates s-o in order to develop a robust egalitarian theory assuring equality does not mean a denial of s-o.

There is an apparent conjunction between the principle of s-o and property rights and an apparent conflict between s-o and equality. Self-ownership is a powerful way of expressing the principle of individual liberty. The view is that those rights, liberties and powers that are associated with the ownership of property comprise the rightful sovereignty of each person over himself. The principle of s-o is a difficult sticking point for egalitarians who cannot but acknowledge the moral force of the principle. Some egalitarians, as discussed earlier, point out the moral arbitrariness of

75 Cohen’s theory posits an external world jointly owned by everyone with each having a veto over its prospective use. And he demonstrates that ‘final equality of condition is assured when that egalitarian hypothesis about the ownership of the external world is conjoined with the thesis of s-o’. Cohen, “Self-Ownership, World Ownership and Equality, Part II.”
differential talents and advocate a public ownership of skills, thereby denying the force of s-o (Rawls, Dworkin). Others in the egalitarian tradition, like Cohen, John Christman, acknowledge the undeniable intuitive force of the principle of s-o but deny they can used to make a species of private property claim.

PROPERTY AND THE PRINCIPLE OF UTILITY

If the principle of s-o established its connection with property in the 17th C, liberal conceptions of property of the 18th C are commonly associated with the idea of utility (Jeremy Bentham, Adam Smith) and the idea of individual autonomy (Kant, Mill in the 19th C). While Locke began the assault on the absolutist state and argued for a more responsible government and a diffusion of property rights, the 18th century liberal thinkers like Bentham, Adam Smith, Kant exhibited a determination to rid individual ownership of the last vestiges of communal and corporate control. Different political priorities stood behind the defence of individual property. It was now directed less against the encroachments of a tyrannical state than against the numerous collective powers and privileges of the aristocracy. Their ‘liberal’ campaign against ‘feudalism’ was specifically against the feudal land tenure and the system of family trust entail. The English land tenure was designed to preserve the aristocracy's territorial rights by rendering the family estate as inalienable as possible by conferring hereditary transfer rights so that ownership was fixed ‘in perpetuity’. 78

18th C liberal conceptions on property were based on two premises: 1) that freedom requires separate property and 2) that the rights which property confers upon individuals do not amount to a quasi-political right over others. Land laws, which restricted ‘ownability’ and commercial mobility of real estate, inheritance arrangements, and the very notion of trans-generational rights seemed antithetical to the core of the liberal doctrine based on the notion of an autonomous individual whose duties and obligations are self incurred. Inheritance arrangements conferred not only economic privileges on a small elite, but also a monopoly over public offices and honours which were denied to the owners of commercial wealth, thus perpetuating the old alliance between land and political domination. Land thus stood in a special moral and political relationship with the community. For both Kant and Utilitarians this negated the maxim of ‘equal starting chances’. They employed the egalitarian principle, of substantive equality of claim, that

all have at least an equal right to opportunities, to discredit feudal privileges and property laws and practices.

For Kant it reiterated his moral position that freedom requires separate property and that all ‘incidents’ of ownership should be concentrated in a single person as an absolute individual right. Kant stated, “An external object which, in respect of its substance, can be claimed by someone as his own, is called property (dominium) of that person to whom all rights in that thing belong, like the accidents inhering in a substance, and which, therefore, he as the proprietor (dominus) can dispose of at will”. There was an intense aversion to the remnants of the past, entertained in the writings of liberal critics from Adam Smith to J.S. Mill. Property rights were thus re-conceptualized in order to free individual liberty as well as the economy.

In the ‘freeing’ of the economy as well as of the state from elitist minority, utilitarianism came to be employed as a central tenet as a defence of both private property as well as democratic state. Jeremy Bentham explicating his principle of utility in “Introduction to the Principles of Morals and Legislation wrote:

“By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency 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 to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government... By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual...”

In this chapter by utilities are meant the economic benefits that are derived from the institution rather than other abstract utilities which are important but difficult to measure. Also over time

social policy increasingly uses utility to mean economic benefits like efficiency, productivity, optimal allocation of resources and so on. Property rights are beneficial in two ways, by performing an allocational function and by encouraging production. The *allocational function* for property rights facilitates social order. It would prevent constant among people to hold on to their possessions in a Hobbesian state of nature and in the process expending resources on private enforcement of their claims. Secondly it would lead to the "tragedy of the commons" where no individual would have the incentive to preserve its value given that the cost of not doing so will be spread among his co-owners, compared with the immediate private benefit gained from overgrazing. There is second function that the institution of private property serves. Many of the goods we value are the product of human labour. Property rights results in owning the object created if they are made using our initial entitlements and/or other objects secured through consensual transfers, and improving the value of our property (e.g. agricultural land or capital equipment). This allows us to appropriate the increased value through subsequent sale or further production. Thus property rights also provide an *incentive to increase production and productivity*. The production and allocational benefits of property rights thus lead to greater productivity, efficiency, co-ordination, optimal use of resources, in short to the maximization of utilities. A utilitarian theory of property rights links the establishment of property rights and prescriptions about how to define such rights with increases in welfare or well-being.

It was in 1776, in his Wealth of Nations that Adam Smith tried to solve the economic problem by taking his stand on the principle of utility. In 1787, in his first attempt at political economy, Bentham adopted the fundamental ideas of Adam Smith'. According to Halevy, what was common in both Adam Smith and Bentham was the idea of utility. "Although the principle of utility is the common principle of Bentham's juridical philosophy and Adam Smith's economic philosophy, it has not the same sort of application in both cases." The objective in both cases is the realization of 'interests', but these interests are identified differently. While for Smith it was specifically the maximization of 'national wealth', for Bentham national wealth was only one of the components of 'happiness'. Utility was defined in terms of pursuit of 'happiness' by Bentham. For Adam Smith these interests are realizable spontaneously, through the mechanism of market exchanges. Law, in the form of the state ought not to intervene. For Bentham interests are not realized spontaneously: therefore in order to establish it law must intervene. In conformity

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with the principle of utility, the end to be produced by all branches of the government was the maximization of happiness.

**The Natural History of Private Property in Adam Smith**

In the Wealth of Nations83 Adam Smith explains that the expectation of profit from "improving one's stock of capital" rests on private property rights, and the belief that property rights encourage the property holders to develop the property, generate wealth, and efficiently allocate resources based on the operation of the market is central to capitalism. From this evolved the modern conception of property as a right which is enforced by positive law, in the expectation that this would produce more wealth and better standards of living.

*Wealth of Nations* is a thesis of commercial and industrial liberty. In Adam Smith the purpose and the consequence of individual choices and liberty is of paramount importance. In the name of liberty Smith pleads for the removal of all restrictions and demands a particular freedom: the right to property. Property was considered an institution vital to the growth of industry and commerce, an idea linked more to utility than to liberty. Typically, a utilitarian explanation makes only a contingent claim for individual liberty, and its sub-set, property. While Halevy finds Smith a typical representative of the dawning utilitarian movement, there is also, at the same time, a considerable debate about how much of Smith’s work is infused with Locke's natural law/natural rights tradition — a lineage which the utilitarians, and in particular Bentham, would be quick to dismiss.

It is easy to find Smitean quotations that are reminiscent of Locke’s language. Consider, for instance, Locke’s opposition to idleness in society and his belief that active production is conducive to human development. This is also suggested in Smith’s statement that ‘man was made for action, that he may call forth the whole vigour on his soul, and strain every nerve in order to produce those ends which is his purpose of his being to advance. Nature has taught him that neither himself nor mankind can be fully satisfied with his conduct...unless he actually produced them’.84 Further Smith writes, ‘The property which every man has in his own labour, as

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it is the original foundation of all other property, so it most sacred and inviolable' (1776, 138). Even the role they assigned to the government, were echoed in a similar language. Locke wrote 'Government has no other end but the preservation of property' (Treatise II 1991, 329). Smith maintained that 'till there be property there can be no government, the very end of which is to secure wealth and to defend the rich from the poor'. i.e. the necessity of civil government grows with the acquisition of valuable property.

In his Lectures on Jurisprudence Smith made one important departure from Locke’s reasoning. Smith rejects the Lockean premise of property rights being natural; rights to body and reputation were natural, but those to estate were acquired (1776, 105) He confined the natural rights to the right to liberty and life and regards the right to property as an acquired right, depending on the disposition of the society – ‘the state of property must always vary with the form of government’. (1896, 291). Smith’s placement of liberty in the natural law tradition is very significant because this natural liberty pervades the whole political logic of the Wealth of Nations. Thus he condemns all legislation that interfered with free individual trading which in turn affected incentives to create and maintain property. Legislation should foster the existence of continuous markets, which in turn would keep prices stable and would emerge as incentives for capital (property) accumulation, resulting in sustained technological progress.

Smith’s first concern was to battle against the restrictive practices of feudal land holdings in an attempt to mobilize property and commercialise agriculture. Prominent among his targets were medieval land tenure and the family trust entail. The territorial basis of aristocratic power rendered the family estate almost inalienable. What Adam Smith did was to put forward a critique of the existing land system and deny that land had any special status among ownable goods and that it did not occupy a special place for the liberal conception of property rights. Land ownership, along with other bundle of ownership rights, involved the freedom to use, alienate, exchange and capitalize on profits. Ownership rights could never permanently exclude all others from even the opportunity of acquiring property in land or legitimately grow into a power over future generations. The success of a market economy depends on its ability to treat all goods, indiscriminately, as commodities. Extension of individual liberty was sought for its alleged beneficial impact upon the commercial exploitation of land. The individual should have the freedom to mobilize property; the immobility of land is ‘extremely prejudicial to the community,

85 Adam Smith [1896], Lectures on Justice, Police, Revenue and Arms (New York: Kelley & Millman, 1956), 291
as it excludes land entirely from commerce. Despite his insistence that the idea of property implies complete freedom of choice, Adam Smith does not consider the unproductive use of land, as a matter of legitimate preference. It is prejudicial to the “wealth of nations”. Interest of the state requires that land should be as much in commerce as any other goods. ([1776] 1978, 70)

Land did constitute a special case for the liberal conception of property rights. On the one hand it had to be freed from the clutches of the feudal land tenure system and had to be made a commodity, which was commercially mobile. For this it was necessary to refer to the world’s natural resources as a kind of common fund upon which all persons have some claim. It was an assumption which enabled Smith to condemn feudal landownership as an unwarranted privilege. ‘The earth and the fullness of it belongs to every generation and the preceding one can have no right to bind it from posterity’. ([1776]1978, 48) There can be therefore no permanent exclusion of others from even an opportunity of acquiring property in land. Smith thus began with an egalitarian premise in defence of a liberal and a private conception of property. Once extensive liberties and powers were granted to the individual, exclusive privileges denied, smith had no reason to dwell upon the ‘original condition of entitlement. ‘The case for private property, in land as in any other goods, could safely rest upon the proof of its incentive value for the creation of economic wealth. All that the political economist has to show is that the extensive liberties and powers granted to the individuals under an exclusive and transferable right to their possessions will contribute more to the productive efforts of a modern commercial economy than any alternative arrangement’. 86

Adam Smith’s second concern was to secure these rights as absolute and restrict the domain of the state in economic activities, a move that would not only protect private property but would also lead to a more productive utilization of resources and creation of greater wealth. Adam Smith argues that it is not the function of the state directly to increase wealth and to create capital; its function is to guarantee security in the possession of wealth once it has been acquired. The state has a judicial function to fulfil, but its economic function must be reduced to the minimum. Three functions comprised these minimal functions that the state was required to perform. 1) protection from external threats, which was extended in the 19th C to enlarge and extend foreign markets through armed coercion;2) protection, as far as possible, of every member of society from the injustice and oppression of every other member i.e. the duty of establishing an exact

86 Ursula Vogel, When the Land Belonged to All, (1988), 115
administration of justice; 3) the function of erecting and maintaining certain public institutions and public works 'which can never be for the interest of any individual or a small number of individuals to maintain because the profits could never repay the expense to any individual or a small number of individuals...' ([1776]1978, 688)

In all the three duties assigned, the natural law tradition is located most clearly in the second of these duties. As for the third, Smith has been criticized by Libertarians for outlining a positive role for the government that went further than upholding justice and protecting property. Duty number 3), in fact, has been described as representing the philosophy, not of natural law/ rights, but of Benthamite utilitarianism which instructs the government to supersede the market in many areas. At the same time some theorists allege public works and public interest had generally been interpreted to mean the creation and maintenance of institutions that fostered profitable production and exchange. In the context of 18th C, it probably involved making a role for the government in allowing large scale stockholdings to exist. It also indicates Smith's awareness of the advantages of the extension of limited liability. There was a growing need, at the beginning of the Industrial Revolution for "instrumentality" in carrying on large business. There was a demand for more legal variety in the structure of property rights. The notion of limited liability was crucial for the existence, management, trading of business enterprises. The third duty is to be therefore seen not as an instruction to the government to carry out discretionary and utilitarian economic intervention, but rather as a demand for the enlargement of the whole legal framework and, by implication, the area of natural liberty, a demand that was consistent with the natural law tradition.

According to Adam Smith, property rights always require the ability to exclude others (non-owners) and it is only via the protection, provided by the government, that this exclusion, or in other words, the exclusion of property is possible. The main of the government was therefore the preservation of property via a proper legal framework

(a) The Evolution of Property

For Smith, the case for private property does not merely rest upon premises of utility viz. the creation of economic wealth. 'If Adam Smith had looked at property merely as an economist,
content with the task of explaining the greater or lesser utility of different forms of ownership, he would have no reason to dwell upon the “original conditions” of entitlement. The case for private property, in land as well as in any other goods could safely rest upon the proof of its incentive value for the creation of economic wealth. To justify the extension of individual liberty and make a case for absolute ownership, by its alleged beneficial impact is a proposition which can easily be falsified. One could cite examples of many societies where land has enjoyed a non-commercial status and where the productivity of land was ensured through a collective, rather than individual, ownership of land; or cite examples where the individual ownership of land has not actually been productively beneficial. The conservatives, the romantic critics of liberalism, and today the campaigners for community rights in land, have defended communal ownership in land; whether to defend feudal land laws or to conserve and protect bio-diversity and rights of traditional communities is a separate question. In order to pre-empt objections of this kind Adam Smith presents a historical account of the emergence of private property in land. A reconstruction of the history of property in land enables Smith to reveal that exclusive individual property right was not a universal practice at all stages of history. It has emerged as a logical, inevitable consequence of the limitations of the earlier modes and systems of property to cope with changes in the modes of subsistence. It emerged at a specific stage of history of civil society, warranted by certain social and economic changes, in modes of subsistence. The logic and the same rational purpose which led to the gradual evolution of private property in land, which Smith terms its greatest extension, becomes a precondition for further evolution and progress of mankind. What Smith demonstrates is that property rights correspond to particular requirements of time and place. The evolution of property rights was incremental and a response to the growing requirements and complexity of the economies.

Based on three aspects, what is an object of property; modes of acquisition; how the power and authority of the government operate; Smith delineated 4 stages-

a) The hunting stage where property is treated only as possession.

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89 Both conservatives and romantic critics of liberalism regarded land to have a separate, non-commercial status among goods where the community’s interest lay in collective rather than individual ownership of land. Land should not be in commerce because its true value is not commensurable with that of other economic goods. For instance S.T. Coleridge who argued that the landed aristocracy provided permanence and stability. S.T. Coleridge, Lay Sermons (London: RKP, 1972), 229; Henry S. Maine, Village Communities in the East and West (London: John Murray, 1907), 270;

90 Smith, Lectures on Jurisprudence, 20
b) The shepherd stage where an important extension property took place viz. ownership of animals; "shepherds treating possessions not only as a matter of what they have about them, but also what they have in their hovels". ([1776]1978, 209). 'Settled laws, or agreements concerning property, will soon be made after the commencements of the age of shepherds ([1776]1978, 209).

c) The agricultural Stage was the extension of fixed property in land. For Smith this was the 'greatest extension of property' (1978, 107).

d) The Commercial stage marked not by an extension of the objects of property but by its diffusion and wide distribution.

R.L. Meek has argued for the profound importance of Adam Smith's 'stages' of property. "The theory was that society "naturally" or "normally" progressed over time through more or less distinct and consecutive stages, each corresponding to a different mode of subsistence, these stages being defined as hunting, pasturage, agriculture and commerce. To each of these modes of subsistence... correspond different sets of customs, manners and morals. The four stages theory... was destined ...to dominate socio-economic thought in Europe in the latter half of the 18th C." 91

Charles Letourneau's account of Property, its Origin and Development, published in 1892, also presents an evolutionary account based on modes of production and subsistence. The process of movement of property was a movement away from common property, which had run its course with disastrous consequences for particular civilizations in the past and which was threatening contemporary Europe, towards private property. However, he added that the diffusion of property that Smith thought possible in the commercial society was absent in the industrial one and rampant individualism would lead to great inequalities. In The Communist Manifesto (1848) and the Preface to a Critique of Political Economy (1859), the historical account provided by Marx and Engels, also puts forward a similar typology based on different modes of production to which correspond definite stages of history. Paul Lafargue account of the Evolution of Property (1975), shares this evolutionary perspective.

Smith, as do Letourneau, Marx and Lafargue, presents an evolutionary history of property. Locke presented a conjectural history of property. But they are asking different questions and drawing different conclusions from that history. Locke is asking how could property have arisen legitimately. Locke's conjectural history seeks to establish property as a natural right and thus

establish its legitimacy. Smith, on the other hand, is trying to present the evolution of property along a sort of natural trajectory—the emergence of private property in land in the commercial stage is a natural progression arising out of limits of common property regulated by feudal laws. According to him, from the original situation where the earth was available to all, but belonged to none, we cannot derive a standard of right. Common ownership was the first and a natural form of ownership given the limited productive capacities of a primitive political economy; it cannot become a moral standard for a right in circumstances of changed social and economic organization. For him property rights are legitimate not because they are natural rights but because of the tangible benefits that accrues to a society when land is privatised and commercialised. He seeks confirmation of this in a reflection on the historical origins of the modern institutions of land tenure.

The most persuasive argument of this kind is sometimes referred to as ‘the tragedy of the commons’ (Hardin 1968). If everyone is entitled to use a given piece of land, then no one has an incentive to see that crops are planted or that the land is not over-used. Or if anyone does take on this responsibility, they themselves are likely to bear all the costs of doing so (the costs of planting or the costs of their own self-restraint), while any benefits of their prudence will accrue to all subsequent users. And in many cases there will be no benefits, since one individual’s planning or restraint will be futile unless others cooperate. But if there are individuals who bear the costs and also reap all the benefits there will be an overall increase in the amount of utility derived. This was the context in which private land tenure systems developed. Smith historicized property and by examining the different modes of controlling access to land that have existed so far, Smith was able to explain and justify the gradual extension of individual rights towards full individual ownership. Although Smith does not discuss the origins of legitimate property, the sense in which it has natural origins is so strong that legitimacy is thereby suggested.

It is on the twin grounds of utility and ‘naturalness’ of progression that Adam Smith makes a case that the idea of property implies a complete freedom of choice and that it is a necessary condition of society’s progress. In a commercial the most desirable pattern of distribution will emerge from the free interplay of individual actions of choice. The issue of ‘just entitlement’ need only concern itself with the legality of the acquisition, legal equality and open equal

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92 Ursula Vogel, When the land belonged to All (1988):117
93 Andrew Reeve, Property (London: Macmillan, 1986), 61
opportunities as necessary condition of individual acquisitions. Adam Smith hands over the issue of justice to benevolent “invisible hand”.

**Utility and the Structure of Property Rights in Bentham**

The simplest defence of the existence of property rights over external objects is utilitarian. It would be impossible for the individuals to use the raw materials provided by nature for anything other than the simplest sort of consumption unless he is granted the right to appropriate, use, transfer objects of value or interest. Bentham argued that the essence of property was the deriving of benefit (pleasure) from the use of that thing. Bentham connected property directly with human feelings, human desire and individual will. ‘Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do...They govern us in all we do, in all we say, in all we think...’

He further explains that the principle of utility ‘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...’ he believes that the happiness principle applies equally to the actions of individuals and to governments, and when applied to governments it requires them to maximize “the greatest happiness of the greatest numbers” in the community.

Utilitarianism emerged, as a political and philosophical movement, in the context of feudal privileges, as a radical critique of the English society, to protect the interests and enhance the rights of the majority against the privileges of small privileged feudal elite. It was, at that time, associated with progressive reforms and political programmes – the extension of democracy, penal reforms, welfare provisions etc. Arguing against monarchy, Bentham regarded a monarch as the least safe of all masters: ‘for (the monarch) being, on this hypothesis, absolutely free to do what he wishes, he will follow his own interest and not the interest of the greatest number... The majority which becomes the sovereign power is the least fallible of masters: for since each individual is the best judge of his interests, it is the majority of the individuals which will be able to estimate the interest of the greatest number...the most numerous are the strongest’.

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95 Ibid, 126-127
96 Quoted from Elie Halevy, *The Growth of Philosphic Radicalism* (Faber and Faber: London, 1928), 491
Utilitarianism, in its simplest formulation, claims that morally right act or policy is that which produces the greatest happiness for the members of society. This principle of 'political morality' ought to govern the basic structure of society. Elie Halevy distils two fundamental postulates of utilitarian philosophy, although, he says, that they are never formally enunciated. 1) That pleasure and pain can be quantified and measured as objects of a calculus, and a rational mathematical science of pleasure is possible. This he calls the 'rationalist postulate' of the Utilitarian doctrine. 2) All individuals who make up society have an equal capacity for happiness. This he calls the 'individualistic postulate' of the utilitarian doctrine. The primary goal of the state is therefore to rationally identify the greatest interest of the greatest numbers and ensure it. In calculating the aggregate interests, each person's interest should count as one. This Halevy contends, is the Benthamite 'equalitarianism' which results from the individualistic principle. It may be said of all laws that they are in essence equalitarian and individualistic; in so far as they are laws they tend to consider all individuals as equal.

According to Will Kymlicka, this however led to two different formulations of utilitarianism, which led to two radically divergent streams of utilitarian philosophy in the post Bentham period, one which contests individualism and the other, equalitarianism. On one interpretation, utilitarianism is a standard for aggregating individual interests and desires and in aggregating each individual's preference is to count as one. In doing so, we maximize happiness. Maximization of happiness (utility) is not the direct goal but a by-product of the equal consideration standard. In the second interpretation, maximizing utility is the primary, not the derived goal. The primary goal is not to treat people as equal but to maximize happiness.

The Utilitarian defence of property, in any form, is a defence of the legal recognition of ownership as an instrument of promoting greatest happiness. The "pleasurable" relationship would make property a source of happiness. The background assumption of the utilitarian defence of property is that resources in the nature are scarce, and needs ever-growing; we thus need to devise ways in which nature can be made to yield as much as possible. Most men are not are altruistic creatures and will therefore need rules to govern the distribution of appropriated goods. Property rights emerge as useful guidelines in devising principles of benefit sharing. Property also satisfies the need for security and provides a natural incentive for labour to succeed; rules of

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97 Ibid, 492
98 Ibid, 501
99 Will Kymlicka, Contemporary Political Philosophy, 32-35)
100 For a discussion see Will Kymlicka, Contemporary Political Philosophy, Chapter 1
ownership will ensure that our desire for well-being will lead us to work. He sees the private actions of individual, particularly in the production of wealth, as the main source of utility. The utility of property, for Bentham, had a naturalistic basis for it was rooted in the human species’ imperative for survival. However in arguing so Bentham is nowhere near Locke’s natural law paradigm; in fact he is hostile to the doctrines of ‘natural right’. Bentham holds that property is a legal right and all legal rights are a matter of positive law. These legal rights are moral in nature for ‘they are explicable as liberties and powers that an individual ought to have in order to promote their most important interests’.

Bentham moved away from Locke on another count. Bentham believed that property was an essentially an external relationship. Property relations were subject-object relations. Hence no man should be described as having property in his own person. A man might be said to “have a property” in a thing (i.e. to be in a certain relationship to it) without having or possessing the thing itself. Physical appropriation, for Bentham, was not a necessary condition for property to exist. Bentham divided objects of property into “real” or “corporeal” and “fictitious” or “incorporeal”. Real property he divided into moveable and immoveable. The classification of incorporeal property is interesting. He considered it a mistake to regard one’s own livelihood or skills as one’s property, though they could be another’s, and said that “Integral property” would subsist in things only. Many important abstract notions such as “reputation”, “power”, “rights”, “liberties”, “duty”, “obligation” were not subsumed by Bentham under the heading of property. These for him were “fictitious moral goods”, which were objects of desire, not because they were inherently virtuous but because possession of them is justified by its social consequence, these being measured in terms of pleasure or pain to the individual.

Thus for Bentham property essentially was vested in real or corporeal objects; it was essentially a relationship, not an object. These relationships ought to be protected by law which ‘transformed the field of property relationships, from a battlefield of conflicting desires into a chessboard of reciprocal rights and duties, powers and obligations’. Bentham argued that the essence of property was the deriving of pleasure and benefit from the use of property and as long as the use

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101 Alan Ryan, Property, 56.
102 Alan Ryan, Property, 53.
of property was a source of happiness, it was an institution which was morally defensible and desirable. ‘The very adequacy of an individual’s being, expressed through the purposeful and powerful nature of his desires, was measured by his capacity to acquire and enjoy property’. Bentham’s defence of private property hinges on the co-relation between independence of will and the independence of means, the latter becoming a precondition for individual autonomy and freedom of will and happiness. However, as Long states: “he allows the methodological structure of the legal system and the science of political economy to dictate the structure of happiness itself... It is not man who develops but rather, utilitarian social planning itself”... his legislative theory overwhelms his moral theory…”

There is also an inherent conservative character about utilitarianism, according to Will Kymlicka. Utilitarianism makes morality a contingent factor. Classical utilitarianism is a radically consequentialist doctrine. Even if a policy involves grave harm, that is no reason to object if the net effect is an increase in total utility. Finding the morally right answer is not based on arbitrary moral prohibitions, but a matter of measuring changes in human welfare. Consequentialism seems to provide a straightforward method for resolving moral questions. What ought to be matter of personal or political commitment becomes a matter of consequence. Ryan argues that it is characteristic of utilitarian arguments that they are reversible; that is, since all justification rests on a consideration of consequences, a reconsideration of consequences will force a reconsideration of what is being justified. The grounds of morality thus keep shifting, as do the grounds of utility.

This perhaps is the reason that the justification of private property on merely utilitarian grounds is a lukewarm one, for it is forever hostage to the relativity of consequences. The institution of private property is only defensible on grounds that it maximizes welfare of the greatest numbers, and this is an empirically contestable issue. Since property rights are to be justified in terms of general benefit, there doesn’t appear a clear cut case against public and common property too, as long as they can be legally and unambiguously defined. Property may be more or less private, or

106 Ibid, 239
107 Ibid., 249
108 For a discussion see Will Kymlicka, Contemporary Political Philosophy, 46-48
109 Alan Ryan, Property, 59
more or less public; the only issue is how to define, legally, the rights of ownership. Classical Utilitarianism, thus, does not present a very emphatic defence of private property.\textsuperscript{110}

Bentham is not an unambiguously, or even a consistent minimal state theorist. It seems clear that he sees the private actions of individuals, particularly the production of wealth, as the main source of utility. Bentham seems committed to a notion of private property as a necessary condition for maximizing utility. This is explicit in Bentham's \textit{Principles of Civil Code} : "Law does not say to man, Work and I will reward you but it says: Labour, and by stopping the hand that would take from you, I will ensure to you the fruits of your labour — its natural and sufficient reward which without me you cannot preserve..."\textsuperscript{111} Bentham wrote:

"In the distribution of rights and obligations, the legislator, as we have said, should have for his end the happiness of society. Investigating more distinctly in what that happiness consists, we shall find four subordinate ends — Subsistence; Abundance; Equality; Security. The more perfect enjoyment is in all these respects, the greater is the sum of social happiness: and especially of that happiness which depends upon the laws. We may hence conclude that all the functions of law may be referred to these four heads: To provide subsistence; to produce abundance; to favour equality, to maintain security.... Some persons may be astonished to find that Liberty is not ranked among the principal objects of law. But a clear idea of liberty will lead us to regard it as a branch of security. Personal liberty is security against a certain kind of injuries which affect the person. As to what is called political liberty, it is another branch of security, - security against injuries from the ministers of government." \textsuperscript{112}

This passage clearly reflects Bentham’s view that although the rule of law is essential to the pursuit of utility, law should limit itself to ensuring that people can pursue utility for themselves.\textsuperscript{113} On the other hand, Bentham’s utilitarianism, by implication, may also regard the merits of redistribution and consider redistribution from the rich to the poor as a net social improvement. Although wealth increases happiness “ten thousand times the quantity of wealth will not bring ten thousand times the quantity of happiness”, the law of diminishing marginal

\textsuperscript{110} Bentham tackles property rights in particular only in his \textit{Theory of Legislation} (Trubner: London, 1887) a work compiled from his manuscripts and not one his frontline works.


\textsuperscript{113} For a further discussion on law’s fundamental emphasis as providing security, see Nancy Rosenblum, \textit{Bentham’s Theory of the Modern state} (Cambridge: Harvard University Press, 1978), 53
utility would prevent a corresponding increase in satisfaction. It would, however, if redistributed among the needy, would lead to a greater production of happiness, both individual and aggregated. The logic of utilitarian in this reading is thus not antithetical to the idea of redistribution through state intervention.

Ian Shapiro however argues that “no particular redistributive policy can be inferred from the principle of diminishing marginal utility... The principle says that the wealthier you are, the less new utility you will derive from each additional dollar. This suggests that the more money you have, the larger the dollar increments that will be required, at the margin, to increase your utility.”114 While it can be inferred that there is a redistributive core of the theory it is doubtful that anyone professing to be a Benthamite utilitarian will commit to it. Bentham also argues only for “practical equality” where this is understood to mean that no approach to equality can undermine “abundance, subsistence and security— which are of superior necessity “.115 Bentham further writes “Equality ought not to be favoured except in the cases in which it does not interfere with security; in which it does not thwart the expectations which the law itself has produced, in which it does not derange the order already established. What can the law do for subsistence? Nothing directly. All it can do is to create motives, that is, punishments or rewards, by the force of which men may be led to provide subsistence for themselves. But nature herself has created these motives, and has given them a sufficient energy.”116

Bentham’s defence of security was primarily directed against the egalitarian pressures of the doctrine of diminishing marginal utility. Bentham claims that the abundance of the wealthy is the inevitable result of the security of property; without security there would be no property; without property, there would be no general guarantee of subsistence, without abundance there would be less certainty of subsistence for all.117

There are two points that Bentham makes here. One that there is nothing gained from limiting the rights of the wealthy; and two that abundance of wealth is to be created and defended for it provides a resource for the whole community. The case for security clearly overwhelms the case for equality. Security (of property) is a highly desirable feature in the scheme of utility.

114 Ian Shapiro, Moral Foundations of Politics (New Delhi: Aakar Books, 2004), 31-32
116 Jeremy Bentham, Principles of the Civil Code
117 Shapiro, Moral Foundations of Politics, 30-33.
Continuous redistributive upheavals can hamper it. The state may aid the non-propertied, but only to the extent that the security of property is not jeopardized, even if it means that general welfare is lessened.

Utilitarianism is as readily available to the critics of private property as to its defenders. One of the liveliest controversies in recent times has involved a debate on whether claims of community, vis a vis the rights of the individual, are supported by the utilitarianism. The debate interestingly illustrates varied positions, depending on a perception of rights from a negative or a positive perspective. It is a fairly common perception, especially on the left, that the Utilitarians were deeply committed to capitalism, and therefore to unfettered private property rights.\(^{118}\) This reading is based on the premise that utility and private property are happy allies. William Goodwin's discussion on property rights in book VIII of his *Political Justice* \(^{119}\) presents an extreme version of utilitarianism where it becomes a doctrine of welfare and amounts to a denial of any thing one can call property rights.

Ritchie, acknowledged as a trenchant critic of natural rights, formulated an important synthesis between rights-theory and utilitarianism.\(^{120}\) In Ritchie's arguments, utilitarianism survived as a dominant aspect of modern welfare thought as it shed its highly individualistic Benthamite aspects. His version of 'ethical utilitarianism' proposes that property rights are not only about the protection of individual/corporate rights; it is as much about the promotion of collective interest and welfare.

Robert Nozick, a forceful critic of utilitarianism, relies on the view that each of us, in the sense of being a proprietor of his own person, has no general duty to promote any other person's welfare. Nozick argues that utilitarianism doesn't take into account rights (individual) and their violation and instead gives rights a "derivative status", employing them only as "side constraints on actions" - 'the rights of others determine the constraints upon your actions'.\(^{121}\) He is strongly critical of propensity of utilitarianism to enhance the vulnerability of separate individuals to considerations of general interest and of equal treatment of individuals.

\(^{120}\) D.G. Ritchie, *Natural Rights* (London: Allen and Unwin, 1952), 98
\(^{121}\) Nozick, *Anarchy, State and Utopia*, 28-29
In Utilitarianism there is no prospect of settling the question of property rights by asking the question what property really is. What interests in objects should be protected by law, so that they become property rights, is a question to be settled by law, property being a legal and not a moral question. Property is entirely a by-product of law. In essence, the claim is that there are no natural titles of ownership; they may be created in accordance with the law of the land. Rationally the law should be so designed that utility is maximized. Utility is maximized, for Bentham, when almost anything can be bought and sold in a free market, at prices mutually agreed upon by the buyers and sellers; profit and wealth creation being the incentive.\footnote{122}{Bentham, Theory of Legislation, 118-119.}

Bentham’s defence of the individual being allowed to pursue his own good, in his own way, has less to do with a respect for individuality and a moral position on individual liberty, and more to do with maximization of benefits. Elie Halevy’s claim that Bentham is no respecter of individuality, but his principle of utility is an instrument of individualist laissez faire, is widely accepted.\footnote{123}{E.Halevy, The Growth of Philosophical Radicalism.} The point of rights of ownership is that they increase general well being by allowing appropriate areas freedom of choice- from freedom to invest, to freedom of contract and so on. The classical utilitarian argument is about the best way to allocate and control rights over the use of society’s resources. How property rights came to be, whether these rights ought to be unfettered, whether the net outcome of these rights are markedly egalitarian or inegalitarian issues on which the doctrine does not provide clear answers; in fact it chooses not to enter the realm of moral philosophy. Utilitarianism, in a nutshell, believes that giving people property rights is a good way of solving the problem of coordinating everyone’s productive activities. The argument for property rights is therefore a contingent one, as is utilitarian morality.

Assessing Utility as a Justificatory Principle for Private Property

The consequentialist utilitarian argument argues that people in general are better off when a given class of resources is governed by a private property regime than by any alternative system. Under private property, it is said, the resources will be more wisely used, or used to satisfy a wider (and perhaps more varied) set of wants than under any alternative system, so that the overall enjoyment that humans derive from a given stock of resources will be increased.
The argument for markets is that in a complex society there are innumerable decisions to be made about the allocation of particular resources to particular production processes. Is a given ton of coal better used to generate electricity which will in turn be used to refine aluminum for manufacturing cooking pots or aircraft, or to produce steel which can be used to build railway trucks? In most economies there are hundreds of thousands of distinct factors of production, and it has proved impossible for efficient decisions about their allocation to be made by central agencies acting in the name of the community and charged with overseeing the economy as a whole. In actually existing socialist societies, central planning turned out to be a way of ensuring economic paralysis, inefficiency and waste. In market economies, decisions like these are made on a decentralized basis by thousands of individuals and firms responding to price signals, each seeking to maximize profits from the use of the productive resources under its control, and such a system often works efficiently. Motives to improve and to be efficient will occur only if the resources are privately owned, so that the loss is theirs (or their employer's) when a market signal is missed and the gain is theirs (or their employer's) when a profitable allocation is secured.

Arguments of this sort are familiar and important, but like all consequentialist arguments, they need to be treated with caution. In most private property systems, there are some individuals who own little or nothing, and who are entirely at the mercy of others. So when it is said that 'people in general' are better off under private property arrangements, we have to ask Which people? Everyone? The majority? Or just a small class of owners whose prosperity is so great as to offset the consequent immiseration of the others in an aggregative utilitarian calculus? Alternatively, some consequentialists cast their justifications in the language of what is called 'Pareto-optimality'. Here the consequentialist has to show that everyone is better off under a private property system, or at least that no-one is worse off. Maybe the privatization of previously common land does not benefit everybody: but it benefits some and it leaves others no worse off than they were before. The homelessness and immiseration of the poor, on this account, is not a result of private property; it is simply the natural predicament of mankind from which a few energetic appropriators have managed to extricate themselves.

CONCLUSION
Property, Liberty and Consequences

In dealing with the pros and cons of private property as an institution, it has sometimes been suggested that the general justification of private property and the distribution of particular
property rights can be treated as separate issues.\textsuperscript{124} It can be argued though that the separation is not complete: most theories, whether consequentialists, like the utilitarian argument or the liberty argument, affect patterns of distribution of resources and rights. Most theories, consequentialist, like the utilitarian argument or the liberty argument, have direct or indirect distributive implications. Justificatory premises for property have to be tested in the context of the distributive implications and outcomes and in the context of justice and like rights as well.

The idea that property-owning promotes virtue (Aristotle), upholds individual will, autonomy, (Kant), protects individual liberty (Locke, Nozick), promotes market efficiency (Adam Smith), aggregates general welfare(Bentham) - are all arguments which provide a defence for private property and discredit economic collectivism and redistribution on various grounds. Robert Nozick (1974), for instance, argued that a theory of historical entitlement, along Lockean lines, provides both a complete justification of the institution of property and a set of strict criteria that govern its legitimate distribution. Property rights, according to Nozick, are an act of individual liberty and constrain the extent to which we are entitled to act on our intuitions and theories about distributive justice. In Kantian liberalism, property guarantees to the individual merely external freedom, or scope for making choices. Any reference to particular ends and tangible benefits is excluded from the strict notion of rights. Property is a right because it is one of the expressions of the moral autonomy and will of the individual.

The liberty and the moral autonomy arguments describe societies with private property as free societies. Part of what this means is that owners are free to use their property as they please; they are not bound by social or political decisions. (And correlatively, the role of government in economic decision-making is minimized.) But what it ignores is that there is simultaneously, a social exclusion of people from resources that others own. The freedoms of some coexist along with the unfreedoms of others. As T.H. Green observed, a person who owns nothing in a capitalist society 'might as well, in respect of the ethical purposes which the possession of property should serve, be denied rights of property altogether'.\textsuperscript{125} All property systems distribute freedoms and unfreedoms; no system of property can be described, without qualification, as a system of liberty.

\textsuperscript{124} See Ryan, \textit{Property}, 82; Waldron, \textit{the Right to Property}, 330.
\textsuperscript{125} T.H. Green, \textit{Lectures on the Principles of Political Obligation} [1895], (London: Longmans Green & Co., 1941), 219
Arguments from liberty commit the libertarians to a moralized conception of freedom, as in case of positive liberty, a conception that they usually shy away from.¹²⁶

Most recent theoretical writings on property have been dominated by two approaches: Labour theory and utilitarian theory of property. In large part, their prominence derives from the fact that they grow out of and draw support from lines of argument and justifications that have long figured in the defence of property institutions and forms of property. Whether it has been the shift from common property to private property, whether it was the inclusion of land in the list of things that count as property or whether it is recent extension of knowledge as a form of property, the principles of self-ownership and utility (culminating in the labour theory and utilitarianism respectively) have for long retained their appeal for defences of various forms of property, particularly in the private domain. From limited rights in land, to moveable objects, to enhanced rights in estates, to body rights, copyrights and now IP rights and knowledge rights; from a property right as being ownership of a thing to rights as defining the relation between people with respect to that thing, property rights have come a long way but retain as their core philosophical appeal the labour and utilitarian justificatory premises.

The dependence of modern-day theorists on Locke and Nozick’s labour theory and on utilitarianism and the debt they owe to these theories is evident today in constitutional provisions, case reports, preambles to legislation, and so forth. References to the role of intellectual-property rights in stimulating the production of socially valuable works riddle American law.¹²⁷ Thus, for example, the constitutional provision upon which the copyright and patent statutes rest indicates that the purpose of those laws is to provide incentives for creative intellectual efforts that will benefit the society at large. The United States Supreme Court, when construing the copyright and patent statutes, has repeatedly insisted that their primary objective is inducing the production and dissemination of works of the intellect. Drawing from the labour theory, references to the importance of rewarding authors and inventors for their labour are almost as common. Proponents of legislative extensions of copyright or patent protection routinely make arguments like: "Our American society is founded on the principle that the one who creates something of

¹²⁶ Libertarians generally defend the ideal of freedom from the perspective of how little one is constrained by authority, i.e., how much one is allowed to do (also referred to as negative liberty) and is distinguished from a view of freedom focused on how much one is able to do (also called positive liberty).

¹²⁷ See, for example, Article I, Section 8, Clause 8 of the United States Constitution empowers Congress "to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
value is entitled to enjoy the fruits of his labour".\textsuperscript{128} In the Harper & Row case, the U.S Supreme Court took a similar line: "...The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors..."\textsuperscript{129}

Incentives, reward, desert, in these and countless other passages reflect the influence that the two sets of theories have exerted on contemporary ideas about property and its institutions. While earlier, in the hands of their original propounders and loyal followers, they were employed as both sufficient and necessary explanatory theses, in contemporary times, by contrast, such themes are typically juxtaposed and employed in tandem, especially by the policy makers. It is quite common for a single author to invoke a wide range of arguments to support private property rights. In policy and legal literature they are often regarded as providing multiple reasons for justifying the rationale and the purpose of property rights in general and intellectual property rights in particular. It is not surprising that theorists familiar with these debates should separate ideas about intellectual property into similar piles. This has been the rationale behind distilling, from the multiple standpoints and justificatory arguments, Labour theory of property and the Utilitarian theory of property, more than any other theory demonstrate their modern relevance. It is no surprise that they are replicated in the context of intellectual property.

Interestingly, the various leading arguments that normally buttress each other and converge in support of private property diverge widely when applied to the concept of intellectual property. For example, a theory wherein property is viewed as the just reward for labour (a "desert theory") might very well support intellectual property rights, while at the same time a theory in which property is defined as the expression of liberty might not. Those who strongly favour liberty and property might well come to differing conclusions. This occurs because liberty and property in the context of IP rights may be irreconcilable; copyrights and patents seem to be property, but they also seem to restrict liberty. Those who prioritize utility over liberty might well fall prey to counter empirical validation or differing conceptions of utilities in a world of multiple normative concerns.

Intellectual property represents a reification of property which marks an extension of property rights to an intangible realm where scarcity is not naturally or potentially implied. Most property rights have their roots in scarcity of goods; it is scarcity, which in the ultimate analysis, led to the

\textsuperscript{128} Testimony of Elizabeth Janeway, Copyright Law Revision (1965), reprinted in George S. Grossman, Omnibus Copyright Revision Legislative History, vol. 5 (1976), 100.

privatization of property. Knowledge as a good is not scarce and therefore requires a different set of principles or a different application of the principles to justify and legitimate its private use. How this is done and the problems that posed for the justificatory premises is the subject matter of the next two chapters. The following two chapters will test the notion self ownership and utility as underlying principles of intellectual property rights and will test their validity against the distributive implications of both goods and rights that IPRs may generate.