CHAPTER SIX

TRADITIONAL ARGUMENTS FOR PROPERTY IN LAND

WE NOW TURN to examine the most prominent traditional arguments for the allocation of property rights in land. There are five: (1) The Argument from First Occupancy; (2) The Argument from the Labor Theory of Property Acquisition; (3) The Argument from Social and Economic Utility; (4) The Argument from Political Liberty; and (5) The Argument from Personality or Moral Development.[1] While each of these arguments are distinct, there is much that overlaps among them, especially regarding their basic assumptions. We shall deal with each in turn and then consider them together. It will not be possible to discuss all of the supporters of each argument, and so we will be selective in our citation from established authorities. Fortunately, the most interesting thing about each argument is not its supporters but its rationale.

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[1]See, as cited in Introduction, Lawrence C. Becker, Property Rights; Anthony Parel and Thomas Flanagan, eds., Theories of Property; J. Roland Pennock and John W. Chapman, Property; and Richard Schaltter, Private Property. Also, Equality and Freedom: past, present, and future, edited by Carl Wellman, Archiv fur Rechts und Sozial Philosophie: Beih.: N.F. Nr. 10 (Wiesbaden: Steiner, 1977); James O. Grunebaum, "Two Justifications of Property," American Philosophical Quarterly, 17 (1980): 53-59; Frank Snare, "The Concept of Property," American Philosophical Quarterly 9 (1972): 200-206; Harold Demsetz, "Toward A Theory of Property Rights," American Economic Review, 57 (1967): 347-359; and Carol C. Gould, "Contemporary Legal Conceptions of Property and their Implications for Democracy," Journal of Philosophy, LXXVII (1980): 716-729.

That property rights need justification is noteworthy in and of itself. It illustrates that ownership is understood to be a social as well as an economic phenomenon requiring explanation. Entitlements are not self-explanatory.[2] Sheer possession is insufficient to establish the enormous benefits that ownership confers; nor is it sufficient to justify the advantages that some individuals will have over others. For these reasons careful explanation is necessary whatever form or degree of property rights is permitted within society.

Though, historically speaking, conquest may probably be the most widely practiced method of acquiring and controlling land, it is not generally considered a legitimate basis for holding title against the will of others.[3] Some other argument must be appealed to in support of ownership, at least pro forma. Let us see what these arguments amount to and what validity, if any, they exhibit. Again, we must note, that it would be impractical to consider all the possible arguments that have been employed, spurious or not, but the five major arguments do amply illustrate

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[2]Even extremist proponents of entitlement based forms of distributive justice like Robert Nozick recognize the need to establish some rationale for original entitlements. See, his Anarchy, State, and Utopia, pp. 150-153.

[3]For a good summary of the conquest and subsequent occupancy of the New World see, McDougal, Lasswell, Vlasic and Smith, "The Enjoyment and Acquisition of Resources in Outer Space, University of Pennsylvania Law Review, 111 (1963): 596-634.

the most important lines of thought regarding the justification and allocation of ownership of land. It is to them that we turn.

(1) The Argument from First Occupancy

One of the first things people are likely to ask when confronted with a dispute about rights of possession is, 'Who got there first?' This is understandable since we are accustomed to stand in line and wait our turn whenever there is a scarcity of goods or services in relation to demand. Certainly, such a procedure is not merely a polite convention, but is, in fact, a just one. It embodies the formal principle of justice. Moreover, it meets the standard of equal treatment. And furthermore it can easily accommodate other criteria of justice, such a need or status, without too much difficulty. Sick or important individuals can be sent to the head of the line or wait by proxy. Such a useful and sensible procedure seems a good candidate for determining important matters. Hence, the argument from first occupancy has been used to justify ownership of land, though it is not always carefully evaluated in this employment.

As soon as we look at the argument closely, we see that it contains a number of assumptions which condition even its partial acceptance. Foremost is the assumption that the place in question is unoccupied.[4] This is no easy

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[4]Cicero uses the analogy of seats in a public theatre

matter to determine in many instances, especially if the argument can be used by other parties. Someone may claim to have been at the site before. If all that is necessary to establish ownership of a given site is that one visit the place, then many a tourist today would dispossess established tenants. Unless we wish to limit acquisition to what is physically possessed at any given moment, then there must be some further means by which we can correctly determine who had first occupancy.

This difficulty has given rise to various conventions and legal procedures whereby title is established.[5] But the conventions and procedures are nbt self-evident nor universal. Even the great English legal conventionalist, Sir William Blackstone, could not resist noting:

> We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to

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where everyone is entitled to occupy one, and no more than one, vacant seat. "And the nature of man, Chrysippus said, is such, that as it were a code of law subsists between the individual and the human race, so that he who upholds this code will be just and he who departs from it, unjust. But just as, though the theatre is a public place, yet it is correct to say that the particular seat that a man has taken belongs to him, so in the state or in the universe, though these are common to all, no principle of justice militates against the possession of private property." De Finibus Bonorum et Malorum, trans. by H. Rackham, Loeb Library (Cambridge, Mass: Harvard University Press.), Bk. III, xx, 67.

[5]For a discussion of the value of land registration in relation to security of tenure see, S. Rowton Simpson, Land Law and Registration, pp. 8-11. Also, J. C. Smith,

> reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.[6]

The point is clear. Social and political acceptance of specific legal instruments are not rational grounds for universal acceptance of those instruments. No doubt deeds or titles to land can effectively assist us in discovering whether or not prior claims have been laid upon the site in question. But even aside from the question of bogus claims and forged titles, this does not solve the underlying problem.

"The Concept of Native Title," University of Toronto Law Review, 24 (1974): 1-19.

[6]Blackstone, Commentaries on the Laws of England, 2:2. As is well-known, Blackstone did not really attempt to investigate the philosophical principles behind land ownership. He does observe, however, that property rights are conventional in the strict legal sense: "We are apt to conceive at first view that inheritance of land has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself was no natural, but merely a civil right." (his emphasis) (2:11) See, Schlatter, Private Property, pp. 162-171; and Frederick G. Whelan. "Property as Artifice: Hume and Blackstone," pp. 101-129 in Property: NOMOS XXII, edited by Pennock and Chapman.

The argument assumes that originally the earth was created for all men. Such an assumption has a reasonable basis. As we have already remarked, it makes no sense to accept the human right of self-preservation and deny the necessary means for that right. Practically every philosopher has accepted in principle that the earth and its resources must be considered ab initio as the common property of all mankind without distinction as to race, color, creed, or even sex. That some have qualified this right according to the criteria of need, merit, or status does not negate their general acceptance, ceteris paribus, of mankind's common right to the earth and its fruits.

Of course, scripture has usually been cited in support of common property rights.[7] Genesis 1:29 is the primary text:

> And God blessed them, and God said unto them, be fruitful and multiply

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[7]We cannot enter into a discussion of the Christian idea of property, but is noteworthy that there is disagreement as to whether private property is a matter of necessity or only a matter of convenience. St. Augustine, quoted by Gratian, Decretum, Dist. VIII, writes: "Whence does each possess what he does possess? Is it not by human right? For by divine right 'the earth is the Lord's and the fullness thereof;' poor and rich are supported by one and the same earth. But it is by human right he saith, 'This estate is mine, this house is mine, this slave is mine.' By human right, that is, by right of emperors. How so? Because it is through the emporers and princes of this world that God hath distributed human rights to mankind." See, Richard Schlatter, Private Property, p. 33. Also, Felix Alluntis, "Private Property and Natural Law," Studies in Philosophy, 2 (1966): 189-210 argues that St. Thomas "affirms that a general system of private ownership is necessary (necessarium), which means that it is

> and replenish the earth and subdue it, and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

But there are others, such as Leviticus 25:23:

> The land shall not be sold for ever: for the land is mine for ye are strangers and sojourners with me.

This second text introduces an idea—the jubilee year—that we shall discuss later. But certainly it is clear that with the possible exception of the Promised Land given to the Jews, the Bible supports the contention that the earth is man's dominion. Robert Filmer's defense of absolute monarchy is only of interest since it gave rise to Locke's Two Treatises. The idea that God gave the earth only to Adam who as the Father of Men passed on his

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not only permitted but demanded by ius gentium, by natural law." But, for opposing views see, Anthony Parel, "Aquinas' Theory of Property," in Anthony Parcel and Thomas Flanagan, eds., Theories of Property, pp. 89-111, where he concludes "Summing up the right to possess and to acquire private property, it is clear that such right: 1) does not come from dominium naturale but from human convention and human law that must always be in conformity with natural law; 2) is justified only in terms of given assumptions about human motivations and social and political organizations; 3) is subject to the primary right of use by all mankind; 4) limits the actual quantity both by reason of the transcending spiritual end of man and by reason of equality required by justice; 5) requires that surplus, whether acquired by labour, investment, or commerce, be socially justified; 6) requires that money not be misused as a commodity." (101-2) and Marcus Lefebure, "'Private Property' According to St. Thomas and Recent Papal Encyclicals," in Summa Theologiae, Vol. 38 (2a2ae. 63-79), "Injustice" (London: Blackfriars, 1975), pp. 275-283. Additionally, Brian Tierney, Medieval Poor Law (Berkeley, Calif.: University of California Press, 1959), pp. 22-44.

dominion so that "none of his posterity had any right to possess anything, but by his grant or permission, or by succession from him" would be more than ridiculous, if it had not been seriously entertained.[8]

Since rights to property in land are *in rem* rights, they are held against the whole world. This is part of the rationale for granting merit to the idea of first occupancy. Brushing aside the difficulties of establishing who got there first, we can see who is there now. In other words, occupancy is the most important aspect of this argument. It is important for several reasons. Physical occupancy of the earth is a primary condition for human existence: we all occupy some space. Man is a terrestial creature. Per contra, if he were an aquarian creature, no doubt water rights would become as important as territorial rights.[9] Additionally, occupancy for numerous activities,

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[8]On Locke and Filmer, see: John Dunn, The Political Thought of John Locke (Cambridge: Cambridge University Press, 1969), pp. 43-76 and James Tully, A Discourse on Property: John Locke and his Adversaries (Cambridge: Cambridge University Press, 1980). The quotation is from Locke's First Treatise where he cites Filmer's Patriarcha. See, John Locke, Two Treatises of Government, edited by Peter Laslett, Second Edition (Cambridge: Cambridge University Press, 1967), Book I, Chap. III, paragraph 16, p. 170.

[9]Actually, of course, ocean rights are also a serious matter of dispute. The fact that they have remained in the background until recently is a consequence of the different qualities of land and water. The one can readily be enclosed while the other is much more difficult to command or control. As early as 1609 Grotius wrote his defense Of the Freedom of the Sea /Mare Liberum/ English & Latin, ed., trans. Magoffin (Oxford: Oxford University

especially productive ones, must be secure for long periods of time. If a man is to reap what he has sown, then he must at least wait out the harvest. Finally, liberty is protected, if not completely secured, by exclusive, private property. This point leads us to another argument, and so we shall not pursue it here.[10] (Though, again, we should note that there can be no absolute separation of the five arguments.)

Yet we should not jump to too many conclusions about the specific nature of property rights _in rem_. It is entirely possible that they are held jointly rather than individually. Pufendorf rightly noted[11] that a distinction can be drawn between 'positively' held common rights to property and 'negatively' held common rights. Those held 'positively' imply joint or communal ownership wherein each person has an alloted share. Those held 'negatively' merely

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Press, 1916). Since then, especially in recent times with the advance of technology, ocean rights have become one of the most heatedly discussed issues of international law. See, Ross D. Eckert, _The Enclosure of Ocean Resources_ (Stanford, Calif.: Hoover Institution Press, 1979) and Erin Bain Jones, _The Law of the Sea_ (Dallas: Southern Methodist University Press, 1972).

[10]Political liberty as a justification for private property is discussed below; however here we might mention how the argument from occupancy depends in some degree upon the presence of political liberty rather than vice-versa.

[11]Samuel Pufendorf, _Of the Law of Nature and Nations_. Translated by Basil Kennett with the notes of Jean Barbeyrac (London, 1729), IV, iv, 2-6.

imply that the actual distribution of the common property is open and equally available to all. Anyone can quickly see that according to whether man's common right to the earth and its fruits is viewed 'positively' or 'negatively' makes an enormous difference.

First occupancy claims do not arise where property is jointly owned. It is assumed that all are equal occupants, even though all shares may not be the same. No titles can be legitimately granted without the consent of all. Even a majority of men cannot create private ownership, for the principle that all men have equal rights to inherit the earth, reminds us that all men presently living do not constitute mankind. Disenfranchisement of future generations cannot be justly permitted even if every living human being were to agree to it. This is part of the significance of the Jubilee Year. Socialists and utilitarians, among others, appeal to this notion of positive rights <u>in rem</u> to justify social welfare and redistribution of wealth, but in fact logically speaking libertarians should also adhere to its implications.

In a brief note, Hillel Steiner poses the 'libertarian quandary'. He points out that libertarians regularly criticize any interference with their property rights which they have not explicitly contracted.

> From such critiques one might reasonably infer that it is a libertarian principle that all enforced obligations should be contracted ones.

> It is an analytic truth that any property right, as a right against the world (right in rem), entails correlative obligations in all persons who are not the holders of that right. On the libertarian principle just stated it follows that, for such obligations to be legitimately enforceable, they must be contracted by those subject to them. This principle requires universal consent for legitimate property rights.[12]

So long as we consider man's common right to land a positive in rem right, we are bound to require universal consent for individual and exclusive private property in land.

Not surprisingly, then, most have interpreted man's common right to be 'negatively' held. But still the question of first occupancy remains. Even if it could be shown that no previous occupancy has taken place, there is the difficulty of demonstrating how current possession creates the right of ownership.[13] There seems to be no

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[12]Hiller Steiner, "A Libertarian Quandary," Ethics 90 (1980): 257.

[13]Lawrence C. Becker, Property Rights, makes an important point when he reminds us: "it should be pointed out again that possession—even possession protected by social agreement or law—is to be sharply distinquished from the claim right to possess. If one has a claim right to possess a certain seat in a theatre, then others have a duty either to turn it over on demand or to forbear altogether from possessing it themselves. But your possession of an unreserved seat may be protected (as the legitimate exercise of a liberty), as long as you occupy it, without any recognition of a claim right to possession, or any of the other rights of ownership. It is proof of the existence of a claim right to possess, derived from the fact of first occupancy, with which one must be concerned. And that is a very difficult task." (p. 28) In other words, property rights in land are quite different than liberty

difficulty in arguing that possession grants certain (perhaps all) liberties of use: but liberties are not rights. So long as one is in control of or is using a site it surely is reasonable to think that in itself is sufficient prima facie justification for respecting the possession. But monopolizing large tracts of lands by force or blatantly misusing land through destructive activities, certainly go against the liberty of possession. Reasonable competitive enclosure of land may, however, be permitted, if the 'Lockean Proviso' is adherred to: "at least where there is enough, and as good left in common for others."[14]

These qualifications show how quickly other factors come into play when we look to justify property rights. The importance of seeing how one's duties toward the rest of mankind are influenced by possession of land cannot be forgotten. If one has the right to hold title to land, then others must have the duty to not interfere with that holding. Likewise, we have the duty not to interfere with other's holdings. But once again, we have not established

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to occupy vacant sites. It is always important to keep Hohfeld's classification in mind.

[14]John Locke, The Second Treatise, Book II, Chap. V, paragraph, 27, p. 306. Locke recognizes this essential limitation, while others tend to overlook its implications. See, C. B. Macpherson, The Political Theory of Possessive Individualism, pp. 194-262 for his analysis of the development of the right to 'unlimited acquisition'. We examine the 'Proviso' in the next section, "The Labor Theory of Acquisition," below, pp. 130-142.

any sound basis for our initial holdings, we have only spelled out the consequences of allowing private acquisition.

To consider some other problems that arise with the argument, we need only ask, 'What is the extent of physical occupancy?' In the past it has been imagined that whole continents could be claimed by mere discovery. Rousseau satirized this idea, and pointed to the reductio ad absurdum:

> On such a showing . . . the Catholic King need only take possession all at once, from his apartment, of the whole universe, merely making a subsequent reservation about what was already in the possession of other princes.[15]

We all have a foothold on the universe. How far should our rightful claim extend? What constitutes occupation? Who can exercise the claim? Are proxies permitted? What notice must be given? All these are inherent difficulties with the notion of acquisition by occupancy.

It is clear that some limitation must be placed upon the size of an acknowledged acquisition by occupancy, if the procedure is to make any sense at all. Limiting it to the size of the person would hardly satisfy most, unless they are just looking for a place to stand. Indeed it becomes evident that some consideration must be given to the purpose of the acquisition. Moreover it surely

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[15]Jean-Jacques Rousseau, The Social Contract, Bk. I Chap. ix, p. 21 in The Social Contract and Discourses, translated by G. D. H. Cole. (New York: E. P. Dutton, 1950).

makes no sense to allow unlimited acquisition for speculative or monopolistic purposes. The ultimate foundation for property rights is necessity. We require the use of land for all our activities. Sometimes extensive holdings are necessary for accomplishing specific tasks—i.e. farming, grazing, lumbering, etc. But to allow men to hold land out of use is completely unjustified. Afterall, the problem of just distribution of land stems from the fact that land is already a scarce element in the world. Why then, permit a condition of ownership to arise which will take more land out of use than is absolutely necessary? The need is to make land available. And since an unfortunate but stubborn fact of experience is that men often fail to fulfill their obligations and responsibilities, we must be especially careful to outline specific protective regulations for the possession and utilization of land and its resources.

Lawrence Becker formulates what he considers as the appropriate limits upon acquisition as follows:

> A reasonable position—and, I think, partly what lies behind the classic requirement that one occupy no more than one can use—is that the amount one can be said to appropriate with one's presence be determined by one's purpose in occupying the thing and one's carrying out of that purpose <u>at the time of occupation</u>.[16] (emphasis in original)

What he wants to emphasize is the need to distinquish between mere <u>presence</u> and actual <u>acquisition</u>. Just being

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[16]Becker, <u>Property Rights</u>, p. 26.

somewhere hardly can be considered sufficient grounds for asserting ownership, and so we are compelled to include some sort of intention as part of the process of acquisition. But, as we have already argued, the intention to acquire land in order to exclude others in itself cannot be considered an explanatory reason for ownership since that is what property rights entail. As we have seen in Honoré's analysis of the meaning of ownership and its various uses, though the right to possess is fundamental (whether it is understood as physical possession or merely metaphorical possession), some implicit purpose must lie behind the desire.[17] Otherwise, we reduce property rights to sheer greed. Also, Becker wants to limit acquisition by occupancy to a time framework, and this is intelligible because the first element involved in determining first or original occupancy is time. Hence, it makes sense to insist that this be part of the condition for holding the site. Afterall, since there has never been a time since the days of Adam when one could be absolutely sure that one's occupancy was unprecedented, then 'first occupancy' must be taken metaphorically, if at all. That this original purpose should be sufficient for claiming the site only until its completion seems likewise fair. Otherwise, we are effectively eliminating purpose as necessary. Of course, this stipulation does not preclude

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[17]A. M. Honoré, "Ownership," pp. 113-115.

the possibility of asserting a succession of purposes in order to prolong one's stay.

What these requirements effectively do is translate the notion of first occupancy into a form of the utilitarian and labor theories of ownership. Suppose, if only for argument's sake, we limit the purpose or utility of occupancy to esthetic enjoyment of a landscape, we are still granting the right to occupy the site on the basis of an activity which has a distinct purpose. Of course, we might weigh this purpose against others and decide that it does not yield sufficient results in order to be justified. But in so doing we obviously move away from the notion of occupancy and toward that of utility.

It should be clear by now that the argument from first occupancy really does not provide us with truly rational and independent grounds for acquisition of land. At most it may help to remind us that access to land is essential and that there is something to be said in favor of those occupying a given site, for whatever purpose, over those who just hold title or claims to land. The old phrase—'Possession is nine tenths of the law'—indicates at once how important possession has always been.[18] We can only

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[18]See, Richard A. Epstein, "Possession as the Root of Title," Georgia Law Review, 13 (1979): 1198-1243. Epstein points out that the leading case on first possession, Pierson v. Post, 2 Am. Dec. 264 (N.Y. 1886) fails to examine the fundamental philosophical question: "The large question—why is first possession sufficient to support a claim for ownership—received no consideration at

say that this argument provides us with some rather vague guides for settling disputes about particular claims, i.e. who actually needs the land presently. As a general justification for *in rem* rights, either positive or negative, however, it fails.

(2) The Argument from the Labor Theory of Property Acquisition

The labor theory of property acquisition is directly connected with the third criterion for justice: 'To each according to his work or contribution.' And as we have observed already, there does seem to be an intuitive recognition of the propriety of 'rendering every man his due' in proportion to the performance or productivity of individuals. However, such an intuition, though not unreasonable, is not adequate to establish the labor theory of property acquisition for a number of reasons. Aside from being vague, it does not really provide us with an unquestionable ground for property rights, especially property rights to land.

In order to explore these questions more fully, we shall look at the formulation of this theory in Locke's *Second Treatise*. His exposition is at once the most convenient and important one available. Others before and since have argued similarly, but John Locke's influence stands pre-eminent in the field of political philosophy

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all." (p. 1225)

just as his contemporary and friend, Isaac Newton, stands pre-eminent in natural philosophy or physics. We shall, therefore, follow his argument carefully and see where it leads us. But we shall not give any special attention to Locke himself, for that would take us too far astray.[19]

The argument properly begins by noting that the earth and its fruits were given by God in common to all men. There was no original segregation or allocation of the natural goods of life. And yet, necessity demands that even primitive man needs exclusive possession of at least a part of the bounty of nature for nourishment and support. Though the earth and its fruits, including inferior creatures, be given in common, there is one thing that is not common: that is, a man's person. "Every Man has a Property in his own Person. This no Body has any Right to but himself." This leads to the next point: everyone has the sole right to his own labor. "The Labour of his Body, and the Work of his Hands, we may say, are properly his." This leads to the idea that 'mixing' one's labour with nature creates property in things. "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned

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[19]On Locke, see Life, Liberty, and Property: Essays on Locke's Political Ideas, edited by Gordon J. Schochet (Belmont, Calif.: Wadsworth Publishing Co., 1971) and M. Seliger, The Liberal Politics of John Locke (New York: Praeger, 1969) as well as the two works mentioned in note 8, above.

to it something that is his own, and thereby makes it his Property." Not only is property created in this manner, but private property from which all others may be excluded is created. "It being by him removed from the common state Nature placed it in, hath by this labour somethings annexed to it, that excludes 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 . . ." The only reservation to this right is the 'Lockean Proviso' that: "at least where there is enough, and as good left in common for others."[20] This 'proviso' becomes crucial, as we shall see.

The argument takes only two paragraphs to complete. It is simple and straightforward. Few can deny that Locke makes his point clearly. Nevertheless there are a good number of problems with the argument; not least of which is, does it really prove what it intends? Does mixing one's labor with nature create property in those things? If so, what forms of labor are acceptable? Can one create property in ideas, for instance, by thought? It is necessary to conclude that the property rights created are negative in rem rights? What is the implication of the 'proviso'? These and other questions have been raised about the argument. Let us look at them in turn.

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[20]See, Locke, The Second Treatise, Book II, Chap. V, paragraphs, 26-27.

When Locke asserts that "every Man has a Property in his own Person", he is surely arguing that natural rights give man the right to integrity of person. This also implies that actions of a man's body insofar as they do not interfere with other men are rightfully free. It seems that without this sense of freedom, Locke's argument would have to stop before it is half finished. It is noteworthy to see that political liberty grounds economic liberty here, for if there is no freedom of action, then we can hardly say with Locke that, "the Labour of his Body, and the Work of his Hands . . . are properly his." Yet, can we say that the products or results of one's activities must also belong to us? This is a bigger step than is logically demanded. There are many things which we do which in so doing we lose our control over.[21] Speech is an obvious example. Our words are no longer only our own once they are uttered. Or, a step further, a letter we write belongs to the recipient, even for copyright purposes. What about gifts and promises and so on? These too are activities that one may perform but not fully possess: they all create in personam rights and duties.

Others have also pointed out that bearing children certainly is an activity involving the labour of his body which does not result in property rights over one's children.

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[21] Robert Nozick, Anarchy, State, and Utopia, pp. 174-5 gives a number of examples.

(Even though the Romans, and others, thought it did.) Locke himself would not have accepted this consequence.[22] But we can save the argument once we allow that certain rights and duties can conflict. Locke is not saying that the only consequence of labor is property rights. Political liberty is fundamental to his as well as to our way of thinking. Therefore, he would not allow property to destroy liberty. In fact in the First Treatise of Government he is explicitly concerned to counter Filmer's royalist position. He asks:

> And how will it appear, that Property in Land gives a Man Power over the Life of another? Or how will the Possession even of the whole Earth, give anyone a Sovereign Arbitrary Authority over the Persons of Men?[23]

If property rights in land cannot give one the right to suppress freedom or establish absolute rule over men, then surely parentage, or the fruits of one's labor, cannot do so either.

Since the right to property is the consequence of the exercise of one's personal liberty to act, property rights cannot be superior to personal liberty. It is evident

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[22]Indeed, his opposition to Filmer's Patriarcha is based upon Locke's abhorence of the paternalism and extreme monarchism of Filmer's position. Even a cursory reading of the First Treatise would show the importance of liberty for Locke.

[23]Locke, The First Treatise, Book I, Chap. IV, paragraph 41,

that 'labor' means all possible and just activities for Locke. Otherwise, theft would be an acceptable way of creating one's property. Here we see one of the limitations of the labor theory of property acquisition. It depends on an idea of liberty which dovetails with that which forms the basis of the argument from political liberty. Is labor primary or is liberty? In a certain sense they are complementary notions: labor demands liberty, while liberty is meaningful through labor. So long as our premiss is that personal liberty (or the integrity of one's own person) generates the right to the fruits of our labor, we cannot accept an interpretation which would cancel out the equal right of another to similar integrity or liberty on the basis that parents produce children through their own labor. Too often it is forgotten that the concept of mankind entails future generations, and, therefore, any interpretation of natural rights which favors one generation over another must be rejected.

But the most crucial aspect of the theory lies in the idea that by 'mixing' one's labor, or bodily activities, with things, those things are transformed into personal property.[24] As we have seen this is not at all self-evident.

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[24]Samuel C. Wheeler III, "Natural Property Rights as Body Rights," NOUS, 14 (1980): 171-193 argues that "if we have natural moral rights to move and use our bodies, then there are natural moral rights to property as well. It is also argued that there is no upper bound on the amount of property a person can have a natural right to by

Brushing aside any questions about the particular metaphor embedded in the term 'mixing', it is not necessary to conclude that through handling or fabricating, property rights arise. Perhaps they are exercised; but that does not mean that they come into existence. Locke himself indicates that he realizes the limitations of his assertions. He argues that the same law of nature which permits appropriation also fixes the limits of individual property:

> But, how far has he given it us? To enjoy. As much as anyone can make use of to any advantage of life before it spoils; so much may he by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others.[25]

Furthermore, Locke makes the point that "Nothing was made by God for Man to spoil or destroy." In other words, he assumes that appropriation will be for useful purposes, not merely for speculative gain or idle amusement. His theory contains the seeds of the utilitarian theory, as John Stuart Mill was to discover.

The next stage in his argument is the most important,

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this derivation. The fourth section of the paper argues that the antecedent of the conditional is true--that we do have a natural right to move and use our bodies." (p. 171) Wheeler pushes the argument of the labor theory of property to the furthest extreme, but he is still unable to show that bodily movements actually create rights. At the most, we can only say that natural rights to personal integrity protect bodily movements from interference. Wheeler is answered by David Braybrooke, "Our Natural Bodies, Our Social Rights: Comments on Wheeler," NOUS, 14 (1980): 195-202.

[25]Locke, The Second Treatise, Book II, Chap. V, 'Of Property,' paragraph, 31.

at least for our attention. In it Locke endeavors to apply the labor theory to the acquisition of land. He is quite aware of the significance of this aspect of the argument.

> But the chief matter of Property being now not the Fruits of the Earth, and the Beasts that subsist on it, but the Earth itself; as that which takes in and carries with it all the rest: I think it is plain, that Property in that too is acquired as the former. As much land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common.[26]

Whether Locke honestly thought that 'it is plain' that property in land is created through the application of labor to the soil, we will never know. But we, along with many others, certainly cannot see the undeniable truth of his assertion. There is an enormous difference between owning the earth and owning the fruits of the earth, and no mere assertion—however confident—can satisfy the need for demonstrating entitlement to the soil.[27]

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[26]Ibid., paragraph, 32.

[27]Herbert Spencer noted the illogical move from arguing that men have the right to the fruits of their labor to asserting that they also have the right to the earth itself. In an imaginary dialogue, he notes, "Still you have not shown why such a process makes the portion of earth you have so modified yours. What is it that you have done? You have turned over the soil to a few inches in depth with a spade or a plow; you have scattered over this prepared surface a few seeds; and you have gathered the fruits which the sun, rain, and air helped the soil to produce. Just tell me, if you please, by what magic have these acts made you sole owner of that vast mass of matter, having for its base the surface of your estate, and for its apex the center of the globe? all of which it appear you would monopolize to yourself and your decendants forever." Social Statics, First Edition

Of course, it must be admitted that Locke is speaking about a time in history (or theoretical history) when the earth had not been fully enclosed. Hence, his important 'Proviso' still holds:

> Nor was this appropriation of any parcel of Land, by improving it, any prejudice to any other Man, since there was still enough and as good left; and more than the yet unprovided could use. So that in effect, there was never the less left for others because of his inclosure for himself. For he that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injured by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the Case of Land and Water, where there is enough of both, is perfectly the same.[28]

Unfortunately, the 'Proviso' is forgotten as Locke brings us up to modern times. The State of Nature gave way to sovereign states wherein a social compact guaranteed individual property rights.

(New York: D. Appleton and Co., 1850), Chap. IX, section 4. Further, Spencer observes, "It may be quite true that the labor a man expends in catching or gathering, gives him a better right to the thing caught or gathered, than any one other man; but the question at issue is, whether by labor so expended, he has made his right to the thing caught or gathered, greater than the preexisting rights all other men put together. And unless he can prove that he had done this, his title to possession cannot be admitted as a matter of right, but can be conceded only on the ground of convenience." (Chap. X, section 1) Spencer changed his views later, but offered no explanation for the change. See, Henry George, A Perplexed Philosopher (New York: Robert Schalkenback Foundation, 1965) for an examination of his inconsistency.

[28] Locke, The Second Treatise, Book II, Chap., V, paragraph 33.

> Thus Labour, in the Beginning, gave a Right of Property, wherever anyone was pleased to imploy it, upon what was common, which remained a long while, the far greater part, and is yet more than Mankind makes use of. Men, at first, for the most part, contented themselves with what un-assisted Nature offered to their Necessities: and though afterwards, in some parts of the World, (where the Increase of People and Stock, with the Use of Money) had made Land scarce, and so of some Value, the several Communities settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, by Compact and Agreement, settled the Property which Labour and Industry began; and the Leagues that have been made between several States and Kingdoms, either expressly or tacitly dosowning all Claim and Right to the Land in the others Possession, have, by common Consent, given up their Pretences to their natural common Right, which originally they had to those Countries, and so have, by positive agreement, settled a Property amongst themselves, in distinct Parts and parcels of the Earth: yet there still great Tracts of Ground to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) lie waste, and are more than the People who dwell on it, do, or can make use of, and so still lie in common. Tho' this can scarce happen amongst that part of Mankind, that have consented to the Use of Money.[29]

Clearly Locke imagines that consent may surplant labor as the basis for the distribution of property rights. And what does this, then, reveal about his theory? One thing seems certain: Locke is more concerned with protecting the status quo than providing us with independent grounds for property rights in land. He passes so quickly from

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[29]Ibid., paragraph 45.

the notion that labor gives a man the right to the fruits of his labor to the notion that distribution of land—either by labor initially or by consent latterly—is a matter of the same dimension and character that it is hard to believe he really thought the issue out carefully.[30]

John Stuart Mill was one who objected to this move:

> The essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence, this principle cannot apply to what is not the produce of labor, the raw material of the earth. If the land derived its productive power wholly from nature, and not at all from industry or if there were any means of discriminating what is derived from

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[30]Jeremy Waldron, "Enough and as Good Left for Others," The Philosophical Quarterly 29 (1979): 319-328 tries to argue that Locke did not, despite the unanimous opinion of commentators, believe that the 'Proviso' was to be taken literally but only provisionally. "If the 'enough and as good' clause were a necessary condition of appropriation, it would follow that in a situation of extreme scarcity the only legitimate course for the inhabitants would be death by the starvation and exposure of them all (distribution by consent being ruled out practically and ex hypothesi), since no appropriation would leave enough and as good in common for the others." (p. 325) He quotes a passage from the First Treatise, "As Justice gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise" Book I, paragraph 42 to demonstrate that, nevertheless, Locke did not defend "unmitigated capitalist accumulation." (p. 326) However, Waldron misses an important point: charity cannot replace justice as the primary moral virtue. An instructive story is told by Hannah Arendt about Pope John XXIII, who, when he discovered that many Vatican employees were poorly paid, ordered that they be given raises. "When later told that the new expenses could be met only by cutting down on charities, he remained unperturbed: 'Then we'll have to cut them. For . . . justice comes before charity.'" Men in Dark Times (New York: Harcourt Brace Jovanovich, 1968), p. 66.

> each source, it not only would not be necessary, but it would be the height of injustice, to let the gift of nature be engrossed by individuals.[31]

Mill argues for security of tenure, however, since this is necessary if men are to reap what they have sown. But he goes to an unnecessary extreme when he suggests that this security should be perpetual.

> The fruits of some industry cannot be reaped in a short period. The labour and outlay are immediate, the benefit is spread over many years, perhaps over all future time. A holder will not incur this labour and outlay when strangers and not himself will be benefited by it. If he undertakes such improvements, he must have a sufficient period before him in which to profit by them; and he is in no way so sure of having always a sufficient period as when his tenure is perpetual.[32]

One might expect Mill to seek lifetime security but not perpetual security! His line of reasoning indicates vividly how easy it is for exaggerated claims to enter into discussion of land ownership. Even though he rejects Locke's argument for the labor theory of property rights in land, he concludes his position with a demand that would in fact create the very same rights. As we saw in our examination of Honoré's exposition of the liberal theory of ownership, 'unlimited' duration (perpétuité) is one of the prime characteristics of the most liberal forms of ownership. If it is present, then the owner clearly has

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[31] Mill, Principles of Political Economy, p. 227.

[32] Ibid., p. 227.

rights of property of the most extensive sort.[33]

Lawrence Becker has succinctly summarized the difficulties of the labor theory of acquisition, even when it is acknowledged that labor deserves some reward (compensation) for its efforts or contribution:

> Perhaps in some cases what laborers deserve is property in the thing labored on; in other cases property in some sort of fee for the labor; and in still other cases, not property at all but simply the recognition, admiration, or gratitude of other people.[34]

But in no case does it seem logical or sensible to grant property rights in land when none of the criteria of justice requires it. In fact, the first criteria 'To each the same thing' would preclude vesting any one individual with special property rights in land since all cannot possibly share such rights. Hence, while the third criteria 'To each according to his work or contribution' encourages giving the laborer his fair share of the proceeds of production, it does not demand that the primary means of production (land) be alienated from the rest of society through private, exclusive ownership of the classic liberal sort.

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[33]John W. Van Boren, "Redistributing Wealth by Curtailing Inheritance: The Community Interest in the Rule Against Perpetuities and the Estate Tax," Florida State University Law Review 3 (1975): 33-63 discusses the effects of current loopholes in the Rule Against Perpetuities and how they tend to promote concentrations of wealth in the hands of a few families.

[34]Becker, Property Rights, p. 47.

(3) The Argument from Social and Economic Utility

The utilitarian argument for private ownership of land takes two forms: (1) social utility (maximization of the greatest good for the greatest number demands that each individual be given the opportunity to acquire at the very least the material goods that make for human happiness; (2) economic utility (maximization of efficiency, productivity, and quality) demands that individuals have control over the means of production and that the 'free market forces' be allowed to promote economic welfare.[35] The first form of the argument dovetails into the second, but it is distinct insofar as it stresses a broader conception of utility than pure economic welfare. Both emphasize results more than methods and it is easy to see how the utilitarian goals of social and economic welfare can be urged by capitalists as well as by socialists.[36] There is

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[35]Milton Friedman is probably the most widely known 'free market' advocate in economics. He writes "in the complex enterprise and money-exchange economy, co-operation is strictly individual and voluntary provided: (a) that enterprises are private, so that the ultimate contracting parties are individuals and (b) that individuals are effectively free to enter or not to enter into any particular exchange, so that every transaction is strictly voluntary." Capitalism and Freedom (Chicago: University of Chicago, 1962), p. 14. Unfortunately, Friedman never spells out what form of property rights will assure that "individuals are effectively free to enter or not to enter into any particular exchange."

[36]See, Bruce A. Ackerman, ed., Economic Foundations of Property Law, (Bostor: Little Brown, 1975) for opposing views.

no intuitive connection between social or economic utility and one form of property rights. One must demonstrate how and why a particular form of property rights will promote the two better than any other form. And this, of course, is hard to do.

Perhaps more than either the argument from first occupancy or the argument from the labor theory of acquisition, the argument from utility is based on a conception of human nature and an ideal of human happiness that cannot be forgotten. In this regard, the argument is similar to the argument from political liberty. The fundamental goal of property rights according to utilitarians is human flourishing. Whether we wish to measure such flourishing in qualitative (social) or quantitative (economic) terms, the fact remains that property is viewed as a means and not as an end. In and of themselves, property rights are neutral: the sanctity of private property comes from a notion of social or economic utility and not vice-versa. The need for certain human goods and services—food, clothing, shelter—generates the need for some arrangement of property rights but not necessarily private property rights. They must be based on further evidence and argument.

Since all human beings are individuals, certain of the utilitarians argue that respect for individuality requires individual, private property. Moreover, since it is presumed that individuals best know how to pursue their own

interests, private property advances the freedom to do so because it protects against undue pressure or interference from others. Thus the liberal conception of property historically has presumed that the relationships among individuals are adversarial, if not entirely acrimonious, and has imagined that property rights arise in fundamentally competitive circumstances. Its guiding notion is exclusivity—negative *in rem* rights. This individualistic ontology is also present in the labor and first occupancy arguments, for both seek to uphold individual *in rem* property rights against society as a whole.

Yet utilitarians also recognize man's social character. The good of the whole is as least as important as the rights of individuals. The challenge is to provide for individual autonomy and happiness while maximizing social harmony and prosperity. The theoretical, not to mention the practical, difficulties of this goal are considerable. An adaquate utilitarian form of property rights must balance the claims of individual autonomy against those of social harmony. Certainly the full liberal conception of ownership leans far too heavily on the side of individual rights and neglects too hastily the legitimacy of social responsibility.

Many seek to avoid the conflicting interests of individuals and society by stressing the purely economic aspects of utility. If greater and better productivity is what we are after, so the argument goes, then we must allocate property rights to those who will best use their

advantages.[37] As Mill puts it:

> These are the reasons which form the justification in an economical point of view, of property in land. It is seen that they are only valid, in so far as the proprietor of land is its improver. Whenever, in any country, the proprietor, generally speaking, ceases to be the improver, political economy has nothing to say in defense of landed property, as there established. In no sound theory of private property was it ever contemplated that the proprietor of land should be merely a sinecurist quartered on it.[38]

Unfortunately, while this position has much merit, it does not anticipate several trouble spots. Without some means to determine the qualitative (social) as well as the quantitative (economic) benefits derived from a particular distribution, it is possible that concentrated holdings of land and the resources for production might be encouraged because of apparent (or real) advantages of large scale production. And though this may be in the interests of economic utility, it may well be against the interests of

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[37]Richard Posner, Economic Analysis of Law (Boston: Little, Brown and Co., 1973), pp. 10-15 advocates the strict utilitarian concept of private ownership of land: "If every piece of land is owned by someone, in the sense that there is always an individual who can exclude all others from access to any given area, then individuals will endeavor by cultivation or other improvements to maximize the value of land." He does, however, recognize that there must be some method or incentive whereby the most efficient entreprenuers have access to the best sites. In other words, land must be put to its 'highest and best-use.' We shall discuss this problem in the next chapter on "Site Value Taxation."

[38]Mill, Principles of Political Economy, p. 228.

social utility.[39]

One of the most beneficial results of a just system of property rights should be full employment. A society which finds itself unable or unwilling to give every man the opportunity to support himself and family can hardly be said to be maximizing social welfare. Even if it provides all the goods and services necessary for human comfort and convenience to each of its members, unless all have the opportunity to contribute to society through some form of socially useful work, the social fabric will slowly unwind. As we have already noted, part of the fundamental makeup of every individual is the need to work, to create, to be useful. And as the labor theory of property rewards the exercise of that need, so the utilitarian theory must recognize the importance of labor in the life of the community. Sheer efficiency is not an adequate justification for a particular form of rights to property, for such rights will affect the social and political orders according to the degree of distribution, and thus they must take both social, as well as, economic utility into consideration to be just. As Frank Michelman says:

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[39]Alan H. Goldman, "Business Ethics: Profits, Utilities, and Moral Rights," Philosophy & Public Affairs 9 (1980): 260-286 argues that managers (as well as owners) have fundamental moral responsibilities which cannot be overridden by business or economic responsibilities. It is not possible, in other words, to vest an individual with certain property rights or responsibilities which contradict his primary moral responsibilities.

> We cannot stand on the assumption that efficiency is the only goal. Few people any longer doubt that governments are properly engaged in controlling the distribution and income among members of society, as well as in controlling resource use so as to maximize the aggregate social product.[40]

Additionally, utilitarian formulae for distributive measures lack substantive criteria which may be judged on the basis of established rights and duties. These remain intuitive, and hence indemonstrable, from an utilitarian perspective. John Rawls has summed up the difficulty in the following words:

> If, then, we believe that as a matter of principle each member of society has an inviolability founded on justice which even the welfare of everyone else cannot over-ride, and that a loss of freedom for some is not made right by a greater sum of satisfactions enjoyed by many, we shall have to look for another account of the principles of justice.[41]

It should be clear by now that the justification of the liberal conception of property rights, and most especially rights in land, cannot be sustained by arguments from either social or economic utility.

(4) The Argument from Political Liberty

Certainly everyone recognizes that property rights at

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[40]Frank I. Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation Law,' in Ackerman, ed., Economic Foundations of Property Law, p. 109.

[41]John Rawls, "Distributive Justice," in Peter Laslett and W. G. Runciman, eds., Philosophy, Politics and Society, 3rd. Series (New York: Barnes & Noble, 1967), p. 59.

once condition and reflect the degree of liberty that a given society possesses. From a liberal perspective, it is practically impossible to separate property from freedom. Indeed property rights may be considered the bulwark against interference with individual liberties. Certainly, the ancient adage of the Common Law—'A man's home is his castle'—indicates the direct connection that exists between property and privacy, perhaps the most important political liberty.[42]

But if there is freedom _from_ (or negative liberty), there is also freedom _for_ (or positive liberty) which needs protection.[43] And property is undoubtedly valued as much for the freedom _for_ doing as one likes that it grants as for the freedom _from_ interference that it protects. Security is essential; but prosperity comes next in priority. The rights to use, manage, draw income from, etc. that the

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[42]See, Ernest Van Den Haag, "On Privacy," pp. 149-168 in _Privacy: NOMOS XIII_, edited by J. Roland Pennock and John W. Chapman, (New York: Atherton Press, 1971). Haag argues: "Privacy is best treated as a property right. Property grants an owner the exclusive right to dispose of what he owns. Privacy is exclusive right to dispose of access to one's proper (private) domain. The _genus_ is the same; the _differentia_ lies in the origin and nature of what is owned." (pp. 150-1)

[43]The now classic essay by Sir Isaiah Berlin, "Two Concepts of Liberty," in _Four Essays on Liberty_ (Oxford University Press), pp. 118-172 develops these notions interestingly from the perspective of traditional liberalism. There are problems in his exposition, however. See, Charles Taylor, "What's Wrong with Negative Liberty," pp. 175-193 in _The Idea of Freedom: Essays in Honor of Isaiah Berlin_, edited by Alan Ryan (Oxford: Oxford University Press, 1979).

liberal concept of ownership embodies makes owning property attractive. However, the advocacy of the liberty to do as one likes is connected to a particular conception of human freedom and the importance of the individual.

As with all political philosophies, the notion of individualism becomes a key factor in determining the potential arrangement of property rights. Indeed, sometimes it is hard to separate the argument from political liberty from the argument from personality since what is thought to be man's personality (his true individuality) will necessarily influence what political ideals are sought. Extreme individualists seek private property rights as matters of political and personal liberty. On the other hand, those who emphasize man's social nature view private property rights as being of much less importance.

As we have already seen with Locke, the distribution of private property in land is often deemed essential in order to protect individuals from the state. And yet the paradox remains: it is only through the explicit or implicit acceptance of particular arrangements and rights of property that an individual can maintain his holdings. This is what the state guarantees. It is fine to talk about the natural right to property, but the argument from political liberty reminds us that unless society permits a particular form or system of property rights, it will not exist. When Rousseau in his Discourse on Inequality wrote:

> The first man who, having enclosed a piece of ground, bethought himself of saying 'This is mine,' and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars, and murder, from how many horrors and misfortunes might not anyone have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows: 'Beware of listening to this imposter; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.'[44]

he was not merely satirizing the notion of private property; he was also illustrating in his own inimitable fashion the need for a social contract—whether expressed or not—in order for there to be any system of property rights.

Once more we are faced with the perplexing problem: how do we advance liberty without promoting injustice? As Rousseau himself saw, we are not able to live without some property rights, including property rights in land.

> What, then, is to be done? Must societies be totally abolished? Must meum and teum be annihilated, and must we return again to the forests to live among bears? This is a deduction in the manner of my adversaries, which I would as soon anticipate as let them the shame of drawing.[45]

And yet he was unable to formulate with any precision what form or system of property rights could we live with and not lose our freedom in so doing. If political liberty is a ground for property, then unless the particular type

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[44]Rousseau, A Discourse on the Origin of Inequality, Part II, pp. 234-235 in The Social Contract and Discourses.

[45]Ibid., Appendex, p. 281

of land tenure insures all equal access, some will enjoy privileges that others are denied.

(5) The Argument from Personality or Moral Development

As man's freedom and dignity stem from the possession of a free will, so too the right to property has been argued for on the basis of the expression of the human will or personality. This argument is found most fully in Hegel, but it—like many other aspects of his thought—has antecedents in Kant. We shall consider both of their positions briefly. The argument also is connected with an ideal of moral development which transcends the utilitarian notion of good. Basically, it relies on the perception that some individuals' appreciation of things is greater or more refined than others', and hence those who know best how to value property—esthetically and morally—deserve rights to property above and beyond what the ordinary person merits.

Stated so baldly, the argument may seem to have little merit, but it is, nevertheless, widely used. Nor can it be derived entirely from any of the previous arguments we have considered so far. It is hard to see how we can avoid taking into consideration the question of moral benefit when deciding principles of distributive justice. After all, if we are concerned that proper care be taken, we must be as concerned with who is given the responsibility to take care and whether they will appreciate their position.

Thus the argument from personality depends upon a notion of will whose freedom is expressed in and through possession. In this sense, the argument is allied with the argument from first occupancy, for the underlying assumption is that the thing in question has not already been alienated by another. Kant argues that the original commonality of land implies the possibility that portions of it may rightfully become private property.

> Purely physical possession (detention) of land already constitutes a right in a thing, although it is obviously not sufficient for considering the land mine. In relation to others, this possession is (as far as one knows) a first possession and as such is consistent with the law of external freedom and is, at the same time, implied in the original community of possession, which, in turn, implies the a priori ground of the possibility of private possession.[46]

Mere occupancy, Kant is at pains to demonstrate, is not the essential characteristic of possession or ownership: it is the exercise of one's own will which grounds property.

> Thus I can say: I possess a field even though it is located at a place completely different from the one in which I now actually find myself. For we are concerned here only with an intellectual relationship to the object, namely, so far as it is subject to my authority (the concept of possession as a concept of the understanding, which is independent of spatial determination); and it is mine /my property/ because my Will to use the object as I please does

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[46] Immanuel Kant, The Metaphysical Elements of Justice, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), p. 59.

> not conflict with the law of external freedom.[47]

This takes us back to 'The Juridical Postulate of Practical Reason' which asserts categorically: "it is possible to have any and every external object of my will as my property. In other words, a maxim according to which, if it were made into a law, an object of will would have to be in itself (objectively) ownerless/herrenlos/(res nullius) conflicts with Law and Justice."[48]

Kant finds it inconceivable to postulate free will if the will is incapable of making the external world its own. Property is a necessity for personality to express itself. But Kant does not seem to appreciate the difficulties of his position.[49] With Hegel we see how developed the personality theory can become.

Hegel's discussion of property is best found in the beginning of the Philosophy of Right. He wishes to show how 'Abstract Right' is objectified through the action of persons. Only person have rights, for only they have free will.

> A person has as his substantive end the right of putting his will into any and everything and thereby making it his, it has no such end in itself and derives

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[47]Ibid., pp. 61-62.

[48]Ibid., p. 52.

[49]See Becker, Property Rights, pp. 28-29.

> its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'.[50]

Following Kant, he argues that first possession is a self-evident explanation of ownership, but that it is necessary to actually occupy the thing in question. This may be done in one of three ways: grasping, manufacturing, or marking the thing. Through possession, the thing takes on a new character when it is put to use. But partial or temporary use is not to be confused with ownership which is permanent and complete. In addition, property may be alienated, and this gives rise to contract in society.[51]

Property is, hence, viewed as freedom because it is the first actualization of the free will in objectivity. It is not primarily a means for the attainment of an end, but rather in the strict Hegelian sense it is the precondition for all other freedoms in the objective world which are in themselves manifestations of will.

> Therefore, those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is

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[50] G. W. F. Hegel, Philosophy of Right, trans. T. M. Knox (Oxford: Clarendon Press, 1965), Paragraph 44, p. 41.

[51] For an outline of Hegel's line of thought, see Peter G. Stillman, "Person, Property, and Civil Society in the Philosophy of Right," pp. 103-117 in Hegel's Social and Political Thought, edited by Donald Phillip Verene (New Jersey: Humanities Press, 1980)

> imprescriptible. Such characteristics are my personality as such, my universal freedom of will, my ethical life, my religion.[52]

Property becomes the essential condition for morality. Without property, i.e. without the locus for the independence of the individual will, there can be no responsible action. In the same light, the individual must go beyond being a mere property-owner.

> The rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason. Even if my freedom is here realized first of all in an external thing, and so falsely realized, nevertheless, abstract personality in its immediacy can have no other embodiment save characterized by immediacy.[53]

Perhaps not surprisingly, equality of property is not important in Hegel's eyes, for what matters is that everyone possess some property to express his or her personality, not that everyone possess the same amount of property. "What and how much I possess, therefore, is a matter of indifference so far as rights are concerned."[54] Surely this misses the point, for the amount one owns does not change one's fundamental nature, but it can certainly affect one's practical possibilities. When Hegel adds:

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[52]Hegel, Philosophy of Right, Paragraph 66, pp. 52-53.

[53]Ibid., Addition 24 (to Paragraph 41), pp. 235-236.

[54]Ibid., Paragraph 49, p. 44.

> The demand sometimes made for an equal division of land, and other available resources too, is an intellectualism all the more empty and superficial in that at the heart of particular differences there lies not only the external contingency of nature but also the whole compass of mind, endlessly particularized and differentiated, and the rationality of mind developed into an organism.[55]

Is it too extreme to read in this statement the idea that some deserve more property, and here he speaks directly of land, because of superior merit? It seems not. We can see how Hegel's views can be used to justify inequality, if that inequality is supposed to promote the moral development of the privileged.

In the past property has often been associated with virtue. Aristotle felt that temperance and liberality required private ownership. And there is a long history of tracts seeking to show that special merit or worthiness grounds the unequal distribution of wealth in the world. We cannot begin to examine this idea, but we must at least recall it is one thing to bestow special honors or privileges upon a person because of his achievement, but it is quite another to limit or penalize others in order to do so. George Santayana has best stated the aristocratic ideal. He observed:

> An aristocratic regimen can only be justified by radiating benefit and

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[55] Ibid., Paragraph 49A, p. 44. Knox notes that Hegel apparently is referring to the Moravians and Anabaptists.

> by proving that were less given to those above, less would be attained by those beneath them.[56]

Perhaps the most important moral trait for property owners is conscientious care. The earth is too precious and too small to allow those who are not willing to look after it to enjoy exclusive *in rem* rights in land. It is the common heritage of mankind and there is a moral responsibility, not just an economic opportunity, contained within the right to property. We shall turn to this aspect of ownership next.

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[56]Quoted by Rawls, "Distributive Justice," p. 79.