AN INQUIRY INTO
THE CONCEPT OF PROPERTY.

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INTRODUCTION
The Genesis and Scope of the Inquiry

Although in recent years there has been renewed interest in the notion of property, it is apparent that discussions regarding the concepts of property and ownership — concepts which we may for the moment conveniently take together — have had little impact on either contemporary commerce or theories of distributive welfare. Some have claimed that it is even misguided to analyse property and property rights because the notion of property is too fragmented to allow for a general theory.

My original intention was to attempt to vindicate the idea of property, or more particularly of private property, arguing that legitimately acquired private property could be represented as a set of fixed points that limits the morally permissible scope of the public welfare or other redistributive policies of government — a view within a tradition that has been defended most notably in recent times by Robert Nozick in "Anarchy, State and Utopia".¹

¹ Although it may be said that "property" is anything to which value attaches and endures, whereas "ownership" is the placement of these features with a particular person (or persons). F.A.Harper "Property and its Primary Form" in S.L.Blumenfeld (Ed.) "Property in a Humane Economy" (Open Court, Lasalle, Illinois, 1974) pp.17-18.

¹ R.Nozick "Anarchy, State and Utopia" (Basic Books, 1974)
However, it became increasingly apparent that the concept of property itself is even more slippery than commonly supposed, so much so that the task of vindication as I had originally understood it seemed not only daunting but impossible.

I had intended to explore the traditional philosophical problem of property, that is, to analyse and evaluate various justifications for the right to private property, which have ranged through the utilitarian, to do with efficient use of resources; the psychological, such as the supposed human need for unique external attachments; the religious, including Old Testament and other supposed scriptual mandates for private property; and the most famous of all, namely, that associated with Locke, which itself includes elements of utilitarian, religious, psychological and even, arguably, independent and additional moral desert justifications. What all these purported justifications have in common is that they assert our right to private property is ultimately grounded in something natural, in a broad sense of the term; in other words, that our right to private property (though not all would be comfortable with the language of rights) has a basis which is "pre-legal". That is to say, private property is not ultimately a creature of law as Thomas Hobbes¹ most famously maintained, but is something which is intelligible

and defensible in abstraction from the particularities of any legal system, or of law in general. It is natural in the sense in which the natural is contrasted with the artificial, positive law being an artefact, or human creation, and thus artificial.

Yet what I discovered was that although the concept of property appears to be fundamentally involved in our ordinary life and speech, (I say "appears" for good reason, as will be clear below), and that various usages of the term "property" are found in law, jurisprudence and in economics, as well as in popular speech, little analysis had been done on the concept itself. Further, limited analysis appears to have been done on the clearly jurisprudential problem of whether the modern regulatory State has eroded private property rights, although we still talk of "property."

In my discussion of the concept of property I will be dealing, therefore, primarily with the question of what calling something my private property really implies. In other words, what is property? I will be looking at the justification of private property only insofar as this analytical inquiry requires such a venture.

Discussions of property typically begin with a consideration of property in a political/legal State or organised society
with a legal system. A useful starting point for such a discussion may be the following definition of property, tentatively proposed by Charles Donahue: "Property may be said to be the law of the relation of persons to things". However, as Donahue himself has pointed out, this, like many sweeping definitions falls short of being wholly satisfactory, although any study of property must at least involve a general study of the rights of people, moral and/or legal in relation to things in the broadest sense.

The variety of conclusions reached in discussions regarding the nature of property — of whether property can be seen as things that are owned by persons or as consisting of various rights which constitute ownership — reflects the current divergent views on the concept of property. The concept has, in an analytical sense, become the very locus of the problem of property both legally and morally.

It would seem appropriate, then, to assume that one can only find the true sense in which property can be defined through an examination of its natural characteristics.

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5 Ibid.

6 See for example R.L.Rariden "The Right to Property" (University Microfilms International, Ann Arbor, Michigan, USA, 1985.)
Property has been central to Western law, as much of the legal systems have been taken up with the protection of property, resolving conflicts about property, and securing its orderly exchange and redistribution, while the concept of property has also been "central in the development of European society" in the sense that it has been a principal force in social and political thought, and a building block of a significant number of political theories. In addition, concerns about property underlie every aspect of economic affairs as economics, by definition, deals with all things that are desired and, arguably, scarce. It deals, therefore, with all things that are of worth and all its associated phenomena in society. Every item of property must be owned by someone (or group) and "value cannot exist without an owner"- it is because we value things that we acquire them as property.

As Harper claims, it is difficult therefore to understand why, despite furious and bloody quarrels about who owns what, the concept of property has been so much (until perhaps more

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F.A.Harper "Property and its Primary Form" in S.L.Blumenfeld (Ed.) "Property in a Humane Economy" (Open Court, LaSalle, Illinois, 1974) p.6
recent times') ignored throughout the history of philosophic and economic thought. Similarly, Grunebaum argues that little attempt appears to have been made to discover the necessary internal structure of the concept of property and the possible range of property rights that are common in the many forms of property, and how the different forms of property can be classified to facilitate comparison with one another. Property underlies, arguably, every aspect of human liberty, because it is only by depriving us of ownership of things "that it makes it possible for one person to trespass upon the liberty of another." The right to private property can be seen as a particular application of the general right to freedom, while the acquisition and disposition of proprietal interests are manifestations of the economic dimension of freedom. For example, as Mill maintained, property exemplifies freedom and one must have freedom to appropriate and dispose of things as one sees fit, or as Hegel argued, property is necessary not because it helps to satisfy human needs, but because a person must translate his freedom into an external sphere in order that

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he must realise his ideal existence,\textsuperscript{11} - property is the first embodiment of freedom and so is itself a substantial end.

Although the concept of property appears to have been neglected, the idea of property has certainly loomed large in history, being entrenched in various forms; as stated in the French declaration of 1789, translated by Thomas Paine as the "Rights of Man" XVII: "The right to property being inviolable and sacred, no-one ought to be deprived of it, except in cases of evident public necessity, legally ascertained and on condition of a previous just indemnity."\textsuperscript{13} The United Nations Universal Declaration of Human Rights in 1948 also included the right to property — that everyone has the right to own property alone as well as in association with others (Article 17) and that no-one shall be arbitrarily deprived of his property (Article 17(2)).\textsuperscript{14}

Yet what is meant by the term "property" and what defines "ownership"? To what does "property" refer, and can we give

\textsuperscript{11} G.W.F. Hegel "The Philosophy of Right" (Oxford: Clarendon Press, 1941 ed.)

\textsuperscript{13} T. Paine "The Rights of Man" (1791) reprinted E.K. Bramsted and K.J. Melhuish (Ed.) "Western Liberalism"(Longman, 1978)

\textsuperscript{14} Although the UNESCO Committee of Experts reporting on Human Rights in 1949 limited the fundamental rights of property to what is "necessary for (man's) personal use and the use of his family: no other form of property is itself a fundamental right".
an adequate non-stipulative definition of "property"? These are not just verbal quibbles. Confusion appears to be prevalent over the nature of property itself. For example, property may be concerned with the right to call upon an organised society to prevent unauthorised persons from enjoying certain commodities. However, the specific rights or titles which are protected by this appear to be viewed differently by jurists, philosophers, historians and sociologists.

At the outset I wish to point out that there are several approaches one may take to property, but it is clear that any discussion or analysis must be precise in its definition of property. I highlight this point due to my concern with the manner in which many analysts, including philosophers, appear to have generated a running confusion. As Lloyd argues, the use of the word "property" has introduced some confusion and it is "necessary to distinguish between the right of ownership and the subject matter of that right". A review of the literature suggests they have under-estimated the need for conceptual clarification of property and ownership. Particularly notable is the extent to which analytical and

15 See P.Hollowell (Ed.) "Property and Social Relations" (Heinemann, London, 1982).

justificatory issues have been intertwined,\textsuperscript{17} often not being clearly distinguished, let alone dealt with separately. (I acknowledge however that analytical and justificatory issues, though separable, cannot always and necessarily be dealt with independently.) For example, normative issues of justification are raised by the talk of what moral or other relationships between people and things would support a particular distribution of wealth. At an increasingly "meta" level there are questions to do with justification for property allocations in general, while claims of justification inevitably lead back to what are really analytical questions to do with the meaningfulness or otherwise of talking of the ownership of oneself and, in one great theoretical tradition, of one's labour. Rawls, for example, argues that goods come into the legally regulated world unowned and await distribution on the basis of a conception of justice\textsuperscript{18}, whereas Nozick\textsuperscript{19} holds that things may be already (pre-legally) owned and thus only a minimal State, minimally disruptive of authentic proprietary relationships, and which protects the individual's property, is justified.

\textsuperscript{17} See for example J.Locke "Two Treatise on Government" Second Treatise, Ch.5 "Of Property" (Reprinted Scientia Verlaag Aalen, 1963)

\textsuperscript{18} J.Rawls "A Theory of Justice" (Oxford University Press, 1971).

\textsuperscript{19} R.Nozick "Anarchy, State and Utopia" op. cit.
Questions of both justification and conceptual issues are raised in particular by the issue of when property begins. For example, is it a natural phenomenon; as rights, are these natural in any sense — can we talk of a general right to property in a natural sense of right, that is, in a pre-legal sense — or are property and property rights merely conventional, more specifically, are they particular legal rules? For example, what might justify the statement "A owns x"? Putting it another way, how could we prove the statement "x is mine (yours, ours, his, theirs)". "What, at minimum, can we expect if it is indeed true that someone owns something?" Some may argue that if something belongs to a person, he will have the say about its use or disposal, while others will not. He, not others, "ought to (be the one who will) have that say".11

Donahue, for example, states that "defining property and justifying property are closely interconnected", but does not tell us why and how. In another example, Becker and Kipnis12 do not even attempt to separate the issues, merely...


11 Ibid.

12 C.Donahue, T.E.Kauper and P.W.Martin "Property: An Introduction to the Concept and Institution - Cases and Materials" op. cit. p.176

posing both conceptual and justificatory questions together, as is evident in the following passage: "Should individuals be able to hold land as private property? Should they be able to own the means of production? Should they be able to accumulate wealth without limit? Should they be able to pass their wealth to their children? How much property can the State tax or take away? What counts as property? Who owns the air, the sea, the moon?"

Regarding labour, in particular, justificatory discussion is usually centred on the questioning of the value of one's labour, and the implications of various answers for one's relationship to full or partial products of that labour, its alienability, and the normative judgements we can make about the desirability of the proprietary outcomes purportedly generated in this manner. Yet as things "owned", one's person, one's body, and one's labour were rarely, until relatively recently,¹⁴ analytically compared with other possessions one may call property, and certainly such analyses as there are go little way towards a full analysis of either the concept of property or that of ownership.

I acknowledge that, as J.L. Austin has pointed out, a clear

¹⁴ See for example R.Scott "The Body as Property" (Allen Lane, 1981).
delineation between analytical and justificatory issues may not always be possible, where possible may not always be useful, and where useful may not always be desired. Yet failure to identify which question one is addressing, or by the same token to declare whether they are being treated as inseparable questions, and if so, why, can only cause confusion. Such confusion can easily occur when property is simply equated with a "bundle of rights" (and duties and liabilities). Some argue that property or ownership is not a right, but is in fact a bundle of rights. As we shall see, however, it is not always clear whether all or some of these rights are derived analytically from the concept of property or whether they are corollaries of whatever justificatory process is supposed to legitimate a particular claim to property, or to property in general.

There are, then, at least two separable "problems of property". The first is the moral problem of justification of private ownership - why should anyone own anything? Why should particular people who own land, houses, stocks and shares go on doing so? What, if anything, would be wrong if the State expropriated all the current owners of such things


and took them into public ownership? Entangled in such questions are numerous conceptual questions about the nature of ownership or property and its difference from other rights. To expand slightly on a distinction which has already been laboured, it is possible to distinguish, at least in principle, between an analysis of the concept of private property, or of the ownership relation, which is that which links us to what we call our private property, on the one hand, and on the other, a justification of that degree of virtually impervious exclusivity, which is for critics the morally most troublesome feature of the notion of private property. However, the qualification "in principle" is necessary, most notably in the case of Locke where issues of analysis and justification will be shown to be inextricably woven together. This inseparability will be true, moreover, for any theory which analyses private property in terms of a nexus that is a consequence of a particular type of lineage, which results in the current tie between the property in question and its putative owner.


18 Or as C.B. Macpherson, for example, interprets the concept of property: in a wide a sense as possible to bring the support given by society to the protection of property to bear on achieving new rights that ought to be recognised. Property, for Macpherson, should include even rights to political power and to participation in a satisfying set of social relations. See V. Held "Rights and Goods" (The Free Press, 1984) p.184
We need to understand what is meant by "property" and property rights before justificatory issues can be tackled. As Machan argues, many who have been concerned with issues of property have, for example, tried to show that nothing of the sort exists, that is, that individuals should not be free to own goods and services, only collective bodies or States should, and that the institution of private property is thought of as "evil". From hard core Marxists to so-called non-ideological welfare-State liberals — even including some modern conservatives — many intellectuals consider the institution of private property to be a weapon of class warfare, a provisional and limited legal device established by governments, or at best a crude means by which individual greed might be exploited for the benefit of social welfare. Property rights, in turn, some argue, are acknowledged via full legal recognition and protection "only here and there in the world". Those who American commentators typically call "classical liberals" assert that the only role of the State is to protect certain rights, in particular rights of personal liberty and private property, whereas "modern liberals" hold that the State ought also to concern itself with issues such as poverty, lack of housing.

1 T.R.Machan "Human Rights and Human Liberties" op.cit. p.122
10 Ibid.p.122.
ill health, lack of education and the like.\textsuperscript{31}

Yet what is clear is that the institution of private property is arguably one of the main things that, as Eastman claims, "has given persons that limited amount of freedom and equalness that Marx hoped to render infinite by abolishing the institution."\textsuperscript{32} We may even be tempted to conceive of property as whatever is morally immune from government taking without compensation. This of course leads to constitutional and political questions about balance of power and rights between the individual and the State. Alternatively, we may view property as an entitlement that should promote a particular type of efficiency in the use of resources, especially in non-renewable resources. This in turn leads to questions of the role of efficiency and justice in a general theory of property, whereas to "see property as including public-law entitlements - say, to minimum level of income - raises deep issues of equality and the significance of property to personal development."\textsuperscript{33}

Theories of property and ownership, as Ryan points out,


\textsuperscript{32} Reprinted in F.A.Harper "Property and its Primary Form" op. cit. pp. 6-7.

\textsuperscript{33} S.R.Munzer "A Theory of Property" (Cambridge University Press, 1990) p.35
tackle two questions above all: the first is the question of how we obtain a title to whatever sorts of property are at issue; the second is the question of what rights we obtain and over what varieties of entities — how extensive our rights over property are, and over what things we can have such rights. Is property "natural", is it conventional, is it necessary, is it just, what determines the legal title to property, what determines the proper size of property and what is the function of property, is it the source of livelihood, of wealth, power, sovereignty or freedom?

The attraction of the natural rights theories such as that proposed by John Locke whereby the origin of property is based on the idea of self-ownership, is that they answer both sorts of questions simultaneously — by starting with an a prioristic commitment to self-ownership, and then by deductive extension to our owning certain things external to us (by, for example, having mixed our labour with the otherwise unowned external thing). Thereafter the rights pass on by, and arise from, morally permissible forms of contract, gift, sale, exchange, bequest, etc.

Instrumental, particularly utilitarian justifications of

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property rights may, arguably, be said to have generally been "conjoined with a (Hobbesian) positivist approach" to the definition of property\textsuperscript{35}. That is, "A owns x" is held to be elliptical, meaning "A owns x according to the legal or quasi-legal rules of community 0". Whether somebody actually does or does not own the thing is in the final analysis a factual question about his relationship to a particular legal or quasi-legal system. It is positivistic in the sense that ultimately there can be no meaningful talk of property rights except relative to a relevant legal system. The moral justification of a particular property right is a matter of showing what good would be done by the existence of such a relationship, and thus belongs to a Benthamite critical or censorious, as opposed to analytical or descriptive, jurisprudence.

Interest, my own included, in the subject of private property has been dramatically increased by debates, first in the West and now in the formerly communist States of Eastern Europe and the former elements of the Soviet Union about what should be the appropriate levels of government regulation, particularly over matters regarding "the environment". To take a recent Western example first, the Canadian government tabled its Constitutional Reform package on 24 September 1991 in which part of the very first proposal is that "the

\textsuperscript{35} A. Ryan \textit{ibid.} p. 224.
Canadian Charter of Rights and Freedoms be amended to guarantee property rights" - the rationale reportedly being that guaranteeing the right to own and enjoy property is one of the fundamental protections needed for human rights, and that this would ensure that governments cannot expropriate private property. Further, rights we enjoy regarding our property - which some consider in economic terms as "economic rights" - have in recent years once again "become a lively topic" of constitutional debate in the United States, whereas they had been virtually a settled issue for the past fifty years.

The transformation of Eastern Europe, and now proposed changes to the former Soviet Union, from State socialism to a market economy, has resulted in factors of production, including rural production and land, being assigned to private hands, in ways that plainly contradict the Marxist-Leninist economic theories on which these States had previously been based. For example, in September 1990, former President Mikhail Gorbachev announced his national economic plan for the Soviet Union - the "500 Day Plan". Although events in the now "Commonwealth of Independent States" have overtaken the implementation of this plan, it is worth noting

19 E.Frankel Paul and H.Dickman (Eds.) "Liberty, Property and the Future of Constitutional Development" (State University of New York Press, 1990) p.3
17 See for example "Time Magazine", 24 September 1990.
that this radical plan envisages that 80% of the Soviet economy will eventually be put in private hands. Large enterprises would be turned into stockholding companies, and small businesses, shops and restaurants sold to individuals. Farmers would be allowed to withdraw from the collective farms and receive an allotment of land and assets. Such developments have reportedly triggering debates within the new Commonwealth about the principles that should govern the transition to privatisation. How do we determine the new "first owner"? To what extent, if at all, is it relevant to consider the claims of those who purport to trace their title to ownership that preceded communist expropriation, and indeed, those who claim ownership prior to Soviet annexation of republics?"

In addition, the interest of any philosopher concerned with the relationship between political liberty and moral freedom should be sparked by the new boom in administrative regulations by the State and its agencies, which increasingly limit and, some would argue, therefore seriously infringe on the individual's ability to deal with items we customarily

"These questions are being considered particularly in Estonia and Latvia under their new land reform. For example, the Republic of Estonia Ownership Reform Act (Eesti Vabariigi Omandireformi Aluste Seadus) has, as its objective, the reorganisation of ownership relations, the inviolability and restoration of free enterprise, and the return of property or compensation as a result of "injustice in violation of property rights".
call our property, in accordance with the individual’s own considered judgement. To complicate matters further, there appears to be no agreement in law as to what, even for the technical purposes of the law, is to be deemed property. I will discuss this in Chapter 2.

The lack of clarity and confusion over what we term "property" may of course be due to real variations in our pre-theoretical background understandings of property. There are also the tacit influences of a growing volume of empirical work, and quasi-empirical work in social theory, aimed at understanding the feelings of attachment we have to what we recognise as our property.

From the viewpoint of psychology and personality theory, for example, the acquisitive behaviour of human beings has been well documented. Feelings regarding property appear to be easily nurtured in human personality, and we have many symbolic, as well as direct ways of declaring "this is mine". Beaglehole, for example, suggests that property objects — objects regarded as one's property — assist the development of self-consciousness and integration of the personality into an ordered system."

Certainly this acquisitive impulse or instinct seems to be very deeply rooted, and the reality of the phenomenon of what we might call "felt ownership" is a powerful challenge to the Hobbesian view — still very widely held on both the left and right of the political system — that property rights are conventional or purely legal. Even among animals we find this recognition of "mine" and "yours", not only towards individuals of their own species, as for the young of a family, but also towards inanimate things. The bird may claim the nest and even the whole tree as its own and the dog guards its territory. In certain cases, as the squirrel stores its food, this also extends to the provision for future needs, whereas some birds, such as magpies, also appropriate and claim useless objects as their own.

In children this impulse develops quite early. Although this may also be instinctive, it is arguable that it may be entirely the result of social example. I must say that the latter alternative seems quite implausible, however this is essentially an empirical question, and beyond the scope of this thesis to answer.

"It is evident even in the works of Marx that there are innate feelings of property. For example, workers feel or believe that they have been defrauded by the employer. As Silver points out, Marx seems to have recognised "property" as the object of feelings triggered by productive activity, arguing that "property means no more than man's attitude to his natural conditions of production as belonging to him". M.Silver "Foundations of Economic Justice" (Basil Blackwell, 1989)."
From a psychological point of view, property has been argued to be a complex set of, presumably distinctive, "feelings of approval" with regard to an object - "object" being not only physical things, animate or inanimate, but incorporeal objects such as leisure, effort, information, ideas, liberty and reputation. As a result, for something to be considered as our property, we have a feeling of legitimate entitlement (or possession approval) with regard to that thing, and others must feel that our entitlement is legitimate. That is, property can only be property if it is respected - whatever word is used - or even if no specialised terminology is available, property is known in a particular society if members experience feelings of approval for possession. Certainly by using the word "right" with property we engender a feeling of approval with regard to an object, and some argue that to cope with the problem of economic justice it is essential to define property and property rights in a manner explicitly recognising their emotive content. But it would, of course, be fallacious to pass from the proposition that there are, if this view is correct, distinctive feelings associated with something's being recognised by me as property, to the conclusion that property just is these feelings.

See M. Silver "Foundations of Economic Justice" ibid. p.13

See M. Silver ibid. p.168
Property may also be seen in expressive terms. By saying that something is my property, I may be expressing a feeling or attitude towards that thing or when I am at pains to point out that something is definitely not my property. That is, much has been made of the emotional investment in owning things, however equally it may be said that we may want to disown things; for example, one may not want the responsibility for the dog which has just bitten the postman. There is plainly room here for a serious phenomenological study of the experience of ownership which would take into account both an individual's feelings towards a thing as well as those of other people towards that thing. Thus when we speak of property, there is both a relational as well as social dimension.

Most discussions regarding property and ownership consider them in the light of particular rights which are assigned people in relation to a thing. A.M.Honoré's account of those rights is no doubt the most comprehensive of the sorts of rights we commonly consider to be involved in our modern, legal understanding of property and may be seen as a paradigm of the concept of ownership.\footnote{\textit{A.M.Honoré "Ownership" in A.G.Guest (Ed.) "Oxford Essays in Jurisprudence" op. cit.}}

However, there appear to be three possible alternatives
concerning the analysis of the concept of property if we are to consider the particular rights. They are that:

(1) The concept of property is a relatively stable cluster concept, consisting of various rights which may vary in number and combination from one thing owned to another.

(2) The concept of property is an unstable cluster concept, generally changing towards a very weak cluster; the holding of even a very limited and variable set of rights over a thing is all ownership of that thing amounts to.

(3) The concept of property has not in fact changed - that is, property consists of a very narrow set of necessary and sufficient rights - however, people's relationship to things has changed, in a way that has overtaken both linguistic practice and popular reflective judgement.

It is this third alternative which I maintain is correct. Ultimately I shall argue that property or ownership is what I will call an absolute concept, intuitively plausible counter-examples notwithstanding. That is, I will argue that a single core right, derived from a core set of rights, all of which boil down to control, is necessary for there to be genuine ownership. This puts me in conflict with the variable "cluster" or "bundle of rights" approach, such as that associated with Honoré, to be considered further below. My
misconceived, although some of the particular rights or "incidents", to use Honoré's terminology, within the bundle or cluster are necessary for ownership. In claiming it is absolute, I shall argue that there is more truth than may appear in the familiar rhetorical exclamation — "It's mine, so I can do what I like with it".

Interestingly, even critics of the idea of absolute ownership are usually willing to concede that we do have some examples of absolute ownership in the form of some relatively insignificant things including personal possessions such as my watch, clothes, etc.45- if it really is my hat, then I can even destroy it if I want to - while others affirm that self-ownership is absolute,46 even using this to morally justify suicide, and to explain how one could maintain both that murder is a most heinous crime, but that suicide - which may equally be deliberate destruction of an innocent human being - is no crime at all. Moreover, the classical liberal notion of the liberal State rests on the idea of absolute property rights over oneself and parts of the world. It embodies what is generally regarded as the Lockean view of rights, as inalienable and absolute by definition, and


essentially negative in character, not subject to majority vote or social policy. Yet as Wolff among others has pointed out, those rights themselves are are often "given little by way of defence".

I will argue, further, that our practices with regard to what we call ownership and property, particularly as they have evolved in Western post-industrial society are, in many respects, indistinguishable from those of stewardship. The tradition of stewardship, never dominant, but certainly persistent, dates back to post-Platonic philosophers of the Roman Empire and especially to the teachings of Iamblichus in the 3rd century A.D. There certainly are particular duties placed upon us which appear to be stewardly — one is often called upon to exercise responsible care over possessions, often requiring us to maintain, protect and account for the condition of things we own — from the pet dog, to one's land, and their relations to "the environment". A steward and an owner are, of course, fundamentally different — a steward generally is responsible for the thing entrusted to him by the owner, whereas an owner cannot coherently entrust something to himself.

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"J. Passmore "Man's Responsibility For Nature" (Duckworth, 2nd. ed. 1980) p.28
However, it appears that historically the concepts have often been carelessly thrown together, particularly when talking of land. That is, there appears often to be behind talk of ownership and property an idea that is really stewardly. For example, one theological line has been that God is the real owner of all the riches of the universe, including the human body.\textsuperscript{4} The human being therefore must so use and/or protect the divinely entrusted resources so as to further God's intentions - that is, act in a stewardly way vis-a-vis the thing on God's behalf. This really denies the reality of human ownership in favour of the notion of mere stewardship.

While discourse about the notion of stewardship generally appears to have been abandoned in recent times, certainly in popular political and social discourse, what is evident and implicit in our practices and expectations regarding property today, and particularly property regarded as significant, is strictly speaking better characterised as a new form of stewardship. In other words, I would suggest that stewardship has effectively superseded ownership as the fundamental relationship between the so-called property and the owner, but that our linguistic practices have not caught

\textsuperscript{4} This is not only a Christian concept. In Islamic legal theory, for example, all property belongs ultimately to God, and that He grants men only the right of possession. M.M. Khadduri "Property: Its Relation to Equality and Freedom in Accordance with Islamic Law" in C. Wellman (Ed.) "Equality and Freedom: Past, Present and Future" op. cit. p.177
up with this really quite remarkable transformation.

Of course, it may be argued that the concept of stewardship makes no sense without a "true" owner who entrusts us with things. To this there appears to be three possible responses, either:

1) a secular answer, to the effect that there is a one true "owner" but that ownership is a collective ownership of present, past, and future generations. In this ultimate form of collectivism, no individual human being or subgroup of humans can ever really be an owner. This idea is rarely put forward; and even those environmentalists whose declarations seem to imply it do not explicitly advocate this view, although it would provide a foundation for their rhetoric about our obligations to future generations;

2) a theological answer, that is, that God is the one true owner;

3) a rejection of the pre-supposition, in other words, stewardship does not need a true owner.

The views of Rawls and Reich may be regarded as glosses on the first, collectivist, alternative. As Schwartzzenbach has suggested, to appreciate that our practices regarding

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what we deem to be ours are indeed a form of stewardship, one merely needs to take Rawls' example that individual fundamental rights may be interpreted as "gifts" — a recognised given from a reasonable community — or as Reich has suggested, a form of government largesse, that is, that government provides public "assistance", such as health benefits, unemployment assistance and the like — that all property has always been, in a sense, government gift or donation, possibly with strings attached.

In sum, if we accept the reality of growing restrictions on what we call our property, it appears that we are left with two broad alternatives:

1) due to the amount of government intervention that is apparent, all we really have is stewardship of those things which the government allows us to enjoy; that private property is simply disappearing; or

2) while there is a movement toward a form of stewardship, these government interventions are really violations of one's property. We must reaffirm our rights to private property, allowing restrictions to be rigorously applied only so long as, and so far as, certain ways of exercising our property rights may be harmful to other innocent people. Otherwise, there is no justification

for restrictions - our rights are trumps.

Property can be viewed in many ways, so in the next chapter I will expand on the various perceptions we have of property and include some points of clarification.
CHAPTER 1

PERCEPTIONS OF PROPERTY—ITS SCOPE AND LIMITS
1. **Property and Society**

Generally, in any society, but certainly within a society sufficiently complex to have a legal framework, consideration must be given to how that system is to deal with things already seen as property, and further, how to include into the general category "property" things barely conceivable at a previous time,¹ but which have now come to be regarded as of significant commercial, cultural or personal value.

The varieties of things which are regarded as of value and, hence, are worth acquiring as property, also differ between individuals, groups and sub-communities, even within the same broad community, as well as differing over time. For example, the discarded aluminium drink can become an unowned thing from the point of view of the well-to-do consumer, but becomes a valuable resource which may be reclaimed as his own, for the child seeking pocket money. A particular set of stones may be sought by a tribal hunter because of the magical powers he believes they give, though to a sceptic they are just worthless rubble.

Further, considerations of value may also vary from the

¹ For example, one could imagine even new living creations resulting from genetic engineering which may be the subject of ownership in the sense of patent. See J.O.Grunebaum *Private Ownership* (London: Routledge and Kegan Paul, 1987) p.7
aesthetic to the sentimental, to functional and, more broadly, to market values. The reasons why a person may want to own something are correspondingly various. And what seems a perfectly good reason for owning something to one person, may seem hopelessly irrational, even a sign of madness to another.

In all, the variety of things people may seek to own, and the variety of motivation that may induce them to seek to acquire or defend ownership, are so wide-ranging, that we may be tempted to be sceptical as to whether there really could be a single all-embracing notion which corresponds to the relevant uses of the word "property". Yet at the same time, this may be thought to be obviously wrong. Plainly we use the term "property" and its cognates constantly, usually without hesitation, and seemingly consistently.

For those who would equate meaning with use, as many do in consequence of a simple reading of the later Wittgenstein's discussions of language, meaningfulness is guaranteed by the very fact that such use is an undeniable social reality. However, it is surely arguable that a word or phrase may have a customary social use which survives only so long as a number of difficult issues which are actually ignored or

1 Ludwig Wittgenstein "The Blue and Brown Books" and "Philosophical Investigations".
avoided through that use are not brought to the surface.

For example, Galen Strawson\(^1\) has argued this very thesis with regard to our everyday use of "freedom" and "free", while others have argued that everyday terms such as "mind" and "colour" survive only as a cloak over realities to which in the end they have no application. If we take "colour" to mean a property or a range of properties (red, blue, yellow, green, etc.) possessed by surfaces and volumes ordinarily perceived as coloured — which is the nucleus of one possible common sense view — then it is open to question whether there really are any colours, and whether anything is really coloured. The reason is, or is claimed to be, that the physical explanation of why we see things as coloured does not require us to posit any such property, or range of properties, for no properties posited by contemporary physics correspond even roughly to the colour differentiations made by the unaided human eye.

While not necessarily agreeing with these claims about "freedom" and "colour", they serve to illustrate how it may be coherently argued that a word can have a regular and easily grasped use in everyday discourse, while a combination of philosophical analysis and empirical research

\(^1\) G. Strawson "Freedom and Belief" (Oxford: Clarendon Press, 1986) Ch.1
shows that its use is predicated on assumptions which are empirically false.

2. **Ordinary Language Usage of Property and Ownership.**

In most of its ordinary occurrences the use of the word "property" creates no mystery, needs no explanation and needs no justification. For example, for most values of x, one understands quite clearly what is meant by "x is my property" and "I own x". Moreover, we continue to understand by "property" something over which one has exclusive control — something one can use, destroy, sell, give away, or even wantonly destroy, without it being anyone else's business. However, the legal reality is that virtually nothing today is owned in this sense. Given legal complexity, there are few areas in which all these powers are enjoyed in full purity. For example, if I abandon something or throw it away, I could be accused of littering, and even how we dispose of things such as rubbish leads to public concern and legal obligations. Yet it is this idea of exclusive use, which is not subject to externally accountable justification, that goes to the core of what we might call our "primitive" understanding of property. It is summed up in the rhetorically forceful, but rarely legally correct declamation: "It's mine, so I can do anything I like with
Against this, we have to recognise that our modern use of the word "property" to encompass so many different types of items, objects, things, and to underpin a huge variety of rights, obligations, liabilities and interests, must leave us in confusion not only over what we really do own in some cases, but as to how we could even apply the words "property" and "ownership" as tokens of univocal and universal concepts.

Conventional dictionary definitions of property generally, of course, link it analytically with ownership and it

"Property" : ownership, the thing owned, possessions. (Australian Universal Dictionary).
: that which one owns, the possessions of a particular owner. (Macquarie Dictionary)
:(a) something that is or may be owned or possessed
(b) the exclusive right to possess, enjoy and dispose of a thing, a valuable right or interest primarily a source or element of wealth - ownership
(c) something to which a person has legal title; an estate in tangible assets (as lands, goods, money) or intangible rights (as copyrights, patents) in which or to which a person has a right protected by law. (Webster's Dictionary)
: 1) the condition of being owned by or belonging to some person or persons; hence the fact of owning a thing; the holding of something as one's own; the right (esp. the exclusive right) to possession, use or disposition of anything (usually a tangible
therefore appears that in ordinary language usage the subject matters of "property" and "ownership" are synonymous and virtually interchangeable. Certainly they may be seen to be complimentary concepts in the sense that all property is owned and what is capable of being owned is property. As Snare has pointed out, when people talk about property and ownership, in many cases a contemporary statement about ownership can be translated into a statement about property, and vice versa, without confusion. That is, "I own that car" and "that car is my property" today convey the same information, and are readily understood as conveying the same information.

In a legal context, however, property and ownership are not necessarily interchangeable terms. "Property" appears often

material thing); ownership, proprietorship = propriety.
2) that which one owns; a thing or things belonging to or owned by some person or persons; a possession (usually material) or possessions collectively; (one's) wealth or goods. (Oxford English Dictionary)
: That which is capable of being owned (Concise Law Dictionary)
: Whatever can be thought or claimed to be owned. (Dictionary of Philosophy)

Perhaps, however, "proprietorship" would be a more appropriate term in this analogy.

to be used in a loose way to refer either to the thing itself or to the rights in that thing, whereas the concept of ownership appears to be quite distinct from any tangible or intangible things to which it may relate. As some have argued, ownership is no more than "the expression of a legal relationship resulting from a set of legal norms".

In a legal sense, a distinction is made between the right of ownership in relation to a certain subject matter, and the subject matter of that right. This distinction is well illustrated by the many types of property in modern law which have as yet no tangible identifiable subject matter at all to which they must relate, for example, certain classes of future interests, patent rights and copyright. These represent the present right of a potential future possessor or of the first inventor or author, whereas the ownership in any actual product to which these present rights relate in a quasi-intentional way would be a separate matter. I may own a copy of a particular book and therefore possess certain rights regarding it as an object that I have (rightfully) acquired by, say, purchase, but the content, the plot, the

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7 Here I use "thing" in a generic sense which includes all interests.

8 D.Lloyd "The Idea of Law" (Penguin, 1976) p.319

9 Although, of course, it may be said that at some stage there exists a tangible object to which the copyright and patent relates.
ideas within the book, film or magnetic tape, remain by copyright the property of the author or publisher.

"Ownership" is used legally as the term which denotes separable legal rights, and it is this idea which pervades discussions of property as consisting of a "bundle of rights". I will, however, treat property and ownership as synonymous, and, subject to grammatical constraints, as interchangeable words, realising that they do not have equivalent status as legal terms. The grammatical qualification is that "property" can be used only as a substantive, whereas "ownership" and its variants, which may take verb and adjectival forms, may also be used as a relational term.10

"Property" comes either directly or through French "propriété" from Latin "proprietas", which means the peculiar nature or quality of a thing and (in post-Augustan writing) "ownership".11 There is a common thread in terms of our references to what is proper to, or appropriate to something. To steal is to misappropriate, while the State that seizes the property of citizens without benefits of law or without

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10 See also R.L.Rariden "The Right to Property" (Ann Arbor, Michigan, 1985) p.8

just compensation, is said to expropriate it. In philosophical discussions of things and their properties, even the word "ownership" is used; thus P.F. Strawson, for example, distinguishes ownership and no-ownership theories of the relationship between persons and their bodies.  

I will, however, be concerned only with property as it relates to the things which people meaningfully claim, dispute, deny, etc. ownership. Although it may only be a metaphor, and Strawson would no doubt argue a philosophically misleading one, that in the former sense the apple "owns" the redness of the skin, there is nothing metaphorical about the claim that the orchardist owns the apple.

3. **Owning Property and Owning in General.**

Nevertheless, it is worth noting that in looking at the ordinary language usage of the word "property", the relationship between people and possible possessions is clearly distinct from other things we may cite as falling within the denotation of the word "property" — all the properties of the table I am sitting at or all the properties of this piece of paper, for example. When we speak of the

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11 P.F. Strawson "Individuals: An Essay in Descriptive Metaphysics" (London: Methuen, 1959) Ch.3 "Persons".
properties of people, we can speak of them having two eyes, and having two houses, although to do so in the same breath would seem like a bad joke. The properties of people, such as skin colour, height and so on, clearly do not count as examples of the sorts of property, things possessed, or things owned, that have been the subjects of political and jurisprudential discourse about possessory rights, although they are relevant to discourse about prejudice, opportunity, and other civil and political rights.

There has never been any overt confusion between the cluster of jurisprudential problems about property and the classical metaphysical problem of the relationship between a thing and its properties. This may therefore tempt us to say that the word "property" is simply ambiguous in suggesting both the qualities or characteristics of something and the things owned. "Rupert Murdoch has properties" could in some contexts be ambiguous, it not being clear to others whether the statement is intended to mean that he has certain coloured eyes and hair — as perhaps would be said in a philosophy tutorial — or that he owns farms and newspapers. However, to say that "property" is merely ambiguous may be too hasty. That is, there are analogies between properties of the two sorts. It is not the same sort of ambiguity as, say, the word "bank" has in meaning either the sides of a river or a place where money is held — it is an etymological accident.
that "bank" has at least two distinct meanings, but this cannot be said for "property".

As a point of clarification, so far we have assumed that property and ownership are synonymous, but is it true that everything we own is an item of property? Take, for example, the phrase "my pain". Can I correctly say that I "own" the pain or that the pain is my property? Ownership and property generally suggest disposability or alienability,\(^{11}\) that one can, for example, sell, dispose of, destroy or bequeath one's house or car. However, it would be incorrect to suggest that one could dispose of, in the same sense, one's pain. Pain is inalienable, as opposed to property or ownership which I suggest cannot be inherently inalienable.\(^{14}\) After all, something is property only if it is logically capable of being stolen. It is only because the link between a person and that person's property is a severable one that the link cries out for justification in the first place. Perhaps the correct view is that the sense of "owns" which applies to our bodily sensations — a use, incidentally, which is confined virtually exclusively to philosophical literature — is at best a metaphorical sense.

\(^{11}\) Some may argue, however that labour can be termed as property and that labour is inalienable.

\(^{14}\) Those of course who take the view that one's life is one's property and therefore is inalienable are putting forward a moral restriction and not a logical one.
To take another example, whenever I say "x is mine" is it always true that "x is my property"? For example, the statement "the decision is mine" cannot be interpreted as "the decision is my property". (Although there is a strong analogy given that what is intended is that the decision is within my exclusive control.) Not only is this a linguistic or grammatical issue, but one relating to the question of whether one can own something that is impossible to transfer to another. A power to make a decision is not always transferable to another, particularly if it is a power one has pursuant to a delegation.

It is important to note that the concept of property understood as ownership can be distinguished from the sense of things or persons having properties. Looking at the etymological background of the term "property", Minogue has suggested that property is the concept by which we find order in things. We may take as an example the greenness of grass. "The world is a bundle of things and things are recognised in terms of their attributes or properties", and this works both at the social and epistemological levels.\(^\text{15}\) Minogue suggests that we extend this order into social situations to discover ways of behaving that are "appropriate" to

situations such as respect being the "proper" response to the elderly. Certainly the history of the word "property" is closely related to "proper" as belonging to oneself or itself, or owned as property, and although now obsolete, "proper" has meant that which one owns. Further, it should be noted that property is also related to the verbs "appropriate" and to "misappropriate", apart from appropriate in the sense of correct behaviour or appropriate time, so that this usage has the same core as property.

The major difference, however, between personal properties or natural properties, such as having blue eyes and fair skin, and property such as my car, of course, is that the latter is inevitably relational. Moreover, only an entity capable of having an express will (including corporations, to which a will can quite properly be imputed) are capable of owning property. (Although of course one could acquire something without one's own action - for example, if something is left by will. Further, it could be argued that one could continue to have blue eyes due to inaction if, say, there was in existence a surgical procedure by which the colour of one's eyes could be changed.)

\[\text{\textsuperscript{16} Ibid. p.11}\]
\[\text{\textsuperscript{17} Oxford Dictionary}\]
\[\text{\textsuperscript{18} Ibid.}\]
Yet there is, in another sense, a distinct connection between property seen as what is owned and properties such as physical characteristics. For example, the owner of a particular house which is rented out may be seen as the owner of productive capital. This ownership, communists may argue, allows the owner to have a source of power and to exploit others, whereas characteristics such as blue eyes would not be seen as such.

However, if we delineate properties into active and dormant, the distinction between ownership of property and those physical properties which are personal characteristics is no longer clear. That is, one's property of blue eyes could, for example, be actively managed to entice someone, to manipulate them, thus using a source of power with which to exploit others. This point of course has serious implications, particularly for the communist position which states that peoples' property should be equalised. In the above sense there would, as a result, be few things that could not become "active" property.

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17 See K.Minogue "The Concept of Property and its Contemporary Significance" op. cit. p.16

18 A further delineation is often made between "passive" property and "active" property. That is, passive property is owned as consumer goods for consumption, whereas active property is owned for the means of production. See L.Kohr "Property and Freedom" in S.L.Blumenfeld (Ed.) "Property in a Humane Economy" op. cit.
4. **What is Property?**

It can be argued that almost everything in the world may be identified as someone's property. For example, personal things such as one's land, car, house or clothes are indisputably called one's property.\(^{11}\) We may even say that public facilities are "owned" or are the property of the given public, say, residents of a particular municipality, state, province or country, and that public sector corporations are the property of the residents of the relevant political unit. We could even venture so far as to suggest that wilderness areas are "owned" by a particular government or even the people whose government it is. This is particularly so when some calamity befalls the wild, and we look to the government within whose territory these events occurred to take responsibility for its repair. Further, one may even say that the air we breathe while on our own land is owned by us. This is apparent by our ability to sue in tort if others pollute the air around our house. I am not suggesting that all such claims of ownership are correct — only that we can make sense of all these contentions being argued as cases of ownership.

\(^{11}\) Under the law, almost anything can be owned except a human corpse. D.P.Derham, F.K.H.Maher and P.L.Waller (Ed.) *An Introduction to Law* (The Law Book Company, 1977) p.29
There are also many items whose existence or significance is open to discovery, leading to questions of how one might come to own them and presenting us with the need for ongoing application of the concept of property and of property rights. The discovery, for example, of the electromagnetic spectrum opened up a new variety of things capable of being owned. As no-one had previously known that such items as frequencies existed in nature, it had not been forseen how someone might own (rent, buy, sell, steal) this or that frequency. The concept of property is not, then, confined in its applicability to a fixed number of kinds of things.

5. The Objects of Ownership.

Our claims to own things — using "things" in the most generic of its senses — cover things of almost every conceivable type. People assert ownership claims in relation to buildings, land, cattle, packets of food, broadcasting licences, works of art, automobiles, copyrights, patents, rights of way, companies, shares, intellectual property and equitable interests, just to mention some — not that everything is agreed to be capable of being owned, at least in principle. Among the more contentious putative objects

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11 See T.R.Machan "Human Rights and Human Liberties" op.cit. p.184
of ownership are, for example, human beings (by ourselves, or by others as in some forms of slavery), children by their parents, one's own body and its constituent organs and others parts, and one's self — if indeed there is any such entity. As my aim is analytical, I will endeavour to be as neutral as possible in relation to these more contentious objects of ownership, and not use any particular assumptions about them to arbitrate between rival analyses.

It is apparent that not only is there a variety of potential objects of ownership, but there is a variety of rights, or more precisely, interests, which are generally thought to be less fullsome than ownership, which may nevertheless be claimed in relation to things capable of being owned. But how that distinction should be drawn, and whether it should be drawn in terms of a sharp cut-off, or as a matter of degree — and degree of what? — are questions that go to the detail of any analytical enquiry.

6. **What is Not Property.**

Leaving aside any religious argument which might suggest that everything is owned by God or held in trust for God, one could argue that, even if we granted all the cases above as cases of ownership, there would still be examples of unowned
things. For example, the high seas, that is, those areas of the oceans which are beyond the territorial limits of any country may be said to be unowned. This is so despite the fact that they are widely used for commercial purposes, from navigation to fishing; yet there is no direct control by any one country of those waters. However, this is of course only a matter of fact, not of logical necessity. Countries in the past have extended their territorial limits to include areas which they find useful or valuable (for example as the result of oil discoveries on the sea bed). A case in point is the discovery of oil in Bass Strait which separates the Australian continent from Tasmania, and the extension of Australian territorial limits to include the adjacent oil bearing area. Similarly, the 1958 Convention on the Continental Shelf in effect converted the North Sea into owned property by dividing among the countries bordering the North Sea some of the commonly held attributes of the sea, such as fish and the sub-oceanic minerals, and allowing for the extension of territorial rights. The factors which led to this agreement were the declining cost of underwater drilling and indications that the region bore gas and oil. As a result, the bordering countries gained ownership of

Although some unowned things are used.

Y. Barzel "Economic Analysis of Property Rights" (Cambridge University Press, 1989). pp.72-73

Belgium, Denmark, France, The Netherlands, Norway, United Kingdom and (West)Germany.
segments of the sea.

In addition to apparently unowned things that appear never to have been owned, there are some things which are unowned due to, for example, having been abandoned. These include discarded personal possessions, unwanted pets, buildings and equipment of no commercial value, even for scrap, and tracts of land. Some of them are quite vast, but no longer thought worth working or guarding.

Abandonment is not, however, without difficulty. One may renounce one's rights, but it is conceivable that obligations with liabilities for their breach, such as requirements regarding safety, would continue to be in force. Renunciation of ownership and ceremonies of abandonment are neither logically nor, in general, legally sufficient to guarantee non-ownership. Whatever the legal position, one could argue that moral obligations, particularly duties to strangers who might stumble across the abandoned property, continue well beyond the moment of purported abandonment.

A further case of things which are not owned are wild animals. Although game and fish in a wild state often have been described as the property of the State, an examination of legal cases demonstrates that the interest of the State
appears not to be of an owner but as a sovereign. That is, the State's interests and obligations are insufficient to make the relevant rights property rights in wild animals, but do give it the power to regulate the living conditions of the animals, for example, through licensing hunting and providing protective care for the animals. In this sense the exercise of sovereignty does not require the assertion of ownership — sovereignty may be said to be a broader and looser "framework" type of control.

7. More Difficult Cases.

Although it may be said to be a fiction, the airspace above one's home has in the past also been considered to be one's property. Of course, until the invention of aeroplanes no question of traversing or trespassing on another's property purely via airspace ever arose, and perhaps even today any unauthorised penetration of a country's airspace should be treated not as trespass of property; rather it should be accepted that countries control access to, and possibly through, their airspace due to considerations of safety and as expressions of national sovereignty, quite independently of any property considerations.

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14 C. Donahue, T.E. Kauper and P.W. Martin (Ed.) "Property: An Introduction to the Concept and the Institution" op. cit. p.49
A further case of non-ownership is that which is incapable of control. An uncontrollable thing, or something which is too unstable such as, say, a cloud or a rainbow, cannot be said to be owned. As a matter of logic, it is absurd to talk of ownership in such cases, particularly if its identity conditions are loose — that is, what makes a cloud I see today the same as the one I saw yesterday, through what combination through other clouds may it enter before it loses its identity? It is impossible to make sense of claiming something as one's own which is constantly changing, depends for its existence on the subject's point of view and/or dissolves in an amorphous way into its background.

8. **Sorts of Property.**

One could delineate property into a variety of groups. For example, one delineation proposed by Feibleman divides property into artifacts which are material objects altered through human agency for human use and the human individuals themselves, so that property varies from the physical (for example, hills), chemical (salt mines, oil wells, etc.), biological (cattle, pets), to the psychological (items in minds or brains, that is, property not in the legal sense,

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17 J.K. Feibleman *Justice, Law and Culture* (Martinus Nijhoff, 1985) p.157
but to the extent that one person adopts the ideas of
another) and cultural (musical compositions, copyrights,
patents, etc.). Although this may be a questionable
classification of the sorts of things we call property, it
does hint towards the variety of possible classifications
which have been suggested by many writers. The variable
classification of the sorts of things known as property is
particularly evident in law. In relatively recent times, for
example, the law recognised property both as that which is
movable, such as equipment, furniture, clothing etc., and
property which is immovable, that is, land itself, and
fixtures attached to the land. Today non-physical things are
also considered as property.

The development of the law in recognising non-physical,
incorporeal things — many of which cannot be easily
classified as movable or immovables — in more recent times
is not, of course, a totally new idea. For example, Warren
and Brandeis argued in 1890 that the common law constantly
changes to accommodate the demands of society, usually moving
from recognising something physical to recognising something
non-physical in its wake. This evolutionary model of law was
the basis on which they predicted, wrongly as it turned out,
the emergence of a tort of violation of privacy.18

18"Political, social and economic changes entail the
recognition of new rights, and the common law, in its eternal
youth, grows to meet the demands of society. Thus in very
9. **Attempts in Defining Property.**

What we generally agree about property is that it is what is capable of being owned by persons. However, many writers have argued that beyond this trivial observation, it is impossible to define "property", that is, that the concept itself defies explication in terms of a closed set of necessary and/or sufficient conditions.\(^{19}\) Therefore analytical discussion often appears to be hampered by scepticism as to the very possibility of any acceptable definitional analysis of property. In law, in particular, even the "most refined and subtle legal analysis has failed early times, the law gave a remedy only for physical interference with life and property, for trespass *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life - the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession - intangible, as well as tangible...From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trade marks." (S.D. Warren and L.D. Brandeis "The Right to Privacy" Harvard Law Review, Vol.IV, no.5, 1890).

to yield any clearly established criteria by which ownership may be identified".\textsuperscript{10}

This lack of a universal definition appears to be particularly due to the fact that neither the denotation nor the connotation of the word "property" have been constant, in either historic or geographic respects. Although property is an important category politically and economically, discussions regarding property often appear to have done little to illuminate what may be termed "property". As Grey rather gloomily points out, in less than two centuries we have gone from a world in which property was a central idea mirroring what was regarded as a clearly understood institution, to one in which it may well no longer be a coherent or crucial category in our conceptual scheme.\textsuperscript{11} Grey's contention seems to be based on the idea that there has been a transition of a conception of property from material things people own, to a conception of property as a bundle of rights, thus incorporating intangibles as property. Further, Grey argues that there has been a proliferation of specialised conceptions, that is, that specialists use "property" in different and conflicting

\textsuperscript{10} D.Lloyd "The Idea of Law" (Penguin, 1976) p.319

\textsuperscript{11} T.C.Grey "The Disintegration of Property" in J.R.Pennock and J.W.Chapman (Eds.) NOMOS XXII "Property" op.cit. p.74
Whether or not this is true, it may be observed that, for example, around the end of the 18th Century the idea of private property stood at the centre of the conceptual scheme of lawyers and political theorists. As Blackstone wrote: "There is nothing which so generally strikes the imagination, and engages the affections of mankind as the right of property". Most telling in this respect was the fact that between the enthronement of Charles II in 1660 and the middle of George IV's reign in 1819, 187 new capital statutes became law - nearly six times as many as had been enacted in the previous three hundred years. "Nearly all were drafted to protect property, rather than human life." English law for centuries even treated a man's rights over his servants as a branch of property law, and treated "conjugal affections" as part of a man's property. This was not just a feature of English legal and political development - property was also seen as the right of enjoying and disposing of things in the most absolute manner, as defined by the

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11 Ibid. pp.71-73
13 Ibid. p.73
14 R.Hughes "The Fatal Shore" (Collins, 1987) p.29
15 A.Ryan "Property" op. cit.p.2
This 18th Century conception of property (and perhaps our "ordinary" conception which views property as ownership of material things), not only mirrored the economic reality of the times, that is, that wealth was essentially centred in land, and to a lesser extent houses, shops, etc., but that property also served as an attack on feudalism. Further, viewing property as ownership of things by individuals fitted the principal justifications for treating property as a natural right, in which property was some form of emanation from the productive individual will. For example, the dominant theory of 18th Century England, espoused by John Locke, was that property resulted from the mixing of an individual's labour with the natural environment. This natural right to property implies that when we acquire something over which others have no prior right of ownership, we get an outright freehold on it. This is intuitively plausible - if I pick up a nugget of gold, whose is it, if

36 The French Civil Code had as its "grand and principal object" to "regulate the principles and the rights of property". R.Schlatter "Private Property - The History of an Idea" (Rutgers University Press, N.J. 1951) p.232


38 J.Locke "Two Treatises of Government" Second Treatise. Chapter 5 "Of Property" op.cit.
not mine? It was nobody's before I got there." (This is a theory to which we will return later).

The historical changes, particularly in more recent times, have therefore had an impact on the general perception of property. For example, many have refused to use the word "property" with its focus on the things that are owned, and have turned instead to the proprietary relationship. In other words, they prefer to speak in terms of ownership relations expressed as a particular set of rights and obligations usually granted some sort of social recognition, thus relying on "ownership" instead.

This change in focus, I believe, is arguably related in particular to the changes in the nature of objects classified as property. For example, although we still speak of property usually in terms of physical things or objects such as one's house or car, the application of the term "property", particularly in the legal system, has had most of its growth in relatively recent times in relation to non-physical things such as intellectual property. Consider, for example, the property bases underlying the applications of the legal rules of copyright and patent. Of course, the application of the

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19 See A.Ryan "Property" op. cit. p.65

20 See for example J.O.Grunebaum "Private Ownership" op. cit.
term "property" to non-physical things has a long and significant history, such as in the institution of trusts, particularly since the mid-16th Century. However, it is important to note that the various equitable interests in real estate, though themselves intangible, were interests in something itself tangible, namely land.

One could argue that in the case of copyright and patent also, there is also a nexus between the rights and the physical object. For example, in a patent for a type of tractor there is still a relationship with the physical product. Similarly, in the case of a copyright of a musical score, there is still a relation with a particular performance, a spatio-temporal event, or with the item of software which will facilitate its reproduction. But the patent's existence and value are not contingent upon the physical process or product patented ever in fact itself coming into existence; and copyright is not an interest in paper, ink, magnetic tape, or celluloid, but only in these things qua vehicles of a certain propositional or perceptible content.

10. **Can We Define Property?**

Statements of the form "I own x" and "x is my property" cannot be then assumed to be intelligible for all values of
To formulate a coherent set of restrictions on the possible values, is to put forward a theory about what can be property. There can be no satisfactory definition of property without an agreed resolution. Suffice it to say that if an adequate definition of property is to be proposed, then the following questions must be answered. That is, three general issues can be identified as main areas of concern which arise in trying to define property and ownership, given the sorts of objects or "things" — always in the most generic sense our subject will permit — that we call property. These are:

1. What is the relationship between owner and property when it is true that the owner in question owns the property in question? The relationship between a person and a thing which a lay person calls "ownership" is not a simple relationship and may be said to involve a complex bundle of relations which differ considerably in their character and effect. For example, a person has rights, liberties and duties in relation to a thing, but legal relations can be changed so that it is evident that the bundle of rights does not remain constant. For example, until relatively recently one could have driven one's own car in New South Wales seated in an unrestrained way (so long as the public and other motorists were not

jeopardised by a posture that was tantamount to dangerous driving). This right has now been curtailed with the mandatory requirement to wear a seat-belt, applicable to all drivers, whether or not owners. The liberties of the owners, in relation to the vehicle, thus have been reduced. Has ownership in some sense then also been diminished?

2. Is the concept of ownership univocal, within and across cultures? There appear to be different concepts of ownership, for example, reflected in different countries by their respective laws. The terms "ownership" or "property" do not appear to convey any determinate idea as to what particular legal relations there are, only that there are "some legal relations". In each case we might look at the particular legal relations, so that what can be owned is limited by local convention.

In modern law it is the function of the courts, or, in other words, the judicial branch of the State, to determine what property rights individuals possess, against a background of increasingly complex legislation and administrative regulation. In countries operating under common law, court rulings are either based on

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previous rulings and/or serve as precedents for future rulings. Often the courts, however, are working within a legislative framework which purports to establish property relations, rather than merely safeguarding rights that individuals have independent of State decision and legislation. For example, in some countries married women are clearly not permitted to be owners, while in South Africa, under the (recently repealed) "Group Areas Act", segregation was enforced whereby blacks were not permitted to own houses in certain areas. Generally, children and the handicapped are also excluded from certain kinds of ownership. Further, under Roman law coastal lands lying between high and low tide lines may be unownable, while in parts of Canada, for example, "those lands may be owned by those who own the adjacent lands. Another better known example is the difference in ownership of water running through the banks of a stream" — the content of the ownership relationship here varies from country to country.

Generally, then, it appears that there is no logical necessity or even any empirical universality requiring

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1 J.O.Grunebam "Private Ownership" op. cit. p.5.

" J.O.Grunebaum ibid. p.5
that laws or rules assign any particular set of rights or provide any particular way in which ownership rights can be acquired, transferred or alienated.

3. Do the types of entities that can be owned, and the types of entities that can be owners, constitute a manageable diversity, within a single conceptual approach? The objects of ownership differ so radically that it might be argued that the "same concept of ownership and property could hardly be applied to them all"; for example, to physical objects, interests, shares, ideas, copyright or reputation. There is also a variety of different types of owner, for example, a natural person, varieties of corporations, a voluntary association, or the State (and on some interpretations, God).

One could argue that this diversity of objects of ownership or things that we call property, and of the types of owner, is so vast that the concept of ownership or property is bereft of all content. That is, one could argue that, analogous to using the word "thing", no inference can be drawn of what the "thing" may be, nor of the limits of what may be termed "thing". Similarly, it may be said that the terms "ownership" and "property" are empty of any particular

See J.Waldron op. cit. p.316
Despite these issues which emphasise variety, diversity, and plurality among the "hard data" to which any account of property must apply, it will be argued that an analysis of ownership and property which is comprehensive, univocal and non-trivial can be provided.

11. **Property as an Essentially Contested Concept.**

An alternate argument, of course, is to suggest that the terms "property" and "ownership" are essentially contested concepts. As described by W. Gallie, the proper use of some concepts "involves endless disputes about their proper uses on the part of their users". By this idea one can consistently believe that there is one concept of X and that there are rival "conceptions" of X or uses of the concept of X. For example, "democracy" and "art" may be held to be such

"Essentially contested concepts are distinct from C.L.Stevenson's "persuasive definitions" (Mind, 47, 1938, p.331) by which we may say that a term such as "property" is an emotively loaded term. By this, it is intended that the direction of peoples' interest is altered by covert manipulation of the connection between descriptive and emotive meaning.

"See W.E.Connolly "The Terms of Political Discourse" (Heath and Co., 1974) p.10

"Ibid. p.10."
concepts. Not only do these concepts admit of a variety of "interpretations" or uses, but that the proper use of the concept is disputable. The "inevitability" and "endlessness" of contests about the proper use of the concepts is due both to the human psyche to continue to press one's view, and that these are features of the concept itself — features which render contest incapable of being rationally settled. This is the feature of essential contestedness."

Although this theory may offer an explanation of why it is so difficult to define property and ownership, it is questionable whether terms, including "property" and "ownership", really are essentially contested concepts at all. For example, arguing over certain concepts such as "democracy", "art", "liberty" or "property" presupposes, arguably, definite uses of other related concepts (such as the related concepts of use and possession of property) which are themselves identifiable in a given society. Gray, for example, suggests that essentially contested concepts find their characteristic uses within conceptual frameworks which already have endorsed functions in respect of definite forms of social life."

That is, an essentially contested concept


is a concept such that any use of it in a social or political context already presupposes a specific understanding of a whole range of other, contextually related concepts (whose proper uses may be no less disputed) which lock together so as to compose a single, identifiable conceptual framework.

Thus, we may say that in a given society one may argue over, say, the concept of property and may also disagree over the related concepts such as when or how one has a right to possess an object, but that overall there is already a framework within which we may argue the points. That is, if the argument makes sense, there must be some background understanding of property. Hence, given the acknowledged related distinguishable concepts, which may be diverse, we can say that there is also an acknowledged framework and that, therefore, the concept is not logically "essentially contested". There may be some interesting parallels here, for example, with an ontological argument regarding the concept of God, but the reader will be pleased to know that this issue will not be pursued here.

Further, as Gray points out, not all societies possess essentially contested concepts. We are acquainted with many primitive, closed, or traditional social orders in which definist and descriptive claims might legitimately be made
for a wide variety of concepts. In other words, there are societies in which a term acquires its meaning and the conditions under which it is used correctly are all but identical.

Generally, it could be argued that any concept acquires a contested character along with social changes. In fact, it could be argued that concepts are not essentially contested at all, but are merely confused. Therefore, I would argue that the category of essentially contested concepts is suspect and not a safe one to pursue particularly given the controversy over this theory. More importantly, however, I would argue that we do usually have an idea of property which generally seems to correspond to others' ideas of property — it is usually merely the examples over which we disagree. As Hume pointed out, property rules do display a generic similarity everywhere, regardless of the apparent historical variability of property.\(^1\)


\(^2\) See F.G. Whelan "Property as Artifice: Hume and Blackstone" in J.R. Pennock and J.W. Chapman (Eds.) NOMOS XXII "Property" op. cit. p.110
12. **Property as a Definable Concept.**

In considering property as a concept, we can say that we have some agreed denotation, and we regularly and effectively converse about property, so long as we agree on the examples. But problems regularly arise, particularly over things that are not standard, and this may lead to radical disagreements of understanding.

Words, of course, have those meanings which we as social beings have given their and we give them meanings by explaining their use.\(^3\) However, by trying to define "property", for example, one may draw on Wittgenstein's distinction between "criteria" and "symptom" to show the inherent problems involved, particularly if one were to identify a particular object as property. As an example, Wittgenstein gives the defining criterion of angina as the finding of the bacillus so-and-so in a patient's blood. His example is that the criterion of angina can be given by answering the question: "why do you say that this man has angina?" The answer is: "I have found the bacillus so-and-so in his blood". By this we have given the defining criterion of angina.

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If, however, the answer was "His throat is inflamed", Wittgenstein points out that this would merely be a symptom, that is, a phenomenon of which experience has taught us that it coincides, in some way or other, with the phenomenon which is our defining criterion. Then, to say "A man has angina if this bacillus is found in him" is a tautology, or at least it is a loose way of stating the definition of "angina". But to say "A man has angina whenever he has an inflamed throat" is to make a hypothesis.\(^4\)

While acknowledging there are several controversies regarding Wittgenstein's concept of a criterion, we may apply the criterion-symptom distinction as follows. Given that property involves or consists, in some sense, of rights, then we could say that if we have a criterion of property and ask the question "why do you say that this man has (particular) property?", the answer may well be: "I have found he has the right to use, to possess, to dispose of, x". However, if the answer to this question is "he is using x, he is selling (disposing of) x" then perhaps we may only have a symptom of property, but certainly not a defining criterion - after all, even thieves, who have no legitimate title to the things they have stolen, may use them, sell them, dispose of them etc.

What has this analogy then shown of the concept of property?

Certainly we are constantly faced with "symptoms" of property, but the question remains of whether we can give a defining criterion of property. In the context of ideological conflict, property looms large and it is important, if such conflict is to be conducted rationally, to solve the problem of what it means to have property. Given the diversity of what is counted as property, and acknowledging that the nature of economically significant property is constantly changing, it is essential to address this issue both morally and politically.

13. **Property as "Worse" Than Indefinable**

I will argue however, that the concept of property, whether or not the word "property" may be ultimately definable, is worse than indefinable - it may no longer have any literal application, except for the most trivial of things. That is, although it may turn out that we can define property, it has very little application apart from trivial cases. Today legislation, various regulations, and even the common law, so override and overcloud the discretionary use of what we call our property, that they have steadily and radically diminished our right to determine the use and disposal of the things we call our property, with the result that we are hardly better than stewards of what we say we own.
In other words, it is at least arguable that the limitations are now so great and so common that few if any of the things we conventionally say we own really are, strictly speaking, our property. Instead, acquiring and retaining property means acquiring and retaining a host of increasingly burdensome publicly imposed obligations. The consequences are perhaps, inevitably, due to the closeness of living, increasing mobility and the increasing acceptability of appeals to the public interest with its correlative increase in liabilities and responsibilities.

But where does this leave the concept of property? This issue is not just whether we can define property; rather, it is whether the concept of property has now outlived its usefulness. Earlier in the chapter I pointed to the diversity of the sorts of things we call property. The greater the diversity, the less content there will be to the concept of property; so much so that it might even be bereft of virtually all content, and be little more than a purely formal concept as can similarly be argued of the common noun, adjective, and transitive verb, respectively, "thing","real" or "exist". That is, it may be argued that the greater the diversity, the less likelihood that there will be that a common factor to all the things we call "property". The generality and diversity should make us wary that we can find common and peculiar factors to all things we call "property".
Like Wittgenstein, we should not assume that there are such factors, and we should instead look at all things we call "property". At the same time, the growth in the regulatory powers of the administrative State means that even this highly general and formalistic concept, property, seldom has literal application.

In what follows, before pronouncing on the issue of its continued relevance, I will examine some analytical issues in law and political theory as they relate to the concept of property, indicating the current divergent views, together with those elements of the concept which appear to be indicative of property and ownership. In particular, I will consider the rights people hold in relation to property.

I will argue that although it may no longer have much in the way of literal application, the concept of property may still be regarded as a unitary concept which is neither vague nor ambiguous. Rather, the objects which may be called property are diverse in the extreme, but the concept of property need not vary, and in particular it does not vary in sympathy with variations in the categories of things owned. I will also argue that the concept of property involves essential reference to the right to control. Moreover, I will argue that strictly speaking property rights cannot be overridden by any other rights, without thereby not merely qualifying,
but strictly speaking, contradicting the assertion of property rights. I acknowledge that this claim may seem extraordinary, however, much of what follows will be devoted to rebutting what I consider are unsuccessful objections to this view.
CHAPTER 2

PROPERTY AS A PRE-LEGAL AND LEGAL CONCEPT

- SOME ANALYTIC ISSUES.
1. **Property — An Artefact of Law or Naturally Created?**

The concept of property raises many issues, for example, property may be seen as entirely a creature of law as Thomas Hobbes indeed viewed it: an artefact dependent on the legal system, not just for its enforcement, but for the very meaningfulness of property talk; or it can be seen as something which can exist pre-legally or even extra-legally, generated by some sort of "natural" activity or process, as John Locke conceived it, trusting to a legal system only for its recognition, enforcement, and the peaceful resolution of disputes. Certainly the idea of property is more readily understood within a legal framework. However, when it comes to the moral justification of the institution of property, the idea of pre-legal, extra-legal or "natural" property is typically a critical plank to such a justification.

It is worth noting here that the disagreement between Hobbes and Locke as to whether the sovereign had an obligation to respect the property rights of the subjects, was connected to the issue of whether property could be meaningfully said to exist within a state of nature, where, by hypothesis, there is no legal system. Many philosophers have, however, attempted to justify claims to private property by recourse to the decisions of the sovereign or the community as a whole. In such cases, property rights must be considered to
be parasitic upon the legitimacy of the sovereign authority or, at the very least, its right to promulgate property laws.¹ As Hobbes¹ argues, in the absence of a sovereign there could be no secure possession of any kind. The sovereign provides security and enables a person to reap the benefit of his own activity: without the sovereign, "property" would be "too unstable to deserve the name".¹ Hence, in the absence of a sovereign, there could be no property on this account.

However, I will not pursue these arguments regarding sovereignty because, as Carter has stated, the problem shifts from an analysis of property dé jure to that of assessing the right of the sovereign body over individuals.¹ The "validation" of property rights is the outcome of prior arguments concerning authority, and property rights stand or fall with the justification of the authority which promulgates them. In any case, it may be totally misleading to support the traditional division between what may be considered public and private, that is, between a division which may be seen to be between "sovereignty" and (private)

¹ T.Hobbes "Leviathan" op. cit.
¹ A.Reeve "Property" (Macmillan Education, 1986) p.120.
¹ Ibid.
"property". Of course, it is easier to justify claims that rulers have an obligation to respect something if it can be proved that the thing in question would have existed, and justifiably so, without the rulers or indeed any rulers, having been in authority.

In any case, for the purpose of this thesis, it is not necessary to come to a conclusion concerning the issue. Indeed, if much of what I have to argue is correct, it may be irresolvable. It may be that our common understanding of the concept of property, such as it is, is simply too muddled or too vague to sustain the debate as to whether it is applicable only to certain sorts of creatures of law, or is also, and perhaps more fundamentally, applicable within a pre-legal or extra-legal domain.

There is much to be said, nevertheless, for the view, as Hoffman and Fisher have argued, that no fully adequate theory of justification of property acquisition has yet been achieved in modern Western social philosophy, where fully adequate means:

a) a theory which does not simply equate ownership with effective possession, that is, that equates having a justified claim to something with having the power to

See V. Held "Rights and Goods" op. cit. p.168
enforce that claim, and

b) a theory which is reasonably congruent with social assumptions about what are, and are not, possible and legitimate objects of ownership.°

In other words, a fully adequate theory of justification of property acquisition must be neither a mere rationalisation of the status quo, nor its revisionist overturning.

Now I stress I have not proved and will not attempt to prove, this claim about the absence of a fully adequate theory of justification, it having already been declared out of bounds so far as the scope of this thesis is concerned. But the recognition that such a view may be an arguable one, helps to focus why I have elected to concentrate on the analytical issue. The lack of an adequate theory of justification of property may indeed be due to a lack of clarity concerning analyses of property. That is, it may be argued that attempts to justify ownership have been unconvincing due to the lack of a clear conceptual exposition of property.

Given the presumed absence of a fully adequate theory of

property, I believe that an examination of the notion of property itself is a far more fundamental issue which has yet to be resolved. Unless we get it right, there will only be continuing confusion and difficulty in justification, if indeed that task can really be completed.

2. Ownership and Political Theory.

A consistent theme in political theory is that societies require consensus on the evaluation of property. Explanatory and normative theories about property both need to consider what property is, and normative theories have to discuss what it should be or why the existing arrangements are defective. As Hollowell points out, there appear to be three general areas which interest political philosophers and are of particular interest in the search for a feasible concept of property⁷. These are firstly, the economic meanings of our classifications of property, for example the importance of land or industrial capital. That is, some argue that ownership of these are a source of political power. Secondly, there are concerns regarding the moral entitlements consequent on ownership of such things as land and industrial capital. That is, questions arise regarding distribution and

perhaps the balance of power. Thirdly, there are the questions about the justification of such ownership, both in general and in the individual case.

In all of the above three areas, assumptions are made concerning the concept of property. For example, Macpherson's definition of property focuses directly on the need for a justification of the institution. Macpherson's focus highlights historical changes in the concept of property which have great bearing on both conceptual difficulties at present and on justificatory issues. Macpherson, for example, suggests four major changes which are worth considering.

1) Macpherson suggests that as late as the 17th Century it was quite usual for writers to use the word in what may seem to be an extraordinarily wide sense. For example, Locke defined men's properties as their lives, liberties and estates. For Hobbes, the things in which a man had property included his own "life and limb, and in the next degree those that concern conjugal affection, and after them riches and the means of living". Thus one's own person, one's capacities, one's rights and liberties

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were regarded as individual property and they were more
important than material things and revenues. This broad
meaning has been lost according to Macpherson, due to
the emergence of the market society, that is, property
came to have a narrower meaning, relating to material
things and revenues. We may ask, however, whether
Macpherson is correct in making this observation. It
is certainly not evident that property has narrowed its
meaning, but rather it could be interpreted that things
we cannot market are of less interest to us now.

2) The second major change was the narrowing of the concept
of material property. That is, according to Macpherson
from the time of Aristotle to the 17th Century, property
was seen to include two kinds of individual rights — an
individual right to exclude others from some use or
enjoyment of some thing, and an individual right not to
be excluded from the use or enjoyment of things the
society had declared for common use — common lands,
parks, roads, waters. However, according to Macpherson,
in modern times the idea of property has been generally
narrower and includes only the first right — the right
to exclude others, and although we have such things as
national parks, Macpherson contends that every citizen's
right to use the park is not thought of in the context
of the citizen's individual property, so that the modern
concept of property is pretty well confined to the right of an individual or corporation (a natural or artificial person) to exclude others from some use or enjoyment of some thing.

3) The third change in the concept of property in Macpherson's analysis is the further narrowing from property as an exclusive right merely to use and enjoy some thing, to property as an exclusive right both to use and to dispose of a thing—a right to sell it to someone else, or to alienate it.

4) A fourth change in the concept of property is the change from property as a right to a revenue, to property as a right to things (including the things that produce revenue).

Macpherson thus contends that we are left with a modern concept of property as an exclusive individual right to use and dispose of material things. As Macpherson\textsuperscript{10} states elsewhere, these changes in the concept of property are associated with the rise of capitalism and are generally changes which denote shifts from (pre-capitalist) property.

\textsuperscript{10} C.B. Macpherson "Capitalism and the Changing Concept of Property" in E. Kamenka and R.S. Neale (Eds.) "Feudalism, Capitalism and Beyond" (A.N.U. Press, 1975) pp.105-106.
which was understood to comprise common, as well as private property, and now is essentially private property. A further shift has occurred from the right to revenue to a right to (or in) the thing itself, together with a shift in the rationale or justification of private property. That is, according to Macpherson, prior to capitalism, various ethical and theological grounds had been offered, but with the rise of capitalism the rationale came to be mainly that property was a necessary incentive to the labour required by the society.

By Macpherson's historical analysis it is claimed that private property, as it is known today, is a claim to total dominion over a thing to the exclusion of others, and that this phenomenon is only a particular time-bound definition of property. Thus he calls for some further change to make our "narrow concept of property consistent with a democratic society".11 Further, as Tay has pointed out, by this Macpherson makes a plea for the return of an alleged pre-capitalist conception of property as social and as including rights to access and to a revenue - that is, in modern terms, as including and allowing for claims to such things as employment, social insurance, community action,

11 Ibid.
However, contrary to Macpherson's claim that the concept of property, which essentially entails total dominion or control over a thing, is a reflection of a "modern" context, and is "the" modern concept of property, I would contend that this observation is neither accurate nor appropriate. Clearly Macpherson's account has normative uses. However, it is instead, as Karl Renner has argued, the social function of the concept of property that has changed as the nature of the things we call property have changed - the concept of property is relatively stable. Indeed, others have also examined the historical changes in the conception of property and have suggested quite different conclusions than that proposed by Macpherson - even to the point of denying the importance of property as a category in legal and political theory. It can be argued, further, that traditional

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13 J.Brigham "Property and the Politics of Entitlement" op. cit. p.20

14 See also C.Donahue "The Future of the Concept of Property Predicted from its Past" in J.R.Pennock and J.W.Chapman (Eds.) NOMOS XXII "Property" op. cit. p.55

Marxism bases its condemnation of property on a conception that equally views property as ownership of material things.

I would contend that it is not the case that the concept of property itself has changed, rather it is the types of things that we call property that have changed, and this is evident from decisions of the courts which reflect shifts in the objects of legal conflict. Moreover, we do think of property more widely than the exclusive use of material things, and have done so for some time - this is not a recent phenomenon. If we accept that property, or more precisely ownership, is equivalent to, or at least entails certain rights, then we must accept that there are correlative duties placed on other people which come on to play, although as indicated elsewhere, these duties may be as Nozick argues, entirely negative. Further, we have long thought of property as consisting of rights which persons hold with regard to a thing and thus intangibles have correspondingly been long considered as property (although intangible property arguably has become increasingly important). I do, however, acknowledge that the idea of rights is, arguably, a relatively recent phenomenon. As Golding has pointed out, Greeks and other ancients did not employ the terminology of rights in either their philosophical or moral discourse. "How surprised would one of the Ancients have been if a contemporary had said not merely 'That (thing) is mine; give it back!' but rather 'I
have a right to that thing: give it to me!'"  

3. The Legal Framework of Property.

In a sense, property only exists because there is law. Law is thus vital for an understanding of the institution of property. Whether or not one holds the view that property is a creature of the State, or the creation of law, many discussions of property begin with a consideration of property in a State or organised society, within a legal system as defined by the legal system.

Generally, we are faced with what we might call, not altogether happily, the jurisprudential aspects of the problem of ownership; this is the area within which the law itself creates new and increasingly obtruse forms of proprietary interests. These developments suggest one's understanding of what it is to own something or to have

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16 M.P.Golding "The Significance of Rights Language" in Philosophical Topics Vol.18 No.1, 1990

17 Waldron argues that it "would be a mistake to restrict all talk of property to contexts where something recognisable as a State with institutions of positive laws exist". J.Waldron "What is Private Property" op. cit. p.319.

18 See for example J.Chandler "A Reconsideration of the Concept of Property" in C.Wellman (Ed.) "Equality and Freedom: Past, Present and Future" op. cit. p.147
property, may interact with one's ability to participate in one's society — the range of the attachments we can have to the objects of ownership, and hence our capacity to use our own property, are determined by the legal framework within our society, itself a product in its particular law of property, of the intended and unintended consequences of the increasingly subtle ways in which we wish to deal with the resources to which we lay claim.

From a jurisprudential point of view, it is the types of property objects that are dealt with, together with the holder-object relationship(s), the varieties of lawful and unlawful acquisitive action, and property law as defining a legal and social system, that are the principal areas of interest. An enumeration and critical comparison of legally recognised justifications of property, and the "felt" or subjective side of property may also figure in a comprehensive jurisprudential treatment.¹⁹

The diversity of property is frequently acknowledged. In particular, Roman and common law have long recognised that property may be corporeal²⁰ or incorporeal, and include

¹⁹ See P. Hollowell "On the Operationalisation of Property" in P. Hollowell (Ed.) "Property and Social Relations" (Heinemann, London, 1982) p. 16

²⁰ In legal terms, property which has a physical existence such as land or goods.
economically potent assets such as patents, copyrights and trade marks. The French Patent Law of 1791, for example, explicitly affirmed that individuals owned ideas.\textsuperscript{11} Incorporeal proprietary interests also include a number of different kinds of rights over the property of others, for example, leases, tenancies, servitudes (easements), securities and trusts.

The types of holder-object relationships are also diverse under the major legal codes. They range from what some may call the "fullest" form of ownership, where there is indisputibility of ownership and entailing a large number of rights, including the right to use and destroy, the right to possess, that is, rights to occupy, control and exclude, and the right to transfer, that is to donate, sell or bequeath, to other types of relationships or weaker forms of attachment, such as permissive possession, the rights of detention and custody, all of which carry potentially burdensome obligations with them.

Although property typically comes to us by transfer from previous owners, all property, however, traces its existence (as property) to appropriation of previously unowned

\textsuperscript{11} M.Silver "Foundations of Economic Justice" op. cit. p.29
People thus acquire property by various methods, for example, by original ownership, that is, by one creating something, by occupation, or by accession of a hitherto unowned or abandoned thing. One can also acquire property by derivation, that is, by sale, gift or even statute, or by succession, that is, by bequest. There are, of course, illegal methods of acquisition such as conquest, by forcible occupation, squatting, forcible seizing, and the many forms of theft and fraud. If successful, they yield *de facto* many of the powers of ownership, although not the moral or (usually) the legal rights. That is, thieves lack legal rights over what they steal yet they are able to consume it, exclude others from it, derive income from it, and dispose of it — many of the activities or rights we generally associate with ownership.

Within the general framework of law there exists also a general justification of property rules. Granted that it is accepted that the law exists to facilitate and make secure the fundamental elements of interactive human life, and hence must protect interests and preserve social order against threats to the security of human life, then — given the

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11 See D. Schmidtz "When is Original Appropriation Required?" in *The Monist* Vol. 73, 1990, p. 504

13 Although it should be noted that even those who acquire things illegally may have some title against others with no better right.
natural acquisitiveness of human beings — a rational and enforceable system of resource allocation is an inevitable feature. A legal framework facilitates the orderly acquisition, use and disposal of property both for the individual and generally to the benefit of the society at large. Even an unjust or inefficient property law is, as Hobbes said when comparing civil society with the state of nature, better than no law at all.

Further, it could be argued that legal views of property throw some light on the key elements of property. For example, both philosophers and jurists have addressed the issue of the importance of intention, some arguing that it is decisive in possession cases. Others have given control the paramount role.

A further aspect in the analytical approaches to property appears to be associated with sociology, or, more precisely, social anthropology. Examples are often given to illustrate both the sheer number of differing legal systems and the varieties of society types which, despite differences, nonetheless uphold property in some form or other. Indeed, as H.L.A. Hart has pointed out, any viable society will have some sort of system of property, or as Hume argued, any

*H.L.A.Hart "The Concept of Law" (Oxford University Press, 1961).*
society must have some rules of property.\textsuperscript{15}

Discourse about property, however, has fragmented into many different usages and this is most evident when enumerating the various usages within a legal context. In fact, it may be said that the term "property" is often used imprecisely, even in legal writing,\textsuperscript{16} and in many ways these usages no longer reflect the common conception of property. Four recent legal cases in Australia, for example, have raised in various guises the vexed question of what property is. It appears, however, that the decisions of the cases do little more than illustrate that "there is no ready response to this question".\textsuperscript{17}

For example, in Milirrpum v Nabalco Pty Ltd (Gove Island Rights) representatives of Aboriginal clans claimed entitlement to certain areas of the Gove Peninsula in Arnhemland. One of the questions specifically raised in the pleadings was whether the clans' relationship to the land was a recognisable proprietary interest. Blackburn J. of the

\textsuperscript{15} F.G. Whelan "Property as Artifice: Hume and Blackstone" in J.R. Pennock and J.W. Chapman (Eds.) NOMOS XXII "Property" op. cit. p.110


\textsuperscript{17} M. Crommelin "Economic Analysis of Property" in D.J. Galligan (Ed.) "Essays in Legal Theory" (Melbourne University Press, 1984) p.74
Supreme Court of the Northern Territory found a proved relationship of the clans to defined areas of land, a relationship which in the eyes of the members of the clans was supported by a system of law. However he decided that this relationship was not a recognisable proprietary interest within the framework of the Australian law. "I think that property, in its many forms generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications. But by this standard I do not think that I can characterise the relationship of the clan as to the land as proprietary."\(^1\)

In Dorman v Rogers, Murphy J. (in dissent) addressed the question of whether the right to practice medicine was proprietary. Justice Murphy held that the right to practice medicine was proprietary, and in so doing he espoused perhaps the broadest possible definition of property: "The limits or property are the interfaces between accepted and unaccepted social claims...In modern legal systems 'property' embraces every possible interest recognised by law which a person can have in anything and includes practically all valuable rights."\(^2\) Thus it appears that Murphy held the

\(^1\) M.Crommelin, ibid. p.75

view that property consists of all possible rights that one considers to be of value.

In addition, in *Re Toohey; Ex Parte Meneling Station Pty Ltd* the issue of whether a grazing licence was an "estate or interest in land" was raised, that is, whether the licence was an estate or interest of a proprietary nature in the land. It was decided that the licence was not an interest in the land. "Before a right or an interest can be admitted into the category of property or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability". The grazing licence failed to meet these criteria.

Generally the law of property is concerned with the relations of persons to things, that is, relations between persons with respect to things. However, what distinguishes proprietary relations from other relations between persons appears to be the scope of the enforcement of rights with respect to things. That is, contractual relations, for example, give rise to particular rights which are enforceable merely between the parties to the contract, whereas proprietary relations involve rights enforceable against the society at large. This distinction is identified as rights in *rem*

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(rights good against the world) as opposed to rights in personam (rights good against determinate persons). This issue is discussed below.

Further, T.C. Grey has enumerated several legal usages which are useful in indicating the divergent notions of property within the law. These are:

1. The body of law concerned with the use of land such as estates in land, title registration and transfer, the financing of real estate transactions, the law of landlord and tenant, public regulation of land use, and public subsidy and provision of low-income housing. In general these are concerned with real estate.

2. Property as a purposive account which includes among property rights all and only those entitlements whose purpose (in some sense) is to advance allocative efficiency by allowing individuals to reap the benefits and requiring them to bear the costs generated by their activities.

3. The purpose of property to protect security and independence.

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4. The prohibition against "taking" private property except for a public purpose and upon the payment of just compensation.

5. The use of "property" rules as opposed to liability rules according to the nature of the sanctions imposed upon their violation. For example, a person's ownership of his car is protected by both liability rules (tort doctrines of conversion and liability for negligent damage to property) and property rules (criminal laws against theft).

If we were to push all of the above to their limits at the same time, the result would almost certainly be contradictory. While the law may well be intended to protect each person, his rights, and hence by extension his property, it will inevitably do this by intruding on the "individual's right to be free of constraint". One obvious example arises in respect to Eminent Domain, the government's right to take private property for public purpose, and a government's power that ranges from appropriation or

31 See also R.A. Epstein "Takings - Private Property and the Power of Eminent Domain" (Harvard University Press, 1985)

33 K.Mason "How Change (Reform?) Occurs and How to Block It" in K.Mason "Constancy and Change" (The Federation Press, 1990) p.87
acquisition of land from private hands to the various modes of regulation and taxation which are levied in the modern State.

In addition, property, as I have already indicated, entails the logical possibility of theft. Theft and property may then be seen as co-relative terms in the sense that neither is conceivable without the other. Although it may be argued that property can be defined without reference to theft, it may equally be argued that a society without theft is a society in which private property is not possible. Property brings with it the possibility of theft - neither is possible in the absence of the other. In a legal sense, theft can only occur in respect of a specific item of property, that is, theft presupposes the institution of property. As Silver points out, theft deliberately violates property rights as a thief deliberately employs coercion to obtain power over

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34 Not as Proudhon stated, that property is theft. [P.J.Proudhon "What is Property? An Enquiry into the Principles of Right and of Government" (tr. B.R.Tucker, N.Y.Dover 1970 ed.)p.11] This is merely an indication of Proudhon's confusion, however much others may adhere to his view. The paradox is as much moral as legal or logical. As Smith argues, Proudhon clearly intends a moral re-evaluation of the practice, but since the practice itself provides the only available terms for criticism, he resorts to paradox, that is, literal nonsense to make the point. J.M.Smith "The Scope of Property Rights" in S.L.Blumenfeld (Ed.) "Property in a Humane Economy" op. cit. p.233.
an object by means of physical force or deception\(^3\) (although not all acts of coercion are acts of theft.) Can it be said, conversely, that that which cannot be stolen is not deemed to be "property"? Certainly this is not the case with objects that cannot be stolen due to physical constraints - I cannot steal, run away with, for example, Mr Trump's Tower in New York, yet if property is by definition constitutive of certain rights, then it may be possible to "steal"\(^4\) those rights from Mr Trump by deception. In any case, if we emphasise the logical possibility of theft, then the tower itself could be whisked away.

This of course still suggests that the concept of property as equated with control or dominion over something, that is, what is it to steal Mr Trump's rights, but to have control. If property belongs to no one, it cannot be stolen, and if property is abandoned, there cannot be any theft of it. Such property can be appropriated, but not, prior to such

\(^3\) M.Silver "Foundations of Economic Justice" op. cit. p.19

\(^4\) Under the actus reus of theft, theft can only be committed in respect of a specific item of property and it is essential that the property belongs to another. "Belonging to another", however, is widely defined to include almost any legally recognised interest in property and since the law protects all interests in property, a person with a greater interest can be guilty of theft from a person with a lesser interest in the same chattel. See D.P.Derham, F.K.H.Maher and P.L.Waller (Eds.)"An Introduction to Law" op. cit. pp.29-31.
appropriation, misappropriated.

4. Property, Rights, and Relations.

What at least is apparent in all the examples of property and ownership so far considered is that the owner of an object is put into a privileged position of having certain rights over and above the rights of other people in relation to that object. These rights would include, for example, the right to use, to possess and to manage something - it is not merely a relation between a person and a thing, but a relationship between people in relation to a thing. After all, no distinction would be drawn by saying that "I own X" if, say, I was the last sentient being in the universe. I would not need to assert that "X is my property" and that therefore I may use it, destroy it etc.; I would merely do as I please. As Donahue has eloquently put it, "There is no property on the philosopher's desert island ... Robinson Crusoe did not

\[17\] For a full analysis of rights and the common features of ownership as suggested by A.M. Honoré, see Ch. 3

\[18\] This does not, however, necessarily detract from my relationship with, for example, the environment. We need not exhaust discussion of what we do in relation to nature by talking only of property - we may still have moral limitations not connected with property rights. My relationship with the environment may have nothing to do with other people, so that perhaps we should not necessarily use the concept of property to explain all things external to ourselves.
need property until Friday arrived." In the world of Robinson Crusoe property rights play no role. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations that he can reasonably hold in his dealings with others.

Similarly, I would agree with Ayn Rand that "all wealth is produced by somebody and belongs to somebody" and "all property and all forms of wealth are produced by man's mind and labour". By this I mean that the value put on things by people, and hence which they consider to be worth acquiring as property, is something which is not inherent within the thing, but which is contrived or attributed by people. I therefore disagree with Mavrodes that this can be countered by such statements as "there is plenty of standing timber, lands, mineral deposits and so on, which was never produced by any human being at all. And plenty of that wealth is inherited." This entirely misses the point of property. That is, property and wealth are conceptually only

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39 C. Donahue "Property - An Introduction to the Concept and the Institution", op. cit. p.XXIV.


creations of people — although mineral deposits, forests and land need not be created by people, certainly the value and the use to which these can be put, particularly by acquiring them as one's property, are undoubtedly determined by people, and specifically will be determined by the particular society in which they live.

Here I wish to reiterate the point that property and ownership involve relations between people; they are the relationships generated in respect of designated rights, liberties and perhaps duties. These are not necessarily related to a need for order due to limited resources — it is simply not necessarily true that property exists only because of competition or conflict over limited resources, unless, that is, one trivialises the scarcity thesis by representing every whimsical preference a person may have for one particular thing, rather than another just as good, as a scarcity factor.

These rights may be viewed as purely conventional, and on a broader view, it could be said that property and ownership may be seen in terms of a social contract, that is, that property exists due to a metaphorical pact which is made with the State, and is expressed in the form of State recognition and enforcement of contracts respecting the relations with
things. As Hobbes argues, society and political authority proceeds from consent - individuals transfer their rights to a sovereign to whom all claims to ownership have been transferred. A particular society or legal system may determine its own criterion or criteria of ownership or property. Those formal relations or legal relations are arrangements between individuals, or between groups, respecting both each other and those objects which, according to the society and its laws, are known as property. How the rights or legal relations are applied, however, or how they are constituent of what is known as property still remains central to the problem of attempting to define property and ownership.

Rights must be assigned on some basis, but there appear to be many possible criteria for doing this. For example, differing political, legal and/or moral views, as well as a variety of ideologies, may be taken into consideration by various governments in determining the sorts of things which may be allowed as property; consider, for example, controversies over subterranean minerals, gold, and wild animals. We can, of course, say that there are certain logical requirements which property or ownership relations must contain. That is, there must be a method of application

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41 See J.K. Fieblemann "Justice, Law and Culture" op. cit. Although I accept that some hold the view that contract cannot be equated with property.
of rights, for determining how rights are assigned, and how disputes are to be resolved, and, further, how and why the particular rights an individual is assigned over what a person owns."

A specific distinction which arises in law, and which may be applied to our relationship to property, is the distinction drawn between rights in rem and rights in personam. Of course all talk of rights carries implications of relations between people, however in rem refers to rights existing because of a relation between a person and a thing, whereas in personam refers to rights conceived primarily as existing because of a relation between persons. An example of rights in rem would be a contractual debt or claim for damages in tort against a particular person, whereas rights in personam would, for example, entail a proprietary right such as ownership against the whole world. This distinction appears to reflect the general contrast which is often made between general and particular rights. For example, a general right against everyone may be my right not to be murdered. This means that everyone capable of murdering me must refrain from doing so (although we may disagree or have different interpretations of who "everyone" is). Particular rights, however, are those rights we have over particular people to do certain specific actions such as those arising as a result

"See J.O.Grunebaum "Private Ownership" op. cit.p.12."
of promises or agreements.\(^45\)

Although these terms *in rem* and *in personam* are used when speaking of ownership specifically in law, and hence may not assist us in defining ownership generally, they do at least indicate the essential position of rights recognised with respect to property.

This brings us to what we may call the "right of title" to things in general and to some thing in particular, that is, what constitutes ownership. This appears to have three aspects: firstly, the constituent rights must be self-consistent, that is, it must not be a consequence that a person can own and not own at the same time; secondly, the rights must be determinate – one must be able to determine whether a person does or does not own a thing; and thirdly, the rights regarding title must be complete, that is, if something is ownable there must be procedures making it possible for someone or some group to own it.\(^46\) As Hume points out, rights in a system of justice, including property


rights, must be precisely defined. As a normative problem, the question becomes how are we to discover the best set of rights or rules, from the points of view or morality and prudence, governing a situation in which persons manage things. I will argue that there are certain core rights which are essential for there to be a coherent idea of property. These are the right to possess, the right to use, and the right to dispose of a thing. These, I will contend, actually constitute the right of control, that is, there is a mutual entailment between them.

5. **Right to Property and Property Rights.**

A further point of clarification must be made concerning rights as they may relate to property which often leads to confusion. Leaving aside for the moment the issue of whether or not there are moral rights in general, certainly in legal terms there are rules which are used in defining property and property rights within the limits of a given legal system, and in any such system, we accept that the greater the number of rights one possesses in respect to a thing, the less contentious the question becomes of whether one is an owner.

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This point can be distinguished from the question of whether one has a right to property. That is, I am concerned here primarily with the analysis of property, the internal structure of property, or what used to be called the nature of property and ownership as we understand it, prior to expressing it in legal terms (but also accepting that this is reflected in what appears to be our generally accepted account of property in legal terms) and not with any assertion that one has a right, legally, to own anything. After all, one could merely enumerate certain rules or rights peculiar to a particular legal system to explicate one's legal right to property under that legal system.  

The issue may, however, be raised of whether there is a distinction between moral and legal rights to property, or whether property rights merely involve the legal enforcement of moral rights, some of which one has acquired by passing through appropriate legal channels. Leaving aside the grand controversy between Hobbes and Locke as to whether property

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48 McCrae makes a similar distinction by stating that the increasingly prevalent position among lawyers, influenced by economists, is that property is a bundle of separable rights, some of which may be taken or transferred while others remain. That of the layman and the courts is more nearly that an analysis of property involves control of a "thing" - a bundle of rights that are seen as inseparable and that belong as a bundle to one person or another. (D. McCrae "Scientific Policymaking and Compensation for the Taking of Property" in J.R. Pennock and J.W. Chapman (Ed.) "Property" NOMOS XXII op. cit. p.327

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rights are ultimately pre-legal, or ultimately conventional, the creature of a legal system, there is a clear parallel between what we customarily think of as morally permissible and defensible ways of acquiring and disposing of property, and what is found in a developed liberal legal system. I will therefore take the view that the foundation of particular property rights can be either legal or moral, noting that they commonly coincide. These of course are not different sorts of property rights but rather different foundations, a different pedigree.

The question may then be asked: does the right of ownership exist independently of the rights (and liabilities) which constitute ownership? For example, one could argue that, say, I have the right of ownership to a particular car but that if I lease the car to someone else, I have given away or transferred certain rights and liabilities. Similarly, one could argue that ownership consists of particular rights and liabilities, and if one person possesses all of these, then he is the owner. (Alternatively, often rights may be so dispersed that it is conceivable that there is no one owner.) Ultimately, however, it is clear that the particular rights are constitutive rights of ownership.

Of course, one can assume that once a specific definition of property in the sense of certain legal rights has been
provided, then one can give examples of one's right to particular property, that is, one's right to a particular thing. For example, if I assert that I have the unqualified right to use, to possess, to alienate, to destroy etc. a particular car, then it would logically follow that I have a right to that car (as property). That is, by enumerating certain rights, one may generate a list which entails that the particular thing is one's property. Equally, one could say that the possession of property in a legal sense, say, a car, is the basis of certain (legal) rights. That is, by owning a car, this would entail the right to use, to sell etc. the car, and as such, the ownership of the car is the source of various rights.

Alternatively, there may be other principles such as moral considerations based on a natural rights theory whereby one may argue that individuals have rights by virtue merely of their being human beings and hence all humans have these same rights. These would be independent of society or consent and particular rights would apply to all individuals. However, here I am essentially concerned with rights as they relate to property, whether or not it can be argued that natural rights exist or that legal rights are dependent upon moral ones.

Yet it seems that these questions arise as a result of a
certain amount of confusion that exists when we speak of rights and property, and it appears that greater precision is required when discussions of property arise. For example, to claim that there exists a general right to property does not entail that every human being has a right to own some piece or quantity of land as if, for example, every human being has a right to half a hectare.\textsuperscript{49} The delineation which I have found to be often dealt with together, and often confused, is the distinction that can be made between what I observe to be four different ideas of property and rights. It appears that, both in ordinary speech and in philosophy, we tend to unthinkingly move between the four. For example, Kelley states that the principle of the right to property—that each individual should be free to use and dispose of certain objects as one chooses and no one is permitted to use those objects without the owner's permission or to interfere coercively with the owner's use—only applies when a person has acquired an object, and that further, this right to property is perfectly consistent with my having failed to acquire anything.\textsuperscript{50} I agree that this may well be true, however Kelley is identifying the right pertaining to the ownership of a particular thing. Whereas Nelson, for example,


describes property as involving two kinds of rights:

(1) rights ("powers") the exercise of which constitutes the acquisition of property, and

(2) the complex of particular rights over a "thing" which amount to its being one's property. One acquires these latter rights by exercising one's rights of acquisition.\(^5\)

Here Nelson has identified two rights relationships with respect to property. That is, the first example identifies a situation by which one holds (general) right(s) prior to, and which enable the acquisition of, property, whereas the second example refers to the particular rights one holds as a consequence of (rightfully) acquiring something.

Similarly, Waldron presents a formulation of property rights based on two types of "special rights" — those rights which derive from an important interest created by the occurrence of some contingent event or transaction such as a promissory right— and "general rights" — those which are founded directly on a qualitative character of an interest as with

the right to life.\textsuperscript{52} This appears to be similar to Nozick's distinction between positive rights - those which emanate from an individual's voluntary undertaking, and negative rights - our rights not to be interfered with.

However, I contend that in fact a distinction can be made between four separate ideas of rights as they relate to property, and that these can be applied both legally as well as morally. These are:

(1) the right to property, or the capacity to be a property owner,

(2) the capacity or right to own particular types of property,

(3) the right to particular items of property, and

(4) particular rights, that is, the rights we exercise in consequence of being a property owner of a particular item of a particular type.

(1) Firstly, one may say that I have a general right to property - a "capacity" for ownership. This general right may be said to be predicated of human beings and may be thought of as a "natural" right. Its recognition in practice would involve the particular rules of the system which determines the acceptability of a person

\textsuperscript{52} J. Waldron "The Right to Private Property" op. cit. p.116
as a potential owner, for example, whether a person is of a certain age, a citizen of the particular country or is mentally competent to own property. That is, this involves the issue of whether one is allowed or permitted to be an owner by the appropriate system. This issue is not, of course, contentious when examining trivial objects of property such as the ownership of one's clothes, but has implications, for example, on Rupert Murdoch's capacity to own additional media in the United States, or on the permissibility of the mentally handicapped or minors to own property without the assistance of trustees.

(2) Secondly, one may say that individuals have a general right to certain types of property — a capacity to own particular types of property.\footnote{In our society we may own all sorts of things, but not other human beings.} This takes into account the significant differences between societies regarding what may be permitted as property. For example, in Australia private ownership of major railways is not permitted, although it is permitted in the United States. Further, this takes into consideration the varied types of property items which may be permitted. For example, under communist doctrine "private property" is unlawful, yet even strict
communist systems allow for the capacity for ownership of particular types of property. For example, Article 10 of the (former) Constitution of the USSR allowed for "personal property", in theory at least, protected by law. Again, this distinction of a right to certain types of property may not be significant when examining insignificant types of items considered as property, but is of importance for examples such as ownership of land.

(3) The third possibility is the issue of what flows from an affirmative or negative answer to the question of whether one has a (legal) proprietary right to a particular thing, say a particular parcel of land or a particular house, or a particular car. That is, one has some sort of right to something in particular which is called one's property. This is of course important in the sense that if I have a right to X, then others may not prevent me from possessing, using etc., that X; and I would be acting correctly according to the law if I were to possess, use or dispose of X.

54 Personal property under the strict socialist system is different from private property. It is of a consumer character, in other words it is designated for satisfying the personal material and cultural requirements of citizens, and may be applied only to purchase objects of consumer use, but not the means of production. V.V.Laptev "Social Property and Economic Development" in C.Wellman (Ed.) "Equality and Freedom: Past, Present and Future" (Franz Steiner Verlag, Wiesbaden, 1977)
(4) Under the fourth possibility, one may distinguish whether one possesses certain rights with respect to a particular item of property, say, an individual motor car. These are specific rights which can be enumerated in relation to a particular object which one calls one's property, that is, whether one has the right to possess, the right to use or the right to dispose of that particular item as one pleases. These rights may be used to define ownership of a particular thing, so that in the case of, say, the car, it can be asked: Do you have the (legal) right to use that particular car? or Do you have the (legal) right to dispose of the car? These particular rights become an important issue if, say, one were to hire the car from a car rental firm and hence would have the right to use it, but not to dispose of it as one pleased.

Generally, the recognition of a property right may be said to lie in the promise or assurance of State protection of the link between the individual and the thing according to the rules already established by the State. (When a State is not in a position to provide protection to any substantial degree, its days are probably numbered as a viable political entity.)
In other words, property and rights may be said to go together and may be differentiated in the following manner:

(1) I may have a general (legal) right to hold property in this particular society (I am a citizen, I am mentally competent, etc.).

(2) I may have a general (legal) right to hold property of a particular type in this particular society (such as houses, cars, etc., but not railways).

(3) I may have the right to that particular car (as property). That individual item is my property.

(4) Given the particular thing which is my property, e.g. my car, I possess certain rights which may be enumerated with respect to that car. For example, the right to use it, to drive it around, to dispose of it by selling it or by giving it away etc.

I will be essentially focussing on (4) initially by examining Honoré's suggested enumerated rights which are regularly involved in legal ownership in the following chapter. This of course will also entail some overlap into (3), that is, given certain rights one may have with respect to a thing, it may be said that one has a right to that thing as
property. The distinction here is between rights one may have to do, or with, something and the rights to merely try to have or do something.

Of course the possession of any of these formulations of rights, that is, to say that one has a general right to property – to be a property owner – has a general right to particular types of things, has a right to a particular item or thing, or possesses particular property rights in relation to that item does not necessarily entail that the person in fact has the ability to utilise the rights or objectify the rights – to put these rights into practice. For example, I may have the right to possess a particular item, but I may not be able to possess the object if, for example, it has been stolen. However I may still retain that right. Or, for example, I may have the right to use and to dispose of my car, but if it has been stolen I cannot in fact do so. Similarly, I may say that I have a proprietary right to my car, but I cannot attain it if it has been stolen.

Further, it should be noted that even the holding of certain rights does not entail that these will be upheld. For example, some property rights which may have once been easy to enforce have become unenforceable in practice through the development of technology. As an example, copyright laws were in existence prior to the development of photocopy
machines, and without strict physical enforcement of all copying, there is nothing to prevent a person from utilising a copying machine in contravention of the laws.\(^{55}\) Similarly, property rights in printed material and computer software are also rapidly becoming unenforceable.

6. **Recurring Themes.**

One thing that quickly becomes apparent throughout these analytical and descriptive approaches to property is that there are recurrent themes throughout. For example, there appears to be a mental aspect which can be illustrated as follows:

(1) thinking of something as somebody's property — even if I do not know whose — involves thinking of it differently from thinking of it as unowned; I think of it as having a special relationship with somebody, even though I may not know who;

(2) thinking of something as my property leads to certain feelings such as what we might call "possessive

indignation", a special category of moral indignation or even outrage, when it has been borrowed without permission, stolen or wantonly destroyed;

(3) we all have some concept of property, that even if we have no convenient word for property, we have some sense of the special attachment that would be expressed in some such phrase as "this is mine".

In addition, there is also an acquisitive dimension, that is, the particular process of appropriation by which an individual gains access to property.

Further, the question of distribution is a recurrent theme, although I will not be dealing with this issue. Nevertheless, it is always possible to ask whether it is right, or best, that this property is aligned with that owner, rather than some other individual or collective owner, or whether it should be held in common, unowned, or — as some would maintain with wilderness areas — absolutely sealed off from human interaction of any sort. In this sense, normative elements have always entered the question of distribution.

It may also be noted that it is often unclear whether

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56 P. Hollowell "On the Operationalisation of Property" in P. Hollowell (Ed.) "Property and Social Relations" op. cit. p.23
property equates with certain rights, privileges, powers and liabilities; or whether one is speaking of the value the possession of those rights, privileges, powers and liabilities gives to the holder. That is, it is often unclear whether it is the subject matter of those rights which is being discussed, or whether it is the use to which the holder puts those rights, privileges, powers and liabilities. Similarly, it is often not clear in the literature whether a general right to property is being discussed, or whether the focus is on the right to particular types of property, the right to particular items, or whether the specific rights associated with ownership are at issue.

Certainly the range of things which we call property brings out this problem. Those things which one calls one's property in ordinary cases, such as our house, personal possessions or land may easily be said to involve specific rights which we readily recognise as having value and use. However, what is held as property as wealth sometimes appears neither to be valuable nor tangible in the same way as, say, our house. Money, for example, takes most of its value from social practices, agreements or expectations, not from the material of which it is made, whereas copyrights and patents protect what is called intellectual property, that is, they protect the intangible ideas we hold as valuable.
7. **Property as a Family Resemblance Concept.**

If we are to consider property and ownership as rights, a possible view of these concepts is of course not to suggest that there is a single right or set of rights that is necessarily associated with the concept of property, but that property is a concept which exemplifies Wittgenstein's concept of family resemblance.\(^57\) There is, as Wittgenstein famously pointed out, a tendency to look for something common and distinctive to all entities correctly subsumed under the same general term. Such an assumption, while very natural, is simply wrong, and lies behind many of the confused reifications that litter the history of theories of meaning. Taking the particular example of the general word "game", Wittgenstein suggests that games form a family, the members of which share family likenesses.\(^58\) With people in families, some – but not all – "may have the same nose, some the same eyebrows and some again the same way of walking"; and these groups, defined by their particular likenesses, overlap.\(^59\) By the family resemblance analogy we may see a "complicated network of similarities overlapping and criss-crossing:

\(^57\) See for example J.Waldron *The Right to Private Property* op.cit.

\(^58\) L.Wittgenstein *The Blue and Brown Books* (Harper Colophon, 1965 ed.) p.17

sometimes overall similarities, sometimes similarities of details".\textsuperscript{60}

If the family resemblance model is appropriate here – and nobody maintains it is appropriate for \textit{all} general terms – we would not concentrate on looking for some characteristic(s) common and peculiar to all genuine cases of property; we would instead look at example after example, noting patterns of overlap.

In general, the family resemblance doctrine is that there may be a class of things such that:

1) There is no one basic or undefined predicate, other than the predicate defining the entire reference class, which applies to every member.

2) Basic predicates do however apply to every member of various sub-classes.

3) The predicate applies to the whole reference class in virtue of the applicability of these basic predicates to its sub-classes.\textsuperscript{61}

\textsuperscript{60} L. Wittgenstein "Philosophical Investigations" (Basil Blackwell, 1976) s.66

However, the problem with using this model for property is that because the content of ownership may vary from society to society, despite broad similarities, it becomes possible for people to argue that the idea of ownership and property prevalent in their society is superior or worse than ownership or property prevalent elsewhere. That is, one could argue that a society, by comparison, does not in fact have a system of ownership or property at all. Unlike "game", "property" does not even have a stable and agreed denotation. For example, for many years lawyers disputed whether property included such things as "future interests". It is the very nexus between property and rights that seems to frustrate the descriptive approach necessary for applying the family resemblance model. In fact I will argue that property is a definable concept, not to be understood in family resemblance terms, but which must include the rights to use, to possess and to dispose of a thing, all of which are absolute and which boil down to control.

8. Ownership – Absolute or Relative?

A notion of what we might call absolute ownership is intuitively very appealing as a starting point for thinking

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about property, particularly among those who feel very strongly that if something is genuinely and legitimately one's property, then nobody can rightfully destroy or limit your relationship with that thing, except with your freely given consent. Equally, something being owned by me means that I can do absolutely anything with it, for whatever purpose I like, and can even destroy it or waste it, however foolish this might be. I will always have an answer to critics: "It's mine so, I can do what I like with it."

But the reality is that urbanisation and greater population densities have made it seem obvious to most, if not all philosophical and jurisprudential commentators that ownership in this absolute sense is fundamentally implausible. Conceding any owner total discretion in the use, say, of certain land, without restraint or liability for harm caused to others in the neighbourhood, simply cannot be reconciled with plausible liberal assumptions about the rights of the neighbours not be harmed by what that owner does with or on his property.

Yet that phrase, "but it's mine - so I can do what I like with it" continues to carry some rhetorical force. So let us look at some examples of the limitations which are

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commonly accepted in developed, civilized societies, and which appear to spell doom for the notion that ownership is absolute.

a) When the thing owned is a sentient being.

Few would concede that the owner of, say, a dog would be permitted to do anything with it, merely because it was uncontroversial that he was, indeed, its true owner. To generalise, it would seem that the interests of any owned sentient being in being spared gratuitous suffering are already sufficient to render any such ownership non-absolute.

In other words, ownership does not override the owner's being precluded, morally as well as legally, from doing certain things to the sentient living\(^6\) thing he owns. He cannot do what he likes, but notice that this is not dependent upon someone else having a stronger, residual or correlative claim to it. That is, to understand this moral constraint, we do not have to suppose that the owner's proprietary interest in, for example, the dog is tempered by someone else also having a proprietary interest in it. It is not just other proprietary or quasi-proprietary interests that limit what an owner may

\(^6\) See below for self-ownership and children as property.
do, thereby rendering that ownership less than absolute.

b) When the thing owned is of unique aesthetic value.

Limitations may be based upon aesthetic considerations when the thing owned is, say, a unique and irreplaceable aesthetically prized object. For example, in increasing numbers of cities, local regulations will not permit the owner of a unique building, perhaps the only surviving authentic example of a particular architectural style, to destroy or modify the building. The basis of such regulations lies in a public conviction that it is morally wrong to destroy something of great aesthetic value, and that ownership does not override the embargo which such considerations justify.

This category is, of course, more controversial, and this shows up in the fact that there are surprising inconsistencies in the law. For example, in no Australian jurisdiction that I know of is it an offence for an owner of, say, a Van Gogh masterpiece to deliberately destroy it, or to modify it to "improve" it. Yet an aesthetically valuable painting need be no less valuable than an aesthetically valuable building. Perhaps the reason for the inconsistency is that paintings which "lose" their aesthetic value lose nearly
all their commercial value, while a functioning building on the site it occupies may have a commercial value vastly in excess of one that simply represented its aesthetic value. Hence, there are market incentives to destroy some aesthetically valuable buildings, but none to destroy aesthetically valuable paintings. Thus the latter stands in less need of legal protection.

Nonetheless there has been a growth of legislation which increasingly controls the destruction, redevelopment and renovation of buildings considered to be of architectural value and of aesthetic significance. A distinct feature of these restrictions is that, unlike the limitation based on the interests of animals as sentient beings, aesthetically based restrictions appear to amount to acknowledgement that other people, i.e. people other than the owner, have an interest in what the owner does. This interest is rarely, if ever, described as proprietorial, and seems to be based on no more than the assertion that the right to appreciate and enjoy certain classes of aesthetic objects cannot be completely privatised.

c) When the thing is of unique historic value.

Restrictions may also be applied on historic grounds.
For example, certain buildings or terrain which are deemed to be of historic importance, such as the area where the first white settlers to Australia set foot, may be considered to be so valuable for that historic reason alone, that the owners of the land may not be permitted to redevelop it; for example, the proposals to preserve the very ordinary house in which D.H. Lawrence resided while temporarily in Australia, merely because it is where Lawrence stayed and worked. This restriction has nothing to do with aesthetics or beauty and may even be regarded as little more than a form of sentimentalism, particularly if all the facts of historical significance have been gleaned so that the absence of any restrictions on future use would in no way frustrate the endeavours of future historians.

Certainly there appears to be an increase in society's willingness to limit, through regulation, what an owner may do with something, for reasons that are in the end sentimental. Needless to say, put like this, owners, particularly prior owners, who obtained title before the restrictions were introduced, tend to regard them as an illegitimate and flagrant violation of all that is involved in ownership.
d) When the thing owned has a particular productive capacity.

In no Australian State or Territory can an owner of land use it to grow marijuana, even if the owner has no intention to trade in it or to smoke it, but merely takes aesthetic delight in simply looking at the admirable shape of the leaves. In many countries owners are banned from growing certain sorts of crops such as tobacco, corn, rice, in order to protect a State monopoly supplier, or to keep the price artificially high. Such restrictions may anger owners – they can't do with their land what they like – but the reality of such restrictions, which often have general public support, cannot be denied. Yet once again we are not crediting some other person or body with a conflicting or rival proprietary interest which overrides or limits that of the owner.

In sum, these considerations – which could readily be multiplied – indicate that the acknowledgement of absolute ownership is a very rare specimen. This is, of course, not a novel point. For example, even under Roman law, a field could not be left unworked for more than three years; if it was, a stranger could walk in and, rightfully, plant and harvest that field and treat it as in all respects his own,
subject to the same qualifications about not leaving it idle. This suggests the rights of others to under-utilised resources. Similarly, under common law, an easement may be attained by an owner's acquiescing to a person traversing his land - what begins as a violation of ownership, and therefore a wrong, can turn into a right, given sufficient acquiescence.

All these considerations, then, indicate that there is, in practice, scant respect for any idea that genuine ownership is absolute ownership. Notice, however, that it does not follow from the fact that absolute ownership is rarely acknowledged, that ownership cannot be understood fundamentally in absolute terms. Indeed, I will argue below that ownership should be understood in absolute terms, and that examples such as those just listed have been misconstrued by Donahue and others as implying the non-existence of absolute ownership.

Even if the examples I have offered may appear tendentious, it should be noted that absolute ownership does not imply that you can do anything with a thing just because it is yours. The issue is whether the restrictions to which owners are often rightly subjected means their's is really a limited or relative sort of ownership, or that it means, rather, that ownership carries with it an obligation to "seal off" one's
use of what one owns, so that others are not hurt or harmed in the process. These issues will be addressed below.

There is an important and often overlooked *non sequitur* in concluding that because ownership in an absolute sense is virtually non-existent in practice, all ownership is really limited or qualified. For example, as I shall argue subsequently, some apparent restrictions on ownership are not strictly restrictions on ownership at all, but arise from the recognition that what an owner does, may in fact have "spill-over" consequences for others. Because these spill-over consequences are practically inseparable from the activity that produces them, the activity itself is limited—an apparent limitation on ownership. If it were to become possible, however, to "detach" the original activity and the spill-over consequences, that is, to conduct the activity without producing those consequences, then the case for restricting such activities by owners would be correspondingly diminished.

If indeed there is no sense to ownership in an absolute sense, then there arises a very real question as to how much coherence there is in a concept of some sort of limited ownership. Of what, precisely, is it a "limited" version? What can we make of this idea? In its various forms
commentators often elude to different degrees and sorts of ownership, meaning the amount of interest one has in a thing, or the number or types of rights one may say to have with respect to a thing. For example, it has been suggested that the idea of temporary, limited ownership may be applied in many areas— I may own a house, have a right to paint it green, a right to remodel the bathroom, a right to live in it, to sell it, to rent it, or to bequeath it to my heirs. Yet there seems to be no reason in logic or in the essential nature of people or houses for supposing that these rights must always go together. That is, one may have a right to live in it, but not to rent it out, or a right to rent it but not to bequeath it to one's son. Certainly in some Australian cities one may own a house, live in it, paint it any colour, rent it out etc., but not be permitted to erect a fence in front of the house, while in some suburbs one may not remodel the exterior except in brick. And one may not carry on a trade or business from one's house in many areas. How can all these qualifications and distinctions make sense, except against a background of an "unlimited" form of ownership, on which these are various sorts of limitation?

Of course one may say that ownership itself may ultimately

" See for example J.O.Grunebaum "Private Ownership" op. cit.

come down to a decision merely of who has a better claim to a thing in deciding who is the proper owner. But in the case, for example, of one's fence-free house, there is at a common-sense level no doubt who is the proper owner - yet restrictions still apply.

The formal possibilities for property and ownership appear to be as follows:

(1) Ownership really is always absolute, but since this is in fact rarely honoured, then the concept of ownership actually has little, if any, genuine application.

(2) Ownership permits of degrees, that is, most, if not all ownership is to some greater or lesser degree limited or qualified ownership, that is, ownership is a concept with a rich application, though describing a relationship as ownership leaves many questions about the owner's rightful powers wide open.

It is the first option that appears to be correct. If ownership admits of degrees, as the second alternative requires, then the question arises: of what is it they are degrees? The answer appears to be degrees of permissibility on the part of the owner, that is, degrees of freedom of the owner to do things by, with, or to, the putative property
without the consent of any other person. This may be interpreted as degrees of "interest" an individual has in a thing, but this cannot be equated with property or ownership.

For convenience, we may represent degrees of permissibility as the extent of the scope to engage in activities vis-a-vis the property as of right. Thus the degree of one's ownership of an item of property would be measured, to put it crudely, by the size of the "bundle of rights" one enjoys in relation to that property — it is none other than the essence of A.M. Honoré's seminal "bundle of rights" theory of property."

On this theory, or theories of this type, it may be said that property is nothing but a complex bundle of rights. But if that bundle always contained the same elements, there would be no problem in understanding property — it would be a relatively simple matter of definition. In other words, if the bundle remained constant for all or most of the cases that we want to describe as property, the bundle as a whole could be defined in terms of its contents. However, as many have stated, it does not remain constant, and that is where the difficulties begin."

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"8 See for example J. Waldron "What is Private Property" op. cit. p. 315.
However, instead of persisting with the metaphor of a bundle, we should perhaps adopt the semi-technical term "cluster" to characterise the concept of property understood in this way. The concept of property would accordingly be a concept to be understood in terms of a cluster of rights. Such a cluster may be understood in one of three possible ways:

(1) Analogous to Wittgenstein's idea of Family Resemblance, that is, that there may be overlaps of the various rights associated with things called property — we may hold certain rights with respect to a thing, but the same rights might not be present in all cases of property, and there may be no single right common and peculiar to all cases of property;

(2) as comprising a core sub-set of rights which are necessary when speaking of property, together with a variable set of further rights, some of which, but no single one of which, must necessarily be present;

(3) as comprising a certain set of rights which are singly necessary and jointly sufficient to constitute property.

As stated above, the first option, following Wittgenstein's model of "family resemblance", cannot represent an adequate method by which we can attempt understand property. I will,
however, examine (2) and (3) in the following chapters, initially examining Honoré's "bundle of rights" account of ownership.
CHAPTER 3

PROPERTY AS A BUNDLE OF RIGHTS—
HONORÈ AND BECKER
1. **Introduction**

In this chapter I will examine the bundle of rights analysis of property and ownership as proposed by A.M. Honoré and L.C. Becker. Before doing so, however, I will make some preliminary remarks on various approaches to property and rights.

Property denotes certain rights possessed by an "owner" with implications for other persons in relation to a given thing. Certainly, to consider property as (a set of) rights seems to be the most satisfactory description of its nature and its application. As C.B. Macpherson has stated, as soon as any society, by custom or convention or law makes a distinction between property and mere physical possession, it has in effect defined property as a right. In this sense, to have property is to have a right by way of an enforceable claim to some use or benefit of something. As stated in the previous chapter, however, we distinguish between property as a right and the particular rights which constitute property or one's ownership of a thing. As Morris Silver points out, "a property right is visualised as a vector of distinct rights over an object".


To recapitulate, we can say that there are four distinct uses of the word "property". These yield:

1) that property is the set of things (in the broadest sense) that are items of property — indeed any thing of any sort that is the object of an ownership relation, or is even capable of being owned;

2) that property is a rights relation — a set of ordered pairs with owners as first members and things owned as second members;

3) a property is a quality or a relation, that is, property represents a fundamental ontological category;

4) that property is a socio-economic category; indeed a way of looking at the actually or potentially productive elements of the universe that give rise to the problem of property, conceived as a search for the best way of relating humans to the productive resources of the world.

Certainly under (1) we may say that the things we know as property vary so much that we are unable to determine what property is in terms of a common factor uniquely shared by all, and only these things that are items of property, while
and insofar as they are items of property — especially given that something's being, or ceasing to be, an item of property requires no inherent change in the item.

(3) merely leads to confusion if considered in this context. As stated earlier, we may be forced to say that in all cases of property there must be an owner; for example, that the apple "owns" its redness. We should, however, resist the temptation to offer an analysis of property so comprehensive it will follow through into this category of ontology — an infrastructure which, while it may lie behind the subject-predicate grammar of Indo-European languages, has little, if anything, to do with people and their possessions.

(4) is essentially a creature of a particular set of intellectual traditions, and though perhaps a useful way of focusing thought in economic or sociological theory, is unhelpful to one engaged in the analytic enterprise.

(2) then emerges as the focus of this inquiry, without prejudice to what we may want to say in relation to these other areas.

Undoubtedly, as ordinary speech goes, A.M. Honoré is surely correct in pointing out that we can identify ownership as closely connected to the thing owned, that is, that the term
"property" is often used to speak of both the relation of rights one has with respect to a thing and also of the thing itself, which is the object of the relation.\(^1\)

Of course it may be correct to say that a lay person would typically refer to a physical object as property, as is the case with ordinary language usage,\(^4\) or what we may consider to be a "popular" conception of property as things. However in law it may not always be the case. That is, property\(^5\) is often used in speaking of the rights relating to the object.

Although some may argue\(^6\) that there are two distinct senses of property, that is, that property can be understood either as an object or set of objects that are the putative objects of ownership, or that property can be understood as that rights relation, whatever it is, that is constitutive of ownership, I would argue that there are not really two senses — that underlying both idioms is a more or less implicit or explicit reference to that relation. It is merely the object


\(^4\) See F.Snare op. cit. "The Concept of Property"

\(^5\) Perhaps the use of the word "property" in this sense is similar to our application of the word "uncle" - that is, it may refer to a particular person, the type of person, or to the relationship between people.

\(^6\) See for example R.Rariden "The Right to Property" (University Microfilms International, Ann Arbor, Michigan, 1985)
of ownership that varies, that is, it may be a physical object such as a car or it may be an intangible thing such as a share, copyright or a lease. All of these involve rights, (and, I would argue, the same rights). As Munzer points out, to think of property as involving relations among persons or other entities with regard to things is the "sophisticated" conception of property.  

By considering property as a rights relation we are able to allow for a broader interpretation of the objects of the right, although of course we may say that physical property, or a physical object is still more easily identifiable as something which is owned. In law for example, what is known as a chattel — a tangible, movable article of property — can easily be understood as someone's property. Physical property may be seen here as more central, in the sense of being readily understood as property — as being owned — while other types of property are epistemologically parasitic.  

This suggests that these other types of property, that is, other sorts of "things" such as intellectual property, are logically or conceptually, or at least "pedagogically",

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7 The "popular" conception views property as things. S.R.Munzer "A Theory of Property" (Cambridge University Press, 1990) p.16

8 See for example P.F.Strawson "Individuals: An Essay in Descriptive Metaphysics" (London:Methuen 1959) Ch.3
dependent upon the physical objects - pedagogically, in the sense that one would not be able to grasp a concept of property if it were taught initially in relation to intellectual property. Consider, as an analogy, the command concept in law. To answer the recurrent question of "What is law?", it has often been suggested that the key to the understanding of the law is to be found in the simple notion of an "order backed by threats." This idea of imperatives and obedience is obviously the easiest to comprehend when explaining law to a person who is unfamiliar with it. From examples such as a policeman ordering a particular motorist to stop, or ordering a beggar to move on, we can then explain other, more complicated cases. That is, when explaining the idea of a legal system we can explain it, in its simplest terms, as some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This would be to suggest that command-type laws are pedagogically fundamental, but would leave open whether they enjoyed any other type of genuine logical or conceptual characteristic or attribute.


\[^{10}\] H.L.A. Hart ibid. p.25
This description of law is more readily understood if one were to give it as an explication specifically, say, of criminal law, but certainly would not be the full story when attempting to explain the intricacies and complexities of commercial law. Although this may be put down merely to contingencies of human understanding, that is, that command-law is pedagogically prior, I would agree with Hart that there is a deeper logical priority, misunderstood — as Hart rightly points out — by the classical positivists.

Similarly, that logical link between our understanding of physical objects as property and other sorts of things, such as intellectual property, as property, is dependent upon the fact that property is a rights relation in all cases and can be explained as such.

To accept property as a rights relation (which necessarily brings with it other immediate and/or consequential incidents such as liabilities and duties) allows for a broader interpretation of the objects of property, and also of people's claims to particular things. This relation then requires that there be a person involved for there to be issues regarding ownership and claims to property. That is, it is logically necessary that at some stage there be a person involved — there is a person, at some stage, who owns the car, the share in a company, or who has patented the
design of a new machine.

The problem remains, however, that there appears to be no one definition of property or ownership which has been offered as a standard definition, even when we accept that property and ownership entail rights. The aim, of course, of having a grand formula for property would be to settle once and for all our understanding of property. I will endeavour to suggest a possible solution in the next chapter.

2. Ownership as Rights and Obligations.

A.M. Honoré's account of ownership may be characterised in the light of particular rights which are assigned people in relation to a thing. His is no doubt a comprehensive account of the sorts of rights we commonly consider to be involved in our modern, legal understanding of property. Certainly many philosophers justify property rights following Honoré's idea of "full liberal ownership", and certainly the list of rights proposed by Honoré is useful in


\[\text{\textsuperscript{12}A.Carter "The Philosophical Foundations of Property Rights" (Harvester Wheatsheaf, 1989) p.132}\]

\[\text{\textsuperscript{13}I will, however, for brevity refer to only rights rather than to both rights and obligations, although Honoré defines ownership in terms of rights and obligations.}\]
demonstrating the sorts of features we would expect to find in standard cases of ownership, and shows us that the notion of property or ownership is internally complex.

According to Honoré, one can define ownership\(^{14}\) (and property) as the greatest possible interest in a thing which a mature system of law recognises. That is, one could identify an owner as the person who possesses the most rights in relation to a thing or object. Honoré thus sets out his eleven common features or "standard incidents" of the full liberal concept of ownership in ordinary "uncomplicated" cases. His analysis of "full ownership" and private property rights presents us with a bundle of rights or cluster concept and illustrates the wide range of rights and obligations which can constitute legally recognised ownership.

According to Honoré, ownership comprises 11 distinct legal relations, most of them separable rights:

1) the right to possess (to have exclusive physical control of a thing, that is, the claim right to be put in exclusive control of a thing and the right to remain in control);

\(^{14}\) Honoré specifically uses the term "ownership" rather than "property".
2) the right to use (the owner's personal use and enjoyment of the thing owned);

3) the right to manage (the right to decide how and by whom the thing owned shall be used);

4) the right to the income (a benefit derived from forgoing personal use of a thing and allowing others to use it);

5) the right to the capital (the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it);

6) the right to security (an immunity from expropriation);

7) the incident of transmissibility (the power to bequeath or devise);

8) the incident of absence of term (the indeterminate length of one's ownership rights);

9) the prohibition of harmful use (the duty to forbear from using the thing in certain ways harmful to others);

10) liability to execution (liability of the owner's interest to be taken away from him for debt, either by
11) residuary character (the existence of rules governing the reversion of lapsed ownership rights).

Looking at Honoré's list of "incidents", owners would have the right to use and manage what they own as they please, and this does not only entail physical control or alteration, but conditions under which others may use the owned object such as your car, or when others may, for example, enter your land.

Further, owners would have the right to the income or capital of what is owned, not only the rights which are to the rent or lease of the object, but also the right to sell at a profit (or conceivably also at a loss) or to even destroy that which one owns. Thus owners of resources may sell on the market or may even withhold the sale in order to raise the price of the resource. One would also have the right to bequeath what is owned, or indeed any part of it, to whomever the owner pleased and with whatever conditions they please.

Note that Honoré quite correctly does not express (7)—(11) inclusive directly in the language of rights. Rather, all, in this formulation, whether or not rights, are called "incidents". In discussing Honoré's set, referring to the
typical characteristics in an analysis of ownership, it certainly is useful if we think of them as "incidents", although we often commonly continue to refer to this set of "incidents" or similar groupings as a "bundle of rights" theory. I would suggest here that our loose way of talking of a "bundle of rights" is inadequate for a formulation such as Honoré's. That is, even if we enumerate all the rights commonly associated with ownership, it is evident that there is more to ownership than simply these. For example, liabilities are also associated with one's ownership of something, and while these liabilities are consequent on the ways in which the rights have been exercised, it is a serious omission if they are not included in a descriptive list such as this. Liabilities are also consequent on one's ownership and may not depend in all cases on one's employment or exercise of one's rights. For example, owners of houses and land are liable for the payment of the legal liability of rates or property taxes, while some liabilities may be consequent on the exercise of one's rights. The payment of gift duties for example, may flow from the exercise of my right to dispose of a thing and to give it away as a gift.

Certainly there are also liabilities, apart from legal liabilities, which may also flow from one's ownership of a thing; for example, I may be morally required to compensate another who I have morally wronged through my actions, so
that we may say that there are "moral liabilities" apart from legal liabilities.

Thus, although we commonly consider property to consist of various rights, such as the right to use or dispose of an object, property rights may be narrower in scope than what we may term property. For example, property rights may be said to involve only advantageous incidents, such as the right to use, the right to dispose, etc., while it is evident that property also involves disadvantageous incidents. For example, a person may own a house and thereby possess various rights such as the right to use and to dispose of it, yet disadvantageous incidents may also exist in the form of various duties not to infringe on the rights of others, which may be directed by, for example, government zoning regulations. I may not be permitted to build, say, a certain type of building in a residential area or use my rural land for industrial purposes. One could even conceive of liabilities such as those which are attached to the ownership of a house whereby courts can hand down judgements which demand the sale of the house as payment as a result of the loss of a civil action.

Certainly in general terms the increase in responsibilities

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within a civil society with a legal system has led both to greater (negative) restrictions on the overall use of the things one calls one's own and also positive responsibilities which can also be interpreted as restrictions, so that we may say that we have both rights and liabilities with respect to a thing.

The law in particular views property as relations among persons to things, and as a starting point of which relations are involved may be seen in what some writers have referred to as the Hohfeldian analysis of property. This classic analytical topology of legal rights, which appears to have been used by Honoré and Becker is that proposed by W.Hohfeld. While not necessarily agreeing with Hohfeld's analysis, particularly as he considers that all legal relations are rights, and further, he does not analyse his conceptions but merely organises them into tables of opposites (contradictories) and correlatives (equivalents), his scheme is nevertheless acknowledged as a fundamental analysis of rights and is useful as a guide to legal analysis.

and judicial reasoning. Certainly by distinguishing four sorts of rights, Hohfeld indicates to us that there is no simple answer to the question "what is a right?". The Hohfeld scheme appears to consider what is on the "other side of a right". That is, if you have a right of some sort, what does that mean for my situation?

Understanding property along the lines suggested by Honoré and Hohfeld has the salient advantage of cross-cultural application, that is, this idea of property (though perhaps not a moral and political theory of property) applies to all or almost all societies. Further, this also sheds light on moral relations among individuals - the analysis starts from a central truth that property involves relations among persons with respect to things and enables one to clarify these relations in widely different social settings, so that starting from Hohfeld's analysis of legal rights, we can expand and look at all rights within any conventional rule system, legal or non-legal.

According to Hohfeld, a legal right may be either a claim, a liberty, a power, or an immunity, and on this analysis the traditional right and corresponding duty involves a

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10 S.R.Munzer "A Theory of Property" op. cit. pp. 25-26
constellation consisting of elements, their correlatives and opposites. This reads:

1) claim - right — duty
2) privilege (liberty) — no right — duty
3) power — liability — disability (no power)
4) immunity — disability — liability

In other words, property rights consist in a complex of relations, that is, all aspects of property rights which pertain to an individual are accompanied by correlatives which pertain to others - it shows the multiplicity of social relations which the notion encompasses.

Under (1), Hohfeld's notion of a correlative involves two-way entailment. Claim-rights correspond to duties so that if I have a right, then you have a corresponding duty. That is, the right-duty correlatives should, by this analysis, only be used in situations in which one person is entitled by legal process to compel another person to act in a certain way. For example, as in the case of A enforcing payment of a debt from B - A has a right to $100 from B, and B has a duty to pay A $100. The statement that A has a claim-right to $100 from B entails that, and is entailed by, the statement that B has a duty to pay $100 to A.

By (2), the privilege or legal liberty involves no
correlative duty but the absence of a right on someone else's part to interfere. For example, one may say that an owner has the right to walk on his land and everyone else has "no-right" to interfere. Hence the "liberty — no-right" dichotomy.

According to (3), a person, has a legal power when, by some act, he can alter his legal position or that of someone else. For example, he may have the right to make a will controlling the succession of his estate, so that in effect this is a legal power to produce a change in the legal relationships of others who are "liable" to have their legal relationships changed. The "liability" then is a susceptibility to having one's legal position altered (But this liability need not be disadvantageous). Thus there is a power-liability correlative set.

By (4), an immunity is a lack of susceptibility to having one's legal position altered by someone else. We may say, for example, that a person enjoys freedom from having a given legal relationship altered by the act of another, such as in the case of a statement given under parliamentary privilege which is immune from a defamation suit being brought against that person.

S.R. Munzer "A Theory of Property" op. cit. p.18
The point of Hohfeld's analysis appears to be that rights are often compounds of two or more of the above types, but until these elements are identified, that is which elements in a particular case, one cannot proceed with moral arguments.

3. Honoré, Becker and Rights

Honoré presents us with a "bundle of rights" account of ownership which is in many ways inconsistent. For example, Honoré argues that none of the incidents or rights he enumerates are individually necessary, though they may be together sufficient conditions for "a person of inheritance" to be designated "owner" of a particular thing in a particular system. The analysis thus suggests that property and ownership consist in (a bundle of) rights/incidents, none of which are essential. It could be argued, then, that some or all of these rights can be the basis for ownership claims. That is, in Honoré's view ownership may be present although some of the incidents are absent. None of the incidents or features, that is, various rights associated with ownership in Honoré's view, are individually necessary, but the members of each of a very large number of large sub-sets are jointly sufficient conditions of ownership. Honoré claims that "it would be rash to assert that the features" discussed are "necessarily common to different mature systems". Yet
according to Honoré, they have a "tendency to remain constant from place to place and age to age."12 That is, if a system did not admit them, and did not provide for them to be "united in a single person, we would conclude that it did not know the liberal concept of ownership, either of a primitive or sophisticated sort".13 Further, these resemblances exist "de facto" and can be explained by common needs of mankind and the common conditions of human life.14

Honoré's model may then be understood as a Wittgensteinian model. In Honoré's view, concepts take their character from the uses of their associated words - to explicate a concept is to explain a particular use. Therefore, on this account, there is no expectation of universality for any particular feature, and no requirement that each individual property right be a necessary condition for ownership. However, if this is really Honoré's position, then I find this unsatisfactory. As stated above, to consider property on a Wittgensteinian model would instantiate what Wittgenstein characterised as a linguistic analogue of family resemblance. Accepting such a view means that the various different uses of the word "property" each correlating with differing sub-sets of rights, could be said to form a family, (although

13 Ibid. p.112.
14 Ibid. p.109
for Honoré "full liberal" ownership contains all of these incidents). However, as already stated, I find this type of model inappropriate for our common understanding of property.

It should be noted however, that a fuller delineation may be made regarding property and the dispersal of rights. For example, distinctions are often made between private and public property in the context of right-holders. That is, the identification of the owners or right-holders facilitates this additional terminology. If the owners are identifiable entities distinguishable from some larger group, there is often said to be "private property". The most common example is individual private property, where an individual person is the owner. Persons or right-holders may also be considered together, such as in partnerships or corporations, while contrasted with private property are various "sorts" of "public property". Here the owners are the State, city, community, tribe, etc. It is also possible that some forms of ownership involve a "mixture of private and public property rights".

Thus we may distinguish rights as they relate to property

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15 See A.Carter "The Philosophical Foundations of Property Rights" (Harvester Wheatsheaf, 1989) p.5

into three groups:
1. Collective property rights, that is, those which are held by, or in the name of, the State or — less clearly — a "community",
2. Private property rights, that is, those held by natural and other legal persons, excluding those which act only or predominantly as State agencies, or agents for the State, and
3. Individual private property rights, that is, those held by a single natural person.

I am not making a distinction here, however, between different "sorts" of property, but rather how rights may be held by different recipients or holders. It is easy to exaggerate, however, the importance of the distinctions between collective and private property — usually the distinction is really over the notion of exclusivity of property. In fact, whether property is said to be held privately or in common with other people, or in some other mode of collectivity, it is still exclusive to that individual or group. Even if one were to make the distinction between excludability, that is, the power or the right to exclude others, and exclusion or exclusive (the state of being excluded), we may say that the central aspect of property is that others are excluded from the use of a thing in any case, whether or not the owner's permission is
Property rights relate the owner of the thing to non-owners - albeit by means of a relation of exclusion. Thus this delineation does not add to Honoré's account.

This does have implications, however, on how one is to assess, for example, a socialist's view of ownership in his society. Socialists stress that under capitalism others are excluded from access to the means of production. However, I would argue that under any communal system - whether socialist, communist or whatever - a particular community has the right to exclude non-members from, say, its fields. Even villagers may exclude non-members from grazing on communal land. The distinction is merely that the right to exclude is held by the group, rather than an individual, and exercised by those who are its nominal agents. This power to exclude can equally be equated with the power of the capitalist to exclude - large corporations are restricted to share-holders, while government corporations are also exclusively restricted to the taxpayers and other members of the particular State. The exclusionary right is thus identically grounded in ownership.

In this sense, it is clear that all property is private property. What differs is the capacity of individual natural persons to enjoy private property.
The law, of course, recognises property in a variety of forms from ownership (conceivably) of slaves to land, animals, goodwill to copyright; and the rights involved are also multivarious. That is, it appears that an owner may possess some rights with regard to a given object, but not others. Further, the combinations of rights may vary between different people in regard to the same sorts of objects or the same person may hold different combinations for different objects. More fundamentally, however, it may be argued that property and ownership in law is nothing but the rights, that the rights possessed by individuals or groups of individuals constitute property in terms of the legal concept.

To hark back to the variations in the referential use of the word "property" already noted, property in legal terms may therefore be said to be not the thing itself (nor a property) but a relation which is defined by rights. To say, then, that one legally possesses property is to say that one possesses rights which can be defined as property rights and which have objects of those rights of some kind. Legal property and legal property rights may have their origin in custom, convention or legislation and these in turn may reflect prescription, general acceptance, habitual usage, or perceived utilities, needs or deserts.

The major difficulty with Honoré's analysis of ownership,
however, is that it avoids giving a satisfactory definition or analysis of ownership apart from using the term "greatest interest" to identify the person who is deemed to be the owner, thus making "owning" incidentally a relative term, and not just a relational term (which, formally, it obviously is) in the process. To say, however, that we can identify an owner as the person with the greatest number of rights (incidents), does not constitute an adequate analysis of ownership. Granted, under ordinary circumstances a person may accept on face value, that this would seem to be a plausible explanation of the use of the word "ownership" and its cognates. Nonetheless, if pushed on the point, such an accommodating critic may soon concede that their everyday speech is confused. That is, they would soon feel pressed to suggest particular rights, or a specific number of rights, which would be either sufficient or perhaps necessary for one to say that a person with the "greatest interest" can be identified.

The initial question which arises here is how do we even begin to count the number of rights one has in relation to a thing; or how else might we begin to quantify the extent of an interest one has with regard to a thing? The "greatest interest" is so vague that we could even identify an owner other than the favoured collectivity, in the most
collectivist systems. That is, we could say that the regularly designated driver and mechanic of a particular tractor on a Soviet commune may be said to have the "greatest interest" in the tractor, as compared with anyone else. However, this is surely a *reductio ad absurdum*. Certainly this analysis would not work for this particular political system (as a natural person cannot own the means of production under strict communist doctrine).

Leaving aside the particular political or legal system under which this definition may arise, the suggestion that an owner can be identified as the person with the "greatest interest" still cannot provide an adequate analysis of ownership. For example, we can construct cases involving long and complex chains of conditional and contingent assignments, as a result of which a lessee of land who undoubtedly has, under the lease, the greatest interest in the land. Nevertheless, it cannot be said that he is therefore the owner of the land. Moreover, the idea that a lessee may be an owner relative to the holder of a sub-lease, but not relative to his principal, is not an explanation but a complete distortion of our ways of speaking of ownership.

Further, there may be in fact be cases in which there is no

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owner at all, yet there may be several people who hold some interest in a thing. For example, there may be many rights and liabilities connected with a particular thing which may in fact be considered to be owned, and yet these rights and liabilities are so vague and dispersed that it would be difficult to pinpoint the owner. This would be the case, if for example, a particular thing, say, land, is leased by a person through various companies.

Of course if all the rights and liabilities etc. were to be centred in one specific person, as Honoré suggests they can be, then it would not be difficult to determine that that person is in fact the owner. But if that were the norm, we would not have the problem Honoré is attempting to address.

One must further question the use of the idea of "interest" in a thing in explicating ownership. It may be argued that ownership is a value in itself, and not merely a means to the end of well-being. The assertion of a right is "categorical", and a right is not the same as an interest, though there may be an interest behind every right. Nevertheless, clearly not all individual interests have sufficient importance to form the basis of rights. We may have interests in things to which we have no right, such as

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18 M. Silver "Foundations of Economic Justice" op. cit. p.14
that the market value of land we own will rise precipitously. Further, there are many sorts of interests which would be irrelevant to the concept of ownership. Plainly the word "interest" can cover things which have no relevance to property (although we may say that in many circumstances the term is closely related to rights). For example, one's interest in one's health or our interests in what we believe, rightly or wrongly to be to our advantage, do not entail that one has a right to that thing or to undertake that activity, nor does it imply ownership. In addition, we may have rights to do things that are contrary to our interests, such as the right to make a bet that we shall probably lose, or have rights to what will never be in our interest such as to give away our assets or to endanger ourselves in useless ways.

Further, it is conceivable that although various interests may be held by separate individuals, there may in fact be no owner. For example, many people may have a right of passage with respect to a piece of land or, say, a river, and hence have an interest in it, although they are clearly not owners.

One would therefore need to distinguish those things that are relevant interests for ownership to be recognised. For example, lawyers only recognise "possessory" interest when considering ownership or property. As a result, I would

\[ See\ V.Held\ "Rights\ and\ Goods"\ op.\ cit.\ p.173 \]
suggest that Honoré's analysis should be qualified to read: the "greatest rightful possessory interest" in a thing. Yet "possession" itself merely implies some sort of power or control over something, and there are, of course, cases where possession or control does not necessarily imply ownership. For example, if one has stolen something, it cannot be said that the person is the owner although he is in possession of the object. There is, therefore, a distinction between the right to possess and the mere physical possession of a thing.

Further, one must question Honoré's use of the notion of a "liberal" concept of ownership. It is not clear what is meant by this. That is, perhaps due to our rights over property we may be said to have certain powers to decide what to do with our property and to exclude others, and that this confers freedom. It is not clear whether Honoré is suggesting that property rights confer freedom to individual owners, and, if so, why call this analysis of ownership, a "liberal" one? It appears to me that it may be for two reasons:

1) either Honoré is merely using "liberal" in a historic sense, that is, a tradition which emanates from Locke, or,
2) he is using "liberal" to strongly assert individual rights and suggesting that property is the source of

\[\text{See A.Reeve. "Property" (Macmillan Education, 1986) p.16}\]
Certainly it can be said that property as a legal institution creates and protects certain private rights of the individual. As Reich has suggested, one of the functions of property is to draw a boundary between public and private power. That is, property draws a circle around the activities of each private individual or organisation. Within the circle the owner has a greater degree of freedom than without. Outside he must justify or explain his actions and show his authority. Within he is master, and others, including the State, must explain and justify any interference. It is in this sense that it appears as if property has shifted the burden of proof; outside, the individual has the burden; inside, the burden is on others and the government to demonstrate that something the owner wishes to do should not be done.

Although Honoré does not make it clear, perhaps he is making a distinction between the impact of public administration on what one owns in contrast to a liberal idea of property. That is, although under increased public administration we still talk of our "property", we are faced with increased


\[13\] Ibid.
responsibilities which may impede, restrict, and even appear to negate our particular rights. In Reich's terms, public administration is encroaching into our circle. Certainly if we speak of a liberal notion of property we consider it to be rights-driven and the government is intended to protect those rights, yet with increased responsibilities and restrictions the converse appears to be true.

In addition, it may be asked whether Honoré considers there to be other concepts of ownership. Honoré merely states that he is describing the liberal concept of ownership. However, this seems to suggest that there may be others. If so, what, if anything, makes them all concepts of ownership? Perhaps, however, by using the term "liberal concept" of ownership Honoré merely avoids facing up to any issue of property which may be described in an absolute sense. Rather, the idea of a "liberal" concept of property may be seen as a device to describe the situation in which ownership allows for decisions to be made about the possession, use, destruction, etc. of a thing, subject to limitations, without specifying all the possible uses or all the actual or possible limitations. It is looking very like a liberal concept of ownership not in the Lockean sense, but the contemporary popular American sense of "liberal", in which "liberal" has often been a euphemism for socialist.
As stated above, for Honoré, none of the particular features he has enumerated are necessary, although they may be jointly sufficient for a "person of inheritance" to be designated "owner" of a particular thing in a particular system.\(^{14}\) As I understand Honoré, then, we can also delineate between simple and complicated cases; simple cases being those in which things such as one's watch may be owned in the same way in all "mature" legal systems.\(^{15}\) However, Honoré recognises that the category of things owned may vary from system to system, and that all "mature" legal systems recognise ownership in some things, but not that they recognise all things, nor the same things.

Although it is not made clear why Honoré specifies that the incidents he has listed occur in a mature legal system, that is, how one would non-circularly identify such a system or what the criteria would be for a legal system to be mature, possibly he is making the distinction between those systems which have primary rules only, in H.L.A. Hart's sense, and those which have both primary and secondary rules as proposed by Hart.\(^{16}\) Primitive societies, according to Hart, contain only primary rules, which are closely related to morality and

\(^{14}\) A.M. Honoré "Ownership" *op.cit.* p.112

\(^{15}\) *Ibid.* p.108

\(^{16}\) H.L.A. Hart "The Concept of Law" (Oxford University Press, 1961) pp.77-96
to custom. They are the primary rules of obligation. Secondary rules are meta-rules which explain the primary rules, that is, by resolving the uncertainty of primary rules, they also accommodate changes and thirdly, are rules of adjudication.

However, it must be noted that even primitive societies, that is, those which may only possess primary rules may also possess some form of property and understand the concept of ownership. After all, how otherwise could prohibitions against theft figure in the primary rules?

Although Honoré suggests that ownership can be defined as the greatest possible interest in a thing which a mature system of law recognises, he makes it clear that, in his view, ownership can still exist when the set of specific powers, rights, liberties and obligations is not complete. Yet Honoré goes on to highlight three of the rights as important, stating firstly, that the right to possess, that is, the right to exclusive physical control of a thing, is the "foundation on which the whole superstructure of ownership rests", and that the protection of the right to possess

\[37 \text{Ibid. p.91}\]
\[38 \text{I make the distinction here between the right to possess and mere possession.}\]
\[39 \text{A.M.Honoré op. cit. p.113}\]
is achieved only where there are rules allotting exclusive physical control to one person rather than another. By the right to possess, I take it, this would not only include the right (claim) to be put in exclusive control of a thing, but the right to remain in control, that is, the claim that others should not interfere.

According to Honoré, unless a legal system provides some rules and procedures for attaining these ends, it cannot be said to protect property. Further, for Honoré the right to use at one's discretion is a "cardinal feature" of ownership. Standard (legal) limitations are, in general, rather precisely defined, while the permissible types of use constitute an open list.

Thirdly, Honoré states that the right to security, which legally, is an immunity from expropriation, is an important aspect of the owner's position.

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One is not, however, entitled to exclude everyone from one's property, but this is a consequence of our particular legal system.

On a wider interpretation, according to Honoré, this may include the right to manage and the right to income.


In the same spirit as Honoré, L.C. Becker in his analysis of the concept of ownership improves Honoré's list and expands the list of 11 incidents to 13 by splitting the right to capital into the right to consume or destroy, "the right to modify and the right to alienate." Thus Becker further suggests that there may be various sub-sets of the list which may reasonably be regarded as ownership, that is, numerous combinations which may amount to ownership. On Becker's analysis, as with Honoré's, there is no one necessary condition for property, although Becker suggests (based on "nothing stronger than a feel for the semantic proprieties") that among the rights which are sufficient to establish a claim to ownership are the right to capital alone, or any paired combination of "some version of the right to security", that is, the right to immunity from expropriation, with the rights to possession, use, income, management, consumption or destruction, modification, 

Certainly the right to consume or destroy may be seen as distinct from the right to the capital. However, both these activities take value out of an object and may be said to run it down.


Ibid.


"The "one who has the right to the capital is 'fundamentally' the owner". L.C. Becker ibid p.20
alienation or transmission. Based on nothing stronger than his understanding of English, the sufficiency of these elements allows for a person to have a property right, and that any further combination with the other elements in the list would also be considered as ownership. "Full ownership", however, includes all of the elements, whereas full exclusive ownership is full ownership, by an individual or a group, in cases where no other individual or group has any form of ownership in the same thing.\(^\text{50}\)

This then suggests that there is a very large number of possible forms that property may take if we look at the Honoré or up-dated Becker list of possible rights associated with ownership. However, this also suggests that there are many varieties of rights which may constitute "ownership", and many combinations of property rights which do not reach the level of "full ownership". It also suggests that there may be something approaching varying "degrees" of ownership - a view that, even merely based on our understanding of English appears questionable. What are these "non-full" instances of ownership degrees of? Surely they are merely cases of the amounts of interest one may have in a thing while not being the owner. One may conceivably have the right to capital, that is, the right to consume or destroy a thing,

\(^{50}\) L.C. Becker "The Moral Basis of Property Rights" op.cit. p.192
the right to modify it, or the right to alienate (sell, abandon, etc) of a thing without being considered as the owner. For example, a bank may hold a mortgage on a house, having the right to sell it in given circumstances, yet we generally do not consider the bank to be the owner of the house (although we could argue that the owner has transferred his right to the bank by agreement).

The possession by one individual of all of the claim-rights, duties, powers and liabilities with respect to a given thing, as set out by Honoré and Becker, may seem to illustrate what they consider to be the paradigm case of full (liberal) ownership, that is, that one person holds all the possible "incidents". This is obviously rarely the case. Some have argued, however, that, historically, this paradigm was perhaps realised for a short time in late eighteenth and early nineteenth century America by the original pioneers, but that this notion of "full ownership" appears to be of little practical importance in the late 20th Century. Empirically, of course, it does appear to be the case that social policy as applied by governments through legislation and other rules severely infringe on that classic set of the individual's proprietary rights. Further, it is often the case that many of the rights are not held by one and the same

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person, so that the incidents go in different directions and, indeed, in some cases only some of the rights appear to be applicable at all. In addition, there may be more than one claim of ownership to a thing, and in some cases some individuals may have complete ownership of parts of a single whole.

Further, Honoré's list does certainly take into consideration the practice of law in modern commercial life. For example, the use of a thing can be sold separately from the thing itself, so that the rights pertaining to an object may be dispersed, as is the case with leases, sub-leases or hiring of machinery. Thus often those who we call "owners" in contemporary life make do with fewer than this full set of rights in things. For example, shareholders in corporations may hold some rights such as the right to income and the rights to security (an immunity from expropriation) and bequest, but not rights regarding the detailed management of the corporation. It could even be plausibly maintained that modern ownership patterns are typically of this sort.

It should also be noted that it is only since the mid-19th Century that shares themselves have been an entirely separate form of property, legal objects in their own right. This

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51 See A.Reeve "Property" op.cit. p.20
53 A.Kernohan "Capitalism and Self-Ownership" op. cit. p.63
recognition of the share as a new form of property has not, however, been without problems. Indeed the exact legal nature of this new form of property continues to elude even company lawyers. Lawyers know what a share is not—a direct interest in the company's assets—but not what it is. For example, in defining the share, one leading company lawyer states:

"A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to appropriate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital— that remains the property of the corporation. But, nevertheless, the share is a property in a fractional part of the capital ...."

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But this is neither coherent nor helpful. It appears that company lawyers also seem to have great difficulty in accommodating the major changes in the nature of the things we call property. Certainly the owner of a share of a company does hold certain rights with respect to that company, for example, the right to an income or to elect officers in that company, but the shareholder does not own the company and has no right to, for example, give orders to workmen.

This separation of ownership and control is based on, arguably, an empirical presumption that ownership of the modern corporation is so diluted among the multitude of shareholders that this interests are essentially unrepresented when corporate management makes its decision. Sensible rejoinders to this charge have been made — that when the need arises, dispersed ownership will become sufficiently concentrated to give property guidance to, perhaps "boot out", an ineffective management such as in a takeover, a rebellion by a group of cooperating shareholders or the acquisition of large shareholdings by one or a few shareholders. These put a constraint on management even when they are not currently operative.^^

^^ H.Demsetz "Ownership, Control and the Firm" (Basil Blackwell, 1988) pp.197-198
In other, more obvious cases people have rights in a limited framework and still regard themselves as "owners". For example, one's house is subject to numerous council regulations and legislation, such as zoning laws, building regulations, limitations on the nature of its use, and pollution guidelines, yet one is still regarded as an "owner". One may not only appear to possess a limited number of rights, but those rights appear to be restricted.

Further, often the legal concept embraces not so much a bundle of rights, as various bundles of heterogenous rights. This fragmentation is most apparent in the branch of the law relating to land where it appears that two doctrines are employed to determine the content of the various bundles of rights. These are the doctrine of estates which divides rights on the basis of time, and the doctrine of tenure, which divides rights on a qualitative basis.

57 M. Crommelin "Economic Analysis of Property" in D.J. Galligan (Ed.) "Essays in Legal Theory" (Melbourne University Press, 1984) pp.77-78

58 An estate is an interest in land. An "absolute estate", for example, is one granted without condition or termination, whereas a conditional estate is one liable to divest on the fulfilment of a condition. Others include contingent estates, the right to the enjoyment of which will accrue on the happening of some event, and an estate in expectancy which one cannot enjoy until some future time.

59 The mode of holding or occupying land.

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It appears then that various "owners" may hold different bundles of rights in one and the same thing. The fact that their bundles are not complete does not stop us calling them owners, yet can it be said that people own things to a greater or lesser degree? That is, that one can be a "partial owner"? As stated above, the holding of certain interests may merely entail that one holds an interest in a specific thing, but is not the owner. Thus we need to be careful of an ambiguity in the phrase "partial owner".

I make the distinction here of having either "full ownership" according to Honoré's paradigm case, whereby all possible rights are held, or as I have stated and will discuss below, holding at least the core rights (which includes all other non-administrative rights) with respect to that thing, on the one hand, with holding these same rights, full (or core, as I will expand on later) in respect of a part of a (large) thing. An example here would be the ownership of a share of a company. One may hold rights and exercise them to the exclusion of others in pursuance of one's ownership of a particular share, but it cannot be said that the shareholder is a partial (full) owner in the same sense of control over the company. Part ownership or partial ownership can only mean ownership of a part. For example, there appears to be a general fallacy, a confusion in trying to translate a relationship to a part-relationship to a whole, between A has
a relation to part of B, and A has a part-relation to B. For example, if I love a member of a family, I don't part-love that family, rather, I love part of the family. Similarly, if I hit part of a person, I do not part-hit that person, rather I have (fully) hit part of him, say, his arm.

Further, I may own part of an airline, but it is not the case that I have a "part-owning" relationship to the airline — whatever that may be. Rather, one may say that I am the owner of a share in that (airline) company. The totality of shareholders constitute the owners of the whole of the company, and each shareholder wholly owns a part of the company. But there is also an important difference here between being a member of a family, and hitting a part of a person. A shareholder does not own an "identifiable" part of a company; at best he owns an identifiable part of the value of the company — a part that is proportionate to the scale of the shareholding — so that a share of a company is at best a metaphor — it is not a segregatable part that I could point to which is mine to the exclusion of all others.

In all, I have not found Honoré's nor Becker's analyses of property and ownership convincing, and will therefore suggest an alternate view, using as a starting point our general understanding of rights.
CHAPTER 4

PROPERTY AS THE RIGHT TO CONTROL.
1. Introduction.

Although it may be argued that ownership consists of some sub-set of all the possible directive rights which may be held concerning a thing, I intend to argue that the terms "property" and "ownership" can, strictly speaking, only be applied in cases where one has the right to control a thing. The obvious consequence, that therefore we genuinely own very little of what we claim to own is one which reluctantly I embrace.

The essential elements of the right of control, as I see it, are the rights to possess, to use and to dispose of a thing. What is more, if this is to constitute ownership, this right must be absolute. This means that it cannot be dislodged or nullified by other, more powerful rights. It is not a merely defeasible right, or what some would call a prima facie right; in no sense is it a right only relative to some other potentially competing rights.

Further, I will argue that rights themselves may be considered in terms of Dworkin's "trumps", recognising the special force of rights – so that the holding of the right has the function of excluding certain actions by others, including actions that, in the absence of the right, would be considered reasonable and even highly desirable. The
recognition of a right is recognition of its overriding character, which ought to be respected for its own sake and need not be defended by an estimate of its consequences. Rights can of course conflict, which is one reason why some people prefer to talk in terms of *prima facie* rights. However, a resolution of such a conflict does not mean that one right is more powerful, or may override the other. A resolution whereby one right is enforced leaves all rights intact, although decisions are made regarding the right to act on that right due to, say, desired outcomes or even due to sheer force. A right, which we may say is absolute, could never be dislodged by any *prima facie* right. But in calling a right "absolute", however, I am not implying that what one does with or to the thing owned is a matter of complete moral indifference.

In calling ownership "absolute" the rights of possession, use and disposal jointly entail control and may be seen as the "rights of control". That is, anyone who is able to exercise these rights would in fact enjoy control. An analogy may be made with the rights people have with regard to their bodies. That is, the rights of control a person may have over his or her body excludes others from making choices and determinations without one's permission. But it does not

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¹ See also D.A. Lloyd Thomas "Liberty, Equality, Property" in *Proceedings of the Aristotelian Society, Supplement* vol.XV. 1981, p.181. However, I make this statement without
imply that what a person does with, or to, his or her body is a matter of moral disinterest.

There is a clear analogy between the rights of control people claim to have over their own bodies and the rights of control they have over what they genuinely own, that is, it may be said that in both cases we claim an overall right of control, and that this claim implies denial that others can ever have an overriding right to counter the exercise of that control, even when it is being exercised in a foolish or plainly immoral manner.

Of course it may be argued that if rights are anything approaching the moral, legal or political "trumps" that Dworkin suggests they are, then in having a right to x, a person has a dangerously powerful weapon against everyone who may have reason to object to x, and even if this dominion is qualified in various ways, nevertheless that person has rights to the extent that he has a weapon against all others. As Flathman argues, "if the right is to property, it warrants Able, as Blackstone put it, in exercising sole and despotic dominion... over external things of the world"; exercising prejudice to the question of whether one's body is one's property.

dominion over external things in the world impacts on resources that may be vital to the interests, objectives or well-being of other persons.

As indicated earlier, however, this argument refers to one's general right to property, that is, what I have called one's "capacity" to own. Flathman's is an objection regarding inequality, not one concerning the nature of property rights. Rather, if we were to look at the specific rights associated with ownership, we may employ the notion, as suggested by Nozick, that rights are to be thought of as "side constraints", (and not merely "trumps" as proposed by Dworkin) that is, blocks or constraints on the actions of others, limits on the actions that are morally available to an agent - the rights of others may determine the constraints on your actions - then these would require an agent to "refrain from performing actions of a specific type".¹ I would suggest, further, that although it may be argued that the rights of possession, of disposal and particularly of use (that is, the rights which are the elements of the right of control) may be subject to restrictions or "side constraints" as suggested by Lloyd Thomas,² these limitations are ultimately restrictions on and determined by the effect of, say, one's use. That is, we need to distinguish between the

¹ J.Waldron "Rights in Conflict" in Ethics 99. 1990, p.503
² D.A.Lloyd Thomas. op. cit. p.181
possession of a right, the right to exercise that right in a given context or set of circumstances, and the consequences of acting upon that right. The fact that a right is absolute does not entail that one always has the right to exercise that right. Limitations on the exercise of one's rights are based on the extrinsic effects of the exercise of those rights. If it were technologically possible to do whatever one was doing by, with, or to, the thing owned in a way that bypassed that extrinsic effect (an option which may turn out to be no more than a logical possibility in some cases) then the point of the side constraints would lapse. In other words, it is our right to exercise our right, and not the right itself, that is qualified. By making this distinction, it can be shown that rights are absolute, and if we admit that restrictions on one's actions occur, this does not mean that the restrictions are on the right itself. Rather, these are restrictions on the exercise of one's right due to possible harmful consequences to other by one's actions.

That is, we may still say that I have, for example, the right of control over my arm, but not the right to punch you. If it were possible for me to transcribe the same motion with my arm without punching you, that possibility would escape the side constraint. Similarly, we may say that I have the right of possession, of use and disposal of the knife which I own, but I do not have the right to stab you. If my arm,
blade in hand, were to describe an identical motion, but with no other human being in the vicinity, it would be, morally speaking, quite unproblematic. Further, if we were to take another example of something I may own — say a factory — I have the right of control, that is, the right of possession, of use and of disposal of the factory. Nevertheless, we can arguably say, however, that I do not have the right to pollute the neighbouring area. Once again, if I could use the factory in the same way, but containing the pollution so that it never impacted on any person or thing beyond my property line, the case for restricting my use would lapse.

In each case it is the effect of my use of my property which is at issue, and not whether I have the right of control. If I could do whatever I was doing and seal its effects from the neighbourhood, the case for restricting what I was doing would lapse. In this sense, it can be said that it is only when the effect or consequence of the exercise of these rights comes into conflict with rights of other people (and possibly of animals) that I may be legitimately restricted in the exercise of my right, and then only to the extent that it is not technologically possible to prevent the effects of my conduct without preventing my conduct.

But this is not to say, however, that the rights are not absolute — to have this absolute right of control is what I
designate absolute ownership. That is, my ownership of something entails my rights to possess, to use and to dispose of the thing which is my property, and these are exclusive. However, there may be restrictions or constraints which derive from other peoples' rights. That is, I may be limited in the de facto exercise of my rights of control by the constraint that the consequences of that exercise should not violate other peoples' rights. Conversely, my rights legitimate and protect my use, etc. as they too have the status of limiting other peoples' behaviour towards me, and generate "side constraints" requiring them to plot their own conduct so as to avoid the production of certain effects.

I am not arguing, however, that these rights are defeasible; rather, my idea of rights in general is that they should function as a blocking device or be considered in terms of Dworkin's "trumps" — that the holding of the right has the function of excluding certain actions by others. Where an action would on balance bring about a desirable result, but violates certain rights, the assertion of rights will normally take precedence. In general, however, a restriction on the way in which a right may be exercised is not necessarily a limitation of the right itself, nor does it necessarily represent subordination or defeat in favour of an overriding right. My right to vote, for example, must be exercised by my attending a polling booth on a specific day,
or by my completing an appropriate absentee form. These are hardly limitations or restrictions on my right to vote, though they clearly restrict, in a very narrow way, how I may exercise it.

In characterising the position more exactly, we must take care to distinguish circumstances which constitute contingencies which negate the existence of the right, from circumstances which limit, even very severely, how the right may be exercised. That is, it is possible to claim both that the rights of control — the rights to possess, to use and to dispose — are absolute, and yet there may nevertheless be very good reasons, morally speaking, for the State or other agencies to prevent someone exercising their rightful control in a certain way, or in any way at all, because there is no practically possible way for them to do so which does not yield consequences others are unable to control.

I would argue then that an owner must possess certain rights, (which can be derived from the Honoré scheme), but that, given the various rights we associate with ownership of a thing, there are those rights which are essential, and which constitute a core group of rights — and that these are constitutive of the single comprehensive right of control. It is this group which constitutes what I consider to be property or ownership. That is, the rights to possess, to
use, and to dispose of a thing, and which entail an exclusivity of the owner towards that thing.


The literature on rights, of course, is immense and presents us with no sign of a general agreement on their nature, their definition or their source, or on their basic moral principle or justification on which they rest. When one talks of rights, one can mean one of several very different things. One might mean peoples' moral claims, or mean people's rights as established and recognised in law, and this would involve weighing up of evidence as to whether they are so established or not. Or one might mean, how far can such moral claims be established in law: "What is their content? Are they clear? Do they meet the pre-requisite for efficient enforcement by the legal system?"

What is clear is that the notion of a right cannot be explained either as referring to or denoting any kind of entity, or as being equivalent to, or mutually implicative

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6 L.V.Prott "Cultural Rights as Peoples' Rights in International Law" in Bulletin of the Australian Society of Legal Philosophy No.36, 1986. p.4
with, any of the notions with which it commonly keeps company, such as duty or obligation, ought, liberty, power, privilege, or claim. Nor can it be reduced to the notions of right and wrong.\(^7\) (Although it may be explained or understood by reference to these other notions).

Without expanding greatly on theories of rights, I acknowledge that much has been written concerning whether any or indeed all rights are in some sense absolute,\(^8\) that is, can never be overridden, or whether (some or all) rights are defeasible. These issues, together with consideration of rights as liberties, powers, entitlements, immunities from interference,\(^9\) whether positive duties are entailed (and, if so, whether they are duties of designated individuals or some abstraction such as "the community") and whether rights may be seen as interests morally deserving of protection, mean it is hardly surprising that some commentators have said that our common notion of rights is loose, ambiguous, and vague.\(^10\)

When we speak of rights, they are often considered in the


\(^8\) Although perhaps less has been written on the idea of absolute rights.

\(^9\) Particularly as based upon Hohfeld's analysis of rights.

following manners:

1) Rights sometimes are thought of as legitimate "interests", that is, a right is assigned a greater weight than ordinary interests and therefore counts for more in utilitarian or welfarist calculations, but in principle it can be outweighed. A similar interest or competing right matched against it, or a sufficient quantity of more mundane interests will ensure that it is not conclusive in generating a final requirement.\(^{11}\) In other words rights are defeasible as, logically, they can be pitted against each other. By this model a right can always conflict with another right and one must be successful over the other.

2) On a second model, the interests protected by rights are given "lexical priority" over other interests.\(^{11}\) They are to be protected and promoted to the greatest extent possible before other interests are even taken into consideration. This then makes rights absolute against considerations of mere utility, but still allows for what Nozick would have considered the utilitarianism of rights, that is, the maximising of fulfilment of the

\(^{11}\) J.Waldron (Ed.) "Theories of Rights" (Oxford University Press, 1984) p.15

rights and minimising of the violations of rights when they come into conflict.

3) However, a third model may be seen as the most controversial and suggests that rights are not particular interests or lexically weighted interests. They may be understood as the basis of strict constraining requirements. That is, the (moral) function of a right is to render morally impermissible certain forms of behaviour of other people which we would regard as transgressing the right of the right-holder. Indeed, it is arguable that it is morally impermissible to even seriously entertain the prospect of deliberately engaging in such behaviour. For example, your having a right not to be tortured makes it wrong even to contemplate torturing you. This model is put forward by Nozick - rights so understood can conflict with each other, but the outcome may simply depend upon adjudication or even force.

Similarly, we may follow Dworkin's argument which closely resembles alternative (2), above, and say that rights can best be understood as "trumps" over some background

J.Waldron *op.cit.* p.15

See A.Gewirth "Are There Any Absolute Rights" in J.Waldron (Ed.) "Theories of Rights" *op. cit.*
justification for political decisions that states a goal for the community as a whole.\textsuperscript{15} That is, an individual has a right despite the fact that normally decisive considerations of the general interest (or other collective goals) would argue against the assignment. For example, if someone has a right to publish pornography, then this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did.\textsuperscript{16} Thus rights can be distinguished from goals or political aims.

Further, we may apply this model to the particular rights we may have with respect to things as property, for example, our land, pitted against the political or social goals governments may have while enforcing their right to resume our land by state acquisition. Or, for example, in the case of the job that I have created, the rights connected to this may be pitted against the government's racial or anti-discrimination legislation.\textsuperscript{17}

\textsuperscript{15} R.Dworkin "Taking Rights Seriously" (Duckworth, 1977) p.XI

\textsuperscript{16} R.Dworkin "Rights as Trumps" in J.Waldron (Ed.) "Theories of Rights" op. cit. p.153

\textsuperscript{17} This of course may depend upon the government's intention or its policies in enforcing, for example, a particular ideal. However, it may also be the case that the government is corrupt and may be said to be stealing the land, or that the ideology is corrupt.
Property rights, however, like rights in general, are commonly left unanalysed in the jurisprudential literature or, what comes to the same thing, they are "defined" by synonyms such as "claims" or "that which is due someone", or according to category such as "moral", "utilitarian", or "legal". Nevertheless, in the broader literature on rights, it has become common to distinguish between claim-rights and liberty-rights. We may generally note that rights that are recognised as claims have achieved at least a special kind of endorsement or success: legal rights by a legal system; human rights by widespread sentiment or an international order. When we say that a person has a right to something, we at least mean that he has a claim to it. But it must mean more than that; that is, one could present claims of all kinds, but many may not be rights. Equally, one may possess rights that one does not in fact claim, or which one is physically or intellectually incapable of claiming.

Generally, claims represented as rights are claims that are "often, perhaps usually, presented as having a special kind of importance, urgency, universality or endorsement that

18 M.Silver "Foundations of Economic Justice" op. cit. p.13

makes them more than disparate or simply subjective demands". It is not required that all right holders, however, actually themselves be claimants, for example, the ignorant, the oppressed and the intellectually retarded may not even believe they really do have the rights which others claim on their behalf. What makes a claim of right successful politically, is endorsement by a government or other public agency that has power to grant and protect such rights, or recognition within a tradition or by an institution whose authority is accepted within the relevant regional, national or international community.

The adoption of a particular conception of a right will, of course, structure the way in which we view the nature and function of all rights; yet the denotation of "right" is not sufficiently stable to serve as a benchmark for whether a particular conception of a right should or should not be acceptable.

Leaving to one side the broader question of the nature of rights for the moment, it seems relatively safe to say at least that one cannot easily separate human rights from property rights. Much of the literature agrees persuasively that the concept of a right beyond that guaranteed by a particular legal system is coherent and morally defensible.

18 E. Kamenka op. cit. p. 148
Further, while the common theological and metaphysical bases for natural rights may, arguably, not be adequate, there is a basis in human nature for rights which apply to all human beings regardless of their membership or status in a particular legal system - they call attention to interests independent of their citizenship in a particular State or membership in a particular society. These rights, like their "natural" ancestors can be asserted "against the world", that is, they constitute valid demands even though they are not actually met at a given time or place; and even if they are not ever contemplated within a particular legal order. That fact constitutes a criticism of that legal order - it provides a moral basis for censuring a State or society which refuses to protect these interests. For example, my right to vote and my right to speak on issues may be equated with property rights because they define the relationship between myself and other people, that is, (without reducing all rights to property rights\textsuperscript{11}) what can be said is that property rights apply to all rights of an individual vis-à-vis other people. Property rights are relations between individuals - they specify the norms of behaviour regarding things that are owned, or, in economic terms, "economic

\textsuperscript{11} Although in this sense it may be argued that it is plausible to construe all rights as property rights. See J.Narveson "The Libertarian Idea" op. cit. p.66
In addition, the common distinction between positive and negative rights is also generally accepted. By "positive" rights it is understood that (except in very special circumstances) these exist only as a result of people undertaking the obligations that correspond to those rights such as by making a mutually binding promise or contract. That is, when a person comes to have a right by virtue of a contract, someone else comes to have an obligation; but the only person who has an obligation is the person who voluntarily incurred it by entering into an agreement. "Negative" rights, on the other hand, are non-contractual - they are negative rights to non-interference from others, and others have a duty to forbear. That is, if it is a negative right, someone's claim to X is a right which he has against the entire world, including the State - the duty to forbear or not to interfere is universal (X being something like the freedom from physical interference) and the duty or obligation is on others. We usually think of property as entailing negative rights, that is, as grounds for negative claims to be let alone to "hold, keep and enjoy what you

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lawfully acquire as your own". Property rights imply obligations on the part of everyone else, regardless of their consent, and irrespective of their social position.

The distinction between these two ideas of rights is that if rights are thought of as negative, then, so long as they are universally respected, it seems that there can be no conflicts. But of course the mere fact that we have rights does not guarantee that they are respected - thieves, murderers, terrorists, etc., may violate our rights, but the point is that our rights cannot be overridden without the right-holder's consent.

It is a commonplace within what is now called classical liberalism to hold that private property is the basis of liberty, and whatever else they may be, property rights are examples of "liberty rights". In general, I have full liberty only when I may either do or not do something, without externally imposed impediment, the root idea being that people are to be allowed to whatever they want to do. So long as any trains of actions are conceivable, and really instantiable, the question can only be whether a given sort

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14 L. W. Sumner "The Moral Foundation of Rights" op. cit. p.77
of action - the exercise of liberty in a particular way - will "collide" with actions which are the legitimate liberties of others. But this is not unique to rights as they relate to property. That is, although some have argued that property rights are more problematic than other rights, it is evident that if, for example one has the right to freedom of speech, that is, the right to exercise the particular rights one holds under that freedom, such as the right to speak as one sees fit, this enhances one's freedom, but may correspondingly restrict the freedom of others. Thus, although the exercise of one's rights may come into conflict with someone else's exercise of their rights, adjudication or a decision may be necessary, but this does not mean that one's right has been overridden.

Nozick in particular treats rights as negative, construing them as providing side constraints and as being exhaustive - trumping all other moral considerations; thus rights have a "secure absolute character". Rights, then, cannot be overridden for the sake of public welfare, nor for the sake of other rights nor for any other reason. The Nozick view is, of course, contentious and against the idea that rights are

15 J.Narveson op. cit. p.81
negative, the utilitarian may say that we have no moral rights whatsoever beyond the right to "be counted as one"\textsuperscript{18} in the utilitarian calculus, while certain socialists and liberal egalitarians may argue that rights are not exhaustive and that there are other values such as the preservation of the natural environment which may override rights in some cases.

If we accept that there are general and specific rights, then here we may make a distinction between a general liberty, which corresponds to a general right to property, and a specific liberty, associated with a specific right to a specific item of property. A society in which there were no general right to property — if indeed such a society is conceivable — would be one in which people did not enjoy the freedom to deal with some resources in ways that they decided for themselves, irrespective of the wishes of them. A person who enjoys a specific right to a specific item of property enjoys a freedom in relation to how that item is dealt with, a freedom which is not enjoyed at that time by other members of the community, with regard to the same item of property. This freedom is protected by rules which prohibit any interference in relation to that particular property.

There seems, however, to be an ambiguity in the application

\textsuperscript{18} Ibid. p.23
of the term "property" which appears to correspond to an ambiguity of "rights". That is, a distinction may be made between what are often deemed to be "natural rights" and those that are seen as "conventional rights" (which may be equated with the idea of general and particular rights). For example, it could be argued that it is not the case that everyone has the moral, pre-legal or general (natural) right to whatever possessions or things he is allowed to enjoy in the system of laws under which he lives. Exiled criminals living in South America, for example, may have their fortunes recognised as legitimate possessions by the local regime so that these particular possessions may be rightful in positive law, under particular rights, (in a conventional sense) but not in natural or moral law. However, either form of rightfulness will justify the conventional application of the word "property", so that whoever has a right may be said to have a title, something which entitles him or which we may say gives him a sort of ticket of justification to do or be given so and so, to be or to feel such and such. Though the possession of this does not entail the rightness or wrongness of certain behaviour, it does provide a strong reason, moral, legal or otherwise for or against certain behaviour. A person's right gives him immunity from at least certain sorts of criticism for what he does, and conversely, one's

19 On a Hobbesian account there would be no rights beyond those which are institutionally recognised.
possession of a right can expose others to possible criticism for interfering.

A further familiar distinction which has often been made is that between a right "absolute" and a right "prima facie". Although one could argue that both are in fact rights, that a prima facie right is merely a defeasible right which, in the absence of a conflicting right, would be an absolute right, I would contend that a distinction can be made between a genuine right (call it "absolute") and one which only appears to be a right.

Although the general philosophical discussion of prima facie rights is unclear, it may be argued that if rights are potentially prima facie, then it can be said that all rights are prima facie rights, that is, other rights may override them. However, if a right is merely "prima facie" in this manner, then it may be said to only "appear" to be a right. That is, on closer inspection, it is evident that what appeared to be a right, in fact was not. Although it is often argued that these may have to yield to "other" rights with greater stringency,¹⁰ I would argue that a prima facie right is no more a species of right, or a way of being a right, than is an alleged criminal a species of criminal, or a way of being a criminal. To suggest otherwise is to commit

¹⁰ See V. Held "Rights and Goods" op. cit. p.171
the common modal fallacy involved in treating intentional tags as dividing the reference of the terms, to which they are attached.

It can be argued, rather, that rights themselves are not limited, and although rights that are associated with, say, ownership may appear to be limited, it is instead the exercise of those rights which may be limited (if that exercise cannot but harm others). The effect or consequences of one's actions, particularly in dealing with things deemed to be one's property, are inseparable from the use of one's property. As such, it may appear that the right is limited, whereas in fact it is one's action, the consequences of acting upon one's right, that is limited.

It is imperative that we do not, however, fall into the common trap of confusing the idea of a prima facie right, that is, an apparent right which may turn out not to be so in the light of further information, and the fact that certain activities associated with what are unequivocally genuine rights which may in fact be directed, limited, or restricted in the circumstances of their exercise. It must be stressed that in the case of what is described as a prima facie right which is overridden, a person does not then and there possess the relevant right at all.
This must be contrasted with the case in which, for some reason, which may be morally very good or morally very bad — that is a separate issue in each case — a person is not permitted to exercise or act upon a right he enjoys in the way or in the circumstances he may most prefer. An analogy may be made with, for example, the right to freedom of speech. That is, even if particular speech may be regarded as controversial or harmful, the right to freedom of speech still remains, and this right is not dependent upon the considered outcome as to whether particular speech will do harm or good. However, it cannot be said that one's freedom of speech can never be interfered with. Free speech is a legally protected interest, whether it be in an individual's interest in "self development, or a social interest in the general benefits of a marketplace of ideas". But the propagating of racist views may be considered as abhorrent in a particular "marketplace", and in circumstances of extreme racial tension it might be necessary for the particular speech to be curtailed. However, it is the right to exercise one's right to freedom of speech in this particular case which is overridden, and not one's freedom of speech.

It is, on this analysis, the result or effect of the particular action, which is the basis of the intervention — the actual right to freedom of speech remains. If the effect,
which is contingently related, could be severed, the case for the restriction would go. For example, if one could utter the same (racist) statement where no racial tension existed, then there would be no reason for the intervention. Similarly, one may say that one still has a general right to property, but that the result or effect of one's utilisation of the right to a particular item of property may be overridden. That is, one would not be permitted to exercise one's right in certain circumstances.

To show that the holding of a (general) right and one's acting upon that right can be quite separate issues, we may differentiate between, for example, the value we place upon the holding of a right and the exercise of that right. We may, for example, value holding a very exclusive right of membership to swim at a prestigious swimming pool yet have no desire to exercise that right; or perhaps I value the right that my life may be terminated by suicide or euthanasia even if I do not exercise this. People choose to exercise rights when they believe the gains from such actions are beneficial. Conversely, people fail to exercise rights when the gains are deemed insufficient. In economic terms it is said that people choose to exercise rights when they believe "the gains from such actions will exceed their costs" \(^\text{11}\) and

\[^{11}\text{Y. Barzel "Economic Analysis of Property Rights" (Cambridge University Press, 1989) p.65}\]
conversely, people fail to exercise rights when the gains from owning properties are deemed insufficient. As conditions change, however, something that has been considered not worthwhile to own may be newly perceived as worthwhile.

Similarly, we may also make the distinction between rights we may hold but which we are unable or not permitted to exercise. Americans value the right to bear arms, but most of them also appreciate that the circumstances in which arms may be used, or even displayed, should be subject to the most severe restrictions. There is no inconsistency here, provided we insist on the distinction between those things that limit our rights, and those that limit the circumstances in which we may exercise those rights. By making this distinction we can see why it is that, if the circumstances which are the basis for restricting our exercise of a given right are removed, we can then exercise that right without further ado. Moreover, our having the right is both an argument for and — if we value it highly — a motivation for removing the circumstances which inhibit our exercise.

In summary, like a decision not to exercise one's right, a legal and/or moral constraint on one's exercising a right, does not have the slightest tendency to show one does not

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33 See below for Dworkin's distinction between rules and principles.
have it, any more than a ban on my paying my bus fare in one cent pieces means I do not have the value of the fare.

As the examples make clear, restrictions per se do not entail that one's right is defeasible, is limited, or has been overridden by other rights. Rather, it indicates how a right is to be exercised. Of course, it is always possible for someone to represent cases such as these as cases of one's right being overridden or defeated by other considerations, including certain rights of others, but we do not have to understand it in that way, and as the examples show, we do not normally so understand such situations. Similarly, it may be the case that one may either choose not to exercise one's rights in respect of one's property, if that exercise endangers others, or may be forbidden from exercising these rights. Yet we may still value holding those rights, and look to inventing strategies for exercising them that avoid the harm to others that is currently unavoidable.

If one really does own something, one must own it in an absolute sense, that is, one has the right to do what one likes with it. However, as in the case, for example, of one's (voluntary) right to vote, it may be (morally) wrong in a particular instance to exercise that right — say if my attending a polling booth puts my sick, dependent family member at risk if left unattended. Similarly, in some
instances it may be wrong to exercise one's rights with respect to one's property. In both cases it is due to the fact that in the exercise of one's rights the effects cannot be practically detached from the conduct that is constitutive of exercising the right.

I have stressed we should recognise the distinction between the holding of certain rights and the effects of the exercise of those rights, and that we sometimes choose how we will exercise particular rights, with an eye to minimising any undesirable side effects on third parties. However, it appears that in the case of one's property many restrictions have been placed upon the use of our property, that is, upon the exercise of our rights, which go well beyond the necessity of protecting third parties.

For example, the factory owner may be restricted in the use of his machinery by the enforcement of laws which prohibits pollution. This protects third parties from the harm, say, of dangerous chemicals which may be emitted from the factory. However, there appears to be an increasing number of restrictions such as legislative requirements and other regulations\[^{34}\] which go well beyond the protection of third parties from damage — that is, which limit the effects or

\[^{34}\] See for example R.A.Epstein "Takings - Private Property and the Power of Eminent Domain" (Harvard University Press, 1985)
"spill-over" harm caused by the use of one's property. Increasingly restrictions, limitations and regulation of our property appear to simply be furthering particular social policies; for example, particular aesthetic requirements for buildings, or even, arguably, employment regulations requiring the hiring of particular persons under affirmative action programmes.

Here ownership appears to be compromised in favour of some positive public purpose. (Some utilitarian defenders of private ownership would represent this as a conflict between public purposes, since they argue that private ownership is itself instrumental in furthering such public purposes as the efficient and responsive development and exploitation of scarce resources.) At a political level, I would argue that our property rights are given very little recognition — the law in many cases is so restrictive that it is inconsistent with its own "recognition" of our rights.

The exercise of ownership rights is in fact increasingly seriously circumscribed by provisions to which I will draw attention in the concluding chapter, although some are very obvious, such as sizeable taxation, the regulation of business of all sizes and kinds,\textsuperscript{35} including the employment

\textsuperscript{35} See T.R.Machan "Human Rights and Human Liberties" (Nelson Hall, 1975) p.122
restrictions imposed by anti-discrimination and so-called equal opportunity laws.

Generally, and loosely, it may be said that if there is an "ordinary ideal" when we speak of property it is the exclusive control and use of a thing. However, when we enumerate the various rights (and liabilities) associated with any particular thing we "own", we find that rarely are we able to enjoy all of these "incidents".^^

We must, of course, acknowledge that on any analysis there are "fuzzy areas" as a result of which we may not be able to either decide on who is the owner, given other interests by different people, and it is conceivable that given various interests it is not clear whether in fact there is an owner. (It would, of course, be fallacious to equate our inability, on occasion, to determine who, if anyone, really is the owner of something, with an indeterminacy in the concept of ownership.) Adjudication is therefore often necessary in practice for a decision to be made by the courts in disputed cases - marginal cases are usually the stuff of litigation. In some cases empirical questions of fact will need to be resolved; in others, the facts may be irretrievably lost, so that arbitration or some convention-based resolution is necessary.

^^ I use "incident" in Honoré's sense here.
Most societies have some form of adjudication, that is, a system for implementing rules which act as tie-breakers or act to break deadlocks based on insufficiency of information, or otherwise irresolvable conflicts of available information. Where relevant facts are irretrievable, conventions function as tie-breakers. For example, in New South Wales lost property becomes the property of the finder if there is no one who can show that he has a better claim to the object within a specified period.

But leaving aside genuinely fuzzy areas and the need for conventional tie-breakers, the fact remains that we have so many restrictions and stipulations, which suggest that what I called the "ordinary ideal" is rarely, if ever, instantiated. In many cases we have some rights (e.g. acknowledged or given to us by law) but these may not be sufficient to entail property in the sense of this "ordinary ideal". Yet in many cases we still call it "property". How is this to be understood? Given the scale of contemporary restrictions, perhaps we should merely say that we have government and other social rules which dispense rights by some plan or other that allows for different "interests", but not that we still have property according to a strict interpretation, although we still might call it "property". That is, our conversational talk of property may merely reflect the pre-history of modern social arrangements, just
as our talk of the sun "rising" in the east and "setting" in the west reflects pre-Copernican astronomy.

I acknowledge that many of the restrictions may be justified, or said to be necessary, but given the extent to which they infringe on one's use of things, perhaps we should no longer call it "property". Our choice here will reflect the extent to which we are linguistic puritans.

Perhaps we may say that "absolute" rights are being replaced by qualified rights, that is, the exercise of the rights is limited by the laws of the community which prohibit certain behaviour and actions to a degree that we can no longer apply, for example, Dworkin's "trumps" analogy of rights. However, we may suggest here that rights themselves are not qualified, but limitations upon our actions go further than recognising our rights. As a result, it appears that the best we can say is that, in practice, we have a "proprietary interest" in a thing rather than property or ownership if the exercise of our rights to possess, use and dispose of things — our control of things — are being eroded by government intervention. But this would suggest that the residue of the proprietary interests, that is, those we do not enjoy, belong elsewhere. This could only be in the State, which lies behind these public agencies which direct and limit our use of what we continue to misdescribe as our property. Of course
the State does not claim ownership, although there is, it appears, some truth in what many take to be the overly dramatic claim that the regulatory State has, in effect, socialised, without direct compensation, economically and socially significant property, without the intermediate step of nationalisation or formal and explicit expropriation. Like Rousseau, the modern regulatory State compensates for its restrictive behaviour only by awarding us the common right to participate in the new public good benefit it intends as a result.

3. Absolute Property — Absolute Rights?

It may be argued that there is no property in an absolute sense, that is, independent of considerations of the interests of the community. It may be argued that urbanisation and greater population densities have simply made more evident the fundamental impossibility of absolute property rights in this sense. Conceding one owner total discretion in the use of certain land, for example, without restraint or liability for harm caused cannot be reconciled with comparable rights of any value in his neighbours. 37

That is, one could argue that to permit X to do absolutely

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37 C. Donahue, T. E. Kauper and P. W. Martin (Ed.) "Property: An Introduction to the Concept and the Institution" op. cit. p. 1037
what he likes with his property would be to make property in general valueless.

I will argue, however, that:

1) the idea of absolute ownership or property rights is not totally implausible, and that

2) an idea of absoluteness with regard to property and rights which takes into consideration "side constraints" that is, limitations on only the harmful effects of one's actions may reveal that there are not different "sorts" of property relationships but only one true understanding of ownership.

When we talk of ownership, of owning something, we generally speak in relation to particular people and particular things. That is, the essence of ownership and what we call property certainly seems clearest in the sense of an individual's domination or control over a particular thing - a near absolute ownership which has its roots in Roman law in which the owner has absolute title to the property object, absolute right to dispose of it, with very few public law restrictions over its use. 18 Certainly the standard legal definition of ownership reads: the right to the exclusive enjoyment of a

18 P.G.Hollowell "On the Operation of Property" in P.G.Hollowell (Ed.) "Property and Social Relations" (Heinemann, 1982) p.29
thing. Hence we may infer that the constitutive rights are absolute.

Further, ownership as we generally understand it, involves the free as well as exclusive enjoyment, including the right of using, altering, disposing of or destroying the thing owned. Ownership is then also of indeterminate duration in the sense that it is terminable only by the deliberate act of the owner by, for example, selling it or giving it away.

Some have argued, however, that the idea of "absolute property" is merely a conceptual device whereby we imagine someone with a perfect title (that is, unqualified in any way) to a thing, who can do what he likes with it, without sharing it unless he wishes, and who can transfer these rights to someone else, since ownership has no temporal limit. However, this seems to confuse the notion of absolute with "unencumbered freehold". For example, Macpherson means by absolute, the "unfettered discretion of an owner, unencumbered by customary or communal claims upon

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40 See for example A. Reeve "Property" (Macmillan, 1986)

41 A. Ryan "Locke on Freedom: Some Second Thoughts" in K. Haakonssen (Ed.) "Traditions of Liberalism" (Centre For Independent Studies, 1988) p. 36

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the property"\textsuperscript{42}, whereas lawyers have a use for the
distinction between "absolute" and "non-absolute" - they
understand absolute as that of a single owner who possesses
all the powers (be they few or many) over his property that
the law recognises.\textsuperscript{43}

My point is that the notion of absolute is possible with
respect to property notwithstanding the fact that I have
consistently stressed, that in practice we may not be
permitted to deal with our property in such a manner.
Macpherson appears, like many, to confuse his justificatory
position with the concept of property. That is, claims that
absolute property is a "kind"\textsuperscript{44} of property, to be compared
with property circumscribed by social considerations, merely
lead to confusion. That is, Macpherson confuses the concept
of property with ideas about who is to do what with whatever
property is in question.

Macpherson, like many, is in fact concerned with what I call
the "spill-over" of one's actions or extrinsic effects of
one's actions. That is, it is uncontroversial that one would
hold the view that action which harms others should be

\textsuperscript{42} C.B.Macpherson "Property: Mainstream and Critical Positions"
(University of Toronto Press, 1978) p.10

\textsuperscript{43} See A.Ryan \textit{op. cit}.

\textsuperscript{44} C.B.Macpherson \textit{op.cit}.p.11
restrained — as Macpherson points out, social pressures are developing such as the "growing public consciousness of the menaces of air and water pollution". The issue is, rather, whether restrictions are put into effect due to the (potential) harmful results of one's actions, or whether the restrictions entail restrictions on one's rights. I would argue that restrictions can in fact be considered as impediments to one's actions rather than on one's rights, thus not compromising the notion of absolute, and although it may be argued that the contrast between acts and consequences cannot be used as a basis for considering the notion of absolute, an important distinction can nevertheless be made. For example, it is not inherently, morally, wrong to carry a gun without a licence if one does not use the gun and does not intend to use the gun. Nevertheless, legal restrictions are placed on all gun-owners and potential gun-owners in case harm is brought to others, that is, due to the possible consequences of one's actions. As stated above, if there were a way of ensuring one's actions did not impinge on others, then there would not be a case for restrictions. Of course this is not feasible in many cases — we cannot isolate the particular use, say the firing of a gun in the vicinity of others, from the harmful consequences to others. As the action and the (potential) results are not severable in practice, restrictions operate to protect third

parties so that, as a result, we may not operate in an unqualified way.

This is not to say, however, that any ownership of, say, the gun is not absolute. By absolute I take it that there is indisputibility of title to a thing but that our actions may, in some particular circumstances, be restricted.

There appear to be two notions of "absolute", however, which are employed by various commentators with regard to rights and which may equally be applicable to rights associated with property: one, as suggested by Gewirth that a right can never be overridden, that is, that nothing can override it in its importance. On this account, a right can only be said to be absolute when it cannot conceivably be thought to be overridden by anything else in any circumstances, so that it can never be justifiably infringed or limited. Of course, arguments that employ this definition inevitably run the risk of criticism that, since rights often come into conflict, either rights "trump" each other to the conclusion that one particular right (say, the right to life) is the one and only absolute right that we have, or it is merely concluded that there are no absolute rights. But we do not need to think of rights in this sort of hierarchical way - we may merely

concede that rights do clash and this may need a resolution, or in fact the conflict may be insoluble and the circumstances may ultimately turn on a question of force or power, or on adjudication. As Gewirth points out, if two (moral) rights can only be fulfilled by infringing the other, the right takes precedent whose fulfilment is more necessary for action, and the criterion for the degrees of necessity may require "institutional rules".¹⁷

A second notion of "absolute" as it may relate to property is suggested by Unger; that by absolute terms we mean those that do not admit of degrees. I will discuss these ideas in turn.¹⁸

Both ideas of absolute may be asserted when considering property, and it appears that sometimes we mean one or the other. That is, we may mean either:
1) that nothing, however appealing, can be said to override our rights with respect to our property, or
2) that rights including those with respect to property are unqualified, that is, there are no other interests which matter regarding what I do.

¹⁷ Ibid. p.93.

¹⁸ A third type of "absolute" as it relates to property may be where all the possible "incidents" as enumerated by Honoré are present. See below.
Arguments of the first category suggest that a right is absolute when it can not only never be justifiably infringed in the name of another right, but there cannot be any claim so morally compelling that it can justify hindering my exercise of my right. (This of course is not to deny that in some circumstances it may be better not to exercise my right).

A necessary consequence of a thing's being an absolute right in this sense is that the holder has not only the right to exclude others no matter what the circumstances from the thing, but may equally not be restricted in any sense, and implying how the thing is to be used — this is a matter of his control. In the sense, then, of having a proprietary right to a particular thing, one would say that a person's claim is absolute by having exclusive use or control of the thing. In other words, an absolute right to a thing entails an unqualified right to have and use that thing (and if there is a clash of rights with respect to the property in question, this might well be an insoluble situation which ultimately will be resolved by, say, force or power, or the enforcement of particular institutional rules).

All property, however, is exclusive, both in the the sense of either an individual or group holding exclusive control of a thing, and further, that there is always a cut-off point which excludes some as owners of a particular thing.
In practice, particularly in a legal context, however, it appears that no society allows for this behaviour, and let me grant at once that there may not be any legal system that recognises absolute proprietary rights in the sense of total and exclusive control no matter what the consequences. As stated above, restrictions are placed upon one's actions as a consequence of possible harm to third parties. It does not follow, however, that there are no such rights; it is only that no society has thought it worthwhile or practicable to give them all full recognition - to allow for one's rights to be acted upon. It is conceivable, however, and logically possible that in a world with a different range of technologies from ours, in which we could insulate others from harmful consequences of free use, that absolute rights would be given legal recognition.

Property in this absolute sense is not logically unattainable. We may consider property as a sort of limiting case with all actual cases of property as really more or less "thick" — it is logically attainable but that it is always conceivable that a rights-based case can be made relative to the property right in question and which overrides its exercise. Generally, we require people to cease harming other persons and hence restrictions are often applied.

There is a very important distinction, as stated above, that
must be made here between the exercise of one's right and the consequences thereof, which is a specific instance of the general distinction—often difficult to draw in practice—that can be made between acts and consequences. For example, if we were to consider the restrictions on an individual's utterance of racist views, it is arguable that these curtailments would be taken to be restrictions on one's right to freedom of speech. Although this is the way in which some of the less reflective tabloids do characterise it, I would argue that the restrictions are merely directed towards the exercise of one's right, taking into consideration the possible consequences of those utterances.

Take, as an analogy, the distinction that is made by Dworkin between "principles" and "rules". For Dworkin, "principle" refers to a standard (as opposed to a rule) that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard, for example, that no man may profit by his own wrong is a principle. However we do not mean that in all cases a person may not profit from wrongdoing—the granting of an easement after trespassing on another's land long enough is a case in point. Therefore principles are not falsified or qualified by the

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50 R. Dworkin "Taking Rights Seriously" (Duckworth, 1977) p.22
fact that there are some circumstances in which they are displaced by permitting what amount to exceptions. "Rules", however, are applicable in an all-or-nothing fashion - like the rules in a game - and although there may appear to be exceptions, an accurate statement of the rule would incorporate these apparent exceptions, and any formulation which ignored them would be literally wrong. That is, apparent exceptions must be incorporated in a pre-stated and more complex rule.

By this distinction it may be argued that one's right to freedom of speech is an example of a principle, that is, an unrestricted right with exceptions. Like the right to vote, which is circumscribed by procedural limitations such as the nominated hours for polling and qualifications such as one's age and citizenship, but which nevertheless remains a right, the right to freedom of speech is no more compromised by the prohibition in some instances on the utterance of racist views.

A case can, then, be made for the distinction between one's right and one's action, and the limitations which are imposed on one's right and on one's exercise of that right. Take, for example, a situation in which an individual calls out "fire" in a non-burning cinema; it is clear that the right to make a statement is one thing, but to call this out in a crowded
theatre is quite another. Here there is a distinct difference between the limitations on one's right and on one's action.

Further, there is a distinct difference between one's action and the result or consequences of one's action. It is quite irrelevant, for example, who owns the gun when restrictions are imposed, that is, it says too much if we insist that the limitations are on ownership - owning entails rights to do things, provided that they do not have particular effects, and these effects may occur independently of one's ownership of a thing. As an analogy, we may take the example of the use of nuclear radiation - it has no intrinsic value as to whether it may be good or bad - but it is the result of one's use which may be weighed. For example, X-rays are used to treat children with leukemia, which we agree to be good, while nuclear power plants may be built for the sole purpose of creating nuclear weapons which may have disastrous effects.

One could argue, of course, that restrictions or limitations on one's actions necessarily entail restrictions on one's right - there being no apparent difference. However, I would argue that this would be synonymous with asserting that the illiterate do not have the right to freedom of information. That is, by this argument, being unable to read is a restriction on one's ability to act as a consequence of a
right, and hence the restriction also has bearing on one's right - there being no practical difference, then, between a person who is illiterate and a person who is denied the right to freedom of information.

Contrary to this argument, we do commonly distinguish between having the right and the capacity to enjoy that right. We can make the distinction and demonstrate the difference. (We may merely teach the illiterate to read so that they can exercise their right.) But this does not mean, however, that we should fund, for example, or permit the continuance of the activities of the factory that is belching out pollution - this remains the domain of the problem of available technology to limit the harm to others.

Absolute rights with regard to what one owns are defensible. That is, if one really owns something, no-one has the right to force one to use or not use that thing in a particular way unless, as a contingent fact, it is morally unacceptable to third parties. These restrictions are justified so long as that contingency remains. For example, say a butcher, who we may say has the right to freedom of movement, is brandishing a knife which may only appear to be putting a nearby baby in his shop at risk. We may say that we are justified in disarming the butcher to the extent that it will prevent harm to the innocent baby - but not more than is necessary. In
this case it is not relevant what the butcher's motive is. By "absolute", then, we may say that restrictions on usage are justified, but only as necessary conditions to prevent morally unacceptable harm to others.

The use of terms such as "relative" and "absolute", of course are troublesome - no-one would argue that one may use anything (including the things one owns) irrespective of the the harm which could be done to others, even the use of one's own body to beat up another body. So that by "absolute" I mean that it cannot be subordinated to some other good, but that restrictions may be warranted to limit harm, but only if there is no other available way to do so.

For example, one may have the freedom to smoke, that is, use tobacco as one pleases. However, as technology, at present at least, is not sophisticated enough to prevent harm to others as "passive smokers", restrictions on the smoker's use of tobacco is regularly enforced. We do not, however, say that the smoker's ownership is limited if he is prevented from smoking his tobacco in public places. The restrictions are enforced to prevent morally unacceptable harm to others. These limitations are restrictions on the exercise of the smoker's right, but are not limitations on the smoker's ownership of the tobacco.
In stating that property should be viewed as an absolute term, I make two observations:

1. There exists the pervasive attitude that if I really do own something, I can do anything with it, and
2. We recognise that if someone has a greater interest in a thing than I do, then whatever relation I may have to it, I do not really own the thing. Even if their interest is smaller, I still do not own the thing; I (fully) own a (large) share in the thing.

Thus, it can be said that property and ownership entail the absence of other sorts of interests. Although others deny the existence of absoluteness when speaking of property and ownership, I would contend that it would make no sense to speak of property without having an idea of what it is we are comparing it with as an example.

I turn now to the second notion of "absolute", and draw on Peter Unger's distinction between absolute and relative terms. For Unger, the term "flat", for example, in its central, literal meaning is an absolute term. To say that a "surface is flat is to say that some things or properties

\[^{11}\] See for example C. Donahue *op. cit.*

\[^{12}\] P. Unger "Ignorance - A Case For Scepticism" (Clarendon Press, Oxford, 1975)
which are matters of degree are not instances in the surface to any degree at all". Thus, something which is flat is not all bumpy and not all curved. Bumpiness and curvature are matters of degree. That is, when we say of a surface that it is bumpy or that it is curved, "we use the relative terms "bumpy" and "curved" to talk about the surface." So that, for example, if we say that a surface is pretty near flat or very flat, or extremely close to being flat, we have not simply said how flat the surface is, but, rather, how close the surface is to being flat. That is, if a thing is very nearly flat, by implication, it is not flat.

Semantically, our absolute terms indicate, or purport to denote, an absolute limit. "Flat" then, purports to denote a limit, flatness, which more or less curved or bumpy things approach to the extent that they are not bumpy and are not curved, and so on. If we were to look at the relative term "bumpy", however, and say that the surface is pretty nearly bumpy or extremely close to being bumpy, this would make no sense at all. Thus if we say that the surface is very bumpy, it is entailed by what we say that the surface is bumpy, while if we say that the surface is very close to being

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53 Ibid. p.54
54 Ibid p.54
55 Ibid. p.57
bumpy, it is entailed that the surface is not bumpy.\textsuperscript{56} Consequently we can distinguish between absolute and relative terms.

Further, if we are to compare two surfaces, one of which is said to be the flatter of the two, we must say either that the first surface is flat, but the second is not, or else it is closer to being flat than the second.\textsuperscript{57}

Similarly, we may say that in the case of ownership and property, if A's degree of ownership is greater than B's, then this entails that B is not the owner of X. If A's right to use X is greater than B's, and this greater right to use cannot be traced to some concession by B, then B does not own X, even if B holds certain rights (or in a weaker sense, has interests) with respect to X. By Unger's analogy, if we think of something as flat, but it is not as flat as X, then that thing is not really flat. To be flat is to be absolutely, perfectly flat, so that if we can order the relatives, we must also concede that in the case of ownership, for example, that a person with say, fewer rights than another, does not really own X.

Given the possibility, at least, of absoluteness with respect

\textsuperscript{56} Ibid. p. 58

\textsuperscript{57} Ibid. p. 59
to rights, we may now look at the particular rights as they relate to property, and initially, we may note that a problem arises as a consequence of applying rights to property. For example, ownership may involve intangibles or non-corporeal things such as copyright, which can themselves be said to be legal rights, so that ultimately one may say that one "owns the rights to" a particular film or manuscript. Thus we would be asserting that one has an absolute right to a legal right. This of course appears to be confusing.

The problem appears to be that although one may say that one has an absolute right to a particular thing, it may not be clearly the case once the particular rights (and liabilities etc.) are enumerated. For example, I may, quite rightly, say that I have an absolute right to this car (which is my property), but if pushed on the specific rights involved, such as the right to use it (e.g. I may drive it as fast as I please whenever I like), the question of absolute (specific) rights may not be as clear.

We may ask, if there are many rights which come into play regarding property, how do we apply the notion of absolute? The formal possibilities for the idea of absolute rights in the context of property and ownership are as follows:
Either:

1) All of the possible rights are absolute in the above sense, and for one to have ownership one would need to possess all of the rights.

2) Some rights may be said to be absolute in the above sense (at least one right is absolute) but the others need not be.

3) None of the rights are absolute, that is, any one of them can be overridden.

We can say, generally, that in practice there are always restrictions, legal and/or moral, on what a person may do with an object even if it is said to be their property. But to what extent can these restrictions be permitted before they denude the concept of ownership itself, or put more simply, how far may restrictions be permitted before the owner would no longer find any value in the thing and not want it any more?

Looking at the three possibilities above, one may say of (1) that this seems to me to be a plausible account of ownership. However, it is obvious that government and other restrictions make this alternative, in fact, impossible.
Number (2) also appears to be a possible alternative, but one must question whether this can in fact be equated with ownership. That is, firstly one must stipulate which of the rights might be said to be absolute, and are they the same rights in each case of ownership. That is, for each object said to be one's property can we specify the particular rights which are absolute, and say that these are the same rights for each object?

Similarly we may say that (3) appears to be the case in practice. That is, we may say that one possesses many rights with respect to an object or thing, but that for every right we may find examples of restrictions. However, this does not answer the question of whether this may be a possibility or an adequate explanation of one's ownership of a thing. In fact, it may be questioned whether the possibility of all of one's rights being able to be overridden simultaneously can be compatible with ownership.

Of course, one could argue that so long as one's rights are not challenged, one is put into a privileged position, or has an advantage over another who does not possess any rights with respect to a thing. However, there is very little operational difference between a person who may possess certain rights such as the right to use or to dispose of a thing, but whose holding of these rights may be overridden
at any time and in fact are overridden by, say, legislation.

But, as I have stated earlier, restrictions need not be considered as the defeasibility of one's rights, rather, they may be seen as limitations on one's actions. Interference with one's actions need not entail a negation of one's right. For example, I may have the right to play a game of football, to play by the rules or to try to make a goal, but I do not have the right to win or to actually make that goal, thus others are permitted to restrict me from making that goal by tackling me even though I still retain the right to play the game.

It is of course useful for us to define property and ownership as strictly interpreted; not least to provide a standard benchmark against which to determine the extent to which we have property. For example, Grunebaum suggests that we can define the concepts of property and ownership by specifying the subject, object and content of the ownership relation. The subject would, of course, generally be persons, individuals or groups of persons, the object being any possible ownable, that is, anything at all and, I would assume, logically even other persons, and the content is that

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55 See J. Narveson "The Libertarian Idea" op. cit. p.43
which defines the ownership, that is, the vestiture of the right to use ownables in any way whatsoever (limited perhaps only by moral considerations).

4. **Property as Control.**

Although there appears to be no agreement over which rights are necessary or at least sufficient as defining characteristics of ownership and property, as proposed by Honoré and Becker, I suggest that there is an essential core right to property, and that right is the right of control. After all, for something to be capable of being owned, a thing must be capable of being controlled.

But what is it to control something? In general terms, it is to have power to direct a thing or that matter in a way that accords with your desire as to how it should be directed. When we say of someone that he owns an object, we assert that he has the power to act, command and to restrain, and that he enjoys certain rights over that thing against the world at large. To have the rights of control is to have the right to that power, and to exercise that power rightfully, one must have, I would argue, the right to possess, the right to use and the right to dispose of a thing. These rights entail the right to exclude others. It is one of the
essential components that property entails the exclusivity of ownership. By this I mean that an owner has the right to choose what to do with what he owns, how to use it, and who is to be given access to it. The exclusivity of ownership thus creates a strong link between one's right to choose how to use the property and bearing the consequences of that choice."

Control involves the power to exercise one's will in relation to how the subject matter is to be deployed. To be in control of a thing or matter is to have the power to implement your desires, to direct the thing or matter in accordance with your desires. As an owner has a power to exclude others, he has substantial control over what he does with his property - he can wear the clothes he wishes, spend his money, smoke in his house or rearrange the furniture in the house. He also has control over others, that is, he can decide who may read his books or who may enter his house.

Certainly I would further contend that exclusion rights are central to ownership. By this I mean those rights which allow a person not only to exclude others from a particular thing, but for the person to be able to use, to manage, to possess, etc. a thing to the total exclusion of others.

Certainly control stems directly from this power. That is, exclusion, entails that another cannot do anything regarding the thing without the owner's consent. For example, in any society regarded as civilized, even police officers may not enter a private house without consent. That is, this excludability is directly related to the owner's power to keep the State from interfering. Further, I make the distinction that ownership is not based upon the ability to exclude others, as this would suggest that owners must have more ability to exclude others such as thieves. Rather, an owner must have the right to exclude others. Thus the distinction between mere control and the right of control may be made - the control or power is "congruent with right".

It is, of course, the case that these rights may be seen to be limited or overridden by legislation or regulation; for example, the police officers may have been issued with a police search warrant to enter the house. The rights of control, as legally recognised, thus often appear to be restricted. However, the police may ordinarily conduct criminal searches and seize evidence only with a warrant, and they must justify a proposed search before a magistrate will issue a warrant - these are the particular institutional

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61 See S.R.Munzer "A Theory of Property" op. cit. p.91
rules which regulate certain actions.

However, the distinction must be made between limitations on one's actions regarding a thing and the rights one holds with respect to that thing. For example, it may not be possible in a given situation for me to exercise my right A without thereby violating my neighbour's right B. But this does not necessarily mean my right A is inherently qualified or limited. It may be a perfectly "full" right, which I will only ever be able to exercise freely if some technology is invented which enables me to isolate its impact on my neighbour's exercise of his rights, and although restrictions may appear to be qualifications on my rights, these are not necessarily on the right itself, but represent limitations on how one's right can be exercised. In the meantime, institutional rules regulate certain actions. (This may be, however, sufficiently powerful to be mistaken as limitations on the right itself.)

Of course in one's house or factory one is not free, at least legally, to commit an assault or to create a nuisance — but save for the actions the law prohibits, restricts, or requires, one can do what one likes. I agree here with the civil libertarian tradition that the exercise of one's right to exclude should only be allowed to be overridden by a legally authorised discretion — to be exercised in the most
scrupulous and highly scrutinised way, like the oversight many believe ought to be set on search warrants. This of course lies behind the well-known sentiment that an Englishman's home is his castle.

Certainly it is clear that by "property" we may invoke to certain particular rights such as the right to use, to possess, or to exclude or to manage, which may be seen as a "core" group of rights.

Alternatively, "property" may be thought as already noted, to refer to the thing to which some entity or entities, natural or artificial persons, have some or all of the incidents of the full list as enumerated by Honoré and perhaps it is this second sense which has become the "popular" conception of property. "That is, that given all of the incidents of ownership as set out by Honoré, if they are held by an individual and each held to the fullest degree possible, there would not be any dispute over his or her ownership of a thing. In this sense it is often suggested that his or her ownership is absolute. Even Honoré himself admits that there is a sense of "absolute ownership" which emphasises the exemption of ownership from social control."^\textsuperscript{11}


^\textsuperscript{14} A.M. Honoré "Ownership" op. cit. p.113
However, I would argue that the set of rights to possess, use and dispose of a thing are far more central to one's ownership of a thing and that these may be said to comprise the "core" group of rights which entail control; hence absolute property in the sense of indisputibility of one's ownership. By "central", I suggest that these rights are paramount, particularly when it comes to resolving disputes, and in the sense that other rights are not merely subordinate to them, but in fact may be reducible to them.

It has, however, been argued that the advent of capitalism has resulted in the view that a property claim is absolute with respect to an object. In particular, Macpherson argues that with the advent of capitalism has come an emphasis on exclusivity or an exclusive conception of property, as the object is viewed as a form of capital, to be valued merely for its capacity to earn interest or profits. However, as stated above, this merely reflects Macpherson's particular view on the justification of property. Rather, on analysis, I would argue that anything less than the exclusive use of an object would make the concept we know as property too vague.

See for example C.B. Macpherson "Property - Mainstream and Critical Positions" op. cit. p.7. Although Macpherson has made the claim that capitalism has given rise to absoluteness, the term, in the sense of the "trumps" idea is even found in ancient Greek and Roman literature. See, for example, the notion of theft in Plato's "Dialogues" and the discussion of the immorality of theft.
Similarly, it has been suggested that a different view of property is that property consists in particular rights which are distinct from the thing itself. That is, that the bundle of rights "combine" in the concrete thing and that some or all of the rights may be considered to be suitable as subject of property claims of individuals or groups. The distinction appears to be between a theory which holds that the object of the property relationship is the item or thing itself, and one which holds that the object of the property relationship is the right to a specific quality of an object (such as the right to use the item).

However, first, such a distinction cannot be drawn between what I consider to be the idea of ownership (that is absolute) and the idea of a bundle of rights theory. In both cases rights are involved. For ownership, one would require that there be the right to possess, the right to use in any way one saw fit and the right to dispose in any way one saw fit, but that one's actions based on these rights are contingent upon the requirement that no harm be brought others. The bundle of rights theory may be able to accommodate this position, provided we are clear to distinguish the rights and limitations which qualify the strategies we may employ in exercising these rights - that

R.L. Rariden "The Right to Property" (Ann Arbor, Michigan, 1985) p. 15
there may be limits on our actions.

Of course this would not accommodate the violation of the rights of others. Any limitations would not, however, be on one's rights, but on the strategies one undertook - that is, on the exercise of one's rights. For example, I may wish to dispose of my house by blowing it up, thereby causing suffering to my neighbour from falling debris and nuisance from noise. However, if I could explode it in a way in which the debris did not put my neighbour or his property at risk and could suppress the noise, then I would have found a strategy for blowing up my house without violating my neighbour's rights.

Further, if it is asserted by the theory which advocates a bundle of rights, that several property claims can be made simultaneously and successfully on one and the same thing by several individuals or groups, then it cannot be the case that each has the exclusive rights to possess, to use and to dispose of the thing. Once this is recognised, it is clear that all that can properly be claimed is that the various individuals or groups have various "interests" in that thing, and that no single set of which can be equated with ownership.

It is not inconceivable, however, that different individuals
may claim to own one and the same thing in the sense of each possessing a share, say, of a given company, but this would merely be the assertion that one had the exclusive control by the right to possess, to use, to dispose of that particular share. It cannot be said that this power or ability extended to the whole thing, the company.

Rariden, for example, suggests that separate individuals could have a private property in the same physical object. I believe, however, that Rariden is simply wrong. It is uncontentious that several individuals may hold some rights with respect to a thing, but this cannot be equated with ownership. Property requires exclusivity in the thing, and although Rariden asserts that an object can be seen as held by private individuals with absolute control over certain limited functions of the thing, this cannot be equated with property or ownership of the thing itself. Either the individuals hold certain rights other than the rights to possess, use and dispose of the thing, in which case they may only be said to hold an interest in the thing itself, or they hold the rights to possess, use and dispose of some thing such as a share. In this latter case, it may be said that they "own" the share, and it is an exclusivity which is independent of the whole, so that on a proper analysis we may say that the holding of certain rights with respect to a

R.L.Rariden ibid. p.15
thing does not necessarily entail ownership.

We may take the example of a parcel of land which is considered to belong to the government, that is, it is owned by the State, and find that the timber rights may be held by one individual and the hunting rights on the land may be held by another. In this case, we can go so far as to say that both of the individuals have absolute control over their respective claims, that is, exclusivity of their part.\textsuperscript{11} This sort of example may be used to illustrate that we are able to enumerate many different rights one may have with regard to a particular thing. In the case of the hunter, he has the right to take possession of the animals by capturing them, to use them by shooting them for their skins or meat, and disposing of them by selling the fur or meat. Similarly, the holding of the timber rights may also be said to contain analogous particular rights. However, to equate these separate proprietal relations individuals may have with say, in this case, the land itself, is a misconception of what constitutes property and ownership.

With respect to the land, it merely indicates that various rights (those associated with the hunting licence or the timber licence) are held by separate individuals. This does

\textsuperscript{11} Although of course in the case of "tennants in common", all are said to own the whole and do not have exclusive control of a part.
not mean, however, that the hunter "owns" the land. That is, a distinction can be made between the many different rights related to an object (which can be dispersed among different individuals) and the holding of certain central rights with regard to a particular object which is a part of the whole. That is, the hunter may be said, loosely, to "own" the hunting licence. However, the holding some of the rights (even when these rights may be those core or central rights equated with property) indicates that the hunter merely has an interest in the land, even though he may possess absolute control over his interest, comparable to holding a share in a company.

A legal interest in a thing exists when one has a set of legally enforceable rights, titles, advantages, duties and liabilities connected with it, and as a result we may say that the hunter "owns" the hunting licence, but he does not own the land — he merely has an interest in it. More generally, I have an interest in something, though not necessarily a legal interest, when the way in which future events unfold (either positively or negatively) involving that thing, advantage or disadvantage one has in particularly significant ways. This, however, falls a long way short of

" Osborne's Law Dictionary. op. cit.
As stated earlier, the word "property" usually brings to mind an image of a physical object, say, a block of land or a wristwatch. However, this is misleading, for as soon as we begin to look at the actual use of the word, it is apparent that property is not only a set of things but may be seen as a set of rights as well as interests.

Most writers on property, including Honoré, have recognised property as a set of rights. John Locke, for example, defined "property" so widely as to mean by it rights to "life, liberty and estate", while standard interpretations see property as consisting of rights such as to possess, use, manage, dispose of, and keep others away from things. But property may also be associated with a set of interests. However, these are only corollaries of ownership — if the things we own were to become worthless, then we would no longer have property. For example, a person who owns a car has an interest in its resale value, while a person who owns a house has an interest in having the value of the property increase through an upgrading of the neighbourhood, although he may have no right to have its value increase in this way.

The holding of a right, however, does entail that I have an interest in a weak sense - the interest in there being nothing which prevents me from exercising my right.

V.Held "Rights and Goods" op. cit. p.167
Property rights and interests are complicated; we have rights to pay our debts with the balances in our bank accounts, and interests that the paper they represent not be devalued. We have rights to the dividends that our shares in a corporation accord, and interests in the corporation's paying as high a dividend as possible; we have rights to a superannuation from the plan we have joined, and interests in the plan not going bankrupt. But we must not confuse what are quite correctly considered to be rights which amount to ownership and those that merely give us an interest in a thing - I may "have" two computers, one at home, the other at my office, and both render the same service, yet I "own" the home computer, whereas I merely have an interest in the office computer - I cannot, for example, (legitimately) sell it or give it.

Of course if all of the rights (and liabilities) are held by one person, it would be uncontroversial as to who should be declared to be an owner. That is, if one person were to be not only the owner of the land, but also be able to utilise it in the various ways including, for example, those connected with what would have been the rights under a lease, he would undoubtedly be considered to be the owner.

Further, we could argue that property can be explained as a bundle of rights, but the problem really is whether one holds
particular rights which can indicate ownership, and not merely an interest in a thing. The question must then be asked: Which rights are necessary, and/or which are sufficient for ownership? My argument is that there must be at least a core group which entails ownership, and/or a core group which is entailed by ownership.

One could hold the view that if one has ownership then it cannot be accepted that various specific rights can be alienated while one can still retain that unique position with regard to a thing. But I think that this is the nature of the bundle theory, that is, others may have various interests but not ownership. The holding of the core group of rights would necessarily indicate control and exclusivity which is beyond mere interest in a thing.

Of course it can be argued that there must be a balance between the rights of the individual and the State's right, power, and perhaps obligation, to regulate one's rights in relation to property. That is, the State by legislation, regulation, and through court decisions, might establish specific limits on the individuals freedom of acquisition, of possession, of use and disposal of things owned, that is, on one's specific property rights. This appears to be the case for two reasons:

1) The State may protect the individual owner's rights
against the plunder of other individuals, or

2) The State may attempt to ensure that all individuals have the benefit of these freedoms as all individuals have the same relationship to the State.

But I would suggest that certain rights are paramount in some sense when we look at property rights. That is, that some rights are at least sufficient to entail property or even that some (or at least one) is necessary for ownership.

Certainly the law has always suggested that possession is central to the notion of property. However, it cannot constitute or generate a right to some (particular) property. After all, it is conceivable that one may possess something that is not rightfully yours and, conversely, one can own something which is not in one's possession.

5. **Core and Residual Rights**

Several attempts have been made to explain the nature or essential qualities of property and ownership employing Honoré's list of incidents. I will argue, however, that certain rights are paramount in determining ownership, and, further, that the other rights as enumerated by Honoré and
Becker are reducible to three core rights — namely the rights to possess, to use and to dispose of a thing.\(^1\)

Certainly within the law, the general right property or the right of ownership contains four elements, namely,

1) the right to use a thing \((usus)\)

2) the right to capture the benefits from that thing \((usus fructus)\)

3) the right to change its form and substance \((abusus)\)

4) the right to transfer all or some of the rights under 1), 2) and 3) to others.\(^1\)

If we accept the Honoré and Becker enumeration of property rights as being the definitive set of all possible rights we could conceivably consider in cases of ownership, and given my apprehension of accepting a "bundle of rights" theory, one could argue that there are 3 possibilities by which we can

\(^1\) Villey, for example, describes the "modern" concept of property as the right of an individual to use, enjoy and dispose of material things, and emphasises that it is unlimited in amount and indefinitely extensible. (Michel Villey Notes Sur le Concept de Propriété" [Notes on the Concept of Property] in C.Wellman (Ed.) "Equality and Freedom: Past, Present and Future". op. cit.) Macpherson also takes the view that property can be described as the right to use, enjoy, and dispose of material things, but emphasises that the right to exclude others from the use or enjoyment of the thing is also a corollary of this definition. (C.B. Macpherson "On the Concept of Property" Ibid.)

\(^2\) See S. Pejovich "The Economics of Property Rights: Towards a Theory of Comparative Systems" op. cit. p.28
identify property and ownership:

1) by identifying a particular element or particular right as necessary and sufficient;

2) by identifying a combination of elements or rights as necessary and sufficient for identifying property and ownership;

3) by identifying some elements or rights as more central and others as more peripheral to the concept of property and ownership, and arguing that certain variable combinations and permutations are sufficient, and their inclusive disjunction necessary for property and ownership.

The crucial question is to determine which of the rights or incidents are necessary by asking which, if any, of the rights or "incidents" suggested by Honoré and Becker can exist independently of any particular legal concept and institutional arrangements. That is, one must ask: which of the incidents could exist conceivably in a state of nature. Although I accept that as property is a relational concept, denoting not material things, but certain rights -

relations between individuals in relation to a thing—some may interpret this as entailing that property rights do not exist in a world apart from organised society. We may nevertheless consider whether property and ownership can exist independently of government or a legal system—whether property claims can be valid even if none of the mechanisms of enforcement that a particular legal system provides are available.

If the answer is that property rights do not exist independently of institutional arrangements, then this would vindicate the thesis of Hobbes that property and ownership rights are necessarily conventional, conceivable only relative to a possible legal system. However, it is at least arguable that, for example, the right to possess and the right to use would make sense in a pre-legal or extra-legal setting—they could, arguably, exist also in a "state of nature". If this is so, it may be possible to identify some immutable characteristics of property and ownership, attributes of property that have non-contingently remained unchanged by government practice irrespective of place or age; such attributes would have a strong claim to constitute the basis of the only "true" property.

Thus if we are to analyse the meaning of the claim: "A owns X", we could examine this in a simple setting, without
government and limited to a small universe. In the absence of government, the connection between A and X, when using the terms "property" and "ownership", would be to say that A can possess, use and dispose of (transfer through voluntary exchange or gift, or even abandon) X at A's discretion.

If the general right property is seen as the freedom, within as yet unspecified limits to acquire, hold and transfer a thing, then it can be said that the specific rights of possession, use and disposal are rights which are perfectly capable of existing in the natural state and which are subsequently enforced in a social State. Indeed, despite Hobbes' contention that property rights are purely conventional, he also maintains, most famously, that in the state of nature we each have the natural right to everything, even one another's bodies.

The various rights, or in Honoré's more cautious terms, "incidents", I will show are reducible to the rights to possess, use, and dispose and may be said to be secondary manifestations of the three core rights. This reductionist approach I believe is useful in determining the essence of property and ownership. It enables us to consider ownership

S.R. Munzer also makes a similar point. He contends that the (claim) right to possess and use and the power to exclude are enough for a "rudimentary" form of property. S.R. Munzer "Property, Incorporation and Projection" op. cit. p.292
as a clearly defined set of necessary and sufficient conditions, each of which may be complex. Although many commentators have suggested various rights which may constitute property, I have singled out Honoré's right to possess and the right to use, and suggest that the right to capital (which Becker has elaborated upon to expand into the rights to consume or destroy, the right to modify and the right to alienate) may better be explained by the general right to dispose.

Of course it may be argued that "property" is ambiguous; that there is a "thick" concept and a "thin" concept of ownership. A "thick" concept of property or ownership would include all 11 rights or "incidents" as suggested by Honoré, or indeed 13, vis-a-vis, Becker, whereas a "thin" concept may merely include a few of the "incidents". This would correspond to their suggestions that there is "ownership", "full ownership", and, in Becker's case, "full exclusive ownership". But concepts, like other entities, should not be

71 Pound: notes that in the civil law tradition property involved six rights: the right of possessing, of excluding others, of enjoying fruits or profits, of destroying or injuring, of using, and the right of disposition. Blackstone: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposition of all his aquisitions, without any control or diminution, save only by the laws of the land." Snare: the right to use, to exclude, to transfer, to punish, to receive a recompense for damages; and liability for damages. E.Frankel Paul "Property Rights and Eminent Domain" (New Brunswick Transaction Books, 1986) p.240
multiplied beyond necessity; since on any such view the "thin" concept would be a proper part of the "thick" concept, it simply obscures matters to talk of ambiguity.

There appears to be just four ways in which an individual can assert a claim to own something:

1) first, by simply asserting that it is his exclusively. It is generally agreed, however, that mere unsupported assertion is not sufficient to substantiate a claim to ownership; nor is it even necessary that a genuine owner should explicitly assert the fact of ownership.

2) The second method is by taking possession of something — possession can itself take many forms, depending upon the nature of the property.

3) The third possible way is by using something — by transforming the property, or by causing the property to transform something else.

4) The fourth method is by disposing of the property; by causing someone else to come into possession or to use the property — a process which presupposes for its validity an implicit assertion of ownership on the part of the transferor for an unspecified period immediately preceding
the transfer, and while the process of transfer is being executed.

Having eliminated mere verbal assertion, that is, the first option, we are left with three possible ways in which ownership may be expressed. I contend that all other expressions of ownership reduce to these three. If ownership is rightfully enjoyed then, and only then, are these expressions exercises of ownership rights.

These rights can be said to be the rights which allow for the control of the thing, to benefit from it and to be able to alienate it, that is, to dispose of it as one sees fit. But what of the right to exclude others? It is wrong to regard this as a separate since it is not merely causally impossible, but logically impossible to exercise any of the other rights, unless one has the power or the right to exclude others.

Let us look at each element in turn:

1. Possession
Possession has the best claim to constitute the minimum content of property. (Although it is clear that mere possession cannot constitute or generate a right to
property.) Possession is the \textit{de facto} holding of a thing. What constitutes "holding", however, varies as does the nature of property, so it must be understood as acquiring increasingly metaphorical nuances as we move from the tangible to the intangible. We may thus say that the minimum content of property is whatever is involved in enjoying the possession of a thing, although it is not enough for ownership.

Certainly in a state of nature an individual's possession of a thing would depend upon his natural ability to take and to defend the possession of the thing which he needs to sustain his life. Later, in a social setting, one is compelled to rely on the law of the society which governs one's acquisition and retention of the possession of things.\footnote{J. Chandler "A Reconsideration of the Concept of Property" in C. Wellman (Ed.) "Equality and Freedom: Past, Present and Future" op. cit.}

Whether or not one is of the view that rights also exist naturally, that is, prior to, or without a legal system or system of conventions, certainly in the organised State the right to resist intrusions\footnote{I am not arguing however that one's consent to participate in a social state is an absolute and unconditional surrender of one's power.} upon one's possessions replaces

\footnote{It can be said that the very nature of the right to hold things with security and without interference necessarily embraces the right to resist intrusions by the state upon}
the physical power to resist intrusions which one would conceivably need to exercise in a natural state.

By taking possession of a thing, we can distinguish three elements by which this can be achieved. That is,

a) one may directly grasp something physically; this would be quite literally "taking possession";

b) one may possess something by shaping, forming or through bringing it into being as a distinct entity; developing it out of an amorphous collection of raw materials; and

c) taking possession by simply marking off, enclosing or segregating something."

It is evident that intention must inform all three activities if they are to underlie property. In taking possession of an object I must intend that it is to become my property, if it is to be so - mere accidental possession cannot be sufficient for property. An essential feature of property is the intention" of entities or individuals to, at some

individual possession, or interference by the state with the individual's freedom to acquire possession. See for example, J.Chandler op. cit.


stage, acquire or retain a thing. One must intend the possession in order to establish the sort of link between the individual and the object, after all, a prisoner does not own his cell, although his possession of it may be protected by law for a considerable period. Property must be intentionally acquired for something to be owned. That is, whether it is acquired by creation, by purchase, by finding or even by gift from someone else, there is an intention (either by the acquirer or recipient, or the benefactor) for the thing to become the property of the owner. Certainly intention appears to be a necessary element in one's ownership of a thing—it is true that at least all initial acquisition, that is, the first time a particular thing is acquired, must be done so intentionally. Even if something comes to me by accident—say I find myself in possession of something that belongs to nobody else—it requires an aquisitive intent to retain it, if I am to think of it, henceforth, as my property. Owning a thing is an action and therefore a necessary condition for A's owning x is A's intention to own x.

Further, this intention must extend beyond the initial acquisition, but it need not be intentional with respect to every element of the thing possessed. For example, if I claim ownership of a parcel of land, by implication I also intend that my ownership will be extended to, say, the rare
flowers growing on it of which I had no prior knowledge, or the mineral deposits of which I am unaware. This extension would also apply to organic consequences of activities naturally occurring on the land such as the offspring of my cows.

This intention is, of course, usually more detailed or pronounced if I am to take possession by creating something, by shaping or forming something - I intend that the piece of wood, for example, which has no prior claim on it, and which is fashioned into a chair by me, will be mine. As Hegel pointed out, a person puts his will into a thing - this is the psychological investment that underlies our feeling of "attachment" to what we call our property.\(^{11}\) Hegel's characterisation of property is that it results from a mental act; the person decides that he wishes the thing and wills it - "I want it, this is mine". Thus Hegel distinguishes between property and mere possession. It is this will that produces rights and thus is unique to humans.\(^{11}\) Similarly, by marking off something as my own again extends my intention to ownership beyond the immediate thing that is actually manipulated, such as a plot of land, by the act of marking

\(^{11}\) G.W.F. Hegel "The Philosophy of Right" op. cit. By contrast, Locke's natural man is entitled to (particular) property as a result of mixing his labour with a natural object.

\(^{11}\) See P.G. Stillman "Property, Freedom and Individuality in Hegel's and Marx's Political Thought" in J.R. Pennock and J.W. Chapman (Eds.) NOMOS XXII "Property" op. cit. p.133
Of course counter-examples may be given. For example, corporations may acquire additional assets such as factories where intention may not appear at first to be apparent in this process. However, it must be said that a corporation's activity is ultimately determined by entities capable of having the appropriate or relevant intentions, such as the managers of the corporation. One cannot own something accidentally.

This raises the further question of whether the recipient's intention to accept or acquire is equally a necessary condition. That is, one could argue, say, that the recipient of a gift or a beneficiary from a bequest might not have intended to acquire the particular thing. However, we may equally say that the intention is still present, albeit centred in the benefactor - I may not have even heard of the inheritance from a forgotten uncle! Similarly, we allow that intellectually retarded people, incapable of forming the intention to acquire ownership, may nonetheless own things - this is attributed to them on the express intentions of others, who cause certain items of property to be aligned with the retarded person.

In sum, it may be said that mere possession of a thing -
physical description of a thing - in the absence of an intention to acquire or transfer would not be ownership. Take, for example, a case in which I have two coins in my pocket -

I own one (acquired as change from a purchase) while the other happened to fall into my pocket. Both coins are physically identical and both have the same physical relationship to me. Yet as the original owner did not intend to give me the second coin, and I did not intend to receive it. In the absence of either the other person's or my intention, I cannot own the second coin, although I do possess it. However, the coin may be said to be mine if I decide to keep it; and if I merely possess something that I do not think of as my property, it may still be considered by others as something I own. It is interesting also to note here that the intention to convert to one's own use is an inherent element of the offence of theft as a trustee.

2. Use
All claims about ownership can be analysed in terms of rights to perform various actions. Generally, it may be argued that all are rights to do certain things to intentionally bring about states of affairs. For something then to be eligible for ownership, it must be capable of being affected by someone in some way, at least potentially. Both Narveson and Carter have recognised the importance of use with regard to ownership; Narveson arguing that the right to use is
"primary" in ownership," while Carter points out, the "core aspect of property" is the claim to the exclusive use of a good." That is, we claim the right to the use or benefit of various things which in turn enjoy some sort of community sanction.

The use that is involved in ownership of a thing need not be, however, and typically cannot be, its simultaneous, or even sequential use in every possible respect, or every possible way. Indeed, some of these may in any case actually be mutually inconsistent. In some cases it is even possible that one may not be able to use or even cannot use the thing owned.

Thus we can include from Honoré's list of incidents under the general right to use, the rights to the income of a thing (which may be derived from foregoing personal use of the thing) in addition to the right to manage (that is, by deciding on how the thing is to be used, and perhaps directing others in its day to day exploitation, as, say, by managers, or when we have transferred or leased a thing to another for a period of time).

" J.Narveson "The Libertarian Idea" op. cit. p.80
" A.Carter "The Philosophical Foundations of Property Rights" op. cit. p.130
A further essential feature of property for something to be capable of being used is the materiality of property - it must be material at some stage. That is, even if there is an element of substitution or surrogacy in the form of "tokens" such as musical score sheets, the manuscript of a novel, deeds, money or copyright, which convey what is valuable, there must at some stage be a physical, material entity which is capable of being stolen, in other words, of being misappropriated or expropriated. Moreover, it is through an examination of the tokens that we discover whether there has been a theft of intellectual property or for example a breech of copyright. Not all property of course is material, nor are all the rights one may have, rights in material objects; for example, one's property may be a copyright or a patent. However, even copyright and patent firstly requires the existence of some writing, drawing or model through which rights are claimed, and, secondly, points in an intentional way to some possible physical object (printed paper, celluloid, magnetic tape, etc.) which will embody the subject matter of the copyright or patent. Certainly, for example, one's legal position with regard to a patent, particularly one's power to exclude others, would be worthless, if not literally meaningless if the patent did not pertain to some physical manifestation of the intangible property (the patent which forbids people producing a patented machine without a licence from the patent owner).
3. Disposal

"Disowning" something, for example, by selling it, giving it away, abandoning it or destroying it, presupposes, as a basis for the rightfulness of my activity, that it is, up to that point, mine. Hence, disposal or disowning is an expression of antecedent ownership. Overwhelmingly, of course, the method by which we acquire something is that of transfer from a previous owner, that is, by exchange or by gift; even the chair that I fashion from wood is usually made from lumber acquired though exchange. In this sense, a public declaration is made as to the intention of ownership - first by the selling of the lumber to a new "owner" and secondly by the purchase of the wood and the fashioning of the chair.

Here there appears to be three methods by which I may dispose or "disown" something:

i) by giving it over to another in exchange for something I deem to be of value, for example, money (this would entail sale), or by barter;

ii) by outright gift - so long as it is accepted as a gift, that is, others may conceivably refuse a gift; or

iii) by abandoning it, so that it becomes "res nullus" - the property of no-one.
It may be argued that destruction is a fourth method, that is, I may intend that the thing not only becomes the property of no-one, but that it ceases to exist at all and, hence, not an object that can be classified in terms of property. However, by destroying the thing, my expression of ownership may be similar to abandoning it as in (iii); no-one is henceforth the owner, although the effect or outcome of destruction is not the same as the outcome of abandonment. That is, if the whole is destroyed, then there is no possibility of anyone owning the thing. But if we were to destroy something to obtain the various ingredients, such as destroying a car with a view to re-use of its parts, then the question of disposal or disowning does not arise (until, of course, we sell, barter, or give away those parts, thus leading us back to (i) and (ii).)

The first and second options are clear enough. That is, we often sell or exchange items and give presents, although this does leave open questions such as what constitutes a fair exchange or an appropriate gift — issues that are not relevant to address here — yet it may be pointed out that one must intend that a thing be the subject of sale or purchase, or of gift. A transfer thus cannot be exclusively one way — exchange is always subject to agreement, and gifts must be accepted. However, the third option is less clear; that is, although I may deliberately abandon a thing, intending to
disown it, it is not clear whether the attached rights of ownership continue to exist, whether they remain with the "former" owner, or indeed whether any associated duties remain with the owner. For example, it is arguable that even in a pre-legal setting I may not deliberately abandon my nuclear waste, particularly near inhabited areas, and merely declare that it is no longer mine.

Now it may be objected that the right to dispose of a thing is an implausible element in one's definition of property. Certainly we do sometimes acquire things at least with the first or second forms of disposal in mind. One may intend to buy, for example, a house merely for the profit one would receive as a result of a future sale. Yet it it clear that it is only if I own the house, that I can rightly dispose of it and equally clear that if I own it, then one of the things I must have is the power to dispose of something. I must have the right to cease to own it - this is implied in the voluntariness associated with the link between ownership and intention. Thus, a person may be said to own an object if and only if he has the right to decide upon the disposition to be made of that object." After all, it may be said that the "out-and-out" version of what is property, of "X is A's

However, this may be ambiguous, in that a distinction can be made between our right to dispose of a thing and the method by which this may be permitted to be undertaken.
Moreover, possessing a right to dispose of a thing entails the following:

1) The fact that the owner has disposed of the object in a way contrary to some other person's preference is not per se evidence that the owner has done something which (morally) he ought not, and

2) the fact that some other human agent has disposed of the object in a way contrary to the owner's preference is, per se, evidence that this other agent has done what (morally) he ought not.\footnote{11}

Of course it could be argued, however, that if the owner wished to dispose of a rare Rembrandt painting by deliberately destroying it, that a moral argument—that it is morally wrong to wantonly destroy an object of aesthetic appreciation—would prevail and that a strong argument would be put to prevent the owner exercising his right to dispose of the painting as he wished.

To recapitulate, the three core property rights I contend are:

\footnote{17} J. Narveson \textit{op. cit.} p. 64
\footnote{11} G. Mavrodes \textit{op. cit.} p. 247
1) the right to possess
2) the right to use, and
3) the right to dispose of a thing.

Although I agree all other "incidents" may be present in a "full liberal conception" of ownership as suggested by Honoré, it is the right to possess, the right to use and the right to dispose of a thing which are the singly necessary and jointly sufficient conditions for ownership, and which therefore constitute the core group of rights inherent in ownership. If we return to the remaining "incidents" proposed by Honoré and Becker, we find that some of the incidents collapse into these three, while others can be dismissed as mere rules of a particular legal system.

The right to possess may stand alone as a general, necessary, right within the concept of property; suffice it to say that we generally consider the right to possession to be the minimum requirement for any case of genuine ownership. The right to use, however, as stated above, may include the right to the income of a thing and the right to manage that thing, as suggested from Honoré's list of incidents. That is, the derivation of income from a thing is dependent upon one's prior use of a thing, or is derived from a delegated use by others, thus forgoing personal use. We may permit others to use our things, or voluntarily transfer our powers to others.
by agreement, so that they in turn may, for example, licence others or lend the thing, or direct how the thing is to be used. But we must be clear to distinguish between what may be delegated, such as managerial powers, and those that constitute ownership.

The right to dispose of a thing includes, by definition, the right to the capital from that thing, that is, the power to alienate a thing (by alienation, Honoré means the power to dispose by sale, mortgage, gift or by any other manner) and the power to consume, waste or destroy the thing. Further, we may include under disposal, the incident of transmissibility, which entails the right to transfer assets to others at mutually agreed term, that is, to sell assets or to give them away." (Although, more correctly, perhaps this should not be considered as a right, as the transfer of assets usually in this category entails transfer after the holder's death to a successor, and does not necessarily entail that there has been a choice made by the holder.)

In considering the remainder of the list of "incidents" enumerated by Honoré, we find that the right to security, that is, an immunity from expropriation, the absence of term

" S.Pejovich "The Economics of Property Rights: Towards a Theory of Comparative Systems" op. cit. p.28

" A.M.Honoré "Ownership" op. cit. pp.120-121
— the indeterminate length of an episode of ownership — the prohibition of harmful use of the thing, the liability to execution (liability of the owner's interest to be taken away from him for debt, either by execution of a judgement, debt or insolvency), together with the residuary character of ownership, that is, rules which govern the reversion of lapsed ownership, are all based on general observations of our legal system, and can be claimed to be more or less true of all fully developed legal systems.

Certainly the right to security of property, although important, simply reflects our common expectations that we should remain owners so long as we choose to do so, and also reflects an ideology which holds that adequate compensation should be paid to an owner as a result of expropriation by the State. Similarly, the incident of absense of term, although a legal term, reflects our expectation that our ownership is to be indeterminate in length and that we should continue to enjoy our property as long as we choose or as long as possible (terminated only by death).

It is apparent that at least two of the "incidents" do not involve rights at all that owners can be said to have — hence, as I have already observed, his studious use of the more general term "incident". These are: the prohibition of harmful use and the liability to execution. These
"incidents", as with the preceding ones are not inherent in the concept of property or ownership, and can stand alone without any reference to ownership. Although I have argued that we have a corresponding duty not to harm others, many harmful uses are prohibited without any reference to ownership - I am prohibited from using anyone's (or nobody's) knife to stab you in the chest, but what attaches to ownership is less the prohibition of harmful use than liability for injuries caused by my property in the absence of criminality. But this suggests merely that liability for the injuries caused by my property is an observation of our particular legal system - if my property causes you harm, it is to me that you turn for compensation.

Thus if we examine the list of "incidents" proposed by Honoré, we find that for Honoré ownership does not essentially consist of claim-rights. That is, following Hohfeld's analysis, property rights may be claims, privileges, powers or immunities. Thus Honoré holds that, for example, using what one owns in a way likely to cause harm to others can lead to legitimate confiscation of the thing owned. Similarly, one may be deprived of one's things due to outstanding debts, taxes, etc.

12 A.Carter "The Philosophical Foundations of Property Rights" op. cit. p.5
Honoré holds what, on the face of it, appears to be the odd view that these two incidents are also inherent in his full liberal concept of ownership, although they are not rights. For Honoré, then, ownership is something other than a series of claim-rights. However, even if it is granted that one ought not use something in a harmful way, or that penalties rightfully imposed may be legitimately executed on what you own, it is a non-sequitur to infer that prohibition of harmful use or the liability to execution are part of what it means to own a thing. The prohibition of harmful use is a limitation enforced by law which corresponds to our duty not to harm others — it is not inherent within the concept of property. By including prohibition of harmful use as an "incident" of the concept of property, Honoré confuses a contingent connection with a necessary one. This is a non-sequitur. That is, by making the step from the claim that people should not cause certain categories of harm, to treating this as an incident of property, this merges two separate issues. For example, as Mackie points out, suppose that A has a right to do X but it is causally impossible for him to do X unless he does Y, it does not follow from this alone that he has a right to do Y."¹ So that if in fact it is impossible to detach the harm that is caused by one's use of property, at best we may say that one would be limited in

¹ J.L. Mackie "Can There be a Right-Based Moral Theory?" in J. Waldron Ed.) "Theories of Rights" (Oxford University Press, 1984)
the exercise of one's right of use of one's property, not that the prohibition of harmful use is a necessary incident of property.

In addition, liability to execution may be said to be an observation of legal systems generally. If, for example, a penalty could be executed in some other way, by, say, requiring you to perform some personal service, there would be no a priori reason, and certainly there is nothing inherent in the concept of property, to suggest that execution via property should be the preferred mode of redress.

This same point I have recently found in Alan Carter's work in which he states that the prohibition of harmful use and the liability to execution are social restrictions in modern liberal societies on ownership - they are limits set by society on ownership or conditions set upon our use of the things we own. They are not conditions of the concept of ownership."

The distinction between core and residual rights as I have

" Alan Ryan, however, holds the view that this is part of the concept of property. A.Ryan "Property" op. cit. pp.54-55

" A.Carter ""The Philosophical Foundations of Property Rights" op.cit. p.5

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presented them, is not, of course, a new or novel idea. It does, however, offer a way of becoming clearer about what is important in ownership. Moreover, this idea can be used in elucidating the distinction between an "ultimate owner", where the core is left to the owner while the object itself is enjoyed temporarily by another person, and what in legal terms may be called "complete or beneficial ownership" where a person enjoys all the rights and privileges associated with a thing but is not the legal or nominal owner.

Many attempts have been made by political theorists, jurists and economists to defend property rights. Yet a complete theory of property ought to be internally consistent and should provide separate theories which explain how one comes to acquire property legitimately, what constitutes a proper use of that property, how one is to transfer title of what one owns to another person or dispose of it, and what means one may employ to recoup one's property if it is taken, lost or damaged."

"See for example C.R. Noyes "The Institution of Property" in P. Hollowell (Ed.) "Property and Social Relations" op. cit. p.29

"See E. Frankel Paul "Property and Eminent Domain" op. cit. p.195
6. Implications.

Possession, use and disposal do not form a random list of rights; instead they lie at the core of a comprehensive and coherent idea of ownership. As Epstein has pointed out, the right way to think about these "incidents" is to ask what ownership means if any of them are removed. "Is it sensible to have a notion of ownership without the right of possession? If so, who can possess the land in question, and why is he not the owner?"" Given that possession is recognised as essential, what should be done about the question of use? If the owner cannot use the thing in question, who can? And what does it mean to use and not to possess? Any effort to lodge possession in one person and the right of use in another, creates a high degree of "incoherence" in an analysis of property. Any viable conception of ownership that embraces the right of possession, must embrace the right of use as well, and, similarly, the right of disposal must be vested in the owner. The unity of these rights is an inseparable part of the concept of ownership. Further, ownership gives us the right to exclude others without the need for any further justification. Like the freedom of speech, whereby one has the

"R.A. Epstein "Takings: Private Property and the Power of Eminent Domain" (Harvard University Press, 1985) p.60

"Ibid."
right to talk in ways that are unpleasant to others without any justification for so doing, so too, ownership gives us the right to exclude others without the need for any justification. 100

Given that the concept of property entails that if A owns X, then A can possess, use and dispose of X at A's discretion, this does not entail that A may use X or permit others to use X in ways that cause harm to others; this limits the circumstances within which that discretion may be exercised. In addition, this means that as others do not own X - they cannot possess, use or dispose of X without A's consent. If we extend the universe to include all valuable things and all individuals, nothing essentially changes 101 - the picture merely becomes more cluttered. In legal terms at least, we find that if X harms others in ways they could not necessarily avoid, then A is responsible for the damages and must pay compensation, whereas if X is harmed by the calculated or negligent acts of others, A is entitled to compensation. Further, it is wrong for others to take X away from A against his will, and if X is taken away, then A has the right to recover X or to be compensated.

100 See R.A.Epstein "Takings - Private Property and the Power of Eminent Domain" op.cit. p.66
101 See E.Frankel Paul "Property and Eminent Domain" op. cit. p.195
Of course, if X is a simple thing, then we have practically no problem with this analysis. But the likelihood of harm to X, (or by A's use of X on others), increases dramatically from "spill-over" effects or externalities by several means and for a number of reasons. For example, in more recent times possible harm or damage from such things as air pollution, water contamination or annoying noises has increased as industries multiply. This, together with the increase of populations, means that the extent to which these "spill-over" effects are considered to constitute harm and the extent to which ownership of X is permitted freedom from others' "spill-over" interferences, will depend upon the various particular property rights theories which are utilised by various authorities (all of which must address the issues of acquisition, legitimate use and disposition).

Ownership entails an element of intention; if something is my property then either I intend that something to be my property, or I at least acquiesce in the fact that other responsible people so intend. This acquiescence may be not only innocent but even ignorant, as when I do not realise that I am a beneficiary under the estate of a long lost relative. Equally, that intention underlies the elements of possession, use and disposal. As stated earlier, mere possession cannot constitute ownership, nor can mere use of a thing or disposal of it, without the element of intention.
in relation to that owner's ownership; but not necessarily on the part of the present owner.

Although intention to possess a thing and the disposal of it may not present us with serious problems - these may be dealt with by the various justificatory theories of property (for example, they may be considered in terms of a theory which denies certain types of things as property, or allows disposal only in certain fashions) - however the intention to use a thing in various ways, that is, producing certain results or consequences from one's actions, may lead to criticism of this strict interpretation of the concept of property. I have argued that we hold certain rights viz. the rights to possess, use and dispose, and also that these are absolute - only we can possess, use and dispose of a certain thing we call our property, and that by doing so we hold total control of that thing, barring the requirement that we do not exercise these rights in ways that harm others. But we are in fact often restricted in the use of our property, and this might be interpreted as restrictions on the rights themselves; that is, it may be argued that there is no actual difference between the restrictions we commonly encounter that are placed upon our use, and interpreting this as being restriction on our right to use. However, as stated above, we need not think of rights in this way - that they are restricted in all cases. I make the distinction here between
our right (say, to use X) and our actions in our use of X which bring about certain consequences. In fact, what restrictions often are applied to are the "spill-over", that is, the consequences of my actions - and if we could separate, given appropriate technology, the consequences from my actions (e.g., shooting a gun without the danger of hitting someone, or disposing of my house as I wish, even blowing it up, so long as it does not harm others) then there would be not be the restriction. Thus it can be shown that theoretically there can be restrictions based on the consequences of my exercise of my right to use, but these do not compromise, undermine, or qualify the full reality of my right to use.

Of course it still may be argued that if restrictions are placed on the results of our use, then the use itself is limited. That is, it may be argued that if one were to restrict the production of certain consequences, then this would entail that the use of that which produces them would be equally restricted. The issue of acts and consequences is not an easy one, particularly if intention and purpose are brought into play to indicate the distinction between what is intended by one's use and the resultant side-effects, that is, those effects of one's actions which are not intended. However, we need not bring in intention and purpose on this analysis. That is, as consequences go, there is no difference
in the case of the restricting of loud music in urban areas
between the playing of music by someone who is merely deaf
and cannot hear how loudly he is playing it (thereby not
intending to annoy the neighbours); a player of music who has
no regard for others; one who intentionally wants to disturb
others; and someone who wants to "fill the world with music".
It is merely the consequences on others that are to be
considered. That is, restrictions are imposed merely on the
basis of the resultant event (or in anticipation of the
event), and not because of motivation.

Of course the distinction of what is intended and what is not
intended, but brought about as a side-effect (what I have
called the "spill-over") is the basis of the vast modern law
of tortious liability in negligence, and is the focus too of
the criminal law's long accepted distinction between murder
and manslaughter.\textsuperscript{101} Side-effects can be genuine side-
effects, that is, not intended, even if they are foreseen as
a probable consequence. For example, I may put up curtains,
knowing that they will fade, but I do not put them up
intending that they do so. It is difficult to determine, of
course, whether something is intended or not - what we can
show is that even if certain things are foreseen as certain,
this does not entail that one intends that result.

\textsuperscript{101} J.Finnis "Intention and Side-Effects" (Legal Theory
Workshop Series, Faculty of Law, University of Toronto,
1988) p.1
The intention that I have outlined above regarding property and ownership - that I intend that something be mine, or that someone who then owned it intended it as mine, or even that I intend to possess it, use it, or dispose of it - is not necessarily the same as intending to, say, use it in a particular way. This is not to say that we should choose to act regardless of side-effects, even if the consequence is something not intended. Ownership carries with it certain duties.

Of course people may still think that by calling something one's property, that this entails unrestricted rights which are morally untennable. However, I do not suggest that by proposing a definition which is "absolute" that this entails unfettered control no matter what the consequences. Firstly, from a justificatory point of view, even the liberal justification of property does not defend ownership by the private individual out of sympathy for the narrow interest of the property owner and "stony indifference" toward the welfare of others. Contrary to Macpherson's plea that social considerations be returned to our understanding of property, I would say that they are already here, if indeed they ever left. Property as commonly understood is burdened

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not only with duties and liabilities imposed by the State, but these become even more burdensome, and our sense of something's really being our property even more flimsy, with growth of the administrative-bureaucratic State. That is, not only are restrictions increasing but so indeed are liabilities (see, for example, the notion of strict liability — the latter is a liability you may have even after something has ceased to be your property — indeed does not depend on property at all.) Secondly, we may conclude that these may increase the social considerations bound up with property, but, as a result, we may already be living in what some people already think of as a post-property society, if property is to be understood as certain rights which entail control and, hence, may be said to be absolute as a concept. As Tay has noted, ownership and control no longer part company as an exception. As a result, what we consider to be our property often resembles things over which we hold stewardship, although we hold certain "interests" in those things.

There are three empirical observations to be made regarding control, although I realise that control, as a right is not the only element inherent in property.

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144 A.E.S.Tay "Law, the Citizen and the State" in E.Kamenka, R.Brown and A.E.S.Tay (Eds.) "Law and Society - Crisis in Legal Ideas" (Edward Arnold, 1978) p.11
(1) One's rights regarding property are becoming increasingly restricted through government intervention to the extent that one no longer can strictly profess to have control over most things.

(2) Those rights which pertain to property and ownership are being apportioned to various individuals and other interest groups so that control again does not rest with a specific individual.

(3) Increased responsibilities and additional liabilities placed onto the property holder not only restricts the actions of owners but again generally distorts the notion that the owner is to have complete dominion or control over an object.

By (1) I mean restrictions such as those which are evident even in respect of one's own home. For example, my house may be deemed by the government to be of historic importance and hence National Trust orders or particularly burdensome and discriminatorily restrictive local council regulations may be applicable. As the owner I am bound by these regulations and cannot, for example, paint the outside walls any colour other than those stipulated. These regulations not only have bearing on one's control, but also on the value of one's property.
Further (although this may be more contentious as the sorts of things we generally consider as property) jobs may be seen as property and, as a result, employers may claim that they are owners of the positions they have created, yet they are restricted by various union regulations, anti-discrimination laws and other statutes in regard to who is to be employed in those positions.

(2) Secondly, with the increase in the sorts of things we identify as property, such as corporations, associations, companies and other business enterprises, we find that particular rights associated with property are scattered amongst several individuals or groups. The separation of ownership and control has occurred particularly in the modern corporation - no longer can it be said that a certain individual or individuals are owners or have property in the sense of control. Reference is usually made instead to the various rights as "interests" one may have in something, although the interests of the owner and the ultimate manager


106 Whether or not employers should have full moral rights of ownership over jobs they dispense, i.e. give jobs to whomever they please, is, of course a separate issue. See for example J.J.Thomson "Preferential Hiring" Philosophy and Public Affairs. Vol.5, 1973. pp.364-384

107 H.Demsetz "Ownership, Control and the Firm" op.cit. p.187
may, and often do, diverge. For example, stockholding owners today have little or no direct control over what they "own" because ownership is so broadly dispersed across large numbers of shareholders, and control being for all practical purposes totally in the specially trained hands of management, although the stockholders, of course, still hold other rights in regard to the company such as a right to the income.

(3) Thirdly, the imposition of social responsibilities and liabilities ranges from those applied to corporations and companies to individuals in suburban settings, and again raises the question of the relationship of ownership to control. For example, the notion of strict product liability as developing in some U.S. States, places on manufacturers the responsibility of ensuring the safety of their products beyond even foreseeable limits. The ownership of, say, a refrigerator, may be straightforward, but the sale of it does not constitute outright transfer, that is, the manufacturers remain the "owners" of the attributes that are subject to warranty and those for which they are liable - "the manufacturers are "owners" of potentially lethal escape of

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Further, with the growth of the environmental movement and increased awareness of, for example, hazardous effects of pollutants, responsibility is placed on all individuals to ensure that anti-pollution and anti-noise guidelines are adhered to (although some regulations provide for strict penalties and therefore may correctly be included in category (1) as direct restrictions on one's activities in regard to one's property). Generally, however, social questions such as how are we to use our natural resources, concerns regarding polluting of the environment and the destruction of the ecological balance of nature all depend to a great extent upon the concept and institution of property.

The question which faces us then is: to what extent can so-called property not be in one's control and still be called property. As Tay\textsuperscript{110} has asked, as social and economic functions of ownership, particularly the constraints under which it works, have changed, "are we approaching the time—or have we reached it—in which the legal norm itself has to undergo radical transformation striking at the very

\textsuperscript{110} Y. Barzel "Economic Analysis of Property Rights" op. cit. p. 86

\textsuperscript{110} A.E.S. Tay "Property and Law in the Society of Mass Production, Mass Consumption and Mass Allocation" op. cit. p. 88
definition itself or lose its centrality in the law and in social and political thought?"

Further, as standard law textbooks point out, the whole community's concern about the use and enjoyment of property, particularly land, by those who have interests as owners and possessors has been stressed much more vigorously than ever in the past. It has resulted in legislation (either of a general kind applicable to our whole community, or of a more specific kind only applicable within particular municipal areas), which regulates what use and enjoyment may be made of particular properties.\footnote{D.P.Derham, F.K.H.Maher and P.L.Waller (Eds.) "An Introduction to Law" op. cit. p.93} Our modern concern about the environment has produced complex environmental protection legislation, which uses the machinery of administrative law and the criminal law to achieve its purposes.

Although the use and enjoyment of things (excluding land) has always also been affected by the rules of criminal law and of the law of torts; this gives protection to other interests which people have and which may be affected by the use of our own property. However, today they are also controlled by general legislation such as car parking regulations, or by legislation prohibiting the use in particular areas of particular things such as motor vehicles in certain
districts, or noisy instruments or annoying toys in public parks and reserves.\footnote{Ibid.}

It may be argued that in these regards the interests of the majority prevail over the admitted interests of the owner in the use and enjoyment of his property. However, given the restrictions on one's property and the divergence of ownership and control, it can be asked: is there a point at which what we customarily call property is no longer really property? (This of course has led us to the question: is property an "all or nothing" concept?) Property and ownership are a matter of control. Yet the extent to which one's use is regulated and curtailed suggests that there may be a threshold after which something can no longer be classified as property (or can there be different degrees of ownership?). Certainly it appears that given extant restrictions, we do not, strictly speaking, have ownership. Further, can it be said that one has ownership of a part, in the sense of a share in a company, or only part ownership of a whole company? Property and ownership are, inherently a matter of control and this entails certain rights.

Yet the permissibility by the State or government of the application of this concept of property - conditions which include the qualification that no harm be brought to third
persons - appears to be rare and indeed it is obvious that these conditions do not in fact prevail, although property and ownership in this strict sense is still a useful concept, particularly because it is clear and specific. That is, we see that when things are sentient beings, restrictions are applied which are not dependent upon others' claims to ownership, but are tempered by moral constraints not to harm others (and this may include even animals). When things are of unique aesthetic value, restrictions are applied by various authorities, and are often controversial. Restrictions are even applied on so-called historic grounds, some of which are little more than mere sentimentalism. Further, limitations are often placed on things that have a particular productive capacity - such examples include the growing of certain crops or regulation of the amount to be grown.

In all cases restrictions are applied in manners that seems arbitrary. For example, in some societies dogs are considered a delicacy and are readily eaten, whereas in ours this is prohibited or at least discouraged. The aesthetic value of things varies not only between communities but temporally in the same society. Similarly, in cases of things considered to be of historic value, or considered to necessitate regulation as a source of productive capacity, again these vary and often appear arbitrary.
But this is not to say that there is no ownership or property in an absolute, definitive sense; rather it is precisely because we do not live in isolation, and property is a rights relation, that we therefore have corresponding duties, in particular not to harm others, which are enforced by appropriate authorities. The problem, however, is to question the extent to which regulation, limitation and the associated enforcement duly applied, transgresses the boundary of personal property and erodes the concept of property.

Apart from various legislative restrictions, we may even question the extent to which possible moral restrictions could conceivably impinge on one's enjoyment of what one owns and thus further erode the concept of property. For example, moral considerations may dictate that an owner of a particular parcel of land, which also happens to encompass the whole town's water supply, should not sell that land to the owners of a large paper mill, the use of which will inevitably pollute the water supply. However, if we are to admit restrictions on the use of property which (may) cause harm to others, regardless of the intentions concerning the use, then this example does not present us with major problems.

But a different sort of example would be, say, if I were to buy a rare Rembrandt painting and subsequently wished to
destroy it (discounting that I am ill or otherwise incapable of making a rational judgement). Should I (morally) be stopped from doing this? Some would say, "yes", due to considerations of rare historic or aesthetic value.

Both examples, of course, raise the question of scarcity and rarity — in the first instance perhaps there is no other available water supply, and in the second, there is only a limited number of Rembrandt paintings in existence and no (legitimate) renewable source — but they differ in community interest. It is this notion of community interest that is both from a purely logical point of view arbitrarily applied, and yet apparently being increasingly applied as a justification for State encroachment on one's ownership.

This then brings us to the central issue of the concept of property. That is, there appears rarely to be instances in which one may be said to be an owner in the absolute sense I have suggested (the examples that we do have are trivial and limited to such uncontroversial things as one's clothes or one's watch). When we apply the core set of rights which would enable us to identify an owner, we find that the rights to possess, to use and to dispose of a thing (to which the other rights are reducible) do not always come up "trumps". This is particularly due to government intervention through legislation, regulations and other rules. Not only is it
sometimes unclear whether the consequences of utilising the rights attributed to property are permitted, but that the rights themselves appear to be limited. That is, there may sometimes be an indeterminacy of ownership. For example, one's use of a thing may be questionable as to whether it constitutes use — how much does one have to use something for it to be "used"? Similarly, possession may also admit of degrees. Take, for example, a miner who digs for gold on a site for a short time, but who ultimately leaves his diggings. In this case it is not clear whether the miner's activity constitutes possession of the site. Further, one may dispose of or abandon a thing even unbeknownst to the owner. As a result, we can conclude that ownership is not always a determinate thing, nor may it be possible to identify a point at which something is owned, that is, that there may be no threshold at which one may identify ownership.

However, this does not mean that, as in the case of extended twilight hours, we cannot say that there are times which are identifiable as night or as day. Similarly, as Wittgenstein points out, there is indeterminacy in identifying a point at which a person is able to read — at one stage he clearly cannot read, at another he is able to read. To give another example, we could consider the colours red and blue,

\[\text{L.Wittgenstein "Philosophical Investigations" op.cit. ss.159-171}\]
the shading of which from one to another will give us various shades which cover a range including purple. These shades are different and may be indeterminate when we try to equate the colours with red and blue. Nevertheless, the colours of red and blue remain definite, identifiable colours, so that the indeterminate shades may be said to be neither one nor the other, but not that the shades are therefore degrees of red or blue.

This indeterminacy does not compromise the idea of ownership in an absolute sense - we may still say that if A owns X is true, then "Not-A owns X" must be false. Thus someone other than A ought not to possess, use or dispose of X (unless of course voluntarily permitted to do so).114 This suggests that we have a definite idea of ownership, and this is not inconsistent with the position held, particularly in modern law, that we often cannot identify the exact point at which something may be deemed to be property. That is, the law merely adjudicates on unclear cases, and the rules which are applied are mere conventions.

It is, however, often unclear who has the right of control. In some cases it may be said that no one is the owner, yet

114 Although, of course, there may be no fact of the matter as to who owns the the particular thing. That is, it is conceivable that no-one owns it but some may have an interest in it.
one person has more interest in the thing than another—Mary may have more interest in a thing than Betty, but neither is the owner, nor may there be an owner. In the case, say, of an abandoned thing, I may see it first and make the first claim, yet you may pick it up first. As a result of two conflicting interests as here, of course, a conventional tie-breaker is usually introduced to settle the matter.

In the case of a company, the governing body holds some degree of control, yet this is not identified as ownership, some members of the Board of Directors may have no shares at all. Similarly the State, by limiting the control one has over property also exercises some degree of control. There is thus a shared control although the State does not declare this to be ownership on its part (although it has the power to control, it does not possess or use the item in question).

If the physical power of another limits my control, then my capacity to control is limited. However, it cannot be said that my right has been limited. Limitations may be effected because my use of my right would cause harm to others. If

111 To suppose that things must have owners is habitual with Kant and Hegel, but alien to the utilitarian tradition. On the utilitarian view, ownership is a convenient device but one whose function could largely be replaced by other sorts of rights and it would not be troublesome in a legal system if many things were simply unowned and were dealt with in quite different ways. See A. Ryan "Utility and Ownership" in R.G. Frey (Ed.) "Utility and Rights" (University of Minnesota, 1984) p. 184
one could causally unconnect the harm from one's use, then the one's use cannot be limited by others. However, given that my capacity to control is often limited by the State or government, but my right remains, then this may be equated with theft. While restrictions are imposed, they are applied because the possible resultant harm is causally incidentally connected to one's use.

But can it still be asked whether ownership is a matter of degree, that is, dependent upon the degree of possession or control one may have? Take, for example, two children who are given a bicycle by their parents and told to share it. Neither child here has complete control, yet there is a plenum of ownership.

However, in some cases the plenum of ownership is not competing control, and in these more difficult cases can it be asked whether there is a point at which a thing is owned or unowned? For example, in the case of unowned land the first (legitimate) occupier may mark off an area of land, cultivate it and occupy it permanently. This then is undoubtedly ownership. However, a different person may merely set foot on a piece of land, declare it his own, but leave the area.

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116 This example must be distinguished, however, from the legal concept of "joint tenancy" and "tenancy in common".
Certainly the law itself is unclear on explaining property and ownership. Some rights which are not proprietary rights in law may nevertheless be enforceable against others, including the owner. For example, an exclusive licence granted by a copyright owner, or, for example, the rights of ownership may not be universally enforceable such as in the wrongful sale of another's goods by a "mercantile agent".  

A further problem with English law, for example, is that there are two kinds of owner, that is, a legal owner and an equitable owner. The latter case arises from the use of trusts — that is, the legal title to property is vested in trustee(s) who hold the property on behalf of a beneficiary who owns the beneficial interest and is in effect the real owner. However the trustees have the full legal ownership and the beneficiary would lose equitable title if, say, the trustees sell to another who buys in good faith.

I would argue that as (legal) property and ownership are, a priori, logically arbitrary, that is, dependent on the particular rules of a legal system, property does not exist independently of the rights (and liabilities) which constitute it. Therefore I would argue that there must be

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117 D.Lloyd "The Idea of Law" op.cit. p.323
at least a "core"\textsuperscript{118} concept of ownership, that is, that the legal concept of property must be explained in terms of certain rights and that these rights are necessary to entail property. These are: the right to possess, the right to use and the right to dispose and that these entail exclusivity and permit us the right to exclude others. These rights extend equally to a pre-legal sense of property.

Without some necessary elements, the notion of ownership and property would be too vague and one would not be sure whether a case is one of property or not. For example, easements, bailments, and licences are clearly legal examples of (groups of) rights which do not have enough of the elements nor the necessary elements to qualify as ownership — they are merely examples of an interest one may have in a thing, or as Honoré suggests, examples of "limited property rights". There must be some clear delineation between the holding of these sorts of rights and being a true owner, of having property. The concept of property and ownership must entail control so that the right to possess, the right to use and the right to dispose are paramount.

However, there appear to be two types of restrictions which

\textsuperscript{118} See also F.Snare "The Concept of Property" op.cit. p.202. Snare states that the core concept of ownership consists of the right to use, the right of exclusion and the right of transfer (although none is necessary when speaking of property).
are imposed upon us in respect to our property. First, there are those restrictions imposed upon us which protect the interests of others. These, for example, ensure that harm is not inflicted onto others — I am not permitted to emit poisonous gases from my factory, or use the incinerator in my back garden. These restrictions are based upon the causal impossibility of my using my property (my factory, my incinerator) without harming or risking harm to others. Second, there are those restrictions which appear to merely amount to benefits for others. For example, the payment of gift tax is based on the notion of a redistribution of wealth which will benefit others. To take another example in this category, restrictions are put on one's National Trust house (or the house briefly visited by D.H. Lawrence) which require that redecoration of one's house is not permitted if this amounts to change to the original structure and design. As a result, the legislative restrictions amount to benefits for others (they find the house, in its original design and authenticity pleasing) and subsidises others' experiences.

In the first category we may say that if it were possible to do X without causing Y, then there would not be a basis for restricting X.

It is the second category, however, which appears to be most problematic and which appears to be increasingly imposed upon
us. Not even Honoré, in his list of "incidents", commonly found in the legal notion of ownership, included a duty to uplift aesthetic beauty as judged by others. As such, we may look at the various limitations placed upon us which go far beyond acceptable limits of moral and legal norms that require us to refrain from harming others. Constraints that range from substantial ones such as price controls, to minor restrictions such as keeping one's fence two feet from the property line, all reduce our set of choices of what to do with the things we own.
CHAPTER 5

PROPERTY AND STEWARDSHIP.
1. Introduction.

Having considered what the concept of property (and ownership) entails, it is evident that we do not commonly have as many instances of property as first thought, although we still talk of property in the terms I have suggested. There are two distinct ideas to which I draw attention; these are, first, that genuine ownership entails the the right to control, although restrictions may be applied to limit harm to others. I suggested in the previous chapter that the notion of absolute may be shown by differentiating between one's right, and the actions that may be licenced via that right, and the result or consequence of that action. Thus it is possible to maintain both that the rights of property, are absolute, but that restrictions may be imposed on the manner and circumstances in which that right may be exercised, generally based on considerations regarding the prevention of possible harm to others. Restrictions based on contingent consequences of one's action do not necessarily entail limitations on the right itself.

Second, however, it is clear that restrictions and qualifications upon one's enjoyment and use of one's property are today being applied for purposes other than the prevention of harm to others and in order to harness the property in question for the service of some supposed public
or community good. This further erodes the application of the concept of property.

Thus it appears that present usage of the word "property" is inconsistent with the above concept of property, and is being applied often to examples other than those consistent with that standard. That is, we often apply the word "property" to things to which our relationship, although we have an interest in the thing, is at best no more than stewardly.

It appears that with the growing increase in regulation over things which are becoming of greater social, economic and cultural importance, that the rights we associate with property may be held elsewhere. Rights associated with property nominally owned by the individual have become in practice vested in the State, without any form of transfer in direct action of expropriation by the State. Although regulation by the State is, in many cases, necessary, it appears that the State is becoming all but in name the owner of many of the things we commonly own only in name. Although the State does not claim this, we are nevertheless faced with property rights so dispersed or limited to the extent that no-one appears to hold ownership of the things in question.

Thus we may conclude that, looking at the concept of
property, we are moving towards what some would consider a socialist State whereby the individual is becoming equivalent to a steward in respect to his "property" while furthering State aims. While this might still be called "ownership" and "property", this may be merely a linguistic phenomenon which, in my view, has neither caught up with, nor reflects, our current practice.

2. Property and the State.

In effect, property is being quietly overridden by the State. It is both obvious and accepted that governments regulate the use of our property and that the terms and extent of this control vary with the decisions of legislatures and subordinate administrative agencies. That is, the State appears to have resumed the individual's ownership rights, leaving the individual only interests, liabilities and duties, all of which constitute something less than ownership. It is not the case, as Mavrodes believes, that ownership can be "fragmented"1 for social purposes. On the contrary, we appear to be moving towards a form of stewardship by stealth.

1 See G.I. Mavrodes "Property" in The Personalist Vol. 53, 1972, p. 261
For example what, at minimum, can we expect if it is indeed ever true that someone owns something? Norman Malcolm tells the story about Ludwig Wittgenstein: "When in very good spirits he would jest in a delightful manner. This took the form of deliberately absurd or extravagant remarks uttered in a tone, and with a mien, of affected seriousness. On one walk he 'gave' to me each tree that he passed, with the reservation that I was not to cut it down or do anything to it, or prevent the previous owners from doing anything to it: with those reservations it was henceforth mine."

Clearly Wittgenstein was here indicating through this game what it means to own something, what owning something must be. The "reservation" cited is absurd precisely because it would render it meaningless to say that the tree then belongs to the nominal assignee, that the ceremony of bequest transferred ownership to Malcolm. Precisely as Wittgenstein put "reservations" on the owning of the trees, the limitations put on us by governments and other authorities render calling something "property" in many cases equally absurd.

So what can we say about the talk of property and ownership, given present circumstances? Generally, we may say that

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regarding human interdependence, much of economics at least assumes that resources are limited and wants are indeterminate and unlimited,\(^1\) so that the exercise of particular rights individuals hold with respect to their property may come into conflict in respect of things. Without necessarily agreeing that all conflicting rights reflect or reduce to an allocatory question in a context of scarcity, the right to (particular) property and the associated property rights carry implications for the relationship of one person to another with respect to a thing or to a line of action. These rights are the instrument of the society by which inevitable human interdependence is managed in an orderly way, and potential conflicts over who gets what are resolved in what is by and large an effective manner. The existence of such rights also motivates the holder of the rights. For example, empirical facts indicate a person will not plant his field if it is expected that someone else will take his harvest. Conversely, individuals are generally more productive in comparison on land, the harvest of which is for their own consumption or other use, that is, if they have the rights to possess, use and dispose of the harvest as they wish. (This has been the case most notably in the Soviet Union. For example, in the former Soviet state of Latvia, 44% of the collective farm income came from tiny private plots

\(^1\) A.A. Schmid "Property, Power and Public Choice" (Praeger, 1978) p.4
of land, and 43% was produced in Lithuania in 1975. The private sector produced 39% of Lithuania's total agricultural output, while 17% of Estonia's marketed agricultural output was produced on 5 to 7% of the total arrable land. In an interdependent world, in economic terms, the "opportunities" of one person are shaped by the opportunities of others and it is the rights that define potential opportunities.

Arguably the most popular notion of the foundation of property rights is that of John Locke, who regarded property as a fact—created by the mixing of one's labour with something never owned (or owned only by God) or abandoned, it may be said that property is for Locke and his followers incorporated labour. In the end, however, for labour to impart a right, it must depend upon the society being selective over which laborious actions are acceptable—that is, as between actions, including labour, which lead to rights and which are regarded as violations of other rights.

It is this issue which leads me to conclude that property is not being honoured. On a traditional account of liberalism, conceptions of property are to be defended by reference to

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5 Ibid p.6
6 Ibid p.24

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justice. An assignment of goods is just if and only if each person owns the goods he holds, according to the rules of property. In Nozick's case, he sets out three fundamental principles:

1) The principle of acquisition which specifies how objects may originally come to be held as property.

2) The principle of transfer, that is, how property titles may be transferred from person to person.

3) The principle of rectification, that is, how violations of property rights acquired under 1 and 2 can be corrected.

Thus, the allocation of goods is just if the person owns what he holds either by (1), (2) or (3), so that the justice of the distribution is dependent upon the history of how it was acquired. The Lockean liberal State, through its legal system was conceived to protect one's rights to possess, to use and to dispose of something, that is, to control what we consider to be our property. Yet the linear heirs to the Lockean conception are infringing the individual's ability to do so. The result is a loss of freedom and independence for the individual which the classical liberal State was supposed to

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R. Nozick "Anarchy, State and Utopia" op cit. pp.150-153

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provide. For example, various government taxation on one's land, investments and income, other regulatory legislation which govern the use of one's house and land, environmental protection standards, various building codes - many of them merely decorative in aim - and, on a larger scale, the nationalisation of industries and the government powers of compulsory acquisition, enable authorities to acquire proprietary interests - whether called by that name - from private owners without consent.

In the case of taxation, one may say that taxation is the power to coerce other individuals to surrender their honestly acquired property without consent. As Nozick has claimed, "taxation on earnings from labour is on par with forced labour". Legitimate taxation does generally support a wide range of public services, and is intended as a transfer of money for some other use. However, if we assimilate property rights in external thing to property rights in one's body, taxation can be seen as "taking" by a government and hence a kind of forced labour or slavery. Further, one could say that there is an added element of force involved in those cases in which payment for items includes sales or

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1 It is interesting to note that income tax was first introduced as late as the 19th century.


^ R.Nozick "Anarchy, State and Utopia" op.cit. p.169
consumption tax - amounts which are often unknown to the consumer,\textsuperscript{11} and are collected by third persons, such as retailers, on behalf of the State - a "camouflage" for the State.

Of course, one may argue that this is true only if coercion is actually used. However, I do not think that it would be difficult to make a case to illustrate coercion by the State through threats of fines, an increasing willingness to use public humiliation, and even, in the most extreme cases, threats of imprisonment. By governments imposing wage and price controls and many other regulations, they are arguably guilty of "extorting a restrictive covenant".\textsuperscript{11} That is, an individual is offered a choice between paying the price charged by the government - thus ensuring freedom from government penalties - or maintaining control over, and using his object as he wishes; running the risk of incurring government sanctions. Yet an individual who chooses to pay the price has not consented to the transaction; he feels that he has been robbed "just as surely as the individual who hands his wallet to the stick-up man to save his life."\textsuperscript{11}

Although the thief who says, "your money or your life" has

\textsuperscript{11} A further normative element arises if the purpose or use to which one's taxes are put do no meet with one's approval.

\textsuperscript{11} M. Silver "Foundations of Economic Justice" op. cit. p.22

\textsuperscript{11} Ibid.
given his victim a "choice", he cannot keep the money on the grounds that the victim has put his hands in his own pockets and given it to him. The thief's threat of force has transformed the victim's action of disposal of his money into an illegal taking, a theft. Matters do not change if the government sets a monetary sum - call it a tax - which the citizen can relinquish from whatever assets he chooses. "The element of choice added to this stage simply transforms the case from garden variety coercion - "your money or your life" - to one of duress of goods - "of your possessions, you may keep A or B, but not both." Although this is a simple equation between taxation and government theft, the government does end up with what was once in private hands, which, prima facie, suggests a theft or taking of an individual's property.

To take another case, under the doctrine of eminent domain a government asserts the right to take private property for public purposes. That is, under international law the State is regarded not only as having power of disposition over the whole of the national territory, but also as the representative owner of both the national territory and all the property found within its limits. This is a common doctrine arising in many different legal and political
systems — it is not merely an aberration of one legal system. In principle, of course, the power of eminent domain is intended to facilitate, particularly during national emergencies, a planned distribution of benefits and losses. In this respect it is formally similar to taxation, the difference being that particular assets and not monetary value are sought. Compensation is intended to ensure a return of benefits to the individual equal to the value of the property acquired by the State. We understand property as involving the notion that the State may not deprive a person of his property without due process or payment of compensation, so that actual appropriation of, say, land for public use such as for a park, highway or reservoir must be accompanied by compensation. Yet it is difficult to accept, given our fundamental understanding of ownership, that forceable acquisition by the State is anything but a repudiation of the genuine owner's right to that particular thing, and this is particularly the case when an individual disputes the government's expropriation.\textsuperscript{15} If we accept that property provides a concrete, literal boundary to the intrusiveness of others, including governments, that is, others, including governments, cannot take what is mine, cannot unilaterally enter my home, etc., then the

\textsuperscript{15} Gilbert Matraire recently posted a "private property" sign on a section of the Grenoble-Valence highway where his home and hazel tree orchard used to stand. A French court ruled the expropriation illegal and he now owns 70 metres of highway - minus his house. (The Toronto Star, 5.10.1991)
qualification of eminent domain allows government to "take" private property. And if this expropriation is done under police power, this stands more obviously against the autonomy of the property holder's rights.

There are further examples of government limitations, restrictions and interference: for example, limitations upon bequests or testaments lead to the conclusion that these restrictions are incompatible with the notion that their subject matter is private property. That is, in all cases the owner is not only restricted, but may even be flatly denied the exercise of the right to dispose of what he owns in the way he wishes, even when this in no way harms either the intended beneficiary or those who do not benefit from the intended disposition.

In this same vein, there exist limitations on goods to be sold and prices to be charged in the form of quotas and prices. For example, farmers in many countries, including what are generally regarded as liberal property-owning democracies, must adhere to set prices and are required to limit the amount they produce per annum in wheat, wool and other products. The result of these directives by the State

\[16\] In America, for instance, an owner may leave his goods in his will to more or less anyone he pleases. Yet in England this liberty is not so great, and it is even more heavily curtailed in New Zealand. See J.Waldron "The Right to Private Property" op. cit. p.29
may be equated with privileges permitted by the government
to grow, for example, particular crops on one's land. It
cannot be said that the person who chooses to abide by these
terms has consented either explicitly or implicitly
(although, of course, he may well agree to do so). 17

In all, it may be said that property rights seem to be
regarded, not only by Marxists but also by contemporary
democratic interventionists who might consider themselves
non-Marxists, not as a limit on State action, but as a test
of the State's ability to limit and direct the use of
property to serve an alleged general interest. Thus the
freedom to use and acquire property and the security of one's
acquisitions appear to be the potential objects of regulation
and redistribution.


But in talking of one's property and the associated rights,
it would be too hasty to suppose that this only covers land,
other "chattels" as variously legally defined, and an array
of intangibles such as patents and copyright. This would fail

17 So that coercion and choice are not always mutually
exclusive. But as Hayek points out: "though the coerced
still chooses, the alternatives are determined for him by
the coercer so that he will choose what the coercer wants."
M. Silver "Foundations of Economic Justice" op. cit. p. 22
to take into consideration the rights, which many interpret as property rights, in the human body. It is this example of a thing owned that many would consider to be "absolute", maintaining as the most fundamental example of property the right of control of one's own body. Generally, it could be argued that there are three broad categories of entity over which a person might claim ownership: a selection of the non-human resources, whatever their form, of the world external to himself, his own person - his body (if this be different) - and his powers, and other people. But more importantly, if the person or body turns out to be property, that is, the rights we consider in relation to ourselves or our bodies can be deemed to be property rights, then these may serve as a springboard for justifying rights to other things in the world. After all, theories of property need a theory of legitimate acquisition and legitimate transfer, and behind every legitimate transfer or transaction there will ultimately always be the first owner and an unowned thing, and this first owner will own the thing either as a result

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20 And, of course, there would seem to be little point in defending people's right of self-ownership unless one also defends their rights to control things external to themselves.
of discovery or by creation. Many theories of property and of justice appear to start from two fundamental premises, viz., firstly, the absolute property right of each individual in his own person or his own body — the right of self-ownership —, and, secondly, the absolute right in material things as property of the person who first finds an unused thing. The right of self-ownership implies the right to then also give away any property either gratis or in exchange for something else, and to use or not use that thing as one sees fit.

Take, for example, Locke's theory of the origin of property — his belief that there is a natural right to property — which is based upon the premise that a person is capable of self-ownership and, as I interpret this, the ownership of one's own body.

(If "person" is not equivalent to "body", then it must at least be said to necessarily encompass the body, in this world in any case). For Locke,

1) everyone has property in his own person, and no-one has a right to it but he himself, and

2) the labour of his body and the work of his hands are

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11 See for example M.N.Rothbard "Justice and Property Rights" in S.L.Blumenfeld (Ed.) "Property in a Humane Economy" (Open Court, LaSalle, Illinois, 1974) p.106

11 Although many commentators treat Locke's idea of self-ownership as synonymous with ownership of one's labour or productive power.
properly his. ¹¹

Thus a person is a proprietor not only of his person, and his actions, but the things an individual produces by his own labour (limited by the amount that he can use and so long as he leaves "enough and as good" for others). Locke's classic text suggests what may be a logically sufficient condition for property: "It is mine because I made it" (although not, of course, when one is in the employ of another).

As an analytical foundation of property rights in external things, Locke's theory of property may be seen as a projection theory. ¹⁴ That is, things become property by embodying the person in that external thing, and Locke uses the metaphor of our mixing our labour with unowned things and by so doing converting them into our property. Further, in Locke's view, one's labour adds "value" ¹⁵ to the thing, and ultimately it would be unjust not to allow the person to have what they have worked on (and on some interpretations, it is also, if not equivalently, what the person "deserves").

¹¹ J.Locke "Two Treatise on Government" (Reprinted Scientia Verlag Aalen, 1963) "Second Treatise on Government" Ch.5, "Of Property" S.27


¹⁵ Locke's theory of labour has been interpreted on some accounts as the "labour theory of value", however, these are arguably two distinct theories which have often been intertwined and confused. See D.P.Ellerman "On the Labour Theory of Property" in The Philosophical Forum (Boston) 16, 1985
is, of course based on a metaphor. Although contentious, some argue that such useful polemical devices as metaphors should always be replaceable with non-metaphorical literal language; that is, that every metaphor can be cashed out in terms of a literal equivalent. A metaphor itself is not literally true, but points the mind of the audience in the direction of that literal truth which is its counterpart, and does so with a particular rhetorical face — this indeed is the power of the metaphor. Others maintain that a metaphorical statement may be meaningful and yet there be no counterpart literal truth. The metaphor may prod the mind in the direction of a truth which is inexpressible literally; perhaps something that can only be shown, and not said, to use the celebrated but difficult distinction of Wittgenstein's "Tractatus". I find such a view unpersuasive, but it is beyond the scope of this thesis to resolve that issue.

Metaphor or not, the question is properly asked of how one's labour could lead to property, that is, ownership of a thing, and how labour could be a basis for, as Locke suggests, one's entitlement to the thing, or its being our just desert. Suffice it to say that fundamental to our idea of the legitimacy of property — whether individual, collective, or state property — is something to do with an acknowledgement of productive human effort. We distinguish between the labour
of someone who creates a watch, from that of the "labour" of a thief who steals it. Thus Locke's idea of property based on the need to reward persons for "taking pains", for undertaking productively motivated effort, does have intuitive merit. We are comfortable with the idea that people are entitled to the fruits of their labour.

But behind Locke's "mixing" theory, and absolutely essential to it, is his contention of self-ownership, or more strictly ownership of one's body. (I will ignore the philosophically important distinction between the concept of the human person, and that of the human body, in what follows). Locke's theory of self-ownership has led libertarians to argue that each person is the owner of himself, and by extension, of the material and indeed other goods (if we allow intellectual labour) he has produced, that is, that people become owners of the world's resources which they can acquire as a result of the proper exercise of their self-owned personal powers. Moreover, when private property in natural resources has been rightly generated, then this, morally, insulates it against expropriation and limitation.

The idea of self-ownership, of course, supports a powerful and deeply entrenched intuition about bodily integrity - the

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idea that our bodies ought to be protected from intrusive (non-consensual) invasion. Self-ownership confers rights against involuntary bodily intrusions and against coerced deployments of the individual's bodies and powers. Our bodies are, or should be, our own; "they are the only ones we've got and we don't have anything else to make us who we are"\textsuperscript{17} - the principle being that each person, by virtue of being a human being, owns his own body, that is, has the right to control his own body free from coercive interference. It follows that no one else should be in a position to dispose of us while we live, nor sell us into slavery, force transplants from or upon us, or force us to bear children. As Levine,\textsuperscript{18} for example, suggests, no one would hold that a healthy individual can be rightfully compelled to give up one of his kidneys for someone who is about to die from kidney malfunction, even if it is demonstrably morally obligatory according to a widely accepted moral theory, such as one which holds that this sort of transplantation will maximise overall utility. One would still say that his kidneys are his own, and while he may be liable to (moral) criticism for keeping them both to himself, it seems blatantly wrong to allow them to be taken from him by force.

\textsuperscript{17} K.Campbell "Comments on 'The Body as Property: Ethical Issues' By Russell Scott" \textit{Bulletin of the Australian Society of Legal Philosophy} No.23, 1982 p.65


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(Precisely this intuition lies behind Nozick's purported *reductio ad absurdum* of welfarist arguments for redistributive taxation; that the same arguments lead *mutatis mutandis*, and subject to the surgery being technologically possible and perfectly safe, to a forcible redistribution of bodily parts.)

In discussing the most basic of things of which we claim ownership, Becker, however, argues that property rights in one's body can be perfectly well understood merely as the correlation of other people's duties to forbear from acting so as to allow one to possess, use and manage one's body. Property rights, he contends, as in the standard cases of ownership, are fundamentally rights to exclude others, however he does not analyse the possible application of all of the "standard incidents" of ownership as outlined by Honoré in relation to one's body; nor am I aware of the application of the "incidents" *vis-a-vis* Honoré having been attempted elsewhere (as distinct from examinations of one's labour and activities). Becker merely states that assertions such as "my body is my property" are not logically troublesome.

However, I will explore this in an attempt to demonstrate that the concept of property and ownership can be applied to the most fundamental of things we call our own, our bodies, but that the limitations imposed on us by authorities show us that it is indeed problematic. Although many hold the view that the body should be thought of as property, that we each own or have title to ourselves, others maintain that the body ought not to be thought of as property as all, and that it "demeans" human beings to think of themselves or their bodies as property.\(^{10}\) While many may consider it even shocking to say that our bodies or our minds are our "property",\(^{11}\) it is at least conceivable for us to, for example, sell or otherwise transfer control over ourselves to another person as in the case of slavery. (Those who argue that our right to our own body is inalienable are surely making a moral rather than a logical point). In fact, in the case of indentured servants, this form of slavery can simply be considered as a labour contract. (Although forced slavery of course is initiated by abduction or kidnapping, which can be viewed as special varieties of theft). Further, there is clearly a market for such things as human hair, blood and detachable or replaceable organs such as kidneys.

The question may be asked, however, is the body something

\(^{10}\) S.R.Munzer "A Theory of Property" op. cit. p.37

\(^{11}\) J.Narveson "The Libertarian Idea" op. cit. p.67
which can be owned? Let me answer this first. The formal possibilities of whether the body may be said to be property are as follows:

(1) One's body is owned by God (this appears to be Locke's position);

(2) One's body is owned inalienably by the community — what we do with, or to, our bodies is consequently subject to community approval;

(3) One's body is logically capable of being owned either by the person whose body it is, or by some other person or group of people — whether or not it is owned, and, if so, by whom, is a matter of contingent fact;

(4) One's body is logically incapable of being owned;

(5) One's body is the inalienable property of the person whose body it is.¹¹

(1) I will not elaborate on this first possibility since it clearly depends upon theological questions beyond the scope of this thesis. Suffice it to point out that Locke held the view that man was the property of God. "We are His whose workmanship we are, sent into the world on His business made to endure as long as He should choose."¹²

¹¹ See also J.L.C. Chipman "The Body as Property" (Unpublished Paper. University of Wollongong, 1983)

¹² J.Locke "Second Treatise of Government" Ch.5 "Property" op.cit. S.6
(2) To say that the body is owned by the community is implausible. Certainly there are restrictions and controls under various laws and people are subject to all sorts of community rules. However, these restrictions which, in some societies forbid self-mutilation, and in most societies forbid public nudity - so-called indecent exposure - and other bodily displays, do not appear to be, and are never explicitly asserted to be, based on a community proprietary interest in one's body.

(3) If the body is not in fact owned, then one may ask why organs/body parts of those who no longer need them or who are incapable or unable to give consent (for example, the retarded) are not merely taken from them. And if ownership is not contingent, then how does transplant surgery among the living legitimise the recipient's possession of the transplanted organ? However, it would be possible to argue that one owned disposable (i.e. inessential for one's own life) parts of one's body, though not the whole of one's body.

(4) If one asserts that the body is logically incapable of being owned, then one would need to have a new and distinct argument for this, since everything else we consider to be incapable of being owned is inherently incapable of being
controlled (such as rainbows, clouds and numbers), therefore, there can be no right to control. One might argue that the ownership relation implies separability of its terms - they are "distinct existences" in Hume's sense. However, this condition is satisfied, in that my body can certainly exist, and one day will exist when I do not, and my identity is at least logically capable of transcending the particular constellation which is, at present, my body.

(5) The body and its parts are in fact the property of the person whose body it is. This, of course, leads to the presumption that one could sell, give away or exchange body parts at will or indeed one's whole body.

If one were to deny that there is a relationship between oneself and one's body, then it could be argued that one's body could be free to anyone for plunder. After all, as Nozick points out, governments enforce income redistribution, so why not body part redistribution? That is, by analogy, the marginal loss of an eye to someone with two good eyes may be less than the gain to someone congenitally blind. The consequence of denying self-ownership leads to only two alternatives; either

(1) there is no prior ownership right that can be appealed to, to rebut a contention that one class of people have a right to own others (or another class of people), or
parts of others; for example, those who could benefit most, or

(2) there is no prior ownership right that can be appealed to to rebut the contention that everyone has a right to own, say, an equal quotal share of everyone else (and, by extension, things people produce).

Neither is satisfactory. Either one class of people is allowed to exploit another (the first alternative), or no one is free to take any action without the prior consent of everyone else (the second alternative). The body is logically capable of being owned, and is in fact owned by the person whose body it is. If one does not concede that the body is capable of being owned, then it would certainly be difficult to resist utilitarian arguments for redistribution.

Certainly one could argue that possession and use are the strongest plausible candidates as rationale for our understanding of bodily ownership. In particular, being in possession of that to which no one else has any prior title throws the onus of justification of dispossession on the potential dispossessor, so that possession here does serve as a general ground for ownership. After all, the only ground

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on which others could prevent the individual from ownership is an implicit claim to previous ownership by someone else.

I would contend that we can apply the notion of property and ownership to one's body, but that this is increasingly being restricted by legislation, and other regulations. These, together with increased technological advances, particularly in medicine, indicate that we are not given a degree of legal control over our bodies commensurate with ownership. Take, for example legislation which prohibits suicide. Although such legislation has been repealed in most western legal systems, the aiding of that person by another is still a criminal offence. Further, scant regard is given in most jurisdictions to those documents commonly called "living wills", written at an earlier time prior to the onset of debilitation, and which direct others to act in certain manners towards that body to alleviate pain or to allow one to die. This leads one to conclude that if the body is to be considered as property, then it is generally given little regard as something which is to be exclusively possessed, used or conceivably disposed of by (or as directed by) the owner.

For example, if we were to apply Honoré's set of eleven "incidents" (leaving aside the question of their reducibility in number), we find that although logically conceivable,
these cannot be universally applied, and that the legal position regarding rights in one's body are extremely arbitrary. Here I would counter such arguments which suggest that persons merely have "limited" property rights in their bodies, that is, that too many incidents are lacking to conclude that persons own their bodies in the same way as, say, a car, and that a juxtaposition of those rights which we do acknowledge with respect to our bodies with an analysis of property, would be too superficial. To say that we merely have limited property rights in our bodies would equally be too hasty - one's body certainly can be considered in terms of those rights which constitute control, that is, the rights to possess, use and to dispose.

There are countless ways in which particular legal systems do limit what people can do with their bodies, from being able to sell oneself onto slavery, to being able to transfer those body parts which are deemed by others to be essential for our life. I will give some examples of restrictions and show the difficulties inherent within a legal system which arise as a consequence of suggesting that one owns one's body.

Although some do argue that selling oneself into slavery is fundamentally incoherent. See, for example, J.M. Smith "The Scope of Property Rights" in S.L. Blumenfeld (Ed.) "Property in a Humane Economy" op. cit. p.237
For example, the right to use, manage and dispose of the income as a consequence of bodily use is hindered by law if the person is, say, a prostitute. Yet if one assumes that body entails bodily parts, we find that in some countries there is legislatively permitted commerce in bodily parts and bodily materials, for example, the sale of blood (excluding Australia), and Britain permits (in the sense of not being illegal) commerce in human tissues. Recent reports also indicate that consideration is being given to the legalisation of the sale of bodily parts in the United States. Due to a thriving blackmarket in body parts, at present, it has been reported that violent crime in South America has increased, possibly as a consequence.

Further, one might say that we do not have the right to capital (the power to consume, waste, destroy) in cases in which this would contravene laws governing suicide. Although in the United Kingdom and most of Australia one does have a right to commit suicide, one cannot bequeath the whole body or any of its parts, except to approved scientific agencies for approved scientific purposes, even though one may kill oneself by destroying one's body. The State will, however, try to prevent the killing or mutilating of oneself, and does not allow persons to consent to murder or criminal

R. Scott "The Body as Property" (Allen Lane, 1981) p.2
assault. Yet self-mutilation is an offence in military, but not in civil law, which might be then taken to suggest that the body is considered to be the property of the military.

The right to security (immunity from expropriation) does not hold against laws which demand arrest and imprisonment. Further, laws are arbitrary when applied to bodily parts. For example, one can refuse to donate an organ or bodily materials even if one is the only compatible donor, and it is generally agreed that persons have an immunity against appropriation of part or all of their bodies, yet increasingly jurisdictions permit organs to be taken from the dead without prior living consent.

The power of transmissibility (that is, to devise or bequeath) is also restricted in cases where laws demand disposal of bodies in a certain manner due to assumptions about hygiene; for example, one may bury the family dog in the private household garden, but not one's parents. Further, (if we consider a person as more than the physical body) such things as one's reputation and good will can be sold, used, or bequeathed. The absence of term (that is, indeterminate length of one's ownership rights) can be made determinate in the case of the carrying out of the death penalty.

See S.R. Munzer "A Theory of Property" op. cit. p. 43
Prohibition of harmful use (the duty to forbear from using the thing in certain ways harmful to others) can also be disregarded by certain occupations which may indeed demand actions on the part of its members that are harmful to others and themselves. For example, the law may require police officers to undertake pursuits and arrests which expose both them and those whom they pursue to the risk of serious bodily damage. Liability to execution (liability to having the thing taken away for repayment of a debt) is conceivable and is manifest by debtors' prisons, in those jurisdictions that continue to permit imprisonment for debt or, as in N.S.W., for non-payment of a fine. Residuary character (existence of rules governing the reversion of lapsed ownership rights) perhaps may be the only inappropriate "incident" for application to persons or bodies.

Although the above examples may suggest that the body is not in fact property in the same way as, say, a piece of furniture, nevertheless persons do have the legal power, and the right, to forcibly exclude others as when defending themselves against murder, rape or battery. Persons do have the right to use their bodies largely as they wish (so long as they do not harm others) and they may even sell or donate some parts of their bodies while alive and, by will or contract may donate their bodies to medical institutions on death. Thus we may conclude that, whether we call those
rights we possess in regard to our bodies property rights or "personal rights", the rights do correspond to those commonly attributed to property. Whether we speak of our car or ourselves (whether as persons or bodies), in both cases the rights to possess, to use or manage, to dispose of, to transfer, and generally to exclude others are involved.

A further example of the body as property, although it may muddy the waters somewhat, is the contentious argument regarding ownership of other bodies. (I leave aside the question of slavery here.) My concern is with control by a person of another's body, and I will restrict this example to unborn "bodies", and the control possessed by a mother in relation to the foetus she is carrying.

Pro-abortion arguments are generally presented in terms of what one is permitted to do with one's own body, rather than strict arguments concerning what one can do with someone else's (assuming that the foetus is not strictly an [independent] human being). Although the questions are usually concerned with ethical considerations regarding rights of human beings and possible conflicts (for example, between the rights of the mother and the rights of the unborn

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child'), these are not generally considerations of questions of conflicting property rights. Yet the arguments do still suggest an idea of property. That is, in pro-abortion arguments women often claim: "This is my body", and that therefore they may do as they please. Leaving aside ethical questions regarding conflicting moral rights, what is it that these women are saying? That is, that I "own" my body, that this body is my "property" (and that therefore I have certain rights)? Can these rights be equated with anything resembling property rights or is this merely a problem of semantics and/or grammar?

Many have argued that rights associated with property cannot be applied to persons, as this would suggest that the body is no different from land and cars. Of course, if we think of examples such as restrictions on body searches, we think of them not in terms of property, but rather in terms of privacy, or even reputation (but even these can be said to be "mine" - a non-physical part of me). However, it is unhelpful to suggest that none of the same rights can equally be conferred on the body or on one's person. Many seem to

\[19\] Although on some interpretations it is argued that it makes no sense to say that a foetus can exercise, waive, claim, secure, or surrender a right or have a duty, privilege, obligation, power, etc., but can nevertheless have a "right", - this stretches the ordinary notion of a right. See A.R.White "Rights" (Oxford: Clarendon Press, 1984) p.172

\[46\] See S.R.Munzer "A Theory of Property" op.cit. p.47
contend merely that it is "inappropriate" to speak of property or property rights in the body, as this would treat person or body in the same way as "things" or "commodities". Certainly in recent cases of surrogate motherhood, for example, the question of whether the child may be considered to be a commodity or property has been raised. Some critics of the practice have objected to commercial surrogacy on the grounds that it improperly treats children as well as the women's reproductive capacities as commodities. The argument is that commercial surrogacy applies the market norms which regulate production, exchange and enjoyment of a commodity, thus treating the children as property, and the participants as bargaining over the use and disposal of the child. The natural mother deliberately conceives a child with the intention of giving it up for material advantage. She and the couple who pay her to give up her maternal rights over the child thus treat her rights as a kind of property right.  

Of course, proponents of commercial surrogacy would deny that in the transfer of children, which includes the exchange of money, the industry is engaging in the sale of children. They would argue that payment to the surrogate mother is not

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42 Ibid. p.74
in exchange for the child, but for the mother's services. However, to say that payment would be merely for services, can be equated with, say, a baker who sells his bread; the baker may seek payment by selling his bread as compensation for his labour and expenses, but no one would argue that in so doing he is denying that the bread was ever his property.

Thus on balance there is no barrier to regarding human bodies, or embodied persons, as property. Some will respond that it is "inappropriate", "demeans people" or "affronts human dignity" to embrace such a conclusion. This is unconvincing. The point to remember is that although people may be property, this has no tendency to show that we are "mere" property. In sum, the body is capable of being owned; the body is thus property, but in many cases this ownership, and the status of the body as property, are not honoured by society, and not fully recognised in its legal system.

It may be objected that if people could own their bodies, then they would be owning themselves, and self-ownership is an absurdity, or even a contradiction in terms. Self-ownership might indeed look paradoxical, and some may even consider it misleading. The relation of owning, it turns out, has the formal properties of a relation which is

non-reflexive, non-symmetrical, and non-transitive. There is no logical problem about something owning itself, nor does the belief that one can own one's body commit one to dualism. Even if one can sell parts of oneself, there is no requirement that the selling part is different from the sold part, nor must the selling part be differentiated or differentiable from the sale. Indeed, it may even be wrong to speak of one part of the whole selling another part of the whole; rather the whole sells part of itself. For example, when a corporation sells off part of itself, it is not one part of the corporation selling off another, rather it is the corporation selling a part. (Although it must be added that the corporation is not an entity which acts independently of the individuals who make up that corporation.) Here it is clear that "ownership is a didactic relation which is satisfied by the whole - part relation".

4. Labour as Property.

To further our comparison of our bodies and other forms of property vis-a-vis Honoré's incidents within ownership, we may look at an additional question which arises as a result of property rights in our bodies - an aspect of oneself which has special interest as property - that is, ownership of, or

" J.L.C. Chipman "The Body as Property" op. cit p.7
property rights in external things as a result of our labour. Indeed, the connection between ownership of oneself and, by extension, of external things is often cited as a strong one - that, arguably, the rights of self-ownership would be curtailed severely in practice if people were not permitted to exercise strong control over some material possessions. This arises particularly on Locke's account of ownership of oneself - that by extension we may claim ownership of our labour and that persons have proprietary claims on parts of the external world. Locke states that for a person "the labour of his body and the work of his hands are properly his." The idea of ownership of one's self or one's body and one's labour (and therefore what one's labour produces) has been dismissed by some as simplistic, particularly in the modern world; and as Nozick has most famously suggested, labouring on, and changing a thing does not make a thing one's own - it is merely a way of losing one's labour.

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4 See J.Narveson "The Libertarian Idea" op. cit. p.71

5 J.Locke "Second Treatise on Government" Ch.5 "Of Property" op.cit. S.27

6 Although some accept the premise that we own ourselves, but argue that we do not need to accept the legitimacy of (private) ownership of other things. See for example G.A.Cohen "Self-Ownership, World Ownership and Equality" in Social Philosophy and Policy, Vol.3, 1986.

7 R.Nozick "Anarchy, State and Utopia" op. cit. p.174-175. "If I own a can of tomato juice and spill it into the sea so that the molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"
However, work is predicated of all our other activities, and may be the most "fundamental of all human activities". After all, labour does, as Locke rightly points out, distinguish what we own, what we have an exclusive right to. (Who else would be entitled to the thing I have made, or to the previously unowned land that I have cleared, given that I am not of course in another's employ?) In what sense, however, does one own one's labour - both in the sense of one's capacity and in specific instances? One could argue that labour is logically dependent upon the existence of the person, and therefore if we own our own person (that is, body), then one owns one's labour as well. However, it appears that, like the body, although labour may be owned, it often is not honoured as property. That is, although the importance of one's labour or work is not in dispute in the hierarchy of human activity, as Haggard has recently pointed out, "what is in dispute is the proper role of government in regulating this activity".

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However, the difficulty with this example is that the sea may already be owned, and further, there may not be an appropriate emotional response, that is, a "feeling" or intention to own by this action.


50 T.R.Haggard Ibid. p.241
Of course, one could hold the view that one's body and labour are not inter-dependent, that is, that one can be owned without the other. Alternatively, it could be suggested that a person cannot "own" or have property in one's labour in any case, as labour is not a distinct entity. The formal alternatives both conceptually and substantially for owning one's body and one's labour are:

1. one does not own the body but owns one's labour;
2. one owns one's body, but not labour;
3. neither body nor labour are owned.

1. One could argue that I merely have a right to my body or to my person, but that I do in fact own my labour. That is, I may control my labour; I may possess, use, dispose of my labour, but that this is not dependent upon the ownership of my body. However, I have already suggested that the body may be property.

2. One could imagine, of course, that one could own one's body or person, but not one's labour. For example, I may be employed by another person, and in this situation it may be said that I do not "own" my labour as I am restricted to this employment, particularly if I am under contract to the employer and am not free to work elsewhere for a period of time. Although this may be seen merely as restrictive, or at worst a temporary
surrendering of my labour (and one presumably does this voluntarily in any case), still it can be argued that for the duration of the employment I do not possess my labour, in the sense of exclusive control. I do not, for example, have the right to use it elsewhere (that is, legally for any other employer) nor can I exclude the employer as the contract binds the employee to the employer. Hence, Locke argued that the turf cut by the servant remained the property of the master. Certainly the wage of the servant is still rightfully his in exchange for the cutting.

(3) Alternatively, one may say only that I have a right to my labour. Locke argued that by mixing one's labour with something led to a property in the thing. However, one could argue that it is also true that I have a moral right to my labour, without relying on the idea of property. That is, one could simply say that I have a right to my body and I have a right to my labour, without relying on the notion of property.

Generally it is unclear what labour is, that is, it is difficult to separate an entity called "labour" that exists between the person and the finished product. Even motive may be relevant. The same activity may be regarded as labour if undertaken for productive purposes, whether or not
commercial, but considered to be relaxation if undertaken for enjoyment. Consider, for example, the difference between a commercial driver working to a tight timetable, and a person driving in a long distance motor rally.

Labour is an activity\(^1\) dependent upon the person, it is ephemeral and can be seen as the expenditure of energy—a particular dissipation for a particular purpose. Labour may be intentional, that is, the activity is intended for a particular purpose, although it may be intended that the particular activity is for some purpose other than the result. Further, the labour may be totally unintentional—that is, \(X\) attempts to make \(A\), but instead creates \(B\). For example, a sculptor may attempt to create a bust of a person, but the finished product may look like a pineapple.

Labour certainly is not a product. For example, if we were to strip back a pair of shoes one has laboured upon to produce, one would not find an entity called "labour". Labour cannot be equated with the actual product, namely the shoe. Perhaps labour can best be understood in terms of a channelling of effort, not only of actual labour or "labour-

\(^1\) Or, conceivably, a non-activity in the case of, say, a nightwatchman who merely stands with a torch in hand in anticipation of further activity.
power", but also of directing and supervising it, to create (in the future) a new object, so that labour encompasses such diverse activities as manufacturing, storage, transport, exploration, and sometimes "ritual incantations". We may of course understand the notion of one's labour as one's work in the sense of one's job and that this, conceivably, may be considered to be our property.

The idea of job property is often put forward as a crucial one for the understanding of much of collective bargaining in industry, and many public employments, particularly the public services and professional occupations have the practice of "establishing" positions giving tenure for a person's working life. Various pieces of legislation also provide for compensation for the loss of a job. We may thus say that a job is property both due to the objective elements we perceive such as the particular rights held in regard to that job one may have - the right to possess, the right to use and the right to dispose of (by retiring or resigning) - and to the subjective elements, that is, that we often claim

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51 Which is the subject of Marx's explication of property - the right to direct, control and profit from one's power to produce valuable products.

52 M. Silver "Foundations of Economic Justice" (Basil Blackwell, 1989) p.47

53 See P. Hollowell "Career: The Claim to Job Property" in P. Hollowell (Ed.) "Property and Social Relations" (Heinemann, London, 1982) p.183
a job or position to be mine, that is, as property.

If the idea of mixing of one's labour with something, thus entailing ownership of that thing, is not a metaphor, then we may ask whether one's labour can be an "ingredient". It seems implausible that by the act of labouring one "mixes" things together; for example, one cannot say that labour stands to the product as flour does to cake, or water to ice. Certainly labour cannot be identified as an ingredient in this sense. This appears to be a category mistake if interpreted literally, that is, how can labour be an element?

If one says plainly that one makes things, how does this lead to property? Yet mixing is intended to answer this. The general question remains, however, of whether one's labour is the sort of thing that one can deem to be property. Can we do anything with it, or pass it and the corresponding rights and responsibilities to another? Certainly there is a confusion if we were, for example, to apply the concept of property to labour in an employer and hired labour situation. A person may hire himself out to another, but how inalienable is one's labour in the sense of personal involvement or responsibility in the employment of one's labour? Is labour alienable in any sense, or is it inalienable like the "self"?

Further, it may be argued that work and property are
fundamentally similar in that they are transformations of each other—property is objectified work activity and work is potential or future property. Yet we should distinguish between genuine property and mere (proprietary) interest, even in one’s job. Ellerman for example, poses an interesting example of an entrepreneur and his employees who rob a bank. As Ellerman points out, a worker cannot turn over the use of his self to the entrepreneur and not have any personal involvement in the employment of his labour. Unless a worker is for some reason incapacitated and doesn’t know what he is doing, a worker is inexorably involved and inescapably de facto responsible for the results of his intentional actions—all would be held legally responsible for the crime. Ellerman’s conclusion is that by rejecting the idea that labour is hired to others, the legal system upholds the labour theory of property that people are entitled to the fruits of their labour. A person cannot in fact transfer the use of his actions (fruits of one’s labours) even when the enterprise is not criminal. Certainly we do, legally, abide by the concept of vicarious liability.


But this may be more in line with a person’s individual moral judgement in the case of a crime, and thus the two cannot be equated.
If we think of the ownership of one's labour as ownership of one's personal productive powers or labour powers, we may again apply the Honoré set of rights and powers, particularly if applied to one's talents and abilities. Although I have already reduced these "incidents" to a sub-set, it is still useful to examine Honoré's full list. In fact, it may be more appropriate to apply this set to one's labour powers than to one's body; that is, the rights to possess, to use, to manage, to the income, to alienate (to sell one's labour or waste one's talents) security, infiniteness of term and reversion (although one cannot bequeath one's talents because of their nature, nor is it likely that one would have one's talents taken in repayment of debts) to such things as one's skills at building, talents such as computer programming, painting, or the ability to endure strenuous physical labour.

Certainly in the case of an individual it would appear that we can safely apply the notion of property rights with respect to a person's productive powers. Regarding ownership of productive powers (labour power) and ownership of the means of exercising productive powers (means of labour or

Although it could be argued that, according to a strict application of a contractual obligation, this would not rule out forced labour or indentured servitude in satisfaction of a contract or the sense of community service orders applied later by a court as a penalty (although this was not a condition of a contract) if in debt.
means of production), this is sometimes complicated because the product of the labour, for example, cars, may be something consumable, or they may be a means of production, such as the machinery which makes the car. Because of this, then, it may be that the conclusions contradict the traditional conclusions about the relation between ownership of labour and ownership of its product.

Further, it is possible to argue that people lose property rights in their labour in ways that are similar to the various transactions a person employs in regard to property rights in a thing, for example, by selling the thing. To sell one's labour power one sells the right to direct, control and profit from one's power to produce valuable products, that is, one leaves to the discretion of others the use of one's talents, abilities and capacities. (Although a person cannot justly lose property rights in a thing through actions of others, for example, if A sells X to B, but C was also a joint owner with A of X, then without consent, C has been defrauded.) But even if one can only exercise one's skills via a particular method, and that method is denied, then this does not entail that one's skills have been lost.

However, Kernohan argues that if one owns just the skill itself, but not its exercise, then this is less than "full
that he merely holds an interest in the thing, in this case, the thing being his productive powers.

It may be argued, however, that the libertarian justification of private property needs to have both. That is, if self-ownership merely guarantees ownership of the capacity to labour and not of labour itself then the labour justification of private property loses credibility. This is evident if one "mixes" one's labour (something one owns) with something one does not own and begins to own the latter. That is, this becomes a worse argument if one mixes something one only owns in part, with an unowned thing and somehow

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\[\text{ownership}^1\]. That is, it would be analogous to someone who has legal title to a piece of land, but does not own the leasehold and someone who owns land in "fee simple". The former cannot use, manage or produce income on his land and thus has an interest which is of a "lesser degree" than ownership as compared to the latter. That is, if someone does not own the exercise of his or her productive powers, then it may be argued that his interests, real as they may be, do not amount to ownership of the powers themselves - we may say that he merely holds an interest in the thing, in this case, the thing being his productive powers.

\[\text{Fee simple: an estate of freehold; an estate of inheritance, implying an absolute inheritance, clear of any condition, limitation or restriction to particular heirs.}\]

\[\text{A.Kernohan "Capitalism and Self-Ownership" op. cit. p.67}\]
appropriates it. To take an analogy: A owns a hammer and B owns the nails. B denies A access to the nails. As a result, A still owns the hammer, but may be said to have some sort of "reduced" ownership, or more precisely, has merely an interest which is less than ownership in the sense that one possible use of the hammer is ruled out.

To take another analogy: A cannot use the hammer at all, that is, is denied all use of the hammer and no longer has the right to use, manage, to the income etc. As a result, we would say A has sufficient reduction in his capacity to use the hammer. But rather than concluding that A's type of ownership has changed, that A no longer owns the hammer, rather we say that A has some interest which is less than ownership. Similarly, if a thing only has one use, and that use is legally denied it may also be said that one's capacity is reduced and hence no longer can it be said that one owns it. Some productive powers may be said to be like this, that is, are so specialised; for example, skill at computer programming cannot be exercised without access to a computer. But this is not to say anything about the concept of property itself as it relates to specific objects of ownership such as the hammer or the nails; rather, it concerns the requirements externally imposed which suggest that if, in the above case the skill cannot be used, its possessor may no longer have ownership, but only holds some lesser interest.
What conclusion can be drawn in relation to position that property entails the rights to possess, use and to dispose of a thing, in light of the above discussion? It is evident, that wideranging restrictions do exist regarding one's property. For example, we may argue that even employers "own" the positions they create, yet are faced with regulations governing working hours, work conditions and even anti-discrimination legislation in their employment of others. The restrictions which apply to the rights of an owner create doubt over whether those jobs, for example, can be exclusively possessed, used and disposed of, and hence can be called the employer's property.

J.J. Thomson, for example, argues that private employers have a right to employ whomever they please (although it is not clear whether she means by this a constitutional - in the American sense - and/or a moral right). The principle is that no perfect stranger has a right to be given a benefit which is yours to dispose of. Drawing the analogy with other objects which may be said to be one's own, for example, the orchardist having extra apples (they're mine: I grew them, on my own land, from my own trees), or extra money, or extra tickets to a series of lectures and am prepared to give them away, Thomson argues that one would not have to give them to
the first or let them draw straws. The argument is: one can give them to whom one likes and on any ground one pleases (so long as no one's rights have been violated, that no-one has been treated unjustly or harmed). The question of need of the recipient is a separate issue. If one is the rightful owner of some entity, then one has the right of giving it to whomever one pleases. Of course, an applicant may complain, for example, that he has been denied a position because of his colour and may feel angry and unjustly treated, but no right has been violated (provided that there is no prior agreement or understanding between the employer and the applicant). However, if the employer advertises "only merit counts" or "only minorities need apply", and then proceeds to hire his incompetent nephew or a person from a non-minority, then we may say that the employer is a thief. What matters is not the contents of a preference, or its relevance or irrelevance in utility terms, or its "fairness", but rather only whether or not it is the employer's preference.

Of course, one may claim that moral consideration should be brought into play; for example, one may question whether a

\[ ^{11} \text{J.J.Thomson "Preferential Hiring" reprinted in K.Kipnis (Ed.) "Philosophical Issues in Law: Cases and Material" (Prentiss-Hall, 1977) p.249-250} \]

\[ ^{12} \text{Ibid.} \]

\[ ^{13} \text{M.Silver "Foundation of Economic Justice" op. cit. p.70} \]
person who is the owner of a whole community's water supply should be permitted to give it to whomever he pleases." Particular social rules, including specific laws may be applied with particular social considerations in mind. For example, we may have a social policy to combat racism, but I am concerned here with the application of the idea which suggests that the fact that an object is one's property entails that one has a particular set of rights with respect to that object. In other words, I am concerned with the application of the concept of property. The fact that the particular society is attempting to combat racism by utilising legislative power may not be intended to hinder a person's use of his property or deny that something is one's property. However, by the enactment and enforcement of the legislation limits the effects or results of the owner's use and, hence, also the actual use by the owner.

5. **Property and the Common Interest.**

The implications, then, for the concept of property is that normative questions arise as a consequence of trying to apply the idea of property - is property only applied or permitted

in the context of social utility, or based on natural rights to property; or if we have first or original acquisition of something, is it merely based on the empirical observation of the first occupant, based on entitlement due to our labour, by divine ordination, some sort of historical accident, might makes right, or just unmitigated force?

It appears that with the rise of the welfare state, as Reich has put it, a "new property" has arisen, whereby the rights that are held, such as the rights to income, to services, etc. are rights against the government rather than rights against other individuals or groups exercised in a civil society. "That is, this "new property" differs from what has gone before because it comes from government. It differs in the sense that property (what Reich calls "old property") is characterised by individual rights, whereas the "new" may be said to characterise "privileges" adhering in government grants. This then recognises that the welfare state has altered the status of the individual.

Personal rights appear to be giving way to a "common interest", requiring us to be motivated by "social


"J. Brigham "Property and the Politics of Entitlement" op. cit. 75
responsibility". That is, we may be seeing the emergence of the public interest State in which property is increasingly composed of what Reich calls "government largesse". In this sense, the bureaucratic State increasingly regulates and dispenses wealth at its discretion and the government provides public "assistance", such as health benefits, unemployment insurance and licences to practice professions. Although it may be a misnomer to suggest that all property has always been government largesse, the law does allow some objects to be owned and not others. Further, the State via its particular laws prevents those without property from helping themselves to what is designated as "other people's property". Police and other designated authorities protect individuals' property, yet the State often interferes with the freedom to those without adequate property to acquire what they need or desire. And whether or not these welfare payments, subsidies to industries, trade barriers and the like can be equated with property - the State is certainly a major source of wealth dispensing these. The State in effect controls these, and does so, arguably, at the expense of private property.

Reich, I think, is correct in so far as property and the control one necessarily has over one's wealth entails a degree of personal autonomy, and whether or not one extends...
the concept of property to include the dispensed government bounties (as does Reich as a solution to government encroachment on individual liberty), it is certainly clear that precisely because so much of the control (by regulation) has been absorbed by the State, that we can see how little regard is given to individual control and hence individual liberty.

Of the ongoing social criticism of property, one of the strongest and newest challenges to non-State ownership of things comes in the area of environmental policy. A whole new body of regulatory law designed to protect the environment has further restricted the traditional privileges of owners of resources to use them to their advantage; and while the concept of property is not usually directly involved in the debate over these regulations, their existence suggests a further weakening of the practical powers of the property holder. That is, in the case of environmental legislation, neither one's right of use, nor the power of the State to regulate that right is usually questioned, but what is feared is that the quantum of State regulation may ultimately reduce the right of use to "meaninglessness". In fact, an

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See C. Donahue "The Future of the Concept of Property Predicted From Its Past" in J.R. Pennock and J.W Chapman (Eds.) NOMOS XXII "Property" op. cit. p.29

C. Donahue "The Concept of Property Predicted From Its Past" Ibid. p.30
influential environmental lawyer in the U.S., F. Bosselman, recently argued that these regulations were to be invalid "only if they fail to bear a reasonable relationship to a valid public purpose."  

In many respects the objections to one's use for particular purposes, or the particular consequences of such actions, are central to some arguments against the particular rights which are held by an owner with respect to a thing. For example, some conservationists have argued that owners do not hold the right to destroy. However, it may be better that such conservationists just say outright that they disapprove of particular behaviour, or indeed that they do not believe in property. Further, I would emphasise that restrictions as a result of particular objections are already being enforced on such a scale that an owner of property is once again in a position which appears virtually indistinguishable from stewardship. For example, there is a growing consensus that various aspects of the natural environment should be owned in common, managed through some sort of collective choice if they are to be developed, used, and conserved efficiently.

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70 J. Brigham "Property and the Politics of Entitlement" (Temple University Press, Philadelphia, 1990) p.113

71 See for example R.E. Goodin "Property Rights and Preservationist Duties" (Paper prepared for "Philosophy in New Zealand": the 1990 Conference of the Australasian Association of Philosophy, New Zealand Division).
In the past, many natural resources have been thought of as unregulated common property, that is, unregulated in the sense of no collective choice and enforcement having been used to control and regulate usage. Arguably the high seas have been treated as such *de jure*. But phrases such as "environmental protection" may be misleading in that it suggests that the environment itself, far from being some vast impersonal force, enjoys a recognised status as a holder of rights. But we should not be misled. Many claims about the environment appear to be translatable into the claims of some individuals to be protected in their person and property against the wrongful acts of others. There is no doubt that ordinary cases of pollution discharge, such as into rivers and underground waters, constitute infliction of harm or the destruction of another's individual property, so that those things which are unowned are often placed on par with those that are owned when it comes to protection from possible destruction by pollution. Looking at environmental policy, two strategies regarding property appear to be possible. One is to impose regulation on all unregulated common property, the other is to convert it into private property. It appears that, in practice, the first alternative

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71 Some philosophers in recent years have asked: "What are our obligations, if any, to nature?" V.Held *Rights and Goods* op. cit. p.238

72 R.A.Epstein "A Theory of Environmental Protection: The Case of Superfund" (Law and Economics Workshop Series, University of Toronto, 1981.) p. 18

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is being implemented.

6. Conclusion: Property or Stewardship?

The freedom to possess, use and dispose of one's property are now potential objects of regulation and redistribution, while we become stewards over what we still consider as our "property". Even those who argue that private property may in fact protect the environment — that property rights offer the best incentive for protecting many components of the natural environment — also appeal to the notion of stewardship. That is, that private property assures accountability and makes good stewardship pay. For example, Shaw argues that a person who owns property will reap the rewards of good stewardship and bear the consequences of bad stewardship, and that in a system of private property individuals who believe that, for example, the forests will be valuable in the future, have a strong incentive to protect them.

Further, this tradition of stewardship does appear to be important in Western thought — that man has responsibilities

toward nature as a rational conservationist,75 and that one generation is not to take advantage of its descendents by consuming its wealth. As Rawls has argued, a just saving principle requires one generation to save for the "welfare of future generations".76

As Schwartzenbach has claimed, stewardship appears to underlie not only the thought of many political theorists, but much of ordinary everyday practice as well - both the conception of private property and stewardship seem to be central to the "Western type of ownership",77 revealing that our "practices emerge as far richer than our theories".78 For example, there appears to be an idea of stewardship of our bodies that is very much alive today even if the surrounding theological justification has been dispensed with - I cannot legally cut off my hand and sell it, nor can I sell myself into slavery.

This idea of stewardship is contrary to, and may be contrasted with, Honoré's claim that our conception of property is of a "western type of ownership" which entails

75 J.Passmore op. cit. p.39
78 Ibid. p.160
the exclusive, permanent and transmissible use of the thing I own.\textsuperscript{79} Stewardship may also be contrasted with the idea that property is absolute which entails the rights to possess, use and dispose of that thing which an individual possesses. That is, these rights become secondary to considerations such as obligations to "future generations". This notion of future persons does appear to becoming stronger; advocating that we have a moral obligation not to leave our successors in an impoverished world, that is, in a world with exhausted resources and polluted waters and land. Although this may be a desirable notion, it is questionable whether indeed we can have such obligations, that is, it is arguably at least true that we can only have obligations to those with corresponding rights, but (future) persons can only have rights until they actually exist. (Although some do suggest that we have obligations not to ourselves or to future generations, but to nature itself.\textsuperscript{80})

In considering stewardship, we may take as an analogy a simple case, and consider a steward of a club to indicate the fundamental differences between stewardship and genuine ownership. A steward of a club is the custodian of another's

\textsuperscript{79} A.M.Honoré "Property, Title and Redistribution" in C.Wellman (Ed.) "Equality and Freedom: Past, Present and Future" (Franz Steiner Verlag, Wiesbaden, 1977) p.111

\textsuperscript{80} See for example J.S.Shaw and J.Hospers "Private Property and the Environment" \textit{op.cit.}
property and holds it for the benefit of the owner and returns the thing, say a bag, in good order. This, of course, is a contractual relationship, against a background of clear property rights. But can we think of stewardship outside of this idea? That is, can we conceive of stewardship only against the background of ownership (even allowing, that for nature at large, God is the owner), or is it conceivable to have a no-owner idea of stewardship? Can we think of the ultimate future inheritors as the owners, so that the only true owner is the last generation on Earth, with all the previous generations having the stewardly obligation to hand the world on in good order and condition? The issue of consideration for "future generations" is often brought up in this context - that certain actions and behaviour on our part now will benefit others in the future. The concept of stewardship holds that the current title-bearer to a particular thing, say, to a particular piece of land, does not "really" own it. He is, instead, a custodian whose task it is to hand on the land in at least as good a condition as he found it to the next generation.

This is a common sentiment among dwellers in rural areas. Few farmers, for example, are in fact motivated by profits alone and considerations other than maximisation of lifetime

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P.Hollowell "Landed Property: Challenge and Response" in P.Hollowell (Ed.) "Property and Social Relations" op.cit. p.87
profits are part of the general culture in farming and landowning communities, either consciously or subconsciously. Their activities reflect a shared sense of stewardship which may well be so strong as to dictate courses of action. The stewardship concept encourages landowners to think and act in the long-term "interests of the land" and not just the family or community it currently supports — the landowner's vision is to improve his heritage for his heirs in the broadest sense. That is, even in traditional conservative thinking there remains a "vestage of the feudal idea of property", in which the possessor is not so much the individual but the family line, and in which the current owner acts partly as trustee, with responsibilities not just to decendants but also to the less fortunate. Consider for example the question of whether a landed family should be permitted to demolish their country mansion, which is of great architectural and historical interest, and sell the site to an industrialist who intends to build a safe, but ugly chemical plant. As Wolff points out, when we reflect on policy judgements "modern conservatives should be pulled in both directions".

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81 P. Hollowell ibid p. 79
82 Ibid p. 79
83 Ibid p. 80
Stewardship can be seen to be connected with the notion of possessing something that is not wholly earned by us and bestowed on us by another (a lender) for his benefit. It is something which may be rejected. In some cases, the use of it may be a gift. Further, "owning" such gift-property may be said to be fundamentally a form of guardianship—implicit with the acceptance of an authentic gift is appropriate uses of it, and these uses are, at least in part, determined by the intention of the donor.¹⁵

On close inspection of the concepts of property and of stewardship, we find that they are quite distinct. My ownership of a thing entails that I have exclusive use and possession of that thing, and that my plans for it or enjoyment or disposal of it are paramount. They are only limited by considerations, whether moral and/or legal, of preventing harm to others. Stewardship, on the other hand, entails that my private use, enjoyment, disposal of the thing become secondary to fulfilling some previously assigned role which is determined by others, and it is my obligation to ensure its return to the owner in as complete and good a condition as when the period of stewardship commenced.

Of course, it may be said that this is merely a verbal

distinction, but if we inspect current practices closely, we
discover that the notion of stewardship underlies much of
social policy considerations and how these affect our use,
disposal, etc. of property, even our bodies. Certainly it
appears that a person's private use, plans, enjoyment and
disposal of what one owns are treated as secondary to
government policy. It may be argued that Locke also held the
view that one's own life, limb and labour was a form of
inalienable stewardship." That is, for Locke we owe a duty
to God to preserve ourselves as life, limb and natural
freedom are gifts from God. Further, we can square the
insistence that our lives are our property and the insistence
that we are God's property legalistically by saying that we
have no freehold on our life and liberty, only a life tenancy
which is inviolable against other men, but not against
God." 

I am not suggesting that indeed God is the true owner of the
things that we commonly call our our own, nor is the State,
(although it may appear to) but merely wish to point out that
in practice, what amounts to the stewardly way of thinking
is certainly alive. In medical ethics, for example, or in
the law, our relation to our bodies and body parts is treated

" S.Schwartzenbach ibid p.161

" A.Ryan "Property and Political Theory" (Basil Blackwell,
1984) p.29
in such a manner, and this is clear from examples such as the States' treatment of suicide and euthanasia. (Although the law of course is changing and may be said to be fluid in relation to permitting one to end one's own life.) In business ethics consideration is also given not only to what can or should be sold, but for what purpose. In both instances, the priority of social responsibility for what we "own" appears to be paramount in practice — our practices regarding what we consider to be our own is far more steward-like than any theory of the concept of owning property could possibly allow. For example, in the case of euthanasia, opposition is often on utilitarian grounds in that allowing for the option to end one's life may promote or create pressure on some to end the life. Further, fear is often expressed that care for, and specialised research on, the terminally ill will end.

Of course it may be argued that in contemporary political theory stewardship is an issue which is rarely discussed as such — that discussions of ownership usually centre on the particular legal rights individuals hold in relation to a thing — it can nevertheless be shown that in practice stewardship appears to be a viable description of the manner in which social policy considerations are applied to the things we purportedly own.
Although it may be argued that stewardship is connected with the notion of possessing something originally obtained as a gift, some unearned value bestowed upon us by another (a donor) for our benefit, if we consider that an individual's rights, including those which are held in respect of property, are some sort of "gift", but one which carries with it responsibilities, one may argue that as a gift, it must be given by someone. However, we do not need to appeal to a theological position to explain how certain items may be seen as gift-property entrusted to us as stewards. For example, it can be seen that individuals hold fundamental rights which may be considered as "gifts" from a reasonable community. One does not "earn" the honour of being born into a particular society, hold a passport for that particular country or hold certain constitutional rights. Further, if the gifts are authentic, I cannot always do whatever I like with them — this is an implicit notion of stewardship. Such "gift-property" is fundamentally a form of guardianship; so that as Rawls would have it, nothing is "mine absolutely" but only "mine given the rules".

This can be equated with my previous delineation between a general right to property, a right to particular property and

"S. Swartzenbach op.cit. p.162
"J. Wolff "Robert Nozick - Property, Justice and the Minimal State" op.cit. p. 141
property rights. That is, under a general right to property — what I have called the "capacity" for property — there is a general right which is a consequence of one's citizenship within a particular society, being of a certain age and mental capacity, etc. This general right is not earned and may merely be interpreted as a gift from society. To give another example, it is often said that parents' rights over their children are trusts, which they must always exercise for the sake of the child.  

The historical position, according to Macpherson, was that property as an interpersonal relationship of rights and obligations vis-a-vis the things of the world gave way to the capitalistic concept of property as an exclusionary relationship between the individual and the thing. In other words, the foundation of property is really, historically speaking, stewardship. The depth of this alleged contrast is, however, open to question. Some of its roots are to be found in the medieval concept of ownership. That is, lands and possessions were static and passed from one generation to the next. Whereas in our society many possessions may pass through the hands of one man — in that time it was more common for many men to succeed in possession of one dominion

90 E.S. Anderson "Is Women's Labor a Commodity?" Philosophy and Public Affairs, op.cit. p.75

of land without its substantially changing. Owners were looked upon as stewards, keeping possession secure and intact so that the next may take charge of that thing in the same condition as it was tendered to the one before him.

Although we may question Macpherson's historical analysis, it is certainly the case that present restrictions suggest a form of stewardship of the things we purportedly own. The extent of this regulation has rendered the relationship between ownership and control weak; while in law, economics and politics, property remains a central issue over which there is much debate, challenging the very concept to achieve particular ends, while some writers have suggested that property rights have declined in importance to the point that they regard them as marginal and even inimical to human interests.

Generally, however, it appears that we no longer have control over most things (except for the most trivial of things) and as we have seen, it appears that much of the control that is entailed by property is vested in the State. Yet the concept of property remains central to the question of government, and many basic issues of the legitimate scope of government, indeed the desirable nature of government continue to be fought out over the issue of property. However, priority of the individual's property rights no longer appears to serve
as a clear boundary between the legitimate spheres of the State and the individual. The rights of possession, use and disposal, entailing individual control over a thing, provide a conceptual boundary between the State and the individual—the liberal idea since Locke is in essence that the government cannot simply take one's property. But if the rights of property are reduced to only whatever the State allows, then the long-standing conception of limited government as resting on the apolitical boundaries of law, and property in particular may, as Nedelsky has argued, have to be replaced.¹¹

Yet, as I have attempted to show, property does entail particular rights—a core set which entails control. These are absolute, and barring the requirement to prevent harm to others, they give us the freedom to act without the need for further justification. Freedom without coherent property rights is a contradictory concept—the two are not separable. I am not free unless I have control of my person (my body) and that which I have acquired as property without infringing on, or harming others. When one's action is hampered by arbitrary controls, and when acquisitions are subjected nonconsensually to a fragmentation of one's control, then freedom is diminished, leading to conflict and

¹¹ See J. Nedelsky "Property and the American Conception of Limited Government" (Legal Theory Workshop Series, University of Toronto, 1984) p.27
contradiction - a non-system, not so much a bundle of rights, but as what one critic has called a "bundle of absurdities".
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