WHAT IS PRIVATE PROPERTY?

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(1) SCEPTICISM ABOUT PRIVATE PROPERTY

Although private property has found its way again to the forefront of attention in jurisprudence and political philosophy,[1] serious discussion is hampered by the lack of a generally accepted account of what private property is and how it is to be contrasted with alternative systems of property rules. As R. H. Tawney pointed out:

> It is idle . . . to present a case for or against private property without specifying the particular forms of property to which reference is made, and the journalist who says that 'private property is the foundation of civilization' agrees with Proudhon, who said it was theft, in this respect at least that, without further definition, the words of both are meaningless.[2]

Many writers have argued that it is, in fact, *impossible* to define private property—that the concept itself defies definition. If those arguments can be sustained, then disputes about the justifiability of private property are misconceived. Since private property is indefinable, it cannot serve as a useful concept in political and economic thought: nor can it be a point of interesting debate in political philosophy. Instead of talking about property, we should talk about more general features of economic organization (whether to have a market economy; if not, how the economy is to be managed; what principles of justice are to constrain economic institutions and policy; and so on) or, if we want to focus on individuals, about the detailed particular rights that people have to do certain things with certain objects—rights which vary considerably from case to case, from object to object, and from legal system to legal system. But, if these sceptical arguments hold, we should abandon the enterprise of arguing about private property as such—of saying that it is, or is not, conducive to liberty, prosperity, or

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1 See, for example, Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell, Oxford 1974); Lawrence Becker, *Property Rights: Philosophic Foundations* (Routledge & Kegan Paul, London 1977); C. B. Macpherson (ed.) *Property: Mainstream and Critical Positions*, (Basil Blackwell, Oxford 1978); James Tulley, *A Discourse on Property—John Locke and his Adversaries* (Cambridge University Press, Cambridge 1980); J. R. Pennock and J. W. Chapman (eds) *NOMOS XXII: Property* (New York University Press, New York 1980); Alan Ryan, *Property and Political Theory* (Basil Blackwell, Oxford 1984).

2 R. H. Tawney, in an extract from *The Sickness of an Acquisitive Society* reprinted in *Property: Mainstream and Critical Positions*, op cit, 136.

rights—because the term does not pick out any determinate institution for consideration.

Why has private property been thought indefinable? Consider the relation between a person (call her Susan) and an object—say, a motor car—generally taken to be *her* private property. The layman thinks of this as a two-place relation of *ownership* between a person and a thing: Susan owns that Porsche. But the lawyer tells us that legal relations cannot exist between people and Porsches, because Porsches cannot have rights or duties or be bound by or recognize rules.[3] The legal relation involved must be a relation between *persons*—between Susan and her neighbours, say, or Susan and the police, or Susan and everyone else. But when we ask what this relation is, we find that the answer is not at all simple. With regard to Susan's Porsche, there are all sorts of legal relations between Susan and other people. Susan has a legal liberty to use it in certain ways; for example, she owes no duty to anyone to refrain from putting her houseplants in it. But that is true only of *some* of the ways that the car could (physically) be used. She is not at liberty to drive it on the footpath or to drive it anywhere at a speed faster than 70 m.p.h. Indeed, she is not at liberty to drive it at all without a licence from the authorities. As well as her liberties, Susan also has certain rights. She has what Hohfeld called a 'claim-right' against everyone else—her neighbours, her friends, the local car thief, everyone in the community—that they should not use her Porsche without her permission. But Susan also owes certain duties to other people in relation to the vehicle. She must keep it in good order and see that it does not become a nuisance to her neighbours.[4] She is liable to pay damages if it rolls into her neighbour's fence. These rights, liberties, and duties are the basic stuff of ownership. But legal relations can be changed, and, certainly in our society, if Susan owns the Porsche, then *she* is in a position to change them. She has the power to sell it or give it to somebody else, in which case all the legal relations change: Susan takes on the duties (and limited rights) of a non-owner of the Porsche and someone else takes on the rights, liberties, duties and powers of ownership. Or perhaps Susan lends or hires the car; that involves a temporary and less extensive change in legal relations. She can bequeath the car in her will so that someone else will take over her property rights when she dies. These are her powers to change her legal situation and that of others. But she may also, in certain circumstances, have her own legal position altered in relation to the Porsche: she is liable to have the car seized in execution of a judgment summons for debt. And so on. All these legal relations are involved in what we might think of as a clear case, indeed a paradigm, of ownership. Private property, then, is not only not a simple relation between a person and

3 See American Law Institute, *Restatement of the Law of Property* (1936) Vol. I, 11. See also C. Reinhold Noyes, *The Institution of Property* (Humphrey Milford, London 1936) 290. The same point was made by Kant in the *Rechtslehre*, Vol. I, Chap. 2, s 11.

4 As Alan Ryan puts it, '*My* car is the one that *I* must keep in good order.'

a thing, it is not a simple relationship at all. It involves a complex bundle of relations, which differ considerably in their character and effect.[5]

If that were all, there would be no problem of definition: private property would be a bundle of rights, but if it remained constant for all or most of the cases that we want to describe as private property, the bundle as a whole could be defined in terms of its contents. But, of course, it does not remain constant, and that is where the difficulties begin.

Each of the legal relations involved in Susan's ownership of the Porsche is not only distinct, but in principle separable, from each of the others. It is possible, for example, that someone has a liberty to use an automobile without having any of the other rights or powers which Susan has. Because they are distinct and separable, the component relations may be taken apart and reconstituted in different combinations, so that we may get smaller bundles of the rights that were involved originally in this large bundle we called ownership. But when an original bundle is taken apart like this and the component rights redistributed among other bundles, we are still inclined, in our ordinary use of these concepts, to say that one particular person—the holder of one of the newly constituted bundles—is the *owner* of the resource. If Susan leases the car to her friend Blair so that he has exclusive use of the Porsche in return for a cash payment, we may still say that Susan is *really* the car's owner even though she does not have many of the rights, liberties and powers outlined in the previous paragraph. We say the same about landlords, mortgagors, and people who have conceded various encumbrances, like rights of way, over their real estate: they are still the owners of the pieces of land in question. But the legal position of a landlord is different from that of a mortgagor, different again from that of someone who has yielded a right of way, and different too from that of a person who has not redistributed any of the rights in his original bundle: depending on the particular transactions that have taken place, each has a different bundle of rights. If lay usage still dignifies them all with the title 'owner' of the land in question, we are likely to doubt whether the concept of ownership, and the concept of private property that goes with it, are doing very much work at all. The lawyer, certainly, who is concerned with the day-to-day affairs of all these people, will not be interested in finding out which of them really counts as an owner. His only concern is with the detailed contents of the various different bundles of legal relations.[6]

As if that were not enough, there are other indeterminacies in the concept of ownership. In America, an owner can leave his goods in his will to more or less anyone he pleases. But an owner's liberty in this respect is not so great in England; it is even more heavily curtailed by statute law in, say, New Zealand;

5 This analysis is obviously indebted to A. M. Honoré's seminal paper, 'Ownership' in A. G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford 1961). I shall refer to Honoré's discussion of the way in which ownership is to be defined in section 6, *infra*.

6 For a particularly strong statement of this view, see Thomas C. Grey, 'The Disintegration of Property' in *NOMOS XII: Property* op cit, 69–85.

and in France the operation of the doctrine of *legitima portio* casts a different complexion on wills, bequest and inheritance altogether.[7] What does this show? Does it show that the French have a *different concept* of ownership from the Americans and the English, so that it is a linguistic error to translate '*propriété*' as 'ownership'? Or does it show that the power of transmissibility by will is not part of the *definition* of ownership, but only contingently connected with it? If we take the former alternative, we are left with the analytically untidy situation in which we have as many ambiguities in the term 'ownership' as there are distinct legal systems (and indeed distinct momentary legal systems—for each may change in this respect over time). But if we take the latter option, we run the risk of leaving the concept of ownership without any essential content at all. It will become rather like *substance* in Locke's epistemology: a mere substratum, a hook on which to hang various combinations of legal relations.

In fact, I think many legal scholars now do take this latter option. In their view, the term 'ownership' serves only as an indication that *some* legal relations, *some* rights, liberties, powers, etc., are in question. On their view, the term does not convey any determinate idea of what these legal relations are. In every case, we have to push the words 'ownership' and 'private property' aside and look to the detail of the real legal relations involved in the given situation.[8]

For completeness, I should mention a third source of indeterminacy. The objects of property—the things which in lay usage are capable of being owned—differ so radically among themselves in legal theory, that it seems unlikely that the same concept of ownership could be applied to them all, even within a single legal system. In England, the ownership of a Porsche is quite a different thing from the ownership of a piece of agricultural land. There are different liberties, duties, and liabilities in the two cases. Private property in these comparatively concrete objects is a different matter again from the ownership of intangible things like ideas, copyrights, corporate stock, reputations and so on. Once again the common word 'ownership'—'X owns the car', 'Y owns the land', 'Z owns the copyright'—may be unhelpful and misleading, for it cannot convey any common content for these quite different bundles of legal relations. There is also a similar though perhaps less spectacular variation in ownership with different types of *owner*: the ownership of a given resource by a natural person may be a different matter from its ownership by a corporation and different again from its being the property of the Crown. Variations in 'subject' as well as variations in 'object' can make a difference to the nature of the relation.[9]

7 See E. L. G. Tyler, *Family Provision* (Butterworths, London 1971); S. G. Maurice, *Family Provision Practice* 4th edn (Oyez Publishing, London 1979); and, for the doctrine of *legitima portio*, A. G. Guest, 'Family Provision and the *Legitima Portio*' 73 *LQ Rev* 74 (1957).

8 Cf. Grey, op cit, 70; also Bruce Ackerman, *Private Property and the Constitution* (Yale University Press, New Haven and London 1977) 26 ff.

9 Cf. W. Friedman, *Law in a Changing Society*, 2nd edn (Stevens & Sons, London 1972) 96 ff.

(2) CONCEPTUAL DEFINITION

We owe to H. L. A. Hart the point that in jurisprudence as in all philosophy, it is a mistake to think that particulars can be classified under general terms only on the basis of their possession of specified common features.[10] But when jurists express doubts about the usefulness of general terms such as 'private property' or 'ownership', it is usually this sort of definition that they have in mind. They imply that if we are unable to specify necessary and jointly sufficient conditions which an institution must satisfy in order to be regarded as a system of private property—or which a legal relation must satisfy in order to be regarded as a relation of ownership—then those terms are to be regarded as ambiguous or confused and certainly as analytically unhelpful.[11]

Once Hart's point is accepted, however, this scepticism seems a little premature. Conceptual definition is a complicated business and the idea that it always involves the precise specification of necessary and sufficient conditions must be regarded as naive and outdated in the light of recent philosophical developments. A term which cannot be given a watertight definition in analytic jurisprudence may nevertheless be useful and important for social and political theory; we must not assume in advance that the imprecision or indeterminacy which frustrates the legal technician is fatal to the concept in every context in which it is deployed. I shall consider whether any of the more interesting recent accounts of the nature and meaning of political concepts—such as Wittgenstein's idea of family resemblance, the idea of persuasive definitions, the distinction between concept and conception, or the idea of 'essential contestability'—casts any light on the question of the meaning of private property. Briefly, what I want to say—the main argument is in section 6—is that private property and private ownership are *concepts* of which many different *conceptions* are possible, and that in each society the detailed incidents of ownership amount to a particular concrete conception of these abstract concepts.

That will be the core of my argument in this paper. In the other sections, I shall try to relate this approach to some of the other difficulties we have noticed: difficulties about different types of property object, difficulties about split ownership, difficulties about alternative private property systems, difficulties about corporations, and so on.

When the case against concepts like private property is made out, the difficulties are often exaggerated by the way they are presented. We saw that there were three main areas of difficulty: split titles; differences between different legal systems; and variations in the subjects and objects of property relations. The tendency is simply to pile up these problems on top of one another so that they appear to add up to a massive indictment of the concept. Look at the way Tawney presents them:

10 H. L. A. Hart, 'Definition and Theory in Jurisprudence', in his *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford 1983) 21–47.

11 These points are put forcefully by Grey, op cit, 76–81.

Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the state. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and moral justification. They may be conditional like the grant of patent rights, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a goldmine or rubber plantation.[12]

Everything he says here is correct, but he has raised a large number of *distinct* issues about the concept of property and it is not clear that our understanding of them—their implications and how they might be resolved—gains anything from their simple juxtaposition. I believe that any attempt to deal with these difficulties must approach them one at a time and in a certain order: we cannot deal with them all at once. If people keep saying, 'Ah—but what about the difference between tangible and intangible property?' when we are trying to untangle the differences in ownership as between England and France, we will get nowhere. A solution to these difficulties must be *articulated*, so that we deal patiently with one kind of difficulty at a time; when we have sorted one out, then we may see how the solution to the first difficulty clears the way to a solution for the second; and so on.

(3) THE CONCEPT OF A PROPERTY SYSTEM

The concept of property is the concept of a system of rules governing access to and control of material resources. Something is to be regarded as a material *resource* if it is a material object capable of satisfying some human need or want. In all times and places with which we are (and, as things stand, are ever likely to be) familiar, material resources are scarce relative to the human demands that are made on them. (Some, of course, are scarcer than others.) Individuals (either on their own or in groups) are therefore going to disagree about who is to make which use of what. These conflicts are often serious because, in many cases, being able to make use of a resource that one wants is connected directly or indirectly with one's survival. A problem, then, which I shall call the problem of *allocation*, arises in any society which regards the avoidance of serious conflict as a matter of any importance. This is the problem of determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when. The systems of social rules which I call property rules are ways of solving that problem.

This definition of the concept of property raises a number of distinct issues which I want to consider in some detail before moving on to discuss its relation to the concept of *private property*.

12 Tawney, op cit.

(*a*) *Social rules*

Not all societies need regard allocation as a problem (perhaps they value conflict) and, even among those that do, not all have rules of property. Having social rules is quite a sophisticated way of solving problems of this sort, and some societies may rely on more or less co-ordinated instinct and impulses, or even on nothing but the goodwill of the members. It seems best to say that these societies do not have institutions of property at all: they have solved the allocation problem in other ways. In other societies, the scarcity of resources and the exigencies of survival may be so extreme that the operation of social rules becomes practically impossible. In these societies, the problem of allocation will be resolved, to the extent that it is resolved at all, by force. But although I am putting 'instinctive' societies and Hobbesian 'states of nature' to one side, it would be a mistake to restrict all talk of property to contexts where something recognizable as a *state* with institutions of *positive law* exists. The notion of social rule that I am using is wider than that.[13] A primitive 'acephalous' society may have rules of property, enforced violently by the individuals whose 'rights' they define and socially by the pressure of kinship or peer groups, even though there is no determinate procedure for changing or recognizing such rules and even though there is no specialized apparatus of tribunals and police to uphold them.[14]

It is possible for a society to have property rules with regard to some of the resources it has to deal with but not others. If a particular resource is not the subject of an allocation problem in the circumstances of some society, there may be no need for rules regulating access to and control of it. Sometimes this point can be controversial. There is a fine line between a society recognizing common or collective property in a plentiful resource (say, land in a hunter/gatherer society) and there being no property rules at all with regard to that resource. This distinction has caused difficulty in a number of aboriginal land right cases in Australia and North America.[15] The difficulty is compounded by a failure to distinguish, even in principle, between a society or a tribe having *jurisdiction* over a resource (so that they regard themselves as competent to establish property rules in regard to it) and that resource being the collective or common property of the society or tribe.[16]

13 For the notion of a rule, see H. L. A. Hart, *The Concept of Law* (Clarendon Press, Oxford 1961) 54 ff.

14 See M. Taylor, *Community, Anarchy and Liberty* (Cambridge University Press, Cambridge 1981) Chaps 2–3.

15 For an American example, see *Caldwell* v *State* 1 Stew and P 327 (Alabama 1832), discussed in Donald W Large, 'This Land is Whose Land?—Changing Concepts of Land as Property' *Wisconsin L Rev* 1039 [1973] esp. 1041f. For a recent Australian decision, see *Milirrpum* v *Nobalco Pty Ltd* (1971) 17 FLR 141. See also the discussion and correspondence in 45 *Austl Law J* 333, 773 (1971), 46 *Austl Law J* 206, 305, 476, 663 (1972), and 47 *Austl Law J* 151 (1973).

16 I have discussed the importance of this distinction in J Waldron, 'Locke, Tully, and the Regulation of Property' 32 *Pol Studies* 98, 101–2 (1984).

(*b*) *Scarcity*

What I have said about scarcity may be misunderstood. Marx and Engels believed that the scarcity of material resources relative to human needs was not an irremovable feature of the human condition. Indeed they claimed that the abolition of scarcity was an absolute prerequisite for the successful establishment of socialism.[17] Marx foretold a time 'in a higher phase of communist society' when people would labour freely and creatively, and when 'the productive forces have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly'. When that happened, he suggested, we would be able to abandon any concern with distributive justice, allocation, rights, and property: natural resources and human products would simply be applied naturally to needs and demands as and when they arose.[18] I do not want to consider here whether Marx's vision represents a real social possibility, and whether, as C. B. Macpherson has argued, 'scarcity can be ended once and for all by the technological conquests of nature that are now so rapidly advancing' provided only that we abandon the bourgeois conception of man as a being capable of infinite, incessant and in principle insatiable desire.[19] Let us leave these important questions aside. There is, at least, no dispute between the socialist and the liberal traditions on the following points: that without some assumption of scarcity, there is no sense talking about property and justice; and that to the extent that we are willing to abandon that assumption, we must recognize the redundancy of this traditional problematic.[20]

(*c*) *Access and control*

The concept of property does not cover *all* rules governing the use of material resources, only those concerned with their allocation. Otherwise the concept would include almost all general rules of behaviour. (Since almost all human conduct involves the use of material resources, almost all rules about conduct can be related to resources in some way.) For example, most societies have rules limiting the use of weapons: they are not to be used to wound or kill people under ordinary conditions. Some jurists have suggested (in relation to private property systems) that rules prohibiting harmful use should be included among the standard incidents of ownership.[21] (Indeed, in our discussion of Susan and her Porsche, we suggested that speed restrictions might also be treated in this way.) Nothing much hangs on this, but I suspect that a better approach is to treat prohibitions on harmful behaviour as *general* constraints on action, setting limits

17 Karl Marx and Frederick Engels, *The German Ideology* Pt One, Students' edn, (C. J. Arthur ed., Lawrence & Wishart, London 1977) 56.

18 Karl Marx, *Critique of the Gotha Programme* (Progress Publishers, Moscow 1960) 17–18.

19 C. B. Macpherson, *Democratic Theory: Essays in Retrieval* (Clarendon Press, Oxford 1973) 19.

20 See David Hume, *A Treatise of Human Nature* Bk III, Pt II, ii; Hart, op cit, 192 ff; John Rawls, *A Theory of Justice* (Oxford University Press, Oxford 1971) 126 ff.

21 See e.g. Honoré, op cit, 123.

to what may be *done* in a given society. Then we can locate rules about property *within* those limits, as rules determining which (generally permissible) actions may be performed with which resources. As Nozick puts it, the rules of property determine for each object at any time which individuals are entitled to realize which of the constrained set of options socially available with respect to that object at that time.[22] So, for example, the rule that knives are not to be used murderously nor cars driven at a certain speed are not to be seen as property rules. They are part of the general background constraints on action which place limits on what anyone can do with any object whether it is his property—or something he has some sort of entitlement to use—or not.[23] Once we have settled what the background rules of action are, we can *then* turn to the property rules. If a particular action, say, riding bicycles, is permitted by law, it does not follow that the law permits me to ride any bicycle I please. The specific function of *property* rules in this regard is to determine, once we have established that bicycles may be ridden, who is entitled to ride which bicycle and when.

(4) MATERIAL OBJECTS

I have defined property in terms of *material* resources, that is, resources like minerals, forests, water, land, as well as manufactured artifacts of all sorts.[24] But sometimes we talk about objects of property which are not corporeal objects: intellectual property in ideas and inventions, reputations, stocks and shares, choses in action, even positions of employment. As we have seen already, this proliferation of different kinds of property objects is one of the main reasons why jurists have despaired by giving a precise definition of ownership. But I think

22 Nozick, op cit, 171.

23 Cf. Salmond, *Jurisprudence* 12th edn (P. J. Fitzgerald ed., Sweet & Maxwell, London 1966) 251n.

24 It is tempting to follow John Austin and draw a sharp line between *persons* and *things*—persons being humans and things 'such permanent external objects as are not persons'—and then insist that property is a matter of rules governing access to and control of things by persons. (See J. Austin, *Lectures on Jurisprudence*, 5th edn (R. Campbell ed., John Murray, London 1885) Vol. I, Lect. xiii, 357–8). This has what appears to be the moral advantage of ruling out slavery as a form of property *a priori*. But, as Austin himself notes, that analysis does nothing to rule out the possibility that a slave, though not a chattel, might occupy in a certain legal system 'a position analogous to a thing' in virtue of the law of personal status (ibid, I, xv, 385). A more common sense approach is to recognize that humans *are* material resources (in the sense we defined): they can be used to lift loads or drive mills, as footstools, and even as food. Slavery is wrong, no doubt; but the objection to systems which treat humans as one another's chattels ought to be ethical rather than conceptual. Moreover, Austin's approach has the disadvantage of driving a conceptual wedge between the idea of property in oneself and property in external objects: indeed the former locution must be, for him, impermissible. But some philosophers (notably J. Locke, *Two Treatises of Government* (Cambridge University Press, Cambridge 1960) II, section 27) have wanted to use that idea as the basis of their argument for private property. Maybe there are problems with such arguments. But we should not define our concepts in such a way as to make them impossible in advance.

there are very good reasons for discussing property in material resources first before grappling with the complexities of incorporeal property.

First, we should recall that the question of how *material* resources are to be controlled and their use allocated is a question which arises in every society. All human life involves the use of material resources and some of the most profound disagreements among human beings and human civilizations have concerned the basic principles on which this is to be organized. The allocation of material resources, we may say, is a primal and universal concern of human societies (though if Marx's optimism is justified, it may not concern us for ever). The question of rights in relation to *in*corporeal objects cannot be regarded as primal and universal in the same sense. In some societies, we may speculate, the question does not arise at all either because incorporeals do not figure in their ontology or, if they do, because human relations with them are not conceived in terms of access and control. That is a point about incorporeals in general. Turning to the incorporeal objects we are interested in, it is clear that questions about patents, choses in action, reputations, positions of employment, and so on are far from being universal questions that confront every society. On the contrary, one suspects that these questions arise for us only because other and more elementary questions (including questions about the allocation of material objects) have been settled in certain complex ways.[25]

Of course, once these prior questions have been answered, it is possible and often illuminating to characterize the solutions in terms which bring out certain analogies with the way in which questions about property have been answered. For example, once it is clear that individuals have rights not to be defamed, it may be helpful to describe that situation by drawing a parallel between the idea of owning a material object and the idea of having exclusive rights in a thing called one's 'reputation'. Indeed, such talk may take on a life of its own so that it becomes difficult to discuss the law of defamation *except* by using this analogy with property rights. So I am not suggesting that talk about property in incorporeals should be abandoned or 'reduced' to more complicated talk about other legal relations. But it is important to see that there is a reason for concentrating *first and foremost* on property rules about material resources, for it is only on that basis that talk about property in incorporeals becomes possible.[26]

A more extreme materialist view is taken by Jeremy Bentham, who insists that all talk of incorporeal property is 'fictitious', figurative', 'improper' and 'loose and indefinite':

25 For a discussion of the variety of incorporeal objects recognized in primitive societies, see R. H. Lowie, 'Incorporeal Property in primitive Society' 37 *Yale LJ* 551 (1928).

26 Thus I reject the approach of A. M. Honoré, 'Social Justice' in R. S. Summers (ed.) *Essays in Legal Philosophy*, (Oxford University Press, Oxford 1960) 61–94, who claims that 'no rational distinction can be drawn' between property rights in material goods and incorporeal things. I believe that our understanding of the latter is increased immeasurably by having a grip *first* on an understanding of the former.

In almost every case in which the law does anything for a man's benefit or advantage, men are apt to speak of it, on some occasion or other, as conferring on him a sort of property. . . . The expedient then has been to create, as it were, on every occasion, an ideal being and to assign to a man this ideal being for the object of his property: and these are the sort of objects to which men of science . . . came . . . to give the name of 'incorporeal'.[27]

(Austin took a similarly scathing view.)[28] However, I do not agree that talk of incorporeal property causes confusion in the law: there are, I think, topics, like copyright and patents, which are probably most lucidly discussed in these terms. My only point is that the analysis of concepts and arguments about incorporeal property must be postponed until we have a clear concept of property—and of private property—for material objects.

Perhaps I should add one or two detailed comments about the proliferation of incorporeal objects of property in modern legal analysis.

(*a*) *Property and 'government largesse'*

Sometimes the proliferation arises out of purely tactical considerations. In the United States, the protection given by the courts to property rights is much stronger than that given to most personal rights. As a result there is constant pressure to broaden the scope of 'property' by including the personal rights thereunder—an easier task than working directly to improve the protection for personal rights as such.[29] (This is the tactical background to Charles Reich's proposal to include welfare benefits, government jobs, occupational licences and other forms of 'government largesse' as objects of property. Reich believed that recipients of government largesse were too much at the mercy of administrators and policy-makers. To remedy this he proposed that these relations between individuals and government should be 'constitutionalized', so that these entitlements would be seen as matters of constitutional right and not subject to the day-to-day fluctuations of policy. This is surely a worthy aim. But the particular form of Reich's proposal was to bring all these interests within the ambit of the Fifth and Fourteenth Amendments' protection of property in the Bill of Rights.)[30]

27 Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (J. H. Burns and H. L. A. Hart eds, Methuen, London 1982) 211.

28 Austin, op cit, XLVI, 775f.

29 Cf. Noyes, op cit, 295.

30 Charles Reich, 'The New Property' in *Property: Mainstream and Critical Positions*, op cit, 179–98. A similar situation arose also in English Law. In *Gee* v *Pritchard* 2 Swanst 402, 36 ER 670 (1818), the doctrine was established that equity would act only to protect property rights. The result was to stretch 'property' almost beyond recognition to accommodate all the interests equity deemed worthy of protection. (See K. Vandervelde, 'The New Property of the Nineteenth Century' 29 *Buffalo L Rev* 325, 334 (1980)).

(b) Land

It is often said that the English law of real property is not concerned with land as a material resource but only with *estates* in land. Since there can be several different estates in a single piece of land, each with a different owner, it is impossible to identify an estate with anything corporeal. The law of real property is, therefore, said to be concerned with incorporeal objects (estates) not corporeal things like rocks and soil.[31]

This argument is plausible only if we have already identified property with *private* property. If we insist that the function of a property rule is to assign particular objects exclusively to particular individuals, then we *will* have to say that the objects of English real property law were estates not pieces of land. But that is not my view. The concept of property is the concept of rules governing access to and control of material resources, and such a system of rules may assign several people rights in the same resource. The situation appears to be that in its origins the English system of real property was not a *private* property system at all but a highly structured system of collective property.[32] Talk of incorporeal estates attaching to particular individuals was a way of characterizing that system (just as talk of 'reputations' as property objects was a way of characterizing the complexities of the law of defamation). Today, however, some of these incorporeal estates (notably fee simple) are so far-reaching in the rights over the material land they involve that they are tantamount in effect to private ownership of land. It seems most sensible to say then that the *forms* of a feudal system of collective property have been adapted by the English law to express the modern *reality* of private property in pieces of land.[33]

What about the corporeality of land itself? A piece of land is not usually taken to be identical with the soil and rock etc. at a given location.[34] If anything, the land is identified with the *location* itself: it is, so to speak, a region of three-dimensional space rather than the sort of material object that one might locate *in* space.[35] There are two ways of responding to this argument. We might accept the conclusion but insist that spatial regions can still be regarded as material resources. Although they differ ontologically from cars and rocks they also seem to be in quite a different category from the complexes of rights that

31 See e.g. F. H. Lawson, *The Law of Property* (Clarendon Press, Oxford 1958) 16; E. H. Burn (ed.) *Cheshire's Modern Law of Real Property*, 12th edn (Butterworths, London 1976) 32.

32 See F. S. Philbrick, 'Changing Concepts of Property in Law' 86 *U Pa L Rev* 707–08 (1938); see also Noyes, op cit, 232 ff.

33 See R. E. Megarry and H. W. R. Wade, *The Law of Real Property* 4th edn, (Stevens & Sons, London 1975) 14–15; also O. Kahn Freund, 'Introduction' to Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge & Kegan Paul, London 1949) 42.

34 But the Californian Civil Code defines land as 'the solid material of the earth': see G. W. Paton and D. P. Derham, *A Textbook of Jurisprudence*, 4th edn (Clarendon Press, Oxford 1972) 508–09. See also Salmond, op cit, 416–17.

35 This is the view of A. Kocourek, *Jural Relations*, 2nd edn (Bobbs Merrill, Indianapolis 1928) 336.

constitute familiar incorporeals—patents, reputations, choses in action and so on. It is philosophically naive to think that the fact that we have to regard *regions* as property objects adds anything to the case for regarding, say, choses in action in that way. The second response is more subtle. We may concede that land, as conceived in law, is too abstract to be described as a material resource. But we may still insist that the primary objects of real property are the actual material resources like arable soil and solid surfaces for dwellings which are located in the regions in question. Until recently, these resources have been effectively immovable and so there has been no reason to distinguish 'land as material' from 'land as site'.[36] But developments like modern earth-moving and high-rise building necessitate a more complex system of rights over these resources, packaged in more sophisticated ways. Thus the concept of land as site has now had to be detached from its association with relatively immovable resources and employed on its own as an abstract idea for characterizing these more complicated packages of rights. Still, in the last analysis, the system of property in land is a set of rules *about* material resources and nothing more.

(c) *Modern forms of wealth*

Both worries about land stemmed from a desire to preserve a link between the concept of property and that of 'economic reality'. To preserve that link, it was suggested we should reject the view that property is primarily a matter of material resources. The same suggestion has been made more generally in the literature. Many believe that in the modern commercial world, wealth no longer consists in the possession and control of material objects, but is a matter of less tangible considerations—complicated economic relations which cannot be reduced to the ownership of things.[37]

Once again, this worry seems to be based on the identification of property with private property. If we ask, 'What things do modern men *own* which are definitive of their wealth?', we will certainly have to conjure up incorporeal things to correspond to the complex legal relations that in fact define their position in the commercial world. But if we say instead that property is a matter of rules about access to and control of material resources, but not necessarily about ownership, then we can still say that a man's wealth is constituted for the most part by his property relations. He may not be the owner of very many resources; but the shares he holds, the funds he is involved in, and the options and goodwill he has acquired, together define his position so far as access to and control of material resources is concerned. This view, I think, reflects the complexity of modern economic life much more faithfully than the rival view which purports to treat shares, options, goodwill as though they were objects simply and straightforwardly on a par with minerals, land, and factories.

36 This distinction is from Noyes, op cit, 438.

37 Ibid; see also Friedmann, op cit, 96.

(d) Rights as property?

Finally, we should consider Salmond's well-known insistence that it is improper to talk about the ownership of things and that we ought to talk about the ownership of *rights* instead. Salmond's argument seems to be based on considerations of consistency: it is inconsistent to talk sometimes of owning rights and at other times of owning things; we ought to opt for one style or the other. Since it is easier to translate talk about owning things into talk about owning rights than vice versa, the latter is the style we should choose.[38]

There is some merit in this. It *is* worth recalling that the term 'property' is correctly applied to rights rather than things, and that the common usage whereby material objects are called property ('This Porsche is Susan's property') is at best a figure of speech.[39] But the tendency to make this mistake is diminished anyway, once we distinguish the concept of property from that of private property.[40]

On the other hand, Salmond's approach is analytically awkward. If we say that rights can be owned, we can hardly then go on to say that ownership involves having certain rights, without moving in a circle. A better approach is the following. To say that a person *owns* X is to say that he is vested by the law with certain rights in respect of X. He does not own the rights, rather he *has* them, and because he has them he owns the object in question. However, if his rights over X are not sufficiently comprehensive, we may want to deny that he is the owner of X. If so, it is a mistake then to try and re-introduce the concept of ownership by the back door by insisting that the person at least *owns* his limited rights over X.[41]

(5) THE CONCEPT OF PRIVATE PROPERTY

I now want to say what distinguishes a system of *private* property from other types of property system. Some jurists give the impression that by making out a case for the establishment of *some* system of settled rules about material objects, they have thereby refuted socialism.[42] This is a mistake. A socialist system, as much as a system of private property, is a system of rules governing access to and control of material objects. A case for private property must relate to what is distinctive about this type of system, and not merely to the concept of property rules—to which socialists and capitalists have a common commitment. Marx, for example, regarded it as obvious that all forms of society require some system of property: 'That there can be no such thing as production, nor, consequently,

38 *Salmond on Jurisprudence*, 7th edn (Sweet and Maxwell, London 1924) 279.

39 Bentham, op cit. 211n.

40 Cf. Macpherson, 'The Meaning of Property', op cit, 6–9.

41 Cf. W. W. Cook, 'Introduction' to W. N. Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, New Haven 1923) 12. Salmond's line is rejected also by the present editor of his *Jurisprudence* 12th edn, op cit, 250–1, and by G. Williams, 'Language and the Law', 61 *LQ Rev* 384, 386 (1945).

42 E.g. S. Benn and R. Peters, *Social Principles and the Democratic State* (George Allen and Unwin, London 1959) 155.

society, where property does not exist in any form, is a tautology. . . . But it becomes ridiculous when from that one jumps at once to a definite form, e.g. private property.'[43]

The definition of private property that I am going to give is very abstract. But it has I think the great advantage of separating the question of what *sort of system* private property is from any particular theory of how private property is to be defended.

(*a*) *Private property*

In a system of private property, the rules governing access to and control of material resources are organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual.

This claim requires clarification in two respects. We need to know what it is for a system of property rules to be *organized around* an idea. And we need to know what exactly, in the case of private property, this organizing idea of *belonging* involves. Let me say something about the latter issue first.

The organizing idea of a private property system is that, in principle, each resource *belongs* to some individual. At its simplest and most abstract, the idea can be explained in the following way. Imagine that the material resources available for use in a society have been divided into discrete parcels (call each parcel an *object*), and that each object has the name of an individual member of the society attached to it. (There are many ways in which this division of resources and the allocation of names to objects could be made. I make no assumptions about the way in which these processes take place. Both are matters for a theory of distributive justice.)[44]

A private property system is one in which such a correlation is used as a basis for solving what we earlier called the problem of allocation. Each society faces the problem of determining which, among the many competing claims on the resources available for use in that society, are to be satisfied, when, by whom, and under what conditions. In a private property system, a rule is laid down that, *in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by the society as final.* When something like the idea of a name/object correlation is used in this way as a basis for solving the problem of allocation, we may describe each such correlation as expressing the idea of *ownership* or *belonging*. 'Ownership', then, on my definition, is a term peculiar to systems of private property. The owner of a resource is simply the individual whose

43 Karl Marx, *Grundrisse,* in *Karl Marx: Selected Writings* (D. McLellan ed., Oxford University Press, Oxford 1977) 349.

44 See Ronald Dworkin, 'What is Equality?—II: Equality of Resources' 10 *Phil and Pub Aff* 283–345, esp. 285–7 (1981).

determination as to the use of the resource is taken as final in a system of this kind.

Clearly, the idea of ownership is a *possible* way of solving the problem of allocation. But everything would depend on whether people accepted it and were prepared to abide by its fundamental rule. Partly this would be a matter of the acceptability of the name/object correlation. People would not be happy with a random or arbitrary correlation, or with a correlation under which *their* name was not attached to any object worth using. That is a matter for the theory of justice. But there might also be controversies about the *very idea* of ownership. People may ask, 'Why should *one* individual be put in a specially privileged position with regard to a given resource? Why not insist that, for *all* resources (or at least all the most important resources), the claims of *every* citizen are to be treated on an *equal* basis? Or why not insist that resource use is to be determined in each instance by reference to collective aims of the society?' These questions constitute the ancient problem of the justification of private property. The definition of private property that I have given enables us to see, in the abstract, just what is at stake when these questions are asked. It enables us to see what is distinctive and controversial about private property.

I should perhaps say something now about the organizing ideas of those types of property system that are usually opposed to private property in such debates. The two most common alternatives are *common property* and *collective property*.

(b) Collective property

In a system of collective property, the problem of allocation is solved by the application of a social rule that access to and the use of material resources in particular cases are to be determined by reference to the collective interests of society as a whole. If there is any question about how or by whom resources like land, industrial plant, housing and so on are to be used, then those questions are to be resolved by favouring the use which is most conducive to the collective social interest. (We are familiar with this in the way that the control of major productive resources—industrial plant, mines, forests, agricultural land, and so on—are organized in socialist countries.)

Of course this leaves open two very important questions. First, what *is* the collective interest? Is it to be understood in an aggregative welfarist way, or a statist way, or in some other holistic way, or what? Secondly, given some conception of the collective interest, what procedures are to be used to apply that conception to particular cases? Are we to have a central economic planning committee, or the delegation of collective responsibility on trust to expert managers, or some sort of national democratic structure of decision-making, or local decision-making with certain national reservations, or what? A conception of collective property is not completely specific until these questions have been answered. But the general idea is clear enough: in principle, material resources are answerable to the needs and purposes of society as a whole, whatever they are and

however they are determined, rather than to the needs and purposes of particular individuals considered on their own. No individual has such an intimate association with any object that he can make decisions about its use without reference to the interests of the collective.[45]

(*c*) *Common Property*

The idea of common property is superficially similar to that of collective property, but actually quite different. It is similar to the extent that no individual stands in a specially privileged situation with regard to any resource. But it is different inasmuch as the interests of the collective have no special status either. In a system of common property, rules governing access to and control of material resources are organized on the basis that *each* resource is in principle available for the use of *every* member alike. In principle, the needs and wants of every person are considered, and when allocative decisions are made they are made on a basis that is in some sense *fair to all.*

Our familiarity with this idea does not stem from our knowledge of any society in which it is the dominant form of property, for there is no such society. It stems rather from our familiarity with the way in which the allocation of certain resources are handled in almost all societies: parks and national reserves are the best example. From time to time, governments have attempted to institute common property in relation to other resources as well: one thinks of the experiment by the city of Amsterdam to make bicycles freely available on the basis that anyone may use a 'common' bicycle for a journey within the city provided that when he has finished he leaves it where it is so that the next comer can use it on the same basis as well. The experiment failed. We should note also that many philosophers have used the idea of comon property to characterize the initial situation of men in relation to resources in the so-called 'State of Nature'.[46]

In the case of finite resources, or resources which cannot be used simultaneously by everyone who wants to use them, the operation of a system of common property requires procedures for determining a *fair* allocation of uses of individual wants. This is the task of a theory of justice, once a system of common property has been adopted. To illustrate, let us consider the description of rights in one such possible system given by G. Panichas:

> (a) An individual can legitimately expect that if he has an interest in or use for some thing this claim will be considered, along with the claims of others (if such claims exist) as grounds sufficient for his having (so as to use) that thing. (b) If more than one such legitimate claim exists, then an individual can expect to *either* share in the use of the thing where sharing is possible, *or,* if sharing is not possible, to take his turn on a fair first come

45 Macpherson describes substantially the same idea under the heading of 'State property', op cit, 5–6.

46 For the tradition in Natural Law theory which considers the possibility of common property without a state apparatus, see the discussion in Tully, op cit, 68 ff. See also Richard Tuck, *Natural Rights Theories* (Cambridge University Press, Cambridge 1979) 60–1.

first served basis. (c) If an individual ceases to have an interest in or use for that thing which he has had an interest in or use for, others can legitimately expect to have that thing so as to use it in accord with the conditions of (a) and (b) above.[47]

The fact that the implementation of such a principle is likely to involve in practice a state apparatus for determining authoritatively whose claim to use a given resource should justly prevail at a given time may lead to a blurring of the distinction between common property systems and (statist) collective property systems. But in principle the ideas may be distinguished and each is different from the idea of private property.

In all three cases, what I have outlined is rather simplistic compared with the complicated property rules of most actual societies. It may be thought unrealistically simple in two ways. First, the terms in which I have described the different types of system are very abstract. For example, in real private property systems, nothing like a deliberate name/object correlation ever actually takes place. Secondly, as we all know, there are no examples of pure systems of any of these three types. All systems combine the characteristics of private property, common property and collective property to some degree. I want to consider both points.

First, the point about the abstractness of my characterization. In relation to private property systems, of course my claim is not that people ever actually get together to divide resources into parcels or objects and to allocate names to objects in the way I described. Rather my claim is that the *idea* of ownership, which is crucial to the operation of these systems, is something like the idea of such a correlation. An idea of this sort—an idea whose gist is expressible in terms of this image—serves as an essential point of reference by which the operation of these systems of very detailed and complicated rules is to be understood.

To clarify this, we need to know what it is for a system to have such a point of reference and why such an organizing idea is necessary. It is possible that a property system might exist without any 'organizing idea' at all. There might be nothing but a set of rules governing the allocation of resources without any conception of the point or general idea behind these rules. Or, if the rules are conceived to have a point, it may be understood in terms of general social goals like utility and prosperity rather than any abstract property idea. However, if a society of this sort were at all complex, then citizens would have great difficulty following the rules. Everyone would need to become a legal expert to determine at any point what he could or could not do in relation to the resources that he was inclined or tempted to use. He would have to acquire a detailed knowledge of the rules for each resource and of his rights, powers, liberties and duties in relation to it. There would be no other way of ensuring in ordinary life, that one abided by

47 See G. Panichas, 'Prolegomenon to a Political Theory of Ownership' 64 *Archiv fur Rechts- und Sozialphilosophie* 333, 340 (1978). See also G. A. Cohen, 'Capitalism, Freedom and the Proletariat' in Alan Ryan (ed.) *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, Oxford 1979) 9–25, esp. 16–17.

the rules except to find out what they were and learn them by heart.

To a large extent, our society is not like that. It is possible for the layman to go about his business most of the time without this detailed knowledge. This point has been well expressed by Bruce Ackerman. Every day in a private property society the layman has to make countless decisions as to whether one thing or another may be used by him for some purpose that he has in mind. In making these decisions it is rare for him to find it necessary to obtain professional legal advice. 'Indeed, most of the time Layman negotiates his way through the complex web of property relationships that structures his social universe without even perceiving a need for expert guidance.'[48] He can do this because he knows in an informal and non-technical way which things are 'his' and which are not. If something is 'his' then (roughly) *he* determines what use is to be made of it; if not, somebody else does. Of course this is rough and ready knowledge by the standards of legal science. But it is there and it is socially very important: in the case of the overwhelming majority of citizens, it provides the main basis on which they learn to abide by and apply the property rules of their society.

The organizing idea of a given property system may also have important functions in relation to its legitimation. The problem of allocation, as we have seen, is both difficult and dangerous. Disputes about the use of resources and about what property rules should be are likely to be among the most deadly disputes that can arise. If violence is not to erupt continually, they must be settled on terms whose legitimacy is widely acknowledged. But the complexity and detail of economic life is such that there is no question of securing a consensus for the justification of each particular rule of property (e.g. 'Cheryl to have a right of way across Blackacre', 'The factory foreman to have responsibility for the maintenance of that type of machine', and so on). Justification and legitimation necessarily proceed in general terms on a fairly broad front; and the organizing idea of a property system (the basis on which its rules are learned and understood for application in everyday life) provides a natural point of contact between legitimating considerations and the grasp which ordinary citizens have on the rules.

But all this talk about the organizing idea of a private property system makes sense only on the assumption that we can say whether a given system, in real life, *is* a system of private, common or collective property. Is this a warranted assumption? This raises the second of the issues I said we had to consider.

As categories of social, economic or political science, it is clear that these ideas of a private property system, a collective property system, and a common property system are very much 'ideal typic' categories. It is clear also that, to

48 Ackerman, op cit, 116 and also the discussion at 97 ff. For the claim that some ability of the sort Ackerman describes is essential to the operation of a market economy, see James Buchanan, *The Limits of Liberty* (University of Chicago Press, Chicago 1975) 18.

quote Weber, 'none of these ideal types . . . is usually to be found in historical cases in "pure" form.'[49] In Britain, for example, some industries (like British Leyland) are collectively owned, while others (like Times Newspapers) are privately owned. In the Soviet Union, the most recent constitution makes explicit provision for the private ownership of houses and smallholdings, even while it insists that the land and basic means of production are the property of the state.[50] Both these systems, with their respective mixes of private property rules and collective property rules, also have certain common property rules, controlling resources like Hyde and Gorky Parks, respectively. This means that our ideal types of property system are somewhat difficult to apply in the real world. We can identify four main sources of difficulty here.

(i) As we have seen, the ideas of common, collective and private property represent focal points for political disagreement and debate in each society. To put it crudely: socialists argue for a system of collective property, radicals for something like common property, and capitalists and their liberal ideologues for private property. In practice, these arguments seldom result in outright victory for one side or the other. More likely there will be a measure of *compromise*, with access to and control of some resources being private, others common, and others organized on a collective basis. That has certainly been our experience in the West.

(ii) Sometimes debate about the problem of allocation is conducted in a way that makes *direct* reference to social goals (like prosperity or stability) without the mediation of any organizing idea like private or collective property at all. We have seen that this can hardly happen all the time and across the board, but it may happen occasionally and haphazardly. These debates, then, may yield 'pragmatic' solutions to particular allocation problems which fit only loosely with the general approach to property rules in the society concerned.

(iii) No society, whatever its ideological predilections, can avoid the fact that some resources are more amenable to some types of property rule than others. In the case of sunlight and air, for example, it seems hard to envisage anything like private property. Common property here seems the 'obvious' solution: people simply make use of these resources as and when they want to. For other resources, like clothes, tooth-brushes, and food for the table, it is hard to see how they could be regulated except on a private property basis. Finally there are resources like highways and artillery pieces, over which most societies have found it necessary to exercise collective control. These are certainly not hard-and-fast *a priori* truths: the circumstances of human life may change; and, even if they remain the same, someone could be committed so fanatically to a particular property idea that he

49 Max Weber, *Economy and Society* (G. Roth and C. Wittich eds, University of California Press, Berkeley 1968) Vol. I, 216 (referring to three ideal types of legitimate domination). For Weber's discussion of the notion of ideal types, see ibid, 9 ff.

50 *Constitution of the Union of the Soviet Socialist Republics,* Article 13; see S. E. Finer, *Five Constitutions* (Penguin Books, Harmondsworth 1976) 151.

sought to apply it across the board to *all* resources.[51] But for practical purposes, they represent outer parameters within which different systems of property may be established.[52]

(iv) As we shall see in section 8, systems of private property have the peculiarity that they permit individual owners to split up the rights that they hold and therefore to produce new property arrangements which, when looked at statically, may seem to imitate the arrangements of other non-private property systems. (By this means, for example, joint ownership and common ownership can come to be categories *of a private property system.*)

Even in the face of these and other complications, I think it is still possible to say, of most actual societies, whether their property system is one of common, collective or private property. Partly this is a matter of the society's self-understanding. In Britain, despite considerable industrial nationalization, there remains a feeling that property rules are still organized primarily around the idea of private ownership. In the Soviet Union, by contrast, despite the leeway for the private property which we have noticed, the official ideology and self-understanding of the society points firmly towards state or collective property as the dominant property idea. This is expressed in the Soviet Constitution where it is said that state property is 'the principal form of socialist property'.[53]

Of course, all this may be controversial in a given society; perhaps it is possible for a society to deceive itself in this regard. As an objective constraint, we may want to look at the way in which the resources deemed most important in the lives of the people (or, perhaps, those resources in relation to which the problem of allocation is in the long run most acute) are controlled. The dominance of the Marxist paradigm in social theory has generally meant that property rules in relation to the main material means of production are taken as the crucial index.

(6) THE CONCEPT AND CONCEPTIONS OF OWNERSHIP

I want now to return to the problems of the *definition* of private ownership. Ownership, as we have seen, expresses the very abstract idea of an object being correlated with the name of some individual, in relation to a rule which says that society will uphold that individual's decision as final when there is any dispute about what is to be done with the object. The owner of an object is the person who has been put in that privileged position.

51 See the discussion in Salmond, op cit, 252.

52 Of couse, there are disputes about these parameters. Many of the arguments in favour of socialist collective property, for example, boil down eventually to the claim that the nature of human production (in advanced societies, at least) is such that the means of production are intrinsically apt for collective property relations and peculiarly inapt for private ownership. They even suggest that the prevalence of corporate ownership in private property systems indicates the truth of this claim. Needless to say defenders of private property deny this.

53 *Soviet Constitution*, Art. 11; see Finer, op cit, 151.

But how is this very abstract idea related, in a particular system, to the detailed legal rules conferring particular rights, powers, liberties, on particular individuals? Until we have given some account of this, we will not be able to say *how* the idea of ownership performs the various functions that I outlined for it in the preceding section. For example, does the idea operate as some sort of informal or shorthand *summary* of the rules? If so, then we ought to be able to indicate how it works by stating in a definition what the legal rights of owners are characteristically taken to be. Or perhaps the idea of ownership has the same relationship to the detailed legal rules of property as the moralistic idea of *infidelity* has to the detailed matrimonial law of adultery: it determines the spirit, rather than abbreviates the content, of the legal rules. Or maybe there is some other relationship.[54] That is the question I will consider in this section.

As we saw in section 1, most jurists now agree that it is impossible to capture the relation between the idea of ownership and the detailed rules of a private property system in a precise legal definition. The definitions that have been proposed in the past seem to fall into two categories. Some of them are framed in terms which are 'so extravagant as to be laughable',[55] while others appear to suffer from the opposite vice of innocuous vacuity. In the former category, we may place Blackstone's famous definition of ownership as 'that sole and despotic dominion which one man has over the external things of the world, in total exclusion of the right of any other individual in the universe.'[56] And for the second category, we may consider the definition proposed in the German Civil Code: 'The owner of a thing may, as far as the law and the rights of others are not violated, deal with his property as he wishes and exclude others from interference.'[57] The trouble with this definition is that the clause referring to the law and the rights of others effectively empties the definition of any content.

But definitions seeking to ply between the Scylla of extravagance and the Charybidis of vacuity seem true, at most, only of the ownership of *some* types of resource by *some* people in *some* societies at *some* times. Vary the society, the resource, or even the circumstances of individual owners, and the definition becomes inapplicable. This seems to indicate that the term 'ownership' cannot be regarded as a univocally descriptive term, picking out the same legal right or bundle of rights in all circumstances. How are we to respond to this fact?

One possibility is that we conclude that the term is simply *ambiguous*—rather like the term 'right' before Hohfeld went to work on it—covering a variety of

54 For an account of different views of the relation between the legal term 'ownership' and ordinary language, see Ackerman, op cit, 10 ff.

55 Noyes, op cit, 297.

56 W. Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, Chicago 1979) Vol. II, 2. (Elsewhere Blackstone modified this definition so that it became more like the one I cite in the passage immediately following: ibid, I, 138.)

57 *The German Civil Code* BGB, Article 903; see Dorothy Wayand, 'Owners Beware: Themes and Variations in Property Law' 28 *U New Brunswick LJ* 158 (1979).

quite distinct legal phenomena from usage to usage.[58] If we take this approach, we will probably end up abandoning the term altogether (as Hohfeld suggested we should abandon 'right'), replacing it in every context by a less ambiguous statement of the legal relations we want to draw attention to. This suggestion is reinforced by the view (in fact still controversial in the literature)[59] that, in modern legal practice, it is seldom necessary in the course of pleading to set up a claim to the *ownership* of a disputed good. Litigation revolves around the idea of *a better title to possess*, and in general around some of the particular rights which we might take to be connected with ownership, rather than ownership itself.

However, before being panicked into abandoning the concept, we ought to consider other possible relations between the 'intuitive' idea of ownership and the detailed rules of a private property system. Three other approaches should be considered. The first offers a 'definition' of a different sort: the term 'owner' picks out a person, not in virtue of her having specific rights etc. over a resource, but in terms, say, of her having *more* rights in relation to a resource than anyone else. The second and third approaches, by contrast avoid the idea of definition by necessary and sufficient conditions. On the second approach, the use of 'ownership' is elucidated in terms of 'family resemblances' between systems of property or between bundles of individual rights; while on the third approach (which I shall eventually favour), its use is to be explained on the basis that ownership is a *contested concept* capable of different *conceptions*.

The first of these approaches is described (but not ultimately accepted) by A. M. Honoré: 'If ownership is provisionally defined as *the greatest interest in a thing which a mature system of law recognizes*, then it follows that, since all mature systems admit the existence of "interests" in "things", all mature systems have, in a sense, a concept of ownership.'[60] A similar suggestion is made by Austin:

> [T]hough the possible *modes* of property are infinite, and though the indefinite power of user is always restricted more or less, there is in every system of law, some one mode of property in which the restrictions to the power of user are fewer [the power of indefinite user more extensive] than in others. . . . And to this mode of property, the term dominion, property, or ownership is pre-eminently and emphatically applied.[61]

The trouble with these suggestions is that they lead us to identify 'owners' in even the most collectivist systems. Even with regard to a harvester on a Soviet farm, there may be someone who has *more* rights in respect of it than anyone else. Thus

58 See Hohfeld, op cit, 36 ff.

59 See A. D. Hargreaves, 'Terminology and Title in Ejectment' 56 *LQ Rev* 376 (1940); W. Holdsworth, 'Terminology and Title in Ejectment—A Reply', ibid, 480; J. W. C. Turner, 'Some Reflections on Ownership in English Law' [1941] *Can Bar Rev* 342; A. K. R. Kiralfy, 'The Problem of a Law of Property in Goods' 12 *Mod L Rev* 424 (1949); A. D. Hargreaves, 'Modern Real Property' 19 *Mod L Rev* 14 (1956); and see also R. W. M. Dias, *Jurisprudence*, 4th edn (Butterworths, London 1976) 396 ff.

60 Honoré, op cit, 108.

61 Austin, op cit, II, 824.

the link between ownership and private property is in danger of being severed.

Moreover, this approach is perhaps *too* pessimistic about the prospects for a more substantial definition. Although there are the variations that we noticed in section 1, there is also *some* common ground. As Honoré points out:

> There is indeed a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China and any other modern country one may care to mention. Everywhere the 'owner' can, in the simple uncomplicated case . . . use it, stop others using it, lend it, sell it, or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or knock over his vase. Ownership, *dominium, propriete, Eigentum* and similar words stand not merely for the greatest interest in particular systems but for a type of interest with common features transcending particular systems.[62]

Honoré has done valuable work, setting out a list of what these common features are—what he calls 'the standard incidents' of 'the full liberal concept of ownership' in ordinary 'uncomplicated' cases.[63] I shall only list them here, very briefly, for (with one exception) I have no wish to improve on the details of his account. In standard cases, Honoré suggests that an owner of an object X will have: (1) a right to the possession of X; (2) a right to use X; (3) a right to manage X (that is, determine the basis on which X is used by others if it is so used); (4) a right to the income that can be derived from permitting others to use X; (5) a right to the capital value of X; (6) a right to security against the expropriation of X; (7) a power to transmit X by sale, or gift, or bequest to another; (8) the lack of any term on the possession of any of these rights etc.; (9) a duty to refrain from using X in a way that harms others; (10) a liability that certain judgments against her may be executed on X; (11) some sort of expectation that, when rights that other people have in X come to the end of their term or lapse for any reason, those rights will, as it were, return 'naturally' to her. My only quarrel is with Honoré's feature (9)—the prohibition on harmful use. As I have already indicated (in section 3(c) above), these prohibitions are better regarded as general background constraints on action than as specific rules of property (let alone as specific incidents of *private* property).

It would be a mistake to think that Honoré intends this list of standard incidents to be taken as necessary or jointly sufficient conditions of ownership. I do not think his account is of that type. It is more an elucidation of certain rather common features of ownership along the lines of a Wittgensteinian 'family resemblance' analysis.[64] The idea of family resemblance enables us to accommodate a certain amount of variation here and there, without abandoning our faith in some constancy in the way the term is used. Thus, for example, the fact that, in particular regimes, incident (7)—the power of transmission—is

62 Honoré, op cit, 108.

63 Ibid, 112–28. See also Frank Snare, 'The Concept of Property' 9 *Am Phil Q* 205 (1972), and Becker, op cit, 18 ff, for other approaches along these lines.

64 For the idea of 'family resemblance', see Ludwig Wittgenstein, *Philosophical Investigations* G. E. M. Anscombe trans., Basil Blackwell, Oxford 1974) 32e ff.

limited, or incident (6)—the immunity against expropriation—is not guaranteed, need not deter us from describing persons in that regime as 'owners' or the regime itself as a system of private property. It need not deter us from that any more than the fact that a particular member of the Churchill family lacks the Churchillian roman nose deters us from attributing 'the Churchill face' to him. We do not have to insist on a strictly analytical definition in order to understand these concepts: providing we can see what Wittgenstein called the 'complicated network of similarities, overlapping and criss-crossing . . . sometimes overall similiarities, sometimes similarities of detail', we can account for the usefulness of the concept in social life.[65]

There is, however, an important aspect of this variability that this approach fails to capture. This has to do with the role of critical argument. Because the content of ownership may vary from society to society, despite the broad similarities noted above, it becomes possible for people to argue that the idea of ownership prevalent in their society is better or worse than the idea of ownership prevalent elsewhere. Such suggestions, which on the surface seem purely conceptual arguments, can easily become vehicles for advancing practical proposals for changes in property rules.

Suppose, for example, that in society A private goods not disposed of by will on their owners' death are taken over and redistributed by the state, whereas in society B they are transmitted by rules of inheritance to the owners' relatives and dependants. A citizen of society A who is in favour of the latter arrangement may argue as follows: 'We don't *really* have a system of ownership in our society; a *real* system of ownership (like that in society B) is one which recognizes not only the power of bequest but also the right of inheritance.' To this suggestion, a defender of the arrangements in society A (call him John Stuart Mill) may reply:

> Nothing is implied in [private] property but the right of each to his (or her) own faculties, to what he can produce by them, and to whatever he can get for them in a fair market; together with his right to give this to any other person if he chooses, and the right of that other to receive and enjoy it. It follows, therefore, that although the right of bequest, or gift after death, forms part of the idea of private property, the right of inheritance, as distinguished from bequest, does not.[66]

What sort of disagreement is this? At one level, we might say that Mill and his opponent are simply disagreeing about what rules of property to have. We give individuals a certain package of rights over resources; should we give the relatives and dependants of those individuals the same rights over the same resources after the individuals have died? If the question is stated blandly in that way, then it can be resolved in the way that all social questions about the detailed assignment of rights are resolved—by direct appeal to the goals of the community such as liberty, prosperity, stability, or whatever.

65 Ibid, 32e.

66 John Stuart Mill, 'Of Property' in *Property: Mainstream and Critical Positions*, op cit, 87.

But what if Mill insists that, whatever the answer to *that* question may be, his point about the *true meaning* of ownership and private property still remains? 'That the property of persons who have made no disposition of it during their lifetime, should pass first to their children, and failing them, to their nearest relations, may be a proper arrangement or not, but it is no consequence of any principle of private property.'[67] Is this anything more than an empty verbal quibble?

A cynic may suggest that Mill's tactic here is one of 'persuasive definition': he is attempting to give 'a new conceptual meaning to a familiar word without substantively changing its emotive meaning . . . with the conscious or unconscious purpose of changing, by this means, the direction of people's interests.'[68] The term 'private property' has a certain emotive force: it awakens feelings and dispositions to act, not just because of its descriptive meaning, but also directly and in its own right as an emotively loaded *term*. Of course, 'private property' and 'ownership' are hardly paradigms of emotive terminology like 'freedom' or 'democracy', for example. Nevertheless, in a society where 'The Defence of Private Property' can still serve as a rallying cry and 'Communism' remains a dirty (i.e. negatively emotively loaded) word, these terms are open to the sort of use that the emotivist philosophers described. Mill, with his 'definition' of private property, is seeking to dissociate the emotive force of the term from the institution of the inheritance of intestate goods.

C. L. Stevenson published his account of persuasive definitions in 1938. Since then another account of the sort of processes that are going on here has been produced by W. Gallie in his paper, 'Essentially Contested Concepts'.[69] There are several important differences between Stevenson's analysis and Gallie's. For one thing, Gallie's account of conceptual disagreements is less cynical than Stevenson's: instead of attributing to the proponent of a conceptual definition the intention to alter the direction of people's interests by covert manipulation of the connection between descriptive and emotive meaning, Gallie suggests that there may be 'concepts whose *proper use* inevitably involves endless disputes about their proper uses on the part of their users.[70] Art, democracy, and the Christian way of life are the examples he gives of concepts whose *essence* it is to be contested in this sense. Put like that it sounds as though Gallie wants to be what philosophers would call a *realist* about what is essential to a concept. But it later emerges that Gallie takes a more pragmatic approach: a concept is essentially contested only if the sort of definitional disagreements that Gallie describes are likely to be fruitful

67 Idem.

68 See C. L. Stevenson, 'Persuasive Definitions' 47 *Mind* 331 (1938).

69 56 *Proc Aristotlean Soc* 167–98 (1955–6). For the initial reception of Gallie's idea, see especially W. Connolly, *The Terms of Political Discourse* (D. C. Heath, Lexington, Mass 1974) Chap. 1; S. Lukes, *Power—A Radical View* (Macmillan, London 1974) 9 passim; J. N. Gray, 'On the Essential Contestability of Some Social and Political Concepts' 5 *Pol Theory* 331 (1977).

70 Gallie, op cit, 169.

in the sense that they contribute to the purposes for which, or to the tradition in whose context, the concept was originally introduced.[71]

The second main difference between Gallie's account and Stevenson's is also connected with the idea of *essential* contestability. Persuasive definition, in Stevenson's sense, depended on there having been a fixed and stable descriptive sense for the term in question which was then changed, suddenly or gradually, in favour of what the manipulators hoped would be a new fixed and stable descriptive sense. Their purposes in persuasively redefining the term could not be achieved without the substitution of one fixed meaning for another: for the emotive force of a word only operates through its *constant* conjunction with a given set of descriptive ideas. No such stability or determinacy is presupposed on Gallie's account. If the *proper* use of a term involves disputing its content, then everyone who uses it will be aware of the disagreements. So there will be only a few users whose naive confidence in a fixed descriptive sense can be taken advantage of by a Stevensonian manipulator. Since almost everyone knows that the concept is the subject of disagreement, almost no-one will associate its evaluative or emotive force uncritically with any determinate set of ideas.

Despite its wide currency in modern political theory, Gallie's idea of essential contestibility remains controversial.[72] But, on both the grounds mentioned in the previous paragraph, his model seems preferable to Stevenson's as an account of the disputes about the meaning of 'ownership' and 'private property'. The variations discussed in section 1 make it inevitable that no single definition of ownership can be regarded as *the* standard definition: the most we can hope for is a list, like Honoré's of the sort of features we would expect to find in standard cases. Nobody acquainted with the modern law of property can doubt that the use of this concept involves disputes about its proper meaning on the part of its users. Whether that contestedness can be described as 'proper', in Gallie's sense, depends on the fruitfulness of the disagreements in relation to the purposes for which the concept was originally introduced. I think this is certainly arguable in the case of the concept of ownership: disagreements about its proper meaning have led to a greater sophistication in our ability to approach the problem of allocation from this sort of perspective.

To return to our main problem. If we adopt Gallie's model, we can characterize the relation between the idea of ownership and the detailed rules

71 Ibid, 167–8 and 180–1.

72 See, for example, K. I. MacDonald, 'Is "Power" Essentially Contested?' 6 *Brit J Pol Sci* 380 (1976); S. Lukes, 'Reply to MacDonald' 7 *Brit J Pol Sci* 418 (1977); B. Clarke, 'Eccentrically Contested Concepts' 9 *Brit J Pol Sci* 122 (1979); W. E. Connolly, *The Terms of Political Discourse,* 2nd edn (Martin Robertson, Oxford 1983) Chap. 6; J. N. Gray, 'Political Power, Social Theory, and Essential Contestability' in D. Miller and L. Siedentop (eds) *The Nature of Political Theory* (Clarendon Press, Oxford 1983 esp. 94 ff.

of particular systems of private property in terms of the relation between a contested *concept* and various *conceptions* of it.[73] The *concept* of ownership is the very abstract idea described in section 5: a correlation between individual names and particular objects, such that the decision of the person whose name is on the object about what should be done with that object is taken as socially conclusive. The detailed rules of particular legal systems (whether real or imaginary) assigning rights, liberties, powers, immunities and liabilities to people in regard to particular resources amount to *conceptions* of that abstract concept. They indicate ways in which the abstract idea of ownership has been or may be realized concretely in particular societies. To the extent that two or more conceptions are opposed to one another—as they were in the John Stuart Mill argument about inheritance that we considered—to that extent, the conceptions can be regarded as contestant uses of the concept in Gallie's sense.

We can also see why ownership *appears* practically dispensable from the point of view of the technical lawyer. Since she is concerned (most of the time) with the law as it is in the society in which she and her clients live, and not with the law as it might be or as it is anywhere else, she never has occasion to raise her attention above the level of the particular conception of ownership constituted by the property rules of the legal system she is dealing with. For her purposes, that conception can be described exhaustively in terms which make no reference to ownership, nor even to the fact that it is a conception of ownership. The detailed rights, powers, liberties and so on which her particular client has, or does not have, are all that she need concern herself with. Others, however, who are concerned with questions about the justification of those rules may need to raise their attention to a somewhat higher level of abstraction.

I think this contrast between concept and conception can also be set up in relation to the other property ideas we have been considering: common property and collective property. Each can be characterized in terms of a very abstract idea; and each may be realized in particular societies in various concrete conceptions. If we compare a particular conception of (say) collective property with a particular conception of private property—the Soviet Union and the United Kingdom, for example—we may be sceptical about whether there are any differences *in principle* between them. But if we see each property system as a concrete conception of a particular concept—as we must, in my opinion, if we are concerned with justification—then the important theoretical differences will be apparent.

73 For the distinction between concept and conception, see Rawls, op cit, 5–11 (competing conception of justice); R. M. Dworkin, *Taking Rights Seriously* rev. edn (Duckworth, London 1978) 103, 134–6 (competing conceptions of fairness and cruelty), and 226 (competing conceptions of equality); and J. N. Gray 'On Liberty, Liberalism and Essential Contestability' 8 *Brit J Pol Sci* 385 (1978) (competing conceptions of liberty). I am grateful to Ronald Dworkin for suggesting this approach to me. For somewhat similar approaches to property, see Ackerman, op cit, 97–8, and Snare, op cit, 201.

(7) OWNERSHIP AND MARKETS

Is an argument for private property necessarily an argument for a free market economy? Does the ownership of a resource necessarily entail a power of alienation over it?[74]

In principle, the answer is 'No'. An economic system might involve the allocation of resources to individuals on the basis that it is for each individual to say how and on what terms the resource allocated to him is to be used, without any individual having the power to transfer that right of decision to anybody else.[75] In such an economy, there might be a rule that whenever the question arises of transferring such rights between individuals, that question should be decided by the society as a whole, perhaps on the same sort of basis as the original allocation was determined. The fact that social decision was involved in this way would not make the system one of collective property, for it would remain the case that actual resource *use* was still determined on the basis of the purposes and decisions of private individuals. Of course, there is an element of social decision in every property system: the society as a whole chooses or subscribes to a particular solution to the problem of allocation and makes whatever decisions are necessary to put that solution into effect. But that is quite compatible in itself with the idea of a system of private property. Private property, and the social allocation of resources to individuals on the basis of private ownership, is a possible object of social decision.

So we could say about exchange and alienation what we have already said (in section 6) about inheritance and bequest. Particular rules about the transmission of deceased estates—and indeed the whole idea of an individual having a power over his deceased estate—may characterize particular *conceptions* of private ownership, but the association of all this with the *concept* of private ownership will be always and necessarily controversial. We could say, then, that the inclusion of powers of alienation and free exchange along with exclusive use is perhaps characteristic of the modern Western conception of ownership, while being aware that there may be competing conceptions of ownership that do not have these characteristics.

But although we *could* take that approach, it would be wrong not to recognize that the link between ownership and alienation is somewhat tighter and more intimate than the connection which ownership has with inheritance and bequest. The tightness of the connection is indicated by what we have said already about the problem of allocation. The problem of allocation arises and systems of property are established because members of a society are likely to disagree on

74 For an affirmative answer, see A. D. Lindsay, *The Principle of Private Property*, quoted in M. R. Cohen and F. S. Cohen (eds) *Readings in Jurisprudence and Legal Philosophy* (Prentice Hall Inc, New York 1951) 99.

75 This possibility is discussed in relation to land in L. Caldwell, 'Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use' 115 *William and Mary L Rev* (1974) 759, 764. See also Salmond, op cit, 415n.

how scarce material resources are to be used. The private property solution to this problem involves the allocation of final decisional authority in these disputes to particular individuals: if there is disagreement as to how the Porsche is to be used, *Susan's* determination will be upheld by the society as final. But the authority allocated in this way is not an *ad hoc* authority to determine particular disputes: it is an indefinite power of decision defined with regard to a particular resource. The owner of a resource is the person whose word goes in all the disputes that arise concerning that resource. Now while, in most cases, we may expect that the owner will be a party to the disputes that he has the authority to determine, and while in many cases we can expect him to exercise his authority in favour of himself, this need by no means always be the case. Sometimes the question may be whether John or James should use Susan's Porsche when Susan doesn't want to use it herself; since Susan is the owner she has the right to determine by whom it may be used. Sometimes, even if Susan wants to use it herself, she may altruistically exercise her power of decision in favour of James. (There is nothing after all in the *logic* of private property compelling people to be selfish in the exercise of their rights!). In these determinations made in another's favour, we have, I think, something like a 'prototype' of alienation. Susan may not have the power to transfer her decisional authority to James, but it will be a natural enough extension of the authority that she does have.

We can come at the same point from another direction. A society confronting the problem of allocation must decide two questions: whether or not to adopt a system of *private* property; and if it does to whom to allocate authority over which resource. However the second question is resolved, it will seldom be satisfactory in the circumstances of the modern world for it to be resolved rigidly once and for all. Circumstances change: whatever principle was used for determining the initial distribution of resources, that principle might dictate different distribution if it were applied again later. For example, if the ownership of a given resource were vested initially in the person who most deserved it, or in the person who could exploit it most efficiently, there would be no guarantee that at the end of a year, say, that person would *still* be the one who deserved it most or who could make the best use of it. Or if the initial distribution were based on equality, that equality might subsequently be upset by the birth or arrival of new individuals or by the uneven consumption or depreciation of the distributed resources.[76] As I have already indicated, we could as a society *redistribute* resources authoritatively from time to time to preserve the application of the principle to which we had initially committed ourselves.[77] But redistribution of that sort has its costs, as many of its critics have pointed out: it disappoints expectations, it undermines security and stability, it leaves people without the ability to undertake long term planning of resource use except to the extent that they can prophesy changes in social circumstances and how the society will

76 See Dworkin, op cit, 308–11.

77 Cf. the famous 'Wilt Chamberlain' argument in Nozick, op cit, 160–4.

respond to them.[78] If these costs are thought to be too great, we may stick with the given distribution even though it now lacks the justification which was the reason for setting it up in the first place. But there is a third possibility. Instead of redistributing resources authoritatively from the centre, we could leave individual owners free to redistribute the resources they owned whenever it pleased them to do so. This would avoid the costs of insecurity, for a person would know a resource of his would never be redistributed until he was ready to redistribute it. Of course, the operation of this system might make matters worse: since it could not be controlled from the centre, it might take the distribution even further away from the original pattern. But it need not have that effect. Particularly if the original distributive principle made reference to the will and preferences of the distributees (as in Lockean principles of acquisition, or distributions on the basis of a principle of efficiency), allowing owners to transfer resources among themselves as they pleased might well promote the application of the original principle in changing circumstances rather than further undermine it.[79]

To sum up so far. In principle, it is possible to argue that there should be private property in material resources without committing oneself to the view that private owners should have a power to alienate the resources that they owned. For this reason, it is best to say that the power of alienation is a characteristic of some but not all conceptions of private ownership. But three factors indicate a somewhat stronger connection than that. The problem of changing circumstances, the principled impulse towards redistribution in the light of those circumstances, and the desirability of allowing owners to redistribute rather than have redistributions thrust upon them, together make up a strong case for suggesting that many of the most attractive conceptions of ownership will say that individuals have the power to exchange or give away the resources that they own.

With this in mind, we can say something about the relation between private property and market capitalism. An economy is a market economy when the redistribution of economically important resources takes place on the basis of bilateral exchange rather than central reallocation. We can say that a market economy is *capitalist* when the following further conditions are satisfied. (a) Important resources are characteristically (though necessarily not always) exchanged and re-exchanged between individuals as *commodities* in the sense Marx gave to that term, i.e. on the basis of each individual's desire to register a 'profit' in the exchange/circulation process itself rather than on the basis of his desire to use the resource in question.[80] An agent in a commodities market buys a

78 The classic argument to this effect is found in Jeremy Bentham, 'Security and Equality of Property' (from *Principles of the Civil Code*) in *Property: Mainstream and Critical Positions*, op cit, 41–58, esp. 49–57.

79 A suggestion along these lines in relation to the principle of efficiency is developed in G. Calabresi and A. D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', 85 *Harv L Rev* 1089, 1092 (1972).

80 Karl Marx, *Capital* Vol. I (Penguin Books, Harmondsworth 1976) Chaps 1–3.

certain quantity of copper, for example, not because he wants to rewire his mansion nor because he wants to use the stuff himself in industry, but so that he can sell it to another agent, reaping a profit which enables him to engage in more transactions of the same kind than he could before. (b) Those who own productive resources are in a position to offer terms to those who do not whereby the latter will work productively on those resources in return for a certain sum which will provide their living while the products of this labour will be retained by the original owner.

Clearly, the existence of a private property system giving owners a power of alienation which they can exercise at will is a *necessary* condition for a capitalist economy (and thus the abolition of private property would cripple capitalism decisively). But it is not sufficient.

In the first place, *economically important* resources must be held as private property, including the means of production. Secondly, if capitalism involves the growth of new modes of consciousness—insatiably acquisitive psychologies, etc.—we should beware of making the move from private property to modern capitalism too quickly.[81] Many arguments for private property do not presuppose a particularly capitalist mentality such as unlimited acquisitiveness or commodity fetishism. They may involve nothing more that the idea of the sober striving of an individual to realize himself and his purposes in a material environment where others are trying to do the same. In these cases, the link between private property and capitalism will be contingent upon the historical development of new psychologies which were by no means implicit in the considerations on which the original acceptance of a private property system was based.

(8) SPLIT OWNERSHIP

We have used the concept/conception distinction to analyse the differences between ownership in different societies or in one and the same society at different times. But it cannot be used to characterize the differences between the rights of owners that arise out of the 'fragmentation' or 'splitting' of ownership within a given society. The rights of a landlord are different from those of a mortgagor and different again from those of an owner-occupier who has no debts secured on his property. We still tend to describe them all as owners; but we can hardly say that there are three different *conceptions* of ownership in play here. A different explanation is necessary.

In this connection, two points appear to me to be important. First, it seems necessary to settle the meaning of ownership in the fullest sense *before* we

81 See Macpherson, op cit, 3–38; and, for a historical view, C. B. Macpherson *The Political Theory of Possessive Individualism: Hobbes and Locke* (Oxford University Press, Oxford 1962).

consider the splitting up and recombination of property rights. If our conception of full private ownership varies from society to society, then the account that we give of the splitting and recombination of property rights will vary accordingly. Thus for example, the rights of a landlord in England are different from those of a landlord in America, not just because the law of landlord and tenant is different but also because of the underlying differences in the respective conceptions of full ownership in the different societies. (For example, a landlord in America has more testamentary freedom than his counterpart in England.)

Secondly, we should note that once we start talking about cases of split ownership, we are introducing a *dynamic* element into what has up till now been a rather static analysis. The idea that an owner-occupier, a landlord, and a mortgagor, can all be described as private owners despite the differences in the particular rights they have, is paradoxical only if we take what might be called a 'time-slice' view of property systems, that is, if we think we can tell who is and who is not an owner by concentrating on the rights, powers, and duties distributed around a society at a particular moment in time. But to approach matters with this expectation is already to beg the question against the concept of private ownership. The idea of ownership, I have maintained, is the idea of solving the problem of allocation by assigning each resource to an individual whose decision about how the resource is to be used is final. Thus in order to see whether a society has a system of ownership, and what its conception of ownership is, we need to examine not just the way that resources are being used at this minute but how it was determined that *that* use, rather than some other possible pattern of use, came about. We have to examine something of the history of the uses and rights to use in the society. A static time-slice view, will not do justice to the essentially dynamic character of the private property systems.[82]

Thus, for example, when we describe a landlord as an owner, despite the fact that he does not have the right to make use of the house he owns (since *he* is not permitted to live in it while the lease is running), we do so because we want to say something about the history—and perhaps about the likely future—of the property rights involved. It may, for example, be politically important to indicate that a given distribution of rights arose out of a private rather than a collective decision. Or we may want to draw attention to the fact that it was *this* person rather than any other whose decision led to this distribution of rights. We may also want to indicate, for reasons of planning and predictability, that certain rights will revert to a certain

82 For a more general critique of 'time-slice' approaches to property and distributive justice, see Nozick, op cit, 153–60.

person, or to his successors in title, after some period of time.[83] Whatever the reason, it will have to do primarily with a dynamic rather than a static analysis of the society we are considering. It will be because we want to convey information about what has happened in the past or what may be expected to happen in the future. Once this is understood, the special position of landlord-owners, mortgagor-owners and so on becomes clear. They do not fall directly under the conception of ownership in their society, but they stand in a dynamic relationship to that conception which is evident and important, and which may explain and justify the use of the word 'owner' to describe them.

(9) CORPORATE OWNERSHIP

I want to be rather brief on the subject of corporate ownership. A society in which the main means of production are held by large corporations and managed by executives and boards responsible to a large and dispersed body of shareholders differs so markedly from a society dominated by *individual* private ownership that it is tempting to describe corporate property as a distinct type of property regime.[84]

However, I am inclined to reject this view and to see corporate property rather as a mutation of private property than as a distinct form of property in its own right. We have seen that one of the distinctive features of private property systems is that individual owners often have the power to split up and recombine the rights over resources originally allocated to them. Sometimes this leads to mortgages, sometimes to complicated leasehold arrangements, sometimes to trusts—and sometimes, I want to say, it leads to corporate property. Individual owners have the power, acting with others, to consitute a corporate person and to transfer their holdings to it. Once that has been done, then those holdings will be used, controlled and managed on a basis that is somewhat different from the paradigm of private ownership, where an individual's determination is taken as socially decisive. A wedge is driven, for example, between what Honoré calls, the right to manage and the right to the capital. (The split, however, is not total

83 Hence the insistence in modern law of property on a mortgagor's equity of redemption. This sort of point is reflected in those theories which attempt to define ownership in terms of a 'residuary' interest: e.g. F. Pollock, *Jurisprudence and Legal Essays* (Macmillan, London 1961) 98; Dias, op cit, 395–6; Noyes, op cit, 298–9. For doubts about that approach, see Honoré, op cit, 127–8. However, if there is no realistic expectation that the rights will revert to the original owner, we may find it difficult to resist describing the person who has acquired those rights as the real owner of the goods. An interesting example concerns modern developments in the law of consumer credit and hire purchase: though in strict theory the hire-purchaser is not the owner of the goods he is paying for, the law has come increasingly to regard him as the 'real' owner of the goods and to give him certain security and protection on the basis of that. The uncertainty in cases like these reflects exactly the different 'dynamic' pressure that I have been describing. (I am grateful to Professor Atiyah for drawing these examples to my attention.)

84 This suggestion is mooted, for example, in J. A. Schumpeter, *Capitalism, Socialism and Democracy* 5th edn (George Allen and Unwin, London 1976) 139–42.

because of the control that shareholders have over a board of directors, at least in theory, in the last resort.)[85]

We may still, however, want to categorize the resulting arrangement as private property. There may be two reasons for doing so. First, we may want to draw attention to the fact that the arrangement was brought about as a result of private initiatives and for the purposes of the particular private individuals (and their successors in the arrangement) who were involved. If this is what we want to stress, we may even say that, in the last analysis, the shareholders are the '*real* owners' of the company's assets. (Of course, they do not have all the rights of ownership on, say, Honoré's list, but then neither does a landlord or a mortgagor.)[86] Secondly, we may want to draw attention to the fact that the corporation, as a legal entity, may act as a private owner acts, using and allocating the resources that 'it' owns as 'it' sees fit rather than on the basis of the common or the collective interest. To the extent that individual owners may exercise their rights in socially irresponsible ways (excluding the poor from their estates when they ought to be charitable, etc.) and still count on the support of the state to uphold those rights when they are challenged, to almost the same extent a corporation may act irresponsibly and expect its right to do so to be upheld and vindicated by the state. In this sense the corporation is just like a natural person in a private property system. If we take this line, we will be inclined to say that the corporation is the '*real* owner' of 'its' assets.[87]

I have said that corporate property can be a form of private property. But it can also be a form of collective property too. Sometimes corporations are constituted not by private initiatives but by the state, and sometimes private corporations are taken over by the state (or 'nationalized') and made to serve public purposes rather than 'their own' purposes or those of their shareholders. In these cases, we should say that corporate property is a form of collective property inasmuch as it is constituted collectively and resources are controlled, ultimately, by collective rather than private purposes. The corporate form, then, has a protean amenability to property systems of different sorts. (Marx regarded this as evidence for his view that the inevitability of the transformation of capitalist into communist societies was a matter of the internal logic of the institutions involved.)[88] For this reason, then, I do not regard it as a distinct type of property system. Confronted with a society in which resources are controlled and managed by corporations, there are further questions to ask, and one of the most crucial of these will be: is the property system of this corporate economy predominantly private or collective?

85 The classic discussion remains A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* rev. edn (Harcourt, Brace and World, New York 1976).

86 For difficulties with this approach, see ibid, Bk II, and Bk IV, Chap. 1.

87 For a useful discussion, see J. Chaudhuri, 'Toward a Democratic Theory of Property and the Modern Corporation' 81 *Ethics* 271 (1971).

88 See especially Karl Marx, *Capital* Vol. III (Progress Publishers, Moscow 1971) 437 ff. There is a useful discussion of this idea in S. Avineri, *The Social and Political Thought of Karl Marx* (Cambridge University Press, Cambridge 1968) 174–84.

An answer to that question may not always be easy (as we saw in section 6). But in answering it, we will have to look as always to the basis on which access to and control of material resources is organized and the extent to which that determines the constitution and the operation of the corporate entities.

(10) CONCLUSION

There are several difficulties with the concept of private property, and they can seem daunting or overwhelming if they are simply lumped together in the way that many jurists present them. In this paper I have tried to show that if we deal with them one at a time and in a certain order, using the full range of techniques of analysis, definition and understanding that are available in modern philosophy, we can reach a reasonably clear understanding of what it is that people are disagreeing about when in a dispute about the justifiability of private property. To sum up, the main moves I have made have been the following.

(a) I have insisted that we should deal with the question of property rights in relation to material resources first, and come back to the issue of rights in relation to intangible objects at the end of our analysis when we are in a position to see more clearly the complex structures of analogy that are involved. (The latter task has not been attempted here.)

(b) I drew a distinction between the concept of property and the concept of private property. The latter (like the rival ideas of collective and common property) indicates a particular sort of way in which a property system might be organized.

(c) Next, I drew a distinction between the concept of private property and particular conceptions of that concept. The latter may be defined as the particular bundles of rights, liberties, powers, duties, etc. associated with full ownership in particular legal systems. Though they differ from one another in their details (and those differences may sometimes be far-reaching), they have in common that they are conceptions of the same concept so that for the purposes of lay understanding and perhaps also for legitimation the component elements in the bundle can be regarded as being held together by a single organizing idea—the idea that it is for a certain specified person (rather than anyone else or society as a whole) to determine how a specified resource is to be used. This distinction, I suggested, provides our best way through the morass of difficulties generated by the diversity of rights associated with private ownership in different legal systems.

(d) Finally, I distinguished between a static conception of private ownership and a dynamic understanding of that conception. An approach which relates a conception of private ownership to a given distribution of rights in terms of its history, or in terms of its likely future, is helpful for understanding the point of continuing to describe landlords, mortgagors, and others who have alienated some of their ownership rights as nevertheless private owners.

Together, these four moves are helpful for sorting out the various difficulties involved in the legal definition of private property. However, we need to remember that private property is not purely a legal concept: it has uses in political philosophy as well. For the purposes of political philosophy, the second of the moves outlined above is the most important. My suggestion is that when philosophers argue about the justifiability of private property, they are interested (at least in the first instance) not with the detail of the property rules of any society in particular—the property rules of nineteenth century England, for example, or twentieth century Singapore—although what they say will have consequences for the evaluation of those societies. Rather they are talking in the first instance about a certain *type* of institution—a type described by the abstract idea outlined in section 5. They are asking whether there are good reasons, on grounds of individual liberty, utility, equality, or other values for preferring property systems of this type rather than property systems of any of the other types that I outlined.

Because the question is being posed in this abstract way, we must not expect an answer to determine a complete blueprint for a property system. Only so much can be done at the philosophical level, and philosophers do their discipline no service by insisting, for example, that traditional arguments such as Locke's or Aristotle's should be rejected because they are not conclusive on the details of property arrangements.[89] A philosophical argument can determine only, as it were, the general shape of a blueprint for the good society. Even if we find that there are good moral grounds for preferring private property to collective property, we still face the question of what *conception* of private property to adopt. In other words, we still face the question of what detailed rights, powers, liberties, immunities and so on should be accorded to owners at the level of concrete legal rules. Occasionally, the philosophical argument may indicate a particular answer to that question. For example, Hegel's very general argument for private property in the *Philosophy of Right* seems to make it crucial that an owner should have a complete power of alienation over the goods that he owns.[90] But in other cases, the argument may not indicate any answer either way. Does Locke's Labour Theory of property generate any case for an unlimited power of testamentary bequest?[91] Does Aristotle's argument in the *Politics* provide any basis for evaluating English common law requirements about the procedures for the conveyance of land? That the answer in both cases is clearly negative does not mean that these arguments are not worth considering. I hope that by isolating and identifying the abstract concept of private ownership, and by distinguishing it from its particular conceptions, I have managed to show why.

89 For the approach criticized here, see Becker, op cit, 22 *passim*.

90 G. W. F. Hegel, *The Philosophy of Right* (Oxford University Press, Oxford 1967) 52–4 (ss 65–6).

91 Locke, op cit, I, ss 86 ff. For a discussion see J Waldron, 'Locke's Discussion of Inheritance and Bequest' 19 *J Hist of Phil* 39–51 (1981).