

The Case Against a Moral Right to Intellectual Property

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Abstract

This thesis looks at the question of whether there is a moral right to intellectual property and argues that there is not. Focus is placed on the right to exclude, which I argue is the essential and controversial component of property rights in general, as well as intellectual property rights. I proceed by examining a wide range of arguments which purport to justify a moral right to intellectual property. I argue that these approaches all fail on at least one of three counts: (i) they do not properly address the burden of justification, (ii) they may be satisfied by property systems that do not include intellectual property, or (iii) they cannot be made to apply to non-rival goods. In addition, I consider whether intellectual property might be justified as a way to protect against free riding. I argue that this will depend on whether the interference from free riders is impermissible, a direction which diverges from the considerations usually relevant to property, but also one that requires further investigation. I conclude that none of the justificatory arguments considered will succeed in establishing a moral right to property, largely due to its non-rival nature.

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Chapter 1: Introduction

This thesis examines the question of whether there is a moral right to intellectual property and argues that there is not. Discussions of justifying intellectual property typically import the traditional justifications of property in general. As such, the question often revolves around whether intellectual property is different from more familiar sorts of property in any way which is relevant to its justification. If property is justifiable, and intellectual property's disanalogous characteristics are not relevant to that justification, then any special moral issues surrounding intellectual property would be separate from the issue of its justification. A commonly cited disanalogy is the non-rival nature of intellectual property. A rival good, roughly speaking for now, is one the full benefit of which cannot be simultaneously enjoyed by multiple persons. I argue that the non-rival nature of intellectual property is in fact relevant to its justification in the most crucial cases.

I locate the source of controversy over intellectual property rights, as with property rights, in the exclusionary aspect of the concept (Chapter 1). As with all rights, this imposes constraints on liberty, and requires justification. Since there is a presumption in favor of liberty, we should look for alternatives to imposing a constraint on liberty and, *ceteris paribus*, prefer those alternatives. Broadly speaking, this is the justificatory challenge which IP does not overcome. There are many arguments that attempt to justify IP, however, and so the specific the reasons vary. However, in the crucial cases—those justifications which would most plausibly support rights in intellectual property—the non-rival aspect of IP becomes relevant.

This thesis does not argue against the permissibility of intellectual property as an institution and it does not argue against a moral right to property in general. While I reject some of the justifications for property in general that are sometimes applied to IP (Chapter 2), others I accept at least provisionally in order to examine specifically why they cannot be

extended to IP (Chapter 3). This happens, in some cases, because the justification is underdetermined in regards to IP. In the other cases, it happens because the non-rival nature of IP makes it exempt from the argument in question.

The range of justifications I will examine is limited by the fact that I am looking only at the question of whether there is a moral right to intellectual property. Many justifications of property, for example utilitarian ones, do not purport to establish a moral right in property. It is useful to distinguish between two broad categories of arguments for intellectual property, which Peter Drahos calls proprietarianism and instrumentalism. Proprietarian theories hold that property rights are pre-legal moral constraints; they tend to draw upon the natural rights tradition.¹ I will, however, be exploring a somewhat broader range of arguments for moral rights to property than just those associated with the natural rights tradition.

Instrumentalism, in contrast, looks at the “contingent connections” between property and other concerns, placing property rights in service of other moral values rather than situating property rights as basic or following as the necessary consequence of basic values.² Instrumentalist justifications of intellectual property most notably include utilitarian arguments. They also include what may be called a social policy approach, which would include reform-minded legal scholars like Lawrence Lessig and James Boyle who broadly accept the use of IP for the promotion of social goals, but seek to incorporate a broader set of goals and improve the cost-benefit balance.³

In Chapter 1, I present the framework of the thesis, including relevant definitions and an account of the burden of justification faced by IP. In Chapter 2, I discuss justifications of

¹ Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot, England: Dartmouth Publishing Company, 1996), 200.

² *Ibid.*, 214.

³ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008); Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin, 2004). For a description of what I am calling the social policy approach, see William Fisher, “Theories of Intellectual Property,” in *New Essays in the Legal Political Theory of Property*, ed. Stephen R. Munzer (Cambridge: Cambridge University Press, 2001), 172-173.

property that do not adequately address this burden of justification, regardless of whether they are applied to property or intellectual property. These include arguments based on the Lockean proviso, comparative justifications, and desert-based arguments. Chapter 3 moves on to justifications of property that even if successful for property in general cannot be extended to intellectual property. These include arguments from the need to avoid conflict, as well as arguments based on significant moral interests such as autonomy or personality. Chapter 4 explores whether a justification might be developed from considerations of fairness and free riding. In Chapter 5, I connect the findings of the previous chapters to conclude that none of the arguments examined so far can justify a moral right to intellectual property, largely due to its non-rival nature.

1.1 Key Concepts

In this section I will introduce the terminology I am using to discuss for rights and the conception of property rights and intellectual property I will be working with. I employ the Hohfeldian analysis of rights, define property rights as rights to exclude, and define intellectual property rights as property rights over a certain type of object.

1.1.1 Rights Terminology

I will be using the Hohfeldian framework for the analysis of rights. The most important distinction made by Hohfeld was that between privileges and claim-rights, which I will refer to as liberties and rights, following the convention of other authors.⁴ A person is at *liberty* to do some act when he is under no countervailing duty to refrain from it. Conversely, a person is at liberty to refrain from some act when he is under no countervailing duty to

⁴ Matthew H. Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford: Oxford University Press, 1998), especially pp. 8-10.

perform it. Meanwhile, a *right* obtains when some person has a claim against another that they perform (or refrain from performing) some act. A right correlates to a duty, while a liberty correlates to a no-right (the absence of a duty). Sometimes, these moral relations between individuals may be altered by an individual who has the *power* to create or remove them, unless the holder of that right or liberty has an *immunity* that protects her against this alteration.⁵

1.1.2 Property as the Right to Exclude

There has been a lot of work done on the problem of defining the concept of property rights. It is standard to treat property as a bundle of rights; a popular itemization of the possible sticks in this bundle is A.M. Honoré's eleven elements of full liberal ownership. Although these elements are all supposed to be necessary conditions for *full liberal* ownership, they are not supposed to be taken as necessary conditions for the broader concept of property or ownership.⁶ It is sometimes suggested that Honoré's treatment is best taken as a family resemblance concept.⁷

Nonetheless, there is some agreement on the key ingredients of property, especially when discussed in the context of liberalism and the context of what needs to be justified. I will present two such accounts and then show how one particular ingredient—the right to exclude others from one's property—becomes central.

(In the remainder of section 1.1.2, I will diverge from my usage of the terminology of *liberties* and *rights* in order to accommodate the various authors I am discussing. Here, I will use *liberty-right* and *claim-right* when an author has provided enough information to discern

⁵ Kramer in Kramer, Simmonds, and Steiner, *A Debate over Rights*, 9-21.

⁶ Lawrence Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), 18-21; Gerald F. Gaus, "Property, Rights, and Freedom," *Philosophy and Policy* 11, no. 2 (June 1994): 212.

⁷ Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 49; Richard E. Flathman, "On the Alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights," in *Property: NOMOS XXII*, ed. J. Pennock and Chapman (New York: New York University Press, 1980), 224.

the intended Hohfeldian instance; otherwise, I will leave the generic term *right* in place where the author has not gone into more detailed discussion of the right in question. In the latter cases, it should be noted that the right might be composed of more than one Hohfeldian instance, e.g. a right to transfer may be composed of a liberty and a power.)

Waldron names three necessary components of property rights: a liberty-right to use the object, a claim-right to exclude others from using the object, and a power to transfer these first two rights. He adds that the liberty-right to use may sometimes—though not necessarily—be backed up by a claim-right against interference with use, and that the claim-right to exclude may sometimes—though not necessarily—be backed up by a right to initiate enforcement procedures.⁸ Gaus provides a similar “core cluster” of necessary conditions for any liberal conception of ownership: the liberty-right to use, the claim-right against interference with use, the claim-right to exclude others from use, the right to transfer these rights, and the right to compensation.⁹

Before moving the focus to the right(s) to use and the claim-right to exclude, I will first make some remarks about the other ingredients—transfer, enforcement, compensation—before setting them aside. There would not be much point speaking of the right to transfer if the other rights did not obtain. More specifically, Waldron notes that it is only because of the right to exclude that we even need to be concerned with the right to transfer: “if others could use [the property] without anyone’s consent, there would be nothing for the owner to transfer to them.”¹⁰

Similarly, Gaus’s right to compensation and Waldron’s right to enforce both rely on there being either a right to use or exclude. Moreover, their presence in the list is possibly

⁸ Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property,” *Chicago-Kent Law Review* 68 (1993): 842-843.

⁹ Gaus, “Property, Rights, and Freedom,” 213-214. See also Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,” *The Yale Law Journal* 102, no. 7 (May 1993): 1550. Gordon makes a similar minimum itemization: liberty-right to use (and consume), claim-right to exclude, and power to transfer.

¹⁰ Waldron, “Authors to Copiers,” 843.

redundant because compensation and/or enforcement are generally taken to be implicit in the presence of a Hohfeldian claim-right. For example, Becker construes enforceability as built into the definition of a claim-right:

It is the existence of a state of affairs such that one individual or institution (the right-holder) has a claim on another (the duty-bearer) for an act or forbearance in the sense that, should the claim be in force or exercised, and the act or forbearance not done, it would be moral (or legal, in the case of a legal right), other things being equal, to use coercive measures to extract either the specific performance (i.e. the act or forbearance claimed), or compensation in lieu of it.¹¹

His definition of a duty also contains the clause: “it would be moral (or legal) for others to use coercive measures to extract either the specific performance required or compensation in lieu of it.”¹²

Steiner holds a similar understanding, saying “duties are uncontroversially seen as *enforceable*.”¹³ What is the subject of some disagreement, however, is Steiner’s argument that a Hohfeldian claim-right will always “imply the existence” of a *conceptually distinct power* to enforce.¹⁴ In other words, Steiner subscribes to the position that genuine rights are always molecular rather than atomic. So when a right to enforce is named separately in the above lists, it should not be counted as a distinct condition for a property right to obtain, if the list already includes a claim-right to use or exclude.¹⁵

This leaves us with the rights to use (liberty-right to use and claim-right against interference) and the claim-right to exclude. Of these, it is often said that the right to exclude is *the* essential feature of property¹⁶ or at least of *private* property.¹⁷ Even Becker, whose

¹¹ Becker, *Property Rights*, 11.

¹² *Ibid.*

¹³ Steiner in Kramer, Simmonds, and Steiner, *A Debate over Rights*, 238.

¹⁴ *Ibid.*, 244-245.

¹⁵ Rather, it might be mentioned (i) for the sake of completeness of the itemization but not completeness of the necessary and sufficient conditions, (ii) in order to locate the enforcement power in the property owner as opposed to a state functionary, or (iii) because some non-Hohfeldians do not think claim-rights are always enforceable (e.g. Shelly Kagan, *The Limits of Morality*, Oxford: Clarendon Press, 1989, pp. 219-221).

¹⁶ Gaus, “Property, Rights, and Freedom,” 220; Gordon, “Property Right in Self-Expression,” 1552.

¹⁷ Waldron, “From Authors to Copiers,” 843.

definition of property comprises roughly 1500 permutations of Honoré's ingredients,¹⁸ was at one point content to summarize his analysis with the remark: "To have such rights is to be entitled to exclude others in some way(s) from the thing."¹⁹

Understanding the right to exclude as the essence of property allows us to apply this definition of property to schemes where a community or other collective entity has sovereignty over some property.²⁰ It also makes room for the fact that property rights do not give owners the right to do whatever they please with their property. Rather, the claim-right to exclude can be understood in terms of it being prima facie wrong for others to use the property without the owner's consent.²¹

Not only is the claim-right to exclude the essential feature of property, it is also the feature which stands out as being most in need of justification.²² The liberty-right to use is the default position of the presumption in favor of liberty, so it does not contribute much to concept of property for my purposes here. The claim-right to use may be nothing more than the liberty-right to use, in conjunction with what is known as the "perimeter of protection," such as rights against interference with one's person that incidentally would also protect the use of some object.²³ In this case it does not present a special need for justification. If use is conceived more broadly to encompass long-term projects where the owner may be absent, it begins to resemble the right to exclude. Since the claim-right to exclude captures all of the important aspects of the claim-right to use, and the claim-right to use is insufficient to

¹⁸ Becker, *Property Rights*, 21.

¹⁹ Becker, "Deserving to Own Intellectual Property," *Chicago-Kent Law Review* 68 (1993): 621.

²⁰ J. Roland Pennock, "Thoughts on the Right to Private Property," in Pennock and Chapman, *Property: NOMOS XXII*, 175.

²¹ Gaus, "Property, Rights, and Freedom," 214. Cf. Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), 25: "the power to exclude and the power to transfer are often the weightiest components of property rights." I think Munzer is wrong to call the exclusionary right a power. The fact that I am not free to use another person's car does not rely on the owner exercising some power to exclude me. The claim-right to exclude, as explained by Gaus above, is more accurate. However, not much rides on whether we define this as an exclusionary right or power; if it is a power, it is a power to impose exclusionary claim-rights and so bears the same burden of justification.

²² Waldron, "From Authors to Copiers," 844.

²³ The term derives from Bentham and Hart. See, e.g., Simmonds in Kramer, Simmonds, and Steiner, *A Debate over Rights*, 165.

constitute a property right unless it becomes more or less synonymous with the claim-right to exclude, I will focus simply on the claim-right to exclude.

1.1.3 Definition of Intellectual Property

It is helpful to begin with a typical description of intellectual property:

Intellectual property refers to a body of legal rights that comprise patents, copyrights, trademarks, and assorted doctrines such as trade secrets, right of publicity, and contract-based rights. This hodgepodge of legal rules and doctrines has two things in common. First, they each relate to some aspect of the association of the creative process with the manufacture of information. Second, they each give to the legally designated creator of information the right to exclude others from copying and distributing the information.²⁴

I define an intellectual property right simply as a property right over an intellectual object.²⁵

It is difficult to provide a precise definition of what counts as an intellectual object, as there are a growing number of categories of intellectual property in the law. I will focus, as others do, on copyright and patent which are archetypical cases. Copyright pertains to works of expression such as writings, music, and visual works. Patents pertain to useful inventions or innovations.

It is helpful to think of these and other intellectual objects in terms of a type-token distinction. An IP right is not, strictly speaking, a relation between an owner and an intellectual object. Rather it is a right against other individuals regarding acts involving the use of or instantiation of the intellectual object. More specifically, since I identify the right to exclude as the essential feature of property, I will be concerned with the rights to exclude others from the use of or instantiation of the intellectual object.

For the purpose of justifying a moral right, IP should not be defined in terms of the actual laws that exist. These legal regimes should be thought of as merely some of the

²⁴ Shubha Ghosh, "How to Build a Commons: Is Intellectual Property Constrictive, Facilitating, or Irrelevant?," in *Understanding Knowledge as a Commons*, ed. Charlotte Hess and Elinor Ostrom (Cambridge, MA: The MIT Press, 2007): 212.

²⁵ Some of the other terms in circulation are abstract object, ideal object, informational good, and knowledge object. None of the available choices are wholly satisfactory.

possible institutional implementations of the broader concept of IP. They vary amongst themselves insofar as the concept is underdetermined. But they also sometimes vary from the conceptions of IP defended by philosophers. For example, even philosophers who support IP rights tend to think it is impossible to justify giving a patent only to the first inventor of a technology when others have independently invented the same thing.²⁶ Accordingly, the focus of this paper is not on any particular legal institution but on the broader philosophical concept to which these belong.

The emphasis I am placing by defining IP in terms of a right to exclude draws attention away from some rights which are often brought under the same heading as IP: the rights to attribution, anonymity, integrity of the work, and choice of the forum of first publication. Some of these rights may be treated as distinct from copyright, especially in European legal systems where they are referred to as *droits morales* or moral rights (note that when I use the term *moral rights* in this thesis, I am referring to normative rights and not this legal usage).²⁷ I do not discuss the justification of these IP-related rights in this thesis; I think such rights, whether they belong to the concept of IP or not, can be independently justified by norms of honesty and privacy.

1.2 The Burden of Justification

In this section, I argue that when looking at the justification of property rights or intellectual property rights, the baseline position should be one of symmetrical liberty. I defend this baseline with an argument from the presumption in favor of liberty, although it may be defended in other ways as well.

²⁶ Becker, "Deserving to Own Intellectual Property," 623, 626, 628-629. Adam D. Moore, *Intellectual Property & Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick, NJ: Transaction Publishers, 2001), 106, 118n8, 163.

²⁷ For more on *droits morales*, see Moore, *Intellectual Property & Information Control*, 26. For choice of forum, see Waldron, "From Authors to Copiers," 873-874.

Many philosophers have felt it necessary to provide a justification for property rights. Beyond this historical fact, there is a very straightforward argument that property bears a burden of justification within liberalism. Liberals are committed to what is sometimes called a “presumption in favor of liberty,” which most straightforwardly says that constraints on liberty bear a burden of justification.²⁸ Property rights are a constraint on liberty, insofar as rights are correlative with duties and liberties are defined as the absence of a countervailing duty to do or forbear. Therefore, property rights bear a burden of justification. The presumption in favor of liberty, as well as the premise that property rights are constraints on liberty, could be contested to some degree so I will discuss them further below.

Gaus and Lomasky have cogently argued that there is nothing special about the justification of property rights in contrast with other rights.²⁹ Indeed, according to an argument such as the one I have presented above, every right is a constraint on liberty and bears the same burden of justification. This is true. It is also somewhat beside the point here because I will be looking at the established arguments for property rights and their relationship to intellectual property. As such, we only need to agree that this justificatory burden for property rights obtains, not that it is unusual. Gaus and Lomasky do not dispute that rights require justification because they are constraints on liberty. Rather, they only wish to dispel the notion that property rights face justificatory obstacles that differ much from other rights.

1.2.1 The Presumption in Favor of Liberty

Gaus and Courtland formulate the presumption in favor of liberty as follows:

“freedom is normatively basic, and so the onus of justification is on those who would limit

²⁸ Gerald F. Gaus and Shane D. Courtland, “Liberalism,” in *Stanford Encyclopedia of Philosophy*, sec. 1.1, <http://plato.stanford.edu/entries/liberalism/>.

²⁹ Gaus and Lomasky, “Are Property Rights Problematic?,” *The Monist* 73, no. 4 (October 1990). Or almost nothing special; they discuss one exception on pp. 498-499.

freedom, especially through coercive means.”³⁰ They cite Feinberg and Rawls in agreement, and quote Mill: “the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition.... The *a priori* assumption is in favour of freedom...”³¹ Elsewhere, Gaus calls this the Fundamental Liberal Principle, so I will refer to it as the FLP.³²

The presumption in favor of liberty is supposed to be uncontroversial among liberals, but this is mostly because it is articulated in broad terms. Gaus argues that we should not expect to conclusively justify a single interpretation of such a principle, but we can at least restrict ourselves to a range of valid interpretations.³³ Although the FLP is compatible with most conceptions of liberty, I will argue in the following that we must rule out any conception of the FLP which employs a “moralized” conception of liberty.

I claimed above that there is a conflict between liberty and intellectual property rights, just as there is a conflict between liberty and all property rights, just as there is a conflict between liberty and any right. This follows from the premise that rights are constraints on liberty. But this premise is true by definition due to the Hohfeldian framework. Some philosophers have wished to define constraints on liberty differently.

The relevant distinction is between moralized and non-moralized conceptions of liberty.³⁴ Those who hold a moralized conception of liberty reject the premise that moral rights are constraints on moral liberties. Rather, for them something only counts as a constraint on one’s liberty when it is one’s moral right which is interfered with. In other words, moral constraints do not count as constraints on liberty because they merely constrain

³⁰ Gaus and Courtland, “Liberalism,” sec. 1.1.

³¹ Quoted in *ibid.*

³² Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996), 162-166.

³³ *Ibid.*, 165-166.

³⁴ Adam Swift, *Political Philosophy: A Beginner's Guide for Students and Politicians* (Cambridge: Polity Press, 2001), 68-71; Ian Carter, *A Measure of Freedom* (Oxford: Oxford University Press, 1999), 70-71; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2001), 142.

you from acts you were not *morally* at liberty to do anyway. This is a view often found in libertarians like Locke and Nozick.³⁵ But it is also found in Dworkin, who argues liberals are not concerned with liberty as such but rather with certain basic liberties and we would do better to interpret this concern as deriving from a concern with equality.³⁶

For our purposes here, we do not need to settle the question of how liberty should be conceptualized. What matters is that we cannot plug a moralized conception of liberty into the FLP. To do so makes the FLP uninformative at best or circular at worst. This is because when liberty is cashed out in terms of some other value or principle, the presumption in favor of liberty is nothing more than a presumption in favor that other value or principle.³⁷ It is important also to recognize that the FLP can still facilitate a common ground starting point for liberals, even if some liberals hold a moralized conception of liberty. Such liberals merely have to restate their position in terms of whatever value actually underlies their conception of liberty.

One of the reasons the FLP can be considered uncontroversial is that it does not make any substantive commitments about which liberties are more important than others. Here, a quote from Rawls is illuminating:

no priority is assigned to liberty as such, as if the exercise of something called 'liberty' had a preeminent value... While there is a general presumption against imposing legal and other restrictions on conduct without sufficient reason, this presumption creates no special priority for any particular liberty.³⁸

³⁵ Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Stanford: Stanford University Press, 1991), 93-94; Carter, *A Measure of Freedom*, 70; Swift, *Political Philosophy*, 70.

³⁶ Gaus and Lomasky, "Are Property Rights Problematic?," 500n2; Carter, *A Measure of Freedom*, 72; Swift, *Political Philosophy*, 70. Gaus and Lomasky describe this as a "revisionist" account of liberalism.

³⁷ Cf. Kymlicka, *Contemporary Political Philosophy*, 142; Waldron, *Right to Private Property*, 309; Carter, *A Measure of Freedom*, 71; Cheyney C. Ryan, "Yours, Mine, and Ours: Property Rights and Individual Liberty," in *Reading Nozick: Essays on Anarchy, State and Utopia*, ed. Jeffrey Paul (Oxford: Rowman and Littlefield, 1981), 332.

³⁸ John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 44 (sec. 13.3).

The presumption in favor of liberty therefore need not be seen as ascribing any value to liberty (although, it may of course be supported by such a view³⁹). In fact, one might think that “to say that there is a presumption means that no grounds need be shewn [*sic*].”⁴⁰

The FLP also does not preclude consideration of other presumptions or values. In fact, since the FLP on its own makes no judgments regarding which liberties are important (or more important than others), and since we often need to make such judgments, the FLP actually calls out for the consideration of other values and reasons. The FLP is best understood as a *ceteris paribus* prescription of liberty.

The FLP as a starting point in the justification of property rights helps us to capture what is at stake formally. More importantly, it indicates what a justificatory reason must do (address the constraint on liberty) and where it might come from (from some principle which can adjudicate between liberties). Lastly, it helps us draw a clearer picture of the justificatory baseline.

1.2.2 Moral Liberty as a Baseline

The controversy over IP is sometimes framed as a contest between two parties, one of whom should be given rights. This view mistakenly gives the impression that we must choose between giving property rights to the creator of an intellectual object or giving consumers rights of access to the work. This overlooks an important “middle ground” option in which neither party has any rights to the intellectual object—which is to say both parties are at liberty in regards to the intellectual work, i.e. neither party has a duty to act one way or the other.

³⁹ E.g., Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973), 20-22.

⁴⁰ Stanley Benn and Richard Peters quoted in Gaus, *Justificatory Liberalism*, 163.

Under such a default position, consumers would be free to try to download music through file-sharing software regardless of the wishes of the songwriters. Musicians or record labels would be free to try to prevent this through openly using digital rights management (DRM) technologies to protect the music they sell. But neither party could claim they were wronged if they fail to succeed in their efforts, and neither would have a right to get their way that they could then try to enforce. Furthermore, neither party could try to get their way by doing something otherwise considered immoral (such as the DRM strategy employed by Sony BMG in 2005, when they secretly installed malware on the computers of their consumers).⁴¹

Due to the presumption in favor of liberty, the burden of justification will fall on those who advocate a right on behalf of either party. Based on this understanding of the task of justification, IP rights can be justified only by appealing to some reason for which exclusion is actually necessary. If exclusion is not necessary in order to satisfy the supposed reason for the right, then the justification fails. Furthermore, exclusion must be more than merely sufficient for its aims: if there is another way to satisfy the supposed reason for the exclusionary right, which does not constrain liberty (or is less of a constraint on liberty), then—all else equal—it would undermine the case for an exclusionary right.

⁴¹ BBC News, “Sony sued over copy-protected CDs,” November 10, 2005, <http://news.bbc.co.uk/2/hi/technology/4424254.stm>.

Chapter 2: Unsuccessful Justifications of Property in General

With the framework I have advanced in the previous chapter, it is possible to identify some problems with two popular justificatory strategies which I will call the *why-not* strategy and the *either-or* strategy. These strategies appear in discussion of intellectual property as well as property rights in general. After discussing these, I turn to a third, the argument from desert. The difficulties faced by desert-based justifications are indicative of the general problems faced in justifying a moral right to IP.

2.1 Why Not?

Becker noticed that some arguments for property reach a point where instead of responding to the challenge of justifying property, they instead assert that the burden of justification is on their opponents. He gives this strategy the name “why not?” and mentioned it in the context of the arguments from first occupancy⁴² and (direct) labor-mixing.⁴³ I think the class of arguments employing this strategy is much larger, encompassing many of the libertarian justifications based on Locke’s famous proviso that appropriation may be justified “at least where there is enough, and as good left in common for others.”⁴⁴

Obviously, a why-not argument can be employed by either side and it is not always unreasonable to do so. It is problematic primarily when insufficient argumentation has been given for shifting the burden of justification. I have defended an account of the burden of justification and shown that it has some popular support among those who are concerned with

⁴² Becker, *Property Rights*, 30.

⁴³ *Ibid.*, 40.

⁴⁴ John Locke, “Of Property,” in *Two Treatises of Government* (London: Rivington, 1824), sec. 27.

liberty and property rights, and this should be sufficient to repel the force of a why-not against it.

An example of a why-not argument can be found in Vallentyne.⁴⁵ As I have argued, the baseline should be one in which there are no property rights and all individuals are at liberty in regards to potential objects of property. Vallentyne considers a state of nature like this when discussing the principle of acquisition that requires the consent of all; he calls this “joint ownership.” He objects to this principle of acquisition primarily on the grounds that “it’s unclear why one needs the consent of others as long as one makes an appropriate compensatory payment for the natural resources appropriated,” which is to say, he finds it “unclear” why we should not move the burden of justification onto the shoulders of those who disagree with his preferred (Georgist) proviso.⁴⁶ Perhaps his preferred proviso can be defended, but he offers no positive argument here.

The why-not argument appears to be at the heart of most libertarian justifications of property in the form of the proviso. Since Locke’s famous labor-mixing metaphor is disreputable,⁴⁷ and most libertarians are said to reject the argument from desert,⁴⁸ the proviso is perhaps the central feature of Locke’s theory of property which remains widely popular in libertarianism. One of the ways in which libertarians may be subdivided is along a left-right spectrum that primarily reflects how they regard the proviso.⁴⁹ Right-leaning libertarians have more permissive provisos and left-leaning libertarians have more restrictive provisos. The

⁴⁵ Peter Vallentyne, “Introduction: Left-libertarianism – A Primer,” in *Left-libertarianism and Its Critics: The Contemporary Debate*, ed. Peter Vallentyne and Hillel Steiner (New York: Palgrave, 2000).

⁴⁶ Ibid., 6. Robert Nozick in *Anarchy, State, and Utopia* (Oxford: Blackwell, 1999) also seems to employ a “why not?” maneuver when he discards a “stringent” proviso in favor of a “weaker proviso.” The stringent proviso threatens to make acquisition impossible, so he offers up the weaker proviso which is friendlier to acquisition. As far as I can tell, he offers no substantive argument for rejecting the stringent proviso (176-178).

⁴⁷ E.g., labor-mixing is said to have been “roundly rejected as impossibly metaphorical,” by Lawrence C. Becker, “Property,” in *Encyclopedia of Ethics*, ed. Lawrence C. Becker and Charlotte B. Becker (New York: Routledge, 2001): 1391.

⁴⁸ Serena Olsaretti, “Introduction: Debating Desert and Justice,” in *Desert and Justice* (Oxford: Clarendon Press, 2003), 2.

⁴⁹ Peter Vallentyne, “Libertarianism,” in *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/libertarianism/>, sec. 2; Vallentyne, “Introduction: Left-Libertarianism.”

stricter, left-libertarian interpretations of the proviso tend to require that appropriators pay into a “global fund” tasked with distributing compensation to those who were disadvantaged by the appropriation. What they all often have in common is that some version of the proviso does most of the justificatory work.

While Locke is typically considered to have introduced the proviso as a constraint on appropriation, contemporary theorists often employ it as a sufficient condition.⁵⁰ Regardless of whether it is a necessary or sufficient condition, it is frequently made to handle all the real work in justifying appropriation. Vallentyne and Otsuka, for example, both say that staking a claim might be all that is needed in addition to satisfying the proviso.⁵¹ For Clark Wolf and Adam Moore, a presumptive claim to property must first be established, which the proviso would then convert into a property right.⁵² The presumptive claim, however, in both cases does little work on its own. Wolf accepts mere possession as establishing a presumptive claim and, jokingly, even something as trivial as “covering an object with chocolate Easter bunnies.”⁵³ For Moore, a presumptive claim is something which on its own would only be strong enough to establish a claim of non-interference.⁵⁴ The most extreme position would hold that the proviso is the sole necessary and sufficient condition for appropriation.⁵⁵ In all of these cases, what really matters is the proviso.

⁵⁰ In addition to those discussed below, the Nozickian proviso has been interpreted as a sufficient condition by David Lyons and G. A. Cohen (Wolff, *Robert Nozick*, 112-113) and Locke’s original introduction of the proviso has been interpreted by Waldron as a sufficient condition, in “Enough and as Good Left for Others,” *The Philosophical Quarterly* 29, no. 117 (1979): 319-328.

⁵¹ Vallentyne also mentions that others replace this with labor-mixing or discovery of a resource (“Introduction: Left-Libertarianism,” 18n11). Michael Otsuka, endorses staking a claim, possibly with the additional restriction that the claimed resource must be of use (“Self-Ownership and Equality: A Lockean Reconciliation,” in Vallentyne and Steiner, *Left-libertarianism and Its Critics*, 170n28).

⁵² Moore, *Intellectual Property & Information Control*, 95, 107; Clark Wolf, “Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations,” *Ethics* 105, no. 4 (1995): 795-797.

⁵³ Wolf, “Contemporary Property Rights,” 797.

⁵⁴ Moore, *Intellectual Property & Information Control*, 108.

⁵⁵ This suggestion is explored by Wolf, “Contemporary Property Rights,” 804. Otsuka (“Self-Ownership and Equality,” 157) also defines the proviso as a necessary and sufficient condition (“if and only if such acquisition places nobody else at a disadvantage”) but as noted above, this is supposed to function in combination with claim-staking.

With a few exceptions, the variants of libertarianism are what Vallentyne calls unilateralist. That is, an individual may appropriate resources without the consent of others, so long as they abide by the imposed restrictions.⁵⁶ I think there are two justificatory challenges faced by all versions of unilateralist libertarianism. These challenges I think are conclusive against Nozickians, those further to the right, and presumptive claim accounts like those of Wolf and Moore. While left-libertarians also face these challenges, I take no position on how successfully they have done so.

2.1.1 *Loss of Liberty*

The proviso prohibits appropriation where it would constitute a worsening, a loss, a disadvantage, or a prejudice to others.⁵⁷ I will refer to this simply as no-worsening. The first justificatory challenge for proviso-based justifications is that they often fail to take seriously the constraint on liberty that property rights impose. If the loss of this moral liberty were considered to be a worsening, any interpretation of this condition would prohibit appropriation in all cases, since property rights entail duties.⁵⁸ More accurately, the no-worsening theorist is committed to one of the following: (i) that a loss of liberty does not count as a worsening, (ii) the duty entailed by a property right is not a loss of liberty, or (iii) a loss of liberty may be compensated.

On the one hand, the no-worsening theorist might accept (i) and define worsening in terms that do not involve liberty. Nozick in fact does this.⁵⁹ His proviso explicitly asks whether or not being “no longer at liberty to use the thing” worsens the position of others. The loss of this particular liberty is a “mode of worsening,” that is a way by which somebody

⁵⁶ Vallentyne, “Introduction: Left-libertarianism,” 7.

⁵⁷ Respectively, these are the terms used by Nozick, Becker, Otsuka, and Locke.

⁵⁸ Cf. Becker, *Property Rights*, 44.

⁵⁹ Nozick, *Anarchy, State, and Utopia*, 175: “This change in the situation of others (by removing their liberty to act on a previously unowned object) need not worsen their situation.”

might be made worse off—and in fact the only mode Nozick is concerned with—but it does not in itself necessarily constitute a worsening.⁶⁰ Taking the position of (i) is to insist that welfare (or whatever the currency of worsening) matters more than liberty. This would require additional argument, not found, at least, in Nozick or Moore.

On the other hand, the no-worsening theorist might accept (ii) and claim that the exclusionary duty is not a loss of liberty. To do this, we could distinguish between two conceptions of what counts as a loss of liberty (or a limitation, restriction, constraint, etc. on liberty). On a Lockean (or other moralized) conception of liberty, “my liberty is limited only if I am prevented by others from doing what I have a *right* to do.”⁶¹ This is in contrast to the conception of liberty on which liberty is constrained whenever the scope of permissible actions is reduced.⁶² But employing this Lockean conception of liberty begs the question. In order to say that these exclusionary duties do not count as a loss of liberty, we would have to know what rights others have in the things they would be excluded from. Assuming that others enjoy no right to use or access the things they are being excluded from begs the question, because it assumes away any possible rights that would conflict with the property rights that we are trying to justify.⁶³

Another way to embrace (ii) is to deploy the idea of conditional rights and duties.⁶⁴ As a conditional duty, the exclusionary duty could be described as lying in wait—we would already have a generalized duty to respect property whenever it is acquired. So when somebody acquires property, an exclusionary duty regarding that specific property would merely be activated. As I never had the liberty to access things that had been appropriated by

⁶⁰ Nozick, *Anarchy, State, and Utopia*, 178.

⁶¹ Wolff, *Robert Nozick*, 94 (my emphasis).

⁶² *Ibid.*

⁶³ Ryan describes the circularity in Nozick’s attempt to derive property rights from liberty as follows: “To claim that certain restrictions...constitute coercion...presupposes prior determination of the rights they have...[I]t would seem that *any* appeal to personal liberty in the matter of how people may employ their holdings must rest on a conception of what rights individuals have over their holdings in the first place” (“Yours, Mine, and Ours,” 332). As it applies here, the claim would be that certain restrictions (exclusionary duties) do *not* constitute coercion—but this presupposes that certain other rights did not already exist.

⁶⁴ Waldron, *Right to Private Property*, 267.

others anyway, I do not suffer a loss of liberty when someone else acquires some specific property.

Such a conditional right would be a Hohfeldian power (to acquire and thereby exclude) and the conditional duty would be a Hohfeldian liability (to be excluded from eventual acquisitions of others). As mentioned earlier, such powers to impose exclusionary duties would be in need of the same justification as a claim-right to impose. So to say that the conditional duties already existed and so acquisition does not introduce a loss of liberty does not help avoid the burden of justification for property.

The third option, (iii), takes the loss of liberty more seriously. This view accepts that a loss of liberty is a worsening, but argues that it can be compensated.⁶⁵ Such a view differs from that of Nozick, who argues that a worsening may be compensated, but that a loss of liberty does not always count as a worsening and so does not in itself require compensation. Both of (i) and (iii) might hold that liberty is commensurable with something like material welfare, but (iii) is distinguished by viewing all losses of liberty as morally relevant losses that should be compensated.

This approach is, I think, more promising, but I will not address it in depth. The main doubt I want to raise in connection with compensation is that it seems to open the door to justifying expropriation. If the loss of a liberty can be compensated, why shouldn't we also be able to compensate the loss of a property right? If the loss of A's *liberty* when B unilaterally appropriates a hill can be compensated, then why can't the loss of B's *right* be compensated when A unilaterally stakes a claim in what was formerly B's hill? If the argument suggests something like, "the loss is compensated, so *why not?*" it would also imply I can take ownership of a car that currently has another owner, so long as I leave her a proper compensation. Such a power would of course be antithetical to the concept of property rights,

⁶⁵ I do not discuss the possibility that worsening can be assessed at the institutional level, because I think this interpretation would clearly lead to an instrumentalist argument.

rendering property too readily liable to unilateral expropriation.⁶⁶ Therefore, if (iii) is to take moral liberties seriously, it must not only insist upon compensation for the loss but also explain why compensatory trade-offs are enough to justify constraints on liberty but not constraints on rights.

2.1.2 *Permissibility Justifications*

The second challenge for proviso-based accounts is that the proviso alone is not capable of doing enough justificatory work. But, as discussed earlier, many theorists place the justificatory burden on the proviso itself. What the proviso does is stipulate the circumstances in which a particular change in normative relations—the creation of a property right—can occur. For an attempted act of acquisition, we look at whether this requirement is satisfied and thus whether the principle may be applied. But satisfying this condition cannot in itself justify the creation of a property right, because the principle itself needs to be justified as well.

Proviso-based arguments are what A. John Simmons calls a “permissibility justification,” in contrast with “optimality justifications.” The latter seek to show that a given conception of property rights would be better than an alternative arrangement. Permissibility justifications only purport to show that property “does not violate basic moral rules and is not subject to other kinds of basic...moral objections.”⁶⁷ Justification, in this sense, means “simply the denial of ‘absolute’ (i.e., necessary) wrongness.”⁶⁸ The proviso, when it stands alone, is essentially a permissibility justification regarding the creation of property rights.

⁶⁶ Even the exceptional cases where expropriation is sometimes permitted, like eminent domain, are often considered controversial.

⁶⁷ A. John Simmons, “Original-Acquisition Justifications of Property,” *Social Philosophy and Policy* 11, no. 2 (June 1994): 68.

⁶⁸ *Ibid.*, 73.

According to Simmons, “the *primary* force of Locke’s [original-acquisition] justification of private property is to display private property rights as morally possible or permissible, and to articulate the conditions under which this permissibility is sustained.”⁶⁹ Simmons happens to be referring to the institution of private property rights as a whole. Furthermore, the proviso does not stand alone in Simmons’ account of Locke’s justification of property, since he makes additional claims about the moral significance of purposive acts of labor.⁷⁰ But for accounts like those discussed above, which eschew labor-mixing or avoid its theoretical dangers by shifting the justificatory weight off of labor-mixing and onto the proviso, the proviso is made to stand alone.

As Simmons makes clear, the proviso is aimed at refuting charges of impermissibility:

If creating private property in originally unowned things inevitably and wrongfully deprived others of needed goods or fair opportunities, then one could attack private property as morally impermissible and attack existing private property systems as fundamentally and uniformly unjust...⁷¹

This is a problem, I argue, because such a principle cannot justify the creation of rights when it stands alone. Yet this is exactly what happens when the proviso itself is relied upon to do the justificatory work. Moore explicitly sees the proviso serving in this capacity: “If the unilateral changing of the moral landscape makes no one worse-off, there is no room for rational criticism.”⁷²

To see the problem with this argument, consider the gap between the justificatory component of the argument and the resulting right, a property right. It is not the case that satisfying the proviso would enable an individual to make any sort of normative change whatsoever. I cannot impose just any sort of duty on an individual simply in virtue of the fact that they are not made worse off by it. A cannot create a right that B takes some vitamins I have given him simply in virtue of the fact that B is not made worse off by the correlating

⁶⁹ Simmons, “Original-Acquisition Justifications,” 72.

⁷⁰ *Ibid.*, 71-72.

⁷¹ *Ibid.*, 72.

⁷² Moore, *Intellectual Property & Information Control*, 109.

duty. A cannot create a right that B become his servant simply in virtue of the fact that B is homeless and unemployed and would benefit from the arrangement. But such rights would seemingly be implied by Moore's remark above, as well as any argument that relies on the proviso alone to do the justificatory work.

For arguments which rely solely on the proviso to justify property, it is being asked to function in this way. Some libertarians can avoid this criticism. They might hold that the world is not initially unowned and that individuals are born with a right to a fair share of resources.⁷³ An act of appropriation, in this case, can merely be a matter of acting on a prior entitlement to one's fair share. In this way, weight could be shifted off of the proviso again. But insofar as this fair share view is advanced strictly as an interpretation of the proviso itself, the problem would resurface: nothing about merely *leaving* a fair share for others provides a reason to accept a change in normative relations, when one does not have a positive claim to appropriate their own fair share to begin with.

Rather, if the proviso-based argument succeeds in generating a property right, it only does so because of a background assumption that individuals already have the normative power to acquire property.⁷⁴ An argument must defend the normative power in question. Accordingly, the justification of that normative power is what justifies the imposition of a constraint on liberty; merely satisfying the proviso conditions for the permissible exercise of this power does not justify the power.

In other words, there must be a reason to justify why an individual is capable of changing normative relations in this way. The proviso does not provide this reason. Therefore, an additional argument would have to be added to the proviso in order to successfully justify a moral right to property. If we were merely trying to justify property as a legal institution, a proviso-style permissibility justification would suffice when taken in

⁷³ Kymlicka, *Contemporary Political Philosophy*, 121; Richard Arneson, "Lockean Self-Ownership: Towards a Demolition," in Vallentyne and Steiner, *Left-libertarianism and Its Critics*, 337.

⁷⁴ E.g., Vallentyne, "Libertarianism," sec. 2.

combination with an account of political obligation. But there can be no recourse to political obligation to generate the rights in question if property is supposed to be a pre-political moral requirement.

As Simmons says, permissibility justifications are a sort of defensive concept.⁷⁵ Principles may be defended in this way by deflecting objections. But I think there is more to justification than this. Unless there is a presumption that all things are justified until proven otherwise, we will sometimes need positive justifications as well. The proviso, as I have said, can be combined with further argument. When it is, it is the further argument which provides the justificatory force for the creation of property rights.

2.2 Either-Or (Comparative Justifications)

The second problematic strategy, either-or, effectively ignores the possibility that individuals may have nothing more than liberties regarding resources. Rather, this strategy makes the assumption that some positive allocation of property rights is required. While it is obviously the case that two people could not each individually possess full ownership rights to the same object, either-or (EO) presupposes that every object must have an owner, so that denying property rights to one person entails allocating property rights in some other person(s).

Rothbard tries to justify private property in this way. He asks, for example, “if a producer is *not* entitled to the fruits of his labor, who is?”⁷⁶ Rothbard compares the options for how one might distribute property rights in things: to the producer, to some individual(s) other than the producer, or to everybody as a collective. By process of elimination, he lands

⁷⁵ A. John Simmons, “Justification and Legitimacy,” *Ethics* 109, no. 4 (July 1999): 740.

⁷⁶ Murray Rothbard, “Property and Exchange,” in Vallentyne and Steiner, *Left-libertarianism and Its Critics*, 225.

on private property for the producer. His description of these options as “three logical alternatives” seems to suggest he thinks they are exhaustive.⁷⁷

Technically, Rothbard’s remarks might be taken as an argument for the EO claim:

But people are not floating wraiths; they are not self-subsistent entities; they can only survive and flourish by grappling with the earth around them. They must, for example, *stand on* land areas; they must also, in order to survive and maintain themselves, transform the resources given by nature into ‘consumer goods,’ into objects more suitable for their use and consumption. . . . Man, in other words, must own not only his own person, but also material objects for his control and use. How, then, should the property titles in these objects be allocated?⁷⁸

This could be read to involve a false inference that since we require *liberty-rights to use resources* we also require *full titles to control*. Or it might just be a bald assertion of the either-or claim.

Although Rothbard is a particularly clear illustration of EO, the claim is often not made so apparent. For example, when the debate over intellectual property rights is described as a dispute between proponents of IP rights and proponents of access rights, it falsely implies we must choose between these two sides. Moore, for example, says that supporters and opponents of IP both see each other’s activities “as a kind of trespass—a zone of control has been violated without justification.”⁷⁹ The opponents of IP are said to defend the view that “information belongs to everyone.”⁸⁰ Moore considers, for example, the common objection to IP that producers should not be given rights to intellectual objects, which these are social products which draw on social resources. He rejects this view on the basis that it cannot establish a property right *on the part of society* to the intellectual object and it would be wrong for society to “demand compensation” from the artist.⁸¹ Correctly understood, this objection need not establish this in order to call the producer’s property right into question.

⁷⁷ Rothbard, “Property and Exchange,” 222.

⁷⁸ Ibid., 221.

⁷⁹ Adam D. Moore, “Privacy, Intellectual Property, and Hacking: Evaluating Free Access Arguments” (PDF: Social Science Research Network, 2007), 2.

⁸⁰ Ibid., 16.

⁸¹ Ibid., 18-20. The same mistake is made by Richard A. Spinello and Maria Bottis, *A Defense of Intellectual Property Rights* (Northampton, MA: Edward Elgar, 2009), 186.

Himma similarly misrepresents the debate at times. When discussing the objection that IP rights are unnecessary because intellectual objects are non-rival and do not generate conflict, he alleges that this argument against IP fails because it does not look at “the weight of the respective interests that people have in a particular intellectual entity. To show that IP protection is illegitimate, one must show that such protection violates some morally protected interest...”⁸² But just because two parties have some interest in the object does not mean we have to adjudicate between these interests and assign one the status of a right. This portrayal of the situation overlooks the possibility that neither party’s interest is morally significant enough to justify a right.

Of course, the EO premise can sometimes be defended. Some viable ways of doing this will be discussed throughout this thesis. When the EO premise is supported by independent argument, it supports the establishment of some property system, though it does not specify a particular property system directly. Arguments that are too weak on their own to justify a constraint on liberty, become relevant again when a constraint on liberty is unavoidable, because they can be used to defend a particular system of property rights against the alternatives. For example, if the desert argument does not justify a constraint on liberty in itself, considerations of desert may still help us determine which system of property is best when EO obtains and we are therefore required to choose.

The why-not and either-or strategies both fall short of addressing the burden of justification when they are advanced as arguments in their own right. They can be combined with further arguments, however. When this is done, it is the further argument which takes on responsibility for addressing the burden of justification. Why-not and comparative justifications which assume EO do not contribute positively toward justifying the imposition of constraints on liberty.

⁸² Kenneth Einar Himma, “The Justification of Intellectual Property: Contemporary Philosophical Disputes,” *Journal of the American Society for Information Science and Technology* 59, no. 7 (2008): 1147.

2.3 Desert

The argument from desert is a classic justification of property sometimes applied to intellectual property.⁸³ It does not dodge the justificatory baseline like the why-not and either-or arguments; it offers a positive justification for property. However, it suffers from other problems which reflect the problems faced by other arguments to be examined later.

An argument from desert may be evaluated along several lines. One dimension of evaluation I will forego is what may count as a desert base. A desert base is the feature in virtue of which a deserver is thought to deserve something. I will assume for the sake of argument that all proposed desert bases are acceptable. Instead, I want to emphasize how the argument from desert suffers from the weakness that desert can be rewarded by alternative means. The question of whether it must be rewarded in one particular way, i.e. by assigning exclusionary rights, is a question of the appropriateness of the suggested reward to a given desert base.

The concept of desert sometimes risks losing its distinctiveness. Olsaretti distinguishes between “restrictive” (also “selective”) and “inclusive” (also “ecumenical”) accounts of what may be a basis for desert. The latter, by “holding that many different things may constitute desert bases” run the danger of using desert in “too loose a sense, so that a claim that someone deserves something just means that it would be good if that person got that thing.” In such cases, desert would “not identify a distinctive sort of moral claim.”⁸⁴

The rhetoric of desert often appears in this non-distinctive sense in the literature on property rights. At times, saying that someone deserves the fruit of their labor or a right to exclude may mean nothing more than that it would be just or good. If we loosen the notion of

⁸³ E.g., Becker, “Deserving to Own Intellectual Property”; Robert P. Merges, *Justifying Intellectual Property*. (Cambridge: Harvard University Press, 2011), especially chapters 4 and 6; Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown Law Journal* 77 (December 1988): 296-310.

⁸⁴ Olsaretti, “Introduction,” 5.

desert too much, all the justificatory arguments considered in this paper are desert arguments, in the sense that they insist it would be good for certain individuals to be given property rights.⁸⁵

Becker has provided what I think is the best development of a desert-based argument for IP. But he himself at one point even collapses the distinction between desert and other justifications:

Under what conditions can I deserve to have such powers over you by virtue of my labor? That question is equivalent to asking under what conditions my labor can justify your becoming liable, or vulnerable, to my manipulation of your liberties and duties.⁸⁶

I believe Becker is mistaken to claim this equivalence in regards to his own account. In fact, elsewhere he advanced an account of desert as a “fundamental principle” underlying the Lockean justification of property.⁸⁷

2.3.1 Alternative Rewards

Granting a right to exclude is not the only possible reward for desert. This is the biggest challenge that needs to be addressed by a desert-based theory. As I have argued, in order to ground a moral right to IP, the right to exclude must be more than merely a sufficient condition for satisfying the demands of the justificatory argument. It must be a necessary condition (i.e. the only sufficient condition) or the least objectionable sufficient condition. So long as the FLP is in place as our justificatory guideline, any option which avoids constraining liberty (or, perhaps, presents less of a constraint) is preferable.

Failure to overcome this challenge would not, in itself, prove fatal to the desert justification here because it could still be argued that a right to exclude is the most

⁸⁵ E.g., Spinello and Bottis say that a producer “deserves ownership of these things in the name of justice” (*A Defense of Intellectual Property Rights*, 180). Also, it appears to me that desert-based accounts appearing in Gordon (“Property Right in Self-Expression,” 1561) and Hughes (“The Philosophy of Intellectual Property,” 303), are not really based on desert in any distinctive sense of the word.

⁸⁶ Becker, “Deserving to Own Intellectual Property,” 621.

⁸⁷ Becker, *Property Rights*, 49.

appropriate reward. This would imply there is something unique about the right to exclude which can be used to justify it.

Secondly, desert may still be relevant as a complement to other justifications of property rights. Becker believes that due to the problem of alternative rewards, desert arguments cannot conclusively establish “*whether* property rights are appropriate.”⁸⁸ Nonetheless, he says, they can still have something important to say about “what *sort* of property rights are appropriate.”⁸⁹ Similarly, if another argument establishes whether property rights are justified as a general matter, the desert argument might help us tell when (i.e. in which specific cases) they are justified. Furthermore, if there is an argument that supports EO, meaning we have no choice but to allocate property rights in some way, then desert may play a role in the comparative justification of one system over another.

2.3.2 *Appropriateness of the Reward*

The strength of an argument from desert depends, then, on its ability to establish the appropriateness of the reward in question, relative to the desert base. The desert base in Merges’ account is “effort and creative work,”⁹⁰ although he often treats the products of this effort as a proxy.⁹¹ One of the bases discussed by Becker, is the “human excellence” which leads to a creative product, an excellence which deserves an “expression of admiration.”⁹² Another base discussed by Becker is the social value of one’s creative products.⁹³ For the sake of argument, I will accept these are legitimate bases of desert.

⁸⁸ Becker, “Deserving to Own Intellectual Property,” 623 (my emphasis).

⁸⁹ *Ibid.*

⁹⁰ Merges, *Justifying Intellectual Property*, 106.

⁹¹ *Ibid.*, 115.

⁹² Becker, “Deserving to Own Intellectual Property,” 621-622.

⁹³ *Ibid.*, 623-625. A third base considered by Becker does not strike me as distinctively pertaining to desert. On this account, our social norms produce a situation in which creators may have a psychological need for control of creative works (“identity-dependence”). According to this account, since there is a “duty of care to the people put at risk,” we either need to see to their special needs or remove the conditions that generate these special needs (626-628).

Becker names some constraints on desert-based theories of intellectual property. First of all, a reward cannot be earned for doing something that is morally obligatory and it cannot be earned for doing something that is morally impermissible. Second, desert is “double-edged” in the sense that one’s actions might deserve reward or punishment. Therefore, we might not deserve a reward for terrible poetry and the like. What is more, the production of disvalue would be liable to punishment. As a result, we might simultaneously deserve rewards and punishment.⁹⁴ A system of IP similar to our own could be justified by reasoning in this way: some aspect of what I have done by writing a terrible poem deserves the reward of a right to exclude while some other aspect of what I have done calls for people to shun my work.

Beyond these straightforward constraints, we need to evaluate whether a proposed reward is appropriate to its base. Hettinger has pointed out that we should be careful not to conflate the base with the reward.⁹⁵ Deserving a reward for producing some object does not necessarily mean that the reward you deserve is the object you produced. Becker may be guilty of this when he says that creating social value is suggestive of deserving that value.⁹⁶ Merges seems to assume without argument that the proper reward comes in the form of the “benefits of what they work to create,” albeit with some restrictions on scope.⁹⁷

So we will need some criteria for evaluating whether the proposed reward is the proper reward. Becker uses different criteria of evaluation, related to the inherent logic of the arguments for each moral base. However the only time he describes any clear criteria is for the base of social value. One of these criteria is that the reward be “proportional” to the benefit for which it is being given.⁹⁸ Merges also employs a “proportionality principle” or

⁹⁴ Becker, “Deserving to Own Intellectual Property,” 624. Discussion parallels Becker, *Property Rights*, 51-53.

⁹⁵ Edwin C. Hettinger, “Justifying Intellectual Property,” *Philosophy & Public Affairs* 18, no. 1 (Winter 1989): 41.

⁹⁶ Becker, “Deserving to Own Intellectual Property,” 623.

⁹⁷ Merges, *Justifying Intellectual Property*, 126.

⁹⁸ Becker, “Deserving to Own Intellectual Property,” 624-626.

“principle of disproportionate reward” which states that “an IPR must not confer on its holder leverage or power that is grossly disproportionate to what is deserved in the situation.”⁹⁹ The appropriateness of the reward will help only if it can be shown to be the most appropriate reward. But proportionality does not help with this. Too much control is certainly a bad thing, but why is any control at all the appropriate reward?

Becker’s version of proportionality incorporates greater concern for the burden placed on others. Whereas Merges measures the proportion of the base to the reward, Becker argues that proportionality should be assessed in terms of the sacrifice others are asked to make.¹⁰⁰ However, I think it only serves to emphasize the constraint on liberty. Since the right to exclude is a right *in rem* (good against the world), it imposes duties on everyone and this proportionality can easily be upset. We can suppose the burden to each individual is quite minimal, so that when they are aggregated they still do not exceed the net benefit which has earned the producer this reward. But then suppose that the burden of being excluded on terms decided by the owner is an incredibly large inconvenience to one person or a moderately large inconvenience to a small number of people. This could conceivably tip the scales to make the net burden too disproportionate. Alternatively, this could happen as a result of the net benefit being too low. Suppose the novel in question is not widely read. The net benefit in this case might be too low to warrant the net burden that results from everybody having to observe the duty of being excluded. And if the scales are in such precarious balance already, it is all the less likely they will level when the stakes are raised. The burden to individuals who must forego a patented treatment for a deadly disease while a lucky few receive treatment will clearly fall outside the parameters of proportionality. The question is still why any right to exclude at all is more appropriate than some other reward.

⁹⁹ This is one of four mid-level principles advanced by Merges (*Justifying Intellectual Property*, 139-191), but is notably the only one which makes reference to the desert-based thread in his pluralistic justification.

¹⁰⁰ Becker, “Deserving to Own Intellectual Property,” 625.

Another criterion Becker offers in determining whether IPR is a suitable reward is whether it is “fitting,” which he argues should be subjectively judged by the person receiving the reward.¹⁰¹ Hettinger raises the possibility of cases where the producer is not interested in obtaining property rights.¹⁰² Regardless, this criterion does not add anything to the case for imposing constraints on liberty. A producer’s wish to constrain others is hardly a reason to constrain them.

There is a further problem with the appropriateness of such a reward. In the case of reward for producing social value, the right to exclude would remove the moral base for the reward. A reward must be given *for* something. In this case, it is supposed to be given for the production of social value. But at the time IPR is handed out as a reward, all that has been produced yet are *opportunities*. If IPR is the reward, it allows the producer to foreclose those opportunities by excluding people who might have benefited. It seems contradictory that the reward being given is precisely the power to remove the grounds for which the reward is being given in the first place. Indeed, the burden of exclusion is borne even before the excluded individual has received anything of value. Elsewhere, Becker makes a remark sympathetic to this argument: “Deserving a benefit for producing something which only you profit from is a strange notion.”¹⁰³

¹⁰¹ Becker, “Deserving to Own Intellectual Property,” 625.

¹⁰² Hettinger, “Justifying Intellectual Property,” 41.

¹⁰³ Becker, *Property Rights*, 55.

Chapter 3: Justifications That Cannot Be Extended to Intellectual Property

3.1 Sovereignty and Conflict-Avoidance

As we have seen, one way to justify property is by defending the EO premise. We do not need to look far for an argument that can handle this task: a moral requirement to avoid or prevent serious conflict can play this part. Property is often discussed in this capacity. Waldron, for example, says that a property system is a way of addressing the problem of allocation which “arises in any society which regards the avoidance of serious conflict as a matter of any importance.”¹⁰⁴ Property addresses the problem of allocation by providing “rules governing access to and control of material resources.”¹⁰⁵ This is different from “rules governing the use of material resources,”¹⁰⁶ which could specify permissible and impermissible uses. Rather, property addresses the problem by assigning sovereignty over certain resources.

Such an argument is based on the contingent fact that scarcity produces the kind of conflict that we are morally required to prevent. Although it is conceivable that there could be a world where conditions of scarcity did not lead to conflict in the absence of regulation—such as a world where people were not inclined to plan far ahead and tended to shy away from confrontation—it seems perfectly safe to assume that in our actual world, at least, scarcity poses a serious threat of conflict.

What this calls for then is a set of regulatory rules. Insofar as these rules respond to the moral requirement of preventing serious conflict, they would be morally binding. Insofar as these rules consist in exclusive rights of access and use, they would be property rights.

¹⁰⁴ Waldron, *Right to Private Property*, 32.

¹⁰⁵ *Ibid.*, 31.

¹⁰⁶ *Ibid.*, 32-33.

And when dealing with material resources and rational planners, it is plausible to think that exclusive rights are precisely what would be needed if the system is to function at all.

This argument supports property rights as opposed to a world with no system of property at all. It does not indicate support for private property over other property schemes such as communal property. Rather, exclusionary rights could be held at the community level. The important function then is that they allow the community to exclude those who do not follow the rules. Therefore, the claim is that without the right to exclude—vested in some entity—we would face conflict.

3.1.1 Conflict and Non-Rivalry

The non-rival nature of intellectual property is often said to eliminate the concern about conflict. Kinsella, for example, subscribes to the argument that conflict-avoidance is what justifies moral rights to property, but points out that it is circular to justify property on these grounds when the conflict is artificially imposed.¹⁰⁷ He quotes Boudewijn Bouckaert saying, “artificial scarcity itself needs a justification.”¹⁰⁸

It is evident, at least, that intellectual property is much less conducive to an argument from conflict-avoidance. Conflict over the use of expressions and innovations will be far less inevitable, and far less serious. But this still leaves open the question of which kinds of conflicts we are morally required to make an effort to prevent. The prevention of conflict does not require that we establish rules governing all possible activities. Instead, the property solution is to assign sovereignty over objects. As mentioned earlier, this settles the question of who gets to decide how a given object is used, but it does not settle the question of how it may be used by the owner (i.e. which uses are permissible).

¹⁰⁷ N. Stephan Kinsella, “Against Intellectual Property,” *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 22-25.

¹⁰⁸ Quoted in *ibid.*, 23.

Moreover, the prevention of conflict does not even require us to assign sovereignty for all objects. We have managed to avoid serious conflict over the use of air, sunlight, and rainwater. Rather, conditions of scarcity—i.e., where a supply is less than the potential demand—is the feature of land and natural resources which have driven us to make them into property. Two commonly remarked features of IP bear on this question. First, intellectual objects are naturally non-excludable; that is to say, the feasibility of excluding others from the object is ordinarily quite low. The excludability of material resources, however, increases the likelihood of conflict. If person A hordes apples and person B wants those apples, B has to confront A to get them. When a good is not excludable, like a lighthouse, it is less likely that an attempt to use it will lead to conflict.

Second, intellectual objects are non-rival. This is a similar point. Non-rivalry lessens the chance that serious conflict will arise, because one party's use of the object does not prohibit the other party's use of the object. If I want to build a catapult, I do not have to enter into conflict with the first person who built a catapult; whereas, if I want a *particular* catapult, I have no choice but to enter into conflict with whoever else wants to use it.

Although IP is usually said to be non-rival, it may be objected that there is a sense in which it is rival. Take three possible uses of a novel: reading it, printing it (or otherwise instantiating copies of it), and selling copies of it. The first two are straightforwardly non-rival. One person printing a novel does not interfere with another person printing that novel. But the third use, selling copies of the novel, is less straightforward. On the one hand, it is non-rival because two people can in fact simultaneously sell copies of the same novel. On the other hand, it may be objected that selling copies is in fact rivalrous, because (i) the value of each copy on the market is diminished if others are selling the same novel, and (ii) one's ability to successfully sell the object is diminished if others are selling it. In more general

terms, it is the use of that object for the purpose of extracting wealth which we can say is rivalrous.

There is an important distinction to be made between two types of rival goods.¹⁰⁹ An object may be rival in the *full* sense when its use by A absolutely precludes its use by B. Consumables are like this, as are most physical objects. While I am using a shovel, it makes it impossible for somebody else to use that shovel. This is the sense being used when economists define rivalry in terms of reducing the available supply of the good. An object may also be rival in a *partial* sense, when that object's value to others is reduced but not eliminated when others use it. An example of this is when a beach at sunset becomes gradually less enjoyable as increasing numbers of people crowd the beach. This is the sense being used when economists define rivalry in terms of reducing the available benefits from a good.

The market value (i) and the likelihood of a successful sale (ii) are rival in the partial sense. Moreover, the prevention of conflicts which result from full and partial rivalry involve different treatment. Consider, as already noted, that the property solution to conflict is to answer the question of who may make use of an object, but not what use they may make. Resolving the conflict over the rival use in (i) can be seen as a conflict over who gets to obtain a *particular* market value (the monopoly value). However, that particular market value is determined in part by the rules of the market, including the rule about whether or not an individual has the right to enter the market as the exclusive seller of this good. Alternatively, it may be seen as a dispute over what particular market value an individual is entitled to. In either case, it begs the question to presuppose that a particular market value is the market

¹⁰⁹ This distinction is often overlooked even by economists. Garrett Cullity, "Moral Free Riding," *Philosophy & Public Affairs* 24, no. 1 (Winter 1995): 34 gives a comprehensive account of the lack of uniformity in the use of this and related terms. Charlotte Hess and Elinor Ostrom use both senses of rivalry but fail to note the distinction, defining "rival" differently on p. 5 and p. 9 of "Introduction: An Overview of the Knowledge Commons," in *Understanding Knowledge as a Commons*, ed. Charlotte Hess and Elinor Ostrom (Cambridge, MA: The MIT Press, 2007).

value which should obtain under the rules. This must be settled prior to deciding who may be entitled to that value.

The claim about rivalry in (ii) regards a conflict over the chance of success. It is, as I have said, possible for two people to successfully sell the same intellectual object. So it is not the *possibility* of completing a sale which is the object of rivalry; it is the *probability* of completing a sale. The factor which is rivalrous, again, is a variable which varies with the rules of the market. In order to think we must settle a conflict over who gets to enjoy a particular probability of success or what probability of success a given seller is entitled to, we must already determine the rules about whether a seller has a right to enter the market as the exclusive seller.

The argument from conflict-avoidance calls for us to make rules which will avoid conflict, but various schemes of property rules are capable of performing this function. What (i) and (ii), as partially rival uses, have in common is that they deal with potential conflicts that result from the rules regarding exclusion, rather than potential conflicts that exist prior to a determination of the rules regarding exclusion. So we cannot appeal to the moral requirement to settle certain conflicts, until that prior determination is made. In other words, regarding a partially rival use, we are not forced to assign sovereignty in order to facilitate the general use of the object; rather, we bring in substantive considerations about *which* uses should be facilitated.

3.2 Morally Protected Interests

Property rights are sometimes thought to protect or serve morally significant interests an individual might have. These interests might be such that they are held generally by every human individual, or these interests might be such that they reflect the situation of a given individual. Following Waldron, I will refer to these respectively as general rights and special

rights.¹¹⁰ For an interest of either sort to establish a moral right to property or intellectual property, it must be sufficiently morally significant.¹¹¹ Analogous to the desert base and deserved reward, we can think of these arguments in terms of a base (the interest) and a reward (the right to exclude). Analogously to arguments from desert, some interest arguments suffer from the problem of alternative rewards and evaluating the appropriateness (i.e., is the right necessary for the protection of the interest?; does the right actually protect the interest?).

Most of the arguments I will look at in this context appeal to various features of human nature and what is required for autonomy, personhood, self-actualization, human flourishing, and the like. Fisher summarizes this view as holding that “private property rights are crucial to the satisfaction of some fundamental human needs.”¹¹² Like others, he suggests this argument can be applied to intellectual objects whenever property rights would serve this function. These arguments are often referred to as the personality theory of property and associated with a Hegelian lineage. We might also think of these as representatives of the claim that property enhances some particular conception of liberty.¹¹³

It is possible to object to these arguments—though I will not—on the basis that they require commitments to a theory of the good or controversial conceptions of personhood or autonomy. Thus, at least some of them may be accused of perfectionism or paternalism, which many liberals will want to avoid.¹¹⁴ Since my purpose is not to make any commitments on such matters, I want to assume for the sake of argument that these controversial conceptions can be defended—the only caveat is that the defense of such conceptions cannot make direct appeal to the FLP—and focus instead on whether, once defended, property rights are actually what is required to protect the interests in question. To this extent, it does not

¹¹⁰ Waldron, *Right to Private Property*, 116.

¹¹¹ *Ibid.*, 103; Himma, “Justification of Intellectual Property,” 1156, 1159.

¹¹² Fisher, “Theories of Intellectual Property,” 171.

¹¹³ Waldron, *Right to Private Property*, 290.

¹¹⁴ Fisher, “Theories of Intellectual Property,” 194. He also notes that such claims about human nature may be contingent on a “particular culture and time” (191-192).

matter how these controversial conceptions have been defended by their authors; what matters is what follows from them.

3.2.1 *General Rights to Necessary Means*

Arguments in support of a general right to at least some property are numerous. It has been suggested that property “lessens independence between individuals,”¹¹⁵ that it protects “the ability to live as pursuers of values and projects,”¹¹⁶ that it provides security against moral exhaustion by creating a sphere within which one’s activities are not contingent on the consent of others,¹¹⁷ that property saves us from having to devote all our energy to subsistence,¹¹⁸ and that it serves “the need for stability, discipline, and responsibility in the exercise of free will.”¹¹⁹ Along similar lines, “an individual needs some control over resources in the external environment” and “the necessary assurances of control take the form of property rights.”¹²⁰ Rawls is also in the vicinity of these arguments. He included among his basic rights a limited right to “personal property,” grounded on the need for a “sufficient material basis for personal independence and a sense of self-respect.”¹²¹

Such justifications have also been applied to intellectual property. Resnik, for example, extends this justification to intellectual property on the grounds that “A person exercises his or her freedom (or autonomy) by controlling physical objects as well as information.”¹²²

¹¹⁵ Hettinger, “Justifying Intellectual Property,” 45; see also Waldron, *Right to Private Property*, 300.

¹¹⁶ Gaus and Lomasky, “Are Property Rights Problematic?,” 484.

¹¹⁷ Waldron, *Right to Private Property*, 302.

¹¹⁸ *Ibid.*, 306.

¹¹⁹ *Ibid.*, 310.

¹²⁰ Margaret Jane Radin, “Property and Personhood,” *Stanford Law Review* 34, no. 5 (May 1982): 957.

¹²¹ Rawls, *Justice as Fairness*, 114 (sec. 32.6). See also the preface to the Revised Edition of *A Theory of Justice* (Cambridge: Harvard University Press, 1999), xvi: “a right to personal property as necessary for citizens’ independence and integrity.”

¹²² D. B. Resnik, “A Pluralistic Account of Intellectual Property,” *Journal of Business Ethics* 46 (2003): 326. See also Fisher, “Theories of Intellectual Property,” 171, 189; Hughes, “Philosophy of Intellectual Property,” 330-365.

There are some characteristics these arguments—as formulated here—have in common and which prevent extending their application to IP. First, they only argue that individuals require ownership of *some* property, i.e. that they not fall below a certain amount of holdings. Second, they underdetermine not only the system of property that will suffice, but also which varieties of property are required. Regardless of whether they support IP as one possible variety of property, they will not succeed in justifying a moral right to IP unless they support the claim that IP *must* be one variety of property.

As a class of objects, intellectual objects are plainly not necessary to the protection of any of the interests listed above. While intellectual property can certainly provide material independence, security, and subsistence, these same things can be provided for by means of other sorts of property. As Fisher says, such “values could be promoted equally well by providing persons rights to land or shares in private corporations.”¹²³ Hettinger likewise remarks that intellectual property is “neither necessary nor important for achieving these ends.”¹²⁴ In other words, we have the problem of alternatives. Historical and present-day counterexamples attest to this. For the vast majority of individuals, the abolition of IP rights would not affect their independence, security, or subsistence. For individuals who might be impacted in these ways, it would only be due to the contingent fact that their livelihoods are based in industries supported by IP.

However, the argument might be better understood in terms of justifying rights to particular objects: perhaps there are *some instances* when an individual requires ownership over a *particular* expressive or innovative work. While clearly I can flourish without the right to exclude a friend from reusing a witty sentence from an email I sent him, a musician who could not exclude others from using his musical compositions might be denied the possibility

¹²³ Fisher, “Theories of Intellectual Property,” 190.

¹²⁴ Hettinger, “Justifying Intellectual Property,” 45.

of truly flourishing. Even this claim may still seem implausible, because again there are certainly counterexamples of creative individuals who flourish(ed) without IP protection.

Nonetheless, the intuition remains that we identify strongly with some of our creative works and this special relation might call for protective rights. This suggestion brings us away from the idea of a general right and back to the idea of a special right. Thereby, it avoids the problem of whether intellectual objects as a class must be represented among the varieties of property we have a general right to. It also avoids the problem of there being alternative ways to protect these personality interests.

3.2.2 *Property as Constitutive of the Self*

As Radin observes, there is a difference between property that is needed in order to secure autonomy, and property that is *constitutive* of the self. This latter idea more appropriately helps account for the way in which a particular piece of property may be something we identify with and as a result, is not easily replaceable.¹²⁵ If property rights are necessary to protect what I will call our personality interests in the object we identify with, this would have clear applicability to intellectual objects.¹²⁶

From this premise, Radin develops a dichotomy between *fungible* (“held purely instrumentally”) and *personal* property (“bound up with a person”).¹²⁷ Some property will fall closer to the personal end of the spectrum, while some will fall closer to the fungible end. As an example, she says that a home is more often personal than fungible.¹²⁸ Nonetheless, it is also the case that the very same home which is dear to its owner may be sold at some point. So while some rights such as use or possession will protect a morally significant personality

¹²⁵ Radin, “Property and Personhood,” 960.

¹²⁶ Radin does not apply her theory to IP. For a cynical discussion of a similar theory in the context of IP, see Himma, “Justification of Intellectual Property,” 1155.

¹²⁷ Radin, “Property and Personhood,” 960.

¹²⁸ *Ibid.*, 986-987.

interest in the property, other rights such as a right to sell it will not serve to protect that interest and would have to be justified on other grounds.

In my opinion, Radin's justification provides clear support for a right to attribution and a right to integrity of the work. It also seems evident that an author might have a strong personality interest in preventing certain individuals from reading or performing her work; and an inventor may have a strong personality interest in preventing competitors from using her inventions. But how appropriate is a right to exclude for the protection of this interest, more generally?

I see three difficulties. The first, that some uses have no relevance to one's personality interest, I already mentioned. Generating a stream of revenue seems to be a clearly fungible use and would not on its own justify a right to exclude. The second is that there are natural limits to the extent of rights we would grant based on personality interests. Consider, for example, that material objects are not the only things which are constitutive of the self in this sense. Friends, family, and inspirational figures should also be seen in this light. We obviously do not have a right to exclude them from the use of their own selves, nor to exclude others from accessing them. Nonetheless, we are free—may have a right, in fact—to exercise some control over our relationships in ways that impact those others. I think this is how we should look at the question of which rights are appropriate to protecting our personal interest in intellectual objects.

According to this view, an author should have the right to kill off a character, beloved by his readers, in a sequel. Google (personified here for the sake of the example) should have the right to redesign its Gmail interface, despite the fact that Gmail is an integral part of the lives of countless people who will be inconvenienced by the change. This is true *not* because the author has a right to meddle with the emotions of his unsuspecting readers or because Google has a right to meddle with people's ability to communicate. Rather, it is true because

the author and Google have the right to some degree of control over their products, as a matter of protecting their interest in a constitutive part of their selves. It would be wrong, according to the personality theory, to prohibit the author from developing the fictional world that is so closely associated with his identity, or to prohibit Google from updating a product that serves as its face to millions.

The third difficulty is that a producer's personality stake in an intellectual object will necessarily be diluted after he releases the intellectual object into the world. There will be diminishing consequences for the producer's personality interest as more people come to use the intellectual object. It is unlikely that the effect on an author's personality will be particularly noticeable when his readership grows from 103 to 104. More importantly, an intellectual object once released into the world will come to be constitutive of other individuals. A song may in some cases have much more meaning to a fan than its writer. The more widely the object is used, the more cases of overlap will arise.

The second and third difficulty stem directly from the non-rival nature of intellectual objects. These three difficulties add up to a situation where a producer may begin with a very strong right to exclude in all cases, but loses these claims upon releasing the work to the general public or even to a limited audience. The use of an object to generate a stream of income, after all, is a fungible use. A producer could leverage personality rights to exclude others before releasing his work for sale, thus facilitating a stream of income initially. But once it is released, the rapidly diminishing consequences for his personality interests will dilute his stake in the object. Moreover, I have indicated that there are some natural limits to the rights which can be justified on grounds of personality interests. A personality interest clearly supports the claim that a producer should not be stopped from using or interacting with her own work (as might happen if somebody purchased the rights to a musician's songs and then obtained an injunction to prevent that musician from performing them publicly). But

it does not clearly support the idea that a producer should be able to prevent others from making use of her work in a way that merely impacted her ability to generate revenue.

3.3.3 Interference with Projects

There may be other morally protected interests which are significant enough to generate special rights. Himma, for example, argues that a person's time and effort are intrinsically valuable to him or her. Therefore, a person has an interest in having her time and effort respected. He says that "one plausible way" to respect their time and effort is by "refraining from doing something that would ultimately convert a worthwhile expenditure of time into a waste of a valuable resource."¹²⁹ Since this is supposed to constitute a morally significant interest, he argues it can ground a right.

Assuming, once again, that the interest is a valid one, Himma's argument fails to justify IP because IP is merely one way of respecting the interests of the producer. Moreover, there is no reason to think it is the most appropriate way. Not all expenditures of time and effort obviously lead to a right against interference. Suppose there are two business competitors, one of whom treats his business with casual abandon and just throws his inherited wealth at the project, while the other painstakingly invests a great deal of time and energy. The former does not appear to have a morally significant interest on the line; but should that lead us to the conclusion that the latter should have a right against the former to withdraw from competing?

This raises important questions which will be explored in greater depth in the next chapter. First, what should count as interference in a person's projects, and when is this interference impermissible? Second, what is property's role in preventing this interference?

¹²⁹ Himma, "Justification of Intellectual Property," 1158.

Chapter 4: Fairness and Externalities

A number of the foregoing arguments converged on the thought that a producer should have some control over her product. What is not controversial for our purposes here, because it would not constitute an exclusionary right, is that a producer would have access to purely self-regarding benefits. Since IP is non-rival and non-excludable, access to these benefits does not require any right to exclude. But for the same reason, positive externalities (benefits that others could reap) abound. The controversy, then, is over excluding others from these positive externalities.

In this chapter, I explore the permissibility of free riding and considerations of fairness. I also propose that this issue might be better addressed by the idea of a fair chance of success instead of a property right.

4.1 When is Free Riding Impermissible?

At its most basic, to free ride is to take advantage of the work of others, or in other words, to benefit from a positive externality. We talk of there being a free rider *problem* in contexts where this becomes undesirable. Typically, free rider problems are discussed in the context of public goods—goods that are (relatively) non-excludable and non-rival. When the possibility of free riding on the provision of a public good discourages its production, there is the problem of underproduction of that public good. Alternatively, when we are dealing with negative externalities (public “bads”) instead of positive externalities, there is the problem of overproduction.

Less serious cases can also appropriately be called free rider problems; such as when an individual chooses to free ride but in a way which is within the system’s tolerance levels. If we think, for example, that in some cases it is undesirable that an individual benefits

without working for that benefit, even though the result for others is negligible, we could still call this a free rider problem.

When it comes to intellectual property, the threat of free riding is often raised in connection with consequentialist arguments. According to some of these arguments, there would not be enough (or a high enough quality of) intellectual objects produced if it were not incentivized with mechanisms like copyright and patent. This is largely an empirical claim. It is also an instrumentalist argument, so it would not produce a moral right. But the objectionable nature of free riding enters the discussion in other ways.

To begin with, it has been suggested that private property is the only system which does not reward those individuals who would free ride on the industrious.¹³⁰ This can be taken either as a desert argument for property or merely a reason to prefer private property over other allocations of resources. However, it could constitute a distinct and stronger argument if we think there are some cases where free riding is morally objectionable enough that we are required to discourage or prevent it.

Such an approach seems best captured by the idea of a right not to be taken advantage of. Gordon, for example, has suggested we might “contend that it is morally wrong for users to take unconsented advantage of others’ efforts.”¹³¹ But this suggestion—that free riding is never permissible—is usually considered to be too strong of a claim in most contexts. Under most circumstances, we usually think it is permissible for people to benefit from positive externalities. Demuijnck says that immoral cases of free riding (such as with important public goods) are exceptions to the “the standard case, i.e. market production in which the

¹³⁰ Jeremy Waldron, “Property and Ownership,” *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/property/>, sec. 5.

¹³¹ Wendy J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,” *Stanford Law Review* 41, no. 6 (July 1989): 1434.

appropriation of positive externalities is allowed” or “the general rule of the market mechanism – in which charging people for positive externalities is disallowed.”¹³²

Free riding, therefore, is not always impermissible. But there are at least two ways in which we might think free riding crosses the line from permissible to impermissible. The first is that a particular public good is morally important enough to warrant coercion. Again, this could be taken as a consequentialist argument (e.g. avoiding the tragedy of the commons). But it may also be taken as something more. Strictly speaking, such an argument would only warrant enough coercion so as to secure provision of the good. At this point, however, the principle of fairness comes into the picture, requiring that the burdens be fairly distributed among those who benefit from it.

This will not serve to justify a moral right to IP for three reasons. First, most IP is not morally significant enough to warrant coercion in securing its provision. Intellectual objects which are morally important, such as some pharmaceutical patents, are not important in virtue of their nature as intellectual objects. Second, there are alternative means of securing the provision of these goods (including prestige, prizes, subsidies, patronage, charity), most of which do not place constraints on liberty. In fact, IP regimes notoriously lead to the underproduction of some public goods such as pharmaceuticals for so-called “orphan diseases” in developing countries.¹³³ Third, this argument treats all intellectual property as one big collective good. The proposed property right would be instrumental to the provision of this good, but it has no bearing on the claim to a moral right that an individual might have over a particular intellectual object.

¹³² Geert Demuijnck, “Is P2P Sharing of MP3 Files an Objectionable Form of Free Riding?,” in *Intellectual Property and Theories of Justice*, ed. Axel Gosseries, Alain Marciano, and Alain Strowel (New York: Palgrave Macmillan, 2008), 144, 147. Cf. Arneson, “Lockean Self-ownership,” 325.

¹³³ E.g., Thomas W. Pogge, “Human Rights and Global Health: A Research Program,” *Metaphilosophy* 36, no. 1-2 (January 2005): 189-190.

The second situation in which we might think free riding is impermissible is more applicable in this regard; it is what Pettit calls being a foul dealer¹³⁴ and Gauthier calls being a parasite.¹³⁵ These are instances of free riding where the free rider not only benefits from a positive externality, but, in doing so, imposes a negative externality on others. An even narrower version of this behavior can be called exploitation, in which the negative externality is imposed on the producer of the initial positive externality.¹³⁶ Exploitation is closer to what we are looking for here, since only this could provide a reason why control over positive externalities should be given specifically to the producer.

However, the claim that it is impermissible to benefit from a positive externality whenever this creates a negative externality for the producer of the initial positive externality does not line up with our moral intuitions. Suppose McDonald's invests heavily in market research in order to find the best locations based on factors like population density and consumer habits. A competitor, Burger King, decides to take advantage of this by opening up locations very close to all of McDonald's new locations. They are benefiting from a positive externality (namely, the indirect disclosure of information about ideal locations for fast food restaurants), but this seems to be permissible.

When a musician releases a song, this creates as a positive externality the opportunity for others to copy it and share it. Doing so might be considered harmful to the musician if it hurts his chances of selling more copies. However, we might attribute the source of this harm (and responsibility for this harm) to the musician himself, who after all is the producer of the initial positive externality. At least, it seems just as objectionable for an individual to produce externalities but then blame others for how they interact with them. Or from another angle, it

¹³⁴ Steven Kuhn, "Prisoner's Dilemma," in *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/prisoner-dilemma/>.

¹³⁵ Demuinjck, "P2P Sharing," 143.

¹³⁶ Munzer, *A Theory of Property*, 171.

is plausible to think that by making available a non-excludable and non-rivalrous positive externality, the producer must accept its use by others as a possible outcome of his action.

4.1.1 *Non-desert*

Another way we might formulate the general intuition about fairness is in terms of distribution according to desert. Rather than relying on any claim about the creator positively deserving property, the argument is sometimes stated in terms of what others do *not* deserve. Becker, for example, says of the Millian and Lockean line of thought: “It is not so much that the producers *deserve* the produce of their labors. It is rather that no one else does, and it is not wrong for the laborer to have them.”¹³⁷ I will refer to this as a non-desert argument.

To isolate the root idea of such an argument, it is important to distinguish it from some closely related ones. McFarland, for example, makes a related point when he says, “Those who worked to create it have the strongest claim to the benefits of its use, over anyone else who contributed nothing.”¹³⁸ Appeal to the idea of a strongest claim might imply a comparative argument based on presumptive claims. However, the root idea of non-desert would instead focus on the significance of the *absence* of other claims. What matters for non-desert is not that there is a presumptive claim which remains undefeated, but that no other morally significant counter-claims obtain.

Non-desert, then, is related to and must avoid the mistake of relying on the EO premise. For example, Gordon raises an argument focused on non-desert in which she emphasizes Locke’s phrase that a free rider “desired the benefit of another’s pains, which he had no right to.”¹³⁹ Her discussion suggests that we agree with Locke that this is wrongful harm because an either-or decision is made between the benefit of the free rider and the

¹³⁷ Becker, *Property Rights*, 41.

¹³⁸ Quoted in Himma, “Justification of Intellectual Property,” 1154.

¹³⁹ Quoted in Gordon, “Property Right in Self-Expression,” 1545-1546.

benefit of the laborer. Since the free rider can only justify this act by way of his preference for his own benefit, he is using the worker only as a means. This falsely assumes that EO holds in this case.

In order for a non-desert argument to work, it must insist that other parties have no claim even to the moral liberty to use the object. The popular way to argue for this is by appeal to the idea that the product would not have existed if not for the producer. If it would not have existed, it might seem that we can invoke the proviso *and* extend it to normative constraints: one's lack of liberty to access something which had not previously existed does not worsen their normative position insofar as that liberty had no possible extension prior to the act. However, Waldron and Gordon have both convincingly refuted this argument.

Gordon argues that “if there is only one culture (and whether technological or literary culture is at issue, the point is the same), a person who wishes to contribute to it is usually required to use the tools of that culture.”¹⁴⁰ As Waldron says, “We live in a world constituted by the actions and achievements of others, and that now is the only environment in which there can be any question of our freedom.”¹⁴¹ He adds, more forcefully: “this environment, having been thrust upon us by those in whose interests cultural commodities circulate, is now the only one we have, so that it is now in a sense unfair to deny us the liberty to make of it what we will.”¹⁴² The point is that externalities, even positive externalities, make real changes to the position that other people are in. With this in mind, whether we have a moral liberty available to us now takes on significance apart from whether that moral liberty had any relevance beforehand.

¹⁴⁰ Gordon, “Property Right in Self-Expression,” 1570.

¹⁴¹ Waldron, “Authors to Copiers,” 870.

¹⁴² *Ibid.*, 885.

4.1.2 A Fair Chance of Success

What emerges from this discussion is a further disanalogy between property and intellectual property, occurring in the treatment of positive externalities. As we have seen, free riding is most often considered permissible. In other words, property owners are typically not entitled to capture the positive externalities of their holdings, although they might be entitled to try. Ripstein gives the following example:

if I grow mushrooms in the shade cast by your fence, you cannot claim a portion of my profits. If, however, you tell me that you plan to take down the fence unless I help you to repair it, I am free to accept or refuse your offer. The one thing you are not entitled to do is claim that I have wronged you because I have deprived you of the effects of something that you own.¹⁴³

An owner's right to exclude may in this way enable her to try to exclude others from positive externalities, through the non-coercive means of acting upon her own property (e.g., taking down one's own fence). In the case of IP, however, the right to exclude is supposed to extend beyond this and permit the owner to coercively exclude others from the positive externalities of her property (i.e., to enforce her moral right).

Are there any cases where traditional property rights are thought to function in this way? Consider Locke's claim that chasing a hare, without capturing it, still establishes a property right.¹⁴⁴ According to Ripstein, legal systems since the Romans have sided against Locke on this.¹⁴⁵ However, it is possible to imagine circumstances where we might think the hunter had some valid claim against others—for example, if he were still in pursuit of the hare and somebody else tried to capture it. In fact, Gordon has discussed how courts have at times protected interests in “prospective advantages such as wild ducks not yet caught.”¹⁴⁶

The hare and the wild duck are cases where a hunter's actions create positive externalities for others. By chasing a hare or luring a duck, it becomes easier to catch, for

¹⁴³ Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009), 102.

¹⁴⁴ Locke's actual words are that the hunter “begins” a property in the hare (“Of Property,” sec. 30). However, both Ripstein (*Force and Freedom*, 100-101), and Waldron (*Right to Private Property*, 263-264), interpret this no differently from establishing a property right.

¹⁴⁵ Ripstein, *Force and Freedom*, 100.

¹⁴⁶ Gordon, “Property Right in Self-Expression,” 1547.

everyone. But if others take advantage of this opportunity that has been made available to them, it imposes a negative externality on the hunter: the opportunity is foreclosed to him. The opportunity is non-excludable, but fully rival.

If we agree that the hunter has some right against interference in this case, I think it is clearly not because of a property right. (Otherwise, the hunter could then give up the chase and go home, and later claim to have been robbed if somebody else chases down the hare another day.) Whatever is unfair about the interference by another individual during the chase, it is not an interference with one's property. Property secures means, but not results.

What is needed, I suspect, in order to decide when free riding on IP becomes impermissible is an account of what sorts of interference with goals and projects are permissible. In particular, something like a *fair chance of success* could serve as an ideal. For goals that are fully rival (like the capture of a hare), the pursuit of such goals (chasing the hare) may produce opportunities that are also fully rival (the hare becomes easier to catch). A fair chance of success might suggest that free riding on this opportunity is impermissible. It would also explain why the hunter has no right to the hare after he has given up the chase; there is no longer any project for him to succeed in and so we are no longer concerned with protecting his fair chance.

For goals that are partially rival (like earning a living through selling one's novel), the pursuit of such goals may produce opportunities that are also partially rival (copies of the novel become available to customers, who are then able to copy and distribute the novel as well). However, what is required for a fair chance of success is less clear in this case because free riding on a partially rival use does not foreclose the possibility of success in absolute terms; it merely reduces the chances. What exactly a fair chance of success would call for in this case is less clear. This is, for now, only a sketch of how a fair chance of success might operate. A precise development of the idea will have to wait for another time.

Chapter 5: Conclusion

In the case of material resources, we have reasons to impose exclusionary rights. First, there would otherwise be a high chance of serious conflict. Second, the use of a material object for short-term purposes and long-term projects will become impossible in most cases if others are also free to use it; yet humans have certain morally significant interests which require the use of at least some material resources. Third, some objects become so important to our self-constitution that we require rights to use them in some ways.

These things justify constraints on liberty, not because it is morally important that we be able to exercise control over the activities of others but because it is morally important we are able to exercise control over certain of our own activities. Where those activities involve rival goods, it is a necessary condition for our own protected interests that we be able to exclude others. The description of the right to exclude should place emphasis, as Gaus does, on how others must obtain consent to use the object, more so than an interest in controlling what others may or may not do.¹⁴⁷

Which specific uses would such rights protect? This must be answered in order to determine the extent of our rights. If the only uses of an object which require exclusion are not uses that must be protected, then there will be no right to exclude. The above reasons provide some specific content for which uses should be protected, but they leave other details open. For example, people may need the ability to engage in long-term projects to pursue their interest in human flourishing. But various projects might suffice and having some sufficient range of options available will secure this interest. This is the problem of alternatives. If I own enough resources to build a skyscraper, but zoning ordinances prohibit tall buildings, my morally protected interests are not objectionably impinged upon. Building a skyscraper was not specifically required by the interest in question.

¹⁴⁷ Gaus, "Property, Rights, and Freedom," 214.

These considerations add up to an insurmountable challenge for justifying IP as a moral right in this way. To begin with, property systems that do not include rights to IP will satisfy the demands of the arguments from conflict-avoidance and general moral interests. This is in part due to the problem of alternatives. But it is also because intellectual objects are non-rival, and so they may be used in service of the moral interests discussed above without requiring exclusionary rights to facilitate this. Again because intellectual objects are non-rival, exclusionary rights are not needed to prevent serious conflict over them.

Finally, those uses of IP which are rivalrous are only partially rivalrous. If we are going to adjudicate between the conflicts over partially rival uses or support the general moral interests with these partially rival uses, we must first determine the rules regulating permissible and impermissible interference with goals and pursuits. This is because partially rival uses do not interfere with the means which property rights are meant to secure and regulate; instead, they interfere with the goals those means might be used towards. For example, when two sellers are selling copies of the same novel, they are not interfering with each other's use of the novel as a means to engage in this activity. Rather, to whatever extent they are in conflict, it is because they are interfering with the ability to succeed in the goal of selling more copies. I suggested that the idea of a fair chance of success may provide guidance in determining such rules. For now, I leave open the question of what such a principle might look like and whether it might be capable of justifying something like IP rights where other arguments have failed.

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