The Concept of Ownership

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Abstract

There is no universally accepted definition of ownership, and this is a problem. This thesis explores this claim and then explains how a truly universal definition can be given with an analogy to MacCallum's analysis of freedom. It will then explain the distinction between de facto and legitimate ownership before going on to present universal descriptions of both.

Having given the universal description of legitimate ownership this thesis will then demonstrate how Kant's conception of ownership can be accommodated by it, before going on to use it to describe and analyse several conceptions of self-ownership and of intellectual property. Finally, this thesis will demonstrate how the universal description can be used as an evaluative tool by identifying split justifications within conceptions. This thesis will conclude with a summary and suggestions for further research.

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Author's Declaration

I am aware of and understand the University's policy on plagiarism and I certify that this thesis is my own work, except where indicated by referencing, and that I have followed good academic practices.

Sorley Stollard

Introduction

"Among the philosophical enthusiasts for the liberating and enriching powers of private property, there is a striking lack of agreement about its essential character . . . there is a divergence between the view of property as a thing of the earth and body and . . . that it is intangible and invisible energy. Property, it seems can be perceived in different ways . . ."[1]

"The first person who, having enclosed a plot of land, took it into his head to say "This is mine" and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared, had someone pulled up the stakes or filled in the ditch and cried out to his fellowmen, "Do not listen to this imposter. You are lost if you forget that the fruits of the earth belong to all and the earth to no one!""[2]

Property or ownership (I will use the second term for reasons set out in Chapter One) is the central issue of distributive justice, which itself is one of the most important questions of political philosophy. In order for there to be rich and poor, economic justice and injustice, rent and theft, it must be possible for people to own things. Yet despite the importance of the questions surrounding ownership, a precise definition of ownership is hard to give. This is due to two main reasons.

First, "ownership" as it is commonly used, and has been used throughout history, refers to a vast number of different practices: ownership of land, ownership of items, ownership of people, ownership by states, ownership by corporations, ownership by individuals, self-ownership, intellectual property, ownership of speech, ownership by right, or ownership by expectation and many more. Such a great diversity of practices makes it difficult to pin down the common central core that unifies them.

Secondly, a particular definition of ownership is always a normative tool as well as a descriptive one. Adopting a particular definition of ownership is closely connected with adopting a

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[1] Rowan Moore, *Property: The Myth that Built the World*, (London: Faber Limited, 2023), 82.
[2] Jean-Jacques Rousseau, "Discourse on the Origin and Foundations of Inequality among Men," in Rousseau: The Basic Political Writings, ed. Donald Cress, (Indianapolis: Hackett Publishing Company 2011), 69.

particular theory of distributive justice. The definitions of ownership given by Nozick and Rawls for example are not only different, but entail the adoption of radically different theories of distributive justice as a result of their differences. This partially explains why giving a definition of ownership is so difficult and contested. As a particular definition will entail a particular theory of distributive justice, definitions will only be accepted by those who accept that associated theory of distributive justice and will be critiqued and rejected by everyone else.

Notwithstanding these problems, in this thesis I will present and defend a particular definition of ownership. This definition is one which is universal and can avoid both of the problems identified above. It is therefore practically useful to philosophers, both as a tool providing a greater understanding of ownership and assisting in resolving disputes concerning ownership.

The structure of the thesis is as follows. The first chapter will set out the approach I am going to take by drawing an analogy with MacCallum's analysis of freedom and then describe several terminological and methodological features I will be using in the rest of the thesis. Chapter Two describes one particular debate in the philosophy of ownership, that between bundle theorists and monists, in order to explain why a universal description is useful to the philosophy of ownership. I will then critique Christman's framework of ownership when interpreted as a universal framework, to provide a basis for my own universal description.

Then in Chapter Three, I will begin to present this universal description by providing the framework description of the concept of de facto ownership. In Chapter Four I will build on that to present the universal framework description of the concept of legitimate ownership. This is my answer to the initial question, what is ownership? In Chapter Five I will further explain the framework's operation and utility by demonstrating how it can accommodate Kant's conception of ownership.

In Chapter Six I will apply the framework to a specific issue, self-ownership, providing insight into, and evaluation of, theorists in the field, as well as justifying the importance of the framework description. In Chapter Seven I will do the same for intellectual property, showing how the framework can accommodate intellectual property and serve as a tool for understanding and analysis of particular conceptions of intellectual property. Finally in Chapter Eight, I will demonstrate how the framework can be used directly, as an evaluative tool, with respect to split justification conceptions of ownership.

Chapter One.
MacCallum's Analysis of Freedom and the Terminology of Ownership

1.1 Introduction

My aim In this thesis is to present a description of ownership which can be accepted as such by every philosopher who writes about ownership. Many problems in the philosophy of ownership arise, either from different sides in a debate not agreeing on a shared definition of ownership, or from people claiming that no precise definition of ownership is possible. I aim to resolve these problems, by presenting and justifying a clear and precise description of ownership which is universally recognised as such by all political philosophers.

I will begin this task by describing a project similar to mine: Gerald MacCallum's analysis of freedom. The comparison between MacCallum's project and my own reveals the techniques I shall use and the benefits I hope to gain. Following that I shall introduce the concept-conception distinction and explain how it will provide the foundation for the rest of the thesis. Finally, I will introduce a distinction between de facto and de jure ownership and explain how this informs the structure of the following chapters.

1.2 The Analogy of Freedom

My goal in this thesis is to present, explain and vindicate a universal framework description of the concept of legitimate ownership. In order to explain what this entity is and why a thesis on it is important, I will begin by describing an analogous project to mine in the philosophy of freedom. This analogy should make clear what exactly this thesis is about.

1.2.1 Berlin on Freedom

I shall begin this analogy with a discussion of Isaiah Berlin's *Two Concepts of Liberty*. Berlin in this text identifies two concepts of freedom (he uses "freedom" as a synonym for "liberty").[3]

[3]Isaiah Berlin, *Two Concepts of Liberty*, (Oxford: Oxford University Press, 1958), 169.

The two concepts are negative freedom and positive freedom. Negative freedom for Berlin is freedom from external human interference; I am negatively free insofar as I can act unobstructed by other people.[4] Positive freedom meanwhile, is freedom as self-mastery; I am positively free insofar as I am the autonomous originator of my own actions.[5]

Having described these two notions of freedom, Berlin then gives an argument as to why an awareness of this distinction is useful and important. He argues that the sole acceptance of either one of these conceptions of freedom leads to a radically different political philosophy. Accepting and valuing negative freedom alone leads to a society in which certain personal rights (free speech, assembly, freedom of thought) are absolute. He associates this view with Benjamin Constant, Mill, Tocqueville and the liberal tradition generally.[6] In contrast, accepting and valuing positive freedom alone leads to a society in which the state has a duty to force people to act in accordance with right (that is to act freely) and there are no rights individuals have which can prevent this. These two diverging conclusions lead Berlin to state that freedom is not one concept at all:

> "These are not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life . . . it is a profound lack of social and moral understanding not to recognise that the satisfaction that each of them seeks is an ultimate value which, both historically and morally, has an equal right to be classed among the deepest interests of mankind . . ."[7]

To summarise the relevant parts of Berlin's analysis for this analogy, what we ordinarily call "freedom" is not a single concept, but instead contains within it two distinct non-mutually realisable conceptions. An awareness of this fact is useful as it enables us to better understand past political philosophers and current debates in political philosophy.

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[4] Berlin, *Two Concepts of Liberty*, 169.
[5] Berlin, *Two Concepts of Liberty*, 178.
[6] Berlin, *Two Concepts of Liberty*, 211.
[7] Berlin, *Two Concepts of Liberty*, 212.

1.2.2 MacCallum on Freedom

While Berlin's distinction has remained influential it has also produced detractors. One of these is Gerald MacCallum. MacCallum, in "Negative and Positive Freedom," argues that the division of theories of freedom into negative and positive freedom is both inaccurate and unhelpful to political philosophy.[8] He argues that instead of freedom being two different kinds (negative and positive) it is in fact a single kind. This unified freedom can be described using a schematic definition made up of variables and a form which for MacCallum is as follows:

> "x is (is not) free from y to do (not do, become, not become) z.
> x ranges over agents, y ranges over such "preventing conditions" as constraints, restrictions, interferences, and barriers and z ranges over actions or conditions of character and circumstance."[9]

Both negative and positive conceptions of freedom can be described by this definition; the key difference between the two being their differing positions about the range of variable y. While negative freedom theorists argue that y can only be an external constraint, positive freedom advocates would argue that it can also be an internal constraint.

MacCallum argues that this approach to understanding theories of freedom (based on seeing them as all agreeing on a universal structure and disagreeing about variables within that structure) has a number of advantages. The first is simply the reduction in confusion brought about by a new awareness of common ground. MacCallum argues that many of the debates in the philosophy of freedom, such as the question of the relative value of freedom and how to know when someone is free, have been unanswerable because the two sides believed they had been advocating for radically different concepts. As a result, convincing someone who did not share your concept on one of these specific issues was impossible. By eliminating this confusion and revealing commonalities, MacCallum argues that his approach is more likely to lead to progress in these debates.[10] The point here is not that MacCallum's framework will necessarily lead to agreement over whether the negative or positive freedom theory is correct. It is instead that by providing a unified definition of freedom MacCallum presents a way to resolve

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[8] Gerald MacCallum, "Negative and Positive Freedom," *The Philosophical* Review, Vol 76 No 3 (July 1967), 312.
[9] MacCallum, "Negative and Positive Freedom," 314.
[10] MacCallum, "Negative and Positive Freedom," 319.

arguments in more specific areas of the philosophy of freedom and avoids them all becoming understood as disputes over different definitions of freedom.

A second advantage MacCallum identifies with his definition of freedom, is the more accurate understanding of previous philosophers it enables. MacCallum notes a tendency to classify previous philosophers in terms of the positive-negative freedom division. Isaiah Berlin for example provides lists placing predominantly British philosophers (Hobbes, Locke, Mill etc) in the negative group and predominantly continental philosophers (Kant, Rousseau, Marx etc) in the positive group.[11] MacCallum argues that this classification is inaccurate, because even the paradigmatic cases of positive or negative freedom theorists include both types of freedom in their theory. For example, MacCallum argues that Locke's account of freedom includes the positive freedom claim that the laws of a state, by restricting its citizen's freedom, actually enhances that freedom rather than removing it. Meanwhile Marxists often argue that internal restrictions on freedom are the result of external social action and thus all restrictions are ultimately external restrictions.[12] Locke therefore sometimes is concerned with positive freedom and Marxists can be understood as seeing all freedom as negative freedom. MacCallum is not arguing that these two philosophers have been miscategorised and ought to be moved to the opposite group, but instead that the categories themselves are such a simplistic way to understand their theories that they obscure more than they illuminate. In contrast his understanding of freedom provides a more accurate means of analysing such figures, than an understanding which attempts to classify them as negative or positive freedom theorists.

The success of MacCallum's project can be seen in the continuing use of his framework by contemporary philosophers of freedom. Ian Carter for example, in his book *A Measure of Freedom* in which he aims to provide a means to quantitatively assess freedom, uses MacCallum's framework as a starting point for his own definition. For him MacCallum provided the "canonical analysis"[13] of the concept of freedom. MacCallum's framework then, has been successful as a tool for other philosophers of freedom to develop and refine their arguments.

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[11] Berlin, *Two Concepts of Liberty*, 8.
[12] MacCallum, "Negative and Positive Freedom," 322.
[13] Ian Carter, *A Measure of Freedom*, (Oxford: Oxford University Press, 1999), 15.

1.2.3 The Relevance to the Thesis

The relevance of the Berlin-MacCallum example to this thesis is that my project is in some respects the same as MacCallum's. I aim to do for ownership what MacCallum did for freedom: to provide a universal description which can accommodate currently existing descriptions and be practically useful to philosophers. MacCallum's project, as I understand it, was to provide a universal description of freedom, which could enable philosophers of freedom to debate each other clearly and avoid the risk of such debates becoming purely semantic ones about the meaning of freedom.

In this thesis I will do the same for ownership, arguing that the distinctions that are drawn between different types of theories of ownership (unified vs bundle, natural vs conventional, person-person vs person-thing, etc) obscure the common understanding of ownership that all these theories share. While not denying that these distinctions exist, I will argue that a greater understanding of the common definition of ownership will provide similar benefits to MacCallum's account of freedom, namely: an elimination of confusion over where disagreement occurs; a better understanding of the theories of significant philosophers; and a clear separation between debates over the nature of ownership and debates over other more specific issues within the philosophy of property.

1.3 The Concept-Conception Distinction

1.3.1 Rawls' Concept-Conception Distinction

Throughout this thesis I will use the word "ownership" rather than "property". This is because the word "property" can mean either the relation between an owner and her object or the owned object itself. Ownership is a more specific term that means the relation which exists between an owner, an owned object and everyone else, by which the owner gains legitimate control over her object.

The definition that MacCallum gives of freedom is distinct in kind from definitions of positive and negative freedom. His definition of freedom is general and allows for many different types of freedom to be accommodated within it, while a definition of negative freedom, for example,

is specific and refers to only one type. This phenomenon of two types of definition is not limited to MacCallum's analysis of freedom. To describe this difference clearly, I will use the terminology of concepts and conceptions. This concept-conception terminology is drawn from Rawls.

Rawls in *A Theory of Justice* describes the difference between the concept of justice and various conceptions of justice. Individuals may have conflicting conceptions of justice, but still agree on a shared concept of justice:

> ". . . it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common . . ."[14]

The difference between a concept and a conception is that between a general and a specific term. In the real world people have differing, often conflicting, conceptions of justice. However, debates surrounding justice are possible between people with conflicting conceptions. It is possible, for example, for two people with antithetical conceptions of justice to use the same arguments to argue for the importance of justice as opposed to other values. The fact that everyone is able to recognise that these are conceptions *of justice*, indicates that there is a shared element in the conflicting conceptions of justice. This shared element can be understood, Rawls argues, as the concept of justice. While the concept of justice has some content to it, in many respects it is ambiguous:

> "Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life. Men can agree to this description of just institutions since the notion of an arbitrary distinction and a proper balance, which are included in the concept of justice, are left open for each to interpret according to the principles of justice which he accepts. These principles single out which similarities and differences among persons are relevant in determining rights and duties and they specify which division of advantages is appropriate. Clearly this distinction between the

[14] John Rawls, *A Theory of Justice, Revised Edition,* (Oxford: Oxford University Press, 1999), 5.

> concept and the various conceptions of justice settles no important questions. It simply helps to identify the role of the principles of social justice."[15]

The difference between a concept of justice and a conception of justice for Rawls then is that while a concept of justice is comprised of many purposively ambiguous elements such as "arbitrary distinction" and "proper balance", a particular conception of justice will mirror the structure of the concept and replace the ambiguous elements with specific content. A utilitarian conception of justice for example would replace "proper balance" with a "balance which maximises happiness", while a Kantian conception of justice would replace it with a "balance in accordance with the categorical imperative".

Rawls goes on to define a concept of justice as anything which involves principles that determine rights, duties and social advantages, while a conception of justice is a particular set of those principles:

> ". . . a conception of social justice, then, is to be regarded as providing in the first instance a standard whereby the distributive aspects of the basic structure of society are to be `assessed."[16]

> ". . . the concept of justice I take to be defined then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role."[17]

Rawls does not define the concept of justice in more detail than this and instead proceeds to describe his own preferred conception of justice.

To summarise Rawls' distinction then, the concept of justice is a general idea, universal among those discussing it, but one which both lacks fully specific content and is vague or not precisely defined. It contains the unifying features that link conceptions of justice together, but does not contain any specific content and therefore cannot itself fulfil the primary function of a

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[15] Rawls, *A Theory of Justice*, 5.
[16] Rawls, *A Theory of Justice*, 8.
[17] Rawls, *A Theory of Justice*, 9.

conception of justice: to identify just and unjust institutions. For Rawls, knowledge of the concept of justice also provides no argument for or against any particular conception of justice.

A similar concept-conception distinction is made by Ronald Dworkin in *Taking Rights Seriously*. He uses fairness as his example and describes the difference between appealing to the concept of fairness and appealing to the conception of fairness:

> "The difference is a difference not just in the *detail* of the instructions given but in the *kind* of instructions given. When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness and my view is therefore the heart of the matter, When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it."[18]

As in Rawls, for Dworkin a concept is a general idea that in some sense incorporates or accommodates the more specific conceptions. It is possible for a group of people to have conflicting conceptions, but a shared concept of the same idea. This is due, again as in Rawls, to the irreducibly vague nature of concepts.[19]

1.3.2 The Distinction in this Thesis

In this thesis I will apply the concept-conception distinction to ownership. I will argue that there are many different, indeed conflicting, conceptions of ownership, but they can all be understood as being connected to the concept of ownership. As with Rawls' distinction, I will argue that the concept of ownership is deliberately ambiguous and possesses less content than particular conceptions of ownership. Knowledge of the concept of ownership does not in itself provide a conclusive argument for or against particular conceptions of ownership, but it does provide greater understanding and clarity. This is my main difference from Rawls' project. Unlike Rawls my main focus is on the concept itself, and in describing it clearly and precisely. Despite its lack of content and the fact that it does not immediately settle philosophical disputes, clear knowledge of the concept of ownership leads to important benefits. Rawls

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[18] Ronald Dworkin, *Taking Rights Seriously,* (London: Duckworth, 1977), 135.
[19] Dworkin, *Taking Rights Seriously*, 136.

defines the concept of justice as that which is concerned with rights and duties and the distribution of social advantages. A similarly vague definition could be given of the concept of ownership: the concept of ownership is the common elements of our ideas concerning property and owners. Such a definition is imprecise and not nearly as helpful as a precise one. It should be noted here that while I aim to give a precise description of the concept of ownership, in contrast to Rawls' vague description of the concept of justice, my description will be equally, and deliberately, as ambiguous as Rawls'. While vagueness is not a requirement of the description of a concept, ambiguity is, as a concept is an entity which encompasses multiple conceptions with conflicting content. As a result, the concept must be ambiguous in order to be able to accommodate conflicting conceptions.

As an example of how this will proceed we can look to MacCallum. MacCallum's definition of freedom can also be understood in terms of the concept-conception terminology. Positive and negative freedom are contrasting conceptions of freedom. MacCallum's definition is of the concept of freedom. As with Rawls' discussion of justice, the concept of freedom is purposively ambiguous (for example about whether freedom can be restricted by internal means), because it serves as a unifying element for views which differ over those substantive issues. However, unlike Rawls' vague description of the concept of justice, MacCallum's description of the concept of freedom is precise. MacCallum's clear description of the concept of freedom allows philosophers with different conceptions of freedom to be clearer about areas of agreement and disagreement in debates with each other, and also allows them to debate other issues in the philosophy of freedom, without first needing to agree on a shared conception of freedom. I aim to do the same for ownership: to describe the concept of ownership, with clarity and precision, and demonstrate the benefits that come to political philosophy from doing so.

The concept-conception distinction can be explained in more detail by putting it in terms of form and content. When initially giving a description of a conception of ownership, one is describing its content. A conception of ownership will have a whole list of content elements such as: an account of the rights and duties that comprise ownership; lists of the types of entities that can be owners and owned; a description of de facto and de jure ownership and so on (I will define these terms later on). The form of a conception of ownership is the structure that links all of this content together. The form of a conception is not as immediately visible as the content but can be found by analysis.

The concept of ownership is made up of form and variables. It is primarily composed of variables not content (the variables indicate where a conception of ownership would have content) and has a minimalist form that includes only the essential elements from the various conceptions. This is all the same as MacCallum's definition of freedom which is likewise composed of a form and variables. My project in this thesis will be to precisely describe the concept of ownership. I will do this by developing a hypothesis and then testing it against different conceptions of ownership.

As a further illustration of how this process works, I will now describe two conflicting example conceptions of ownership. The Lockean conception of ownership holds that ownership rights are natural rights gained through original acquisition of unowned objects.[20] Ownership is pre-social as it is supported by natural law and thus sets limits on what governments can legitimately do. By contrast, the Rousseauvian conception of ownership holds that legitimate ownership can only arise through the actions of a democratic state. Ownership rights are artificial, and instances of ownership are only justified when they are in accordance with the will of the state.[21]

These conceptions have conflicting content (natural ownership vs artificial ownership, ownership as a limitation on the state vs ownership only justified if approved by the state), but they are concerned with the same entity: legitimate ownership and more specifically its origin. A concept of ownership which encompassed these conceptions would not include any of these specific elements within it, and so would not in itself be a reason to choose one over the other. It would instead aim to be the common form of these conceptions with variables in place of the conflicting content. As an example of what such a concept could be, consider the following:

A legitimately owns B iff: A's ownership of B originated in a Just Manner (JM) and is in accordance with Just Principles (JP)

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[20]"I shall endeavour to shew, how Men might come to have property in several parts of that which God gave to Mankind in common, and without any express Compact of all the Commoners", John Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 2017), 286.

[21] ". . . each private individual's right to his own land is always subordinate to the community's right to all, without which there can be neither solidity in the social fabric nor real force in the exercise of sovereignty.", Jean-Jaques Rousseau, "The Social Contract" from *Rousseau: The Basic Political Writings*, ed. Donald Cress, (Indianapolis: Hackett Publishing Company, 2011), 169.

For the Lockean conception JM is original acquisition or transfer and JP is the law of nature, while for the Rousseauian conception JM and JP are the actions of the democratic state at different times. The description of the concept of ownership I will provide in this thesis will be very different to this one as it will account for all conceptions of ownership, rather than just two, and account for full conceptions of ownership which describe all aspects of ownership, rather than the limited conceptions which focus on legitimacy and origins which I have used in this example. The point I am conveying with this example is that a concept is purposively ambiguous, so as to account for multiple conflicting conceptions, and as a result, for a description of the concept to be accurate, it must use variables to indicate where conceptions can conflict.

1.3.3 Example of Government

As a further aid to understand my use of the concept-conception distinction, in this example I will demonstrate how it can be applied to the case of government. Here is an outline of the concept-conception relation using government rather than ownership as an example.
Concept of Government[22]

Instance ⟶	Conception ⟶	Concept
Current British Government, 15th century Ottoman Government, etc (every government ever)	Hobbes' conception of government, Rawls' conception of government, etc (every conception of government)	The concept of government

A conception of government is to many instances of government as the concept of government is to every conception.

An instance of government is a government existing in the world in a particular time and place. A conception of government is a list of the common features of many instances of government,

[22] Jeremy Waldron discusses concepts and conceptions, in relation to democracy, in a broadly similar manner to me. He argues that the concept of democracy is a more "abstract" form of the many distinct conceptions of democracy that have existed throughout history. Jeremy Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, (London: Methuen and Co, 1987) 179.

which thus gives a general definition of government. Hobbes' conception of government is a sovereign originally created by universal consent exercising authority over its subjects.[23] Rawls' conception of government is an association of individuals who agree to live under a universal authority, which has obligations to ensure social justice and protect basic human rights.[24]

The concept of government is the form of every conception of government and a list of their common essential features. For example, the shared concept of government between Hobbes and Rawls could be: government is an entity created through universal consent which possesses power over its citizens. This includes the common elements of their conceptions, but not the divergent ones. This, of course, only functions as the concept of government for Hobbes and Rawls. It cannot be a description of the concept for all political philosophers, because it specifies that government is created through consent something that some political philosophers, such as Robert Filmer disagree with:

> ". . . if the silent acceptation of a governor by a part of the people be an argument of their concurring in the election of him, by the same reason the tacit assent of the whole commonwealth may be maintained; from whence it follows that every prince that comes to a crown either be succession, conquest, or usurpation may be said to be elected by the people, which inference is too ridiculous; for in such cases the people are so far from the liberty of specification that they want even that of contradiction."[25]

Filmer here argues that governments cannot depend upon consent, because it is not possible for the people to consent to their ruler unanimously and expressly, and that the alternative, of holding governments to be justified by partial tacit consent, makes every government in existence consensual. This forms a part of his broader argument against government by consent. The relevance of his position for my purposes, is that it demonstrates a conception of government in which consent plays no part. The universal description of the concept of government then must not have consent as a component in order to accommodate Filmer and others like him.

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[23] "The only way to erect such a common power . . . is to confer all their power and strength upon one man or upon one assembly of men." Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common-wealth: Ecclesiasticall and Civill*, (Oxford: Oxford University Press, 1996), 114.
[24] "I have assumed that the aim of the branches of government is to establish a democratic regime in which land and capital are widely though presumably not equally held." Rawls, *A Theory of Justice*, 247.
[25] Robert Filmer, "Patriarcha, or The Natural Power of Kings," from *Two Treatises on Civil Government by John Locke preceded by Filmer's Patriarcha,* (London: George Routledge and Sons, 1884), 30.

1.3.4 The Real Existence of Concepts and Conceptions

I do not need to prove that concepts and conceptions exist, or even that we can have knowledge of them, in order to use them in my thesis. The only thing I need to demonstrate is that acting as if they exist is a useful way to act in order to better understand our ideas of ownership. If that is the case I am justified in using the concept terminology even if they do not in fact exist. I am only interested in the concept-conception distinction as a heuristic. Their reality is irrelevant.

For example, the planetary model of atoms in which electrons circle the nucleus on fixed orbits[26] is an inaccurate way to envisage atoms as it encourages a false analogy between atoms and planets, which fails to reflect the speed and cloud like nature of electrons. However, despite its inaccuracy it is useful in enabling students to understand and predict atomic bonds, and thus chemistry in general. A theory does not need to be true (in the sense of directly corresponding to reality) in order to be useful. A simplified or knowingly inaccurate framework can still be productive.

My use of concepts and conceptions is however superior, in terms of accuracy to the above example, in that it is not a certainly inaccurate model of conceptual understanding. I personally believe it is plausible, however accepting its plausibility is not a requirement for accepting its utility. That should be capable of universal demonstration.

1.4 Methodology

1.4.1 The Justification of the Description of the Concept of Ownership

My method for developing a precise description of the concept of ownership will be to develop a hypothesis about the concept of ownership and test it by seeing if it is compatible with many different conceptions of ownership. I will therefore be starting with particular conceptions and using them to gain a greater understanding of the general concept. An objection could be made

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[26] *Encyclopaedia Britannica 15th Edition,* (Chicago: Encyclopaedia Britannica Inc, 1974) 676.

here of a type that applies to all projects that attempt to reason to general entities from particular entities. This objection centres on the difficulties I may face in defining a conception of ownership.

My methodology is to use conceptions of ownership to test the accuracy of the description of the concept. If there is any divergence between the conceptions and the description of the concept, then the description of the concept needs to be changed so as to conform to the conceptions. An alternative methodology would be to argue for the opposite approach: that the description of the concept of ownership should be justified without reference to the various conceptions of ownership, and, if the two conflict, then the conceptions are inadequate and ought to be modified so as to conform to the concept. I have not taken this approach of justification for two reasons. Firstly, I do not see how it is possible to give a description of the concept without reference to the various conceptions. A concept is simply a general idea made up of the unifying elements of the various conceptions. Any attempt to give a description of the concept which did not consider many conceptions would only be based on a single conception, that of the person devising it. Without using other conceptions to test it, there would thus be no way to tell whether the resulting description was a genuine description of the concept, or only a more precise description of the philosopher's starting conception.

Secondly, even if the attempt to justify a description of the concept, without reference to the conceptions was successful, it would not guarantee the practical benefits I am aiming to gain. The benefit of having a precise and clear description of the concept of ownership is that it can be used by people with conflicting conceptions of ownership to both, identify where the areas of disagreement between their conceptions are, and join together in debates surrounding ownership which do not touch on those areas of disagreement. These benefits are only possible when the description of the concept of ownership is universally recognised as the description of the concept of ownership. This is possible because the description is required to be able to account for all conceptions. If, however, the description of the concept is justified without reference to the various conceptions, then even though it may be justified, it will not be recognised as the concept of ownership by the holders of those various conceptions. Consequently, these practical benefits of being universally recognised as the concept of ownership will not arise. As a result, in order for the benefits of possessing a justified, precise and clear description of the concept of ownership to be realised, the description of the concept must be justified by reference to the various conceptions.

1.4.2 The Problem of the Specification of the Conception of Ownership

As a result of taking this position however a new problem arises concerning the specification of a conception of ownership. The issue is: what is it that makes something a conception of ownership? It cannot be the case that a conception of ownership is anything that has the form of the concept of ownership, because my justification of the description of the concept of ownership is derived from the various conceptions of ownership. Attempting to specify conceptions by using the concept would therefore be circular.

I therefore appear to be faced with a dilemma in specifying a conception of ownership: either there are no conditions on being a conception of ownership and anything that is, or has been, called a conception of ownership is a conception of ownership; or to be a conception of ownership a conception must both be called a conception of ownership and meet certain conditions.

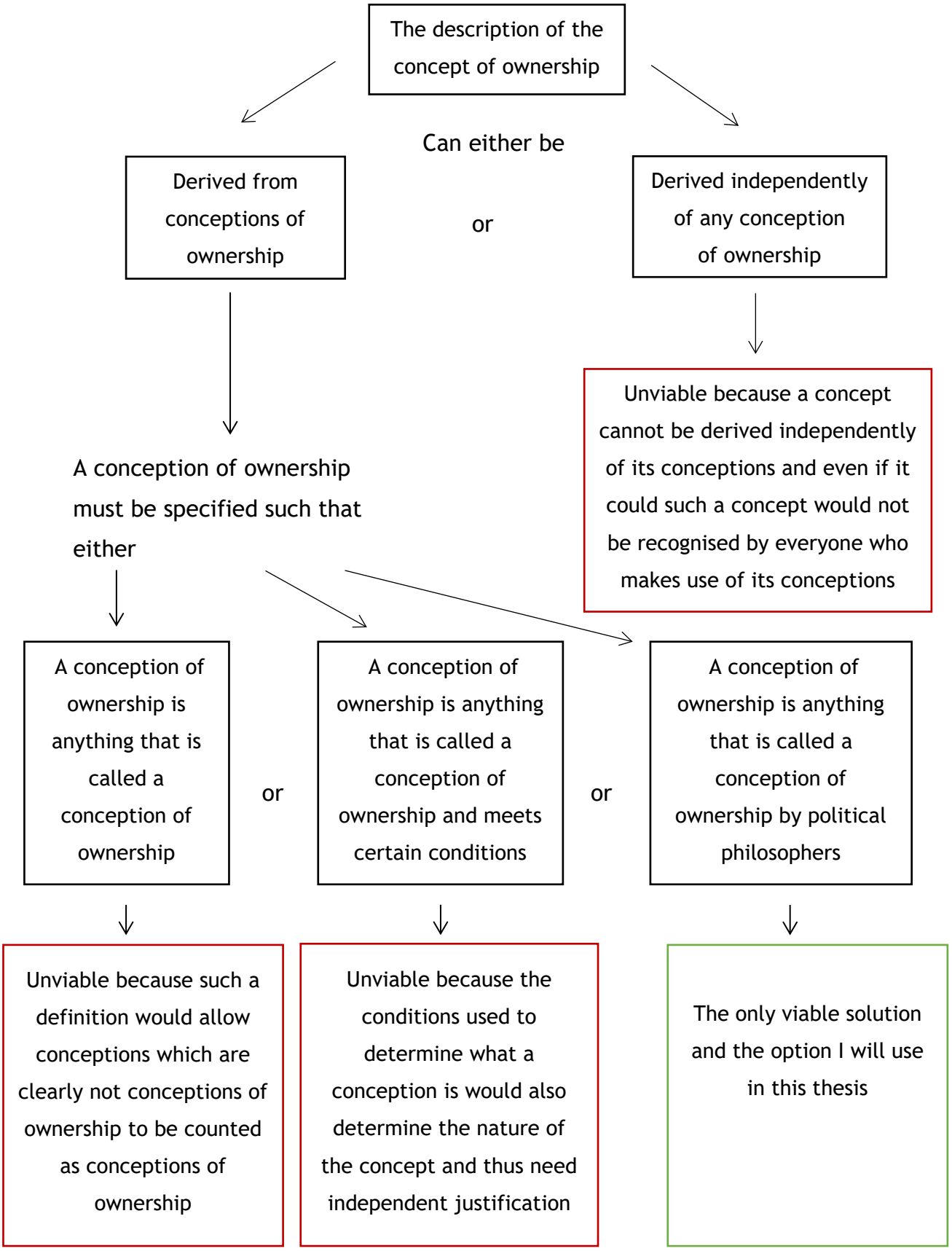
The problem with not having conditions is that I would have to include conceptions of ownership which are conceptions of ownership in name only. For example, imagine I think of a new conception of ownership, the closeness conception. This conception holds that to own something is to stand within 100m of it. It follows that ownership does not require exclusion, rights or even awareness by the owner to exist. As a result, none of these elements can be part of a description of the concept of ownership which was justified in part by such a conception. I can create any number of bizarre conceptions of ownership simply by thinking of a relation and calling it a conception of ownership. As well as the closeness conception, for example, there could also be a thought conception of ownership, which holds that to own something is to think about it for five seconds. Any concept based on such antithetical conceptions could have no form or variables and, as a result, could provide none of the practical benefits I hope to gain from it. In order for there to be a meaningful description of the concept of ownership, there have to be some conditions that prevent anything that is merely called a conception of ownership from being a conception of ownership. As a result, it cannot be the case that there are no conditions on the various conceptions of ownership.

The problem with having conditions is that it is limiting and will result in the concept of ownership merely being equivalent to the conditions I use to determine what a conception is. For example, if I specify that a condition of something being a conception of ownership is that

it must include a right-duty relation between the owner and other people, then the concept of ownership I devise will have the same right-duty relation in it. The concept will be nothing more than the conditions on the conceptions and so the conditions will themselves need to be justified. However, my overall aim is to justify my general description of the concept of ownership by looking at examples of specific conceptions. By introducing these conditions to determine what a conception of ownership is, I am introducing a general element at an earlier stage. Consequently, my attempt to justify the general concept by using the specific conceptions will fail, as the general concept will ultimately be justified by the general conditions on the conceptions. The project will be circular. As a result, for the description of the concept to be justified, the conditions on the conceptions must first be justified and my attempt to justify the description of the concept by the various conceptions will fail.

To further illustrate the problem, I am faced with here is a diagram illustrating the two dilemmas involved in describing the concept of ownership.

The concept-conception dilemma



1.4.3 The Non-Philosophical-Content Conditions Solution

My solution to this dilemma is not to come down on one side of it but to say that my project can escape it altogether. This is because of the context in which I am working. I am interested specifically in the concept of ownership as it is used in political philosophy. Such a concept clearly exists to some degree as people with different conceptions of ownership can usually recognise that they are talking about the same entity. My aim is to precisely describe this commonly shared concept.

As a result, I do have conditions to determine what counts as a conception of ownership, but they are non-philosophical conditions. For this thesis, a conception of ownership is anything that has been called ownership by a political philosopher or theorist up to the present day. These conditions exclude examples of conceptions which are clearly not about ownership (such as the closeness one) as they have not been taken to be conceptions of ownership by political philosophers. At the same time these conditions have no philosophical content. They do not exclude prospective conceptions of ownership based on their meaning, but instead only on their origin. As a result, these conditions do not determine the content of the concept of ownership, as they would if, for example, a conception of ownership had to include property rights, and as a result these conditions do not need their own philosophical justification. Thus, by using non-philosophical conditions to exclude non-ownership conceptions, I can avoid the dilemma.

A final objection at this point is that I myself am a political philosopher and as I have used the closeness conception within my philosophical writings on ownership it should count as a conception of ownership according to my own methodology. I cannot rule out such conceptions at this point by arguing that toy examples or purely vexatious conceptions do not count because then I would be back to reintroducing general conditions.

My response to this objection, is that while I have called the closeness conception a conception of ownership, I have not done so as part of an attempt to describe the practice of ownership to other philosophers. If I genuinely believed that the closeness conception was a description of ownership and tried to convince other philosophers of the fact, I would have to include it. Likewise, if the closeness conception became popular and started to be used by philosophers when discussing ownership, I would have to include it. My criteria for something to be a conception of ownership is that it has to be used by political philosophers as a means of

describing the practice of ownership. As the closeness conception has never been used in this way, it does not have to be accommodated by the concept.

As a result of this, it may be the case that even if my description of the concept of ownership is accurate now, it may become inaccurate in the future. If the closeness conception, for example, became a widely used conception of ownership within political philosophy, then my description of the concept will no longer be accurate as it cannot accommodate such a conception. The conceptions of ownership I will consider are therefore limited both by field (only those used by political philosophers) and temporally (only up to the present day). I would argue though that this is a strength of my description not a weakness. My aim is to enable better and clearer debate between people with different conceptions of ownership by revealing to them their shared concept of ownership. To do this it has to be based on the conceptions of ownership that are used by such people.

A final point is that as a result of this, the concept of ownership I defend will be less philosophically powerful than one which is not developed by an analysis of the conceptions of ownership. If I could clearly describe the concept of ownership without reference to the various conceptions of ownership then I could use that concept as a test to determine what is and is not a conception of ownership. Conceptions, such as the closeness conception for example, could be rejected as actual conceptions of ownership if they do not conform to my description of the concept. However, as a result of the fact that my description of the concept will be developed based on the various conceptions; my description of the concept cannot fulfil such a role. I would argue though, that this approach of describing a concept is still more useful. This is partially because I am doubtful whether it is possible to describe a concept without reference to its conceptions, but also because a clear description of the concept of ownership (even one developed from the various conceptions) provides substantial practical benefits.

1.5 Types of Ownership

A final terminological point I need to address concerns the normative-descriptive distinction. While I have been talking previously about the concept of ownership, this concept can itself be divided into more specific concepts. Theories of ownership are primarily concerned with

normative ownership; the question of who ought to own what. Descriptive ownership debates (who actually owns what) are comparatively neglected.

A comparison here can be drawn with justice. Justice is an inherently normative concept in the sense that if it is just for x to get y it is generally also moral for x to get y. This is not the case for ownership. If x owns y this of itself in no way suggests that x ought to own y or that it is moral for x to own y. The normative and descriptive concepts of ownership can be separated in a way that cannot be done with justice.

1.5.1 De Facto, De Jure and Legitimate Ownership

It might seem that philosophers of ownership, as they are primarily concerned with normative questions, ought to ignore descriptive ownership and focus their attention on normative ownership. This, I would argue, is mistaken because it is the nature of descriptive ownership that determines what normative ownership is. When the concept of descriptive ownership is precisely described, the moral implications of it are obvious. I will argue in this thesis that the most important element (morally speaking) of descriptive ownership is the requirement of exclusion of non-owners from the owned object. This exclusion is a requirement for descriptive ownership to exist, however exclusion has clear and immediate moral implications. Thus, the nature of descriptive ownership determines the nature of the debate concerning normative ownership.

As a result in this thesis, I will draw a distinction between de facto ownership, de jure ownership and legitimate ownership. De facto ownership is purely descriptive ownership. The de facto owner of an object is the person who is generally accepted as the owner. I therefore consider de facto ownership to be synonymous with apparent ownership or recognised ownership. The de facto owner is someone who has the appearance of being the owner or who is recognised by others as the owner. De jure ownership is purely normative ownership. The de jure owner of an object is the person who has the moral right to be the de factor owner. I consider de jure ownership to be synonymous with moral ownership. Legitimate ownership is then a combination of the two. The legitimate owner is someone who is both the de facto and the de jure owner of the object.

The concept of legal ownership is completely distinct from this analysis. The legal owner is not necessarily the same as either the de facto, the de jure, or the legitimate owner. The legal owner is not the same as the de jure or legitimate owner in cases where the legal owner holds the property immorally. For example, in cases of inheritance it may be legally permissible for parents to give all of their property to only one of their two children but doing so may not be morally justifiable. A child who was economically disinherited in this way may argue that; though she is not the legal owner she is the moral owner of half of her sibling's inheritance, as she has the moral right in this case. I am not arguing that such a judgement is correct only that such a judgement is reasonable and as a result legal and moral ownership are distinct relations and cannot be identified with each other.

I would also argue that legal ownership is not equivalent to de facto ownership. Consider the case of a con artist who acquired millions of pounds from her victims, but is able to get away with her crime and live off the money. The con-artist is not the legal owner of this money as she acquired it through fraud. However, I would argue she is the de facto owner as she is able to use it to trade with other people. She is treated as the legitimate owner by strangers she meets, and so is the de facto owner. If she was arrested by the police and the money seized she would no longer be the de facto owner of it, but the fact that it takes the removal of it from her to make her no longer the owner, demonstrates that she was the owner of it, to some degree, beforehand. All it needs for a person to be the de facto owner of something is for her to be treated as the owner by everyone she meets. In many cases this will mean someone who is not the legal owner is the de facto owner and consequently de facto ownership is not dependent on legal ownership.

Therefore, the question of who the legal owner of a given object is, depends neither on who the de jure owner is nor on who the de facto owner is. Legal ownership is determined solely by the laws and legal system of the country in which it occurs. As a result in this thesis, I will not be describing the concept of legal ownership, as it is determined by legal not philosophical considerations and does not determine the nature of the concept of legitimate ownership.

As a further example, imagine that your coat has been stolen from you be a thief who has travelled to a different city and now wears it often. The thief is the de facto owner of the coat as in all her relations with the people she interacts with she is perceived as and treated as the owner. However, she is not the de jure owner as her acquisition of it was through theft. You

remain the de jure owner (at least under a common sense conception of de jure ownership. As a result, she cannot be the legitimate owner as being so would require both being owner de facto and owner de jure. If you recovered your coat and so became the de facto owner again, you would also become the legitimate owner.

These distinctions allow me to organise my description of the concept of ownership. I will begin by presenting a hypothesis of the concept of de facto ownership and then test it against various conceptions of de facto ownership. Once I have a clear and precise description of the concept of de facto ownership, I will develop a description of the concept of legitimate ownership based on it and a legitimacy criteria.

The purpose in drawing these distinctions and in focusing on de facto ownership first is to clearly separate the descriptive and normative aspects of theories of ownership. I will argue that in doing so the similarities between the conceptions of de facto ownership become more obvious and it will become clear that disputes between conceptions of ownership are primarily a result of differences in conceptions of de jure ownership rather than de facto ownership.

It will also allow for clearer categorisation of conceptions of ownership. I will argue that it is universally the case that conceptions of de facto ownership require the exclusion of non-owners. Therefore, in order for this de facto ownership to be legitimate ownership an account must be given of the harm caused by this exclusion, in which the moral justification for the ownership outweighs the harm. This I will argue is a feature of the concept of legitimate ownership and as such a universal characteristic of all conceptions of legitimate ownership within political philosophy.

1.5.2 Why there is no Description of the Concept of De Jure Ownership

In this thesis, I have not tried to describe the concept of de jure ownership. This is because it is significantly more varied and so harder to give a universal description of than either de facto or legitimate ownership. All conceptions of de facto ownership are concerned with the same practice, as are all conceptions of legitimate ownership as they include the conception of de facto ownership. Without a common practice to focus, on conceptions of de jure ownership are

wildly divergent to such an extent that any description of the concept would be very bare, that is to say, not have very many variables and so not be useful.

Consider, for example, trying to identify the common elements in the conceptions of de jure ownership of Locke, Hume and Rawls. All believe that ownership is justified in many situations but also that not every instance of apparent ownership is justified. However, given the lack of commonality in how each justifies ownership, it is hard to see what framework could include them all. The only possibility would be a single variable framework which only contained a variable for justification. Such a framework would not be useful.

Furthermore, I would argue that the concept of de jure ownership only makes sense when understood in the context of legitimate ownership. It is the fact that de facto ownership is inherently harmful which makes an adequate justification for it imperative. Giving a description of de jure ownership which cannot include this harm, is therefore necessarily incomplete. It is analogous to trying to design the roof for a building without being told how strong the walls and columns are. Fortunately, I do not need to give a description of the concept of de jure ownership for the purposes of this thesis.

The impossibility of giving a description of the concept of de jure ownership reveals something interesting about concepts as well. In order for a clear description of the concept of x to be possible, x must both be an entity commonly used and discussed by political philosophers, and also an entity which is routinely and easily subdivided into component parts. The concept of de facto ownership can be described because it is universally agreed that it can be divided into several distinct entities (owner, object, etc). By contrast there is no universally agreed list of the entities that de jure ownership can be divided into. This means that when looking to apply this notion of a "concept" beyond ownership it will only be possible to apply it to composite entities.

1.5.3 Possession

I will be using the concept of de facto ownership throughout this thesis and so need to clarify the differences between it and the concept of possession. Possession is a word which is used in many theories of philosophy but which I do not find useful.

Possession I would define as direct physical interaction with an object. You possess a book when you hold it, a car when you are in the driver's seat and a house when you are inside it. Defining it more precisely than that is difficult because it is such a nebulous concept used in different ways by different philosophers. People routinely speak of possessing cars and houses for example, but it is not possible for even the largest person to extend her body over more than a small part of them at any one time. This implies that in these examples possession does not mean physical contact, but instead means something more like my understanding of de facto ownership (in which case "possession" has no distinct value as a term). In this rejection of "possession" as a useful term I follow Jeremy Waldron's analysis who also raised doubts about "possession" as a tool for the philosophical analysis of ownership:

> "Theories of First Occupancy have always been troubled by the problem of defining "occupancy". What counts as occupying a piece of land? Do I occupy anything more than the ground beneath my feet? If the answer is "yes", how is that area delimited? Is it enough for me to point to the area I am appropriating? Or is something else necessary like enclosure or cultivation? It seems to me that those versions of First Occupancy which do not turn out to be covert versions of the Labour Theory reduce eventually to something like the following claim: the first person who *acts as though he is the owner* of a resource gets to *be* the owner."[27]

Waldron is here arguing against first occupancy theories of original acquisition of owned goods by presenting them with a dilemma concerning occupancy. Either people only occupy the ground they happen to be standing on, or they can occupy objects by standing close to them and some process occurring (such as labouring in the labour theory). The first option undermines first occupancy theories as it will lead to a theory in which it is impossible to acquire large objects. The second option undermines first occupancy theories by reducing them to other theories which justify the process of acquisition (such as labour theories).

I take occupancy to be equivalent to possession. Waldron's argument therefore provides support for my claim that "possession" is not a useful term in political philosophy. This is because possession either means direct physical proximity (in which case barely any objects are possessed and the term becomes useless) or possession means direct physical proximity

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[27] Jeremy Waldron, *The Right to Private Property*, (Oxford: Oxford University Press, 1988), 286.

combined with some other relation (in which case the “some other relation” is the sole basis for ownership and should be studied alone). For these reasons I will use “de facto ownership” rather than possession for the rest of the thesis.

1.5.4 Rent and Contract

Instances of rent appear to present a problem for my understanding of de facto ownership. If the de facto owner is the person who is treated as the owner by everyone else, then is a renter the de facto owner of her rented house? It would seem that she is treated as the de facto owner by some (strangers, friends etc), but not by others (the landlord, possible utilities, etc). My response to this relies on the relational nature of my account. Ownership is not an objective property which if held is true in all contexts (like the property of being 34 years old), it is instead a relation between specific entities. It is possible for A to be the de facto owner with respect to B while X is the de facto owner of the same object with respect to Y. Thus, the tenant is the de facto owner relative to most strangers and observers while the landlord is the de facto owner relative to the tenant. This relational approach aids in the understanding of ownership in many other areas besides rent: how children can own toys against other children while their parents own them against society; how companies can own land against other companies within one country while the country owns the land against other countries. Rent then is an example of a complex type of de facto ownership in which multiple people are the de facto owners of the same object in different contexts.

Concerning contract, for this thesis I take contract and ownership to be distinct things and am only interested in giving a description of ownership. I would define a contract as a type of relation between two agents in which at least one of them will perform some action in the future. Contracts are distinct from ownership in two key ways. Firstly, a contract is composed of two entities and the relation between them, and secondly contracts do not have any presumptive moral value. The concept of ownership is different. Ownership, as I will demonstrate, is composed of three entities and the relations between them and is also (due to

its exclusive character) presumptively immoral. These key differences are why I am justified in treating ownership and contract as distinct practices.[28]

1.6 Conclusion

In this chapter I have explained the project of this thesis through analogy with MacCallum's analysis of freedom and then gone on to describe the concept-conception distinction and the de facto ownership-legitimate ownership distinction as I shall use them throughout the rest of the thesis.

[28] Understanding there to be a sharp distinction between ownership and contract is not unique to me. Avihay Dorfman relies on a similar distinction. Avihay Dorfman, "The Society of Property", *The University of Toronto Law Journal* , Vol. 62, No. 4 (Fall 2012), 564.

Chapter 2.
The Context of the Philosophy of Ownership

1 Introduction

In this chapter I will situate my project within the broader context of the philosophy of ownership and provide a justification for its importance. I will do this by investigating the contributions to the debate surrounding the concept of ownership by two theorists: Penner and Christman. Both philosophers attempt to justify particular theories of ownership, but in doing so they also give arguments to support particular conceptions of ownership. In this thesis I am not defending a particular conception or theory of ownership. Instead, I am trying to understand and describe the concept of ownership in general, and show what practical consequences follow from doing so.

I will argue that the arguments of both of these philosophers demonstrate the importance of developing a clear understanding of the concept of ownership. Penner identifies problems in the philosophy of ownership which are the result of the common bundle of rights conception being inadequate as a conception of ownership and argues for his own monist conception as the replacement. Christman develops a specialised framework description of ownership (something approaching the concept of ownership in my terminology) to aid him in defending his egalitarian theory of ownership. In both of these cases I will argue that the solution to disputes over different conceptions of ownership is (at least as the first step) to give a clear description of the concept of ownership. Neither Penner nor Christman provide such a concept, instead Penner attempts to argue for his preferred monist conception and Christman develops a framework description of ownership that is not a description of the concept of ownership, as it is not universal across political philosophy. I will begin to give a description of the concept of ownership in the following chapter building on the lessons gained from Christman's framework.

2.2 Description of Penner

Penner is a firm opponent of the "bundle of rights" conception of ownership, which he believes is the dominant one in political philosophy and the world in general. The bundle of rights conception holds that ownership consists in holding a bundle of distinct irreducible rights by

the owner in relation to the owned object. Penner traces this conception to Hohfeld and Honoré,[29] and argues it has become the dominant account of ownership eclipsing the alternative monist position which maintains that ownership consists in a single right.

Penner's objective is to prove the incoherence of the bundle of rights conception and to present a better alternative monist conception of ownership. Penner's main argument against the bundle of rights conception is that it does not provide a satisfactory description of ownership. The relevance of Penner to this thesis is that he identifies problems with a dominant conception of ownership, both on a theoretical and practical level. He attempts to solve these problems by supplanting the bundle of rights conception of ownership with his own superior monist conception. My project is similarly motivated by a critique of existing conceptions of ownership. However, unlike Penner, I do not believe that a monist conception of ownership is an adequate solution to the problems defenders of particular conceptions of ownership face, and instead argue for a clear understanding of the concept of ownership. My aim in this thesis will be to present such a description of the concept.

2.2.1 The Bundle of Rights Conception

The bundle of rights conception, as well as being what Penner is arguing against, is also a very influential conception in the philosophy of ownership and one I will refer to throughout this thesis. As such I will take some time to describe it here.

The bundle of rights conception is the position that ownership consists of an irreducible bundle of distinct rights as opposed to the view that the essence of ownership is a single right. This theory can be traced back to Wesley Newcomb Hohfeld who argues that ownership should be understood in such a way:

> "Suppose for example that A is fee-simple owner of Blackacre. His "legal interest" or "property" relating to the tangible object that we call land consists of a complex aggregate of rights, privileges, powers and immunities."[30]

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[29] J.E Penner, "The Bundle of Rights Picture of Property," *UCLA Law Review* 43, no. 3 (February 1996): 712.
[30] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* (Aldershot: Dartmouth Publishing Company, 2001), 96.

Here Hohfeld is arguing that ownership is not a single right but a bundle of distinct rights of different types (or 'incidents' on his molecular theory). A description of what these rights are is given by Antony Honoré. Honoré argues that the bundle of ownership rights is comprised of eleven incidents:

> "Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity: this makes 11 leading incidents."[31]

Honoré argues that these incidents are not all necessary for ownership. Though possessing all the incidents is sufficient for ownership a person could lack any one (or more than one) of them and still be an owner:

> "[The eleven incidents] may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might still have a modified version of ownership, either of a primitive or sophisticated sort. But the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inherence to be designated 'owner' of a particular thing in a given system. As we have seen, the use of 'owner' will extend to cases in which not all the listed incidents are present."[32]

I take Honoré to be saying here that instead of all of the incidents being necessary for ownership, merely possessing a few of the incidents may be jointly necessary and sufficient for ownership. These incidents constitute the complex bundle of rights that is ownership, and this bundle is irreducible to a single right.

The bundle of rights conception of ownership is described most clearly by Stephen Munzer, who builds on both Hohfeld and Honoré's work to provide a deep and complex account of the bundle

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[31] Antony Honoré, "Ownership", *Journal of Institutional Economics*, 9(2), (2013) 231.
[32] Honoré, "Ownership," 231.

of rights conception of ownership. Munzer begins by exploring the complexity of the term "property" and the many different ways in which it is used. An initial distinction that he draws is between the popular and sophisticated conceptions of property. The popular conception holds that property is "things" which is taken to mean both physical objects such as land and cars, and intangible objects such as copyrights and patents. The sophisticated conception understands property as relations between persons with respect to things.[33] These relations constitute a bundle of distinct rights and obligations relating to the property such as the right to exclude the right to use etc. Munzer argues that both these conceptions of ownership can be valid with context determining when it is appropriate to use one or the other.[34] The "sophisticated conception", under Munzer's description is a bundle of rights conception of ownership. He describes this sophisticated conception further with reference to Hohfeld and Honoré:

> "The idea of *property* - or, if you prefer, the sophisticated or legal conception of property - involves a constellation of Hohfeldian elements, correlatives and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalogue of "things" (tangible and intangible) that are the subjects of these incidents."[35].

The final part of Munzer's account of ownership is his discussion of expectations. Munzer argues that a necessary feature of ownership is that it "makes possible legal expectations with respect to things"[36]. To be the owner of an object it is not sufficient that you hold certain rights in relation to that object. You must also have the reliable expectation that should you choose to exercise those rights you will be able to. By including this aspect of ownership in his description, Munzer argues that he is broadening the standard economic conception of ownership to include both its psychological and social dimensions.[37]

Munzer is not primarily concerned, in giving this description of ownership, with identifying scenarios in which the word ownership is used inappropriately or devising a test to distinguish apparent from real ownership. Instead, his aim is to give a unifying description of ownership

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[33] Stepehen R Munzer, *A Theory of Property*, (Cambridge: Cambridge University Press, 1990), 17.
[34] Munzer, *A Theory of Property*, 17.
[35] Munzer, *A Theory of Property,* 23.
[36] Munzer, *A Theory of Property*, 29.
[37] Munzer, *A Theory of Property,* 31.

that aims to encompass as many different types of ownership as possible and reveal their coherence. It follows from this that Munzer's description of ownership is complex and multifaceted. He attempts to give a description that includes both popular and legal understandings of ownership; the many distinct rights that constitute legal ownership and the psychological component of ownership. By contrast Penner, as I will describe in the next section, argues that a clear and precise definition of ownership is required so as to be able to distinguish real from apparent ownership. Munzer views the complexity and breadth of his description as a strength. He argues that only such a wide-ranging description can move beyond western economic views of ownership and be a truly universal description. As an example of this Munzer argues that some attempts to understand Melanesian cultures by anthropologists were hindered by the anthropologists' assumptions of sharp divisions between ownership and non-ownership, and between private ownership and communal ownership[38]. A bundle of rights conception is more useful and accurate as it allows for degrees of ownership. The ability to describe complex and widely different instances of ownership with the same conception is thus a strength of the bundle of rights theory for Munzer.

2.2.2 Penner's Objection to the Bundle of Rights Conception

Penner opposes the bundle of rights conception and argues instead for his preferred monist conception of ownership. In this section I will summarise Penner's criticisms of the bundle of rights conception.

There are two main problems Penner identifies with the bundle of rights conception of ownership. The first is divisibility. The bundle of rights conception relies on the principle that ownership consists of multiple distinct rights. In Penner's terms

> ". . . the bundle of rights can only be taken as meaning that property is a structural composite i.e. that its nature is that of an aggregate of fundamentally distinct norms . . ."[39]

[38] Munzer, *A Theory of Property*, 27.
[39] Penner, "The Bundle of Rights Picture of Property," 741.

Honore's incidents are an example of this conception of ownership; seeing it as being composed of multiple distinct rights. Penner's objection is that having started upon this division of rights, the logical working out of it takes it to absurd places. Penner illustrates this by considering the example of licences. Under the monist view when an owner grants a licence to use an object they own to someone else, that creates new rights of exclusive use for the licensee. Under the bundle of rights conception, by contrast, the creation of a license merely transfers certain rights from the owner to the licensee without creating new ones. This means that prior to granting the license the owner held these rights and all the rights that could be granted to everyone. As a result, all owners hold nearly infinite rights against everyone else at all times, as they need to be able to create licences:

> "On this view A, the owner, holds in his bundle of rights the millions of B to do each and everything with A's property, and the millions of rights of C and D ad infinitum. On the grant of the license to B, A merely extracts the particular right from his bundle with B's name on it and transfers it to B"[40].

This might not appear to be a strong objection to the bundle of rights conception as the existence of a near infinite number of individuated rights in the bundle does not necessarily make it incoherent (though Penner himself does think that the absurdity of so many rights is a reason to reject the bundle of rights conception), but a more powerful theoretical objection can be drawn from it. Penner argues that the cause of this multiplicity of rights in the bundle of rights conception is a result of an error in its structure.

> "We actually conceive of property in terms of a right which permits an owner to do *anything* or nothing with his property; the disaggregative bundle of rights thesis insists that an owner may do everything with his property."[41]

Thus, the absurd proliferation of rights is the result of a mistaken conception of ownership in which everything that it is possible to do with an object is seen as an ownership right. This conception of ownership is in conflict with the common conception of ownership rights, which view them merely as allowing owners unrestricted use of their property. The monist conception of rights is, of course, able to accommodate such a position. The massive quantity of rights and

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[40] Penner, "The Bundle of Rights Picture of Property," 758.
[41] Penner, "The Bundle of Rights Picture of Property," 758.

the conceptual strangeness that causes it, is therefore a problem with the bundle of rights conception.

Penner is here implicitly making a claim about the concept of ownership. He is claiming that this feature of the bundle of rights conception, that all possible rights relating to objects must exist, is a feature that is incompatible, not just with his monist conception of ownership, but with the concept of ownership in general. I would argue that this is a misuse of the idea of the concept of ownership. The concept of ownership must be able to accommodate all conceptions of ownership including a bundle of rights conception with a massive proliferation of rights.

Penner's second objection to the bundle of rights conception is that it is meaningless. He calls it a "slogan" by which he means:

> ". . . an expression which conjures up an image, but does not represent any clear image or set of propositions."[42]

In one sense this is obviously the case, to some degree, when compared to a monist conception of ownership. A monist conception of ownership can give necessary and sufficient conditions of ownership and so clearly distinguish between instances of ownership and non-ownership. A bundle conception of ownership such as Honoré's does not give such conditions as it holds that none of the incidents of ownership are necessary for ownership, though they can be jointly sufficient. A bundle of rights conception is therefore less clear than a monist one.

It does not follow from that however that it is completely meaningless. Ownership is a varied and complex phenomenon in the real world and a bundle theorist could argue that their non-classical definition is a more accurate (and therefore meaningful) definition of ownership than a strict monist one. Penner accepts this but still argues that the bundle of rights conception is meaningless when attempts are made to apply it rigorously to practical examples.[43]

To demonstrate this Penner discusses two legal cases. These both concern edge cases of ownership and, Penner argues, were badly decided due to a reliance on the Bundle conception

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[42] Penner, "The Bundle of Rights Picture of Property," 714.
[43] "As a picture, [the bundle of rights conception] creates an unexamined perspective which guides our approach to the subject, implicitly restricting the focus of our attention, and obscuring the significance of real problems for which it provides no obvious means of solution." Penner, "The Bundle of Rights Picture of Property" 715.

of ownership. The first "International News v Associated Press"[44] is about ownership of news while the second "Moore v Regents of the University of California"[45] is about self-ownership of body parts. In both of these cases the judges deciding them see ownership as a bundle of rights. As a result, they are not concerned so much with identifying whether the entity in question can be owned, and if so who the owner is, as opposed to assessing whether it is useful to treat the entity in question as property or not. Penner's summary of the two cases is that:

> "What the bundle of rights thesis perpetuates, I submit, is the kind of discourse we find in the two cases: a fairly loose and malleable "definition" of property, which provides no real help in applying the term "property" to something like news or body parts, thereby leaving the field of discussion wide open to policy debates about the application of the "instrument" of property protection. This is doubly stupefying."[46]

In other words, the meaninglessness of the bundle of rights conception of ownership is demonstrated in real life by the fact that in court cases that turn on edge cases of ownership (the question of whether something should count as ownership or not), the cases are decided not by the bundle of rights conception, but by broader notions of policy or utility. This demonstrates that the bundle of rights conception gives no guidance as to whether these instances are ownership or not and thus fails to be an effective conception of ownership. The bundle of rights conception of ownership can provide no answer as to whether something is or is not owned when the question is live, and as a result the bundle of rights conception is meaningless.

2.2.3 Penner's Criteria for a Conception of Ownership

Implicit in Penner's criticism of the bundle of rights conception is an account of what the criteria for an adequate conception of ownership is. Penner criticises the bundle of rights conception for its meaninglessness in relation to real cases and its confusion over divisibility on a theoretical level. Penner's own monist conception of ownership avoids these problems. Penner defines property in these terms:

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[44] Penner, "The Bundle of Rights Picture of Property," 715.
[45] Penner, "The Bundle of Rights Picture of Property," 715.
[46] Penner, "The Bundle of Rights Picture of Property," 721.

> "The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety."[47].

Though he lists multiple rights in this conception, the right to abandon, to share etc, these are rights which are derived from the primary right of exclusive use. Penner argues that Honoré's incidents can either all be derived from the right of exclusive use, such as the right to manage, or are not really ownership rights at all, such as the prohibition on harmful use.

Penner's conception is free from the problems of vagueness and infinite divisibility faced by the bundle of rights theories and, on a practical level, is better able to address the issues raised by the case studies. Penner therefore concludes that philosophers of ownership and judges would be better served by adopting his conception.

2.2.4 My Own Criteria

Penner's argument is against a conception (rather than a theory) of ownership, arguing that bundle conceptions of ownership are flawed on a conceptual level and that a better conception is available. I am not concerned here with defending or attacking Penner's conception and his criticism of the bundle of rights conception. My aim is to provide a clear description of the concept of ownership. I would argue that doing so is the way to resolve some of the problems caused by debates between supporters of different conceptions of ownership. As a result, I would argue that attempting to resolve these debates by arguing for the superiority of any particular conception of ownership, as Penner does with the monist conception, will fail.

Penner's monist conception cannot serve as a universal MacCallum-style concept of ownership, because it is insufficient. It lacks the attribute of universality, that ability to be universally accepted as a concept of ownership. This is because a bundle of rights theorist would say that this purported concept is unable to accommodate the conception she defends. A bundle of rights theorist is someone who believes that ownership relations consist of a bundle of

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[47] Penner, "The Bundle of Rights Picture of Property," 742.

irreducible rights. Consequently, they cannot agree to a conception which defines ownership in terms of a single right. Munzer, for example, would argue in response to Penner that despite the problems with the bundle conception which Penner identifies, it is still superior to the monist conception. This is because it better describes the breadth and complexity of ownership. Likewise, a monist such as Penner could not accept a conception of ownership which defined it in terms of a number of irreducible rights. Neither the bundle conception nor the monist conception can be universally accepted.

The only way universal acceptance can be achieved is through the use of a schematic concept. This is a description of the concept, in which not every part is specified but instead variables are included which can be filled with different entities by different theorists. A schematic concept of ownership can be truly universal as it can incorporate a variable that ranges over the underlying right-duty relation in ownership. Bundle theorists and monists will of course disagree on what ought to be substituted for this variable (a bundle of rights and a single right respectively), but both can agree on its overall structure and the other elements of the concept. A schematic concept or framework is therefore the way to describe a truly universal concept of ownership. An outline of what such a schematic concept could be is given by the next theorist I shall discuss, John Christman.

2.3 Christman's Framework of Ownership

2.3.1 Introduction

Christman is a philosopher of property whose aim is to present his own theory of ownership and undermine the alternatives to it. In this case he is arguing for an egalitarian theory of ownership and against any more inequitable theory. Like Penner he also recognises the importance of having an adequate conception of ownership. However, Christman goes further than Penner in that he not only identifies the problem of a lack of a commonly agreed upon conception of ownership, but also presents a solution to it in the form of a framework concept of ownership. Christman then uses this framework concept to bypass debates concerning the nature of ownership, such as the bundle of rights debate addressed by Penner, and can also use it to present a stronger argument for his egalitarian theory.

The relevance of Christman to this thesis is that he is attempting to perform a similar task to me; to give the concept of ownership in terms of a framework of variables and relations between them. In other words, to describe the underlying form of ownership. Where I diverge from Christman is primarily in the scope and detail of the framework. Christman's framework is not universal in that it does not function as a concept for every conception of ownership. This is because Christman is focused on a debate between specific theories of ownership, and so not attempting to capture all forms of ownership. My aim is to provide the concept in the style of MacCallum, that is one to which all theories of ownership can adhere. Simply using Christman's framework in this role is unviable due to the problems that arise when attempting to use it as a universal framework for ownership, such as the lack of specificity around the person-object and object-everyone else relations inherent in ownership and a failure to distinguish between all instances of ownership and only justified instances of ownership.

2.3.2 Description of Christman's Framework

Christman places his framework of ownership in opposition to what he calls the "full disaggregation view."[48] This view, which Christman identifies with Thomas Grey[49], is that ownership, or property rights, cannot be meaningfully referred to, as such rights are only part of a great mass of rights that deal with people's relation to objects. Rules governing liability and inalienability for example govern relations between people and objects and confer rights on people which are indistinguishable from the bundle of rights that comprise ownership. Consequently, individual or specific ownership is something which cannot be meaningfully discussed as it cannot be distinctively defined:

> "Property rights cannot any longer be characterized as "rights of ownership" or as "rights in things" by specialists in property. What, then, is their special characteristic? How do property rights differ from rights generally—from human rights or personal rights or rights to life or liberty, say? Our specialists and theoreticians have no answer; or rather, they have a multiplicity of widely differing answers, related only in that they bear some

[48] John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership,* (Oxford: Oxford University Press, 1994), 20.
[49] Thomas C Grey, "The Disintegration of Property," *Nomos*, Vol. 22, (1980), 73.

> association or analogy, more or less remote, to the common notion of property as ownership of things."[50]

Christman rejects this position arguing that it is possible to define ownership rights in such a way that makes them identifiable and distinct from other rights concerning objects. He does this by using his framework. Christman argues that what is distinctive about ownership rights are their form, which he describes as consisting of a relation of context dependent variables within a fixed structure. He illustrates this through this figure:

Christman's description of ownership

	against →		
"A	B	C	D
Holder(s)	Modalities	Other Persons	"thing"
Subject	(rights, liberties, etc.)		
Private, collective	full, attenuated	in rem, in personum	tangible, intangible
Common etc"[51]			

The fixed structure of ownership is "the relation between A and C characterised by B with respect to D".[52] An individual or party is an owner when they stand in such a relation. All theories of ownership conform to this structure. Their differences are the result of their use of different variables, A, B, C and D. A, C and D are distinct entities, while B is the relation between them.

Christman gives further details on the types of entities which can fill each of the variables. A, for example, is usually either a private holder, a common holder, or a collective owner. Christman identifies these as ownership by an individual, a collective (such as a co-operative) or the state respectively.[53] C almost always refers to every other person in society rather than to specified individuals. Christman argues that it is a mark of property rights, that they are held against a large group of people rather than specific individuals. There can be exceptions to this but in general:

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[50] Grey, "The Disintegration of Property," 71.
[51] Christman, *The Myth of Property*, 23.
[52] Christman, *The Myth of Property*, 24.
[53] Christman, *The Myth of Property*, 23.

> ". . . it will be a distinctive characteristic of ownership rights that they are held not against enumerated individuals but against people in general."[54]

D refers to the thing that is owned. Christman views the specification of D as a legal matter saying: "Whatever the law recognises as own-able belongs here"[55].

The most important variable for Christman is B. B is the relation that links the other three variables together: the substance of the relation between A and C with respect to D. Christman argues that B can be divided into two clusters of rights or "foci"[56]: rights of primary functional control and rights of income. The core idea of primary functional is that barring unexpected circumstances, the owner's desires for her owned object should occur. If Sophie desires to read a book she owns, if she has rights of primary functional control she will be able to actualise her desire. This for Christman is an essential element of ownership:

> ". . . the relation of ownership holds between A and the world in regard to a thing, D, when what happens to D is primarily a function of A's wishes. . . "[57]

The variable B then includes as its first focus, all the rights sufficient to ensure that A has primary functional control over D. Christman specifies these rights as follows:

> "Control ownership is composed of the rights to use, possess, manage, modify, alienate, and destroy one's property."[58]

The second cluster of rights, or focus, that comprises variable B is the right to income. The core of this is the right to "the income flows from the exchange of the goods owned."[59] The right to income is the right to keep the value gained through trading goods with others. To summarise then Christman distinguishes two groups of rights within variable B. The first group are those rights which ensure the primary functional control of the owners and are primarily individual rights of use and control. The second group of rights are not related to primary

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[54] Christman, *The Myth of Property*, 24.
[55] Christman, *The Myth of Property*, 24.
[56] Christman, *The Myth of Property*, 25.
[57] Christman, *The Myth of Property*, 25.
[58] Christman, *The Myth of Property*, 128.
[59] Christman, *The Myth of Property*, 26.

functional control and are rights, not just concerning the actions an individual can take by herself, but are instead rights reliant on trading and interaction with others. This distinction is crucial for Christman's argument.

2.3.3 The Use Christman Makes of his Framework

Christman uses his framework to draw a distinction between what he terms liberal ownership and control ownership. The key distinction between them is the difference in variable B between the two types. In liberal ownership B consists of both the primary control focus and the right to income focus[60], while for control ownership only the primary control focus is required.[61] Christman's central argument is that liberal ownership cannot be morally justified because it leads to inegalitarian outcomes. He considers liberty, natural rights and utility-based justifications for liberal ownership and argues that they all fail to justify its costs.

However, a rejection of liberal ownership does not entail a rejection of all ownership. By using his framework and his idea of control ownership, Christman argues that this alternative form of ownership provides a superior version of ownership which is compatible with the market. Market transactions are possible as people can still gift goods they own themselves and equality is maintained through heavy taxation of income and all other transactions (which is justified as these income rights are not essential for ownership). The difference is in the fact that income rights are not protected, and so people can gain value from trading goods.

Christman also argues that this idea of control ownership is a solution to the problem some egalitarians have with self-ownership. Self-ownership presents a problem for egalitarians because most people have strong intuitions that they own themselves. However, as libertarians have argued, people are naturally unequal in ability. Inequalities in wealth between people can therefore be explained as largely a result of this natural inequality and any attempt to remove them would be acting contrary to people's self-ownership. Nozick for example argues that an inegalitarian distribution of property is justified if it came about through a just process:

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[60] Christman, *The Myth of Property*, 29.
[61] Christman, *The Myth of Property*, 128.

> "If these distributional facts [an unequal distribution of wealth] did arise by a legitimate process then they themselves are legitimate"[62]

The legitimate origin (and subsequent transfer) of property is therefore sufficient to justify any distribution of property even a radically unequal one. In order to justify this position anti-egalitarians, like Nozick, base all ownership on self-ownership, arguing that self-ownership is always justified, and as all other ownership can be traced back to self-ownership, all ownership is justified in that way. Egalitarians who want to rebut such an argument find themselves arguing against the principle of self-ownership, which is a difficult and unintuitive position to take.

Christman argues that his framework, and the distinction it allows him to draw between two types of ownership, provide a solution for egalitarians. The inequalities that are the result of self-ownership are the result of income rights, the more capable gaining more than the less capable through trade.[63] While there might be small inequalities before, it is these income rights which allow significant inequalities to develop. However, income rights are not essential for ownership. Christman argues that removing people's income rights and redistributing the surplus value produced by trade; will prevent new inequalities from emerging and provide funds to redress the inequalities caused by the initial natural inequality in capabilities.[64] As a result self-ownership (provided it is control ownership) is compatible with an egalitarian theory of ownership.

Christman's framework allows him to both identify the specific type of ownership he is arguing against and demonstrate that his preferred alternative is also a conception of ownership. He also does so in a way that allows for constructive debate; a defender of the liberal conception of ownership could agree with Christman's description of the concept of ownership, while still defending the liberal conception of ownership. It is possible for both egalitarian and inegalitarian theorists of ownership to debate the substantive points of their disagreements (value of equality vs liberty, the extent of self-ownership, etc) with both sides agreeing on the definition of terms and that their opponents are presenting an account of ownership. In these

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[62] Robert Nozick, *Anarchy State and Utopia,* (New York: Basic Books, 1974), 232.
[63] Christman, *The Myth of Property*, 155.
[64] Christman, *The Myth of Property*, 157.

ways Christman's framework is successful and its success illustrates why a truly universal framework for ownership would be valuable.

2.4 From Christman's Framework to the Concept of Ownership

While Christman's framework is successful for his own purposes, as a true description of the concept of ownership, it fails for a number of reasons. These reasons are useful to investigate as they are all weaknesses which the universal theory of ownership I aim to describe will have to avoid. These weaknesses are only reasons why it would not be possible to use Christman's framework as a universal description and so are not weaknesses of Christman's framework as he uses it.

2.4.1 Clarity of Form and Variables

Firstly, Christman's framework does not specify the relations between the variables clearly enough for his framework to function as a universal framework. Christman's framework has four variables three of which (A, C and D) are entities and one (B) is the relation between those entities. Christman describes the ownership relation as:

> "the relation between A and C, characterised by B (in regard to D)"[65]

To bring out some of the problems with this framework, consider an example instance of ownership in which Alice owns a book in Canada. Described by the Christman's framework the relation would be

Alice's ownership is the relation between Alice and other Canadians characterised by her ownership rights in regard to her book.

To make this description clearer here is a diagram representing Christman's framework:

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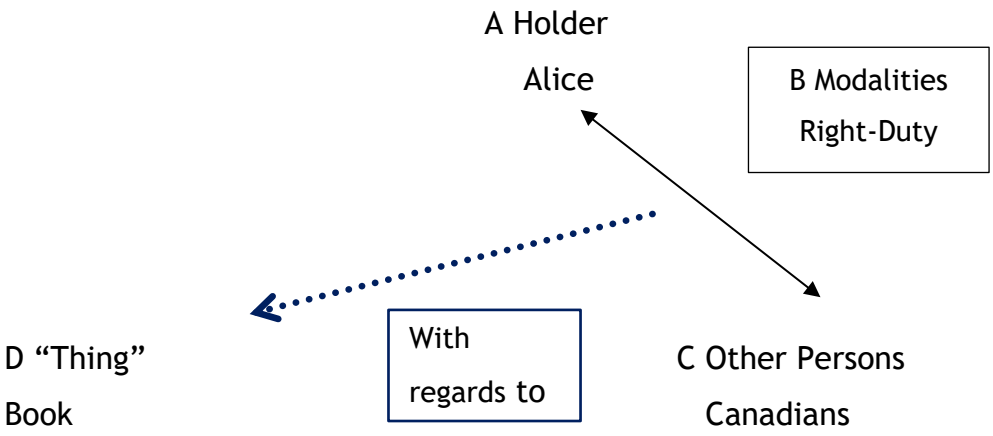
[65] Christman, *The Myth of Property*, 24.

Christman's framework of ownership.



From this description it appears that B is meant to be the sole relational variable which links A, C and D together. However, Christman defines B as a form of right-duty relation between A and C. This means the question of how exactly B and D are connected is unspecified. It might appear that the wording "in regard to" can cover this but it does not resolve my main objection. B and D clearly have some form of relation (under this definition) but it is not clear what precisely it is. The nature of this B-D relation would also seem to require a further variable to describe it. By setting B as the sole relational variable, this framework has no space to describe relations between C and D, and A and D which are essential for ownership. Finally, there is not a clear enough distinction drawn between the entity variables (A, C and D) and the relational variable.

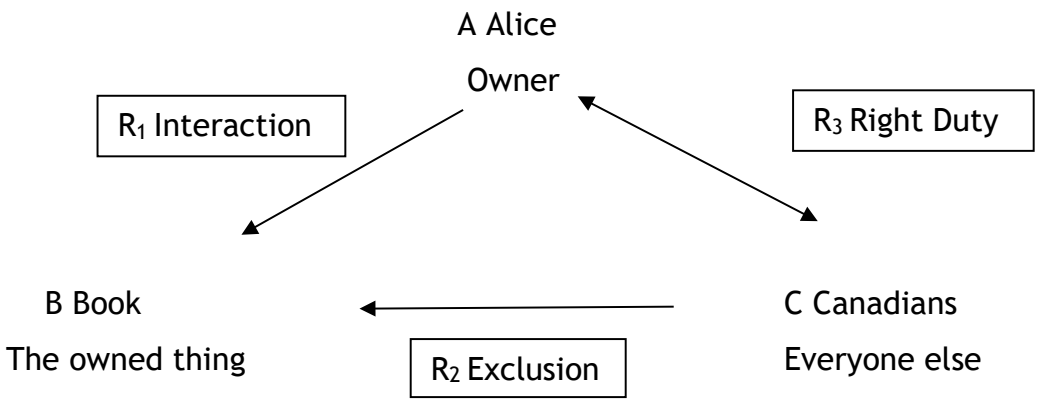
A better and clearer basis for a universal framework would be to start with three entity variables A (owner), B (object) and C (everyone else) and three relational variables R_1 (owner-object), R_2 (object- everyone else) and R_3 (owner-everyone else). Such a schema would describe ownership as:

A owns B iff: A-R_1-B and B-R_2-C and A-R_3-C

Here is how the same example from above would be described by this framework (in which I use interaction, exclusion and right-duty as the values for R_1, R_2 and R_3 respectively).

Alice owns a book if and only if: Alice interacts with the book, other Canadians are excluded from the book and Alice has a right against other Canadians that they should exclude themselves from the book.

And here is the same description as a diagram:
Initial framework of de facto ownership.



My variables “A” and “C” are equivalent to Christman’s “A” and “C”. My “B” is equivalent to his “D” and my “R_3” to his “B”.

In this framework the linking words in Christman’s framework, “characterised by” and “in regard to”, are able to be discarded due to clearly separating the relational variables from the entity variables and making the connections between the entity variables simply be the relational variables without need for further description. This framework is therefore clearer and able to accommodate more diverse conceptions of ownership.

I am not claiming that there is a difference in logical form between Christman’s framework and this revised framework. As both frameworks are concerned with three entities and the relations between them, they are logically equivalent. My claim is that, since the relational variable is not divided, Christman’s framework is less precise in accommodating conceptions of ownership than a framework with a split relational variable is. To demonstrate this, I will now describe the difficulties in describing Munzer’s conception of ownership with Christman’s framework as opposed to with my universal framework.

Munzer is an example of a philosopher who argues that expectations are an essential part of ownership, that is to say, in order to be an owner a person must have expectations of continued ownership of the object.[66] This requirement of ownership cannot be accurately accommodated in Christman's schema as there is no variable for it. In the improved schema, I presented, the expectations can be included in the variable R_1. Such an expectation based conception of ownership, such as Munzer's can be described as one in which R_1 can range over the expectation of continued ownership of B by A. Such a description is more accurate, and thus more useful, than the description that can be given based on Christman's framework. In conclusion then a problem with Christman's framework, when used as a universal framework, is the lack of precision in describing conceptions of ownership as a result of having only one relational variable. My framework will avoid this problem by having distinct relational variables for the different relations.

2.4.2 Over-Specificity

A second problem with Christman's framework when seen as a universal framework is in its over-specificity. When specifying variable B, Christman describes it as consisting in bundles of control rights and income rights.[67] While this specification can accommodate egalitarian and in-egalitarian theories of ownership (and possibly unified as well as bundle theories) it cannot accommodate all theories of ownership. Cruft for example is a theorist who proposes a system of ownership based on controllers in which owners are not right holders, but merely controllers of the objects they own.[68] A requirement for right-duty relations therefore cannot be a part of a universal framework. Similarly, a theory of ownership could exist in which there was no relation between the owner and everyone else. Such a system could be one in which rights were held by owners against the state and everyone else had duties of non-interference in others property, not to the property owners, but to the state. Christman's requirement for there to be a relation between the owner and everyone else (B) is therefore too specific to be part of a universal framework of ownership.

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[66] Munzer, *A Theory of Property*, 29.
[67] Christman, T*he Myth of Property*, 26.
[68] Rowan Cruft, *Human Rights Ownership and the Individual,* (Oxford: Oxford University Press, 2019), 260.

Another way to put this is that Christman's framework unduly limits the number of conceptions of ownership it can accommodate. A universal framework of ownership, which aimed to describe the concept of ownership, would need to be able to accommodate every conception of ownership that exists.

To avoid these issues my universal theory of ownership will have to be more general to describe all theories of ownership. In relation to the above examples, it will allow but not require that the ownership relations be right-duty relations, not require there to be a relation between owners and everyone else.

2.4.3 Moral Justification

A third problem with Christman's framework when seen as a universal framework is in his failure to distinguish between the normative and the descriptive. It is possible, and necessary for an accurate description of ownership, to distinguish between de facto ownership and legitimate ownership as I described in chapter one. Christman's framework is a framework for all ownership (legitimate and illegitimate) and he goes on to argue that a particular type of ownership (control ownership) is moral, and another type (liberal ownership) is immoral. The framework itself however provides a useful means to assess claims of legitimate ownership and find common ground. Christman could for example have included a fifth variable E which ranges over moral justifications. Instances of legitimate ownership would have to have all five variables and E could be specified as creating an egalitarian society. While such a description would not be useful for Christman (as this is a conclusion he is arguing for so he would convince no one by simply asserting it), it would be useful for someone looking to assess theories of ownership. By systematising the justificatory or normative elements of theories of ownership, it will be easier to look for incoherencies or commonalities between theories.

A universal framework description will therefore have to include a variable which ranges over moral justification in order to give a full description of conceptions of legitimate ownership. Such a description will be more accurate and useful than one which lacked such a variable.

2.5 Conclusion

In this chapter I have examined Penner and Christman. Penner's arguments demonstrate some of the problems that emerge from inadequate conceptions of ownership and reveals a way to argue for and against specific conceptions. Christman's work shows the benefit that can be gained from having a framework concept which allows for differing views on variables but can unite people on the essential structure. Both of these theorists' efforts show the value a description of the concept of ownership would have and some of the properties it must possess.

Chapter 3
The Description of the Concept of De Facto Ownership

3.1 Methodology

In this chapter I will provide a description of the concept of de facto ownership. Throughout I will also refer to it as the framework of ownership, as it is a framework that can accommodate every conception of ownership within its schematic form.

The test for the success of this chapter is whether I can present a framework which both can accommodate all conceptions of ownership and also cannot accommodate any conception which is not a conception of ownership. To be a description of the concept it must be able to include all conceptions of ownership and only conceptions of ownership. I do not actually intend to go through every conception of ownership and see if it is compatible with the framework. Instead, I will present my framework, test it against various conceptions and then describe the properties a conception would have to possess in order to avoid being accommodated by the framework. Through this I build up inductive support for my claim that my framework is the most accurate description of the concept of ownership possible.

There are two levels to the schematic for the description of the concept of ownership. It must be able to accommodate both every conception of ownership and every instance of ownership, because conceptions themselves are designed to accommodate every instance. Instances of ownership are individual ownership relations such as my ownership of this laptop. Types of ownership are groups of instances which share similar properties. A conception of ownership must be able to accommodate every type and thus every instance of ownership. For example, a test for Honoré's bundle of rights conception is that it can account for every type of ownership we can think of physical ownership, partial ownership, intellectual ownership, etc. If Honoré's conception counted relations as ownership relations which are clearly not ownership relations (e.g. relations of proximity), or did not classify certain instances of ownership as ownership, then it could not be an adequate conception of ownership. The fact that it can accommodate all and only instances of ownership is a mark of it being a conception of ownership.

As I stated in Chapter One, a conception is to many instances as the concept is to many conceptions. As a result, the test for my description of the concept is that it can accommodate

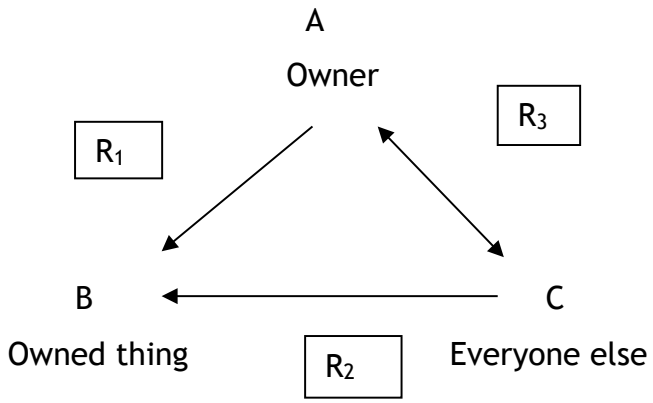
all and only conceptions of ownership. It must also accommodate all and only instances of ownership as well. To be a successful description of the concept it must past these two tests. In this chapter I will begin by presenting an initial description of the concept of ownership, which is based on Christman's framework from the preceding chapter. I will then refine and test it against instances of ownership and then against conceptions of ownership. As a general rule I will initially focus on satisfying the "all" part of the "all and only" requirement. My initial framework will describe more than just ownership and I will proceed to restrict the variables more and more so that eventually it will only be able be able to accommodate ownership.

To briefly recap a discussion from Chapter One, an objection which could be made at this point is that I am misunderstanding some conceptions of ownership by describing them as being valid only insofar as they can accommodate every instance of ownership. The way I have described them here is similar to my own account of the concept of ownership; namely that the concept is dependent on the conceptions. However, this appears to rely on the claim that conceptions of ownership are not derived from observation of instances of ownership, but are instead acquired through some independent process. This is important as if conceptions are so acquired then they can be used as a test of various instances of ownership rather than vice versa. My response to this objection is that I am not dependent on an instance-based understanding of conceptions of ownership. I am only using it as a logical consequence of my understanding of concepts and am not making any claims concerning the nature of conceptions.

Having described Christman's framework of ownership in the previous chapter and explained some its problems, if taken as a universal framework of ownership, I will now describe my own framework of ownership. Following Christman I define ownership as a complex relation composed of an owner, an owned object, everyone else and the relations between these three entities. I will begin by defining control, exclusion and interaction, terms I will rely upon for the rest of the thesis. I will then go through each of the variables within the framework describing the restrictions on the types of entities which can fill them, that are required for the framework. Finally, I will present my framework description and consider several objections.

As a starting point here is my terminology for describing the variables and the relations between them from the end of the last chapter.

Initial framework of de facto ownership.



R_1 is the relation between the owner A and the owned thing B. R_2 is the relation between the owned thing B and everyone else C. R_3 is the relation between the owner A and everyone else C.

3.2 Definition of Terms

In order for the framework to accommodate only conceptions of ownership, some specifications have to be given to all the variables to restrict the entities they range over. If there were no restrictions every practice consisting of three entities with relations between them would be accommodated and, as not all such practices are ownership, the framework would be inaccurate. For example, imagine that there are three entities in a room A, B and C where A and C are taller than B and of equal height to each other. This conforms to the framework as so far described as it is three distinct entities with relations between them. This is clearly not however a conception of ownership as used by political philosophers. Some specifications are therefore required to prevent these particular entities filling these particular variables.

In order to give this specification, I need to define some terms. These are control, exclusion and interaction. Exclusion and interaction are necessary because, as I shall demonstrate, for the framework of ownership R_2 must range over relations of exclusion and R_1 over relations of interaction. I need to give a definition of control in order to be able to give a definition of exclusion.

3.2.1 Control

I define “control of an object” as “the ability to change the object or prevent it from changing”. In effect if X controls Y, X can change Y. I take “change” to be irreducibly primitive and universally understood. I believe this definition to be a common and uncontroversial one, but it has a number of implications that will be important throughout the rest of the thesis. I define control in terms of change or prevention of change as a shorthand for “change relative to the absence of x’s influence”. If I have control over a park, then I have the ability to change its appearance or function by adding trees or benches. I also though, have the ability to keep it in its current state by cutting the grass or preventing new people from visiting it. If I lost that ability to keep it as it currently is, I would have lost some of my control over it and so the definition of “control” must allow that the “ability to prevent it from changing” is a form of control.

Also implicit in the above definition is that control is a scalar property. For any given object the degree to which I can change it varies, I can much more easily change paper than diamonds, for example, and so the degree of control is greater for the first than for the second. It may seem strange to talk about control of natural objects varying by the degree to which they can be changed. This contradicts an intuition that some have that if no one interferes with my interaction with the paper and the diamonds then I control both equally regardless of my ability to change them. In response, to this I would argue that my understanding of control is more in line with common understanding than might be initially apparent. To take another example in common usage, in order to be in control of a car you have to be a competent driver. If someone who did not know how to drive was alone in a car she, even if there was no one preventing her from operating it, would be unable to control it, as she would be unable to change the car (in terms of position/speed/etc) in accordance with her will. Here then is an example in which the ability to change an object is a necessary ability for a person to have in order to control the object. This reinforces my claim that the ability to change an object constitutes control of that object. While my definition is stipulative (in that I am aiming more to give a precise definition than one that reflects common usage) it is still a definition that is broadly compatible with common usage.

Finally, total control appears to be an impossibility. Total control of an entity would require the ability to change it in every way conceivable which would include the ability to (among

other things) destroy it into nothing. This is not possible, but the impossibility of total control is not a problem for descriptions of ownership.

I will go on to base the following two definitions (exclusion and interaction) on this definition of control alone, so I need here to make clear why control alone is sufficient to explain ownership and why in particular I do not also base ownership on use.

"Use" is a term used alongside "control" in the philosophy of ownership. Rowan Cruft for example defines ownership in terms of use and exclusion:

> "My view is that both exclusion and use play a central role in an account of property, but rights of exclusion have some conceptual primacy . . ."[69]

Cruft argues that use and exclusion are both integral to ownership with exclusion being the essential requirement. Ownership for Cruft usually requires not just a relation of exclusion but also one of use. Cruft contrasts ownership with use which he defines as the Hohfeldian privilege to use the object.[70] Ownership for Cruft then generally consists of rights of exclusion held by the owner against everyone else and privileges of use held by the owner. While both of the two are important for ownership, Cruft argues that it is the exclusion which is fundamental for ownership, as in examples where a person has a privilege of use, but no right of exclusion, there is no ownership.[71] I agree with Cruft that use is unnecessary for ownership while the exclusion of others is necessary. However, I do not see exclusion and control as necessarily linked as it is possible for others to be excluded from an object while you lack control of it yourself.

I understand "use" as "the ability to realise the function of an object". For example, to use a car is to drive it, while to use a bridge is to cross it. Use is not a necessary term for my description of ownership because all instances of use are also instances of control. When an object is used, its user has control of it (the ability to change it or prevent it from changing). Consequently, "use" is redundant as a distinct term when describing ownership.

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[69] Cruft, *Human Rights, Ownership and the Individual*, 201.
[70] Cruft, *Human Rights, Ownership and the Individual*, 201.
[71] Cruft, *Human Rights, Ownership and the Individual*, 203.

To return to the framework, I would argue that control is unnecessary for ownership. It is possible for people to own things they cannot change or cannot prevent from changing. For example, I could own a large diamond embedded in granite. Even if it is impossible for me to move, destroy or in fact change the diamond in any way I can still be the owner of it provided that I am the only one who can interact with it. As a result, neither R_1, R_2 or R_3 should be specified as ranging over only relations of control. "Control" is only relevant as a term needed in order to define exclusion and interaction.

3.2.2 Exclusion

"Exclusion" I define as the absence of control. When X is excluded from Y, X lacks the ability to change Y or prevent Y from changing. As control is always partial, so exclusion is also always partial and always present in every relation of control. If I am able to do X and Y but not Z to A then I control A with respect to X and Y, but am excluded from A with respect to Z. My definition of "exclusion" may not map precisely onto the common understanding of "exclusion", but it does not have to for my purposes. I need to precisely define certain terms in order to give a description of the concept of ownership. As I define them the terms may not have exactly the same meaning as they do in common usage, but as long as the specific meaning I give to them can be generally understood, then they will be sufficient for my purposes.

This definition of exclusion as the absence of control is a common one. It is the same as Cruft's definition of exclusion for example:

> "I take a party's *rights of exclusion* over x to be constituted by the duties others owe to the party to refrain from using, handling or (in the case of land) crossing or occupying x. These are what we may call "trespassory" duties owed to the party in question to keep off X."[72]

My account of exclusion differs from Cruft in that I am only interested in the actions of the excluded (when considering de facto ownership) rather than their motivations and so do not include an account of rights and duties of exclusion. Cruft's definition above is of a right of exclusion and is constituted in terms of corresponding duties, however the mere existence of a

[72] Cruft, *Human Rights, Ownership and the Individual*, 201.

right of exclusion does not exclude anyone. If a right exists it can either be respected or violated. My concern is solely with de facto exclusion, that is to say only when people actually are excluded. This can happen if a right is present (provided that right is respected), but it can also happen if there is no right, and the other people are excluded due to some non-right based reason. The presence of a right of exclusion is thus neither necessary nor sufficient for de facto exclusion.

My aim is to give an account of the practice of de facto exclusion and so the presence or absence of a right-duty is irrelevant to my definition, as it could only explain the reasons as to why people are excluded rather than what is practically involved in a relation of exclusion. That is why my definition of exclusion as the absence of control makes no reference to rights.

A potential counter argument to this definition is that exclusion is broader than I allow as it also means the prevention of interaction in which the object itself is unchanged; that is to say the absence of relations which do not change. Consider an example in which Sandra owns a house on land surrounded by railings. The people are excluded from her house by the railings as they are unable to get close enough to change it in any way. However, Sandra wishes to prevent people from looking at her house and so replaces the railings with a high wall preventing anyone from looking in. This appears to be an act of exclusion; however, it would not be so under my definition. The people are already unable to change the house, they are already completely excluded. What they have lost is the ability to experience the house. If they have been excluded, then my definition of exclusion, the absence of the ability to change the thing excluded from, is an insufficient definition as exclusion must also mean the absence of the ability to passively interact with the thing excluded from.

My response is that this type of exclusion is not necessary for ownership. The ability to exclude others from passively interacting with objects (in which the objects themselves are not changed) is not necessary for those objects to be owned. If for example Sandra was unable to build a wall the fact that she cannot exclude others from seeing her house does not diminish her ownership of it. As a result, this type of exclusion is not a necessary component of ownership

and so should not be a part of the framework. My initial definition of exclusion as the absence of the ability to change or use, is thus perfectly adequate.[73]

3.2.3 Interaction

Just as I defined "exclusion" as the absence of "control" so "interaction" is the absence of at least one type of "exclusion". X interacts with Y when X is not subject to all types of exclusion. To illustrate what I mean by types of exclusion consider the diamond example from earlier in which a massive diamond is embedded in granite. If I control the diamond, then I am able to change it, but as it is so difficult to move and impossible to break, significant resources would be required for me to control the diamond.

I am excluded from the diamond insofar as I lack control of it. Therefore, in the absence of tools and machinery to excavate it I am excluded from it as I lack the ability to change it relative to the world with my possession of the resources. As well as being excluded from the diamond naturally by lacking the tools necessary to change it I could also be excluded from the diamond artificially. If I did possess the tools but a group of people were permanently denying me access to the diamond, then I would still be excluded. While it is possible to be excluded from an object by any number of factors for this example, I am identifying just two. Natural exclusion is where I lack the ability to change the excluded from thing due to a natural impediment and artificial exclusion is where I lack the ability to change the excluded from thing due to an artificial impediment. It is possible to be subject to both types of exclusion at once.

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[73] A second response to that same objection (that preventing passive observation is an act of exclusion and consequently, not all exclusion is a denial of the ability to change the thing excluded from and therefore definition of it as such, is flawed) is to argue that passive observation does change the thing excluded from.
The objection relies on the assumption that the experience of an object is a thing of a different kind to the object itself. The experience is mental the object is material. This depends on believing in the existence of mind independent material objects. If that belief is rejected then, passively observing an object is the same kind of interaction as moving it or using it. As a result, passive observation does alter the object observed as the object simply is, a bundle of sense experiences which the observer blocks or otherwise interferes with when she observes it. In fact, observation, in a sense, creates the object as it is the observer who links together the disparate sense data and conceives of it as an object. Distinct objects do not exist independently of our observation of them. Therefore, all instances of exclusion are preventions of the ability to change, and I am justified in using this definition.
However, as my belief in the unknowability of a mind-independent world is not common among philosophers I have not relied on this to base my arguments and so used the one about the exclusion of passive observation not being necessary for ownership instead.

I am interacting with the diamond insofar as I am not being excluded, by at least one type of exclusion, from it, that is insofar as there exists at least one impediment to my control which I am not subject to. If there are neither natural nor artificial impediments to my action, then I can certainly interact with it. However, I can also interact with it simply if I am not subject to all the same impediments as other people. If for example no one has the ability to remove the diamond due to natural obstacles and everyone but me is excluded from the diamond by the action of the state, then I am in a relation of interaction with the diamond. I cannot control it any more than anyone else (due to the natural impediment), but as I am not artificially excluded from it in the way that everyone else is, I am in a relation of interaction with it.

This example seems strange, primarily because interaction is not commonly defined the way I define it, but instead as merely a weak form of control. Again, my aim here is not to give a precise definition of a commonly used term, but to define a specific term for my thesis in a way that is useful to me. My definition certainly does not function as a definition of interaction as it is commonly used but that is not what I am aiming to do. I am trying to define an entity which is the absence of a type of exclusion and explain how this entity is not equivalent to control. I decided to call this entity "interaction", but for a time considered calling it "non-exclusion" as a more precise but uglier word for it. Changing the word "interaction" to "non-exclusion" throughout my thesis would not alter my project at all.

Definitions of control, exclusion and use.

Control	→ Absence	Exclusion	→ Absence	Interaction
The ability to change the controlled thing		The absence of control (the absence of the ability to change the excluded from thing)		The absence of at least one type of exclusion (the absence of at least one type of the absence of the ability to change the interacted with thing)

3.3 Description of the Variables

Having defined "control", "exclusion" and "interaction", I will now begin to give the specifications the variables require in order for the framework to accommodate all and only conceptions of ownership. I will begin with R_2 arguing that this can only range over relations of exclusion. I will then argue that R_1 can only range over relations of interaction and that R_3 is unnecessary. From these I will then derive the specifications of the entities such that A ranges over entities which can interact, B ranges over entities that can be interacted with and excluded from, and C ranges over entities that can be excluded.

3.1 R_2 Can Only Range Over Relations of Exclusion

The core relation which has to be restricted for something to count as an instance of ownership is R_2, the relation between the object and everyone else. This relation must be a relation of exclusion; C must in some respect exclude themselves from B. This means that C must lack the ability to change B or prevent B from changing. The explanation for this is that ownership is fundamentally about exclusive control. If an ownership relation existed in which R_2 was not one of exclusion, then A would not be the sole owner of B. This is a central claim of this thesis, and I will defend it further below. Its ultimate justification though is the framework. I am not here making the metaphysical claim that in reality, separate from me, exclusion is the core of ownership. Rather I am claiming that exclusion is the core of the framework description of the concept of ownership. This claim is justified not by any facts about the real nature of ownership, but rather by the efficacy of the framework as a universal description.

This position is supported by unified theorists such as Cruft, who argue that the core of ownership is a single right of sole use or exclusion[74]. A description of the concept in which the relation between the owned object and everyone else can easily accommodate such a conception. My reliance on this viewpoint, however, may lead to the objection that I am ignoring bundle theories of ownership in which ownership cannot be reduced to a single right, but instead consists of a bundle of irreducible rights. Such an approach appears to be unable to be represented on my schema as a result of my claim that R_2 is a relation of exclusion.

I would argue however that this specification of R_2 can include bundle theorists. This is because the rights involved in a bundle theorist's description of ownership are all rights of the owner to

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[74] Cruft, *Human Rights Ownership and the Individual*, 201.

exclude others from the owned object in various different ways. Honoré for example famously describes eleven incidents of ownership which he argues describe the bundle of rights involved in property ownership. These are:

> ". . . the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity."[75]

The first eight of these incidents all involve the exclusion of everyone else in different ways from the object and the interaction of the owner alone. There is exclusion from appropriation of income, exclusion from management, basic exclusion; all of which are complimented by the ability of the owner to use and control the objects in the ways specified instead.

Therefore, both monists and bundle theorists can be accommodated by the framework, though in different ways. In a monist conception of ownership, such as Penner's, R_2 is essentially a general exclusion from which many specific forms of exclusion (exclusion from rent, exclusion from access, exclusion from interference with transfer, etc) are derived and it is complemented by a general R_1 relation of interaction. For bundle conceptions, such as Honoré's, R_2 is composed of a group of distinct, irreducible and jointly sufficient relations of exclusion of different forms. Exclusion from use and exclusion from income and all the other incidents form a part of this. This is then matched with an R_1 composed of distinct irreducible forms of interaction. Describing de facto ownership relations, in terms of exclusion and interaction, is therefore able to both accommodate monist and bundle conceptions of ownership.

I should note here that throughout the thesis I tend to use the active phrase "C excludes themselves from B", rather than the passive "C is excluded from B". These two phrases suggest different types of ownership; the first being where C chooses to respect B's property and the second where C is forced to respect B's property. The concept of ownership has to include both active and passive options and if there was a short phrase which did, I would use it. As there is not, I will tend to use the active version, though when I use it, it should be understood both as including both the active and passive forms.

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[75] Honoré, "Ownership," 231.

3.3.2 R_1 Can Only Range Over Relations of Interaction

R_1, the relation between A and C, ranges over relations of interaction. A lacks the absence of the ability to control C. My argument for this claim is that the reverse is impossible. If there existed an ownership relation in which R_1 was a relation of exclusion, then A would not own B. All relations are either relations of exclusion or interaction and, in consequence, if R_1 is not a relation of exclusion it must be a relation of interaction.

I do not specify R_1 as ranging over relations of control. This is partially because of examples such as the diamond one. It is possible to own things that you lack the ability to control, provided that everyone else is excluded from them in a way that you are not. Even if you do not think this is an example of de facto ownership that of itself is not a sufficient reason to specify R_1 as control. My aim is to give a description of ownership universal to political philosophers. As a result, it needs to encompass obscure examples even if they are rejected by the majority.

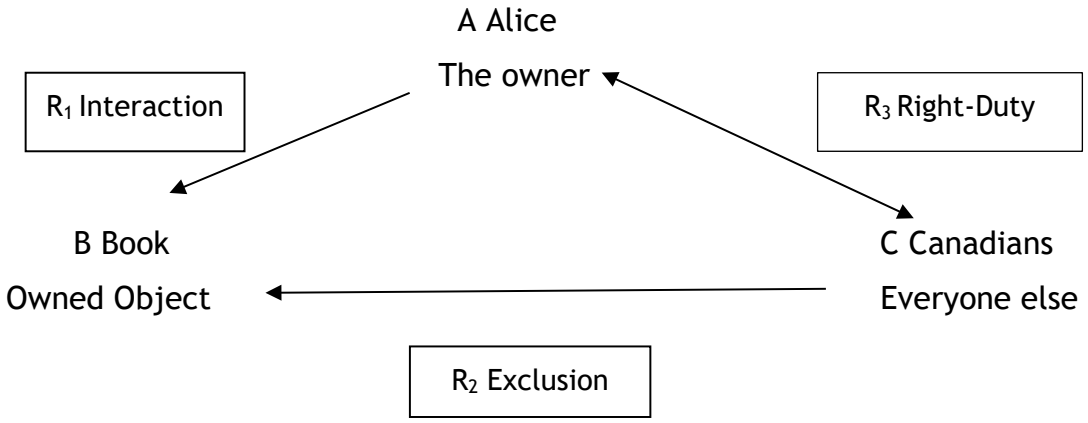
3.3.3 R_3 is Unnecessary

I do not believe R_3 (the relation between the owner A and everyone else C) needs to be specified in order for the framework to describe ownership. In fact, I will now go on to argue that R_3 is unnecessary for the framework. To explain and justify this (as well as to give a better justification for my framework overall), I will give an example of ownership in order to see how the variables fit into the framework.

In order to develop my own framework, I will present an example of an instance of ownership. I will describe the ownership in general terms aiming to give a full description of what people commonly think of when they think of ownership. I will then proceed to analyse the different relations involved in this example and determine which are necessary for ownership and which are superfluous.

Imagine Alice A owns a Book B in Canada C.

Alice, book, Canada, example.



Alice has a relation R_1 with the book which consists in control and use of the book, an expectation of future ownership and an awareness of being the owner. Alice also has a relation R_3 with the Canadians. This relation consists in duties by everyone else to respect Alice's ownership, the duty of the state to enforce these duties and Alice's rights against everyone else and the state for her book. This is also a recognition by everyone else that Alice owns the book. Finally, there exists relation R_2 between the book and the Canadians. This relation consists in the Canadians excluding themselves from the book.

Which of these relations are necessary for Alice to de facto own the book? I will try removing each of them and investigate whether de facto ownership can still exist without them.

R_2 is the relation between the Canadians and the book. Removing this relation would mean that ownership of the book would not require the Canadians to act any differently towards it than if it were an unowned object. This I would argue is not de facto ownership. De facto ownership requires an exclusion of non-owners from the object. As a result, some sort of relation of exclusion is necessary between the object and everyone else for it to be owned.

An obvious objection to this can be made based on stolen ownership. If for example, Alice's book is stolen and then simply left for any Canadian to use, then there no longer exists this relation of exclusion between the book and everyone else. If the relation of exclusion between the book and everyone else is a necessary component of ownership, then in this case Alice would no longer own the book. A requirement for R_2 as a condition of ownership would therefore seem to make ownership disappear upon theft.

I would argue that this objection is not entirely convincing, because what the objection is concerned with is justified ownership while here I am only defining de facto ownership. Alice may very well remain the de jure owner of her book after its theft, but I would argue that de facto ownership cannot exist unless other people exclude themselves from it. Therefore, I would agree that Alice would cease to be the de facto owner if her book was stolen and would only become the de facto owner again if everyone else excluded themselves from it.

In a similar fashion I would also argue that R_1, the relation of interaction between Alice and the book is also necessary for de facto ownership. If Alice was also excluding herself from the book along with everyone else, then the book would not belong to her. It would belong to no one. For her to own the book de facto; Alice has to have some degree of interaction with it, while everyone else excludes themselves and consequently some non-exclusionary form of relation R_1 is necessary for ownership.

Removing R_3 would remove the relation between Alice and the Canadians. This I would argue is the easiest one to remove. It is quite possible to imagine Alice using a book and everyone else excluding themselves from it, not out of any relation to Alice but instead because of a duty to someone else or even an undirected duty. Ownership appears to be possible without any direct relation between the owner and everyone else in her society. Indeed, my framework for ownership will need to allow for such cases, because Cruft's theory of controllership is in some way similar to this. In his account most ownership ought to be thought of in terms of controllership, by which he means people ought to conceive of ownership rights as being owed to society as a whole rather than the controllers of the objects.

> "A controllership system that would more honestly reflect property's common good grounding could take trespassory duties to be undirected or to be owed to the community of which the "controller" is a part . . ."[76]

This is a theory of ownership that dispenses with the direct relation R_3 between A and C and as a result, R_3 is not a necessary component of my definition of ownership.

A possible response to this is to argue that there are some theories of ownership in which a relation R_3 is necessary and R_3 is therefore necessary for the framework. A theory of ownership

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[76] Cruft, *Human Rights Ownership and the Individual*, 260.

based on person-person relations requires such a relation for ownership to exist and consequently R_3 is a necessary component of my framework. An example of such a theory is Hohfeld's conception of ownership.

Hohfeld understands ownership to be comprised of property rights. That is for an owner to own an object she must possess a property right. Such a right must be a right held against other people, however as rights held against things are impossible (as things cannot carry out the corresponding duties):

> "What is here insisted on, i.e. that all rights *in rem* are against persons, is not to be regarded merely as a matter of taste or preference for one out of several equally possible forms of statement or definition. Logical consistency seems to demand such a conception, and nothing less than that."[77]

The relation R_3 therefore appears to be necessary to describe Hohfeld's conception of ownership, as it is the only variable that can account for the right-duty property relation which Hohfeld sees as essential for ownership.

I have two counter arguments to this objection. First my framework as a universal description of the concept of ownership is only trying to include those elements that are necessary for ownership. It may be that certain conceptions of ownership, such as Hohfeld's one, include components in their own definitions which are not present within the framework. This is not a problem for the framework itself as those conceptions would remain conceptions of ownership, even without their superfluous elements. If all references to person-person relations were removed from a person-person conception of ownership, it would still be a conception of ownership as it would still be concerned with the interaction of owners and the exclusion of others from objects. The framework has the function of identifying superfluous elements within a conception of ownership and as a result, it is not necessarily an objection that a conception of ownership possesses an element which is not present in the framework.

To apply this to Hohfeld; he clearly believes in a distinction between de facto ownership which depends on people honouring their duties not to interfere with the property of others, and nominal ownership in which such duties are violated. Mere possession of a property right is not

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[77] Hohfeld, *Fundamental Legal Conceptions*, 56.

sufficient for de facto ownership. That right must also be respected by others. A non-respected property right is therefore not sufficient for de facto ownership for Hohfeld. Such a right is also not necessary. Consider an example in which an owner believed she had a property right against everyone else and everyone else actually excluded themselves from her object. However, there was no right-duty relation as everyone else did not believe they had a duty to her (the owner) to exclude themselves, and instead did so for other reasons (such as a duty to the state or personal inconvenience). In this example there is no right-duty relation, as C (everyone else) do not believe themselves to be under a duty. Nevertheless, the owner still de facto owns her object. Therefore, a right-duty relation R_3 is neither sufficient nor necessary for de facto ownership.

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While the above serves as a satisfactory explanation as to why R_3 is unnecessary for ownership, it does not respond to the problem of how to accommodate conceptions such as Hohfeld's, in which an R_3 is an essential component. My response is that I can account for components superfluous to de facto ownership, such as R_3, within the framework in a different way. While the relation R_3 is not relevant for de facto ownership, it is relevant in many conceptions of legitimate ownership. As a result, it will be possible to incorporate it in the following chapter as part of the description of the concept of legitimate ownership. While a right-duty relation is unnecessary for a Hohfeldian account of de facto ownership, it is clearly necessary for a Hohfeldian account of legitimate ownership and will have to be accommodated within the framework when I reach that point. As a result, conceptions that rely on R_3 are in fact conceptions of legitimate ownership and will be able to be accommodated within the description of the concept of legitimate ownership, as described in the next chapter.

3.3.4 Entity Variables

Following Christman I intend to leave the three variables A, B and C as open as possible so as to include all definitions of ownership, while also restricting them so as to prevent non-ownership instances being accommodated. The only specification that is required for them is the entities they range over need to be capable of relating with other entities in the ways specified by the relational variables.

As a result, here are the resulting specifications: A can only range over entities which can interact with other entities; B can only range over entities which can interact with and be excluded from other entities; and C can only range over entities which can be excluded.

These are very loose specifications, but it does not follow that any entity can fill any variable within any context. Consider the entire atmosphere as an owned entity for example. For the entire atmosphere to be de facto owned all non-owners must be excluded from it. In contemporary society we lack the ability to exclude very large numbers of people from the atmosphere and so within that context the atmosphere is not a thing that can be de facto owned.

Away from such esoteric examples this specification of entity variables is in fact of crucial importance to me later on in the thesis. In Chapter Seven I will argue that abstract objects cannot be de facto owned and in consequence the most accurate description of intellectual property is a description which dispenses with ownership of abstract objects. This argument rests on the idea that abstract objects are not entities which it is possible to be excluded from and consequently are not entities which variable B can range over.

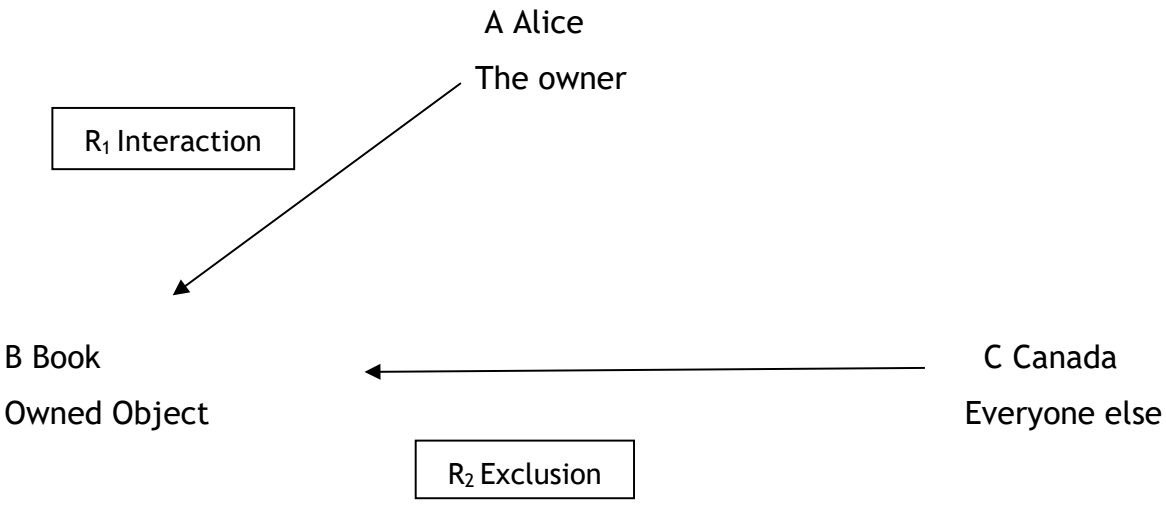
It is interesting to note that the specifications on the relations are stricter than the specifications of the variables. The entity variables need to range over a great diversity of entities, while the relational variables range over a comparatively restricted set of relations. This reveals that there is far greater diversity in the philosophy of ownership surrounding the types of entities which can be owners, owned and non-owners, than there is about the nature of the relations between them. This further supports my understanding of concepts by demonstrating how there is agreement on the core of de facto ownership (exclusion of non-owners) among philosophers and the great apparent disagreement is a function of focusing on the types of things that the entity variables range over. My framework serves to refocus on the underlying commonalities.

3.4 The Final Framework

My final framework description of the concept of de facto ownership is, an owner owns an object if and only if the owner is in a relation of interaction with the object and everyone else is in a relation of exclusion with the object. To put it more precisely:

A owns B iff: AR_1B and BR_2C
R_1 ranges over relations of interaction, R_2 ranges over relations of exclusion.
A ranges over entities that can interact. B ranges over entities that can be interacted with and be excluded from. C ranges over entities that can be excluded.

The final framework description of de facto ownership.



The arrows indicate the direction of interaction. A and C have agency while B (being an object) does not. Consequently, the relations R_1 and R_2 must be relations of A and C to B.

3.5 Objections

Having defined my terms and presented my description of the concept of de facto ownership, I will now consider several objections to it. These objections come from two sources, the first is several competing understandings of "exclusion" raised by different philosophers which appear to present a problem for my use of it. The second, is some objections based on the idea that I am not acting in a fashion consistent with my methodology.

3.5.1 Merril.

In Chapter Two I discussed Penner and his explanation as to why ownership depends on a core right of exclusion. Penner, against Honoré's bundle of rights theory, argues that the essential element in ownership is the exclusion of the non-owners. Penner thus agrees with my conclusion that exclusion is essential for ownership.

More recently than Penner another proponent of the centrality of exclusion to ownership is Thomas Merrill. Merrill argues that exclusion forms the core of ownership:

> "Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property."[78]

Merrill categorises conceptions of ownership in terms of their understanding of exclusion into three groups "single-variable essentialism, multiple-variable essentialism and nominalism"[79]. Single-variable essentialism is an understanding of ownership in which the right to exclude alone is a necessary and sufficient condition for ownership.[80] Merrill identifies Penner as an exponent of this view. Multiple variable essentialism is an understanding of ownership in which the right to exclude is necessary for ownership, but not sufficient as other rights are also required.[81] Merrill describes Honoré as a proponent of this view. Finally, nominalism is an understanding of ownership in which the right to exclude is neither necessary nor sufficient for ownership. Merrill describes Grey as a proponent of this view.

Merrill is a single-variable essentialist theorist and argues that multiple-variable essentialism can be understood as a type of single variable essentialism. The right to exclude has a logical primacy for ownership as all other rights concerning ownership can be derived from it:

> ". . . if we start with the right, to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property.

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[78] Thomas Merrill, "Property and the Right to Exclude," *Nebraska Law Review*, 77 (1998) 730.
[79] Merrill, "Property and the Right to Exclude," 734.
[80] Merrill, "Property and the Right to Exclude," 734.
[81] Merrill, "Property and the Right to Exclude," 736.

> However, the converse is not true: we cannot start with any of the other incidents and reason backwards to derive the right to exclude."[82]

If A has a right to exclude C from B, then A must logically have a right to use B, transfer B etc. Relying on this and other arguments concerned with historical practice and legal precedents, Merrill concludes that the right to exclude is necessary and sufficient for ownership.

It might appear that as I agree with Merrill's conclusion (that exclusion is the core of ownership) that I am also defending his argument. In fact, I do not find his argument for his conclusion convincing. If X and Y are components of A then the fact that X logically entails Y does not mean that Y itself cannot be an essential component of A. In the same way it could be possible both for the right to transfer to be an essential component of ownership (hence multiple-variable essentialism) and for the right to transfer being derivable from the right to exclude.

However, Merrill's argument is very useful and convincing for my conclusion; that every conception of ownership can be accommodated by a concept of ownership including only the exclusion of others. Merrill's argument shows how many more specific abilities of ownership, such as Honore's incidents, are derivable from the exclusion of others. Merrill's argument therefore supports my conclusion that the concept of ownership needs only a relation of exclusion for R_2.

3.5.2 Stern

I will now discuss a contrary understanding of ownership; that of James Stern. Stern in "What is the Right to Exclude and Why Does it Matter?" argues that the right to exclude is not an essential component of ownership. Stern defines the "right to exclude" as follows:

> "[The right of exclusion is] the right to forbid the use of a thing. For assets defined in spatial terms, this translates to the right to forbid the other person to enter within the

[82] Merrill, "Property and the Right to Exclude," 744.

> relevant space. For most other types of assets, however use means things like touching, deploying, or similar forms of active and direct interaction."[83]

Stern like me sees a connection between use and exclusion. However, his definition, as presented, has a number of differences. Firstly, Stern is concerned with the right of exclusion whereas I am concerned with the ability to exclude. This is simply a consequence of the fact that I am giving a definition of exclusion which includes instances of exclusion in which there is no right to exclude. Instances of de facto ownership can often be ones in which the owner has no right to the owned goods and consequently the exclusion which produces the de facto ownership cannot be a function of rights. The fact that Stern's understanding of exclusion is expressed in terms of rights, however, is no issue for my theory as a rights-based understanding of legitimate ownership can be accommodated and, in de facto ownership, the actions of C (everyone else) who are subject to exclusion (R_2) can be the same as those they would have if they were under a duty of exclusion.

Secondly, Stern does not here mention control (which is essential to my understanding of exclusion) although he does mention control later in the chapter.

> "The right to prohibit various uses of a thing is an aspect of the concept of being able to control its use. So is the right to use it. These ideas are subsumed within the idea of control, and frankly it seems there is little else to be said by way of affirmative argument . . ."[84]

Control for Stern is the ability to determine how an object is used. Total control of an object then requires the controller to have both rights of use and exclusion.

There are two ways that Stern's argument could present a problem for my framework. The first is if his conception of ownership is one that is unable to be accommodated by the framework, thus showing it to be non-universal. It is clear that this is not the case. Stern is not arguing that ownership is possible without exclusion, so his conception is compatible with R_2 being a relation of exclusion. My framework can accommodate his position that R_1 is a relation of use as use is

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[83] James Stern, "What is the Right to Exclude and Why Does it Matter?," In, *Property Theory: Legal and Political Perspectives,* ed. James Penner and Michael Otsuka, (Cambridge: Cambridge University Press, 2018) 49.
[84] Stern, "What is the Right to Exclude and why does it matter?," 64.

non-exclusion and hence is a form of interaction. Stern's conception then is compatible with my description of the concept of de facto ownership.

The main problem Stern presents then is the second one; that is does Stern's understanding better capture the essence of ownership? The claim would be that while Stern's conception can be accommodated, by not making use rights a necessary component of the conception of ownership, my framework also accommodates conceptions which are not conceptions of ownership and so is not a real universal description of ownership.

I have two responses to this. The first is a restatement of the point I made in the methodology section in Chapter One. My criterion for what is a conception of ownership is not my own judgement of what a conception of ownership ought to possess. Rather it is whatever has been accepted as a philosophical conception of ownership by other philosophers. The fact that so many philosophers argue against Stern and claim that exclusion is the core of ownership demonstrates that such a conception must be able to be accommodated by the framework for it to be truly universal. Stern can of course still argue that his conception is superior in some way to all other conceptions of ownership, but not that it is the only conception of ownership.

Secondly, I would argue that Stern's understanding of ownership as being essentially about the control of objects is incorrect. This is because (bearing in mind how I have earlier defined control) ownership is possible without control. Stern is hindered in his understanding by reliance on a rights-based understanding of ownership.

3.5.3 Fennel

A possible objection worth investigating to the claim that ownership requires exclusion is given by Lee Anne Fennel. Fennel argues that our current society is transitioning away from an ownership system dependent on exclusion and instead towards one based on the use of services:

> ". . . if we understand property as a human invention designed to optimize access to resources, then exclusion is not an inevitable defining feature of property, but just one possible mechanism for carrying out property's work. And, like any other technology, it can become outdated as conditions change. Recent decades have featured profound

> changes in technologies for managing resources. Increasing urbanization has also dramatically altered how property generates value and imposes costs. These changes have made exclusion a less useful, less necessary, and more expensive way of regulating access to resources and the stream of benefits they provide . . .”[85]

Fennel argues that while exclusion may have once been essential for ownership; it has now been rendered ineffective by modern organisation and technology. I take Fennel’s use of the word “property” to be equivalent to my use of the word “ownership”.

I would argue that Fennel’s argument is not a counter argument to my own, as the transition she is describing is not one from exclusion based property to non-exclusion based property, but from exclusion based property to contract based resource management.

> “Regardless of what we choose to call it, there is something conceptually significant about more closely tailoring entitlements in time and space to fit the value that users derive from resources. The distinction drawn in the commons literature between resource systems, or "stocks" (such as a fishery), and resource units, or "flows" (such as individual fish), is illustrative." Whether or not one thinks property can go beyond exclusion, resource access can morph from a modality that focuses on stocks to one that focuses on flows”.[86]

This change from ownership of an object to ownership of a service or a right is not universal across the contemporary economic system and also not something unique to our time. The service of washing clothes for example can either be provided by owning a device that can perform the service (such as a washing machine) or having a contract with a person or corporation who undertakes to wash your clothes for you. In this case a transition has occurred from a service contract based system to a device ownership system over the past 150 years among middle class people in Scotland. A transition away from exclusion-based ownership in all areas is not inevitable.

Furthermore, this example shows that not all means of gaining access to goods or services involve ownership relations. The transition that Fennel describes is a transition from an

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[85] Lee Anne Fennel. "Property beyond Exclusion." *William & Mary Law Review*, vol. 61 no. 2, (November 2019) 524.
[86] Fennel, “Property Beyond Exclusion,” 571.

ownership-based system to a contract-based system. The loss of exclusion in this transition is not surprising and in fact reinforces the claim that ownership is closely connected with exclusion.

Overall then Fennel's claim, that it is possible to understand resource management without reference to exclusion, is correct but is not in conflict with my claim that exclusion is necessary for de facto ownership.

3.5.4 Exclusion without Ownership

To return to my starting test of success, I would argue that this framework cannot accommodate any conception which is not a conception of ownership. This is primarily because of R_2. It is difficult to think of any relations which depend on exclusion which are not ownership.

As an example, consider a relation of exclusion concerning friendship. Imagine that Bruce is friends with Alexander while Alexander has managed to convince everyone else not to be friends with Bruce. As a result, everyone else excludes themselves from Bruce (with respect to friendship) and Bruce can only be friends with Alexander. This appears to be accommodated by the framework as the relations are ones of interaction and exclusion which would mean that by the framework Alexander owns Bruce's friendship. Does this present a counterexample to the framework?

An obvious response is to argue that a person's friendship is not the type of object which can be owned, and the example cannot be accommodated for that reason. There are two ways to argue for this, either it is not possible to divide ownership of any object or there is something about people which makes it impossible to own distinct parts of them. To the first argument I would respond by saying that that there are many cases of partial ownership which need to be accommodated by the framework and can only be done so by assuming that it is possible to divide ownership in this way.

To the second argument I would respond that there is no reason to think that people are different from other entities in this case. There might certainly be moral objections to exclusively owning someone's friendship, but when considering purely de facto ownership those

are irrelevant. If it is possible to own specific properties of a road or an airport or a company, then it is possible to do the same for a person.

In English, an archaic way of saying someone loves you is to say that you own their love, and to describe someone as being loyal you can say that you own their loyalty. This usage is present in this line from *H.M.S Pinafore:*

> "Let the air with joy be laden,
> Rend the air with songs above,
> For the union of a maiden
> With the man who owns her love!"[87]

This is not now a common way of talking about ownership, and the friendship, loyalty or emotions of other people are not things we commonly think of as owning. However, they are all exclusive relations: the implication of owning someone's love or loyalty is that they will then share it with no one else. As a result, I do not see this as a counterexample to the framework, because these types of ownership are examples which ought to be accommodated by it.

I should also note that this is a further case of ownership without control over the owned entity. In the cases of friendship, love and loyalty there is no necessity for the owner to have power over the owned person or have forced them to be in this relation. In the case of friendship at least it appears antithetical to it. This further reinforces my position that ownership requires merely the exclusion of everyone else and some light form of interaction by the owner, rather any form of power or control by the owner over the owned entity.

I would therefore argue that the example above is a case of ownership and appropriately accommodated by the framework. It appears unusual only because ownership is generally thought of purely with respect to physical objects. A greater understanding of the importance of exclusion reveals many more instances of ownership.

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[87] W.S. Gilbert, "H.M.S. Pinafore", from *The Complete Gilbert and Sullivan,* (New York: Black Dog and Leventhal Publishers), 127.

A second case of an exclusive relation which may appear to be a counterexample concerns immigration. Imagine that Charlie is being excluded from entering Belgium while the Belgians are free to live there. This appears to count as a case of ownership as Charlie is excluded from Belgium while the Belgians can interact with it. Therefore, by my framework the Belgians are the owners of Belgium.

While it might appear strange to think of the inhabitants of a country as its owners, I would argue that it is not unjustified to think it so, and consequently this is not a counterexample for my framework. Belgium is a democracy and consequently the people of Belgium are the sovereign of Belgium. As the sovereign is the ultimate owner of Belgium it is justified to consider the Belgians as owners of Belgium. Compare this to a case in which Belgium is an absolute monarchy and the sovereign of Belgium is the Belgian king. In this case while the Belgians are de facto owner of Belgium (due to their interaction with Belgium and the exclusion of all others) they are not the ultimate owners as their interaction is dependent on the will of the Belgian king. This further implies that the exclusion of other people is necessary in order for the people of a country to own it. Overall then I would argue that immigration does not present a counterexample, but rather reaffirms my argument that exclusion is necessary for ownership and relations of exclusion are usually also relations of ownership.

To return to the other test in order for a conception of de facto ownership to not be accommodated by this framework, it would have to be a conception in which either one or more of these variables is not necessary for ownership, or the framework as a whole is insufficient as it leaves out necessary variables. In response to the first option, I believe it is obvious that variables A, B and C are necessary for ownership and that given the nature of de facto ownership it is also necessary that R_1 be a relation of interaction and R_2 a relation of exclusion.

In response to the second option, I have shown how variable R_3 is unnecessary for de facto ownership and how even conceptions of ownership that appear to depend on it actually rely on it in their conceptions of legitimate ownership, rather than de facto ownership.

However, I do not claim that my description is perfect or can be used as a test to determine what is a conception of de facto ownership. The description is merely based on an analysis of the common features of contemporary conceptions of de facto ownership. My purpose in this

section is merely to suggest why such a description is possible and why thinking of a counterexample (a non-compliant conception) is difficult.

3.5.5 The Necessity of R_2

Another possible objection is that R_2 is not in fact necessary for ownership. The argument would be that the relation R_2 is not present in all conceptions of ownership and for the same reasons that I have rejected R_3, R_2 must likewise be excluded from the framework. A possible example of such a conception of ownership that lacks R_2 is Locke's conception of ownership.

Ownership for Locke is created by an individual labouring on an object. Provided certain conditions are met she will then become the owner of that object in compliance with natural law.

> "Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digg'd in any place I have a right to them in common with others, become my *Property,* without the assignment or consent of any body . . ."[88]

Ownership occurs by individual action not through the actions of everyone else in society. It therefore appears that a relation between everyone else and the owned object is not a necessary component of Locke's conception of ownership and as a result cannot be part of the framework of the concept of ownership.

My response to this objection is based on the distinction I drew earlier between de facto and de jure ownership. Locke does not distinguish between these two, but the description I have given of his conception above is of a purely moral ownership. As this chapter is on the framework of de facto ownership, it does not have to include Locke's moral conception of ownership. The next chapter, in which I discuss the legitimacy criteria, will provide a way to include it.

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[88] Locke, *Two Treatises of Government*, 289.

3.5.6 Rent

A final objection to my framework, as presented, concerns the example of rent. As discussed in Chapter One rent appears to present a problem for my understanding of de facto ownership as it is a practice in which it is not clear whether the tenant or landlord is the de facto owner. My solution at the time was to draw upon my relational understanding of the concept of de facto ownership. The tenant is the de facto owner with respect to most people she interacts with, while the landlord is the de facto owner with respect to the tenant.

My specification of the relations within ownership in terms of exclusion and interaction further reinforces this understanding. The tenant de facto owns her house with respect to strangers because they are excluded from it, while she can interact with it in certain ways. However, the landlord can still own the house with respect to the tenant because there are certain ways that he can interact with the house that she is excluded from doing. Thus, by understanding ownership relationally and in terms of exclusion and interaction, rent can be understood as a form of complex ownership.

3.6 The Relevance of Rights and Possession

In the work of all the people I have been citing, rights play a central role. Exclusion, use and control are not described as abilities (the ability to exclude, the ability to use, etc) but as rights (the right to exclude, the right to use, etc). It might appear that my description of the concept is mistaken in not viewing rights as essential. If a rights-based understanding of ownership is universal,[89] then surely an accurate description of the concept of ownership must also be rights-based?

I have two responses to this concern. Firstly, a rights based understanding of ownership is not universal. Rowan Cruft for example, as I described earlier, argues for a controllership system of ownership of most goods, in which owners merely control their goods without holding rights

[89] Mary Warnock is another example of a theorist with a right based understanding of ownership. “Whatever the difficulties of defining ownership, what is certain is that ownership is a complicated relationship between people, in that, if you claim to own something, you as owner are claiming rights which other people must respect.” Mary Warnock, *Critical Reflections on Ownership*, Cheltenham: Edward Elgar publishing, 2015.

over them.[90] Similarly the social ontology theories of Ásta [91] and John Searle[92] describe a non-rights way to envisage social practices. If a conception of ownership based on their theories is to be accommodated by the description of the concept (as I believe it can be) then that description of the concept must not require that a right-duty relation be a part of it. A rights based description of the concept of ownership would be unable to accommodate non-rights based conceptions and so would not truly be a universal description of the concept.

My second response is that rights-based understandings of ownership are imprecise as they confuse the descriptive and the normative, that is they elide de facto ownership and de jure ownership. In a rights based understanding of ownership; A owns B iff A has a right of ownership of B against C. This cannot be a description of de facto ownership because many de facto owners do not possess rights against other people. If for example, I forged some title deeds and other documents and by so doing made myself the de facto owner of a house, I surely would not possess rights against other people as my ownership would be the product of fraud. Everyone else may not realise that and may in fact respect my ownership, but they cannot be acting in accordance with rights in so doing, as I have neither a moral nor legal right to the house. I have no rights for them to act in accordance with. Consequently rights-based conceptions of ownership cannot be conceptions of de facto ownership, but must be conceptions of de jure ownership.

The failure to separate de facto and de jure ownership accounts for the confusion. When speaking of de facto ownership, rights are irrelevant. What matters instead are abilities (the ability to control) and the lack of abilities (the inability to control is exclusion). Abilities and inabilities exist for de facto ownership whether it is morally justified ownership or not. Rights are justified abilities, and that justification can be either legal or moral.

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[90] Cruft, *Human Rights Ownership and the Individual*, 260.
[91] Ásta, *Categories We Live By: The Construction of Sex, Gender, Race, and Other Social Categories, Studies in Feminist Philosophy,* (New York: Oxford Academic, 2019).
[92] John Serle, *The Construction of Social Reality*, (London: Penguin Books, 1996).

3.7 Conclusion

In this chapter I have presented my description of the concept of de facto ownership and provided sufficient reason for it to be considered accurate. I will go on in the next chapter to use it to develop an accurate description of the concept of legitimate ownership.

Throughout this chapter I have demonstrated how this description of the concept of de facto ownership is able to accommodate all conceptions of de facto ownership used by philosophers and as a result how this description is entirely compatible with contemporary political philosophy. At the same time, I will here note the originality of the description I have presented. This originality comes primarily in two ways: firstly, the focus solely on de facto ownership, and secondly in describing ownership without reference to rights.

A focus on de facto ownership as the subject of philosophical study (as opposed to economic or sociological study) is not something I have seen in many of the sources I have referenced. Instead, there is a tendency to conflate the de facto with the de jure. This limits the effectiveness of the analysis of de facto ownership, particularly with regards to edge cases (rent, intellectual property etc). This conflation, I believe, is explicable as a result of a fixation on rights as the basis of ownership. Rights are normative (either morally or legally) and so if rights are taken to be the basis of ownership, then purely de facto ownership is impossible. In this chapter I have shown that a purely de facto description of ownership is both possible and useful and consequently rights are not necessary for ownership.

To conclude; in this chapter I have given a clear description of the concept of de facto ownership and in so doing have demonstrated the irrelevance of rights for de facto ownership.

Chapter 4
The Description of the Concept of Legitimate Ownership

4.1 Methodology

The framework I have described in the previous chapter is, I would argue, a universal framework of de facto ownership. Every theory or description of ownership conforms to this structure; they are all instances of an owner interacting with an object and everyone else excluding themselves from it. Philosophers of property however are usually far more interested in describing just, or legitimate, ownership than de facto ownership. My framework can describe all instances of de facto ownership. To make it a framework description of legitimate ownership, some conditions or qualifiers must be added, to make it describe only de facto ownership, which is legitimate, and not de facto ownership which is illegitimate. In this chapter I will present those qualifiers.

4.2 Moral Limits on the Variables

As a start I would argue that any theory of legitimate ownership sets limits on the types of entities that can fill the variables A, B and C. Irrespective of whether the ownership originated in a just way or creates a just outcome, many theories of ownership acknowledge that there are some types of entities that cannot in, a moral sense, fill these variables. People are the most obvious example. Many conceptions of legitimate ownership are ones in which legitimate slavery is impossible. Jean-Jacques Rousseau in the *Social Contract*, for example, famously denounced slavery as necessarily illegitimate:

> "Thus from every point of view, the right of slavery is null, not simply because it is illegitimate, but because it is absurd and meaningless. These words, *slavery* and *right*, are contradictory. They are mutually exclusive. Whether it is the statement of one man to another man, or of one man to a people, the following sort of talk will appear equally nonsensical. "I make an agreement with you that is wholly at your expense and wholly to my advantage; and, for as long as it pleases me, I will observe it and so will you."[93]

[93] Rousseau, "The Social Contract," 162.

Rousseau's conception of ownership and others like it can be accommodated by specifying that variable B can only range over entities that can morally be owned, which for Rousseau would not include people.

While slavery may be the most obvious example of a moral limit on the scope of a variable there can also be limits on the scope of variables A and C. It is maintained by many philosophers for example that rules of ownership do not apply in conditions of absolute need. If C is a person who is starving, then she is not bound to respect the ownership rights of others to the food which will keep her from death. Jeremy Waldron makes this point by including what he calls the "Principle of Bodily Need" in his theory:

> ". . . no-one can agree in advance, in good faith to abide by a system of property which has as one of its rules, that an owner's decision to withhold resources from the need of the desperate must be respected . . ."[94]

As a consequence of this principle in Waldron's conception of ownership, duties of exclusion (and hence respect for the ownership of others) are not justifiable when imposed on those in a situation of absolute need. I can accommodate this part of Waldron's conception within the framework by specifying limitations on C such that C can only range over people who are not in conditions of absolute need. The accommodation of cases like this is better accomplished through the specification of C rather than R_2. This is because it is a feature of C which makes the ownership illegitimate, when combined with B being some object, which if C consumes will save C's life. Regardless of the nature of R_2, if C is in a condition of absolute need, then for Waldron, any ownership relation which prevents C's access of goods necessary to their survival is illegitimate. As it is the character of C which makes the relation illegitimate a specification of C such that C cannot range over people in absolute need is necessary for Waldron's conception of legitimate ownership, and hence necessary for the description of the concept of legitimate ownership.

I am not here committed to the position that such a condition is necessarily correct or moral. I am merely claiming that restrictions on the types of entities that can fulfil variables A, B and C are a common way to distinguish legitimate from illegitimate ownership and so my framework for legitimate ownership has to include them.

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[94] Waldron, *The Right to Private Property*, 439.

Legitimate ownership is a relation in which an owner, A, interacts, R_1, with an object, B, while everyone else, C, excludes themselves, R_2. A, B and C must be entities which can morally; be owners, be owned and exclude themselves respectively.

4.3 Moral Limits on the Relations

As well as the variables A, B and C being justified, for an instance of ownership in general to be justified the relations between them must be justified as well. There are many diverse theories concerning the nature of legitimate ownership. A universal framework for legitimate ownership has to find some way to include them all. I would argue that relation R_2 is the one which requires moral justification and as a result, the one to which the justification will be linked in my framework. First though I will argue why R_1 does not require moral justification.

4.3.1 Moral Justification of R_1

R_1 is not presumptively immoral because the relation is morally neutral. Interaction with an owned object in itself does not affect other people. This claim may initially seem unconvincing. Many interactions can be directly harmful and require moral justification to be legitimate. For example, if an owner owned a hammer and used it to assault people that would be, on its face, immoral and would require a sufficient justification (such as self-defence) in order to be moral. I would argue however that the immorality is the result of her action with the hammer, rather than the mere fact of her ownership of it. If she were not the owner of the hammer her action would be equally immoral. This therefore does not bear on the legitimacy of her ownership. The hammer owner remains the legitimate owner of her hammer even as she uses it for assault, because the interaction between owner and object is not presumptively illegitimate, it is merely the use that is. This is in contrast to the relation R_2.

Furthermore “interaction” as I have defined it merely means “non-exclusion”. The relation of the owner to her hammer in the above example while being morally significant due to the harm she does to others, is also morally significant due to being a relation of control. However not all relations of interaction are relations of control (as in the diamond example from the previous

chapter). Therefore, even if the argument above did demonstrate that an owner's interaction was morally significant, that would still not demonstrate that the relation of interaction (R_1) itself requires justification as it is only the subset of relations of interaction which are relations of control which would require justification and not the other subset of relations of interaction which are relations of neither control nor exclusion.

In order to further reinforce this claim, that R_1 requires no moral justification, I will consider two counter examples. Firstly the "common good" counterargument and secondly the "extreme environmentalist" counterargument.

4.3.2 Harm to Common Goods Counter Example

Consider the example of a farmer who diverts water from a river to irrigate her farm and as a result prevents a water-powered mill further down the river from working. This appears to be a case in which mere use of owned goods can be harmful to others. As a result, even though R_1 ranges only over interaction relations it is presumptively immoral and requires the same sorts of justification as the exclusionary R_2.

I would argue that this example and others like it are not genuine counter examples as they are not cases in which an individual's mere interaction with her own goods directly harms others. In the above example, the river is either owned entirely by the farmer, or she does not own it entirely and is under an obligation to maintain a set flow of water. In the first case the mill is in effect stealing from her by using her water for power without her consent and so is not in fact wronged when they lose access to a resource they had no right to. If, however, she has an obligation to maintain the flow of water then when she fails to do that she is directly harming others. This though is not a part of her ownership but is instead the illegal theft of resources that belong to other people and as a result is not contained within variable R_1. To summarise, this example goes further than mere interaction. So, it doesn't show that mere interaction can by itself be morally problematic, which means it is not a counterexample to my claim that a chosen range of the relational variable R_1 as such stands in no need of moral justification.

The theory behind this example makes it apparent why R_1 is not morally significant. In order to harm someone purely by my interaction or consumption of an object, they must be dependent on that object (as the mill owner in the example is dependent on the flow of water). If, however, I am the owner of the object then everyone else must be excluding themselves from the object, therefore they cannot be dependent on it, therefore they cannot be harmed purely by my interaction with it. The water example above appears to be a counter example, because it is unclear whether the river is owned by the farmer or is under common ownership. If it is under common ownership, then the farmer does harm the mill owner by unilaterally consuming all of it but as she does not own it her action is one of theft rather than that of interaction with an owned good. If by contrast the farmer does own the river then the mill owner has no right to use it and his loss of access to it is therefore not a harm.

For a similar reason, I would also argue that arguments based on pollution or littering which purport to show that mere interaction with owned goods harms others, are not in fact convincing. Pollution harms others only because it damages a public good (the atmosphere). As it is not the interaction itself, which is harmful, I would argue that R_1 has no immediate moral consequences and so does not stand in need of justification.

4.3.3 Extreme Environmentalist Counter Example

A possible counter example to the claim that R_1 requires no justification within the framework can be found in environmental philosophy. My claim is that the interaction between the owner and owned object (R_1) requires no independent justification as it is not inherently immoral. Environmental philosophy appears to provide a widely accepted counter example. Certain environmentalist philosophers in reaction to earlier anthropocentric conceptions of ownership argues that human interaction with the natural environment is generally immoral even if it doesn't harm people. This is due to the independent moral value natural entities possess:

> "Yes, but just what and whom do we love? Certainly not the soil, which we are sending helter-skelter downriver. Certainly not the waters, which we assume have no function except to turn turbines, float barges, and carry off sewage. Certainly not the plants, of which we exterminate whole communities without batting an eye. Certainly not the animals, of which we have already extirpated many of the largest and most beautiful

> species. A land ethic of course cannot prevent the alteration, management, and use of the "resources," but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state."[95]

Here Aldo Leopold is arguing against a purely "economic" understanding of land value. He instead argues for a recognition of natural value. Dudley Knowles, in his commentary on Hegel, recognises the problem the existence of theories such as these poses for many conventional theories of ownership.

> "At the time Hegel was writing this idea was commonplace in the West. The earth is mankind's domain, to treat as it sees fit. Nowadays such opinions have become more controversial. Many ascribe a moral status to animals; some even accord them rights. . . Such environmentalist views are morally respectable if philosophically puzzling and controversial."[96]

Whereas Hegel could simply assume the moral neutrality, or moral value, of human interaction with nature; philosophers today arguing for the same conclusions would have to give convincing arguments for these assumptions, as they are no longer universally held.

Applied to my thesis it might appear that I am making the same error as Hegel on Knowles' reading. My claim that R_1 requires no moral justification is not one that is universally shared. Consequently, it cannot be a part of my framework.

I should make it clear that only the more extreme environmentalist theories will require such a condition. If you believe that it is morally wrong to replace wild land with farmland, for example, your view can be accommodated without needing interaction to be presumptively wrong. In such a case it is the type of interaction which is wrong, not the fact that I am able to interact at all.

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[95] Aldo Leopold, "The Land Ethic," In *A Sand Country Almanac and Sketches Here and There,* (New York: Oxford University Press, 1949) https://rintintin.colorado.edu/~vancecd/phil308/Leopold.pdf 2.
[96] Dudley Knowles, *Hegel and the Philosophy of Right*, (London: Routledge, 2002).118.

An example of the type which would pose a problem for me is this analogous one of pet ownership. It is possible to imagine a conception of ownership in which the interaction of owning a pet is necessarily immoral. This immorality does not stem from abuse or neglect or any form of mistreatment which the interaction enables, it is simply because pets are not the type of thing which legitimately can be interacted with in a way which constitutes ownership due to their presumptive rights. The existence of the interaction itself (not any harmful acts which come from exercising it), is what is immoral and that is why I need to cover it with an expanded H variable.

My response to this objection is to argue that a moral justification for R_1 is still unnecessary because the environmentalist examples above can be accommodated by specifying that B cannot range over natural entities (or over animals in the pet example). I have already stated that for a conception to be legitimate, the owner, owned object and everyone else, must be able to be entities which can morally interact, be interacted with and excluded from, and be excluded respectively. For environmentalist philosophers, such as Leopold, natural objects are not the type of entities which can morally be interacted with; as all humans have moral obligations to exclude themselves, in certain ways, from natural objects.

Having now demonstrated why R_1 requires no moral justification, I will now go on to discuss R_2. Before doing so however it is important to note the difference between the two relations. It might appear that these arguments (that purported immorality in R_1 can be accommodated by specifying variable B) could also be applied to relation R_2. However, R_1 is fundamentally different to R_2. To return to the definitions I gave in Chapter Three, both relational variables are specified in terms of abilities; R_2 is the absence of the ability to use and control the object, R_1 is the absence of the absence of the ability to use and control the object. R_2 is therefore a direct limitation. Because of relation R_2 there are abilities that C does not possess which C would possess absent relation R_2. C's choices are restricted and therefore, assuming that C has moral value, R_2 requires justification.

R_1 by contrast is merely the absence of an absence. The presence of relation R_1 does not affirmatively grant or remove any abilities from A. It merely specifies that she is not subject to the same exclusion as C.

In short there is a fundamental difference between R_1 and R_2 (R_2 necessarily limits choices, R_1 does not) and that consequently R_2 is presumptively immoral while R_1 is not. I do not think the environmentalist objection is convincing, because it is not the interaction itself which is immoral but instead the treatment of a natural entity as an owned object (B is an illegitimate entity).

4.3.2 Moral Justification of R_2

R_2 by contrast does require moral justification for the ownership relation to be legitimate. This is because R_2 is a relation of exclusion and as a result causes direct harm to C (everyone else). For an instance of ownership to be legitimate, the harm must either be explained away as not morally significant or outweighed by a sufficient justification. This is a summary of my position, for which I will now give a justification.

In the previous chapter when describing the concept of de facto ownership, I was very clear that R_2 must be a relation of exclusion. This is because the essential element of ownership is that the owned object is the exclusive property of the owner, and this can only be achieved by the exclusion of everyone else from it. As that chapter was solely describing the concept of de facto ownership, I did not at that point discuss some of the consequences of seeing exclusion as essential for ownership. However, when discussing legitimate ownership they must be addressed.

The exclusion of C is an essential condition for A to own B. This exclusion is a deprivation for C and to some extent harms them. It is this harm which explains why ownership as an institution requires a justification. Taken by itself, harm is presumptively immoral and illegitimate. A comparison can be made with imprisonment. Imprisoning someone presumptively harms them. The deprivation of choice and elimination of certain freedoms means that imprisonment by itself is presumptively harmful. In order for imprisonment to be justified, either the imprisonment must be shown to be not harmful or the good created by the imprisonment must be shown to outweigh the evil it produces. In either case the default assumption is the unjustifiability of imprisonment and that some satisfactory reason must be given in order for it to be justified. I would argue the same approach is warranted for ownership; ownership is

presumptively illegitimate, due to the harm to C it entails, and requires some reason to be made legitimate.

My use of "presumptive" is roughly equivalent to Judith Jarvis Thomson's use of "all else being equal". As part of her analysis of the phrase "all else being equal", Thomson argues that the statement:

> "Other things being equal one ought not cause others pain."[97]
> Is equivalent to the statement:
> "An act's being an instance of "causes a person pain" is favourably relevant to its being wrongful."[98]

In other words, the fact that an action causes a person pain is a fact that makes that action more likely to be wrong that it would otherwise be. As Thomson's definition of "all else being equal" is roughly equivalent to my use of the word "presumptive" I can express my claim about ownership with Thomson's terminology. All else being equal ownership is immoral and the fact that a practice is ownership is favourably relevant to that practice being immoral.

An immediate possible response here is to argue that ownership is not comparable to imprisonment and is treated very differently in our society. In the vast majority of cases ownership does not harm or exclude anyone else. In the case of Alice, for example her ownership of her book does not harm or exclude other Canadians, because normally none of them are trying to interfere with it. They are not deprived or hurt because they are not prevented from doing something they would otherwise have done. The same goes for most ownership relations; they are unchallenged and so no exclusion takes place. It would seem then that exclusion, or harm, is not an essential part of ownership.

In response, I would argue that the harm of ownership is something we are so used to in society that it is not immediately obvious. However, the fact that ownership depends on exclusion and that exclusion is an essential part of ownership, becomes obvious whenever ownership is enforced or contested. If Alice's book were stolen from her then the state would have to exclude her thief from the book to return it to her. Exclusion is therefore an essential part of

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[97] Judith Jarvis Thomson, *The Realm of Rights*, (London: Harvard University Press,1990) 14.
[98] Thomson, *The Realm of Rights*, 15.

ownership, as without it an owner could not remain in control of her possessions when challenged and continuous ownership is only made possible by the habitual self-exclusion of C (everyone else). This is made obvious when we imagine a world with an instance of ownership, contrasted with a world in which everything else is the same apart, from the fact that the object in question is unowned. To return to the Alice, Book, Canada example; comparing the condition of the Canadians in world one, where Alice owns the book, and in world two, where the book is owned by everyone in common, the Canadians are worse off in world one. The degree to which they are worse off is infinitesimally small, but applied across an entire economic system the harm becomes considerable. De facto ownership is presumptively immoral, because the exclusion it depends on makes the non-owners worse off than they would be absent the ownership.

I do not expect this conclusion to be convincing immediately so to further reinforce my position I will now present and explain in detail the argument for it.

4.4 The Argument for the Presumptive Immorality of Ownership

P1- De facto Ownership requires exclusion of C (descriptive claim derived from previous chapter)
P2- Exclusion of C is a setback to C's interests (descriptive claim)
P3- De facto Ownership requires a setback to C's interests (descriptive claim derived from P1 and P2)
P4- A setback to interest is presumptively immoral (normative claim based on common assumption/ intuition- shared by Feinberg)
P5- De facto Ownership is presumptively immoral (normative claim derived from P2 and P3)
P6- Relations which are presumptively immoral can be legitimate only if they have a sufficient justification (normative claim based on common assumption/intuition-shared by Feinberg)
C- De facto ownership can be legitimate only if it has a sufficient justification (normative claim derived from P5 and P6)

I will now further explain my argument by going into each of the premises in greater detail.

4.4.1 P1 De Facto Ownership Requires Exclusion of C

P1 (de facto ownership requires exclusion of C) was demonstrated in the previous chapter, so I will not restate my argument for it here.

4.4.2 P2- Exclusion of C is a Setback to C's Interests

For P2 (Exclusion of C is a setback to C's interests) I am using Joel Feinberg's definition of "interests":

> "One's interests, then, taken as a miscellaneous collection, consist of all those things in which one has a stake. . . These interests, or perhaps more accurately, the things these interests are in are distinguishable components of a person's well being: he flourishes or languishes as they flourish or languish . . ."[99]

The key point here for me is the connection between interests and wellbeing. Interests are components of a person's wellbeing and so any setbacks to her interests will reduce her wellbeing.

Exclusion is a setback to interests because exclusion is a lack of ability to control something which you would have been able to control but for the exclusion. If you lack the ability to control something, then you lack the ability to satisfy your interests by it.

It might be argued at this point that exclusion does not setback interests if no interests were previously attached to the thing excluded from. If, for example, I am aquaphobic and hate swimming then the fact that I am excluded from a swimming pool does not appear to setback my interests, as I had no interest in interacting with the swimming pool.

My response to this is to argue that interests are still setback to some degree in the above example. Consider, in comparison to the above example (in which an aquaphobic person is excluded from a swimming pool), a world exactly the same except the aquaphobe was not

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[99] John Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others,* (Oxford: Oxford University Press, 1984), 34.

excluded. Certainly, the aquaphobe will not be able to satisfy his interests to swim in this world as he has no such interests to satisfy. I would argue though that the aquaphobe has a wider range of actions and so more potential interests. He could go with friends to the swimming pool or trade his slot there with somebody else or even make a conscious decision to act on his own hatred of water rather than acting so under the compulsion of the state.

The theoretical point underlying this example is that, as exclusion is a limitation on action it must also be a setback to interests, as actions are invariably performed in the service of interests. Even in the rare cases in which they are not, the mere limitation of action is itself a setback to interests. Feinberg makes this point when discussing non-selfinterested actions. He considers the case of whether interfering with someone from performing an action she had no interest in performing is a form of harm:

> "Such interference when it prevents a person from acting contrary to his own interests, actually *serves* his interest, and would therefore seem to be beneficial to him. Any interference however with a voluntary action, even with a nonselfinterested one, is an invasion of a person's interest in *liberty,* and is thus harmful to him to that extent."[100]

Feinberg is arguing that even in cases where the object the person is excluded from is one that she is not interested in, the person is still harmed, not through the setback to her interests with respect to the object (as she had none) but instead through the setback to her interests with respect to her personal liberty.

This is universally the case with ownership. The exclusion of C means that C is unable to satisfy any of their interests which were dependent on interacting with B. Any desires that C had to interact with B cannot be realised while they are excluded. Even in the cases where C had no interest in B the mere exclusion of C is a setback to C's interests, as all C's have an interest in not being excluded. This exclusion is necessary in order for A to own B and as a result ownership necessarily involves a setback to C's interests.

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[100] Feinberg, *Harm to Others*, 78.

4.4.3 P3- De facto Ownership Requires a Setback to C's Interests

P3 (de facto ownership requires a setback to C's interests) is a logical consequence of premises one and two. To further explain and justify it however I will consider two objections to it.

It might be argued that not every possession owned by someone is desired by someone else and therefore not every instance of ownership is a setback to interests. There are two forms of this objection. The first is that the excluded do not spend all their time desiring the objects of others. As a result, there are times when they have no interest in them and consequently ownership is not always a setback to interests.

To respond to this objection, I would argue that the habit of excluding yourself from the objects of others is ingrained throughout our culture. As a result, people do not generally form desires based on the objects of others. However, when comparing an ownership relation to its absence (that is comparing a world in which Alice owns the book to a world in which no-one owns the book), it is clear that desires would be thwarted. Thus, when I say that de facto ownership necessarily sets back the interests of C, this is true when this is considered relative to the absence of the ownership relation.

The second argument against the necessary connection between ownership and a setback to C's interests, is based on the claim of abundance of resources. If there are a near-infinite number of copies of Alice's book, then Alice's ownership of it does not cause a setback of interest to any Canadian. The response to this is to argue that while this may be case in a world of near-infinite resources, we do not live in such a world. This point was picked up by Jeremy Waldron:

> ". . . the obligations correlative to property rights *are* onerous. They concern are access to and use of resources which are scarce relative to the demands which human wants place on them."[101]

And Hanoch Dagan:

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[101] Waldron, *The Right to Private Property*, 267.

> ". . . the legitimacy of this decision [society choosing to maintain a system of ownership], therefore, depends on the extent to which it can be acceptable to those who will be subject to these powers - a justificatory burden that haunts the liberal case for property."[102]

Ownership necessarily excludes non-owners from the object which, given finite resources, means that the non-owners are deprived of goods which they need for their survival or happiness.[103] Ownership therefore universally harms the non-owners. Waldron uses this clear understanding of the universal harm of ownership to argue against theories of ownership where ownership is justified by individual action, such as those of Locke and Nozick, which he terms "Special Rights Theories"[104]. Waldron argues that Special Rights Theories cannot be justified because no individual action is sufficient to justify the universal harm of ownership. Ownership can only be justified with a "General Rights Theory," which is a theory which justifies ownership in so far as it supports some general good such as happiness or freedom. I agree with Waldron's more limited implicit claim that ownership requires a justification to be legitimate.

4.4.4 P4- Setbacks to Interest are Presumptively Immoral

P4 is the claim that a setback to interests is presumptively immoral. This follows from P3 because I am using a specific definition of setbacks to interest; Feinberg's definition. Feinberg distinguishes between harms and wrongs. A harm is any "setting back, thwarting or defeating of an interest",[105] while a wrong is a type of harm in which a person's rights are violated:

> "One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct, violates the other's right . . ."[106]

A wrong is thus necessarily a harm, because everyone has an interest in their rights being respected. A harm is not necessarily a wrong however, for Feinberg, because if the harm is

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[102] Hannoch Dagan, *A Liberal Theory of Property*, (Cambridge: Cambridge University Press, 2021), 66.
[103] Even assuming infinite resources non-owners will be harmed as they will lose access to particular resources owned by others. To have genuinely non-harmful ownership you would need infinite resources, equal access to all resources and perfect fungibility of resources. In such an environment ownership itself will be meaningless so every instance of ownership in every context in which it is possible is presumptively harmful to others.
[104] Waldron, *The Right to Private Property*, 115.
[105] Feinberg, *Harm to Others,* 33.
[106] Feinberg, *Harm to Others*, 34.

compensated or made up for in some other way, it does not wrong the victim of it. He concludes that the legal system should be concerned with preventing harmful wrongs.[107]

As I have demonstrated P3 (de facto ownership requires a setback to C's interests), when using Feinberg's definition of harm P4 (a setback to interests is presumptively immoral) logically follows. I should note though that the word harm and Feinberg's definition are not necessary for my overall argument. It is possible to substitute "harm" with "setback to interests" throughout the thesis and the argument would still function. That is, it would still be the case that ownership is presumptively immoral and requires some justification to be legitimate. I will only use "harm" rather than "setback to interest" from now on to make my writing clearer.

Using Feinberg's terminology, I would argue that instances of de facto ownership necessarily harm C (everyone) else. This is because C, by excluding themselves from B (the object) are no longer able to use B to satisfy their interests. This is most evident when C attempts to take B and is then prevented from doing so by an authority which maintains ownership, but even in the absence of this forcible exclusion C is, to some extent, continuously harmed. The fact that they are required to exclude themselves from B reduces their means to satisfy their interests and so harms them. When considered in isolation of any possible consequences or justifications, it is clear that ownership harms the non-owners.

The claim that I have been discussing (a setback to interest is presumptively immoral) is not a claim that I can provide a definitive argument for. It is a normative not descriptive claim and so not connected to any of my earlier arguments. The claim is shared by Feinberg and is one I find convincing, but I cannot provide a complete argument for it.

To provide some reason to accept it, I would argue that a setback to interests is necessarily a prevention of the satisfaction of desires. This follows from the connection I drew between interests and desires. From this it follows that de facto ownership necessarily prevents the satisfaction of C's desires. The prevention of the satisfaction of desires is something which is commonly seen as immoral. For example, Richard Kraut draws a direct connection between human desires and moral value:

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[107] Feinberg, *Harm to Others*, 36.

> ". . . many philosophers would as a first approximation, equate the human good with the satisfaction of desire . . ."[108]

Ted Honderich in a similar fashion bases moral value in political philosophy on human desire satisfaction:

> ". . . it must be that every political philosophy and the like should proceed from an explicit response to the question of well-being and distress: Who is to have what amounts? . . . Well-being and distress are to be understood as two kinds of human experience, those in which desires are satisfied and those in which desires are frustrated."[109]

I therefore think it is reasonable to accept that a setback to interests is presumptively immoral.

However, even if you deny this strong claim (that all setbacks to interests are presumptively immoral) the weaker claim, that the setbacks to interests entailed by the exclusion of others that constitutes a part of ownership makes ownership presumptively immoral, is still plausible. This weaker claim is all that is required for the thesis and avoids some of the potentially troublesome counterexamples faced by the stronger universal claim.

Finally, even if you deny both claims and instead continue to assert that setbacks to interest have no inherent moral significance that still does not invalidate this thesis. My aim here is to provide a description of the concept of legitimate ownership, meaning a description which can accommodate all conceptions of ownership. It is invariably the case that conceptions of legitimate ownership have an account of the thing that is required for ownership to be legitimate, which is entirely compatible with the claim that de facto ownership is presumptively illegitimate. The ultimate justification of my framework is not that it is an accurate description of reality, but rather that it is a useful tool to understand conceptions of ownership. It could be the case that ownership is really not presumptively illegitimate, but describing conceptions of it as such allows for a better understanding of them. It is simply a fact about conceptions of

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[108] Richard Kraut, "Desire and the Human Good," From *Ethical Theory: Blackwell Philosophy Anthologies,* edited by Russ Shafer-Landau, (Oxford: Blackwell Publishing Limited, 2007), 315.
[109] Honderich, Ted, *Violence for Equality,* (London: Routledge, 1989)

ownership that they invariably include a justification, and my understanding of ownership allows me to explain this with reference to the necessarily exclusionary nature of ownership.

4.4.5 P5- De facto Ownership is Presumptively Immoral

P4 is simply a logical consequence of P2 (De facto Ownership sets back C's interests) and P3 (a setback to interest is presumptively immoral). As de facto ownership sets back C's interests then, if such a setback to interests is presumptively immoral, de facto ownership must be presumptively immoral.

4.4.6 P6- Practices which are Presumptively Immoral can be Legitimate only if they have a Sufficient Justification

Feinberg argues that not all harms are wrongs, meaning that not all setbacks to interests are immoral. A harm is not a wrong if the harm is sufficiently justified. I intend to use the same principle for my framework and argue that though de facto ownership is necessarily harmful, it is not necessarily illegitimate, as it is possible for a sufficient justification to outweigh the presumptive immorality of the harm and so make the relation moral. This is P6. As with P4, I cannot give a definitive argument as to why a sufficient justification can make an immoral harm moral. However, I am justified in using it as the claim is reasonable, commonly accepted and allows me to create an accurate framework description of the concept of legitimate ownership.

As to whether C is necessarily wronged by ownership however, in the case of de facto ownership it is indeterminate. De facto ownership is merely recognised ownership and has no normative force. Illegitimate or unjust ownership, that is to say instances where A is acting immorally in its ownership of B, however, do wrong C. They are being harmed by the ownership and there is no justification or excuse to prevent that harm from being a wrong.

In order for ownership to not wrong C therefore, there must be some justification or excuse which makes the inevitable harm of ownership, not a wrong. This I would argue is a component of all conceptions of legitimate ownership. Conceptions of legitimate ownership have both a description of the harm caused by the ownership and a justification which makes the harm

caused either not immoral in itself or outweighed by some greater moral good; in other words, to make the harm not a wrong. My description of the concept of ownership can accommodate this with variables for both the harm caused by R_2 and the moral justification which, in legitimate ownership, is sufficient to outweigh the harm.

4.4.7 C- De facto ownership is presumptively immoral and can be legitimate only if it has a sufficient justification

C (legitimate ownership is de facto ownership with a justification which outweighs/nullifies the presumptive harm) follows logically from P4 (de facto ownership is presumptively immoral) and P5 (relations which are presumptively immoral can only be legitimate only if they have a sufficient justification).

One obvious response I will consider here, is the claim that exclusion from owned objects does not harm the excluded, because they benefit more from living in a society with laws protecting ownership than they lose from being excluded from other people's objects. As a result, exclusion in societies such as this does not harm the excluded. I would respond by distinguishing the harm of exclusion from the benefits that might come from living in a society dependent on such exclusion. Those benefits may be sufficient to outweigh the harm and serve as justification of ownership overall within society. However, that does not mean that the harm does not exist and cannot be analysed separately. To use Feinberg's terms; harm in ownership is inevitable but wrong is not.

To be clear, I am not arguing that ownership is always illegitimate. Rather I am arguing that ownership is always illegitimate in the absence of a sufficient justification and, in consequence, ownership is presumptively immoral. The reason for this is the harm to others caused by their exclusion, which is a necessary component of ownership. If it is accepted that ownership requires exclusion and that setbacks to interest are presumptively illegitimate, the conclusion follows logically.

Even if you do not accept the presumptive immorality of ownership however, the fact that the framework is able to accommodate all conceptions of ownership and be a useful tool in their analysis is reason enough for its acceptance. My aim throughout this thesis is not so much to

convince those who disagree with me of their error, as to include them within my framework. The argument above is primarily a description of my process in creating the framework. Disagreement with my process does not entail disagreement with the framework which is justified through its utility rather than its origin.

4.5 Nozick as a Counter Example

A possible counterexample to my argument would be a conception of ownership in which ownership was not presumptively immoral. The existence of such a conception would require me to change the concept of legitimate ownership, so that harm was no longer a necessary component of it. In this section, I will consider whether Nozick's conception of ownership is such a counterexample and demonstrate why it is not.

Robert Nozick in *Anarchy, State and Utopia,* argues for an entitlement conception of ownership which purports to show how ownership can exist without making anyone worse off than they would otherwise be. This is accomplished by the inclusion of a proviso (based on Locke's proviso) which holds that:

> ". . . a process normally giving rise to a permanent bequeath-able property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened."[110]

In other words, appropriation of unowned objects can only be legitimately done when doing so makes no-one worse off. Nozick goes on to argue that the same principle applies to the transfer of existing objects. For Nozick then, for ownership to be legitimate it cannot harm anyone and consequently his conception of legitimate ownership appears incompatible with the framework in which harm to C is a variable.

My response to this objection is to argue that a description of Nozick's conception of ownership in which C is harmed by the ownership is accurate and compatible with Nozick's understanding of it. This is because the harm is not outweighed by the justification, as it is in a Waldron-style general rights conception of ownership, but is instead nullified by it.

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[110] Nozick, *Anarchy, State and Utopia*, 178.

To demonstrate this, consider a Nozickian conception of de facto ownership. Nozick would allow that the exclusion of everyone else, necessitated by the ownership, constitutes a setback to their interests. Nozick therefore agrees with P1 and P2. Considered in a vacuum, he might be able to accept P3. However legitimate ownership does not exist in a vacuum for Nozick, as it depends on historical entitlement for its justification.

Ownership sets back the interests of C. However, in the case of legitimate ownership this does not wrong C, as C is under a duty to exclude themselves from B. As C is not the owner of B any interference with B (without the consent of A) is immoral. The exclusion of C certainly sets back C's interests, but, only those interests which violate A's property. Only immoral interests. It follows that the exclusion of C (in instances of legitimate ownership) does harm C, but does not wrong them. C's interests have been set back, but no moral crime has been committed.

It therefore is an accurate description of Nozick's conception of ownership to have a variable for harm within it. This variable is the setback to C's interest which is nullified from being a moral wrong by the existence of A's right to B.

4.6 The Return of R_3

In the previous chapter, I argued that R_3, a variable to range over relations between A (the owner) and C (everyone else), was unnecessary for the concept of de facto ownership. This is because for de facto ownership the reason behind C's exclusion from B is irrelevant. However, I argued that theories which depended upon such a relation were theories of legitimate ownership and could be accommodated by the description of the concept of legitimate ownership. To do this such a conception would specify that the presumptive harm of ownership is nullified by the right-duty relation.

To explain further, consider the Alice example. Imagine that Alice's ownership of the book was legitimate due to the right-duty relation that existed between her and all other Canadians. To apply this to the framework:

Alice legitimately owns her book iff: Alice interacts with her book; the Canadians exclude themselves from the book and there exists a right-duty relation between Alice and the other Canadians which nullifies the immorality of the harm they suffer.

Here, the harm variable in the framework is not outweighed by a greater good, but instead nullified by the right-duty relation. The Canadians are not able to read the book; this is represented by R_2 (the relation of exclusion). The Canadians are also wronged by Alice's ownership; this is represented by H the moral harm caused by the exclusion. However, in this example the Canadians are not morally harmed at all, because the justification (the right-duty relation) nullifies the harm.

Hence there is a difference between rights based approaches and general principle based approaches (what Waldron describes as the difference between special-rights and general-rights based views)[111]. A utilitarian conception of legitimate ownership holds that C is morally wronged by the relation as they have had their utility reduced. The relation can be justifiable if it maximises utility, but C is always harmed. In contrast, a rights based approach holds that C is not wronged because the right-duty relation exists. C's interests are set back by the ownership relation, but that is of no moral significance, due to the fact that C is under a moral duty to exclude themselves. It would be immoral for C to interact with B, hence the only types of interaction which C is prevented from doing by the relation are immoral types, hence C's exclusion does not morally wrong C.

4.7 The Framework Description of Legitimate Ownership

Having thoroughly explained all elements of the framework it is now possible to present it.

An owner legitimately owns an object if and only if: the owner is in a relation of interaction with the object, everyone else is in a relation of exclusion with the object and the harm caused by the exclusion is outweighed or nullified by a sufficient justification. The owner, object and

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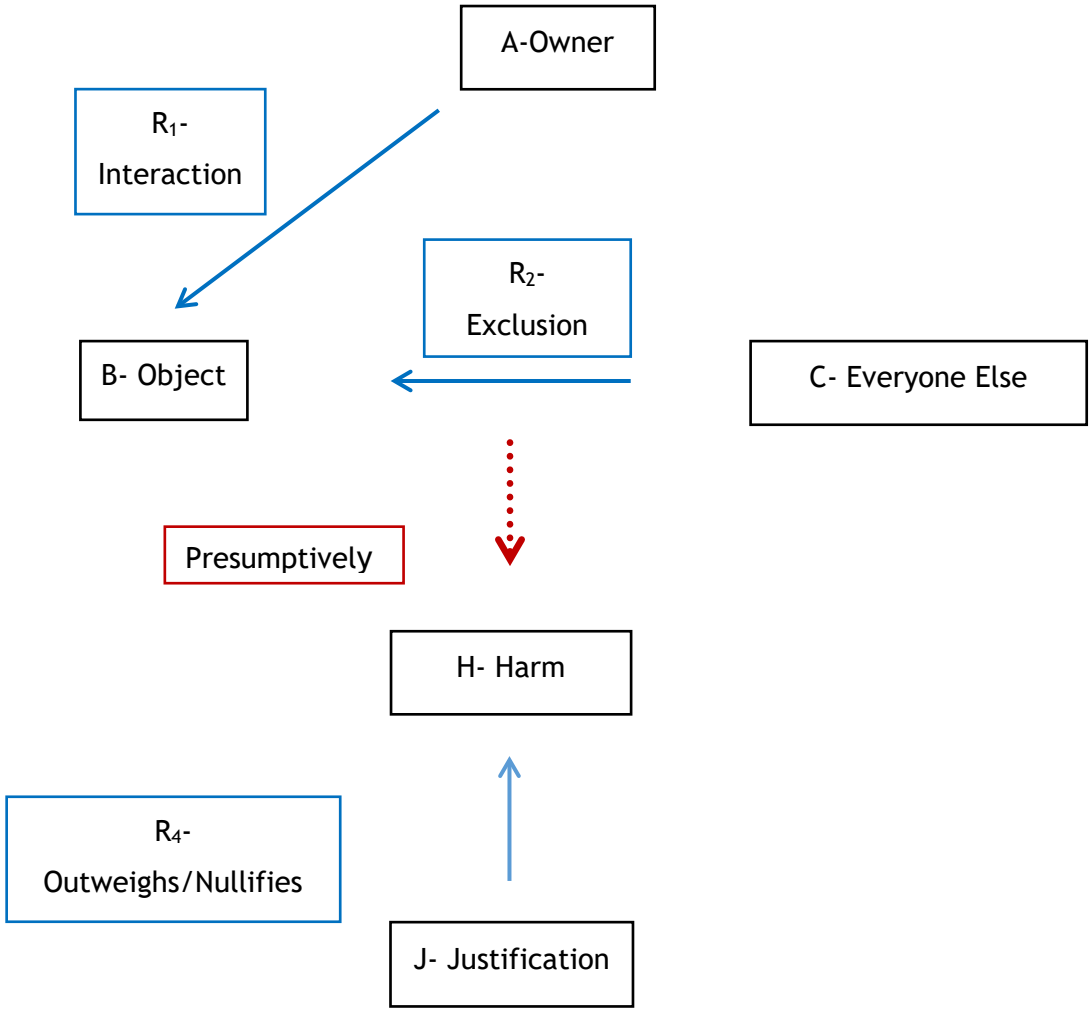
[111] "A special rights based argument . . . is an argument which takes an interest to have this importance not in itself but on account of the occurrence of some contingent event or transaction. A general rights based argument is one which does not take the importance of such an interest to depend on the occurrence of some contingent event or transaction, but attributes that importance to the interest itself, in virtue of its qualitative character" Waldron, *The Right to Private Property*, 116.

everyone else must be entities of a type that can morally: interact; be interacted with and excluded from; and be excluded respectively. To put it in schematic terms:

A legitimately owns B iff: AR_1B and BR_2C and HR_4J
R_1 ranges over relations of interaction, R_2 ranges over relations of exclusion and R_4 ranges over relations of outweighing or nullification.
A ranges over entities that can morally interact. B ranges over entities that can morally be interacted with and excluded from. C ranges over entities that can morally be excluded.

Final framework description of the concept of legitimate ownership



The line between R_2 and H is not a variable and has no letter because it is a constant. It is the necessary connection between the exclusionary relation and the harm it causes. I have called the H-J relation R_4, even though there is no R_3 in the final framework, in order to avoid confusion with the superfluous A- C relation.

R_4 is a variable due to the fact that, it can vary depending on the type of justification. As I have described earlier, in value maximising conceptions of ownership, R_4 would be "outweighs" as the conception of ownership would be legitimate only if the justification had sufficient moral value to outweigh the moral harm caused by the exclusion. By contrast, a rights based conception would hold that C is not morally harmed in a relation of legitimate ownership, as the justification is a right-duty relation the existence of which makes it the case that C is not morally harmed by R_2. Hence J R_4(nullifies) H in rights-based conceptions of ownership.

4.8 Conclusion

In this chapter I have both presented the framework description of the concept of legitimate ownership and provided an argument for accepting it, in my claim that de facto ownership is presumptively immoral. I should note however that the description of the concept is supported by the argument, but is not dependent upon it, and should still be able to function as a universal description, even if it were proved that not all de facto ownership is presumptively immoral.

Chapter Five.
Kant's Conception of Ownership

5.1 Introduction

Having presented my framework description of the concept of legitimate ownership in the preceding chapter, I will now demonstrate in detail how it can accommodate a specific conception of ownership. The conception of ownership I will be using is Immanuel Kant's conception of ownership. I will first present a summary of Kant's conception of ownership as given in the *Metaphysics of Morals*, before then describing in detail how my distinction between de facto and legitimate ownership maps onto a distinction in Kant between sensible and intelligible possession. I will then move onto the variables of the framework showing how, in order to describe Kant's conception of ownership using the framework, specifications need to be attached to the variables, in particular variable B. I will conclude by presenting Kant's description of ownership as described by the framework description of the concept of ownership.

5.2 Summary of Kant's Conception of Ownership

Before demonstrating how Kant's conception of ownership can be accommodated by the framework, I will first provide a summary of Kant's conception of ownership. As some parts of Kant's conception are not entirely clear, I will sometimes rely on interpretive reconstructions by other philosophers such as Kenneth Westphal's and Arthur Ripstein's in order to give a clear picture of Kant's conception of ownership.[112]

5.2.1 Kant on Possession

To begin, running through Kant's conception of ownership is a tension between the a priori and the empirical. For Kant moral laws, and thus the moral foundations of ownership, are universal

[112] Kenneth Westphal, "A Kantian Justification of Possession," From *Kant's Metaphysics of Morals: Interpretative Essays* edited by Mark Timmons, (Oxford: Oxford University Press, 2002), 89.

and can be understood purely a priori. However, as ownership is a social institution which applies to people it cannot be understood purely by rational a priori means. Kant's conception of ownership therefore begins with an a priori rule which defines ownership and then is applied to social situations in order to create legitimate ownership.

This tension between the empirical and the rational can also be seen in Kant's understanding of possession. For Kant possession is the "the subjective condition of any possible use"[113], meaning that x possess y iff x is actually able to use y. Kant uses an example of holding an apple as physical possession, as it is only in holding it that the possessor is able to physically use it.[114] Moving on from direct physical possession Kant distinguishes another kind of possession from it, intelligible or rightful possession:

> ". . . it would be self-contradictory to say that I have something external as my own if the concept of possession cold not have different meanings, namely *sensible* possession and *intelligible* possession, and by the former would be understood physical possession but by the latter a merely rightful possession of the same object."[115]

For Kant legitimate ownership is possible only if rightful possession is possible. Rightful possession is possible because its negation is impossible:

> "It is possible for me to have any external object of my choice as mine, that is, a maxim by which if it were to become a law, an object of choice would in itself (objectively) have to *belong to no one* (res nullius) is contrary to rights. For an object of my choice is something that I have the *physical power* to use. If it were nevertheless absolutely not within my rightful power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong) then freedom would be depriving itself of the use of its choice with regard to an object of choice by putting usable objects beyond any possibility of being used, in other words it would annihilate them in a practical respect and make them res nullius . . .It is therefore

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[113] Immanuel Kant, *The Metaphysics of Morals*, Translated by Mary Gregor, (Cambridge: Cambridge University Press), 1996. 6:245. 41.
[114] Kant, *The Metaphysics of Morals*, 6:247. 42.
[115] Kant, *The Metaphysics of Morals*, 6:245. 41.

> an *a priori* presupposition of practical reason to regard and treat any object of my choice as something which could be objectively mine or yours."[116]

Kant here is arguing that merely rightful possession must be possible as it would be contrary to universal moral law for it to be impossible. While that is clear it is harder to see how precisely or by what mechanism legitimate rightful possession is made possible for Kant. This point is made by Westphal:

> "Kant asserts that the relevant kinds of possession must be intelligible, and he asserts (as a postulate) that we have a duty to behave in ways that allow people to possess things. Surely Kant is right that if we have this duty, then in principle things can be possessed. Yet why should we believe this is a duty? Do we have such a duty? Can Kant offer any insight into the grounds of such a duty?"[117]

Westphal attempts to answer these questions by giving a Kantian reconstruction of how exactly rightful possession can come about. He begins by noting that for Kant respect for rightful possession is a juridical duty, a duty enforceable by the state. This is in contrast to duties of virtue which are not enforceable by the state. In Kantian political philosophy juridical duties are strict duties meaning that they are the result of a contradiction in conception when considering an opposing maxim.[118] For example, the duty not to steal for Kant is a strict duty which the state can enforce due to the impossibility of treating its inverse as a rule for action. A world in which everyone can steal when it is convenient for them, is a world in which ownership has no stability, therefore one in which no one really owns anything, therefore one in which it is impossible to steal. Applied to ownership; Kant's conception of ownership depends on his idea of the inverse maxim in relation to ownership.

Westphal also comments on the tension in Kant between empirical and a priori considerations. Kant aims to give a universal and hence purely rational political philosophy, but no political philosophy can be purely rational as the entities it engages with (people, states, societies) are contingent and only empirically known. Westphal aims to resolve this tension by accepting

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[116] Kant, *The Metaphysics of Morals*, 6:246. 45.
[117] Westphal, "A Kantian Justification of Possession," 96.
[118] Westphal, "A Kantian Justification of Possession," 97.

three empirical, though universal, "basic facts" as the basis for his reconstruction of political philosophy. These are that firstly:

> ". . . we cannot will our ends into existence *ex nihilo*, . . . Secondly . . . we cannot simultaneously physically hold or occupy all that living, even at a subsistence level requires."[119] and thirdly "we are too populous to avoid one another and each other's things and projects"[120].

These three basic facts are empirically known but universal across all human societies and as such can be used in justifying a universal political philosophy. Westphal also argues that the assumption of these basic facts is implicit in Kant's political writings.

Westphal then returns to the maxim the contradiction of which will justify rightful possession. He formulates one and calls it the Maxim of Arrogant Possession:

> "Whenever the sole sufficient means to achieve my ends happen to include things possessed by others, I will nevertheless regard them as being under my control and will use them to achieve my ends."[121]

Can this maxim be universalised without contradiction? Westphal argues that it cannot. There are three contexts under which this maxim could be universalised. Firstly, if there are sufficient resources for everyone to achieve their ends from resources not possessed by anyone else. Secondly, if everyone renounces an end when its satisfaction would require the use of resources possessed by someone else, and thirdly if everyone allows everyone else to use resources they possess. Westphal quickly rejects the first two contexts that attempt universalisation of the maxim; the first because its rejection of scarcity contradicts the third basic fact Westphal earlier accepted and the second because in this context the maxim is never realised and so is empty. The third context is more difficult to deal with, but Westphal argues that it can be shown to be self-contradictory as allowing everyone else free access to your rightful possessions defeats the purpose of having rightful possessions and so is contrary to reason.[122]

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[119] Westphal, "A Kantian Justification of Possession," 98.
[120] Westphal, "A Kantian Justification of Possession," 98.
[121] Westphal, "A Kantian Justification of Possession," 100.
[122] Westphal, "A Kantian Justification of Possession," 101.

Westphal therefore concludes that the maxim of arrogant possession cannot be universally willed as doing so contains within it a contradiction in conception. As a result of this we have a strict duty to respect the rightful possessions of others.[123]

Having now explained how Kantian theory justifies universal respect for rightful possession, Westphal goes on to explain how individual particular instances of rightful possession can come about. Westphal argues that Kant's principle of permission (implicit in the universal law of right) allows any action which is compatible with the freedom of all. In consequence taking unowned objects into your rightful possession is allowed provided that doing so does not restrict the freedom of anyone.[124]An obvious objection to this is that taking possession of an unowned object does restrict the freedom of others as it prevents them from taking possession of it for themselves. Westphal's response to this rests on his third basic fact, namely his assumption of relative scarcity. He argues that in a world of abject scarcity, a world in which "one person's use or possession of something is directly another person's vital deprivation"[125], no ownership in accordance with universal law is possible and so no legitimate ownership at all is possible. In our own world then the fact that first appropriation does not directly deprive others, and that once owned objects must exist in a market of fair exchange, makes first appropriation legitimate.

> "In summary, the way to have something external as one's own *in a state of nature* is physical possession which has in its favour the rightful *presumption* that it will be made into rightful possession through being united with the will of all in a public lawgiving and in anticipation of this holds comparatively as rightful possession."[126]

Rightful possession is possible and becomes actual by the transition from the state of nature to civil society.

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[123] Westphal, "A Kantian Justification of Possession," 101.
[124] Westphal, "A Kantian Justification of Possession," 101.
[125] Westphal, "A Kantian Justification of Possession," 106.
[126] Kant, *The Metaphysics of Morals*, 6:257. 51.

5.2.2 A differing Interpretation of Kant's conception of possession

In the preceding section, I said that Kant divides possession into two categories: sensible/empirical possession and rightful/ intelligible possession. However, this understanding of Kant is not universal.

In their book *Kant's Doctrine of Right: A Commentary* B. Sharon Byrd and Joachim Hruschka argue that Kant has four distinct categories of possession: empirical possession, control possession, sensible possession and intelligible possession.[127] Empirical possession is the same as sensible/empirical possession on my interpretation and intelligible possession is the same as intelligible/rightful possession on my interpretation. Sensible possession for Byrd and Hruschka has no content in itself and is merely a combined category of empirical and control possession. The novel feature then, of Byrd and Hruschka's interpretation is the existence for them of "control possession".

Control possession for Byrd and Hruschka is non-moral and so not rightful possession. but does not depend on direct contact and so is not sensible possession. Their example of control possession is that of maintaining control possession of a house by "locking the doors and windows"[128]. This is their own example not Kant's, as Kant gives no examples of "control possession" in *The Metaphysics of Morals*.

Partially as a result of this, I am doubtful as to whether Byrd and Hruschka's interpretation is an accurate interpretation of Kant's theory of possession as presented in the *Metaphysics of Morals*. Byrd and Hruschka arrive at their conclusion by eliding Kant's "possession as a pure concept of the understanding" with control possession. The section they cite for this is §7 of the doctrine of private right. The strongest section in support of their view is the following:

> "I shall therefore say that I possess a field even though it is in a place quite different from where I actually am, For we are speaking here only of an intellectual relation to an object, insofar as I have it under my control (the understanding's concept of possession

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[127] B.S. Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary*. (Cambridge: Cambridge University Press, 2010). 107.
[128] Bryd and Hruschka, *Kant's Doctrine of Right a Commentary*, 107.

> independent of spatial determinations), and the object is mine because my will to use it as I please does not conflict with the object of my choice . . .”[129]

I would argue that the possession Kant is speaking of in the above quote, the “possession as a pure concept of the understanding” is another name for intelligible possession. This is because of the non-physical way that Kant describes it in the above quote: this possession is a purely intellectual relation and so cannot depend on taking actions, such as locking doors, to exclude others from the object. This interpretation is further reinforced by Kant’s description of possession throughout the rest of the doctrine of right:

> “. . . in summary the way to have something external as one’s own *in a state of nature* is physical possession which has in its favour the rightful presumption that it will be made into rightful possession through being united with the will of all in a public lawgiving, and in anticipation of this holds comparatively as rightful possession.”[130]

Kant in summarising his theory identifies two types of possession, physical and rightful, and states that physical possession in the state of nature is the basis of rightful possession upon the creation of the state. “Control possession” is never mentioned.

I would therefore argue then that Kant’s conception of ownership has only two types of possession, empirical and rightful, and Byrd and Hruschka’s interpretation is inaccurate. Their decision to invent this category of control possession is understandable, however, as it makes Kant’s conception of ownership more conventional. In most conceptions of ownership, the exclusion of others is all that is required for de facto ownership. In Kant however what is essential for de facto ownership (or empirical possession) is owner control of the owned object. This is still compatible with the framework, as owner control requires the exclusion of de facto owners, but it does mean that de facto ownership for Kant, is a far smaller category than is common for conceptions of ownership. A house will not be de facto owned for example unless the owner is in physical contact with it.

Making use of my framework has allowed me to reconstruct and understand Kant’s divergent conception of ownership, and to critically evaluate different interpretations of Kant by making

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[129] Kant, *The Metaphysics of Morals,* 6:253. 48.
[130] Kant, *The Metaphysics of Morals,* 6:257. 51.

explicit the specific respects in which they differ. The ability of my framework to do this, and also to accommodate an unusual conception of ownership, such as Kant's, without flattening it to align with our preconceived conceptions, is more inductive evidence that the framework is both universal and useful.

5.3 De Facto, De Jure and Legitimate Ownership

To begin to describe Kant's conception of ownership using the framework, I first need to be able to separate the parts of Kant's conception that concern de facto ownership from the parts that concern legitimate ownership. This distinction which I have made in this thesis aligns with Kant's division of possession. As noted above Kant identifies two types of possession; sensible possession and intelligible possession[131] (although he sometimes calls these by various other names). Sensible possession is characterised by physical control of the thing possessed. Kant is explicit that it has no moral content as taking away the sensible possessions of a person is not immoral in itself:

> "For someone who tried in the first case (of empirical possession [meaning sensible possession]) to wrest the apple from my hand or drag me from my resting place would indeed wrong me with regard to what is *internally mine* (freedom); but he would not wrong me with regard to what is externally mine unless I could assert that I am in possession of the object even without holding it. I could not call these objects (the apple and the resting place) mine."[132]

Kant here is arguing that sensible or empirical possession has no moral importance in itself and so the immorality with interfering with the sensible possessions of others must come from a violation of their personal freedom rather than a violation of their possessions.

This is all in accordance with my understanding of de facto ownership. I would also argue that de facto ownership grants no moral claim to the de facto owner (hence the necessity of additional conditions for ownership to be legitimate). Further reinforcement of the identification of Kant's sensible ownership with my de facto ownership is Kant's linking of it to

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[131] Kant, *The Metaphysics of Morals,* 6:245. 41.
[132] Kant, *The Metaphysics of Morals,* 6:248. 42.

appearance "Empirical possession (holding) is then only possession in appearance"[133]. Apparent ownership was of course a description which I took to be equivalent to de facto ownership.

The other form of possession for Kant is intelligible or rightful possession. His definition of it is as follows: A rightfully possesses B if a would be wronged by any interference by others with B:

> ". . . something external is mine if I would be wronged by being disturbed in my use of it *even though I am not in possession of it* (not holding the object) . . ."[134]

This definition is slightly confusing as he defines intelligible possession as existing when the subject lacks possession, but is explicable as a result of Kant's two types of possession. I intelligibly possess an object when I am wronged by others' interference of it, even when I do not sensibly possess it. This is because I am wronged by the violation of my possession rather than the violation of my freedom that would accompany interference with my sensible possessions (as in the apple example above).

I would argue that Kant's intelligible possession is equivalent to my understanding of de jure ownership. As in de jure ownership intelligible possession does not require the appearance of ownership or direct physical control of the possessed object. Its distinguishing feature is that violations of it are immoral as is the case with de jure ownership.

Kant is most concerned with purely intelligible possession, first how it is possible and then how it is acquired. De jure ownership is not something I have attempted to give a description of due to the differences in the conceptions and the lack of a universal core.

It might seem from the above that Kant's conception of ownership can easily be accommodated as de facto ownership corresponds to sensible ownership, de jure to intelligible and legitimate to the two combined which is a clearly implicit element in Kant's conception of ownership. However, some of the small differences between Kant's terms and my specifications of de facto and de jure ownership leads to a problem.

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[133] Kant, *The Metaphysics of Morals,* 6:248. 43.
[134] Kant, *The Metaphysics of Morals,* 6:248. 43.

This problem is a result of Kant's identification of sensible possession with physical control. For Kant sensible possession of something that is not under my physical control is impossible. The only possession I can have of such objects is intelligible possession. This is in contrast to my account of de facto ownership, in which I can de facto own something I do not control as long as everyone else is excluded from it. This difference is why Kant sees intelligible possession as so important.

> "I shall therefore say that I possess a field even though it is in a place quite different from where I actually am. For we are speaking here only of an intellectual relation to an object, insofar as I have it *under my control* (the understanding's concept of possession independent of spatial determinations), and the object is mine because my will to use it as I please does not conflict with the law of outer freedom."[135]

To reconstruct Kant's argument in the terms of this thesis, Kant has first linked de facto ownership to control then argued that as ownership of things I do not physically control is possible, de jure ownership must be possible. He then goes on to argue that ownership of things I do not physically possess is de jure ownership. He concludes by stating that de jure ownership (intelligible possession) is impossible in a state of nature and requires a state.

Given the above, can Kant's conception still be accommodated by the framework? I would argue it can as within Kant's understanding of de facto ownership and the moral requirements for de jure ownership there is a clear implicit conception of legitimate ownership in which sensible ownership is legitimate if it is in accordance with the universal law. I will go on to try and reconstruct that.

I would also argue that analysing Kant with the framework in mind reveals flaws with his conception. His understanding of sensible possession I would argue is not empirical as it does not accord with actual de facto ownership, which depends for its existence not on control but on exclusion. In Kant's example of sensible possession this is not obvious because in both cases (losing an apple or a sleeping space) a loss of control is accompanied by exclusion. If the two are drawn apart however, it is clear that control is not essential. If for example instead of the apple being snatched away from me I took it away and locked it in a safe. In both cases I have then lost direct physical possession of it and so for Kant in both I no longer sensibly possess it.

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[135] Kant, *The Metaphysics of Morals,* 6:253. 48.

However, I am still the apparent or de facto owner of it. I am not trying to argue for my claim or claim that Kant's is internally incoherent, rather I would argue that mine is more in line with the common assumption of apparent ownership. Insofar as Kant's conception of ownership is attempting to describe ownership practices it is therefore inaccurate.

5.4 The Entity Variables

Having now shown how Kant's conception of ownership can be understood with reference to the distinction between de facto and legitimate ownership I will now go into greater detail by demonstrating how the various elements of Kant's conception of ownership correspond to the variables of the framework, and the specifications on those variables that are a component of Kant's conception.

To briefly remind you the framework description of de facto ownership is:

A de facto owns B iff AR_1B and BR_2C

A must be an entity which can interact with B, B must be an entity which can be interacted with by A and C can exclude itself from, and C must be an entity which can exclude itself from B.

R_1 must be a relation of interaction. R_2 must be a relation of exclusion.

5.4.1 Variable A- The Owner

For variable A, Kant begins his discussion of possession by describing it as being concerned with "what is externally mine and yours in general"[136] and goes on to further describe it in terms familiar from his moral philosophy:

[136] Kant, *The Metaphysics of Morals,* 6:245. 41.

> ". . . that outside me is externally mine which it would be a wrong (an infringement upon my freedom which can coexist with the freedom of everyone in accordance with a universal law) to prevent me from using it as I please . . ."[137]

From this I infer that by "me and you" he means all rational agents, i.e. all adult humans and all rational autonomous non-humans which may exist. Support for this view is given by Kant's discussion of colonisation:

> ". . . it can still be asked whether, when neither nature nor chance but just our own will bring us into the neighbourhood of a people that holds out no prospect of a civil union with it, we should not be authorised to found colonies, by force if need be, in order to establish a civil union with them and bring these human beings (savages) into a rightful condition (as with the American Indians, the Hottentots, and the inhabitants of New Holland); or (which is not much better), to found colonies by fraudulent purchase of their land, and so become owners of their land, making use of our superiority without regard for first possession. . . . But it is easy to see through this veil of injustice (Jesuitism), which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated."[138]

Here Kant is arguing that the acquisition of land by Europeans in America, South Africa and Australia was contrary to right, because it failed to respect the pre-existing ownership of the inhabitants. This demonstrates that Kant believe ownership claims to be universally valid across the globe, rather than only existing relative to a given society. Applied to my framework this suggests that variable C for Kant can only range over all other people, rather than just the people in the owner's country. Here and elsewhere Kant also talks about collective ownership being a legitimate alternative to individual ownership.

To summarise, variable A for Kant must be a rational autonomous agent, or a corporate body (such as a state or company) composed of rational autonomous individuals.

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[137] Kant, *The Metaphysics of Morals,* 6:248. 43.
[138] Kant, *The Metaphysics of Morals,* 6:266. 58.

5.4.2 Variable B- The Owned

Variable B (the entity which is owned) is the one for which there is the greatest difficulty in giving specifications. Kant clearly believes that physical objects can be owned, the difficulty arises in how far he thinks other people can be owned.

Kant divides the entities which can be owned into three categories:

> "There can be only three external objects of my choice: 1 a (corporeal) thing external to me; 2 another's choice to perform a specific deed; 3 another's status in relation to me. These are the objects of my choice in terms of the categories of substance, causality and community between myself and external objects in accordance with the laws of freedom."[139]

Going into more detail category one is the ownership of external objects, the example that Kant gives is an apple.[140] Category two is contract right; the right I have against others to provide me with some good. Category three is in some way a combination of the two, not ownership of an external object because it applies to people who cannot be owned and not category two because the relation it describes is in some way not equal or consent based. This division is exemplified by Kant's name for it "a right to a person akin to a right to a thing". Kant gives three examples of it "a wife, a child a servant"[141], but allows that there can be other forms.

Kant argues against slavery on the grounds that legitimate slavery would depend on the continuous consent of the enslaved. However, by being enslaved people give up their ability to consent or to refuse consent to anything. As a result, they cannot consent to their own enslavement and so legitimate slavery is impossible:

> "No one can bind himself to this kind of dependence, by which he ceases to be a person, by a contract, since it is only as a person that he is able to make a contract."[142]

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[139] Kant, *The Metaphysics of Morals,* 6:247. 42.
[140] Kant, *The Metaphysics of Morals,* 6:248. 42.
[141] Kant, *The Metaphysics of Morals,* 6:248. 43.
[142] Kant, *The Metaphysics of Morals,* 6:330. 113.

It is impossible for you or anyone to consensually make himself a slave, because by becoming a slave he ceases to be an autonomous agent and so is no longer able to consent to his own enslavement.[143]

The one exception to the principle, that legitimate slavery is impossible, is criminals. Kant argues that criminals by their actions deserve punishment. The degree of punishment should be in proportion to the crime. However, some people are unable to receive that punishment due to having insufficient resources:

> "Whoever steals makes the property of everyone else insecure and thus deprives himself (by the principle of retribution) of security in any possible property. He has nothing and can also acquire nothing: but he still wants to live, and this is now possible only if others provide for him. But since the state will not provide for him free of charge he must let it have his powers for any kind of work it pleases (in convict or prison labour) and is reduced to the status of a slave for a certain time or permanently . . ."[144]

Slavery is therefore justified for Kant only if the slave is one who has been convicted of a crime and is unable to meet the punishment the law requires in any other way. I should note that this form of slavery appears to be more prevalent for Kant than might appear from the above quote. When discussing the same practice of convict slavery, Kant states that convict slaves can be owned by private individuals as well as the state "he is made a tool of another's choice (either of the state or of another citizen)"[145]. He also states that they can be used for any purpose. Both of these appear to be in conflict with Kant's justification for convict slavery as the fulfilment of the punishment for stealing. One might think given his other principles that the slavery should only persist until the value of the stolen goods has been met by the slave's labour and the slave should be owned by the state (as stealing is a crime against society not against the victim).

Convict slaves are therefore the one example of people who can be owned as objects. The second category that Kant lists is rights to people. For this category the difficulty is whether Kant is talking about contractual relations or ownership relations. Through his unified notion of

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[143] This argument is not original to Kant as it was made by Rousseau in the *Social Contract* which I quoted in Chapter Four.
[144] Kant, *The Metaphysics of Morals,* 6:333. 115.
[145] Kant, *The Metaphysics of Morals,* 6:330. 113.

possession Kant is able to unite the two however the framework only describes ownership, not contract. Applying Kant to the framework, then for variable B I will say that Kant's conception of ownership is the subset of his broader conception of possession that is exclusively concerned with ownership. Therefore, for Kant's conception of contract relations, the possession of another's choice, cannot be a part of it. As a result, in Kant's conception of ownership as described by the framework such entities cannot fulfil variable B.

The more difficult part of Kant's theory of possession to understand is his "right to a person akin to a right to a thing". More specifically is it more similar to possession of objects or possession of another's choice? If the former then it can fill variable B while if the latter then it cannot.

Jordan Pascoe in his analysis of Kant's understanding of labour argues that there is a sharp difference between Kant's "right to a person" (meaning contract) and his "right to a person akin to a right to a thing":

> "The *right to a person akin to a right to a thing* reframes the relations within the household in terms of possession: while an employer has rights against those he employs through contract, a householder has rights to his wife, children and servants though these rights to are, like all property rights, really rights against everyone else. The "possession" in question then is "intelligible possession" . . ."[146]

Under Pascoe's interpretation then the "right to a person akin to a right to a thing" is a form of ownership akin to "the right to a thing". A more limited interpretation of Kant's theory of ownership may hold that the "right to a person akin to a right to a thing" is in fact substantially different from ownership. Arthur Ripstein gives such an interpretation in his description of Kant's threefold division of property, contract and status:

> "In property I have both possession and use of the thing. In contract, I have a limited right to the use of your powers for my purposes, but I do not possess you. In the third category, I have possession of you but am not entitled to use you for my own purposes. Let me perform the same triangulation in terms of the wrongs in question. The wrong in property is that of interfering with another's ability to set and pursue such ends as has

[146] Jordan Pascoe, *Kant's Theory of Labour,* (Cambridge: Cambridge University Press, 2022),15.

> set for himself. The wrong in contract is failing to use your means in a way that you have given your contracting partner a right to have them used. The wrong in status is using another person to advance your own ends in so doing you deprive that person of the freedom to set his own ends."[147]

Note that in this quote the wrong of property, "interfering with another's ability to set and pursue such ends as he has set for himself", is directly equivalent to the harm variable from the concept of legitimate ownership demonstrating how Kant's conception of legitimate ownership contains within it an awareness of the harm legitimate ownership inflicts on others in the absence of its nullification by right.

To return to variable B, it appears there is no consensus, among interpreters of Kant, as to whether "the right to a person akin to a right to a thing" is an ownership relation or a non-ownership status relation. This however presents no problem for my framework as it is able to accommodate both interpretations.

To summarise variable B for Kant can be only: a non-human external object, a convict slave or, on some interpretations, a spouse, child or servant though if the latter there are moral limitations on the ownership.

5.4.3 Variable C- The Excluded

For Kant the entities that variable C can range over are everyone else I interact with. In a state of nature all ownership is provisional, but in civil society everyone else is under a duty to refrain from interacting with owned goods. As can be seen from his discussion of colonisation this duty of exclusion applies universally across states and cultures as well.

Variable C for Kant then must always be every rational agent other than the owner.

I have already discussed the relational variables for Kant in my discussion of his understanding of sensible possession. As a result, I will merely summarise the results of that earlier discussion

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[147] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy,* (London: Harvard University Press, 2009), 76.

here. For R_1 Kant describes sensible possession as merely direct physical control. So R_1 must be a relation of direct physical control. Similarly, for R_2 the interference of others voids sensible possession as can be seen in the apple example so for sensible possession to exist R_2 must be a relation of exclusion.

5.5 Kant's Conception of De Facto Ownership as Described by the Framework

Ownership exists iff: An individual or corporate body has direct physical control over a material object, convict slave or possibly the status of another and all other individuals or corporate bodies are excluded from the same material object, convict slave or possible status of another.

The most striking difference between Kant's conception of de facto ownership and the description of the concept of de facto ownership is Kant's requirement for direct physical control to fulfil variable R_1. Such a substitution can be accommodated by the framework, but it does dramatically limit what practices count as de facto ownership.

5.6 Kant's Conception of Legitimate Ownership as Described by the Framework

To get from this to the concept of legitimate ownership, variables for harm and justification need to be added. For Kant the harm is obvious. It is the restriction on others freedom caused by the exclusion, through the creation of the unilateral obligation to exclude:

> "When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right . . . Now a unilateral will cannot serve as a coercive law for everyone with regard to freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone that assurance."[148]

[148] Kant, *The Metaphysics of Morals,* 6:255. 49.

Kant is here arguing that unilateral rightful ownership is impossible as unilateral coercion is immoral and so cannot be rightful. The only way rightful ownership can be possible is in a multilateral context; that is in a state in which everyone agrees to respect each other's possessions and those possessions can be protected by law.

This easily corresponds to the terms of the framework. For Kant the harm H of possession is the unilateral obligation it enforces on everyone else C, which is a direct result of their duty of exclusion R_2. However, in a society that harm H can be nullified R_4 by universal multilateral obligations to respect owned goods J.

Thus, Kant's implicit conception of legitimate ownership can be stated in my terms as follows:

Legitimate ownership exists iff: An individual or corporate body has direct physical control over a material object, convict slave or possibly the status of another and that the same material object, convict slave or possible status of another is interacted with by any other individual or corporate body.

The harm of the unilateral obligation of non-interaction imposed on everyone else is nullified by the taking on of universal mutual obligations to respect ownership in the context of a civil society.

5.7 Conclusion

In this chapter I have demonstrated how the framework functions by showing how Kant's conception of ownership can be accommodated by it. The framework provides a useful tool for understanding Kant's conception and in enabling easier comparisons between it and other conceptions of ownership.

I have not chosen Kant's conception of ownership to be the example application of the framework for this thesis, because it is one where it is obvious how to apply the framework. Rather I have chosen Kant's conception of ownership, because it is in many instances non-obvious how it can be accommodated. The fact that the framework is still able to accommodate such a conception is therefore further evidence of its universal character. Finally, the fact that

Kant's conception is difficult to accommodate, and the specifics of how it can be accommodated, are important facts in themselves which reveal significant insights into Kant's conception of ownership and so demonstrate the utility of the framework description of the concept of ownership.

Chapter 6
Self-Ownership

6.1 Introduction

In this chapter I will demonstrate how my framework description of the concept of ownership can accommodate various conceptions of self-ownership. I shall first lay out my framework and show how a simple instance of self-ownership is compatible with it. I will then describe several conceptions of self-ownership and show how they are compatible with my description of the concept of ownership. Self-ownership is a good example of the application of the framework for two reasons: it is a topic that has been discussed by a diverse range of philosophers across a large span of time, and having the owner and object be the same entity is a divergence from the standard image of ownership in which the owned thing is a distinct external physical object.

I will begin with an examination of Locke, then Hegel, then examine Cohen and several of his contemporaries before finishing with an investigation of Steiner. A running theme through the various conceptions is an apparent incoherence over whether people do or do not own themselves. For Locke and Hegel self-ownership is fundamental to their respective political theories but both also believe people cannot be total self-owners as there are some things people cannot, do to themselves; suicide and self-alienation, respectively. A related but different incoherence is present in the conceptions of Cohen and his contemporaries. Here self-ownership is seen as fundamental for respect for human-rights and the individual. However total self-ownership threatens equality as it perpetuates an unequal distribution of natural talent. When examining all of these conceptions the framework is useful as it provides a clear and universal means for identifying these incoherences and in revealing potential solutions.

I will finish by discussing Steiner's conception of self-ownership. Steiner's conception is interesting as a contrast to all of the above as it is entirely coherent; total self-ownership is always desirable and achievable. It therefore serves as a useful point of comparison to the other conceptions. In general, I would argue that showing how each conception is compatible with the framework reveals the underlying strength of the conception and so provides a defence for it against naive objections made.

6.2 The Framework

My framework of de facto ownership is as follows

A owns B iff: AR_1B and BR_2C

A is the owner, B the owned object and C everyone else. R_2 is a relation of exclusion and R_1 a relation of non-exclusion. I have described the framework and provided justifications for the inclusion of each of its variables in chapter three.

Applying the framework to a general instance of self-ownership gives the following:

A owns herself iff: A interacts with herself and everyone else is excluded from interacting in those ways with her.

This description I would argue clearly captures the essential meaning of self-ownership. It states that self-ownership is a relation involving a person and everyone in wider society and that for someone to own herself, everyone else must be excluded from her in a way that she is not excluded from herself.

As I have explained in Chapter Four legitimate ownership is ownership which is both de facto and de jure. The concept of legitimate ownership is therefore the concept of de facto ownership with a legitimacy criterion attached.

Following this the description of the concept of legitimate ownership is:

A legitimately owns B iff: AR_1B and BR_2C and HR_4J and A, B and C can morally be owners, owner and exclude themselves respectively

A is the owner, B the owned object C everyone else, H the harm caused by the exclusion of C, and J the moral justification. R_1 is a relation of non-exclusion, R_2 a relation of exclusion and R_4 a relation of negation or outweighing.

Applied to the case of self-ownership:

A owns herself iff: A has a relation of interaction with herself and everyone else is in a relation of exclusion with her and the harm caused by the exclusion of everyone else from her is negated or outweighed by the moral value of the ownership relation. A must morally be able to be owned and owner and everyone else must be morally able to exclude themselves.

For a conception of self-ownership to be legitimate it must have some moral principle behind it which is sufficient to outweigh or nullify the harm caused by the exclusion. While it may appear this description is unable to adequately describe rights-based conceptions of self-ownership which do not consider self-ownership to be harmful, I would argue that it can due to the distinction I draw between harms and wrongs described in Chapter Four. Having described my framework and illustrated how it can accommodate a basic conception of self-ownership, I will now show how it can describe self-ownership conceptions held by other philosophers.

6.3 Locke's Conception of Self-Ownership

Locke gives a description of what appears to be self-ownership in perhaps the most quoted section of the *Two Treatises:*

> "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work*, of his Hands, we may say are properly his."[149]

Locke is in the middle of an argument seeking to explain the legitimate ownership contemporary people possess over material goods. He argues that everything was originally given to all people in common with the exception of human beings. Legitimate ownership of material goods is acquired by labouring on it or by consensually acquiring it from someone linked in a chain of consensual transfers with its original owner.

This argument may give the impression that Locke considers people to own themselves, but that is not uncontroversially obvious. Locke is clear throughout the *Two Treatises* that he

[149] Locke, *Two Treatises of Government,* 287.

believes that people were created by God and as such are owned by God. As a result, there are certain actions we cannot do:

> "No Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary power over himself, or over any other, to destroy his own life or to destroy the life and property of another."[150]

Here Locke is explaining why people cannot contract themselves into eternal servitude to their sovereign (in a fashion that Hobbes would have supported)[151], due to the fact that people do not have absolute power over themselves. God, as our creator, retains absolute power over us and there are certain actions (such as self-enslavement or suicide), which we cannot legitimately do. These two quotes present a tension in understanding Locke's conception of self-ownership. Locke appears to regard people as self-owners, in so far as they are able to labour and acquire property, but not be self-owners in the sense that they are unable to dispose of their bodies however they wish.

6.3.1 Ashcraft on Locke

A possible way to resolve this tension is that provided by Richard Ashcraft's interpretation of Locke. Ashcraft argues that Locke's two different answers to the question of whether people own themselves can be coherently understood with reference to the importance that natural law possess in Locke's theory. Ashcraft argues that the difference between the two cases, and the explanation for the difference in Locke's attitude towards them, is that one is a case of compliance with natural law and the other is a case of a violation of it. In the case of the first quote:

> "It is not the individual's labour that gives him a "right" to the property he produces . . . rather it is a fulfilment of his natural law obligations."[152]

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[150] Locke, *Two Treatises of Government*, 357.
[151] "therefore they that are subjects to a monarch, cannot without his leave cast of monarchy, and return to the confusion of a disunited multitude" Hobbes, *Leviathan,* 115.
[152] Richard Ashcraft, *Locke's Two Treatises of Government*, (London: Allen & Unwin, 1987), 130.

The labourer does own herself and the products of her labour when she is working productively and does gain property rights on the unowned ground she is working on, but only because her action is in accordance with the natural law command to make the earth productive. Violating natural law, however, can cause someone to lose all rights over herself. Locke argues that a person who commits a crime deserving of death, for example, loses all self-ownership rights to her own person and can be justly enslaved or executed by a legitimate authority.[153] This is similar to Kant's view discussed in the previous chapter. The violation of natural law voids the ownership rights the individual would otherwise have had over herself. Locke's conception of self-ownership then is more comparable to a voidable privilege, such as a driver's license, than to the modern conception of human rights.

Here then is Locke's conception of self-ownership expressed in the terms of my framework:

A legitimately owns herself iff: A is freely able to interact with herself in all the ways owners can with external objects and everyone else is excluded from interacting with her and the harm that would otherwise have occurred by C's exclusion is nullified by the fact that A's ownership is in compliance with natural law. A must morally be able to be owned and owner and C must morally be able to exclude themselves.

Locke has a similar rights based conception of ownership to Nozick, in which legitimate ownership wrongs no one. This is because, the apparent harm caused to C by C's exclusion is not immoral, as it is in compliance with natural law, while any violation by C of their exclusion would be immoral. It is important to note though that Locke's understanding of natural law is broader than Nozick's understanding of entitlement. For example, at least under Ashcraft's interpretation, Locke believes that the production of a surplus beyond the ability of the producer to consume it may mean that she is compelled, by natural law, to distribute it to the less well off.[154] Ownership is only legitimate if in compliance with natural law and natural law requires that productive or valuable items should not be allowed to waste or decay. Consequently, only goods which are used productively can be legitimately owned by their owners.

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[153] Locke, *Two Treatises of Government*, 284.
[154] Ashcraft, *Locke's Two Treatises of Government*, 130.

The framework here is useful in that it reveals the coherence of Locke, as interpreted by Ashcraft. Arguments attacking Locke for the apparent self-contradiction can be rebutted by using the framework to provide a clear understanding of Locke's conception of self-ownership.

6.3.2 Macpherson on Locke

Ashcraft's interpretation of Locke is not the only one which has been made. As a central figure in political philosophy, Locke's theory has been interpreted by many different people in radically different ways over centuries. To demonstrate the universal character of my framework and its practical utility, I will now consider a different interpretation of Locke and show how it too is adequately accommodated by the concept of ownership. The interpretation which I will be covering is that of C.B. Macpherson.

Macpherson's interpretation of Locke is radically different to Ashcraft's. Whereas Ashcraft sees God and natural law as being central to Locke's political project, for Macpherson they are byproducts. Locke's discussion of the law of nature is a "façade"[155] which merely obscures his real goal, which is justifying a market-based state. To do this Macpherson argues that Locke is relying on an implicit assumption of "possessive individualism"[156]. "Possessive individualism" is a cluster of related assumptions the two most important being:

> "that man is free and human by virtue of his sole proprietorship of his own person, and that human society is essentially a series of market relations."[157]

Locke is mainly concerned then with explaining how legitimate government is compatible with both individual freedom and a market economy. Self-ownership is crucial in explaining how this can be justified.

Despite these overall differences concerning the argumentative role it plays, Macpherson and Ashcraft have similar interpretations of Locke concerning what self-ownership is. Despite the importance of self-ownership to Locke's broader political theory, both agree that people cannot

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[155] C.B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke,* (Oxford: Oxford University Press, 1962), 270.
[156] Macpherson, *The Political Theory of Possessive Individualism,* 270.
[157] Macpherson, *The Political Theory of Possessive Individualism,* 270.

truly own themselves as they are created and owned by God. This is made obvious by Locke in his argument against suicide.

Unlike Ashcraft however, Macpherson argues that there is a difference in kind between a person's rights over her life and her rights over her labour; the first do not exist while the second definitely do. Macpherson interprets Locke as a defender of the partial alienability of self-ownership in contrast to Hobbes for whom self-ownership is fully alienable:

> "But Locke fell far short of Hobbes in his acceptance of bourgeois values. To Hobbes not only was labour a commodity but life itself was in effect reduced to a commodity; to Locke life was still sacred and inalienable, though labour, and ones "person" regarded as ones capacity to labour, was a commodity."[158]

Macpherson therefore sees Locke as using two different types of self-ownership in his theory. One is self-ownership of labour, and the other is self-ownership of life. The difference between them is that the first is alienable while the second is not. Macpherson then goes on to argue that this distinction is incoherent, because it is not possible to separate life from labour. A wage labourer who is forced to sell her labour to keep herself alive has also in effect sold her life as she is completely dependent on those she labours for.[159] This is one of Macpherson's criticisms of Locke.

While this distinction may appear to be incoherent to Macpherson, it can still be accommodated by the framework of legitimate ownership. This can be achieved by specifying the framework such that the variable R_1 is different for life and labour. The R_1 for an ownership relation where B is the owner's life would forbid alienation, while if B is the owner's labour it would not. Consequently, both can be accommodated. The use of schematic variables for the entities and variables between them which constitute ownership, allows the framework to easily accommodate conceptions such as Macpherson's.

My framework can therefore accommodate both of these divergent interpretations of Locke. It does not resolve the disagreement between them, it does not demonstrate which interpretation

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[158] Macpherson, *The Political Theory of Possessive Individualism*, 219.
[159] Macpherson, *The Political Theory of Possessive Individualism*, 220.

is superior, but it is useful as a tool to identify specific points of agreement and disagreement between the two interpretations.

6.4 Hegel's Conception of Self-Ownership

In order to illustrate both the universal character and the utility of my framework I will now demonstrate how it is compatible with Hegel's conception of self-ownership. Hegel's conception is useful for me on both counts, as it is both very different from the conceptions I have so far considered, and it is considerably more difficult to understand. Demonstrating its compatibility with the framework will therefore show both that even dramatically different conceptions are compatible with the framework (demonstrating its universality) and that it provides a novel and useful way to understand obscure conceptions (demonstrating its utility). In this section I will first describe Hegel's conception of ownership, then his conception of self-ownership and finally show how it is compatible with the framework.

6.4.1 Hegel's Conception of Ownership

Hegel's conception of ownership, as presented in the *Philosophy of Right,* holds that the essential function ownership serves is the realisation of human freedom.

> "A person must give to his freedom an external sphere in order that he may reach the completeness implied in the idea. . . The reasonableness of property consists not in its satisfying our needs, but in its superseding and replacing the subjective phase of personality."[160]

The justification of an individual owning a particular object is not that the ownership causes a beneficial effect for her or for humanity in general, it is instead because ownership of external objects is necessary for her to exist as a free person. Human ownership of objects is necessarily connected to human existence. If the ownership were illegitimate her existence would be illegitimate.

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[160] Hegel, G.W.F, *Philosophy of Right*, Translated by S.W. Dyde, (New York: Dover Publications Inc, 2005), 4.

Hegel describes this process in more detail:

> "To have something in my power, even though it be externally, is possession. The special fact that I make something my own through natural want, impulse or caprice, is the special interest of possession. But when I as a free will am in possession of something, I get a tangible existence and in this way first become an actual will. This is the true and legal nature of property and constitutes its distinctive character."[161]

In order to act towards a thing, I must possess some power over it. This possession of power over things is how I manifest my will in the world; how I develop my "actual will". This relation between person and thing is therefore necessary for the person's existence as a person with an "actual will".

This conception of ownership, as that which is necessary for individual self-development, leads Hegel to look negatively on non-individualistic ownership systems. While allowing some limited scope for ownership by the state or corporate entities Hegel argues that the primary means of ownership in any society should be that of private individuals. He attacks monasteries, for example, as institutions which, by their requirements for common ownership of goods and universal poverty, prevent the human self-development private property would have enabled. It is for this reason legitimate for the state to close them.[162]

While ownership is required for self-development it does not follow that goods should be distributed equally. Hegel states that "everyone must have property"[163], but beyond that any redistribution of goods to achieve equality would be unjustified. This is because the justification of ownership is self-development not satisfaction of human desire. As a result, only ownership systems which consider only self-development are legitimate while systems which attempt to promote some other value are illegitimate. As a result, it is clear that Hegel does not consider universal equal ownership to be necessary for universal self-development.

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[161] Hegel, *Philosophy of Right,* 7.
[162] Hegel, *Philosophy of Right,* 8.
[163] Hegel, *Philosophy of Right*, 9.

6.4.2 Hegel on De Facto versus Legitimate Ownership

The above serves as a rough summary of Hegel's conception of ownership, but in order to demonstrate how it is compatible with the framework description of the concept of ownership I need to establish whether Hegel's conception is a conception of de facto ownership or of legitimate ownership. Is Hegel describing ownership as it actually exists or ownership that is morally right?

The answer to this can be found by considering Hegel's discussion of ownership within the greater context of *The Philosophy of Right*. Hegel's aim in *The Philosophy of Right* is neither to provide a thorough description of his own society nor to describe an ideal society against which contemporary society can then be evaluated. Both of these projects are flawed for Hegel, instead, his project is to demonstrate the inherent rationality (or rightness) of his own society.

Hegel's reason for rejecting abstract normativity is his epistemological relativism. For Hegel what is real or what is true, will vary between cultures as it depends on interpersonal relations. To quote David Rose's summary:

> ". . . certainty can only be gained through the recognition by others that my judgement is correct . . .it is no longer the case that one is correct if one reasons impartially and rationally, it also requires free and independent others to recognise your judgements as valid."[164]

Applied to normative judgements, this means that what constitutes a legitimate society will change over time depending on the context in which it exists.

There is a danger for Hegel in this relativism which is that it makes every society legitimate in its own context thus making philosophical evaluation of society impossible. Hegel avoids this through his idea of progress through history. Hegel argues that as time advances and human power and understanding increase the idea of right changes. While it is not possible to judge contemporary society against an abstract idea of right (because no such thing exists in reality) it is possible to judge society against its own idea of right and as society is continuously changing it is highly likely that every society will diverge from its idea of right in some way. Thus,

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[164] Daid Rose, *Hegel's Philosophy of Right: A Reader's Guide*. (London: Continuum, New York, 2007), 24.

evaluative judgement of society is possible for Hegel. Furthermore, thanks to his idea of progress, we can be confident that contemporary societies have a superior (in the sense of being closer to the world spirit/mind) idea of right than past societies.

David Rose has a good example of how this works in practice.[165] He states that in the mid-20th century in Europe women had the right to vote but were still, in general, economically subject to men. A pure conservative would argue against any attempt to end this economic subjection while a believer in abstract morality would argue for a complete revolutionary change in society to fully emancipate women. Hegel would reject both of these options and instead argue that as women have been enfranchised the requirement for female autonomy is part of the idea of right of that society. It is incoherent for a society to grant women political autonomy, but deny them economic autonomy. Consequently, society can be evaluated and judged by its own principles. There is a dialectic in society; as society becomes more in line with its idea of right society changes and hence the idea of right changes as well. History is then not simply a series of successive social arrangements but also a succession of values each emerging from the conditions of the preceding time.[166]

It follows that Hegel's conception of ownership is a conception of legitimate ownership.

A legitimately owns B iff: AR_1B and BR_2C and HR_4J

While H is constant J will vary between different societies reflecting the differing idea of right in each different society.

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[165] Rose, *Hegel's Philosophy of Right: A Reader's Guide,* 29.

[166] This might appear to be simple moral relativism: that which is good is different in different environments. If that were the case, while immanent moral critique would be possible, evaluating a different society based either on your own society's values or your own belief of what universal values are would be impossible. Hegel does allow limited social critique however through his theory of progress. Hegel believes that history reveals the development of consciousness. Later societies are more conscious (that is there are people in them who accurately understand how they work) than earlier ones. Hegel's own society has become fully self-conscious as is demonstrated by Hegel's own understanding of it. The implication appears to be that a more conscious society is superior to a less conscious one. I do not understand how Hegel can say that, however, given his rejection of abstract morality. To say that a T10 society is superior to a T1 society means that T10 possess more of a valuable quality than T1. For that to be possible there must be some quality which is universally valuable across T10 and T1 (e.g. social self-consciousness). However, Hegel denies that any such universal values can exist and so his claim that there is progress in history seems to me to be self-contradictory.

Alice owns her book if and only if, Alice has power over the book and the other Canadians do not. Alice's ownership must be in conformity with the principle of right of her society which nullifies the harm the other Canadians would otherwise suffer as a result of no longer being able to realise their personality through control of the book.

6.4.3 An Hegelian argument against Self-Ownership

In a similar fashion to Locke there is an apparent incoherence in Hegel's examination of self-ownership, at some points self-ownership is a foundational element of his political theory while at others it is impossible. Here I will present an interpretation of Hegel which argues against self-ownership and in the following section I will present the reverse, an interpretation of Hegel in which self-ownership is essential.

Hegel at points argues that mental possession of the self is not equivalent to self-ownership:

> "The possession of the body and the mind, which is acquired by education, study and habit, is an inward property of the spirit which does not fall to be considered here."[167]

Hegel's opposition to self-ownership is further reinforced by his comments on suicide:

> "Have I any right to kill myself? The answer is that I, as this individual, am not lord over my life, since the comprehensive totality of one's activity, the life, falls within the direct and present personality. To speak of the right of a person over his life is a contradiction, since it implies a right of a person over himself. But no one can stand above and execute himself."[168]

In a similar fashion to Locke, Hegel identifies a connection between self-ownership and suicide arguing that suicide is immoral because people do not own themselves. Hegel's argument is that as ownership requires an act of will by the agent on something external self-ownership is not true ownership as the thing owned is not external to the agent. This might appear to be in conflict with Hegel's earlier justification of ownership. If ownership is justified as it enables

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[167] Hegel, *Philosophy of Right*, 6.
[168] Hegel, *Philosophy of Right*, 23.

self-development by enabling a person to realise her will with regard to an object, then surely her body must be owned by her, as a person's body is the first thing she must have power over in order to act in the world. Self-ownership would appear to be a requirement of Hegel's philosophy in order to enable people to legitimately possess power over their own bodies.

Hegel does not in fact argue for this and he is not here in self-contradiction, due to his understanding of mind-body relations. Certainly, if my body is distinct from my mind and thus my ability to choose, then my mind possessing power over my body is a necessary requirement for my action. Such a perspective however depends on a mind-body dualism which Hegel does not share. He is an idealist and instead believes that the mind and the body are one entity of the same kind.[169] Consequently when I possess power over myself that is merely my will reflecting back on itself. It is not manifested because my will is partially constituted by my body. In order to be manifested it must interact with something external. As a result, self-ownership is incoherent while other ownership is necessary for self-development.

This interpretation can be accommodated by the framework by specifying that the exercise of personality that fills variable R_1 for Hegel, is not possible when A and B are the same entity and consequently self-ownership is impossible.

6.4.4 An Hegelian argument for Self-Ownership

The above is an explanation of how the Hegelian position that self-ownership is incoherent is compatible with my framework. However, I am not certain it is the correct understanding of Hegel as it is flatly contradicted by this quote:

> "Only through the education of his body and mind, . . . does he take possession of himself, become his own property and stand in opposition to others.[170]

From this I could develop an alternate interpretation of Hegel. Self-ownership for Hegel is universal as the initial act of will that everyone makes is over their own bodies. Freedom initially comes from a person expressing her will over her own mind and body. This process is developed through education. Expression of will is ownership and so through education

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[169] Hegel, *Philosophy of Right*, 8.
[170] Hegel, *Philosophy of Right*, 13.

everyone comes to own themselves. This interpretation is also compatible with the framework. Simply remove the condition that A and B must be separate entities.

This incoherence in Hegel was noticed by Alan Ryan. He argues that for Hegel:

> ". . . lives and liberties simply are not property in any useful sense of the term, but if we draw this conclusion there is some difficulty in hanging on to Hegel's claim that it is as property owners that persons first exist."[171]

Ryan's argument is that for Hegel the relationship people have with their lives, bodies and freedom cannot be one of ownership because people lack the ability to alienate these things at will. However, Hegel at other points does state that a person's ownership of herself is equivalent to ownership of external objects. Ryan notes the incoherence but does not propose a resolution to it.

6.4.5 Reconciling the Incoherence

Dudley Knowles' interpretation of Hegel's conception of self-ownership is that while people do own themselves this ownership is of a different character to ownership of objects:

> "Although we take possession of ourselves as we realise that we are persons, we cannot alienate ourselves from another, nor can this status be taken away from us."[172]

There are thus two distinct kinds of ownership which differ in the fact that one is alienable while the other is not. People do own themselves, but that ownership is of a different kind than ownership of external objects. This interpretation is similar to Macpherson's interpretation of Locke; the difference being that for Macpherson self-ownership consisted of inalienable and alienable forms of ownership[173], while for Knowles all self-ownership is inalienable. For Macpherson the two different forms of ownership both apply to the self while for Knowles self-

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[171] Alan Ryan, "Hegel on Work, Ownership and Citizenship," In *The State and Civil Society: Studies in Hegel's Political Philosophy,* edited by Z.A. Pelczynski, (Cambridge: Cambridge University Press, 1984), 187.
[172] Knowles, *Hegel and the Philosophy of Right*, 122.
[173] Macpherson, *The Theory of Possessive Individualism,* 220.

ownership is unified and unalienable and different in kind from the alienable ownership of objects.

As in Locke the framework is useful not in resolving this debate between the competing interpretations, but instead in better understanding it and the strengths and weaknesses of each interpretation. Furthermore, the fact that the framework is able to accommodate the conflicting interpretations demonstrates its universal character.

6.5 G.A. Cohen's Conception of self-ownership

G.A. Cohen in his book *Self-Ownership Freedom and Equality, attempts* to answer the challenge self-ownership presents to a Marxist/socialist political-economic system. In describing self-ownership, he introduces an interesting distinction between the thesis of self-ownership and the concept of self-ownership.

> "The concept of self-ownership is not identical with the thesis of self-ownership: the latter may be false while the former, being a concept, cannot be false, save where "false" is used floridly to mean incoherent, or inconsistent, or irredeemably vague or irredeemably indeterminate."[174]

The concept of self-ownership is merely what it would mean for someone to own herself. Accepting the concept as coherent makes no claim about the state of the world; no claim about whether people actually do own themselves, and as a result it cannot be true or false. The thesis of self-ownership is the claim that people do in fact own themselves. This claim can be true or false. In my thesis I follow this distinction in that I am not arguing for the truth of the "thesis of ownership" as it were, which would be the claim that people do own things. Instead, I am investigating the concept of ownership. Is the idea of people owning things coherent and how can it be most accurately described. My use of the term "concept" is therefore compatible with Cohen's use of it.

Cohen defines self-ownership as follows:

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[174] G.A. Cohen, *Self-Ownership, Freedom and Equality,* (Cambridge: Cambridge University Press, 1995), 209.

> "That principle states, as we have seen, that every person is morally entitled to full private property in his own person and powers. This means that each person has an extensive set of moral rights (which the law of his land may or may not recognise) over the use and fruits of his body and capacities, comparable in content to the rights enjoyed by one who has unrestricted private ownership of a piece of physical property."[175]

Self-ownership is thus almost identical to private ownership of an external object, the sole difference being that the thing owned is the owners own person. Cohen does not believe that the idea of self-ownership is incoherent due to difficulties in defining the "self". Insofar as we are able to conceive of a person we are able to conceive of that person owning herself. A perfect understanding of the nature of the self is therefore not required, according to Cohen, in order to accept the concept of self-ownership, that is to believe that the idea of self-ownership is coherent.

6.5.1 Cohen's Conception of De facto self-ownership

As Cohen's conception of self-ownership is simply his conception of ownership applied to an individual owning herself it is completely compatible with the framework. Here is Cohen's definition from the above quotation expressed within the framework:

A owns herself iff: A is able to interact in all the ways laid out by the standard rights of ownership (use, control, etc) with (R_1) herself(B) and Everyone else (C) is excluded from interacting in ways which violate those same rights (R_2) from her (B).

Cohen's definition is rights based but is still completely compatible with the framework description of the concept of de facto ownership, and in fact presenting Cohen's conception as one of de facto ownership allows for a greater understanding of it. This is not the end of Cohen's treatment of self-ownership, however. His main focus is the question of whether self-ownership can be justified. To put it in the terms of my thesis; he is interested in legitimate self-ownership and whether such a conception is coherent or incoherent. This is of course compatible with my description of legitimate ownership so in this next section I will demonstrate how Cohen's

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[175] Cohen, *Self-Ownership, Freedom and Equality,* 116.

conception of legitimate self-ownership is compatible with the framework description of the concept of legitimate ownership.

6.5.2 Cohen on Legitimate Self-Ownership

Cohen argues that self-ownership is immoral, because it has immoral consequences:

> ". . . self-ownership and socialist equality are incompatible. Anyone who supports equality of condition must oppose (full) self-ownership, even in a world in which rights over external resources have been equalised."[176]

Cohen believes that self-ownership is incompatible with egalitarianism because respect for self-ownership would prevent the redistribution of talents and resources necessary for equality. Cohen's argument here is in line with earlier egalitarian thinker such as Edward Bellamy.[177] Interestingly Cohen does not claim to have a conclusive argument for the rejection of self-ownership.

> ". . . the thesis of self-ownership cannot be refuted. But as I also said, many lose confidence in it when certain contrasts and analogies are presented."[178]

Cohen argues for the claim that self-ownership and socialist egalitarianism are incompatible. He also clearly believes that as a result self-ownership is unjustified and any considerations arising from it ought to be discarded in favour of building a socialist society. However, he does not argue for this second claim as he admits belief in self-ownership is too basic to be supplanted by any argument he can present.

Here then is Cohen's conception of legitimate self-ownership as described by the framework:

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[176] Cohen, *Self-Ownership, Freedom and Equality*, 72.
[177] "His [Bellamy's] insight – which now can be deemed as foresight – consists in depicting the threat that self-ownership poses to socialism.", Fernando Lizárraga, "The rejection of self-ownership in Edward Bellamy's egalitarian utopia," *Journal of Political Ideologies,* Vol 27 No 1, (2022), 95.
[178] Cohen, *Self-Ownership, Freedom and Equality*, 244.

A legitimately owns herself iff: A is able to interact in all the ways laid out by the standard rights of ownership (use, control, etc) with (R_1) herself(B) and Everyone else (C) is excluded from interacting in ways which violate those same rights (R_2) from her (B). The harm caused by the denial of the obligation of A to help C, which includes the prevention of the creation of a socialist egalitarian society (H), must be outweighed (R_4), by some moral value gained through self-ownership (J). A must be an entity which can morally be owned, and an owner and C must be an entity which morally exclude itself.

Cohen's claim is that there is no moral value gained through self-ownership (hence no J) which outweighs the harm of preventing the creation of a socialist egalitarian society (H) instead and consequently legitimate self-ownership is impossible. As part of his discussion, he investigates potential Js (such as the elimination of forced labour)[179], but argues that they are either able to be realised by other non-harmful means or are not valuable enough to outweigh the harm of self-ownership.

Describing Cohen's conception using the framework reveals the different ways his position is open to objection. Right wing libertarians could argue that his description of J is inaccurate as there is some justification (such as freedom or respect for the individual) which is sufficient to outweigh H (which is not as great as Cohen believes). Left wing defenders of self-ownership, however, would be more inclined to argue that Cohen is simply wrong about H and that the exclusion of C from A does not prevent the establishment of an egalitarian society. H is thus less harmful than Cohen believes and therefore can be outweighed by a minimal J.

My aim here is not to endorse Cohen's conception of self-ownership. It is instead to provide a greater understanding through use of the framework and, in consequence, to demonstrate the value of the framework. Showing its effectiveness as a tool in aiding understanding and allowing for a stronger defence of conceptions of self-ownership against charges of incoherence.

6.6 The Conceptions of Self-Ownership of Vallentyne and Christman

A left-wing defence of self-ownership of the sort outlined above is given by Peter Vallentyne, who argues that while full self-ownership is impossible a more limited type of self-ownership is

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[179] Cohen, *Self-Ownership, Freedom and Equality*, 231.

possible and indeed legitimate. Vallentyne argues that self-ownership can be defined or limited so as to prevent the creation of large-scale inequalities. He argues for example that untaxed gift giving is incompatible with egalitarianism, but a more minimal type of self-ownership (than that discussed by Cohen) is possible, in which untaxed gift giving, and practices like it, are outlawed and in consequence there is no incompatibility with self-ownership.[180]

To put Vallentyne's approach in terms of the framework: Vallentyne's conception of de facto ownership is distinct from Cohen's because in Vallentyne R_1 and R_2 are much narrower. There are fewer actions that C is excluded from doing to A and A consequently has a smaller range of interactions. As a consequence of this, when considering their conceptions of legitimate ownership it follows that H (the harm caused by the exclusion of C) will be greater for Cohen than it is for Vallentyne. C is prevented from doing more things by A's self-ownership for Cohen. As a result, number of entities H ranges over will be larger. In contrast, for Vallentyne the scope of things C is permitted to do notwithstanding A's self-ownership is sufficient to create an egalitarian society. Legitimate self-ownership is therefore possible.

A more detailed example of this type of conception of self-ownership is given by John Christman. To summarise my description from Chapter Two, Christman argues that it is possible to distinguish between use-rights and income-rights and that these lead to two distinct types of ownership. Use-rights are rights that enable "primary functional control"[181], that is the use and control of the owned goods in accordance with the owner's desires. Income rights are rights that enable an owner to gain economic value from the owned object. Most importantly income rights include the "right to the income from all transfers of goods".[182]

To apply Christman's terminology to Cohen, Cohen's conception of self-ownership is one that includes both use and income rights. In order for A to genuinely own herself other people must be excluded from interfering with A's control over herself and must be excluded from preventing A from using her abilities to earn an income. Christman's conception of self-ownership is more limited. He argues that only use rights are required for genuine self-ownership and income rights are unnecessary.

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[180] Peter Vallentyne, "Review of Self-Ownership Freedom and Equality by G.A. Cohen", Review of *Self-Ownership, Freedom and* Equality, by G.A. Cohen *Canadian Journal of Philosophy,* Vol. 28, No. 4 (Dec. 1998), 624.
[181] Christman, *The Myth of Property,* 25.
[182] Christman, *The Myth of Property,* 30.

> "What matters in self-ownership, I have suggested, is self-control. The kinds of rights which will protect self-ownership in this sense will be full control rights over one's body and talents . . . to say that I alone possess the right to dispose of me and my direct actions does not entail that I thereby also have the right to benefit from the exchange of my skills in any way available."[183]

Christman goes on to argue that the reason why income rights are not essential for self-ownership is that they depend on the interactions of others; there must be other people for me to trade with in order for me to exercise my income rights. In consequence, income rights are "other-control"[184] rights rather than self-control rights and are therefore not an essential component of self-ownership.

Self-ownership is morally significant for Christman, because of the protection it affords for individual autonomy. Respect for self-ownership is required to allow people control over the most basic aspects of their lives; control of their own minds and bodies.[185] However self-ownership (even the more minimal use self-ownership which Christman endorses) is not so morally important that it cannot sometimes be overruled. Christman argues that in certain situations even use self-ownership can create large inequalities in the ways which income self-ownership invariably does.

> ". . . control self-ownership . . . implies a right to opt out of the economy with one's skills intact. This right of secession may conflict with the overall productivity of the economy."[186]

For even use self-ownership to be legitimate then, it must be self-ownership of a sort which does not create substantial economic inequalities.

Legitimate self-ownership for Christman then specified in terms of the framework is:

A legitimately owns herself iff: A is able to interact in all the ways laid out by the use rights of ownership with (R_1) herself(B) and Everyone else (C) is excluded from interacting in ways

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[183] Christman, *The Myth of Property*, 155.
[184] Christman, *The Myth of Property*, 155.
[185] Christman, *The Myth of Property*, 149.
[186] Christman, *The Myth of Property*, 160.

which violate those same rights (R_2) from her (B). The harm caused by the ability of A to interact in ways which produce inequality (H), must be outweighed (R_4), by the moral value of the autonomy gained through self-ownership (J). A must be an entity which can morally be owned, and an owner and C must be an entity which morally exclude itself.

In comparing the two conceptions it is obvious that Cohen and Christman are thinking of two substantially different entities and have substantially different goals in mind. Cohen is concerned with the challenge posed by the appeal of self-ownership rights to his preferred egalitarian political philosophy. He answers it by arguing that self-ownership is incompatible with said egalitarian theory and as a result he (and other like-minded philosophers) are justified in rejecting self-ownership rights. Christman in contrast wants to see off the challenge that self-ownership rights pose to his egalitarian theory by developing a conception of self-ownership which is compatible with it. The success of one or the other depends on whether you believe Christman's more minimal conception of self-ownership is sufficiently broad to explain why people believe it to be valuable.

This comparison demonstrates the value of the framework as a tool, by providing a greater understanding of conceptions of ownership and by making it easier to evaluate them.

6.7 Steiner's Conception of Self-Ownership

Hillel Steiner, in a similar fashion to Hegel, has a conception of ownership in which ownership of external goods is a form of individual freedom. Steiner's justification of ownership is markedly different however in that it sees self-ownership as simply good in contrast to the ambivalence shown to self-ownership by the other theorists I have discussed. Applying the framework to Steiner is therefore useful in that it both further demonstrates the universality of the framework and that it allows for a better understanding of self-ownership through a clear comparison of Steiner to the other theorists.

6.7.1 Steiner's Theory of Possession and Freedom

To understand Steiner's conception of ownership it is first necessary to understand his conception of possession. Possession is a crucial idea for Steiner as it is essential for his understanding of freedom (a foundational idea in his political philosophy). I will first provide an overview of Steiner's theory of action which leads into his description of possession. I will then explain why for Steiner possession is a necessary component of freedom, before going on to investigate how Steiner's conceptions of possession and freedom are connected to his conception of ownership.

Steiner's analysis of freedom and possession begins with an analysis of action which he splits into act-types and act-tokens. Steiner distinguishes between the action the agent is trying to achieve (the act-type) and the action the agent performs to achieve that goal (the act-token). While an act-type is indivisible an act-token is potentially infinitely divisible.

To illustrate this division and explain why it is importance Steiner gives the example of attending a performance of Richard III.[187] Attending the performance is the act-type. The act-token is the list of steps which are required to attend the performance, such as catching a bus, buying tickets, making sure you have time of work, etc. Steiner describes the relation between act-types and act-tokens as follows:

> "Indeed strictly speaking the only things we do when we act are act tokens. Or alternatively we do act-types only by virtue of doing act-tokens."[188]

An action is impossible for Steiner when there is no possible act-token which matches the act-type. For example, if I desire to see a performance of Richard III between the 30th of September and the 1st of October but not on either of those two named dates, then the action that would fulfil that desire is impossible. This is because there is no day between those two dates in which I could see the performance and so no act-token which could exist for that act-type.

The above is an example of necessary impossibility as it will always be impossible to do anything on a day between the 30th of September and 1st of October as no such day exists. Steiner

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[187] Hillel Steiner, *An Essay on Rights,* (Oxford: Blackwell Publishers, 1994), 33.
[188] Steiner, *An Essay on Rights*, 34.

however uses his understanding of action more productively to draw a connection between freedom and possession. In order to perform any act-token embodiment in a spatio-temporal location is required. To use Steiner's example:

> "My standing and waiting for a bus consists in my body occupying a spatial location and a set of contiguous temporal locations. My running to catch a bus consists in my body occupying a set of contiguous spatial locations and a set of contiguous temporal locations."[189]

This occupation of a spatio-temporal location is possession for Steiner. It follows from this that if I am unable to possess the places necessary for fulfilment of all of the possible act-tokens for an act-type then I am unable to fulfil that act-type. For example, if my act-type is to legitimately see the performance of Richard III at the Festival Theatre tonight and that performance is sold out, then it is impossible for me to perform that action. To go further I have been prevented from performing my action by the actions of the other theatregoers and consequently my freedom has been removed.

Steiner is able to arrive at this conclusion due to his definition of freedom. Steiner uses a strictly negative definition of freedom in which the only things that can render an agent unfree are the actions of other agents.

> "(i) a person is unfree to do . . . an action if and only if the action of another person would render his doing it impossible"[190]

Steiner's theory of action allows him to precisely say what it is that render an action impossible; inability to occupy the required spatio-temporal location. As a result, Steiner can then link his definition of freedom together with his understanding of action to give the following result:

> "I'm unfree to do an action, then, if control of at least one of its physical components is actually or subjunctively denied to me by another person . . . In general possession is a triadic relation between a person a thing and all other persons. And statements about the freedom or unfreedom of a person to do a particular action are thus construable as

[189] Steiner, *An Essay on Rights*, 35.
[190] Steiner, *An Essay on Rights*, 33.

> affirmative or negative claims about that person's (actual or subjunctive) possession of that action's physical components. *Freedom is the possession of things.*"[191]

By "subjunctive" Steiner means "would be if attempted". Being in a position to prevent A from doing x if A were to try to, is sufficient to render A unfree to do x. I have quoted this section in full because it reveals some striking similarities between Steiner's conception of freedom and my framework description of the concept of ownership. Steiner sees freedom as a triadic relation with the same entities as my description of ownership.

It should be noted however that the meaning of "possession" changes here for Steiner relative to its meaning in the premises leading up to this conclusion. Steiner had previously argued that "possession" meant presence, in that to possess a space was to be present in it. However, in a footnote to the quoted section Steiner argues that "possession" should be understood as control in the sense of determining what happens to it. He uses the example of holding three eggs where in holding them I possess them even if I lack the ability to make an omelette with them due to my poor cooking skills.[192]

I would argue my holding of x does not mean that I possess x, at least given Steiner's earlier definition. Steiner's earlier description of possession was that it was the occupation of space, while here he is arguing that it is having power over the thing possessed. It would be clearer if Steiner did not use the word "possession" at all and used the word "presence" to describe the possession necessary for freedom and "control" to describe this second type of power-based possession. I have explained in an earlier chapter why I believe the word "possession" is either useless or vague to the point of meaninglessness and so should not be used in political philosophy.

Steiner states that everything is either actually or subjunctively possessed: "Hence for any given time anything which is not actually possessed is subjunctively possessed".[193] Subjunctive possession is potential possession, i.e. if I am free to do x then I subjunctively possess everything necessary for me to be able to perform the x act-tokens.

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[191] Steiner, *An Essay on Rights*, 39.
[192] Steiner, *An Essay on Rights*, 39.
[193] Steiner, *An Essay on Rights*, 41.

Steiner also argues however that subjunctive possession is unique, "subjunctive possession cannot be ascribed to more than one person for any one time"[194]. Taken together this means that for Steiner every set of space-time co-ordinates is possessed actually or subjunctively by a specific person.

This seems to be an absurd conclusion for a number of reasons. First of all, Steiner appears to only be considering the Earth but as he does not limit himself to that he appears to be saying that every place in the universe is possessed by a specific human on Earth. The same concern also occurs for time. It appears absurd to hold that every object throughout all time is possessed by a specific human.

Putting aside the problem of lack of spatio-temporal limitations, it is not obvious that every spatio-temporal co-ordinate is possessed. If possession is simply presence in a space and time then the overwhelming majority of the earth is not possessed by people as there is no one in it. I have a wardrobe at home for example into which it is possible to squeeze four people. As I have never squeezed four people in, then by Steiner's theory of possession, it has never been possessed. The number of spaces possessed by people at specific times is in fact vanishingly small compared to the volume of the Earth, let alone the volume of the universe.

6.7.2 Steiner's conception of ownership

To summarise the discussion of freedom and possession, for Steiner possession of spatio-temporal locations is necessary for action and thus necessary for freedom as well. Any right I have against another person, or duty I have to another person, requires the possession of space (hence ownership) in order for it to be fulfilled. The conclusion from this is that all rights are, or at least depend on, ownership rights:

> "the traditional Lockean view- that all rights are essentially property rights- far from being merely a piece of bourgeois ideology, actually embodies an important conceptual truth."[195]

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[194] Steiner, *An Essay on Rights*, 41.
[195] Steiner, *An Essay on Rights*, 93.

This presents a problem however as in ordinary life it is common to distinguish between property rights (rights to houses, books etc) and other political rights (rights to education, to vote, to security etc) which are not rights to physical objects. Steiner considers two ways of more precisely expressing this objection.

The first objection relies on the familiar distinction between rights in rem and in personam. This is a legal distinction by which rights can be divided into rights which are held "against the world", such as rights to particular objects, and rights which are held "against people" such as the mutual rights of two parties in a contract for the enforcement of it.

Steiner notes that this distinction has been repeatedly challenged by philosophers and legal theorists who try to understand rights as one single category, rather than two fundamentally different categories. He cites Hohfeld's argument that as all rights are in actuality held against people rather than against inanimate objects, so called "in rem rights" must really be a special kind of rights against people: multital (against people in general) rather than pautical (against a single designated person or party).[196]

Steiner argues that a similar type of synthesis can save his claim that all rights are property rights from the argument that only in rem rights are property rights while in personam rights are not. While Hohfeld argues that all rights are against people, Steiner argues that all rights require the use of objects. For Steiner the in rem/ in personam distinction is not a relevant objection, because even in personam rights are rights which require the use of objects. Even textbook examples of in personam rights, such as A making a contract to B to deliver flowers to B tomorrow, the existence of which gives B a right against A, are in fact rights which require the use of objects as the only way that A can fulfil her right to B is if A has the right to the chain of spatio-temporal positions necessary to travel through in order to give B the flowers. Thus, the in rem/ in personam distinction does not present an objection to Steiner as he can demonstrate that both kinds of rights depend on property rights.

The second objection is one that focuses on the apparent differences between property rights and other rights in everyday life. Steiner uses the same example of flower delivery to express this. If A is under contract to deliver flowers to B then B must possess some form of right against A. This right does not appear to be a property rights against A, however, and certainly appears

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[196] Steiner, *An Essay on Rights*, 96.

to be different to any other property rights B may possess, such as the rights over her owned house.

Steiner of course wants to argue that B's right against A is a property right and he does so by endorsing a bundle of rights conception of ownership. Steiner quotes Honoré arguing that the ownership does not require possessing a full set of rights which make up full liberal ownership.[197]

> "The compossibility of all the rights in a set, though it might requires that these rights be property rights - titles to the disposition of physical things, implying forbearance duties in all others - does not require that they be modelled on the liberal concept of unencumbered full ownership of a single object by a single person. Extensional differentiability is the necessary and sufficient definition of their being compossible. And extensional differentiability does not require full liberal ownership."[198]

My interpretation of this is that for Steiner "titles to the disposal of the physical things" and "implying forbearance duties in all others" are the two essential conditions for something to be an instance of ownership. The first, expressed in my own terminology, is a right of control over the object, while the second is a duty of exclusion borne by everyone else. Steiner is therefore not actually a bundle theorist as he believes that there is a right and a duty which if related in the correct way to the same object make that object owned. He believes that there are necessary and sufficient conditions for ownership and that something can be owned even if the owner does not possess all the rights of full liberal ownership.

From this it is possible to give a description of Steiner's conception of de facto ownership which is compatible with the framework.

A owns B iff AR_1B and BR_2C

R_1 must be a right of control and R_2 a duty of exclusion. Instances of ownership vary in form along a scale with minimal ownership containing minimal relations of control and exclusion at

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[197] Steiner, *An Essay on Rights*, 98.
[198] Steiner, *An Essay on Rights*, 99.

one end to full liberal ownership where the relations of control and exclusion are as extensive as Honore's incidents.

6.7.3 Steiner's Conception of Self-Ownership

Steiner is a defender of self-ownership and considers it to be both coherent and morally (though not practically) universal (everyone, throughout all time, ought to be a self-owner but not everyone, throughout all time, has been one):

> "In short, our bodies must be owner-occupied. Self-ownership gives us . . . "full liberal ownership" of our bodies. Being the holders of all the incidents of their ownership, we have unencumbered titles to them."[199]

It is interesting that for Steiner, and unlike for Locke and Hegel, self-ownership is always fully justified. Steiner does not argue that self-ownership must in some circumstances be qualified by other considerations or that there are certain things that people cannot do to themselves. In fact, he argues against any restriction on self-ownership comparable to Locke's on suicide.

Universal self-ownership appears to be obviously justified for Steiner. He moves very quickly over the issue of why everyone legitimately owns herself and onto that of the connection between self-ownership and ownership of external objects. This is because, for Steiner, everything in existence is owned and therefore if individuals do not own themselves then someone else must. As ownership of another person is slavery and thus necessarily immoral the only other option (self-ownership) is justified.[200]

In a similar fashion to Locke, he argues that being a self-owner means that the unowned things that you interact with become owned by you. As everyone has an initial right to an equal share of the earth's resources the amount of ownership which can be gained through this process is quite extensive:

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[199] Steiner, *An Essay on Rights*, 232.
[200] Steiner, *An Essay on Rights*, 231.

> "Self-ownership is, then, a sufficient basis for creating unencumbered titles both to things produced solely from self-owned things and to things produced from this equal portion of unowned things."[201]

However, by both acknowledging universal self-ownership and universal ownership of produced goods Steiner notes the development of a paradox in his theory. This is that every person is the product of her parents she is both self-owned and parentally owned:

> ". . . for each of us is the fruit of other person's labour. How can we each own what we produce when we ourselves are others' products? How can we each own ourselves?"[202]

If universal self-ownership entails ownership of external objects through interaction, then it also entails the ownership of children through interaction, which of course, violates universal self-ownership.

Steiner's solution to this paradox is to deny that children are simply the fruits of the labour of their parents. This is because, while creating children requires some personal effort on the part of the parents, it also requires unowned raw material (DNA). The ownership of a parent over her child is therefore not total as it is not entirely a product of her resources. Consequently, about reaching adulthood children become self-owners and thus self-ownership and ownership of the fruits of one's labour are mutually realisable.[203]

I find this argument unsatisfactory for a number of reasons. Firstly, it seems obvious that if individual's own their own bodies then they own their own DNA. Steiner's argument relies on the claim that DNA is an unowned resource. This contradicts Steiner's earlier claim that everything was owned, but even putting that aside it seems bizarre to argue that I own my body and my labour but not my genetic code. If I own any parts of myself surely it is those parts that are uniquely mine, essential to my existence and that which I am entirely dependent upon. My genetic material possesses all of these properties.

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[201] Steiner, *An Essay on Rights*, 236.
[202] Steiner, *An Essay on Rights*, 237.
[203] Steiner, *An Essay on Rights*, 248.

Secondly, Steiner does not justify why children's self-ownership status should change over the course of their lives. If ownership of an object rests on who owned the material which produced the object then there is no reason for ownership of the object to change after it has been created. If we are partially owned by our parents at birth what is the mechanism by which we emancipate ourselves upon becoming adults?

Finally, even if I am not owned by my parents, because I am predominantly the product of unowned genetic information then that should make me (under Steiner's theory) unowned rather than a self-owner. According to Steiner I never become the owner of my genetic code, because if I did so then I would prevent the self-ownership of my children. Consequently, my genetic code must be unowned throughout my entire life. As my genetic code substantially determines all of my other faculties, then consequently I must be substantially unowned as well.

As Steiner notes Locke actually addresses this issue. Filmer had argued in *Patriarcha* that universal self-ownership is impossible, because everyone is the owned property of Adam or Adam's current heir. The argument is that children are created and so owned by their parents and this chain goes back to the first man.

> "I see not how the children of Adam, or of any man else, can be free from subjection to their parents."[204]

Locke rejects this argument by arguing that while parents do own their children this ownership is governed by a moral principle; namely for the benefit of the children.

> "Parental Power is nothing but that which Parents have over their Children, to govern them for the Children's good, till they come to the use of Reason"[205]

In a similar fashion to self-ownership, child ownership is only justified provided it is in accordance with natural law and as a result terminates when the child reaches adulthood (ownership of adults without cause is contrary to natural law). This summary follows Ashcraft's

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[204] Filmer, *Patriarcha,* 15.
[205] Locke, *Two Treatises*, 381.

interpretation of Locke. This seems like a much more satisfactory resolution of the paradox than Steiner's.

Legitimate self-ownership for Steiner then is:

A legitimately owns B iff: AR_1B, BR_2C and HR_4J

R_1 is a right of control and R_2 is a duty of exclusion. It is not immediately clear what the harm of self-ownership is for Steiner. My interpretation would be that harm would merely be the existence of an incompossible right and this is nullified(R_4) by the universal right to self-ownership(J). If someone other than A owned A then A's right to herself could not be realised alongside it. This would be harmful (the fact that all rights must be mutually satisfiable is one of Steiner's core principles). Consequently no one other than A can have a right to A and so A must have a right to A (this relies on the principle that everything must be owned).

6.8 Conclusion

My aim in this chapter is not primarily to evaluate these conceptions of ownership. It is not to identify flaws in them or to argue for my own preferred conception of self-ownership. My aim is instead to demonstrate both the universal character of the framework and its utility and in these limited goals I have been successful.

The universal character of the framework has been demonstrated by the fact that every conception of self-ownership which I have considered is able to be accommodated by the framework. Conceptions from different centuries, political ideologies and places of origin can all be accommodated.

Use of the framework provides an aid to understanding in a number of different ways. By applying a common framework to different conceptions of the same phenomena, the process of understanding them is easier. Secondly the use of the framework makes the common or conflicting elements of the different conceptions more obvious. Finally, the use of the framework allows the application of interpretative methods from one conception of self-

ownership to another such as using Macpherson's interpretation of Locke to more clearly illustrate an analogous interpretation of Hegel.

Chapter 7
Intellectual Property

7.1 Introduction

Intellectual property is both a concept of immense importance in contemporary society and one about which there is contested philosophical debate. Showing how the framework can accommodate intellectual property will demonstrate its universal character and aid in understanding current issues surrounding intellectual property.

I will first describe the terminology I will be using and then go on to explain how intellectual property can be accommodated by my framework. Following that I will consider an objection that this accommodation means that my framework is no longer universal, before proceeding to use the framework as an analytic tool in relation to the dispute over the scope of intellectual property. Finally, I will demonstrate how my framework accommodates various different conceptions of intellectual property.

7.2 Terminology

Throughout this chapter I use the phrase "intellectual property" (IP) despite having avoided using the term "property" elsewhere in the thesis. This is because the alternatives (ownership of intangibles or ownership of incorporeals) suggest that the thing that is owned is an abstract object, which is a position I reject in this chapter. Furthermore "intellectual property" is so universally used in academic and non-academic literature on the subject that attempting to replace every instance of it with an alternative would make my writing unclear.

By "intellectual property" I mean patents, copyrights and trademarks. These correspond to intellectual property in inventions, in writings and in distinctive marks respectively. Seeing intellectual property as composed of these three elements is supported in the literature[206] and is useful for my purposes as these three types of ownership are clearly distinct in kind from the

[206] Nuno Pires de Carvalho, "Toward a Unified Theory of Intellectual Property: The Differentiating Capacity (and Function) as the Thread That Unites All its Components"*, The Journal of World Intellectual Property*, 15, no. 4, (2012) 252.

ownership of tangible objects. I will later, in the scope of intellectual property section, consider whether "intellectual property" should be understood more broadly.

7.3 The Compatibility of Intellectual Property with my Framework

7.3.1 The Problem of Exclusion

The practice of intellectual property presents an immediate problem to my framework description of the concept of ownership, this problem is the apparent non-exclusive character of intellectual property. This point has been noted by several theorists of intellectual property such as Hettinger:

> "Let us call the subject matter of copyrights, patents, and trade secrets 'intellectual objects'. These objects are non-exclusive: they can be at many places at once and are not consumed by their use."[207]

Hettinger argues that a core difference between intellectual property and the ownership of tangible objects is that tangible ownership requires the exclusion of others from the owned thing while intellectual property does not.

This presents a problem for me as the exclusion of others from the owned object is an essential component of my framework. If the exclusion of others from the owned object is not an essential component of intellectual property, then that would suggest that my framework is wrong, as the exclusion of others from the owned object is then not an essential component of every conception of ownership, and so should not be a component of the concept of ownership. If intellectual property is ownership without exclusion then the concept of ownership cannot include a relation of exclusion.

My response to this objection is to argue that the framework can retain R_2 (the exclusion of others from the owned thing) provided that B (the owned thing) is correctly specified. This lets

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[207] Edwin Hettinger, "Justifying Intellectual Property," *Philosophy & Public Affairs,* Winter, 1989, Vol. 18, No. 1, 35.

us better understand intellectual property, and also vindicates my framework from this potential challenge.

As an example, imagine that I have just bought a copy of Tolkien's “Lord of the Rings” and read it. I own my own copy of the text. However, the copyright holder (the Tolkien estate) owns the intellectual property relating to the text. If my framework is correct then the copyright owner’s ownership requires the exclusion of everyone else, meaning that I (along with everyone bar the copyright holder) am excluded from the intellectual property of the Lord of the Rings. What is the intellectual property holder’s B (owned thing)?

The two most immediate answers are the book itself and the abstract object of the book (the token book and the abstract type of the book). Neither of these answers is satisfactory however. For the former, if we imagine intellectual property ownership as ownership of the tangible objects the intellectual property rights refer to then it would be impossible for anyone else to own them. If the Lord of the Rings IP holder’s intellectual property rights consist in owning every physical copy of the book “The Lord of the Rings”, then my ownership of the book would be impossible.

The latter option is no better. If the “Lord of the Rings’” IP holder’s intellectual property rights consist in owning the abstract object corresponding to the “Lord of the Rings” then it appears exclusion is impossible, as it is impossible to exclude someone from an abstract object. In Chapter Three, I defined exclusion as the inability to use or control the thing excluded from. Therefore, in order to exclude C from an abstract object, C must be unable to control or use the abstract object. This is on its face absurd because prevention of control or use of an abstract object is prevention of a mental action rather than a physical one and so not something that it is possible to exclude people from.

For example, I can use or control the abstract object “The Lord of the Rings” by thinking about the text, remembering the text, or even (in my own imagination) creating my own stories using the characters from the text. In doing so I am interacting with the abstract idea of the “Lord of the Rings”. However, exclusion from this activity is impossible, as doing so would require the IP holder to gain control of my mind. I should note here than in order to know that A is the owner of B merely excluding C is insufficient. You must also know that C is excluded from B. When considering tangible ownership this is not a problem as exclusion is visible. When

considering intellectual property this is impossible as the exclusion is immaterial and so invisible. Therefore, even if it was possible to exclude people from an abstract object certainty concerning de facto owners would be impossible, as it could not be known whether people were actually being excluded or not. In other words, even if the ontological problem concerning exclusion from abstract objects can be solved, the epistemological problem is insoluble. An abstract object therefore cannot fill variable B in my framework as it is not a thing that it is possible to knowingly exclude others from.

One possible response to this is that I am wrong to assume that control or use of an abstract object is a purely mental action. An owner of an abstract object such as the patent to a particular invention may license its creation out to other parties. This is a type of control and use of the abstract object, but it is a control and use made possible by interaction with others and the physical world more generally. My response to this is to insist on a strict separation between the purely mental abstract object itself and purely material copies of it. Both of these entities are present in the example, but only the material elements can be excluded from. I would argue that by reducing the mental to the material (seeing ownership of abstract objects as a particular kind of ownership of physical objects) it is possible to gain a clearer understanding of the mechanics of intellectual property, understand ownership as a single phenomenon with intellectual property as a subset, and demonstrate the universal character of my framework.

7.3.2 The First Ownership Solution

My argument is that all intellectual property in fact depends on exclusion from physical objects and is therefore adequately accommodated by my framework. The owned physical object is not however the copy itself but rather every copy as it is created. The IP holder of the “Lord of the Rings” does not own every physical copy of *The Lord of the Rings* in existence, but rather she becomes the immediate de jure owner of every new copy of *The Lord of the Rings* as they are created. If I created a new copy based on my own copy of the book and tried to sell it then I would in effect be stealing from the intellectual property holder who is the de jure owner of the new copy I have made. The intellectual property holder therefore has moral first ownership of every material copy of the thing her intellectual property relates to.

This explanation may appear outlandish as it radically departs from the convention of treating intellectual property holding as the ownership of abstract objects.[208] However, it does in fact align with common practice. Patents, for example, are not a form of ownership of abstract ideas but of devices:

> "Products and processes are patentable. Abstract ideas or mere suggestions are not patentable. For example, $E = MC^2$ represents an unpatentable abstract idea, but a heat conduction system that applies the principle of atomic patentable."[209]

My framework provides an explanation as to why abstract ideas are not owned in intellectual property. It is because exclusion is a requirement of ownership, and as it is not possible to exclude others from abstract objects it is not possible to own them.

The same holds true for all types of intellectual property. Book publishers for example own the books they publish only because they have the consent of the intellectual property holder to make copies of her books. For copyright, as for patents, the primary function of such practices is the prevention of piracy, that is the prevention of unauthorised copies which entails that the intellectual property holder is in fact the de jure owner of the copies the pirates produce.

A possible objection can be made at this point however, based on intellectual property holding in non-physical objects. A good example of this is music. For a musical such as "Phantom of the Opera" the intellectual property holder has the ability to prevent the putting on of performances of this production without his permission. As this is an instance of intellectual property it must be an instance of exclusion. The problem here is that the thing excluded from is not a physical object (such as a book in *The Lord of the Rings* case) but a musical theatrical performance.

I would argue that this is not a significant problem as it is possible to exclude people from physical, though intangible, interactions (such as performing a piece of music) even though you cannot exclude people from purely mental abstract objects. When I am excluded from the

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[208] "Property is a sovereignty mechanism. The sovereignty mechanism in the case of intellectual property applies to abstract objects. Abstract objects are core structures that are essential to legal identity judgements" Peter Drahos, *A Philosophy of Intellectual Property*, (Aldershot: Dartmouth Publishing, 1996).
[209] Alan Isaac and Walter Park, "On intellectual property rights: patents versus free and open development", In *The Elgar Companion to the Economics of Property Rights,* edited by Enrico Colombatto, (Cheltenham: Edward Elgar Publishing, 2004).

intellectual property of the “Lord of the Rings”, I am not excluded from any particular existing book or collection of atoms. I am instead excluded from any physical copy I produce of an arrangement; an arrangement consisting of a particular arrangement of words. This arrangement does not have to be tangible in the sense of being able to touch it. Creating an electronic copy or projecting the entire text of “The Lord of the Rings” onto the side of my house would be violations of copyright despite not creating a tangible object. They merely have to be copies of an arrangement it is possible to exclude people from. Thus, the exclusion which forms an essential component to the intellectual property of the “Phantom of the Opera” is exclusion from the arrangement of the musical; the particular arrangement of sounds and movements which the “Phantom of the Opera” consists of. In contrast to an abstract object this is an entity which it is possible to exclude people from, because the interaction is physical rather than mental.

As a result, for all intellectual property the thing that is owned (variable B) is first ownership of every copy of a physical arrangement. Physical here means “formed out of matter” rather than “tangible”. Therefore, exclusion is still a necessary component of ownership as while it may be impossible to exclude people from abstract objects it is possible to exclude people from a physical arrangement.

7.4 Why Ownership of Abstract Objects in an Impossibility

While the above section does successfully demonstrate how intellectual property is compatible with my framework it does leave open a potential problem: namely that my framework is not universal as it cannot accommodate the ownership of abstract objects.

I demonstrated how intellectual property was compatible with my framework by showing how intellectual property can be understood as first ownership of material copies of a material pattern. However, many people do not understand intellectual property in such a way. They instead understand it as ownership of an abstract object.

An example of such an approach to intellectual property is in Drahos’ conception of intellectual property. Peter Drahos in his book, *A Philosophy of Intellectual Property,* argues that

intellectual property is the ownership of abstract objects.[210] An immediate problem Drahos identifies with this position is that the existence of abstract objects is not a universally agreed upon position within philosophy. Instead, nominalists and realists disagree over whether abstract objects have a real existence. Drahos argues that he can avoid this problem however, by claiming that whether abstract objects really exist or not, they have a commonly agreed upon existence as fictional entities which is sufficient to enable intellectual property.

> "the use of the term "abstract object" in the context of intellectual property is not meant to imply an ontic commitment to the existence of such objects. A belief in the existence of abstract objects may turn out to be false. But for legal purposes this is irrelevant. The intellectual property system may reject the ontological reality of abstract objects but still retain the category as a convenient fiction to be used in making decisions about relations between actors."[211]

For Drahos It is unnecessary for an abstract object to be "real" for it to be owned. All that is required is that its existence be generally recognised as a legal fiction.

As a result of this understanding of abstract objects Drahos argues that their nature and properties are indeterminate and depend on the judgement of the legal system. In consequence an abstract object is not "the ethereal mirror image of its concrete physical counterpart"[212], instead it is the essential components which enable observers to distinctly identify the material object.[213] The abstract object of a can of Coca-Cola, for example, would include the can's branding and the liquid's taste as it is those features that enable observers to identify the can as a can of Coca-Cola. By contrast the can's metallurgical composition and shape, while essential properties of that can as a can of Coca-Cola, are not essential to distinguishing it as can of Coca-Cola as they are too ubiquitous to serve as identifying features.

As a consequence of this the exact nature of the abstract object connected to each physical object will be a matter of judgement and vary across contexts. Drahos argues that this is what actually happens in legal cases where judges issue decisions concerning what is and what is not part of the owned abstract object.

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[210] Drahos, *A Philosophy of Intellectual Property*, 22.
[211] Drahos, *A Philosophy of Intellectual Property*, 153.
[212] Drahos, *A Philosophy of Intellectual Property*, 153.
[213] Drahos, *A Philosophy of Intellectual Property*, 154.

> "One of their [abstract objects] distinguishing features is that they are fuzzy indeterminate objects. Their boundaries depend on the identity judgement of a legal elite."[214]

To return to the above example imagine a world almost entirely identical to our own, but with the one difference that everyone is a passionate metallurgist and spends their spare time analysing the composition of metallic objects. In such a world the unique composition of a Coca-Cola can (assuming it is unique) would be a distinguishing mark and therefore a judge would have to decide if it was sufficiently distinctive to warrant being part of the abstract object for Coca-Cola cans and so being the intellectual property of the Coca-Cola company.

Drahos' conception of intellectual property thus appears to present a coherent understanding of intellectual property as the ownership of abstract objects. This presents a problem for my framework as I have argued that abstract objects cannot be owned, because the framework states that exclusion is essential for ownership and it is not possible to exclude people from abstract objects. I appear to be faced with a dilemma: either abstract objects can be owned, therefore exclusion is not necessary for ownership, therefore my framework is wrong; or abstract objects cannot be owned, therefore my framework cannot accommodate Drahos' conception, therefore my framework is not universal.

My response to this is to take the second option, reaffirm that abstract objects cannot be owned, but argue that I can still accommodate Drahos' conception regardless. My reasons for rejecting the ownership of abstract objects were adequate. An abstract object can only be interacted with mentally, so any exclusion must be the prevention of mental interaction which it is not possible to do. Exclusion from copying an abstract object is not exclusion from the abstract object but exclusion from a physical copy of it (as I discussed in the previous section). Exclusion from the abstract object itself would require the prevention of mental interaction with the abstract object. As this is not possible, to enforce exclusion from abstract objects is impossible.

Given that that is the case I am left with the problem associated with this horn of the dilemma; how can I accommodate Drahos' conception of the ownership of abstract objects if the

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[214] Drahos, *A Philosophy of Intellectual Property,* 158.

ownership of abstract objects is impossible? This is a significant concern because (as I explained in Chapter One) my goal is not to present a description of the concept of ownership and use it to evaluate conceptions of ownership, but rather to create a description of the concept of ownership purely by combining the common elements of all philosophical conceptions of ownership. If Drahos' conception is a conception that cannot be accommodated by the framework then I have failed in that project.

My response is to argue that intellectual property, as I understand it, the first ownership of copies of a pattern must form a part of Drahos' conception of intellectual property. Drahos is very concerned with the practical implications of intellectual property and sees its chief role as a defence against piracy and appropriation. Exclusion from first ownership of copies of a pattern is clearly a necessary component of this.

As a result, Drahos' conception of intellectual property can be accommodated by the framework as it is implicitly committed to the essential element of the concept; the exclusion of everyone else from a material object. I would then argue that Drahos' discussion of the ownership of abstract objects is not an essential component of his conception of ownership considered as a conception of ownership. As a result, it does not need to be included, as I will now show.

While this conclusion may seem strange or dismissive, it is in fact consistent with the methodology I am using throughout this thesis. Consider, for example, Locke's conception of ownership. God plays an essential role in Locke's conception as both the creator of humanity and the world, and as the source of natural law. God is an essential and significant element in Locke's conception of ownership. My framework has no variable for God, but despite this it is still capable of accommodating Locke's conception. This is because while God is essential to Locke's conception as a Lockean conception of ownership, it is not essential to Locke's conception as a conception of ownership simpliciter. Locke's conception of ownership still functions as a conception of ownership without a specific variable for God (God's moral role can be accommodated by variable J in the description of the concept of legitimate ownership). This issue is not restricted to Locke. The state, freedom, class and any number of other political ideas are necessary components of particular conceptions of ownership. Including all of them within the concept of ownership would make it unusably vague. The only way for me to achieve my aim of presenting a clear, accurate and useful description of the concept of ownership is to

specify it such that it describes conceptions of ownership only as conceptions of ownership and not conceptions of ownership as components of their creator's broader political philosophies.

To apply this to Drahos, because his conception functions as a conception of ownership without the existence of the ownership of abstract objects, the framework is not required to include them, and so Drahos' conception can be accommodated by the framework as it is. Drahos maintains that a system of intellectual property is sustained by the prevention of piracy:

> "Judgements of identity and recognition lie at the heart of infringement issues in intellectual property. Whether a judge has to decide an issue of copyright, patent, design or trademark, the basic process involves a comparison of two physical objects or processes and deciding whether or not one is an impermissible copy of another."[215]

Under this model for an intellectual property holder to de facto hold her intellectual property, a judge must prevent the creation of impermissible copies. This is nothing in this summary that suggests that the intellectual property holder owns an abstract object, or even that abstract objects exist. Drahos' acknowledgement that the actual existence of abstract ownership is irrelevant for intellectual property supports my position. Drahos' theory of abstract objects serves as an explanation of this practice of intellectual property holding. My claim is that; my first ownership of a pattern explanation, is a simpler explanation (as it does not requires positing the existence of, or relations with, abstract entities) and is just as capable of explaining the de facto practice of intellectual property. It therefore ought to be preferred. Drahos' conception of intellectual property can be accommodated without accommodating his belief in the ownership of abstract objects.[216]

This further reinforces the utility of the framework as my discussion here has revealed the confusion surrounding intellectual property, wherein it is mistakenly thought to be the ownership of abstract objects. I have now shown why that it is impossible, (as mental exclusion is impossible) while also maintaining the universal character of the framework (by showing how even the conceptions that mistakenly assert that abstract objects can be owned, can be

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[215] Drahos, *A Philosophy of intellectual Property,* 155.

[216] This way of understanding Intellectual property (as exclusion from new copies of a thing) is shared by Honoré: "Copyright is an example of one type of claim. It involves the right to prevent others publishing, etc., one's written work without consent, and hence a sort of right to exclude others; but this right does not relate to a particular physical thing, a particular book. It relates to all material objects which have certain characteristics, viz. that they are copies of the work in question." Honoré, *Ownership,* 244.

accommodated). This then is a good demonstration of the explanatory and evaluative power of the framework.

7.5 The Scope of Intellectual Property

Before examining how several conceptions of intellectual property are compatible with the framework, I first need to explain why intellectual property is so important for the philosophy of ownership as a whole. Intellectual property is a significant issue because the scope of intellectual property relative to tangible ownership has not been definitively settled. If it turns out that all ownership is intellectual property then intellectual property is the central component of the philosophy of ownership, while alternatively all intellectual property could perhaps be reduced to material ownership.

7.5.1 Carvalho's Distinction

An important distinction can be drawn within intellectual property itself however, which is significant for the rest of the chapter. This is a distinction drawn by Carvalho between what he calls "intangible assets" and "intellectual property":

> ". . . not all intangible assets—such as personal rights of credit—fall outside intellectual property. Other than their economic value, which may vary from one title to another, nothing distinguishes between two checks or two shares . . . Checks, shares, promissory notes, etc., are not differentiating in themselves. They represent intangible assets, but these are not intellectual property."[217]

Carvalho here distinguishes between "intangible assets", such as cheques and shares, and "intellectual property" which he has earlier defined as consisting of three main groups: patents, copyrights and trademarks[218]. For Carvalho what distinguishes them is differentiation. Intellectual property holdings (whether a patent, trademark or copyright) are always unique, whereas intangible assets are fungible with each other. The trademark for McDonald's is a

[217] Carvalho, "Toward a Unified Theory of Intellectual Property," 256.
[218] Carvalho, "Toward a Unified Theory of Intellectual Property," 252.

unique entity which cannot be replaced with an exact equivalent in contrast to a McDonald's share.

I agree with Carvalho that there is a real difference between these two kinds of intellectual property. In relation to my framework however I see it not as a difference of fungibility, but rather in the type of object owned. While ownership of intellectual property is first ownership of copies of a pattern; intangible assets are material, but intangible things which are owned. "Intangible assets" are not abstract objects, because they are material (though intangible) entities, and they are not intellectual property because they are the ownership of distinct entities rather than the first ownership of every entity which conforms to a specific pattern.

The focus of this chapter is on intellectual property considered narrowly rather than including "intangible assets", because "intangible assets" do not present any unique difficulties. It is easy to see how people can be excluded from intangible assets. Someone can be excluded from shares or a cheque in exactly the same way as she can be excluded from an office or a house. My ownership of a share requires the exclusion of everyone else from that particular share. This is exactly the same type of exclusion that makes ownership of material goods possible.

To go into greater detail, ownership of a share is partial ownership of the company the share is in. This company itself is composed of three things: material assets, contracts and intellectual property. In owning the share, I have partial ownership of the company's material assets and intellectual property and partial power over its contracts. The extent to which my ownership is partial is a function of the proportion of the shares that I own; if I own one hundred percent of the shares my ownership is total not partial. This ownership of material assets and intellectual property can be described by the framework just as any other ownership of a single object. In consists in the exclusion of all non-owners, the prevention of their use or control of the object and the corresponding interaction of the owners. To summarise ownership of shares and other "intangible assets" can be understood as ultimately partial ownership of material objects and so can be accommodated by the framework.

In contrast it is not easy to see what I am being excluded from because I do not own the McDonald's trademark. I am certainly not excluded from buying objects with the McDonald's trademark on them. I am also not excluded from interacting with the McDonald's trademark in abstract way, by say imagining it or remembering it or creating a mental variation of it. The

most obvious things I am prevented from doing are selling the trademark or otherwise licensing its use, however that is merely exclusion from power and so cannot form the basis of ownership.

The fact that I am prevented from exercising some power possessed by someone else does not mean that other person owns a particular object. I am excluded from a judge's power to sentence criminals for example, but that does not mean that the judge owns a particular object. In the same way the fact that I am excluded from exercising power over a trademark in the same way that the trademark owner can is not sufficient exclusion to argue that I am not the owner. The exclusion required for ownership is exclusion from the object itself not exclusion from the powers relating to it and it is this which makes intellectual property distinctive.

As a result of this, throughout this chapter I will be focusing on the second one of Carvalho's two types of "intellectual property", meaning specifically patents, copyrights and trademarks, and ignoring the first type. This is because it is ownership of patents, copyrights and trademarks which is distinctively difficult to accommodate within my framework and thus what it is most important to focus on.

7.5.2 Bentham on Incorporeal Ownership

Jeremy Bentham in *An Introduction to the Principles of Morals and Legislation* notes with annoyance the contemporary fashion for considering every right as a property right:

> "In almost every case in which the law does any thing for a man's benefit or advantage men are pat to speak of it, on some occasion or another as conferring on him a sort of property."[219]

This requires moving away from the earlier definition of property in which property always has an object; the corporeal thing which the property holder owns. By expanding the scope of "property" to include such things as "reputation" and "liberty"[220], "property" becomes

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[219] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation,* (London: Athlone Press, 1970) 211.
[220] Bentham, A*n Introduction to the Principles of Morals and Legislation,* 212.

disconnected from any corporeal object. Bentham notes that in consequence incorporeal entities have therefore been created in order to serve as the objects of this more expansive notion of "property". Bentham disapproves of this, arguing that property requires a corporeal object and that consequently this claimed incorporeal property is fictitious:

> ". . . the truth is, that where the immediate object is incorporeal, they are all of them improper, it is scarce practical any where to draw the line."[221]

For Bentham therefore so called "incorporeal property" is not property at all but merely a trust or some other contract or legal relation. Bentham's conception can of course be accommodated by my framework. If a conception specifies that B (the owned object) must be a corporeal object, then no incorporeal ownership is possible for that conception. This does not present a problem for my conception of intellectual property as I have already shown that intellectual property is first ownership of copies of a pattern. Bentham's arguments are thus fully compatible with my framework, and in fact they provide support by demonstrating that there are conceptions of intellectual property which reject the ownership of abstract objects. If I had made the ownership of an abstract object a part of the concept of intellectual property then it would not be able to accommodate Bentham's conception and so not be universal.

7.5.3 Lawson and Rudd on Intellectual Property

A counterpoint to Bentham's position is provided by Lawson and Rudd. They state that the most important form of ownership (for individuals and for society) is intellectual property:

> "One of the main difficulties the student of property law encounters at the very threshold is this presence of abstractions where he expects to find physical objects . . . Conversely he will discover that what he takes to be mere rights, such as the right to be paid a sum of money or the right to use a thing and receive the income from its exploitation for his lifetime, are treated as things."[222]

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[221] Bentham, *An Introduction to the Principles of Morals and Legislation,* 212.
[222] F.H Lawson and Bernard Rudden, *The Law of Property Second Edition,* (Oxford: Clarendon Press, 1982), 16.

This is in direct contrast to Bentham. While Bentham sees ownership as necessarily connected to corporeal objects and any expansion of ownership to immaterial entities (such as liberty) as is a misuse of the word "ownership", for Lawson and Rudd the most common and most important forms of ownership are intellectual property, in which the object of ownership is an intangible thing rather than a tangible thing. This is because it is the value of a thing which determines whether it can be owned:

> ". . . any valuable asset which is the object of commerce is properly treated as a thing, just as much if it is an abstraction such as a share in a company or if it is a physical object such as a ship or a motor car. The main reason why far more attention is devoted to abstractions than to physical objects is that, since they are creations of the human mind, they can be made to conform patterns consciously chosen for their practical utility."[223]

Incorporeal entities therefore can be owned, because such entities are commercially valuable. Incorporeal entities are more economically and legally important than corporeal entities, because they are of much greater commercial value due to their entirely artificial nature.

Again, I would argue that my framework can accommodate this conception as well. As I make no claim about the existence or otherwise of abstract objects, I am able to accommodate conceptions in which they are fundamental. The only thing that is necessary for them to be ownership is the exclusion from some material object, which is true for Lawson and Rudd. In other words, the fact that Lawson and Rudd posit the existence of incorporeal entities and say that ownership of them explains and justifies exclusion from material objects does not mean that their conception does not rest on exclusion from material objects. I am, in effect, making two distinct claims in this chapter: first that all conceptions of intellectual property contain within them an "exclusion from material objects" core which can be accommodated by the framework and second that the fact that these conceptions of intellectual property are able to function without needing to posit the existence of abstract objects, means that such positing is unjustified. I believe the second claim follows obviously from the first and is supported by Ockham's razor, the injunction not to multiply invisible entities unnecessarily. However, in regard to the project of this thesis (presenting and vindicating a description of the concept of

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[223] Lawson and Rudden, *The Law of Property,* 16.

ownership) this second claim is tangential. Demonstrating that these conceptions can be accommodated by the framework is all that is required.

7.6 Conceptions of intellectual property

Having first demonstrated how intellectual property is compatible with my framework and having investigated competing arguments concerning the scope of intellectual property, I will now discuss various conceptions of intellectual property themselves. My aim here is to both demonstrate the universal character of my framework, by showing how it can accommodate many widely diverging conceptions of intellectual property and demonstrate the utility of the framework conception of what the nature of the practice of owning an intangible object is.

7.6.1 Carvalho on Intellectual Property

Carvalho's conception of intellectual property is that intellectual property is distinguished by its ability to differentiate between different entities. Carvalho writes in opposition to the thesis that the function of intellectual property is to promote innovation. He rejects this arguing that not all intellectual property does promote innovation. Instead, the purpose intellectual property serves is to enable consumers to differentiate between different goods:

> ". . . intellectual property is the set of principles and rules that discipline the acquisition, the use and the loss of rights and interests in *differentiating intangible assets* susceptible of being used in the competitive production and circulation of goods and services."[224]

Unlike my framework which describes intellectual property in terms of its form Carvalho describes it in terms of its function. Carvalho's definition is thus entirely compatible with my framework; all instances of Carvalho's intellectual property are instances of exclusion of others from copying a class of physical entities.

At the same time Carvalho's definition is inadequate as a universal definition of intellectual property. This is because the fact that some intellectual property is not used for the purpose

[224] Carvalho, "Toward a Unified Theory of Intellectual Property," 257.

of differentiation does not mean that it ceases to be intellectual property. Patents for example often serve to protect against copying rather than to differentiate the new invention from existing objects. The differentiation is a function of their form, rather than the intellectual property rights their owner claims for them. Even trademarks can be used to mimic existing brands rather than to differentiate from them. In consequence of this differentiation cannot be the defining feature of intellectual property. Intellectual property has too many different functions in society to be defined by any of them. Consequently, the only universal definition of intellectual property is one that describes it in terms of its form as my framework does.

7.6.2 Christman on Indigenous Intellectual Property

A more specific conception of intellectual property is that developed by John Christman to accommodate multiple legitimate or de jure instances of intellectual right holdings, by indigenous communities. Christman develops this conception based on the moral principle of autonomy:

> "Specifically I want to examine the claim that the autonomy of the group is in peril unless IP [intellectual property] protections are afforded."[225]

Christman takes "autonomy" to be self-government: the ability of a group or individual to live in accordance with their values and desires. Christman considers autonomy to be very valuable, but does not believe that it is the only value or even that the claims of autonomy must always override countervailing claims. Autonomy can be justifiably abrogated in certain contexts.[226] Christman goes on to state that autonomy is valuable as it is a necessary precondition for the emergence of democratic structures.[227]

Christman then combines this understanding of autonomy with his division of ownership rights into control rights and income rights. I described the difference between these in Chapter Two, when I discussed Christman's framework, but to briefly summarise; control rights are rights to possess, use and destroy the object, while income rights are rights to gain income from the

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[225] John Christman, "Autonomy, Social Selves and Intellectual Property Claims". In *New Frontiers in the Philosophy of Intellectual Property* edited by Annabelle Lever, (Cambridge: Cambridge University Press, 2012). 34.
[226] Christman, "Autonomy: Social Selves and Intellectual Property Claims," 38.
[227] Christman, "Autonomy: Social Selves and Intellectual Property Claims," 40.

rent or the trade value of the object. Christman claims that only control rights are essential for autonomy. Control rights to an object enable their bearer to gain multiple psychological benefits which are a requirement for autonomy e.g. self-definition and self-expression. The same is not true of income rights.

> ". . . when it comes to controlling an asset, it will often make sense to claim "I need to control this asset to maintain my autonomy", while it will not make sense to claim "I need income from *this* asset to maintain my autonomy". In the latter case, one may well need income *per se,* although not from any particular holding."[228]

I should note briefly that I disagree with this claim by Christman. Income rights, I would argue, can be just as important, if not more important, for autonomy than control rights. Consider the case of a family farm. The autonomy of the current farmer (the ability of her to live according to her core values), requires that she be able to economically support herself and become wealthier, by gaining income from her farm. Without those income rights she will not be able to live according to the values she was socialised into, self-reliance and upward development. Income rights to her farm are therefore necessary for her autonomy. Indeed, they could be more important than the control rights. Government restrictions on control rights (such as environmental laws preventing certain types of possession and use of the farm) may be less injurious to the farmer's autonomy than, restrictions on income rights, in the form of taxation sufficiently high so as to render the farm uneconomic. This presents a problem for Christman, as an example of this type can be made out for any small business owner. For them income rights can be more important than control rights for autonomy.

Having given a definition of autonomy and an explanation of how it relates to ownership, Christman goes on to considers the case of indigenous ownership of intellectual property. Christman is responding to an article by Stenson and Gray in which the two argue that the protection of indigenous autonomy requires the provision of extensive intellectual property rights to indigenous communities relating to any biological or pharmaceutical treatments which can be created from their local environment.[229] These rights include the rights to possess, use and gain an income from the intellectual property.[230]

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[228] Christman, "Autonomy: Social Selves and Intellectual Property Claims," 46.
[229] Anthony J. Stenson, and Tim S. Gray, "An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities," *Environmental Ethics,* 21 (2) (1999) 177-190.
[230] Christman, "Autonomy: Social Selves and Intellectual Property Claims," 52.

Christman argues against this position claiming that the right to gain an income, specifically, cannot be among the rights required for indigenous autonomy. This is because for Christman, only control rights are essential for autonomy and so only control rights can be justified by consideration for autonomy. Christman argues that Stenson and Gray's argument for income rights is motivated by global inequality and any transfer of income to indigenous communities can be justified in that context, just not in the context of autonomy.[231]

Christman's justification of the intellectual property rights of indigenous communities is therefore a justification of a more modest set of rights to a more narrowly defined set of abstract objects. He sets the following three requirements for an intellectual property claim:

1. "The items (designs, expressions, geographical indicators, and so on) that are the subject of IP claims must be strongly and centrally expressive of the identity and practice of cultural communities.
2. Individual members of such communities must see such practices in ways that define their own sense of self.
3. Invocation of IP rights is required for the practice to continue in ways that allow members to avoid being alienated from the fundamental value orientations that guide their lives (to maintain their individual autonomy)"[232]

To summarise under Christman's conception of intellectual property; intellectual property claims are justified only when they promote autonomy. As income rights cannot be justified by autonomy, income rights cannot be part of the autonomy rights of indigenous communities.

Here then is my Christman's autonomy conception of indigenous intellectual property as expressed within my framework.

A owns B iff: AR_1B, $BR_2C$and HR_4J

A is an indigenous community, B is a copy of a pattern essential to the autonomy of the community, C is the rest of the world. R_1 is a relation of interaction with the pattern including

[231] Christman, "Autonomy: Social Selves and Intellectual Property Claims," 53.
[232] Christman, "Autonomy: Social Selves and Intellectual Property Claims," 53.

the ability to possess, use and modify the pattern but not to destroy or gain an income from it, R_2 a relation of exclusion. H is the harm cause to the rest of the world, R_4 is a relation of outweighing and J the value of the autonomy enabled by A's R_1 relation with B.

As Christman allows that autonomy considerations can be outweighed in certain circumstances his R_4 is a relation of outweighing rather than the relation of nullification which it would be if autonomy was the only value.

Demonstrating how Christman's conception is compatible with the framework provides further support to his argument against Stenson and Gray. As autonomy is the only value Christman is considering in this conception (J is solely autonomy) income rights cannot be justified as they have no value to justify them sufficiently to outweigh the harm they cause. It also suggests a possible response to Christman, as if my earlier claim, (that income rights in many circumstances are a requirement for autonomy), is accepted then those income rights can form a part of the intellectual property rights justified by considerations of autonomy. Such a response would vindicate the argument of Stenson and Gray.

7.6.4 Biron on Kant and Intellectual Property

The purpose of this chapter has been to both demonstrate the universal character of my framework by showing how it can accommodate multiple conceptions of intellectual property and to demonstrate the utility of the framework by showing how it can aid in the understanding of multiple conceptions of intellectual property. A potential challenge to both of these objectives would be the claim that intellectual property is not a form of ownership. However, showing how such a claim is false and that a conception based on it can still be accommodated by my framework is a further indicator of its strength.

The conception I am here discussing is Kant's conception of copyright as interpreted by Laura Biron. I have discussed Kant's conception of ownership before, but his understanding of copyright is distinct. Biron, following this conception, argues that intellectual property is a form of speech. Biron argues that the current ownership based conception of intellectual property is causing significant harm.

> "The description of intellectual objects as "property" may be rhetorically dangerous, then, because it can cause us to lose sight of the various ways in which intellectual objects differ from tangible objects of property."[233]

Biron's argument is that conceiving of intellectual property as ownership leads to a too strong protection of intellectual property and an over proliferation of intellectual property. She quotes Merges who argues that this very phenomenon of over "propertisation"[234] is already visible in contemporary scientific research. The alternative to this, she argues, is a conception of intellectual property which does not hold it to be a form of ownership.

Biron argues that such a conception can be found by adopting a Kantian conception of intellectual property. Kant argues that books are a form of speech:

> "A book is a writing . . . which represents a discourse that someone delivers to the public by visible linguistic signs."[235]

However, that is not all that a book is. Kant goes on to allow that a book is both a "corporeal artefact"[236] and "a mere discourse"[237] at the same time. The immorality in unauthorised publishing though, is solely a result of appropriating the authors speech as your own. The mere copying of a corporeal object is not morally significant. It follows from this that intellectual property for authors (in the form of copyright) is legitimate as a protection of authors speech.

Public speech is particularly significant for Kant as it is a requirement for autonomy (that is Kantian autonomy, self-legislation rather than individual freedom), that a person is able to communicate; in her own name, from the standpoint of anyone, and in a consistent manner.[238] In other words, in order to be autonomous a person has to be able to speak in her own voice, in communication with others and in a clear understandable form. In a society without a system of copyright this would be impossible as authors would always have their works copied and

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[233] Laura Biron, "Public Reason, Communication and Intellectual Property", In *New Frontiers in the Philosophy of Intellectual Property,* edited by Annabelle Lever, (Cambridge: Cambridge University Press), 227.
[234] Biron, "Public Reason, Communication and Intellectual Property", 227.
[235] Kant, *The Metaphysics of Morals*, 6:289. 78.
[236] Kant, *The Metaphysics of Morals,* 6:290. 78.
[237] Kant, *The Metaphysics of Morals,* 6:290. 79.
[238] Biron, "Public Reason Communication and Intellectual Property," 236-8.

pirated by others. Copyright is therefore essential for autonomy and enlightenment, in a Kantian sense.

Biron goes on to argue that this Kantian conception of copyright can be applied to the two other main forms of intellectual property, trademarks and patents, as well. In the case of trademarks, it is obvious how this could be done as a trademark is the protection of a sign associated with a particular corporation.[239] The protection of trademarks thus enables companies to do business, and so speak, in their own name whereas the non-existence of trademarks would enable others to falsely speak and represent themselves as other companies. For patents however, it is initially harder to see how a Kantian conception of intellectual property could accommodate them. Biron argues however that patents also demonstrate the three core principles of public speech "authority, intelligibility and consistency"[240], "authority" here means being able to speak in your own voice as an author. The institution of patents allows public speech relating to inventions by preventing piracy. Patents therefore are a protection of a particular type of speech rather than the ownership of an abstract object.

Biron argues that this conception of intellectual property is intellectual property without ownership, as what is protected is the speech of the author rather than an object (abstract or otherwise). Furthermore, it allows us to escape from the problem of over-propertisation that concerned her at the beginning. A system of intellectual property based on a Kantian conception of intellectual property would be one that enables public debate by ensuring that intellectual property is only justified as a protection of public speech. Consequently, it would not fall prey to the problem of over-propertisation which currently afflicts ownership based conceptions of intellectual property.

This appears to present a problem for my framework, as I have argued that intellectual property is a form of ownership. My response is to argue that a Kantian conception of intellectual property is compatible with the framework and thus is a form of ownership. It is not however the ownership of an abstract object. I would argue that many of the problems that Biron identifies are a result of either conceiving of intellectual property as the ownership of abstract objects or rating the protection of private intellectual property too highly as opposed to the protection of the intellectual commons. The use of my framework thus reveals how intellectual

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[239] Biron, "Public Reason Communication and Intellectual Property," 254.
[240] Biron, "Public Reason Communication and Intellectual Property," 256.

property can still be understood as ownership without encountering the problems Biron identifies.

Earlier in this chapter, I described how the ownership in intellectual property is not ownership of an abstract object, but is in fact first ownership of newly created copies of a tangible object. This type of ownership is clearly a requirement for Kantian conceptions of intellectual property. For Kant the legitimate copyright holder must have the ability to prevent others from owning newly created copies of the tangible object which is copyrighted. As discussed in Chapter Five Kant's conception of legitimate ownership is one which requires the exclusion of non-owners. This exclusion of others from tangible copies of an object is a necessary component of Kant's conception and thus reveals that it is not a purely speech-based conception of intellectual property, but also an ownership based one. Where Kant's conception of intellectual property is speech based is in its justification, this can also be incorporated by the concept of legitimate ownership. For Kant copyright holding is legitimate, because copyright enables public speech. It follows that the J for Kant is the ability to produce public speech. The H would be the inability to satisfy desire by copying, but for Kant this desire is immoral if the copyright is legitimately held by someone else. In a similar way to Nozick the existence of A's right to B means that any interference by C with B is immoral and consequently the only actions that C is prevented from doing are immoral ones.

Finally, then I can present the Kantian conception of intellectual property:

A legitimately owns B iff AR_1B, BR_2C and HR_4J

A is the author, B is first ownership of the pattern of the book and C everyone else. R_1 is the authors ability to speak in her own name i.e. to declare that B is a product of her. R_2 is the exclusion of everyone else from being able to claim that. H is the harm caused by the prevention of everyone else being able to claim B as their own, R_4 is a relation of Nullification and J is both A's autonomy and the support given to a sphere of public speech more broadly.

The description of the concept of ownership thus demonstrates how intellectual property is a form of ownership without also justifying a particular (and possibly over-propertised) system of intellectual property. I am not claiming that a Kantian conception of intellectual property is not one in which intellectual property is a form of speech. I do not need to claim that for the

purposes of this thesis. My claim is merely that a Kantian conception of intellectual property is *at least* a conception of ownership, in addition to whatever else it may be. Furthermore, the fact that it is a conception of ownership does not entail that it is committed to justifying either the elimination of the intellectual commons or absolute and unoverridable intellectual property entitlements.

7.7 Conclusion

In this chapter I have both demonstrated how intellectual property can be understood as first ownership of material copies of an object, and is thus compatible with the framework, and how various conceptions of intellectual property can be accommodated in this way. I would argue that the possibility of this reduction of intellectual property to material ownership demonstrates that abstract objects are not a necessary component of conceptions of intellectual property.

Chapter 8
Split Justification

8.1 Introduction

The previous two chapters have demonstrated the value of the framework by showing the benefits that arise from applying it to various conceptions of ownership. In Chapter Six I demonstrated how various conceptions of self-ownership were compatible with the framework, and how this allowed for an easier comparison and relative evaluation, of those conceptions. In Chapter Seven I did the same with respect to intellectual property, but also went further showing how a popular understanding of intellectual property (intellectual property as ownership of abstract objects) was incorrect. This demonstrates that as well as being useful, by aiding in the understanding of particular conceptions, the framework is also useful as an evaluative tool in its own right, in the sense that it allows us to notice the incoherences within conceptions of ownership.

In this chapter I continue and expand on that line of thought by arguing that the framework can be used to judge entire conceptions of ownership as incoherent. This is through what I call the split justification argument. I will begin by describing what a split justification is and why the presence of a split justification within a conception of ownership is a good reason to reject that conception. I shall then consider an objection based on Rawls' theory of punishment which appears to incorporate a split justification. I will then use this notion of a split justification to investigate whether libertarian conceptions of ownership contain within them a split justification; either split between a historical entitlement justification of distribution and a freedom maximising justification of the ownership system, or split between a historical entitlement justification of distribution and a utilitarian justification of original acquisition. I will conclude by considering why there are so few split justifications.

8.2 A Methodological Concern

An apparent problem with my goal in this chapter is that I am using the framework as a tool to evaluate conceptions of ownership: I am arguing that by applying the framework we can

discover a reason to reject a whole class of conceptions of ownership. This appears to contradict the methodology I used to create the framework. When I described my methodology, in Chapter One, I said that my framework could only describe the concept of ownership, if it was able to accommodate all conceptions of ownership used by political theorists. Therefore, if a class of conceptions is incompatible with the framework, following my own methodology, I should see that as a reason to expand the framework to include them rather than judging them as not really conceptions of ownership.

The above objection is wrong, because it relies on the false premise that I am using the framework to evaluate conceptions. Certainly, it would be incompatible with my methodology if I were to use the framework as a dividing line to say that claimed conceptions of ownership cannot be conceptions of ownership because they are incompatible with the framework. Arguing that certain conceptions of ownership are better than others, because they are more in line or easier to accommodate within the framework, would also be unacceptable. What I can do however is use the framework to draw attention to inconsistencies within conceptions of ownership themselves which might previously have been hidden, because the conceptions were not laid out in this way.

While the framework itself cannot be incompatible with any conception of ownership, it can work as a light to illuminate how conceptions of ownership may be internally incoherent. This does not mean they are not conceptions of ownership, instead they are incoherent conceptions of ownership and can still be accommodated by the framework.

As a quick summary a purported conception of ownership, when we try to articular it in terms of my framework might turn out to be:
Normative methodology table.

Not a conception of ownership		Not accommodated by the framework
A conception of ownership which is	Internally incoherent	Accommodated by the framework with the incoherence identified which is a reason to reject the conception
	Internally coherent	Accommodated by the framework, with the defensibility of the conception to be settled on its own by other considerations

In this chapter then I am not arguing that split justification conceptions of ownership are not conceptions of ownership; rather I am arguing that they are conceptions of ownership, but that

the presence of a split justification is an incoherence which is a reason to reject them. “Reason to reject” is also itself a weak claim. It is not a claim that these conceptions must or even should be rejected; it is only that there is at least one reason to reject them and as a result, all else being equal, a conception without a split justification should be preferred over one with a split justification.

8.3 The Split Justification Argument

8.3.1 How J can be Split within a Conception of Ownership

I described in Chapter Four how the framework description of the concept of legitimate ownership needs a variable for justification J. This variable accommodates the moral justification every concept of legitimate ownership has which outweighs or nullifies the presumptive immorality of ownership.

I also described how the framework description of ownership describes not merely every instance of ownership but also a system of ownership composed of many instances. It is possible to apply a particular conception of ownership to determine; not just what makes an instance of ownership legitimate, but also what makes a distribution of owned goods legitimate, a whole system of ownership legitimate, the enforcement of that system as opposed to the creation of that system legitimate and so on. These are all different applications of a single conception of legitimate ownership.

Split justification conceptions of ownership are conceptions of legitimate ownership in which there is a different justification for different applications. The J in the framework of ownership as applied to an individual instance of ownership may be different to the J in the framework as applied to a particular distribution of ownership. The main example I use in this chapter is that of libertarianism as described by Lamb and Cohen. In their description, certain libertarian conceptions of ownership have a justification of historical entitlement for the legitimate distribution of ownership and a justification of liberty maximisation for the legitimate system of ownership as a whole. Lamb and Cohen argue that this split justification is an argument against libertarianism. I agree with them, (insofar as their characterisation of libertarianism is accurate), and, using the framework, universalise that principle to identify other conceptions

of ownership in which the J is different for different applications of the conception. This allows me to argue that; universally the presence of a split justification within a conception, is a reason to reject that conception.

8.3.2 Split Justifications and Irreducibility

I should also note that when I am discussing split justification conceptions, I mean only conceptions in which the differences in the justifications cannot ultimately be resolved by some further and more fundamental principle. Merely having different justifications for different applications is not sufficient for that conception to suffer from the split justification objection. Those different justifications also have to be irreducible to each other. For example, a rule utilitarian conception of ownership may have utility as the justification for the system of ownership as a whole, but the justification for individual instances, and hence for the exclusion necessary to preserve individual instances of ownership, could be mere duty based rule following.[241] This I would argue is not a split justification conception as the two justifications are ultimately reducible to each other. Both are justified by the same principle of utility. In contrast a conception of ownership in which the justification for the system of ownership is utility maximisation, while the justification for individual ownership is pure desert (individual ownership is legitimate if the objects are owned by their rightful owner even if this principle generally applied does not maximise utility), would suffer from the split justification objection.

A distinction, which is a good analogy to the one I draw here, is the one that Miles Tucker draws between weak and strong Value Pluralism. Tucker argues that Value Pluralism (which he defines as the view that "there are many things which are intrinsically valuable"[242]) can be divided into Weak Value Pluralism and Strong Value Pluralism:

> "An axiology is a form of weak intrinsic Value Pluralism just in case it entails that there is more than one good making property"[243].

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[241] For example, Brad Hooker's understanding of Rule Utilitarianism: "An act is wrong if it is forbidden by the code of rules whose internalisation by the overwhelming majority of everyone everywhere in each new generation has maximum expected value in terms of well-being." Brad Hooker, *Ideal Code: Real World*, (Oxford: Oxford University Press), 2000, 32.
[242] Miles Tucker, "Two Kinds of Value Pluralism," *Utilitas*, 28(3) (2016), 333.
[243] Tucker, "Two Kinds of Value Pluralism," 336.

> "An axiology is a form of strong Value Pluralism just in case it entails that there are at least two irreducible kinds of intrinsic value"[244].

As a result of these definitions, all strong value pluralism conceptions are also weak value pluralism conceptions, as strong value pluralism conceptions are merely weak ones with the added property of irreducible value. A weak value pluralism conception can be turned into a strong one simply by making its multiple "good making properties" irreducible to each other or anything else. The reason why the distinction is important for Tucker is due to its connection to the related concept of incommensurability. If values are incommensurable then they cannot be measured on a common scale. Tucker takes incommensurability to be a property of strong value pluralist conceptions but not weak value pluralist conceptions.[245]

To apply this then to split justifications; a split justification can either be analogous to weak value pluralism in which case the justifications are not incommensurable and therefore it is not a split justification of the type that I am arguing against. The other alternative is that it is analogous to strong value pluralism in which case the justifications are incommensurable. This is the type of conception to which, I would argue, there is always a reason to reject. I should note that I am not aiming to argue against strong value pluralist conceptions in this chapter, only split justification conceptions of ownership. Strong value pluralism has specific problems in the field of conceptions of ownership which may not be applicable in other contexts.

8.4 Why the Presence of a Split Justification is a Reason to Reject a Conception

Throughout this chapter I have been simply stating that a conception with multiple different justifications is incoherent and the incoherence of a conception is a good reason to reject it. Both of these claims, while reasonable, are open to challenge. To put it more simply I have been taking it as obvious that a difference, or incoherence, between two justifications in a conception of ownership provides a good reason to reject that conception of ownership. I have two main arguments as to why that is. The first is that the arbitrariness inherent in a split justification conception is a reason to reject it. The second is the presupposition incoherence entailed by a split justification conception is a reason to reject it.

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[244] Tucker, "Two Kinds of Value Pluralism," 338.
[245] Tucker, "Two Kinds of Value Pluralism," 344.

8.4.1 Arbitrariness Argument

A split justification conception is one which has irreducibly different justifications for the J variables in the conception. This assignment of specific justifications to Js is either non-arbitrary or arbitrary. If it is non-arbitrary then there must be some reason as to why particular Js have particular justifications. This means that the conception is not an ultimately split justification one as there is some ultimate reason which determines why particular justifications are assigned to particular Js. Therefore, the justifications are not irreducible. That further reason which explains the assignment of justifications will turn out to be a background non-plural justification for everything.

If the assignment of justifications to Js is arbitrary however, then that is a reason to reject the conception. As an example, imagine a conception of ownership in which the justification for the system of ownership was freedom maximisation and the justification of the distribution of ownership is rights respecting historical entitlement.[246] The assignment of these justifications (freedom maximisation and historical entitlement) to the J variables (justification of system of ownership and justification of distribution of owned goods) is either non-arbitrary or arbitrary. I take arbitrariness in this context to mean that the reason why this J variable is filled by this particular justification, is trivial. If the conception is arbitrary, then the conception can be reversed (historical entitlement justification for the system and freedom maximisation for the distribution) without any change to the conception as a whole.

If it is non-arbitrary, then there must be some reason as to why freedom maximisation has to be the justification for the system and why historical entitlement has to be the justification for the distribution. As a result, this "reason" is a more fundamental value and so the conception is not an ultimately split justification one.

A possible response to this arbitrariness objection can be made based on Chang's understanding of Value Pluralism. In a defence of Value Pluralism Ruth Chang argues that it does not suffer from the problem of incomparability that some suppose:

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[246] "libertarian capitalism sacrifices liberty to capitalism, a truth its advocates are able to deny only because they are prepared to abuse the language of freedom" Cohen, *Self-Ownership, Freedom and Equality*,37.

> "Take any two putatively ultimate values such the value of the right to free speech and the value of pleasure. One can always imagine some option that bears the one value in a notable way that can be compared with another option that bears the other value in a nominal way. So, for instance, an option that involves violating everyone's right to free speech is worse than an option that involves reducing one person's pleasure by a small amount. Given any two putatively irreducibly distinct values, there will always be some comparison between a notable bearer of one value with a nominal bearer of the other value. The existence of "nominal-notable" comparisons demonstrates that if alternatives are incomparable, it is not the plurality of values per se that entails their incomparability."[247]

Chang is here arguing that a value pluralist who holds two distinct values (in her example free speech and pleasure) can choose between them in a non-arbitrary way, because relative to each one of the values will always be nominal and one notable. It is always the rational choice to choose the notable value when confronted with such a dilemma and, as a result, value pluralists can make rational non-arbitrary choices when confronted with a choice between values.

Even though Chang's argument may serve as an effective defence of value pluralism[248], it still does not serve to justify split justification conceptions. Even if it is in fact the case that, all choices between two values are a choice between a nominal value and a notable value, Chang's argument is ineffective as a counterargument to my own claim, as her argument applies to choices between values relating to actions rather than relating to conceptions. When a conception of ownership is being created and its creator is choosing between different values for different justifications, the choice she is confronted cannot be between a notable value and a different nominal value. This is because there are more than two possible values and also

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[247] Ruth Chang, "Value Pluralism", In *International Encyclopaedia of the Social and Behavioural Sciences 2nd Edition*, edited by James D Wright, (Oxford: Elsevier,2015) 24.

[248] I would argue that Chang's argument is also not an adequate defence of value pluralism. Chang's claim, that in any choice between two values one will be notable and the other nominal with respect to the other, seems open to challenge, but a more fundamental problem is that Chang is actually defending value monism rather than value pluralism. Chang's argument relies on the claim that a notable value is always to be preferred to a nominal one. This claim is a value proposition, in that it assigns moral value to certain choices. More than that it is a claim about an ultimate moral value that must be superior over all others for Chang's argument to function. Chang's argument is therefore a defence of "notable-nominal" monism rather than value pluralism. Christian Blum makes a similar argument to this against Chang and other value-pluralists like her: "Either the notion of better simpliciter does not even get off the ground or it commits its proponents to value monism." Christian Blum. "Value Pluralism Versus Value Monism." Acta Analytica: Philosophy and Psychology 38, no. 4 (2023): 633.

because the degree to which a value is nominal or notable is a factor under her own control rather than a fixed state. Regardless of how effective Chang's argument is as a defence of the non-arbitrariness of value pluralism, in terms of deciding between actions it cannot serve as a defence of the non-arbitrariness of value pluralism in term of deciding between moral codes, as the field of choice is insufficiently restrictive for her notable-nominal distinction to function.

If it is arbitrary then that is a reason to reject the conception. For some readers the arbitrariness of a thing is itself a reason to reject it, while for others it might not be. Therefore, simply demonstrating that split justification conceptions are arbitrary is insufficient to demonstrate to everyone that there is a reason to reject them. As a result, I have further arguments as to why the presence of a split justification within a conception is a reason to reject it.

8.4.2 Presupposition Incoherence Argument

My second main argument as to why the presence of a split justification is a reason to reject a conception of ownership, is presupposition incoherence. Unlike the previous argument this argument does not apply to all split justification conceptions and, to those it does apply to, it applies unevenly. The argument is that the presence of a split justification makes a conception of ownership self-defeating, that is it is not logically possible to consistently hold all parts of it without contradiction.

As an example, consider an ultimate split justification conception, in which the two justifications are direct opposites: a conception of ownership in which the justification for a system of ownership is utilitarian (ownership is justified when it maximises pleasure and minimises pain) and the justification for a particular distribution of ownership is anti-utilitarian (a particular distribution of ownership is justified if it is the one which most maximises pain and minimises pleasure). Such a conception of ownership, I would argue is incoherent as the justifications are directly opposed to each other. It is not coherent to will both a utilitarian and anti-utilitarian conception of ownership as the two together are self-defeating. More than that it would not be possible to build a system of ownership based on this conception, as a utilitarian system of ownership could not have an anti-utilitarian distribution and still be utilitarian and

vice versa. It is not possible to create a system of ownership based on this conception which is a reason to reject it.

Of course, there are no conceptions of ownership which have completely opposite justifications of ownership. I would argue however that several conceptions including the libertarian example discussed above do suffer from the same problem to a lesser degree. A libertarian conception of ownership in which a system of ownership is justified if it maximises freedom and a particular distribution of ownership is justified if it corresponds to historical entitlement is incoherent, in that a distribution which completely respects historical entitlement cannot maximise freedom while a system that maximises freedom cannot completely respect historical entitlement. This is how Cohen and Lamb read libertarians such as Narveson and Nozick.[249] Therefore, you cannot logically hold both premises as it is impossible to create such a system of ownership. People who purport to hold such a conception in fact are prioritising one of the justifications over the other in an arbitrary way.

This problem applies to a lesser extent even to more mundane examples. A conception of ownership in which ownership is legitimate if it maximises utility but a distribution is only legitimate if it is completely equal across everyone, is incoherent as any system which maximises utility cannot have an egalitarian distribution while any system while any distribution which is completely equal cannot be one which maximises utility. The two do not directly conflict in the same way as the anti-utilitarian example but the incoherence is still present. As the two justifications cannot both be satisfied (it is impossible to have a system of ownership which both generates the most utility versus any other system and is strictly equal, which I think is a reasonable assumption), it is never possible to actualise both justifications. This causes the problem of arbitrary justifications which is described above, but also is its own problem of presupposition incoherence. The fact that such a conception can never be realised and any attempt to realise the conception of ownership will result in some parts of itself contradicting other parts, is itself a reason to reject the conception. Therefore, as the split justification leads to a presupposition incoherence there is a good reason to reject such a conception proportional to the degree of the incoherence.

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[249] Cohen, Self-Ownership, Freedom and Equality, 57.
Robert Lamb, *Property: Key Concepts in Political Theory,* (Cambridge: Polity Press, 2021), 43.
Nozick, Anarchy, State and Utopia,
Jan Narveson, *The Libertarian Idea,* (Philadelphia: Temple University Press, 1988),

8.4.3 Composite Objection

A related argument as to why the presence of a split justification in a conception is a reason to reject that conception, is the composite objection. Every category of ownership is based on the legitimate instance of ownership (a distribution is only legitimate if every instance of ownership within it is legitimate). It is only legitimate to create a system of ownership if it will be legitimate to enforce it. There is a transitive relation between individual instances of ownership to group effects and between temporally prior things to later ones. If instances of ownership are legitimate if they maximise utility, then every instance of ownership must be one that maximises utility, therefore the distribution of ownership must be one which maximises utility. If instances of ownership are legitimate only if they respect rights then every instance of ownership in the legitimate system must respect rights, so the only legitimate form of ownership will be one that respects rights.

Given this a conception's justification for distribution is effectively necessitated by its justification for individual instances. A conception with a split justification therefore does not have adequate justifications as they work to limit each other. A rights respecting/ historical entitlement justification for individual ownership is not a genuine historical entitlement justification if it is conjoined with a freedom based justification of distribution, as the justification for the distribution prevents full application of the historical entitlement justification for instances.

8.4.4 Error Theory

In the preceding sections I have explained why the presence of split justification within a conception of ownership is a reason to reject that conception of ownership. However, to strengthen my argument I will now give an explanation as to why value pluralism and split justification conceptions are popular despite being flawed.

Isaiah Berlin in Two Concepts of Liberty makes an impassioned case for value pluralism:

> "Pluralism with the measure of "negative" liberty that it entails, seems to me to be a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of positive self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognise the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, so that it is a matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decisions as an operation which a slide-rule could in principle perform. To say that in some ultimate, all reconciling yet realisable synthesis duty is interest or individual freedom is pure democracy or an authoritarian State, is to throw a metaphysical blanket over either self deceit or deliberate hypocrisy. It is more humane because it does not (as the system builders do) deprive men, in the name of some remote, or incoherent, ideal, of much that they have found to be indispensable to their life as unpredictably self-transforming human beings. In the end, men choose between ultimate values; they choose as they do because their life and thought are determined by fundamental moral categories and concepts that are, at any rate over large stretches of time and space, and whatever their ultimate origins, a part of their being and thought and sense of their own identity; part of what makes them human."[250]

I have quoted this paragraph in full because there are a number of distinct points, both positive and negative, within it which I want to respond to. Berlin's general claim in this section is that the value pluralism/value monism debate is analogous to the political liberalism/ political authoritarianism debate in such a way that, insofar as we accept that political liberalism is good and political authoritarianism is bad, we should also accept that value pluralism is good and value monism is bad. Berlin is here expressing what I believe to be a common motivating reason for accepting value pluralism, the belief that it is strongly connected to political pluralism.

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[250] Berlin, *Two Concepts of Liberty*, 216.
I should note that in the quote above Berlin seems to be defending a form of intuitionism in which values are chosen based on personal judgement or intuition rather than by comparing them to a basic value. This intuitionism I would argue is a form of value monism as it maintains that we hold particular values (justice, freedom, equality etc.) only insofar as they align with our intuition or "fundamental moral categories". I interpret Berlin as a value pluralist despite this, because that seems most consistent with his other writings, and it is the interpretation that is most useful for my thesis. This appearance of ambiguity seen in Berlin is not something only I have observed, George Crowder states that Berlin in fact changes his mind as to whether rational (non-arbitrary) choices are possible arguing that rational choices are impossible earlier in his career and arguing that they are possible later. George Crowder, *Liberalism and Value Pluralism,* (London: Continuum, 2002), 57.

I would argue that both the positive and negative aspects of Berlin's claim here are incorrect. It is not the case either that value pluralism is strongly connected to political liberalism or that value monism is strongly connected to political authoritarianism. Berlin can either be claiming that these connections are necessary or that they are contingent, but near universal. These connections are clearly not necessary as there is nothing about the concept of value pluralism that ensures that a society in which everyone is one is a politically liberal one. Value pluralism is ideologically neutral. The connections are also not true contingently, as it is not the case that in general value pluralist societies are liberal and vice versa.

A second related reason why I believe that value pluralism is popular, is the fact that compromise between values becomes easier. A value pluralist never has to reject a value or provide a reason as to why it is unimportant. She can instead say that it should be considered and leave it up to the reader to determine which value they prefer.

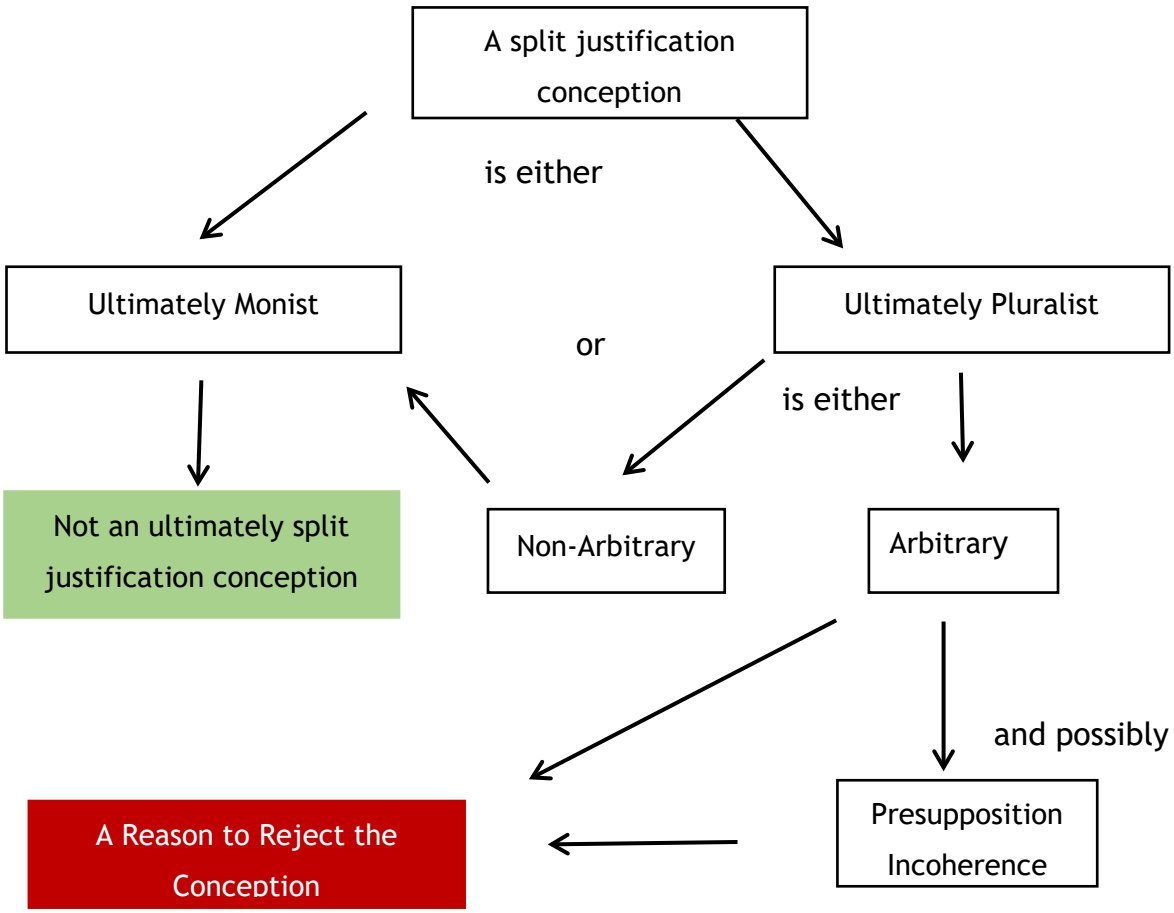
My claim here is that value pluralism (and hence split justification conceptions of ownership), are often adopted because of non-philosophical reasons (such as political liberalism or avoiding conflict). I have demonstrated why there are strong philosophical objections to such conceptions, but that is not enough to convince anyone who has adopted them due to these non-philosophical reasons. In order to do that, you need to first describe and then critique, the non-philosophical reasons behind the position. I have not done that here, but instead merely sketched out how such an argument would be made.[251]

[251] My method here is the same as psychological arguments against religious belief which, by purporting to demonstrate a psychological origin for belief in God, claim to demonstrate how such a belief is unjustified. The same argument, I would argue, can be applied to many areas across philosophy.

8.4.5 Summary

The following diagram summarises my argument against split justification conceptions.

Split justification argument



A conception of ownership with a split justification is either ultimately monist or ultimately pluralist. If it is ultimately monist, then there is one ultimate value which determines why a particular J should have a particular justification and as such, it is not an ultimately split justification conception and not one I am here criticising. If it is ultimately pluralist then the assignment of justifications to Js is either non-arbitrary or arbitrary. If it is non-arbitrary, then there must be some ultimate value that is used to assign justifications to Js, and hence the conception is ultimately monist and therefore not an ultimately split justification conception.

If an ultimately pluralist split justification conception is arbitrary in assigning justifications to Js then that arbitrariness is a reason to reject it. Such a conception might also have incoherence amongst the presuppositions of its justifications and, if it does, then that is another reason to reject it.

8.5 Rawlsian Counter Example

Having now explained why the presence of a split justification within a conception of legitimate ownership is a reason to reject that conception, I will now consider a potential counterexample and explain why it is not a genuine counterexample to my position.

This counterexample is based on John Rawls' account of punishment from "Two Concepts of Rules". I will argue that while the conception of punishment Rawls' contains does contain within it an apparent split justification, it is not an example which presents a problem for my argument.

8.5.1 Rawls' Conception of Punishment

Rawls in his treatment of punishment draws a distinction between the justification for the execution of the law and the justification for the creation of the law. These, Rawls argues, can be and are completely different, even incompatible, justifications.

While the justification of the creation of the law is utilitarian the justification of its execution is retributive. Rawls illustrates this with the example of a son asking his father why a criminal was punished. To this question the answer is:

> ". . . a particular man is punished, rather than some other man, because he is guilty, and he is guilty because he broke the law."[252]

The description here is retributive. The individual instance of punishment is justified not because it will cause any benefits but simply because it is just that people receive their moral deserts for criminal actions. In contrast if the son asks his father why laws prohibiting actions exists at all the answer is different:

> ". . . we have the institution of punishment itself, and recommend and accept various changes in it, because it is thought by the (ideal) legislator and by those to whom the law applies that, as a part of a system of law impartially applied from case to case arising

[252] Rawls, John, "Two Concepts of Rules," *The Philosophical Review,* Vol 64, No 1, (January 1955) 6.

> under it, it will have the consequence, in the long run, of furthering the interests of society."[253]

Here the justification is utilitarian. A system of laws and punishments is justified by the good it does for society as a whole. Rawls argues that these two examples show, how it is possible to have two separate justifications for the creation and execution of laws. The reason why Rawls believes this is important is it allows him to respond to the traditional objection to utilitarianism with respect to punishment; namely that utilitarianism justifies the punishment of the innocent if doing so produces good consequences.[254] Rawls argues that his system avoids this problem as the justification of any instance of the law being executed is retributive and so can never justify punishing the innocent while any attempt to create an institution by law to punish innocent individuals can never be justified on utilitarian grounds.

Rawls summarises this position thus:

> ". . . one distinguishes two offices, that of the judge and that of the legislator, and one distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for what is done under the cover of these offices can be paired off with the competing justifications of punishment."[255]

For Rawls then, a split justification is not a weakness, but a strength and a necessary component of a just conception of punishment.

I have gone into this in some detail in order to clearly demonstrate that Rawls, as I interpret him is arguing not for a rule-utilitarian conception of punishment, but for a split utilitarian and retributive conception. A rule-utilitarian interpretation is one which sees Rawls as arguing for a rule-utilitarian justification of the execution of the law and an act-utilitarian justification of the creation of the law. An interpretation of this type is given by Joseph Margolis.[256] Both justifications are utilitarian, so both the creation and execution of the law are justified only in

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[253] Rawls, "Two Concepts of Rules," 6.
[254] Rawls, "Two Concepts of Rules," 10.
[255] Rawls, "Two Concepts of Rules," 7.
256 Margolis, Joseph, "Rule-Utilitarianism," From *Development and Main Outlines of Rawls' Theory of Justice,* edited by Henry Richardson, (London: Garland Publishing, 1999), 25.

so far as they maximise utility. A rule-utilitarian execution of the law is justified, when the practical benefits of rule-utilitarianism allow it to better promote utility than act-utilitarianism. This interpretation of Rawls is in contrast to the retributive interpretation, in which the execution of the laws is purely retributive and is justified without reference to the maximisation of utility.

The rule-utilitarian interpretation does not provide an analogous counterexample to my split justification argument. My argument is a split justification within a conception is a reason to reject that conception. However, rule and act-utilitarianism are not separate justifications as both can be reduced to the same ultimate justifications (the maximisation of utility), unlike utilitarianism and retributivism. I am interested in exploring challenges to my split justification argument so, for the sake of that inquiry, in the rest of this chapter I will be using a split justification retributive interpretation of Rawls.

I would in any case argue that this is the more accurate interpretation of Rawls' 'Two Concepts of Rules'. Rawls goes into greater detail about utilitarian and non-utilitarian justifications in his account of promises (which he sees as analogous to punishment):

> ". . . the point of the practice is to abdicate one's title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans coordinated in advance. There are obvious utilitarian advantages in having a practice which denies to the promiser, as a defence, any general appeal to the utilitarian principle in accordance with which the practice itself may be justified. There is nothing contradictory, or surprising, in this: utilitarian (or aesthetic) reasons might properly be given in arguing that the game of chess, or baseball, is satisfactory just as it is, or in arguing that it should be changed in various respects, but a player in a game cannot properly appeal to such considerations as reasons for his making one move rather than another. It is a mistake to think that if the practice is justified on utilitarian grounds then the promiser must have complete liberty to use utilitarian arguments to decide whether or not to keep his promise. The practice forbids this general defence; and it is a purpose of the practice to do this."[257]

257 Rawls, "Two Concepts of Rules," 16.

My interpretation of Rawls here is that he is drawing a clear line between the justification of the practice and the justification of action within the practice. While the justification of the practice (which could be punishment, promises or games) is utility maximisation, the justification of action within the practice is non-utilitarian. In terms of punishment Rawls is not arguing for rule-utilitarianism in its execution, but non-utilitarian retributivism. He therefore is arguing directly against my split justification argument.

Finally, I should note that my argument here is not against non-maximising rule utilitarianism. Brad Hooker in *Ideal Code: Real World* presents just such a conception:

> "Suppose rule-consequentialism is indeed a lost cause if one accepts an overarching commitment to maximise the good. This need not be the death-knell of rule consequentialism. For the best argument for rule-consequentialism is not that it derives from an overarching commitment to maximise the good. The best argument for rule-consequentialism is that it does a better job than its rivals of matching and tying together our moral convictions, as well as offering us help with our moral disagreements and uncertainties."[258]

Here as Hooker has a non-maximising justification for the system of ownership as a whole, it does not suffer from the same split-justification as my interpretation of Rawls' conception of justice.

8.5.2 Rawlsian Argument for Split Justifications in Conceptions of Ownership

Applied to ownership Rawls' argument would suggest that theories of legitimate ownership require both a justification for the application of a system of ownership to individuals and the justification of that system overall. While the justification of individual acts of exclusion may simply be a function of the system, the system itself requires further justification.

Earlier I described how J and H could be divided into different variables. A direct transfer of Rawls' example would require separate Js for legislation (the creation of the institution of ownership) and execution (the enforcement of laws that protect the institution of ownership).

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[258] Hooker, *Ideal Code: Real World*, 101.

J_1 Justification of the system of ownership
J_2 Justification of the enforcement of the system of ownership

Rawls' principle applied to ownership would hold that J1 and J2 are distinct and that whatever J1, is J2 is simply the fact that the system exists.

8.5.3 My Response to the Rawlsian Argument

My main response to Rawls is to argue that for his system to work the justification of the practice of punishment cannot be entirely utilitarian, but must involve some non-utilitarian element. As a result, Rawls is not presenting a system with two distinct types of justification within it, instead his system has a single partially utilitarian justification throughout. As a result, this Rawls inspired conception does not provide a counterexample to my split justification argument.

To begin this argument, I need to state a number of assumptions I am relying on. I believe these assumptions are obvious, but describing them precisely reveals the problem with Rawls' position.

First, Rawls' system, of split justification, is not the only logically possible one. It is possible to imagine a system where laws are both created and executed in purely retributivist terms or one in which laws are both created and executed for purely utilitarian reasons. A purely utilitarian one would be one in which both the creation and execution of the law was carried out with a purely utilitarian purpose.

Second, I would argue that it is possible to specify in the creation of the law the justification which ought to be born in mind when executing it. It is possible when creating the law for example, to specify that the law ought to be interpreted and executed with the aim of producing the greatest happiness in mind rather than a strict adherence to the letter of the law or vice versa.

As a result of this when comparing a purely utilitarian system of punishment to the split utilitarian-retributive system Rawls describes, the pure utilitarian system should produce greater utility. While the laws themselves would be the same (as both are created in accordance with utilitarian principles) the execution of the laws would be different. The pure utilitarian system would deviate from the law to greater leniency or harshness, when doing so would serve the greater good while Rawls' retributive execution would require a strict adherence to the law even when doing so reduces utility. As a result, the pure utilitarian system will produce more happiness overall than Rawls' mixed system though presumably at the cost of occasionally punishing the innocent and sparing the guilty.

As the justification for the execution of the law can be specified in its creation, it follows that any theory with a purely utilitarian account of the creation of the law will specify that the law must be utilitarian in its execution. An account of the creation of the law which made no specification or required the law to be interpreted retributively could not be purely utilitarian, as it would not be the option which maximised utility. As a result, in Rawls' system the justification of the law cannot be purely utilitarian (as it specifies a retributive execution) and so Rawls' system is not one of two distinct justifications, but a system with a single mixed utilitarian-retributive justification.

As a more general point it seems impossible to have different justifications for the creation of a practice and for the enforcement of a practice given that it is possible to specify the form of the enforcement during the creation. In consequence Rawls' conception of punishment does not serve as counterexample to my claim (that the presence of a split justification within a conception is a reason to reject that conception) despite it being a conception with apparently two justifications which its creator sees as a benefit, because its justifications cannot be distinct without contradiction.

8.6 Freedom, Historical Entitlement and Libertarianism

To provide practical support for the theoretical explanation in the preceding section, I will now apply the split justification argument to various libertarian conceptions of ownership to demonstrate the value of the split justification argument. I will begin by describing Cohen and Lamb's argument against libertarianism and demonstrate how it is a form of split justification

argument. I will then investigate the libertarians they are critiquing and argue that they are in fact not guilty of upholding split justification conceptions of ownership. This use of the split justifications argument thus provides; partial vindication for the libertarians, new and more productive ways to critique their conceptions and an explanation as to how these libertarian conceptions of ownership can be reduced to ethical principles.

8.6.1 Cohen and Lamb on Libertarianism

In *Self-Ownership, Freedom and Equality* Cohen presents a thorough critique of libertarianism in particular the libertarianism of Nozick. His central concern is with the idea of self-ownership, but he also develops criticisms of libertarianism related to its use of the idea of freedom.

Cohen argues that Nozick is incoherent in his use of the idea of freedom:

> "Nozick presents himself as a defender of unqualified private property *and* as an unswerving opponent of all restrictions on individual freedom. I claim that he cannot coherently be both."[259]

Cohen's argument is that a libertarian distribution of property, which categorically protects private property, does not necessarily protect freedom more than any other distribution of property. This is because; by protecting the property of the individual the freedom of those who lack property is inevitably reduced. This is of course in line with the framework, as the ownership of B by A excludes C from B which reduces the range of actions C can perform, thus reducing C's freedom. Cohen contrasts a libertarian with a socialist distribution of goods and argues that the libertarian case against socialism, that it restricts the freedom of property holders, is a weak objection as libertarianism does the same for a different socio-economic class. The only difference of libertarianism is that it restricts the freedom of the property-less to use objects rather than the freedom of the property owners to dispose of theirs.

> ". . . libertarians cannot complain that a socialist distribution restricts freedom, by contrast with the dispensation that they themselves favour"[260].

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[259] Cohen, *Self-Ownership, Freedom and Equality*, 55.
[260] Cohen, *Self-Ownership, Freedom and Equality*, 57.

The choice between a socialist society and a libertarian society is therefore not a choice between a society which restricts economic freedom and one which does not, but is instead a choice between two societies which both restrict freedom in different ways. Both societies restrict freedom by preventing people from interacting with objects which belong to other people. In addition, a socialist society will restrict the freedom of property owners by taxing them and heavily regulating their property use, while a libertarian society will restrict the freedom of the poor by being organised such that they lack access to capital. Therefore, both the libertarian and egalitarian conceptions of ownership restrict freedom.

This argument itself is not a split justification argument but there is an implicit split justification argument within it, that can be brought out as I will show in the next subsection.

Following on from Cohen, Lamb makes the same freedom based argument against libertarianism: that it does not maximise freedom as it restricts the freedom of propertyless and so cannot consistently claim freedom promotion as its justification.

> ". . . there is no reason whatsoever to think that property rights promote or protect freedom any more than redistributive taxation does."[261]

Lamb's strictly freedom-focused argument is that, absent a good justification, socialist economic systems can maximise freedom just as well as libertarian economic systems. This is because both systems are committed to restricting freedom so as to allow for ownership. The difference between them is only that socialism entails more public and egalitarian ownership, while libertarianism entails more private and inegalitarian ownership.

8.6.2 The split justification Argument Against "Libertarianism"

Cohen and Lamb both present the freedom argument against libertarianism, in which libertarianism is criticised for both justifying property rights in terms of maximisation of freedom (however that is defined), while also justifying an inegalitarian distribution of property.

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[261] Lamb, *Property: Key Concepts in Political Theory*, 43.

This in itself is not a split justification argument. Nevertheless, it does depend on one implicitly against an obvious libertarian response. This response is that Cohen and Lamb depend on the justification for the distribution of owned goods being the same as the justification for the institution of ownership overall. For the freedom argument against libertarianism to work the libertarian's justifications for both must be freedom. However, a libertarian could respond by saying that though my justification for overall institution of ownership is freedom, my justification for a particular distribution is historical entitlement. As a result, my theory is neither incoherent nor non-freedom maximising.

The only possible response to this is the split justification argument, which demonstrates that there is always a reason to reject conceptions of ownership which have different justification for different applications of them. Lamb and Cohen's argument against libertarianism thus depends on the split justification argument for its defence.

8.6.3 Narveson on Libertarianism

I do not believe however that the libertarian conceptions of ownership held by Narveson and Nozick contain within them a split justification. This is because the freedom that both see as being maximised by a libertarian system of ownership is not freedom as "the absence of human imposed restrictions", but instead freedom as "the absence of external human interference". While the former is incompatible with an historical entitlement (and thus inegalitarian) distribution of owned goods the latter is not, and consequently a libertarian conception based on that understanding of freedom does not contain a split justification.

To explain more broadly Narveson defines libertarian theories as those that hold that:

> ". . . the doctrine that the only relevant consideration in political matters is individual liberty."[262]

He begins his book *The Libertarian Idea* by asking the reader to imagine being arrested in the middle of the night by the state. Throughout the rest of the book Narveson argues for a

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[262] Narveson, *The Libertarian Idea*,7.

minimalist state which lacks the right to use force or remove the property from those who have not committed a crime.

From this it might appear that Narveson's conception of ownership is subject to a split justification in the way outlined by Lamb and Cohen. It has a freedom justification for ownership has a whole but a rights-based justification for every individual instance. In fact, however Narveson's conception of ownership is consistent as his conception of freedom is one in which the freedom that is maximised is not absence of restrictions, but instead non-interference. He distinguishes these two alternatives:

> "(1) On the one hand we might take "positive liberty" as our object: society should for instance, *maximise* liberty . . . Our maxim would be: Let us do whatever we can to bring it about that people have as much liberty as possible
>
> (2) Alternatively, the idea might be: let us insist that people *interfere* with each others liberty as little as possible."[263]

Narveson's preference is for the second option. He relies on a strong difference between action and omission. This is reinforced by Narveson's understanding of the difference of positive and negative rights which he defines thus:

> ""A has the negative right against B to do x" means "B has the duty to refrain from preventing A's doing of X"
> "A has the positive right against B to do x" means "B has the duty to assist A to do x""[264]

Narveson argues that it is the negative right to liberty which is fundamental. He references Nozick's theory of rights as side-constraints[265] and argues his view is the same. Applied to the concept of ownership this entails that; the freedom ownership enables is non-interference and the justification for a particular distribution is historical entitlement. These justifications are derivable from each other (historical entitlement is simply universal respect for freedom as

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[263] Narveson, *The Libertarian Idea*, 32.
[264] Narveson, *The Libertarian Idea*, 58.
[265] "In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints C. The rights of others determine the constraints upon your actions." Nozick, *Anarchy, State and Utopia,* 29.

non-interference). This libertarian conception of ownership thus avoids the split justification objection. Cohen's objection to it depends on a freedom maximising justification which is not in fact present within the conceptions of either Narveson or Nozick.

Quite simply then the libertarianism of Narveson and Nozick does not suffer from a split justification (despite having a freedom maximising justification for ownership as a whole and a historical entitlement justification for the distribution of owned goods), because both its justifications are derivable from the same source and so not truly distinct. This is the same explanation as the one I gave earlier as to why rule utilitarianism is not an example of a split justification.[266] In both cases an apparent split justification is reducible to a single justification. This is partially hidden in the libertarian case because it is by understanding "freedom", in an uncommon way, purely as non-interference that Narveson and Nozick are able to avoid a split justification.

8.7 Historical Entitlement and Utilitarianism in Nozick

While libertarian conceptions of ownership (and that of Nozick in particular) may be able to avoid reliance on a split justification due to adopting a non-maximising understanding of freedom, in a different area they do appear to contain a split justification. This concerns the presence of utilitarian justifications within libertarian conceptions of ownership.

Barbara Fried in "Does Nozick have a Theory of Property Rights" argues that Nozick repeatedly relies on utilitarian justifications in *Anarchy State and Utopia* in order to justify his claims in areas in which no libertarian justification is possible.[267] The central moral justification behind Nozick's political philosophy is respect for individual rights. Nozick claims that political philosophy should take seriously the claim that inviolable rights exist and that his political philosophy is one of the only ones to demonstrate how states can exist without ever violating

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[266] Hooker, *Ideal Code: Real World*, 101.
[267] Fried, Barbara, "Does Nozick have a Theory of Property Rights", *Stanford Public Law and Legal Theory Working Paper Series*, Stanford Law School, 2011, ii.

their citizens' rights.[268] Fried argues however that it is not possible to justify a state purely on the basis of respect for rights.

She claims that the only truly right-respecting state that can exist is one which enjoys the universal consent of its citizens. However, Nozick does not attempt to justify his conception of the state on universal consent. He instead contrasts just such a Lockean contractual theory of the state in which the state is created and maintained through the consent of the citizens[269] with his own "invisible hand" theory. This holds that the state is not a product of the conscious choices of its citizens, but instead of millions of individual actions made by people unconsciously in accordance with general rules. He uses this quote from Adam Smith (in which Smith describes how people by buying domestic manufactures can support their countries economy without intending to) to illustrate the process:

> "Every individual . . . intends only his own gain, and he is in this, as in so many other cases, led by an invisible hand to promote an end which was no way part of his intention."[270]

As a consequence of adopting this form of justification consent does not play a role in the creation of the state for Nozick. The state was not created by express consent as it was not the product of conscious choice.

Fried argues that this disregarding of consent leads him to utilitarian justifications for some (but not all) parts of his theory. For example, Nozick argues in a long discussion that violations of rights can be justified (or are not really violations) provided sufficient compensation is paid:

> "The reason one sometimes would wish to allow boundary crossings (when prior identification of the victim or communication with him is impossible) is presumably the great benefits of the act; it is worthwhile, ought to be done and can pay its way. . .. Prohibiting such unconsented to acts would entail forgoing their benefits as in the case

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[268] "Our [Nozick's] main conclusions about the state are that a minimal state, limited to the narrow protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate person's rights not to be forced to do certain things and is unjustified; and that the minimal state is inspiring as well as right" Nozick, *Anarchy, State and Utopia,* xix.
[269] Nozick, *Anarchy, State and Utopia,* 18.
[270] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* Eleventh Edition, (London: Cadell and Davies, 1805), Vol II, 190.

> where negotiation is impossible. The most efficient policy forgoes the fewest net beneficial acts; it allows anyone to perform an unfeared action without prior agreement."[271]

Fried argues that this is a turn away from libertarian justifications to a utilitarian one.[272] Non-consensual interferences (and hence rights violations) are now being justified by considerations of "efficiency" a clear stand in for "utility". Nozick's theory of the state thus depends on utilitarian as well as libertarian justifications.

Fried's explanation for this utilitarian turn in Nozick's argument is the problem that it faces as a rights based theory when encountering a symmetrical context. The principle of the inviolability of rights assumes that; assuming rights are respected no one will be harmed. "Harm" is only a result of violation of rights. However, in reality harm is universal:

> "All disputes between two or more parties involve conflicting desires about how to deploy scarce resources; however we decide the dispute, one side will be "harmed" as a matter of fact, in the sense that it will no longer be able to do as it wishes with impunity. As a result, the question of who is wronging whom cannot be resolved by an unmoralised (factual) determination of who is harming whom. It can be resolved only on the basis of some normative commitments (implicit or explicit) that lead us to favour one side's interests over the other's."[273]

Nozick's theory depends on the principle of compossibility of rights (the principle that all rights can be respected simultaneously). The situation he is faced with however is one where that principle manifestly does not hold: in order for a private collective to vindicate the rights of its members it must violate the rights of others. The principle of respect for rights alone cannot account for situations such as this, and so cannot serve by itself to justify the existence of a state.

Fried argues that this is a general problem throughout *Anarchy, State and Utopia* and for libertarian theories more broadly. It is not possible to justify the practices necessary for a state

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[271] Nozick, *Anarchy, State and Utopia*, 72.
[272] Fried, "Does Nozick have a Theory of Property Rights", 8.
[273] Fried, "Does Nozick have a Theory of Property Rights?", 11.

(government coercion, taxation, etc) merely through respect for individual rights and, as a result, no purportedly "libertarian" theory is purely libertarian. Instead, they all depend upon other non-liberation justifications:

> "But in the end, [no libertarian theory] has satisfactorily shown that broad principles such as "we own ourselves and the products of our labour" can generate answers to the everyday problems we actually face, without an illicit assist from ad hoc intuitionism, naked self-interest, or (I believe) most often welfarism manqué, snuck in through terms like fault, due care, negligence, and definitions of what constitutes a boundary crossing."[274]

Fried's conclusion is that Nozick relies upon welfare utilitarianism, whenever his libertarian principles are insufficient to justify his goals.

To apply this to split justifications: it is clear that Fried is arguing that split justifications are endemic within Nozick's theory, in that he repeatedly depends upon utilitarian justifications despite their flat opposition to "rights as side constraints". This type of split justification can be observed specifically in his conception of ownership. The justification for private ownership for Nozick is historical entitlement; ownership rights should be respected merely because they are rights. However, his justification for ownership acquisition is utilitarian (as is noted by Fried).[275]

Nozick's theory of acquisition is that the acquisition of owned goods (the process by which a prospective owner can gain ownership over unowned objects) is legitimate if it is in accordance with the principle of justice in acquisition.[276]

> "The general outlines of the theory of justice in holdings are that the holdings of a person is just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice (as specified by the first two principles). If each person's holdings are just, then the total set (distribution) of holdings is just. To turn these general outlines into a specific theory we would have to specify the details of

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[274] Fried, "Does Nozick Have a Theory of Property Rights?" 27.
[275] Fried, "Does Nozick Have a Theory of Property Rights?" 26.
[276] Nozick, *Anarchy, State and Utopia,* 151.

> the each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings and the principle of the rectification of violations of the first two principles. I shall not attempt that task here."[277]

Nozick does not go into detail about what the principle of justice in acquisition requires as he is interested in describing a framework for a just state rather than a particular specification of one. To put it in the terms of this thesis, he is aiming to give a description of the concept of a legitimate state rather than a particular conception of it. However, his other comments on it throughout *Anarchy, State and Utopia* reveal some of its features and makes it possible to develop a split justification argument against his conception of ownership, based on Fried's one concerning Nozick's theory in general. The vital point is that Nozick claims legitimate principles of justice in acquisition must contain within them a proviso which holds that:

> "A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened."[278]

In other words, in order for x to be a principle of justice in acquisition, x must ensure that no one is made worse off by the acquisition.

So far this description of Nozick's theory is entirely in line with Nozick's libertarian principles. Provided no one is worse off (and hence no rights are violated) the acquisition cannot be in conflict with rights as side constraints. The split justification only emerges with the application of his discussion of compensation to original acquisition. As we saw earlier Nozick argues that boundary crossing can be justified provided sufficient justification is paid. In the same way, he argues that acquisition can be justified even if it makes people worse off than they were, provided that they are not worse off relative to a world with no property. Given the enormous benefits a world which property provides (which Nozick enumerates at length)[279] the vast majority of original acquisitions are justified with the only exceptions being extreme situations. Nozick's example of an illegitimate original acquisition is the acquisition of the sole water source that many other people depend on for their existence.[280] Such a low baseline ensures

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[277] Nozick, *Anarchy, State and Utopia*, 153.
[278] Nozick, *Anarchy, State and Utopia*, 178.
[279] Nozick, *Anarchy, State and Utopia*, 177.
[280] Nozick, *Anarchy, State and Utopia*, 180.

that many acquisitions are justified even if they make people worse off relative to a world without that acquisition. What justifies this for Nozick is the practical benefits that arise from instituting a system of ownership. This justification is not a libertarian justification, but is instead a utilitarian one.

To summarise, for Nozick original acquisition is justified even if others are made worse off than they would have been had the acquisition not taken place due to the practical benefits that arise from appropriation. In Fried's terms:

> ". . . the one "particular right over a particular thing" that Nozick deals with in detail in Part II -our right to appropriate things out of the commons-- he resolves the same way he derives the minimal state in Part I: by doing away with consent, and requiring only that we compensate those who were deprived of "enough and as good" without their consent."[281]

In the terms of this thesis, I would argue that Nozick's conception of ownership has a split justification. It contains both a historical entitlement justification for a particular distribution of owned goods combined with a broadly utilitarian justification of the acquisition of owned goods. The presence of this split justification is a reason to reject it.

However the above claim requires a disclaimer. The split justification criticism of Nozick depends on Fried's interpretation of Nozick, which holds that Nozick's justification of compensation is a utilitarian justification and that boundary crossings are rights violations. If either of these claims is rejected then the split justification evaporates. For the purposes of this thesis, I am not committed to the accuracy of this interpretation. My goal is merely to demonstrate the importance of split justifications and hence the usefulness of the framework. That Nozick's conception of ownership contains a split justification is not a position I am arguing for. What I am arguing is that: if his conception does contain a split justification then that is a reason to reject it; that it is possible to interpret his conception in such a way; and that the framework aids both in that interpretation and in clarifying the problem with a split justification.

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[281] Fried, "Does Nozick have a Theory of Property Rights?" 25.

8.8 The Shortage of Split Justification Conceptions

So far in the chapter I have described what a split justification is and demonstrated why the presence of a split justification within a conception of ownership is a reason to reject that conception of ownership. It would seem from this that the usefulness of the split justification argument is in it being an evaluative tool for conceptions of ownership. If a split justification can be identified within a conception of ownership then that is a reason to reject it. The split justification argument thus appears to be a straightforward evaluative test that reveals certain conceptions of ownership to be flawed.

I would argue, however, that this is not the main value of the split justification argument, simply because there are few if any conceptions of ownership which have a split justification. The libertarian freedom conception I discussed turned out to be not actually a split justification conception given the libertarian understanding of freedom as non-interference. Nozick conception of ownership (as interpreted by Fried) certainly contains within it a split justification. However, its reliance on a specific interpretation weakens its general applicability. Having researched multiple other conceptions of ownership looking for split justifications I can confirm that there are very few in existence.[282]

Instead in the same way as in the freedom split justification against libertarianism, in nearly every conception of ownership which either appears to be, or claims to be, value pluralist any \apparent inconsistency in justifications can in fact be resolved by a different or non-obvious interpretation of them.

This then presents a problem for my project in this chapter; if there are no conceptions of the sort that my argument is criticising then the argument appears pointless. My response is to argue although there might be few if any popular conceptions of ownership that contain split

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[282] Waldron, Jeremy, "Superseding Historic Injustice" Ethics, Oct. 1992, Vol. 103, No. 1 (Oct. 1992), pp. 4-28
Purdy Jedediah, "Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates" *The University of Chicago Law Review,* Autumn, 2005, Vol. 72, No. 4 pp. 1237-1298
Dorfman, Avihay, "The Society of Property" *The University of Toronto Law Journal*, Fall 2012, Vol. 62, No. 4 pp. 563-607
Nielsen, Kai, "Radical Egalitarian Justice: Justice as Equality," *Social Theory and Practice*, Spring 1979, Vol. 5, No. 2, An Issue Dedicated to the Memory of W. T. Blackstone, Jr. pp. 209-226
Cohen, G.A, "Where the Action is: On the Site of Distributive Justice" *Philosophy & Public Affairs,* Winter, 1997, Vol. 26, No.1 pp. 3-30

justifications I nevertheless think the split justification argument is useful in three other distinct ways.

Firstly, the split justification argument is useful as a tool to analyse other critiques of conceptions of ownership. Many critiques of conceptions of ownership are made in the form of split justification arguments.[283] They allege that conceptions are flawed due to internal incoherence of values. An awareness of how conceptions of ownership can be made coherent through an analysis of their justifications and a reduction of them all to a single value through conceptual interpretation, provides a way to avoid such objections. An awareness of the split justification argument as an inappropriate objection to conceptions of ownership thus aids in the identification of other inappropriate objections to conceptions of ownership.

Secondly, the reductive analysis that the split justification argument applies onto conceptions of ownership, facilitates the application of ethics to considerations of ownership. The split justification argument makes central the issue of the single underlying value which all conceptions of ownership possess. This allows for easier comparison of conceptions of ownership both with each other and with ethical theories which share or conflict with the value underlying the conception.

Finally, I would argue that the fact that there are few if any split justification conceptions of ownership provides further evidence of the strength of the split justification argument. The fact that philosophers near universally create conceptions of ownership with unified justifications is evidence that there is near universal agreement that the presence of a split justification within a conception of ownership is a reason to reject that conception. This further strengthens the split justification argument as an argument against any conceptions which may exist and allows it to serve as a general tool of analysis in critiquing conceptions of ownership. For example, the strength of the split justification argument means that a conception of ownership can be critiqued by showing how it faces a dilemma between either a split justification or some other undesirable alternative. The split justification argument can thus still serve as a tool of analysis even if there are few to no conceptions which have one.

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[283] Fried, “Does Nozick have a Theory of Property Rights?” 25.

8.9 Conclusion

In conclusion, in this chapter I have described what a split justification is, demonstrated how the presence of a split justification within a conception of ownership is a reason to reject that conception, and given at least one example of such a split justification conception. In addition to this powerful evaluative claim, I have also made the analytic claim that an awareness of split justifications allows for a clearer and more accurate understanding of conceptions of ownership. Both of these claims depend upon the framework description of the concept of legitimate ownership and so their justification in this chapter provides further evidence of the universal character and utility of said framework.

Conclusion

To finish I will now summarise the conclusions of each chapter, give the general conclusions of the thesis, and then describe potential areas for further research.

In Chapter One I described and explained the terminology and methodology I would use for the rest of the thesis, including my formulation of the concept- conception distinction and of de facto, de jure and legitimate ownership. In Chapter Two I described a debate in the philosophy of ownership between bundle theorists and monists as a demonstration as to why a universal description of ownership is required. I then demonstrated the flaws with attempting to use Christman's description of ownership as a universal description.

Chapters Three and Four are the core of the thesis in which I presented my universal description of ownership. In Chapter Three I presented and explained the framework description of the concept of de facto ownership and then in Chapter Four I did the same for the concept of legitimate ownership.

In Chapter Five I used Kant's conception of ownership as an example to show how the description could accommodate a conception of ownership. In Chapter Six I focused on self-ownership; describing different conceptions and showing how the framework is both a universal and useful tool. In Chapter Seven I did the same for intellectual property, while also demonstrating how the framework reveals a flaw in conceiving of intellectual property as the ownership of abstract objects. Finally in Chapter Eight I illustrated how the framework could be a more powerful evaluative tool for conceptions of ownership by showing how it could be used to reveal split justifications within conceptions.

My general conclusions can be divided into three categories: those concerning my methodology, those concerning the framework description, and those concerning the application of the framework.

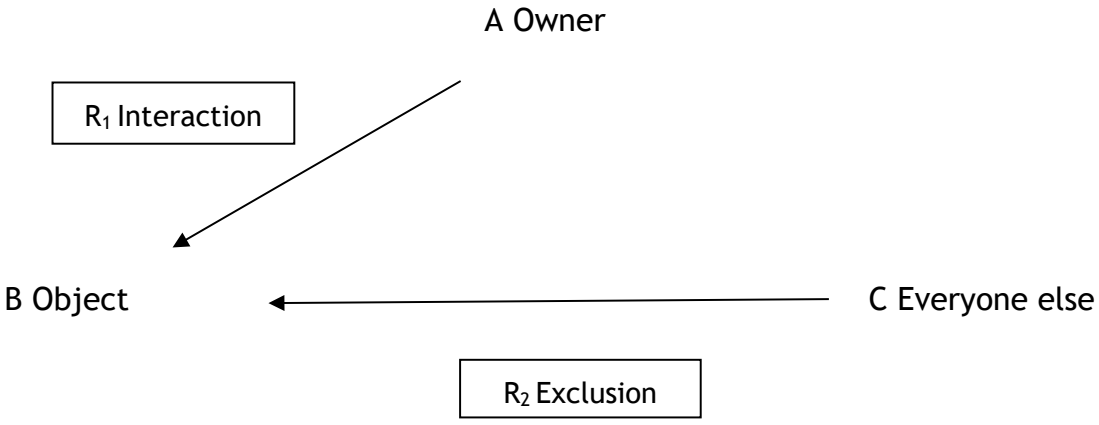
Concerning methodology, I have shown how the concept-conception distinction is a useful distinction within political philosophy. It has been used by MacCallum and Rawls, concerning freedom and justice respectively, and I have demonstrated how it can be applied to ownership

to give a universal description. By clearly separating de facto, de jure and legitimate ownership I have also enabled a clearer description of ownership.

Concerning the framework, I have given a clear accurate description of the concept of de facto ownership:

A de facto owns B iff: AR_1B and BR_2C
R_1 ranges over relations of interaction, R_2 ranges over relations of exclusion.
A ranges over entities that can interact. B ranges over entities that can be interacted with and be excluded from. C ranges over entities that can be excluded.
An owner de facto owns an object if and only if the owner is in a relation of interaction with the object and everyone else is in a relation of exclusion with the object.

The final description of the concept of de facto ownership.

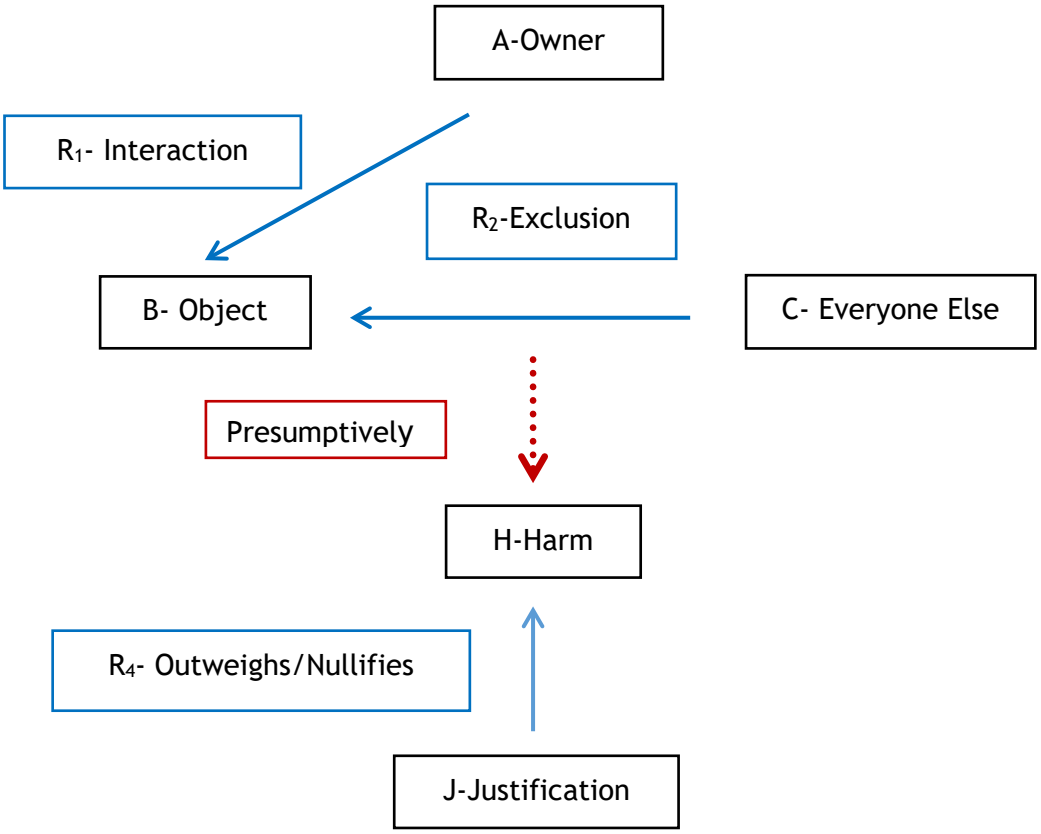


This framework can accommodate every description of de facto ownership used by political philosophers and so functions as a universal description of de facto ownership.

In order to better describe ownership as used by political philosophers I have also given a universal description of the concept of legitimate ownership:

A legitimately owns B iff: AR_1B and BR_2C and HR_4J
R_1 ranges over relations of interaction, R_2 ranges over relations of exclusion and R_4 ranges over relations of outweighing or nullification.
A ranges over entities that can morally interact. B ranges over entities that can morally be interacted with and excluded from. C ranges over entities that can morally be excluded.
An owner legitimately owns an object if and only if the owner is in a relation of interaction with the object, everyone else is in a relation of exclusion with the object and the harm caused by the exclusion is outweighed or nullified by a sufficient justification. The owner, object and everyone else, are entities of a type that can morally: interact, be interacted with and excluded from, and be excluded respectively.

The final description of the concept of legitimate ownership.



This framework can accommodate every description of legitimate ownership used by political philosophers and so functions as a universal description of legitimate ownership.

As well as being important in itself as a universal description, the framework also reveal important insights about ownership. For example, the framework of de facto ownership demonstrates the irrelevance of rights in describing de facto ownership, while the framework of legitimate ownership reveals the centrality of exclusion to ownership and ownership's presumptive immorality.

Finally concerning the application of the framework, I have shown how the framework can be used as a descriptive tool to better understand various conceptions of ownership, including Kant's conception, and various conceptions of ownership specific to self-ownership and intellectual property. In addition, the framework is useful as an evaluative tool, both in how it can demonstrate why ideas concerning ownership may be false (as I demonstrated with respect to how ownership of abstract objects is impossible in relation to intellectual property), and in revealing the hidden incoherences within conceptions (as I demonstrated with respect to split justification conceptions). Therefore, as well as the framework itself being useful I have also made some contributions to the study of intellectual property and historical understandings of self-ownership, which are useful in themselves even apart from the framework.

To summarise my overall conclusions, in this thesis I have shown that: it is possible to give a clear and universal description of ownership, that my framework is such a description and that my framework is philosophically useful.

My suggestions for further research cover four main areas: the idea of wealth, ownership of labour, the concept of government, and broader application of the framework.

Concerning wealth, using the same methodology and terminology to provide a universal description of wealth is a suitable area for further research. Theories of distributive justice depend implicitly on a definition of wealth as they are concerned not with making certain everyone has a just quantity of goods, but rather that everyone has a just quantity of value. This notion of "value" I would put in terms of "wealth"; one is wealthy when one owns high value goods and one is not wealthy when one lacks them. "Wealth" and "value" can both be reduced to "ability to satisfy desire". An object is valuable insofar as it can satisfy desires and an owner is wealthy insofar as she owns valuable objects. Currency provides a standardised unit of desire satisfaction. The strength of this analysis would come through allowing a direct

comparison between the desire satisfaction enabled through value and the desire satisfaction prevented through the exclusion of others, necessary for ownership.

It would also enable me to present my own instrumental, unitary conception of legitimate ownership. I would argue that ownership is legitimate iff it maximises true human desire satisfaction. This is because every other conception of ownership must be one that sacrifices true human desires for the sake of some other good and that such a sacrifice is unjustifiable. Obviously, this is just a sketch of my argument and, as it is an argument for a particular conception, it is beyond the scope of this thesis. A final point for further research concerning wealth is that by demonstrating how legitimate ownership is connected to desire satisfaction it would enable the connection of the theory of ownership to desire based ethical theories, thus reducing political philosophy to moral philosophy. I would argue that political philosophy has be able to be reduced to moral philosophy if it is not to be arbitrary, and that the framework provides a clear way to do so by its invocation of a variable for justification.

Another area in the philosophy of ownership which would be a good area for further research concerns ownership of labour. In Chapter Seven I demonstrated how de facto ownership of abstract objects is impossible and intellectual property can instead be understood as the first ownership of copies. Applying this principle, the impossibility of de facto ownership of abstract objects, to other areas reveals that there are other entities which it is impossible to de facto own. For example, ownership of one's labour distinct from ownership of one's body is impossible as exclusion from one's labour necessarily entails exclusion from one's body and vice versa. This I would argue poses a problem for some simplistic conceptions of labour ownership, which assume that labour is some immaterial entity originally owned by the labourer and then transferred or alienated to others. From my framework I can argue that labour "alienation" is a purely romantic phrase and has no philosophical meaning, because insofar as the labourer still owns her own body, she owns her labour.

Moving beyond the philosophy of ownership to broader political philosophy, another productive area for further research would be in providing universal descriptions of government and society using the same terms (control, exclusion, interaction, etc) as ownership. This would enable the creation of a universal description of all political relations and so serve to identify incoherences within political theories which uphold different values in different areas.

I would argue that this universalisation will also reveal a problem with theories of democratic legitimacy. For conceptions of government, it is possible to draw a divide between; those in which the necessary and sufficient condition for legitimate government are the consent of the governed,[284] those in which the necessary and sufficient conditions for legitimate government are the presence of some moral principle[285] (either maximising or rights based) and conceptions that use a mix of the two.[286] I have not found a consent conception of legitimate ownership and the framework makes obvious why such a one would be difficult. The harm of ownership which requires justification is exclusion of the non-owners. This can be outweighed or nullified, but consent is irrelevant to either of those. People can consent to an illegitimate conception of ownership and refuse to consent to a legitimate one.

Government is analogous to ownership. Like ownership It is presumptively immoral with the harm being the use of coercive force, which is a necessary component of a government. I would argue that the analogy with ownership clearly reveals the flaw with consent based conceptions of legitimate government. The harm of government is coercive force. The person to whom the force is applied is not consenting to it, as consenting to an imposition makes it non-forcible. Therefore, the harm is a moral harm and can only be outweighed or nullified by a moral principle (good maximisation or accordance with right) not the opinion of the majority. The consent of the majority cannot outweigh the harm done to others. An application of the framework of ownership to other areas of political philosophy would therefore be a productive area for further research.

The final suggestion for further research is based on applying the framework methodology beyond political philosophy. Just as MacCallum did with freedom and I have done with ownership, presenting a universal schematic description of a concept allows for productive debate relating to that concept even amongst people who disagree over the correct conception of that concept. Applied to aesthetics for example, rather than trying to argue for a preferred conception of art, attempting to give a description of the concept of art and show how all philosophical conceptions of art can be accommodated by it would serve a useful function. Even if it was not possible to give such a description the fact that it is impossible and the reason

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[284] John A Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, (Cambridge: Cambridge University Press 2001)
[285] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics,* (Oxford: Clarendon Press, 1995), 359.
[286] Amanda Greene, "Consent and Political Legitimacy," in *Oxford Studies in Political Philosophy*, edited by David Sobel, Peter Vallentyne, and Steven Wall, (Oxford: Oxford University Press, 2016)

for that impossibility are useful facts which reveal something interesting about aesthetics (in the same way that the impossibility of giving a description of the concept of de jure ownership revealed something interesting about de jure ownership relative to de facto ownership). The same approach I would argue would be interesting if applied to other basic concepts in other philosophical disciplines. Attempting to give a universal description of the concept of knowledge, mind, meaning, and women would all be useful endeavours in their respective fields.

These then are some of the areas for further research based upon this thesis and the universal description of the concept of ownership I have presented within. I am not claiming that this thesis is the complete, final or perfect definition of ownership. Given my methodology I doubt that any thesis could present that. What I have presented though, is a universal description of ownership the use of which reveals both the similarities between some conceptions and the flaws in others. It is a precise, useful and original contribution to political philosophy.

Bibliography

- Ashcraft, Richard. *Locke's Two Treatises of Government*. London: Allen & Unwin, 1987.
- Ásta. *Categories We Live By: The Construction of Sex, Gender, Race, and Other Social Categories, Studies in Feminist Philosophy,* New York: Oxford Academic, 2019.
- Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation,* London: Athlone Press, 1970.
- Berlin, Isaiah, *Two Concepts of Liberty,* Oxford: Oxford University Press, 1958.
- Biron, Laura, "Public Reason, Communication and Intellectual Property", In *New Frontiers in the Philosophy of Intellectual Property,* edited by Annabelle Lever, Cambridge: Cambridge University Press, 2012.
- Blum, Christian. "Value Pluralism Versus Value Monism." *Acta Analytica: Philosophy and Psychology* 38, no. 4 (2023): 627-652.
- Byrd, B. S., and Joachim Hruschka. *Kant's Doctrine of Right: A Commentary*. Cambridge: Cambridge University Press, 2010.
- Carter, Ian. *A Measure of Freedom,* Oxford: Oxford University Press, 1999.
- Carvalho, Nuno Pires de, "Toward a Unified Theory of Intellectual Property: The Differentiating Capacity (and Function) as the Thread That Unites All its Components", *The Journal of World Intellectual Property*, 15, no. 4, (2012) 251–279.
- Chang, Ruth "Value Pluralism", In *International Encyclopaedia of the Social and Behavioural Sciences 2nd Edition*, edited by James D Wright, Oxford: Elsevier,2015.
- Christman, John, "Autonomy, Social Selves and Intellectual Property Claims". In *New Frontiers in the Philosophy of Intellectual Property* edited by Annabelle Lever, Cambridge: Cambridge University Press, 2012.
- Christman, John, *The Myth of Property: Toward an Egalitarian Theory of Ownership,* Oxford: Oxford University Press, 1994.
- Cohen, G.A, "Where the Action is: On the Site of Distributive Justice", *Philosophy & Public Affairs* , Vol. 26, No.1 (Winter, 1997) 3-30.
- Cohen, G.A, *Self-Ownership, Freedom and Equality,* Cambridge: Cambridge University Press, 1995.
- Crowder, George, *Liberalism and Value Pluralism,* London: Continuum, 2002.
- Cruft, Rowan, *Human Rights Ownership and the Individual,* Oxford: Oxford University Press, 2019.

- Dagan, Hannoch, *A Liberal Theory of Property*, Cambridge: Cambridge University Press, 2021.
- Dorfman, Avihay, "The Society of Property", *The University of Toronto Law Journal,* Vol. 62, No. 4 (Fall 2012) 563-607.
- Dorfman, Avihay, "The Society of Property", *The University of Toronto Law Journal* , Vol. 62, No. 4 (Fall 2012), 563-607.
- Drahos, Peter, *A Philosophy of Intellectual Property,* Aldershot: Dartmouth Publishing Company, 1996.
- Dworkin, Ronald, *Taking Rights Seriously,* London: Duckworth, 1977.
- *Encyclopaedia Britannica 15th Edition,* (Chicago: Encyclopaedia Britannica Inc, 1974).
- Feinberg, John, *The Moral Limits of the Criminal Law Volume 1: Harm to Others,* Oxford: Oxford University Press, 1984.
- Fennell, Lee Anne. "Property beyond Exclusion." *William & Mary Law Review*, vol. 61 no. 2, (November 2019) 521-572.
- Filmer, Robert, *"Patriarcha, or The Natural Power of Kings",* In *Two Treatises on Civil Government by John Locke preceded by Filmer's Patriarcha,* London: George Routledge and Sons, 1884.
- Fried, Barbara, "Does Nozick have a Theory of Property Rights", *Stanford Public Law and Legal Theory Working Paper Series,* Stanford Law School, Research Paper No. 1782031, 2011 .
- Gilbert, W.S, "H.M.S. Pinafore", In *The Complete Gilbert and Sullivan,* New York: Black Dog and Leventhal Publishers.
- Greene, Amanda, "Consent and Political Legitimacy," in *Oxford Studies in Political Philosophy,* edited by David Sobel, Peter Vallentyne, and Steven Wall Oxford: Oxford University Press, 2016.
- Grey, Thomas C, "The Disintegration of Property*," Nomos,* Vol. 22, (1980), 69-85.
- Hegel, G.W.F, *Philosophy of Right*, translated by S.W.Dyde, New York: Dover Publications Inc, 2005.
- Hettinger, Edwin, "Justifying Intellectual Property," *Philosophy & Public Affairs,* Vol. 18, No. 1 (Winter, 1989) 31-52.
- Hobbes, Thomas, *Leviathan or The Matter, Forme and Power of a Common-wealth: Ecclesiasticall and Civill,* Oxford: Oxford University Press, 1996.
- Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* Aldershot: Dartmouth Publishing Company, 2001.

- Honderich, Ted, *Violence for Equality*, London: Routledge, 1989.
- Honoré, Antony, "Ownership" *Journal of Institutional Economics*, 9(2), (2013) 223-255.
- Hooker, Brad, *Ideal Code: Real World,* Oxford: Oxford University Press, 2000
- Isaac, Alan and Walter Park, "On intellectual property rights: patents versus free and open development", In *The Elgar Companion to the Economics of Property Rights,* edited by Enrico Colombatto, Cheltenham: Edward Elgar Publishing, 2004.
- Kant, Immanuel, *The Metaphysics of Morals,* Translated by Mary Gregor, Cambridge: Cambridge University Press, 1996.
- Knowles, Dudley, *Hegel and the Philosophy of Right*, London: Routledge, 2002.
- Kraut, Richard, "Desire and the Human Good," In *Ethical Theory: Blackwell Philosophy Anthologies,* edited by Russ Shafer-Landau, Oxford: Blackwell Publishing Limited, 2007.
- Lamb Robert, *Property: Key Concepts in Political Theory,* Cambridge: Polity Press, 2021.
- Lawson, F.H and Bernard Rudden, *The Law of Property Second Edition,* Oxford: Clarendon Press, 1982.
- Leopold, Aldo, "The Land Ethic," In *A Sand Country Almanac and Sketches Here and There,* New York: Oxford University Press, 1949. https://rintintin.colorado.edu/~vancecd/phil308/Leopold.pdf
- Lizárraga, Fernando "The rejection of self-ownership in Edward Bellamy's egalitarian utopia," *Journal of Political Ideologies*, Vol 27 No 1, (2022), 94-111.
- Locke, John, *Two Treatises of Government,* Cambridge: Cambridge University Press, 2017.
- MacCallum, Gerald, "Negative and Positive Freedom," *The Philosophical Review,* Vol 76, No 3 (July 1967) 312-334.
- Macpherson, C.B. *The Political Theory of Possessive Individualism: Hobbes to Locke,* Oxford: Oxford University Press, 1962.
- Margolis, Joseph, "Rule-Utilitarianism," In *Development and Main Outlines of Rawls' Theory of Justice*, edited by Henry Richardson, London: Garland Publishing, 1999.
- Merrill, Thomas, "Property and the Right to Exclude," *Nebraska Law Review,* 77 (1998) 730-755.
- Moore, Rowan, *Property: The Myth that Built the World,* London: Faber Limited, 2023.
- Munzer, Stepehen R, *A Theory of Property*, Cambridge: Cambridge University Press, 1990.
- Narveson, Jan, *The Libertarian Idea,* Philadelphia: Temple University Press, 1988.

- Nielsen, Kai, “Radical Egalitarian Justice: Justice as Equality,” *Theory and Practice* , Vol. 5, No. 2, (Spring 1979) 209-226 .
- Nozick, Robert, *Anarchy State and Utopia,* New York: Basic Books, 1974.
- Pascoe, Jordan, *Kant’s Theory of Labour,* Cambridge: Cambridge University Press, 2022.
- Penner, J.E, "The Bundle of Rights Picture of Property," *UCLA Law Review* 43, no. 3 (February 1996): 711-820.
- Purdy Jedediah, “Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates” *The University of Chicago Law Review*, Vol. 72, No. 4 (Autumn, 2005) 1237-1298.
- Rawls, John, “Two Concepts of Rules,” *The Philosophical Review*, Vol 64, No 1, (January 1955), 3-32.
- Rawls, John, *A Theory of Justice, Revised Edition*, Oxford: Oxford University Press, 1999.
- Raz, Joseph, Ethics in the Public Domain: Essays in the Morality of Law and Politics, Oxford: Clarendon Press, 1995.
- Ripstein Arthur, *Force and Freedom: Kant’s Legal and Political Philosophy,* London: Harvard University Press, 2009.
- Rose, David. *Hegel's Philosophy of Right: A Reader's Guide*. London: Continuum, 2007.
- Rousseau, Jean-Jaques, “Discourse on the Origin and Foundations of Inequality among Men,” In *Rousseau: The Basic Political Writings*, edited by Donald Cress, Indianapolis: Hackett Publishing Company, 2011.
- Rousseau, Jean-Jaques, “The Social Contract” from *Rousseau: The Basic Political Writings*, edited by Donald Cress, Indianapolis: Hackett Publishing Company, 2011.
- Ryan, Alan, “Hegel on Work, Ownership and Citizenship,” *In The State and Civil Society: Studies in Hegel’s Political Philosophy,* edited by Z.A. Pelczynski, Cambridge: Cambridge University Press, 1984.
- Serle, John, *The Construction of Social Reality*, London: Penguin Books, 1996.
- Simmons, A. John. *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge: Cambridge University Press. 2001.
- Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations, Volume II, Eleventh Edition*, London: Cadell and Davies, 1805.
- Steiner, Hillel, *An Essay on Rights,* Oxford: Blackwell Publishers, 1994.

- Stenson, Anthony J. and Tim S Gray, "An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities," *Environmental Ethics,* 21 (2) (1999) 177-190.
- Stern, James, "What is the Right to Exclude and Why Does it Matter?," In, *Property Theory: Legal and Political Perspectives,* edited by James Penner and Michael Otsuka, Cambridge: Cambridge University Press, 2018.
- Thomson, Judith Jarvis, *The Realm of Rights*, London: Harvard University Press, 1990.
- Tucker, Miles, "Two Kinds of Value Pluralism," *Utilitas*, 28(3) (2016) 333–346.
- Vallentyne, Peter, "Review of Self-Ownership Freedom and Equality by G.A. Cohen", Review of *Self-Ownership, Freedom and* Equality, by G.A. Cohen Canadian Journal of Philosophy , Vol. 28, No. 4 (Dec., 1998), 609- 626.
- Waldron, Jeremy, "Superseding Historic Injustice" *Ethics* , Vol. 103, No. 1 (Oct., 1992), 4-28.
- Waldron, Jeremy, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man,* London: Methuen and Co, 1987.
- Waldron, Jeremy, *The Right to Private Property*, Oxford: Oxford University Press, 1988.
- Warnock, Mary, *Critical Reflections on Ownership,* Cheltenham: Edward Elgar publishing, 2015.
- Westphal, Kenneth, "A Kantian Justification of Possession," In *Kant's Metaphysics of Morals: Interpretative Essays,* edited by Mark Timmons, Oxford: Oxford University Press, 2002.