

INTRODUCTION

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Introduction

Why private property rather than any other system of entitlements? This was the question raised by the Conference that we organized in Brussels in June 2016. We received a great number of important contributions by scholars at the forefront of the developments of property theory. This special issue brings together some of these contributions.¹

Admittedly, the question is far from new, and much ink has been spilled since Grotius, Locke, or Rousseau developed their influential theories of modern property. However, we argue that today more than ever, it is important to get back to the issue of the legitimacy of private property.

First, because this issue is still too often taken as self-evident. Evident in public opinion: in contemporary liberal societies, private property has become a fundamental institution whose evidence is largely left unquestioned. While those seriously defending a radical conception of natural, limitless, and absolute property rights are rather hard to find in the public debate, one cannot help but notice, as Murphy and Nagel have, the pervasiveness of a form of *everyday libertarianism* in public opinion that they describe as a “simplified, naïve version of right-libertarian ideas”.² This conception, which considers market outcomes as a presumptively just baseline, still influences many debates on distributive justice that are disconnected from the academic discussion of these issues.

In the academic debate, a similar state of affairs comes from different causes: here also, the issue of the legitimacy of private property is often taken as evident, not because of the predominance of a naïve conception of property, but rather because of the apparent triumph of liberal-egalitarianism and its contractalist account of private property. Since liberal-egalitarianism has become the dominant paradigm of contemporary political philosophy, in the wake of John Rawls, it has seemed as self-evident among many philosophers that property rights, far from being absolute prerogatives justified by natural law, were only a secondary

1 - We would like to reassert our gratitude for their help and their funding to the FNRS, the Centre de théorie politique (CTP), the Faculté de philosophie et sciences sociales (ULB), the Sophiapol, and the Hoover Chair of Economic and Social Ethics. We also want to say thank you to the participants who presented their work at this conference and to the assistance. Many thanks also to Daniel Brigham who proofread this introduction to put it in good English.

2 - Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice*, Oxford: Oxford University Press, 2004, p. 31.

component of a theory of justice, whose organisation was contingent, and limited by, principles of justice. Therefore, while the gap between academic discourse and the common view of property is of course regrettable, they have in common a waning interest in questioning the legitimacy of private property.

The second reason why this issue is important to discuss is that the concept of private property is challenged by the emergence of new debates. As we shall see, from the rise of the literature on the commons in legal theory,³ to new practices described by some as symptoms of a new “age of access” or an emerging “sharing economy”, to the increasing importance of intellectual property in our increasingly dematerialized economy, there are growing calls to reform, rethink or move beyond our current conceptions of property. However, to do so, we need to understand how this institution was deemed legitimate in the first place, so as to inform a broader understanding of these new developments.

To understand why and how private property has become such a central institution of contemporary Western societies, we need to consider the different arguments that have been advanced to justify the superiority of private property over other types of property rights systems. In fact, we can identify three main categories of justifications for private property that are still influential in contemporary debates: natural rights arguments, efficiency arguments, and republican arguments.

Firstly, natural rights arguments put forward a categorical justification of private property rights by reference to natural law or to individuals’ moral rights. From that perspective, private property is a natural or moral right, i.e. a pre-political right, insulated from any convention. Private property, therefore, only requires protection against illegitimate interference, whether from the State or from other individuals (or groups of individuals). The roots of these arguments are to be found in John Locke’s *Second Treatise on Civil Government*, where the philosopher claims that if an individual mixes “the *Labor* of his body, and the *Work* of his hands”, that are “properly his”, with an unappropriated thing or land, he thereby transfers the ownership he had in his labor into the thing.⁴ Once all things have been appropriated, property rights can still be acquired through voluntary transfer from one individual to the other. The current state of people’s holdings results from the repeated application of appropriation and transfer rules, as in Nozick’s entitlement theory⁵, and the State has no right to interfere with it. This natural rights doctrine is still popular nowadays, especially in the USA where Lockean libertarianism remains strong, despite important criticisms in Europe.

Secondly, efficiency arguments justify private property as the necessary premise for generating a structure of incentives that will lead to economic

3 - See for instance the last volume of the *Revue interdisciplinaire d'études juridiques*, 81:2, 2018, devoted to: “L’actualité des communs à la croisée du droit de l’environnement et de la culture” (directed by Delphine Misonne, Marie-Sophie de Clippele, and François Ost).

4 - John Locke, *Second Treatise on Government*, chap. 5, § 27 in John Locke, *Two Treatises on Government*, Cambridge: Cambridge University Press, 1988.

5 - Robert Nozick, *Anarchy, State and Utopia*, Oxford: Blackwell Publishers, 1974.

efficiency and ultimately benefit the whole society, including the worst-off. The idea here is that, since private property is a necessary condition for a market economy, and since a market economy produces an abundance of goods and raises the standard of living of the whole population, private property is legitimate because even those who benefit the least from the wealth created are in a better situation than if there were no private property rights at all. As the economic saying goes: "A rising tide lifts all boats". The core of the argument lies in the idea that by securing the fruits of their labor to the individuals, private property encourages hard work, entrepreneurship, innovation and risk-taking behaviors. All those features contribute to growth and economic efficiency. An alternative argument claims that private ownership and free exchange between owners are the best option for allowing individuals to satisfy their various preferences. Indeed, if anyone can buy what he wants with what he owns, it is expected that every individual's own aspirations will be satisfied. In comparison, an economic system where the economy is directed by the State is expected to be less efficient and less able to satisfy the diversity of individual preferences. This line of argument also holds that private ownership is not opposed to the common good. Rather, it claims that it is its necessary condition, since it provides the economic structure for its fulfilment.⁶

Finally, a third category of arguments justifies private property as a means to guarantee individual freedom by securing an individual's right to control the material resources that he needs to live his life as he chooses. For republican arguments, private property is not a natural right or something good in itself, but is rather a means to promote and support individual liberty.⁷ On the one hand, private property is legitimate because it is the necessary condition for effective liberty (a liberty without property is "empty", as Hegel argued).⁸ On the other, private property is a means of protecting the liberty of the individual against private domination. Such relations of domination occur, for instance, when a non-owner has no other choice than to sell his labor (or his body, his freedom, her womb, etc.) for whatever price an employer offers. In this kind of situation, the *absence* of property creates a vulnerability that exposes the property-less individual to the arbitrary power of some capital owner. As supporters of basic capital and basic income claim, private property can be used both as a shield against arbitrary domination, and as a support to develop an independent life. Moreover, in a *republic of equals*, private property is the base of citizenship and individual freedom.⁹

However disputable, those three arguments suggest that it is not enough to reject the idea of private property merely because of the consequences it

6 - Friedrich A. Hayek, *Law, Legislation and Liberty*, Chicago: University of Chicago Press, 1973.

7 - Alan Patten, "The Republican critic of Liberalism", *British Journal of Political Science*, 26, pp. 25-44; Cass R. Sunstein, *Free Markets and Social Justice*, Oxford: Oxford University Press, 1997; Vincent Bourdeau, "Citoyenneté et propriété : une conception républicaine de la propriété", *Diacritica*, 24:2, 2010.

8 - Georg Wilhem F. Hegel, *Principes de la philosophie du droit*, Paris: PUF, 2013.

9 - See for instance: Alan Thomas, *Republic of Equals: Predistribution and Property-Owning Democracy*, New York: Oxford University Press, 2016.

might have in terms of domination, inequalities, alienation, and other forms of injustice. As we have seen, there can be many good, compelling arguments for defending private property. Indeed, it is possible to conceive a system of private property rights that retains the positive effects that the institution generates while minimizing its worst consequences.

Such proposals must take into account both the new challenges and the critiques that have been opposed to the old and classical paradigm that defines private property as a natural and absolute right. It is impossible to list here all the critiques raised against private property, but we can briefly review the most important ones to outline the issues addressed by the authors in the following pages.

To start with, the “obviousness” of this “natural” right has given rise to numerous debates and conflicts in modern political history. In highly unequal societies, 19th century socialists notoriously attacked the abuses caused by the conception that owners have an absolute right to their property. As the socialists claimed, their absolute right easily converted in a relation of domination on whoever needs the resource or anything that is derived from the resource. Given that private property could ambivalently promote individual autonomy or turn into a relation of domination, many authors—like J. S. Mill, Karl Marx, or P.-J. Proudhon—felt an urgency to reform and rethink the institutions defining private property in order to conform them to the ideals they should serve.¹⁰

More recently, liberal-egalitarians, such as John Rawls, have emphasized the fact that it does not make much sense to discuss the legitimacy of individual property rights outside of a sphere of social cooperation. In their view, resources are never produced by a single individual, working alone as Robinson Crusoe did on his island. Rather, they are the result of social cooperation. Therefore, justice imposes that rights to the product of social cooperation, just like duties, are fairly distributed between individuals. For liberal-egalitarians, property is not, in itself, a necessary component of a just society. If individual property is to exist, it cannot be an absolute right, but a secondary right that conforms to the principles of a theory of Justice (and for Rawls, especially to the difference principle).¹¹

Strict egalitarians contend that an equal distribution of resources is the only way to reach a just society. Such a claim undermines Lockean property rights since it reduces and limits the absolute right of the owner over his property. For instance, one cannot accumulate goods in a way that makes it impossible for others to access sufficient resources. Consequently, there is no room left for free-market property arrangements in such models - patterned distributive justice takes the place of justice based on free contracts.¹² From a different perspective,

10 - Karl Marx, *Economic and Philosophic Manuscripts of 1844*; John Stuart Mill, *Principles of Political Economy: With Some of their Applications to Social Philosophy*; Pierre-Joseph Proudhon, *Qu'est-ce que la propriété ?*

11 - John Rawls, *A Theory of Justice*, Cambridge: The Belknap Press of Harvard University Press, 1971, p. 274.

12 - G. A. Cohen, *Self-Ownership, Freedom, and Equality*, Cambridge: Cambridge University Press, 1995.

left libertarian theories start from the axiom of self-ownership, but amend their commitment to a system of private property rights with an egalitarian concern. For those authors, every individual has an equal right to a share of natural resources, or to an equal opportunity for well-being, because those who were not able to appropriate resources (and cannot proceed to such appropriation anymore) have to be compensated for the unfair appropriation of their share.¹³

Besides, contemporary economists and activists invite us to rethink the central role played by property in our societies. Rifkin or Botsman and Rogers, for instance, popularized the idea that technology allows a shift from a “property-based” economy to an “access-based” economy, in which what counts is not the owning of a thing, but access to its function. This idea leads to the development of the so-called functional economy paradigm.¹⁴

Moreover, the challenges towards the very notion of private property are probably nowhere as great as in the realm of immaterial works and inventions, where digitization has led to a vast movement of contestation of the scope, length and desirability of intellectual property rights. For instance, free and open source licenses are built on copyright in order to subvert the “all rights reserved” permission culture and promote a greater freedom of access towards immaterial resources, through building various contract-based *commons* subject to specific use conditions. In this area, intellectual property rights are used as the groundwork for new forms of social and economic models, such as commons-based peer production, that aim at undercutting the traditional exclusivity-based models.¹⁵ Some recuse that the notion of “intellectual property” is even applicable to the immaterial realm, claiming that this somewhat recent appellation serves a maximalist rights protection agenda by creating a confusion between property law and copyright, patent, and trademark laws.¹⁶

In the end, it appears that the property ideology, however silently strong in public debates and social representations, is highly contested. The social developments sketched above raise new challenges to the institution of private property. It has to respond to new critics, and its legitimacy is more than ever in question.

13 - Peter Vallentyne and Hillel Steiner, *Left-Libertarianism and Its Critics. The Contemporary Debate*, London: Palgrave, 2000; Axel Gosseries, “Left-libertarianism and left-hobbesianism”, *Revista Portuguesa de Filosofia*, 65:1/4, 2009, pp. 197-215.

14 - Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where all of Life is a Paid-For Experience*, New York, J.P. Tarcher/Putnam Publishing Group, 2000; Rachel Botsman & Roo Rogers, *What's Mine is Yours: How Collaborative Consumption is Changing the Way We Live*, London: Collins, 2011; Walter R. Stahel, “R&D in a sustainable society”, *Science and Public Policy*, 13:4, 1986, pp. 196-203; Nicolas Buclet, “Concevoir une nouvelle relation à la consommation : L'économie de fonctionnalité”, *Annales des Mines, Responsabilité et Environnement*, 39, 2005, pp. 57-67.

15 - Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven, Yale University Press, 2007; Séverine Dusollier, “The Master's Tools v. The Master's House: Creative Commons v. Copyright”, *Columbia Journal of Law & Arts*, 29, 2006, pp. 271-293; Mikhail Xifaras, “Le copyleft et la théorie de la propriété”, *Multitudes*, 41:2, 2010, pp. 50-64.

16 - Richard M. Stallman, “Did You Say ‘Intellectual Property’? It’s a Seductive Mirage”, *Policy Futures in Education*, 4:4, 2006, pp. 334-336.

This is the purpose of the contributions to this special issue. These contributions look into the extent to which a system of private property rights can be justified from a variety of approaches, such as contractualism, republicanism or left-libertarianism. They intend to draw normative commitments from these non-ideological considerations on private property without either simply rejecting it nor accepting it without any conditions.

The first part of this special issue focuses on the justifications of private property that naturally leads to a discussion of its corollary—the limits of property. To open this special issue, Hillel Steiner (University of Manchester) proposes an analytical answer to the question “Why Private Property?” His argument goes back to the very notion of rights to show that if individual rights are morally necessary, so are private property rights. To make his point, Hillel Steiner starts by asking what is the function of rights? As he argues, in case of morally insolvable conflicts, they allow us to avoid the use of violence to decide which of the conflicting options should be prioritized. Building on his previous work on the topic, he demonstrates that such peaceful conflict resolution is only possible if a set of rights is *compossible*, that is: if all the individual rights and their corresponding duties can occur in the same world. But how to ensure that a set of rights is *compossible*? Hillel Steiner’s answer is: by conceiving of individual rights as private property rights.

Billy Christmas proposes an interesting discussion of a line of argument from Grotius on the right to exclude. Considering that it is essential to the idea of full liberal ownership that the owner may exclude others from using his property altogether, he argues that it is this aspect of ownership that is often so mystifying. Critics of private property often point to the indetermination of this right by any account of our natural right to the Earth’s resources. Indeed, the justifications for the acquisition of such an extensive right to exclude all others from an object usually add mystery to the idea, rather than remove it. Billy Christmas argues that private property can emerge through unilateral use without recourse to communal consent: to the extent that we have the right to use the external world, we also have the right to privately appropriate it.

By contrast, Jean-Fabien Spitz defends the view that the existence and extension of property rights should, indeed, be grounded on something like communal consent. His contribution discusses the Lockean justification of the right to exclude others. He argues, like Billy Christmas, that rights of ownership are a kind of miraculous transmutation. They allow the owner to exclude all other people even from things he does not need or touch. Despite its advantageous consequences for owners, the injustices created by this right to exclude leads the author to conclude that property rights can only extend to the point where they are advantageous to all, and thus, rationally acceptable by all.

Finally, Karl Widerquist’s contribution is not so much about consent, but about dissent: how could a property regime be justifiable to those who do *not* consent to it? Dissatisfied with how contractarian theories treat dissenters, the author argues for a theory of Justice as the Pursuit of Accord, which requires literal (and not assumed) accord, as well as a just treatment of dissenters.

According to Widerquist, the most plausible way to minimize the negative impact on dissenters of an accord on a given property rights arrangement is to provide everyone with the highest sustainable basic income. By considering the best way to treat those who are left out, and constantly thriving to bring more people into accord, Widerquist proposes a property theory that takes into account human deficiencies, and thereby addressing a necessary limit of any theory of justice.

The second part of this special issue revolves around unusual liaisons. As in many fields, the literature on property is often compartmented into various schools that rarely interact with each other. The contributions gathered in this second part propose to do just that by confronting different approaches to property rights. They seek to emphasize either their points of agreement, their continued relevance, or a new internal critique inspired by external influences.

While libertarians and egalitarians are often thought to be radically opposed on the relation between liberty and equality, Victor Mardellat claims that an adequate analysis of “justice in holdings” shows that this conflict is overstated. In his paper, he intends to dissipate this dilemma between liberty and equality by justifying, along contractualist lines, the introduction of moral limits on private property rights that would prevent morally unacceptable social and material inequalities from arising without threatening these rights’ ability to protect the diverse interests in liberty that make property rights so important.

Gavin Kerr proposes an original critique of how defenders of *laissez-faire* capitalism conceive property rights. His discussion of the neo-classical liberalism of authors such as Schmidtz, Brennan and Tomasi, focusses on the conditions that may or may not be attached to the enjoyment of private property rights in land and natural resources. He argues that neo-classical liberals fail to guarantee an effective protection of private economic liberty. Indeed, as the author argues, it is reasonable to expect that the institutions of orthodox *laissez-faire* capitalism will create social conditions in which the private economic liberty of a large portion of citizens will be systematically undermined. To avoid this conclusion, he recommends a shift in the burden of taxation from productive economic activity to the rental value of land on the basis that such a tax-shift would enhance the protection of private economic liberty.

Finally, we close this special issue with the transcript of a roundtable discussion between the keynote speakers of our conference. As an opening to this conversation, Philippe Van Parijs asked Hillel Steiner, Jean-Fabien Spitz and Karl Widerquist what is the role, if any, of private property in their own theory of justice? After exploring their disagreement on the legitimacy of private property in contemporary societies, the conversation explores the new challenges raised by intellectual property rights and the digital economy. The discussion concludes with a few selected questions by members of the audience that help enlighten the proper role for property in a theory of justice.

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