Property and (Perhaps) Justice. A Review Article of James W. Harris, Property and Justice *and James E. Penner,* The Idea of Property in Law

James W. Harris, *Property and Justice.* Oxford: Clarendon Press, 1996. Pp. xxvi, 387 [hardcover $154]. James E. Penner, *The Idea of Property in Law.* Oxford: Clarendon Press, 1997. Pp. viii, 240 [hardcover $112].

Reviewed by David Lametti*

Discussions of property have typically revolved around two large, axiomatic issues: first, an inquiry into the nature or concept of property and second, an inquiry into the justification (or an explanation of its origins) of the institution of private property and the related discussion of the relationship between property and justice. Two recent and major contributions in this area come from books by James Harris, *Property and Justice* and James Penner, *The Idea of Property in Law.* In discussing these axiomatic issues (or in Penner's case, choosing *not* to discuss one of them and justifying the approach), both authors advance important substantive claims. As such, each text is a welcome addition to the current jurisprudential discourse illuminating the understanding and justification of this bedrock institution of Western society.

The scope of this review article is restricted to the second axiomatic issue: the question of the justice and justification of private property. It is the author's view that both books understate the idea that private property discourse necessarily includes elements of duties, obligations and goals; what the author labels property's *deon-telos.* Using Harris and, to a lesser extent, Penner as foils, the author tries to identify the underlying dominant rights-based assumptions behind the modern discourse of justification. He also highlights the way in which a stronger focus on *deon-telos* might alter the balance of reasons in this discourse.

Les discussions sur la propriété ont généralement gravité autour de deux questions axiomatiques importantes: d'abord, une étude de la nature ou du concept de propriété; ensuite, une étude des justifications (ou des explications de ses origines) de la propriété privée et du lien entre la propriété et la justice. Les livres *Property and Justice* de James Harris et *The Idea of Property in Law* de James Penner sont deux contributions aussi importantes que récentes venant alimenter ce domaine. En discutant de ces questions axiomatiques (ou, dans le cas de Penner, en choisissant de *ne pas* aborder nne des deux et en expliquant ce cboix), les deux auteurs exposent d'importantes assertions sur l'essence du droit. En tant que tels, les deux ouvrages sont d'heureux ajouts au discours philosophique illuminant la compréhension et la justification de cette institution des plus fondamentales de la société occidentale.

La portée de cet article se limite à la seconde question axiomatique, celle du caractère juste et de la justification de la propriété privée. L'auteur est d'avis que les deux livres sous-estiment l'idée selon laquelle le discours sur la propriété privée inclut nécessairement des devoirs, des obligations et des buts ; ce que l'auteur nomme *deon-telos.* En utilisant les idées de Harris et, dans une moindre mesure, celles de Penner, l'auteur tente d'identifier les postulats dominants de la discussion juridique moderne de justification. Il souligne aussi le fait qu'nne plus large attention portée au *deon-telos* modifie l'équilibre des arguments nourrissant cette discussion.

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I. Introduction

Some of the most important questions that any polity can ask revolve around issues of property. What is property? Or, more specifically, what is *private* property?[1] What are its characteristics — descriptive as well as normative? Can it be explained or justified in whole or in part? How should property be used and distributed? Should it be embodied in law, and if so, how? Treatises in political and legal philosophy that focus primarily, or in part, on property have addressed some or all of these questions to varying degrees. Taken together, these writings comprise some of the core texts in the canon of Western legal and political theory: Plato's *Republic*; Aristotle's *Politics*; Locke's *Second Treatise*; Rousseau's *Discourse on the Origins of Inequality*; and Hegel's *Philosophy of Right*.[2]

More recently, there has been a spate of new works on property. They range from in-depth reflections on the general theory of property by authors such as James O. Grunebaum, Jeremy Waldron, John Christman and Stephen Munzer,[3] to more specific monographs and collections of essays like those by Margaret Jane Radin and Carol Rose,[4] to a variety of shorter essays on more specific property topics, often written from diverse perspectives.[5] These studies pick-up on the traditional questions and state some now familiar conclusions.

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[1] In both lay and legal discourse, the general term "property" is used at once to refer to both the objects or subject-matter of property (*i.e.*, property-as-thing or property-as-resource) as well as the ways in which it can be held or the factual or juridical relationship persons have to the objects of property (*i.e.*, property-as-relationship). According to Harris, *infra* note 7 at 10, the use of the term "property" for the objects of property dates back to the seventeenth century. The term is also used interchangeably with "private property". In what follows, I hope the context makes each usage of "property" clear; where such is not the case, I shall try to specify. In general, though, I shall use "property" to mean "private property" unless otherwise noted, and I shall try to maintain the distinction between property and one institutional manifestation of a private-property entitlement, namely "ownership".

[2] For an overview of the canon, see R. Schlatter, *Private Property: The History of an Idea* (London: Allen & Unwin, 1951).

[3] See J.O. Grunebaum, *Private Ownership* (New York: Routledge & Kegan Paul, 1985); J. Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988); J. Christman, *The Myth of Property* (New York: Oxford University Press, 1994); S. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990). See also earlier works of importance: L.C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977); A. Ryan, *Property and Political Theory* (Oxford: Blackwell, 1984).

[4] See M.J. Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993); C. Rose, *Property and Persuasion* (Boulder: Westview, 1996). See also the following collections of works by different authors: J.R. Pennock & J.W. Chapman, eds., *Property: NOMOS XXII* (New York: New York University Press, 1980) [hereinafter *NOMOS XXII*]; A. Brunder, ed., "Property" (1993) 6 Can. J. L. & Juris. 183; E.F. Paul, F.D. Miller & J. Paul, eds., "Property Rights" (1994) 11 Social Phil. & Pol. 1.

[5] Works from specific or non-traditional perspectives include, for example: B. Edgeworth, "Post-Property?: A Postmodern Conception of Private Property" (1988) 11 Univ. N. South. Wales L.J. 87; J.L. Schroeder, "Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property" (1994) 93 Mich. L. Rev. 239; H.-H. Hoppe, *The Economics and Ethics of Private Property* (Boston:

Discussions of property have typically revolved around two large, axiomatic issues: first, an inquiry into the nature or concept of property and second, an inquiry into the justification (or an explanation of its origins) of the institution of private property and the related discussion of the relationship between property and justice. The first discussion poses the question "what is property?" and answers it by undertaking a descriptive and analytic exposition of property's basic conceptual characteristics and features. Most expositions conclude that property — using the term "property" to identify a relationship one has with both material wealth and with others — is a group or "bundle" of rights that one might exercise over property, here using the term "property" to signify the tangible or intangible item of material wealth which is the object of the bundle of rights.[6] The inquiry into the nature of private property may also help to position the institution in a larger scheme of private law ordering, or argue against such coherence. The second discussion asks if and how private property can be justified, and then analyses the (usually distributive) implications for the imperatives of justice flowing therefrom. Justificatory discussions often take the form of an explanatory narrative of the origins of private property. Such narratives may be historical or hypothetical. Most works of this type point out the inadequacy of any one type of justification for private property, such as the problems raised by a first acquisition theory or a labour theory of property, and may even conclude that there is a plurality of justifications or explanations for private property.

Two of the most recent and major contributions in property theory come from writers based in the United Kingdom: James Harris's *Property and Justice*[7] and James Penner's *The Idea of Property in Law*.[8] Both of these monographs build upon the strong property treatises emanating from the tradition of Oxford analytic jurisprudence and published at the Clarendon Press.[9] In discussing these axiomatic issues (or in Penner's case, choosing *not* to discuss one of them and justifying the approach), both authors advance important substantive claims. As such, each text is a welcome addition to the current jurisprudential discourse illuminating the understanding and justification of this bedrock institution of Western society.

Property and Justice is a comprehensive legal and philosophical analysis of the concept of property in the Common Law. Harris attempts to shed jurisprudential light

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Kluwer, 1993); M. Sagoff, *The Economy of the Earth* (Cambridge: Cambridge University Press, 1988). See also earlier works of importance: H. Demsetz, "Towards a Theory of Property Rights" (1967) 57 Am. Econ. Rev. 347; G. Calabresi & A.D. Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv. L. Rev. 1089.

[6] The exceptions are Schroeder, *ibid.*, and, as we shall see, Penner, *infra* note 10. On the use of the word "property" as both object and relationship, see *Deon-Telos*, *infra* note 12 at c. 2.

[7] J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996). Harris is a Professor of Law at Oxford and Fellow of Keble College.

[8] J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) [hereinafter *The Idea*]. Penner, originally Canadian, is a Lecturer in Law at the London School of Economics.

[9] Most notably see Waldron, *supra* note 3, the base text by F.H. Lawson & B. Rudden, *The Law of Property*, 2d ed. (Oxford: Clarendon Press, 1980) and the seminal article by A.M. (Tony) Honoré, "Ownership" in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961), and more recently in A.M. Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987).

on both of the central preoccupations of property theorists. In addressing the descriptive and normative characteristics of private property, Harris offers a new set of analytic and foundational categories; a property institution, he suggests, consists of both the "ownership spectrum" and "trespassory rules". On the question of the justification of private property, Harris presents a powerful analysis of the various justificatory and explanatory arguments for the existence of property institutions in modern Western society. This work is remarkable from any perspective; it has a wide scope and profound depth, and provides original ways of thinking about property and discussing its implications for justice.

In *The Idea of Property in Law*, Penner ostensibly focuses on only the first line of inquiry, the nature or concept of property. As a result, *The Idea* is formally narrower in focus but substantively as wide in scope as *Property and Justice*, going to the very heart of the way property is conceived in Western legal traditions. Consequently, a great deal may be inferred about the justification of private property. In a previous work published in the *UCLA Law Review*, Penner offers a unique perspective on the nature of property, calling into question the long-held view that property consists of "bundles of rights".[10] Instead, he applies the criterial notion of "family resemblances", the origins of which lie in the thought of Ludwig Wittgenstein, as a primary means of understanding and describing the institution of private property. In *The Idea*, Penner builds on this base, reiterating the argument that the focus of the law of property should be on "things", and describing the criterion of "separability" as a means of identifying them. He follows the analytic jurisprudence of H.L.A. Hart and Joseph Raz,[11] seeking to situate and explain the property relationship in its natural "environment" as part of a normative system of rules, rights and duties. In doing so, Penner also offers new foundational tools, characterizing property relations in terms of a general duty of non-interference, which he calls the "exclusion thesis". Together with the "separability thesis", the exclusion thesis describes the central features of the institution of private property. These features help to vindicate the common-sense view that property is what we all think it is: a right to a thing.

In trying to shed light on one or both of property discourse's two central themes, these works have undertaken monumental tasks — tasks to be taken seriously by the legal philosopher and property theorist. With respect to the first axiomatic issue, the substance of each author's argument for the most part succeeds in advancing our understanding of the descriptive and normative characteristics of this fundamental institution. Despite these merits, however, both Harris and Penner have understated a critical aspect of the concept of property: that of private property's duties, responsibilities

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[10] J. Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 U.C.L.A. L. Rev. 711 [hereinafter *The Bundle Picture*]. In my view, *The Bundle Picture* is a necessary piece of the larger idea in *The Idea*, and one must read the former to understand the latter. If there is ever a second edition of *The Idea*, one would hope for a complete integration of Penner's two works.

[11] See generally H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994); J. Raz, *The Concept of a Legal System*, 2d ed. (Oxford: Clarendon Press, 1980); J. Raz, *Practical Reason und Norms* (London: Routledge & Kegan Paul, 1975).

and obligations, whether they are free-standing or in service of societal goals and values. This is what I have called the "*deon-telos*" of private property.[12]

The primary focus in this review article is not the first axiomatic property inquiry described at the outset, the inquiry into the nature of property. What might be perceived as the flaws in the descriptive projects of Penner and Harris will not be addressed as these issues have been dealt with elsewhere, as have their ties to the moral, normative discourse in which the *deon-telos* of private property plays a necessary part.[13] Rather, the scope of this review article is restricted to the second axiomatic issue: the question of the justice and justification of private property. The omission of *deon-telos* by Penner and Harris is most evident in the discussion (or deliberate non-discussion) of justification; it is this aspect of the analysis in these two monographs which this review article shall pass through the filter of *deon-telos*. An identification of the underlying dominant rights-based assumptions behind the modern discourse of justification will be discussed using Harris and, to a lesser extent, Penner as foils. Furthermore, a stronger focus on *deon-telos* might alter the balance of reasons in this discourse.

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[12] See D. Lametti, *The* Deon-Telos *of Private Property* (tentative title of D.Phil. thesis in progress, Oxford University, on file with author) [hereinafter *Deon-Telos*].

[13] I discuss these issues in detail in "The Normativity of Private Property" [unpublished, on file with author] [hereinafter "Normativity"] and in *Deon-Telos*, *ibid.* at c. 6. In that work, I am once again using Harris and Penner as foils, this time for the purpose of articulating a first argument on the source of property's normativity and its place in private law theory. To state my conclusions briefly, Harris's attempt at describing the institutional characteristics of private property has adeptly identified its components. Yet the descriptive importance of the various component parts reflects certain normative assumptions that, in essence, are rights-based. In my view, an expansion of the purview of these assumptions, by recognizing explicitly that the source of property rules is ultimately moral, will better describe the institution. Similarly, Penner's attempt to find an internal and unique normativity to private property is predicated on more strident rights-based assumptions than is Harris's analysis, with the same result. Both writers, however, have played a critical role in advancing the description of private property and the normative discourse underlying it.

In addition, Harris has implicitly identified, in the structure of his monograph, what I believe is a fundamental truth: there is a discourse justifying private property which underlies property. The dialogne of justification explains the shape of the property institution in any given society. As such, the structure of Harris's argument identifies the source of normativity of private-property rights and duties as embedded in justificatory discourse. If correct, this identification may even help clarify what is unique about property norms in contradistinction to the source of normativity in other areas of private law ordering: contract, tort, and perhaps restitution. These other areas of private law may very well be understandable in formal terms as having an immanent rationality and normativity based on a Kantian form of equality and Aristotelian corrective justice, as argned by Ernest Weinrib in *The Idea of Private Law* (Cambridge: Harvard University Press, 1995). Private property's normativity, on the other hand, finds its source in a necessary morality which is grounded in the fact that property rules are fundamentally distributive. While a tort or contract paradigm can presuppose a distribution which can then be "corrected" where transgressions occur, the property paradigm cannot make such distributional presuppositions, but in theory and practice must *explain* them. This necessity forces a society to refer continually to the discourse justifying private property.

A. *The* Deon-Telos *of Private Property*

As will be argued in Parts II and III, both Harris and Penner are, in essence, "rights-based"[14] theorists who hold, consciously or unconsciously, that the ultimate basis of private property is to be grounded and explicable in terms of rights. These rights are anchored to a large extent in the notion of personal autonomy. That is, property rights protect interests which ultimately foster the ability of individuals to make meaningful choices in their lives.[15] While these rights-based aspects of private property are, in my view, a necessary part of both the description of private property and its ultimate justifications, they are insufficient on their own. A rights-based discourse does not capture the totality of the property picture. In particular, it does not adequately describe those aspects of the institution whose presence is not explainable or understandable in terms of rights. More specifically, the idea of private property con-

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[14] The terms "right-based", "duty-based" and "goals-based" come from R.M. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 171. Dworkin argues that goals, rights and duties may all serve to justify political decisions. That is to say, each of the three justifications can serve as a complete basis for political action. Sometimes the different pairings of rights, duties and goals are correlative; for example, a right to privacy and a duty to respect that right. However, they need not be correlative; more importantly, it is often the case that the justifications are derived from each other. Thus an initial justification for political action will ultimately lead to a further examination, at deeper levels, of its own justification, and so on. These more basic justifications can be appeals to rights, goals or duties. In this way, Dworkin says, more basic goals can justify a complex web of other goals, rights or duties, as can more basic rights or more basic duties. In the end, a political theory can be traced to and based on an ultimate notion of right, duty or goal:

> Political theories will differ from one another, therefore, not simply in the particular goals, rights, and duties each sets out, but also in the way each connects the goals, rights and duties it employs. In a well-weighted theory some consistent set of these, internally ranked or weighted, will be taken as fundamental or ultimate within the theory. It seems reasonable to suppose that any particular theory will give ultimate pride of place to just one of these concepts; it will take some overriding goal, or some set of fundamental rights, or some set of transcendent duties, as fundamental and show other goals, rights and duties as subordinate and derivative (*ibid.*).

It is upon this "reasonable supposition" that Dworkin grounds his tentative initial classification. It follows, then, that for a goal-based theory, some goal or set of goals is fundamental, like improving the general welfare; for a duty-based theory, some duty or set of duties is fundamental, like those set out in the *Decalogue*; and for a right-based theory, a right or set of rights is fundamental, like the right of all persons to the greatest possible liberty. "Pure" or "nearly pure" examples of each theory are given by Dworkin: utilitarianism is an example of a goal-based theory, Kant's categorical imperative is a duty-based theory, and Thomas Paine's theory of revolution is a right-based theory.

Finally, both "rights-based" and "right-based" are used in the literature, often interchangeably. Following what I believe is the spirit of Dworkin's chosen example, I will use "right-based" in connection to those rights-based (traditional deontological) theories which refer to a universal, formal principle of Right, such as Kant's. More generally, I will use "rights-based", taken to mean a larger category of such theories based on individual rights. What I call a "rights-based" analysis has been explicitly applied to property arguments by Waldron, although his study employs "right-based", *supra* note 3 at 3ff.

[15] The most notable writer in this tradition with respect to understanding both Harris and Penner is Joseph Raz: see J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). Penner most clearly follows Raz: see *supra* note 8 at 204; Harris does so less explicitly: see *supra* note 7 at 172-73.

tains not only rights but also specific and general duties and obligations which cannot be adequately explained in terms of correlative rights and duties between and among individuals. These understated or neglected elements of property discourse are captured by the idea of *deon-telos*.

The *deon-telos* of private property includes what one might label the "deontology of private property". The *deon* of *deon-telos* — from the Greek, meaning "duty" or "that which binds" — identifies specific duties and responsibilities contained in legal property norms and their justification, emanating from a variety of sources, whether universal imperatives or more specific types of moral and ethical duties. On the other hand, the *telos* of *deon-telos* — from the Greek, meaning "goal" or "end point" — refers to the inclusion of societal goals and values in the discourse of private property and is, perhaps, the integral component of this definition. That is, I view as part of the *deon-telos* of private property the societal goals which the institution of private property is meant to serve. What one might ordinarily call the "teleology of private property" is in part utilitarian: a particular goal may be the simple good administration of society, or may be more substantively concerned with the fostering of certain individual and collective goods or virtues. In either case, however, the institution of private property is placed at the service of larger purposes, in theory and in practice. Therefore, a substantial part of the institution's explanation or justification must be assessed in moral functionalist terms. That is not to say that all duties, or even the most important duty-based aspects of private property, find their origins in societal goals. Indeed, some duty-based imperatives might influence the framing of societal goals and values traditionally considered goal-based. The component parts of private property grounded in either traditional deontology or traditional teleology are often interrelated. For this reason, the traditional labels of deontology and teleology are difficult to apply, and necessitate a new term: *deon-telos*.[16] In short, the relationship between

[16] As the neologism indicates, I am trying to capture a multiplicity of justifications which do not fall exclusively into one or the other of the two branches of the dichotomy of theories of right action postulated in the tradition of analytical philosophy: deontological and teleological. Briefly, traditional deontological theories hold that there are certain acts which are wrong in and of themselves regardless of any consequences that might result from those acts. Agents act rightly when they do not commit those acts which are wrong, accepting that certain constraints or rules limit their actions. The determination of right and wrong, and the subsequent demarcation of constraints on action, might come from common moral intuitions or religious imperatives, or from a more fundamental, universal moral principle. This latter is usually Kant's Categorical Imperative, or a derivation or recasting of it. See I. Kant, *Foundations of the Metaphysics of Morals*, trans. L.W. Beck (New York: MacMillan, 1985) at 3-94. For a neo-Kantian account in moral theory, see A. Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977); in political theory, see J. Rawls, *A Theory of Justice* (Boston: Harvard University Press, 1971). In contrast, traditional teleological theories do not consider actions as intrinsically right or wrong, but rather require the assessment of actions in terms of their consequences. Actions are right only insofar as they produce positive or more positive results, and, specifically, the advancement of certain values. This analysis of actions might be framed in terms of the comparative assessment of values or the more regimented calculation of costs and benefits, aimed at maximizing utility. Teleological theories are often termed "consequentialist", particularly those teleological theories that are "utilitarian", *i.e.*, aimed at the maximization of utility.

goals and duties — and rights, too, of course — is a rich and complex one. So, in addition to traditional deontological rights and their correlative duties, other goals, duties and responsibilities whose sources are both teleological and deontological serve at once to help demarcate private property norms from other norms, and define the limits on the exercise of property rights.

Those aspects of private property captured by the rubric of the *deon-telos* are an intrinsic component of the concept of private property itself; any discussion of private property, whether in theory or in practice, is incomplete without them. Rights-based theories not only fail to capture this richness, they also lack the ability to discern a larger coherence among all these aspects of the institution. Without these elements, the explanatory force of any descriptive project is weakened. What is more, the rights discourse itself, by characterizing private property only or primarily in terms of rights,

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Strictly speaking, the traditional deontological/teleological divide is supposed to apply to theories of right action; the dichotomy is a subdivision of what political philosophers call "the Right" (see P. Pettit, "The Contribution of Analytical Philosophy" in R.E. Goodin & P. Pettit, *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993) 7 at 30ff.). Others have taken the schema further. John Rawls has quite famously applied this schema not as a subdivision of the Right, but effectively as a synonym for another traditional dichotomy in ethics, that of "the Right" and "the Good". In this application, teleological theories place the Good ahead of the Right, while deontological theories place the Right before the Good. A great deal of modern political and ethical discourse has followed suit. Much of the debate between liberals and communitarians takes place on these terms, the former advancing the Right over the Good, while the latter advance the Good over the Right. Michael Sandel, for example, has adopted Rawls's categories in his general critique of deontological liberal theories of the right, and of Rawls's theory in particular (see M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Harvard University Press, 1982)).

In their monistic forms — that is, where each approach appeals to a singular principle such as the Kantian Categorical Imperative (for traditional deontological theories) or utility (for traditional teleological theories) — both of these views attract debilitating criticism. In a sense, the extreme forms of each view are mollified by the other; there are instances where right action results in disastrous consequences or where the pursuit of consequences beneficial to the greater good require quite drastic restrictions of individual action or violations of individual rights. Thus, there is a strong intuitive basis for arguing that both fail to capture sufficiently either moral action or ethics generally. There are some aspects of traditional deontology in teleological theories and vice-versa. Put another way, there may even be some types of the Good or the Right that are linked to each other. Also, there are some ethical considerations which are genuinely different between both theories. A number of ethical theorists have argued for a wider consideration of ethical inputs. See *e.g.*, B. Williàms, *Ethics and the Limits of Philosophy* (Cambridge: Harvard University Press, 1985) at 15-18. Some have, in the neo-Aristotelian tradition, called the alternative approach "virtue ethics", focussing on concepts such as respect, sympathy, loyalty and fidelity. See *e.g.*, O. O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), and C. Taylor, *The Sources of the Self* (Cambridge: Harvard University Press, 1989). For my part, I take no position on these debates. With respect to the argument which follows, it is fair to take as a given that such moral ground exists, even if one might argue about its contours. "Deon-telos" is a placeholder for this space.

Theories that are commonly called "right-" or "rights-based" usually fall into the traditional deontological category. When a right is a trump card held by an individual, it serves as a constraint on action over and above all possible values that might be promoted in violating that right. What is more, rights-based theories often represent the monistic type of deontological theory, having ultimate recourse to a single universal principle, that of individual human rights.

forces these other, ever-present deontological and teleological elements of this institution into the background.[17] The same is also true, I believe, of the arguments used to justify private property: rights-based arguments in favour of private property do not succeed in justifying the whole of the private property institution.

B. The Pluralistic Justice and Justification of Property: Rights and Deon-Telos

As a result of the *deon-telos* manifested by the institution of private property, a central question of property discourse must be whether, at the level of justification, private property can be ultimately or adequately justified in terms of rights alone. I have argued elsewhere that this is not possible.[18] To summarize, while these non-rights-based elements of the institution of private property exist in practice, and while various theoretical works allude to them or incorporate them, these duties and obligations are often treated as a random, less-than-coherent part of the institution in practice. Theoretically, they are treated as unconnected or even extrinsic to the institution.[19] Yet they are ubiquitous in practice and, in theory, play an important and systematic role in justifying private property and explaining its origins, its distribution and its usage. As a result, rights-based theories are inadequate to explain private property, missing not only aspects of the institution that serve important societal values and goals, or what one might call "goal-based" justifications, but also the aspects that one might call "duty-based" justifications, requiring certain types of conduct with respect to specific resources. These latter obligations are present whether they serve values in society or whether they are grounded in more individualized theories of right action. It is these non-rights-based justifications for private property (as well as their manifestation in legal practice) that I am trying to identify, bring to the fore, and group under the label *deon-telos*.

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[17] Some might argue that private property norms (and justifications) might still be *articulated* in terms of rights, independent of whether the institution can best be understood as grounded primarily in the substance and discourse of individual rights. For example, John Finnis attempts to articulate aspects of his conception of Natural Law in terms of rights in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1981). Extreme care must be exercised in doing so, as the resort to the language of rights will likely precondition or even distort one's view of the explanation or justification: see generally V. Kerruish, *Jurisprudence as Ideology* (London: Routledge & Kegan Paul, 1991). One might question whether Finnis is indeed successful in remaining true to the Natural Law tradition: see D. Beyleveld & R. Brownsword, *Law as Moral Judgement* (Sheffield: Sheffield Academic Press, 1986). For an illustration of the pitfalls of articulating a non-rights-based theory in terms of rights, see my views of the discussion on Hegel undertaken by Waldron, *supra* note 3 in *Deon-Telos*, *supra* note 12 at c. 4.

[18] I make this argument formally in *Deon-Telos*, *supra* note 12 at c. 4, 5. Even rights-based writers have pointed out the shortfalls of rights-based theories and arguments: see *e.g.*, Waldron, *supra* note 3 at 3-5, 127-32.

[19] See *e.g.* Harris, *supra* note 7 at 33, who identifies these elements as part of the institution, admitting they usually exist in virtually every private property institution, but still labels them as not conceptually tied to the institution.

The recent monographs by Harris and Penner help to illustrate my argument. The fact of working within the rights-based paradigm causes both Harris and Penner to miss or mis-characterize important aspects of the institution of private property. In Part I of *Property and Justice*, Harris tries to describe the various components of private property in neutral terms. In Part II, he gives an assessment of various arguments justifying and dis-justifying private property. In *The Idea* (as well as in *The Bundle Picture*), Penner attempts to describe the property institution and its inherent normativity. In each case, the omission of an understanding of property's *deon-telos* has a significant impact. Despite Harris's attempt at neutral description, his underlying assumptions about private property are omnipresent in his descriptive analysis. For example, his classification of elements as intrinsic or extrinsic to the institution is in large measure determined by the rights-based paradigm. As John Finnis has argued, such descriptive judgments of importance and significance cannot be made neutrally.[20] Even in a descriptive project, the determination of which aspects of any given institution are more important or significant requires analytic decisions which cannot be made independent of the observer's own bias. For example, Harris evaluates certain property institutions in Part I of *Property and Justice*, positing that some are more central than others. The same is true of Part II, where the assessment of various justifications and dis-justifications for private property is predicated on a minimal view of justice, which as argued below, is, in essence, rights-based. Thus, even a work as intellectually balanced as Harris's monograph might have unwittingly illustrated the pitfalls of working within the rights-based paradigm. Similarly, Penner's attempt to capture the essence of private property and an inherent normativity is flawed by the assumption of a rights-based paradigm. This causes him to miss what in my view is the ultimate source of normativity for private property: the discourse of justification which at once incorporates and balances rights and *deon-telos*. Therefore, both Harris and Penner need to ask explicitly why certain rules are the way they are in order to show the purposes behind private property as the method chosen by a society to allocate and regulate social wealth and the obligations attached to that social wealth. This will require them to build an idea of *deon-telos* into their pillars or base criteria of private property. As this idea is ultimately the foundation for their pillars, its inclusion cannot but strengthen their analysis and insights.

In *Property and Justice* in particular, these understated elements of private property discourse — the role they play in justifying, explaining, and understanding the implications of private property systems — could be explicitly added without undermining the fundamental insights Harris offers. The justification for private property will ultimately be found in a mix of rights-based, duty-based and goal-based arguments. Phrased another way, it will be found in a mixture of reasons aimed at promoting individual rights and the duties and goals of both communities and individuals. Rights-based arguments will continue to play a role — perhaps even the lead role — in this ongoing drama. As Harris does posit a plurality of justifications, and even implicitly allows some scope for *deon-telos*, the suggested correctives go mainly to

[20] See *supra* note 17 at 11-18.

the weighing and reweighing of certain justificatory arguments. As such, this review article represents a tune-up more than an overhaul.

The rights-based assumptions underlying *The Idea of Property in Law* are stronger and thus more problematic. In my view, Penner needs first to engage in the justificatory discourse and, once engaged, take the concerns of property's deontology and teleology into account. As it stands, Penner does not even take the first step, arguing instead that such justification is not necessary. The result is that he is able to reach only a partial and inadequate understanding of the role of private property in social and legal ordering. In the end, though, my sense is that both writers are too rights-based to be comfortable taking property's *deon-telos* more seriously in the structure of their work.

II. The Need to Justify Private Property

Justifying (or dis-justifying) the institution of private property has become something of a cottage industry. Despite the number of works — including those recent monographs cited at the outset of this review article, and in particular the important contributions of Lawrence Becker, Jeremy Waldron, Stephen Munzer and John Christman[21] — we have still not reached the end of this industry's economic cycle, and probably never will. There are a number of reasons for this.

If we begin from the assumption that all human beings should be treated as presumptively equal, it follows that human beings should have some opportunity to share in the world's physical resources or social wealth.[22] However, those same resources are limited, either by nature or by design;[23] moreover those that do exist are unevenly distributed — some might say perpetually so. There is a long-standing acknowledgment of the powers that are attached to private property, in particular, powers accorded to individuals as against both the community and other individuals. Long before left-wing sceptics railed against the vicissitudes of private property, mainstream political, religious and social writers had identified the relationship between property and power.[24] It is fair to say that the type of property rights historically accorded to individuals in a given society bears directly on the existence and shape of that society's political institutions. According to Harris:

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[21] See Becker, *supra* note 3; Waldron, *supra* note 3; Munzer, *supra* note 3; Christman, *supra* note 3.

[22] As Harris points out, see *infra* note 55 and accompanying text.

[23] What Harris calls "ideational goods", the subject-matter of intellectual property, have a set of quantitative limitations or scarcity which is artificially created and enforced by property rules (*supra* note 7 at 43).

[24] This is clear in some of the oldest debates on the origins and justification of property: those between the Avignon popes and Dominican friars on the one hand, and the Holy Roman Emperor and Franciscan friars, on the other. All sides in the discourse knew that along with temporal possessions went temporal power. For a colourful introduction to these views, see the various passages in Umberto Eco's novel *The Name of The Rose*, trans. W. Weaver (New York: Warner Books, 1983) at 337ff., where the substance of the debate over the poverty of Christ and the Church, as well as some of its principal interlocutors — Pope John XXII, Marsilius of Padua, William of Ockham — are described and identified.

> Private property is controversial for the same reason that it is commonly prized. It emphasizes the individuality of the property-holder. A property institution at least confers some private domain over some scarce things, so that the separateness of persons is made evident in the face of collective decision-making. But that domain necessarily confers some power over others and hence is distributionally problematic.[25]

There are alternative schemes for the distribution and control of social wealth: common property and state property, for example. These alternatives need not be unsophisticated and restricted to "primitive" societies, as Harris points out. For example, one might combine licensing schemes and temporary rights akin to ownership rights for limited periods of time, all under the auspices of a state property system. Or one might hold some types of goods in common, with other resources being subject to a different scheme of distribution and control. As a result, unless there is a natural right to *private* property, it remains but one option for the social ordering of resources. Consequently, we need to articulate why private property is the best system to choose from among the alternatives.

It would seem, then, that this distributive aspect of private property requires the institution to be continually justified and rejustified in light of the idea of natural equality, the recognition of private property's relationship to power, and the presence of alternative structures.[26] Harris, in Part II of *Property and Justice* entitled "Is Property Just?", addresses these questions as they pertain both to the existence and form of private property. He first posits three "minimal" assumptions about justice as a basis for society, and then analyzes the property institution. In this context, Harris identifies and assesses the persuasiveness of the various traditional arguments for private property.

The Idea is less concerned with the issue of justification. Contrary to other writers who address distributive issues — notably Waldron, Munzer and, presumably, Harris[27] — Penner does not believe anything useful will come from this discussion. Penner's claim is that the study of the normativity of private property can be undertaken without recourse to any external justificatory argument. Rather, a normativity which is internal to the institution can be identified, and property rules can be framed and understood in light of this normativity.

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[25] *Supra* note 7 at 165.

[26] Indeed, Waldron, *supra* note 3 at 51-52, goes so far as to categorize private property as an "essentially contested concept." According to philosopher W.B. Gallie, a concept is "essentially contested" when the correct usage of the concept necessarily attracts a debate amongst users of that concept about the correct usage of the concept itself: see Waldron, *supra* note 3 at 51, n. 51, 52, citing W.B. Gallie, "Essentially Contested Concepts" *Proceedings of the Aristotelian Society 1955-1956*, vol. 56 (London: Harrison & Sons, 1956) at 167. For an argument claiming that property is generally justified according to societal goals (especially those of the dominant class), and that these goals will change over time, see C.B. MacPherson, "The Meaning of Property" in C.B. MacPherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) at 1-2, 11-13.

[27] Waldron and Munzer are specifically mentioned by Penner at various points. *Property and Justice*, Harris's most recent work, is not cited by Penner, but presumably he would include Harris among those writers who are characterized as unfruitfully looking at distributive issues.

Choosing between these two very different views on justice and justification, I believe one should prefer Harris's position. Penner's analysis, it seems to me, makes some critical assumptions about both the justification and paradigmatic characteristics of private property, assumptions which are by no means uncontroversial. These assumptions are based — notwithstanding a characterization of property's form in terms of a duty *in rem* — on a rights-based view of property, heavily grounded in assumptions of individual autonomy. Given my belief that private property, in both practice and theory, is based on more than rights alone, I remain unpersuaded. Penner's argument is impoverished by the overt omission of *deon-telos*. Indeed, from a close reading, one might still argue that implicit aspects of Penner's own analysis indicate that property is indeed predicated upon a justificatory discourse — a discourse which does, in fact, include distributive issues.

A. *Penner on Justice (Perhaps)*

Early on in *The Idea*, Penner claims that one need not engage in an external discourse justifying private property; rather, the important question for him is why we treat some things as having value and others as not.[28] According to Penner, the normative structure of private property, based on the interest protected by a property norm as well as the rule-following attitude of those within the normative system, provides an internally-generated justification for the institution. Here Penner is attempting to understand property norms by reference to the "Interest Theory" developed by Joseph Raz.[29] According to Penner, attempting to understand and characterize the interest served by property rules will tell us a great deal about the structure and the normative force of property.

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[28] See *supra* note 8 at 5.

[29] The "Interest Theory" is one of a number of attempts to articulate the nature of what is protected by the concept of a right, without necessarily deciding on the specific content of often competing theories of rights. For example, some have argued that a right exists when one has some measure of control over the duty in question: see H.L.A. Hart, "Choice Theory" (H.L.A. Hart, "Are There Any Natural Rights?" in J. Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) at 77ff.). Others have recast this basic idea by arguing that a right exists when one is the beneficiary of another's duty: see the "Benefit Theory" (D. Lyons, "Rights, Claimants and Beneficiaries" (1969) 6 Am. Phil. Q. 173 at 173-76).

The Interest Theory begins by placing emphasis on the purpose of rules which confer rights. This detaches rights from duties to some extent, laying the groundwork for or providing the reasons behind the imposition of a duty (see N. MacCormick, "Rights in Legislation" in P.M.S. Hacker & J. Raz, eds., *Law, Morality, and Society* (Oxford: Oxford University Press, 1977) 189 at 192). Raz frames this idea in terms of its role in practical reasoning:

> To say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty, *i.e.*, a duty to take some action which will serve that interest, or a duty the very existence of which serves such an interest. One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously (Raz, *supra* note 15 at 5).

The Interest Theory, as applied to property discourse, prompts one to look at the sufficiency of the moral weight of interests protected by property rights or norms.

1. Identifying and characterizing the property norm

Penner's characterization of property norms is of great interest and highly original. Recall that Wesley Newcomb Hohfeld's seminal analysis earlier in this century of the general characteristics and relationship of rights, powers and duties cast all juridical relations as relations between and among persons: "A right *in rem* is not a right 'against a thing'. ... All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected."[30] On this view, a property right in an object is actually a multitude of similar rights held against every individual in the world. Hohfeld's analysis has become the standard point of departure for property theory. But this admittedly legal view does not represent how lay persons deal with their property and how they view the property of other persons. When Smith sells his house to Jones, other persons do not perceive any change in the state of their relationships to either Smith or Jones; all still have a duty not to trespass in *the house*. All persons must respect the property institution, framed in terms of a duty to the house. The relationship, on the lay view, is indeed with an object of property. Building on this argument, Penner claims that it is more accurate to categorize certain norms as "norms *in rem*":

> To understand rights *in rem* we must not only discard Hohfeld's dogma that rights are always relations between two persons, but also the idea that a right *in rem* is a simple relation between one person and a set of indefinitely many others.
>
> ...
>
> The point, however, is that to conceive of a right *in rem* as a single relation flowing to some vast set of duty-owers, as Honoré and [Kenneth] Campbell do, is to hold a quasi-Hohfeldian view of rights *in rem* that makes sense of the right only at the expense of treating the duty-ower as the holder of millions of duties, as many duties as there are property-holders and pieces of property. This is no improvement on Hohfeld. But if we pay attention to the fact that rights and duties *in rem* do not refer to persons, not in the sense that property is not owned by persons, but in the sense that nothing to do with *any particular individual's personality* is involved in the normative guidance they offer, we may get somewhere.[31]

Penner's point is that the *in rem - in personam* distinction applies to all categories of norms and is the basis for our interactions with things. This analysis of norms *in rem* is opposed to the Hohfeldian view and builds on the anti-bundles picture. This critical analysis is predicated on "thingness"; a norm *in rem* requires a relationship to a thing. That is, the relationship is essentially impersonal, focused as it is on an object. He states:

> "Things", then, whether physical things or states of affairs such as bodily security, mediate between rights *in rem* and duties *in rem*, blocking any content

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[30] W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cook, ed. (New Haven: Yale University Press, 1919) at 74-75.

[31] *The Idea*, *supra* note 8 at 25-26 [emphasis in original]. See also *The Bundle Picture*, *supra* note 10 at 720ff.

> which has to do with the specific individuality of particular persons from entering the right-duty relation. How then, do rights *in rem* correlate with duties *in rem*?
>
> A duty *in rem* is a duty not to interfere with the property of others, or some state to which all others are equally entitled. Thus a person is a holder of a right *in rem* when he benefits from that general duty. The holder of a right *in rem* benefits from the existence of an exclusionary reason, but one which does not apply to him alone. Note that in some sense the correlativity here is not symmetrical. The duty-ower's duty applies to more cases than that of the individual right-holder. That is not a failing, I hasten to add. Rather it makes sense given the way that the reasons work.[32]

The critical insight is the idea that norms may apply in a special, impersonal way through objects to other persons. The correlativity between persons is a mediated relationship and can bring with it special types of rights and duties. As a result, rights and duties need not be correlative. The characteristic duty of the private property relationship, according to Penner, is one of non-interference with the objects of property. This duty does not entail a corresponding right, but is wider. The identification of this asymmetry might very well stand as Penner's major contribution to property discourse.

What, then, is the fundamental interest underlying property norms? According to Penner, this interest is grounded in the use of objects of property (identified using the separability thesis) and the exclusion of other persons in the use of the same objects. Private property, therefore, is predicated on the interest in the exclusive use of the objects of property. Property norms protect this interest by their framing in negative terms by prohibiting others from interfering with one's own use. Penner calls this characterization the "exclusion thesis", and incorporates it into his definition of private property:

> [Property is the right to exclusive use, which is] the right to determine the use or disposition of a separable thing (i.e. a thing whose contingent association with any particular person is essentially impersonal and so imports nothing of normative consequence), in so far as that can be achieved or aided by others from it, and includes the rights to abandon it, to share it, to license it to others excluding themselves (either exclusively or not), and to give it to others in its entirety.[33]

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[32] *Supra* note 8 at 29. The idea of "exigeability" fills in the gaps left by the connecting of asymmetrical rights and duties over things to people, as well as the procedural vindication of norms *in rem* against individual persons, thus correcting an apparent imbalance:

> Exigeability explains that while rights and powers *in rem* bind the world, and correlate to duties *in rem* which relate to property in general, not to particular pieces of property, nevertheless when there is a violation of a right *in rem* it is an individual that does it, and so remedial norms like claims to compensation will be personal, *i.e.*, *in personam* (*ibid.* at 31).

Penner takes the idea from P.B.H. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 49-50.

[33] *Supra* note 8 at 152.

This interest in use is *the* interest protected by property rules, according to Penner. Following the normative structure assembled by Raz, the norm protects the interest in use through exclusion. And from Penner's own characterization of norms *in rem* generally, the *in rem* rights to property use are individuated — characteristically identified — and framed in terms of a duty *in rem* to exclude oneself from the property of others. Here we see Penner's recasting of property duties as the relationship we all have to things, or more accurately *through* things to others (and not a relationship to others with respect to things). This is the characteristic structure of a property norm, and looks a great deal like Harris's idea of "trespassory rules": rules which protect property powers and rights.

2. Assuming justice and justification

I have discussed these components of Penner's analysis elsewhere.[34] What is clear is that he has tried to characterize and identify the internal normativity of property in terms of duties *in rem* not to interfere with the property of others. Penner goes further, however, and claims that the above definition of property does not touch on distributive issues, and does not need to deal with the legitimacy of property rights. Yet what obvious assumptions about the private property institution is Penner making throughout his argument?

First, Penner assumes the justice of the institution of private property from the outset. In the concluding chapter of *The Idea*, there is a discussion on issues of distributive justice and needs, leading to this passage:

> The general point is that concerns about the distribution of property, in which an essential minimum or a constitutive kind are to be given some kind of established basis in the idea of property itself, are generally completely swamped by broader considerations of a person's well-being. ... In these pages I have tried to develop a concept of property which, tied to the legal system as it is, is unable to be so promiscuous in its ramblings. ... If [political philosopher Alan] Ryan is right, as I think he is, to argue that the project of political morality will not be advanced by addressing every question in terms of the scope of ownership, then it will also not be advanced by presuming that the justice of any particular distribution of property rights is a major, if not the most important, problem of economic justice. *The legitimacy of property rights* per se *strikes me as well nigh indisputable, for the practice of property protects a liberty,* i.e. *exclusively to determine the use of things, that has proved marvellously productive in contributing to the good life of many.* Determining the justice of any distribution of property, on the other hand, should draw our attention to those distributional mechanisms themselves, such as gifts and contracts and commands, all of which distribute a much broader set of goods than property rights.[35]

This quotation, and specifically the emphasized text, is stunning. On its face, it betrays a rights-based justification of private property that is posited as indisputable.

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[34] See "Normativity", *supra* note 13 and *Deon-Telos*, *supra* note 12 at c. 2, 6.

[35] *Supra* note 8 at 206-07 [emphasis added].

In this passage, Penner advances a view that property is self-evidently justified for utilitarian and libertarian reasons; property is justified because it preserves an institution that has done humankind a great deal of good, and protects a human liberty to exercise powers over resources. This claim is not even relatively uncontroversial. First, private property's legitimacy is not "well-nigh indisputable"; other conceptions of property, such as common property or state property, might also fulfill individual and societal needs in pursuit of the good life (though they will strike balances between powers and obligations, as well as between the individual and the community, differently).

Second, given his characterization of property rights ("the right to exclusively determine the use of things"), Penner even appears to assume that, within the institution of private property, the paradigm of absolute ownership is indisputable. Absolute ownership, in practice, is virtually impossible to achieve, as any lawyer will attest. Any basic text on property, not to mention a congeries of regulations and restrictions at a variety of levels, is filled with exceptions to the idea that ownership is anywhere near absolute in practice. At what point do the exceptions undermine the rule? Indeed, some of these restrictions, in my view, go to the very core of the private property institution, militating against the idea of absolute ownership. The *Civil Code of Quebec*, for example, recognizes such limitations in its definition of private property. Common Law rules perform a similar function. In theory, too, the idea of absolute ownership is at least disputable, as Christman and others have set out to show.[36]

As Harris points out, it is the distribution of control over scarce resources and powers to some individuals and not others that makes private property controversial. So the questions remain: how are these exclusive powers distributed; according to what grounds or criteria; and once distributed, why should these rights be protected by property rules and other norms? It is indeed true that determining the justice of any distribution will lead us farther afield than the scope of traditional property law and into an inquiry concerning the nature of societal goods, but that challenge is not a sufficient reason to exclude such discussions from the province of property law.

More profoundly, an in-depth examination of the substance of and assumptions in Penner's arguments points out that one *does* need to account for property's *deon-telos* in an attempt to discern the normativity of private property. Penner's claim that one must look at larger issues of social ordering is correct; where he falls short is in the claim that such issues are separate from the essence of property. For example, the important question identified by Penner at the outset of *The Idea*, about why we treat some things as the object of property and others as outside the scope of property law, is a distributive issue, as Penner admits. However the solution is not merely definitional. As is implied by Penner's analysis of the criterion of separability and various discussions of scarcity, the determination of what resources will be regarded as objects of property is evolving and must take into account the needs of individuals and the community, in addition to the values the community is trying to promote and pro-

[36] See generally Christman, *supra* note 3. I have made a similar argument in *Deon-Telos*, *supra* note 12 at c. 3.

tect. This *is* a distributive issue, and is determined through a resort to justificatory discourse, as well as through a resort to property's *deon-telos.*

Penner's discussion of needs, undertaken in the pages leading up to the passage cited above, is another example of this same point. According to Penner, once society is constituted in some way, the Lockean proviso of "enough and as good"[37] is out of place as a basis for duties to the less fortunate. Rather, such issues will be dealt with by the other attachments — familial, social — that one necessarily has in society. Penner states:

> Such attachments situate us within a framework of personal relationships, and it is therefore a nonsense to organize a theory about what one person may demand to meet his essential needs which does not explicate the nature and consequence of these various attachments.[38]

This is undoubtedly true, but it does not prove Penner's point. In fact, I would submit that it proves the opposite, as the stipulation *per force* applies to the whole discussion of the institution of private property. It might be true that needs cannot be the *only* focus of inquiry in the area of just distributions, or that the distribution of property *per se* will not make people well off, or that determining the proper minimum basket of tangible and intangible goods which anyone might have is difficult and contingent.[39] It is undeniable, however, that property does contribute to one's sense of well-being and that the needs which can be fulfilled by resources are an important consideration in the discourse of justification.[40] One has to ask what individual and societal functions property fulfils. Penner confuses the issue of justice and justification with some idea of a "justifiable minimum" distribution. Need is but one factor to be assessed in the creation and maintenance of a just property system, and needs are necessarily to be considered as part of the richer determination Penner seems to advocate. Nevertheless, Penner appears to have posited the relationship the wrong way around:

> [The distribution of property *per se* does not make a person well off.] This is not in any way to deny that there is a rational, human interest in exclusively determining the use of things. But it is to deny that our understanding of that gives us a ground for determining the extent and the character of need.[41]

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[37] The proviso states that where one person appropriates to himself from the common, he must leave "enough and as good ... in common for others": J. Locke, *Second Treatise* in *Two Treatises of Government*, 2d ed. by P. Laslett (Cambridge: Cambridge University Press, 1967) at 288, para. 27.

[38] *Supra* note 8 at 204. This statement is based on Penner's use of Raz's Interest Theory: "we remember that a right is not framed purely in terms of one's interests, but in terms of the relationships with others which would justify imposing a duty on them to serve or protect those interests." (*ibid.* at n. 4).

[39] See Munzer, *supra* note 3 at 309, perhaps inadvertently, had made this latter attempt at defining a minimum basket of property. Penner finds this *list* "strange": see *supra* note 8 at 205.

[40] See J. Waldron, "Property, Justification and Need" (1993) 6 Can. J. of L. and Juris. 185 for an argument that any justification for private property must take needs into account. See also Harris, *supra* note 7 at 281ff.

[41] *Supra* note 8 at 204.

The "rational, human" interest in property does not determine the character and extent of need; the fact of need determines the character and extent of the rational, human interest in property. Need takes its place alongside the other substantive interests protected by property institutions; in Harris's terms, individually-derived interests, protection of freedom and autonomy, and instrumental merits.[42] While need may be an "irredeemably dreary and short-sighted focus,"[43] it does help us to understand the claims, interests and duties we have to others with regard to social wealth.

Finally, Penner ignores the allocative powers the property owner has over others, powers which affect their well-being. As such, the contours of the property institution — its distribution, the objects to which it applies, the powers accorded to title-holders and the duties we impose on them — cannot be discussed in an internal, normative vacuum.

In short, Penner must talk about justification; and in doing so, he must also consider basic deontological and teleological imperatives which comprise part of the discourse of justification and part of the very core of the concept of property. Penner's exclusion of them can no doubt be traced to an assumption about the relation of law to morality, buttressed by the usual positivist mantra that there is no necessary link between the two. But even if this claim might be true for other areas of private law, in my view, rights and morality cannot be separated when discussing property issues because of what is at stake: the basic means of a person's physical survival, social existence, the ability to develop, and the power relationships of the society in which this person is found. These issues must identify a part of the substantive interests protected by property rules.[44] The idea of property cannot be separated from these larger moral issues; the interests underlying one's rights and duties are based on these very values.[45]

Indeed, some of Penner's own conclusions require an understanding of property's *deon-telos*. First, an understanding of the full import of the social role of property, partly identified by Penner, requires an examination of the very issues his analysis wishes to exclude. Penner draws the analogy of property to a gate, instead of a wall.[46] Once the gate is opened to reveal property's social function in its true light, that gate can not be easily shut! Second, ironically, Penner has also unconsciously advanced the project of identifying and recognizing property's *deon-telos*. His emphasis on

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[42] See *supra* note 7 at 168.

[43] Penner, *supra* note 8 at 204.

[44] Penner's particular articulation of the Separation Thesis takes the form of the Interest Theory, and as such strives for a high degree of generality. But even if the interest-based view of rights might be separable from moral claims in certain (rare, in my view) instances in other areas of private law, it seems that this cleavage is not as persuasive for private property, which must address critical moral issues within its normative structure. See "Normativity", *supra* note 13 and *Deon-Telos*, *supra* note 12 at c. 6.

[45] Note that Harris's view of the Interest Theory does take these issues into account: see *supra* note 7 at 170-73. I would submit that this reading is closer to the meaning of interest that Raz intended: see *supra* note 29. See also Waldron, *supra* note 3 at 81-87.

[46] See *supra* note 8 at 74. The "gate" permits the owner to make social use of the property, "allowing some to enter."

"thingness" and the identification of the important asymmetry of the property institution facilitates this discussion by giving the justificatory arguments of property rules a unique focus. This new focus allows one to account for issues of distribution and institutional design not caught by the web of Hohfeldian rights and correlative duties. In questioning the Hohfeldian schema, by looking at the objects of property and the asymmetrical rights and duties flowing through these objects in a mediating role between individuals, Penner advances the idea of an *in rem* norm generally, and an *in rem* duty in particular. That such duties might attach to objects of property raises the possibility that certain of those objects might impose intrinsic duties on the person entitled to use or own them, or that some specific or unique object might be the subject of an intrinsic teleological purpose in a particular society. Thus, some role for *deon-telos* is much more easily posited on Penner's understanding of the property relationship than on the traditional schema of correlative rights and duties. In short, Penner's analysis bolsters a taxonomy of elements like Honoré's which includes non-Hohfeldian incidents, such as the liability to seizure for debt.[47] It also allows for unique property justifications and unique legal architecture, distinct from those found in other areas of private law.[48]

For these reasons Penner's claim that property's normativity can be discussed without some resort to justificatory discourse is not convincing. External justifications are necessary to explain property rules and their normative weight. The moral and political justice reasons behind the interests protected by the institution of private property need to be articulated and defended. Implicitly, Penner assumes a position based on one (controversial) view of the very justificatory claims he tries to avoid making directly. He cannot simply assume the veracity of a claim as controversial as the one he is proposing: that the legitimacy of property rights are indisputable because property norms protect a liberty to exclusively determine the use of things. Even if this liberty "has proved marvellously productive in contributing to the good life of many,"[49] Penner's claim goes to the very heart of debates about the legitimacy of private property in principle, and, as Harris and others illustrate, goes to the very outlines — the limits and institutional design — of the manifestations of the property institution. Rather, it seems that the rationale for an institution which confers powers and benefits over some but not others (and often at the expense of others), and which has such a profound impact on the nature and quality of human associations, must be justified. The reasons must be discussed, and continually revisited and rediscussed. These issues are part of the idea of property. Perhaps the discourse of justification does not encompass *all* of the contours of the institution, but it is a necessary part of it. It is explicitly in Harris's recognition of property's controversiality, and implicitly in his analysis of the traditional justifications for private property and their connections to the institutional design of the institution, that the necessity and role of the discourse of justification become clear.

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[47] *Making Law Bind*, *supra* note 9.

[48] Although, as I argue in *Deon-Telos*, such a view might still be advanced under the traditional schema: see *supra* note 12 at c. 2.

[49] *Supra* note 8 at 206-07.

B. Justification and Normativity: A Larger Claim

Penner leaves aside the larger discourse of justification and presumes the validity of his starting-point in the search for property's internal normativity. Penner's failure to find a source of normativity internal to the institutional, "environmental" structure of property suggests that the source of property's normativity lies elsewhere. Harris, on the other hand, makes no attempt to find an immanent source of normativity and does accept the need to justify private property. Harris accepts the controversiality of private property,[50] as well as the presence of other modes of regulating social wealth. His definition of property implies as much.[51] Consequently, in Part II of *Property and Justice*, he sets out to analyze the traditional justifications for private property, giving his views on the validity of each.

The structure of Harris's argument implies that the source of private property's normativity resides precisely in the external, ongoing discourse of justification. That is, not only is it necessary to justify private property because of its "essential controversiality", rather in doing so, one identifies the source of private property's normativity and derives a pluralistic set of benchmarks for creating, interpreting and reforming property rules. If this larger claim about private property's normative sources is correct, then it would follow that Harris's assessment of the justifications for private property will explicitly or implicitly exhibit assumptions about the relationship of property's normativity to its justifying and dis-justifying arguments. The source of private property's normativity is too large a question to broach here, and will be left for another day.[52] It suffices to say that the argument that the normativity of private property resides in its discourse of justification will be strengthened by locating *deon-telos* in this discourse, since therein will lie weighty reasons for allowing individual human beings to deal with scarce social wealth in a specific manner.

Turning to Harris and his taxonomy and assessment of justifications for private property, one must ask if aspects of the *deon-telos* of private property are in fact present in his argument, and if not (or not enough), would their presence (or increased presence) improve his analysis? Put negatively, this second question asks what are the implications of not fully considering private property's *deon-telos* in assessing its justification.

Both of these questions (as originally framed) may be answered in the affirmative. First, some implicit recognition or inclusion of *deon-telos* is indeed present in Harris's analysis. There are observations made that point to property's teleology and deontology, particularly in the specific context or background assumptions which frame the assessment of various justifications for private property; these are what Harris calls his "minimal" assumptions about justice. These foundations of justification and the structure of the argument built upon them show property institutions in the ultimate

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[50] See *supra* note 7 at 165. See *supra* note 25 and accompanying text.

[51] By building a notion of scarcity into the definition of property, distributional issues — and hence controversy — follow. Harris's definition is stated at the outset of *Property and Justice*, *ibid.* at 3.

[52] I make this argument in "Normativity", *supra* note 13 and *Deon-Telos*, *supra* note 12 at c. 6. My analysis in this review article, however, certainly points at least partly to the same conclusion.

service of society and societal goods, whether these goods are framed in terms of the individual or the collective. Put another way, the controversiality that Harris identifies in the dual function of private property, coupled with the assumptions about justice, *necessarily* weaves questions of *deon-telos* throughout the fabric of arguments for and against private property.

Second, regarding Harris's failure to deal explicitly with elements of *deon-telos* and to give full weight to their role in explaining and justifying private property, it is fair to observe that he does exhibit a rights-based view of the institution. While this predisposition is nowhere near as strong as that demonstrated by Penner — private property, after all, does need to be justified according to Harris, and its benefits are not to be assumed — Harris's rights-based assumptions do downplay aspects of the property institution which a fuller set of ethical assumptions would justify. These assumptions are readily identified in a closer examination of Harris's assessment of property justifications.

III. The Arguments for Private Property

As mentioned, in *Property and Justice* Harris does deal with the discourse of justification, and he does this very well indeed. Harris's catalogue of the arguments justifying and dis-justifying private property is relatively complete. It is fair to say that his discussion is the most exhaustive of its kind. While one might quibble over minor organizational matters — whether one should place social convention and equality in the same grouping of justifications, for example — Harris touches on most of the relevant issues at some point, explicitly or implicitly. As for the justification of private property, the reasons given are generally well-argued and usually convincing. Particularly welcome is the general conclusion that what Harris calls "full-blooded ownership" — the most complete set of ownership powers one can have in social wealth, analogous to *dominium* in the Civil law — cannot be justified by any sort of natural-rights argument. This conclusion has profound implications for the form and structure which private property should take.

Despite these analytical strengths, there remains a flaw running through Harris's argument. At first glance, his analysis of the types of justification, taking into account the way in which different justifications should be weighted, is coherent and rationally persuasive. However, there are problems with the weight, or lack thereof, given to certain justifications and dis-justifications. Too much weight is given to property-freedom arguments, and in particular to the assumption that individual autonomy is best-served when there are merely more choices, rather than better choices. This flaw, a flaw common to all rights-based analyses, comes from failing to explicitly recognize property's *deon-telos*. Such considerations are part and parcel of the structure of property, and actually permeate the whole of Harris's analysis, but only implicitly. Thus, the suggested correctives to Harris's argument concern the proper weight to accord to deontological and teleological arguments for private property, with corresponding revisions to the heavy emphasis given to rights-based justifications.

With respect to overall methodology, Harris sets out to identify those justifications that are specifically related to property: "property-specific justice reasons."

These reasons underpin property rights and present a powerful argument justifying the existence of property institutions in modern Western society. While Harris correctly concludes that there are no natural rights to full-blooded ownership which on their own can adequately justify the property institution, he nevertheless maintains that there is a plurality of other justifications that serve to explain the existence and the contours of private property. With this, I also agree. However, I disagree with the overall tenor of the argument which is too rights-based and leads to errors in weighting the various specific arguments for and against private property with the expected effects on institutional design.

What is more, the rights-based approach can result in the exaggeration of the ubiquity of *private* property, and the downplaying of alternative structures for the regulation of social wealth. In Harris's view, these property-specific reasons do not merely reveal private property's justification in specific societies and the institutional design of various private property systems, they also justify the claim that every modern state should have some kind of property institution. Says Harris:

> The upshot consists of a mix of morally viable property-specific justice reasons. I offer them to all those concerned with political and legal questions about distribution and property-institutional design. They are relevant to such questions because it is these same property-specific justice reasons which, I shall argue, support a moral right of every citizen of a modern State that his society should provide a property institution, but only one which is structured so as to take account of what justice does indeed require.
>
> ... Supposing we agree, minimally, that justice makes the following demands: people should not be treated differently on the basis that some kinds of human beings are inherently inferior to others; some degree of autonomous choice should be accorded to everyone; and unprovoked invasions of bodily integrity should be banned. Does it follow that the external resources of the world ought to be brought within the domain of some kind of property institution?[53]

While there is no intuitive answer to this question, the answer resulting from a careful step-by-step analysis is a resounding yes, according to Harris.

This conclusion is too strong if one equates *property* with *private property*, as Harris generally does. In order to succeed, Harris would have to show that the basic demands of justice could only be met by private property, and not by some other conception of property. In my view, this question remains open. Given the critique which follows, one could only arrive at such a conclusion after an assessment which is generally rights-based. While the issue of possible alternative conceptions of property is not directly discussed, the whole of my argument for the inclusion of *deon-telos* in the property discourse suggests that alternatives may be preferable, according to an enriched congeries of property-specific justice reasons. That is, private property, in its most absolute form, might not be a necessary requirement of justice in all societies, though a more limited private property institution might be. In any event, even if one might suggest correctives to the substance of the discourse, Harris's discussion on its

[53] *Supra* note 7 at viii.

own illustrates the presence of the justificatory discourse that is the moral background for the private property institution.[54]

A. Background Assumptions: The Normativity of Private Property

What are Harris's careful steps in building his argument? Harris's opening analytical moves comprise, first, the positing of "minimal" assumptions about justice present in the passage above and, second, the attempt to specify the relation of justice to property and vice-versa. He attempts to discern a "middle-level" of justificatory property discourse which is more explicitly tied to private property than are more general, abstract discourses on justice. Both these analyses are critical to Harris's project and its outcome; in particular, the tenets of minimal justice and the assumptions about the relation of the individual to society that they exhibit reveal a great deal about Harris's idea of private property.

1. Minimal justice

The assumptions of minimal justice are threefold: namely, the protection of natural equality; the value of autonomous choice; and the protection of bodily integrity. According to Harris, these assumptions are not necessarily the foundation for larger claims for social ordering. Rather, they serve only to justify private property. (Of course, since property is so close to our Western notion of just ordering, these three basic assumptions do a great deal more work than Harris admits.) Moreover, these tenets transcend, according to Harris, both moral realism and conventionalism to overcome linguistic and conceptual scepticism. Harris tries to plough a middle ground between the argument that there is an objective or transcendent moral standpoint accessible to all human beings and the position that all morals are relative, thereby forcing a society to agree on what its moral standards will be. While I am sympathetic to the attempt to pursue a balanced theoretical approach to questions concerning the ontology and the epistemology of justice, I am not sure that Harris has succeeded in doing so.

The first minimal assumption is that all human beings possess some measure of natural equality, since no one could plausibly argue that a person belongs to an intrinsically superior genus. This entitles persons to at least a measure of negative equality — in Hart's terms, "treating like cases alike."

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[54] I argue elsewhere that this discourse justifying private property unearths the source of private property's normativity (see "Normativity", *supra* note 13 and *Deon-Telos*, *supra* note 12 at c. 6). That is, the shape of private property — its rights as well as its limitations — comes from the values and rationales it is meant to foster and embody, and the duties that flow from these individual and communal imperatives. I believe that these reasons are historically and contextually situated, and that they vary in normative intensity in accordance with the moral and utilitarian imperatives which underlie them. There are a variety of justifications for private property, many of which are moral. The structure of Harris's argument, weighing justifications according to minimal assumptions about societal justice and property, makes this point implicitly but clearly.

> If treatment of a certain kind is due to one human being, X, nothing less is due to another person, Y, merely because Y is an inferior type of human being to X. If treatment of citizens varies according to age, disability, or gender, the differentiation has to be justified on some other ground ... [or those disfavoured] are inherently inferior kinds of human beings. That is what we mean by 'natural equality'.[55]

Thus any debate about justice requires us to "stand in the same relationship of mutual humanity to one another."[56] As applied to property, this minimal condition requires that differences in use and distribution privileges be justifiable by some morally persuasive argument, since abstract natural equality gives a *prima facie* entitlement to equality in the distribution of the earth's resources. Harris believes this to be relatively uncontroversial.

This is an important assumption. As applied to property, it requires more than merely formal, criterial adherence to the principle of treating like cases alike. While formal requirements of negative equality are no doubt a part of this aspect of justice generally, with respect to property rules, it will be difficult to escape substantive concerns. There must also be some inquiry into the substance of equality that results from the formal treatment of individuals, since property rules go to the allocation of social wealth. In other words, treating like cases alike in the context of the distribution of social wealth will necessarily blur distinctions between formal and substantive criteria. In addition to questions of "how", any difference in distribution privileges will also touch on questions of "how much".

The second of Harris's minimal assumptions is that some degree of autonomous choice over some range of actions is a good to be fostered among human beings. This assumption is grounded in the fundamental idea of human agency, specifically in the fact that human beings are capable of choosing and acting independently of their inclinations. Respecting and fostering human agency is entailed in respecting human personhood. This is a widely-accepted view, according to Harris, regardless of whether one is a proponent of "negative" or "positive" liberty, of liberal "individualism" or "communitarianism". He states:

> Given that respecting personhood is intrinsic to just treatment, it follows that, other things being equal, it counts in favour of the justice of an institution if it accords a wider rather than a narrower scope for autonomous choice. In that sense, "freedom" is a consideration of justice. Furthermore, other things being equal, the wider the range of autonomous choice the better. ... "[F]reedom" of any kind presupposes choice and, at the abstract level, more choices must entail more freedom. All liberals and most non-liberals would, it is thought, assent to the bald assertion that autonomous choice is to be valued, differ though they do as to the kinds of social arrangement which make genuine choices possible.[57]

This is *the* critical assumption made by Harris and represents the point of divergence in our analyses. The assumption colours the whole of Harris's argument. Harris as-

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[55] See Harris, *supra* note 7 at 171.

[56] *Ibid.* at 172.

[57] *Ibid.* at 173.

sumes not only the good of autonomy *per se* but also that this good is manifested more completely in a wider range of choices. With respect to property, the imperative of autonomy might entail that an unlimited range of use-privileges and powers goes with a given property entitlement and, in particular, with full ownership, at least until explicitly restricted by the community or the state. But the concept of private property should not be considered as having a *prima facie* unlimited range of choices, even if only a theoretical starting-point.

While most would agree that the provision and protection of some degree of choice is fundamental to protecting autonomy, not all would agree that all choices are to be treated equally, or that more choice is a value in and of itself. Harris does clearly disassociate himself from those who take the position that more choice is better, yet he appears to imply this very conclusion. So despite claiming to take no side in the communitarian and individualism debate, Harris has implicitly done so. He does this, first, by focusing, without argument, on individual choices as the reason to accord autonomy and, second, by avoiding the question of the quality of a person's choices. In my view, certain choices are better than others and some substantive values are "thicker" than others with respect to justifying choices.[58] This means that some choices deserve more protection, and should necessarily be provided. It does not mean that all choices need be provided or are deserving of protection, or that more choice is always better than some choice. Harris's assumptions mean that any so-called communitarian reasons for fostering or restricting individual autonomy will be more difficult to identify and adequately assess and, in particular, the distinction between and among *better* choices will be impossible to draw. Harris admits that communities may choose to put value on certain choices over others;[59] however, in focussing too much on range of choice, Harris opts for quantity over quality. In doing so, he has opted for a liberal-individualist view. An autonomy-based justification may directly or indirectly serve community as well as individual goals, and while these may be secondary in nature to individual benefits of autonomy, they are not irrelevant.

As a result, I would argue that the inquiry into autonomy must focus on teleological and deontological concerns, writ large. Why is autonomy good? What benefit does it promote for individuals and the community? What goods are better than others in terms of reaching these desirable ends? Such questions place greater emphasis on the substance of individual choice, as opposed to the mere range of choice. They highlight not only why some choices are better than others but also why the state may take different stances with respect to the provision, protection and even the promotion of certain choices over others. Since social wealth composes the subject-matter of property discourse, the inquiry must discuss the objects of social wealth in both senses of the word "object". If Harris could incorporate this type of discussion into his justificatory analysis, a more balanced, and less rights-based, view would emerge.

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[58] See, most importantly, Taylor, *supra* note 16, especially Part I and the discussion of "hypergoods". Taylor strongly disagrees with the view that all choices are to be treated equally. For a discussion of "thick" concepts, see Williams, *supra* note 16 at c. 8-9.

[59] As does, perhaps ironically, Joseph Raz, whose is regarded as the leading proponent of autonomy in analytical jurisprudence. See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

The third and final minimal condition of justice identified by Harris asserts that human beings have a right not to have their bodily integrity interfered with. Without a very strong justification — "medical treatment, promotion of public health, self-defence, just punishment, the maintenance of order or legitimate struggle" — all unprovoked invasions of bodily integrity are "natural wrongs", whether committed by individuals or by the state.[60] Harris does not, however, elevate this claim to one of self-ownership, as has often been done throughout the history of political philosophy.[61] For the purpose of my argument, there is no need to elaborate further on this minimal condition; Harris's position is quite persuasive.[62]

After identifying these three underlying assumptions of minimal justice, Harris uses them to assess rationales for private property and its institutional design. But is the schema too heavily weighted in favour of the individual over more communitarian imperatives? Harris is clearly trying to set out minimal conditions which would be acceptable to most participants in discussions of property and justice, yet there is enough scope for the *interpretation* of these agreed-upon conditions to take a form which would not be acceptable to all participants. Harris's articulation of these three assumptions gives a great deal of weight to individual freedom and decision-making in the determination of individual best interests. Principles of natural equality, autonomy and bodily non-interference all focus primarily, if not solely, on the individual. Moreover, little attention is devoted to the social dimension that is built into these assumptions (although the door is left open). As such, it is not surprising that the property-specific justifications which Harris deems persuasive exhibit a preference for the individual (and the individual's *rights*). The over-arching metaphoric and organizational weight given to ownership in Part I of *Property and Justice*, leading to *prima facie* ownership rights, is consistent with this observation, and is perhaps explained by it.[63]

2. Property-specific justification

While no complete picture of justice can be solely comprised of questions about property, neither can a picture of justice be complete without a discussion of property.[64] Harris observes that "justificatory and disjustificatory arguments about the

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[60] See *supra* note 7 at 174.

[61] Most famously by Locke, *supra* note 37 at 287, para. 27. See also various essays by G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), as well as the works cited by Harris, *supra* note 7 at 184-97.

[62] Indeed one might go so far as to argue that those who posit the right to non-interference with bodily integrity as a property right grounded in self-ownership are unpersuasive precisely because of the impact such rights-based arguments have on other areas of property law.

[63] See Harris, *supra* note 7 at c. 5-6 entitled "Ownership as an Organizing Idea" and "Ownership as a Principle". I have discussed the connection between the substantive roles played by ownership as principle and organizing idea and a rights-based view in "Normativity", *supra* note 13.

[64] Rawls, for example, does have a picture of private property in *A Theory of Justice*, most clearly in the discussion of the "difference principle" and the discussion of economic systems and public goods (see *supra* note 16 at 265ff.).

proper use and distribution of resources commonly play an independent role in the tradition of political philosophy. At the level of grand theory they must be subsumed within some master vision."[65] The larger, general-level arguments, in Harris's view, involve moral claims about property, and point towards an ultimate basis for property rights. They also serve to organize groups of more particular arguments. These organizing claims are: first, that there are natural rights to private property; second, that social convention is, if not the sole basis, one of the ultimate bases of property rights; and third, that the principle of equality of resources should bear on the distribution and use of private property. A "grand theory" will then account for how these are weighed against each other. This is undoubtedly true and is, indeed, the main point of my argument; one will need to have a grand theory, and explicitly state it at some point.

Yet Harris argues that more focused property-specific justice reasons, which are directly associated in some way with property use and distribution, can be detached from the grand theories and discussed at a middle range or intermediate level. With this approach, one need not enter into larger normative debates or reveal one's master vision. I am not sure this is possible. In my view, Harris's middle-level analysis, notwithstanding efforts to the contrary, is based on a distinct, though unstated, master vision.

Harris groups these property-specific justifications into four categories of arguments. The first group of arguments revolves around the attempt to justify private property as the result of some individual's specific interaction with the world. In this sphere, one finds property arguments based on claims emanating from self-ownership, from creation without wrong, first acquisition, personality or privacy. As we shall see, Harris assesses and accords no weight to some of these arguments (self-ownership, creation without wrong and first acquisition), and limited weight to others (personality and privacy). In general, according to Harris, when an individual's interaction with the physical world justifies some sort of property-based desert, a measure of justificatory weight will be given to a theory based on promoting those actions. In particular, desert theories which attach to one's labour (labour-desert theories) give the "shell of a natural right,"[66] determining that one should be rewarded for labouring without specifying the desert. The type of reward, or the content of the right, must be supplied by convention.

The second group contains the arguments for and against property based on promoting and protecting individual freedom and autonomy. As shall be argued below, this group of justifications is accorded the most weight by Harris.

The third category contains instrumental justifications. These utilitarian concerns assess the type of property institution one should have, given one's specific goals and objectives in utilizing the property institution. According to Harris, these play a primary role in the institutional design of private property. However, Harris relegates these concerns to a secondary status by downplaying the teleological aspects of pri-

[65] *Supra* note 7 at 168.
[66] *Ibid.* at 209ff.

vate property. The goals property serves, both collective and individual, are as necessary to its justification as to its design.

Finally, Harris groups social convention and equality arguments together as a fourth category, although in substance he treats these as two larger, general arguments for private property. Social convention arguments hold that private property is a product of socio-political agreement. Equality arguments serve as a benchmark for analyzing the distribution of private property. These two categories of justification are placed on par with natural rights, in which each of natural rights, social convention and equality comprises one of the three meta-groups of argument embedded in some wider grand theory.

Harris carefully examines each of the various strands of these four categories of justification under the light of his initial assumptions about justice and the specific imperatives of institutional requirements. This analysis leads to the important conclusion that there are no natural rights to full-blooded ownership:

> We said at the beginning of the last chapter that[,] if there are any natural property rights[,] that would radically affect the moral background against which property institutions operate. It emerges from our investigation in this and the last chapter that there are no natural rights to full-blooded ownership. Given our minimalist conception of justice, no relationship between an individual and a resource arises such that just treatment of the individual requires that a property institution both surround the resource with trespassory rules availing the individual and anyone to whom he chooses to transfer the resource and also conferring on the individual unlimited use-privileges, control-powers, and powers of transmission over the resource.[67]

According to Harris, full-blooded ownership, to the extent that it exists and is protected by legal trespassory rules,[68] is a creation of human convention and must find its ultimate justification in one or more of the other rationales.

What follows is an analysis of the main lines of Harris's middle-range arguments on justification and dis-justification. The discussion will focus on the fundamental points of disagreement and suggest that the preponderance of individual rights-based arguments of justification be reduced. While Harris claims to have denuded any natural-rights arguments to full-blooded ownership at a higher level, it seems that his detached, middle-level, *prima facie* right to full-blooded ownership[69] does the work a full-blown natural rights justification would do in justifying the scope of property rights in a grand theory. Positing full-blooded ownership as a *prima facie* right gives it a paradigmatic status which, combined with ownership's presence as a historical organizing principle and the weight given to autonomy arguments, still betrays a strong rights-based view. Perhaps any argument that posits the mere possibility of full-

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[67] *Ibid.* at 228.

[68] Trespassory rules are defined by Harris as the rules which protect property powers of owners by prohibiting a general class of persons from acting in a certain way: see *ibid.* at 24ff.

[69] Harris uses "*prima facie*" in the sense that the private-property right should not be intrinsically excluded from just society: see *ibid.* at 277-78. Arguments to lessen the substantive scope of the right thus begin with the burden of justifying the restriction.

blooded ownership for more than relatively trivial chattels or movables is *necessarily* rights-based.

B. The Arguments and Their Weight

The following categories and sub-categories of arguments loosely follow Harris's organization of middle-range arguments. My purpose in this section is to indicate how the crucial, rights-based assumptions identified above underlie the assessment of the persuasive force and subsequent normative weight given to each so-called property-specific argument, and how one might re-balance the force given to an argument by taking property's *deon-telos* into account. The suggested corrective, de-emphasizing the rights-based autonomy arguments implicit in Harris's analysis, is a result of this accounting. For this reason, the arguments under the second category, "Freedom and autonomy", will be dealt with in greater detail.

1. Individual interaction with the world

Harris's first group of potential property-specific justifications is perhaps the most famous and the most commonly identified in the history of property theory. They involve situations where an individual, through some action in the physical world such as labour or appropriation (Locke's famous example of plucking an apple from a tree springs readily to mind) makes some claim to property rights.

a. Self-ownership

The most basic arguments for justifying private property in this category begin with the oft elaborated idea that we "own" ourselves.[70] Harris spends a great deal of time analyzing traditional and possible arguments "from self-ownership". None of these, according to Harris, are persuasive. Rather, such arguments lose their normative force and "sink without a trace" in light of what Harris calls "the spectacular *non sequitur*."[71] It is widely held by many thinkers that human beings have a natural measure of equality and freedom from slavery. Harris agrees with such arguments; recall his first minimal assumption of natural equality. Yet nothing can be derived from this equality in respect of self-ownership. "From the fact that nobody owns me if I am not a slave, it simply does not follow that I must own myself. Nobody at all owns me, not even me."[72] Hence, it is a *non sequitur* to deduce individual self-ownership from innate human freedom.

Rather, Harris argues that a principle of freedom of "bodily-use",[73] given the minimal assumption of equal status, has enough normative weight to stand on its own and determine a range of practical issues, without resort to self-ownership or property

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[70] See *supra* note 61 and accompanying text.
[71] *Supra* note 7 at 196.
[72] *Ibid.*
[73] See *ibid.* at 188.

discourse. "Property rhetoric in this context is unnecessary, usually harmless, but always potentially proves too much."[74] So while we might use property language in lay discourse to describe a familiar and powerful principle — the idea that we and only we have a right to control our own bodies — one must not put self-ownership inside the property institution and draw conclusions therefrom. In Harris's view, Locke, Nozick, Mill and Marx were all guilty of making this inferential leap.[75]

Harris's views on this debate are most welcome.[76] The excesses in the debate, exemplified in Robert Nozick's *Anarchy, State and Utopia*,[77] are individualistic in the extreme and have the effect of undermining legitimate steps on the part of the state to regulate the use and allocation of social wealth. Harris's position helps to destabilize such strident rights-based views. While one might press Harris on the borders of his position — for example, how one would treat a pacemaker or one's own recently-clipped hair destined for a wig[78] — his argument on self-ownership seems intuitively and logically reasonable, as well as judicious.

b. *Creation-without-wrong*

The second type of individual-interaction justifications, namely creation-without-wrong arguments, are adequately described by their label. These seek to reward individuals who add to the total wealth of a society through their own actions without directly or indirectly harming anyone else. "If a person (1) creates a new item of social wealth, and (2) wrongs no-one in doing so, it follows that (3) he ought to be accorded ownership of that new item."[79] Its most famous manifestations are the Lockean provisos of "enough and as good" and "non-spoliation"; one can appropriate land as long as the remaining pool of resources is still "enough and good" for further appropriation,[80] and one can accumulate resources so long as one can use them without wasting them.[81] An analogous argument is found more recently, in a reworked fashion, in Nozick.[82] In a more limited way, Mill counted creation-without-wrong as a justification to all resources *except* land, implicitly recognizing the difficulty that the accumulation of land presents over time to the maintenance of an equitable pool of remaining land resources. Land is the original inheritance of the whole species: it is neither created by man nor can it be appropriated without impact on others.[83]

As with self-ownership, Harris gives this popular argument no weight. He claims that its fatal flaw resides in the need to protect a property entitlement with a trespas-

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[74] *Ibid.*

[75] See *ibid.* at 188-97.

[76] A previous version of Harris's arguments on self-ownership was published as "Who Owns My Body?" (1996) 16 Oxford J. of Leg. Stud. 55.

[77] R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

[78] I am indebted to Rod Macdonald for this insight.

[79] Harris, *supra* note 7 at 197.

[80] See Locke, *supra* note 37 at 290, 291, paras. 31, 33.

[81] See *ibid.*

[82] See *supra* note 77 at 174-82.

[83] See J.S. Mill, *Principles of Political Economy* (Fairfield, N.J.: Augustus Kelley, 1987) at 233.

sory rule; one cannot unilaterally create trespassory rules, or potential wrongs for others. Just because someone has produced or created something new, it does not follow that the person ought to be able to prevent others from using it.[84] One may deserve a reward, but that is not necessarily a property entitlement, not even a simple entitlement to use (what Harris calls "mere property"[85]), let alone full-blooded ownership. Perhaps most important for modern societies, even ideational entities — intellectual property — cannot be justified in this way, as these resources require that an artificial scarcity be imposed and protected by society when the idea is introduced into the public domain.

This approach is most persuasive. There is a logical inconsistency in the creation-without-wrong argument. It posits that a good might be created independent of others such that no harm should be done, yet it depends on others in the sense that some excess demand for the newly created resource or an element of scarcity is a necessary definitional requirement for this (and all) types of private property. If one created something which was not scarce or easily reproducible by others, there would be no property question. Robinson Crusoe had no need of property rules, particularly those based on creation-without-wrong arguments, before Friday. So it seems unlikely that one could create anything of value, any item of social wealth, without somehow disadvantaging others, even if only indirectly.

According to Harris, creation-without-wrong arguments can, however, be coupled with other, usually instrumental arguments to partly justify property entitlements. Thus, rights to newly-created resources might be justified in some other way, such as through instrumental, creator-incentive arguments which try to foster a certain type of practice.[86] The arguments can serve to partly justify entitlements in a situation where the actions of a creator of some new item of wealth merely concretizes existing obligations.[87]

c. *First acquisition*

No weight is given by Harris to yet another traditional and well-known — perhaps *the* most well-known — argument in favour of private property: first acquisition. First occupancy or first acquisition is also aptly described by its label: the first person to occupy some previously unoccupied tangible resource should be its owner. The argument can be used to justify the individual ownership of certain tangible resources, usually land, or it can be used to justify (or dis-justify) ownership of land by a community.[88] Western legal systems assume this, or at least are predicated upon it, in that

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[84] See Harris, *supra* note 7 at 202-03.

[85] See *ibid.* at 28.

[86] See *ibid.* at 203, 293ff.

[87] An example is the "fruits doctrine", where the owners of a resource get what that resource produces or transmutes into. Other incentive-based justifications are still necessary to ground the fruits doctrine, as not all of its ramifications — an increase in value without added labour, for example — are explainable in terms of creation-without-wrong: see *ibid.* at 203-04.

[88] Aboriginal land claims, for example, might have arguments based in communal first-occupation.

they protect pre-existing entitlements without investigating the justice of this claim after a certain time. Furthermore, most systems contain some rule allowing the acquisition of *res nullius*, even if in a restricted fashion.[89] Thus, Harris discusses this provision in terms of an assault analogy; once something is occupied, society will protect unwanted invasions, just as it prevents bodily invasions.

Harris's conclusion is that first acquisition might, at best, provide some right to protection of occupied property, whether held by an individual or a group, pending confirmation of the entitlement. But in his view, no property entitlement (Harris says "ownership interest"), whether full-blooded ownership or mere property, is ever justified by this theory. I agree with this conclusion, even if Harris's assault analogy is a bit forced. First acquisition arguments directly contravene arguments of minimal equality and, without some sort of Lockean "enough and as good" proviso, serve to justify huge inequities in distribution. The assumption of first acquisition theories is one of the downfalls, in my view, of purely formal theories which either allow for or assume first acquisition in spite of strong claims to equality.[90]

d. Labour-desert

The labour-desert argument is the most positively cast variant of the Lockean model, and goes much further in justifying private property than either first acquisition or creation-without-wrong arguments. Under a labour-desert argument, if a person through his labour confers a benefit on someone else, he deserves to gain recompense with some item of social wealth. The focus in this argument is on the worthiness of the labour and the appropriateness of the reward or, more precisely, of a property entitlement as the just reward. Such arguments have been advanced by a number of classical and modern writers.[91]

Harris finds this argument somewhat more plausible than the other types of individual-interaction arguments. This accords with his strong predisposition in favour of individual autonomy. One should note the autonomy-based foundations in Harris's view of the labour-desert arguments:

> [A]nti-desert arguments are incompatible with the second element of our minimalist conception of justice, on the assumption that the individual's working activities come within the range of valued autonomous choice and that the range is not coterminous with marketable outcomes. Their rejection does not by itself, however, establish the soundness of desert claims in general, let alone of any particular desert claim. The second element holds only that autonomous

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[89] See *e.g.* article 914 C.C.Q. where acquisition is restricted in scope to things and is inapplicable to territory (art. 918 C.C.Q.). See also the eventual taking over of such articles by the State (arts. 934, 935 C.C.Q.), and the rule that something merely lost is not *res nullius* (art. 939 C.C.Q.).

[90] Kant's theory of property, as articulated in *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press, 1991), Part I, is plagued precisely by its weak treatment of the impact of first acquisition on the possibility of formal equality.

[91] Such an argument can be extracted, in part, for example, from both Mill and Locke. More recent expositions are contained in Becker, *supra* note 3 at c. 4, in particular at 48ff.; Munzer, *supra* note 3 at c. 10.

> choice is a value to those who make the choices. Whether choices over working activities are meritorious and whether, if they are, the appropriate response from fellow citizens is "reward" cannot be settled independently of social convention.[92]

Thus, labour-desert is to be valued because of the incentive and protection it affords to autonomous choices. While Harris's final assessment of desert claims recognizes the limits of such a claim on specific items of social wealth, the value of fostering autonomous choice gives these arguments some merit:

> All desert claims are hostage to convention. Nevertheless, if the conventions are in place, they serve the purpose of marking society's recognition of the value of autonomous choice. They concretize that aspect of justice in relation to the labouring activities singled out as meritorious and reward-worthy. In that sense, desert claims constitute a derivative, but none the less important and distinct, facet of justice.[93]

In particular, social convention is required to say precisely what kind of labour is meritorious, and what kind of reward is fitting for someone's labour. It does not necessarily follow that all work deserves a reward, or that if a reward is deserved, property will be the chosen means. This is particularly true with respect to intellectual property.[94]

According to Harris, therefore, labour-desert provides a shell of a natural property-right to be filled by convention. It is a micro justification for property allocation, taking its place among the mix of property-specific justifications. In this sense, it parallels Munzer's placement of labour-desert as a less influential type of justification than either justice-equality or utility-efficiency arguments.[95]

The point made about the role of convention in the labour-desert justification is well-taken. However, and somewhat ironically, a consideration of private property's *deon-telos* can afford labour-desert arguments an even stronger justification than a simple autonomy-based analysis. This is the case because a consideration in such circumstances of property's teleology allows society to justifiably reward some choices over others. *Deon-telos* allows one to make a fuller analysis of the comparative benefits of certain autonomous choices. James Tully's "workmanship model" of labour-desert, articulated in the explanation of Locke's justification for private property, is perhaps the most important argument of this kind.[96] Tully argues that, in Locke's view, one *should* labour productively in order to improve oneself and the lot of human beings. This was grounded in Locke's theology, and specifically in the belief that as God made mankind and endowed it with God-like powers of reason, mankind should imitate God's creative activity. For this there would be a reward; as we are God's property, as the product of His hand, so is property ours, as the product of our hands.

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[92] *Supra* note 7 at 207.

[93] *Ibid.*

[94] See *ibid.* at 296ff.

[95] See Munzer, *supra* note 3 at 254.

[96] See J. Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980) at 8-9, 108-10.

Framed in this way, Lockean labour-desert entails an explicit teleology, which it serves. Humankind, taken as individuals, is improved, and *human society* is improved in the workmanship view.

The same argument holds true, in my view, for any labour-desert theory. Rewarding labour-desert not only protects a range of autonomous choices but also posits one type of activity, productive labour, as an intrinsically valuable autonomous choice. Harris seems to acknowledge this, but then does not give it full consideration. He writes:

> There are two reasons for alleging that a person who works deserves a reward. The first is that he has chosen to be industrious, whereas he might have been idle or less industrious. The second is that, through his work, he has achieved something which is worthy of admiration. The first ground is talent-independent — all who do their best have like desert claims. The second is not, since the talented are able, if they choose to make use of their talents, to produce achievements which the less talented cannot.
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> Both arguments appeal, on the one hand, to the moral relevance of autonomous choice and, on the other hand, to a conception of morally appropriate human interaction. If people choose to engage in tasks which are of any value within the human scheme of things, they are in a morally-relevant different relationship *vis-à-vis* others from that which they would have been in had they chosen not to work. The morally appropriate reaction on the part of their fellows is "reward".[97]

Initially, then, there appears to be some scope for considering the moral merit of certain types of productive activity. But shortly thereafter, in rejecting anti-desert arguments, Harris appears to close the door on the possibility that moral considerations might serve to assess and reward one's labour:

> The second anti-desert argument claims that every person ought to engage in valuable work to the best of his ability, so that "reward" is inappropriate. A person may well see his own case in just this light. But for the rest of us, to withhold any kind of commendation on the ground that "[y]ou merely acted as you ought" would be an unattractive mode of human interaction. It would obliterate the moral difference between obligatory and supererogatory action. More importantly, it would presuppose a complete subservience of the individual's work-potential to the requirements of others. Only the most extreme form of communitarianism would accept such an ant-like denuding of individuality. The argument fails if we reject, as a moral starting-point for judging interaction, the view that the individual should employ his energies in all and only the ways which the community deems most valuable.[98]

Here Harris describes an extreme where a communal imperative dictates productivity, rendering a reward unnecessary. Moral considerations — the protection of individuality — are only used in this argument to defeat the idea that no reward is necessary. But the idea that moral considerations, whether individual or collective in their object, might play a reasonable role in assessing labour-desert arguments is not adequately

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[97] *Supra* note 7 at 206.

[98] *Ibid.* at 206-7.

canvassed. A society might well be justified in rewarding certain types of productive activity on moral grounds, even where one "acted as he ought." Harris's presupposition of complete subservience is too strong.

Indeed, there is a middle ground; moral considerations can play a role without erasing either the idea of autonomy or the idea of rewarding good action. There are a range of communitarian conceptions of the good, and attitudes and acts which serve to promote and foster that good. These, while not obligatory, are preferable to certain other possible acts. Thus a community can choose to foster these chosen goods, and to reward those who choose to so act. This position neither "obliterates the difference between the obligatory and the supererogatory" nor "denudes individuality."[99] Under such circumstances, labour-desert may be a stronger justification than Harris would admit, though for communitarian and not individualistic reasons. It is also a clear recognition of specific aspects of property's *deon-telos*, in that the teleology behind private property choices are exposed, as are concomitant duties and rights.

e. *Personhood-constituting*

Arguments that focus on private property's role in becoming or developing part of a person's identity or personhood are commonly labelled "personhood-constituting" arguments. The most famous of these is Hegel's discussion of property in *The Philosophy of Right*;[100] the most recent is Margaret Jane Radin's analysis.[101] Harris illustrates these types of arguments by once again using the analogy of assault. Respect for personhood underlies the universal ban on assault as illustrated in the bodily-freedom principle; it follows that if a person's property is integral to personhood or self-identity, then property should be accorded analogous protection (by trespassory rules). Moreover, since people have powers over their own bodies (recall that these are not ownership powers as such), similar use-privileges and control-powers should be accorded over the objects of property. Harris points out that personhood arguments must be distinguished from autonomy or freedom arguments, all of which can overlap.

Yet in Harris's view, the argument cannot stand alone; it must either appeal to cultural assumptions and conventions, or else fall prey to idiosyncrasy.[102] In addition, it may be inadequate to explain alienation rights:

> Since personhood itself is non-transferable, it must be a *sine qua non* of any claim that a person has incorporated an cxtemal object into himself that is something he could never envisage as belonging to anyone else; and that is hardly the light in which most people view even their much-loved houses or flats. Perhaps wedding rings, sacred mementoes, or even never-to-be-seen dia-

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[99] *Ibid.*

[100] G.W.F. Hegel, *Elements of the Philosophy of Right*, A.W. Wood, ed., trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991) at 73-114.

[101] See *supra* note 4.

[102] Radin recognizes this point, and attempts to use an intuitive reformulation of Hegel's central idea to get around it. To a certain extent, I believe she is successful. See *ibid.* at 47-48.

> ries are instances of the personhood-constituting phenomenon. If so, the argument now under consideration could stand alone as a property-specific justice reason for recognizing an ownership interest over such things (even if ownership could be justified on no other grounds); and the argument would support some features of property-institutional design — for example, that such things should be exempt from bankruptcy or tax-expropriation rules.[103]

Therefore, according to Harris, unless the personhood argument can be combined with something else, it will fail to justify full-blooded ownership since it cannot fully explain the transfer of property entitlements.[104]

Once again, I believe Harris has grasped the ultimate limitation of this type of argument. While personhood might grant some limited rights of use, it does not justify rights to alienate, often presuming them afterwards.[105] However, for reasons similar to those advanced on labour-desert, Harris is perhaps guilty of underplaying the persuasive force of the personhood metaphor. Suffice it to say, the assault analogy used by Harris seems more akin to a freedom or autonomy argument — the creation and protection of some small sphere of social wealth close to the person — than it does to what I see as the most powerful element in both Radin's and Hegel's casting of the developmental argument. Access to private property helps one develop as an individual in the context of one's community. By focusing on protection against intrusion, Harris's treatment makes this approach look more like a static privacy argument.

The personhood argument can be seen in a less individualistic light, particularly in Hegel's work. Even if the primary focus of personhood analysis is on individual development, there is nonetheless a collective good that results from the positive development of the individual, and subsequently or concurrently, from the collective development of the whole. Once again, a focus on the teleology of personal and communal development — to what end should the person and society be aspiring? — and a recognition of mutual duties associated with that process provides a platform from which a society can declare that certain types of personhood-constituting property relations are beneficial and should be fostered. In Hegelian terms, the individual and the community develop in lock step, from Abstract Right towards Ethical Life, where each is submerged in the other.[106] I have analyzed this idea in greater detail elsewhere.[107] Essentially, the developmental argument, as I see it through the teleological and deontological filters of *deon-telos*, makes a sculptors's work of art, a poet's *carnet*, or a furniture-maker's dresser better grounds for a private property argument based on personhood than do the examples given by Harris in the passage above.

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[103] *Supra* note 7 at 223 [footnotes omitted].

[104] See *ibid.* at 220-23.

[105] Hegel's theory, for example, assumes alienability as a logical corollary to embodiment of the will: "It is possible for me to alienate my property, for it is mine only in so far as I embody my will in it." *Supra* note 100 at 95.

[106] See *ibid.* at Parts II, III.

[107] See D. Lametti, "Hegel and Property's Ideology" (1995) [unpublished, on file with author].

f. Privacy

Harris recognizes at the outset the potentially powerful role played by privacy arguments in the justification of private property. These basically assert that a person's privacy can only be guaranteed through some control over the social resources to which he is intimately connected.

> As we saw, when ownership is appealed to as a principle it is sometimes the case that the justificatory force stems from assumptions about privacy. There is a widespread, but by no means universally shared, consensus that respect for privacy represents a valuable facet of human association. Its ramifications range far beyond the agenda of property-specific justice reasons. Nevertheless, it may be invoked to support a natural property right, in the way set out at the beginning of this section. The intimate relationship which has arisen between a person and a thing may be such that, granted that privacy is intrinsically worthy of respect, just treatment entails recognition of an ownership interest.[108]

Ownership interests protect autonomy rights, which we value, and allow some scope for freedom. Once again, the assault analogy is used; invasions of privacy are tantamount to invasions of bodily integrity. The realm of privacy extends to the resources around a person which should, in turn, be protected by trespassory rules. Here one can see the defensive, static role performed by the hiving off of a sphere for the individual; the assault metaphor is, in my view, more appropriate for this type of argument.

Nevertheless, Harris concludes that privacy alone cannot justify a full-blooded ownership right. As with labour-desert arguments, the actual scope of privacy arguments needs to be determined in balance with communal needs. Privacy rights may be respected quite adequately with ownership entitlements which amount to less than full-blooded ownership. Social convention, then, fills in the substance and the scope of the *prima facie* right protected by a privacy argument.[109] My own intuitive response is that Harris's conclusions are sound. Consistent with my argument above, however, one might profitably ask what function privacy is meant to serve in society at large, and whether private property helps, hinders, or is neutral to this goal.

Harris concludes that this first category of property-specific justifications based on a person's relationship with and actions upon social resources, and containing many familiar arguments such as self-ownership, first acquisition, labour-desert and privacy, does not suffice to justify full-blooded ownership rights. At best, the two strongest manifestations of this type of argument, labour-desert and personhood, give added weight to other arguments grounded in other social facts, such as social convention. While I am generally in agreement on these points, I find that Harris's view of autonomy undervalues the labour-desert and personhood arguments. The role of autonomy in Harris's analysis manifests itself even more strongly in his second group of arguments, aptly characterized as freedom and autonomy, where a specific view of autonomy, namely, one which aspires to be neutral as between the value of different choices, is pivotal to the analysis.

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[108] *Supra* note 7 at 224.

[109] See *ibid.* at 227.

2. Freedom and autonomy

The second group of property-specific justice reasons does the yeoman's work of justifying private property in Harris's analysis, assertions to the contrary notwithstanding. However, Harris makes an important error here, both in terms of justificatory weight and the design of property institutions. The overemphasis on autonomy, the second criterion of minimal justice, leads to conclusions about the justification of property that are not entailed in the arguments for freedom.

As stated above, this group of arguments revolves around the ideas of freedom and autonomy. In Harris's view, ownership freedoms foster the promotion of autonomous choice, and therefore the idea of freedom generally contributes to a *prima facie* private property institution which supports these ownership powers and freedoms.[110] Nevertheless, these arguments do not justify full-blooded ownership, they justify at best a property institution with only minimal use-rights.[111] Moreover, the freedom argument does not extend to all types of social wealth, since land is not particularly susceptible to these kinds of arguments. This is a balanced view. Harris is careful to avoid the more sweeping claims of other rights-based theorists, asserting instead that liberal ownership is *not* straightforwardly justifiable merely because it enhances individual freedoms.[112]

In spite of the above caveat and the care taken throughout his analysis, Harris's emphasis on individual autonomy places him closer to those supporting liberal ownership than I believe he intended to be. The emphasis on autonomy creates too strong a *prima facie* entitlement for too wide a range of control and use-powers over objects. In particular, Harris is unpersuasive in attempting to demonstrate that certain alienation privileges are justified by his approach. Rather, only hidden assumptions about individual choice can explain the tenuous leap he makes from use-privileges in a mere property entitlement to transmission and alienation powers in an ownership entitlement. It would appear that, notwithstanding his best efforts, Harris has fallen prey to the individualistic assumptions about ownership that can arise from certain readings of the autonomy criterion. In addition, he is suffering the consequences for not recognizing any intrinsic limits to ownership in his discussion of the ownership spectrum and property-duty and property-limitation rules. ("Aunt Sally" was tougher than she looked![113]) He is unconsciously pushed by his own mindset to a substantive position he formally eschews. This shall be argued in the following sections.[114]

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[110] See *ibid.* at 231.

[111] See *ibid.* at 238.

[112] See S. Coval, J.C. Smith & S. Coval, "The Foundations of Property and Property Law" (1986) 45 Camb. L.J. 457, as well as Penner, *supra* note 35 and accompanying text, who, as we have seen, assumes property's justification is "well nigh indisputable" merely because of its contribution to the well-being of so many.

[113] Harris claims that "totality ownership" — the most absolute form of ownership — is an "Aunt Sally erected to be knocked down" (*supra* note 7 at 134). Yet in both Harris's and Penner's analysis, an examination of rights-based assumptions reveals the pervasiveness of the idea of absolute ownership.

[114] I should point out the sub-headings in this section do not follow those in Harris's discussion.

a. Autonomy and ownership generally

Harris makes the following general statement about ownership and autonomy early in his discussion of such arguments:

> As we have seen, the core idea of a property institution consists in the twinned conceptions of trespassory rules and the ownership spectrum. These conceptions focus on resources (material, ideational, and monetary). Property institutions both regulate use and allocate wealth. *"Owners" are necessarily authorized, not merely to act as they please in relation to resources, but to control uses by others and to arrogate to themselves and to accumulate items of social wealth as part of their private wealth — the more so to the extent that the prevailing conception of ownership rises up the ownership spectrum.* Must it be the case that a "liberal" conception of ownership is one which calls for full-blooded individual ownership of all resources? Clearly not. Everything will depend on the interpretation which a particular liberal theory gives to the first element of the minimalist conception — natural equality. *Autonomous choice is to be valued, the wider the range of it the better. Full-blooded ownership entails a wider range of choice than any lesser conception of property right.* But it may be the case that universal allocation of resource-holdings in the form of full-blooded ownership will have the practical consequence that some people are treated differently from others on the ground that they are different kinds (less well-born, less talented, less canny) of human beings. Since we are not here concerned with the essence of "liberalism" we shall drop the adjective "liberal" altogether. Our enquiry is whether inherent property freedoms are a necessary feature of the just society.[115]

There are a number of points to note in this revealing passage. First, the second emphasized section of text suggests that merely having more choices is a better state of affairs for the autonomous person, and that since full-blooded ownership entails more choice, it is intrinsically better. This is not a neutral claim with respect to autonomy, as was argued above; the idea that more is preferable is based on a very individualistic picture of personal autonomy.[116]

Second, in the first emphasized passage, the use of the term "owner" for all entitlements has implications; notice the prevailing bias in favour of all owners on the ownership spectrum to do what they please. Common lawyers tend to gloss over the difference in use between words like "ownership" and "having" as if nothing turns on such distinctions.[117] Harris, in discussing the ownership speetrum, says the following:

> What one may "own" (be entitled to) may be an ownership interest, or a lesser proprietary, or other, right. Only if the entitlement is to an ownership interest does "ownership" function as an organizing idea from which concrete privileges and powers may be inferred.[118]

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[115] *Supra* note 7 at 231 [emphasis added].

[116] See *supra* note 57 and accompanying text.

[117] Harris does this on a number of occasions, and in general considers such terminological discussions as "red herrings": sce *supra* note 7 at 39-40, 79ff. Waldron is guilty of this same imprecision: see *supra* note 3 at 56-57.

[118] *Supra* note 7 at 80.

In postulating this flexible spectrum where the content of what one "owns" can differ significantly, Harris initially appears to imply that many different property relations to the objects of social wealth are possible and that none are necessarily preferable to any others. All are given the same label — "ownership" — despite their differing points on the spectrum. But a closer examination reveals that this is not the case. Attaching the ownership label to all of those various relationships to social wealth leads to the conclusion that full-blooded ownership is the archetypal mode of ownership or, as I would say, "entitlement". The use of the word "ownership" applied across the spectrum indicates a discourse predicated on the *prima facie* idea of unlimited use of the resources in the bundle unless specifically restricted, as opposed to the *prima facie* idea that resource holding is limited.[119] Under such terms, any "owner" along the spectrum will have the presumptive ability to use the resource as one pleases. The only "sticks" one does not possess in the bundle of rights are those specifically *removed.* In this sense, property theory's dominant metaphor is in fact the inverse: property is not about identifying what substantive powers are in the bundle of rights, but rather is characterized by specifying what powers and rights have been removed. Even in naming the spectrum of private property entitlements "the *ownership* spectrum", Harris seems to rely on the applicability of the label to a wide variety of property relationships. This accords completely with a view of ownership that gives pride of place to individual autonomy, facilitating the widest range of possible choices for the owner of any given entitlement.[120]

b. *Hegel*

Harris is well aware that the Hegelian metaphysical highway is an icy one; once on it, one must drive with care, avoid any "momentary" stops, and drive until the end.[121] Harris's interpretation of Hegel is interesting, as it takes on several of the dominant interpretations of Hegel, notably that posited by Waldron. I believe that as desirable as this conclusion might be to an egalitarian, Hegel cannot be interpreted literally

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[119] If one does not want the ideological assumptions behind the word "ownership" to be attached to resources such as lesser rights, such as what Harris calls "non-proprietary ownership interests", then one must be careful to not use the ownership label to mean "to be entitled to." This, of course, is the irony involved with the Civil law's use and conception of ownership. While one might say that the Civil law, being a system which posits a unitary concept of *dominium* as it starting point, is more focused on ownership than the Common Law or gives ownership a greater pride of place, by defining ownership as but one entitlement, and being careful in the application of the term ownership, the Civil law does not fall prey to the unconscious and often excessively individualistic pitfalls of using the concept and the label of "ownership" indiscriminately.

[120] I have elaborated this argument in "Normativity", *supra* note 13. In my view, there is more to the difference in mind-set than the mere use of the word ownership. It also points to the substance of the interests along the ownership spectrum and how they are meant to function. To what points on the spectrum do we apply the full normative weight of ownership as a principle? When a conflict occurs with other principles, does ownership carry the same weight at all points along the spectrum? So, if one's tools are interfered with in Forest Land, where mere property is the paradigm, is the *prima facie* right as strong as if one's land is interfered with where full-blooded ownership is the paradigm?

[121] The metaphor is mine. See *supra* note 7 at 232, for Harris's careful caveats.

to have meant that property must be available to everyone, as Waldron asserts.[122] While Hegel's property schema does appear to be more materially determined than Harris concedes, Harris's reading of Hegel is nevertheless more persuasive than Waldron's, which, I have argued, is too static in its view of Hegel's "moments".[123]

However, Harris's summation of Hegel's argument is not unproblematic. It is described as an argument from freedom, and my main concern is with the predominant autonomy spin given to Hegelian property as a whole. The following passage in *Property and Justice* is enlightening:

> The argument from freedom to property runs as follows. If we take seriously the concept of the free individual, the person capable of bearing rights, we must necessarily recognize a sphere of *meum* and *tuum*, for in no other way can the abstract person differentiate himself from the world and from other persons. "The person must give himself an external *sphere of freedom* in order to have being as Idea." We confront this philosophical truth with a historically-evolved institution, property. That institution, in its modern guise of individual private property, precisely matches the necessity for abstract freedom to be concretized in an external sphere. It enables the abstractly free will to become actualized through asserting exclusive possession over things, through making unlimited use of things, and through alienating things to others. Its inherent choice-facilitating role is thus *the* rationale of a property institution. "In relation to needs — if these are taken as primary — the possession of property appears as a means; but the true position is that, from the point of view of freedom, property, as the first *existence* [*Dasein*] of freedom, is an essential end for itself".[124]

Despite the initial caveats advising against being caught up in any one Hegelian "moment", it seems to me that Harris has in fact done just that by over-stressing one aspect of the Hegelian process, namely "choice-facilitating". In doing so, he has lost the dynamism of Hegel's process. Harris has reached a dead end. In my view, Hegel cannot be read as saying that more choice is necessarily better. Choice, in this context, is part of the individual's progression towards not only freedom but ultimately Ethical Life. As stated in the Addition: "The rational aspect of property is to be found *not* in the satisfaction of needs but in the superseding of mere subjectivity of personality."[125] Freedom is identical *not* with subjective ends, needs, and arbitrariness, which are the subjective conditions of mere possession. Rather, freedom has an objective, non-contingent — and hence — teleological quality. The act of possession must be recognized by others. So the importance of quality of choice is at least implicit through-

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[122] See *supra* note 3 at 380-81.

[123] See *Deon-Telos*, *supra* note 12 at c. 4. This, in my view, is a product of Waldron's attempt to pigeon-hole Hegel's theory of property into the confines of a general rights-based theory. Hegel's whole body of thought in the *Philosophy of Right* is *sui generis*. It cannot be made to fit standard interpretations, mainly because of its developmental nature and the interconnectiveness of its assumptions. While one can extract tendencies or general principles like "self-development through embodiment" or "expressiveness" for application to modern society generally, it defies more precise classification.

[124] *Supra* note 7 at 234-35 quoting Hegel, *supra* note 100 at 73(§41) and 77(§45) [footnotes omitted and emphasis in original].

[125] Hegel, *supra* note 100 at 73 (§41, Addition) [emphasis added].

out.[126] For Hegel, it is not that any property choice is necessarily a good choice; fetishism, for example, would not likely be allowed as it values an object completely subjectively. This is clear in Hegel's advancement of full-blooded ownership, at the stage of Abstract Right. Harris seems aware that at the level of Abstract Right, both the Will and full-blooded ownership are abstract; in their actualization, both will be read down and limited by communitarian imperatives in the progression to a higher stage.[127]

Yet in his own discussion of what the *prima facie* right entails, Harris seems to cast the net of ownership as widely as possible. In his restatement of the Hegelian schema, the conclusion seems to be that property freedoms writ large are inherently justifiable.[128] This starting point is too strong, especially when one considers the scope of actual private-property rights.

c. *The scope of* prima facie *rights: mere property and transmission*

The problematic emphasis placed on autonomy in the above readings of justification manifest themselves at this stage, where Harris begins to fill in the shell of his *prima facie* property right. In his analysis, unless an anti-freedom property can be advanced, property freedom encapsulates three types of ownership freedoms: uses; transmission powers; and independence from social control. The first two inhere in the property institution; the third is instrumentally connected.

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[126] See *ibid.* at 79 (§49 and Addition); 81-82 (§51 and Addition). One's body, for example, as that which is first possessed may nevertheless not be misused (*ibid.* at 79 (§48 and Addition); 101 (§70)).

[127] Harris, *supra* note 7 at 235 [footnotes omitted], writes:

> Only what we have called full-blooded ownership fits the freedom bill. For the abstractly free will to be capable of appearing on the world stage as a fully rational will it must be presented with an institution that makes possible exclusive, unlimited, and transferable ownership.
>
> That is Hegel's diagnosis of the inherent freedom-conferring qualities of property institutions at the level of abstract right. But it is far from representing his final conclusions about the justifiability of individual private property. Features of concretely just property institutions need not reflect precisely the implications of full-blooded ownership, once the "moment" of abstract right is subsumed within those of morality and ethical life. So far as morality is concerned, "the good" may require that starving individuals be licensed to commit what would, at the level of abstract right, amount to theft. Within ethical life, family property may take precedence over individual private property so that, for example, the right of free testation is appropriately restricted. Within the State, political considerations warrant the permanent maintenance of an independent class of landed proprietors and that justifies restraints on alienation of land which, in terms of abstract right, would not be permissible. Although individual private property is "more rational" than any other form of property, the higher sphere of right embodied in the State may justify corporate property and mortmain.

[128] *Ibid.* at 236.

The first type of ownership freedom asserts that the *prima facie* shell includes control powers over uses. This position is relatively unproblematic. Consistent with what I have said above, these uses are inherent in the relationship we have with things. I say "relatively" unproblematic because these powers are not unlimited; the social aspect of property, governed by its *deon-telos*, means that unlimited use powers over social wealth will rarely be attainable or justifiable. One might have full-blooded ownership of trivial chattels, but most other objects of social wealth will be identified, distributed and regulated according to the considerations I group under *deon-telos*. Harris would go further, consistent with the primacy he gives to autonomous choice:

> If a property institution exists in a society, then at least mere property over some resources must be accorded to individuals or groups with the protection of trespassory rules. Mere-property freedoms necessarily encompass an open-ended set of use-privileges and control-powers. X is free to use and (at his pleasure) to license others to use a picture, or a house, or a copyright if he has any kind of ownership interest in it — subject to any property-limitation rules there may be.[129]

Harris's "analytical truth" is that mere property freedoms are an open-ended set of use-privileges and control powers. But this is not an analytical truth at all. The range of uses that one has over any resource is determined by the social context, by communal imperatives — in short, by property's *deon-telos*. The more important the resource, the more scarce, or the more directly its use will have an impact (especially if negative) on others, the less open-ended the powers will be. One might have open-ended use and control privileges over a chattel; but this does not mean the same argument would be extended in principle to land. In part, this error once again comes from using the loaded term "ownership"; one's entitlement may or may not include some powers. Yet in Harris's book, any point on the spectrum is "ownership" and is vested with all the presumptions that the term implies. "Mere property" is the best form of ownership one can have in many systems. But mainly it comes from the assumption — and it *is* an assumption — that the quantity of choice is better than the quality of choice. Harris makes precisely this point as he moves from the above-quoted passage to assume the truth of unlimited ownership rights *ab initio* and elevate the assumption to the status of a justificatory argument:

> If that analytical truth should turn out also to be a justificatory argument, it will be of far wider application than any of the justice reasons considered under the category of alleged natural property rights. For example, the freedoms thus vouchsafed go beyond anything which would follow from the privacy argument. Ownership, purportedly justified by freedom, extends to things with which the owner has no intimate connection. The underlying value is mere choice, not specially protected choice.[130]

So Harris has taken Hegel's explicitly abstract argument and assumed its veracity in the concrete.

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[129] *Ibid.* at 238.
[130] *Ibid.*

This leap cannot be justified. Indeed, Harris has not justified it. The necessary degree of access to resources that a freedom argument will justify *prima facie* does not entail any sort of unlimited ownership right in substance. This is most easily explained by the variety of non-private alternatives to property: common ownership; quasi-ownership (crown corporations or other public agencies); or even direct state ownership. Harris cannot meet this claim; rather, he is forced to turn to instrumental arguments in an effort to assert an intrinsic superiority of mere property (ownership) freedoms:

> If mere-property freedoms are intrinsically valuable, it must be because they contribute more to human well-being than do any of these variants of regimes of communal use. If the argument from autonomous choice to ownership were based solely on the notion of maximizing opportunities to make use of the external world it would clearly fail. Owners are armed with control-powers enabling them to exclude others. It can hardly be supposed that they will inevitably exercise them in such a way as to confer more use-opportunities than would result from any variety of communal use regime. From an abstract maximalizing standpoint, communal use is preferable. However, that is not the burden of the argument for mere-property freedoms. It has to do with channelling and policing uses which are potentially in conflict.[131]

The efficiency and channelling reasons offered by Harris are in no way entailed by ownership freedoms based on autonomy. Indeed, these instrumental considerations are supposed to go towards filling the shell of the *prima facie, natural* right, to defining its scope and limitations, and not to the argument of its "naturalness" or justification. Harris has had to resort to extrinsic, non-natural, and utilitarian factors to show that private property is intrinsically superior to some other conception of property.

In short, if Harris is to remain true to his own argumentative structure, instrumental reasons like use-channelling and use-policing functions cannot be imported to add substance to the argument for a *prima facie* right. Autonomy-driven freedom reasons might justify the shell of a natural private-property right, as did personhood and privacy of arguments. On the contrary, these instrumental reasons are often driven by social convention and, as such, go to filling out the content of the right at the level of institutional design.

Moreover, once instrumental concerns are included in the substantive delimitation of property rights, one cannot choose to include only those aspects of the instrumental calculus which tend to support private property freedoms; those delimiting aspects of instrumental reasons which tend to illustrate property's *deon-telos*, for example, larger social goals like the channelling of resources, must also be included. If Harris resorts to instrumental reasons to fill out his freedom argument, he must be prepared to discuss a wide variety of instrumental reasons which would serve to limit certain potential autonomous choices in the service of larger goals. Even with respect to chattels, the argument that there is a *prima facie* full-blooded ownership right is too strong, since the reliance on instrumental, use-channelling and use-policing functions of private property to arrive at a full-blooded right means that any limiting aspects of use-

[131] *Ibid.* at 239.

channelling and use-policing cannot be left aside when importing instrumental reasons into the mix of property-specific reasons.[132] If one held a scarce, unique and valuable chattel, use-channelling functions might be driven by social concerns serving societal goals, such that the full-blooded ownership of that type of chattel could never be justified *ab initio*. Had it been known, Lady Churchill could have been compelled — indeed should have been compelled — not to destroy the portrait.[133]

Put another way, Harris has assumed that the burden of proof lies with those wanting to restrict private-property rights to show that the restriction is justified. But if full-blooded ownership cannot be justified in theory without a resort to social convention (Harris admits this) and does not exist in practice (Harris admits this too), on what grounds can one assume that the starting point for private property is unlimited and that the burden of proof should be on those seeking to limit it? Similarly, how can one assume that an entitlement entails powers not explicitly specified? It seems that the opposite might be more plausible. Unless one can show that there is a natural right to full-blooded ownership, one should have to justify full-blooded ownership *ab initio*, and not be allowed even the *prima facie* benefits of organizing one's paradigm around it. Historically and conceptually, one might plausibly assume that common property is the norm, given Harris's first assumption of presumptive equality in sharing the earth's resources, until proven otherwise. Indeed, this was perhaps *the* central Thomistic insight on private property, and the motivating force behind property theory from Thomas Aquinas to Hume, including Locke; originally all had a natural right to property, and *private* property was but one way chosen by human beings, through their reason and in harmony with Natural Law, of determining or specifying that right.[134] As was argued above, Harris has not made the case for the logical priority of private property.

This overstatement on Harris's part lies, I believe, in the characterization of autonomy. To repeat: "The underlying value is mere choice, not specially protected choice."[135] Harris has implied that the *prima facie* property institution serves not a social or communal purpose, but only the underlying value of quantitative autonomy. Some specially-protected choice, however, is often what the moral discourse behind private property will necessitate.

Once assumed, the consequences of this conclusion — that one has the most widespread rights possible under the *prima facie* private-property right — are extremely difficult to contain:

> Thus, we have an independent argument from freedom to property in respect of things which are, conventionally, already the subject of ownership interests.

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[132] See *ibid.* at 244-45, 250.

[133] Shortly after her death, it was discovered that Lady Churchill had destroyed a portrait of Sir Winston given to him by the English nation: see *ibid.* at 66, n. 9.

[134] See Thomas Aquinas, *Summa Theologiae*, q. 94, a.5. On the threads running through the Natural Law tradition of property, see generally S. Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Oxford University Press, 1991).

[135] *Supra* note 7 at 238.

> Clothing, furniture, books, gadgets, toys, vehicles, and many other chattels are examples. One's relationship to such things may in no sense be intimate, such as to give rise to privacy considerations, let alone constitutive of personhood. However, conferring (at least non-transferable) ownership privileges and powers over such things on individuals not only enlarges their domains of choice, it also saves the community the cost of instituting and policing a regime of communal use. Such a regime would multiply, for no good reason, the occasions on which community agencies make decisions about the details of citizens' lives. It would absorb effort and resources which could be expended on other community projects which justice requires.
>
> It follows that mere-property freedoms, in relation to such things, are of value to the individual and to others and are therefore just.[136]

According to Harris, then, *private* property *necessarily* should exist in any society where there is any sort of scarcity; definitionally, this means any society where a property institution exists.

Finally, an autonomy-driven view of ownership would also obscure the focus on the objects of property, something which Penner implores us to consider in his analysis. As autonomy focuses primarily, if not solely, on individual reasons for action, one may lose sight of the intrinsic value which some item of social wealth might have, the goals it might serve and the duties of stewardship or productive use that its owner might attract. How does one rule out the wanton waste of a valuable resource, for example? Lady Churchill's actions are not justifiable on this account either.[137]

The impact of this interpretation of the autonomy interest is perhaps even more pointed when one looks at the second type of ownership freedom, namely alienation powers. Once set up, the autonomy-freedom argument *necessarily* justifies transmission, since a person's choice to lend, license or give away by gift is as deserving of respect as any other choice.[138] Choice then justifies the *monetary* equivalent of such social resources. If these types of transmission are possible, then *prima facie*, so is transmission by contract and, through a similar extension, by will. It seems to me that we have, without justification, gone beyond the uncontroversial starting point that property rights involve some limited use and control privileges. We are now at a starting point that assumes not only use privileges, but also relatively uncontroversial transmission privileges such as gift and perhaps contract,[139] and even very controversial exchange privileges such as inheritance.[140] The allocative impact of some of these powers of transmission seems intuitively too strong and too enduring to grant them inclusion *prima facie* in the shell of a property right. So transmission by will or intes-

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[136] *Ibid.* at 241-42 [footnotes omitted].

[137] I think this is a critical point, and using Penner's notion of an *in rem* property duty, I attempt to elaborate its larger implications for the (moral) source of private property's normativity in "Normativity", *supra* note 13 and *Deon-Telos*, *supra* note 12 at c. 6.

[138] *Contra* Christman, *supra* note 3 at Part III, who does not include exchanges for consideration in the core property right.

[139] Penner does not include contract: see *supra* note 8 at 91-92.

[140] Most famously, see P.-J. Proudhon, *What is Property?*, trans. D.R. Kelley & B.G. Smith (Cambridge: Cambridge University Press, 1994) at 184-85.

tate inheritance, for example, needs to be substantively justified not only in light of their potential benefits to individual autonomy, but as against their negative impact on equality of resources.[141]

I have argued above that even in Harris's description of private property the *prima facie* right is too strong.[142] This claim is now supported in theory; Harris's *prima facie* right is a strong, robust version of ownership entitlements which in some ways has gone even further than Penner's defined property right. In some cases, Harris's right is an explicit *prima facie* right to full-blooded ownership (chattels); in other cases, it involves many or most of the rights traditionally associated with full-blooded ownership. In all cases, the *prima facie* right is fortified by the pre-eminent weight given to *individual* autonomy, and is defended by the preponderant rhetorical weight of private ownership as a principle and an organizing idea. This serves to exclude most obligations as well as any social, non-individualized collective good which private property might serve, or any role it might play in fostering that good. Framing the *prima facie* right in this way explains the definitional tendency identified elsewhere, namely that all rights (rights on the ownership spectrum and the trespassory rules which serve them) are treated as intrinsic to the property institution, while all other concerns (property-duty rules and expropriation rules, for example) are treated as extrinsic.[143] Given this structure, who needs the Aunt Sally of totality ownership? The champion named "full-blooded ownership" is supposedly less strong, but virtually invincible.[144]

d. *Anti-property (freedom) arguments*

Thankfully, some of the normative weight of Harris's theoretical starting point is lessened by the force of so-called anti-property arguments: limitations, fetishism, wealth-disparity and domination potential. However, as was the case in Harris's description of property-limitation rules and property-duty rules in Part I of *Property and Justice*, the amount of possible weight that can be given to arguments limiting property freedoms is hampered from the outset by their relegation to a secondary, extrinsic status.

As a result, in Harris's view, the freedom-based principle of ownership (as full-blooded ownership) does not suffer from an inherent contradiction in allowing the power to create, in perpetuity, lesser ownership entitlements (as less than full-blooded

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[141] Ironically, as we shall see shortly, privileging some types of transactional choices over others by admitting and cohering to property's *deon-telos* might very well make sense of these considerations, and give some guidance as to the circumstance when alienation is an intrinsic part of the entitlement, and when it is not.

[142] *Supra* note 69 and accompanying text. The fuller argument is contained in "Normativity", *supra* note 13.

[143] See *ibid.*

[144] I have omitted Harris's third ownership freedom — independence from social control — as the *deon-telos* analysis only adds the obvious corrective: one should view social control in a more positive context. Harris is already reasonable in this regard.

ownership)[145] which do not possess the same powers as full-blooded ownership. After all, full-blooded ownership is only a *prima facie* right and, as was mentioned above, the common lawyer has the advantage of being able to attach the ownership label to any narrow or wide agglomeration of rights. But in my view, this argument is unconvincing. Not only is it weakened by building as it does on loose usage of the word "ownership"; it also rests on a series of argumentative steps that use only individualistic, instrumental arguments to justify a natural right. As argued above, more socially-oriented instrumental views need be accounted for. Most important, Harris's argument on creating lesser ownership entitlements fails to address the essential logical and moral questions: can one "owner" create perpetual restrictions on some object of property once one has completely alienated it to another owner of the same status? Can such a power ever be justified? Harris seems to argue that this power is justified simply because it forms part of the *prima facie* right, and legal systems allow one to exercise it.[146] One would think that Harris's *prima facie* right should not include a right which so blatantly contravenes his first minimal principle of justice. But such is the force of an individualistic autonomy view which eschews distinguishing the values promoted by competing choices.

Only domination-potential — the idea that private property accords social power to individuals, and thus accumulations of private property in the hands of the few should be avoided — seems to retain some measure of force as an anti-property argument in Harris's conclusions.[147] Other anti-property arguments are not so successful. Wealth-disparities and the principled re-allocation of resources cannot take away from the *prima facie* right to transmit property rights to others, in effect because the *prima facie* right is so strong. Even Rawls' minimax principles of justice are ruled out because Rawls includes private property as a basic right.[148] However, it is quite plausible to interpret a right to personal property as something far less than full-blooded ownership over a wide variety of resources in a private property system. Indeed, this has been the case throughout most of the Western property tradition.[149] Harris's blanket inclusion of transmission rights is, after all, based on an unconvincing argument.[150] It

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[145] The contradiction was identified by Hegel, and recast by Charles Donahue: see Hegel, *supra* note 100 at 90; C. Donahue, Jr., "The Future of the Concept of Property Predicted from its Past" in *Nomos XXII*, *supra* note 4, 28 at 33-34. See also Harris, *supra* note 7 at 253-55.

[146] See *supra* note 7 at 255.

[147] Harris's contrast of the merely "potential" negative effects of domination resulting from property power to the *necessarily positive* effects of affording more choice is illuminating. This is a false contrast in my view: both the positive and negative effects of any choice or any limit is a potential effect. It is unfair to assume that the positive impact of allowing human choice with respect to resources are actual, while the negative impact of domination potential is only potential: see *ibid.* at 265.

[148] See *ibid.* at 259. In fact, Rawls used the term "personal property": see Rawls, *supra* note 16 at 61. Harris's inflation of that term to what amounts to full-blooded ownership across the board is questionable, at best.

[149] The Natural Law tradition held that property was given in common to all human beings, and that *private* property was a human specification of this natural right held by all: see *supra* note 134 and accompanying text.

[150] Christman's argument, *supra* note 3 at 127-35, is much more plausible, in my view. Christman argues that all alienation and transfer rights are not necessarily part of private-property rights. Control

does not suffice to say that since any type of property entitlement will create wealth disparities, these disparities should not have any part in the institutional design respecting transmission limits. Finally, fetishism, according to Harris, cannot play any role in institutional design since any individual choice is as good as any other.

Perhaps fetishism is not so grave a problem to property systems, and can remain within the range of acceptable autonomous choices. (I do, after all, like my books and CDs, and they do contribute to my sense of well-being.) But when even such powerful arguments as wealth-disparity do not pass muster except under very limited circumstances, one suspects that something has altered the balancing process in favour of private-property arguments. The critical point again is the weight given to *any* autonomous choice, and the illegitimate extension of that natural right (via instrumental arguments) to property transmission. A society is served by the private property institution, and its imperatives must be included, *intrinsically*, in that institution's justifications and features. Anti-property arguments — including arguments to prevent the more odious consequences of some types of fetishism — are not, in this view, a secondary category of *ex post facto* limits, but part and parcel of the property institution; they are *property* arguments.

3. Instrumental justifications

Harris's third group of property-specific justifications revolves around the instrumental justifications for private property. In his analysis, these types of reasons contribute towards structure and design. He groups them into four categories: direct justice costs; indirect justice costs to cover basic individual needs; incentive arguments; and independence-fostering instrumental arguments. Once again, Harris's focus is on the fostering of individual choices.

This whole category of argument is downplayed unduly by the individual, autonomy-based nature of the minimal assumptions. There is a more robust reading of instrumental, one might say "teleological", reasons for private property which help foster societal goals. Aspects of this teleology are seen in previous critiques of Harris's use of Hegel, as well as Harris's articulation of personhood-constituting arguments. From a moral functionalist perspective, instrumental arguments might enable private property to further the goal of good social ordering. They might even help discern which types of autonomous individual choice might be promoted, or in some cases prohibited. On such a reading, then, instrumental arguments go not only to institutional design, but also to the substance of the property right. If one takes property's *deon-telos* into account, the societal aspects of instrumental justifications are much more difficult to play down.

It is useful to recall that Harris does use instrumental arguments substantively in support of his freedom argument, filling out its shell. While I am critical of this move on Harris's terms, nothing precludes the substantive use of instrumental reasons. Like

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rights — use, possession, management and unilateral alienation — are more basic than income rights — including market exchange. See also Penner, *supra* note 8 at 153ff., who draws a distinction, implausible in my view, between unilateral alienetic gifts and other exchanges.

other parts of the discourse of justification, all such determinations will involve a balancing of rights and *deon-telos*, and will take place against a backdrop of larger moral claims about justice. Harris has most of the component parts and processes of the discourse right; he neglects only the additional perspective that is afforded by the lens of *deon-telos*.

a. *Direct and indirect justice costs*

Direct justice costs flow from the bodily integrity principle and consist of strong rules protecting against invasions of one's body and closely-held property. Such costs are exemplified by criminal law provisions and other imperative rules. Indirect justice costs, on the other hand, are those necessitated by the requirement that the property institution be used to meet the basic needs of individuals. Once again, Harris categorizes these costs as those which are necessary to facilitate the autonomous choice of individuals.

Both of these categories, in Harris's taxonomy, revolve around the individual. In my view, this is too narrow. There is a good to be protected by the criminal law — peace and order — that does not cash out only at the level of individuals. Similarly, with respect to indirect justice costs, not all choices people can make will facilitate their basic needs — material or immaterial. Any society's definition of its basic needs will be partly contingent, as Harris points out.[151] But this is no reason to avoid defining basic needs, or to characterize them only in terms of individual autonomy. Rather, some idea of the instrumental value of fostering certain societal goals will be absolutely crucial to the justification and design of the property institution.

Therefore, this category includes the two instrumental justifications, use-channelling and use-policing functions, identified above in the discussion of freedom. As I have argued, while these two justifications are in part individualistic, primarily in the service of fostering individual autonomy, they are also social in part, going to the service of societal goals. In this function they encapsulate the notion of basic needs and the goods property is meant to serve, as well as the most effective or efficient way to allocate resources and to design and protect property rules. The same is true for other instrumental arguments.

Thus, in large measure, these instrumental arguments will be subservient not only to individualistic arguments but also to social convention. For example, equally efficient and effective modes of protecting similar individual and social goods might be different in different societies merely because of social convention. More likely, social convention will infiltrate all instrumental arguments.

b. *Incentive arguments*

Incentive arguments are those which provide a justification for property rules to be used in the service of channelling and inducing certain forms of property-related

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[151] See *supra* note 7 at 285-87.

behaviour. Creator incentives and market freedoms are treated in a balanced and coherent fashion, recognizing their role in society and the contingencies to which they are subjected. On markets, Harris points out that these instruments presuppose a distribution of wealth which they cannot justify. One is reminded of the fundamental point famously made by Karl Polanyi: markets are not a naturally occurring phenomenon, but are *created by human decisions*.[152] It is an analogy one should always bear in mind with respect to property. That is, the societal value of the property institution and the explicit goals it can serve — distributional and productive goals, for instance — cannot be ignored. We *create* private property institutions in service of a variety of fundamental, though perhaps lower-level, goods (creator-incentive, for example) for both individuals and society, and we design such institutions using the tools (a market, for example) which will best serve these goals. This discourse is presupposed by property's *deon-telos*, and the study of these processes illuminates it. In practice, these instrumental considerations will play an extremely important role in filling out the contours of property institutions.

c. Independence

The independence argument comes from the idea manifested in historical arguments that having private property creates some space for individual development or citizen independence. Harris recognizes the role property has played in some historical arguments, and notes its continued, if diminished, importance.

Consistent with the substance and tenor of my critique thus far, one must keep in mind that a number of social values are also facilitated by these independence-protecting property rules. Metaphorically, one should consider the historical, republican view that individual rights can only flourish *after* one has secured the safety and independence of the (city) state from external forces. This security then provides the space for the cultivation of individual rights, including property rights.[153] This metaphor is reminiscent of the idea that a person's rights do not precede, but are coincidental with, the existence of the community. Thus, property does not exist on a desert island, there being neither the context nor the need. This insight cuts across the whole of my analysis.

d. Societal Goals?

The following critique shall be developed over the next section: the assessment of the arguments for private property and the design of its institutions must take social goals and imperatives explicitly into account. This will be most visible in instrumental arguments and in social convention, but it is also present, as argued above, in the individual-oriented arguments presented by Harris.

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[152] K. Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957) at 139-41.

[153] See, most persuasively, the work of intellectual historian Quentin Skinner. His most recent, and perhaps most accessible, work in this theme is *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1997).

One must also ask if there are certain types of instrumental arguments which have not been considered. Specifically, are instrumental arguments grounded in societal goods ruled out at the outset by Harris's initial assumptions? This would appear to be the case. Harris uses instrumental values in the service of very individualized goals. But society also attains a synergistic benefit from well-ordered institutions, from the collective product of individuals making good choices and developing their morals and talents. This benefit is more than the summing of individual benefits. Indeed, society has a responsibility to try to foster such goods, and property law is but one way. It is here that the force of the communitarian critique gathers its full strength. Even autonomy is contextual, in this sense, and the community has a responsibility to try to channel autonomous decision-making towards the collective good. Property discourse and institutions are a necessary part of this moral, deontological exercise.

4. Equality of resources and social convention

Finally, Harris deals with the other two large principles which have the potential to dominate property discourse: equality of resources and social convention. Recall that along with natural-rights arguments, these two categories of argument were initially cast as the three grand theories.[154] As a result of his analysis thus far, Harris has formally discounted any natural rights to full-blooded ownership. Nevertheless, Harris's various assumptions have informally given a substance to the shell of *prima facie* natural rights which is nearly as powerful as full-blooded ownership. In light of this, it is hardly surprising that while both equality of resources and social convention may play a role in justifying property, neither works as a dominating principle for Harris.[155]

a. Equality

In Harris's view, equality of resources operates effectively as a threshold issue in justifying private property. Once a threshold is reached, allowing us to say the distribution of the quantity and quality of resources is just or adequate to meet basic needs, then distributive issues no longer play a role in justificatory discourse or institutional design.[156] In light of what was said above, this view cannot be maintained over the long term unless the calculation of the threshold level of acceptability takes into account individual and societal needs. In particular, the threshold test must be continually reapplied, as property distribution changes over time. Moreover, one must consider which objects of property will be distributed to whom. Thus, for example, private-property rights should not have been sufficiently strong to justify absentee land-

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[154] One might speculate on the impact of concentrating the vast bulk of middle-level argument on the elucidation of whether natural-rights arguments to private property are persuasive, while dedicating only a comparatively small portion of the monograph to these other categories of argument. Even with the best intentions, one might argue, it is impossible not to get caught by the overwhelming force of rights discourse. I warned against such a possibility earlier at *supra* note 17.

[155] See *supra* note 7 at 330-31.

[156] The only exception is windfall wealth where equality of resources, according to Harris, is a sound property-specific justice reason: see *ibid.* at 314.

lords in Prince Edward Island if such a distribution causes social injustice to the residents of the island. Perhaps at some point in the future, our society will question the distribution of certain resources — say microchip technology — and its impact on equality.

b. Social convention

It should already be clear from the arguments thus far that social convention plays a critical role in justifying property and giving it its form. Even for Harris, social convention performs this latter role in conjunction with instrumental arguments. But this statement must be more strongly framed. Social convention not only colours the identification and weighing of justifying arguments for property institutions; it also plays a direct, substantive role in determining the shape of property institutions themselves, private or otherwise. While social convention may not be completely determinative of or coterminous with the Good, it does play a integral role in determining which goods should be promoted over others, and how such promotions should take place. Indeed, if natural law scholarship is correct in saying that there are no natural rights to private property but only to property generally (elements of Harris's analysis are not necessarily inconsistent with this view), then it is social convention and instrumental arguments that have moved Western society towards adopting private property over other, competing conceptions of property.

C. The (Unbearable) "Weightiness" of Being Rights-Based

Thus concludes the thumbnail sketch of Harris's property-speeific justifications of private property; their organization and force, along with an indication of how an appreciation of property's deontological and teleological imperatives might influence specific justice arguments and justifications. In subjecting Harris's arguments on justice to the requirements of *deon-telos* and identifying some of the assumptions upon which his structure is predicated, I hope that this review article has put into focus the following specific critique of his work: too much attention is paid to rights-based factors and little or none given to duty- and goal-based arguments. Thus, social convention, for example, is not weighted heavily enough, especially in light of Harris's conclusions on full-blooded ownership and on the role that scarcity plays. Autonomy-freedom arguments are confined to providing quantitative instead of qualitative choice to individuals and the consequences of this approach are unduly emphasized throughout the arguments of justification. Moreover, they are selectively assisted by instrumental arguments to give them certain powers of transmissibility over objects. By framing the whole discourse in terms of how it justifies property *rights*, and by basing those rights on what is, for the most part, an autonomy-based view of justice, Harris loses sight of a whole category of justification.

These specific points can be brought together by showing that, at the level of so-called grand theory, Harris is a rights-based theorist. This can be done by examining Harris's conclusions and assumptions at a deeper level, and it is to this last, global issue that I now turn.

1. Harris's conclusions

Harris offers his own summary conclusion as follows:

> Beginning with our minimalist conception of justice which did not include property, we have reached the conclusion that total abolition of property would treat everyone unjustly. There is a moral background right vested in each citizen of a modern society that a property institution of some kind must be maintained.
>
> It has emerged, however, that it is not every variety of property institution which will satisfy this background right. It must incorporate certain features, and justice requires that any actual institution which does not incorporate them should be altered so that it does.
>
> Most importantly ... the social setting of the property institution must be such that the community shoulders the obligation to meet the basic needs of all citizens. The discharge of that obligation may have implications which have nothing to do with property, but it may also entail some particular requirements of property-institutional design — including expropriatory taxing rules, appropriation rules where discharge of basic needs itself requires conferring property, and quasi-ownership holdings by public agencies.
>
> The property-freedom argument and the various instrumental arguments combine to make money and cashable rights indispensable features of a property institution. The same is true of full-blooded ownership of chattels. All dwellings must be the subject of ownership interests, the point on the ownership speetrum to be determined according to a mix of property-specific justice reasons — which includes the shell of a natural right to privacy, domination-potential in the case of family units, and incentive and market-instrumental considerations. The use-channelling and use-policing merits of property institutions, dangers of domination-potential, and market-instrumental and incentive considerations must all be taken into account on any question whether a major enterprise should be the subject of a (packaged) ownership or (packaged) quasi-ownership interest. Ownership interests over intellectual property should be recognized because, and only to the extent that, they have incentive and market-instrumental value, save where conventional assumptions about labour-desert have crystallized around them.
>
> Irrespective of distribution, all property freedoms are *prima facie* valuable, none are sacrosanct.[157]

So, on their face, Harris's conclusions lead quite reasonably to a plural justification of property rights. That is, various justifications might apply in different circumstances and no one justification is sufficient. A number of property-specific justice reasons may work in concert to justify the shell of a property right or the substance of specific property norms and their institutional design.[158] Moreover, consistent with the larger

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[157] *Ibid.* at 305-06.

[158] Harris writes:

> In the end, we are left with a mix of property-specific justice reasons — property freedoms, labour-desert, privacy, incentives and markets, independence, and basic needs. None of these imports precise, context-free considerations, and their mix can do no

underlying themes of this critique, it appears that the types of property rights that can be justified are limited; "mere property" usually suffices to fill out the shell of any natural-rights argument, for instance, while transmission rights are harder to justify, even using the classic arguments used in everyday discourse such as personality, first acquisition or privacy. Finally, in practice, the functional role of convention is quite strong, even if not considered by Harris to be a dominating condition.

Nevertheless, at the level of Harris's assumptions, it was suggested above that there is an individualist orientation running through the substance of many of the arguments. Thus, while there are no natural full-blooded property rights, there is a weighty moral claim — indeed, a very strong *prima facie* moral right — to some *private* property institution. Harris has defined the functional substance of the *prima facie* right broadly, allowing it to dominate and at times overwhelm other factors that might restrict the scope of rights in theory. I hope this review article has raised sufficient doubts about Harris's underlying emphasis on individual autonomy to warrant the broader-based critique that follows.

2. A rights-based argument

To a certain extent, recourse to a master-vision of property is inevitable at the widest level of social theory. Recall that Harris admits that the more general the justification for private property, the more moral it becomes. The same is also implicit in Lawrence Becker's analysis of property justification.[159] Harris, while admitting this to be the case, claims that he does not want to become involved in the articulation of a master vision or grand theory. Rather, he tries to elaborate a middle-level argument of property-specific justification. Earlier critiques of Harris's arguments have shown the difficulties encountered in such an approach, given the necessarily social aspect of private property.

In addition, as the structure and substance of Harris's argument clearly shows, the backdrop of private property involves moral questions. In Harris's case, this moral backdrop is coloured by the three minimal assumptions about property-specific justice. A re-examination of the role Harris gives to those principles, coupled with the substance of how they are applied, shows that his argument is indeed based on a master vision.

a. A master vision

In the very widest sense, a master vision is present from the outset of Part II of *Property and Justice.* As Harris admits, he does not start off with a clean slate; the

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more than structure our answers to general or specific problems. On the contested planes of politics or adjudication, there can be no such thing as judgement-free determinacy. In any case, property questions are inseparably affected by the social setting in which a property institution exists (*ibid.* at 365).

[159] See L.C. Becker, "The Moral Basis of Property Rights" in *Nomos XXII*, *supra* note 4 at 187. See also Becker, *supra* note 3.

property institution must serve the interests of justice, minimally conceived. Recall that three minimal criteria of property-specific justice — the natural equality of human beings, autonomy and bodily integrity — are postulated. In this articulation of minimal conditions of justice for the purposes of assessing property, I submit that Harris is presuming a teleology for property; the institution is placed in the service of a vision of human justice, the human good, as Harris conceives it in his initial assumptions. Once a *telos* is postulated, one can no longer return to a middle level of argument, if indeed such an intermediary level ever existed. The conditions of property-specific justice reasons are fundamentally tied to larger, necessary questions of social ordering. To this extent, the structure of Harris's argument may very well prove that some larger moral vision is necessary for understanding property rights.

What is the content of this vision and how does it cash out? The answer, as was pointed out above in the course of describing Harris's argument, is an overarching theory of individual autonomy, and specifically, a picture of individual autonomy that is classically liberal, where no particular choice is to be valued over any other.[160] Since the protection of autonomous choice forms the basis of the "interest theory" posited by Harris,[161] autonomous choice forms the basis for property *rights*. It is, in short, a rights-based argument.

Harris's rights-based view is premised on his very specific spin on justice arguments: the minimal justice requirement and its emphasis on autonomy. Instead of framing the minimal conditions of justice in neutral, non-controversial terms, Harris identifies these criteria and the mode of applying them in a rights-based view of private property. This contextual framework is by no means neutral or uncontroversial, even if much of Western society adheres to some version of a rights-based view. Only by importing this view into his analysis does Harris eventually arrive at his stronger claim, namely that there is a moral right to *private* property.

These assumptions and arguments put him squarely in line with other rights-based property theorists like Penner and Waldron, even if he is not as extreme as the former. Nevertheless, having left the door open for duty-based and goal-based considerations, and having implicitly used these elements throughout his analysis, Harris creates a theory which is much less rights-based than Penner's, and perhaps the theories of others as well.[162] Moreover, I would argue that the theory as structured can be more easily re-directed towards greater inclusiveness.

The tendencies built into Harris's foundational assumptions lead him to attribute a normative force to ownership as an organizing principle and colour his subsequent articulation of property rights. This skews his relatively uncontroversial starting point towards the rights-based side of the equation, affecting both the justifications for the institution of private property generally, and the design ultimately chosen. As a result, property's *deon-telos* is downplayed, both in theory and in practice. People exercise

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[160] See *supra* notes 130 and 135 and accompanying text.

[161] See *supra* note 7 at 170-71.

[162] I am thinking of Waldron's articulation of a rights-based argument in *supra* note 3 as well as Munzer's theory in *supra* note 3.

their property rights and responsibilities in context. This context is necessarily social. As such, *autonomy is contextual*, and any autonomy-based justification must reflect the societal context. In doing so, it will try to balance, or perhaps unite, the Good and the Right. This critique, therefore, draws some inspiration from similar critiques of other liberal theorists.[163]

b. A rights-based vision

The step down from grand theory to middle-range, practical or applied theory may be necessary in order to define the specific contours of just property institutions. One cannot, however, escape the assumptions one has made about property and justice at a higher level.

Harris classifies private-property rights as follows near the outset of Part II of *Property and Justice*:

> [In Part I of *Property and Justice*], we considered that juristic tradition, largely inspired by Hohfeld, which seeks to unpack property conceptions. We concluded that references to the 'rights of ownership' might point either to the privileges and powers which are intrinsic to ownership interests, or to those privileges and powers together with particular sets of claim-rights and immunities conferred by the rules of a property institution to protect ownership interests. These are categories of rights internal to property institutions. If, however, arguments based on property-specific justice reasons yield the conclusion that people have moral rights to property, these are rights external to any particular property institution and, on the face of it, 'right' is being used in a different sense. Without entering into the philosophical and jurisprudential controversy which surrounds the concept of 'a right', some clarificatory distinctions are warranted.
>
> A property right may signify:
>
> (1) one of the open-ended set of privileges or powers entailed by a particular conception of an ownership or quasi-ownership interest;
>
> (2) a claim-right, privilege, power, or immunity comprised by, or contained within, a non-ownership proprietary interest;
>
> (3) a right correlative to the duty imposed by a trespassory rule;
>
> (4) an immunity-right which is the resultant of exceptions to, or absence of, expropriation rules;
>
> (5) a right conferred by an appropriation rule to be vested with an ownership or quasi-ownership interest or a non-ownership proprietary interest;
>
> (6) the moral standing to claim that a person or group ought to be vested with an ownership or quasi-ownership interest or a non-ownership proprietary interest over some specific resource;

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[163] See *e.g.* the critique of Rawls' *A Theory of Justice* by Sandel, *supra* note 16.

> (7) the moral standing of a person or group to insist that a property institution (of some kind) be in place in a particular society.[164]

These passages show clearly that, in Harris's view, the private property institution is framed in terms of rights; these are Hohfeldian and moral claims, which have their ultimate basis — their "pride of place", in Dworkin's terms[165] — in individual choice. The Hohfeldian rights (1-5) are powers vested in the individual. The moral claims (6-7), which are internal to property in a way other moral claims are not, are also individually determined. But the rights-based view is more than the mode in which the argument is framed; it is also the substance of claims 6 and 7, which do not have a true Hohfeldian correlative. Thus, claims of duty derived from social claims about how property should be used (based on the goals and functions private property has in a particular society) are excluded from this taxonomy. In articulating a version of the interest theory, which seems to include a wider variety of interests than just individual ones, Harris has nevertheless shut out any possibility for anything other than individual-rights claims, legal or moral.

Thus, the structure of Harris's argument reveals that he *presumes* the teleology associated with the primacy of individual rights. That is, society's primary goal would be the protection and promotion of individual rights and freedoms: the protection of the trump-value of rights. This teleology is implicitly present in Harris's structure, even if he does not formally acknowledge it. This teleology should be balanced by some notion of communal flourishing, or even that a version of Penner's inchoate social function of property be incorporated into Harris's justificatory structure. This will have an impact on institutional design; that is, the justifications will have a specific impact on the manifestation of property institutions.

How might these problems of assessing normative force be illustrated in *Property and Justice*? On the theoretical level, it has been argued above that Harris's rights-based view or master-vision is manifested in the omnipresence of a robust idea of full-blooded ownership approaching the mythical notion of totality ownership. Yet the concept itself cannot be justified by any natural-rights argument, nor does any instrumental argument give it unqualified support. Thus, one would think that a *prima facie* right, which in effect approaches full-blooded ownership, should not be assumed in all circumstances. If one takes to heart the above critique, the conclusion must be that (avoiding the use of the word "ownership") some property entitlements are *prima facie* valuable. None are sacrosanct. All need to be justified in their societal context and with full regard for property's *deon-telos*. Rights, goals and duties all take their normative place in this justificatory dialogue. This follows from the admission that in any discussion of autonomy one must accept that only *some* choices are *prima facie* valuable. Hence, one must be careful not to overemphasize the ultimate justificatory force given to these individual, autonomy-based freedoms. Perhaps the right should be considered to be excluded until justified if it is not explicitly included in the property entitlement. If totality ownership is really a straw man or an Aunt Sally, why ever resort

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[164] *Supra* note 7 at 169.

[165] See Dworkin, *supra* note 14 at 170-71.

to either, even indirectly as Harris does? Rather, one should break down the package of common property rights and powers into certain *prima facie* rights like possession, use, and alienation, without positing them as a package or a unified whole.

One can see an impact of this analysis on Harris's ultimate conclusions as to the justificatory weight accorded to specific justifications. If social development also were taken into greater account by Harris, perhaps labour-desert and personhood arguments would gain strength. Privacy arguments, essentially negative, would remain the same. Decreasing the emphasis on autonomy arguments would also reduce the preponderant weight given to freedom arguments. The normative arguments in chapters 13 and 14 would be reversed in thrust with a more serious inclusion of anti-property arguments in the discourse of justification and design, like the inclusion of anti-fetishism in institutional design. Moreover, the arguments of chapter 17, "The Limits of Property", would amount to more than a "what-is-property" analysis. Rather, such an analysis would go to the identification of the intrinsic limits of the property relationship.

Regarding institutional design, the impact of the foregoing analysis might be elaborated by using the example identified above (the impact of using rights-based assumptions) as the starting point. This example revolves around the inclusion of transmission and alienation rights in the *prima facie* ownership rights one has. In Harris's view, transmission rights are a point of discontinuity on the ownership spectrum; toward the end of the spectrum where one finds full-blooded ownership, these rights are part of ownership but at the opposite end, where one finds mere property, they are not. In terms of justification, transmission rights in all forms are included in the natural *prima facie* ownership rights any society should have. Christman, whose starting point is different, recognizing the limits of ownership, does not include all types of transfer in ownership.[166] Even Penner, whose starting assumptions are generally similar to Harris's, excludes contract from property rights.[167]

These differing viewpoints are evidence that transmission rights require additional or different types of justification, perhaps of a different nature (instrumental as opposed to personhood-constituting). Their justification should perhaps be more specifically tied to the type of resource or even the resource itself (chattels over land, a unique microchip processor), and more restricted and less pervasive (only in circumstances where the chattel is not scarce or valuable). In comparison, another property entitlement — like use rights over resources, more linked to survival or freedom-autonomy — might be narrower in terms of its uses but more utterly unrestrictable.

As Harris admits, one can go too far with freedom-based arguments. Harris himself criticizes those commentators who believe property is straightforwardly justifiable because of the freedom it gives to the holder.[168] Penner is likely in this category of theorists too, given his statement that it is "well nigh indisputable" that property is

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[166] See Christman, *supra* note 3 at c. 1, 2, where he distinguishes "primary functional control rights" from "income rights", and describes them.

[167] See *supra* note 8 at 75, 84-85.

[168] See Coval, Smith & Coval, *supra* note 112.

justified.[169] Harris consciously tries to avoid such extremes, attempting to leave conceptual space for communitarian critiques. As indicated by the concluding passage from Harris reproduced above,[170] he seeks a balanced approach.[171]

In spite of Harris's best efforts, however, he does not succeed in maintaining this balance. His argument is still too strongly framed in terms of rights, too pervasively influenced by the rhetorical and linguistic force of ownership, and too specifically grounded in the individual's stake in promoting autonomy. Harris needs to balance individual rights with duties and goals — property's *deon-telos*. He must reduce the scope of the concept of ownership in theory, and the power of the word itself in practice. He must also recognize the wider, societal imperatives entailed in the identification, distribution and regulation of social wealth.

Harris concludes that "one cannot confront 'ownership', at an abstract level, with any plausible argument which entails that some particular category of privilege or power should be excluded from the concept."[172] An abstract argument for full-blooded ownership cannot be made. Given the asymmetry of property, its mediating role in human relationships, and its allocative impact, the institution is necessarily social. So one must look at the context. At a symbolic level, one needs to discontinue the use of the word "ownership" as an interchangeable synonym for "property entitlement", and jettison the theoretical baggage that goes along with it.

In conclusion, Harris presents a rights-based argument which focuses on the fullest expression of property powers. His minimal assumptions give primacy to individual autonomy and freedom, regardless of the choices that are actually made. This falls into line with classical liberalism, and the priority of the Right over the Good. Structurally, the second criterion of autonomy appears to do the greatest amount of work throughout the justifications. This explains the discussion of ownership as an organizing principle, and the frequent recourse to full-blooded ownership as a paradigmatic concept. While in principle, only a *prima facie* right to full-blooded ownership is articulated, the right is substantively unlimited, approximating full-blooded ownership, and a necessary manifestation of a just society. Hence in the abstract, property rights are virtually unlimited. Any limits on the *prima facie* right will be imposed extrinsically, with the burden placed on society to justify the limit. So, even though Harris ostensibly wishes to leave open the possibility of "more plausible 'communitarian'"[173] views of the person in society, he cannot succeed. By placing so much stress on individual autonomy without ordering or limiting the goods individuals might choose, and by failing to hold the individual to any responsibilities as pre-conditions to the enjoyment of property rights, he in fact precludes the possibility of anything but a liberal, rights-based view. Harris's stated goal needs to be harmonized with his working

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[169] See *supra* note 35 and accompanying text.

[170] See *supra* note 157 and accompanying text.

[171] See *supra* note 7 at 231.

[172] *Ibid.* at 275.

[173] See *ibid.* at 173.

assumptions and their formal and substantive manifestations in theory and practice. To put it colloquially, one has to "walk the walk" as well as "talk the talk."

These presuppositions colour what is otherwise a very careful and complete structural analysis. By introducing the imperatives of *deon-telos* to Harris's starting point and assumptions, one allows the possibility of a more truly pluralistic picture of property's specific justifications. The various justifications could then be reconsidered and rebalanced in a coherent manner, as illustrated in my specific comments on Harris's four categories of argument. Finally, if one were to apply these correctives to the descriptive elements of Part I of *Property and Justice*, one should discard full-blooded ownership as a spectral point or a paradigmatic organizing concept. Thus, the range of property entitlements does not include any sort of full-blooded ownership. Moreover, the rhetorical force of ownership as an organizing idea or as a principle needs to be diminished. Ownership needs to be read narrowly as a concept. It must be separated from private property, and seen as one limited mode of relating to resources.

IV. Conclusions: The Inadequacy of Rights-Based Justifications

Property and Justice and *The Idea of Property in Law* make important contributions to private property theory in each of its two polar discourses. In Normativity, it is argued that both books make substantial contributions to the second axiomatic inquiry: the attempt to describe and define private property. I have argued in this review article that such is also the case with respect to the first axiomatic inquiry — the analysis of the justice and justification of private property — most importantly and most explicitly in the case of Harris, but indirectly and no less importantly in the case of Penner.

Both Harris and Penner are, in differing degrees, rights-based theorists. This conclusion is based on a study of the assumptions and arguments they make regarding the justifications and description of private property.[174] The impact of this starting premise on the superstructural substantive work of each writer differs according to the degree to which each is a rights-based theorist.

Penner, by being so forcefully and firmly rights-based, dispenses altogether with the traditional compulsion to justify property. His definition of property treats ownership as paradigmatic to private property. Effectively equating by definition private property and ownership, he assumes its justification to be "well-nigh" obvious. As Harris carefully proves, private property is distributionally controversial and by no means naturally justified. It is only with great analytic care that the institution can be defended and its contours articulated. Harris, as well as Munzer and Waldron, indirectly show the pluralistic nature of property justifications. Furthermore, as Christman has argued, Penner's strong equating of property with ownership, apparently "full-

[174] I have reached a similar conclusion with respect to the descriptive structures proffered by Harris in Part I of *Property and Justice* in "Normativity", *supra* note 13, and with respect to those of Waldron and Munzer in *Deon-Telos*, *supra* note 12 at c. 4, 5.

blooded", is neither possible, desirable nor justifiable.[175] As a result, Penner proves *a contrario* the need to justify private property. It would appear, then, that Penner needs to re-examine his assumptions and the way they affect his arguments. In particular, he should consider how they may colour his conclusions about which powers are part of the property institution and which are not.

Harris takes a less pronounced, more balanced, but still rights-based view. As a result, he provides a more subtle and wide-ranging contribution to property discourse, not only in the debates on justice and justification, but also on the descriptive and normative analyses. In terms of his description of private property, I have argued elsewhere that Harris's equilibrated view allows him to identify the component parts of the institution but that their actual characterization is unduly influenced by the rights-based starting point.[176] More important, this review article has illustrated the impact of being rights-based on the questions of justice and justification of private property. Harris's analyses of the comparative persuasiveness of each traditional justification of private property is influenced by the fact that his standpoint is, in the main, rights-based. This is also illustrated in Harris's positing and consideration of the three minimal assumptions about justice. While less rights-based than Penner, Harris nevertheless aligns himself with the autonomous individual. In attempting to steer clear of the debate between the Right and the Good, Harris chooses the Right, with all the implications of that choice ultimately exerting a great deal of influence on the analysis of the various justificatory and disjustificatory arguments. A more balanced view would alter the weight given to each argument, resulting logically in changes in institutional design. In particular, Harris's conclusions are generally still too strong with respect to *prima facie* ownership; he needs to apply the most profound insights of Part II of *Property and Justice* to Part I, and reduce the *prima facie* weight given to ownership.

Both Harris and Penner illustrate indirectly, by commission or omission, the need for a consideration of property's *deon-telos*. As I understand the question, there are two major, overriding problems with rights-based theories. First, they result in the omission of certain crucial questions in the understanding of property norms and rules. What goals, communal and individual, are fostered by the choice of property as an institution regulating access to and control of resources? In particular, the social goods and the acts required to achieve these various goals, such as the virtuous use and conservation of resources, or charity and re-distribution, are left out of most analyses. Even in the best analyses, Harris's being a prime example, these aspects, to the extent they are identified, are characterized as "extrinsic" to the institution and their justifications extrinsic to the discourse.

Second, even with a consideration of the full scope of various justifications, the failure to consider property's *deon-telos* results in a weighting of often competing justifications in a manner which does not reflect the reality of the private property institution. With an understanding of *deon-telos*, property theorists might discard the

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[175] See generally, *supra* note 3. I have made a similar argument in *Deon-Telos*, *supra* note 12.

[176] See "Normativity", *supra* note 13.

excesses of firmly rights-based understandings and analyses. In particular, property theorists must stop talking about full-blooded ownership in theory and framing their discussions in light of the concept, instead re-casting property rights in the context of the duties and goals that inhere in the institution.

Finally, Harris, on a metaphoric level, also tells us a great deal about property's normativity. If property is justifiable, and the process of its justification has an impact on institutional design, then important conclusions can be drawn about the source of normativity of private property. One might argue that the normativity of private property — given its controversiality, the failure of any natural rights justifications to adequately justify it, and omnipresent alternatives such as common and state property — is drawn from the underlying discourse of justification. Moreover, by making assumptions about a minimal morality informing this discourse, Harris might be at least implying that this discourse is a moral one. I, for one, would welcome such a reading.