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Abstract

This paper focuses on the legitimacy of private property and analyses the process of first appropriation. In particular, we examine and comment the different views on the origin of private property rights that have emerged through the history of economic and legal thinking, from Democritus to de Jasay. These views have been grouped in two broad categories: consequentialism and fundamental principles. Although consequentialism is now dominant among economists and inchoate in the legal profession, we observe that it is in fact an alibi for discretionary policymaking by the authority. By definition, fundamentalist approaches generate rules that limit discretion. However, we show that some fundamental views rest on questionable a-priori statements. De Jasay's argument based on the presumption of liberty is perhaps the only perspective that escapes this criticism.

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1. Introduction

Property rights play a crucial role in economics: They define the very essence of this discipline, which studies how individuals exchange in order to enhance their welfare, subject to scarcity constraints. If there were no property rights, grabbing and looting would replace exchange, and the time horizon of any economic activity would depend on how effectively and at which cost each individual can protect the goods under his/her control.

One can identify three categories of property rights regimes: common property; centralised property; and private property. Common property defines a context in which the notion of property is abolished or severely restricted. It is in fact equivalent to the absence of property rights: Every individual in the relevant community/group is free to claim and appropriate everything he/she finds. The underlying idea is that individuals produce for their own immediate consumption or for the community at large (altruistic behaviour with an expectation that the others will behave likewise), and that each individual has a right to take and consume whatever he likes. Theft is thus de facto legalised, unless it involves physical violence. Actually, one could even argue that theft no longer exists, because there are no legal owners and no member of the community has the right to prevent others from taking.

Not surprisingly, this social arrangement is of limited practical interest. It would quickly lead to the demise of the community (hardly anybody would produce goods and services, except for situations in which they can be manufactured secretly and consumed immediately); or to slavery (the most effective looters would force the rest of the community to produce and surrender their output). Of course, in the latter case the slave masters would be the actual owners.

By contrast, centralised property corresponds to a system in which property rights are clearly assigned, and belong to a central authority. This authority can be an individual, such as a dictator or an absolute sovereign. For example, since the end of the XVI century, absolute monarchies were based on the idea that God gave all the existing resources to one individual, who would then manage them in the interest of the community and in accord with God's design. The central authority can also be a set of individuals chosen through a shared procedure (elections). This set of individuals often operates by majority voting (e.g., parliaments) or assigns to other parties the power to decide on its behalf (e.g., an agency). Centrally planned economies and modern social democracies follow these patterns. In these circumstances, the expression "private property" is not absent from the debate, but it is in fact misleading. For example, in modern democracies, the central authority enjoys full power to encroach upon somebody's property. This means that in a social democracy the central authority allows individuals to make use of the goods in their possession within the limits defined by the central authority itself. As a result, the ultimate owner is actually the central authority, rather than the individual. In these cases, therefore, individuals engage in economic activities with other individuals, subject to their expectations about encroachment by the authority on their preferences and (temporary) property. When individuals interact with the government widely understood (policymakers, bureaucrats, agencies), they know that their counterparts are the ultimate judges of their own behaviour, and therefore enjoy discretionary power to which little opposition is possible. As mentioned above, property is merely temporary and far from absolute.

The recognition and enforcement of private property rights are the founding pillars of a free-market economy. Private property means that individuals have absolute, exclusive and permanent rights on what they legally own: they can do whatever they like with their property, nobody can interfere with their decisions, and there is nobody to whom these rights must be returned after a given time period. Thus, under this regime each individual engages in unfettered voluntary exchange, subject to his/her compliance with the freedom-from-coercion principle (no violence and no cheating are allowed), and insofar as he/she respects the private property of the other individuals. Put differently, the legitimacy of private property and the freedom-

from-coercion principle specify the moral foundations of a free-market economy. By contrast, the illegitimacy of private property and the limits to private property define the features of the centralised economies, regardless of the political format -- dictatorship or social democracy.

The debate on the origin and legitimacy of private property is thus of crucial importance, since it defines the very features of an economic system (institutions), the role of government and the content of economic policymaking. Briefly put, the debate on the legitimacy of private property focuses on two areas. One regards property rights on natural resources, while the other regards property rights on manmade goods, services, intangibles. Research on the origins of private property analyses and explains the process through which an individual can legitimately appropriate a resource never previously appropriated by somebody else. Moreover, the literature examines whether the goods, services and ideas produced by the individual become private property of the producer; or whether they actually belong to somebody else, e.g. the community of which the producer is a member; or whether they are part of the common pool, and thus belong to nobody.

The following sections provide a critical analysis of these two agendas by considering the different views developed through the history of economic and legal thinking. In particular, the next section is devoted to the consequentialist, natural-right and religious beliefs before John Locke. Section 3 explores the notion of property as the result of rightful appropriation. Section 4 focuses on natural dominion, while section 5 discusses the more recent approaches. The final sections conclude and offer a brief outline of the debate about intellectual property rights.

2. Private property before John Locke: Democritus, Aristotle, and the Etruscan legacy

The first attempt to justify individual appropriation – as opposed to common property – harks back to Democritus (460-370 BC). In his view, private property is justified because it leads to superior economic results (efficiency). In a sentence, individuals make better use of the resources when they own them (Diels 1903: 55 B, frag. 279). In today's wording, one would say that when private property rights are

well defined and enforced, the positive and negative externalities generated by the use of a resource are minimised, and efficiency is enhanced.

According to this approach, therefore, private property is just because it leads to desirable outcomes, efficiency being the criterion that defines desirability. Surely, this view is squarely in the consequentialist camp: morality defines justice and, in turn, the desirability of the outcomes associated with one action or one institutional arrangement defines morality.

However, considering desirability (indirectly) equivalent to justice presents one major weakness. It fails to specify who should define desirability. This is not a trivial aspect, since it is apparent that different individuals are likely to have different preferences, and thus attach different meanings to the notion of “desirable”. For example, one could follow Plato and argue that since each individual should pursue virtue, and since private property encourages greed and social tensions to the detriment of virtue and peaceful coexistence, private property should be outlawed. Likewise, the very notion of efficiency is ambiguous. Efficient is whatever enhances value. Yet, value is subjective and, therefore, the notion of efficiency can vary across individuals and groups of individuals, depending on preferences, religion, traditions and culture. Certainly, technical efficiency is by no means enough to measure social happiness, whatever this means.

The upshot is that if one follows this consequentialist viewpoint, the presence, the boundary and the stability of private property rights are conditional on a notion of desirability that is necessarily arbitrary and subject to change over time. Put differently, by resorting to the notion of desirability in order to legitimise private property, one actually avoids analysing the foundations of private property and moves instead to comparing different concepts of social desirability. Yet, this comparison is hardly conducive to a useful answer. In order to avoid arbitrary rule, therefore, the notion of social desirability requires that the members of the community unanimously agree on a hypothetical desirability function (social preferences). Moreover, this notion also requires that the community members unanimously agree on the institutional tools that allow a society to obtain the desired set of goals (policymaking): when raising revenues to finance desirable public

expenditure, a tariff on car imports is different than a tax on inheritance. Failure to meet these two social-choice constraints – shared goals and shared instruments -- ensures that we can say little or nothing about the consequentialist justification of property in a society.

Aristotle (384-322 BC) enriched Democritus' arguments in favour of private property by mentioning the role of human nature. According to his line of reasoning, since history and factual observation show that individuals like to own resources and goods, one must necessarily conclude that the principle of ownership is indeed part of human nature (see *Politica*: I,8 and II,5). Hence, the institution of private property is part of natural law, and denying or constraining private property would amount to negating the essence of each human being and of the natural order. The Romans also referred to natural law: The use of reason, the observation of reality and consistency with tradition are the instruments through which cultivated men discover the natural law: “si in unum sententiae concurrunt, id, quod ita sentiunt, legis vicem optinet” (*Gaii Inst.*, I § 7). And private property is part of the natural law (*Gaii Inst.*, II §§ 66, 69, 73, 79).

However, and despite its simplicity and consistency, the Aristotelian version is also vulnerable to doubts. By claiming that the foundation of private property lies in natural law, one makes a statement that raises additional questions, rather than answers the original query. Put differently, by claiming that private property is founded on natural law, one wonders whether private property is indeed a component of natural law. One can also ask why natural law is superior to positive law (man-made legislation) and – last but not least -- who has the final word on all these questions.

A third and final vision on private property was typical of the Etruscans and very popular with the Romans. As mentioned in Liggio and Chafuen (2004), religion is a family matter: each family's ancestors are sacred, and present a sacred link with the land upon which the family insists. Violating that land and – more generally – the family's belongings was sacrilegious and usually deserved capital punishment, as the Romulus-and-Remus legend witnesses. Thus, there could be no religion (and no family) without private property. Hence, private property is not a matter of

economic efficiency, nor is it related to human nature. Rather, it is the necessary connection between the household and the gods. It is part of the essence of classical civilisation, and an element that will also play a crucial role in the defense of private property put forward by the early Fathers, together with the obligation of sharing with “the poor [...] the fruits of [the owner’s] labour” (Lactantius, *Divine Institutes*, V, 5).

3. Aquinas and Locke on the process of appropriation

St Thomas Aquinas (1225-1274) produced two original insights, from which a theory of private property legitimised by rightful appropriation emerged. Aquinas agreed with the dominant classical-world view on the desirability/efficiency of private property. Yet, he made a second point, which was new and of great importance. He argued that unused resources do belong to humankind. However, when an individual combines them with his own labour, his claim to the resources trumps all others’, and transforms possession into private property (this is one way of reading *Summa Theologiae*, II-II, 66, 1). A few years later, this argument was forcefully repeated, clarified and expanded by Jean of Paris (1250-1306), a student of Aquinas’: “lay property is not granted to the community as a whole..., but is acquired by individual people through their own skill, labour and diligence, and individuals, as individuals, have right and power over it and valid lordship; each person may order his own and dispose, administer, hold or alienate it as he wishes, so long as he causes no injury to anyone else since he is lord” (quoted in O’Donovan and O’Donovan 1999: 403; see also Rothbard 1995: 57).

In modern times, John Locke’s *Second Treatise* (1689, chapter V) popularised and expanded the line of theorising initially proposed by St Thomas and Jean of Paris, and later enriched by the Dominican Francisco de Vitoria (1483-1546), the Levellers and Earl Shaftesbury (see Lepage 1985: 63 and Rothbard 1995: 315-317). Locke’s line of thinking can be summarised in six points: (1) God gave natural resources to humankind, and are part of the so-called state of nature; (2) every individual is the owner of himself; (3) by mixing natural resources with his own manual labour, ideas and creative efforts, the individual removes the resources from state of nature and

makes them his own; (4) property includes the resources initially appropriated as well as their fruit; (5) since God would disapprove of wastage or abuse, appropriation is no longer valid when private property involves wastages, or when appropriation prevents other people from satisfying their needs. From a normative viewpoint, Locke argues that the preservation of property is the only function of the social contract, which is the origin of government, an institution formed by individuals who agree on finding a peaceful solution to disputes. In fact, (6) private property pre-dates government and justifies its existence.

Clearly, the notion of the “state of nature” plays a key role in the Lockean context. This concept was actually introduced by Juan de Mariana at the end of XVI century. It is a synonym for the common pool, and defines a situation in which resources do not belong to anybody, not even to the community as a whole. Put differently, one could argue that Locke did not theorise private property as an institution inherent in nature or legitimate per se, but rather as a desirable man-made institution that originates from common property (in the state of nature) and ownership of one’s own self. It materialises through an act of appropriation (removal of a resource from the state of nature), is consistent with God’s will and subject to constraints dictated by God’s will.

All in all, Locke’s theory remains incomplete and not entirely satisfactory. As observed earlier, his key elements are the emphasis on the role of self-ownership, which allegedly justifies ownership on what the individual removes from the state of nature (the finders-are-keepers principle already formulated by Gaius, Inst. § 66); and the fact that God is not opposed to private property. However, and this is Locke’s weakness, it is not evident that self-ownership justifies grabbing from the common pool. Locke’s view about the legitimacy of private property is more a description of how private property emerges, rather than an explanation of legitimacy. In other words, the essence of Locke’s argument boils down to claiming that God created common property, and that He does not object to grabbing for a good purpose (wealth creation). In this light, one may indeed argue that Locke’s line of reasoning rests on consequentialism (wealth creation), possibly mixed with an act of faith (God wants people to improve their welfare well beyond what is needed to survive and private property serves that purpose). Hence, the Lockean vision

presents not only the limitations typical of all consequentialist approaches, but also relies on one's vision about religion, and is burdened by the famous proviso which, if taken literally, de facto prevents first appropriation in the presence of scarcity or makes first appropriation conditional on everybody else's consensus.

4. A different natural-right approach to private property: natural dominion

Consequentialism and appropriation are surely the most popular arguments in favour of private property. As mentioned earlier, consequentialism harks back to classical Greece and maintains that private property is justified by the desirable results (efficiency) it produces. By contrast, the case for appropriation was put forward in the Middle Ages, it was further developed by Locke, and implies acceptance of the dominion thesis: consistent with God's design, men are free to exploit natural resources (including animals), and private property is the outcome of appropriation by an individual or a group of individuals, as long as no other human being is harmed.

However, the Middle Ages not only claimed that private property is desirable and consistent with God's design. Not long before the end of its pontificate, Pope John XXII (1249-1334) argued that private property is just also from a deontological perspective. In his view, and in contrast with other property regimes, private property stems from "pure" natural rights. As argued in the encyclical *Quia vir reprobus* (1329), which the Pope released to condemn Franciscan pauperism, God owns whatever exists, and since man has been created in the image of God, the principle of private property is necessarily embedded in the very nature of each human being. Hence, limiting private property would amount to disputing God's design. Of course, in this case, the adjective "pure" is important, since the pure version of natural rights emphasises that these rights are embedded in each individual since his/her birth.

This natural-dominion approach differs from the Aristotelian version, according which natural rights are those revealed by spontaneous behaviour and tradition. And it also differs from the rationalist version, which owes a great deal to Grotius (1583-1645), according to whom natural law coincides with what is needed to ensure

survival, while natural rights are man-made absolute rights dictated by reason and independent of the circumstances. Within the framework suggested by Grotius, therefore, sociability is the moral benchmark with reference to which all institutions are evaluated, and private property is the operational tool to meet sociability (man's inclination to live in harmony with other human beings).

Of course, the normative consequences of the natural-dominion thesis are important. According to this approach, private property is all but sacred and can never be encroached upon; whereas according to the rationalist perspective, private property ends up being the result of human constructivism, and has nothing to do with religion. This also affects the very notion of right. In the former case, a right corresponds to one's freedom to use a resource as he pleases; whereas in the latter (rationalist) case, it corresponds to one's claim to enjoy something, as dictated by the (hopefully) enlightened authority.

5. Recent free-market agendas: from Demsetz to De Jasay

In recent times, the debate on the origins of private property has subsided, with few exceptions. Indeed, mainstream theorising has taken an evolutionary turn. Bordering with Benthamite utilitarianism, Demsetz (1967) and Pejovich (1972) pioneered an approach that neglects the moral justifications of private property, and tends to treat this institution as the spontaneous result that emerges when groups of individuals face the problem of scarcity. In this context, the term "spontaneous" underscores the fact that private property is the result of human action, but not the result of constructivist design. Rather, it originates from trial and error, so that bad solutions lead to unsatisfactory performance and tend to be discarded in favour of superior institutional answers.

In brief, it is claimed that private property emerges when unrestrained access to scarce resources leads to inefficiencies (overexploitation), and when a community finds it appropriate to generate incentives that drive individual behaviour in a desirable way. Put differently, private property is a way of granting access only to selected individuals (the legitimate owners), and of managing valuable goods by internalizing potential externalities. Two consequences follow. First, private

property is a man-made institution, the features of which evolve according to the current environmental conditions (transaction costs, preferences, technology). Thus, it can be neither absolute nor perpetual. Second, this evolutionary approach raises a normative issue: Who defines the features of a private property-right system? This literature draws attention to the institutional entrepreneurs, who devise and experiment alternative property arrangements; and to the judges, who carry out the necessary cost-benefit analyses following which property rights are assigned and re-assigned. As a result, good arrangements survive, bad arrangements are corrected, ignored or discarded. However, when judges, experts and lawmakers are responsible for the assignment, the recognition and the enforcement of property rights, the outcome is de facto determined by government, and spontaneity necessarily falls victim to state coercion. Not unlike Jeremy Bentham and John Stuart Mill, therefore, one hopes that coercion pursues the common interest, whatever this means; and one neglects to notice that the interests of the majority end up trumping those of the minority.

More generally, the recent evolutionary approach mentioned above follows the Lockean tradition in that it has little to say about the origins of private property. Similar to Locke, it provides a consequentialist description of how private property emerges. However, Locke based his consequentialist approach on God's will. By contrast, the law-and-economics tradition to which Demsetz and Pejovich belong bases its consequentialist claim on the utilitarian stamp of an enlightened government. This explains why, and in contrast with the Lockean tradition, the evolutionary approach takes for granted that government precedes private property: legislators create the law in accord with utilitarian principles, and the law defines private property.

Not surprisingly, in order to recover the essence of the debate on the origin of private property, one has to focus on those libertarian scholars who deny the legitimacy of government as a coercive authority, a role that necessarily transforms the state into the source of property. In particular, by drawing on John Locke, these unorthodox authors maintain that private property pre-exists government and that, therefore, government cannot encroach upon private property.

In order to develop their argument, the libertarians follow two lines of reasoning, which do without God and religion and ignore Locke's proviso. The first one starts from the notion of self-ownership and generalises this principle into an ethics of private property. A second perspective focuses on a different notion of legitimacy, which turns the burden of proving the legitimacy of private property upside down by relying on the notion of Paretian optimality.

Rothbard (1974) is probably the most prominent proponent of the first view, based on an *e contrario* argument. Rothbard justifies appropriation by observing that we live in a world of scarcity, and that a resource is scarce if at least two individuals want to exploit it. Now, individual A does not need to ask permission to exploit/appropriate the resource if it is a first appropriation. Thus, A becomes the lawful first owner. By contrast, if A must ask permission, it means that B (or somebody else before him) had already become the owner (or the co-owner) through first appropriation. Put differently, the Rothbardian perspective transforms the debate on private property into an analysis of the legitimacy of first appropriation. If one denies the right of first appropriation, all potential first owners should behave as if all resources were in common, including their own selves and the air they breathe. This would be absurd, since if each individual had to ask permission to act and breathe from billions of other people, the human race would quickly perish.

Rothbard also rejects the possibility that the individuals are at least partially owned by others – e.g., policymakers --, who take decisions in the interest of the rest of the community. In his view, this possibility would be immoral and contradictory. It would be immoral, because all moral rules require generality (all individuals must enjoy the same rights). It would be contradictory, because accepting asymmetric ownership would be equivalent to saying that the human race is actually made of humans and non/sub-humans. According to Rothbard, therefore, first appropriation is a law of nature because it is necessary for survival, and establishes a general principle. Hence, the natural origin of private property. This principle is moral, and also applies to the first appropriation of what an individual creates with his own labour.

De Jasay (1991 and 1998) is an advocate of the second approach, based on the so-called “presumption of liberty”, i.e., on the idea that an individual can act as he pleases, unless a challenger falsifies the presumption by raising justified objections. Justified objections stem from three situations: (1) when it is apparent that an action conflicts with (spontaneous) conventions, (2) when the actor violates obligations that he had previously and voluntarily assumed, (3) when somebody else’s liberty to act is impaired (harm). The third condition is actually reminiscent of the weaker Lockean proviso, which is how Robert Nozick (1974: 178-182) identified a situation in which individual A’s action prevents others from exploiting opportunities to enhance their wellbeing. Although situation (3) above remains ambiguous – one could eliminate all ambiguities by understanding the term “harm” as a synonym for physical violence at the expense of the challenger -- the core thesis outlined by Nozick and De Jasay is clear: the legitimacy of first appropriation is guaranteed by the lack of opposition by individuals who could claim a previous right over the good/resource. If such opposition had substance, then the finder would not be the first finder, and could not keep the good. Another individual is in fact the first finder or the legitimate owner of the goods he obtained from the true first finder.

Put differently, and absent justified opposition, the finders-are-keepers rule is consistent with the presumption of liberty and necessarily represents a Pareto improvement: it makes the finder better off and makes nobody worse off. The second comer would be in a different position, since his claim to the goods appropriated by the finder would violate the presumption of liberty and would not be a Pareto improvement. Of course, the presumption of liberty also applies to private property obtained through exchange or by means of inheritance, and to self-ownership.

To summarise, by articulating a presumption of liberty, De Jasay introduces a negative notion of legitimacy: all non-illegitimate actions are legitimate, and the burden of proof lies with the challenger. Since the presumption of liberty is met when nobody has justified cause to object, and since the absence of objection is also the essence of a Pareto improvement, all actions that imply a Pareto improvement are necessarily legitimate. In regard to the legitimacy of private property, therefore, the debate boils down to assessing whether an individual’s property is based on a

previous act of appropriation that violated the presumption of liberty. Clearly, this would be the case with theft, nationalisation or expropriation.

6. Preliminary conclusions

By and large, the arguments in favour of private property have focused on three points: characterising property rights in the initial status quo; justifying the legitimacy of private property through consequentialism; and explaining the legitimacy of private property by resorting to fundamental principles.

In regard to the first point, the literature analyses various possibilities. According to one version, the initial position consists in the state of nature, where resources belong to nobody and can be appropriated by the homesteader (first-user principle), possibly with some qualifications (the Lockean clauses). A second version consists in claiming that the initial position involves common ownership of the resources, and that regulating the exploitation of the resources owned by a community is a political issue. In practice, the government decides who can use what, and to what extent. Hence, government is in fact the origin of private property. This means that an individual manages what the government assigns to him, subject to the conditions and during the time period established by the authority. Following a third perspective, it has been claimed that the origin of private property is the individual property of one's own self, a concept that defines the very idea of individual and in the absence of which life would be impossible. Finally, according to a fourth (and radical) possibility, it is argued that the initial position is irrelevant and that, given a presumption of liberty based on self-ownership, what matters is the extent to which the various steps that have led to the current status are objectionable. Of course, lack of objections amounts to confirming the legitimacy of homesteading and exchange.

With the partial exception of the view proposed by De Jasay, private property of manufactured goods is considered an extension of the principle of self-ownership. If an individual combines the resources he owns – land, raw materials, labour – denying his property right over the output would involve an act of aggression and amount to a violation of the freedom-from-coercion principle. On the one hand, since each unit of output is a mix of inputs owned by the producer, each unit of

output is necessarily property of the producer. On the other hand, it is manifest that the manufacturer is the first finder of the result of his activity, and that nobody can raise justified objections to the manufacturer's exercise of his liberty (acting as a producer and producing and appropriating the result).

As mentioned earlier, the second set of explanations regarding the origins and foundations of private property focuses on private property as an institutional arrangement justified by efficiency: it ensures better economic outcomes and wards off social tensions. Although this approach is dominant among economists and inchoate in the legal profession, it remains problematic. As a matter of fact, explaining why private property exists is not the same as analysing why it is legitimate (and thus immune to man-made rule making). In particular, it raises the problem of specifying who decides about efficiency: the homesteader or the ruler? As result, different perspectives produce different answers.

Finally, the fundamentalist approaches try to justify private property by resorting to religion, or to natural rights, or to expedience (which differs from consequentialism). As we observed, religion is problematic, in that it has no universal value. If one justifies private property by appealing to faith, different religious views can lead to radically different conclusions. Natural rights are different, since the various approaches underscore one or more natural traits of all human creatures, and give birth to different theories of property in accord with human nature(s). Hence, if one assumes that all individuals share a set of natural rights, then private property is inviolable insofar as it is recognised as a natural right, or strictly derived from a natural right. In a similar vein, if freedom from aggression is recognised as a natural right, private property is legitimate as long as it does not involve aggression (homesteading doesn't, by definition), and as long as appropriation by the comers do not imply violence (voluntary exchange doesn't). However, if one has doubts about the "natural" nature of private property, or about the general validity of the freedom-from-coercion principle, then the legitimacy of this institution becomes questionable. By contrast, expedience rests on identifying the presumption of liberty as the simplest way of organising a community. This presumption leads to the finders-are-keepers rule and requires the second comer to challenge the incumbent owner. The reader might notice three interesting aspects.

According to this vision, (1) the origin of private property rests on a negative (ex post) notion of legitimacy, (2) the presumption of liberty is not a moral argument in favour of liberty, but rather an operating principle that minimises costs; (3) the negative notion of legitimacy ensures that the burden of proof lies with the challenger, a choice that has no moral content, but enhances social cooperation.

7. An extension to intellectual property

Theories about the foundations of private property have usually focused on natural resources and the fruits of men's activities. In recent times, however, considerable attention has been devoted to the property rights on intangibles, with particular reference to two areas: information; and patents. In all these cases, the research agendas share one common feature and are relatively simple.

In contrast with what happens in the realms of natural resources and material goods, intangibles are frequently characterised by the presence of free riding, i.e. by the possibility that individual A benefits from the activity of individual B, regardless of whether A and B are bound by a contract. Knowledge, information and ideas are typical examples. Hence, when free riding occurs, A's welfare increases thanks to B's labour and talents, regardless of whether B agrees or feels slighted. This raises a question. Is free riding a problem, or perhaps a crime against private property? Or is it just a fact of life, which some people consider harmless and others undesirable?

The research agendas follow the lines of thinking suggested by the questions above, depending on whether one believes that free riding should be restrained or, rather, freely allowed. One approach alludes to fairness/envy. These notions play a significant role when some agents have privileged access to relevant information and exploit this privilege in dealing with allegedly uninformed counterparts. Those who lament that uneven information amounts to unfairness require that the informed disclose everything they know, except for situations in which they actually bought or researched the information from which they benefit, or in which the information is easily accessible to anybody (in which case there would be no privilege).

Legislation against insider trading follows this view: it is all right if individual A reads the business press or carries out extensive research about company Z, and

decides to operate accordingly on the stock exchange. However, A cannot exploit the information he obtains if he enjoys an allegedly privileged position. In the case of insider trading, the privilege consists in being an employee or an administrator of Z.

By contrast, the legislation regarding patents exemplifies other views on property rights. One is based on the claim to self-ownership and one on consequentialism. The argument stemming from the assumption of self-ownership rests on the fact that the mind is part of one's own self and that, therefore, what is produced by one's mind is necessarily an extension of the individual, who homesteads it. Put differently, the second inventor/author/discoverer cannot claim property rights on something that others have already removed from the state of nature, a state of nature that includes knowledge, skills and artistic concepts that humankind ignores. Although this thesis has merit, it runs into a number of problems, which we shall only mention. Most innovations are based on earlier insights and discoveries. This approach would require that all inventors track -- and ask permission to -- all the legitimate owners of the knowledge that the current inventor is using. Moreover, the difference between a new invention, a marginal improvement on an idea already existing and the bare use of an existing idea is frequently far from clear. Finally, the very act of exercising one's intellectual abilities hardly justifies preventing other individuals from using their own intellectual abilities, which include thinking, observing and possibly reproducing. Of course, this line of reasoning resonates with the presumption of liberty mentioned in the previous section, a presumption often used as an argument against the existence of property rights on intangibles, and thus against the legitimacy of patents. In other words, one may argue that the theory based on the extension of one's self regards the appropriation of the result one obtains by using his talent, his labour, his knowledge and imagination. Yet, a result is not a process. Put differently, discovering a process and making use of it does not remove knowledge from the state of nature. It merely makes knowledge accessible to the inventor and to the rest of the community. If this is true, one can thus conclude that enriching the state of nature does not involve homesteading, and that involuntary altruism is not a source of rights.

The previous comments help understand why the current legislation on intellectual property rights is founded on consequentialism, rather than on philosophical theorising. As it often happens in law-and-economics debates, the debate presents different views. We list two of them. On the one hand, a large portion of the literature neglects to discuss the nature and foundations of property rights on intellectual property. Rather, it maintains that governments driven by utilitarian principles are justified in enforcing property rights on intangibles in order to compensate their authors for the damage suffered at the hands of free riders. In other words, the origin of intellectual property rights is the government, which assigns them in the common interest. The consequentialist counterargument is that too much protection awarded to a set of inventors may prevent potential competitors from improving on the existing technology and developing new insights. The upshot is that the presence of free riding justifies patents and other barriers to entry. However, these barriers should expire after some time, and allow new competitors to enter the scene at a relatively low cost.

Yet, there is also a second and more recent consequentialist perspective. As mentioned at the beginning of section 5, some eminent scholars argue that private property originates as a response to scarcity. In other words, private property is legitimate because it is an efficient way of exploiting scarce resources: it enhances exchange, and it allows individuals to distribute consumption over time, possibly taking into consideration also the potential benefits enjoyed by future generations. Intangibles, however, do not present a problem of scarcity. The use of knowledge by one individual does not prevent other individuals from exploiting that very knowledge. Hence, absent scarcity, private property has no reason to exist and the debate on the origin of private property in realm of intangibles is moot. From a normative viewpoint, therefore, patents have no legitimacy.

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