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Abstract

A large proportion of our wealth comes from utilizing intangible resources — technologies, knowledge, literature, etc. — left to us by past generations. Does anyone have a right to exclude others from accessing these resources? How should the benefits they make available be distributed? This thesis aims to answer these two questions. The thesis proceeds in three chapters. The first chapter advances an account of when rights are justified, which builds on the interest theory of rights tradition. The second chapter aims to address the first question. It evaluates the normative status of exclusion rights to intangible goods and concludes that although some exclusion rights are justified, they need to be limited in scope and duration. The third chapter aims to answer the second question. It focuses on the economic rent portion of income that derive from intangible goods. It ultimately argues that transactors have no right to this portion of income and the latter, therefore, ought to be redistributed. The results of the thesis challenge the IPR policies and institutions that have prevailed in the last century. It urges us to imagine a more open and equal future that intangible goods have made possible.

[1] I am deeply indebted to my supervisor [redacted for submission] for his invaluable insights and comments. I owe a great deal to Kevin Zhang for his meticulous comments. I also thank David Miller and Cecile Fabre for their comments on some of the ideas contained in this thesis.

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Introduction

Most of us enjoy a tremendous amount of benefit from intangible goods, much of which we inherited as a free gift from previous generations. These intangible goods can include technologies, knowledge, data, software, music, literature, symbols, etc. To get a sense of this benefit's magnitude, we need only think of the difference between our lives and those of our hunter-gatherer ancestors.

Intangible goods have the distinctive feature of being *types*. That is, they are abstract objects capable of being repeatedly instantiated.[2] In contrast, tangible goods are tokens, usually with concrete spatiotemporal locations. For example, a particular copy of *The Lord of the Rings* is a tangible good, while the novel itself, as an abstract object, is an intangible good. This means that rights over intangible goods are much more expansive in their scope than rights over tangible goods. Unlike tangible property rights, which grant rights over tokens, a right over an intangible good grants a right over an entire type (Treris, 2008; Moore, 2001; Wilson, 2010).

This thesis is a project in developing an original account of our rights to intangible goods. At the same time, it sets out to discover the limits of these rights and draw out their political implications. The impetus behind this project is twofold. First, the distinctive features of intangible property rights (IPR) raise questions of significant theoretical interest. For example, well-rehearsed arguments for private tangible property lose their plausibility when applied to intangible goods, or so I will argue. Past works in the literature have even argued that the inherent nonrivalry of intangible goods makes any private ownership over them unjustifiable. Addressing these claims will require close analysis of the concepts and principles at work. The second reason to pursue this project is practical. The thesis is written at a time when rights to intangible goods are extremely unevenly distributed. Access to intangible goods

[2] In this sense, intangible goods are not identical to non-physical goods. Non-physical goods can be non-repeatable tokens (e.g. digital assets built to be non-reproducible and non-interchangeable known as NFTs). The thesis is not concerned with non-physical goods as such.

is increasingly restricted by an extensive legal intellectual property right regime. The benefits created by intangible goods are disproportionately enjoyed by those who hold legal rights and those who control the means to make use of intangible goods. Political institutions create and sanction these distributive patterns. A lot is at stake when we ask how, if at all, the rights these institutions uphold can be justified. As technology progresses, the stakes will only get higher.

With that impetus in mind, this thesis aims to answer two central questions concerning intangible goods: 1) do some agents have a right to exclude others from using certain intangible goods? and 2) how should benefits from intangible goods be distributed? Chapter 1 gives an account of what IPRs are and defend the view that such rights are justified only if they serve what I call asymmetrical interests. This latter view serves as a starting point for arguments in later chapters. Much of the discussion in this chapter will intersect with the existing debates on how rights relate to interests in the interest theory of rights tradition. Chapter 2 addresses the question of who has a right to access intangible goods. This chapter engages with prominent arguments for and against IPR in the philosophical literature as well as empirical evidence on the efficacy of exclusion rights. It concludes that only temporary, limited exclusion rights are justified and provides the philosophical foundations for a public domain. Chapter 3 examines rights to economic benefits derived from intangible goods. It distinguishes any income from transactions into a rent and a non-rent portion. In doing so, it brings out nuances in the concept of rent that have previously been undernoticed. Gauthier's argument for the redistribution of rent is examined closely and ultimately found wanting. Finally, it advances an original argument for the redistribution of rent which leverages the view advanced in Chapter 1. What emerges from this thesis is an account of IPRs that advocates for much more open access and benefit-sharing than what the present institutions uphold.

Chapter 1: Interests and Intangible Property Rights

1.1 Introduction

The goal of this chapter is to give an account of what IPRs are and defend the view that such rights are justified only if they serve what I call asymmetrical interests. In section 1.2, I identify exclusion rights and income rights as the two types of IPRs that this thesis will be concerned with. Section 1.3 motivates the exclusion/income right distinction by criticizing classifications of IPR in the literature which do not make the distinction. It argues that exclusion and income rights are logically independent and can serve different types of interests. Having identified the two types of rights that we aim to examine, section 1.4 defends the view that exclusion and income rights can be justified only if the interests they serve are not symmetrically matched by the interests they hinder. Section 1.5 discusses the types of interests served by these rights which may allow them to meet the aforementioned necessary condition. Up to this point, this chapter assumes that only interests are relevant in justifying IPR. Section 1.6 steps out of this assumption and criticizes a prominent type of non-interest-based argument for IPR. Specifically, it addresses Lockean labor-entitlement arguments and presses a generality objection against them.

1.2 Varieties of Intangible Property Rights

Before we start, it helps to address the terminology that we will be working with. Throughout this thesis, ‘creators’ will refer to the agents who are causally responsible for making intangible goods available. The label of ‘creator’ is misleading since many agents under consideration do not strictly create the intangible goods they make available. For example, it is more plausible to say that Fleming discovered penicillin since penicillin had existed in nature long before Fleming was born. Having said this, I intend to use ‘creator’ as a

broad umbrella term that includes discoverers like Fleming, since IPR is sometimes granted to them.[3]

To better understand IPRs, we can describe them under a Hohfeldian framework. In Hohfeldian terminology, assertions of rights can be understood in terms of four key elements known as Hohfeldian incidents, which are *privileges*, *claims*, *powers*, and *immunities*.[4] To have a *privilege* to φ (where φ denotes an action) is to have no duty not to φ. A *claim*, on the other hand, entails the existence of a duty on the part of a second party. If A has a *claim* that B φ, then B owes a duty to A to φ (and B therefore lacks the privilege to not φ).

We may call *privileges* and *claims* first-order Hohfeldian incidents. In contrast, *powers* and *immunities* are higher-order incidents. To have a *power* is to have the ability to create or waive some Hohfeldian incidents. The right to make promises is an example of a *power*, since it implies an ability to create in others rights against oneself. Powers can potentially alter both first-order and higher-order Hohfeldian incidents. US presidents have the *power* to fire FBI directors, stripping them of the *powers* that come with the job (such as the *power* to fire lower-level officials). The last Hohfeldian incident is *immunity.* An agent S has an *immunity* if and only if another agent P lacks the *power* to alter some aspects of S's Hohfeldian incidents.

Many familiar rights are what are referred to as 'molecule rights' – they are composed of multiple Hohfeldian incidents. Two types of molecule rights are of central concern for my purposes: they may be called 'exclusion rights' and 'income rights'. An *exclusion right* is a right to exclude others from using X in a particular way unless the rightholder's permission is obtained. It can be understood as a *claim* against use that the rightholder has a *power* to waive.[5] We can also produce a definition of the intellectual commons using Hohfeldian terminology:

[3] In many jurisdictions, the purified or isolated form of a naturally occurring chemical can be patented as long as it does not naturally occur in that purified or isolated form.
[4] The Hohfeldian framework used here is initially set out by Hohfeld (1913). My understanding of the framework is also indebted to subsequent developments by Wenar (2005a,b).
[5] It should be distinguished from a privilege to place hurdles to make it difficult for others to use X. We will not discuss this type of privilege in this thesis. Rather, our focus will be on claims which generate duties in others.

Intellectual commons: A use of an intangible good is in the intellectual commons if and only if no one has an exclusion-right based duty to refrain from making that use.[6]

It follows that the right to exclude determines and constrains the scope of the intellectual commons.

On the other hand, to have an *income right* from an intangible good X is to have a *claim* to certain economic benefits. Such a *claim* may be conjoined with a *privilege* to use the income in certain ways as well as a *power* to waive the claim. P may acquire an income right by exchanging access to some intangible goods for some sum of money. Income rights can also exist without market exchange. Creators may, for example, be legally entitled to direct funding from the state.

Exclusion and income rights are not mutually exhaustive of all possible IPRs. One basic IPR that is not covered, for example, is the Hohfeldian privilege to use an intangible good. Exclusion and income rights are singled out because they relate most closely to the central questions that we aim to answer in this thesis: 1) Who should be able to access intangible goods?, and 2) How should benefits from intangible goods be distributed?

1.3 Motivating the Exclusion/Income Right Distinction

To examine the extent to which a right is justified, it is helpful to start by considering the moral bases of these rights. If different types of IPRs serve different types of functions or protect different moral interests (Wilson, 2008, 2010; Moore, 2001; Christman, 1994, 2012), then it pays to separate them in our normative analysis. In other words, we should classify rights in a way that 'cut at the joints' of interests. The last section introduced a classification of IPRs which distinguishes between exclusion rights and income rights. It might seem strange that exclusion and income rights are distinguished in this way. After all, it is often thought that

[6] Although there is no duty to refrain from using goods in the intellectual commons *owed* to IPR holders, there might still be a legal or moral duty not to use these goods in certain ways. Gunpowder, for example, clearly belongs to the intellectual commons, since no one can plausibly have IPR over it. However, there is plausibly a moral duty to not make use of gunpowder in certain ways.

the aim of patent rights (a type of exclusion right) is to reimburse and incentivize creators. Indeed, some in the literature have produced competing classifications of IPR which merge exclusion and income rights on the assumption that they serve the same type of interest. This section examines a competing classification and argues that it fails to satisfactorily cut at the joints of interests. It also serves to motivate the exclusion/income rights partition that this thesis relies on.

Some scholars draw a distinction between *creators' rights* and *economic rights* (Wilson, 2008; Moore, 2001).[7] On this distinction, *economic rights* are rights to 'prevent unauthorised use of the idea in question' (similar to what I call *exclusion rights*), and *creators' rights* include miscellaneous rights like the right to be credited, and the right against deformations or other modifications of the creator's work (Wilson, 2008, p. 412-3). Proponents of this distinction claim that economic rights protect the economic interests of the author - hence the name - whereas creators' rights are thought to protect creators' non-economic interests such as that of 'controlling the image that others form of them through their work' (ibid). This distinction does not distinguish between exclusion and income rights. This may be motivated by the following thought: the right to exclude is both necessary and sufficient for an ability to earn income. The right to exclude seems necessary for income because if I cannot exclude others from using an intangible good, then no one has any reason to pay me for that good. It seems sufficient because, as long as I can exclude others at will, I can use this right as a bargaining chip to demand payment as a condition for my permission. If this is right, then my division of exclusion and income rights is unnecessary.

In my view, the economic/creator rights partition fails to track the bifurcation between the economic and non-economic interests of creators that it aims to reflect. A right to exclude is neither a necessary nor a sufficient condition for an ability to earn income. A state could give

[7] Wilson uses the term *authors' rights* instead of *creators' rights*.

creators no control over who gets to use their works, but nonetheless mandate that everyone who uses a creator's work must pay the creator a royalty. Here, creators have a right to income but no right to exclude. Alternatively, the state could confer creators a right to exclude, but no right to exchange their permission for income (analogous to laws which permit the ownership but not the sales of drugs). Here, creators have a right to exclude but no right to income. This logical independence of exclusion and income suggests that we should treat them separately in our theoretical analysis.

Not only are exclusion and income rights logically independent, exclusion rights can also serve precisely the non-economic interests that creators' rights are supposed to serve. Musicians have an interest in excluding the use of their works in certain contexts to protect the integrity of their works and to control their image. To take an example, many musicians have opposed the use of their music in Donald Trump's presidential campaigns. In the words of John Fogerty, '[Trump] is using my words and my voice to portray a message that I do not endorse'. It may be true that some musicians' exclusion of Donald Trump is partially motivated by economic interests. But even if that was the case, the exclusion can only serve their economic interests indirectly via its impact on their image. Some creators may only care about their image instrumentally, but others may not. That 'economic' (exclusion) rights can serve both economic and non-economic interests again suggests that the present partition of rights is too rough-grained to track the relevant interests.

In section 1.5, I discuss my account of how interests ground income and exclusion rights. Before then, it is necessary to discuss some foundational issues in how interests relate to rights. The following section defends a view about the conditions under which interests can ground exclusion and income rights. It lays the conceptual framework for the rest of the thesis.

1.4 The Asymmetry Requirement

In section 1.2, I distinguished between exclusion rights and income rights. In one sense, both types of rights are *exclusionary*. *Exclusionary rights* are claims held against some other party which deny them the privilege to use some good or opportunity. IPR exclusion rights are, as the name would suggest, exclusionary rights. Income rights are similarly exclusionary, since they give their holders a claim to private ownership over some amount of economic benefit, which logically requires the denial of an equal amount of benefits to others. This section will lay out the form that justification for exclusionary rights must take. For the purposes of this section, I will only consider justifications of exclusion that appeal to interests.

For an appeal to interests to successfully justify exclusionary rights, the strength of the interests involved is never sufficient by itself. The existence of exclusionary rights implies that there is some party who is being excluded. If a right protects one party's interest by hindering a symmetric interest of another party, then that right cannot be justified. To illustrate, suppose B owns a coffeehouse on a busy street. C wants to open a competing coffeehouse on the same street. Let us suppose that there are no reasonable alternative locations for C's new coffeehouse. Further assume that B and C are both solely interested in the profits, and that there are no easily accessible alternative financial opportunities for C. There is no doubt that B has an interest in excluding C from competing with him, since it will decrease his profits. It is nonetheless implausible that B has a right to exclude C from competing against him, since such a right would advance B's interests in profits at the expense of C's similar interests. Further, this right would not be justified even if the interest in question is otherwise strong enough that it would ordinarily ground rights. Suppose that B relies on the income from his coffeehouse to sustain a decent life. Such an interest is usually sufficient to ground a claim against other people to not intentionally sabotage B's shop, post malicious reviews of B's coffee, and so on. Yet, it is implausible that B's interest can ground a right to exclude C from opening a similar

coffeehouse, especially if C's economic situation is symmetrical to B's (that is, C also needs the income from a coffeehouse to maintain a decent life). Absent exceptional circumstances (e.g., the owner of the street promised B to let him exclude other coffeehouses), a right that protects B's interests at the expense of C's symmetrical interests will seem arbitrary. In granting this right, B's interests are arbitrarily favored over C's. We could have alternatively granted an analogous right to C. Had we granted B a right to exclude C, the latter could reasonably protest: 'why should *I* be the person who is excluded?'

In contrast, if the interests at stake are asymmetrical, where some party has a unique or stronger interest, and not everyone's interest can be simultaneously satisfied, then we may have good moral reasons to confer a right to exclude to the party with stronger interests.

The view we aim to defend here states that, *for a right to be justified, the interests that it serves must be asymmetrical to those interests that it hinders*. Again, we assume for now that only interests can ground exclusionary rights. It, therefore, seems plausible to stipulate an asymmetry requirement for exclusionary rights:

> **Asymmetry requirement**: An exclusionary right is justified only if the interests that it serves are asymmetrical to those interests that it hinders.

This requirement purports to be a necessary condition for justified exclusionary rights. However, it does not require that the asymmetrical interests involved provide the sole justification for the relevant right. This requirement stresses that, since exclusionary rights give the ability to deny some party access to some good or opportunity, they generally hinder the interests of non-rightholders. So we must look at the competing interests at stake to determine whether an exclusionary right is justified. An exclusionary right is only justified if the interests served by the right is not matched by the competing interests of others. Competing interests can be asymmetrical to each other in kind or in strength. In the coffeehouse example, B and C's interests are similar in kind and strength. B's interest in owning a thriving coffeehouse

counts in favor of granting B a right to exclude C, but C's symmetrical interests counts against granting B such a right. In contrast, consider ownership over our own bodies. Our interest in sovereignty over our own bodies is different in kind from our interest in sovereignty over another person. We may even think that the former kind of interest cannot be outweighed no matter how strong the latter interest is. Accepting the asymmetry requirement does not require a commitment to any particular view about how to weigh different interests. For instance, it is compatible with both utilitarian calculus and lexical priority. It merely claims that whatever view one holds about interests, no exclusionary rights can exist if the competing interests are symmetrical to each other.

Whenever a right satisfies the asymmetry requirement, there must be some interest that it serves which is not equally hindered by the right. Call such an interest an *asymmetrical interest*. These interests count in favor of the relevant right and are essential to the latter's justification.

Though the asymmetry requirement might seem obvious, it may be challenged with apparent counterexamples. For instance, A may have purchased a book that she has no special attachment to. Suppose B, who currently does not own a copy of that book, has an equally strong personal interest in having the book. Yet, it is clear that only A has rights over the book. Therefore, the objector might press, there exist exclusionary rights that do not serve interests asymmetrically.[8]

This counterexample presents a problem for the asymmetry requirement only if a right in X must be justified with an interest that makes direct reference to X (which in this case is the book), since the counterexample just stipulates that my neighbor and I have symmetrical interests in this particular book. However, the asymmetry requirement can reject this restriction. In the book example, there are interests at stake that do not directly reference the

[8] This example borrows heavily from an example Raz (1995) considered.

book itself. Foremost among them is perhaps people's general interest in living in a society where they may control items that they have purchased.[9] Although both A and B have such an interest, this interest is nonetheless asymmetrical in the sense that it asymmetrically counts in favor of granting rights to A rather than B. Since only A has purchased the book, only failing to confer rights over the book to A would be detrimental to this interest. This is an example of a second-order interest – it is not directly book-regarding, but it is nonetheless promoted by rights to the book. In general, one's right to perform a specific action φ need not be justified by one's interest in specifically performing φ. It may be justified by an interest in having a general ability of which φ is an instantiation.

A similar class of counterexamples consists of cases where some benefits must be arbitrarily distributed if it was to be enjoyed at all. For example, suppose we have a 'lumpy good' that has to be distributed unequally if it is not to be thrown away, and no individual has a special interest in the good. We might believe that the best way to distribute such a good is by lottery. Suppose this practice is adopted. It then seems that the lottery winner has a right to the 'lumpy good' even though she has no special interest in the good. This case need not violate the asymmetry requirement. Since the 'lumpy good' is desirable, each person has an interest in having an equal *ex ante* probability of receiving that good as opposed to throwing it away and having no chance at all. It is this interest which justifies the lottery. Since the acceptance of a lottery necessitates that the winner of the lottery acquires exclusive rights to the good in question, granting the lottery winner an ownership right over the good serves the interest in holding a lottery. As the right serves the latter interest without hindering a symmetrical interest, it passes the asymmetry requirement.

[9] Against a similar example, Raz (1995) makes a similar point about a general 'interest in freedom, in being able to control a segment of their environment according to their will' (p.48-9).

Additionally, I wish to argue that a putative rightholder R's right to X can be justified by some other agent P's interest that is advanced by R having a right to X. This claim is in apparent tension with classic formulations of the interest theory of rights. Raz (1986) writes that: '"X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a *sufficient* reason for holding some other person(s) to be under a duty' (emphasis added, p.166). Further, he writes that '[o]nly where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right' (p.183). This account appears to entail that any reference to the interests of those other than the rightholder is redandent for the justification of rights, since the rightholder's interests are purported to be *sufficient* to generate the relevant duties. However, this implication is vulnerable to well-rehearsed counterexamples. Here, we will briefly mention three classes of counterexamples, which involve third-party beneficiaries, role-bearers, and political rights respectively. Starting with the first class of counterexamples, consider a parent who has a claim-right to child benefit payments from the state (Wenar, 2013). It is clear that it is the child's interests rather than the parent's interests which justify the state's duty to make such payments to the parent. Even if these payments are in the parent's interest, that interest alone would not have been sufficient to hold the state under a duty in the absence of the child.

Role-bearers present another important class of counterexamples: judges have a power-right to sentence criminals; traffic wardens have a power-right to issue parking tickets; army commanders fighting a just war have a right to order their units to battle (Wenar, 2005a). The role-bearers' own interests seem insufficient to justify any of these rights. Rather, these rights seem to be justified by social interests that asymmetrically count in favour of these rights.

Lastly, political rights like the right to free expression and the right to vote present another class of counterexamples. Indeed, Raz (1995) himself argues that 'the protection of many of the most cherished civil and political rights in liberal democracies is justified by the fact that they serve the common or general good' and that 'there is every reason to regard the value of the rights to the common good as part of their justification' (p.52-5). This suggests that Raz allows third-party interests to be part of the justificatory story, perhaps by 'reinforcing' the interests of rightholders themselves. The problem, however, is that if Raz's original account is correct, then any appeal to the common interest is redundant since the rightholder's interests are sufficient to ground the relevant duties anyways. These examples seem to show that this cannot be the case. In each of the counterexamples mentioned above, the interests of those other than the rightholder appear indispensable in the justification of the relevant rights. On the basis of these examples, I hold that the asymmetrical interests of agents other than the rightholder are also relevant in deciding if a right passes the asymmetry requirement.[10]

One response to these counterexamples is worth considering. One may argue that what justifies those rights is neither the interests of the individual nor the interests of society. Rather, it is the interests of people *qua* role-bearers that do the justificatory work.[11] A traffic warden *qua* traffic warden has a special responsibility to deter illegal parking, and his right to issue parking tickets facilitates the discharging of this responsibility. This response also applies to the third-party beneficiaries and political rights examples. Parents *qua* parents have a special interest in benefiting their children. Similarly, citizens *qua* citizens have an interest in political rights that are indispensable for participation in public discourse and decision making.

Whether or not the preceding response is available to Raz, it does not undermine the key claim that I wish to make here – justifications of rights can (and often need to) make

[10] There may still be a special conceptual relationship between rights and the rightholder's interests. As Raz (1995) points out, it is bizarre to say that a criminal has a right to be punished, and a plausible explanation for its oddness is that it is not in the criminal's interest to be punished.
[11] This response is inspired by Wenar (2013).

reference to the interest of those other than the rightholder. Whether role-based interests can justify rights depends crucially on the normative status of the role, which will depend on the interests that the role serves. A hitman *qua* hitman has a role-based interest in assassinating their target, but such an interest clearly cannot justify a right to assassinate. On the other hand, the fact that roles like judges, parents, and traffic wardens serve important social interests is indispensable for explaining why the normative weight of their role-based interests.

Applying the asymmetry requirement to exclusion and income rights to intangible property, we need to ask if the interests served by these rights are symmetrical to the interests that these rights hinder. If so, then these rights cannot be justified. At first glance, it is not obvious how the asymmetry requirement could be met. An exclusion right may protect its holder's interest in commercially manufacturing copies of the patented product against competition from other potential manufacturers. Yet, it is not obvious why this interest is not symmetrical to the interests of other capable manufacturers. Similarly, although creators have an interest in receiving money in return for their work, non-creators have an interest in simply receiving more income. In the next section, I will attempt to provide a bird's eye view of how, if at all, exclusion and income rights can meet the asymmetry requirement. This is followed with a more detailed examination of exclusion and income rights will be the subject of chapters 2 and 3 respectively.

1.5 Asymmetrical Interests and Intangible Property Rights

This section provides an overview of the asymmetrical interests that I take to be at stake for exclusion and income rights. It also makes the crucial point that we must operate at an appropriate level of generalization about what interests are at stake. What determines whether a right is justified, in other words, depends on what interests are *normally* present.

To start with exclusion rights, creators generally have special interests in controlling their works. Christman (2012) writes that

> One clear manner in which claims such as copyright protection and other forms of IP might be necessary to guard autonomy interests are when monopoly rights over use and dissemination are necessary to protect the author's or artist's *identification with the product* when, in turn, such identification is central to the value of the creative enterprise for the author. (emphasis in original, p. 48)

In virtue of creators' identification with their works, they have an interest in preventing the deformation and misappropriation of their works that others lack. The works of creators can occupy a unique place in their life plans, and their interest in controlling what is done to their works is an extension of their interests in shaping their own lives as well as how they are seen. Although these creator-specific interests will not be present for every intangible good or creator, it seems plausible to state that they are *normally* present.

These creator-specific interests may help justify granting creators certain exclusion rights. Exclusion rights allow creators to 'use the valuable end results of their labor as bargaining chips to set the terms under which they exercise their productive capacities, and utilize those capacities to meet their needs and desires, and pursue their ends' (Cwik, 2014, p. 689). If creators can decide who is permitted to use their works, they can control the contexts in which their works appear and prevent misuse of their works.

Nevertheless, the extent to which creator-specific interests are present will be contingent on the norms that prevail in a society. A creator's work may constitute an important part of her identity only because the prevailing culture tends to see creative works as extensions of their authors. In a culture where individuals who create artworks were regarded as mere conduits for communal or godly expression, it would not be as obvious that creators have strong special interests in these works.[12] I readily concede that the extent to which exclusion rights are justified will be similarly contingent.

[12] I thank Thomas Sinclair for this example.

Moreover, there might exist types of intangible resources where creator-specific interests are clearly absent. For instance, discoverers of scientific facts and mathematical formulae may rarely identify with their discoveries. For these intangible resources, exclusion rights are more difficult to justify. We will come back to the overall scope and duration of justifiable exclusion rights in Chapter 2.

Turning now to income rights, it is difficult to make the case that creators have special direct interests in economic benefits that others lack. It is reasonable to presume that everyone, creators and non-creators alike, has an interest in receiving economic benefits. As Christman (2012, p. 45) points out, 'for any given flow of income, one's interest is the same as any other person's, for income generally is in the form of currency or capital.' While this is a plausible presumption to make, income rights may still serve second-order asymmetrical interests. Firstly, there is a strong social interest in encouraging the creation of intangible goods. Intangible goods create large externalities. They disseminate easily and can potentially improve well-being on a large scale. However, if a rational creator cannot expect her opportunity costs to be recuperated in the form of extrinsic rewards or intrinsic satisfaction, she would not create intangible goods. On the other hand, the public has no special interest in allowing non-creators to receive an income from intangible goods, beyond an interest in each agent's well-being. The public, therefore, has an asymmetric interest in incentivizing intangible goods creation through granting creators income rights proportional to their opportunity costs.

Additionally, creators have an asymmetrical autonomy-based interest in income rights. The argument here is closely related to our analysis of the book example in section 1.3. As previously mentioned, both creators and non-creators have interests in having more money, and so the creators' specific interests in income *qua* income cannot ground any rights due to symmetry. However, creators (and would-be creators) have an autonomy interest in living in a society where creators are able to recuperate the costs of engaging in creative activities. A

reasonable expectation of compensation expands an individual's set of viable options – being a full-time author is not a viable option if full-time authors have no means to feed themselves. In fact, non-creators, in their capacity as potential creators, also have an interest in living in a society where income rights are enforced, since their option sets would also be expanded. Therefore, despite everyone's symmetrical interest in having more income, our interest in expanding our viable option set counts asymmetrically in favor of creators having a right to receive a compensatory income.

Could the non-creator make a similar claim? Suppose our non-creator has a strong desire to surf in Malibu, but such an expensive hobby is not a viable option for him unless he is well-funded. It appears that, given the discussion above, our non-creator should have an analogous autonomy interest in living in a society where non-creators are able to recuperate the cost of engaging in such expensive hobbies too. This example poses a twofold challenge to our autonomy argument for income rights. Firstly, if the interest in expanding one's viable option set grounds rights, then it seems that non-creators would have a right to have their expensive hobbies funded. Some readers may find this absurd. For these readers, this example constitutes a *reductio*. Secondly, even if we do not find this conclusion absurd, it threatens to show that autonomy interests are symmetrical, and thus incapable of supporting exclusionary rights. It seems that, for any given portion of income from an intangible good, the autonomy interests of creators count in favor of conferring the income to creators, but the autonomy interests of non-creators count in favor of giving it to non-creators. Thus, autonomy interests, considered as a general type, do not asymmetrically count in favor of granting income rights to any party.

In response, we should first note that autonomy interests are not the only asymmetrical interest at stake for IPR. As I argued earlier, there is an asymmetrical social interest in incentivizing socially useful activities at stake. This social interest is absent for activities like

surfing in Malibu. More directly to the point, we can respond to the objection by claiming that the ability to pursue some activities is more central to our autonomy than other activities. It is clear that denying someone the ability to fund a project of counting how many blades of grass there are in Oxford is a rather trivial infringement on one's autonomy. In contrast, we may think that an ability to engage in creative work is crucial or even essential for an adequate level of autonomy.[13] This suggests that not all expansions of one's set of viable options are equally valuable to one's autonomy. Though the ability to pursue certain expensive hobbies is not quite as trivial as the ability to count grass, we might still think that it sits somewhere in the middle in the continuum from grass-counting to creating self-expressive artwork. If this is right, then the reductio fails because we can say that the ability to surf in Malibu is not important enough to our autonomy interests for it to support exclusionary rights. Similarly, we may resist the second challenge by saying that making creative activities a viable option for someone advances her autonomy interests more than making expensive hobbies a viable option. This provides further support for a right to a compensatory income, although it might not be sufficient to ground exclusionary rights by itself – social interests might well be an indispensable part of the justification. Nor does this autonomy interest show that every artist has a right to an income. The possibility of an income alone may be sufficient to make it *ex ante* economically viable to pursue creative activities.

To take stock, table 1 presents a picture of the asymmetrical interests at stake for compensatory income.

[13] This view is famously championed by Marx and Hegel; see Sayers (2011) for discussion.

Table 1

Asymmetrical Interests in Compensatory Income Rights

	Creators	*Non-Creators*
Rightholder Interest	Autonomy (stronger)	Autonomy (weaker)
Social Interest	Incentivize intangible good creation	None

Not all income is compensatory. Compensation is understood as the portion of income that equals the creator's opportunity cost. The remaining portion of the income is sometimes known as 'economic rent', which refers to the excess amount paid to a factor of production's supplier beyond the minimum amount necessary to induce its present level of supply.

Agents' interests in the economic rent portion of income are symmetrical, or so I will argue. Since the ability to earn rent as a result of an activity is not necessary to engage in that activity, a right to rent does not advance an interest in autonomy in the same way that a right to compensation does. Moreover, precisely because a right to rent is not necessary to incentivize a transaction, it cannot serve a social interest in the same way as a right to a compensatory income. These claims will be subject to much closer scrutiny in Chapter 3. If these claims are correct, then the right to economic rent fails to pass the asymmetry requirement and cannot be justified.

So far, we have relied on generalizations of what interests are at stake for exclusion and income rights. While it is often possible to make accurate general claims about agents' interests in certain situations, there are usually exceptions. Some agents will have highly idiosyncratic interests. This gives rise to two questions. First, we must ask whether an individual who lacks a commonly shared interest also lacks the right that is grounded in that interest. Secondly, a closely related question is whether individuals who have a strong idiosyncratic interest can have a correspondingly idiosyncratic right. Kramer (1998) provides what I believe to be the

right response to both questions. On Kramer's view, rights are '*normally* beneficial', but not '*invariably* so' (original emphasis; p. 93).[14] He shows that if we want an account of rights that closely tracks the ordinary understanding of what rights there are, then it seems necessary to answer 'no' in response to both questions. For example, although some individuals can be harmed by minimum wage laws, we would nonetheless say that they have a right to the minimum wage. Similarly, it sounds absurd to say that a person has a right to be betrayed, even though an overly zealous supporter of a regime might be pleased when his child informs on him.

Of course, the appeal to what is 'normally' in one's interests invites more questions about identification. One might ask: 'Normal for which group?' If the relevant group is overly zealous supporters of Big Brother, then it might well be normally in their interest to be betrayed. It is out of the scope of this thesis to fully address this problem, but one reason to justify rights at a generalized level is as follows: if we want rights to be action-guiding, then it must be rough-grained enough to be internalizable. Agents cannot be expected to internalize a system of rights that is specific to the individual nor overly specific groups. Indeed, agents are generally not even in a position to know about other people's idiosyncrasies. As Waldron (1990; p.89-90) suggests, an interest might be sufficient to ground a right if we have reasons to presume it to be present. In the rest of this essay, I will take it for granted that idiosyncratic interests neither defeat rights nor are they sufficient to ground idiosyncratic rights. Similarly, the asymmetry requirement will only require that an asymmetry is *normally* present. The absence of asymmetry in a particular case need not undermine the presence of a right.

To summarize, while some rights under the income and exclusion right umbrellas serve asymmetric interests, others do not. Table 2 shows how some instances of IPR can be categorized.

[14] See also MacCormick (1977).

Table 2

Relations Between Asymmetrical Interests and IPRs

	Asymmetric interests	*Symmetric interests*
Income rights	Right to a compensatory income	Right to economic rent
Exclusion rights	Rights against mutilation, misrepresentation, and misappropriation of works	Rights to exclude others from the use of scientific and mathematical facts

Rights to the opportunity cost portion of income pass the asymmetry requirement, whereas rights to economic rent do not. The situation with respect to exclusion rights is slightly more complex, since exclusion rights can be subdivided into rights to prevent particular types of uses. The rights to prevent mutilation, misrepresentation, and misappropriation of one's work protect asymmetrical interests. However, rights to prevent other uses of a good may only serve symmetrical interests. This is the case if both the original creators and others have similarly strong interests in the rivalrous use in question. The next chapter will explore these claims in more detail.

I have discussed rights as if they must always be grounded in some kind of interest. However, pace the interest theory, Kamm (2002) suggests that a number of rights are justified independently of serving anyone's interests. Her examples have some plausibility. Even if the right to equal treatment and the right to punish serve some interests, it is not clear that it is these interests that justifies these rights.[15] For our purposes, we do not need to commit to the view only interests can ground rights. I will instead argue on independent grounds that non-interest-based arguments for more extensive exclusion and income rights fail. I take it that the most

[15] Kamm (2002) argues that it is a being's nature as a person that makes it fitting to treat them no differently from anyone else. The right to punish, on the other hand, may be a burden to everyone involved, but it might still justified by appealing to moral desert, at least if retributivism is correct.

promising non-interest-based justification is the argument from labor-based entitlement.[16] This type of argument is discussed and criticized in the upcoming section.

1.6 Against Labor-based Entitlement Arguments

Labor-based entitlement arguments for IPRs have received much attention in the literature (Child, 1990; Gordon, 1993; Moore, 2001; Yen, 1990). If successful, they have the potential to justify exclusion rights that are perpetual in duration. This type of argument does not rely on an appeal to interests. Instead, they rely on abstract principles of moral entitlement from the Lockean tradition. If successful, such an argument may justify both exclusion and income rights for intangible goods. Here, I present a general challenge faced by labor-entitlement arguments in favor of IPRs. In section 2.3, I will discuss and raise objections against the most prominent and refined version of labor-entitlement argument for IPR exclusion rights developed by Adam Moore.

According to labor-based entitlement arguments, creators are morally entitled to rights over goods that they create through their labor. Although a variety of arguments have been given for this claim, the core intuition, according to Becker (1977, p. 32), is that 'people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry'. For the sake of argument, I will not dispute this premise here. We may also grant the claim that creators are wholly responsible for the creation of intangible goods, even though this claim is subject to well-known problems.[17] I wish to focus here on the generality problem faced by labor entitlement arguments.

[16] A more complete account would need to address all non-interest-based arguments for IPR. For example, see Drassinower (2012), McFarland (1999) for pro-IPR arguments from rights against compelled speech and desert. I am unable to respond to these arguments due to space constraints.

[17] Hettinger (1989), for example, argues that intangible objects are not solely to products of the creator's labor, Rather, they are social products. Further, for many types of intangible goods, such as scientific discoveries, it is not plausible to claim that they are *created* by anyone. The labor entitlement claim is much less plausible for discoveries than for creations.

As I have mentioned in the introduction, an important difference between tangible property rights and IPRs is that the former are token-protecting, and the latter are type-protecting (Treris, 2008; Moore, 2001; Wilson, 2010). My ownership of an Apple laptop only entails rights to exclude others from this particular laptop-token, while Apple's IPR over the laptop allows it to prohibit others from manufacturing new copies of the Apple-laptop-type. Exclusion rights, therefore, confer the right to control the physical instantiations of an intangible good-type. This type-protection feature of IPR generates a generality problem for labor entitlement arguments, or so I will argue.

Imagine that the first book ever written is the *Adventures of Sherlock Holmes*. It follows that it is also the first-ever fictional book, the first collection of short stories, the first collection of short stories about Sherlock Holmes, the first detective novel, the first detective novel that features a scandal in Bohemia, etc. A virtually infinite number of intangible-good-types could be said to have been *created* by the author, Sir Arthur Conan Doyle, through his labor on this single book. The labor entitlement theorist needs to tell us which good-type(s) Sir Doyle has exclusion rights over. If creators are simply entitled to whatever they *create* through their labor, then it seems that we should pick the maximally general type. But this seems to entail an absurd conclusion. How could the person who wrote the first book be morally entitled to exclude all others from writing any book or be owed income from all books written in the future?[18] This conclusion would seem absurd even if there is an independent creator exception. If Sir Doyle's novel inspired me to write my own novel about Victorian women without his permission, what objections could Sir Doyle have against me?

In response, labor entitlement theorists may seek to avoid the absurd conclusion by claiming that the labor-based entitlement is merely *prima facie* and defeasible. They can then

[18] Similar problems also arise for discoveries. Take Edward Jenner, who is often credited with the discovery of vaccination. On one end of the spectrum, we may say that he is entitled to rights over the method of inducing immunity to smallpox by injecting pus from the blisters of milkmaids suffering from cowpox. On the other end, we may confer a right over all future methods of vaccination to him.

offer reasons for thinking that the labor-based moral claim is defeated when it comes to overly general good-types. However, even after making this concession, the labor entitlement theorist's position still seems too strong. Even the claim that the first book writer has a *prima facie* claim to excluding me from writing books or to a portion of all book writers' income appears strongly counterintuitive.

Are there non-arbitrary ways to restrict the generality of intangible good types to make the labor entitlement view more plausible? The prospects are grim. As Attas (2008) suggests, there seems to be no natural way to determine the boundaries of an intellectual product. Crucially, descriptions of a particular creator's work can be more or less specific. Should the inventor of the light bulb be credited with the 'idea of a light source produced by electrons travelling through a filament within a vacuum' (p. 50)? Or should they be credited with the idea of producing light with current level X with filament made with material Y in an environment with gas density level Z? If labor entitlement theorists wish to avoid committing to the view that creators have claims to maximally general types, they face the unenviable challenge of making these determinations in a non-arbitrary manner, and as we will see, their theoretical commitments push them toward drawing implausibly broad boundaries. This appears to present a serious challenge for labor-entitlement theorists. If they wish to avoid embracing the absurd conclusion and maintain type-protection feature of IPR, then they must provide a way of determining the appropriate level of generality.

One potential candidate is the legal doctrine of the idea/expression dichotomy. According to this doctrine, IPRs only protect expressions, not ideas. As has been widely recognized, this distinction is not easy to make sense of.[19] For artistic works like music, the content of an idea and the style of expression may be impossible to disentangle (Hettinger, 1989). Of course, a distinction may still be viable despite the existence of hard cases. More

[19] For a review, see Samuels (1988).

problematically, it is not clear why the idea/expression dichotomy is relevant for labor-entitlement theorists. If the claim is that creators are entitled to what they create, then shouldn't they have a claim to any entity that they create through their labor, regardless of whether it is an idea or expression? To take an example, Picasso and Braque created Cubism, which clearly falls on the idea side of the dichotomy – no court would grant an artist copyright over an artistic style. Nonetheless, since Cubism was created by Picasso and Braque through labor, those who hold that labor can give rise to entitlement to ownership over types are pushed toward making the claim that they own the entire genre of Cubism. It is perhaps plausible that Picasso and Braque deserve recognition, praise, or some reward for inventing the artistic style. Indeed, they may deserve a compensatory income for their work. However, it is surely implausible to say that they are entitled to or deserve excluding others from making artworks under the style or a portion of the income from those artworks.

Unless labor entitlement theorists could provide a plausible and non-arbitrary way to identify the boundaries of what creators have rights to, we must reject the claim that creators have a labor-based moral entitlement to intangible good types that they create. This is not to deny that labor can give rise to moral entitlement in general. The view that the creation of intangible goods, like the creation of tangible goods, generates an entitlement to tokens rather than types is not vulnerable to the generality objection. However, such a view would not support IPR. It is not obvious that the core intuition behind labor-entitlement arguments – that we are entitled to own what we produce –applies to types rather than tokens. As we will discuss in section 2.3, we may think that a laborer has a *prima facie* claim to exclude others for goods because failing to grant them exclusion rights allows others to interfere with his projects and in this way to harm his legitimate interests (Moore, 2001). However, this claim is much harder to defend when we are concerned with types rather than tokens.

1.7 Summary

This chapter introduced and defended the exclusion/income right distinction. Then, it argued that exclusionary rights such as exclusion and income rights need to meet the asymmetry requirement in order to be justified. Then, it discussed the types of exclusion and income rights that may meet the asymmetry requirement. This sets the stage for the next two chapters, in which I give closer examination to issues surrounding exclusion and income rights more closely.

Chapter 2: Limits of Exclusion Rights

2.1 Introduction

The last chapter has argued that exclusion rights advance numerous asymmetrical interests of authors. This provides at least a *prima facie* case for exclusion rights. This chapter examines the extent to which exclusion rights are justified for intangible goods in more detail. In section 2.2, we discuss a nonrivalry argument against exclusion rights. This discussion will bring out a crucial point – IPRs are best analyzed at the level of uses. This section also allows us to better understand the asymmetric interests at stake for creators in excluding others. Section 2.3 discusses why exclusion rights ought to be limited in both scope and duration. Section 2.4 criticizes Adam Moore's argument for IPR, which argues in favor of perpetual and unlimited exclusion rights. Lastly, section 2.5 discusses the weaknesses of the instrumental argument for exclusion rights.

2.2 The Nonrivalry Argument

It is widely claimed in the IPR literature that intangible resources are nonrivalrous (Attas, 2008; Hettinger, 1989; Moore, 2001; Risse, 2012; Shiffrin, 2001, 2008; Wilson, 2008, 2010; Waldron, 1992). The nonrivalry of intangible resources are often taken to provide a powerful argument against exclusion rights. Nonrivalry is taken to mean that 'the possession or use of an intellectual object by one person does not preclude others from possessing or using it as well' (Hettinger, 1989, p. 34). Although nonrivalry is usually predicated upon intangible goods, this is an over-simplification. Rivalry is a property that is most usefully ascribed at the level of *uses* rather than intangible resources *simpliciter*. That is, while your use of an intangible good might not preclude me from using the same good altogether, it can preclude me from certain uses of the good. In my view, a more helpful concept of 'rivalry' ought to recognize the mere preclusion from certain uses as instances of rivalry. To take an example, consider the commercial publication of *Harry Potter*. The commercial-publication-use of the *Harry Potter* book series is rivalrous because the size of the *Harry Potter* market is limited. Once everyone

who wishes to buy a copy of *Harry Potter* has bought one, latecomers have no more opportunities to profit from publishing the series. This shows that, for a given intangible resource, some uses can be rivalrous while others need not be.

A lot will depend on how we individuate use-types. Although the use-type of 'gaining profits by selling a novel' is rivalrous, the use-type of simply 'putting a novel on sale' will not generally be impeded by others selling the same novel. Which individuations are normatively relevant will depend on agents' purposes and interests. Since agents do not normally have a strong interest in simply putting a novel on sale, but they do have an interest in deriving profits *by means of* putting a novel on sale, it is the latter individuation that is of normative importance.

The use-type of profit-making is helpful for us to get a better grip on the concept of rivalry. The ability to profit, as with many use-types, come in degrees. If my publication of *Harry Potter* merely decreases other people's potential profits but never entirely eliminates it, is the use-type of 'making profits by publishing *Harry Potter*' rivalrous? On Hettinger's characterization of nonrivalry presented above, couched in terms of 'preclusion', it would seem to count as nonrivalrous. I think this is a mistake. The property of rivalry is normatively important because making a rivalrous use worsens the situations of others. Other people's situations are worsened not only when they are precluded from satisfying their goals, but also when their ability to do so is diminished. On this view, rivalry is a property that comes in degrees. To illustrate this conception of rivalry, we may consider the example of internet access. Those whose household has a limited internet speed will be familiar with how members of the same household often need to compete over internet usage. In my own case, I can report that my streaming 4k videos is invariably followed by my family members complaining about how slow their internet had suddenly become. Even though no one is *precluded* from accessing the internet, it is quite natural to call internet use in such contexts rivalrous. This suggests that, rather than understanding rivalry narrowly as requiring one party's use to *preclude* others from

the same use, we should understand rivalry as a tendency to diminish other parties' ability to fulfil the relevant goal. On this conception of rivalry, the publication of *Harry Potter* for profit is rivalrous. This concurs with the commonly cited claim that money-making is an exception to nonrivalry of intangible goods.

We now have the necessary backdrop to introduce the argument from non-rivalry, keeping in mind that it is specific to the level of use. Later on in this section, I will also argue that there are rivalrous uses other than making money. However, let us bracket the exceptions for now and reconstruct the argument from nonrivalry. The argument can be expressed as follows:

> P1: If a use of an intangible good is nonrivalrous, then any agent's making that use does not worsen the position of others.
>
> P2: If an agent's making a use of an intangible resource does not worsen the position of others, then she has a privilege-right to make that use (with or without anyone's permission).
>
> P3: If some agent P has a right to exclude agent S from making a use, then agent S lacks a privilege to make that use (with or without anyone's permission).
>
> C: If a use X of an intangible good is nonrivalrous, then no one has a right to exclude others from making use X of intangible resource Y.

Discussion of this argument serves to help us determine the limits of exclusion rights. If the argument is successful, then exclusion rights are unjustified for all uses of intangible goods that satisfy the antecedent of the conclusion. Unfortunately, I will argue that the antecedent is not true for all uses of intangible goods, unlike what those who made the nonrivalry argument seem to assume. The rest of the section examines when it fails to hold, which will help us come to grips with the condition under which exclusion rights can be justified for intangible property.

Before we look at where the argument fails to apply, let us start with a defense of premise 2 and premise 3. Premise 3 straightforwardly follows from the concept of exclusion rights that we are using as defined in section 1.2. Premise 2, on the other hand, can be understood as a weak Pareto principle. Moore (2001) distinguishes between strong and weak Pareto superiority. A state of the world S1 is *strongly* Pareto-superior to another state S2 if everyone in S1 is better-off than in S2. In contrast, a state of the world S3 is *weakly* Pareto-superior to S4 if at least one person is better-off than in S4 and no one is worse-off (p.109). The weak Pareto principle states that if an act is weakly Pareto-superior, then that act is permissible. Indeed, it seems difficult to justify a right to prohibit a use when that use is weakly Pareto-superior. Grotius (1609) writes:

> If any person should prevent any other person from taking fire from his fire or a light from his torch, I would accuse him of violating the law of human society, because that is the essence of its very nature…Why then, when it can be done without any prejudice to his own interests, will not one person share with another things which are useful to the recipient and no loss to the giver? (p. 45)

Along similar lines, some have argued that a right to exclude others from using a good when it doesn't leave anyone worse-off violates a Lockean anti-spoilage condition (Hettinger, 1989; Attas, 2008). In stark contrast to the Grotian line, Moore (2001) employs a Pareto principle to argue in favor of IPR exclusion rights. His view will be discussed and criticized in section 2.4. Bracketing Moore's argument for now, I will take the weak Pareto proviso as a plausible sufficient condition for a privilege-right to use. We can, therefore, accept premise 2 of the nonrivalry argument.

Let us now turn to the argument. Its conclusion states *that if a use X of an intangible good is nonrivalrous, then no one has a right to exclude others from making use X of intangible resource Y.* As I noted earlier, an obvious case where the antecedent is false is money-making:

if others are also profiting from selling an author's novel, the author's ability to gain profits will be diminished. Nonetheless, many anti-IPR theorists do not find this exception to nonrivalry troubling. They argue that an interest in profits cannot normally ground exclusion rights. Analogously to the beforementioned coffeehouse example, Attas (2008) invites us to imagine someone who owns a lemonade stall: 'if someone were to set up a lemonade stall next to mine, thereby reducing the market value of my lemonade and my stall, I would have no legitimate complaint' (p.36). If IPR exclusion rights solely protect interests in profits (*qua* profits), then they must be unjustified. As discussed in section 1.4, our reluctance to recognize an interest in profit (*qua* profits) as a ground for monopoly rights can be explained by the fact that interests in profits fail to pass the asymmetry requirement.

However, I think that this exception to nonrivalry is more troubling for anti-IPR theorists than it first appears, because disanalogies exist between the lemonade stand case and intangible property cases. As I have argued in section 1.5, individuals have an autonomy-based interest in having the ability to recuperate the costs of voluntary activities. This means that they have an interest in profits *qua* compensation for opportunity cost. For example, because the cost of being an author is much higher than the cost of publishing other people's work, the individual interests of parties involved are not symmetrical. However, the order in which lemonade stalls are set up generally makes no difference to the cost of setting one up. In such cases, the autonomy-based interest is symmetrically possessed by both parties. In addition, there is an asymmetric social interest in allowing authors to be renumerated for a socially valuable activity. In contrast, there is generally not much of a social interest in ensuring that people have the ability to set up lemonade stalls. Due to these disanalogies, it is not clear that the example from the lemonade stand generalizes to intangible goods. On the contrary, the rivalrous nature of the profit-seeking use, coupled with the presence of asymmetric interests absent in the lemonade case, may be sufficient to justify limited exclusion rights for this use.

Nevertheless, such a justification only applies when there is no alternative system in place to compensate creators and when the opportunity cost has not yet been recuperated. As I will argue in section 2.5, there may be good reasons to prefer alternative systems of compensation over conferring monopoly rights to creators.

More importantly, the use of intangible goods as a means for profiting is not the only rivalrous use of intangible goods. Suppose J. K. Rowling wishes to produce a film based on *Harry Potter*. For this project to be possible, she needs to recruit other people who have relevant skills and are willing to participate in making such a movie. The pool of people who fit this description will be limited. If sufficiently many movie studios are already making similar films based on Harry Potter, then she will be precluded from recruiting the crew that she needs for her project. This is true even if J. K. Rowling was merely trying to make a film for personal consumption rather than money-making. This example shows that money-making-uses are not the only type of rivalrous use. A use of intangible goods is rivalrous whenever it requires scarce resources. The scarce resource can take the form of a limited market, a limited pool of human resources, and many other forms. Nonrivalry is therefore at least sometimes a relational property, possessed in virtue of the contingent facts of our world.

Many of us will think that authors generally have a stronger interest in adopting their own works into derivative works. As I mentioned in Chapter 1, creators have an asymmetrical interest in controlling *their* image that non-creators lack. Creators also often identify with their works, and these works may constitute their life projects or otherwise occupy an important place in their lives (Christman, 2012). These creator-specific asymmetrical interests seem to suggest that creators have a stronger claim to make derivative works. If the use of making derivative-works is rivalrous as I have argued, then conferring upon creators a claim to make derivative works necessitates conferring upon them a claim against others to refrain from creating derivative works of the same type. These considerations suggest that a right for

creators to exclude others from creating derivative works passes the asymmetry requirement. They also show that the antecedent of the conclusion – that a use of an intangible good is non-rivalrous – does not hold for many types of uses. Although the presence of these interests do not entail that creators actually have exclusion rights to derivative works, they do count in favor of them. In addition, they show that such rights would not be in conflict with either the asymmetry requirement or the argument from rivalry.

In addition, a use can also be rivalrous in a broader sense. So far, we have been examining cases where there is rivalry within a single type of use. More generally, one party making use X of an intangible good may harm another party's ability to make use Y of the same good. Cultural appropriation may constitute such a useful example. The commercial use of a culturally important intangible good can trivialize it and change its social meaning, diminishing traditional uses of the same good. Additionally, Shiffrin (2001) mentions the case of diaries. One party's use of a diary as reading material diminishes another party's use of the diary as a private journal. Lever (2012) offers us another example:

> because people can have different and mutually inconsistent purposes, my use of our shared ideas can undermine the value of your use of them, and may even come to prevent you using them at all. So, for example, if my invention of a new weapon is designed expressly to protect people struggling against unjust domination, then your use of it on behalf of those would-be dominators will diminish the value of my ideas to me and, if you are successful, may wreak so much destruction that my side, over time, is unable ever to use them again. (p.14-5)

To take one last example, Walt Disney's project of creating Mickey and Minnie mouse may be undermined by an underground comic book's depiction of them as 'active members of a free thinking, promiscuous, drug-ingesting counterculture' (Waldron, 1992, p.842). These examples show that one party's use of an intangible good can diminish the value of other uses

of the same good. Again, the argument from rivalry fails to apply to cases like this. Those whose asymmetric interests are liable to be harmed may have a right to exclude such uses.

The example of cultural appropriation brings out an important additional point. Although we have focused on creators, it may be a mistake to think that only they can have asymmetric interests with regard to intangible goods. Cultural groups, for example, may have special interests in controlling 'songs, rituals, ceremonies, dance, traditional knowledge, art, customs, and spiritual beliefs' which are created by their forebearers (Riley, 2005; p.77). An American Indian tribe has a significant interest in keeping 'a popular music group from using its sacred ceremonial song as part of a performance that parodies Indians' (Carpenter et al, 2009; 1100-1). If exclusion rights are grounded in the asymmetrical interests of creators as I have suggested, then similar interests belong to groups should ground group exclusion rights.

Up until this point, we have discussed the cases where the conclusion of the argument from rivalry may not apply. However, we may also challenge the soundness of the argument. To recall, premise 1 states that: if a use of an intangible good is nonrivalrous, then any person's act of making that use does not worsen the position of others. This premise fails to hold in many cases. One person making a certain use of an intangible good may harm a creator's interests not by reducing her ability to *use* the IP for anything, but just in virtue of how the IP is associated with her image, as in cases of misrepresentation and mutilation of one's work. In other words, a use of an intangible good can be harmful in ways other than diminishing someone else' ability to use that intangible good. Such harms are again not limited to individuals, a common example of harmful cultural appropriation is the misrepresentations of Native Americans by Hollywood filmmakers (Young, 2008, p. 107-8; Matthes, 2016). Matthes (2016) highlights how cultural appropriation can create and exacerbate epistemic injustices by causing credibility deficits and inhibiting the ability of group members to speak for and represent themselves.

That premise 1 may fail to hold in certain cases should not lead us to dismiss the argument from nonrivalry altogether. Premise 1 still appears plausible as a defeasible presumption. Correspondingly, the argument might still hold we should weaken the conclusion of the argument as follows: If a use X of an intangible good is nonrivalrous, then, *prima facie*, no one has a right to exclude others from making use X of intangible resource Y. This is defeated in cases where one can be harmed by nonrivalrous uses. In practice, this may mean placing the burden of proof on those who wish to claim a right to exclude for nonrivalrous uses.

Let us take stock here. The preceding examination of rivalrous uses of intangible property leaves us with the following conclusions: It is necessary to evaluate exclusion rights at a use-type level. Premise 2 and 3 of the argument from nonrivalry should be accepted. Premise 1 of the argument is plausible as a presumptive claim. Therefore, when a use is nonrivalrous, we have reasons to presume that no exclusion rights are justified for that use. In cases where intangible goods are rivalrous, exclusion rights may be justified only if they pass the asymmetry requirement. This suggests a two-step test for exclusion rights. Agents such as creators or cultural groups should be granted an exclusion right for a use only if both of the following statements are true:

1. One party's making that use can worsen the position of others.

2. The exclusion right would serve asymmetric interests that sufficiently outweigh countervailing interests to warrant the imposition of a duty to refrain from making the use.[20]

If a use-type of intangible goods fails to pass either test, it should be freely available to all. If both tests are passed, then we have at least *pro tanto* reasons to support exclusion rights.

[20] I leave open whether or not interests of non-creators ought to be aggregated when comparing with the creators' interests.

However, as will be discussed in the next section, even if there were exclusion rights, there are reasons to limit them in both scope and duration.

2.3 Limits of Exclusion Rights

This section discusses the limits to the scope and duration of exclusion rights. However, the precise boundaries of these limits will turn on empirical questions as well as contentious debates in moral philosophy. While it is impossible to settle the issues here, I aim to provide reasons for the limiting both the scope and duration of exclusion rights.

To start with the question of scope, as Himma (2008) warns, we must weigh the creators' interests against all the interests at stake. Where the creators' interests are in competition with mere whimsical wants, then the former may trump the latter. But in cases like medical discoveries, for example, creator-specific interests might come in conflict with patients' urgent needs. In such cases, it is not at all clear that an exclusion right can be justified. Even for artistic works, it is not so clear that the author's interests always outweigh the users' interests. Parodists, pastiche artists, and others may have an interest in reproducing a creator's work that is as strong as the creator's interest in preventing these acts of reproduction (Waldron, 1992). These considerations may therefore justify exceptions to exclusion rights, perhaps in the form of the fair use doctrine that is practiced in many countries. This would constitute a limit on the scope of exclusion rights.

There are also reasons to think that exclusion rights should be temporary. Many creator-specific interests are limited in duration. For example, a creator-specific interest in creating derivative works will cease to exist upon the creator's death. This suggests that the posthumous interests in exclusion of creators are generally weaker than their interest in contemporary

exclusion. This might partially explain why, in virtually all jurisdictions, copyright only lasts for some fixed term after death, with lengthiest being 100 years after death.[21]

More generally, even if creators can have interests in posthumous exclusion exist,[22] we may think that posthumous interests are generally weaker or less morally significant compared to the interests of the living.[23] Afterall, the dead no longer exist, nor can they experience harms. This gives us another reason to limit the duration of posthumous exclusion rights. The recognition of posthumous interests as less significant is in line with widespread legal practice, where they are often afforded weaker or no protections. In most jurisdictions where defamation law exists, they do not protect decedents. Similarly, the right to privacy and medical confidentiality erodes significantly at death. Lastly, US law places much greater restrictions on decedents' ability to destroy their property (through testaments) than on the living. Even when decedents are afforded some legal rights (e.g. a right to have one's will enforced), attempts to justify these rights often focus on how decedents continue to influence the lives of the living, rather than the interests of decedents themselves (Kramer, 2001). With all this said, posthumous interests and rights are a contentious issue, and I do not have space to pursue the issue further.

Besides creator's posthumous interests, posthumous rights may promote social interests if it effectively incentivizes intangible good creation. Even so, it is unlikely that perpetual exclusion rights will be more instrumentally optimal than temporary rights.[24] A more detailed discussion of the instrumental argument will be given in section 2.5. Before then, the next section addresses Adam Moore's argument for perpetual and unlimited exclusion rights.

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[21] For a list of countries' copyright lengths, see: https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths

[22] For endorsements of posthumous interests, see Aristotle (Nicomachean Ethics, I.11, 1101a25-b7), Feinberg (1980), and Smolensky (2008).

[23] Due to space constraints, I am unable to defend this claim thoroughly here. For arguments critical of posthumous interests or harm, see Fabre (2008), Luper (2004), and Partridge (1981). See Harris (2003) for reasons to think that the frustration of posthumous interests is less morally significant.

[24] For example, most of economic benefits from medical patents are generated in the first 10 years of the patent life (DiMasi et al, 2003).

2.4 Moore on Exclusion Rights

In the previous section, I have given reasons to think that there ought to be limits to both the scope and duration of exclusion rights. In contrast, Moore (2001, 2012) advocates for unattenuated IPR that is unlimited in scope and duration. This section considers and rejects Moore's argument.

Moore (2001) puts forward the following conditional: 'If the acquisition of an intangible work satisfies a Paretian-based proviso, then the acquisition and exclusion are justified' (p.114). He argues that, by laboring to create an intangible resource, individuals acquire a labor-based weak *prima facie* claim to control the resource. When a weak Pareto proviso is satisfied, the *prima facie* claim is undefeated. To determine whether the Pareto proviso is satisfied, we are to compare people's states immediately before and after the 'acquisition' of an intangible good, by which Moore means the conjunction of 'creation and exclusion' (Moore, 2012, p. 1082). We may wonder why the baseline of comparison should be the moment before 'creation and exclusion' rather than the moment before exclusion but after creation. If we pick the latter baseline, it appears clear that the Pareto proviso is not satisfied. Nevertheless, let us grant Moore's choice of baseline for the sake of argument. Moore argues that the proviso is satisfied for intellectual creations because these goods did not exist prior to the act of creations. Since non-creators did not originally have access to that particular intangible work, their situations cannot be worsened by the creator's act of creation and exclusion. In addition, since 'the number of ideas, collections of ideas, or intangible works available for appropriation is practically infinite' (ibid), acquisitions of intangible property do not deplete the total pool of intangible works out there to be appropriated. Given these considerations, the Paretian-based proviso is fulfilled for at least some acts of intangible property creation and possession. Therefore, Moore claims, exclusion rights are at least sometimes justified. If successful, Moore argues that the view supports radically expansive and

perpetual IPR with 'no room' for 'free use zones of first sale or fair use, and limits on the rights of created, rather than discovered, intellectual property' (p. 174). This is because the Paretian proviso can be satisfied even if the acquisition is perpetual and maximally expansive. Had J. K. Rowling not written the *Harry Potter* series, then we would *never* have had access to *Harry Potter*. Her perpetual exclusion of us would not leave us worse off than we were before her act of creation.

As some authors have noted, even if Moore's conditional is true, it fails to justify exclusion in many cases. This is because, contrary to Moore's claim, the Paretian proviso often fails to be satisfied. Breakey (2010) cites Nozick's point that appropriation of an intellectual good worsens the situations of would-be independent creators. Scientific discoveries often occur independently. If the first person to discover an idea is allowed to prohibit others from using the idea in certain ways, then those who would have discovered the idea independently and acquired rights over it are now prohibited from using those ideas. Moore recognizes the force of this objection and makes an exception for independent creators – if someone independently creates or discovers an intangible work that has already been created or discovered, she too will acquire rights over the good (Moore takes it to be possible for the same good to be concurrently owned by many individuals). However, Moore is still vulnerable to a subsequent objection. Information about an intangible good is often widely disseminated after it has been discovered. Learning about this information prevents agents from becoming *independent* creators. Since the agents who may have originally had a chance to become an independent creator and acquire rights over the intangible good are now prevented from doing so, even appropriation with an independent creation exception violates the weak Pareto proviso.

In addition, one may challenge the soundness of Moore's claim that creators have a *prima facie* claim to control intangible goods in the way that he suggests. Moore argues that

'[o]ther things being equal, when an individual labours to create an intangible work, then weak presumptive claims of *non-interference* have been generated on grounds of labor, desert, or autonomy' (emphasis added, p.108). While it is plausible that creators have claims of *non-interference*, it does not take us very far. Since Moore himself is committed to the claim that intangible resources are nonrivalrous, it is not clear how another person's use of an intangible good *interferes* with the creator. It is, therefore, not clear why a creator's 'weak presumptive claims of non-interference' would entail any right to exclude others from simply using an intangible good in nonrivalrous ways. [25] Even if it is possible to use intangible resources in such a way that interferes with the creator's projects, this would at most ground a right to exclude those potentially interfering uses. We have already defended this type of limited right to exclude in previous sections. However, a *general* right to exclude cannot be inferred from the prima facie claims of non-interference that he argues for.

Nevertheless, perhaps the Pareto proviso alone is *sufficient* to ground exclusion rights, as Moore sometimes seems to suggest? Moore defends his conditional in part by appealing to a 'no harm, no foul' intuition: 'if no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted' (p.114). However, this claim is much less intuitive when acquisition implies the imposition of duties on others, as it does on his usage of 'acquisition'. Why should weak Pareto superiority be sufficient for creating duties that restrict other people's freedom? The freedoms that IPR exclusion rights restrict are not trivial. As Hettinger (1989) points out, IPR exclusion rights are prohibitions against certain types of acts/expressions, often enforced by the state. When uses of intangible goods are non-rivalrous, exclusion rights violate a moral presumption in favour of liberty to perform actions that do not encroach on the freedom of other people (Waldron, 1992). Such a restriction of liberty may satisfy the weak Paretian proviso, since the actions or expressions that are restricted are not

[25] See relevant discussions in Breakey (2010).

ones that non-creators were originally in a position to make (in the absence of the relevant intangible goods). Nevertheless, there is no reason to think that the presumption of liberty loses its force in such cases. Imagine that there are two identical coffee shops on a street, and it would not worsen your position if I restricted your ability to go to one of them since you would have an equally good alternative. This fact, by itself, is clearly not *sufficient* to grant me a power to make such restrictions. The presumption of liberty means that any restriction of liberty requires a justification. And as we have seen in the last paragraph, 'weak presumptive claims of non-interference' cannot act as such a justification in the general case.

Notice also that exclusion rights to intangible property are extremely expansive compared to exclusion rights to tangible property. Only the former restricts people's consensual activities with objects that they legitimately own – if I own the patent for abacuses, then you may not make an abacus using a piece of wood that you own and sell it to someone without my permission. It also imposes duties on what we can do with our own bodies in certain contexts. If you own the copyright to a poem, then I may not perform it publicly. Both kinds of duties are created without the consent of the duty bearers. This puts intangible property exclusion rights in tension with the principles of tangible property rights and self-ownership, which are typically taken to entail *immunities* against the non-consensual loss of such privileges. As Breakey (2010) puts it: 'You would not fully own your land (or indeed yourself) if I could, without your consent, impose enforceable new duties constraining your actions on your own property' (p. 232).[26] In the context of IPR, there is some truth to the slogan 'Property is theft!'.[27] Even if the reader (like me) is not particularly sympathetic to libertarian principles, the expansive degree to which IPR restricts liberty surely means that they require correspondingly strong justifications. This puts further pressure on the view that a 'weak prima facie claim' plus

[26] Schroeder and Singer (2011; p.282) make a similar observation.
[27] The slogan is commonly attributed to Proudhon (1840).

the satisfaction of a weak Paretian proviso or the latter alone is sufficient to justify such restrictions.

These objections lead me to reject Moore's argument for perpetual exclusion rights for intangible goods. The considerations that he offers, including claims to non-interference and proviso superiority, seem too weak to justify the expansive duties and claims that such rights create. Note also that his argument also faces the generality problem that I pressed against labor-entitlement arguments in section 1.6.

Our discussion about the tension between a presumption of liberty and exclusion rights also raises the question of whether, if exclusion rights are justified, those who wish to exercise them through the state should be required to meet a burden of proof. An analogy with defamation may serve us here. It is thought that people have a significant interest in controlling their reputation. But this clearly does not warrant a blanket claim-right against speaking about one's life without one's permission.[28] Moreover, the burden of proof is generally shouldered by the rightholder.[29] Any right more expansive than this would be seen as incompatible with a liberal commitment to free expression. It is difficult to see why exclusion rights to intangible goods, which similarly restrict the freedom of expression, among other freedoms, should be treated differently.[30]

2.5 Against Instrumental Argument for Exclusion Rights

I have mentioned an instrumental argument in favor of exclusion rights. This is perhaps the most widely accepted argument among policy makers. It claims that exclusion rights allow creators to recoup their initial costs by granting them a monopoly over the relevant intangible

[28] Notice that such a right would likely pass Moore's Paretian proviso. If I did not live my life the way I did, you would not have had the ability to talk about my life as it is. So my acquisition of life narrative (that is the conjunction of creation and exclusion) can leave no one worse off. Although it is plausible that persons have rights against speech that harms their reputation, it is surely absurd to claim that persons have blanket rights against being talked about without permission.
[29] UK's Defamation Act of 2013, for example, requires that claimants show to a court that 'serious harm' to their reputation was caused or was likely to be caused by the defendant's statement.
[30] See also Snow (2009) for a related argument.

good, allowing them to charge higher prices than they could under perfect competition. Exclusion rights are thus said to serve two instrumental purposes: 1) they serve the creators' autonomy-interests in having the ability to recoup opportunity cost, and 2) they serve society's interest in incentivizing the creation of valuable intangible goods. The instrumental argument for exclusion rights suffers from many well-known difficulties.[31] This section presses one particular objection from epistemic uncertainty. Exclusion rights impose duties and restrictions to freedom on a large scale. To be justified, there needs to be very good evidence that exclusion rights are efficacious; that is, they achieve their purported instrumental aims, and we lack better ways to achieve the same aims. However, this section mounts an empirical challenge, arguing that the available empirical evidence should leave us, at best, skeptical toward the efficacy of exclusion rights. Under such epistemic uncertainty, it goes against the presumption of liberty to instate exclusion rights.

We begin by looking at the significant ethical costs of legal exclusion rights, which should leave us less confident about their all-things-considered instrumental benefits. Some of these costs have become apparent in the Covid-19 pandemic. In an Oxfam (2021) survey, three-quarters of epidemiologists surveyed say that waiving IPR would increase global Covid vaccine coverage. Not only does the poor global vaccine coverage create deep inequalities between nations, it increases the likelihood of vaccine-resistant mutations and a prolonged pandemic. More generally, Schroeder and Singer (2011) argue that the current IPR system is partly responsible for the global lack of access to life-saving drugs, causing an estimated 10 million preventable deaths. Exclusion rights prevent the poor from buying cheap generic versions of new drugs, effectively denying them medicine that could have saved their lives.

With the significant costs that the monopoly rights system generates, there is surprisingly little evidence that it is effective at promoting the creation and discovery of

[31] See Hettinger, 1989; Himma 2008 for other instrumental objections.

valuable intangible goods. Numerous problems with monopoly rights as an incentive to innovation have been identified in this respect.[32] Ramello (2008) and Stiglitz (2014) provide theoretical reasons to think that overly expansive IPRs decrease the total production of new intangible goods. Because intangible goods simultaneously serve as inputs, outputs and productive technologies in the production process of new goods (knowledge production is based on prior knowledge), restrictions to their accessibility both increase the cost of production and decrease the productivity of new knowledge. Empirical evidence has corroborated with this worry. Baker (2016) notes that there is very little evidence that IPR-like monopoly protections increase innovation or creative work. There has been no obvious increase in R&D spending despite the number of patent approvals more than quadrupling between 1983 and 2010 along with significant strengthening of international IPR rules (Boldrin et al., 2011). Comparing genes sequenced by the private firm Celera and the public Human Genome Project, Williams' (2013) analysis suggests that Celera's intellectual property rights led to a 30% reduction in subsequent scientific and product development outcomes. Although these threads of evidence do not show that having no exclusion rights at all is optimal, they should raise doubts against the instrumental efficacy of monopoly rights.

So far, we have presented evidence against the efficacy of exclusion rights. Another claim that is necessary for the instrumental argument to work is that exclusion rights are the best way to achieve our goals to expand creator autonomy and incentivize the creation of valuable intangible goods. We now examine this latter claim. As previously observed, the right to compensation is logically independent of the right to exclude. Many have pointed out that a variety of social mechanisms other than conferring monopoly rights are able to secure compensation for creators (Hettinger, 1989; Moore, 2001; Himma, 2008). As Himma (2008) has noted, states could fund intangible good creators directly. Moreover, the role of monopoly

[32] See Pogge (2009) as well as Stiglitz & Jayadev (2010) for excellent surveys of these problems.

rights as a mechanism for companies to recuperate their initial costs is often greatly exaggerated. For most industries, subsidies from patents only account for 5-15% of the R&D spending (Baker, 2016, p.89). Other major factors include first-mover advantage and complementary services (Cohen et al., 2000).

Many have proposed alternatives to an exclusion rights system to compensate creators. Pogge's (2009) Health Impact Fund, endorsed by Schroeder and Singer, proposes a global, governments-backed agency.[33] Patentees who register with the Health Impact Fund would receive annual payments for the impact of their medicines at the cost of waiving their right to market exclusivity. Competition would thus drive their medicine's price to the marginal cost of production. Prize systems like this which place research in the public domain would fund the development of impactful medicine without excluding the poor from their use, while eliminating the incentives for drug companies to misrepresent the safety and effectiveness of their products. Linking financial rewards to impact also reduces perverse incentives that currently exist for firms to conduct wasteful duplicative research (Baker, 2008; Stiglitz et al., 2017; Stiglitz & Jayadev, 2010).[34] A health impact fund also addresses the dire problem of neglected diseases. Since the potential profits are low, monopoly rights generate very little incentive for pharmaceutical companies to find drugs for diseases if they affect relatively few people or if they affect a large number of people in poor countries (Sønderholm, 2012; Schroeder & Singer, 2011; Pogge, 2009). Again, the potential benefits of alternative mechanisms of compensation should leave us skeptical toward the necessity of monopoly rights.

[33] Baker (2016) suggests another scheme modelled after the contracting system used by the US Defense Department.

[34] According to Baker (2008, p. 737), in the years from 1990 to 2004, almost 80 percent of the drugs approved by the FDA fell into the standard classification, meaning that they provided no significant advance over existing drugs.

Similar buy-out systems can in principle work for intellectual domains other than health (Kremer, 1998). The largest difficulty with such schemes consists in determining the value of an innovation. Kremer (1998), however, has shown that this could be done with an auction system.[35] There have also been other proposals for funding creators without granting monopoly rights. For the creative industry, Stiglitz et al. (2017) suggest that the state allocate a certain sum (e.g. $100) to each adult, used to support whatever creative workers the person chooses.

In the face of empirical uncertainties, our commitment to a presumption of liberty may give us reasons to prefer a system that does not restrict freedom over one that does. This shifts the onus of proof to those who claim that exclusion rights are justified on instrumental grounds.

2.6 Summary

Let us take stock. In section 2.2, we argued that certain asymmetric interests, such as the interest of creators in controlling their image and life projects, may justify exclusion rights. The scope of exclusion rights is determined by the relative interests at stake. If the creators lack asymmetrical interests in a use, or when the use of an intangie good does not worsen anyone's position, creators lack exclusion rights over that use. In section 2.3, we argued that, even when exclusion rights are justified, they ought to be limited in duration. Sections 2.4 and 2.5 examined prominent arguments in support of exclusion rights and found them lacking. In section 2.4, we criticized Moore's argument from a Paretian principle, and noted the tension between exclusion rights and the presumption of liberty. We also argued that, conforming to the presumption of liberty requires us to place the burden of proof on those who propose to exclude others. In section 2.5, we criticized instrumental arguments for exclusion rights on empirical grounds. Exclusion rights as a mechanism to protect compensatory income has only conditional importance – it is needed only when no alternative compensatory institution is available. Indeed, we have strong reasons to build these alternative compensatory institutions.

[35] Although it should be noted that Kremer's proposal would not completely eliminate patents.

Chapter 3: Limits of Income Rights

3.1 Introduction

In Chapter 2, we discussed the extent to which exclusion rights may be justified for intangible goods. We defended rights to the compensatory or non-economic-rent portion of income, since it serves both the creators' autonomy interests and the public's interests in incentivizing the creation of intangible goods. In section 2.5, we also saw that an income right from the creation of intangible goods can potentially be implemented through a variety of institutions, beyond the monopoly rights system that we are familiar with. This leaves us with the question of how we ought to treat rent that can be extracted from the use of intangible goods. It is important to note that this chapter is no longer solely concerned with the rights that creators have – it is possible for non-creators to earn an economic rent from the commercial use of intangible goods in the public domain.

A large amount of rent is extracted from the use of intangible goods due to a mix of factors. Legal monopoly rights are one of them. In 2015, estimated patent rent from the prescription drugs industry alone amounts to 2.3% of the US GDP (Baker, 2016, p. 83). However, legal monopoly rights are only one of many factors. As noted earlier, subsidies from patents only account for 5-15% of the R&D spending for most industries (Baker, 2016, p.89). Market power can come to exist through spontaneous economic forces. One such force is the first-mover advantage. First movers benefit, for example, from name recognition and the network effect. The network effect applies when the value of a product is exponentially related

to the number of users for the given product. It may be largely responsible for the lack of competition for social media companies, proprietary standards, rail networks, etc. These effects are exacerbated by the high scalability of the copying of intangible goods. As firms' market power increases, their rents increase along with their markup (Schwerhoff, 2020). Again, none of these effects require legal exclusion rights to intangible goods – social media companies will likely stay dominant, even if their underlying technologies become widely available. This section seeks to answer how such rents ought to be distributed. There is a long history of philosophers and economists arguing for the redistribution of rent, stretching from John Stuart Mill, Henry George, through Fabians, to contemporary philosophers such as Gauthier, Christman, and van Parijs.[36]

Beside the significant magnitude of intangible good rent that presently exists in the world, the right to rent needs to be addressed for another reason. In Chapter 2, it was suggested that a system which compensates creators without monopoly rights would be preferrable since the monopoly rights system infringes on the presumption of liberty. If we indeed ought to adopt an alternative compensatory institution, we need to determine how much payoff are creators entitled to.

Chapter 3 examines rights to economic rents derived from intangible goods. In section 3.2, I aim to clarify the conceptual landscape of rent, building the conceptual apparatus needed to better understand arguments in later sections. Section 3.3 provides a brief overview of prominent arguments that scholars have historically drawn on to justify the confiscation and redistribution of rent. This is followed in section 3.4 by a discussion of the most sophisticated argument for the redistribution of rent developed by Gauthier (1986). Section 3.5 presses two objections against what I argue to be the most plausible interpretation of Gauthier's argument. In section 3.6, I advance an original argument for the redistribution which relies on the

[36] For the history of thought on rent, see Fried (2001).

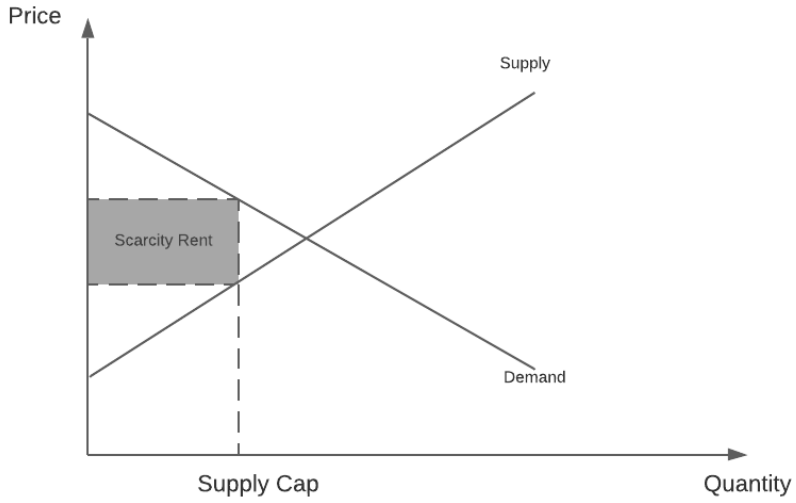
asymmetry requirement. If the argument is correct, its application would go well beyond rent derived from intangible goods. Finally, in section 3.7, I defend the argument from numerous objections.

3.2 The Concept of Economic Rent

Despite the recent resurgence in interest in economic rent, the nuances of the concept are generally underrecognized in the philosophy and economics literature. In either literature, there is no single widely accepted precise definition of rent. This is no indictment of these literatures, since distinct conceptions of rent can play different theoretical roles in different theories. However, these concepts of rent are often liable to be conflated with each other, and their conflation can lead us to draw specious conclusions. We therefore start with a discussion that lays out the conceptual space of 'rent'.

In Chapter 1, I characterized economic rent as the excess amount paid to a factor of production's supplier beyond the minimum amount necessary to induce its present level of supply. This reflects how the term is generally understood in the contemporary economics literature (Varian, 2014; Schwerhoff et al., 2020; Wessel, 1967). As Varian (2014, 440ff) observes, one form of rent occurs whenever the supply in some market is restricted for any reason. In such cases, the market fails to reach economic equilibrium, and the relevant product or service is able to command a higher price than what is necessary to induce the supply of the product. This happens because the demand curve is downward sloping – a higher price can be charged if the quantity of some product is smaller. As we can see in figure 2, a rent appears when the quantity traded is below equilibrium.

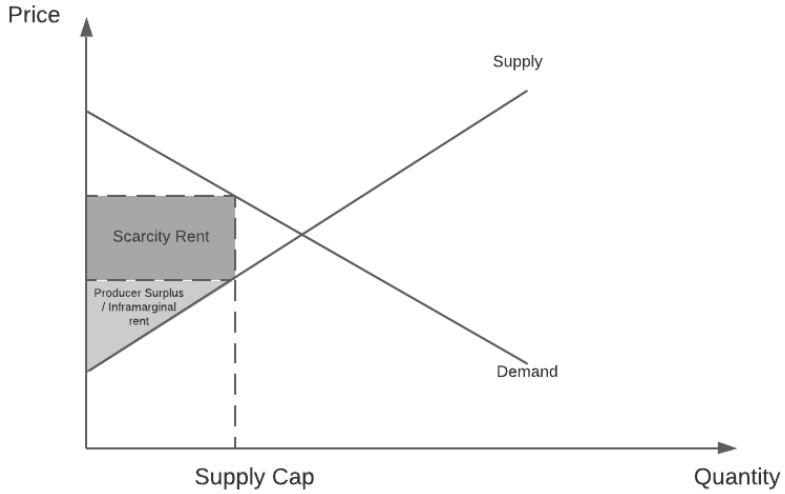
Figure 2



Limited supply can be caused by natural scarcity, such as in the case of rare natural resources, but also other factors such as government policies (such as patents) and other forms of entry barriers to the market.

What has been identified as scarcity rent in figure 2 is not the only type of rent. The triangle below the shadowed area in figure 2 is commonly referred to as the *producer surplus* or *inframarginal rent* (see figure 3).

Figure 3

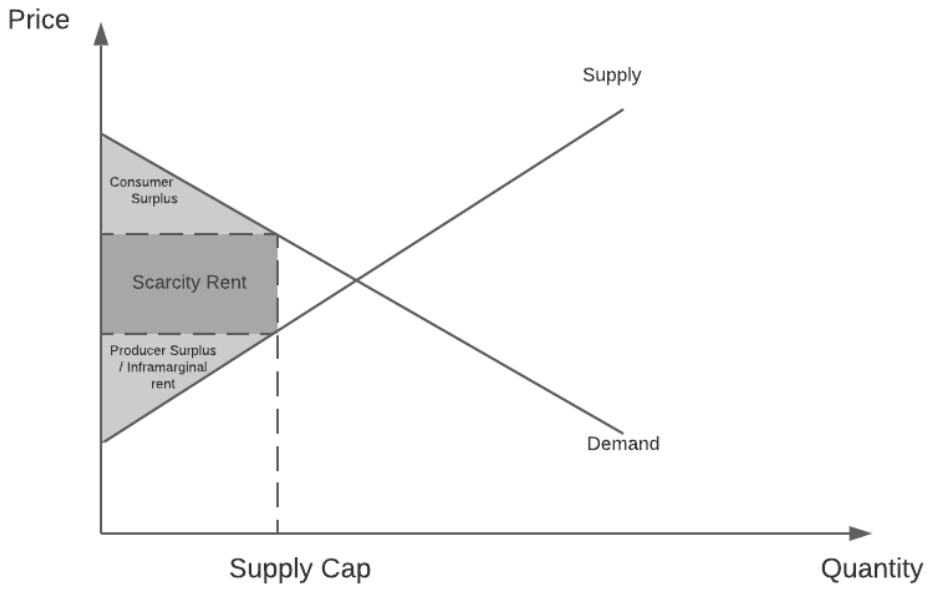


Since this portion of income is unnecessary to induce suppliers to offer the relevant quantity of products, it can also be seen as a form of rent (Schwerhoff et al., 2020). Inframarginal rent is ubiquitous, since it exists whenever the supply curve is not perfectly elastic (when not every producer has the same marginal cost of production). This type of rent would exist even if the market is competitive (all goods are sold at equilibrium price). Inframarginal rent was, in fact, the first systematically described form of rent. In 1815, economists including David Ricardo observed that the price of grains are determined by the cost of production on marginal (least productive) land (Fried, 2001). Since the cost of production is lower on more fertile land, those who farm such land receive the difference between their cost and market price as a surplus, which would drive up the economic value of the land (this association with land is also why we refer to rent as 'rent'). Similar to differences in land fertility, technological differences can also be a source of inframarginal rent. If a firm can produce goods at a lower cost due to having better technologies, such a firm would command an inframarginal rent.

Lastly, we may notice that the supplier is not the only one who can receive a surplus from a transaction. On the demand side, a consumer may be willing to pay more than what she

actually pays for a product. This gives rise to the consumer surplus, represented in figure 4 as the triangle above the scarcity rent rectangle.

Figure 4



Although discussions in the philosophical and economic literature have generally focused on producer rent (also known as *factor rent*), I think the neglect of consumer rent is a mistake. My reason for thinking this will become clear as we discuss Gauthier's arguments in section 3.4. I, thus, broadly follow Schwerhoff et al. (2020) in identifying rent with 'those benefits to an agent that are in excess of the minimum necessary for the agent to accept the transaction', where the agent can be either a consumer or a producer. As we will see, this definition is intimately related to Gauthier's concept of co-operative surplus. I will, however, refine this definition in section 3.6.

The preceding discussion has hopefully provided us with a basic grasp of the concept of rent. We have already seen how there are broader and narrower conceptions of rent. Unfortunately, we now have to complicate the discussion further to bring out some nuances

that are generally overlooked. To determine the magnitude of rent that has been extracted in a particular transaction, we need to know 1) whether we are concerned with a transaction from an *ex ante* or *ex post* perspective, 2) whether we ought to hold the identity of participants in the transaction fixed, and 3) what are the baseline levels of benefits against which benefits from transaction should be compared to. Ambiguities can be introduced at each level.

The first question is whether we are concerned with a particular transaction from an *ex ante* or *ex post* perspective. Suppose some reward for a transaction comes in the form of a lottery, and one supplier wins the lottery. From the supplier's *ex post* point of view, he has received a high amount of unnecessary payment as he would have been willing to supply the product for a much reduced price. From an *ex ante* point of view, however, the potential lottery payment to this supplier is necessary to motivate them to provide the present level of supply. Whether or not we take the *ex ante* point of view also matters crucially to how we treat sunken costs. We can distinguish between the fixed costs which go into acquiring some productive capacity and the marginal cost of producing an extra copy. Though a rational agent will be willing to enter into a transaction *ex post* if the price is higher than her marginal cost regardless of her sunk cost, she would not have wished to produce the good *ax ante* if she did not expect that her fixed costs would be covered. In section 3.4, we will see an example of a notion of rent which effectively takes the *ex post* perspective in Mack's interpretation of Gauthier. In section 3.6, I argue that a notion of rent that takes the *ex ante* perspective is most appropriate for my argument.

Secondly, regarding participants to a transaction, we may or may not want to hold their identities fixed in determining rent. Let's illustrate this question with an example. Suppose Pfizer is able to produce a vaccine shot at $100 but Moderna is able to produce an identical vaccine at $80. Now suppose I purchased a vaccine from Pfizer for $500. If rent is determined by the reservation price of the actual supplier, then the supplier rent is $400. However, if rent

is determined by the minimum reservation price of all possible suppliers of the same good, then the rent is $420. Analogous things can be said on the demand side.

From some perspectives, it may not even matter who either participant is. The state may not care who receives a vaccine, as long as some threshold of citizens are vaccinated. From such a perspective, we may think of rent as what is paid beyond what is necessary to maintain a specific quantity of transactions. Even in this case, we still need to determine if we are interested in the short-term or long-term quantity of transactions. For example, it is conceivable that eliminating profits from Covid vaccines will not reduce the level of production for Covid vaccines, but it will reduce the long-term quantity of vaccines developed in general. Depending on the theorist's goals, either conception may be appropriate. In section 3.6, I will discuss why I think a notion of rent that is insensitive to the participant's identity is most appropriate for my argument.

Lastly, we must know how the baseline level of benefits is to be determined. Remember, rent is roughly benefits received by an agent in a transaction that are in excess of the minimum payment necessary for the agent to accept the transaction. The question, then, is how the minimum payment necessary for the agent to accept the transaction is determined. Broadly, there are two types of approaches. The first is counterfactual, where the level of benefits received in a transaction is compared to the level of benefit that someone would have obtained under some counterfactual circumstances. On some accounts under this approach, the relevant counterfactual is a no-scarcity condition where supply could be expanded (Cohen, 1995). On others, it might be a Robinson-Crusoe-like condition bereft of social interactions (Gauthier, 1986). For this type of approach, it is crucial that we know how the world would have been, had the relevant counterfactual been true. We will see an example of how different ways of identifying the relevant counterfactual world can result in different conceptions of rent in section 3.4. The second type focuses on features of the participants, such as their opportunity

cost or reservation price. These features of the participants may be cashed out in counterfactual terms – an agent's reservation price might just be the lowest price that she would have accepted for a transaction. The central feature of this type of definition is that it holds most features of the world fixed. It only varies how an agent might have interacted with the world. The distinct concepts of rent entailed by different approaches here are easy to conflate because they can be extensionally equivalent under certain assumptions.[37] We will see an example of the reservation price notion of rent converging with a counterfactual notion of rent in section 3.4 as we discuss Mack's interpretation of Gauthier.

There is therefore a conceptual pluralism with 'rent' – there are multiple interrelated concepts that the term may pick out.[38] There is not much point in asking of which concept is the *real* or privileged concept of rent. How 'rent' should be understood will depend on the role a theorist needs the concept of rent to play in her theory. However, precisely because 'rent' is not univocal, it is crucial for a theorist to be explicit and precise about her definition. As we will see in the following discussion of Gauthier, many substantive issues turn on how rent is conceptualized. Having now introduced the concept of rent, let us examine historically prominent arguments against the right to retain rent.

3.3 Historical Arguments for Redistributing Rent

Historically, arguments for the redistribution of rent tend to focus on the fact that rent is 'unearned'. John Stuart Mill saw rent accrued by landowners as a by-product of 'the ordinary progress of a society' (*Principles of Political Economy*, p. 818). Such increases in wealth are received by landowners 'independently of any trouble or outlay incurred by themselves. They grow richer, as it were in their sleep, without working, risking, or economizing' (*ibid*). Mill's argument is echoed by Henry George, who writes that

[37] As Cohen (1995) points out, Gauthier seems to have conflated the no-scarcity, Robinson Crusoe, and reservation price definitions.
[38] On conceptual pluralism, see Chalmers (2011).

> [Rent] does not arise spontaneously from land; it is due to nothing that the land owners have done. It represents a value created by the whole community… [It] necessarily belongs to the whole community. (1912, p.897)

Although Mill and George lacked the conceptual apparatus to apply the concept of rent to other factors of production, their claims would be equally sound for factors other than land. For example, intangible goods like a given technology or dataset can only increase in value from external changes in the society. Data becomes more valuable as a result of the development of machine learning algorithms, and the latter also increases in value from the increased availability of the former. Both Mill and George argued for the taxation of economic rent. George (1912) is explicit in describing the desired distributive effects as follows:

> [T]he wealth produced in every community would be divided into two portions. One part would be distributed in wages and interest between individual producers, according to the part each had taken in the work of production; the other part would go to the community as a whole, to be distributed in public benefits to all its members. In this all would share equally... And justly so—for while one part represents the result of individual effort in production, the other represents the increased power with which the community as a whole aids the individual. (p. 1082)

At times, George seems to endorse the Lockean idea that each is entitled to the fruits of her labor (p. 835). The idea, then, seems to be that since rent is the fruit of the community's labor, not the rent recipient's, the community is entitled to it. However, this argument can be easily challenged. Consider a farmer whose increased productivity is a result of his education, the infrastructure, and other social products. It would nonetheless be false that the increased harvest is not a result of her labor. It would be more accurate to say that rent is a result of both the rent recipient's labor and the community's. If so, it is not clear why the entirety of rent ought to be redistributed. Moreover, if it is causal responsibility that matters, then why should

rent be shared equally among the community? From the fact that rent is a social product, it does not follow that each member of community is equally responsible for it. In sections 3.4 and 3.5, we will consider Gauthier's sophisticated argument for the redistribution of rent, which strongly echoes George's argument. We will see that, even if interpreted along Gauthierian lines, George's argument cannot justify the type of egalitarian redistribution that he envisions.

In my view, it is a negative claim – that rent recipients lack a legitimate claim to rent – which is really doing the work in justifying the redistribution of rent. The negative claim is supported by another argument offered by Mill and George. Both emphasize that land, from which rent derives, is itself a 'gift of nature' (*PPE,* p. 423). To this gift each person has an equal claim (George, 1912, p. 834).[39] Again, although their focus was on land, their claim is equally sound for intangible goods. It is plain that much of our productive capacity is a result of knowledge and technologies that we inherit from past generations. It is equally plausible that no one has a special claim to the values of these heritage intangible goods, at least for those that are not subject to protections like copyrights and patents. This lends intuitive support to the negative claim. The redistributive conclusion can then be supported as follows: since rent recipients do not have a moral right to rent, the state would be unjustifiably favouring them if it did not redistribute the rent. The symmetry argument I defend in sections 3.5 and 3.6 can be seen as a refined argument developing on the same intuition – rent recipients lack any special claims to the rent that they receive. It aims to vindicate the negative claim that rent recipients lack a legitimate claim to rent. It also develops a more generalized and disambiguated concept of rent.

In *Real Freedom for All,* van Parijs (1997) also defends the redistribution of rent. He argues that the value of our initial external endowments ought to be equally distributed. For

[39] They both distinguish between the value of the unimproved land itself, and any improvements that agents may be responsible for. It is the former value which is seen as commanding a rent which ought to be taxed.

van Parijs, external endowments include 'whatever usable external objects in the broadest sense individuals receive access to' (p.101). These can include both material objects such as 'factories and stamp collections' and intangible goods like 'nursery rhymes and computer programmes' which we inherited (ibid). These are 'a pool of external assets to which all have an equal claim' (p. 129). It then follows, van Parijs' argues, that each person ought to be taxed whenever she uses more than an equal share of society's scare resources. In that case, those who get less than their share will be able to receive the competitive value of what they give up. Although I am very sympathetic to van Parijs' argument, we have different starting points. While he starts from a 'real libertarian' position, I start from a view about how rights must relate to interests. In addition, I have two key disagreements with van Parijs' view. First, although van Parijs counts intangible goods as external assets, he believed that they do not directly generate rent. I will attempt to show the mistake in this view in section 3.7. Second, van Parijs' approach leads him to apply his redistributive conclusion beyond commodities. Specifically, he recognizes that there was an analogy between scarce commodities and scarce marital partners. In the face of this analogy, he suggests that we should embrace the conclusion that those without a partner ought to pay for their privilege, giving those without partners 'an equal share in the value of the scarce asset' (p. 127). This conclusion is not one that I am prepared to accept. In section 3.6, I will attempt to show why the argument that I advance there need not entail this conclusion. Before I move on to my own argument, however, it pays to closely examine one of the most sophisticated arguments for the redistribution of rent to date, advanced by David Gauthier. In the next section, I will present Gauthier's argument. Its weakness will be discussed in section 3.5.

3.4 Gauthier's Argument

Gauthier's (1986) argument for the redistribution of rent is an application of the general moral framework developed in his *Morals by Agreement*. In that book, Gauthier is primarily

concerned with deriving moral principles from an account of how rational persons would bargain from an *initial bargaining position*. Briefly, the initial bargaining position represents the benefits that each bargainer would receive without cooperation while not violating the rights of her fellows nor benefiting from making her fellows worse off. Through the rational bargaining process, bargainers agree on a joint strategy that is mutually beneficial for all participants as compared to their baseline conditions. We will first present the *maximin relative benefit* criterion, which governs the rational bargaining process for Gauthier. Then, we will see how Gauthier's redistributive view of rent derives from this principle of bargaining.

To make sense of the maximin relative benefit criterion, we must first introduce the notion of *co-operative surplus*. This is the utility that each bargainer receives 'over and above what she obtains in the initial bargaining position' (p.131). For each potential co-operative agreement, there is some maximum magnitude of surplus that is possible for each bargainer to receive without leaving the other bargainers worse off than they were initially. This magnitude is measured in individual utility and may be different for each bargainer. A bargainer's maximum benefit is just the maximum surplus that she could receive. Her *relative benefit*, then, is the ratio between her actual benefit and her maximum benefit from a bargain. If George can receive utility u^* under his initial bargaining position, his maximum possible co-operative surplus was u', and his actual utility from a joint strategy is u, then his relative concession is measured by $[(u - u^*)/(u' - u^*)]$. Maximin relative benefit states that, given a range of possible outcomes, an outcome is selected only if the smallest benefit it confers on any bargainer is as large as possible. In most cases, this results in equal relative benefits for each bargainer. When the surplus takes the form of a single transferable good, divisible in any way among co-operators, maximin relative benefit requires its equal division. Importantly, an equal division of surplus is required regardless of how much or how little each co-operator has contributed to the collective venture. Or as Gauthier (1986) puts it: 'no contribution yields no claim; some

contribution yields full claim' (p.154). His main argument for this criterion is that it provides a plausible solution to the rational bargaining problem. In addition, the maximin relative benefit criterion appears intuitively attractive because 1) it requires that each co-operator is compensated proportionately to their opportunity cost through the non-surplus portion of their benefits, and 2) it treats each partner equally in the distribution of co-operative surplus (van Parijs, 1996).

Let us now see how maximin relative benefit works in an example. Suppose a basketball team is negotiating with Chamberlain on his payment. If Chamberlain plays with the team, they will generate $500,000 in ticket revenue. Suppose Chamberlain would receive $30,000 in his initial bargaining position. Without Chamberlain, the team will only generate $250,000 in ticket revenue. The maximum payment that the team would be willing to offer Chamberlain is therefore $500,000 - $250,000 = $250,000, and his maximum co-operative surplus is therefore $250,000 - $30,000 = $220,000. The maximum cooperative surplus that the team could receive is also $220,000 since this is what they would receive if they paid Chamberlain the minimum possible amount ($30,000) that would not leave Chamberlain worse off. Assuming that income relates linearly to utility, maximin relative benefit implies that the $220,000 is to be divided equally among all bargainers.

Before we proceed to see how maximin relative benefit relates to rent, it is necessary to examine the concept of rent that Gauthier uses. This will take some work, partly because of the ambiguities inherent in the concept of rent itself, as discussed in section 3.2. The difficulty in reconstructing Gauthier's concept of rent is evident in Cohen's (1995) charge that Gauthier conflates three different concepts in the vicinity of rent, while van Parijs (1996) identifies no less than eight possible definitions of rent in Gauthier (1986). Rather than attempting to provide an exegesis of Gauthier's view, I will argue that the most plausible reconstruction of Gauthier's argument identifies rent with the cooperative surplus.

To start with Gauthier's explicit characterizations of rent; they seem to suggest a scarcity notion of rent. He writes that

> Rent is determined by factor scarcity; it is the premium certain factor services command… because there is no alternative to meet the demand. (p. 272)

Taking this definition of rent seriously, it appears that Gauthier is employing a counterfactual notion of rent (discussed in section 3.2) where the relevant counterfactual comparison is a world with no scarcity. Now, this concept of rent is still ambiguous because it is not clear how we are to imagine the counterfactual world with no scarcities. We can find evidence of this ambiguity in the differences between Mack and Cohen's interpretations of rent. On Mack's (1992) interpretation, rent is what a supplier actually receives over and above what she would have received in a 'perfectly competitive market' with an 'unending supply' of perfect substitutes for the factor of supply in question. Taking Chamberlain again as an example, Mack thus imagines a world with a 'reserve industrial army of Chamberlains' (p.181). In such a world, Chamberlain will clearly receive no more than his reservation price for his services, since if he demanded any more than that amount, other Chamberlains would underbid him.

In contrast, Cohen (1995) appears to imagine a world where supply is expanded, and many others are Chamberlain-like in their athletic capacity. These other athletes are identical to Chamberlain in their relevant productive capacity, but not necessarily identical in other respects. Chamberlain may or may not receive his reservation price in Cohen's counterfactual, as what he would receive depends on how much he enjoys playing basketball compared to others. If it turns out that Chamberlain dislikes basketball more than his would-be competitors, then his potential wage in the counterfactual world would be lower than his reservation price.

Cohen's notion of scarcity can be appropriate in some contexts. When supply is limited artificially via patents, it makes sense to ask how much some product would have cost someone had such patents not existed in the actual world (and thus the supply is expanded) without

regard to the reservation prices of the actual participants. However, this notion of rent is inappropriate for Gauthier's purposes, as it renders the magnitude of rent underdetermined in many cases. How much Chamberlain would receive in Cohen's counterfactual will depend on *who* becomes Chamberlain-like and particularly how much *they* would enjoy basketball. If these Chamberlain-like athletes hate basketball, then the counterfactual wage will remain high. If they love basketball, the wage will be lower since less income is necessary to induce them to play. In such cases, we are asked to imagine a world that is much removed from the actual one and we lack a non-arbitrary way of a counterfactual from a range of equally suitable candidates.

Mack's interpretation of Gauthier's rent, which in effect collapses scarcity rent into reservation price rent, has the benefit of being determinate. Nonetheless, this interpretation renders Gauthier's argument too implausible. If we imagine an abundant number of perfect substitutes for Chamberlain, then the price he will be able to command will be insensitive to any initial investments or sunk costs that went into his training. Any amount beyond his current reservation price, even though they are necessary for covering fixed investment costs. Many economists indeed adopt such a conception of rent. But this cannot be acceptable for Gauthier's purposes, since he proposes that all rent should be confiscated and redistributed. On such a proposal, agents will be discouraged from productive activities which require fixed upfront costs, since they would not be able to recuperate these costs. Clearly, this is an untenable outcome.

It is possible that Mack or Cohen's interpretations can refined to overcome the problems I have pressed against them. However, they both only identify surpluses earned by suppliers as rent, neglecting consumer surpluses. As I will argue below, this is inappropriate for Gauthier's purposes.

In my view, the most plausible version of Gauthier's argument simply identifies rent with all co-operative surplus. Contrary to Mack, Cohen, and even Gauthier himself sometimes (see, for example, his characterization of rent at pp. 97-98, 272-274) this conception of rent would include surpluses earned by both suppliers and consumers. While a supplier-only notion of rent reflects mainstream usage of the term, this restricted concept of rent is inappropriate for Gauthier's theory. Gauthier's justification for the redistribution of rent is derived from his view that rent is a form of cooperative surplus. However, nothing in the argument from maximum relative benefit is specific to suppliers. Indeed, the argument applies to the surplus earned by all participants to a cooperative agreement, suppliers and consumers alike. Once we expand the concept of rent to include the excess benefits that any party to a transaction receives as Schwerhoff et al. (2020) do, we are in a position to identify rent with co-operative surplus, at least within the context of Gauthier's theory.

To understand rent as co-operative surplus is to identify the relevant baseline for rent determination as each bargainer's initial bargaining position before they enter the relevant bargain. To Gauthier, the relevant bargain is the participation in society at large. He writes that

> Society may be considered as a single co-operative enterprise. The benefit represented by factor rent is part of the surplus afforded by that enterprise, for it arises only in social interaction. But then that benefit is to be distributed among the members of society on the terms established by [maximin relative benefit]. Each person, as a contributor to social interaction, shares in the production of the benefit represented by factor rent. (1986, p. 274)

Gauthier identifies all members of society as co-operators of a grand bargain that accounts for all rent from that society. One immediate question one might raise is what is the scope of 'society'? We shall come back to this point in section 3.4. Granting Gauthier's claim for now, rent is therefore the part of a participant's remuneration which is over and above what they

would receive in a Robinson Crusoe world, or a world with no co-operative social interactions (though it may include non-cooperative interactions).[40] We may call this notion of rent the Robinson Crusoe conception of rent. Gauthier's apparent focus on scarcity can be explained by his view that benefits of scarcity 'arise[.] only in social interaction'(p. 274). Additionally, this conception of rent makes the connection between maximin relative benefit and Gauthier's reason for redistributing rent straightforward, unlike previously considered alternatives. His argument can be reconstructed as follows:

1. Society is a single co-operative enterprise.
2. The co-operative surplus (rent) arising from participating in society is identical to the part of an agent's benefits that is over and above what they would have received in a Robinson Crusoe world.
3. Distribution of co-operative surplus ought to follow the principle of maximin relative benefit.

   Therefore, the benefits received by members of society over and above what they would receive in a Robinson Crusoe world ought to be distributed according to the principle of maximum relative benefit.

The redistribution of rent is therefore simply justified by a direct application of his view on rational bargaining. Further, if the surplus takes the form of a single transferable good, divisible in any way among co-operators, and relates linearly to utility, maximin relative benefit requires its equal division.[41]

There is another way to show that Gauthier is compelled to identify all benefits beyond what can be received in a Robinson-Crusoe-like state as rent. Consider 'The Rock' Dwayne

[40] van Parijs (1996) also arrives at a Robinson Crusoe interpretation of Gauthier's rent. However, van Parijs still limits rent to suppliers.

[41] Notice that those who would have received more benefits in a Robinson Crusoe world would be entitled to more benefits overall, since the total amount of benefits that each person should receive according to maximin relative benefit is benefits equivalent to (what one would have received in the baseline condition + an equal share of the surplus).

Johnson. Suppose Johnson receives 1 million dollars from a movie project. If he had not agreed to the movie project, his next best option was to earn $800,000 as a wrestler. Had he refused both the movie project and the wrestler offers, the next best option for Johnson was to be a college coach, in which case he would have received $100,000. Let us assume that Johnson is indifferent to all career options if he ignores differences in income. Would Gauthier confiscate only $200,000, which is the difference between Johnson's actual pay and his next best option, or would he confiscate at least $900,000, the difference between what he makes as a movie star compared to a college coach? The answer must be the latter. If all rent is confiscated as Gauthier advocates, Johnson does not genuinely have the option to receive $800,000 as a wrestler. Had he become a wrestler, he would have been taxed $700,000, taking $100,000 as the baseline. It would therefore be a mistake to use the $800,000 figure as the baseline to determine the magnitude of rent Johnson receives as a movie star, since his next best option would really only yield him $100,000 after tax. This reasoning can be iterated for each next best option that Johnson has. It stops when some bargain leaves Johnson no better off than he would be without any co-operative bargains, or when Johnson as well off as he is in what we have called the Robinson Crusoe world. The upshot is that all that Johnson receives beyond what he would receive with no bargains at all is rent, to be confiscated and redistributed under maximin relative benefit. A similar argument could be advanced on the consumer side. This argument, then, leads us to the same conclusion that we reached through considering society as a single grand bargain.

Because this interpretation of Gauthier's argument identifies consumer surplus as a type of rent, it avoids a serious objection faced by standard interpretations of Gauthier's theory. If Gauthier's proposal only confiscates and redistributes supplier rent, the proposal self-defeats, as recognized by Mack (1992). If supplier rent is to be confiscated, suppliers will simply stop collecting it and 'no rent will exist' (Mack, p.183). Adopting a definition of rent that includes

both supplier and consumer rent allows Gauthier to avoid Mack's objection. On such a definition, rent would not cease to exist if suppliers cease to collect it; it would simply go to the consumers as surplus. If consumer surplus is confiscated, it would make no difference if suppliers stop collecting rent.

Although Gauthier states that equal redistribution of rent 'might have little effect on inequalities of wealth' (p. 274), we should reject this claim. What an individual can produce under Robinson Crusoe conditions depends on the productive technologies available to her. In Defoe's novel, Robinson Crusoe would not have been able to make pottery or create a calendar if he had been completely free of social interactions from birth. Gauthier did not recognize the near-total dependence of our productive capacity on know-how transmitted through social interactions. Baumol (2000) estimates that 'nearly 90 percent … of current GDP was contributed by innovation carried out since 1870' (p. 27). Cohen (1995) is correct in stating that, if Gauthier's *redistribuendum* are fruits of social interaction, then his view 'would justify taxing virtually all income' (p. 219).

3.5 Objections Against Gauthier's Argument

Gauthier's view captures the thought that, since intangible goods are social products, their benefits ought to be widely shared. Nonetheless, Gauthier's argument should be rejected. I offer two interconnected objections to Gauthier, one from the indeterminacy of his notion of rent, the other from the scope of redistribution his view requires.

Gauthier's account, as interpreted in section 3.4, does not escape the charge of indeterminacy. On his view, rent is determined by comparing actual benefits to what one would receive in a counterfactual Robinson-Crusoe-like condition. For this to yield a determinate magnitude of rent, we need to be able to at least theoretically identify a determinate level of benefit which one would receive in the Robinson-Crusoe-like condition. On Gauthier's account, the latter is determined by what one may acquire through one's natural capacities

under a Lockean proviso. However, this magnitude is not easy to determine. Even in conditions of solitude, we do not acquire anything *merely* through our labor. In Locke's terms, we must mix labor with the external world. That is, what we are able to acquire will at least partly depend on the technologies available and the external conditions that one finds oneself in. However, Gauthier does not offer us a way to determine what the relevant external circumstances should be. Indeed, any such choice would seem arbitrary. It is telling that, in discussing the initial bargaining condition, Gauthier relies on examples where the characters initially find themselves in solitary conditions. For these characters, their initial bargaining positions are determined by their fictional histories. For *us*, the initial bargaining position must be purely hypothetical. We are born into a (largely) co-operative world, educated from birth with knowledge accumulated by generations of forbearers. Lacking a historical condition to serve as our initial bargaining position, any number of hypothetical initial bargaining positions would be equally sensible for us. We could take what I would acquire in the lush jungles of the Amazon rainforest in 200 BC as a baseline, or we could as easily take a version of my birthplace with all humans absent as the relevant external environment. Determining the magnitude of rent that we receive requires that we arbitrarily choose one of these worlds as the initial bargaining position. This renders the magnitude of rent either arbitrary or indeterminate. Not only does this present a theoretical problem, it also makes Gauthier's view difficult to implement, since he does not prescribe a determinate amount of confiscation.

One way to respond to this problem is to stipulate that everyone's level of benefit in solitary conditions would have been zero (perhaps due to a lack of knowledge) regardless of our choice of counterfactual. We may therefore assume that *all* net benefits that persons receive are co-operative surplus. Individuals would be compensated for costs, such as the psychological toll or initial investments that they incur in social co-operation. Any additional benefits will be redistributed if possible. Accepting this response seems to bring Gauthier very

close to Rawls, since this response suggests that we should redistribute virtually all social benefits in a maximin manner, clearly echoing Rawls' difference principle. Indeed, van Parijs (1996) also suggests that Gauthier was much closer to Rawls than the former realized. Nevertheless, this response only saves the view in its practical application; it does not address the underlying theoretical issue. It is implausible that we would in fact enjoy a benefit level of precisely zero under all solitary conditions. Even if we would be utterly powerless in solitary conditions, our benefit level can still vary from zero to some negative level depending on which Robinson Crusoe world we find ourselves in. This, again, renders the magnitude of rent either arbitrary or indeterminate.

The second objection I will press here addresses the scope of rent redistribution. Gauthier seems to claim that rent is to be redistributed among all members of society (1986, p. 274). But he is also explicit in emphasizing that each agent may receive :

> only the part of the surplus to the production of which he would participate… For if someone were to press a claim to what would be brought about by the co-operative interaction of others, then those others would prefer to exclude him from agreement. (p.134)

These claims seem to be in tension. If rent from a transaction is to be distributed across society, then it must be that all members of society participate in the production of that rent in some way. Gauthier is, of course, not committed to claiming that all members of society contribute to its production equally. As stated before, any contribution, however small, generates a full claim to a share of the surplus on his view. But consider again the rent that Chamberlain is in a position to receive. For a great proportion of Earth's population who do not enjoy basketball, it may well be the case that Chamberlain would have generated the same amount of rent had they not existed. In what sense do they participate in the production of Chamberlain's rent? We may think that these people still indirectly participate in the generation

of Chamberlain's rent by participating in shared political institutions. However, this type of participation is not what Gauthier has in mind. In the quote cited above, Gauthier makes clear that a bargainer can only be entitled to a share of the marginal surplus that she adds to the bargain. It is likely that many members of society do not add any marginal contribution to the surplus that Chamberlain generates. [42]

This suggests that Gauthier chose an inappropriate level of generality in his argument for the redistribution of rent. Rather than describing society as a 'single co-operative enterprise', it seems more accurate to characterize it as a set of diffuse, overlapping co-operative enterprises. There may well be co-operative enterprises that all members of society engage in, such as the democratic state, but it doesn't follow that each member of society is a participant to every co-operative enterprise that occurs in a society (at least if participation requires a positive marginal contribution). This suggests that Gauthier's conclusion requires much revision. Gauthier's initial conclusion that rent is to be redistributed in an egalitarian fashion relies on a conception of society where all social activities within it are seen as occurring under a grand bargain. If we abandon this conception of society in favor of a conception of society as consisting of numerous bargaining agreements happening on various population levels, Gauthier's argument entails that one's share of redistributed rent must depend on which bargains one actually participates in.

This suggests that Gauthier's view is not as egalitarian as it first appears. Indeed, it gives rise to unacceptably inegalitarian results. This view would leave out precisely those who are the neediest. Suppose a person suffering from severe cognitive impairments is unable to participate in most cooperative enterprises. Gauthier's view seems to suggest that, in addition to not receiving any compensation for their disability, they should in fact receive less benefits

[42] The view that each co-operator is only entitled to a portion of the marginal surplus that she contributes toward faces other serious challenges (van Parijs, 1996). Briefly, if co-operators can only claim their marginal contributions to the surplus, then there are cases where a large proportion of surplus would be claimed by no one.

than everyone else due to their inability to contribute to cooperative projects. To many, this seems unacceptable. Nor does Gauthier have room elsewhere in his theory to support any moral claims by the disabled. Their exclusion is deeply embedded into Gauthier's mutual benefit conception of justice, as Gauthier emphasizes that it would be unfair for someone to be required to give others freerides (p.206, 219-220). If some people, suffering from severe disabilities, cannot participate in co-operative enterprises through no fault of their own, they must rely on the charitable wills of others in other to survive. As we have seen in section 3.3, this is also a challenge faced by proponents of the social product argument in general.

Suppose that Gauthier accepts the inegalitarian conclusion. He would then run into another practical indeterminacy problem, this time with regard to the scope of redistribution. We have seen that, for many transactions, it is implausible to identify the set of all members of society as the relevant co-operators. Consider again Chamberlain's contract with the basketball team. Who counts as co-operators in that contract? The list may or may not include sport fans around the globe, Chamberlain's high school coach, the coach's healthcare providers, the legislators who set the legal framework for labor contracts, the legislators' professors, etc. Who it includes will ultimately depend on the extent to which each contributes to the magnitude of the surplus. The issue is that any attempt to determine the scope of redistribution for any surplus will be made practically impossible by the complexity of the social interactions which lead to the surplus. As van Parijs (1996) points out, any proposal to parcel out the surplus according to contribution is 'hopeless' when the surplus is 'the outcome of a complex interaction between natural resources, inherited technology, the legal and customary framework and particular capital and labour inputs' (*ibid*, p.17).

Gauthier might acknowledge the problem and reply that we have to rely on rough generalizations in redistributing rent. Although certainly a setback, this would not normally be fatal. After all, a reliance on generalization is commonplace and necessary for policymaking.

However, the proposal to rely on generalizations is particularly troublesome in the current context. To implement the proposal, the state would classify citizens according to their expected co-operative contribution. A rough-grained classification system would sort people into officially recognized caste-like categories, with people at the top receiving the most benefits. Whether or not one's classification is made public, an official ranking of citizens is difficult to reconcile with the equal dignity of citizens (Anderson, 1999; Scheffler, 2005).

3.6 The Symmetry Argument

This section will advance what I will call the symmetry argument for the redistribution of rent. It relies on the asymmetry requirement introduced in section 1.2. Through developing the argument, we will also uncover the constraints on an appropriate concept of rent. To recall, the asymmetry requirement states that an exclusionary right is justified only if the interests that it serves are asymmetrical to those interests that it hinders. The right to rent is an exclusionary right held over the rent portion of the economic benefits received by an agent through market exchange. The first premise of the symmetry argument is just the asymmetry requirement as applied to rent. It states that private ownership of rent can be justified only if the interests served by the ownership are not matched by the interests that it hinders. Notably, since this premise only requires that the asymmetry requirement is true for property rights, one can accept this premise even if one rejects the asymmetry requirement as a necessary condition for other types of rights.

The second premise states that there are no such asymmetric interests in favor of a right to rent. Call this the *symmetry premise*. If both premises are sonds, it follows that the right to rent is unjustified. That is, no one has a justified claim to the economic rent portion of the benefit they are able to receive through a market transaction. If so, then the state is under no duty to recognize the rent portion of anyone's income or wealth as their legitimate property. Indeed, the state would have a strong *pro tanto* reason to tax away all economic rent, since not

doing so discriminates in favor of rent recipients who lack any asymmetrical interests over the rent. As the scope of this argument is not limited to rent deriving from intangible goods, it does not specifically rely on any distinctive features of intangible goods. This generality is advantageous for the argument since it is more parsimonious than a view that treats rents from different sources differently. It is also in line with the views of past rent theorists, who have advocated the redistribution of rents from land, labor, and capital.

The asymmetry requirement that lies behind the first premise was defended in section 1.2. To recall, the underlying intuition is the following: if two parties' interests in a good or opportunity are symmetrical, then it cannot be justified to grant one party the right to deny the other party access to that good or opportunity. This section will take the asymmetry requirement for granted and pay closer attention to the second premise, which states that there are no such asymmetric interests in favor of a right to rent.

The thought behind the symmetry premise is well encapsulated by Christman's (2012) claim that 'for any given flow of income, one's interest is the same as any other person's, for income generally is in the form of currency or capital' (p. 45). Literally understood, this claim is false. As I have argued, there are asymmetrical interests to receive income as compensation. What lies behind the symmetry premise is the thought that the immediate recipient's interest in any given flow of *rent* is the same as any other person's, assuming that the rent is in the form of currency or capital. To emphasize, this is not to say that no rent recipients have stronger interests in rent than some non-recipients. As I argued in section 1.5, the justification of rights must be concerned with what interests are *normally* present rather than the idiosyncratic interests of individual rent recipients.

Before we defend the symmetry premise in more detail, it is necessary to make explicit the scope of the symmetry argument. There are many ways to acquire property, including transactions, interpersonal gifts, social welfare payments, etc. For our purposes, we should

restrict the concept of rent such that it can only arise from transactions, which are agreements to exchange goods or services with each other. There are two reasons for this restriction. First, the term has been primarily associated with transactions in its traditional usage. Second, normative differences between transactions and other mechanisms of property acquisition make the symmetry argument especially plausible for the former. In transactions, each participant is primarily interested in receiving a given good or service and minimizing costs. They are indifferent to the identity of the agent on the other side of the exchange. That is, it does not matter to transactors whether their payment is taxed by the state or received by the other transactor as long as they receive their end of the bargain. In contrast, those proffering social welfare payments and interpersonal gifts generally care about how much the other agent receives. This difference makes the symmetry premise more plausible for transactions than other mechanisms of acquiring property, as we will argue shortly.

The question, then, is whether there is an asymmetric interest in favor of granting transactors a right to retain rent. Such an asymmetric interest can belong to either the putative rightholders themselves or other people. Our claim is that neither form of asymmetric interests exists for rent. We will take for granted that rent always comes in the form of money, or in some form of benefit that is commensurate with money. Given an appropriate conceptualization of rent, it is definitionally entailed that the ability to retain rent is not necessary to induce anyone to agree to a transaction. Therefore, a right to rent does not serve autonomy interests the way that the ability to recuperate costs does. From the transactors' perspective, rent is analogous to free income rained down from heaven to their lawns. Secondly, a transactor's right to retain rent also does not serve the interests of their transaction partner since the latter generally do not have an interest in the identity of the recipient of their payment, as mentioned in the previous paragraph. This distinguishes transactions from other property conferring mechanisms such as gifts, where a tax on the recipient might infringe on

the giver's interest in conferring some benefit on the gift recipient. Finally, precisely because rent is unnecessary for encouraging any market activity, it is also a redundant payment from any third parties' point of view no matter the magnitude of positive externalities. Not only do third parties lack an interest in allowing transactors to retain rent, but they also have an interest against it, since it benefits them to receive a share of the rent.

If the preceding discussion is correct, then the symmetry premise holds for rent. However, certain constraints need to be satisfied by our concept of rent for the premise to be sound. The rest of the section will be devoted to making the precise constraints explicit. The key move in our defense of the symmetry premise is the claim that the ability to retain rent is not necessary to induce anyone to enter into a transaction. It is crucial to address the ambiguities in this claim, as discussed in section 3.2. Firstly, our notion of rent should be defined from an *ex ante* perspective on the transaction. That is to say that our concern should be with the expected benefits that are necessary to induce agreement to a transaction *before* the investment of fixed costs. If we do not ensure that agents' fixed costs would be recovered, new agents would not choose to enter markets which require such fixed costs. Individuals have an autonomy interest in the ability to invest in developing marketable skills, and society has an interest in making it commercially viable for new firms to enter a market. Hence, including the income necessary to induce a firm or individual to invest in fixed costs under our notion of rent would render the symmetry premise false.

Secondly, we should take an identity-neutral notion of rent. This makes a practical difference in cases where the confiscation would change the identities of the transactors. To start with single transaction cases, suppose that Chamberlain is to be paid $250,000 for a basketball game, and this is precisely Chamberlain's reservation price. However, a perfect substitute for Chamberlain, who is similar to him in all relevant ways, would have been willing to play in Chamberlain's stead for only $200,000. An identity-neutral notion of rent would

determine its magnitude based on the lowest price that any possible transactor would have accepted, rather than what the actual transactor would accept. It would thus identify the magnitude of rent that Chamberlain receives as $50,000. Not recognizing Chamberlain's title over this portion of income would have deterred Chamberlain from accepting the contract, but it would not prevent the basketball game from being played, since Chamberlain's perfect substitute would be hired in his stead. If Chamberlain's interest in taking a transaction is undermined, it is offset by the satisfaction of his substitute's interest. There seems to be no general reason to prioritize the former's interest over the latter's.

It would seem unjust if, after Chamberlain has formed a reasonable expectation to earn $250,000 by forming a contract, we were to tax him $50,000 based on the deal his substitute would have accepted. To avoid such an outcome, policies to tax rent ought to ensure that what is to be taxed is knowable prior to transaction agreements. Assuming such prior knowledge, it is easy to show that *any amount of tax confiscated is necessarily a surplus*, defined as payment beyond the actual transactor's reservation price. Chamberlain, knowing that he would be taxed, would simply not have entered into the contract. Adopting an identity-neutral notion of rent merely reflects the presumptive symmetry between the interests of all potential transactors. It therefore seems that, if we accept the symmetry argument, it is natural to adopt an identity-neutral concept of rent.

So far, we have discussed identity-neutrality in the context of a single transaction. In practice, it is usually impossible to have a tax policy that is specific to the level of single transactions. It must make rules about types of transactions instead. This complicates our analysis whenever there is increasing marginal cost of supply. To illustrate with an example, suppose that we are concerned with the sales of grains. Given increasing marginal costs, each additional grain is more expensive to produce. If we calculated rent based on the lowest possible cost of supply and confiscated this amount from all grain sales, then we will drastically

reduce the amount of grain sold. Instead, rent should be conceptualized as the maximum amount that can be taxed without decreasing the *level of transaction*, whether or not it alters the identity of transactors. Taxes on monopolies, in addition to all taxes on scarcity rent, normally satisfy such a condition. Inframarginal rent taxation, if identifiable, would also generally satisfy this condition. The present notion of rent, therefore, subsumes the paradigmatic types of rent.

We have assumed that the relevant level of transactions against which rent should be defined is the current actual level of transactions. This may constitute an inappropriate status quo bias. We can instead consider the appropriate level as an open political question (which I do not have space to fully pursue here). A reasonable first pass is to set the level low for activities that generate negative externalities; for activities that generate positive externalities such as scientific discoveries, the level should be set high. In addition, we must also consider people's autonomy interest in the ability to pursue the relevant activity. If the ability to pursue creative activities are essential for human wellbeing, and market viability is necessary for the possession of this ability, then this also pushes us to set the level high.

The preceding discussion also helps address how we ought to identify the magnitude of rent theoretically. By defining rent as the maximum amount that can be taxed without decreasing the number of transactions below some level, as we did in the preceding paragraph, we are adopting a counterfactual definition of rent rather than one that is defined in terms of reservation prices. For our generalized, identity-neutral approach, a reservation price notion of rent is too individualized and introduces unnecessary complexity.[43] Rent is then determined by *the maximum amount of tax charged in all accessible possible worlds with different tax policies where the levels of all relevant transaction types are within in a given range*. In other words,

[43] Reservation price still bears a conceptual relationship with our notion of rent. Reservation prices are fixed relative to an available option set. When the option set is fixed, a simple reservation price definition coincides with the counterfactual definition. However, if we are considering wholesale tax policies that aims to tax rent from all transactions, such policies would change the option sets available.

it picks out a single possible world with the maximizing tax policy and asks how much each transaction is taxed there. Note that, under this definition, the magnitude of rent is determinate. The set of accessible possible worlds is simply the set of worlds that we could reach through different policy packages. In any such set of worlds, there is a maximum magnitude of total tax.[44] We need not make any arbitrary theoretical choices as we do with a Robinson Crusoe notion of rent, for which we must arbitrarily select a baseline external condition for each person.

To take stock, the symmetry argument states that there are generally no asymmetrical interests in granting transactors the right to be paid income beyond what is necessary to induce a certain level of transaction. In terms of individual interests, such surplus income is no different from free money from heaven. We argued that every agent should be presumed to have the same interest in simply having more money. Moreover, there is no social interest in simply allowing any particular set of agents to have more income. The asymmetry requirement implies that there is no right to retain economic rent. A right to rent allows agents to privately control economic resources and deny access to others. If a right to rent is unjustifiable, then a state recognizing a right to retain rent arbitrarily favors transactors over non-transactors. Recognizing a right to rent is akin to the state granting a free gift to some but not to others. If rent recipients have no moral right to retain rent, then states have a *prima facie* duty to not recognize a legal right over rent portions of income.[45] The following section will discuss key objections to this argument.

[44] In rare cases, multiple possible worlds might raise identical amounts of tax while all maintaining levels of transaction at a certain level with distinct tax policies for some transaction-types. These possible worlds may tax different transaction-types differently. This may seem to render the rent extracted by each transaction-type indeterminate. One approach to addressing this problem is by introducing additional non-ad-hoc criteria for ranking these possible worlds, e.g. by social utility.

[45] The next question is how rent ought to be redistributed. Perhaps it should be distributed in the form of a basic income. Or perhaps priority should be given to the needy. The symmetry argument does not commit us to any views on this question. It may seem that, since the needy have a strong asymmetric interest in receiving more income, they should receive some type of priority. This would allow us to avoid Elizabeth Anderson's (1999) objection against van Parijs' basic income proposal, which stresses that it 'indulges the tastes of the lazy and irresponsible at the expense of others who need assistance' (p. 299). While the symmetry argument is certainly

Note that the scope of this argument is much wider than many other arguments that we have considered. Compared to Gauthier, the scope of redistribution is much wider. While I am not committed to any specific redistributive strategy, my argument is not compatible with limiting the scope of redistribution to co-operators. This would be just as unjustified as letting transactors retain rent. In contrast to Mill and George, we are not solely concerned with rent deriving from land. Instead, we are concerned with rent that derive from all transactions. Lastly, compared to van Parijs, the argument is not restricted to the rent derived from the initial external endowment. Specifically, it is not limited to the material and intangible goods that we inherit. Nonetheless, my argument is more restricted than van Parijs' in a crucial respect. As mentioned in section 3.2, van Parijs' view has the intuitively embarrassing consequence that benefits received from having scarce romantic partners ought to be taxed and redistributed. The symmetry argument would not have the same implication. Recall that the symmetry argument aims to *refute* a *right* to rent. Aside from the pedantic point that romantic partnerships are not transactions, the important point is that we do not have a (claim) *right* to our romantic partners or any benefits that we enjoy from having them. In the case of economic benefits in the form of private property, not recognizing a right to rent amounts to its confiscation (or putting it in the commons), as private ownership of rent requires such rights. In the case of romantic partners, not recognizing a right to benefits leaves everything as is, since romance does not require that people have a right to each other. This point extends to many other domains of life, including other types of interpersonal relationships as well as all kinds of benefits that we enjoy daily. We may one day wake up feeling content, or we may feel a sense of joy from looking at a beautiful bird. These are benefits that we would pay money for. Nonetheless, there is nothing to confiscate according the symmetry argument, since we do not have rights to these benefits

friendly with this view, it does not entail it, since it only states that the existence of asymmetrical interests are necessary (not sufficient) for rights.

to start with.[46] When the state recognizes a right to economic rent, it discriminates between transactors and non-transactors unjustly. When the state simply *allows* us to be with each other or enjoy ourselves, it discriminates against no one. Unlike van Parijs, my view does not require conceiving *all* benefits from our external endowment as subject to redistribution.

3.7 Responses to Objections

Objection: The rent that Wilt Chamberlain is able to receive is a result of free voluntary transfer between him, team management, and basketball fans. People have a right to freely transfer resources that they legitimately own. The confiscation of rent is incompatible with this right.

Response: The confiscation of rent is not incompatible with freedom of transfer. Unlike what the objection suggests, whether the confiscation of rent is justifiable turns on principles of 'justice in acquisition', not 'justice in transfer'. As Fried (1995) points out, from the claim that we justly own X, it does not follow that we own the market value of X, or what anyone will voluntarily pay us for X. To use her example, let us imagine that Chamberlain has bought a piece of land near New York City for $5,000 in the 1950s with money that he justly earned. In the 1970s, as people emigrated to the suburbs, someone is now willing to buy Chamberlain's land for $250,000. Fried argues that whether Chamberlain is entitled to receive the full $250,000 depends on what 'justice in acquisition' principle we accept. On one view, people simply acquire full ownership over whatever they purchase. But this position is not self-evident. Another plausible view, which Fried calls the left Lockean view, states that 'by virtue of his labor [Chamberlain] is entitled to a portion of the value of the land limited to [his] actual cost, or sacrifice, in acquiring it ($5000), plus perhaps a fair return on that cost' (Fried, 1995, p. 236). The rest of the market value, we might think, is rightfully owned by society all along. We can think of society as the 'silent partner' in every enterprise which is 'justly exercising its

[46] We do have the Hohfeldian privilege to enjoy these benefits – we lack any duties not to enjoy these benefits. However, the symmetry argument does not apply to privilege rights, since they are not exclusionary rights.

right… by taxing [Chamberlain] on the increase in value as it occurs' (ibid, p. 237). Mill anticipates this view in 1848, writing that land rent is 'reserved from the beginning by the State, which has never belonged to or formed part of the income of the landlords' (PPE, p. 820).

This left Lockean view can be generalized to all goods. For every good that we can justly acquire, it may be that we acquire full exclusion rights but only partial income rights over it. On this view, ordinary ownership is in effect analogous to that of a company's majority shareholder. A majority shareholder may have control over whether to sell the company, but if she was to sell the company, other shareholders must be given their share of the market value. This is perfectly compatible with the majority shareholder having an absolute right to freely transfer what he legitimately owns.

While Fried focused on rights of the supplier, a similar point can be made about consumers. Just as entitlement to the increased value of goods, we may argue that entitlement to the increased value of income is an issue of justice in acquisition. The symmetry argument requires us to confiscate the rent that consumers receive. To see why this is compatible with freedom of transfer, let us augment Fried's example from the last paragraph. Again, Chamberlain is paid $5,000 in the 1950s. Let us assume to what Chamberlain could buy with $5,000 at that time is commensurate to his costs and sacrifices. As time passes, technological developments allow Chamberlain to purchase more goods with better qualities with the same amount of money. Again, there are distinct views on what Chamberlain has justly acquired. On one view, he is entitled to whatever he can buy with the money. On a distinct view, he is only entitled to benefits equivalent to his actual cost or sacrifice. According to the latter view, taxing Chamberlain's purchases such that his purchasing power stays constant would simply reflect what he has justly acquired. Chamberlain remains perfectly free to offer what he legitimately owns in exchange for goods, the tax ought to be seen as a way to ensure that Chamberlain holds

no more resources than he is entitled to, rather than a limit on his freedom to exchange with others.

To emphasize, we are not here endorsing the left Lockean view as presented in the preceding paragraphs. The key point, in short, is that we cannot settle the issue of rent entitlement simply by appealing to a principle of free transfer. To defend a right to rent, one must engage directly with the substantive issue of what rights transactors can acquire in the first place before any transfers occur. This is precisely what the symmetry argument attempts to address.

Objection: The redistribution of rent to those who have not contributed to a transaction amounts to a requirement for rent creators to give others free rides, but, as Gauthier (1986, p.206, 219-220) argues, no one is morally required to give others freerides.

Response: 'A requirement to give others freerides' is ambiguous. In the context of rent redistribution, it can either mean: 1) that we are morally required to engage in activities which generate rent, or 2) that we are morally required to give away the rent *if* we choose to engage in rent-generating activities. Since, the symmetry argument does not suggest that anyone is morally required to engage in rent-generating activities, it is the second type of requirement that is at issue. The objection may be driven by the intuition that helping others is morally supererogatory. But it begs the question against the symmetry argument. To say that the symmetry argument requires rent creators to *give away* rent assumes that they have a right to rent in the first place. This is precisely what is at issue here.

Objection: The redistribution of rent sanctions morally objectionable parasitism. The symmetry argument suggests that a bystander who has nothing to do with a transaction would receive a benefit at the expense of the transactors – the transactors would be worse off than they would be had the bystander not existed. Surely, this cannot be morally acceptable?

Response: According to a prominent characterization of parasitism championed by van Donselaar (2009), A is parasitic with regard to B if and only if A is better off and B is worse off than either of them would have been in each other's absence or in the absence of interactions with each other. Those who receive benefits from rent redistribution fit this characterization of parasitism. They are better off than they would be without rent creators, and rent creators are worse off than they would be without the recipients' presence. However, the moral status of this type of parasitism is unclear, as van Donselaar does not provide any argument for why parasitism should be prohibited as a matter of justice. Notice that, on such a definition of parasitism, *all* forms of redistributive taxation are at least *prima facie* objectionable (although perhaps still justifiable all-things-considered) even if it is to give resources to those who need assistance.

Let us consider a specific case involving rent. Suppose a government has reached an agreement to sell a patch of oil to a foreign company. Due to the scarcity of oil, negotiators are able to secure a large amount of rent in exchange for the oil. Clearly, justice requires this income to be shared rather than exclusively appropriated by the negotiators. The oil or its market value never belonged to the negotiators; they are merely negotiating on behalf of the public. Yet, the sharing of the oil revenue would constitute Donselaarian parasitism. Had non-negotiators not existed, negotiators would have received a larger share of the income, and the former would have received no shares at all had the negotiators not existed. Intuitively, the sharing of the oil revenue does not seem even *prima facie* wrong.[47] These examples suggest that the prohibition of Donselaarian parasitism is implausible as a general moral principle.

Nonetheless, there might be a nagging sense that there is something wrong with letting the voluntarily unemployed live off the fruits of others' labor. Is there not a moral requirement

[47] Similar examples of Donselaarian parasitism which do not intuitively constitute moral wrongs can be found in Widerquist (2006), and Zwolinski (2010).

for social burdens to be shared? Perhaps, but this cannot be an objection against the symmetry argument, since the latter is compatible with an obligation to work. In principle, we may think that those who willingly receive redistributed rent incur a reciprocatory obligation to engage in socially productive activities themselves.[48]

Objection: People's reservation prices for life-saving drugs are extremely high. This means that the same level of transactions for life-saving drugs can be maintained even if we place an extremely high consumer tax on them. Suppose an average income earner, Bill, has purchased a cure for his cancer, the maximum viable tax for which amounts 95% of Bill's savings. The symmetry argument seems to imply that Bill ought to be taxed this amount. This seems unfair since Bill might be ill due to bad luck. Moreover, even if Bill was causally responsible for his cancer by being a smoker, such a steep tax still seems unfairly burdensome.

Response: It is worth noting that if one has a prior right to life-saving drugs, then the symmetry argument does not apply. In such cases, one's right to a life-saving drug is not conferred by any transactions. Instead, the right might derive from the person's need alone. As discussed in section 3.5, the symmetry argument is aimed at determining our rights to receive rent, where rent is definitionally restricted to benefits arising from transactions. This means that if Bill has a prior right to life-saving drugs, the symmetry argument does not tell us anything about the case, let alone the implications alleged by the objection.

Even if one has no prior right to life-saving drugs, the symmetry argument still does not commit us to implausibly inegalitarian conclusion. This is because the symmetry argument does not commit us to a view about how confiscated rent is to be redistributed. It may well be the case that rent ought to be redistributed in a way that prioritizes those who need assistance, including those whose lives can be saved by drugs. This would be equivalent to foregoing at least a portion of what could have been taxed from Bill.

[48] I do not find a work obligation attractive, see Widerquist (2006) for objections against a work requirement.

Objection: van Parijs (1997, pp.105-6) argues that no rent is directly paid on intangible goods. To show this, he considers how much intangible goods would sell for in a competitive auction. What an auction should reveal is the opportunity cost of appropriating each marginal copy of a good (since rational agents will always be willing to bid their opportunity cost). Since intangible goods are non-rivalrous on his view, they would command a price of zero in auctions. To see this intuitively, imagine that there is an infinite number of copies for each intangible good on sale in the auction. Because of the abundant supply, no one would bid against someone else for a particular copy; each would simply bid for their own copy. If intangible goods command no rent, then even if the symmetry argument is correct, it is irrelevant to rights to intangible goods.

Response: As van Parijs acknowledges, this position is counterintuitive, as there is a 'strong intuition that we are jointly inheriting a tremendous amount of wealth from past generations, mainly in the form of technology in the broadest sense' (ibid. p. 90). My response to the objection is twofold. First, not all intangible goods are non-rivalrous, as I have discussed in section 2.2. In some cases, intangible goods may be artificially made rivalrous, as when they are patented. In other cases, factors such as network effect can make uses rivalrous. Additionally, one use of intangible goods can generate opportunity costs in a variety of ways. Using an intangible good in one way can diminish the value of another use of the same good, or it might just directly make someone worse off. To put the point in the context of an auction, I would bid a high price to prevent your use of an intangible good if your use makes me worse off.

Second, this objection fails against me because van Parijs employs a narrower conception of rent compared to me, and his argument fails to apply to my conception of rent. Crucially, his conception does not count consumer surpluses as rent. On my conception of rent, auction prices do not reveal the amount of rent generated in intangible good transactions. Van

Parijs (1997) employs a notion of rent where rent reflects the societal opportunity cost from the appropriation of a resource, or how valuable others find an appropriated resource. This notion of rent straightforwardly entails that non-exclusive goods cannot earn rents, as their appropriation cannot have opportunity costs. The auction simply illustrates this consequence of his conception of rent. What he explicitly ignores (ch. 4, n. 35) – and what the auction fails to reveal – is consumer surplus. When a good being auctioned is in abundant supply, van Parijs is right that it would fetch a price of zero in standard auctions. However, this is compatible with bidders receiving a consumer surplus when they receive material benefits for free in such auctions. This consumer surplus constitutes rent on my account.

Nonetheless, this objection does draw attention to an important point about how rent confiscation will interact with our endorsement of limited exclusion rights. A state that recgonizes a more limited set of exclusion rights may permit little to no trades of IPRs like patents or copyrights. This might appear to make our discussion of rights to rent from intangible goods moot. This is not so. First, intangible goods can increase our tax base both directly and indirectly. Even if no intangible goods are sold directly, intangible goods can make tangible goods more valuable – a phone is more valuable because of the internet, and land is more valuable because of better agricultural techniques. In so far as a transaction confers on an agent a right to such benefits, the symmetry argument prescribes what is permissible for the state to recognize as the outcome of the transaction.

Second, we have argued that alternative mechanisms of compensation to creators are preferable to the monopoly rights regime that we currently have on the grounds of empirical uncertainty and a presumption in favour of liberty. To adopt such alternative compensation mechanisms require us to determine how much ought to be paid to creators. The symmetry arguments provides an answer to this question. It justifies not paying creators any amount that would constitute economic rent.

3.8 Summary

Chapter 3 set out to determine the limits of IPR income rights. It argued against a right to retain the rent portion of income from intangible goods. It did so by first introducing the concept of rent and its ambiguities. Then, it discusses existing arguments for the redistribution of rent, with a particular focus on Gauthier's argument, and their shortcomings. Lastly, this chapter presents an original argument against a right to retain rent. It argues that since everyone's interest in any portion of rent is presumptively symmetrical, a right to rent is unjustifiable. If the symmetry argument is correct, the scope of its implications goes well beyond rent earned from intangible goods.

Conclusion

The thesis sets out to answer two questions concerning intangible property rights: 1) do creators have a right to exclude others from accessing intangible goods? and 2) what rights do people have to the benefits that intangible goods bring about? Regarding the first question, we have argued that creators only have limited exclusion rights over the intangible goods they create and that these rights ought to be limited both in scope and duration. Regarding the second

question, we have argued that while creators may have rights to a compensatory income, economic rent generated from intangible goods ought to be redistributed.

These conclusions are short of a complete theory of intangible property rights in several regards. This thesis has not attempted to delineate the precise boundaries of exclusion rights. It has also not examined in detail the differences in interests at stake and, consequently, differences in rights that may be justified for different types of intangible goods. A more complete theory will also need to provide a theory of justice in the distribution of confiscated rent.

Despite the work yet to be done, our conclusions challenge the IPR policies and institutions that have prevailed in the last century. Currently, creators enjoy expansive exclusion rights, much of which is aimed at incentivization. These rights allow their holders to reap massive amounts of benefits. This thesis urges us to imagine a more open and equal future that intangible goods have made possible. It prescribes a world where the ability to create is not conferred at the cost of the exclusion of others, and the benefits from intangible goods, inherited or otherwise, are shared widely.

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Declaration of Originality of Authorship of a thesis submitted for examination in the BPhil in Philosophy in the academic year 2020-2021

I, Mingyang Yi, affirm that my submitted thesis entitled *The Limits of Intangible Property Rights* is my own original work, except where otherwise stated, and that I have only shown drafts of it to my supervisor, Prof. Thomas Sinclair, in approximately eight hours of supervision, and that I have received help in its preparation from Prof. David Miller and Prof. Cecile Fabre who provided comments on some of the ideas contained in this thesis.

Signed: Mingyang Yi Date: 13/07/2021