

“WHY PRIVATE PROPERTY?”

A discussion between **Jean-Fabien Spitz**, **Hillel Steiner**, **Philippe Van Parijs** et **Karl Widerquist**

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"Why Private Property?"

A discussion between Jean-Fabien Spitz, Hillel Steiner,
Philippe Van Parijs and Karl Widerquist

Philippe Van Parijs (PVP): This discussion will gravitate around two questions. The first question is the one featured in the title of this conference: "why private property?". Since we have the chance of having here three outstanding scholars who are each defending, or presupposing to some extent, a theory of justice, the first question will simply be: "what follows from the theory of justice to which you are committed as regards private property?" To make the question more specific: according to your own conception of justice, is it conceivable to have a just society without private property? And if it is not conceivable - if private property is intrinsic to a just society - how unrestricted should the right of private property be according to your conception of justice? If instead it is conceivable for you to have a just society without private property, what would then be the alternative to private property? Public property? Communal property? Something else? And under what conditions could one do away with private property?

So, two preliminary questions: what is your conception of justice, and what follows from it for the private property of external objects? We can leave self-ownership aside, except if self-ownership is part of what is needed in order to indicate what the implications are.

Hillel Steiner (HS): In my view, the answer to the first question is no. I don't think you can have a theory of justice which doesn't rest on the idea of private property. Obviously, persons, private property in the self, is the starting point. I don't think you can have a theory of justice that isn't talking about rights, and I don't think you can have rights that aren't basically private property rights. That's the order of the argument. But I take that to be a purely formal conceptual point, which could be true of any theory of distributive justice. This is to say that I subscribe to a particular theory of justice, but I don't think that theory is entailed by this need for private property rights. It is as consistent with Rawls or other views. About the second part of the question—"could we have a society without property rights?"—I think the answer is yes. But it would have to be a society where everybody's practical desires—what they want to do—were just spontaneously harmonious with those of everyone else.

PVP: And so this society is not only conceivable, but it could be a just society in your view, provided this contingent condition is satisfied?

HS: Yes indeed. What would be happening is that whenever it appeared that two peoples' activities or two groups' activities were incompatible, they would negotiate and discuss.¹ They would further come to some consensus as to which of these activities is the better one, and the people who would want to pursue the worse one would just back off.

Jean-Fabien Spitz (JFS): In my view, the answer to the question "can there be a just society without private property?" is no. The reason for this is that if there is no private property, there are no means to constrain people to adopt behaviours they don't want to adopt. And if there are no means to constrain people, to coerce them into behaviours they don't want to adopt, it is impossible to reach the benefits of a productive society that multiplies consumption goods. So you need to have these means of exerting some pressure on others, coercing them into behaviours they wouldn't adopt if they had the choice not to. If you want to have a just society, it has to be a prosperous society. To accomplish this, you must have some things to share. But if you want to have a prosper society, you have to have a mean to coerce people into being productive. Private property is indispensable for that precise reason.

PVP: So your argument is fundamentally different from Hillel's, isn't it? Hillel said his view was just a sheer conceptual point, irrespective of any consequentialist consideration, whereas in your view there cannot be a just society that wastes its resources massively, so it needs to be a prosperous society and you cannot have a prosperous society without protecting people's property.

JFS: Mine is a consequentialist view, yes. But I add that it doesn't mean that the right of property has to be unconditional.

PVP: Ok, we will return to that later. Karl?

Karl Widerquist (KW): I believe there can be a society that is just and that has no private property. Yet there is one, and only one form of property, that there must be at least some of, and that is a commons. We cannot interact freely with other people in a society of more than four people without some common property. Now, if everybody wants to live on a commons, then it would be just if we all have a commons. To the extent that there are people in the world today who prefer to live on a commons, they should be allowed to have their own society that is entirely filled with common property. It will

¹ - Editor's note: See Hillel Steiner's contribution in this volume for further developments on this point.

probably not be everyone's choice, but those people should be able to live as they can, and we should try to make ways to accommodate them as we are sort of doing with few of the remaining isolated indigenous communities that are left.

Now: "Why private property?" The answer to that question under my conception of justice is: "If people want it". The same goes with public property. If people want to take the commons and make it into another mix of public and private property, it is perfectly acceptable as long as there is a mutually beneficial deal in which the majority signs on to the deal, and the deal is made in such a way as to minimize the negative interference and maximize the benefits of those who can't sign on to that deal for whatever reason. It is essential to minimize the interference with them because it is impossible to have a universal agreement on it, or it is expected to be impossible. If you minimize the interference with them, it is possible to arrange whatever mix of public and private property people are most going to want. The indication seems to be that it would be a substantial mix of both. There would be quite a bit of public property and quite a bit of private property, which should be subject to regulations and taxation in order to make the deal palatable for those who have less.

PVP: Can you clarify the distinction you make between commons and public property?

KW: A commons is property that anyone can use on an equal basis as long as they don't take anything, they don't establish ownership in any part of it, any longer than they are actually directly using it. There are closed commons and open commons. In closed commons, it is necessary to be a member of the society to access it. In an open commons, there is no such restriction: anyone can use it. For example, the Inuits famously thought of the Arctic as an open commons; they didn't think they had any special claim to it, although some other groups did. Now, if you wanted to have a coexistence between people living on a commons and other people living in a private property system, that commons will probably have to be a closed commons. At least there must be some criteria for membership or something like that.

However, the distinction between a commons and public property isn't easy because there is some overlap. For instance, the roads and the sidewalks are essentially provided to be a commons where people can use them to interact with other people. But they are "managed commons" in the sense that government takes full possession of them and decides whether this will be a one-way street or whether there are going to be crossing guards on this street, etc. Public property, when you think of it by contrast to a commons, is something like a school, or a government-owned dam, or the houses of parliament. The houses of parliament are publicly owned, but they are not a common. It is not possible for anybody to just go into the house of parliament, grab something, use it as long as he needs it and leave it where he found it when he's done. So, there is

an important difference between this kind of public property and commons. People need a commons to have interactions with other people, but they also might need public property in order to have good schools, infrastructures, and some place for their legislature.

PVP: So at first sight, Karl answers “yes” to the question to which Hillel and Jean-Fabien replied “no”. However, I am not sure that there is really a contradiction between your positions. The main disagreement seems to be about whether it is possible to reconcile Karl’s idea that a just society can work without private property rights provided that the people agree to have something that is called “the commons” with Jean-Fabien Spitz’s position to the effect that, while a society without private property rights is a conceptual possibility, a society can only become prosperous enough if it establishes private property rights.

JFS: Indeed, the question is “who’s going to produce the pie”? Who’s going to produce the goods to distribute? And the commons?

KW: Well, mother nature produced the commons before any of us got here. It is really time property owners stop taking credit for producing that. As a matter of fact, people who want to live on a commons have regularly been forced for the last ten thousand years to get off the commons, so it can be split up for either public or private property. Very often, it is not that they say: “oh that private property system looks great, I can’t wait to get into it!” They have to be forced into it. The same thing is going on still today as the commons are being closed. To illustrate, there is also, of course, a big history of the colonial period in the United States when the native Americans were forced off the commons, both those who treated the land as a commons and those who didn’t were similarly forced off.

JFS: It would be very easy to answer that if people have to be coerced on the commons, if they refused private appropriation, it is simply because they didn’t sense the advantage of it. But afterwards, once they begin to sense the advantages of private property, they say: “I have been expelled, but maybe it is not so bad after all”, because the effects of private property in terms of progress and prosperity are huge, and everyone is going to take advantage of it.

KW: The “potential effects” are huge for the wealthier among us indeed. But I just published a book² in January that looks at that claim that we’ve all benefited from enclosing the commons. And my conclusion is that it simply

2 - Karl Widerquist et Grant S. McCall, *Prehistoric Myths in Modern Political Philosophy*, Edinburgh, Edinburgh University Press, 2017.

is not true. The poorest people in our societies today, if they had the opportunity to trade with somebody living in a non-State society, on a commons, would have a better opportunity for welfare.

PVP: But would I have been born? Because a response could be that there has been such a massive demographic expansion thanks to the development of agriculture and, later, of industry, which would not have happened without private property...

KW: But supporting this kind of argument would imply endorsing the repugnant conclusion that it is better to have a larger population with a lower welfare than it is to have a small population with a higher welfare. And it goes even worse, because this justification of private property runs something like this: "because you have been born, we the rich people can treat you worse than you could do for yourself if you were living in a non-State society on a commons". I think that's a really poor compensation, also because not everyone is worse-off: some of us are far better off and some of us are worse off. This kind of argument is a really poor excuse for those who are better off not to share the benefits with people, making them actually want to leave the commons. It basically says: "you wouldn't have been born otherwise, so we can share all the benefits among ourselves".

PVP: So Karl, after this failed attempt to reconcile you with Jean-Fabien Spitz, let me try to reconcile you with Hillel Steiner: his point was that you could have a just society without private property but under the unrealistic assumption that there was such a convergence between people that they would agree on sharing the commons and on the way to share it.

HS: I think that is what Marx envisaged with the withering away of the state. What would be left would be an organization that just makes purely technical decisions, solves coordination problems and things of that sort. It wouldn't be making substantive value bearing decisions or choices because there would be this harmony of interests in Marx's thought. Because everybody's basic needs would be satisfied, there would be such a convergence. Even so, the problem is that it takes inadequate account of the fact that people want more than their basic needs.

PVP: Here the agreement might be an empirical one about whether it is conceivable for people to converge sufficiently for them to be able to run the commons. We have examples of that. Some people who initiated limited communal initiatives, like running a vegetable garden in their neighborhood. We see that they can manage conflicts to some extent. When there are conflicts, there are institutions to solve them, and in the last resort, those people who think that the outcome is not just can always leave the vegetable garden. For sure it doesn't involve the whole neighborhood or society, but your point is that there are cultural contexts, where this is possible.

KW: Yes, I can agree on that.

PVP: Let me then throw in the second question, which we can relate to what we have just been discussing. The question is about how your views about the place of private property over external objects are affected, if at all, by the shift to a different sort of economy and society, which may be variously described as the “information society”, the “digital economy”, “cognitive capitalism”, etc. Such a society has many features, but the role that is being given to digitized information is of utmost importance for our discussion because of its consequences for the feasibility of protecting intellectual property. Compared to material goods, this information is less “excludable” (a feature that it has in common with public goods), while private property is primarily a matter of physically excluding others. The legitimacy of private property may also be challenged because of the non-rivalry of intellectual goods (another characteristic of public goods). The fact that there is a zero marginal cost of production—making one more copy of a book is just one click away—raises some additional issues about the legitimacy of protecting private property in the way we did for material goods. Yet another aspect is the “big data” dimension. All the information we just create as users or consumers is provided at no cost to companies who produce “big data”, thereby raising further questions about the legitimacy of exclusion. We could multiply the examples of new challenges to the idea of private property. The conclusion is that however you describe it, there is something that has changed, essentially due to the increasing role of intellectual property versus material property. Hence my second question: Should we really see this development as something that modifies deeply the role we gave to private property? For example, the “productivist” argument in favor of private property may be very strong in the case of material property, but is it as strong in the case of information property?

JFS: There is one point which affects our lives as members of the academic community. We produce texts. We give them to journals and editors to publish them, and then they belong to the companies owning the journals and books in which we have published. Afterwards these publishers sell our own work to our own universities ! It seems to me that technical progress should allow us to bypass such a rent-seeking situation, which is just not acceptable, and to nullify the profits made by the publishers on the backs of academics and students. It should be possible to make a commons of the work of academics, to make it freely available for all. The rationale behind that is that academics have already been paid for producing those texts, and universities shouldn't have to pay to have them back. I even experienced a publisher who send me an email offering me to buy a copy of my own work...

HS: I am a little bit conflicted about intellectual property rights. On the whole, I think they're not legitimate.

PVP: Not at all?

HS: Not at all. And that seems to be the view of most libertarians, even right libertarians. It seems to me that such rights don't pass the litmus test of whether something can be a right or not depending on whether it could exist in the so-called "state of nature", in the absence of an enforced legal system. And obviously intellectual property rights couldn't, because they are monopolies granted by the state. Nobody in the state of nature would have the authority to unilaterally declare a monopoly on something, and impose uncontracted restrictions on what other people may do with their legitimate property.

KW: Too bad the first person who invented farming didn't think of patenting it...

JFS: But if we take this position, if we abolish intellectual property rights, isn't there a risk that some people, who invent things because they know that their rights will be protected, won't make the effort to invent anything?

HS: Yes, there is that risk. But I think this is one of these occasions where theories of justice have to bite the bullet and make clear that they're not utilitarian theories.

KW: It is questionable the extent to which we need copyright protection or patent protection to get people to invent or create new stuff. The fact is that lots of people do produce things for open source projects with no monetary incentives. Besides, not all creators want to have their name attached to their work. For instance, in the days of the folk tradition, there was a lot of good music being produced where somebody could take your song and add stuff, change it, move it around. The result was that people forgot who first did this song. On the other hand, I agree with Hillel on the fact that there is not necessarily a natural right to intellectual property (IP). And I am not sure that IP rights are necessary to incentivize creators and inventors either. But if there is one thing about the digital economy that we shouldn't forget, it is that it is still based on controlling resources, or what we can call the "means of production" for lack of a better term. Big companies get large advantages, and small companies that do manage to break in just become big companies; it's not realistic that we're all going to start the next Google. So it brings up a really important institutional position of how the individual relates to the institution, and I think any of our theories could be applied just as well in that situation.

HS: I think that to get a transparently clear view of where rights lie in relation to the objects of intellectual property rights, we need what some philosophers are working on, which is an account of the ontology of information—what kind of stuff is information? We know roughly what material things

are, and we can have ontologies in which there are “minds” as distinct from “brains”. But we don’t really know what information is. Some electrical engineers have tried to model information and it may be possible that this will contribute to the ontological characterization of information.

The reason why I think we need to have an ontology of information in order to get a clearer account of whether people can have rights to it and who can have rights to it, is that we want to know whether – as it is always the case when people patent things or copyright things—somebody has discovered an idea or a piece of information, or actually created it. Intellectual property rights are supposed to go to creators and not discoverers. So until we know what kind of stuff information is, it is difficult to have a clear position on this topic.

PVP: Is it something that preexists and is discovered, or is it something that is created?

HS: Plato says that it’s all there in the cave. So all you’re doing when you invent a concept is discovering it: it already pre-exists in the cave. And you don’t get any intellectual property rights for discovering it.

PVP: Was your initial formulation not more radical? I thought you said that there is no room for intellectual property rights, because they could not exist in the state of nature. This position has far-reaching implications, as more and more of our wealth takes the form of information and less of this wealth comes in the form of material objects which are legitimately protected by private property.

HS: Right. And additionally, I think it’s an empirical argument as to whether this will have disincentivizing effects. There are some economists that say that actually, granting IP rights disincentivizes inventiveness, because the people who have these licenses make a small modification in order to stop others from competing, creating costs of entry and so on.

PVP: But your own view is that you don’t care about that, because, from your point of view, normative aspects of IP rights are a matter of principle, whereas in the debate between Jean-Fabien and Karl, these empirical questions are important.

JFS: But then in this case, the question of ontology, of what kind of reality is information, is useless. The only question is: what happens if you confer rights of property to some people on some things, and what happens if you don’t?

PVP: Let’s open the floor to the discussion.

Maxime Lambrecht (ML): To follow-up on this discussion, couldn't we say that the extension of property in IP is even more worrisome than in the material realm? I have two worries about the extension of IP rights, that I would like to submit to this panel. First, a worry about equality: there are some characteristics of IP that makes them more inherently inegalitarian than material property. These characteristics are basically the fact that IP enforcement is very costly, especially in the digital world and in the era of zero marginal cost of reproduction; along with the fact that the reason small IP owners care about IP is not so much for protecting the use value of their creations but rather for protecting their exchange value (most individual creators generally transfer their IP, often to large corporations, for perpetuity, and under "take-it-or-leave-it" standard form contracts). As a global result, there is a tendency towards concentration of IP rights in the hands of large corporations.

PVP: Which means that the extension of private property into the intellectual realm would have a more inegalitarian impact than in the material realm.

ML: Exactly. Since there is a growing part of the economy (around a third of the GDP) that relies on IP-intensive industries and since IP seems to have more inegalitarian tendencies, how can IP not increase inequalities?

My second worry relates to what Karl said about the need to have a commons to interact with people. He was referring to the material realm but it is even more relevant for the immaterial realm, where one of the main challenges is to preserve an intellectual commons (the "public domain") where people can interact, against the constant extension of the scope, the subject matter and the length of the protection of IP (as you might know, under the recent case law of the Court of Justice of the EU, making a hyperlink might amount to committing a copyright infringement). Therefore the question is how can we preserve people's freedom to interact with information (and their freedom of speech on virtual forums) against this creeping tendency of extending the realm of IP at the expense of the intellectual commons?

HS: Yes, I agree with you.

KW: I agree and I think it's really important to stress that a lot of the things that we're using as commons online are privately owned. Moreover, it would seem possible to create a cooperative Facebook, and it seems that the biggest barrier to that is the inertia. You've got to get people to switch: first it would be the hardcore cooperativism activists, and then you have to get a critical mass that the other people want to join. It would be really hard to get the switch over, meanwhile we're paying Facebook billions of dollars, because it's hard to switch.

PVP: It's not only inertia but also network externalities: they tend to be natural monopolies. You want to be connected to your friends and they're all on Facebook so you cannot easily leave Facebook. More questions?

Member of the audience: The society of commons that Karl describes is really interesting. But I'm concerned by how do you deal with free riding in that type of society? I would like to know if you rely on the basic economic hypothesis that human beings have unlimited needs, because in this case we have this classical example of a river with fishermen. Since it is a commons and we have free access to it, then all the fishes will be fished by a single person who wants to maximize his utility. So how do you deal with free-riding? Do you imagine some kind of exclusion mechanisms in order to coerce these people into not free riding?

KW: I think that the tragedy of the commons better describes what you are talking about than free riding. Tragedy of the commons is something that economists have been worrying about for a while and it had been used to show why we need private property. There are some cases in which that could happen, but private property isn't the only solution, also government regulation is a solution to the tragedy of the commons. But in addition, a lot of non-state societies have a customary way of avoiding the tragedy of the commons. Most hunter band societies habitually underutilize their resources and clearly they have a sustainable system because it was going on for hundreds or thousands of years before colonization. Therefore, the tragedy of the commons can't be that true if it could go two thousand years without showing any signs of being unsustainable. However, sometimes that happens. We know at least one historical event when the Polynesians got to New Zealand and they hunt all the Moa. Doing that, they didn't make the society unsustainable but they did do the tragedy of the commons in extinguishing one very valuable resource. So it's a thing that *can* happen, but it doesn't mean it *must* happen in every commons.

Member of the audience: Thank you. To make my question more precise: Are there specific social structures that prevent the commons from being spoiled?

KW: In that sense, the smaller scale nomadic societies of less than a hundred people can't really accumulate wealth so they can't have an incentive to take more than they can use. Also they tend to have a strong ethic of "you should not show that you have more than someone else, and if you have more than what you need, you should share, and if you continually don't do this, you should find some libertarians to camp with".

JFS: Do you think that this kind of social organization would be possible in larger scale society where people don't physically know each other?

KW: It was done on extremely large scale: up to ten or eleven hundred years ago, it was done at a continent scale.

JFS: Large scale but in small groups.

KW: There are anarchists who believe it's also possible for large and complex societies. But I think that the ideal scale for anarchism is small scale societies.

Justine Lacroix: My question is to Jean-Fabien Spitz. For you, private property is the precondition for prosperity. But what do you mean by prosperity? Do you mean a more equal society? Because it certainly has been the case in the nineteenth and in most part of the twentieth century, but is it still the case today?

JFS: We need property because it's a way to constrain people to adopt behaviour they wouldn't adopt otherwise. But of course, it doesn't mean that owners can constrain people to do everything they want. Their constraints have to be legal. Therefore, property rights in a society have to be linked with democratic procedures. That means that we have to decide collectively what kinds of constraints we find acceptable and what type of constraints we do not find acceptable. I would like just to give you an example. There is a famous lake in the US, Lake Tahoe, which is a magnificent place. The fact is there is a pollution problem but nobody knows where it comes from, probably from human activities. The municipality took a decree forbidding any other construction around the lake. The owners of strands of land near the lake of course protested because they thought their property rights were violated. This is a clear example where property rights might be limited in the name of the public good even if it's not proved that property owners are responsible for pollution, but it's a measure of precaution and it's perfectly legitimate. So, yes to rights of property, but only to limited rights of property. Those rights have to be limited in the name of the possibility that anyone has access to a decent life and by the necessity to preserve some common goods which are absolutely necessary. As for prosperity, the possibility for everyone to have a decent life is my definition of prosperity.

Pierre Crétois: It is a question for Hillel Steiner. If ownership is necessary to organize a society, do we talk about ownership on things or ownership on rights over things? On one hand there is ownership of things themselves, and on the other hand there is ownership of diverse rights over things, which isn't the same. Can you clarify what definition of property you defend?

HS: Private property rights are rights between persons with respect to things, and ownership has many of what Hohfeld calls legal incidents (powers, claims, liberties, immunities). Yet, the only encumbrances, I think, I would put on private property rights are two—and this comes from the left libertarians. If I own this bottle, I can do whatever I like with it—I have all the powers, immunities, all of the Hohfeldian legal incidents—with two provisos that are generally added by any theory of rights. First, I have all these Hohfeldian legal incidents as long as I don't violate other people's rights with it, but I just take that for granted. The one Hohfeldian legal incident of ownership which I lack with respect to the bottle is the power to leave it in a will to someone else after I die. The second restriction concerns what I may do with any natural resources on which I have property rights. I have a duty, a liability to pay the value of those natural resources into a fund that everybody—including myself—is entitled to an equal slice of. Otherwise people can do what they want with their property.

RÉSUMÉ

« Pourquoi la propriété privée ? » Une discussion entre Jean-Fabien Spitz, Hillel Steiner, Philippe Van Parijs et Karl Widerquist

Le texte suivant est la transcription de la table ronde qui a clôturé la conférence internationale « Pourquoi la propriété privée ? » (organisée à l'Université libre de Bruxelles en juin 2018). Philippe Van Parijs a accepté d'animer la discussion et d'organiser la confrontation des thèses de Jean-Fabien Spitz, Hillel Steiner et Karl Widerquist sur la propriété privée. La discussion est divisée en trois moments principaux. Tout d'abord, les orateurs clarifient leur propre approche de la propriété privée et la place qu'occupe ce concept dans leur théorie de la justice. Ces clarifications mènent le débat à la question des biens communs (*commons*) et soulève le problème de leur compatibilité avec les thèses de Jean-Fabien Spitz et Hillel Steiner. Dans un second temps, les conférenciers évaluent comment la dématérialisation de l'économie et le développement des droits de propriété intellectuelle posent de nouveaux défis au concept de propriété privée. Ces évolutions contemporaines sont-elles d'une telle importance qu'ils peuvent les amener à revoir leur position sur la propriété privée ? Et de manière générale, la propriété privée est-elle légitime dans le domaine intellectuel ? Enfin, les trois orateurs répondent à différentes questions du public. Ces questions les amènent à évoquer la tragédie des communs, la nature de la prospérité et les limites légitimes au droit de propriété privée. Cette discussion permet aux trois orateurs de clarifier leurs positions et de faire état explicitement de leurs désaccords (et des raisons qui les fondent) sur certains points majeurs des débats sur la propriété privée.

ABSTRACT

"Why Private Property?" A discussion between Jean-Fabien Spitz, Hillel Steiner, Philippe Van Parijs and Karl Widerquist

This text is a transcription of a round table that [MB2]closed the international conference "Why Private Property?" (held at the Université libre de Bruxelles in June 2018). Philippe Van Parijs accepted to lead the discussion with the intention of confronting the positions of Jean-Fabien Spitz, Hillel Steiner and Karl Widerquist on private property. The discussion is divided into three main parts. First, the keynote speakers clarify their position on private property and which place this concept occupies in their own theory of justice. These clarifications bring the debate on the commons, and on whether they are compatible with

Jean-Fabien Spitz and Hillel Steiner's thesis. Second, the speakers discuss how the dematerialization of the economy and the development of intellectual property rights raise new challenges to the idea of private property. Are those challenges of such importance that it can lead them to revise their position on private property? Are intellectual private property rights legitimate? Finally, the keynote speakers answer some questions from the audience that lead them to discuss the tragedy of the commons, the notion of prosperity, and the legitimate limitations to property rights. This discussion is especially useful to clarify the positions of each of the speakers on the topic of private property.