The Rights Source: Libertarianism, Self-Ownership, and Justice in Transfer

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Introduction

In this paper, I plan to explore whether giving gifts, inheritance, or charity can be justified using the concept of self-ownership. I will be using Robert Nozick's principle of justice in transfer in his book *Anarchy, State, and Utopia* as my foundation, and I will determine whether gifts – as a form of transfer – are compatible with this principle. The main argument will be that gifts are not compatible with Nozick's principle of justice in transfer because they cannot be justified using the principle of self-ownership.

The point of this argument against gifting is to show that Nozick's principle of justice in transfer is incomplete. Not all transfer can be justified using self-ownership, and thus we need another principle along with it. It is essentially an argument *ad absurdum*. If we show that gifting cannot be justified, the only choice is to create a system that does not include gifts, charity, or inheritance. But, as I will discuss in the conclusion, such a system would be intuitively incorrect, and would lead to ridiculous practical consequences. Thus, I aim to show that self-ownership cannot do all of the work in Nozick's theory – he must add another principle that can account for gifting.

In the first chapter, I will outline the arguments for the principle of self-ownership, and how these arguments lead to property ownership. I will also describe what it means to own property, or to have a right to property. In the second chapter, I will examine the principle of justice in transfer and the free market, and some of the objections to them. The third chapter deals with the argument specifically against gifting, and the fourth chapter shows how the arguments against gifting do not extend to market transfer. In the fifth chapter, I will describe and refute some possible objections to the idea that gifting cannot be justified using self-ownership within the principle of justice in transfer. In the conclusion, I will look at some of the practical consequences that show us why a system without gifting would be absurd.
1. Self-Ownership and Property Rights

Before we can explore which property rights exist, and which of those we can justify using self-ownership, we must be able to accurately define what property rights are and what it means to be a self-owner. Since self-ownership is a subset of ownership in general, I think it is important to first understand the idea of property ownership, whether that property is material or not. Ownership is, most basically, a type of right. Unfortunately, that does not tell us much – we must understand what type of rights property ownership falls under, and what that implies for the application of property rights.

1.1. What are Property Rights?

W. N. Hohfeld developed a way to characterize different types of rights in his legal theory. Often, Hohfeld's theory of legal rights is extended to include moral rights as well, and I believe it is a useful and helpful way of understanding moral rights. According to Hohfeld, there are four basic types of rights, or incidents, that can either be taken individually or be combined to form more complex rights. These are divided into first-order incidents, which are the most basic, and second-order incidents, which can be seen almost as meta-rights: they are “rights over the first-order rights” (Wenar 2007).

The first-order rights are claims and privileges. A claim-right is the type of right that imposes certain duties against others. This means that duties are correlatives of claim-rights. In Hohfeld's schema, “claim-right” correlates to “duty,” while “privilege” or “liberty” correlates to “no-right.” (Hohfeld 1964 [1919], p. 36). He illustrates the distinction between claim-rights and privileges and their correlatives with an example about land ownership. If X owns a certain piece of land, then:

X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off … But the correlative of X's privilege of entering himself is manifestly Y's 'no-right' that X shall not enter (Hohfeld 1964 [1919], p. 39).

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1 For Hohfeld, an incident is something that makes up a right. I will refer to them as rights themselves, but he does not give them this status.

2 Hohfeld uses the term “right” to mean “claim,” or what I call “claim-rights.” Rights may be made up of many different incidents, but they must include claims. I am using a conception of rights as bundles of Hohfeldian incidents, where each incident is a right in itself. This is akin to Carl Wellman's idea of molecular rights. For Wellman's full theory of rights, please see Wellman, Carl, A Theory of Rights.
In other words, if one has a claim-right, it means that another person has a duty; if one has a privilege, it means that he does not have a duty to someone else. Hohfeld sums up the definitions of privilege and claim quite nicely: “A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another” (Hohfeld 1964 [1919], p. 60).

The second-order rights are rights that concern privileges and claims, and they include powers and immunities. A power is the right to “waive, annul, or transfer” a claim-right or liberty (Wenar 2007). An immunity is a right that means no-one else has a power-right over your claim-right or liberty: no-one else can take away or transfer your claim or privilege. Second-order rights do not just govern first-order rights; in fact, they can become third-order rights over other second-order rights. For the purposes of this paper, I will refer to each Hohfeldian incident as a type of right on its own – for instance, a power-incident is, in my terminology, a power-right.

Property ownership combines all four of the Hohfeldian incidents (Wenar 2007). In order to say that we meaningfully own property, we must have the privilege to use it, a claim against others using it without permission, the power to get rid of or transfer the property, and immunity from others taking it or otherwise “altering your claim” to it (Wenar 2007). For example, if I own a bicycle, I am at liberty to do whatever I want with it, as long as it does not interfere with the rights of others. I also have a claim against anyone else using the bike without permission, the power to sell it or abandon it, and immunity against someone else taking these rights away. It is important to note that in a rights-based theory, rights are not entirely absolute: other rights may limit them when they conflict. For example, I do not have the right to run over my neighbor's cat with my bicycle because it would conflict with my neighbor's claim-right over the cat, and possibly with the rights of the cat.

John Christman offers a different account of what it means to have property rights. He describes each right within the right to property, and then puts them into two groups. He claims that the “central core of elements … forming more or less the essence of ownership,” include rights to possess, use, transfer, and gain income from property, and rights to “security in ownership, transmissibility (after death), and absence of term” (Christman 1991, p. 29). Essentially, he further delineates the Hohfeldian conception: the right to possess and use are first-order, while the rights to transfer, income, and transmissibility are powers, and the right to security and absence of term are immunities. The rights in the second group, including the right to gain income, are second-order because they are rights that concern the claim-rights and liberties, but are not necessarily claims or liberties themselves. For the purposes of his article, Christman groups the rights in a different way,

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3 It is debatable whether animals have rights, and whether they are of the type that can conflict with a property right. Either way, it is clear that harming a pet violates the right of the pet-owner.

4 I include income rights with power-rights because they are not really claims in themselves, but govern the claim-
so that he can focus on the difference between possession, use, and transfer and income. Since I plan to focus on transfer and other powers, I will be using Hohfeld's incidents together with Christman's more precise breakdown of the rights contained within a property right.

Self-ownership, then, seems like it should be a property right to oneself. This idea sounds rather strange, but it is actually quite intuitive: a person has the right to do whatever she wants with herself, as long as it does not violate the rights of others. The self includes all the aspects of a person, such as her talents, labor, skills, personality, and body. Being a self-owner means that one has a right develop her talents and personality, control her body, decide how to labor, and so on. In G. A. Cohen's description, as interpreted by Waldron, “a person owns himself when he has all the control over his own body that a master would have over him were he a slave” (Waldron 2004). We can characterize self-ownership using Hohfeld's incidents – or bundles of rights – just like any other property right. One has an absolute claim to her person, such that no one can interfere without her permission, she has the liberty to do what she wants with herself as long as she does not violate any other rights, and she also has second-order rights that govern her claim and liberty. Very basically, self-ownership is a concept related to self-determination and autonomy – rights to oneself essentially allow us to control our actions without interference.

1.2. How Can We Justify Self-Ownership?

The next step in understanding property rights and self-ownership is to examine the arguments used to justify these concepts. I will begin with the grounds for self-ownership, and then I will, in turn, use self-ownership as the foundation for all property rights. There are several arguments for self-ownership, some stronger than others, and so I will focus on the arguments formulated by John Locke, Robert Nozick, and Eric Mack, all of which relate to the ideas of autonomy and self-determination.

Locke's justification of self-ownership, and of property rights, comes from his political theory of the State of Nature. Locke claims that, historically, before people came together to form societies and government, they lived in a “state of perfect freedom … within the bounds of the law of Nature” (Locke 1966 [1690], p. 118). Thus, even though there were no political or state-mandated laws – there was no state yet – people were obliged to follow certain natural, moral laws. In Locke's view, in the State of Nature, Natural Law says “no one ought to harm another in his life, liberty or possessions” because everyone is God's property and therefore equal (Locke 1966 [1690], rights you already have. I will discuss income rights in greater detail in the second section of chapter two. I will further describe Christman's notion of property rights in the next chapter. I do not think Christman's account is as exhaustive as Hohfeld's, but I do think it is more detailed, which is why I choose to combine them. Or, perhaps, it should not violate any of her other rights either.
Departing from Locke, we could also justify the no-harm principle using perfect equality, omitting the reference to God.

Locke also uses the idea of rationality to justify natural rights in the State of Nature. He claims that “the freedom then of men, and liberty of acting according to his own will, is grounded on having reason, which is able to instruct him in that law he is to govern himself by” (Locke 1966 [1690], p. 146). Essentially, the reason that we can have Natural Rights and Natural Law is that we are rational and able to apply those moral laws to ourselves – we are moral agents. It is our equal rationality that gives us our natural rights because it allows us to recognize ourselves and each other as moral agents deserving of rights. Locke's point about rationality is akin to Kant's moral theory: Kant justifies rights using the idea that because of our rationality, human beings are ends, not mere means, and should be treated as such.7

Nozick also explains his conception of self-ownership using the idea of Kantian rationality and human dignity. He claims that rights are “side constraints … The rights of others determine the constraints upon your actions” (Nozick 1974, p. 29). These side constraints on how we interact with others are grounded in the Kantian idea of human dignity: without the rights of others constraining our actions toward them, we would treat them as means and not as ends (Nozick 1974, p. 31). Mack suggests that we could use the idea of Kantian dignity to ground rights as well. Kantian dignity could give us reasons for justifying rights as a way of establishing as sort of bubble “for each person within which” he is “(morally) immune from interference” (Mack 1982, p. 287).

But this Kantian description of rights is not satisfactory for either Nozick or Mack. According to Mack, Kantian dignity alone is not enough to justify rights – we must also have an explanation of why it is important to have rights and protect this dignity. This is a sort of assessment of the value of rights beyond rationality. It has to tell us exactly why autonomy, self-ownership, self-determination, or other related concepts are valuable. Mack claims that “what underlies rights must, at least in part, be the value, desirability, or rightness of persons being separate beings, each having his own life and living it” (Mack 1982, p. 288). According to Nozick, self-ownership and related rights to determine one's actions are important because that is precisely what makes human life meaningful or valuable: “a person's shaping his life in accordance with some overall plan is his way to giving meaning to his life” (Nozick 1974, p. 50). Without the ability for a person to decide what she wants to do with herself and with her life, human existence becomes meaningless.

Mack uses a similar idea to show that there is value in autonomy and self-ownership. He

7 This is based off the second formulation of the Categorical Imperative in Kant's *Foundation for the Metaphysics of Morals*. Although Kant describes the Categorical Imperative as duty-based, it can be interpreted as a rights-theory, as I am doing here, and it is a common way to justify many kinds of rights.
describes his argument as “eudaemonistic” because it assumes a certain notion of what it means to have a good life, and he bases his argument off of this specific conception (Mack 1982, p. 291). According to Mack, living a good and successful life means having the ability to make an individual life-plan and at least attempt to live it out. He claims that “a person whose activities are not his own does not live successfully” (Mack 1982, p. 290). Hence, self-ownership, and particularly the autonomy that extends from it, are part of the definition of living a good life, and are therefore intrinsically valuable.

1.3. The Argument for Property Rights

Now, once we have explored several justifications for self-ownership, we can use it to justify individual property rights. Hegel, Mill, and Locke all have arguments for how property rights come from such a notion of self-ownership or autonomy. I will begin with Hegel and Mill, and then later focus on Locke's description because that is the account that Nozick seems to use. According to Jeremy Waldron, “G.W.F. Hegel's account of property centers on the contribution property makes to the development of the self … and giving some sort of external reality to what would otherwise be the mere idea of individual freedom “ (Waldron 2004). He justifies property by arguing that it is an external way to express our self-ownership, self-determination, or autonomy. Mill uses a similar argument, albeit from a much different background. His utilitarian justification of property rights juxtaposes socialism or communism with property ownership in order to decide which would produce the best outcome. The best outcome, for Mill, also depends on preserving liberty and autonomy. According to Mill, communism would have worse consequences – it would not be able to protect liberty as well – so some form of property rights are necessary for society (Mill 1909 [1848], p. 210).

Nozick, however, uses Locke's argument for property rights based on self-ownership. Very simply described by Locke, “every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his.” Thus, mixing labor – which is owned by the individual – with resources in the State of Nature makes those resources his property (Locke 1966 [1690], p. 130). According to Locke, in the State of Nature, all property is initially unowned, and can be appropriated by laboring because, before this cultivation, the resources are not useful and have minimal value. Adding labor to resources is what makes them valuable, and since the laborer owns the value of the labor, he owns the resources that he makes valuable as well. In Nozick's words, “laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created” (Nozick 1974, p. 175).
Therefore, since one owns her talents and skills, she should have property rights over the value of the things those talents and skills create. These rights include the rights to use, transfer, and non-interference, just like Hohfeld’s incidents describe. Still, it is unclear how she gains the right to use the resources in order to labor on them because she does not yet have property rights to them. Locke proposes that we all have a right to use resources because all natural resources are initially commonly owned, not simply unowned. Thus, in a world where property is commonly owned, every individual is at liberty to use and appropriate property. That is, everyone shares a Hohfeldian privilege to the good, and then can appropriate it and gain a Hohfeldian property right. Furthermore, we should be allowed to appropriate the common property simply because it would create more value and make the resources more useful. He claims that property or ownership leads to the most efficient cultivation; common property remains uncultivated (Locke 1966 [1690], p. 132). Thus, it is important to have a system of appropriation.

Nozick uses this Lockean idea to form his principle of just acquisition. Essentially, he adopts Locke’s description of how one can justly acquire property without violating the rights of others. Locke claims that appropriation of property from the commons is allowed in any case “at least where there is enough, and as good left in common for others” (Locke 1966 [1690], p. 130). This is often called the Lockean Proviso, because it is the one restriction on what is essentially an unlimited allowance to acquire property. It is not entirely clear what it means to leave enough for others, and different philosophers interpret the Lockean Proviso in many varied ways. Nozick interprets it to mean “the situation of others is not worsened” by the acquisition (Nozick 1974, p. 175). Once the property is acquired, it is fully owned.

Once we have a principle for justice in acquisition, we must also have a principle for justice in transfer. Using the idea of a molecular property right derived from Hohfeldian incidents, justice in transfer should simply be a part of justice in acquisition: acquisition grants full property rights, and transfer is part of those rights. However, there are several reasons for describing the principle of justice in transfer in more detail. First, Nozick himself includes justice in transfer along with justice in acquisition in his entitlement theory. Second, it might be helpful to more fully describe what it means to have this power of transfer over property. Lastly, I am not sure that Hohfeld is correct in saying that transfer rights are simply a part of property rights, and so I would like to keep the principle of just acquisition separate from the principle of justice in transfer. I will describe the last point in more detail in later chapters.

The principle of justice in transfer simply states that once property is justly acquired, the owner has the power to transfer or exchange the property in the market. Since the free market is ideally a system of voluntary exchanges and transfer, the free market system is just, at least in
theory. In Nozick's terms, “the means of change specified by the principle of justice in transfer” – that is, the market system of voluntary exchanges – “preserve justice” (Nozick 1974, p. 151). Justice in transfer is a way for owners to change their holdings into a different form, while still preserving the value of their initial acquisition, and thus their talents and labor. According to Nozick, “in a free society, diverse persons control different resources, and new holdings arise out of the voluntary actions and exchanges of persons” (Nozick 1974, pp. 149-150). We should note that the free market exchange also includes waiving one's rights to property by abandoning it, or transferring it through gifts, charity, or inheritance – the free market retains all of the Hohfeldian powers within the right to property. According to Nozick, all of these transfers preserve the justice of the initial acquisition.

1.4. What Kinds of Property Rights Exist?

Lastly, I would like to give a specific description of how we can break down property rights into the individual types of rights that they contain. To do this, I will use Hohfeld's incidents as well as Christman's distinctions to formulate a very precise account of property rights. The first category in Hohfeld's description is liberties or privileges. A privilege is a right of use, and so within it are rights to any specific use of property that does not interfere with the rights of others. I will treat the right to use property as one right that encompasses all these different uses. Claim-rights impose specific duties on others not to use or disturb the property in any given way. I will treat claim-rights as one right as well.

Second-order rights are more complicated because they contain different types of rights. Power-rights over property include the right to waive or annul property rights by abandonment or disuse, the right to transfer property rights by gifts or charity, the right to transfer property rights by inheritance, the right to gain income or use from the property, and the right to exchange property rights. Immunity-rights include the rights against theft\(^8\), rights against government seizure, and other such rights to the security of property. In the rest of this paper, I will concentrate on the many different types of power-rights described above, specifically in connection with Nozick's principle of justice in transfer and the concept of self-ownership. In the next chapter, I will give a more detailed account of the principle of justice in transfer and the objections to it.

1.5. Summary of Chapter One

I began this chapter by defining property rights. Property rights are bundles of several

\(^8\) The right against theft is an immunity-right because theft is an involuntary annulment or waiver of one's property rights.
different types of rights – what Hohfeld calls incidents – including claims, liberties, immunities, and powers. These rights can contain other, more specific rights. For instance, power-rights include the right to exchange, transfer, abandon, and so on. In this paper, I will focus on the power-right to transfer because it relates to gifting.

Next, I defined self-ownership and used it to justify other property rights. Self-ownership is a property right to oneself, and everything within the self, such as one's labor, talents, and body. Self-ownership is justified through concepts like autonomy, self-determination, or natural rights. We can justify property rights using self-ownership as well. Adding one's owned labor to unowned resources makes those resources her property because she has added the value of her labor, and she owns that value.
2. Justice in Transfer

In this chapter, I would like to focus more on the principle of justice in transfer as it relates to property rights. Although Nozick does not describe his idea of justice in transfer in much detail, I will offer an account of this principle that will relate to the free market, and show how the free market preserves justice through these just transfers. First, I will give a basic description of what it means to operate and transfer in a free-market or laissez-faire market system. I am not an economist; thus, I will include only information essential to understanding the arguments for and against justice in transfer in the free market. Next, I will use this account of the free market to further describe Nozick's principle of justice in transfer. Lastly, I will explore two objections to this laissez-faire market system for justice in transfer.

2.1. The Free Market and Justice in Transfer

A free market is a rather simple concept: economic interactions are governed by the voluntary choices of individual actors, and these interactions are free from regulation by any outside body. Thus, it is free in two different ways. First, the choices of the actors within the market are not subject to interference, as long as they are based upon voluntary actions of all parties involved. Second, the free market is free in the sense that all actions within it must be voluntary; that is, all market actors are at liberty to choose what happens to their property. The free market is commonly thought to be controlled by an “invisible hand,” but this does not refer to any market control so much as it refers to the predictability of human action within the market.

Property transfer as described by Nozick exists within this free-market system. By free-market system, I mean an abstract, theoretical economic system, not a political or legal one that might be used in practice. Nozick explains that “in a free society, diverse persons control different resources, and new holdings arise out of the voluntary actions and exchanges of persons” (Nozick 1974, pp. 149-150). For justice in transfer to make sense as a principle, once all property is owned, there must be a theoretical system which respects second-order Hohfeldian incidents or rights – that is, power-rights and immunities. It is the principle regulating the acquisition of new holdings in the owned world. The free market is simply a way for people to exercise their power-rights over their property by providing a space for voluntary exchange free from interference.

Essentially, to begin with, people control a certain set of resources that they have justly acquired and earned through their owned talents and labor. The free-market system then assures that they can acquire a new set of resources through voluntary exchange. Using the Hohfeldian conception, each person has absolute rights over her property, and so, once all property is owned,
one can acquire new property if someone else decides to exercise her power to annul, waive, or transfer her own property right. The fact that the exchanges are voluntary is important because that is the only way to respect the property rights of each of the actors. The fact that these exchanges exist within a non-regulated setting is also important because it is compatible with and respects the immunity-rights within property rights. According to Mill, “the right of each to what he has produced implies a right to what has been produced by others, if obtained by their free consent … to prevent them from doing so would be to infringe their right of property in the product of their own industry” (Mill 1909 [1848], p. 220).

The free market, then, is compatible with immunity-rights and power-rights. But, as we have seen, there are several types of power-rights that the free market needs to protect, including the rights to annul, waive, exchange, and gain income from one's property rights or holdings. It is clear how the free market is compatible with and, once implemented, protects the first few power-rights: it allows voluntary gifts, inheritance, and trade with other voluntary market participants. Gaining income from property through the free-market system, however, is not quite as transparent.

In a free-market system, the right to gain income is realized through application within market surpluses. That is, when goods and services are transferred in the market, there is often a difference between the value of the good or service to the owner – the user value – and the value of whatever it is traded for, the exchange value. There are three main reasons for this discrepancy. First, the good or service traded could be scarce, or whatever it is traded for could be plentiful. This has to do with the relative supply and demand of the goods or services being traded: when there is scarcity, demand increases and so the value of the good or service rises artificially. Scarcity is simply a part of the market, and a natural part of a world in which we have limited resources. Second, market surplus could stem from imperfect information, which is to say that the buyer might not know what the good or service is actually worth in the market. Third, actors in the market might simply have different preferences for goods or services, causing them to pay more or less than the value of the property that the owner determines.

John Christman argues that the scarcity and imperfect information, among the varied preferences in the market, that cause market surpluses are what secure the right to income gained from property holdings. Without a market, there would be no surplus, and thus no income\(^9\). Everything would be sold at cost (Christman 1991, p. 32). He argues that if people simply traded for the exact value of their property holdings they would never gain value from their holdings. Further, it is the market system itself that allows people to trade their property for more than it is worth. The market provides the imperfect information, the scarcity, and the varied buyers, and

\(^9\) I will further explain Christman's argument, and the problems with it, in both chapters three and four.
these are what makes surplus possible. Thus, it is the market that allows for the power-right to gain income or benefit from our holdings. This is especially true when we think of something like stocks or other investments. Suppose I invest in an uncultivated piece of land, build beautiful houses on it, and later sell the land to several families for a higher price. In this circumstance, I would have exercised the power-right of exchange: the added value would not be a market surplus, but rather the value of the labor – in this case, houses – that I added to the land.

But suppose that land is on an isthmus, and on that isthmus there is a university and a state capital. In this case, I could sell my land for much more than in the first instance, and not just because of the added value of my labor. Suddenly, the demand for land increases because of the government and the university, and the land becomes scarce because it is situated between bodies of water. Now, the added value I gain from selling my land is not the value of the labor, but rather a market surplus created by scarcity, and I have exercised the right to benefit from my property rights, not just the right to exchange them\(^\text{10}\). Thus, the free-market system can protect all types of power-rights, as well as other aspects of property rights.

Nozick's principle of justice in transfer is simply voluntary transfer within the free market because the free market can protect all of the initial types of rights we have over our property. Since the free market protects rights while allowing transfer, it preserves justice, which is what the principle of justice in transfer is meant to do. As long as the initial distribution of property is just, according to the principle of justice in acquisition, distributive justice is preserved through the principle of justice in transfer – that is, the voluntary exercise of second-order rights within the free market.

2.2. Objection: Christman, Fried, and Market Surpluses

In his paper, John Christman objects to one particular part of the principle of justice in transfer and power-rights in the free market. Essentially, he argues that there is no reason to think that we should be entitled to any market surpluses. Thus, we cannot have the power-right to benefit or gain income from our property holdings. His argument is based on the idea that ownership of market surpluses has nothing to do with self-ownership, and it cannot be a part of the conception of property rights. Furthermore, since market surpluses are part of the free-market system, such a system cannot govern just transfer.

For this argument, Christman departs from the conception of property rights as a bundle of Hohfeldian incidents and instead uses his own grouping of rights. He concentrates specifically on

\(^{10}\) This is an actually example from the State of Wisconsin in the United States. In the mid-1800s, Governor Doty bought land in the small city of Madison, situated on an isthmus, then used his influence in state government to move the capital and build the state university there. Needless to say, he made a fortune.
what he calls “control rights” as compared with “income rights.” These two groups, admittedly, do not constitute an exhaustive notion of property rights, but are instead the subset of property rights that have to do with the market. Control rights include the rights to possess, use, and transfer one's property within the market, while income rights are rights that deal with gaining income or benefiting from one's property ownership – the “right to increased benefit” beside the holding itself (Christman 1991, p. 29).

Christman makes the distinction between these two subsets of property rights because he claims that there is an “important difference between control rights and income rights in the justification of ownership” (Christman 1991, p. 30). Control rights are independent of the market in their justification; we can justify them using principles such as self-ownership or self-determination, or using explanations like Locke's State of Nature, as we have seen in the previous chapter. For Christman, it is important that these control rights could exist without a market. Even without a free-market system, we could have the right to use, possess, and transfer owned property.

The existence of the right to gain income, on the other hand, is dependent on the existence of the market system. According to Christman, the right to gain income is justified by patterns of distribution and principles behind those patterns – quite distinct from and “not reducible to” concepts like liberty or autonomy (Christman 1991, p. 30). Essentially, without an economy and a market system, market surpluses could not exist, and so there would be no way to gain income from one's property. Market surpluses depend upon the scarcity and imperfect information that only exist within the market, and the fulfillment of the right to gain income depends upon these market surpluses. Control rights do not have this problem. Without a market system, the owner or agent and her preferences determine value, and so control rights do not necessarily have to do with distribution of goods in general. The right to gain income, however, “presuppose[s] such structures” of distribution of goods in the larger community (Christman 1991, p. 31). They presuppose a market that will set a value that is different from the value assigned by the owner of the property, and thus a market surplus.

In Christman's view, since the right to gain income is purely a construction of the market system, they cannot be justified using the same reasoning as the justification of control rights. And the justification of control rights is essentially the idea of self-ownership that we explored in the previous chapter. According to Christman, “what matters in self-ownership … is individual rights to control oneself,” but this self-control cannot justify the right to gain income because this right assumes an economic system is already in place (Christman 1991, p. 39). Self-ownership and the rights that come from it exist before the market system, as we have seen in Locke's explanation, and so the right to gain income cannot be justified by self-ownership.
Barbara Fried has a similar objection to the ownership of market surpluses, but instead of questioning the right to gain income like Christman, she questions the idea that willingness to exchange property should be relevant in the justification of transfers and the market system. In her explanation, Nozick claims that if A owns X, then A owns what he can get for X in a voluntary market transfer. This is problematic when there are market surpluses due to scarcity, imperfect information, or other market failures (Fried 1995, p. 228). Market surpluses occur when B is willing to give A more for his property than A thinks the property is actually worth. Even if the transaction is perfectly voluntary, it is only voluntary because B either has imperfect information or there is some scarcity of product X in the market.

Fried explains that the common libertarian defense of surplus is that “people are entitled to what the market pays because they are entitled to the value they bestow on society” (Fried 1995, p. 233). On this view, the value is determined by the society, and so the market surplus is not actually a surplus; instead, it is a re-assessment of the value. The value to society is simply different than the value to the owner. Still, this justification has nothing to do with the willingness of two parties to trade – it is not the voluntary aspect of the free market that is important is its justification. That is, the fact that B buys property X willingly does not have anything to do with A's right to own whatever B gives him for X. Willingness is not the issue or the important part of the justification of ownership and trading.

Fried illustrates her point using Nozick's example of Wilt Chamberlain playing basketball. Suppose that Wilt Chamberlain, the famous basketball player, lived in a world where all property was distributed equally. Since Chamberlain was such a talented player, the people in this world might all decide to pay 25 cents to see him play. The result would be potentially great inequality, but that inequality would be just because people voluntarily gave up their 25 cents to Wilt Chamberlain, who owned the excess wealth because he owned his ability to play basketball, and that ability was worth 25 cents to each of his fans.

According to Fried, however, it is not the fact that the transfer was voluntary that gives Wilt Chamberlain the right to his excess wealth. It is the fact that Chamberlain earned it through his talented basketball playing, and that he owned his talent for playing basketball. Voluntary exchange – the willingness to give Chamberlain 25 cents – is not relevant to Chamberlain's right to own that 25 cents. Chamberlain produces “a valuable asset” with his talent and labor, which he owns (Fried 1995, p. 241). When he trades this valuable asset, he is merely exchanging it for something of equal value. Thus, justice in transfer, at least in terms of exchanges, has to do only with self-ownership and the rights of the property owner, and not with the voluntary aspect of the exchange. I will further discuss this point, and Fried's argument in general, in chapter four.
Fried's argument relates to Christman's point because it further shows that ownership of market surpluses may not be justified, even if the transfer is voluntary, because they are not justifiable using the principle of self-ownership. In the next chapter, I will extend Fried's and Christman's objections to Nozick's conception of justice in transfer and the justice of free-market transfer. I will show that the arguments they use against the ownership of market surpluses can also be used, in a similar vein, against other types of market transfers, such as gifts and inheritance. In the following chapter, I will show that although certain types of transfers are not justifiable using self-ownership, market exchanges, including surpluses, are grounded in self-ownership.

2.3. Summary of Chapter Two

In this chapter, I have outlined the principle of justice in transfer and its relationship to the free market. The free market is a system of unrestricted exchange of property: individuals make voluntary exchanges according to their own choices and preferences. The only allowed regulation of a free market is to protect against rights-violation. The free market is a way of preserving justice in transfer because it is compatible with all of the rights contained property rights. It especially allows us to exercise our power-rights, such as the right to transfer, however we choose. I also explored an objection to the free market as a realization of justice in transfer. The market creates surpluses, and the ownership of surpluses cannot be just because it cannot be justified by self-ownership.

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11 I include gifts, charity and inheritance in market transfers because they do exist within the market system, and they are clearly allowed with in the market system, even though they could exist outside of it.
3. Extending the Argument against Just Transfer

Now that we have explored justice in transfer and some arguments against it, I will take a closer look at one aspect of property transfer, namely, gifting. In Hohfeldian terms, gifting is the exercise of a power-right to transfer one's property rights, but without receiving any property in return. I will define “gifting” as the type of transfer that does not involve an exchange, and so it will include inheritance and charity, but not abandonment of property. It is important that gifted property must have an intended recipient. Gifting thus relates to both the property rights of the original right-holder – the giver – and the property rights of the recipient.

In this chapter, I intend to argue against the idea that gifting is a part of the principle of justice in transfer, and therefore not a part of property rights. First, I will outline the intuitive problems with gifting as a part of justice in transfer. Then, to support these intuitive claims, I will extend John Christman's arguments against the principle of justice in transfer beyond market surpluses to inheritance, gifts, and charity. Lastly, I will formulate an argument specifically against inheritance using the idea of self-ownership. Then, in the next chapter, I will argue that while gift-transfers do not fit within the principle of justice in transfer, exchange-transfers are a just form of transfer, and that justice in transfer should only apply to exchanges.

3.1. The Intuitive Problem with Justice in Transfer

There is an intuitive problem with the idea that gifts should be included in the principle of justice in transfer, and it stems from the notion of earning one's property through labor. Gifts – especially inheritance – are unearned property that can have enormous effects on one's life prospects. It is intuitively questionable to say that one has earned a right to her property simply because of the previous owner's right to give it to her – it seems like she did not earn it at all, and that it is unjustified and unfair that she should have it. In John Stuart Mill's words, “The foundation of the whole is the right of producers to what they themselves have produced. It may be objected, therefore, to the institution as it now exists, that it recognises rights of property in individuals over things which they have not produced” (Mill 1909 [1848], p. 218). Mill points to the same intuitive objection to gifts and inheritance: the owner did not produce the property.

If this intuition is still doubtful, it might be helpful to clarify it using a commonplace example. This example deals with the issue of inheritance because that is the most intuitively clear case, but it could be applied to other types of gifts. Suppose we have a hypothetical person, Adam. Adam was a relatively wealthy man who lived in the United States. He grew up relatively poor, and earned his wealth through hard work and just exchanges. His parents did not financially support
him as a young adult, and so he had to work to pay for university and for law school, which can be quite expensive in the United States. He became a lawyer in New York, married Beatrix, a woman with a similar background, and earned his living through his well-earned skill and talent as a lawyer. Beatrix earned her money by exchanging her labor with Adam by working as a housewife. So far, all of these transfers appear to be just. They are fair exchanges of labor for wealth and position.

The story becomes a bit more complicated, however, upon the death of Adam. According to the principle of justice in transfer, Adam's wealth belonged absolutely to him, and so he had the right to do whatever he wanted with it, as long as it did not violate any other person's rights. He ended up leaving his wealth to his wife and son, Charlie, and donated some of it to charity. On his side of the transfer, everything was intuitively fair: he had the right to leave his wealth to whomever he chose. But on the other side of the transfer, the side who accepts the wealth, there are still intuitive problems. For the family, accepting this transfer would mean gaining rights to property that they did not earn. It seems like Adam had a right to leave his property to his family, but that the family did not have a right to own it.\footnote{It is possible that the family has the right to receive the property, but not to own it. Even so, the right for Adam to give away his property to his family seems to entail more than that they receive it, but that they have full property rights to it as well, and that means ownership.}

This intuition creates a problem for the idea of just transfer and property rights; in fact, it makes it contradictory. Charlie and Beatrix, for example, do not have a right to any of the mementos Adam left them – his books, his clothes, and so on. Adam had the right to transfer, which means he had the right to transfer his right of property to Charlie and Beatrix, but Charlie and Beatrix do not have the right to that property because they did not earn it. In the next section, I will use Christman's argument against rights to market surpluses to justify this intuition and further explain the problem with gifts and inheritance using the principle of self-ownership.

3.2. Christman's Argument Extended

Christman's claim is that property owners are not necessarily entitled to gain excess income from their property holdings, beside what the holding is worth to the owner\footnote{I will discuss the distinction between value to the owner and market value in the next chapter, as well as the problems with focusing on the value to the owner as opposed to the market value. For now, it is important to Christman's argument that we are talking about a value to the owner that does not relate to a value determined by the market in any way.}. That is, the owner has the power-right to exchange her property, but she may only receive something of equal value in return. The excess income, Christman argues, cannot be justified using self-determination, self-ownership, or any related concepts, but can only be justified within the market system. Thus, if we...
presuppose that property rights include the right to gain income, and then use that conception of property to justify the free market, we have begged the question. Instead, we should be able to justify property rights without referring to the market system, and instead base them upon these concepts of self-ownership.

It seems, then, that the basis of Christman's objection has to do with the property rights of a party who did not earn her property, but rather acquired it through a flaw in the market system. This idea is also at the heart of the objection against inheritance and gifts. In the case of inheritance and gifts, as with market surpluses, the final ownership is not the result of the owner's self-ownership. For example, if I give my friend a dollar, he cannot justify the ownership of that dollar using his own self-ownership, just like he could not justify owning the income he could gain by investing that dollar. His property right to that dollar is not based on his autonomy, or ability to live his life-plan, or any other such justificatory concepts, but instead on the fact that there is a market system in place that allows him to receive gifts. Just like he would not earn the market surplus, he did not earn the gifted dollar.

Unlike Christman's argument, however, this extended argument presupposes a specific notion of distributive justice and its justification. It assumes that if we are using self-ownership to justify property rights, then each individual incident of ownership should be justifiable using the concept of self-ownership. This is contrary to Nozick's idea of a historical theory of distributive justice, but I think it is still a good presupposition. In Nozick's theory, if the initial holding is just, and each transfer after that is just, then any outcome that results is just. In this case, we will take justice in acquisition and justice in transfer to mean that the action is justifiable using the concept of self-ownership. Thus, as long as we can justify the initial acquisition of property using self-ownership, and we can justify any transfers of property using the concept of self-ownership, then any result of the transfers is just.

As Jeremy Waldron describes it, "the owner is … empowered to transfer the whole bundle of rights in the object she owns to somebody else — as a gift or by sale or as a legacy after death. With this power, a private property system becomes self-perpetuating" (Waldron 2004). The self-perpetuating part is the historical aspect of the market system. The free market only works and continues to work if we take a historical view of distributive justice. If we can prove that the historical principle of distributive justice is inadequate, or simply incorrect or not useful, then we will be able to show that the market itself is inadequate as a description of the principle of justice in transfer, and also explore some of the problems with it.

The problem with the historical view of distributive justice is that we may be able to justify all acquisitions and transfers using the concept of self-ownership, but we still cannot justify the
resulting property ownership using the same principle. According to Waldron, “it is part of the logic of private property that no-one has the responsibility to concern themselves with the big picture, so far as the distribution of resources is concerned” (Waldron 2004). It does not matter if we can justify the current situation at any time, so long as we can justify how we got to that situation.

Nozick argues for a historical principle of distributive justice because he believes it better satisfies the requirements of liberty. He juxtaposes historical principles with end-state or patterned principles, which only take into account one specific point in time, and not the actions or choices leading up to that time. The idea is that liberty will always disrupt end-state principles because people's choices will disrupt whatever pattern is being used. He uses the example of Wilt Chamberlain playing basketball: people will choose to pay Wilt Chamberlain to play, he will have earned this money, and the pattern will have been disrupted by the choice (Nozick 1974, p. 161). When Chamberlain ends up with more money, we can justify it historically, but not using a pattern. Thus, only historical principles can account for liberty.

The key here is that Wilt Chamberlain has earned his excess money, that he deserved it. According to Nozick, “in contrast to end-result principles of justice, historical principles of justice hold that past circumstances or actions of people can create differential entitlements or differential deserts to things” (Nozick 1974, p. 155). My argument against historical principles of justice does not conflict with this assessment – in fact, it supports it. I argue that we should show that all earnings are entitled earnings at every stage, which supports the idea of deserts and being entitled to one's property. An end-result principle that takes into account the justification of the holding of one's assets does not violate Nozick's requirements. It takes liberty into account, as well as entitlements and deserts, but it still looks at the bigger picture of distribution.

If we do not accept the historical view, we must be able to justify each individual's property rights using the concept of self-ownership – her own self-ownership. In the case of gifted property, we cannot use this justification. We can justify the giving of the property, but perhaps not the receiving, and not the owning; that is, the initial owner has the right to transfer based on his self-ownership, but the recipient does not have the right to the property based on her self-ownership. This idea is strange, because it seems like it is impossible to have a third-order Hohfeldian power-right of transfer if the recipient does not have the right to the property after the transfer. But again, we can use the analogy of market surpluses from Christman's argument. Christman rhetorically asks, “can I be said to retain the control rights to an object without the right to transfer that thing for a price someone is willing to pay me?” That is, he asks if it makes sense to say that there is a right to transfer if one cannot transfer at whatever price he happens to get from the market (Christman
1991, p. 35). He argues that we still have the right of transfer, but it is limited. A person can still transfer her property for a price, but not for any price, and especially not for a price that is determined solely by the market and market surpluses.

Likewise, when we regulate transfers in the form of gifts, we are not getting rid of transfers altogether. The owner still has a right to transfer his wealth, but the recipient must be able to justify her acquisition, which she cannot do unless she earns it by transferring something of equal value she owns back to him. Moreover, extending Fried's argument in the last chapter, just as voluntary transfer does not imply that the seller has a right to keep market surpluses, voluntary gifting does not imply that the recipient has a right to keep the gifted property. I will address Fried's argument further in the next chapter and the issue of whether a right to transfer implies a right to receive in chapter five. For now, I will move on to specific arguments against inheritance.

3.3. A Further Argument against Inheritance

After arguing against gifts in general, I would like to turn to arguments against inheritance as a specific form of gifting. I want to focus on inheritance because there are more reasons to think that inheritance is unjust as opposed to other forms of gifts. I will describe two basic arguments against inheritance: first, inheritance is unearned property and thus not deserved, and second, we cannot attribute the right to transfer property to the deceased. I will address these arguments in turn.

To begin, when we apply the same intuitions and arguments used in the above sections to inheritance, they seem intuitively stronger. According to Hillel Steiner, "it is … difficult to detect the presence of any strong connection between an individual's just deserts and his ancestors' accomplishments" (Steiner 1982, p. 382). In the self-perpetuating market system, people have great benefits from inheritance that they may not otherwise deserve. In fact, inheritance can have great effects on one's opportunities in life – the child of a wealthy person will certainly have more opportunities for success than the child of an impoverished person, whether she deserves these opportunities or not. Mill argues against inheritance in this manner as well:

If it be said, as it may with truth, that those who have inherited the savings of others have an advantage which they may have in no way deserved, over the industrious whose predecessors have not left them anything; I not only admit, but strenuously contend, that this unearned advantage

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14 It is still unclear what should happen to the property if there is no right to receive it. It is possible that it is just abandoned, and then can be re-appropriated according to a theory of just acquisition. I believe, however, that this is a gap in the theory, and requires another principle beside self-ownership to be filled in. I will discuss this in my conclusion.
Like Steiner, Mill focuses on the unearned nature of the bequest. Since inheritance is unearned, the inherited property does not reflect the productiveness or the labor of the individual who owns the property, and thus is not justifiable using self-ownership.

The second and stronger argument against inheritance is that it is difficult to say that a dead person has the right to transfer his property. Rights to transfer in the form of inheritance are essentially rights to transfer property as a gift after death. It is not the right of a living person to gift his property, but the right of a dead person. And it is incorrect to attribute property rights to dead people, especially since this right of transfer is the only right we attribute to the deceased, at least legally. The dead cannot have claim-rights or liberties – that would seem ridiculous – but are attributed this specific power-right. It is inconsistent.

Looking at this argument from a different perspective, if this right to leave an inheritance is ignored, it is not clear that any person's right has been violated. Again, we can use the example of Adam, Beatrix, and Charlie. Suppose Adam left an inheritance to my Charlie, but, after Adam died, the United States government took all of the money. It would be difficult to say whose right had been violated. It would not have been Adam's right because he is deceased and those who no longer exist cannot be said to have rights. It would not have been Charlie's right because his right to receive an inheritance would depend on Adam's right to transfer, which he no longer has since he no longer exists. Again, according to Steiner, “The existence of the right to bequest requires special proof, inasmuch as the sense in which a deceased person may be said to have his inviolability breached is evidently not the same as that in which a living person undergoes such a transgression” (Steiner 1982, p. 382). A right to transfer property cannot exist if nobody holds that right.

So far, we have two objections to the principle of justice in transfer, as defined by the free-market system. First, we still have Christman's objection to market surpluses that remains unanswered. Second, we have the new argument against gifts and inheritance. In the next chapter, I will show that we can justify the ownership of market surpluses, as well as exchanges, but that gifts and inheritance are still unjustifiable from the principle of self-ownership. Essentially, I will argue that all transfers must be market exchange transfers.

3.4. Summary of Chapter Three

In this chapter I have argued that gifting should not be a part of the principle of justice in transfer. First, I showed that it was intuitively unfair. I then made an analogy between gifting and market surpluses. Like market surpluses, gifting cannot be justified using self-ownership because

should be curtailed” (Mill 1909 [1848], p. 219).
ownership of a gift cannot be justified using the recipient's self-ownership. Gift-ownership also cannot be justified using the giver's self-ownership because that would require a historical principle of justice, which I have argued against. Lastly, I presented a further argument against inheritance that questioned the idea that the dead have a right to transfer property.
4. Pro-Market, Anti-Gift

At this point, we have arguments against the principle of justice in transfer both in terms of market exchanges and surplus, and in terms of gifts and inheritance. In this chapter, I will focus on refuting the arguments against market exchanges and market surpluses, and thus show that exchanging within the market should be a part of the principle of justice in transfer. I will do this by refuting Christman's argument against market surpluses from chapter two, and by using Fried's more robust argument about market surpluses and other transfer. I also intend to show further that even though exchanges within the market are just, inheritance and gifting within the market system are not. I will examine the counter-arguments in favor of gifting in chapter five, where I will also refute them.

The idea of justice behind exchange-transfer is tied to the idea of retaining value. Suppose I own a certain piece of property – for example, a zucchini – that I have presumably labored to earn, and that zucchini has a certain value based on my labor. I could trade that zucchini for an item of equal value, perhaps a cucumber. The owner of the cucumber would gain a zucchini, and I would gain a cucumber, but since we both lose something of equal value, neither of us has gained or lost any value. It is as if we never traded vegetables at all. We still retain the exact same value from our labor, but in the form of different products. In the first section, I will focus on refuting Christman's argument about market surplus. Then, I will explore Fried's broader argument about surplus and transfers, and apply it to gifting. Lastly, I will bring the arguments together to show that market transfers are justified, but gifting is not.

4.1. Against Christman

To begin this chapter, I want to refute Christman's argument against market surpluses from previous chapters, but still support the extended argument against gifting. Christman's argument against market transfers and market surpluses fails in a way the extended argument against gifting does not. His original argument, as we have seen in earlier chapters, is that we are not entitled to keep property gained in a transfer if that property is a product of the market, and not a product of trading for equal value. All exchanges must be equal-value exchanges, where value is determined by the owners and not by the market.

The extended argument, then, suggested that the reason we are not entitled to market surpluses is that they were unearned. The problem with entitlement to unearned property is that it is not justifiable using the concept of self-ownership, provided that we do not use a historical principle.

15 I believe these vegetables are called gherkins and courgettes, respectively, in British English.
of distributive justice. Since gifts and inheritance are not earned, they have the same problem that market surpluses have in Christman's argument – they are the product of something beside autonomy, self-ownership, self-determination, or other related concepts. Furthermore, the only way to justify gifts using these sorts of concepts is by taking up a historical principle of distributive justice. And, as I have argued, the historical principle of justice is not the best type of principle to use. So, ruling out the historical principle, we cannot justify gifts using the concept of self-ownership.

I contend that while these arguments hold for gifting, they do not actually rule out market surpluses as a part of justice in transfer. This objection has two parts: first, market surpluses are in fact earned, and second, market surpluses can be seen as independent of the economy. Both of these claims stem from the idea of value within the market and the value that the individual places on his or her property. They also have to do with the functioning of the market. Christman says that the market determines the value in market exchanges, not the individual. This claim is the basis of Christman's argument that the entitlement to market surpluses is dependent on a presupposed market system, and that the market surpluses are unearned.

If the market works correctly – and we should assume it does in this theoretical argument – then each party in an exchange should receive something of equal value. Scarcity is something that exists independently of the market: with or without a market, we live in a world with limited resources, and that affects the value of resources to the owner and to everyone else. Imperfect information is a market failure; it exists only when the market is not working properly. And market surpluses that result from market failures should not be part of an argument against a market. When we argue for a market, we assume that it is a market that works perfectly, and when we have a market system, we try to correct for failures anyway. Thus, if Christman's claim has to do with surpluses that stem from market failures, it should not be relevant to the discussion of the market.

There are, however, other reasons to that there might be a market surplus for the individual, and I think these are the types of market surpluses Christman is arguing about. It is possible that the individual owner personally values his property less than the value in the market. That is, he values it less than the value he could exchange it for in the market, so when he does exchange it, he gains value. Christman claims that the value to the individual is the value that matters, not the value in the market, because if we measure value in the market, we are presupposing a market system within our property rights. Thus, we should measure using the value to the individual owner. But the market is just a collection of people, and they determine value individually by voluntarily trading.

Basically, Christman is wrong in assuming that the right to income assumes a market that artificially sets prices. Prices are in fact determined by individuals within the market. Ideally, the
market is simply the aggregation of choices that individuals make, and even though the choices of individual actors rely on the choices of other actors, the market does not function according to a principle of collective action. That is, the market is not a system in which a collection of people make choices together, as a single unit. Naturally, there are other factors involved within the market, but individual decision-making still lies at the core of the market system. Individuals are trading equally valuable goods, which trace back to their own labor and talent, and thus to their self-ownership.

The problem with Christman's argument, then, is that it uses the assumption that the value of property should be measured as the value to the owner of the property, and not the value to everyone else who would trade with her. The extended argument against gifting and inheritance, however, does not fall prey to the same problem. In the case of gifts, unlike market surpluses, the excess value actually exists, whether the market determines the value or not. Also, market surpluses do not rely on the market system in the same way as gifts do, although they do naturally presuppose a market. Market surpluses rely only on the idea that different people will place different values on property. Gifting, on the other hand, can only be justified using a historical principle that grounds market transfers.

4.2. Fried on Exchanges, Surpluses, and Gifting

In her article “Wilt Chamberlain Revisited,” Barbara Fried discusses voluntary market exchanges within libertarian theory, including exchanges for surplus value. She differentiates between these two types of exchanges: market exchanges for surplus value require a different justification than other kinds of exchanges. The crux of her argument is that the discussion of market surplus does not belong in the discussion of the principle of justice in transfer, but rather the principle of justice in acquisition. In a theory of justice in acquisition, we could defend the right to keep surplus value by the idea that people are “entitled to the value they bestow on society” (Fried 1995, p. 233). But Nozick attempts to justify it using the principle of justice in transfer, which is problematic because market surpluses are not the same as other transfers.

In a normal exchange, we do not gain anything of value within the market. Transfer is simply a way for us to change the way in which value or worth is held (Fried 1995, p. 239). Fried uses the example of Wilt Chamberlain, who makes $250,000 by playing basketball because each of his fans pays 25 cents to see him play. In her explanation, Chamberlain has not gained $250,000, but has rather transferred the value of his talent and skill at playing basketball into money. The value of his holding has not changed – it has simply changed form. He had the ability to make money, and changed it into actual money. The value remained the same.
The problem of transfer in Fried’s view, then, is not whether Wilt Chamberlain had the right to transfer his wealth or worth, but whether he had the “right to the full market value” of his talent and abilities before he exchanged them (Fried 1995, p. 235). Essentially, in an exchange, the right to keep one's new property holding depends on whether each party owns the full value of his or her property before the exchange. This is the controversial part of property exchanges. But, according to Fried, this aspect of transfer belongs in the principle of justice in acquisition, not in justice in transfer, because it deals with ownership of the original holding and the entitlement to that, not the entitlement to exchange it.

Even so, we could still justify the entitlement to market surpluses using Fried's ideas about exchange and ownership. Going back to the Wilt Chamberlain example, in Fried's view, a person does not gain anything from exchanging his basketball-playing ability for money. In her words, “Chamberlain is not wealthier in the broad sense. He has merely changed the form of his wealth, from an ability to command a gate of $250,000, to the actual gate receipts” (Fried 1995, p. 240). That means that at any point in time, Wilt Chamberlain already owns the surplus value that he could get in a market exchange. He already owns it because he could, at any point, trade it for the surplus value, and because that is what his talent is worth.

We can also apply Fried's ideas and arguments to the principle of gifting within the principle of justice in transfer. She points out “there are two types of transfers – “gratuitous” (gifts, charity, and inheritance) and “market exchanges,” and that “the two raise quite different justificatory problems” (Fried 1995, p. 229). As we have seen, we can justify exchange-transfers because they do not entail any gain or loss of value. But gift-transfers do not work the same way. The assumption underlying gift-transfers is that “persons who have a right to hold also have a right to choose that others hold in their place,” which is a much different justification than merely changing the form of one's wealth (Nozick 1974, p. 168).

Fried argues that we cannot necessarily “derive a buyer's right to keep what she gets in a market exchange from the seller's right to give it to her” (Fried 1995, p. 227). Rather, as we have seen, the buyer's right is derived from the fact that she already owns the value, and is merely changing its form. The same principle can be applied to gifting. The recipient's right cannot come from the giver's right to transfer her property, but instead must be derived from her right to keep it, and that is a right that we cannot justify.

If we use Fried's argument, the refutation of Christman's argument, and the extension of his argument, we can see that using the principle of self-ownership, we can justify market exchanges, but we cannot justify gifting and inheritance. The problem with gifting is that it actually is lopsided in the way Christman describes market surpluses – it creates an artificial surplus. The ownership
cannot be traced back to self-ownership in the same way. Also, according to Fried, it is important to be able to justify the recipient's right to keep the property, and not just the giver's right to transfer it. If we cannot use self-ownership to justify this right, then it is not clear that the recipient has the right, and thus gifting cannot be a part of justice in transfer. In the next chapter, I will describe and try to refute some objections to these arguments.

4.3. Summary of Chapter Four

In this chapter, I have argued that gifts are not justified, but that other market transactions are. Surpluses are justified because the market, or the aggregate of individual actors in the market measures the value of property, not the owner of the property. Thus, there is not actual surplus value, just a difference in preferences. Exchanges do not create surplus value either. But gifts do create surplus value, a value that is unearned, and thus unjustified using the principle of self-ownership.
5. Objections

So far, we have explored both the arguments for market exchanges as the actualization of the principle of justice in transfer, and the arguments against gifting being included in the principle of justice in transfer. I have also refuted several arguments against the justice of market exchanges. However, we must still look at the arguments in favor of gifting – that is, the objections to my argument against gift-transfers. There are two basic arguments in favor of including gifting in the principle of justice in transfer, and I will explain and refute both of them. The first deals with the concept of the right to property and the idea that gift-transfer are simply a part of the definition of that right. I call this the objection from full property rights. The second treats gifting as a type of exchange, and uses a broad definition of property that goes beyond what we commonly think to be exchangeable commodities. I will call this the relationship-commodity objection.

5.1. Objection from Full Property Rights

The crux of this first argument is that the right to do what you like with your property is meaningless if you cannot transfer it however you please. Essentially, if we remove gifting from the set of rights contained within property rights, the owner would no longer have a full right to her property. That is, it would not include all of the rights within the property right. Using Hohfeldian incidents, rights to transfer are simply a part of an absolute property right, which means that the inclusion of gifting in property rights is simply definitional. An absolute right to property means that the owner may do whatever she pleases with her property as long as it does not violate the rights of anyone else. In terms of self-ownership, since we have absolute rights over ourselves – each person can do whatever she wants with herself if it is not rights violating – and our property is a part of ourselves because we mix our labor and talent to create it, then the right to property should be full. The only way to restrict a right is with another right.

Gifting appears to be a part of a full right to property. Gifting does not, on the face of it, appear to violate anyone's rights, but it is a way for the owner to exercise control over her property. Therefore it must be included in property rights. There are several ways to respond to this objection. One is to say that the right to gift one's property does not necessarily entail that the recipient has a right to own the property after it is gifted. This solution appears at first to be a bit counter-intuitive: it seems that the right to transfer property as a gift is meaningless if the intended recipient does not have the right to own it once it is transferred. I think, however, there are ways to make some sense out of it, some of which I have discussed in previous chapters. I will focus on the idea that we can differentiate the right to receive from the right to own, and that gift-transfers only imply a right to receive.
For it to make sense, the right to transfer one's property as a gift seems to imply a right for the recipient to receive the property. But that does not mean that the recipient necessarily has a right to own the gift, at least not in the way that the original owner did. This is an important conceptual distinction, and so we must look at what it means to receive versus what it means to own property. Receiving is the act of taking – the word itself comes from the Latin for “taking back.” In the sense I am using it, it is the moment when the property changes hands. Owning happens after the property is transferred. It is the status of the property after it is received, and it implies full property rights over whatever was received. When two property owners participate in an exchange-transfer, it is important that they exchange their full property rights in order for the value to be equal. With gifts, this is not necessarily true. The right to transfer property as a gift implies that the recipient should receive the gift in some sense, but it does not imply that the recipient owns the property.

It might be best to use an example of this kind of property transfer to illustrate the point. In chapter three I used the example of Adam, Beatrix, and Charlie. Again, suppose that Adam has died and left all of his money to Beatrix, Charlie, and his favorite charity. They have received the property, and so they have fulfilled Adam's right to transfer. The action of transfer has taken place. Since the transfer is over, Adam's property rights are no longer relevant, only Beatrix and Charlie's are. So, if Beatrix and Charlie do not have a right to own the property that stems from their self-ownership, we cannot justify their right to own based on Adam's right because Adam's right has already been exercised. As long as Beatrix and Charlie receive the transfer, Adam has exercised his right.

Another way to respond to the objection that gifting is part of the definition of property rights, and thus must be included in property rights, is to say that gifting violates a right. To do this, we would have to add to the concept of self-ownership: we would have to say that other rights exist that do not necessarily come from self-ownership, and conflict with the right to transfer. We could, for example, add a set of human rights that stem from Kantian human dignity. We could justify these rights on the grounds of human dignity, justify human dignity, and then simply add this theory to the theory of self-ownership.

But that solution depends on being able to justify another theory beside self-ownership. Ideally, there would be a way to circumvent this objection within the theory of self-ownership and property rights. I think we can do this by using the idea of a no-right instead of the idea of a right. If the recipients do not have a claim to the property, then in Hohfeldian terms, the recipients would have a no-right to the value of the property. In previous chapters we have seen that the recipient of a gift has a no-right to the value of that gift because her ownership of the value cannot be justified using her self-ownership. The recipient cannot retain the gifted value because that would violate
her no-right. But that would depend on whether a no-right, as an absence of a right, has normative status.

The question, then, is whether rights to property can be outweighed by no-rights. We have seen that the only way a property right can be nullified is if it conflicts with another right. If rights and no-rights have the same status, then we should be able to restrict property rights using no-rights as well. And I claim that rights and no-rights do have the same status. If we take all Hohfeldian incidents as separate rights, as I have been throughout this paper, then each individual incident should be able to outweigh a property right, at least conceptually, depending of course on the content of the right. For example, the liberty-right to free movement could, in some circumstances, nullify a property right. If each incident is a right, then their opposites and correlatives—duties and no-rights, for instance—should have the same status as the right. Essentially, it is the rights that do all of the normative work, and the correlatives have normative status because they are attached to the rights. For example, if a claim-right can outweigh a property-right, then a duty should be able to do so as well because a duty implies the existence of a claim. A no-right is also a Hohfeldian correlative, so it should have the same status as a duty. Like duties correlate to claims, no-rights correlate to liberties. Since a no-right is attached to a liberty, it should be conceptually able to overrule a property right if they conflict.

Incidentally, it is not uncommon to restrict power-rights to transfer because of another person's lack of rights, especially in the legal setting. For example, suppose I am living in California, and I own a gram of marijuana, used only for medical purposes, that I bought with a prescription. I would like to exercise my right to transfer my property by selling the marijuana to my perfectly healthy friend. It is natural to think that my transfer-right should be limited by the fact that my friend has no legal right to own the marijuana after I sell it to her. Arguably, she has no moral right to own the property either. In this case, my property rights would be limited by my friend's lack of a legal right to own marijuana, but it is not intuitively unjust. There are good reasons behind my friend's no-right, just as there are good reasons to think that recipients of gifts do not have rights to own what they are given. Hence, it is not strange to restrict a right to transfer because of a no-right to receive.

5.2. Relationship-Commodity Objection

The second objection is that inheritance and gifts can be seen as a type of market transfer. Normally, when a person gives a gift, or writes someone into her will, she is doing so because she has a special relationship with the recipient. We can look again at the case of Adam, Beatrix, and Charlie. Adam leaves his property to Beatrix and Charlie because they are his family, and

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16 For more information about correlatives and opposites in Hohfeld, see Wenar 2007 and Hohfeld 1964 [1919].
presumably he loves them and they love him. The inheritance is a way of showing that Adam loves his family. Moreover, he loves them because they treat him well and have given him love and affection throughout his life. The inheritance, then, is a sort of exchange – Adam exchanges property for Beatrix and Charlie's love and affection, and for their relationship.

Most gifts work in the same way. A Mother's Day card, a birthday gift to a close friend, or a romantic gesture to a significant other are all ways of exchanging property for emotions. The recipient of the gift is actually exchanging a relationship for property. The giver is simply quantifying an emotion or a relationship and equating it to a particular piece of property. The relationship, or the feelings or emotions that make up the relationship, become commodities that function like any other commodity on the market. This makes sense in terms of self-ownership: if I own myself, then I own my emotions and relationships, and can trade them for other types of property.

One may object that it is impossible to commodify relationships and emotions like we do goods and services, that we cannot put a price on our feelings and relationships. But I believe that it is certainly possible to regard a relationship as a market item that can be weighed against other goods and services in the market: people commodify their relationships all the time. For example, a career-driven parent must balance his or her professional life with her family, deciding how much of a relationship with a child to sacrifice in order to make more money. That is an example of commodification of a relationship, and there are other similar examples.

One may also object that while commodification of relationships is possible, it is not morally right. There is intuitive appeal to this argument. Relationships are supposed to exist outside the market, and it cheapens them, and the emotions attached to them, to equate them with other market goods and services. Relationships, intuitively, seem to be above property, more valuable, priceless. For example, many people would find the idea of selling a child or a parent horrific – the relationship between a mother and daughter, for instance, should not be given a price. Although this objection might have strong intuitive appeal, and some philosophical basis17, I only mention it as an interesting point, and will focus on a more conceptual argument against the relationship-commodity objection.

The best argument against the relationship-commodity objection is that relationships are different from other commodities in such a way that they cannot fit into the market system. To explain this point, I will use the concepts of user value and exchange value. User value is the value of a piece of property to the individual who owns the property – it represents what the property is worth to her. The exchange value is what the property is worth in a market, or what it is worth to everyone else beside the owner. Naturally these two values could be very different. For example, I

17 For more on the philosophical arguments against commodification, I recommend Margaret Radin's book *Contested Commodities* (1996). It gives an interesting overview and position on the problem.
might love my old, damaged bicycle because of the experiences I have had riding it. I might love it so much that it is worth $100 to me, even though I could sell it for only $40. Similarly, I might hate my bicycle so much that I only value it at $10, even though I could sell it for $40 in a market exchange.

When we talk about transfers, markets, and fair exchanges, we are dealing with exchange values, not with user values. I touched on this point in chapter four while refuting John Christman's argument against market surpluses. When we are dealing with the value of property within the market, and within a specific transfer, we are dealing with exchange value. The value that is traded is set by the aggregate of individuals, and that is the value that matters. But when we trade emotions or relationships, the relevant value is not the exchange value, but the user value. Because relationships and feelings are so individual, the only value they have is the value to the owner of the feelings or the participants in the relationship.

It may be possible to commodify relationships and set a market value for them, but that value is not the relevant or real value of the relationship. A relationship is restricted to the owners of the relationship – it is only valuable to them – and so it is the user value that is relevant. Thus, relationships do not really exist within the same sort of market as commodities because they do not use the same assessment of value. Relationships are not transferable property in the same way as other goods and services.

5.3. Summary of Chapter Five

In this chapter I dealt with possible objections to my argument against gifting. The first objection was that restricting gifting violates the rights of the giver. I answered that owning gifted property violates the no-right of the recipient, which could be seen as the same as violating a right. Thus, the restriction would be justified. The second objection was that gifts could be seen as exchanges. Gifts are essentially exchanges of goods or services for emotions or relationships. I answered this objection by arguing that relationships and feelings do not exist in the same market as commodities because they have a different type of value than market value. The value that matters is the value to the owners, not to the market.
Conclusion

We have now seen, I hope, that gifting does not fit into the principle of justice in transfer, at least when justified only by self-ownership. The problem is that this conclusion leads to some strange practical situations. To illustrate, I will go back to the example of Adam, Beatrix, and Charlie from the previous chapters. Suppose that Adam leaves his property to Beatrix and Charlie in his will. He dies, but Charlie and Beatrix have no right to the inherited property. It essentially becomes abandoned property, available for anyone to acquire using the principle of justice in acquisition. A neighbor, Delilah, might come to the property, labor on it a bit – fix up a house, take care of the cat, and so on – and the property would become hers. But it seems like fixing the house and feeding the cat intuitively do not constitute enough value of labor for the house and the cat to become Delilah's property. This property acquisition cannot really be justified using Delilah's self-ownership because she did not add significant value to the already-valuable property.

It is not clear, then, what should happen to Adam's property, or, for that matter, any property that an owner wants to gift. Abandonment leads to absurd consequences, but it would also seem strange to destroy it or say that Adam still owns the property. When we base gifting solely on the concept of self-ownership, it cannot be justified. But if gifting is not justified, we reach some absurd conclusions. Thus, I believe the problem is that we are relying on only self-ownership. If we add another principle, it might be possible to justify gifts, charity, and inheritance. Self-ownership cannot be the only principle, even if it is a justified principle. There must be another source of rights.
Bibliography


