

LIBERTARIAN NATURAL RIGHTS

ABSTRACT: *Non-consequentialist libertarianism usually revolves around the claim that there are only “negative,” not “positive,” rights. Libertarian negative-rights theories are so patently problematic, though, that it seems that there is a more fundamental notion at work. Some libertarians think this basic idea is freedom or liberty; others, that it is self-ownership. Neither approach is satisfactory.*

The distinction between negative and positive rights is crucial to libertarian variants of rights theory. Sometimes this distinction is characterized in terms of the duties that correlate with rights. Jan Narveson (1988, 58), for example, distinguishes between negative and positive rights as follows: “‘A has the negative right against B to do X’ means ‘B has the duty to refrain from preventing A’s doing of X.’” In contrast, “‘A has the positive right against B to do X’ means ‘B has the duty to assist A to do X.’”

While there is room for discussion about what it means to prevent somebody from doing something (e.g., do threats constitute prevention or not?), the concept of a negative right is nonetheless reasonably clear if the contrast with “positive rights” is kept in mind. Restraining someone in order to prevent her from eating is an infringement of her negative right to eat when she wants to (if that is indeed a right), while refusing to feed someone who wishes to eat but is unable to does not violate that same right, because negative rights create no positive duty to assist.

Libertarians claim that there are no positive rights, because, they maintain, such rights would violate, rather than promote, (real) liberty. Why would that be so? Because positive rights entail positive duties,

and positive duties of justice mean that you may be forced to do them, hence that you may be forced to do something you don't, even on due consideration, want to do. At least on the face of it that is an interference with your liberty. (Narveson 1993, 59.)

Libertarianism therefore radically limits people's duties. It insists that people only have negative rights and no positive rights, and correspondingly that they have only negative duties to refrain from interfering with other people's actions, but no positive duties of assistance.

In drawing the line between positive and negative duties, libertarianism theoretically leaves no conceptual scope for any consideration of the weight of the consequences of an act (or of its omission). Consider as an example the following hypothetical situation. A man sits by a pool doing a crossword puzzle. Suddenly, a small child slips into the pool and begins to drown. By getting out of his chair, walking a few steps, and reaching into the pool, the man could save the child (Lomasky 1987, 96). Few people believe that the man has a right not to be coerced that is so strong that he shouldn't be forced to save the child. Yet this is the position to which the libertarian is bound by maintaining that we have strong negative (and no positive) rights.

The distinction to which libertarians are committed can be described as a distinction between the right and the good. Often this distinction is backed up by an extreme form of moral subjectivism. Ayn Rand (1964, 111), despite her commitment to "Objectivism," writes that

If man is to live on earth, it is right for him to use his mind, it is right to act on his own free judgment, it is right to work for his values. . . . If life on earth is his purpose, he has a right to live as a rational being. . . . To violate man's rights means to compel him to act against his own judgment, or to expropriate his values.¹

Rand would say that, as a rational being, the man at the pool has the right to "use his own mind" by deciding for himself whether or not to save the child. If he would decide against it, to force him to do it anyway would be "to expropriate his values." There is a qualitative difference, according to such a theory, between the actions that an individual may find morally appropriate (the good) and what he has a duty to do

(the right). Any individual libertarian may find it abhorrent not to save the child, but from this it does not follow that people may be forced to take the desired action.

Such a stringent distinction between the good—the content of which is what everyone has a right to decide for herself—and the right—which consists solely of the right not to be interfered with—may seem strangely artificial to those who have not been initiated into libertarian philosophy. One of the problems that libertarians face in defending their theory is that human intuitions do not uniformly support a system consisting of only negative and no positive rights. Neither do our intuitive values support a system of property rights that does not allow taxing the fortunate to provide, for example, for those who suffer from undeserved disadvantages.

Rights and Human Nature

One influential methodology for justifying a moral theory is intuitionism. Intuitionism starts from the belief that there is a plurality of first principles. In particular cases, these principles may conflict, yielding contrary directives about what ought to be done. In these cases, according to intuitionism, we are simply to strike the balance between conflicting principles by intuition, pursuing what seems to us most nearly right (Rawls 1971, 30). Obviously, in the case of the drowning child, an intuitive balance would differ from the libertarian proscription.

Likewise, even if many people believe that no one should be arbitrarily divested of his property, few people agree with libertarians that no government may impose any taxation on an unwilling citizen. So libertarians cannot rely on intuitionism to substantiate the claim that all rights are negative. Instead, they often rely on the nature-to-morality method (Noggle 2001, 532).² This method draws on assumptions about human nature to derive conclusions about what people may or may not do to each other. It is sensible, then, to conceive of libertarianism as a family of natural-rights theories.

Hans-Hermann Hoppe is one libertarian who straightforwardly attempts to justify private-property rights through assertions about human nature. He starts with the observation that the question of what is just or unjust arises in argumentation (Hoppe 1993, 204–7).³ Thus, it arises only for beings that are capable of engaging in justification by means of propositional exchange, and it arises only for beings that are

willing to rely on those means to convince others of something. Next, Hoppe contends that argumentation “is a form of action requiring the employment of scarce means.” In other words, people need a body to engage in argumentation. So the exclusive right to use one’s own body is already presupposed in any argument. “Anybody who would try to justify any norm whatsoever would already have to presuppose an exclusive right to control over his body as a valid norm.” From this, it allegedly follows that “by being alive and formulating *any proposition . . .* one demonstrates that any ethic except the libertarian private property ethic is invalid” (ibid., 207, emphasis added).

Arguments such as these leave the reader in despair, wondering whether she has missed the crucial link somewhere. (Why is the “exclusive right to control” oneself a necessary presupposition of any argument one makes? How does this exclusive right to control come to extend over property that *isn’t* necessary to make an argument?) But it would be futile to detail such lacunae, and needless. It is far more productive to determine what common claim various libertarian theorists are trying to prove, and then to determine, by direct examination of this claim, whether it is in fact impossible to prove.

Given the central role of the distinction between positive and negative duties in libertarianism, it would seem natural to focus on this distinction’s justification. One might expect that libertarians have invested substantial intellectual energy in developing a defensible account of the troublesome distinction between those duties that do and those that do not interfere with human liberty. That is, however, not the case.⁴ And this signals an important fact about libertarianism. These theories rely (sometimes implicitly) on a more fundamental notion to account for the distinction between those actions that are permissible and those that are not.

Libertarians seem to disagree on what this notion is. Some take liberty (or freedom)⁵ as fundamental. Others concentrate on self-ownership and property rights in externals as fundamental. Each of these notions could be taken as the basis of an argument establishing why human beings have negative rights. But natural rights derived from the idea of human liberty support something close to libertarianism only if our notion of liberty corresponds closely to a certain conception of property rights. Thus property is the fundamental notion on which libertarians rely to distinguish between negative and positive rights.

Property is fundamental to libertarianism in that it defines the

boundaries that people must not cross. Anything that encroaches on an owner's control over her property violates the owner's liberty. Property, in these theories, is thus logically prior to the rights relations that it is supposed to justify. It is the notion that distinguishes legitimate rights claims from others. Consequently, the function of the nature-to-morality method in libertarian theory must be to explain how individual property came into being. In the closing section of this paper, I will argue that this conception cannot yield a plausible theory of justice.

Types of Libertarianism

Before we assess the case for libertarian natural rights, we should distinguish it from three lines of reasoning that are often ranked as libertarian, but that are not natural-rights theories. The first attempts an "economic" or "utilitarian" justification for capitalism (see, e.g., von Mises 1996 and Friedman 1962).⁶ Many have held that libertarianism provides the best, perhaps even the only, guarantee for a stable, flourishing society (often conceived in economic terms). The proponents of this view usually do not see themselves as natural-rights theorists. And yet it is very doubtful that a purely consequentialist argument could ever yield the normative prescriptions—for example, against even one penny of taxation, for any purpose whatever—that are characteristic of libertarianism. As a result, libertarians usually straddle consequentialist and deontological arguments, relying on the one where the other seems to fail (Friedman 1997). It is not clear how the deontological claims made in such writings could be accommodated within a utilitarian framework.⁷

While libertarian theories may be unavoidably deontological, I will not argue that here in detail. Suffice it to say that some versions of libertarianism do not explicitly ground themselves in natural rights, and thus may not be subject to the criticisms elaborated in the rest of this paper.

A second line of reasoning that seems distinct from libertarian natural-rights theory is contractarian libertarianism. At the most general level, this theory claims that it would be utility-maximizing for people who live in the state of nature to establish institutions that protect negative rights. Jan Narveson (1988) has defended the thesis that it would be utility-maximizing for each and every individual to contract herself

out of a state of nature and agree to respect each other's negative rights. Clearly the same argument would not hold for a set of positive rights.

Unfortunately for the libertarian, the argument does not even work for negative rights. It is simply not true for all people under all circumstances that to respect each other's negative rights would maximize their utility (Viminitz 2000). Numerous dictators have fared relatively well while brutally disregarding other people's freedom.

More important, however, contractarian libertarianism starts from the presumption that social arrangements can be legitimate only when approved by every individual. But this is basically a way of taking for granted the right not to be forced into a form of social cooperation that requires us to aid people who are less well off. Here again, libertarianism degenerates into a deontology of negative rights.

There is another version of libertarianism—one that is often counted as a member of the natural-rights tradition—that is not a natural-rights theory in the sense I am envisaging. Like most natural-rights theories, this argument focuses on a quality of human beings (such as the ability to make decisions or to pursue projects), but it develops this into an account of rights based on the psychological and/or physical needs of such beings.

The tendency to ground natural rights in a human need (e.g., the need to control one's body) has been well expressed by Murray Rothbard. He begins his proof of the necessity of natural rights by distinguishing between human nature and the nature of other living beings:

While the behavior of plants and at least the lower animals is determined by their biological nature or perhaps by their "instincts," the nature of man is such that each individual person must, in order to act, choose his own ends and employ his own means in order to attain them. Possessing no automatic instincts, each man must learn about himself and the world, use his mind to select values, learn about cause and effect, and act purposively to maintain himself and advance his life. Since men can think, feel, evaluate, and act only as individuals, it becomes vitally necessary for each man's survival and prosperity that he be free to learn, choose, develop his faculties, and act upon his knowledge and values.

Violent interference with a person's learning and choices is therefore profoundly "antihuman"; it violates the natural law of human needs (Rothbard 1978, 27). From the natural law thus derived, it follows

that each person has the absolute right “by virtue of his (or her) being a human being, to ‘own’ his or her own body; that is, to control that body free of coercive interference.” It further follows that each person must be able to acquire control over externalities (*ibid.*, 28, 30–37).

As with the contractarian version of libertarianism, a bit of reflection about empirical realities is enough to reveal the defects in Rothbard’s claim about human nature. Many people do survive without ever acquiring private property.⁸ Moreover, it remains a mystery why some amount of “coercive interference” (such as the imposition of an income tax) is incompatible with people’s “learning about cause and effect,” with purposive action, or with being “free to act upon his knowledge and values” with the remainder of one’s property.

The best-developed theory I know that builds a justification of private property on a specifically human need—proposed by Hegel in his *Philosophy of Right*—is often thought to be profoundly antiliberal, and certainly does not sustain inviolate property rights.⁹ Hegel defends what has been called a “developmental thesis” about the connection between individual freedom and private property (Patten 1999, 140; see also Stillman 1980). According to this approach, the rationale behind private property is that it provides the property holder with a concrete perception of his agency, and in this way helps to constitute her as a free person. One problem with this defense, as Allen Patten (1999, 149) has suggested, is that the argument—even if it succeeds—would demonstrate only that private property is a sufficient condition for developing and sustaining one’s personality. But, as with Rothbard’s argument, Hegel’s is hardly sufficient to demonstrate the superiority of private property over other kinds of property arrangements that might accomplish the same objective.

Fichte’s argument for private property might seem to remedy that problem. He contends that “original [or natural] right is the absolute right of the person to be *only a cause* in the sensible world” (Fichte 2000, 103). He maintains that in order to become self-conscious, one has to distinguish oneself from other human beings “through opposition,” and that this can be done only if one can distinguish one’s own efficacy from that of others. This, in turn, requires that one have a sphere in which she alone exercises efficacy. “Only in this way can the subject posit itself as an absolute free being, as the sole ground of something; only in this way can it separate itself completely from the free being outside it and ascribe efficacy to itself alone” (*ibid.*, 39–40).

There are several difficulties with Fichte's argument. Most importantly, it is not self-evident that private property is essential for developing awareness of one's efficacy. While repairing shoes, a cobbler has a sense of the effect of his actions; it does not matter whether he owns the shoe or not.

It could be argued that while private property is not strictly necessary for people to be aware of their effects on the world, it either guarantees or enhances the likelihood that people will have that awareness. Yet even if we grant this, and conclude from Fichte's argument that people have a right to private property, a mandate for libertarian property rights is still lacking. It does not follow from the developmental thesis that property rights are absolutely inviolate. In fact, redistribution would not abridge people's rights as long as they retained some property. A concern for people's access to property cannot justify the rule that no one can be taxed to care for the poor.

On the contrary, if people have a right to lead a fully human life—or, in Hegel's jargon, to develop personality—and if property ownership is indispensable to that end, then the property system should guarantee a minimum amount of property to each individual.

But since entitlements to minimal amounts of property are precisely what the libertarian opposes, I conclude that the tortured argument from the "needs" of human nature is not available to her. The foundation for libertarian ethics, then, is neither consequentialist nor contractarian nor needs-based. It is rather a deontological theory that relies upon notions of intrinsically valuable aspects of human nature.

Freedom as the Basis of Natural Rights

In this and the following section, I will focus on two notions at the core of libertarian defenses of rights. This will allow us to see if either of these two notions produces a defensible account of libertarian conclusions.

The first and most obvious candidate for a core conception underlying libertarian natural-rights theory is freedom. One intuitive way to express this thesis is to say that libertarianism allows individuals to decide for themselves how to behave. But why is such freedom the most important human interest?

A libertarian might begin to answer with the observation that morality is a human artifact, and to suggest that ethical norms are therefore

ultimately contingent on the moral convictions of individual human beings. The demand that people be allowed to pursue their own conception of the good, then, is not on a par with other moral demands. Since coercive morality arbitrarily privileges one person's conception of the good over another's, neither coercion nor positive rights can be justified.

Behind this line of thought stands the idea that because human beings are naturally *able* to direct their behavior according to self-chosen principles, they should be allowed to do so (as long as they do not interfere with other people's liberty). Thus, "human" rights are not just those that happen to be ascribed only to human beings; they should be ascribed to human beings in the first place because only human beings are free in the relevant sense. Only human beings possess free will, and are thus able to direct their behavior (in a nontrivial way). I will call this capacity "psychological freedom" to distinguish it from freedom in the more mundane sense.

There are at least two closely related problems with grounding human rights in human freedom. The first problem is how psychological freedom, even if it is valuable, is related to the freedom that is the subject of practical philosophy. Or, to put it differently, why does interference with freedom of action count as interference with psychological freedom? The second problem is how freedom of action can be delimited in a way that does not presuppose the theory of rights one is trying to prove.

To begin with the first problem: the link between freedom of the will and practical freedom is by no means an obvious one. A radical way of questioning the relationship between practical and psychological freedom would be to notice that the latter is not affected in many instances where the former is. Often when people's freedom of action is abridged, their ability to "will freely" is not. Take as an example somebody who is physically prevented from taking certain actions: a prisoner. While her inability to leave her cell seems a straightforward case of unfreedom, there is no reason to think that this impinges on her capacity to will. So how, we may ask, could her right to freedom of action be grounded in a capacity to will that is not lost even if her freedom of action is?

An obvious reply would be that the human will characteristically expresses itself in action, and consequently that the freedom that is relevant here is freedom to put one's will into practice—freedom from interference. One difficulty about this reply, however, is that people are

often made less free even while they are free to decide what to do. Consider the case of a treasure-bearing ship attacked by pirates, who say they will sink the ship unless its captain hands over the treasure. The captain obviously has a choice between handing over the treasure and letting the ship be sunk, and in this sense he is free to decide what to do. Nevertheless, it would seem to most of us that the pirate's threat reduces the freedom of the captain. The captain may be free to choose between different options, but at least one option that was previously open to him—that of sailing further with the ship *and* the gold—is closed off by the pirates, and in this sense he is less free than he was before the pirates issued their threat.

If so, then perhaps freedom should be construed in terms of the options open to somebody. As such, any state of affairs that I dislike and am unable to control could be considered unfree. Thus, I am unfree to run 60 miles per hour or to turn myself into a frog.

Many libertarian philosophers would hold that natural causes may make one *unable* to do something, but not *unfree* to do it. But why should this be so? There is no difference—in terms of interference with acting upon one's free will—between those instances when the options available are reduced by other people, and those when they are reduced by natural events (see, e.g., Williams 1995, 4). Suppose that our ship were assaulted not by pirates but by a storm, and that to stay afloat, the captain had to throw the treasure overboard. In both this case and the last, the captain is forced to abandon the treasure in order to save the ship, but in the second case the source of the coercion is natural. This, according to libertarian authors, precludes counting the second case as truly coercive. Yet in neither case is there a loss of free will. In both examples, the effect of the situation is a decline in the range of actions open to the captain to act upon, regardless of what he wills.

A libertarian could object that the extent to which freedom is affected by natural phenomena is irrelevant to the issue of rights, even if one allows that freedom of action is sometimes diminished by natural phenomena—if for no other reason than that it is senseless to speak of rights against inanimate objects or forces to which a duty of noninterference cannot be applied. Thus, it is only where one's ability to act on the basis of one's free will can be curtailed or enlarged by other persons that it is proper to speak of a right to freedom.

But impoverishment reduces the range of options for exercising one's free will, and it *can* be remedied by duties imposed upon others. And there is a significant class of other cases where libertarians similarly

condone limiting people's options. If you own a forest, you can bar others from using the option of walking in it. No libertarian would protest that other people's rights are being violated, and yet their overall freedom is being diminished. It is by no means obvious that the increased freedom of the owner compensates for the decline in freedom for all the people prevented from walking in the forest. How, then, can the right of the owner to enclose his forest be defended on the basis of a concern for liberty? Unequal property distribution is, in this sense, incompatible with equal freedom.

A second problem is that since libertarianism doesn't say that anyone can do whatever she wants—it does not allow one person to murder another—there must be a way to discriminate between those acts that are a legitimate exercise of freedom and those acts that are not. The question is again whether the notion of “freedom” can provide us with a criterion to make such a distinction (LaFollette 1979). Traditionally, libertarians have answered this question by saying that people are entitled to the most extensive freedom compatible with a similar freedom for all. So libertarianism doesn't allow me to murder my neighbor because doing so would destroy her freedom. (One might well ask whether that is really the problem with killing somebody!) We already have reason to doubt the merit of this response, however, since some acts that do limit other people's freedom, like enclosing a forest, are nevertheless considered legitimate by libertarians.

The libertarian might respond that in prohibiting others from using his forest, the owner is not interfering with other people's freedom at all, since these other people do not have a right to enter the forest in the first place (Cohen 1991, 167–72). It is easy to see the circularity in this response. If freedom is the basis of rights (or is the reason that people have rights), our conception of freedom must circumscribe the exercise of legitimate freedom in terms other than those of pre-existing rights. We cannot rely on a prior theory of property rights to decide whether some act encroaches on other people's freedom—since according to the libertarian, freedom just is freedom to use one's property, as defined by one's property rights.

Another, more plausible, defense of a right to exclude others from walking in the forest would start by invoking a purposive conception of freedom. Not all acts that we could possibly perform are equally important. The residents of London are far more often hindered by traffic lights when going to work than the average Chinese peasant is hindered in practicing his preferred religion. Still, we would not consider

England less free than China, because the freedom to practice the religion of one's choice is considered more important than the freedom not to be hindered by traffic lights when going to work.¹⁰

However, once one relies on a purposive conception of freedom to defend property rights, the argument ceases to be liberty-based in the sense necessary to produce a compelling account of libertarian property rights. The problem is once again that something other than liberty—in this case, the importance of religion—is taken to be basic; freedom is not (Kymlicka 1990, 141–45). The importance of some purpose for which freedom might be used should presumably be balanced against other purposes, and the result will not be a system of absolute property rights meant to preserve indifferently the freedom to pursue any purpose.

These difficulties suggest that it is not freedom as non-constraint of options, or freedom to do what one wants, or anything similar, that libertarians have in mind when they say either that they are in favor of the most extensive equal freedom for all, or that their doctrine requires people to respect other people's freedom. I would like to suggest that the conception of freedom underlying libertarianism is instead the long-standing idea, fundamental to much of the natural-rights tradition, that people—because they are endowed with free will—have a kind of normative *authority*.

Traditionally, this idea was expressed by saying that people, unlike animals, are capable of having dominion (*dominium*). Contemporary libertarians often claim that Locke was a founder of libertarianism, but the theory that grounds rights in dominion can be traced back at least to the thirteenth century.¹¹ I believe that we can better understand the libertarian conception of natural rights if we realize that libertarianism is the heir of these early theories.

Natural Dominion as the Basis of Natural Rights

Historically, *dominium* was used in two different senses relevant to the issue at hand. In a narrow sense, it was synonymous with property, but the wider sense of dominion could include many kinds of authoritative control, ranging from having jurisdiction to having a claim-right (see, e.g., Coleman 1983 and 1985, and Burns 1992, ch. 2). (This section owes much to an unpublished paper by S. N. Balagangadhara.)

The notion of dominion was a focal point in the famous poverty de-

bate between the Franciscans and their adversaries—one of the crucial episodes in the development of ideas about property rights (Lambert 1998; Mäkinen 2001). The Franciscans felt obliged to live in poverty, and they understood this not just in terms of the restricted use of material goods. Outward poverty was the expression of a more important inward humility, modesty, meekness, and obedience. The ultimate form of internal poverty, of “having nothing proper,” was expressed in the vow of obedience, which St. Francis interpreted as the renunciation of one’s will (see, e.g., Francis 1991, ch. 10).

At first, none of this seemed to have anything to do with legal or natural rights, but when the Franciscan order came under attack, one of the key issues became whether the friars could rightfully consume things that they did not own, and whether they could licitly use things without having a (legal) right to their use. The Franciscans saw both property and legal rights as instantiations of the *dominium* (normative control) that they wished to avoid.

The traditional view, on which the Franciscans relied, was that property was introduced by human laws. From this, the Franciscans concluded that before the Fall, Adam and Eve had only rights to use the Earth, and no right to exclude others from its use. In other words, they did not have any normative authority over the things they could use.

One of the best-known adversaries of the Franciscan cause, towards the end of the debate, was Pope John XXII. He referenced Genesis in arguing that “our first parents, in the state of innocence, had *dominium* over the earth, the fish of the sea, the birds of the air, and all living things that move upon the earth.” John XXII further held that property could not be avoided, because people naturally exercise a kind of sovereignty over a part of their world, and he thought that “any intervention by any agent in the outside world was the exercise of a property right” (Tuck 1979, 29). He used Biblical authority to make his point, but already other writers were paving the way for a naturalistic foundation of ownership rights.

Thus, Thomas Aquinas (1902, 52) held that the dominion that man has over his own will makes him capable of dominion over other things.¹² In the sixteenth-century debate over the rights of American Indians, this assertion formed the basis of an argument for native rights. Francisco de Vitoria (1991) argued that even a sinner had *dominium*, and “does not lose his dominion over his acts and body.”¹³ For de Vitoria, the fact that Indians had dominion over their acts and their bodies, just as the Spaniards did, was the basis for claiming that they had natural

rights to control the ground on which they lived, and had a right to choose their own rulers.

Once we realize that natural dominion is basic to libertarianism, all the puzzles that we encountered in the previous sections are resolved.

Consider the distinction between negative and positive duties. I said that libertarianism seems to rely implicitly on some more-fundamental notion to account for the distinction. This notion is, of course, that of individual dominion over property. Private property defines the boundaries that other people are not supposed to cross (without the consent of the owner). Anything that encroaches on the dominion that an owner has over her property is a violation of the freedom (of action) of the owner—even though prohibiting such encroachments diminishes the freedom of others. Private property, in libertarianism, is justificationaly prior to the rights relationships, and therefore to the “freedom,” that the theory supports, in that dominion over such property is the fundamental notion that distinguishes legitimate rights/freedoms from illegitimate ones.

Taking natural dominion as basic also solves the problems that, as we have seen, haunt the supposed grounding of natural rights in freedom of the will. Free will is generally associated with the capacity not to be determined by our natural inclinations or instincts, instead directing our lives according to our chosen ethical principles. This means that free will entails the ability to generate norms. If people have a *right* to generate norms, then it seems plausible that each individual human being must have a certain area where her norms are valid; there must be a domain where her will is the supreme authority. Within this domain, each human being is, to borrow Herbert Hart’s (1982, 183) apt expression, a small-scale sovereign.

Small-scale sovereignty is the meaning of “freedom” in libertarian theories of natural rights. People are adjudged free if they are able, within certain confines, to decide what is to be done—that is, to have normative control over a part of the world. Not to have one’s freedom violated means not to have anything done in one’s domain that goes against one’s will.

As long as we understood freedom as freedom of action, or freedom to do as we will, it was difficult to see why there should be a fundamental difference between natural obstacles to freedom and those caused by human actions. But if we understand dominion to be a normative power *inherent in* freedom of the will, the assumption that genuine freedom of action can be violated only by other human beings

becomes intelligible. After all, only human beings follow norms, so the norms that a sovereign generates can be directed only to human beings.

The problem of discriminating between human actions that violate another's freedom and those that do not is also resolved by interpreting freedom as dominion. A person who walks in a forest against the owner's will is, as a rule, not reducing the owner's freedom of action; and she is exercising her own freedom of action, according to any definition of "freedom" that doesn't assume that only the forest owner's property rights qualify as freedom. But the trespasser is violating a norm issued by the owner regarding his property, thereby violating the command of a small-scale sovereign.

Some authors have suggested that the notion of natural dominion is an inherently religious one. Richard Tuck (1979, 30), for example, wrote of one of the early natural-rights theorists, Jean Gerson, that the central area of convergence between his rights theory and his theology is his belief that man's relationship to the world is conceptually the same as God's.

If the notion of natural dominion is indeed inherently linked to the religious framework from which it emerged, its validity in a secular context would be dubious. But another major historian of natural-rights theories, Brian Tierney (1991, 320), thinks that the persistence of the doctrine of natural rights is a rather straightforward example of licit secularization. He writes:

It can often happen that a doctrine is first formulated in a religious framework of thought—perhaps could be first formulated only in a religious framework—and later is seen to have an independent value of its own and to be defensible on rational non-religious grounds. The legitimacy of the process depends on whether the rational arguments adduced for the doctrine are in fact valid.

How are we to judge whether the idea that people naturally have dominion is defensible on rational nonreligious grounds? I fail to see how one could *argue* that human beings naturally have dominion, or that they are by nature sovereign beings. Natural-rights theorists employing these claims likewise find it impossible or unnecessary to prove them; they usually simply assume that the claims are true. But it is utterly mysterious why having free will should entail normative power.

Moreover, even if people naturally control part of the world (their private property), it does not follow that they also have claim-rights

against other people not to encroach upon that domain. A *dominus*, a sovereign, exercises normative control by virtue of being the highest authority within the relevant domain. As a consequence, the classical thinkers on sovereignty—Bodin, Hobbes, Rousseau—all thought that sovereignty had to be absolute. In his domain, the sovereign cannot be limited by anyone or anything. If anyone could normatively bind the sovereign, the binder would be the higher authority and, in fact, sovereign.¹⁴ How does a sovereign acquire a domain? There are at least two ways of doing so. One is by transfer from another sovereign. Thus, some traditional natural-rights theories held that “our first parents” acquired dominion over (a part of) the world because that part was given to them by God. By virtue of having created the universe, God is the sovereign of everything. Not only does He have the power to give people some of what belongs to Him, but He can also declare laws that forbid people to steal other people’s property. The question of why people ought to respect other people’s domain therefore causes no more trouble to religious theorists of natural dominion than does the question of how people acquire their domains to begin with. Secularized versions of dominion theory (such as Robert Nozick’s), by contrast, have notorious difficulties with these two issues.

Still, there are several advantages to a theory that can give a more naturalistic account of the process of acquisition of property than one that explains the origin of individual *dominia* solely by reference to gifts from God. For example, it was a matter of debate whether God gave dominion to humanity in common, or to individual people. If He gave it in common, things may only be appropriated by individuals after everyone else agrees. If, on the other hand, property was given to individuals, how are we to know who is the rightful owner of some heretofore uninhabited island? Problems such as these could be multiplied endlessly.

The alternative view of dominion acquisition holds that a sovereign acquires a domain by creating it. The paradigm case of creation is, of course, God’s creation *ex nihilo* of the universe. Because human beings seldom or never create things in such a literal sense, the criterion of creation must be loosened if it is to apply to us. Locke, for instance, maintains that each person has a property in his person, and that his labor is properly his. By mixing his labor with something that he previously did not own, he can appropriate it because out of it, he has created something new.

Two difficulties with this argument are worth noting. One is that it

merely assumes self-ownership and labor ownership. The other is that the labor-mixing argument gives rise to numerous uncertainties. If I build a fence around a piece of land, have I become owner of the enclosed land, or only of the fence and the earth immediately underneath it (Nozick 1974, 174)?

Despite these difficulties, many people feel that the labor-mixing theory captures, albeit in an imperfect manner, a deep-seated human intuition. How best to depict this intuition? Is there a core idea that will allow us to make sense of such divergent intuitions as the fact that people own themselves, the fact that a sculptress owns the sculpture she has made (because she made it), and the fact that an adventurer who plants a flag on a previously uninhabited island thereby becomes the legitimate owner of the island?

The crucial intuition that connects these instances of appropriation to the idea of creation is that everything is created for a purpose. God did not act capriciously when He created Heaven and Earth. Now we can see in what way human beings equal their creator. Free will is the capacity to have intentions, to generate purposes. Moreover, our purposes often involve (or require) material objects, which become means to our ends. Even if we seldom or never create something out of nothing, we do transform objects, and they thereby become part of our purposes. This idea has been beautifully expressed by Frank Van Dun (1983, 37–38, my trans.), a Belgian libertarian. He writes that things are “created as means” by human beings:

Means are not just given to people . . . they have to be discovered, produced, invented. They are creations of the human mind. Nothing is a means in and from itself, not even the human body. . . . Something becomes a means only when somebody transforms it from a thing into a means, i.e. when somebody starts to use it purposively, to give it a certain purpose and includes it in his objectives. The one who first uses a thing creates it as a means—he is the author or *auctor* of the thing. . . . The thing is through him, and in that sense it is *of him*: as a means it arises out of him, it originates in him.

When people develop intentions, material objects are transformed from mere things into instruments for the realization of these intentions. This description allows us to make sense of the close connection libertarians see between free will and the capacity to appropriate things (even one’s own mind and body). Of all earthly creatures, only human beings are not entirely subject to their natural inclinations;

they can control themselves and develop genuine purposes. Consequently it is only human beings who are able to appropriate things. The fundamental significance of such an act of creation/appropriation for theories of rights, we are led to believe, is that it obliges other people to respect one's dominion over the things one has appropriated.

Where does this obligation come from? I suspect that the intuition that people's intentions generate obligations to respect their sovereign control over the things that are thereby drawn into their plans is simply a secularized version of the belief that you ought to respect the commands of God because He has created everything that is.¹⁵ But by populating the universe with more than one sovereign, none of whom is subordinate (since it is a secular theory) to God, this raises the question of why they should respect each other's "rights" to already-appropriated objects. For instance, why should a being with free will, and thus with the ability to appropriate objects as means to his ends, accept the proviso that objects that are already owned by someone else cannot be appropriated, and even that people themselves (as "self-owners") cannot be appropriated?

The question here is not whether a principle of non-appropriation of private property could be defensible on consequentialist grounds, but whether it follows from the concept of sovereignty itself that something that belongs to the domain of one sovereign cannot become part of the domain of another. Remember that the ascription of creation activity to humans required that the definition of creation be loosened. This loosening calls into doubt the supposed separateness of domains, since there is no reason why something that is part of someone else's purposes cannot at the same time be part of my purposes.¹⁶ Sovereignty means being able to generate one's own ends and appropriate things that become means to those ends (I can domesticate a wild animal and turn it into a beast of burden). However, other people could also become part of my intentions (I could aim at enslaving them, drafting them, or forming a *corvée*). Why may I not do so?

Hegel is representative in flatly stating that a thing belongs to the person who happens to be the first to take possession of it, because a second party cannot take possession of what is already the property of someone else.¹⁷ But why not? If ownership is nothing more than "making something part of one's purposes," there is no reason why two or more persons cannot be in (full) possession of something at the same

time. Obviously you can draw into your purposes the means to others' ends, just as you can with things that are as yet nobody's property.¹⁸

Many apologists of natural property rights would say that respect for other people's rights is a precondition for being able to enjoy these rights oneself. But this argument is defective both practically and philosophically. As a practical matter, if I were strong enough to defeat my enemies, I could enjoy my sovereignty *without* having to respect other sovereigns. More importantly, the precondition argument falls short of generating a philosophically valid obligation: even if I agree to respect other people's sovereignty out of a concern for my own, this would be a prudential decision only. It produces advice, not obligations.

Sovereignty designates a normative relation between the sovereign and those things (and persons) that belong to her domain—*not* between different sovereigns. That is why the existence of other sovereigns cannot obligate a sovereign to respect her sovereignty. For another sovereign to have normative power over me would be for me to have become part of her domain. That is precisely what the theory of individual sovereignty wishes to avoid.

My conclusion is that libertarian natural-rights theory is incoherent. The idea that people are sovereign beings does not allow us to infer that they have an obligation to respect each other's sovereignty. In fact, sovereignty precludes the notion of duty. If libertarians wish to maintain the notion of sovereignty, they can thereby endorse only a Hobbesian state of nature. If, on the other hand, the notion of sovereignty or natural dominion as the basis of libertarianism is abandoned, in favor of a notion of freedom conceived either as freedom to do what one wills or as overall freedom—no longer defined in terms of property—then the resulting set of rights will diverge drastically from those commonly defended by libertarians. Either way, (nonconsequentialist) libertarianism as we know it is unsustainable.

NOTES

1. For another example of libertarian moral subjectivism, see Van Dun 1983, 127–29.
2. See, for example, the claim of Tibor R. Machan (1989, 47) that “individuality in human beings is a central characteristic. The nature of human life is necessarily that of an actual, active individual human being. . . . The human good is tied to human nature which involves both life, the source of values, and freedom of choice or of the will, the element of responsibility.”

3. Hoppe seems to have derived most of his inspiration from Alan Gewirth's famous argument for human rights to well-being, yet he mentions a "close methodological resemblance" with Gewirth (1979) only in a footnote.
4. Among recent defenders of libertarianism, only two authors, Loren Lomasky (1987, 94–100) and Jan Narveson (1988, 57–61), give some modestly detailed attention to the distinction. For criticism of the distinction, see Lippke 1995.
5. I will use "liberty" and "freedom" interchangeably, as well as "natural rights" and "human rights."
6. Rather it seems that the deontological claims serve to keep the theory from lapsing into some version of utilitarianism.
8. Some people, including mendicant friars like Thomas Aquinas and William of Ockham, have not just survived but flourished without possessing private property or even exclusive control over their bodies.
9. The extent to which Hegel's theory is anti-liberal is subject to debate. See, e.g., Smith 1989, and Allen Wood's introduction to the Cambridge translation of the *Philosophy of Right*.
10. The scenario is adapted from Taylor 1985, 219.
11. John of Paris (1971) said that "lay property . . . is acquired by individual people through their own skill, labour and diligence." Thus these individuals have "right and power and valid lordship" (*ius et potestatem et verum dominium*) over their property. Some of the major property dicta of John of Paris were adopted completely by the French conciliarist Pierre d'Ailly, and they were published as part of Gerson's *Opera*. See Coleman 1983 and 1985. For general accounts, see Tuck 1979 and, more recently, Tierney 1997.
12. In the *Summa Theologiae* (*ST IIa-IIae* q. 66), Aquinas depicts the human capacity for *dominium* in similar terms, but it becomes obvious that he did not think that property existed prior to human institutions.
13. One of the arguments used to defend the expropriation of the Indians' land was that they could not have legitimate ownership since they lived in a state of mortal sin. De Vitoria added that "man is the image of God by his inborn nature, that is by his rational powers. Hence he cannot lose his dominion by mortal sin" (1991, 241–3).
14. Bodin and Rousseau also thought that sovereignty had to be indivisible and unlimited.
15. Is there not something strange about the idea that someone's planting a flag on an island should generate duties for all other people? But we only seem to realize this upon reflection, perhaps also because this example is as remote from prototypical instances of creation as it can be.
16. Libertarians are likely to counter this suggestion by saying that two people cannot use the same thing at the same time, so that it cannot serve as a means for two people. But if two people wanted an acre of land to stroll across, there is no reason they could not do this simultaneously upon the same acre. Even if simultaneous uses were impossible, and property claims could be granted as exclusive means to ends, this would not help the libertarian. Libertarianism does not guarantee people the means to realize their projects, a

- guarantee that would seem to be the upshot of making property rights instrumental to the satisfaction of people's ends.
17. In the next paragraph, Hegel suggests that this is because of the "anticipated relation to others," which probably means that two people cannot both be recognized as having full ownership of the thing.
 18. Moreover (and this is often overlooked), if free will is the requirement for being able to acquire property, the standard rule that the first occupant acquires property in a thing would allow people to take possession of children, since they do not yet "own themselves."

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THE NEW POLITICS OF PROPERTY RIGHTS

ABSTRACT: Philosophical defenses of property regimes can be classified as supporting either a conservative politics of property rights—the political protection of existing property titles—or a radical politics of direct political intervention to redistribute property titles. Traditionally, historical considerations were used to legitimize conservative property-rights politics, while consequentialist arguments led to radical politics. Recently, however, the philosophical legitimations have changed places. Conservatives now point to the beneficial economic consequences of something like the current private-property regime, while radicals justify political redistribution as restitution for historical misappropriations. This shift can be explained by such factors as the failure of state-directed redistributions of property during the twentieth century to benefit the poor. But there are limitations to the usefulness of historical arguments for radicals, and of consequentialist arguments for conservatives: namely, the undeserving poor and the idle rich, respectively.

The average citizen of a liberal democratic state would be astonished to learn how few police officers are on duty in her country, and how little of their time is devoted to the protection of property rights. The night-watchman state can usually sleep peacefully through the night.

The low ratio of police to population is possible because the large

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majority of people accept the existing property regime. When this acceptance collapses—for instance, in the riots that followed the assassination of Martin Luther King, Jr., in several U.S. cities in 1968, or after the Rodney King beating trial in Los Angeles in 1992—the local police invariably lack sufficient force to coerce the population to respect the property regime. Yet such riots are rare in liberal democracies. Even in the above-mentioned cases, the looting was arguably more a form of political protest than an attempt to redistribute property.

This is not to say that a popular revolution may not enact a new property regime, as through agrarian reforms. Following the French Revolution, the serfs who toiled on the land of their feudal lords became peasants who owned the land they worked. In such cases, however, the use of coercive force to change the property regime is direct and temporary. If the redistribution is subsequently popular, it does not require much in the way of enforcement.

When distributions of property rights are contested and the state is weak, property owners tend to develop their own private security forces to protect the property regime. Feudalism provides a clear example of this tendency.

When active coercion is instead the province of the state, it must become tyrannical, usually totalitarian. Property regimes that most people, including the state agents charged with enforcing it, consider illegitimate can survive for a time, as in the former Communist bloc and Baathist Iraq. But the combination of totalitarianism with illegitimacy results in widespread corruption, as the regime's officers use their varying levels of power to modify the property regime to their own benefit. Such property regimes hang by a thread and can quickly collapse. In Iraq, U.S. occupation brought the sudden overthrow of totalitarianism and the property regime it protected. A spontaneous, popular redistribution of property immediately followed.

A similarly spontaneous “privatization” took place after the collapse of the Soviet Union. This redistribution occurred on a more limited scale than in Iraq, though, because certain sectors of the Soviet property regime enjoyed somewhat greater legitimacy. For example, Eastern Europeans, unlike Iraqis, accepted the legitimacy of government museum holdings, hospitals, and school supplies. Like Iraqis, however, they rejected the legitimacy of state ownership of the means of production and appropriated them when the regime fell.

The dependence of a property regime on popular legitimacy may be further demonstrated by cases where property was sustained, with-

out state sanction, exclusively by mutual consent. Such was the arrangement in California during the initial phases of the Gold Rush. Following the 1848 war with Mexico, California came under the rule of the U.S. military, which declared all Mexican laws null and void. Congress failed to pass legislation necessary to organize the territorial government, leaving California lawless until the establishment of a district court in 1850 (Umbeck 1977, 202–4). In the absence of civil law, miners developed their own property regime, endorsing a means of acquiring “unowned” land. A typical contract from 1849 outlined a form of original appropriation of mineral rights: “Each person can hold . . . one claim by virtue of occupation,” but such a claim “must not exceed one hundred feet square.” As soon as there was sufficient water for working a claim, “five days absence from said claim, except in case of sickness, accident or reasonable excuse, shall forfeit the property” (*ibid.*, 217).

The miners assumed a mixture of first-occupancy and Lockean labor-based appropriation principles. Although the property appropriated by these popularly accepted rules had belonged to the U.S. government according to national law, the state ultimately recognized the miners’ spontaneous property regime in the Civil Practice Act of 1851, which authorized justices deciding a mining case to admit as evidence “the customs, usages, or regulations established or in force at the [gold] miners’ embracing such claims” (*ibid.*, 204).

The right to property is not a relationship between an individual and a thing, but one between individuals, including state agents and members of the public. Either they mutually recognize property rights as part of their social world (Searle 1995), or there must be actual or implied use of force against potential violators of what some take to be legitimate property and others do not.

Conservatives and Radicals; History and Consequences

We can distinguish two broad political approaches to property regimes: conservative and radical.

Conservatism supports and upholds an existing property regime. It assigns regulation of the property regime—the system of property title holding—to common or civil law, enforced and regulated independently of the discretion inherent in the executive branch of a government. It accepts voluntary transfers between holders of prop-

erty titles as well as transfers to the state through taxation of property. However, the conservative state does not intervene with the system of title holdings *directly* by reassigning property titles from one nonstate entity to another.

Radicalism, by contrast, assigns the determination of property regimes to the political rather than civil realm. It expects the state to intervene directly in the system of property titles to distribute or redistribute them. Colonialism, Communism, Nazism, and ethnic cleansing involve direct political intervention in property regimes through the reassignment of titles to land, houses, bank accounts, and art. For example, the conservative Roman Republic became radical during the first century BCE, when new regimes took power after civil wars and redistributed the properties of their political opponents. Eventually, winning factions began designating the owners of desirable properties as their political opponents in order to confiscate their estates.

Both conservative and radical approaches to property rights seek philosophical legitimation. Traditionally, the most significant types of legitimation for conservative and radical regimes have been, respectively, *historical* and *consequentialist*.

The historical justification of property rights, expressed for example by Locke (1999) and Nozick (1974), has usually accompanied conservatism and the preservation of a status quo. Conservatives may acknowledge that the status-quo property regime reflects some luck in the initial appropriation of unowned property by current possessors or their ancestors, but they tend to maintain that the status quo primarily rewards past labor, thrift, creativity, or voluntary transfers by those who have earned their property through such qualities. As Jefferson (1816) put it:

To take from one, because it is thought his own industry and that of his fathers has acquired too much, in order to spare others, who, or whose fathers, have not exercised equal industry and skill, is to violate arbitrarily the first principle of association, the *guarantee* to everyone of a free exercise of his industry and the fruits acquired by it.

By contrast, consequentialist considerations, usually coupled with egalitarian normative assumptions, were traditionally used to justify political intervention in the civil system of property titles to accomplish the radical redistribution of property. Thus, Marx and Engels argued

that various ill effects of the unequal distribution of property, including poverty, exploitation, hopelessness, disenfranchisement, tyranny, widespread ignorance, and bad health, might be ameliorated or even eliminated through a more equal distribution of property.

Neither consequentialist arguments for conservative policies nor historical arguments for radical policies were unheard of. For example, Hume, and under some interpretations even Locke, used consequentialist arguments to support conservative property regimes. But the history of the dominant political ideologies reveals a strong tendency for conservative regimes to be justified historically, and for radical regimes to be justified by their consequences.

The Great Transformation

Recently, however, each political stance has adopted the philosophical rhetoric of its traditional opponent. Many contemporary conservative arguments for the preservation of a property regime rely on the regime's allegedly beneficial effects, rather than on the historical origin of the holdings. And radical demands for the redistribution of property rights are now grounded in the notion that such redistribution constitutes the restitution of historical property rights to those from whom they were unjustly usurped.

A handful of developments provoked these rhetorical about-faces. Advances in historical knowledge of the actual origins of initial property holdings have made the traditional approach to property rights set forth by classical liberals untenable. Widespread acquaintance with the history of exploitation and theft now encourage claims for restitution for lost labor and property on behalf of individuals and historically disadvantaged groups. At the same time, the failure of radical politics, such as Communism, to improve the lot of the poor and downtrodden has severely undermined traditional egalitarianism, which is now more often associated with economic stagnation, poverty, and tyranny than with an improvement in the well-being of the masses.

The shift to historical theories of property rights raises philosophical problems for radicals, though. History cannot justify redistributing property to the undeserving poor—those whose poverty cannot be explained by past victimization—or away from current property holders—those who are innocent of wrongdoing. Likewise, the shift

Table 1. The Great Transformation in Property Politics

	Conservative Politics	Radical Politics
<i>Historical theories of property rights</i>	Classical Liberalism	Politics of Group Restitution
<i>Consequentialist theories of property rights</i>	Postlibertarianism, ¹ Law and Economics	Socialism, Communism

to consequentialism creates a philosophical problem for conservatives, since consequentialism cannot justify the property titles of the idle rich.

In Table 1, we schematize the extant combinations of property rights politics and philosophical justifications.

Though there are close relationships and mutual influences between philosophical positions about property rights and the effective political rhetoric on the subject, the two are rarely identical. Philosophical arguments are far more sophisticated and complex than anything that is or could be effective in politics. Furthermore, philosophical debates, especially of the academic variety, react more slowly to social and political changes than does political rhetoric. Philosophers may go on debating classical sources such as Locke, Nozick, and Marx long after they become obsolete in public discussion. The distance between public and academic discourse must be borne in mind.

The Historical Case for Radically Redistributing Property

A property-rights regime may be the result of theft, enslavement, exploitation, fraudulent processes of transfer, the seizure of property, forced exclusion, or the deprivation of freedom to acquire property and to dispose of it at will. Historical arguments for property redistribution usually imply the restoration of a property regime to the situation preceding such injustices, or at least restitution to the victims. Since the Second World War there have been many such restitution claims. A flurry of them became an avalanche in the 1990s, when judges began to decide that restitution is subject to judicial review instead of being a political issue to be decided by negotiations between states, or between social groups and states.

Groundbreaking legal cases in Australia (Dodds 1998; Hocking and Hocking 1999) paved the way for a New York judge to accept jurisdiction in a case that forced Swiss banks to change their antirestitution policies. Restitution lawsuits can now be brought not just against governments, but also against private firms, banks, and insurance companies. Following these developments and the establishment of various committees for extrajudicial restitution, academic history developed an applied subfield that trains historians to be expert witnesses and members of committees that examine evidence for restitution claims (Evans 2002).

The notion of redistribution as restitution is now common fare in popular, legal, and academic discourse. The main types of historical claims for radical redistribution of property rights in the last decade have been:

Restitution of property to indigenous populations. Organizations of aborigines in Australia and New Zealand, and of Native Americans in the United States and Canada, have demanded restitution for the land that was taken from them by Europeans. Some representatives of indigenous populations have gone further, demanding restitution for plundered intellectual property in the form of medicinal plants appropriated without compensation by pharmaceutical companies; and of traditional myths used by successful authors and filmmakers without compensating the historical entities that generated, preserved, and passed on these narratives.

Restitution to previously colonized countries for the theft of resources. During the imperialist era, the natural resources of colonies, including diamonds, gold, and bauxite, were sometimes extracted and sold by the imperialists (Rodney 1982). Post-colonial Third World countries have demanded restitution from former European empires for resource exploitation, citing the lingering implications of such expropriations on the economic development of these former colonies. An extreme case is the Haitian government's claim for restitution from France for being forced to pay "independence debt" to France since 1825. Haiti demands 21.7 billion U.S. dollars in restitution for this exploitation.

Restitution for stolen labor, slavery, or forced labor. African-American organizations, countries in the West Indies, and Eastern European governments have demanded reparations for slavery from the American government, from European countries that were involved in the slave trade, and from German and Austrian businesses and governments, respectively. The theft of labor is clearly a violation of prop-

erty rights as conceptualized by Locke. When the benefits derived from mixing one's labor with natural resources accrue involuntarily to other individuals, it is clear that by Locke's criterion, an injustice in acquisition has taken place. Claims have thus been made by representatives of the descendants of African slaves in North America and the West Indies, who argue that the fundamentally exploitative nature of the institution of slavery serves as grounds for reparations from those who derived economic and developmental benefits from this institution.

The moral argument is that although the past cannot be undone, and although restitution can be directed only to descendants of the victims, the effects of such historical iniquities constitute continuing injustices (Barkan 2001, 284). Randall Robinson (2000, 8–9) advocates reparations for “the great still-unfolding crime of official and unofficial America against Africa, African slaves and their descendants in America” by defending the relevance of the historical context out of which present-day inequalities arose, arguing that “the dilemma of blacks in the world cannot possibly be understood without taking the long view of history.” He contends that since “the value of [slaves'] labor went into others' pockets . . . there is a debt here. . . . I know of no statute of limitation,” he writes, “either legally or morally that would extinguish it” (ibid., 207).

Restitution for loss of economic opportunities has been demanded by victims of state-orchestrated economic discrimination, such as apartheid in South Africa and Jim Crow laws in the American South.

Restitution for properties that were redistributed by a radical regime. Jewish organizations, the state of Israel, Palestinians and their representatives, Cypriots, former Yugoslavs, Südeten German organizations, and other victims of ethnic cleansing, such as Eastern European émigrés and other victims of Communism, have demanded restitution for property that was taken from them by radical political interventions under previous property regimes. Most of these demands are for real estate, although financial assets, insurance policies, and works of art have also been claimed.

Some historically argued demands for radically distributing property rights have been more successful than others. Post-colonial nations have so far been unsuccessful in extracting reparations from European governments, as have African-Americans demanding slavery reparations. Demands for reparations for Eastern European slave labor have met with some success, although the sums involved have been limited, and

reparations have been awarded only to surviving former slaves, not to descendants of deceased ones. The most successful case of restitution to date involves the reparations that the West German government agreed to pay Jewish organizations and the state of Israel. Some restitution to owners of properties confiscated by Communist states, by the Nazi state, and by Swiss banks have also taken place.

Several common features emerge from these cases. First, not individuals but representatives of organizations, communities, countries, and other constructed social entities claiming to represent group identities have presented these restitution claims. Second, all successful cases of restitution have been political; they have involved negotiations with a government (sometimes together with an industry) that may not have been the property expropriator, but is designated as legally equivalent to it. Third, there is usually a cap on the total sum that any single individual may receive, and the value of the actual restitution paid is considerably lower either than the demands of the organizations that negotiate the restitution, or the original value of the property that was expropriated. In short, restitutions ultimately depend on political power and interest.

For example, West Germany was viewed after the Second World War as a country of war criminals, creating serious problems of international legitimacy. The state of Israel and other Jewish organizations were best situated to offer the new West German state legitimacy—even absolution—in exchange for restitution. By contrast, in the context of the Cold War, Eastern European Communist states had little—least of all, political legitimization—to offer West Germany. Consequently, Eastern European slave laborers for the Third Reich began to receive restitution only after the collapse of Communism, in the context of an expanding European Union and better relations between east and central Europe.

The designation of the Israeli state as the legitimate heir of the Jews who perished in the Holocaust highlights the identity politics involved in the new form of historical property rights. Many—probably most—Jews who were victims of the Holocaust were not Zionists, and would not have been likely to designate Israel as their legal heir. The voluntary migration patterns of Eastern European Jews indicate that given the choice, most Holocaust victims would have preferred to immigrate to North America or Argentina rather than Palestine. Likewise, not all Germans were Nazis, only a minority actually committed war crimes, and most contemporary Germans weren't even alive during World War

II. Yet in accordance with identity-based property politics, the restitution deal was struck not between individual criminals and their victims, but between two states.

Prior to the German-Israeli reparations agreement, there may have been no radical redistribution of property on the grounds of restoring historical rights in world history. (One possible exception occurred about 2,500 years ago, when the Persian Empire restored land in Judea to some of the Jewish exiles from whom it had been expropriated by the Babylonian Empire). This deal marks the beginning of the new form of the “radical” politics of property rights.

In short order, as the popularity of restitution claims has grown around the world, civil courts have agreed to adjudicate them between individuals and other legal entities, including private businesses. In the 1990s, several lawsuits were filed against German companies (Volkswagen, BMW, Dresdner Bank, Siemens, and Daimler Chrysler) that had benefited from slave labor under the Nazi regime. As a result, the German companies and their government signed an agreement in July, 2000 to create a fund to compensate Eastern Europeans who had been forced laborers in Nazi Germany. Restitution was again negotiated with a state, but involved private industry as well.

If we take existing restitution claims seriously, it is obvious that fairly extensive radical redistributions of wealth would follow, even granting that constraints on existing wealth limit the extent of possible restitution. Almost all properties are liable to be connected with some historical injustice or another by some route. This is one reason for supporters of the new conservative politics of property rights to try to limit the scope of historical property rights. They may plausibly argue that it is impossible to determine the last truly just property regime, because historical information is lost in the mists of time. Information about the actual effects of historical injustices on living persons may also be lacking. Setting the baseline for restitution is therefore highly contentious work. For example, restitution in most post-Communist countries assumes as a baseline the year when the Communists took over, thereby excluding claims by Jews, Germans, Hungarians, and others for property that was confiscated earlier by the Nazis and/or by locals.

Anticipating such objections, George Sher (1981) has suggested that the extent to which demands for restitution should be met correlates with how far back one has to go to identify when a wrongful appropriation took place. Jeremy Waldron (1992) has similarly argued

that ancient claims diminish as they are superseded by newer ones. Alternatively, however, one might see in property restitution an infinite regress, since among our forefathers there must be both beneficiaries and victims of property crimes—and the fact that our ancestors survived to reproduce may suggest a greater likelihood that they were perpetrators than victims.

Restitution may also be limited by the identity of the victims. Arguably, reparations should not be paid to victims—such as Holocaust survivors or slave-descendants who are multimillionaires—who were clearly not handicapped economically by the historical injustice. Some conservatives go much farther, and suggest limiting restitution to living, direct victims, excluding descendants and other indirectly affected people. Janna Thompson (2001, 116) contends that “it is a principle basic to reparative justice . . . that individuals or collectives are entitled to reparation only if they were the ones to whom the injustice was done.” While acknowledging the potentially lasting effects of injustice, she holds that it is difficult in many instances to draw a direct line from a given historical injustice to the contemporary disadvantages of a particular person or a group. She argues that the most plausible claims for redistribution as reparative justice, or as redress for stolen labor or property, obtain when the actual victim makes the claim.

However, these two strategies for curtailing redistributive restitution—limiting its baseline and its beneficiaries—do not save the traditional conservative politics of *historical* property rights.

From the perspective of historical rights, insisting on a recent baseline for restitution is arbitrary, not to mention that it is highly susceptible to political manipulation for the discriminatory exclusion of certain types of claims, as in post-Communist Eastern Europe. Furthermore, scarcity of information about historical injustices is not necessarily correlated with the passage of time. Injustices that took place hundreds of years ago may have generated substantial evidence that survived to the present, while there may be no proof of the misappropriation of unregistered land in the Third World that took place yesterday. Nor does the degree of harm that an act causes necessarily diminish in proportion to the time that has elapsed since it occurred. Arguably, Latin Americans still suffer from colonial injustices perpetrated hundreds of years ago, while Südeten Germans have prospered, surpassing in their standard of living and longevity the Czechs who deported them in 1946. Conversely, many Palestinians who were expelled by Israeli forces in 1948 continue to suffer from that loss of

property. They became refugees and permanent second-class citizens in xenophobic, authoritarian, economically stagnant states that, with the exception of Jordan, have afforded them little access to economic opportunity. By contrast, Jews who were expelled from or pressured to leave such countries as Iraq and Yemen around the same time have suffered much less, because despite facing some discrimination from Israel's socialist, Eastern European establishment, Jewish immigrants from the Middle East found substantial opportunities for economic mobility in their new country. These contrasting cases highlight the illogic of traditional (historically based) conservative efforts to delineate a "statue of limitations" on claims for restitution.

Radicals have another ready answer to conservative attempts to avoid redistribution by limiting the time-frame and definition of victimhood: restitution can be demanded for present harm by conceiving the injustice to be a protracted temporal process (Meisels 2003; Waldron 1992). Native Americans, Australian aborigines, and New Zealand Maoris demand compensation for the lasting, present, and constantly reinforced effects of injustices that began long ago.² Similarly, Boris Bittker (1973, 9–26) argues that rather than focusing on the practices of slavery, the case for slavery reparations should be made through reference to its durable implications, particularly "the litany of discrimination by public agencies" and the denial of civil rights to Americans of African descent until the late 1960s. He further asserts that

preoccupation with slavery . . . has stultified the discussion of black reparations by implying that the only issue is the correction of an ancient injustice, thus inviting the reply that the wrongs were committed by persons long since dead, whose profits may well have been dissipated during their own lifetime or their descendants' and whose moral responsibility should not be visited upon succeeding generations, let alone upon wholly unrelated persons. (Ibid., 11.)

Bittker argues that "the distant past is serving to suppress the ugly facts of the recent past and of contemporary life" (ibid., 12). This argument could be more broadly deployed against conservatives opposed to radical property redistribution on historical grounds.

Finally, the specter of an infinite regress of wrongs actually provides an argument in favor of radical egalitarianism. If the past entitles us to myriad rights for restitution but also burdens us with myr-

iad duties to restore, it is plausible that we should just save on adjudication costs, and deal with our inevitable ignorance of the ultimate origin of present-day property titles, by distributing all properties equally.

Consequentialist Conservatism

Conservative theories of property rights that correlate restitution with its effects on the victims, or that limit restitution to direct victims or to those who clearly still suffer from injustice, must therefore forfeit historical defenses of property rights in favor of a consequentialist theory. Historically derived property rights, by contrast, are indifferent to the present effects of their enforcement. Thus, while radical egalitarians have been turning increasingly towards historical arguments for restitution, conservatives have adopted consequentialism.

Consequentialism is useful in principle for maintaining post-colonial, post-slavery, post-Communist, and post-ethnic-cleansing property regimes alike. Rhodesian colonists, members of the communist managerial *nomenklatura*, descendants of Southern plantation owners, Europeans who settled in the houses of Jews, and Israelis who settled on Palestinians' lands all resort to the same argument to justify the persistence of their property regimes: the argument from economic utility.

Jeffrey Friedman (1991 and 1992) argues that the main attraction of libertarianism lies in the stimulation that a liberal economy founded on private-property rights provides to general welfare and prosperity, in contrast with the demonstrated failures of centrally planned economies. In his view, echoing that of Chicago- and Austrian-school economists and Law-and-Economics scholars, private property is an instrumentally valuable institution, not an intrinsically valuable one. Accordingly, the justification for a current property regime should be empirically derived. Its defenders must prove its advantage over alternative distributions, state ownership, or no ownership at all. Classical libertarianism, by contrast, offers only an a-priori, philosophical justification of property rights.

More recently, Friedman (2000) has suggested that the reason for the advantages of private property is that it facilitates voluntary interactions that allow participants to leave relationships (notably economic ones) at will, enabling them to deal with their fallibility piecemeal, exiting from troublesome interactions without having to understand the source of

the trouble. By contrast, problems in interpersonal relationships that offer no exit—most notably, relationships determined by politics—require decision makers to understand the source of the problem, making them comparatively vulnerable to their ignorance and ideological biases. Thus, any economic system that relies on exit mechanisms is likely to facilitate a more desirable distribution of property over time. Private property and free-market competition provide comparatively greater opportunities for exit and, thereby, for optimal economic results in the aggregate and in the long run.

This argument, despite its grounding in political science, is similar to the neoclassical economist's argument that the distribution of property most conducive to growth would follow from free and fair competition. Irrespective of the initial distribution, properties will tend over the long term to fall into the hands of those who can extract maximal utility from them. The consequences of a free-market system of competition is thus held to justify any property distribution that arises from its rules. However, neither the political-science nor the economics argument applies if the rules of free trade are broken—as when, for example, government favoritism suppresses competition on behalf of corporations or unions. For a consequentialist justification of conservative property politics to be effective, the rules of the market must be observed and enforced over a long period.

Stephen Holmes (1995, 73) has remarked that liberal-democratic norms can justify a system of private property “if, by accepting it, we can wipe out poverty and dependency.” But he also observes that such norms “cannot justify . . . the assignment of first property rights.” Unequal property distributions in Western societies have been legitimized “by the mist of time, by just and voluntary transfers ostensibly stretching back in a long chain of inheritance and exchange.” Since, in fact, private property in the Western hemisphere has often been acquired by violent means, the legitimacy of current patterns of ownership depends wholly on an act of social forgetting. Even if such an act may be justified on consequentialist grounds, it “is a luxury not available to the countries of Eastern Europe, whose citizens must stand by and witness *nomenklatura* privatization—that is, the skillful accumulation of first property rights by individuals who, by hook or by crook, were well placed under the old regime” (ibid.). Many post-colonial nations, such as Zimbabwe and South Africa, are also unable to ignore the violent histories that produced their current property distributions.

The Political Perils of Consequentialism

In the real world of politics in these societies, opponents of radical redistribution face tough going in their attempt to base their argument not on the rights of current owners, but on the utilitarian concern that redistribution would diminish prosperity for the nation as a whole. As Waldron (1988, 79) notes, the

distinction between utilitarian and right-based theories focuses on the fact that, though both are distinguished by their pursuit of individuated political aims, right-based theories take single individuated aims as the basis for generating genuine and full-blooded moral constraints whereas utilitarian theories do not.

Accordingly, the utilitarian (consequentialist) case for preserving property regimes is usually brought on behalf of a *class* of people who claim to further the common good through their continued holding of a set of properties irrespective of how they came to possess them.

Zimbabwe's white minority most recently used such an economic-utility argument to justify the status quo against radical demands for redistribution. When white minority rule of Rhodesia was overthrown in 1980, after almost a century of colonial domination and "extreme class, race, and gender apartheid" (Bond and Manyanya 2002, 4), about 4,500 whites owned some 15.5 million hectares of land—almost half of the productive land in the country.

Most of that land was in the high rainfall agro-ecological regions where the potential for agriculture output is highest. The small scale commercial farming sector, comprised of some 8,500 black farmers, held 5 per cent of the agricultural land, located mostly in the drier agro-ecological regions. (Weiss 1994, 193.)

Landed white conservatives did not attempt to justify the manner by which their ancestors acquired and maintained the best land in the country. Rather, they claimed that they should keep the farms they owned because this would profit society as a whole.

Their argument did not win the day, and the post-apartheid government of Zimbabwe implemented a policy of land redistribution that represented "the largest land reform program in Africa. Some 3 million hectares—about 25 percent of commercial farm land—was acquired for the resettlement program during the first independence

decade” (Weiss 1994, 193). The principal argument against the massive redistribution of land—since borne out by the catastrophic fall in agricultural productivity now facing Zimbabwe—was that since agriculture is the mainstay of the Zimbabwean economy, radical redistribution would be economically pernicious. If land were redistributed, the new owners would not know how to manage it, farm workers would lose their jobs, exports would decrease, and those major sectors of Zimbabwe’s economy that depend indirectly on exports would suffer.

A Zimbabwean economist claimed that the white farmer

knows his market, he sees opportunities, knows precisely where he can procure his raw materials at the best price. He knows how to cost. He just runs rings around his competition. In that sense whites have the edge. They grew up in an industrial society in a competitive environment. And they work hard. (Quoted in Weiss 1994, 157–58.)

A tobacco farmer offered other, more blatantly racist reasons to oppose land reform:

It’s been proved that blacks can’t organize. Or manage. They’re subsistence people, they plan day by day. It’s hopeless settling them on land without supervision. . . . As for productivity, forget it. Only people who have the know-how, which means the commercial farmers, can turn marginal land to good use. The native can’t do that. (Quoted in *ibid.*, 195.)

Another white farmer asserted that “blacks rarely come up with ideas. They don’t spot market opportunities the way a white does” (quoted in *ibid.*, 155).

Meanwhile, supporters of redistribution supplied credible critiques of the notion that white economic hegemony benefited all Zimbabweans. Many white owners “[did] not use their farms productively as they [were] absentee gentlemen farmers” (Made 1998, 195). Further, it seemed plausible that large commercial farms owned by white settlers produced “wealth for the few and poverty and humiliation for the many,” as black leaders argued (Weiss 1994, 37).

The government ultimately capitalized on such arguments in order to forward a redistributive agenda that was in fact driven more by power politics than by a coherent and committed economic philosophy. Conservatives’ dire predictions of economic disaster indeed came

true. But this result did not arise from the alleged incompetence of common black farmers. Land was not distributed to them, but rather to loyalists of Robert Mugabe's ruling Zanu PF Party. The resulting economic failure may be attributed to the political interests of a failing bureaucratic dictatorship that, in order to secure its henchmen's loyalty, distributed to them the only wealth it could obtain.

In Zimbabwe, then, radical distributors of land resorted to historical-restitution arguments to justify their actions, even though in reality, Mugabe's party members had no special connection with the tribes that had originally inhabited the lands appropriated by the colonizers. Meanwhile, postcolonial white farmers resorted (unsuccessfully) to consequentialist arguments of economic utility to defend their holdings.

A somewhat different form of the new politics of property rights can be seen in present-day South Africa. Radicals have lobbied for redistribution on historical grounds. The South African government has redistributed some resources to loyalists of the president's faction within the African National Congress, especially through preferential treatment in government contracts and direct "voluntary" transfer of shares in large white-owned businesses to a few black businessmen, including a former leader of the South African Communist Party. Unlike Zimbabwe, however, the South African government has avoided radical reform of the property regime. But it has (thus far) maintained the status quo ante not out of any belief in the historical rights of the beneficiaries of apartheid, but for a consequentialist reason: fear of capital flight and economic collapse.

An even more successful application of economic-utility arguments to justify a status-quo property regime was made during the privatization of state-owned enterprises in Eastern Europe. In many cases, the managers of state-owned enterprises ended up as the owners of these firms. *Nomenklatura* members were the main beneficiaries of the transition to a capitalist economy, "with managers or bureaucrats privatizing themselves, [and] politicians involved with privatization also being on [the] company board" (Brabant 1992, 200).

"The process of converting monopolistic positions into *de facto* property rights enjoyed by managers has been called 'spontaneous privatization,' 'wild privatization' or '*nomenklatura* privatization'" (Major 1993, 132). The Communist elite justified this process by arguing that it had run the former state enterprises for decades, and therefore knew best how to manage them. If the properties were restored to their former

owners, general mismanagement would follow. Productivity would fall, unemployment would rise, and economic growth would suffer, harming virtually everyone.

These arguments were specious. In truth, Communist managers had not acquired the skills necessary for successful management in a capitalist economy. The chief managerial skills required in command economies had been negotiating and lobbying. Expertise in “marketing, quality control, product development, and finance were not deemed necessary” (Rondinelli 1994, 3). In these crucial regards, enterprises in the former Communist regimes were more like government departments than business enterprises. As Jozef Brabant (1992, 216) observed,

economically, there is no reason to believe that turning over assets to those who ran these facilities poorly when they were formally under state control will improve resource allocation. . . . There is no guarantee that old-style managers will potentially do better than other asset holders.

However, judging by the absence of public pressure (as distinct from resigned resentment) against wild privatization, the *nomenklatura*'s unsound consequentialist argument was effective in an intellectual environment dominated by xenophobia (which precluded selling assets to foreigners), the absence of civil society, and ignorance of economics.

Another consequentialist argument in favor of *nomenklatura* privatization arose ex post facto, purporting to justify the maintenance of this property regime after its initial implementation. This argument was that a society needs to maintain stable property rights in order to prosper. Without a stable property regime, long-term investment is too risky, capital flight is rational, and asset stripping is the norm. While the countervailing incentives to current owners that are produced by protecting the status quo cannot by themselves justify any property regime, since a new regime might offer equal or greater incentives to different owners, frequent radical redistributions reduce investment motivations across the board, and owners who do not expect to retain their properties for the long term underinvest and strip assets. Thus it was held that the radical redistribution of properties wrongfully acquired by members of the Communist *nomenklatura* would have damaged the economy and undermined the welfare of all who depended on it. This argument ef-

fectively convinced many economists to support the results of the *nomenklatura* privatization.

Prehistory, History, and the New Politics of Property Rights

A number of recent developments account for the new politics of property rights. These include better knowledge of history; the spread of human-rights politics and rhetoric; the new urban economy; and the failure of all the major radical redistributions of the twentieth century to substantially improve the lot of the poor, or even to result in substantially more egalitarian societies.

Homo sapiens evolved about 100,000 years ago in Eastern Africa and, as hunters and gatherers, set about appropriating the Earth. Arguably, even that “first” appropriation was morally problematic, because the Earth was already populated by other humanoids, such as Neanderthals, with strong claims to be moral subjects. If Neanderthals were moral subjects, they had rights to the lands where they hunted game and gathered plants and insects. But for the sake of our current argument, we will ignore such competing groups of humanoids.

Homo sapiens successfully left Africa about 65,000 years ago. They migrated to the shores of southern Asia and Australia, where they hunted, fished, gathered, and flourished. About 40,000 years ago, they spread into the plains of central Asia. From this base, during and after the last Ice Age, they launched their appropriation of Europe and the Americas. By about 15,000 years ago, almost all land suitable for human use already had its first “owners.” The last pieces of global real estate to be appropriated for the first time were the Pacific islands and New Zealand, about 1,500 years ago.

Prior to the recent growth in movable forms of property, there was little that people could exchange with each other to purchase hunting and gathering “rights.” Forceful appropriation of land appears to have happened more often than its voluntary exchange. An additional, enormous stimulus for the appropriation of land arose from the Neolithic revolution. The invention of agriculture in the Fertile Crescent made land more productive, feeding more people with less effort, supporting larger and more concentrated populations, and freeing a growing pool of laborers from agricultural work. These be-

came craftsmen, warriors, priests, scholars, and rulers, ushering in the dawn of civilization.

Genetic research demonstrates that a large population of Middle Eastern males migrated to Europe around the time of the Neolithic revolution there (Cavalli-Sforza 2002; Olson 2003). They brought with them the agricultural technology that enabled this revolution. Armed with that, and other advantages of civilization, they were able to claim Europe as their own. It is likely that their capture of the Continent occurred substantially by force. By some combination of slaughter, castration, economic domination, and other means, Neolithic Middle-Eastern men appear to have obliterated the genetic traces of Neolithic European men.

More-recent history contains mountains of evidence of appropriation by force. The American West was won first by guile and violence and only later by labor. European history records nearly endless waves of war, violent migration, and expropriation. Labor, innovation, and voluntary transfer may well have been the exception rather than the rule for most of history.

The emergence of civil society guaranteed by the rule of law in urban Europe in the late Middle Ages proved a turning point. But it has become possible for a great number of people to accumulate property through voluntary exchanges only with recent technological innovation and rapid economic growth.

The results of research in genetics are new. But since at least the eighteenth century, historians have forced their readers to remember the record of misappropriation. As higher education has made this information common knowledge, the notion of historical legitimacy for existing property distributions has grown increasingly obsolete, while history seems to offer a much more solid base for radical redistribution founded on restitution. Thus, while such philosophers as Locke (1688) told fairy tales about initial acquisition to audiences that found in them credible and useful ways to determine property rights, Nozick (1974) was deterred from even trying to determine which present holdings were initially justified by a Lockean process of labor mixing. Nozick may figure as the last major philosopher to try to reconcile conservative views about property distribution with an historical theory of property rights. As he acknowledged, the Lockean theory, even if purged of its philosophical perplexities, could justify massive property redistribution depending on the actual prehistory of present-day holdings.

Similarly, European colonists had no need for historians to tell them

how they appropriated their properties. They knew well that their land had been previously inhabited and was not voluntarily transferred to them; but they viewed the forced transfers as just. As one Georgia governor and congressman put it:

Treaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it. (Gilmer [1830] 1963, 83.)

The American colonists' "right" to the lands they possessed relied on two claims: that the natives were not human, and that in any case, they did not customarily own property. One Pennsylvania Supreme Court judge (1795–1814) articulated both notions at once when he said that the "animals, vulgarly called Indians" could have no property rights (Brackenridge 1782). Before John Winthrop set sail in 1630, the Reverend John Cotton ([1630] 1985, 75–80) articulated for him the "spiritual" basis for appropriating American land to found the Massachusetts Bay Colony that Cotton himself would later join:

Admitteth it as a Principle of Nature, That in a vacant soyle, hee that taketh possession of it, and bestoweth culture and husbandry upon it, his Right it is. And the ground of this is from the grand Charter given to *Adam* and his posterity in Paradise, *Gen.* 1.28.

Thus, by decree of God, Nature, and European man, uncultivated land belonged not to the hunter-gatherer but the settler-farmer.

What use do these ringed, streaked, spotted and speckled cattle make of the soil? Do they till it? Revelation said to man, "Thou shalt till the ground." This alone is human life. . . . To live by tilling is *more humano*, by hunting is *more bestiarum*. I would as soon admit a right in the buffalo to grant lands, as in Killbuck, the Big Cat, the Big Dog, or any of the ragged wretches that are called chiefs and sachams. . . . (Brackenridge 1782.)

Over a hundred years later, Theodore Roosevelt (1891, 331) endorsed this legal reasoning in secularized and less inflammatory terms.

It cannot be too often insisted that [the Indians] did not own the land; or, at least, that their ownership was merely such as that claimed often

by our own white hunters. . . . To recognize the Indian ownership of the limitless prairies and forests of this continent—that is, to consider the dozen squalid savages who hunted at long intervals over a territory of a thousand square miles as owning it outright—necessarily implies a similar recognition of the claims of every white hunter, squatter, horse-thief, or wandering cattle-man.

Property rights in America were based from the founding of the colonies until the twentieth century on the linked notions that natives were less than fully human and that they had no claim on the land. At least since the Second World War, these assertions have virtually vanished from public acceptance. Dehumanizing ethnic groups and denying any moral obligations to them are practices now indelibly associated with the Nazi project. Few people are willing to claim any more that some ethnic group is not human, or that its members have no rights.

In the contemporary urban economy, in which the large majority of people perform no agricultural work, the Neolithic tendency to deny nonfarmers property rights or the status of “human” would be howled down as absurdly arbitrary and unfair. In the last decade, Australian courts formally incorporated the new sensibility into law, repudiating the *terra nullius* doctrine that had rendered precolonial Australia and New Zealand (and, for that matter, North America) unowned (Dodds 1998). Gathering, hunting, farming, and other forms of labor now have equal standing before property law.

On the other hand, the history of the twentieth century recounts the continuous failure of radical projects of property distribution to ameliorate the situation of the poor in whose name redistribution was pursued, once the historical defenses of the status quo began to collapse in the previous century. Instead of helping the poor, radical distribution benefited the political/bureaucratic class that directed it. The Communist collectivization project provided jobs and some wealth for political *apparatchiki*, but resulted in mass peasant starvation during and following collectivization. Most of the millions who perished as a result of Communism were not real or imaginary political enemies of the regime, who died in the gulags; they were expropriated farmers.

Likewise, in postcolonial countries, radical redistribution benefited the poor only very rarely. More often a new, indigenous class of bureaucrats gained control over such natural resources as oil and diamonds and such cash crops as poppies. These sources of income allowed their

controllers to rule without needing to raise taxes. Consequently, they did little to increase the standard of living of their subjects, and they had the leeway to run oppressive, destructive regimes. State bureaucracies that have amassed power sufficient to force a radical redistribution of property have felt little obligation to redistribute the property to others once they gained control over it. Further, as Friedman (2000) notes, drawing on such economists as Ludwig von Mises and F. A. Hayek, even a benevolent bureaucracy would be hard pressed to achieve a beneficial redistribution, since it inevitably operates under constraints of ignorance. For example, bureaucrats would be unable to determine which piece of property is best suited for whom.

At the same time redistributive schemes were failing, economies that concentrated on growth rather than redistribution achieved far greater advances for their poor. This occurred in one of three ways. First, high economic growth and technological innovation could improve the material well-being of society as a whole. Second, nonradical redistribution of property, via transfer payments and the welfare state, could buoy the socioeconomic status of the poor by filtering to them some of the general prosperity. Or, third, both of these processes could take place at once in the liberal-democratic synthesis.

The Limits of the New Politics of Property Rights

History does not offer perfect support for restitutive redistribution, in the absence of consequentialist considerations. Neither all poor people nor all of their ancestors have been victims of misappropriation. Some people become poor through bad luck, bad decisions, or just sloth. It is quite difficult to justify the radical redistribution of property to such people.

Left-wing libertarian Hillel Steiner has attempted to do so. He argues that just redistribution redresses violations of what he terms “specific titles,” such as an individual’s right to self-ownership and to the fruits of his own labor, which may have been lost through slavery or the denial of opportunities to engage in productive enterprise or voluntary transfers. Focusing primarily on those cases where states are said to owe redress to other states or entire peoples, Steiner (1994, 266–82) advocates a program of redistribution through a “global fund.” He proposes determining how much is owed to this fund, by whom it is owed, and to whom they owe restitution, by calculating the proportions of “initially

unowned things” that were appropriated by and from various parties. Steiner bases this proposal on the assumption that “in a fully appropriated world, each person’s original right to an equal portion of initially unowned things amounts to a right to an equal share of their total value” (ibid., 271). Therefore, he concludes, “undeserving” poor people (judged according to an historical theory of appropriation) are entitled to receive a share from that global fund in compensation for the initially unowned natural resources to which they have a right, but that have been appropriated by others. Their rights extend to genetic resources, the value of which must be equally apportioned to those un- luckily endowed with bad genes.

Steiner’s ostensibly thorough disposition of property entitlements does not, however, consider the possibility that there may be paupers with superior genes or large financial inheritances who squandered their advantages. Given such cases, there is still no rationale for universal redistribution. Unlike the classical egalitarian consequentialist, concerned with the putatively beneficial results of redistribution, the left-wing libertarian concerned with intrinsically valid property rights finds it quite difficult to justify universal redistributive coverage for the poor.

Consequentialist-conservative economic theories are also inherently limited. It is difficult to find an economic-utility justification for the idle rich. Some wealthy people, either because they have more wealth than they could possibly use, because they are lazy, or because they are extremely risk averse, do not maximize their returns. The Duke of Westminster owns much of central London. He collects rent on his properties through agents. By maximizing rents, his agents ensure that only those who secure the highest value from living and working in London will live and work there. However, had the Duke been interested in *developing* his properties rather than just collecting rent from them, there is little doubt that the economy of London would have benefitted immensely from extra office space and living quarters. The Duke is sufficiently wealthy or lazy or ignorant to have foregone this lucrative possibility. Had his property been radically redistributed to his tenants or sold to the highest bidder, the beneficial economic effects might have been considerable.

Conservatives may therefore fall back on a non-maximizing consequentialist position. True, the Duke of Westminster does not maximize his profits, but he generates some profits, and to that extent contributes to the general welfare. This argument is unconvincing, though, as it

provides no reason *not* to maximize wealth in accord with the consequentialist pursuit of the greater good. Even a nonmaximizing consequentialism cannot protect the property rights of owners who, for example, let their property lie altogether idle or hold inactive patents. In addition to performing no economic activity, such owners prevent others from doing so—blocking the development of their idle real estate and use of their patented technology. Therefore, to justify the property rights of the idle rich, conservatives must abandon consequentialism and fall back on logically incompatible historical property rights.³

These are forced moves in any debate about the justification of property rights, old or new.

NOTES

1. We borrow this concept from Friedman 1991 and 1992.
2. Contemporary discourse on indigenous peoples, national identity and “group rights” extends claims for restitution well beyond land rights to usurped cultural and political rights.
3. Friedman’s political consequentialism, however, could be invoked to defend the aggregate benefits of a system that allowed “market imperfections” such as the idle rich, by virtue of thereby closing the door to economically illiterate redistributions—a door that might be opened if it fell within the purview of politics to routinely redress departures from perfectly functioning markets.

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