

# The Ethics and Economics of Private Property

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From the Elgar *Companion to the Economics of Private Property*  
Edited by Enrico Colombatto  
London: Edward Elgar, 2004

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## *I. The Problem of Social Order*

Alone on his island, Robinson Crusoe can do whatever he pleases. For him, the question concerning rules of orderly human conduct - social cooperation - simply does not arise. Naturally, this question can only arise once a second person, Friday, arrives on the island. Yet even then, the question remains largely irrelevant so long as no *scarcity* exists. Suppose the island is the Garden of Eden; all external goods are available in

superabundance. They are “free goods,” just as the air that we breathe is normally a “free” good. Whatever Crusoe does with these goods, his actions have repercussions *neither* with respect to his own future supply of such goods *nor* regarding the present or future supply of the same goods for Friday (and *vice versa*). Hence, it is impossible that there could ever be a conflict between Crusoe and Friday concerning the use of such goods. A conflict is only possible if goods are scarce. Only then will there arise the need to formulate rules that make orderly - conflict-free - social cooperation possible.

In the Garden of Eden only two scarce goods exist: the physical body of a person and its standing room. Crusoe and Friday each have only one body and can stand only at one place at a time. Hence, even in the Garden of Eden conflicts between Crusoe and Friday can arise: Crusoe and Friday cannot occupy the same standing room simultaneously without coming thereby into physical conflict with each other. Accordingly, even in the Garden of Eden rules of orderly social conduct must exist - rules regarding the proper location and movement of human bodies. And outside the Garden of Eden, in the realm of scarcity, there must be rules that regulate not only the use of personal bodies but also of *everything* scarce so that *all* possible conflicts can be ruled out. This is the problem of social order.

## ***II. The Solution: Private Property and Original Appropriation***

In the history of social and political thought, various proposals have been advanced as a solution to the problem of social order, and this variety of mutually inconsistent proposals has contributed to the fact that today’s search for a single “correct” solution is frequently deemed illusory. Yet as I will try to demonstrate, a correct solution exists; hence, there is no reason to succumb to moral relativism. The solution has been known for hundreds of years, if not for much longer.<sup>1</sup> In modern times this old and simple solution was formulated most clearly and convincingly by Murray N. Rothbard.<sup>2</sup>

Let me begin by formulating the solution - first for the special case represented by the Garden of Eden and subsequently for the general case represented by the “real” world of all-around scarcity - and then proceed to the explanation of why this solution, and no other, is correct.

In the Garden of Eden, the solution is provided by the simple rule stipulating that everyone may place or move his own body wherever he pleases, *provided only that no one else is already standing there and occupying the same space*. And outside of the Garden of Eden, in the realm of all-around scarcity the solution is provided by this rule:

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<sup>1</sup> See section V below.

<sup>2</sup> See Murray N. Rothbard, *Man, Economy, and State* (Auburn, AL: Mises Institute, 1993 [1962]); idem, *Power and Market* (Kansas City: Sheed Andrews & McMeel, 1977 [1970]); idem, *The Ethics of Liberty* (New York: New York University Press, 1998 [1982]); idem, *Egalitarianism as a Revolt against Nature and other Essays* (Auburn, AL: Mises Institute, 2000 [1974]); idem, *The Logic of Action*, 2 vols. (Cheltenham, UK: Edward Elgar, 1997).

Everyone is the proper owner of his own physical body as well as of all places and nature-given goods that he occupies and puts to use by means of his body, *provided that no one else has already occupied or used the same places and goods before him*. This ownership of “originally appropriated” places and goods by a person implies his right to use and transform these places and goods in any way he sees fit, *provided that he does not thereby forcibly change the physical integrity of places and goods originally appropriated by another person*. In particular, once a place or good has been first appropriated, in John Locke’s words, by “mixing one’s labor” with it, ownership in such places and goods can be acquired only by means of a voluntary - contractual - transfer of its property title from a previous to a later owner.

In light of wide-spread moral relativism, it is worth pointing out that this idea of original appropriation and private property as a solution to the problem of social order is in complete accordance with our moral “intuition.” Is it not simply absurd to claim that a person should *not* be the proper owner of his body and the places and goods that he originally, i.e., *prior* to anyone else, appropriates, uses and/or produces by means of his body? For who else, if not he, should be their owner? And is it not also obvious that the overwhelming majority of people - including children and primitives - in fact act according to these rules, and do so as a matter of course?

Moral intuition, as important as it is, is not proof. However, there also exists proof of the veracity of our moral intuition.

The proof is two-fold. On the one hand, the consequences that follow if one were to deny the validity of the institution of original appropriation and private property are spelled out: If person A were *not* the owner of his own body and the places and goods originally appropriated and/or produced with this body as well as of the goods voluntarily (contractually) acquired from another previous owner, then only two alternatives would exist. Either *another* person, B, must be recognized as the owner of A’s body as well as the places and goods appropriated, produced or acquired by A, or *both* persons, A and B, must be considered equal co-owners of all bodies, places and goods.

In the first case, A would be reduced to the rank of B’s slave and object of exploitation. B would be the owner of A’s body and all places and goods appropriated, produced and acquired by A, but A in turn would not be the owner of B’s body and the places and goods appropriated, produced and acquired by B. Hence, under this ruling two categorically distinct classes of persons would be constituted - *Untermenschen* such as A and *Uebermenschen* such as B - to whom different “laws” apply. Accordingly, such ruling must be discarded as a human ethic equally applicable to everyone *qua* human being (rational animal). From the very outset, any such ruling is recognized as not universally acceptable and thus cannot claim to represent law. For a rule to aspire to the rank of a law - a *just* rule - it is necessary that such a rule apply equally and universally to everyone.

Alternatively, in the second case of universal and equal co-ownership, the requirement of equal law for everyone would be fulfilled. However, this alternative would suffer from an even more severe deficiency, because if it were applied, all of mankind would instantly perish. (Since every human ethic must permit the survival of mankind, this alternative must also be rejected.) Every action of a person requires the use of some scarce means (at least of the person's body and its standing room), but if all goods were co-owned by everyone, then no one, at no time and no place, would be allowed to do anything unless he had previously secured every other co-owner's consent to do so. Yet how could anyone grant such consent were he not the exclusive owner of his own body (including his vocal chords) by which means his consent must be expressed? Indeed, he would first need another's consent in order to be allowed to express his own, but these others could not give their consent without having first his, and so it would go on.

This insight into the praxeological impossibility of "universal communism," as Rothbard referred to this proposal, brings me immediately to an alternative way of demonstrating the idea of original appropriation and private property as the only correct solution to the problem of social order.<sup>3</sup> Whether or not persons have any rights and, if so, which ones, can only be decided in the course of argumentation (propositional exchange). Justification - proof, conjecture, refutation - is *argumentative* justification. Anyone who denied this proposition would become involved in a performative contradiction because his denial would itself constitute an argument. Even an ethical relativist would have to accept this first proposition, which is referred to accordingly as the *apriori of argumentation*.

From the undeniable acceptance - the axiomatic status - of this apriori of argumentation, two equally necessary conclusions follow. First, it follows from the apriori of argumentation when there is *no* rational solution to the problem of conflict arising from the existence of scarcity. Suppose in my earlier scenario of Crusoe and Friday that Friday were not the name of a man but of a gorilla. Obviously, just as Crusoe could face conflict regarding his body and its standing room with Friday the man, so might he with Friday the gorilla. The gorilla might want to occupy the same space that Crusoe already occupied. In this case, at least if the gorilla were the sort of entity that we know gorillas to be, there would be no rational solution to their conflict. Either the gorilla would push aside, crush, or devour Crusoe - that would be the gorilla's solution to the problem - or Crusoe would tame, chase, beat, or kill the gorilla - that would be Crusoe's solution. In this situation, one might indeed speak of moral relativism. However, it would be more appropriate to refer to this situation as one in which the question of justice and rationality simply would not arise; that is, it would be considered an extra-moral situation. The existence of Friday the gorilla would pose a technical, not a moral,

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<sup>3</sup> See also Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer Academic Publishers, 1989); idem, *The Economics and Ethics of Private Property* (Boston: Kluwer Academic Publishers, 1993).

problem for Crusoe. He would have no other choice than to learn how to successfully manage and control the movements of the gorilla just as he would have to learn to manage and control other inanimate objects of his environment.

By implication, only if both parties in a conflict are capable of engaging in argumentation with one another, can one speak of a moral problem and is the question of whether or not there exists a solution to it a meaningful question. Only if Friday, regardless of his physical appearance, is capable of argumentation (even if he has shown himself to be capable only once), can he be deemed rational and does the question whether or not a correct solution to the problem of social order exists make sense. No one can be expected to give *any* answer to someone who has never raised a question or, more to the point, who has never stated his own relativistic viewpoint in the form of an argument. In that case, this “other” cannot but be regarded and treated as an animal or plant, i.e., as an extra-moral entity. Only if this other entity can pause in his activity, whatever it might be, step back, and say “yes” or “no” to something one has said, do we owe this entity an answer and, accordingly, can we possibly claim that our answer is the correct one for both parties involved in a conflict.

Moreover, it follows from the apriori of argumentation that everything that must be presupposed in the course of an argumentation as the logical and praxeological precondition of argumentation cannot in turn be argumentatively disputed as regards its validity without becoming thereby entangled in an internal (performative) contradiction.

Now, propositional exchanges are not made up of free-floating propositions, but rather constitute a specific human activity. Argumentation between Crusoe and Friday requires that both have, and mutually recognize each other as having, exclusive control over their respective bodies (their brain, vocal chords, etc.) as well as the standing room occupied by their bodies. No one could propose anything and expect the other party to convince himself of the validity of this proposition or deny it and propose something else unless his and his opponent’s right to exclusive control over their respective bodies and standing rooms were presupposed. In fact, it is precisely this mutual recognition of the proponent’s as well as the opponent’s property in his own body and standing room which constitutes the *characteristicum specificum* of all propositional disputes: that while one may not agree regarding the validity of a specific proposition, one can agree nonetheless on the fact that one disagrees. Moreover, this right to property in one’s own body and its standing room must be considered *apriori* (or indisputably) justified by proponent and opponent alike. Anyone who claimed any proposition as valid vis-à-vis an opponent would already presuppose his and his opponent’s exclusive control over their respective body and standing room simply in order to say “I claim such and such to be true, and I challenge you to prove me wrong.”

Furthermore, it would be equally impossible to engage in argumentation and rely on the propositional force of one’s arguments if one were not allowed to own (exclusively control) other scarce means (besides one’s body and its standing room). If

one did not have such a right, then we would all immediately perish and the problem of justifying rules - as well as any other human problem - would simply not exist. Hence, by virtue of the fact of being alive property rights to other things must be presupposed as valid, too. No one who is alive can possibly argue otherwise.

Furthermore, if a person were not permitted to acquire property in these goods and spaces by means of an act of original appropriation, i.e., by establishing an objective (intersubjectively ascertainable) link between himself and a particular good and/or space prior to anyone else, and if instead property in such goods or spaces were granted to late-comers, then no one would ever be permitted to begin using any good unless he had previously secured such a late-comer's consent. Yet how can a late-comer consent to the actions of an early-comer? Moreover, every late-comer would in turn need the consent of other and later later-comers, and so on. That is, neither we, our forefathers, nor our progeny would have been or would be able to survive if one followed this rule. However, in order for any person - past, present or future - to argue anything, survival must be possible; and in order to do just this property rights cannot be conceived of as being timeless and unspecific with respect to the number of persons concerned. Rather, property rights must necessarily be conceived of as originating by means of action at definite points in time and space by definite individuals. Otherwise, it would be impossible for anyone to ever say anything at a definite point in time and space and for someone else to be able to reply. Simply saying, then, that the first-user-first-owner rule of the ethics of private property can be ignored or is unjustified implies a performative contradiction, as one's being able to say so must presuppose one's existence as an independent decision-making unit at a given point in time and space.<sup>4</sup>

### ***III. Misconceptions and Clarifications***

According to this understanding of private property, property ownership means the exclusive control of a particular person over specific *physical* objects and spaces. Conversely, property rights invasion means the uninvited *physical* damage or diminution of things and territories owned by other persons. In contrast, a widely held view holds that the damage or diminution of the *value* (or price) of someone's property also constitutes a punishable offense.

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<sup>4</sup> Note the "natural law" character of the proposed solution to the problem of social order - that private property and its acquisition through acts of original appropriation are not mere conventions but necessary institutions (in accordance with man's nature as a rational animal). A convention serves a *purpose*, and an *alternative* to a convention exists. For instance, the Latin alphabet serves the purpose of written communication. It has an alternative, the Cyrillic alphabet. Hence, we call it a convention. What is the purpose of norms? The avoidance of conflict regarding the use of scarce physical things. Conflict-generating norms contradict the very purpose of norms. Yet with regard to the purpose of conflict avoidance, no alternative to private property and original appropriation exists. In the absence of prestabilized harmony among actors, conflict can only be prevented if all goods are always in the private ownership of specific individuals and it is always clear who owns what and who does not. Also, conflicts can only be avoided from the very beginning of mankind if private property is acquired by acts of original appropriation (instead of by mere declarations or words of late-comers).

As far as the (in)compatibility of both positions is concerned, it is easy to recognize that nearly every action of an individual can alter the *value* (price) of someone else's property. For example, when person A enters the labor or the marriage market, this may change the value of B in these markets. And when A changes his relative valuations of beer and bread, or if A himself decides to become a brewer or baker, this changes the value of the property of other brewers and bakers. According to the view that *value* damage constitutes a rights violation, A would be committing a punishable offense vis-à-vis brewers or bakers. If A is *guilty*, then B and the brewers and bakers must have the right to *defend* themselves against A's actions, and their defensive actions can only consist of physical invasions of A and his property. B must be permitted to physically prohibit A from entering the labor or marriage market; the brewers and bakers must be permitted to physically prevent A from spending his money as he sees fit. However, in this case the physical damage or diminution of the property of others cannot be viewed as a punishable offense. Since physical invasion and diminution are defensive actions, they are legitimate. Conversely, if physical damage and diminution constitute a rights violation, then B or the brewers and bakers do not have the right to defend themselves against A's actions, for his actions - his entering of the labor and marriage market, his altered evaluation of beer and bread, or his opening of a brewery or bakery - do not affect B's bodily integrity or the physical integrity of the property of brewers or bakers. If they physically defend themselves nonetheless, then the right to defense would lie with A. In that case, however, it can not be regarded as a punishable offense if one alters the value of other people's property. A third possibility does not exist.

Both ideas of property rights are not only incompatible, however. The alternative view - that one could be the owner of the value or price of scarce goods - is indefensible. While a person has control over whether or not his actions will change the *physical* properties of another's property, he has no control over whether or not his actions affect the *value* (or price) of another's property. This is determined by *other* individuals and their evaluations. Consequently, it would be impossible to know in advance whether or not one's planned actions were legitimate. The entire population would have to be interrogated to assure that one's actions would not damage the value of someone else's property, and one could not begin to act until a universal consensus had been reached. Mankind would die out long before this assumption could ever be fulfilled.

Moreover, the assertion that one has a property right in the value of things involves a contradiction, for in order to claim this proposition to be valid - universally agreeable - it would have to be assumed that it is permissible to act *before* agreement is reached. Otherwise, it would be impossible to ever propose anything. However, if one is permitted to assert a proposition - and no one could deny this without running into contradictions - then this is only possible because *physical* property borders exist, i.e., borders which everyone can recognize and ascertain independently and in complete

ignorance of others' subjective valuations.<sup>5</sup>

Another, equally common misunderstanding of the idea of private property concerns the classification of actions as permissible or impermissible based *exclusively* on their physical effects, i.e., without taking into account that every property right has a *history* (temporal genesis).

If A currently physically damages the property of B (for example by air pollution or noise), the situation must be judged differently depending on whose property right was established *earlier*. If A's property was founded first, and if he had performed the questionable activities before the neighboring property of B was founded, then A may continue with his activities. A has established an easement. From the outset, B had acquired dirty or loud property, and if B wants to have his property clean and quiet he must pay A for this advantage. Conversely, if B's property was founded first, then A must stop his activities; and if he does not want to do this, he must pay B for this advantage. Any other ruling is impossible and indefensible because as long as a person is alive and awake, he cannot *not* act. An early-comer cannot, even if he wished otherwise, wait for a late-comer and his agreement before he begins acting. He must be permitted to act immediately. And if no other property besides one's own exists (because a late-comer has not yet arrived), then one's range of action can be deemed limited only by laws of nature. A late-comer can only challenge the legitimacy of an early-comer if *he* is the owner of the goods affected by the early-comer's actions. However, this implies that one can be the owner of un-appropriated things; i.e., that one can be the owner of things one has not yet discovered or appropriated through physical action. This means that no one is permitted become the first user of a previously undiscovered and unappropriated physical entity.

#### ***IV. The Economics of Private Property***

The idea of private property not only agrees with our moral intuitions and is the sole just solution to the problem of social order; the institution of private property is also the basis of economic prosperity and of "social welfare." As long as people act in accordance with the rules underlying the institution of private property, social welfare is optimized.

Every act of original appropriation improves the welfare of the appropriator (at least *ex ante*); otherwise, it would not be performed. At the same time, no one is made worse off by this act. Any other individual could have appropriated the same goods and territories if only he had recognized them as scarce, and hence, valuable. However, since

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<sup>5</sup> While *no one* could act if *everyone* owned the value of his property, it is practically possible that *one* person or group, A, owns the value of his property and can determine what *another* person or group, B, may or may not do with the things under their control. This, however, means that B "owns" *neither* the value *nor* the physical integrity of the things under his control; that is, B and his property are actually owned by A. This rule can be implemented, but it does not qualify as a human ethic. Instead, it is a two-class system of exploiting Uebermensch and exploited Untermensch.



no other individual made such an appropriation, no one else can have suffered a welfare loss on account of the original appropriation. Hence, the so-called Pareto-criterion (that it is scientifically legitimate to speak of an improvement of "social welfare" only if a particular change increases the individual welfare of at least one person and leaves no one else worse off) is fulfilled. An act of original appropriation meets this requirement. It enhances the welfare of one person, the appropriator, without diminishing anyone else's physical wealth (property). Everyone else has the same quantity of property as before and the appropriator has gained new, previously non-existent property. In so far, an act of original appropriation always increases social welfare.

Any further action with originally appropriated goods and territories enhances social welfare, for no matter what a person does with his property, it is done to increase his welfare. This is the case when he consumes his property as well as when he produces new property out of "nature." Every act of production is motivated by the producer's desire to transform a less valuable entity into a more valuable one. As long as acts of consumption and production do not lead to the physical damage or diminution of property owned by others, they are regarded as enhancing social welfare.

Finally, every voluntary exchange (transfer) of appropriated or produced property from one owner to another increases social welfare. An exchange of property is only possible if both owners prefer what they acquire over what they surrender and thus expect to benefit from the exchange. Two persons gain in welfare from every exchange of property, and the property under the control of everyone else is unchanged.

In distinct contrast, any deviation from the institution of private property must lead to social welfare losses.

In the case of universal and equal co-ownership - universal communism instead of private property - the price to be paid would be mankind's instant death because universal co-ownership would mean that no one would be allowed to do anything or move anywhere. Each actual deviation from a private property order would represent a system of unequal domination and hegemony. That is, it would be an order in which *one* person or group - the rulers, exploiters or Uebermenschen - would be permitted to acquire property *other than* by original appropriation, production or exchange, while another person or group - the ruled, exploited or Untermenschen - would be prohibited from doing likewise. While hegemony is possible, it would involve social welfare losses and would lead to relative impoverishment.

If A is permitted to acquire a good or territory which B has appropriated as indicated by visible signs, the welfare of A is increased at the expense of a corresponding welfare loss on the part of B. The Pareto criterion is not fulfilled, and social welfare is sub-optimal. The same is true with other forms of hegemonic rule. If A prohibits B from originally appropriating a hitherto unowned piece of nature; if A may acquire goods produced by B without B's consent; if A may proscribe what B is permitted

to do with his appropriated or produced goods (apart from the requirement that one is not permitted to physically damage or diminish others' property) - in each case there is a "winner," A, and a "loser," B. In every case, A increases his supply of property at the expense of B's corresponding loss of property. In no case is the Pareto criterion fulfilled, and a sub-optimal level of social welfare always results.

Moreover, hegemony and exploitation lead to a reduced level of future production. Every ruling which grants non-appropriators, non-producers and non-traders control, either partial or full, over appropriated, produced or traded goods, leads necessarily to a reduction of future acts of original appropriation, production and mutually beneficial trade. For the person performing them, each of these activities is associated with certain costs, and the costs of performing them increases under a hegemonic system and those of not performing them decreases. Present consumption and leisure become more attractive as compared to production (future consumption), and the level of production will fall below what it otherwise would have been. As for the rulers, the fact that they can increase their wealth by expropriating property appropriated, produced or contractually acquired by others will lead to a wasteful usage of the property at its disposal. Because they are permitted to supplement their future wealth by means of expropriation (taxes), present-orientation and consumption (high time preference) is encouraged, and insofar as they use their goods "productively" at all, the likelihood of misallocations, miscalculation, and economic loss is systematically increased.

### ***V. The Classic Pedigree***

As noted at the outset, the ethics and economics of private property presented above does not claim originality. Rather, it is a modern expression of a "classic" tradition, going back to beginnings in Aristotle, Roman law, Aquinas, the late Spanish Scholastics, Grotius and Locke.<sup>6</sup>

In contrast to the communist utopia of Plato's *Republic*, Aristotle provides a comprehensive list of the comparative advantages of private property in *Politics*. First, private property is more productive. "What is common to the greatest number gets the least amount of care. Men pay most attention to what is their own; they care less for what is common; or at any rate they care for it only to the extent to which each is individually concerned. Even when there is no other cause for inattention, men are more prone to neglect their duty when they think that another is attending to it."<sup>7</sup>

Secondly, private property prevents conflict and promotes peace. When people have their own separate domains of interest, "there will not be the same grounds for quarrels, and the amount of interest will increase, because each man will feel that he is

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<sup>6</sup> For details see Murray N. Rothbard, *Economic Thought Before Adam Smith. An Austrian Perspective on the History of Economic Thought, Volume I* (Aldershot, UK: Edward Elgar, 1995); also Tom Bethell, *The Noblest Triumph. Property and Prosperity Through the Ages* (New York: St. Martin's Press, 1998).

<sup>7</sup> Aristotle, *Politics* (Oxford: Clarendon Press, 1946), 1261b.

applying himself to what is his."<sup>8</sup> "Indeed, it is a fact of observation that those who own common property, and share in its management, are far more often at variance with one another than those who have property in severalty."<sup>9</sup> Further, private property has existed always and everywhere, whereas nowhere have communist utopias sprung up spontaneously. Finally, private property promotes the virtues of benevolence and generosity. It allows one to be so with friends in need.

Roman law, from the *Twelve Tables* to the *Theodosian Code* and the *Justinian Corpus*, recognized the right of private property as near absolute. Property stemmed from unchallenged possession, prior usage established easements, a property owner could do with his property as he saw fit, and freedom of contract was acknowledged. As well, Roman law distinguished importantly between 'national' (Roman) law - *ius civile* - and 'international' law - *ius gentium*.

The Christian contribution to this classic tradition - embodied in St Thomas Aquinas and the late Spanish Scholastics as well as Protestants Hugo Grotius and John Locke - is twofold. Both Greece and Rome were slave-holding civilizations. Aristotle, characteristically, considered slavery a natural institution. In contrast, Western - Christian - civilization, notwithstanding some exceptions, has been essentially a society of free men. Correspondingly, for Aquinas as for Locke, every person had a proprietary right over himself (self-ownership). Moreover, Aristotle, and classic civilization generally, were disdainful of labor, trade, and money-making. In contrast, in accordance with the Old Testament, the Church extolled the virtues of labor and work. Correspondingly, for Aquinas as for Locke, it was by work, use, and cultivation of previously unused land that property first came into existence.

This classic theory of private property, based on self-ownership, original appropriation (homesteading), and contract (title transfer), continued to find prominent proponents, such as J. B. Say. However, from the height of its influence in the eighteenth century until quite recently, with the advance of the Rothbardian movement, the classic theory had slipped into oblivion.

For two centuries, economics and ethics (political philosophy) had diverged from their common origin in natural law doctrine into seemingly unrelated intellectual endeavors. Economics was a value-free "positive" science. It asked "what means are appropriate to bring about a given (assumed) end?" Ethics was a "normative" science (if it was a science at all). It asked "what ends (and what use of means) is one justified to choose?" As a result of this separation, the concept of property increasingly disappeared from both disciplines. For economists, property sounded too normative; for political philosophers property smacked of mundane economics.

In contrast, Rothbard noted, such elementary economic terms as direct and

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<sup>8</sup> Ibid, 1263a.

<sup>9</sup> Ibid, 1263b.

indirect exchange, markets and market prices as well as aggression, crime, tort, and fraud cannot be defined or understood without a theory of property. Nor is it possible to establish the familiar economic theorems relating to these phenomena without the implied notion of property and property rights. A definition and theory of property must precede the definition and establishment of all other economic terms and theorems.

Rothbard's unique contribution, from the early 1960s until his death in 1995, was the rediscovery of property and property rights as the common foundation of both economics and political philosophy, and the systematic reconstruction and conceptual integration of modern, marginalist economics and natural-law political philosophy into a unified moral science: libertarianism.

### ***V. Chicago Diversions***

At the time when Rothbard was restoring the concept of private property to its central position in economics and reintegrating economics with ethics, other economists and legal theorists associated with the University of Chicago such as Ronald Coase, Harold Demsetz, and Richard Posner were also beginning to redirect professional attention to the subject of property and property rights.<sup>10</sup>

However, whereas for Rothbard private property and ethics logically precede economics, for the latter private property and ethics are subordinate to economics and economic considerations. According to Posner, whatever increases social wealth is just.<sup>11</sup>

The difference between the two approaches can be illustrated considering one of Coase's problem cases: A railroad runs beside a farm. The engine emits sparks, damaging the farmer's crop. What is to be done?

From the classic viewpoint, what needs to be established is who was there first, the farmer or the railroad? If the farmer was there first, he could force the railroad to cease and desist or demand compensation. If the railroad was there first, then it might continue emitting sparks and the farmer would have to pay the railroad to be spark free.

From the Coasean point of view, the answer is twofold. First and "positively" Coase claims that it does not matter *how* property rights and liability are allocated as long as they *are* allocated and provided (unrealistically) that transaction costs are zero.

Coase claims it is wrong to think of the farmer and the railroad as either "right" or "wrong" (liable), as "aggressor" or "victim." "The question is commonly thought of as

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<sup>10</sup> See Ronald Coase, *The Firm, The Market, and the Law* (Chicago, University of Chicago Press, 1988); Harold Demsetz, *Ownership, Control, and the Firm* (Oxford: Basil Blackwell, 1988); Richard Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981).

<sup>11</sup> Posner, *The Economics of Justice*, p. 74: "an act of injustice (is defined) as an act that reduces the wealth of society."

one in which A inflicts harm on B and what has to be decided is, How should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A. The real question that has to be decided is, Should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."<sup>12</sup>

Further, given the "equal" moral standing of A and B, for the allocation of economic resources it allegedly does not matter to whom property rights are initially assigned. Suppose the crop loss to the farmer, A, is \$1000, and the cost of a spark apprehension device (SAD) to the railroad, B, is \$750. If B is found liable for the crop damage, B will install an SAD or cease operations. If B is found not liable, then A will pay a sum between \$750 and \$1000 for B to install an SAD. Both possibilities result in the installation of an SAD. Now assume the numbers are reversed: the crop loss is \$750, and the cost of an SAD is \$1000. If B is found liable, he will pay A \$750, but he will not install an SAD. And if B is found not liable, A is unable to pay B enough to install a SAD. Again, both scenarios end with the same result: there will be *no* SAD. Therefore, regardless of how property rights are initially assigned, according to Coase, Demsetz and Posner the allocation of production factors will be the same.

Second and "normatively" - and for the only *realistic* case of *positive* transaction costs - Coase, Demsetz and Posner demand that courts assign property rights to contesting parties in such a way that "wealth" or the "value of production" is maximized. For the case just considered this means that if the cost of the SAD is less than the crop loss, then the court should side with the farmer and hold the railroad liable. Otherwise, if the cost of the SAD is higher than the loss in crops, then the court should side with the railroad and hold the farmer liable. Posner offers another example. A factory emits smoke and thereby lowers residential property values. If property values are lowered by \$ 3 million and the plant relocation cost is \$2 million, the plant should be held liable and forced to relocate. Yet if the numbers are reversed - property values fall by \$2 million and relocation costs are \$3 million - the factory may stay and continue to emit smoke.

Both the positive and the normative claim of Chicago law and economics must be rejected.<sup>13</sup> As for the claim that it does not matter to whom property rights are initially

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<sup>12</sup> Ronald Coase, "The Problem of Social Cost," in: idem, *The Firm, the Market, and the Law*, p. 96.

The moral perversity of this claim is best illustrated by applying it to the case of A raping B. According to Coase, A is not supposed to be restrained.. Rather, "we are dealing with a problem of a reciprocal nature." In preventing A from raping B, harm is inflicted on A because he can no longer rape freely. The real question is: Should A be allowed to rape B, or should B be allowed to prohibit A from raping him/her? "The problem is to avoid the more serious harm."

<sup>13</sup> See also Walter Block, "Coase and Demsetz on Private Property Rights," *Journal of Libertarian Studies*, Vol.1, no. 2, 1977; idem, "Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Harold Demsetz," *Review of Austrian Economics*, Vol. 8, no. 2, 1995; idem, "Private Property Rights, Erroneous Interpretations, Morality and Economics," *Quarterly Journal of Austrian Economics*, Vol. 3, no. 1, 2000; Gary North, *The Coase Theorem: A Study in Epistemology* (Tyler, Texas: Institute for Christian Economics, 1992); idem, "Undermining Property Rights: Coase and Becker," *Journal of*

assigned, three responses are in order. First, as Coase cannot help but admit, it certainly matters to the farmer and the railroad to whom which rights are assigned. It matters not just how resources are allocated but also who owns them.

Second and more importantly, for the value of social production it matters fundamentally how property rights are assigned. The resources allocated to productive ventures are not simply given. They themselves are the outcome of previous acts of original appropriation and production, and how much original appropriation and production there is depends on the incentive for appropriators and producers. If appropriators and producers are the absolute owners of what they have appropriated or produced, i.e., if no liability vis-à-vis second- or third-comers arises out of acts of appropriation and production, then the level of wealth will be maximized. On the other hand, if original appropriators and producers can be found liable vis-à-vis late comers, as is implied in Coase's "reciprocity of harm" doctrine, then the value of production will be lower than otherwise. That is, the "it doesn't matter" doctrine is counterproductive to the stated goal of wealth maximization.

Third, Coase's claim that the use of resources will be unaffected by the initial allocation of property rights is not generally true. Indeed, it is easy to produce counterexamples. Suppose the farmer does not lose \$1000 in crops because of the railroad's sparks, but he loses a flower garden worth \$1000 to him but worthless to anyone else. If the court assigns liability to the railroad, the SAD will be installed. If the court does not assign liability to the railroad, the SAD will *not* be installed because the farmer simply does not possess the funds to bribe the railroad to install an SAD. The allocation of resources is *different* depending on the initial assignment of property rights.

Similarly, contra the normative claim of Chicago law and economics that courts should assign property rights so as to maximize social wealth, three responses are in order. First, any interpersonal comparison of utility is scientifically impossible, yet courts must engage in such comparisons willy-nilly whenever they engage in cost-benefit analyses. Such cost-benefit analyses are as arbitrary as the assumptions on which they rest. For example, they assume that psychic costs can be ignored and that the marginal utility of money is constant and the same for everyone.

Second, as the numerical examples given above show, courts assign property rights differently depending on changing market data. If the SAD is less expensive than the crop damage, the farmer is found in the right, while if the SAD is more expensive than the damage, the railroad is found in the right. That is, different circumstances will lead to a re-distribution of property titles. No one can ever be sure of his property.<sup>14</sup> Legal

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*Libertarian Studies*, Vol. 16, no. 4 (forthcoming).

<sup>14</sup> Posner, *The Economics of Justice*, p. 70-71, admits this with captivating frankness: "Absolute rights play an important role in the economic theory of the law. ... But when transaction costs are prohibitive, the recognition of absolute rights is inefficient. ...property rights, although absolute, (are) contingent on transaction costs and subservient or instrumental to the goal of wealth maximization."

uncertainty is made permanent. This seems neither just nor economical; moreover, who in his right mind would ever turn to a court that announced that it may re-allocate existing property titles in the course of time depending on changing market conditions?

Finally, an ethic must not only have permanency and stability with changing circumstances; an ethic must allow one to make a decision about "just or unjust" *prior* to one's actions, and it must concern something under an actor's control. Such is the case for the classic private property ethic with its first-use-first-own principle. According to this ethic, to act justly means that a person employs only justly acquired means - means originally appropriated, produced, or contractually acquired from a previous owner - and that he employs them so that no physical damage to others' property results. Every person can determine *ex ante* whether or not this condition is met, and he has control over whether or not his actions physically damage the property of others. In distinct contrast, the wealth maximization ethic fails in both regards. No one can determine *ex ante* whether or not his actions will lead to social wealth maximization. If this can be determined at all, it can only be determined *ex post*. Nor does anyone have control over whether or not his actions maximize social wealth. Whether or not they do depends on *others'* actions and evaluations. Again, who in his right mind would subject himself to the judgment of a court that did not let him know in advance how to act justly and how to avoid acting unjustly but that would judge *ex post*, after the facts?

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