

THE RIGHT TO PRIVATE PROPERTY

On pain of living a life that's seriously immoral, a typical well-off person, like you and me, must give away most of her financially valuable assets, and much of her income, directing the funds to lessen efficiently the serious suffering of others.

—Peter Unger,
*Living High and Letting Die:
Our Illusion of Innocence*

ETHICS AND POLITICS

If one doubts that a political economic system rests on certain ethical precepts, the quotation from Peter Unger should help dispel the doubt. Suppose it is true, as Unger claims, that we are immoral if we do not “give away most of [our] financially valuable assets.” Indeed, more strongly put, suppose we are immoral if we do not support a system of law that requires this of us—that is what's meant by saying we “must” give our wealth away. What sort of legal system follows from this?

Surely one in terms of which we do not even own our wealth but share it all with those who lack wealth. To give this idea its legal teeth, a socialist economic order would have to be in force. The right to private property would have no place in such a system, for such a right, properly protected, would make it possible for wealth to be spent on goals other than giving it to the poor—according to Unger, a violation of not just a moral but ideally a legal imperative.¹

From this alone it is clear enough that ethics are essential for laying out a system of laws. But ethics is one of the most controversial concerns of human beings. At every turn of our lives we confront drastic disagreements about what human beings ought and ought not to do. From the most private, personal sphere to the most public concerns, people hold varying views on how we ought to act.

How, then, could we ever hope to unite sufficiently on ethical principles to recognize why a system of laws is justified? For those of us who take politics, including the portion of it pertaining to our economic lives, seriously, this is a vital issue.

Thus it makes sense for us to explore what ethical foundations if any might be identified and agreed on in support of the kind of political economy we consider just, namely, libertarianism. In particular, we need to consider why the right to private property ought to be protected in a human community, since in a capitalist system that right is the foundation of a free economy and is proposed as a sound foundation for justice as such.²

WHY THE CONCERN WITH PRIVATE PROPERTY?

The institution of the right to private property is perhaps the single most important condition for a society in which freedom, including free trade, is to flourish. There is no mystery about why Karl Marx put the abolition of private property at the top of his list of revolutionary changes leading to his communist utopia. Under communism we all are deemed to be one. Privacy has no place in a system that holds, as Marx proclaimed, that “the human essence is the true collectivity of man.” Privacy is ruled out *by definition*. Stealing, robbery, burglary, embezzlement, trespassing, not to mention borrowing, bequeathing, giving, and the like, are precluded where everything is the property of everyone all at once. Rather, nothing would be untoward except the failure to share, to distribute fairly what is needed or to yield to a government mandating such distribution.

However, if we are fundamentally *individuals*, then communism is not right for us, and the system of private property rights could well be the best system of political economy for human beings.

A libertarian theory of justice must address whether the strong prohibition against any kind of involuntary redistribution of privately owned wealth can be justified. It will be helpful, therefore, to explore

what may be a somewhat novel defense of private property rights as understood within the framework of classical liberal political economy.

Generally, the prohibition against any form of involuntary redistribution of wealth rests on the existence of a basic human right to private property.

WHAT IS PRIVATE PROPERTY?

Karl Marx understood well the nature of the right to private property. In his essay “On the Jewish Question,” Marx said that “the right of man to property is the right to enjoy his possessions and dispose of the same arbitrarily without regard for other men, independently, from society, the right of selfishness.” This is correct, but far from the whole story. The right to private property, whether it be a toothbrush or a factory, authorizes persons to use what they own as they see fit, without regard for other persons. This use may be reckless as well as prudent, provided it does not invade the rights of others.

The right to private property as a *natural* right was not discussed in such direct terms until the eleventh and twelfth centuries. In the early fourteenth century, William of Occam characterized natural rights as “the power of right reason,” the power to make one’s moral choices on one’s own, free of others’ intrusion. Now, since such choices are made by human beings within the natural world, it follows that one of our natural rights would have to be the right to private property, as John Locke later made clear.

Occam’s use of the term “natural rights” followed several centuries of unsystematic references to basic rights, which usually meant some area of personal jurisdiction, a sphere of privacy where the agent has full authority to choose what to think or do. Clearly, within an increasingly secular understanding of reality, the extension of the concept of basic rights to include private property rights was perfectly natural. The details may have been somewhat problematic, and indeed still remain so, but the basic notion held that the kind of being we are, namely,

human (and thus possessed of personal authority or sovereignty), has the right to private property as a basic principle of our social existence.

ONE ROLE OF PRIVATE PROPERTY IN SOCIETY

Property rights may not have been explicitly identified as such in ancient times, although the Old Testament ban on stealing is not far from the doctrine as understood later by Locke and other classical liberals. There have also been strong philosophical intimations of it in, for example, the work of Aristotle. In his *Politics* Aristotle addresses the question of the soundness of Plato's communism in the *Republic*. Plato held that at least within the ruling class of a political community, there may not be any private property, or indeed privacy, at all. Aristotle's objection goes as follows:

That all persons call the same thing mine in the sense in which each does so may be a fine thing, but it is impracticable; or if the words are taken in the other sense, such a unity in no way conduces to harmony. And there is another objection to the proposal. For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill; as in families many attendants are often less useful than a few. [*Politics*, 1261b34]³

In short, communal ownership leads to reduction of responsibility and a corresponding lack of care for and attentive involvement with whatever is owned. Though Aristotle made this observation nearly twenty-five hundred years ago, its truth is evident today as we consider the condition of, say, public beaches or bathrooms or roadsides. On a U.S. public beach, where the tradition of public propriety is weak, litter flourishes. This does not mean that people are evil. Some simply don't care, and drop their trash where it's most convenient; others may find themselves short of time and leave their trash scattered, perhaps think-

ing, somewhat vaguely, that the mess will eventually get cleaned up, even though, at home, this is likely to be quite different—if one is late and rushes off, the trash is there to be cleaned upon one's return. At a public place the attitude seems to be, "It will get cleaned up somehow, by someone, at some time." So, the issue is not that people are generally lazy or careless, though they sometimes are. It is more of a systematic problem: people are unable to incorporate the significance of managing the public property within their scale of values. It is very difficult to assess what value it is to oneself that some public sphere receives one's care, whereas it is not a problem to place the significance of the management of one's private sphere within one's hierarchy of values.

More simply, each of us knows, quite directly, how important or not it is to keep one's backyard clean, and one will take care of it commensurate with that knowledge. But it is not possible for an individual to know how important it is for the community, society, or humanity at large that one keep the air or river or lake clean, and to what degree. This is because values cannot be separated from those who are to be benefited by them. The community is composed of individuals with a highly varied set of values, which depend not on the universal fact of what they are, but on the more particular facts of who they are, what subgroups of human beings they belong to, and so on. There is no concrete universal—or reified—community that might be benefited, only individuals and the diverse groups to which they belong, not all of which share the same values. Where ownership is divorced from usage, control, or economic impact, care is nearly impossible to bestow.

CAN WE DO WITHOUT PRIVATE PROPERTY?

Some propose that this ambiguity of responsibility can be avoided in a society in which the notion of public service is inculcated at an early age. It is, they might argue, a matter of education and training toward common values, rather than simply a fact of human nature, or a basic feature of human psychology. However this may be, a program to educate

(some would say indoctrinate) children toward an inclination to public service may come at the costly price of precluding other important alternatives as well as the misallocation of resources. The reformation of human nature is, in fact, the goal of some radical critics of the business culture of capitalism. They argue that human nature itself needs to be redirected so that the spirit of service, not profit, will motivate people. This view faces several challenges.

First, service tends to be a weak motivator for long-range, complex objectives; second, service presupposes knowledge of what other persons would most benefit from, but such knowledge is less readily available than knowledge of what benefits oneself; and third, efforts to redirect the human spirit tend to be subverted to personal ends, which are then pursued without the constraints of individual rights, resulting in harm to others. This is clearly and dramatically exemplified in the major collectivist states of human history.

Garrett Hardin developed Aristotle's insightful observation, taking only a few lines in the *Politics*, into a major thesis in the twentieth century. Hardin argues that collective ownership leads to the tragedy of the commons. His example is a grazing area used by private citizens, several owners of cattle. This area, belonging to everybody, is more likely to be exploited and abused than if it were privately owned, because no one knows the limits of his or her authority and responsibility and people will therefore tend to use more than would be prudent for the collective interest. At least, all that it would take to bring the "commons" to ruins would be one or two participants who, even if they knew the proper limits, would ignore them thoughtlessly. To prevent this, strict regulations, backed by threat of serious sanctions and accompanied by vigorous surveillance and enforcement, would be required.

The thesis common to both Aristotle and Hardin points out a practical or utilitarian feature about what property rights do for human beings in societies: they place a limitation on what people may do and also on what may be done to them, producing an overall benefit. In other words, if one's predominant social concern were to maximize the

net benefit for the greatest number of people, a policy issuing from respect for property rights would most likely satisfy that concern. Just as one's own backyard limits what one may do, thus confining one's good or bad activities, there is everywhere a practical use for the idea of private property rights. Private property rights provide the proper limits against those who would fail to act responsibly, while also promoting public welfare resulting from those who do act responsibly while exercising their rights.

It would appear, then, that avoiding the "tragedy of the commons" is at the very least a practical necessity for human social life. If human beings were omniscient and always acted from benevolent motives, perhaps there would be no such tragedy, for we would know what ought to be done within the commune, and we would be moved to do so. But we are in fact liable to err, to make mistakes, to be sometimes motivated by less than moral virtues, and so it is vital to confine these mistakes within a sphere identifiable with the agent. If I make a mistake with respect to something that I possess, I should be the one who suffers the consequences of my mistake, and so too with everyone else and his possessions. Now, if we voluntarily pool our resources, as in a corporation, club, or family, mistakes will overlap, but no one will be justified in complaining, because we have freely chosen, or consented, to join that "community" or group. It's reasonable, too, that in such cases we will have a better appreciation for the responsibility we have accepted in common with willing others.

BEYOND THE SOCIAL, TO THE MORAL VALUE OF PRIVATE PROPERTY

Over and above practical benefits, private property rights can be shown to have a significant moral value. This is evident in the social world, where we live in the vicinity of strangers, other people with whom we often choose to interact even when they are not our intimates. If one lived alone on a desert island, property rights would, of course, not

matter, there being no one either to respect or to threaten one's authority over one's actions or one's relationship to the natural world. But the minute another person—Robinson Crusoe's Friday, let us say—appears, both have the choice to do good or ill, and each may have an impact on the other. Under these conditions, the two must decide when they want to cooperate and when they do not.

If people are to act morally, everyone needs to know one's scope of personal authority and responsibility. One needs to know that some valued item, skill, or sum of money itself lies within one's jurisdiction to use before one can be charitable or generous to other people. Short of such knowledge, one could hardly know whether it would be courageous or foolhardy to protect something, whether it would be generous or reckless to share it, and so on.

In other words, private property rights are the social precondition of the possibility of a personally guided moral life. If one is to be generous to the starving human beings in the Sudan but one has nothing of one's own, generosity will be impossible. There is, in effect, a necessary connection between a practical moral code or set of guiding moral principles and the institution of private property rights, certainly if a moral code is to include such virtues as generosity, courage, honesty, and prudence as they relate to limited resources and other things of value to human beings.

John Locke, perhaps the most prominent philosopher to defend private property rights, was to some extent aware of their moral significance. He drew a connection between acting freely and responsibly as moral agents, and having the right to private property. He defended the institution of the right to private property as well as the way that property might be assigned.

There are two issues here. The first is whether this system of private property rights is a morally necessary system. We have thus far suggested that it is, or, at least, that it is necessary for a robust system that would allow for the exercise of certain virtues. Without knowing what precisely is one's own and what belongs to others, the practical moral decisions

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one makes will get hopelessly confused. A “tragedy of the commons” of a moral sort, not just practical, will take place.

Karl Marx emphasized the destructive possibilities entailed by the right to private property. He observed, one-sidedly but accurately, that if one has acquired private property and therefore authority over that property, this implies that no one may interfere in how one uses what one owns, provided one does not encroach on other people’s rights in the process. This means, of course, that one is free to misuse one’s property, but it also means that it is possible to use it prudently, productively, wisely, charitably, and so on. Indeed, as Aristotle suggests, the right to private property may very well encourage just such an obligation.

PROBLEMS WITH ASSIGNING PRIVATE PROPERTY

Now, having said that these rights are a necessary condition for the personal moral life of human beings, we are still faced with the second issue, namely, how property rights may be assigned over various valued items, including one’s skills. Some people suggest that such assignment is impossible.

In opposition to this claim, it needs to be noted that property rights must be compossible—that is, each person’s right to private property must be compatible with every other person’s similar right. A system of impossible rights, being inconsistent, is thus a flawed system and would lead to internal conflict. Because critics see no basis for establishing ownership, they believe that such impossibility is inherent in a property rights system.

But we need here to distinguish between conflicting rights and conflicting claims, for, although it is true that a system of private rights must be compossible, it is also true that there could be conflicting *claims* to having rights (to something). After all, if people have free will they are able either to exercise their property rights or to violate those of others. So, even though rights may be *in principle* compossible, people

may still violate each others' rights. However, if such rights are not compossible and no harmonious assignment of them can be obtained, then there would be no way to avoid violating other people's rights. Such a system would be impossible to implement.

A system that aims to protect both "negative" and "positive" property rights is on a collision course with itself. If persons have a right to be free of interference as well as to be provided with what they need, conflict is inevitable. For example, if a person has a "positive" right to (be provided with) health care, and the doctor has a "negative" right (of noninterference with respect) to his or her skills, occasions will certainly arise where these rights will conflict. Just to the extent that the doctor must acknowledge everyone's (positive) right to his skills, the doctor's (negative) right is compromised. Thus, should the doctor wish to help a friend, or simply to relax rather than work, another's right to medical help would result in a conflict of rights. The doctor cannot both exercise his right to noninterference and, at the same time, honor the other's right to medical assistance. These are not compossible rights. If this is what the critic has in mind, namely, that no system could protect both negative and positive rights, then what needs to be said in response is that a system of private property rights should avoid the problem by not positing positive rights at all.⁴ Only once protection of rights has been secured, via contract or politics, would so-called positive rights arise, but these would not conflict with the negative rights that made their emergence possible.

"Negative" rights are compossible. If both the doctor and the patient have a right to their property—the patient to his money and the doctor to his time and skills—the exercise of these rights need never clash. The patient will be the one to decide how and when to spend his money, the doctor will be the one to decide how and when to spend his time and skills. They can agree to come to terms, to negotiate, or to pursue another course of action to attain their goals. If this situation is protected from disturbance, neither party will be required to sacrifice what belongs to him to serve someone else. Another objective may not be realized—

for example, the illness may remain untreated—but that is an entirely different matter. No one is entitled to the involuntary servitude of another person, even if that is the only way to obtain a valuable service. It may turn out that in some situations the doctor ought, morally, to attend to someone, but not because the ill person has a general “positive” right that the doctor does so. It may be the doctor’s professional obligation, or compassion, pity, or charity, that impels him to assist, but, in any case, it may not be someone’s coercion.

Another attack on private property rights is the argument by Marx that such rights are necessary only for bourgeois society, not because an institution of private property rights would be just but because it would increase material production. This would serve the historically important purpose of supplying society with ample goods that, under socialism, would be distributed in an equitable and sensible way.

Yet another argument against property rights, advanced by Pierre Joseph Proudhon, the prominent French anarchist, is that all property is theft: no one knows whether what is currently assigned to someone is in reality his or hers, since it was probably stolen, or acquired by conquest several times over throughout history. Thus, so this argument goes, by the time it gets down to the present generation, ownership is so corrupt and unclean that any claim to private property rights is insupportable. (A curious feature of this view is that it unwittingly implies the wrongfulness of theft, since, if simple possession were sufficient warrant for ownership, past ownership would be irrelevant; if theft is indeed unjustified, then simple possession cannot be a warrant for ownership! It seems to follow from this that any claim to undermine the institution of private property rights by appeal to historical theft or conquest begs the question.)

Clearly, if we wish to defend the institution of private property rights and its concomitant political economy (capitalism), we need more than a practical defense. We need a principled, morally convincing case that shows this system to be right and just, not simply useful. It is now necessary to outline the case showing that a regime of private

property rights is a just institution, and that particular ownership can also be assigned justly. Even if most people in a society favoring private property were to fare well, there remains the question of how individuals in such a society are treated. For example, in *The End of Laissez-Faire* (1927), John Maynard Keynes likens a capitalist system to the heartless, untamed wilderness, in which the strong survive, but those without advantages are doomed. According to Keynes, people who are helpless are callously left abandoned. Though some charity or philanthropy may exist, the capitalist system itself lacks the compassion, kindness, or generosity to help the millions of abandoned, needy people.

Keynes, and his many followers, accordingly advocated the interventionist welfare state to counter the social evils of capitalism. He believed that some intervention, some regulation, some redistribution of wealth, is a moral imperative. Even John Stuart Mill, the English utilitarian political economist and philosopher who advocated the market system, had similar misgivings about capitalism. He maintained that pure capitalism should prevail at the production stage, but that some statism is necessary at the distribution stage to help the unfortunate.

Given such concerns, it is evident that in order to defend the system of consistent, uncompromised private property rights, one must offer more than the practical argument that in the long run we are all better off in a system, such as capitalism, that provides such wealth. One must provide a principled, moral defense. A system that is truly just must in general be right for any human being. Everyone, upon reflection, should be able to appreciate that rights, dignity, justice, and fair play are honored by this system. In the absence of a sound moral defense, thoughtful and unbiased persons are likely to find capitalism wanting and will then fail to provide the support that it requires in order to survive.

Furthermore, without a sound moral defense, the system of private property rights, despite its efficiency and productive potential, will always be vulnerable to significant legal erosion. In the legal process, judges tend to move the law in the direction of moral convictions, since they must often make discretionary judgments that rest on morality. If

people know well enough that some assignments are unjust and the law fails to take notice, the system of law will lack moral force.

A case in point is environmental law. In contrast to much of the criminal law, at least in the United States of America, in environmental law the protection of endangered species and wetlands and the general policy of preemptive or precautionary public policy provisions tend to trump such rights-based “technicalities” as that the prosecution must carry the burden of proof and prior restraint is prohibited. In general, regulatory law treats individuals and companies and their right to property along lines introduced in a dissenting opinion of U.S. Supreme Court Justice Oliver Wendell Holmes. In his *Lochner vs. New York* dissent, Holmes argued that for a government action to be held invalid, “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the tradition of our people and our law.” This requirement is nearly impossible to satisfy. If it were applied to, say, efforts to undermine the principles of the First Amendment, there would be little left of freedom of speech in America. However, the real threat is in the modus operandi of nearly all cases where legislatures and regulatory agencies challenge people’s private property. The mere logical possibility of something affecting a species of animal or the condition of wetlands can serve as justification for overriding the private property rights of citizens. One reason for this is the lack of a clear, well-enunciated, and well-propounded defense of such rights.

It is also arguable that most people desire to be on the side of morality, no doubt a source of widespread hypocrisy. So, their loyalty to a system lacking this alliance is likely to be weaker than if they are confident in the moral justness of the legal system.

Finally, there is the concern that members of society be treated decently and justly. Lacking a serious attempt to realize such treatment, the authority of the law will very likely suffer. What reason would people have not to steal, or (its political equivalent) vote themselves portions

of other people's money, if the only objection to stealing is mere economic inexpediency?

Considered from a purely utilitarian point of view, where individual well-being is subservient to the collective well-being, it is irrelevant whether private property rights are assigned to one or another, so long as they are privately assigned. Property may be given to one we now regard a thief or to one from whom the thief stole, and overall *social* gain or loss would be the same, at least for the time being. This is one of the insights of the late Nobel laureate Ronald Coase, a major contributor to the Law and Economics School of analyses of community affairs. His famous "Coase theorem" establishes that regardless of how property rights are assigned at a given moment, the social consequences are unchanged. All that is important is that *some assignment* of property rights occurs.

Surely this perspective is limited, for it overlooks the moral dimension of the assignment of property rights. This invites the question: "Is there a method for correctly assigning property rights?" The moral reputation of business and commerce in general depends in some measure on whether ownership itself is morally just, since trade, the activity of commerce and business, presupposes that one cannot trade in what one does not own.

FROM MIXING LABOR TO REWARDING GOOD JUDGMENT

John Locke advanced the theory that when one mixes one's labor with nature, one gains ownership of that part of nature with which the labor is mixed. Thus, for example, if I gather wood from the forest for a fire, or for materials to build a shelter, I have a "natural right" to what I have gathered, inasmuch as I have "mixed my labor" with it and to that extent put some of myself into it. Since I have a self-evident right to my own body, including my labor, that part of nature that includes myself (i.e., my labor) is also mine. Though Locke held that nature is

initially a gift from God to us all, he argued that once we individually mix our labor with some portion of it, it becomes ours alone.

This idea, though perhaps commonsensically compelling when limited to simple examples of physical labor such as gathering wood, has not carried wide conviction, mainly because the idea of “mixing labor with nature” is too vague. Does discovering an island count as an act of labor—never mind “mixing” one’s labor? Does exploring the island? Fencing it in? Does identifying (discovering) a scientific truth count as mixing labor with nature? What about inventing a new device based on scientific information available to all? Or trade—should the act of coming to an agreement count as mixing one’s labor with something of value? Challenging examples to Locke’s principle abound.

A revised Lockean notion has been advanced in current libertarian thought by way of a theory of entrepreneurship, an idea advanced at about the same time by philosopher James Sadowsky of Fordham University and by economist Israel Kirzner of New York University. The novelist-philosopher Ayn Rand, perhaps the modern era’s most fervent advocate of capitalism based on a theory of the inalienable individual right to life, liberty, and property, also emphasized the moral role of individual judgment and initiative or entrepreneurship.

According to the entrepreneurial model, it is the *judgment*—no small matter in human affairs where instincts play hardly any role—that fixes something as possessing (potential) value (to oneself or others); and therefore the making of this judgment and acting on it—the alertness and attentiveness of it all—is what earns oneself the status of a property holder. The rational process of forming a judgment is neither automatic nor passive; neither does the process involve more than a minimum overt physical effort, but it is an *act of labor* nonetheless. What gives the judgment its moral significance is that it is a freely made, initiated choice involving the unique human capacity to reason things out, applied to some aspect of reality and its relationship to one’s purposes and life goals. One exerts the effort to choose to identify something as having potential or actual value. This imparts to it a practical dimen-

sion, something to guide one's actions in life. Whether one is correct or not in any given instance remains to be seen, but in either case the judgment brings the item under one's jurisdiction on something like a "first come, first served" basis.

For example, assume that George identifies some portion of un-owned land as being of potential value. Having made this judgment, George now has rightful jurisdiction over the property, so that others may not (rightfully) prevent him from exploring it for oil or minerals, or simply using it to build a museum or a private home. His judgment may have been in error: the land may turn out to be infertile or otherwise unsuitable for his purposes. Even so, given that people require for their lives a sphere of jurisdiction, by having first made and acted upon the decision to select the land, he has appropriated it in a way that cannot be objectionable—indeed, is a prudent effort, at least.

On this model, then, the appropriation of items in nature has moral significance because it exhibits an effort of prudence, of taking proper care of oneself and those for whom one is responsible. George's attempt to exercise the virtue of prudence by his judgment and subsequent use of what he has chosen to appropriate is potentially morally meritorious. Under this description, the act of appropriation is a *moral* act. Apart from actual outcomes, George's exercise of his judgment here is *prima facie* valuable as an expression of his prudence, his industry, good sense, practical savvy. All this being so, in order to live as a moral agent, as one responsible for oneself and perhaps others, George must be free to make such attempts without interference.

Critics would see such acts not as morally worthy, but as acquisitive or possessive, implicitly deeming as morally insignificant a person's attempt to benefit himself or one's loved ones. Without supporting argument, the critics implicitly accept the idea that advancing one's own well-being, aiming for one's own prosperity, is something morally negligible or demeaning.

The case just made in support of private property rights is merely the beginning of the development of an elaborate legal system of private

property rights. In complex social contexts such as an industrial society, property acquisition occurs via thousands of diverse acts of discovery, investment, saving, buying and selling, with willing participants who embark upon the same general approach to life. Nor is anyone coerced into one particular approach, which accounts for what Harvard University philosopher Robert Nozick made note of in his defense of capitalism: the system's hospitality to diversely conceived utopias, to experiments with great varieties of human conceptions of the good social life. This is evident in all the experimental communities, churches, artistic colonies, economic, educational, and scientific organizations that abound in what has come to be perhaps the largest, most closely capitalist, private property respecting society in human history.

APPLIED RIGHTS THEORY

Theoretical defenses of the system of private property rights do not begin to answer all the questions concerning the best application of that system with regard to the multitude of complex problems involving acquisition and use. Though the 1980s ushered in the global movement toward privatization, including Eastern Europe's substantial rejection of the planned economic system, we are far from having full confidence in the concept of private property rights as a foundation for a sound socio-economic system. As we have seen, this lack of faith is not due essentially to problems inherent in the system of private property. Rather, resistance comes from the philosophical climate and attitude that has surrounded those who are perhaps the most visible beneficiaries of private property, namely, commercial agents, people in business, and entrepreneurs.⁵ Though countless others are just as much beneficiaries, this is less obvious. Consequently, capitalism is condemned roundly for lack of fairness and for permitting great inequities of wealth, as if these would not arise or would be more effectively addressed by another system. It is the simple failure to consider the alternatives to capitalism, coupled

with an ignorance of its widespread benefits, that nurtures the anticapitalist prejudice.

Defenders thus argue that the capitalist system has proved itself in comparison with all other alternatives. Furthermore, when problems do arise within this system, the courts adjudicating the difficulties can arrive at appropriate solutions concerning particular applications of the right to private property, in everything from radio signals to frozen embryos, and from the air mass to bodies of water. Without elaborate legal and technical discussion, which would be prevented within alternative models, the great potential of the system of private property will remain unexploited—for example, with respect to environmental and ecological concerns.

Thus, there appear to be two candidates for the philosophical foundations of the system of private property rights. One, that the system is necessary for the provision of “moral space”; two, that it makes the realization of prudential conduct possible vis-à-vis our natural and social world. (*Natural* in the case of initial appropriation, and *social* in the case of voluntary trade.) Unless these are sound, the system of private property rights is eventually likely to be defeated as a political-economic model for the modern world.

NATIONAL DEBT AND THE TRAGEDY OF THE COMMONS

We can now address a public policy result of the gradual erosion of the role of private property in our legal system. This consequence has seldom been noted and is different from the more obvious problems identified by economists such as Ludwig von Mises and F. A. Hayek. Both von Mises and Hayek have noted throughout their scholarly works that without private property rights the price system is corrupted, leading to the development of widespread economic inefficiency in the community.

As we observed earlier, Aristotle demonstrated the social value of the right to private property. In particular he made clear that “Every

one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill." Garrett Hardin, as we saw, is to be credited with coining the modern expression of this problem as "the tragedy of the commons." Hardin argued that, without borders identifying which area belongs to whom, the commons—that is, all public resources—tend to be overused, not from human greed, but because each user quite understandably wants to maximize the yield of his endeavors.

The principle here has been applied successfully to environmental problems, and many scholars have concluded that, without extensive privatization of public properties such as lakes, rivers, beaches, forests, and even the air mass, environmental problems will remain largely unsolved. It seems to be generally agreed that there are inherent problems in common ownership,⁶ but it is less apparent, evidently, that what is required to solve the problems is to transfer common ownership into private. It hasn't yet been fully appreciated that one main reason for the terrible environmental state of the former Soviet bloc countries is the pervasiveness of publicly owned spheres. Even now the political will to effect the solution, via uncompromising privatization, is lagging far behind the analysis that identified the problem and came up with the solution. Nevertheless, in this area at least, the identification has been made.

What has not been widely noticed is that a "tragedy of the commons" exists in any national treasury. This is what by law amounts to a common pool of resources from which members of the political community will try to extract as much as possible to serve their purposes. Whether it's for artistic, educational, scientific, agricultural, athletic, medical, or general moral and social progress, the national treasury is the trough for all citizens in a democratic society. Of course, everyone has noble reasons to access it, and usually goals are sufficiently thought out so as to inspire confidence in their plans. All they need to further their goals is support from the treasury, so they devote great energy, will,

and ingenuity to extract from the commons whatever they can for their purposes.

Unfortunately, as both Aristotle and Hardin knew, the commons are fated to be exploited without regard to standards or limits: “that which is common to the greatest number has the least care bestowed upon it.” This explains, at least in part, the gradual depletion of the treasuries of most Western democracies. Japan, Germany, Great Britain, and the United States are all experiencing this, as are numerous other societies that open their treasuries to the public for uses that are essentially private. How else can we view education, scientific research, the building of athletic parks, upkeep of beaches and forests and so forth, than as the pursuit of special private goals by way of a commons, the public treasury?

Some might claim that all these goals involve a public dimension, a public benefit. Indeed—so does nearly every private purpose, including the widely decried phenomenon of industrial activity, which produces the negative public side-effect of pollution and the depletion of a quality environment. Private enterprises can certainly have public benefits, but their goal is to serve the objectives of private individuals. When the public treasury is tapped for, say, AIDS research, Medicare, or Social Security, the primary beneficiaries would be those with the needs these programs are meant to satisfy, not the general public; when theater groups gain support from the National Endowment for the Arts, the primary beneficiaries are those working in theater; when milk producers gain a federal subsidy by price regulation, or by being compensated for withholding production, the dairy farmers are the first to gain, not some wider public. When Medicare helps those elderly who have not secured adequate private medical insurance or Social Security, those who haven’t prepared, for whatever reason, for their retirement needs, the beneficiaries are not some “public” but specific individuals.

So we find, one after the other, to the thousands, “public” projects that in reality are supporting private goals, first and foremost. One need only observe who lobbies for the money. But since the “treasure chest”

is public property, it is impossible to rationally allocate the wealth consistent with proper budgetary constraints. Such constraints arise from considering the implicit limits on spending that are determined by the wealth of the individuals who make up the society, as well as their credit worthiness. Without reference to specific individuals or companies of such, no limits and therefore no clear constraints can be identified. Instead, politicians spend to the extent that they can borrow and print money, using only anticipated funds; or, they reduce the value of existing moneys, funding requests with hardly any restraint other than public opinion. This tendency is fueled by the urgency of various groups of constituents, who express their urgent desires in the ballot box. The inevitable result is the tragedy of the commons, as the public treasury gets looted

Without structural remedy, there is no end in sight to this process. Only when the country loses its credit worthiness in the world community will this near-Ponzi scheme come to a halt. The country will then have to declare bankruptcy, leaving those citizens who had nothing to do with the tragedy—our children and grandchildren—holding the empty bag. Such is the final end of treating with cavalier disdain people's right to private property and individuals' efforts to enrich themselves. When intellectuals commonly pit human rights against property rights, as though the right to what one owns is not a human right, we are increasingly impoverished, not just individually, but as a society and government as well.

According to Bernard Mandeville and others, "private vices [make] publick benefits." Here is economic insight, but moral ignorance: indeed, if we denigrate the pursuit of prosperity, we will produce general misery for everyone, but what these political economists failed to realize is that *the striving for personal prosperity is not a vice, but an aspect of the virtue of prudence*. It is private prudence, not vice, that leads to public benefit, so we ought not demean that which enables us to obtain personal prosperity.

An additional fallacy common to social philosophizing is the view

that what really matters in our consideration of public affairs is the general good, a rather vague idea of collective utilitarianism whereby the “greatest happiness or good or well-being of the greatest number” is the central goal of politics. It is not to our purpose to enter that debate here. Suffice it to say that such remnants of tribalism draw heavily on an initial discrediting of the worthiness of individual human lives.

UNGER’S MORAL MISTAKE

Let us briefly return to what started our discussion: the claim from Peter Unger, one often echoed in churches and political rhetoric, namely, that we owe our wealth to others. Unger goes on to assert that we “must give away most of [our] financially valuable assets.”⁷ Presumably, then, others, in turn, may take these assets from us, via the legal system and its administrators, in the form of taxation or similar schemes of redistribution—which then could well recommend socialism as the proper political order for human community life.

What is wrong here? Unger’s precept demeans us because it grants us no chance to flourish unless we pay a ransom to others. And it demeans us because it does not credit human beings with the capacity to be generous, a moral virtue that needs to be practiced voluntarily, not as a result of legal regimentation that robs the agent of any moral credit for doing the right thing. It is also curious to hold that, whereas others are entitled to our wealth, we are not, as if we were less important, less significant than those others. Finally, it fails to recognize that sometimes those who lack wealth either choose to live that way because they judge it proper for themselves to do so, have made bad judgments that led to their poverty, or, even more importantly, have been oppressed precisely by being prevented from being productive and exercising private property rights.

Altruism, the broader ethical theory underlying Unger’s claim, is thus seriously flawed. But neither is it the case that there is no moral virtue attached to helping others. Indeed, an ethical outlook that places

the individual agent's overall well-being first has a great deal of room for generosity, benevolence, kindness, compassion, and similar other-directed practices and attitudes. But it recognizes that the pursuit of happiness for the agent is his first though not only ethical responsibility and that the practice of any virtue must be voluntary.

The institution of private property is the societal principle that renders the practice of such an ethics practically possible. This principle does not rest on crass selfishness, narrow self-interest, or automatic utility maximization. Rather, it rests on the idea that everyone has the responsibility to choose to live properly, and without a sphere of personal jurisdiction this would not be possible to achieve in one's community. Nor could individuals flourish in their lives if they lacked the right of securing the means to do so, means over which they are free to exercise their discretionary, prudential judgment.

WHAT ABOUT THE FACTOR OF LUCK?

A final comment is needed here about a point that seems to exercise the critics of private property rights to no end, namely, that some of what we have, some of our valued resources, come to us through sheer luck. We may be born good looking, exceptionally healthy or talented, or to wealthy parents—none our achievement, even of the produce of our good judgment. So, why should we not conclude, as do Harvard University's political theorist John Rawls and the many who follow him, that since we do not deserve these resources, we have no right to them? As Rawls puts the point, "The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is . . . problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit."⁸

No doubt we are all partly self-made and partly the result of nature's impersonal forces. Our two eyes, to pick just one example, weren't self-created, a product of "the effort to cultivate" anything; they are aspects of what and who we are, and just because they aren't personal achieve-

ments, it is gross non sequitur to hold that others are authorized to take over control over them. The same applies to what we came by through luck. Indeed, it is part of our moral task to manage these features of ourselves wisely, judiciously, and generously, and when others presume to take over this management, they have deprived us of the moral agency that is so central to our human lives.

The right to private property exists in part to secure for us a realm of personal authority—jurisdiction, if you will—and some of what we then become responsible to administer properly, ethically, includes our good or bad fortunes. Collectivizing all of what we have not directly accomplished is wholly unjustified, without any convincing evidence to give it moral or political standing.

We may, then, conclude that the existence and value of the right to private property is established beyond any reasonable doubt, despite how prominent academic opinion seems to stand against it. It will not be the last good idea in human intellectual and political history that prominent people have stubbornly resisted.

NOTES

1. This is the force of the “must” in his statement, namely, that persons may be legally required to “give away most of [their] financially valuable assets.”
2. In their book, *The Myth of Ownership* (London: Oxford University Press, 2002), NYU professors Liam Murphy and Thomas Nagel dismiss the right to private property, mainly so as to make the institution of taxation unproblematic. The work pays scant attention to the case for a natural right to private property. It assumes, instead, that property rights are grants of governments and that income, for example, is not owned by those who earn it in the market, so taxation is not a kind of confiscation at all. Interestingly, however, the authors realize that confiscatory taxation is an anomaly in a society such as the American Founders had conceived, namely, where the right to private property was supposed to be inalienable and only to be abrogated for *bona fide* public purposes (such as building a court house or a military base). So, they reject the stance of the American Founders and embrace, instead, the feudal position, namely, that govern-