Justice and Property Rights

di Murray N. Rothbard

THE FAILURE OF UTILITARIANISM

Until very recently, free-market economists paid little attention to the entities actually being exchanged on the very market they have advocated so strongly. Wrapped up in the workings and advantages of freedom of trade, enterprise, investment, and the price system, economists tended to lose sight of the things being exchanged on that market. Namely, they lost sight of the fact that when $10,000 is being exchanged for a machine, or $1 for a hula hoop, what is actually being exchanged is the *title of ownership* to each of these goods. In short, when I buy a hula hoop for $1, what I am actually doing is exchanging my title of ownership to the dollar in exchange for the ownership title to the hula hoop; the retailer is doing the exact opposite.[1] But this means that economists' habitual attempts to be *wertfrei*, or at the least to confine their advocacy to the processes of trade and exchange, cannot be maintained. For if myself and the retailer are indeed to be free to trade the dollar for the hula hoop without coercive interference by third parties, then this can only be done if these economists will proclaim the justice and the propriety of my original ownership of the dollar and the retailer's ownership of the hula hoop.

In short, for an economist to say that X and Y should be free to trade Good A for Good B unmolested by third parties, he must *also* say that X legitimately and properly owns Good A and that Y legitimately owns Good B. But this means that the freemarket economist must have some sort of theory of justice in property rights; he can scarcely say that X properly owns Good A without asserting some sort of theory of justice on behalf of such ownership.

Suppose, for example, that as I am about to purchase the hula hoop, the information arrives that the retailer had really stolen the hoop from Z. Surely not even the supposedly *wertfrei* economist can continue to blithely endorse the proposed exchange of ownership titles between myself and the retailer. For now we find that the retailer's, Y's, title of ownership is improper and unjust, and that he must be forced to return the hoop to Z, the original owner. The economist can then only endorse the proposed exchange between myself and Z, rather than Y, for the hula hoop, since he has to acknowledge Z as the proper owner of title to the hoop.

In short, we have two mutually exclusive claimants to the ownership of the hoop. If the economist agrees to endorse only Z's sale of the hoop, then he is implicitly agreeing that Z has the just, and Y the unjust, claim to the hoop. And even if he continues to endorse the sale by Y, then he is implicitly maintaining *another* theory of property titles: namely, that theft is justified. Whichever way he decides, the economist cannot escape a judgment, a theory of justice in the ownership of property. Furthermore, the economist is not really finished when he proclaims the injustice or theft and endorses Z's proper title. For what is the justification for Z's title to the hoop? Is it only because he is a nonthief?

In recent years, free-market economists Ronald Coase and Harold Demsetz have begun to redress the balance and to focus on the importance of a clear and precise demarcation of property rights for the market economy. They have demonstrated the importance of such demarcation in the allocation of resources and in preventing or compensating for unwanted imposition of "external costs" from the actions of individuals. But Coase and Demsetz have failed to develop any theory of justice in these property rights; or, rather, they have advanced two theories: one, that it "doesn't matter" how

---

[1] Economists failed to heed the emphasis on titles of ownership underlying exchange stressed by the social philosopher Spencer Heath. Thus: "Only those things which are *owned* can be exchanged or used as instruments of service or exchange. This exchange is not transportation; it is the transfer of ownership or title. This is a social and not a physical process." Spencer Heath, *Citadel, Market, and Altar* (Baltimore, Md.: Science of Society Foundation, 1957), p. 48.

the property titles are allocated, so long as they are allocated precisely; and, two, that the titles should be allocated to minimize "total social transaction costs," since a minimization of costs is supposed to be a *wertfrei* way of benefitting all of society.

There is no space here for a detailed critique of the Coase–Demsetz criteria. Suffice it to say that in a conflict over property titles between a rancher and a farmer for the same piece of land, even if the allocation of title "doesn't matter" for the allocation of resources (a point which itself could be challenged), it certainly matters from the point of view of the rancher and the farmer. And second, that it is impossible to weigh "total social costs" if we fully realize that all costs are subjective to the individual and, therefore, cannot be compared interpersonally.[2] Here the important point is that Coase and Demsetz, along with all other utilitarian free-market economists, implicitly or explicitly leave it to the hands of government to define and allocate the titles to private property.

It is a curious fact that utilitarian economists, generally so skeptical of the virtues of government intervention, are so content to leave the fundamental underpinning of the market process—the definition of property rights and the allocation of property titles—wholly in the hands of government. Presumably they do so because they themselves have no theory of justice in property rights; and, therefore, place the burden of allocating property titles into the hands of government. Thus, if Smith, Jones, and Doe each own property and are about to exchange their titles, utilitarians simply assert that if these titles are *legal* (that is, if the government puts the stamp of approval upon them), then they consider those titles to be justified. It is only if someone violates the government's definition of legality (for example, in the case of Y, the thieving retailer) that utilitarians are willing to agree with the general and the governmental view of the injustice of such action. But this means, of course, that, once again, the utilitarians have failed in their wish to escape having a theory of justice in property. Actually they do have such a theory, and it is the surely simplistic one that *whatever government defines as legal is right*.

As in so many other areas of social philosophy, then, we see that utilitarians, in pursuing their vain goal of being *wertfrei*, of "scientifically" abjuring any theory of justice, actually *have* such a theory: namely, putting their stamp of approval on whatever the process by which the government arrives at its allocation of property titles. Furthermore, we find that, as on many similar occasions, utilitarians in their vain quest for the *wertfrei* really conclude by endorsing as right and just whatever the government happens to decide; that is, by blindly apologizing for the *status quo*.[3]

Let us consider the utilitarian stamp of approval on government allocation of property titles. Can this stamp of approval possibly achieve even the limited utilitarian goal of certain and precise allocation of property titles? Suppose that the government endorses the existing titles to their property held by Smith, Jones, and Doe. Suppose, then, that a faction of government calls for the confiscation of these titles and redistribution of that property to Roe, Brown, and Robinson. The reasons for this program may stem from any number of social theories or even from the brute fact that Roe, Brown, and Robinson have greater political power than the original trio of owners. The reaction to this proposal by free-market economists and other utilitarians is predictable: they will oppose this proposal on the ground that definite and certain property rights, so socially beneficial, are being endangered. But suppose that the government, ignoring the protests of our utilitarians, proceeds anyway and redistributes these titles to property. Roe, Brown, and Robinson are *now* defined by the government as the proper and legal owners, while any claims to that property by the original trio of Smith, Jones, and Doe are considered improper and illegitimate, if not subversive. What now will be the reaction of our utilitarians? It should be clear that, since the utilitarians only base their theory of justice in property on whatever the government defines as legal, they can have

---

[2] For a welcome recent emphasis on the subjectivity of cost, see James M. Buchanan, *Cost and Choice* (Chicago: Markham, 1969).

[3] I do not mean to imply here that no social science or economic analysis can be *wertfrei*, only that any attempt whatever to apply the analysis to the political arena, however remote, must involve and imply some sort of ethical position.

no groundwork whatever for any call for restoring the property in question to its original owners. They can only, willy-nilly, and, despite any emotional reluctance on their part, simply endorse the *new* allocation of property titles as defined and endorsed by government. Not only must utilitarians endorse the *status quo* of property titles, but also they must endorse whatever *status quo* exists and however rapidly the government decides to shift and redistribute such titles. Furthermore, considering the historical record, we may indeed say that relying upon government to be the guardian of property rights is like placing the proverbial fox on guard over the chicken coop.

We see, therefore, that the supposed defense of the free market and of property rights by utilitarians and free-market economists is a very weak reed indeed. Lacking a theory of justice that goes beyond the existing *imprimatur* of government, utilitarians can only go along with every change and shift of government allocation after they occur, no matter how arbitrary, rapid, or politically motivated such shifts might be. And, since they provide no firm roadblock to governmental reallocations of property, the utilitarians, in the final analysis, can offer no real defense of property rights themselves. Since governmental redefinitions can and will be rapid and arbitrary, they cannot provide long-run certainty for property rights; and, therefore, they cannot even ensure the very social and economic efficiency which they themselves seek.[4] All this is implied in the pronouncements of utilitarians that any future free society must confine itself to whatever definitions of property titles the government may happen to be endorsing at that moment.

Let us consider a hypothetical example of the failure of the utilitarian defense of private property. Suppose that somehow government becomes persuaded of the necessity to yield to a clamor for a free-market, laissez-faire society. Before dissolving itself, however, it redistributes property titles, granting the ownership of the entire territory of New York to the Rockefeller family, of Massachusetts to the Kennedy family, etc. It then dissolves, ending taxation and all other forms of government intervention in the economy. However, while taxation has been abolished, the Rockefeller, Kennedy, etc., families proceed to dictate to all the residents in what is now "their" territory, exacting what are now called "rents" over all the inhabitants.[5] It seems clear that our utilitarians could have no intellectual armor with which to challenge this new dispensation; indeed, they would have to endorse the Rockefeller, Kennedy, etc., holdings as "private property" equally deserving of support as the ordinary property titles which they had endorsed only a few months previously. All this because the utilitarians have no theory of justice in property beyond endorsement of whatever *status quo* happens to exist.

Consider, furthermore, the grotesque box in which the utilitarian proponent of freedom places himself in relation to the institution of human slavery. Contemplating the institution of slavery, and the "free" market that once existed in buying, selling, and renting slaves, the utilitarian who must rely on the legal definition of property can only endorse slavery on the ground that the slave masters had purchased their slave titles legally and in good faith. Surely, any endorsement of a "free" market in slaves indicates the inadequacy of utilitarian concepts of property and the need for a theory of justice to provide a groundwork for property rights and a critique of existing official titles to property.

TOWARD A THEORY OF JUSTICE IN PROPERTY

Utilitarianism cannot be supported as a groundwork for property rights or, *a fortiori*, for the free-market economy. A theory of justice must be arrived at which goes beyond government allocations of property titles, and which can, therefore, serve as a basis for criticizing such allocations.

---

[4] On the arbitrariness and uncertainty of all legislative law, see Bruno Leoni, *Freedom and the Law* (Los Angeles: Nash, 1972).

[5] The point here is not, of course, to criticize all rents *per se*, but rather to call into question the legitimacy of property titles (here landed property) derived from the coercive actions of government.

Obviously, in this space I can only outline what I consider to be the correct theory of justice in property rights. This theory has two fundamental premises: (1) the absolute property right of each individual in his own person, his own body; this may be called the *right of self-ownership*; and (2) the absolute right in material property of the person who first finds an unused material resource and then in some way occupies or transforms that resource by the use of his personal energy. This might be called the *homestead principle*—the case in which someone, in the phrase of John Locke, has "mixed his labour" with an unused resource. Let Locke summarize these principles:

". . . every man has a *property* in his own *person*. This nobody has any right to but himself. The *labour* of his body and the *work* of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men." [6]

Let us consider the first principle: the right to self-ownership. This principle asserts the absolute right of each man, by virtue of his (or her) being a human being, to "own" his own body; that is, to control that body free of coercive interference. Since the nature of man is such that each individual must use his mind to learn about himself and the world, to select values, and to choose ends and means in order to survive and flourish, the right to self-ownership gives each man the right to perform these vital activities without being hampered and restricted by coercive molestation.

Consider, then, the alternatives—the consequences of denying each man the right to own his own person. There are only two alternatives: either (1) a certain class of people, A, have the right to own another class, B; or (2) everyone has the right to own his equal quotal share of everyone else. The first alternative implies that, while class A deserves the rights of being human, class B is in reality subhuman and, therefore, deserves no such rights. But since they are indeed human beings, the first alternative contradicts itself in denying natural human rights to one set of humans. Moreover, allowing class A to own class B means that the former is allowed to exploit and, therefore, to live parasitically at the expense of the latter; but, as economics can tell us, this parasitism itself violates the basic economic requirement for human survival: production and exchange.

The second alternative, which we might call "participatory communalism" or "communism," holds that every man should have the right to own his equal quotal share of everyone else. If there are three billion people in the world, then everyone has the right to own one-three-billionth of every other person. In the first place, this ideal itself rests upon an absurdity—proclaiming that every man is entitled to own a part of everyone else and yet is not entitled to own himself. Second, we can picture the viability of such a world—a world in which no man is free to take any action whatever without prior approval or indeed command by everyone else in society. It should be clear that in that sort of "communist" world, no one would be able to do anything, and the human race would quickly perish. But if a world of zero self-ownership and one-hundred-percent other-ownership spells death for the human race, then any steps in that direction also contravene the natural law of what is best for man and his life on earth.

Finally, however, the participatory communist world cannot be put into practice. It is physically impossible for everyone to keep continual tabs on everyone else and, thereby, to exercise his equal quotal share of partial ownership over every other man. In practice, then, any attempt to institute universal and equal other-ownership is utopian and impossible, and supervision and, therefore, control and ownership of others would necessarily devolve upon a specialized group of people who would thereby become a "ruling class." Hence, in practice, any attempt at communist society will automatically become class rule, and we would be back at our rejected first alternative. We conclude, then, with the premise of absolute universal right of self-ownership as our first principle

[6] John Locke, "An Essay Concerning the True, Original, Extent and End of Civil Government," in E. Barker, ed., *Social Contract* (New York: Oxford University Press, 1948), pp. 17–18.

of justice in property. This principle, of course, automatically rejects slavery as totally incompatible with our primary right.[7]

Let us now turn to the more complex case of property in material objects. For even if every man has the right to selfownership, people are not floating wraiths; they are not selfsubsistent entities; they can only survive and flourish by grappling with the earth around them. They must, for example, stand on land areas; they must also, in order to survive, transform the resources given by nature into "consumer goods," into objects more suitable for their use and consumption. Food must be grown and eaten, minerals must be mined and then transformed into capital, and finally into useful consumer goods, etc. Man, in other words, must own not only his own person, but also material objects for his control and use. How, then, should property titles in these objects be allocated? Let us consider, as our first example, the case of a sculptor fashioning a work of art out of clay and other materials, and let us simply assume for the moment that he owns these materials while waiving the question of the justification for their ownership. Let us examine the question: *who* should own the work of art as it emerges from the sculptor's fashioning? The sculpture is, in fact, the sculptor's "creation," not in the sense that he has created matter *de novo*, but in the sense that he has transformed nature-given matter—the clay—into another form dictated by his own ideas and fashioned by his own hands and energy. Surely, it is a rare person who, with the case put thus, would say that the sculptor does *not* have the property right in his own product. For if every man has the right to own his own body, and if he must grapple with the material objects of the world in order to survive, then the sculptor has the right to own the product which he has made, by his energy and effort, a veritable extension of his own personality. He has placed the stamp of his person upon the raw material by "mixing his labour" with the clay. As in the case of the ownership of people's bodies, we again have three logical alternatives: (1) either the transformer, the "creator," has the property right in his creation; or (2) another man or set of men have the right to appropriate it by force without the sculptor's consent; or (3) the "communal" solution—every individual in the world has an equal, quotal share in the ownership of the sculpture. Again, put baldly, there are very few who would not concede the monstrous injustice of confiscating the sculptor's property, either by one or more others, or by the world as a whole. For by what right do they do so? By what right do they appropriate to themselves the product of the creator's mind and energy? (Again, as in the case of bodies, any confiscation in the supposed name of the world as a whole would, in practice, devolve into an oligarchy of confiscators.)

But the case of the sculptor is not qualitatively different from all cases of "production." The man or men who extracted the clay from the ground and sold it to the sculptor were also "producers"; they, too, mixed their ideas and their energy and their technological know-how with the naturegiven material to emerge with a useful product. As producers, the sellers of the clay and of the sculptor's tools also mixed their labor with natural materials to transform them into more useful goods and services. All the producers are, therefore, entitled to the ownership of their product.

The chain of material production logically reduces back, then, from consumer goods and works of art to the first producers who gathered or mined the nature-given soil and resources to use and transform them by means of their personal energy. And use of the soil logically reduces back to the legitimate ownership by first users of previously unowned, unused, virginal, nature-given resources. Let us again quote Locke:

---

[7] Equally to be rejected is a grotesque proposal by Professor Kenneth E. Boulding, which, however, is a typical suggestion of a market-oriented utilitarian economist. This is a scheme for the government to allow only a certain maximum number of baby-permits per mother, but then to allow a "free" market in the purchase and sale of these baby rights. This plan, of course, denies the right of every mother over her own body. Boulding's plan may be found in Kenneth E. Boulding, *The Meaning of the 20th Century* (New York: Harper and Row, 1964). For a discussion of the plan, see Edwin G. Dolan, *TANSTAAFL: The Economic Strategy for Environmental Crisis* (New York: Holt, Rinehart, and Winston, 1971), p. 64.

"He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask then, when did they begin to be his? When he digested? or when he ate? Or when he boiled? or when he brought them home? or when he picked them up? And 'tis plain, if the first gathering made them not his, nothing else could. That labour put the distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will anyone say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. . . . Thus, the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in my place, where I have a right to them in common with others, become my property without the assignation or consent of any body. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them." [8] If every man owns his own person and therefore his own labor, and if by extension he owns whatever material property he has "created" or gathered out of the previously unused, unowned "state of nature," then what of the logically final question: who has the right to own or control the earth *itself*? In short, if the gatherer has the right to own the acorns or berries he picks, or the farmer the right to own his crop of wheat or peaches, who has the right to own the land on which these things have grown? It is at this point that Henry George and his followers, who would have gone all the way so far with our analysis, leave the track and deny the individual's right to own the piece of land itself, the ground on which these activities have taken place. The Georgists argue that, while every man should own the goods which he produces or creates, since Nature or God created the land itself, no individual has the right to assume ownership of that land. Yet, again, we are faced with our three logical alternatives: either the land itself belongs to the pioneer, the first user, the man who first brings it into production; or it belongs to a group of others, or it belongs to the world as a whole, with every individual owning an equal quotal part of every acre of land. George's option for the last solution hardly solves his moral problem: for if the land itself should belong to God or Nature, then why is it more moral for every acre in the world to be owned by the world as a whole, than to concede individual ownership? In practice, again, it is obviously impossible for every person in the world to exercise his ownership of his three-billionth portion of every acre of the world's surface; in practice, a small oligarchy would do the controlling and owning, rather than the world as a whole.

But apart from these difficulties in the Georgist position, our proposed justification for the ownership of ground land is the same as the justification for the original ownership of all other property. For as we have indicated, no producer really "creates" matter; he takes nature-given matter and transforms it by his personal energy in accordance with his ideas and his vision. But this is precisely what the pioneer—the "homesteader"—does, when he brings previously unused land into his private ownership. Just as the man who makes steel out of iron ore transforms that ore out of his know-how and with his energy, and just as the man who takes the iron out of the ground does the same, so too, does the homesteader who clears, fences, cultivates or builds upon the land. The homesteader, too, has transformed the character and usefulness of the nature-given soil by his labor and his personality. The homesteader is just as legitimately the owner of the property as the sculptor or the manufacturer; he is just as much a "producer" as the others.

Moreover, if a producer is not entitled to the fruits of his labor, who is? It is difficult to see why a newborn Pakistani baby should have a moral claim to a quotal share of ownership of a piece of Iowa land that someone has just transformed into a wheatfield and vice versa, of course, for an Iowan baby and a Pakistani farm. Land in its original state is unused and unowned. Georgists and other land communalists may claim that the entire world population "really" owns it, but if no one

[8] Locke, *An Essay Concerning the True, Original, Extent, and End of Civil Government*, p. 18.

has yet used it, it is in the real sense owned and controlled by no one. The pioneer, the homesteader, the first user and transformer of this land, is the man who first brings this simple valueless thing into production and use. It is difficult to see the justice of depriving him of ownership in favor of people who have never gotten within a thousand miles of the land and who may not even know of the existence of the property over which they are supposed to have a claim. It is even more difficult to see the justice of a group of outside oligarchs owning the property, and at the expense of expropriating the creator or the homesteader who had originally brought the product into existence.

Finally, no one can produce anything without the cooperation of ground land, if only as standing room. No man can produce or create anything by his labor alone; he must have the cooperation of land and other natural raw materials. Man comes into the world with just himself and the world around him—the land and natural resources given him by nature. He takes these resources and transforms them by his labor and mind and energy into goods more useful to man. Therefore, if an individual cannot own original ground land, neither can he in the full sense own any of the fruits of his labor. Now that his labor has been inextricably mixed with the land, he cannot be deprived of one without being deprived of the other.

The moral issue involved here is even clearer if we consider the case of animals. Animals are "economic land," since they are original nature-given resources. Yet, will anyone deny full title to a horse to the man who finds and domesticates it? This is no different from the acorns and berries which are generally conceded to the gatherer. Yet in land, too, the homesteader takes the previously "wild," undomesticated land, and "tames" it by putting it to productive use. Mixing his labor with land sites should give him just as clear a title as in the case of animals. From our two basic axioms, the right of every man to selfownership and the right of every man to own previously unused natural resources that he first appropriates or transforms by his labor—the entire system of justification for property rights can be deduced. For if anyone justly owns the land himself and the property which he finds and creates, then he, of course, has the right to exchange that property for the similarly acquired just property of someone else. This establishes the right of free exchange of property, as well as the right to give one's property away to someone who agrees to receive it. Thus, X may own his person and labor and the farm he clears on which he grows wheat; Y owns the fish he catches; Z owns the cabbages he grows and the land under it. But then X has the right to exchange some of his wheat for some of Y's fish (if Y agrees) or Z's cabbages and when X and Y make a voluntary agreement to exchange wheat for fish, then that fish becomes X's justly acquired property to do with what he wishes, and the wheat becomes Y's just property in precisely the same way. Further, a man may, of course, exchange not only the tangible objects he owns, but also his own labor which, of course, he owns as well. Thus, Z may sell his labor services of teaching farmer X's children in return for some of the farmer's produce.

We have thus established the property-right justification for the free-market process. For the free-market economy, as complex as the system appears to be on the surface, is yet nothing more than a vast network of voluntary and mutually agreed upon two-person or two-party exchanges of property titles such as we have seen occurs between wheat and cabbage farmers, or between the farmer and the teacher. In the developed free-market economy, the farmer exchanges his wheat for money. The wheat is bought by the miller who processes and transforms the wheat into flour. The miller sells the bread to the wholesaler, who in turn sells it to the retailer, who finally sells it to the consumer. In the case of the sculptor, he buys the clay and the tools from the producers who dug the clay out of the ground or those who bought the clay from the original miners, and he bought his tools from the manufacturers who, in turn, purchased the raw material from the miners of iron ore. How "money" enters the equation is a complex process, but it should be clear here that, conceptually, the use of money is equivalent to any useful commodity that is exchanged for wheat, flour, etc. Instead of money, the commodity exchanged could be cloth, iron, or whatever. At each step of the way, mutually beneficial exchanges of property titles—to goods, services, or money—are agreed upon and transacted.

And what of the capital–labor relationship? Here, too, as in the case of the teacher selling his services to the farmer, the laborer sells his services to the manufacturer who has purchased the iron ore or to the shipper who has bought logs from the loggers. The capitalist performs the function of saving money to buy the raw material, and then pays the laborers in advance of sale of the product to the eventual customers.

Many people, including such utilitarian free-market advocates as John Stuart Mill, have been willing to concede the propriety and the justice (if they are not utilitarians) of the producer owning and earning the fruits of his labor. But they balk at one point: inheritance. If Roberto Clemente is ten times as good and "productive" a ball player as Joe Smith, they are willing to concede the justice of Clemente's earning ten times the amount; but what, they ask, is the justification for someone whose only merit is being born a Rockefeller inheriting far more wealth than someone born a Rothbard?

There are several answers that could be given to this question. For example, the natural fact is that every individual must, of necessity, be born into a different condition, at a different time or place, and to different parents. Equality of birth or rearing, therefore, is an impossible chimera. But in the context of our theory of justice in property rights, the answer is to focus not on the recipient, not on the child Rockefeller or the child Rothbard, but to concentrate on the giver, the man who bestows the inheritance. For if Smith and Jones and Clemente have the right to their labor and their property and to exchange the titles to this property for the similarly obtained property of others, then they also have the right to give their property to whomever they wish. The point is not the right of "inheritance" but the right of bequest, a right which derives from the title to property itself. If Roberto Clemente owns his labor and the money he earns from it, then he has the right to give that money to the baby Clemente. Armed with a theory of justice in property rights, let us now apply it to the often vexed question of how we should regard existing titles to property.

TOWARD A CRITIQUE OF EXISTING PROPERTY TITLES

Among those who call for the adoption of a free market and a free society, the utilitarians, as might be expected, wish to validate all existing property titles, as so defined by the government. But we have seen the inadequacy of this position, most clearly in the case of slavery, but similarly in the validation that it gives to any acts of governmental confiscation or redistribution, including our hypothetical Kennedy and Rockefeller "private" ownership of the territorial area of a state. But how much of a redistribution from existing titles would be implied by the adoption of our theory of justice in property, or of any attempt to put that theory into practice? Isn't it true, as some people charge, that all existing property titles, or at least all land titles, were the result of government grants and coercive redistribution? Would all property titles, therefore, be confiscated in the name of justice? And who would be granted these titles? Let us first take the easiest case: where existing property has been stolen, as acknowledged by the government (and, therefore, by utilitarians) as well as by our theory of justice. In short, suppose that Smith has stolen a watch from Jones. In that case, there is no difficulty in calling upon Smith to relinquish the watch and to give it back to the true owner, Jones. But what of more difficult cases—in short, where existing property titles are ratified by State confiscation of a previous victim? This could apply either to money, or especially to land titles, since land is a constant, identifiable, fixed quotal share of the earth's surface.

Suppose, first, for example, that the government has either taken land or money from Jones by coercion (either by taxation or its imposed redefinition of property) and has granted the land to Smith or, alternatively, has ratified Smith's direct act of confiscation. What would our policy of justice say then? We would say, along with the general view of crime, that the aggressor and unjust owner, Smith, must be made to disgorge the property title (either land or money) and give it over to its true owner, Jones. Thus, in the case of an identifiable unjust owner and the identifiable victim or

just owner, the case is clear: a restoration to the victim of his rightful property. Smith, of course, must not be compensated for this restitution, since compensation would either be enforced unjustly on the victim himself or on the general body of taxpayers. Indeed, there is a far better case for the additional punishment of Smith, but there is no space here to develop the theory of punishment for crime or aggression.

Suppose, next, a second case, in which Smith has stolen a piece of land from Jones but that Jones has died; he leaves, however, an heir, Jones II. In that case, we proceed as before; there is still the identifiable aggressor, Smith, and the identifiable heir of the victim, Jones II, who now is the inherited just owner of the title. Again, Smith must be made to disgorge the land and turn it over to Jones II.

But suppose a third, more difficult case. Smith is still the thief, but Jones and his entire family and heirs have been wiped out, either by Smith himself or in the natural course of events. Jones is intestate; what then should happen to the property? The first principle is that Smith, being the thief, cannot keep the fruits of his aggression; but, in that case, the property becomes unowned and becomes up for grabs in the same way as any piece of unowned property. The "homestead principle" becomes applicable in the sense that the first user or occupier of the newly-declared unowned property becomes the just and proper owner. The only stipulation is that Smith himself, being the thief, is not eligible for this homesteading.[9] Suppose now a fourth case, and one generally more relevant to problems of land title in the modern world. Smith is not a thief, nor has he directly received the land by government grant; but his title is derived from his ancestor who did so unjustly appropriate title to the property; the ancestor, Smith I, let us say, stole the property from Jones I, the rightful owner. What should be the disposition of the property now? The answer, in our view, completely depends on whether or not Jones's heirs, the surrogates of the identifiable victims, still exist. Suppose, for example, that Smith VI legally "owns" the land, but that Jones VI is still extant and identifiable. Then we would have to say that, while Smith VI himself is not a thief and not punishable as such, his title to the land, being solely derived from inheritance passed down from Smith I, does not give him true ownership, and that he, too, must disgorge the land—without compensation—and yield it into the hands of Jones VI.

But, it might be protested, what of the improvements that Smiths II–VI may have added to the land? Doesn't Smith VI deserve compensation for these legitimately owned additions to the original land received from Jones I? The answer depends on the movability or separability of these improvements. Suppose, for example, that Smith steals a car from Jones and sells it to Robinson. When the car is apprehended, then Robinson, though he purchased it in good faith from

Smith, has no title better than Smith's which was nil and, therefore, he must yield up the car to Jones without compensation. (He has been defrauded by Smith and must try to extract compensation out of Smith, not out of the victim Jones.) But suppose that Robinson, in the meantime, has improved the car? The answer depends on whether these improvements are separable from the car itself. If, for example, Robinson has installed a new radio which did not exist before, then he should certainly have the right to take it out before handing the car back to Jones. Similarly, in the case of land, to the extent that Smith VI has simply improved the land itself and mixed his resources inextricably with it, there is nothing he can do; but if, for example, Smith VI or his ancestors built new buildings upon the land, then he should have the right to demolish or cart away these buildings before handing the land over to Jones VI. But what if Smith I did indeed steal the land from Jones I, but that all of Jones's descendants or heirs are lost in antiquity and cannot be found? What should be the status of the land then? In that case, since Smith VI is not himself a thief, he becomes the legitimate owner of the land on the basis of our homestead principle. For if the land is "unowned" and up for grabs, then Smith VI himself has been occupying and using it,

[9] Neither is the government eligible. There is no space here to elaborate my view that government can never be the just owner of property. Suffice it to say here that the government gains its revenue from tax appropriation from production rather than from production itself and, hence, that the concept of just property can never apply to government.

and, therefore, he becomes the just and rightful owner on the homestead basis. Furthermore, all of his descendants have clear and proper title on the basis of being his heirs. It is clear, then, that even if we can show that the origin of most existing land titles are in coercion and theft, the existing owners are still just and legitimate owners if (a) they themselves did not engage in aggression, and (b) if no identifiable heirs of the original victims can be found. In most cases of current land title this will probably be the case. *A fortiori*, of course, if we simply don't know whether the original land titles were acquired by coercion, then our homestead principle gives the current property owners the benefit of the doubt and establishes them as just and proper owners as well. Thus, the establishment of our theory of justice in property titles will not usually lead to a wholesale turnover of landed property.

In the United States, we have been fortunate enough to largely escape continuing aggression in land titles. It is true that originally the English Crown gave land titles unjustly to favored persons (for example, the territory roughly of New York State to the ownership of the Duke of York), but fortunately these grantees were interested enough in quick returns to subdivide and sell their lands to the actual settlers. As soon as the settlers purchased their land, their titles were legitimate, and so were the titles of all those who inherited or purchased them. Later on, the United States government unfortunately laid claim to all virgin land as the "public domain," and then unjustly sold the land to speculators who had not earned a homestead title. But eventually these speculators sold the land to the actual settlers, and from then on, the land title was proper and legitimate.[10]

In South America and much of the undeveloped world, however, matters are considerably different. For here, in many areas, an invading State conquered the lands of peasants, and then parcelled out such lands to various warlords as their "private" fiefs, from then on to extract "rent" from the hapless peasantry. The descendants of the conquistadores still presume to own the land tilled by the descendants of the original peasants, people with a clearly just claim to ownership of the land. In this situation justice requires the vacating of the land titles by these "feudal" or "coercive" landholders (who are in a position equivalent to our hypothetical Rockefellers and Kennedys) and the turning over of the property titles, without compensation, to the individual peasants who are the "true" owners of their land. Much of the drive for "land reform" by the peasantry of the undeveloped world is precisely motivated by an instinctive application of our theory of justice: by the apprehension of the peasants that the land they have tilled for generations is "their" land and that the landlord's claim is coercive and unjust. It is ironic that, in these numerous cases, the only response of utilitarian free-market advocates is to defend existing land titles, regardless of their injustice, and to tell the peasants to keep quiet and "respect private property." Since the peasants are convinced that the property is their private title, it is no wonder that they fail to be impressed; but since they find the supposed champions of property rights and free-market capitalism to be their staunch enemies, they generally are forced to turn to the only organized groups that, at least rhetorically, champion their claims and are willing to carry out the required rectification of property titles—the socialists and communists. In short, from simply a utilitarian consideration of consequences, the utilitarian free-marketeers have done very badly in the undeveloped world, the result of their ignoring the fact that others than themselves, however inconveniently, do have a passion for justice. Of course, after socialists or communists take power, they do their best to collectivize peasant land, and one of the prime struggles of Socialist society is that of the State versus the peasantry. But even those peasants who are aware of socialist duplicity on the land question may still feel that with the socialists and communists they at least have a fighting chance. And sometimes, of course, the peasants have been able to win and to force communist regimes to keep hands off their newly gained private property: notably in the case of Poland and Yugoslavia.

[10] This legitimacy, of course, does not apply to the vast amount of land in the West still owned by the federal government which it refuses to throw open to homesteading. Our response to this situation must be that the government should throw open all of its public domain to private homesteading without delay.

The utilitarian defense of the *status quo* will then be least viable—and, therefore, the least utilitarian—in those situations where the *status quo* is the most glaringly unjust. As often happens, far more than utilitarians will admit, justice and genuine utility are here linked together. To sum up, all existing property titles may be considered just under the homestead principle, *provided*: (a) that there may never be any property in people; (b) that the existing property owner did not himself steal the property; and particularly (c) that any identifiable just owner (the original victim of theft or his heir) must be accorded his property.