

The Origin of Property Rights:
A Critique of Rothbard and Hoppe on Natural Rights

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March 23, 2000

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Working Paper—Comments Welcome

A Natural Rights Perspective on Property and Externalities¹

The natural right to self-ownership, and the right to homestead that with which one mixes his labor, are the twin axioms upon which all libertarian social thought supposedly rests, according to Murray Rothbard and Hans-Hermann Hoppe. This paper contends that while Austrian economists have made unique and valuable contributions to economics in many areas, the ethical defense of property rights espoused by some Austrians is lacking.²

Ultimately, this paper attempts to show that the natural rights approach to property rights is based on a set of unsupported assumptions—which some might call “faith.” Rothbard and Hoppe are right to seek fundamental ethical norms to support private property rights (and liability rules for externality resolution), but key parts of their arguments depend on faith: a faith their readers may not share. Faith is certainly not incompatible with economics, but the statement of faith should at least be made clear rather than maintaining the pretense that there are universally accepted external standards by which an argument may be tested. Presuppositions are necessary to any argument, but presuppositions vary. Christians, for instance, presuppose the truth of biblical revelation. A revelation-based approach is neither more faith-dependent than, nor inferior to, the natural rights approach employed by Rothbard and Hoppe. For the Christian, the ethics of property and externality resolution originate not with natural rights but with biblical truth. This in no way undermines the imperative of private property, but rather places it in its proper context.

¹ An earlier version of this paper appeared in the *Journal of Markets and Morality*, vol. 2, no. 2 (1999). The author wishes to thank Mark Brandly of Ball State University and Glenn Moots of Northwood University for their helpful comments and criticism. All errors and omissions are, of course, the author’s responsibility alone.

² Of course, many Austrians view Austrian economics as a body of analytical thought, not an ethical system, and believe that there is no “Austrian” ethical position. Austrians are deeply divided on their ethical views, and in many cases it is difficult to see any ethical views in their work. However, the prominent Austrian Murray Rothbard and certain of his followers (notably Hans-Hermann Hoppe) have espoused a particular ethical view in their attempts to defend private property rights. It is this view that is the focus of this paper.

The first section outlines key points of the Austrian view of property rights and externality resolution as expressed in Murray Rothbard's paper "Law, Property Rights and Air Pollution" (1997). Section two presents the excellent Rothbardian critique of the Coase Theorem, introduces the twin axioms undergirding libertarian property rights theory, and describes Rothbard's criteria for an ethical legal system, including externality resolution. Section three argues that the most basic assumptions libertarians make concerning property rights have some weaknesses that should be resolved if they are to support an entire "system of property rights titles." Section four makes applications to the difficult ethical issues surrounding animal rights, abortion, and children's rights. Section five concludes the paper.

Property and Rothbardian Solutions to Externalities

Economists who are impressed with the efficiency of a free market in many areas of human interaction are often stymied when attempting to achieve those same free market efficiencies in cases of externality. Resolving certain problems of externality seems to be impossible without resorting to some level of government intervention. It is difficult in many situations to imagine a satisfactory property rights-based solution to externalities. Arguably, the most difficult case of externality for the free market to solve independent of government intervention is that of air pollution. This is because there potentially exist many dispersed producers of the pollutant and many dispersed victims of the pollution. Voluntary contracting among the many individuals and firms is virtually impossible because of extremely high transaction costs.

Austrian economists have persisted, however, in maintaining that free-market solutions do exist for air pollution and other externalities. Rejecting the Coasean view that varying allocations of property rights in externality cases have no effect on the outcome as long as transaction costs are zero, Austrians hold that a strict-liability, tort law approach based on fundamental axioms of private property will resolve externality conflicts appropriately. Many Austrians tend to reject notions of "social efficiency," claiming that

conflicts must be addressed using an ethical system based on deductive reasoning from these “self-evident” axioms.

The Austrian critique of Coase is powerful, and a thoughtful Christian may well find substantial agreement with this and many other contributions of the Austrian school. However, in later sections of this paper it is argued that at the most basic level, the Austrian school lacks a firm ethical foundation.

Austrian Economics vs. the Coase Theorem

Ronald Coase (1960) and Harold Demsetz (1966) began with the assertion that the victim of an externality is equally responsible for the damage done him. Writes Coase, “[it] is not that the man who harbors rabbits is solely responsible [for damage done to neighboring fields]; the man whose crops are eaten is equally responsible.”³ The idea of “fault” disappears in the Coasean world, as the distinctives between perpetrator and victim are blurred. Courts would attempt to award property rights in such a way as to maximize social wealth, though much “wealth” is invisible to the courts, as will be shown later.

A classic example used to illustrate the Coase Theorem is the case of a railroad track running alongside fields of grain. The steam locomotive emits sparks from its stack, some of which land in the field, setting the grain afire. It is true that without the presence of both the field of grain and the locomotive, the damage would not occur. The question before the judge is: Should the locomotive be permitted to continue emitting sparks, or should the farmer receive rights to continue to grow grain undamaged by sparks? In a zero transactions cost setting, says Coase, resources will be allocated identically no matter which party receives the rights to enjoin the other.

If the farmer receives the right to have spark-free fields, the railroad will take costly measures to a) prevent damage from occurring or b) compensate the farmer for damage that does occur, or c) do some mixture of both prevention and compensation.⁴ If

³ Coase (1960), p. 37.

⁴ This may include the installation of a smoke abatement device, running fewer trains along the track, paying the farmer to leave that part of the field near the track unused, or compensating the farmer for damage actually done.

the railroad receives the right to continue emitting sparks, the farmer will approach the railroad with an offer to pay the railroad to take the same actions.

For example, if the farmer is losing \$20,000 per harvest to fire damage, and the property rights are assigned to the farmer, the railroad will have to compensate the farmer \$20,000 or take other costly measures, whichever is cheaper. If the property rights are assigned to the railroad, the farmer will pay up to \$20,000 to the railroad to eliminate the damage. If abating the damage is more expensive than the value of the grain, no abatement will occur regardless of the allocation of property rights. Alternatively, if abating the damage is less expensive than the value of the grain, abatement will occur regardless of the allocation of property rights.

The court does have an impact on the wealth of the disputants, of course. If the farmer receives the rights, the railroad will lose up to \$20,000 per harvest. If the railroad receives the rights, the farmer will lose the same amount per harvest. Here we can see the source of one Austrian objection to the Coase Theorem. Wealth does have significance to both of the involved parties, and it does make a difference to them (though perhaps not to the smoke abatement equipment manufacturer) which one receives the property rights.

To understand the main Austrian objection to Ronald Coase's famous Theorem, we must recall the distinctive Austrian concept of subjective value. Walter Block writes, "as long as the values of both sides in the legal dispute were real, or general, that Coase's Theorem was correct. However, if these values were psychic or not general across at least a few people, it was incorrect."⁵ If the farmer has any inalienable value in his field of grain—if his field has value for him that cannot be traded away—the farmer may not be able to pay the railroad to abate spark emissions. Further, the farmer will not be willing to accept the market value of the grain in compensation, for the market value of the grain is less than the total value of the grain to the farmer. Even in a zero transactions cost world, it matters which party receives the property rights. As Block notes,

...there is no guarantee that the loser will have the requisite funds with which to bribe the victor, even if he indeed values the bundle of rights under contention to a degree greater than his

⁵ Block (1995), p. 64.

opponent. Coase had supposed that the payment could be financed out of the greater value; but if this took the form of mere psychic income, it would be unable to do any such thing.⁶

Under a court's application of the Coase Theorem, then, great losses of subjective value produced by aggressive acts may not be fully recovered by the victim. The result can be a violation of basic economic or religious freedoms. Demsetz (1979) advocates coercive reordering of property rights to a resource based on a court's determination of the most profitable use of the resource. Because subjective values and religious beliefs cannot be easily assessed by judges, their manipulation of property rights could easily result in the loss of freedom to practice true religion. In what Block notes is a "highly emotional example," Demsetz puts forward the case of a resource owned entirely by a religious sect, which preserves the resource exclusively for religious worship. The resource, dubbed "Austrian Pure Snow Trees," happens to be the only cure for cancer, but the sect fervently believes that using the trees for curing disease would be a sacrilege resulting in certain eternal damnation. On the implicit assumption that the religious sect is wrong in its views, Demsetz argues that it would be preferable for a redistribution of property rights to occur. Block interprets Demsetz such that Demsetz "must claim that the law should be written so as to attain this result..."⁷

Twin Axioms: Self-Ownership and Homesteading

Instead of the efficiency-based, "value-free"⁸ approach of Coase and Demsetz, Rothbard proposes a normative approach based on two related axioms, defended by Austrians as "self-evident."⁹ The first of these is that "every man is a self-owner, having absolute jurisdiction over his own body." The second axiom follows from the first: "each person justly owns whatever previously unowned resources he appropriates or 'mixes his labor with.'" From these two axioms stem the libertarian "harm principle": "No action should be considered illicit or illegal unless it invades, aggresses against, the person or just

⁶ *Ibid.*, p. 65.

⁷ *Ibid.*, p. 78. For the Block-Demsetz debate, see Demsetz (1966, 1967, 1979, 1997) and Block (1977, 1995).

⁸ The Coasean view is actually not value-free. For instance, as Rothbard points out, Coaseans do not defend their assumption that efficiency, an ethical norm, should prevail in establishing legal principles.

⁹ See David Gordon (1993), pp. 28-30.

property of another. Only invasive actions should be declared illegal, and combatted with the full powers of the law.” Tort law, Rothbard believes, can form the foundation of a libertarian society. Only a physical invasion of person or property constitutes a tort, and physical force may be used to defend against or punish those torts.

The second axiom mentioned above is also known as the “homesteading principle.” A consistent application of this principle establishes the right to transfer property through sale, gift, or bequest. Rothbard, attempting to resolve modern externality problems, applies the homesteading principle to air pollution and noise pollution issues. Easement rights to pollution are acquired, he says, by “prior claim” to emit certain levels of pollution:

It should be clear that the same theory should apply to air pollution. If A is causing pollution of B’s air, and this can be proven beyond a reasonable doubt, then this is aggression and it should be enjoined and damages paid in accordance with strict liability, *unless* A had been there first and had already been polluting the air before B’s property was developed. For example, if a factory owned by A polluted originally unused property, up to a certain amount of pollutant X, then A can be said to have *homesteaded a pollution easement* of a certain degree and type.¹⁰

The homestead principle allows for varying conditions in different areas and over time. The case of *Bove v. Donner-Hanna Coke Co.* (1932) is illustrative. Mrs. Bove had moved into a factory district, across the street from Donner-Hanna Coke Company. When Mrs. Bove took the coke company to court, complaining of noise and air pollution, the court wrote:

With all the dirt, smoke and gas which necessarily come from factory chimneys, trains and boats, and with full knowledge that this region was especially adapted for industrial rather than residential purposes, and that factories would increase in the future, plaintiff selected this locality as the site of her future home. She voluntarily moved into this district, fully aware of the fact that the atmosphere would constantly be contaminated by dirt, gas, and foul odors; and that she could not hope to find in this locality the pure air of a strictly residential zone. She evidently saw certain advantages of living in this congested center. This is not the case of an industry, with its attendant noise and dirt, invading a quiet, residential district. This is just the opposite. Here a residence is built in an area naturally adapted for industrial purposes and already dedicated to that use. Plaintiff can hardly be heard to complain at this late date that her peace and comfort have been disturbed by a situation which existed, to some extent at least, at the very time she bought her property.¹¹

¹⁰ Rothbard (1997), p. 77.

¹¹ quoted in Rothbard (1997), p. 79.

Torts of trespass or nuisance, Rothbard makes clear, only exist insofar as they harm the homesteader. Thus radio waves, while they cross geographical property boundaries, may be legally broadcast without violating anyone's property rights because property owners are not harmed by their transmission (if they were proven to be harmful beyond a reasonable doubt, the broadcast should be enjoined, Rothbard notes). The radio station owner has homesteaded the electromagnetic spectrum for those frequencies and distances over which he broadcasts, and therefore he has property rights in that spectrum.

Likewise, those who seek to reduce air pollution in their neighborhood do not have a case if either a) the polluters of the air were producing at their present level of pollution before anyone else moved into the affected area, or b) the pollution cannot be linked beyond a reasonable doubt to harm suffered by the complainants.

Criteria for an Ethical Legal System

Austrians derive from the basic harm principle several other criteria for an ethical legal system. One is that the burden of proof in a tort case should rest upon the plaintiff. This may be intuitively appealing, but Rothbard's defense of this principle is weak—he relies exclusively upon the raw assertion that “if we are unsure [of the guilt or innocence of the defendant], it is far better to let an aggressive act slip through than to impose coercion and therefore to commit aggression ourselves.”

Another criterion is strict causality. “To establish guilt and liability,” Rothbard writes, “strict causality of aggression leading to harm must meet the rigid test of proof beyond a reasonable doubt.”¹² Again, it is not clear how Rothbard derives this principle from the two basic axioms.

Following from strict liability is the doctrine that only the aggressor should be liable for torts against the victim. Nonaggressors may not be lumped in with the aggressor

¹² In a paragraph that has great relevance for current legal battles, Rothbard writes, “Thus, if lung cancer rates are higher among cigarette smokers than noncigarette smokers, this does not in itself establish proof of causation. The very fact that many smokers never get lung cancer and that many lung cancer sufferers have never smoked indicates that there are other complex variables at work. So that while the correlation is suggestive, it hardly suffices to establish medical or legal proof; *a fortiori* it can still less establish any sort of legal guilt (if, for example, a wife who develops lung cancer should sue a husband for smoking and therefore injuring her lungs).”

for expediency or for any other reason. This principle would seem to follow directly from the harm principle as well as from strict liability.

Rothbard on Externalities

Rothbard summarizes the libertarian position on externalities as follows:

Anyone who initiates [an overt act of aggression against the person or property of someone else] must be strictly liable for damages against the victim, even if the action is “reasonable” or accidental. Finally, such aggression may take the form of pollution of someone else’s air, including is owned effective airspace, injury against his person, or a nuisance interfering with his possession or use of his land.

This is the case, *provided that*: a) the polluter has not previously established a homestead easement; b) while visible pollutants or noxious odors are per se aggression, in the case of invisible and insensible pollutants the plaintiff must prove actual harm; c) the burden of proof of such aggression rests upon the plaintiff; d) the plaintiff must prove strict causality from the actions of the defendant to the victimization of the plaintiff; e) the plaintiff must prove such causality and aggression beyond a reasonable doubt; and f) there is no vicarious liability, but only liability for those who actually commit the deed.¹³

Rothbard proceeds to collapse all crime into tort law, so that no one other than the victim can press charges against an aggressor—not the state or any other entity. Giving some attention to problems of multiple aggressors and large numbers of victims, Rothbard asserts that victims may not join others to the suit as plaintiffs without their permission, as class action suits do.

Weaknesses in Libertarian Property Rights Theory

For all of the strengths of Rothbard’s arguments and the power of the Austrian critique of the Coase Theorem, there remain some weaknesses in the foundations of libertarian property rights theory. I shall direct my criticism at the level of the two basic axioms upon which Rothbard builds his entire political theory:

...the basic axiom of libertarian political theory holds that every man is a self-owner, having absolute jurisdiction over his own body. In effect, this means that no one else may justly invade, or aggress against, another’s person. It follows then that each person justly owns whatever previously unowned resources he appropriates or “mixes his labor with.” From these twin

¹³ Rothbard (1997), p. 87.

axioms—self-ownership and “homesteading”—stem the justification for the entire system of property rights titles in a free market society.¹⁴

Though these axioms are interrelated, I shall address them independently.

“Every Man is a Self-Owner”

Hans-Hermann Hoppe defends the self-ownership axiom by contending that the process of argumentation necessarily presupposes the existence of self-ownership and private property:

...argumentation...is a form of action requiring the employment of scarce means; and furthermore that the means, then, which a person demonstrates as preferring by engaging in propositional exchanges are those of private property. For one thing, obviously, no one could possibly propose anything, and no one could become convinced of any proposition by argumentative means, if a person’s right to make exclusive use of his physical body were not already presupposed.¹⁵

In other words, it is self-contradictory to verbally oppose private property without contradicting oneself. Because one must assert private property rights in one’s own body in order to make any argument whatsoever, one cannot make any consistent argument against private property.

N. Stephan Kinsella explains quite clearly Hoppe’s point:

...anyone engaging in argumentation implicitly presupposes the right of self-ownership of other participants in the argument, for otherwise the other would not be able to consider freely and accept or reject the proposed argument. Only as long as there is at least an implicit recognition of each individual’s property right in his or her own body can true argumentation take place. When this right is not recognized, the activity is no longer argumentation, but threat, mere naked aggression, or plain physical fighting. Thus, anyone who denies that rights exist contradicts himself since, by his very engaging in cooperative and conflict-free activity of argumentation, he

¹⁴ Rothbard (1997), pp. 60, 61. Note the similarity between Rothbard’s statement and the position of John Locke:

[E]very 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, 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. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to.... [John Locke, *An Essay Concerning the True Origin, Extent, and End of Civil Government*, V. pp. 27-28, in Laslett (1960), pp. 305-307; in Rothbard (1998), pp. 21, 22.]

¹⁵ Hoppe (1993), p. 205.

necessarily recognizes the right of his listener to be free to listen, think, and decide. That is, any participant in discourse presupposes the non-aggression axiom....¹⁶

This sort of reasoning is quite appealing, and many in the Austrian school of thought have adopted Hoppe's reasoning as their ultimate defense of private property (which is to say, their ultimate defense of the whole libertarian system).¹⁷

This defense of the self-ownership axiom relies upon the rule of ethics that an ethical system must apply equally to all people.¹⁸ If this rule did not hold true, a special entity or class of entities could own one or more people. No reason why this rule of ethics must hold true is presented—it is accepted on faith and is therefore subject to the criticism above. It is no defense to place the burden of proving the existence of owned people on the opposition, for neither Hoppe nor Rothbard present any compelling reason to believe that this universality rule should hold over any other ethical rule. No justification is offered other than the “self-evident” nature of these principles. To argue the universality rule based on a “most people agree that...” argument seems to ignore grave epistemological difficulties.

As the libertarian theory of property rights is essentially faith-based, it is no more “objective” than any other faith-based property rights theory. The Christian may assert that God is the creator, and therefore the owner, of all men.¹⁹ The Christian ethical system

¹⁶ Kinsella (1996), p. 315.

¹⁷ Even so, many Austrians (*e.g.* the Kirznerians, the Hayekians, and even some Rothbardians) do not agree with Hoppe's argument. *See* footnote 2, above.

¹⁸ Rothbard writes, “...if we are trying to set up an ethic for man..., then to be a valid ethic the theory must hold true for *all* men, whatever their location in time or place. This is one of the notable attributes of natural law—its applicability to all men, regardless of time or place.” (Rothbard [1998], p. 42.) This universality of ethical norms is, according to Hoppe, “the idea, as formulated in the Golden Rule of ethics or in the Kantian Categorical Imperative, that only those norms can be justified that can be formulated as general principles which without exception are true for everyone.” (Hoppe [1993], p. 182.) This definitional statement is apparently supposed to suffice for a defense of the universalization test of ethical rules.

¹⁹ It might be contended here that man cannot voluntarily enter into slavery. As Rothbard put it, “...a man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement.” (Rothbard [1998], pp. 40, 41) It might seem then that a resolution would require either rejecting the idea that man has an independent will, or giving up the thesis that God is owner of all men. This is a false opposition, however. God as creator owns all men, whether or not they will it to be so. The ownership is not voluntarily entered into, neither are we slaves. We have a free will, in that we all have the freedom to do what we please, given our choices. Our choices are in turn determined by our desires, which are naturally evil in Reformed thought. St. Augustine essentially argued that we have the freedom to choose, but the ability to choose only what we want.

applies equally to all people in principle, but only because God has *chosen* to act in this way with his creation, not because God is *constrained* by an external rule of ethics. The universality rule is understandably appealing, but it cannot stand apart from an ethical system that supports and applies it. The burden of proof can equally as well be placed upon Hoppe to show that the universality rule is superior.

Rothbard (1998) addresses the possibility that one class of humans might own (or partially own) another class:

...here, one person or group of persons, G, are entitled to own not only themselves but also the remainder of society, R. But, apart from many other problems and difficulties with this kind of system, we *cannot* here have a universal or natural-law ethic for the human race. We can only have a partial and arbitrary ethic, similar to the view that Hohenzollerns are by nature entitled to rule over non-Hohenzollerns. Indeed, the ethic which states that Class G is entitled to rule over Class R implies that the latter, R, are subhuman beings who do not have a right to participate as full humans in the rights of self-ownership enjoyed by G—but this of course violates the initial assumption that we are carving out an ethic for human beings as such.²⁰

The first axiom is not intuitively obvious. It is a statement that is essentially arbitrary and must be accepted by faith.²¹ Questions of faith certainly bear on economics, but without an internally consistent, trustworthy revelatory document, these questions cannot be answered definitively. Rothbard does not present or even argue the existence of such a document. It is also no defense to defend the self-ownership axiom with the homesteading axiom,²² for the homesteading axiom has difficulties of its own. The entire system derived from the faith-based assertion is therefore on shaky ground. Those who do not share Rothbard's faith will not necessarily accept this first axiom.

“Each Person Justly Owns Whatever Previously Unowned Resources He Appropriates”

This axiom is alleged to follow from the first. Because each human must make use of substances outside his own body to survive, each human is entitled to appropriate all

²⁰ Rothbard (1998), pp. 45, 46.

²¹ Rothbard defines an axiom as a statement that cannot be refuted without contradicting oneself in the refutation. Cf. Rothbard (1998), pp. 32, 33. Yet this “axiom” can be refuted, as this paper attempts to do in part.

²² Such a defense might run as follows: Because each human was the first to make physical use of his own body, each human has effectively homesteaded his own body and is therefore entitled to property rights in it.

substances outside his own body with which he mixes his labor (to follow John Locke) and which are not owned by another.

There is some ambiguity here as to the extent of “mixing” necessary to produce a property right in an unclaimed resource. One cannot simply affix a flagpole in a beach and lay claim to all unowned land for a thousand miles in every direction, Rothbard says.²³ Yet exactly how much transforming of the land must take place before a title to the land is held by the settler? Is the claim limited to the area of the settler’s footprints and the grains of sand displaced by the flagpole? With no appeal to common law or a legitimate state to adjudge these issues, there is no unambiguous solution. Suppose I fence off forty acres of previously unclaimed land, on which I construct a house and outbuildings whose foundations cover ½ an acre, keep ½ an acre for a corral, and I plow 29 acres. Because I like to view some land in its natural state, I leave 10 acres uncleared and unplowed. Is this section of land then not truly mine? Rothbard would seem to say it is not:

Suppose, for example, that Mr. Green legally owns a certain acreage of land, of which the northwest portion has never been transformed from its natural state by Green or anyone else. Libertarian theory will morally validate his claim for the rest of the land—provided, as the theory requires, that there is no identifiable victim (or that Green had not himself stolen the land). But libertarian theory must invalidate his claim to ownership of the northwest portion. No, so long as no “settler” appears who will initially transform the northwest portion, there is no real difficulty; Brown’s claim may be invalid but it is also mere meaningless verbiage. But should *another* man appear who does transform the land, and should Green oust him by force from the property (or employ others to do so), then Green becomes at that point a criminal aggressor against land justly owned by another.²⁴

It remains unclear how Rothbard would resolve this ambiguity without appeal to his own personal preference.

Explaining the core of the homesteading argument, Hoppe writes,

...it would be...impossible to sustain argumentation for any length of time and rely on the propositional force of one’s arguments, if one were not allowed to appropriate next to one’s body other scarce means through homesteading action, i.e., by putting them to use before somebody else does, and if such means, and the rights of exclusive control regarding them, were not defined in objective, physical terms. For if no one had the right to control anything at all except his own body, then we would all cease to exist and the problem of justifying norms—as well as all other human problems – simply would not exist. Thus, by virtue of the fact of being alive then,

²³ Rothbard (1998), p. 64.

²⁴ Rothbard (1998), pp. 63, 64.

property rights to other things must be presupposed to be valid, too. No one who is alive could argue otherwise.²⁵

This is a *non sequitur*. It does not follow that because I must use certain substances outside my body, that I must therefore appropriate them as my own property. Not only is it possible to not own our own bodies, it is possible to use things that we do not own—even things necessary for our very survival. Again, if we can imagine the existence of an entity or class of entities that owns a person or group of persons, we can easily imagine that that entity also owns all substances necessary for that person’s survival. For some reason, that entity may permit the use of the human body and substances surrounding that body. The Christian defends God’s ownership of the world, and all that is in it.²⁶ Our bodies, and all we possess, may be thought of as being lent to us for our temporary use and enjoyment. R.J. Rushdoony explains the outworkings of this view:

The implications of this are spelled out in the law. Sovereignty means taxing power: hence the tithe. Sovereignty means absolute jurisdiction: thus man can use the earth and his own being only subject to God’s law. Sovereignty means property rights: the Bible thus affirms the absolute ownership of the earth by God, and its possession as a steward by man under God. The private possession of property is God’s purpose, but it is at all times subject to God’s law and taxation.²⁷

The beginning of a Biblical doctrine of property is to see God’s absolute property rights over us, and over our income, vocation, family, and total life. *What belongs to God cannot be surrendered to another*. Our sin begins with a claim that we are our own property, and it ends with our enslavement by a tyrant state.²⁸

The contrast here between Rushdoony and Hoppe is startling. Rushdoony views the claim to self-ownership as the initial step toward statism, while Hoppe believes that self-ownership is a guard against statism. The different views stem from different faith-based assumptions about human nature. Rushdoony believes that the man who claims self-ownership will see himself as free to surrender his life and property to the state, and because of his fallen condition, he will tend to do so. Only the acknowledgement of God’s

²⁵ Hoppe (1993), pp. 205, 206.

²⁶ Psalm 24:1, 2 states, “The earth is the Lord’s and all its fullness, The world and those who dwell therein. For He has founded it upon the seas, And established it upon the waters.” Cf. Psalm 47:2, 7-8; Jeremiah 27:5.

²⁷ Rushdoony (1997), p. 534.

²⁸ Rushdoony (1997), p. 538.

ultimate ownership provides a rationale for rejecting the power of the state. Hoppe must assume that man has the moral fortitude to resist an unjust transfer of individual rights to the state—self-enslavement. Why is the assertion of biblical truth any less valid than Hoppe’s assertion of ideas without any appeal to revelation?

Applications to Animal Rights, Abortion and Children’s Rights

To see another problem with the *non sequitur* in the homesteading axiom, consider the life of a newborn baby. Newborns cannot appropriate to themselves any substance that is not given to them—not milk, not covering, not a crib.²⁹ Though we typically do not declare that a newborn is *owned* by his parents,³⁰ it is clear that the newborn depends for his very life upon substances owned by his parents. For their own reasons, parents permit and even encourage the use of these substances by the child. Christians believe that God acts in a parallel way with his creation.

It is not necessary that the owner of property of any sort *claim* rights to the property to *retain* rights to the property. The owner’s quiescence does not deprive him of the right to his property. If a person is owned by another entity, he may never even know of the entity’s existence.³¹ Certainly atheists do not admit to God’s existence, much less his ownership of the world. Yet their belief has no impact on the fact of God’s existence and sovereignty over his creation.

Hoppe says that to argue presupposes private property rights. He does not say (nor would it seem that he can show) that failure to argue implies a lack of property rights. It is not clear, then, under Hoppe’s argumentation ethic, why animals do not have

²⁹ We will allow that the child can appropriate air to himself.

³⁰ This, however, is the case Hoppe and Rothbard would make. The parents cooperated in “laboring” to produce the child, who did not exist before conception. If the parents have property rights over their own bodies and substances with which they mix their labor, it follows in the libertarian system that the child is owned by the parents. Cf. Rothbard (1998), p. 99-112. The Christian can counter with the argument that God, as owner of all living things, retains property rights over the offspring of his creation, and lays down parental limitations and requirements. Parents may indeed own their children, in a sense, but that ownership is temporary and conditional. See below, p. 16.

³¹ Certainly the unborn child is unaware of the existence of his mother—yet a Rothbardian would defend the ownership of the child by the mother.

property rights in their own bodies. Hoppe vociferously contests the validity of this criticism,³² but his objections appear to be raw assertions: “Animals are not moral agents, because they are incapable of argumentation; and my theory of justice explicitly denies its applicability to animals and, in fact, implies that they have no rights!” Animals may not argue, but they do contest territory. Why isn’t this the same thing? Even so, the Christian argues for or against certain animal rights based on biblical truth, not the presence or absence of the ability to argue.³³ It would also appear that the killing of human fetuses, infants, the senile, mentally retarded, and comatose would be acceptable under Hoppe’s ethical system, because they cannot argue.

Rothbard (1998) contends that man’s rights are grounded in the nature of man; they are *natural rights*. Because man is uniquely distinguished from all other creatures by his capacity for rational thought, the “rights-ethic for mankind is precisely that: for all men, regardless of race, creed, color or sex, but for the species man alone. ...Natural law is necessarily species-bound.”³⁴ The Christian might well agree, but the Christian would base that belief on the fact that biblical law explicitly recognizes the unique place of mankind in the world. Rothbard, in contrast, bases his argument on the sympathies of the reader. Statements beginning with “It would surely be absurd to say....”³⁵ beg the question. Rothbard hopes to prove that “the concept of a species ethic is part of the nature of the world...by contemplating the activities of other species in nature.” The “proof” lies in the contention that the wolf, in devouring other species, “is simply following the natural law of his own survival.” In other words, ethics are species-specific because other species act as though ethics are species-specific. Apparently, the commonality of the practice implies its moral rightness—a “natural right.” The principle here carries consequences at which Rothbard would likely have balked. Contemplating the activities of other species in nature might lead us to infer a natural right to infanticide. Lions, alligators, guppies, and other species often devour their young—may we then infer a natural right to do the same?

³² Hoppe, (1993), pp. 205, 247.

³³ See, e.g., Deut. 25:4, John 21:9-13.

³⁴ Rothbard (1998), p. 155, 156.

³⁵ Rothbard (1998), p. 156.

A human fetus within the body of its mother cannot argue, and what it consumes is provided entirely by the mother, perhaps without her consent. This leads many libertarians to defend the legality of abortion at any time prior to birth.³⁶ In *The Ethics of Liberty*, Rothbard lays out clearly the libertarian position on abortion.³⁷

The proper groundwork for analysis of abortion is in every man's absolute right of self-ownership. This implies immediately that every woman has the absolute right to her own body, that she has absolute dominion over her body and everything within it. This includes the fetus. Most fetuses are in the mother's womb because the mother consents to this situation, but the fetus is there by the mother's freely-granted consent. But should the mother decide that she does not want the fetus there any longer, then the fetus becomes a parasitic "invader" of her person, and the mother has the perfect right to expel this invader from her domain. Abortion should be looked upon, not as "murder" of a living person, but as the expulsion of an unwanted invader from the mother's body. Any laws restricting or prohibiting abortion are therefore invasions of the rights of mothers.³⁸

Rothbard notes that he is not trying to establish "the *morality* of abortion (which may or may not be moral on other grounds), but its *legality*, i.e., the absolute right of the mother to have an abortion." He is concerned, he writes, with "people's *rights* to do or not do various things, not whether they should or should not *exercise* such rights." It is certainly true that not all sins should be crimes. Yet the Bible provides not only definitions of sin, but definitions of crime (*e.g.*, Exodus 21, 22, *cf.* Matthew 5:17-19). What is rightfully legal and illegal is determined by God, not by rationalistic appeals to man's self-asserted right over his own body and right to that which he homesteads.³⁹ Whether or not we deem it proper that an unborn child should be legally protected from harm,⁴⁰ or that a woman should be required by law to care for her child before and after birth, these are God's requirements.

Failing to appeal to God's law concerning children forces Rothbard into a difficult situation. After defending the ownership of children by their parents, Rothbard recognizes that certain limitations would have to be placed on that ownership.

³⁶ A possible exception would be when the mother is under contract as a surrogate for another woman.

³⁷ Some prominent libertarians do, of course, take exception with this position. Ron Paul is a notable example.

³⁸ Rothbard (1998), p. 98.

³⁹ See Rushdoony (1973, 1982, 1999).

⁴⁰ See, *e.g.*, Exodus 21:22, 23.

But surely the mother or parents may not receive the ownership of the child in absolute fee simple, because that would imply the bizarre state of affairs that a fifty-year old adult would be subject to the absolute and unquestioned jurisdiction of his seventy-year-old parent. So the parental property right must be limited *in time*. But it also must be limited *in kind*, for it surely would be grotesque for a libertarian who believes in the right of self-ownership to advocate the right of a parent to murder or torture his or her children.

We must therefore state that, even from birth, the parental ownership is not absolute but of a “trustee” or guardianship kind. In short, every baby, as soon as it is born and is therefore no longer contained within his mother’s body, possesses the right of self-ownership by virtue of being a separate entity and a potential adult. It must therefore be illegal and a violation of the child’s rights for a parent to aggress against his person by mutilating, torturing, murdering him, etc.⁴¹

At two points here Rothbard finds that his reasoning leads to conclusions he finds objectionable. For a resolution he relies partially on the reader’s sympathies. First, the ownership of an older adult child by an aging parent is “bizarre,” Rothbard claims, so the reader is expected to agree to the limitation of ownership in time. If an appeal to strangeness were sufficient to dismiss a position, then many libertarian positions could be rejected out of hand.⁴² Why must we agree with Rothbard’s notion of bizarritude? Second, the murder or torture of children by the parents is called “grotesque.” It is relieving that Rothbard agrees with Christians and others on this point, but again, our mutual agreement does not suffice as an argument against child abuse.⁴³ To call something bizarre, grotesque, or strange implies a standard. What is Rothbard’s standard?

Rothbard’s concept of parents as trustees or guardians is entirely appropriate, but is defensible only from a Christian perspective. Rothbard’s defense is arbitrary. A child *ex utero* has the right of self-ownership, he writes, because the child is a separate entity (no longer requiring the specific services of the mother) and a potential adult. A child has the right not to be harmed,⁴⁴ but does not possess the right to any property or services of

⁴¹ Rothbard (1998), p. 100.

⁴² Including, perhaps, Rothbard’s defense of markets in children. Rothbard (1998), p. 103.

⁴³ A similar case in which Rothbard “borrows” conclusions from Christian principles without acknowledging their proper source (or providing a non-arbitrary alternative means of deriving the same conclusions) is found in his chapter on punishment and proportionality in *The Ethics of Liberty*. Rothbard argues that the punishment should fit the crime—“the criminal loses his rights to the extent that he deprives another of his rights.” We might all deem this principle (the *lex talionis*) just, but our mutual agreement does not make it so. *Cf.* Exodus 21:22-25. Incidentally, Rothbard’s favored principle of multiple restitution for theft also has precedent in Hebraic law—*e.g.* Exodus 22:1, 4, 7, 9. See generally North (1990).

⁴⁴ Thus Rothbard’s implied opposition to corporal punishment by the parents. See Rothbard (1998), p. 105.

another. Therefore parents may legally allow a healthy child to starve to death, in Rothbard's system. Again, why we must accept this assertion of rights is unclear.

Yet again, this position results from a refusal to acknowledge God's ultimate ownership of all humanity. God as creator sets the rules by which all men must live, and among these is the requirement that parents provide for their children. To the Christian who understands God's ownership of all things, we are only trustees of all we possess.

One less-than-adequate argument made against Rothbard's position asserts that the parents, as creators of their children, have an obligation to support and protect their children. Depending heavily on the libertarian scholar Williamson Evers, Rothbard points out the weaknesses of the creation argument: How long is this obligation to last? To what extent must the parents or guardians drain their personal resources in the support of a needy child?

The parents are still the creators of the child, why aren't they obliged to support the child forever? It is true that the child is no longer helpless; but helplessness...is not in and of itself a cause of binding obligation. If the condition of being the creator of another is the source of the obligation, and this condition persists, why doesn't the obligation?⁴⁵

The most powerful argument against the creation thesis may simply be to attack the blatant assumption lying at its root: Why should creation imply any obligation toward the created thing?

Rothbard's criticism of the creation thesis is on target, as far as it goes. God, as creator, has no obligation to support any of his creation. However, he has done so, and he has established rules governing the behavior of his created beings. If Rothbard believed in the God of the Bible, he would agree to this principle.

...as long as the child lives at home, it must necessarily come under the jurisdiction of its parents, since it is living on property owned by those parents. Certainly the parents have the right to set down rules for the use of their home and property for all persons (whether children or not) living in that home.⁴⁶

⁴⁵ Rothbard (1998), p. 102, citing Evers. *Cf.* Evers (1978a, 1978b).

⁴⁶ Rothbard (1998), p. 103.

Conclusion

The twin self-ownership and homesteading axioms are the foundation upon which all libertarian social thought supposedly rests, according to Rothbard and Hoppe. If they cannot be defended with anything more than raw assertions, then they deserve no more attention than most Austrian economists give to econometrics. Austrians do have devastating criticisms of Coasean and Pigouvian schemes of externality resolution. What is needed is a better way of defending an alternative scheme based on private property rights. Rothbard and Hoppe are right to seek fundamental ethical norms to support private property rights and liability rules, but they are short of their goal.

To support private property rights and draw nearer to a resolution of the problem of externality, we must begin to recognize God's ownership of creation. For the self-ownership and homesteading axioms Christians should, without apology, substitute two axioms derived from the Bible: 1) God owns the creation, and 2) God provides a system of ethics that must govern our use of the creation. There is often substantial agreement between libertarian scholars and Christians on the necessity and salutary consequences of private property and a free market. However, Christians who import the natural rights approach into their own ethic of property rights may be doing so at the cost of internal consistency. Ultimately, Christians who wish to make consistent contributions to the ethics of property rights and produce constructive contributions to externality theory must rely on biblical truth. Such a revelation-based approach is neither inferior to, nor less objective than, the natural rights approach.

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