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Justice and property: on the institutional thesis concerning property

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INTRODUCTION

The institutional theory of property is that view that property rights are entirely and essentially conventional and are the creatures of states and coercively backed legal systems. In this paper, I argue that, although states and legal systems have a valuable role in defining property rights, the institutional story is not the whole story. Rather, the property rights

that we have reason to recognize as part of justice are partly conventional in character and partly rooted in universal human interests and dispositions. Property rights are perfectly possible in the absence of a state and a legal system, but they are vague, indeterminate and incomplete. In a just social order, we have reason to recognize the legitimate interest that people have in establishing rights over objects external to themselves. But these rights are not absolute, and they may be compromised both for reasons of justice and for other reasons.

In what follows I first situate my discussion of property rights in relation to two recent debates: the disagreement between liberals and libertarians about property rights and the disagreement between nationalist or statist liberals and some cosmopolitan egalitarians. I argue that a tightly integrated view of the relationships among institutional structure, territory, property, justice and jurisdiction underpins the institutionalist liberal view and at the core of this is a view about property. Unfortunately for these liberals, however, this view about property is grounded in arguments that are, at best, inconclusive and which, I believe, we ought to reject. This may appear to open the alarming prospect that libertarians, with their attachment to natural rights to

property, are correct. But this is an outcome which we should only take seriously if we also believe that such rights are absolute.

RAWLSIAN ORTHODOXY

Rawlsian views about distributive justice contain two substantive elements. The first of these elements is the well known principles of justice as derived in the original position; the second is an idea of how those principles can be realized in a social system. Central to this latter part is the idea that distributive outcomes, such as the difference principle, can be programmed into the institutional structure of society via the specification of certain rights, procedures, privileges, permissions and so forth, that can be known *ex ante* by the citizens of a well-ordered society. Instead of a picture where distributive justice is realized by the state coming along and taking from some to give to others, rather the system as a whole is designed with the generation of a particular outcome in mind. Citizens in their economic life pursue their own advantage, but in circumstances that have been shaped with a view to a particular pattern of outcome. The social system as a whole, via this basic structure, works to the common advantage, but especially so as to

maximize the expectations of the least advantaged members of society.[1] This image of society as a quasi-automatic mechanism is an important component of two responses that Rawlsian liberals have to classical liberals and libertarians. Classical liberals, such as Hayek, were opposed to socialist and social democratic redistributive schemes because, according to them, such schemes violated the principle of the rule of law, according to which citizens should know, in advance, the probable consequences of ordering their behaviour in particular ways.[2] A state which disposesses people of property that they have acquired under the public rules of that society, violates this principle. Similarly, for someone like Robert Nozick, the idea that the state should interfere in "capitalistic acts between consenting adults" is monstrous and taxation involves something akin to forcing people to work for the benefit of others (or the state) in a manner akin to conscription or slavery.[3] But the Rawsian basic structure procedural model avoids such problems. Contra Hayek, the rule of law is not violated, since people know in advance the likely consequences of their actions and are not subject to ex post interfer-

[1] See e.g.Krouse and MacPherson [1988]Mandle [2000]Pogge [1989], Rawls [1999].

[2] Hayek [1976].

[3] Nozick [1974].

ence; contra Nozick, since the nature and content property rights are subject to specification by the state, there is no unjust appropriation or rights violation. People simply do not have the kind of natural rights in external objects that Nozick thinks they can acquire, but, rather, a more limited set of rights, specifically designed as part of a broader procedural system with certain stable distributive outcomes.

According to this institutional view of justice, a just outcome is simply whatever results from the procedural operation of a social system designed with justice in mind.[4] The purpose of the state is to secure this system of co-operation within the boundaries of a given territory and to given the individual members of society the assurance that their pursuit of their own conception of the good is compatible with the fair similar pursuit of advantage with the fellow citizens with whom they share institutions. The state realizes their common will that their co-operative scheme should be a fair one, distributing the benefits and burdens of that co-operation appropriately. States grant individuals the assurance necessary to make such a cooperative scheme possible, and outside of such a scheme of cooperation there is no real issue of justice.[5]

[4]The rejection of this view of justice is of course a major theme of Cohen [2008].

[5]For a particularly uncompromising version of this view see Freeman [2007], es-

At this point the other face of this approach should also be clear. Since the boundaries of justice are necessarily fixed by the boundaries of the state and legal system, there is no issue of global distributive justice. At most, members of one society owe to members of other societies certain general duties of humanity, which may have some positive components (perhaps limited duties of assistance) but which are overwhelmingly negative in character.[6] On this view is is a mistake, perhaps even a conceptual or a category mistake, to think of there being global principles or duties with respect to distributive justice.[7]

Most of the argumentative strategies that have been deployed in response to this approach have stressed the fact that co-operation of various kinds takes place across state boundaries, or that there is a global system of law and right to some extent, or that the externalities involved in production (such as with the production of greenhouse gases) require us to come up with some principles of distributive justice that operate on a global level. I do not dissent from these critiques in this

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pecially chapter 8.

[6]For further examples of this view, see e.g.Blake [2002], Mandle [2009], Nagel [2005] and for rebuttal see Caney [2008], Cohen and Sabel [2006].

[7]See again Freeman [2007].

paper, indeed I think that many of them have merit, but my own focus is at a more microscopic level, at the claim that rights and procedures that constitute a system of procedural justice for a given scheme of co-operation are purely conventional. If they are not, then that will go some way toward weakening the statist bias in theorizing about justice that lies at the heart of the liberal position.

CONVENTIONALISM ABOUT PROPERTY RIGHTS

The conventionalist orthodoxy that property rights are "up for grabs" and open to specification by the state has been given powerful impetus in recent work by Thomas Nagel and Liam Murphy.[8] Murphy and Nagel argue that the very idea that individuals have some kind of natural rights to their pretax income is mistaken, even incoherent. In a complex modern economy, there is some merit to their thought that asking what an individual earns prior to and outside of the co-operative scheme that make such earning possible is highly problematic. The state is not best seen as something external to the working and co-operating that citizens to, but rather that co-operative activity is already consti-

[8]Murphy and Nagel [2002].

tuted and structured by the institutions, rules, incentives and disincentives that the law (and the scheme of taxation) puts in place. But Nagel and Murphy also rest their case on more general conceptual claims about property rights and these are more open to question.

In one passage, they draw an analogy between property rights and language.

> The conviction that determines our approach to all more specific questions is that there are no property rights antecedent to the tax structure. Property rights are the product of a set of laws and conventions, of which the tax system forms a part. . . . While this conventionalism seems to us just like common sense, we recognize that it goes against a natural illusion of a kind that arises whenever the conventions governing a practice are so pervasive and deeply buried that they become invisible. It is true of the conventions of language, which seem natural, even though we know they are highly arbitrary.(74) [9]

The parallels with language here are surely instructive, but it is far from clear that they unproblematically bolster the contention that the

[9] Murphy and Nagel [2002] pp. 6-74.

norms of property are entirely non-natural. Language has the feature, of course, that there is massive variation among societies in grammar, syntax, vocabulary, that the connection between names and their objects is arbitrary, and so forth. Language has, then, like property a conventional aspect to it. But there also something to be said on the other side: we are a linguistic species and we are that by nature. The detailed linguistic practices we have do indeed vary, but they have a basis in a shared human linguistic competence that is a part of our genetic endowment. If Nagel and Murphy were looking for an analogous domain to support their contention that property rights are a matter of convention and not of nature, then language is not a particularly good choice, because the case of language illustrates the possibility that "natural" and "conventional" are not mutually exclusive categories. Conventions may depend for their possibility on our biological nature and may also be constrained by it.

There is another respect in which Nagel and Murphy's approach is problematic, and that is their tacit acceptance of the idea that "conventional" with respect to property equates with what the law and the state prescribe. I shall come back to this point later, but note here that the

language analogy illustrates the difficulties with this thought. Linguistic practices and standards can and have emerged without any kind of centralized guarantee, in the shape of state power. Humans in their social groups are capable of converging on and adhering to a set of (evolving) common standards, of noticing deviation from those standards, of policing that deviation, and so forth. That we, as a species, have these capacities for anarchic organization with respect to language does not, of course, establish that we have such capacities with respect to other social practices. But it should put us on our guard against *a priori* arguments that we could not work out and conform to shared conventions in those other domains.

LOCKEAN RIGHTS TO PROPERTY

The best known and most influential version of the idea that people can acquire property rights in objects independently of a state and legal system is that of John Locke.[10] Locke's account continues to be important because of its influence on modern philosophical writing on property (most famously on Robert Nozick). Locke's theory is, however,

[10]Locke [2005].

despite its continued influence, deeply problematic for at least two reasons. The first of these has to do with the theological background to Locke's ideas and the idea of natural law as God's command; the second is that the distinctive norms of acquisition that Locke endorses are closely bound up with a particular political agenda, that of colonialism. Despite these embarrassments, though, there is at the core of Locke's theory a central idea, that we can act in the world in such a way as to acquire rights over objects, rights which exclude others and impose various duties on them. Moreover, they can be aware of those duties, and see themselves as having reason to respect another's holdings in objects, and they can acquire this awareness by the application of their common human reason to the issue. The weakest version of such a claim would be that humans sometimes have the natural capacity to recognize that something belongs to someone else, and that this relation of belonging places limits on their own permissible behaviour.

The details of Locke's own theory should be familiar. He invites us to contemplate a state of nature where adult human beings, endowed with reason, co-exist as free and equal creatures without relations of authority or subordination. Each of these persons enjoys the right of

ownership over his or her own physical body and this right imposes correlative duties on other people. My right to my chin imposed a duty on you not to move your fist into the space currently occupied by it. Secure ownership of our bodies being insufficient for survival and flourishing, Locke argues further than people can come to have property rights in the earth, even though its initial moral state was one of common ownership. Since getting everyone's permission to privatize a bit of the earth is plainly impractical, God could not have intended that, instead people can come to acquire rights in what was previously common property by mixing their labour with it. In other arguments, Locke also advances the idea that privatization could be justified, just so long as the condition of third parties was not worsened by it.

Now there is a good deal that is problematic about the particular details of the Lockean approach and others like it, but what I want to do now is to look at some arguments that say that it is misconceived at a very fundamental level and that such extra-institutional acts of privatization are conceptually impossible. The reason for doing this, is that I believe such arguments are generally accepted by supporters of the Rawlsian institutionalist theory about justice and that they think these

arguments bolster their view about the relation between justice and institutions.[11] However, the arguments I am about to canvas seem to me to be misconceived or inconclusive, so that if the Rawlsian institutionalist view does indeed rest on them, it is, to that extent, in difficulty.

THE KANTIAN STATIST VIEW

The arguments in question are found in their canonical form in Kant's *Metaphysical Elements of Justice*,[12] though some of them are anticipated in other writers such as Hobbes and Rousseau. The distinctively Kantian twist is that they purport to show the conceptual impossibility of natural property rights rather than being (as was perhaps the case with Hobbes) a set of practical or empirical objections. Kant argues that prior to a legal order, the most that can be said is that we can acquire a merely provisional right to things, a right that amounts to little more than physical possession of an external object. Another person wrongs us if they seize something that we are physically in possession of, since

[11] For an absolutely clear and unequivocal tying of Rawlsian institionalism to Kantian views about property see Mandle [2009].

[12] Kant [1996].

such seizure necessarily involves aggression against our person. As soon as we no longer have the object in our grasp, however, a person who takes what we had previously held does us no wrong. Kant's key argument is that ownership is a moral and therefore a social relationship. It is not merely a relationship between a person and a part of the external world but a relationship among persons. When I claim ownership in a part of the world, I thereby impose a set of duties on you with respect to that part, duties which you must recognize and take account of it your deliberation and action. Kant's strategy is to ask what would be necessary to make such an imposition of duties possible and concludes that the required conditions would necessarily be absent in a state of nature.

Kant has three reasons for this claim, each of them has some apparent appeal, but each is also problematic. These reasons are;

1. that natural property rights are necessarily and fatally indeterminate (the indeterminacy thesis);

2. that property rights require reciprocal assurance of their security to exist (the assurance thesis); and

3. that individuals lack authority unilaterally to impose duties on one

another (the duty thesis).[13]

The indeterminacy thesis

The indeterminacy thesis states that in the absence of a civil constitution, property rights are necessarily indeterminate and therefore subject to dispute (potentially leading to conflict) among reasonable persons. In the absence of an authoritative agency, it can be unclear how far my rights to, say, a piece of land extend, whether they are only rights for a particular use, whether they are temporally limited in some way (perhaps for this growing season only), how far they exclude others (can recreational walkers cross my farmland), and so on.

So is the indeterminacy thesis a conclusive objection to the possibility of property rights in a state of nature?

One reason for thinking so might be if it were the case that, to count as a property right at all, a right has to be fully determinate. But that looks like an implausible claim, because even under a civil constitution, with a central state authority and legal order, there will be many property rights that are not fully determinate, where it is vague or un-

[13] My reading of Kant here is heavily influenced by Ripstein [2009], especially chapter 6.

clear what the extent of the rights and duties of various persons are with respect to an object or a piece of land or a contract. Indeed there are whole areas of economics and psychology devoted to the problem of incomplete contracts. So complete determinacy cannot be a necessary condition for the existence of a property right.

Another possibility would be not determinacy, but determinability. That is to say, that in the absence of a civil constitution, it might not be possible to settle disagreement about rights, whereas with a state and a legal order it is always possible to achieve a resolution. But here again the case looks less that conclusive. Even with societies with a civil constitution rights are often established by custom and settled by negotiation and, in case of dispute, arbitration. There seems to be no a priori reason why an anarchic society could not evolve such procedures for settling such disagreements, and indeed there is plenty of evidence that they can.[14]

It is also worth noting that many forms that indeterminacy can take will be of little practical interest. Whether a property right in land confers the moral right to the airspace above or the mineral rights to the oil

[14]See, e.g Ostrom [1990] and Ellickson [1991].

far below the surface is something that will only need working out for a society with aviation or for which hydrocarbons are useful. Indeterminacy with respect to those questions is no obstacle to people getting in with their lives with sufficiently good common knowledge of their rights and duties to co-exist and co-operate (if they wish to).

This is not to deny, of course, that having a state and a legal system can be very useful in reducing indeterminacy, but the Kantian claim is much stronger than that, it is that the indeterminacy is an objection to the very possibility of a property right. That claim is unjustified.

The assurance thesis

The assurance thesis is essentially an adaptation by Kant of a Hobbesian idea. Hobbes had argued that in the absence of a coercive sovereign power, individuals who unilaterally abided by the law of nature would simply make themselves prey for others. In the case of property rights, the thought is that the person who respects the provisional claims of other people in a state of nature without an enforceable guarantee of similar reciprocal conduct is acting irrationally. Kant adds to this picture the additional moralizing element that people who do this fail in

their duty to themselves.

How convincing this thesis is rather depends on whether we (a) accept a basically Hobbesian view of human nature and (b) think that (whether or not the Hobbesian view of human nature is correct) anarchic communities could not solve this problem. But, in fact, there is a good deal of evidence that the Hobbesian picture of human nature is false (that people are more co-operative and social by nature than Hobbes thought), that even Hobbesian utility maximizers could evolve and conform with reciprocal norms, and that people do succeed in establishing stable co-operative norms in the absence of a centralized coercive power. An additional point to note is that whether or not human beings can solve these problems of co-operation and reciprocal respect for norms in the absence of state coercion is very much an empirical matter and not, as Kant was prone to claim, a conceptual one.

Both the assurance thesis and the determinacy thesis are presented by Kant as decisive arguments for the idea that property rights can one exist, properly speaking, under a civil constitution, but it has to be admitted that he is not altogether consistent on this point. For example, at one point he writes that "in the state of nature, too, there can be soci-

eties compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others) but no law (6.306)". He also draws repeatedly on Roman private law in the *Rechtslehre* despite the fact that, as he must have been aware, this system lacked a mechanism of centralized enforcement. This should lead us to suspect that neither the determinacy nor the assurance thesis are, in fact, as conclusive for the statist case as they are sometimes presented and that the third thesis, the duty thesis, is really doing most of the work.

The duty thesis

The duty thesis is the claim that individuals have no right unilaterally to impose duties on others. This, the establishment of a property right in a piece of the world does, because when I assert my right over that thing or space, I also thereby assert that you have a duty not to use or to occupy my property without permission. This amounts, according to Kant, to the subordination of one person's will to another's: whether you get to use what is mine is subject to my choice. What then could make such an imposition of duty possible? Kant's proposal is that such an authorization would be possible if made by an omnilateral will that

only limited the freedom of one person in a manner consistent with the equal freedom of others. Such an omnilateral will is, he claims, a feature of a state with a civil constitution. A will that represents a universal standpoint can impose a system of reciprocal rights and duties in a fair manner, whereas private individuals are not in a position to do this.[15]

There is certainly something appealing about Kant's resistance to the idea that people can unilaterally impose duties on one another, but there are also a number of problems. Once of these is that Kant allow that people may have certain non-imposed duties to one another that simply flow from a recognition of the moral facts. So, centrally, one person, even in a state of nature, has a duty to recognize the personhood of other people, and so must not make use of them without their consent in various way. To the extent that people have the capacity to recognize a similar duty of respect and restraint towards external objects that an individual has appropriated, and to which it is right for them to do so, then talk of the unilateral imposition of a duty seems misplaced. The real problems for Kant come, however, not at this point in the argument but with the claim that only the state (as a body acting from

[15]Much of this Kantian argument is also present in Gibbard [1976].

the perspective of an omnilateral will) can impose rights and duties in a manner consistent with universal freedom.

The claim about the state could be presented in two ways. On the one hand, it could be a claim about what would be necessary to make private property legitimate; on the other, it could be presented as a claim about what underpins the legitimacy of actual private property. Starting with the claim that Q is a necessary condition of P and the propositions that apparently-P and apparently not-Q, we have some choices to make. Perhaps P is merely apparent, so, in fact, not-P. Perhaps, given P, we should assert that Q obtains despite appearances. Or perhaps, if we have sufficient reasons to doubt that Q obtains, but P apparently does, we should revisit our initial insistence that Q is a necessary condition for P. So if an omnilateral will is a necessary condition for legitimate private property, and private property apparently exists, then we have a choice between

1. The sceptical conclusion about property: denying the claim that current private property is actually legitimate (since there is no omnilateral will);

2. The heroic conclusion about the state: actual states do in fact act

from the standpoint of an omnilateral will; or

3. Concluding that, after all, private property can be legitimate without this condition being fulfilled.

Kant, famously, opts for (2) or, perhaps more charitably he opts for "as if" (2). I am inclined, with Locke, to assert (3), at least for some private property.[16] The claim that actual states represent the perspective of an omnilateral will is problematic for a number of reasons. Here are two: first, with respect to actual states, even democratic ones, the mechanisms for will-formation from an impartial perspective do not exist and the way that the laws are actually framed reflects not the equality and autonomy of citizens but rather the deep inequalities of power and wealth among them; second, just as the will of one person cannot pretend to be the will of all, nor can the wills of a number of people. But actual states always contain a subset of humanity as a whole. They therefore engage in the business of the unilateral imposition of duties from a merely partial perspective all the time because of the way in which they

[16]Note the parallels here with some other debates in philosophy. Is the consent of the governed a necessary condition for state legitimacy? Does knowledge require holistic justification?

exclude outsiders from their territory.

I conclude, therefore, that we have some reason to reject the idea that an omnilateral will is a necessary condition for legitimate private property. However, a rejection of that claim is not enough. We also need some positive reason to think can individuals can and do recognize the legitimate claims of others on parts of the external world in the absence of state authority.

Before concluding this section, I want to anticipate one reaction to what I have said about Kant on property. It might be thought that I am being uncharitable. This is because what Kant say, strictly speaking, is not that there are *no* rights in external property in the absence of a legal order, but rather that such rights are merely provisional and that we have a duty to enter into a lawful condition with others, to institute a state, in order to make them conclusive. But then the issue is whether these merely provisional rights have any bite or not. One way of interpreting their merely provisional status is to see the rules of property as having a status akin to the laws of nature in Hobbes's state of nature. In this picture, rational individuals can discern the structure of right, but have no reason to abide by it in the absence of a solution to the

assurance problem. If that is the correct interpretation, then merely provisional property rights have no normative force for individuals at all. The alternative is that they do give individuals reason for action and to respect the holdings of others in the absence of state authority. Whilst Kant's official position cannot be this, some of his remarks on the rights of the indigenous inhabitants of non-European lands suggest a different picture. But if, after all, provisional rights do have normative force then the essential connection between state authority and property rights evaporates.

NATURAL PROPERTY RIGHTS REDUX?

Both the Lockean and the Kantian approaches to property rights purport to provide not only a general justification for the existence of property rights, but also a justification for particular acts of acquisition. But not all philosophical writing about property has this character. David Hume, for example, couched his account entirely in terms of its social usefulness and he rejected theories that rely on particular modes of acquisition as being arbitrary.[17] What Hume does instead is to provide

[17] See Hume's discussion at Hume [1978] III, 2, ii–iii; see also Waldron [1994].

a social-evolutionary account of property. Human beings begin in a quasi-Hobbesian anarchy where they waste a great deal of time, energy and blood on conflict over land and possession. However, human beings have the capacity to learn and, perhaps over many generations, come to see that putting in place and observing conventions for the ownership of property can be mutually beneficial. These conventions are arbitrary in content but, once in place there are powerful reasons for individuals to comply with them since everyone does better under a stable assignment of rights that they do in a state of endemic conflict.

This Humean approach looks like the complete antithesis of something like the Lockean natural rights theory, since natural rights theorists see particular rules as having an evident moral force to creatures endowed with the power of reason whereas rules have an arbitrariness in the Humean picture. But in spite of this appearance of incompatibility, there might be a way to reduce the distance. Hume's social learning process might take place not consciously as the result of people deliberating about the costs and benefits of different course of action but, rather, as a preconscious process forming part of our evolutionary history. A disposition to perceive some claim to ownership as legitimate,

or, to move up a level, a capacity to acquire and respond to a system of rules governing ownership could be part of our genetic endownment.

Some recent work in both evolutionary biology and developmental psychology appears to support this hypothesis. In evolutionary biology, some scientists have claimed that there may be a survival advantage to the encoding of specific rules governing the allocation of resource. This is for the very Humean reason that conflict over resources threatens to result in damage to the fighting individuals and thereby decreases the probability that they will pass on their genes. Such rules may include deferring to larger and more powerful opponents but also other forms such as the recognition of first occupancy. In this latter case, those in first possession may fight longer and harder to hang onto what is theirs. This endowment effect means tat conspecifics will be reluctant to challenge first occupiers and will seek alternative resources if they can.[18] In humans, the well-documented phenomenon of loss-aversion, the tendency that people have to value what they are in possession of more highly than some functional equivalent and to hold onto that possession even when it appears not to be economically ra-

[18]Smith [1982], Stake [2004].

tional for them to do so, may have a similar evolutionary basis. In developmental psychology, there is growing evidence to suggest that very young children operate with a "first-possession heuristic" which they use to assign ownership rights to objects and hence to order their own actions (and those of others) in relation to those objects. Children, that is, are naturally disposed to make normative judgement concerning objects and to consider themselves and others as bound by those norms (even if, like adults, they are sometimes tempted not to be!).[19]

None of these findings will cut any ice with hard-line anti-naturalists about normativity. The fact that people are naturally disposed to follow certain rules or that people (and animals) behave as if they were doing so will not, they will say, answer the question of what we have reason to do. Even showing that it would be mutually advantageous for people to follow a rule assigning rights (and imposing duties) according to some principle such as first possession does not answer that question.[20] Perhaps nothing could. I merely note this difficulty and move on since it seems to me that proponents of a strongly institutionalist view about the normativity of property are in the same boat.

[19]Friedman and Neary [2008], Friedman [2008].

[20]For discussion see Korsgaard [1996] ch.1.

SOME TENTATIVE CONCLUSIONS

The conclusions I am arguing for in this paper are weak ones. I am trying to undermine the view that property rights (and hence justice) is a purely institutional matter in favour of the idea that we have, pre- or extra- institutionally, some duties with respect to ownership. That claim should not be mistaken for the view that private property in the sense in which it exists in modern societies is a natural phenomenon nor for the claim that people in a state of nature could acquire the kind of strong and fully-specified ownership rights that libertarians (such as Robert Nozick have claimed). Nor, for that matter, am I suggesting that institutions are unimportant for distributive justice either in terms of the specification of precisely what our duties of justice are or for the realization of norms of justice or to meet our duties of justice.

What I do deny, is the exclusively statist institutional focus that is often dogmatically asserted by some liberal philosophers under the influence of Kant and Kant-inspired arguments. If people can establish and observe norms of property independently of the state, if we reject the idea that property depends conceptually on the existence of a centralized legal authority exercising jurisdiction over a particular territory

then we will should be less inclined to think of the property-rights of individuals and sub-state communities (whatever those rights are) as being subject to the unlimited discretion of the sovereign; we should also be less inclined to think of the boundaries of justice as being co-extensive with the boundaries of the nation state.

Social democrats and egalitarian liberals may worry that opening the door to some natural property rights (or to some natural element of property rights) opens the door to strong libertarian claims against the redistributive state. But that worry, it seems to me, would be mistaken, for a number of reasons. First, there is no reason to believe that any natural rights that individuals have to the personal property they have, their product of their direct labour, the family farm (etc.) are so extensive as to ground the extent of rights in assets that libertarians believe natural rights protect. Second, the libertarian concern and the liberal proceduralist response in terms of the basic structure is predicated on a certain view of rights as absolute or close to absolute. If we revisit that view and allow both (or either) that justice may justifiably be compromised for the sake of other values and (or) that there may be compromises within justice (say between procedural rights and patterned dis-

tributive outcomes) then the worry that recognizing extra-institutional property rights will entrench inequality will have less force. But some of these are concerns for other papers.

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